

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2026

RICHARD LEE ROGERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

DANIEL BALL
Hendrickson Law Firm, P.C.
208 North Broadway, Suite 324
P.O. Box 2502
Billings, MT 59103-2502
(406) 245-6238
*Counsel for Petitioner

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the district court's denial of Petitioner's appeal by rejecting his lawful conduct protected by the First Amendment to the United States Constitution.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the District of Montana and the United States Court of Appeals for the Ninth Circuit:

United States v. Richard Lee Rogers, No. 25-1267. Mr. Rogers seeks a Writ in this case.

Parties to proceeding- Plaintiff: United States of America; Defendant: Richard Lee Rogers.

United States v. Richard Lee Rogers, No. 25-4001. The appeal in No.-4001 has been dismissed by the United States Court of Appeals for the Ninth Circuit. Mr. Rogers does not raise this case in the instant Writ.

Parties to proceeding- Plaintiff: United States of America; Defendant: Richard Lee Rogers.

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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

The Petitioner, Richard Lee Rogers (referred to herein as “Mr. Rogers” or “Richard”), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Court of Appeals’ unpublished memorandum upholding the denial of Mr. Rogers’ appeal is unpublished but can be accessed at *United States v. Richard Lee Rogers*, 2026 WL 1429748 (9th Cir. 2025). It is also reproduced in the appendix. (App. A, *infra*, 1a-5a).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit’s Memorandum upholding Mr. Rogers’s conviction was filed on May 21, 2026. (App., *infra*, 1a-5a). This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). Mr. Rogers appeals the Ninth Circuit’s Memorandum in No. 25-1267.

STATUTORY PROVISIONS INVOLVED

United States Code Title 18 U.S.C. Section 115(a)(2) provides:

Whoever—

(a)(1)(B) threatens to assault, kidnap, or murder, a United States official...with the intent to impede, intimidate, or interfere with such office... while engaged in the performance of official duties...shall be punished as provided in subsection (b).

Title 47, Section 223(a) provides:

Whoever—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass any specific person;

(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any specific person...

Shall be fined under title 18 or imprisoned not more than two years, or both.

STATEMENT OF THE CASE

A. District Court Proceedings

1. Factual Background

Richard Lee Rogers is a patriot with a firm belief in the First Amendment to the United States Constitution. This case presents a crucial question as to the Government's ability to infringe upon a citizen's right to redress or petition the Government. Mr. Rogers was charged with the offenses of: Count I: Threats to Injure and Murder a Member of the United States Congress in violation of 18 U.S.C. §115(a)(1)(B), (b)(4); and Count II: Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) in a September 21, 2023, Indictment.

This case involves a series of electronic communications, phone calls, that Richard had with the office of Speaker of the House of Representatives and with the F.B.I.'s National Threat Operations Center (NTOC). The calls were Richard's attempt to exercise his First Amendment right to Petition the Government for redress. The United States has classified those communications as threatening. Richard has asserted his fundamental right to make those phone calls pursuant to the First Amendment of the United States Constitution.

The United States filed a *Superseding Indictment* on May 1, 2024, charging Richard with the offenses of: Count I: Threats to Injure and Murder a Member of the United States Congress in violation of 18 U.S.C. §115(a)(1)(B), (b)(4); and Count II: Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) and a new Count of Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) in Count III.

Count I generally alleged that on or about February 3, 2023, Richard threatened to assault or murder a member of the United States Congress, Speaker of the House Kevin McCarthy, with

the intent to impede, intimidate, and interfere with that official related to the performance of his official duties. [Doc. 43]. II-ER-64–66.

Count II generally alleged that on or about February 3, 2023, Richard made repeated telephone calls and repeatedly initiated communication with a person (staff at McCarthy’s office) solely to harass a person at the called number. *Id.*

Count III generally alleged that between December 2021 until October 2022, Richard knowingly made repeated interstate telephone calls with a person (employees of the National Threat Operations Center) solely to harass that person.

This case should be reversed because the District Court erred in determining that Richard’s calls were not conduct protected by the 1st Amendment to the United States Constitution. Richard, although at times in very blunt language, legally exercised his right to Petition the Government. The District Court also erred in denying Richard’s motion for Judgment of Acquittal as the Government failed to prove the elements of the offenses beyond a reasonable doubt.

2. Procedural Background

Mr. Rogers was charged with the offenses of: Count I: Threats to Injure and Murder a Member of the United States Congress in violation of 18 U.S.C. §115(a)(1)(B), (b)(4); and Count II: Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) in a September 21, 2023, Indictment.

The United States filed a *Superseding Indictment* on May 1, 2024, charging Richard with the offenses of: Count I: Threats to Injure and Murder a Member of the United States Congress in violation of 18 U.S.C. §115(a)(1)(B), (b)(4); and Count II: Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) and a new Count of Harassing Telephone Calls in violation of 47 U.S.C. §223(a)(1)(E) in Count III.

The District Court's final Judgment and Order was filed on February 27, 2025. [Doc. 140]. I-ER-5–10. Richard's original Notice of Appeal of the Judgment was filed on February 27, 2025. [Doc. 142]. The *Petition for Warrant for Offender Under Supervision* was filed on March 18, 2025. [Doc. 150]. II-ER-61–63. The Court set a preliminary hearing to occur on March 27, 2025. [Doc. 159]. A final revocation hearing was held on June 13, 2025. Richard admitted to the violation of conditions. The Court sentenced Richard to 24 months imprisonment on June 13, 2025. [Doc. 169]. I-ER-2–4. Richard's Notice of Appeal of the Judgment of Revocation was filed on June 26, 2025. [Doc. 171]. IV-ER–672.

A jury trial was held on September 30, 2024, through October 2, 2014, with Honorable Susan P. Watters presiding. Richard was convicted of Counts I, II, and III. Richard was sentenced to 4 years of probation on Count I and one year of probation on Counts II and III with all counts to run concurrently.

The United States filed a *First Notice of Intent to Offer Evidence Under Federal Rule of Evidence 404(b)* on January 22, 2024. [Doc. 20]. The United States asserted that numerous calls that Richard made to the NTOC should be admitted pursuant to Rule 404(b).

Richard filed *Defendant's First Motion in Limine to Exclude the Government's Proposed Rule 404(b) Evidence* on April 1, 2024. [Doc. 35]. Richard filed his *Defendant's Brief in Support of First Motion in Limine to Exclude the Government's Proposed Rule 404(b) Evidence* concurrently with his *Motion*. [Doc. 36]. The United States filed its *Response to Defendant's First Motion in Limine to Exclude the Government's Proposed Rule 404(b) Evidence* on April 15, 2024. [Doc. 38]. The Court denied the Order as being moot in its September 16, 2024, *Order*. [Doc. 89]. I-ER-18–35.

Richard filed a Motion to Dismiss the case on April 1, 2024. [Doc. 31]¹. Richard filed *Defendant's Memorandum to Dismiss Indictment* on April 1, 2024. [Doc. 32]. The United States filed the *Response to Defendant's Motion to Dismiss Indictment* on April 15, 2024. [Doc. 37]. The Court denied the *Motion* in its April 29, 2024, *Order*. [Doc. 40]. I-ER-47–58.

The United States filed its Superseding Indictment on May 1, 2024. [Doc. 43]. II-ER-64–66. Richard filed *Defendant's Motion to Dismiss Count III in the Superseding Indictment* on August 12, 2024. [Doc. 76]. Richard filed the *Defendant's Memorandum to Dismiss Count III in the Indictment* contemporaneously therewith. [Doc. 77]. The United States filed a response in opposition. [Doc. 82]. The Court denied Richard's *Motion* in its September 11, 2024 *Order*. [Doc. 88]. I-ER-36–46.

Richard filed *Defendant's Second Motion in Limine to Exclude Evidence* on August 12, 2024. [Doc. 78]. Richard filed *Defendant's Brief in Support of Second Motion in Limine to Exclude Evidence* contemporaneously therewith. [Doc. 79]. The Court denied the *Motion* in its September 16, 2024, *Order*. [Doc. 89]. I-ER-18–35.

Richard appeared for sentencing on February 26, 2025. The District Court sentenced him to a term of 4 years probation on Count I and one year terms of probation on Counts II and III, with all counts to run concurrent. See Judgment [Doc. 140]. I-ER-2–4. Richard timely filed his *Notice of Appeal* on February 27, 2025. [Doc. 142].

A *Petition for Warrant or Summons and Order* was issued on March 18, 2025. Richard was alleged to have violated his conditions of supervision. [Doc. 150]. II-ER-61–63. Richard made his initial appearance for the revocation on March 20, 2025. Richard requested a

¹ The Motion was incorrectly titled “Defendant’s Motion to Suppress.”

preliminary hearing which was scheduled for March 27, 2025. Richard requested a detention hearing. [Doc. 164]. The detention hearing was also scheduled for March 27, 2025.

The Court, through Magistrate Judge Kathleen L. DeSoto conducted the preliminary hearing and detention hearing on March 27, 2025. The Court found probable cause that Richard violated his probation. The Court denied Richard's request for release pending further proceedings. [Doc. 167].

The Court held a final hearing regarding revocation of sentence on June 13, 2025. Richard admitted to alleged violation numbers 1, 2, 3, and 4. Richard's probation and supervised release was revoked. He was sentenced to the custody of the Bureau of Prisons for a term of 24 months, with no supervision to follow. [Doc. 168]; [Doc. 169]. I-ER-2-4. Richard timely filed a *Notice of Appeal* of that Order on June 26, 2025. [Doc. 171]. IV-ER-672.

B. Ninth Circuit Proceedings

On appeal, Rogers raised several issues:

- (1) Whether the District Court erred in allowing 404(b) evidence at trial;
 - (2) Whether the District Court erred in denying Richard's Motion to Dismiss the Indictment and the Superseding Indictment;
 - (3) Whether the District Court erred in denying Richard's second motion in limine;
 - (4) Whether the District Court erred in denying Richard's Motion for Judgment of Acquittal;
 - (5) Whether the District Court erred in granting Government proposed jury instructions 38 and 40 and in refusing many of Richard's proposed supplemental jury instructions.
- The Ninth Circuit rejected the arguments and affirmed Rogers's conviction and sentence

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION AFFIRMING MR. ROGERS' CONVICTION IS INCONSISTENT WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE, AS WELL AS DECISIONS FROM OTHER CIRCUITS.

A. The District Court Improperly Dismissed Mr. Rogers' First Amendment Defense and Motions to Dismiss

Mr. Rogers asserts that the District Court, and the Ninth Circuit's, most apparent error was in denying his defense pursuant to the First Amendment to the United States Constitution and denying his First Amendment defense as detailed in his Motions to Dismiss. Richard's lawful protests, his lawful petition for redress, and his lawful appeals to elected officials were improperly criminalized.

Richard filed a Motion to Dismiss the Indictment on April 1, 2024. [Doc. 31]. Richard asserted the basis for his Motion in the accompanying Memorandum. [Doc. 32]. Richard moved to dismiss the count of threatening a member of the United States Congress and the count of making harassing telephone calls to the Speaker's Office. *Id.* At that time, the calls to the NTOC were not part of the Indictment. *Id.*

Richard filed a *Motion to Dismiss Count III in the Superseding Indictment* on August 12, 2024. [Doc. 76]. Richard's *Memorandum to Dismiss Count III in the Indictment* described the legal basis for his motion. [Doc. 77]. Count III, (47 U.S.C. §223(a)(1)(E)), as applied to Richard violated his 1st Amendment rights under the United States Constitution because the statute impacts political speech and is not a content-neutral regulation of speech as applied, and as such, fails to pass either strict or intermediate scrutiny.

The relevant statutes, and charges, as applied to Richard violate his First Amendment rights because it implicates political speech and is not a content-neutral regulation of speech. Thus, the restriction fails to pass either strict or intermediate scrutiny.

The interest in protecting public officials from annoying, harassing, or abusive speech is not compelling and the interest in protecting them from true threats was not implicated. Here, as to Count III, NTOC is a law enforcement entity and an arm of the United States government.

Speech that is coercive is legal. As the United States Supreme Court emphasized that “Speech does not lose its protected character...simply...because it may embarrass others or coerce them into action...” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-911 (1982). Richard engaged in coercive speech in an effort to petition the Government.

When a regulation hinders political speech, *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 340 (2010), or discriminates against certain speech based upon its content, *Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991), it applies strict scrutiny. It must determine whether the regulation is narrowly tailored to further a compelling state interest. *Federal Election Com’n v Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476 (2007).

When a regulation impacts speech mixed with conduct, *United States v. O’Brien*, 391 U.S. 367, 377 (1968), or incidentally impacts speech, *United States v. Albertini*, 472 U.S. 675, 689 (1985), the Court applies intermediate scrutiny. It asks whether the regulation “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.*

The 1st Amendment provides that “Congress shall make no law...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.” U.S.Const.Amend. 1. The “hallmark” of the protection

“is to allow ‘free trade in ideas—even ideas that the overwhelming majority of people might find distasteful and discomforting.” *Virginia v. Black*, 538 U.S. 343, 358 (2003)(quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919).

Content-based limitations on speech raise the specter that the Government may drive ideas of viewpoints from the marketplace. *Simon & Schuster*, 502 U.S. at 116. Thus, such regulations are presumptively invalid. *Id.* at 115. The 1st Amendment affords the broadest protection to political expression in order to assure the unfettered interchange of ideas. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)(quoting *Roth v. United States* 354 U.S. 476, 484 (1957)).

This reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and open-wide, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). “When a law burdens core political speech, courts apply exacting scrutiny and uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre v. Ohio Elections Com’n*, 514 U.S. 334, 347 (1996). Richard’s speech, as the jury found he engaged in, does not rise to this level of a true threat, or incitement, or speech that can be proscribed. *Watts v. United States*, 394 U.S. 705, 706 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Titles 18 U.S.C. Section §115(a)(1)(B), (b)(4) and 47 U.S.C. §223(a)(1)(E) violated Richard’s 1st Amendment right to free speech. The phone calls that Richard made were civil disobedience protest calls. None of the calls were true threats that the government can proscribe. *Virginia v. Black*, 538 U.S. 343, 359 (2003). The evidence and the allegations at trial did not reflect a true threat—a serious expression of an intent to commit an act of unlawful violence to a particular individual. *Black*, 538 U.S. at 359.

Even the phone call that contained an alleged threat to Speaker McCarthy, was rhetoric hyperbole if it indeed occurred. Indeed, to “verbally abuse a public official for voting a particular way on a public bill, annoy him into changing a course of public action, or harass him until he addresses the problems previously left unaddressed” is legitimate speech. *United States v. Popa*, 187 F. 3d 672, 673, 676-677 (D.C. Cir. 1999). Here, Richard’s calls as alleged by the Government to the Speaker’s Office or the NTOC were directed at changing a course of public action, or inaction. Conduct similar to Richard’s calls to NTOC “sweeps within its prohibitions telephone calls to public officials where the caller...has an intent to verbally ‘abuse’ a public official for voting a particular way on a public bill, ‘annoy’ him into changing a course of public action, or ‘harass’ him until he addresses problems previously left unaddressed.” *Id* at 676-677.

In addition, contrary to the Ninth Circuit Opinion, Richard was not punished for conduct. He was punished for his speech. Thus, the statute is unconstitutional as applied.

Further, these sections fail to pass intermediate scrutiny. Section 115(a)(1)(B), (b)(4) regulates conduct combined with speech. These sections do not further an important or substantial government interest. *United States v. O’Brien*, 391 U.S. 367, 377 (1968). Similarly, the intermediate scrutiny test for content-neutral statutes that incidentally burden speech requires that the statute promote a “substantial government interest that would be achieved less effectively absent the regulation.” *United States v. Albertini*, 472 U.S. 675, 689 (1975). Richard’s conviction of these offenses results from statutes that unnecessarily encroach upon protected political speech.

Richard has a First Amendment right to petition the Government for a redress of grievances. Here, his communications to the Speaker’s office and to the NTOC were a petition for a redress of grievances as contemplated by the 1st Amendment. The testimony

throughout trial demonstrated that Richard contacted NTOC to address political grievances that he had with the Government, to address the Speaker's political inaction, a perceived political or existential threat to the United States, and to generally address the Government's inaction on political issues. Thus, Richard's conduct was protected speech that cannot be proscribed pursuant to the 1st Amendment.

Richard asserts that the Ninth Circuit's decision is contrary to this Court's jurisprudence. Richard respectfully asserts that this issue is of utmost importance and respectfully requests that the United States Supreme Court address the Ninth Circuit's errors in order to ensure that the First Amendment to the United States Constitution is protected.

B. The District Court Improperly Included Propensity Evidence

Richard filed his *First Motion in Limine to Exclude the Government's Proposed Rule 404(b) Evidence* on April 1, 2024. [Doc. 35]. Richard requested an Order prohibiting the Government from introducing evidence related to "NOTC" phone call recordings from the year 2022. Richard's basis for the motion was set forth in his accompanying brief. [Doc. 36]. The Court denied this motion as moot since Richard was later charged with Count 3 of the Superseding Indictment which related to his calls to the NTOC; however, the Court did not address the Rule 403 objection component of the Motion in its Order. [Doc. 89]. I-ER-18-35.

The recordings of Richard's 2022 phone calls to NOTC was inadmissible propensity evidence that would result in unfair prejudice to Richard under Federal Rule of Evidence 403. At the time of the motion, Richard was not yet charged in Count III and his pending charges related to phone contacts with Speaker McCarthy's office. [Doc. 36].

Rule 404(b) prohibits the use of extrinsic evidence of a person's behavior to show one's propensity and that the person acted in conformity with that propensity on another occasion. *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007). Under Rule 404(b) "evidence of prior bad actors crimes may not be used to prove that a defendant has a propensity to commit the crime charged." *United States v. Bracy*, 67 F.3d 1421, 1432 (9th Cir. 1995).

The 9th Circuit has established a four-part test for admission of evidence under Rule 404(b). Prior acts may be admitted if:

- (1) The evidence tends to prove a material point;
- (2) The prior act is not too remote in time;
- (3) The evidence is sufficient to support a finding that the defendant committed the other prior bad act; and,
- (4) In cases where knowledge and intent are at issue, the act is similar to the offense charged.

United States v. Vizcarra-Martinez, 66 F.3d , 1006, 1013-1014 (9th Cir. 1995).

If the evidence meets those four requirements, the government must demonstrate that the evidence also satisfies Rule 403. *Curtin*, 489 F.3d 958. Rule 403 F.R.Evid. provides that the Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The phones calls to NTOC fail to prove a material point. The NTOC calls do not include physical threats. The calls did not provide any relevant evidence as to the alleged threat to Speaker McCarthy. The numerous calls, approximately 150 calls, is mere propensity evidence

used to demonstrate that Richard was purportedly disrespectful to the NTOC, therefore, he was more likely to have committed the offenses related to Speaker McCarthy's office.

Further, the admission of the calls were in violation of Rule 403 precluding admission of unfairly prejudicial evidence. The calls were unduly prejudicial to Richard with limited evidentiary value, as well as confusing the issues before the jury. The District Court did not appear to address this issue in its Order denying the Motion. The calls should not have been admitted as the prejudicial value of the phone calls were substantially outweighed by the probative value of the calls.

The 9th Circuit has held as a matter of law that a court does not properly exercise its balancing discretion under Rule 403 when it fails to place on the scales and personally examine and evaluate all that it must weigh. Relying only on the descriptions of adversary counsel is insufficient to ensure that a defendant receives the due process and fair trial to which he is entitled under our Constitution, as this case demonstrates. *United States v. Curtin*, 489 F.3d 935, 958, (9th Cir. 2007).

Here, the prejudicial effect of the multiple calls out of context, especially without admission of other calls that could not have been argued as being hostile, distorted the evidence and mislead the jury causing Richard prejudice.

C. The District Court Erred in Denying Richard's Rule 29 Motion

The standard of review of a defendant's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 is favorable to the government. In reviewing such a motion, a court "draw[s] all reasonable inferences favorable to the government." *United States v. Arriaga-Segura*, 743 F.2d 1434, 1435 (9th Cir. 1984); *Jackson v. Virginia*, 443 U.S. 307 (1979). It also "respect[s] the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary

conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all such matters in a manner that supports the verdict.” *United States v. Yoshida*, 303 F.3d 1145, 1149 (9th Cir. 2002)(citing *United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987)).

Courts have also observed that the granting of a Rule 29 motion may be appropriate where a “witness’s qualifications are so shoddy that a verdict of acquittal should [be] directed.” *United States v. Matthews*, 240 F.3d 806, 806 (9th Cir. 2000). This observation recognizes the general rule that jurors retain the exclusive authority to judge the credibility of witnesses. But, at the same time, it gives courts limited authority to grant a Rule 29 motion when a witness’s testimony or previous statements are “incredible or unsubstantial on [their] face.” *United States v. Shelton*, 588 F.2d 1242, 1245 (9th Cir. 1978)(citing *Lyda v. United States*, 321 F.2d 788, 794 (9th Cir. 1963)). A trial court has the duty to grant a judgment of acquittal when, as in this case, the evidence is so scant that the jury could only speculate as to the defendant’s guilt. *See*, 2 Charles A. Wright et al., *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* 2D § 467, at 660-61 & n. 23 (West 1982).

The Court erred in denying Richard’s Motion for Judgment of Acquittal. The Government did not meet its burden of proof on Counts I, II, or III.

In order for Richard to be found guilty on Count I, the Government needed to prove that:

- (1) Richard;
- (2) threatened to assault, kidnap, or murder;
- (3) a United States official;
- (4) with the intent to impede, intimidate, interfere with, or retaliate against that official or officer;

(5) while the official was engaged in or on account of the performance of his official duties. *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), *overruling on other grounds recognized by United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002); Ninth Cir. Jury Instructions 8.15. Manual Model Crim. Jury Instructions, at 188 (2024).

Here, the Government failed to provide a recorded call between Payson Thomas and Richard. The call was not recorded. Vol. I, Tr. Transcript p. 129. IV-ER-544. Payson Thomas had no notes of the calls forming the basis for Counts I and II. Vol. I, Tr. Transcript p. 129. IV-ER-544. He had no notes of his call wherein Richard allegedly made a threat to Speaker McCarthy. Vol. I, Tr. Transcript p. 129. IV-ER-544.

Indeed, Payson Thomas agreed that Richard discussed his right to redress the Government during his phone calls. Vol. I, Tr. Transcript p. 140. IV-ER-555. Mr. Thomas agreed that Richard discussed acting in the context of civil disobedience. Vol. I, Tr. Transcript p. 140. IV-ER-555. The Government failed to provide any evidence or testimony from other individuals at the Speaker's office. Further, the evidence failed to demonstrate any intent by Richard to impede, intimidate, interfere with, or retaliate against that official or officer. There was no threat as Richard stated his purpose with the call was to redress his grievances with the Government and engage in civil disobedience.

In order for Richard to be convicted of Counts II and III, the Government must prove:

(1) Richard made telephone calls in interstate or foreign communications;

(2) the telephone calls were repeated;

(3) during the telephone calls some conversation ensued; and,

(4) Richard made the repeated calls solely to harass the person at the called number. 2B Fed. Jury Prac. & Instr. §69:03 (6th ed.).

Here, the evidence failed to show the Richard made calls “solely to harass the person at the called number.” There was no evidence presented that the sole purpose of the calls was to harass the person at the called number. Again, Richard was exhibiting his 1st Amendment right to address his grievances with the Government. Again, Richard noted that he was exercising his right to redress the Government and that he was acting in the context of civil disobedience. Vol. I, Tr. Transcript p. 140. IV-ER-555. Agent Deurmeier agreed that Richard made no physical threats in his calls to the NTOC. Vol. I, Tr. Transcript p. 234-235. IV-ER-649–650. Agent Deurmeier agreed that Richard expressed that he was engaging in peaceful disobedience. Vol. I, Tr. Transcript p. 235. IV-ER-650.

Agent Deurmeier acknowledged that the 150 calls to NTOC that were admitted into evidence did not occur on the same day. Vol. II, Tr. Transcript pages 265-266. III-ER-169–170. He acknowledged that upon being contacted by the FBI, Richard ceased contacting NTOC. *Id.* at page 273-277. III-ER-177–181. He acknowledged that the calls to the NTOC were not threatening in nature. *Id.* at p. 293. III-ER-197.

Richard’s testimony was consistent on these points and the Government did not effectively rebut Richard’s claims related to the nature and purpose of the phone calls. The record has numerous citations with Richard discussing his intent behind the phone calls. For instance, Richard testified that:

A. He was a citizen petitioning redress of grievances. Vol. II, Tr. Transcript p. 380. III-ER-284;

B. He was engaging in a redress of grievances. *Id.* at p. 387. III-ER-291;

C. He was not engaging in calls in an effort to harass others. *Id.* at p. 388. III-ER-292;

D. He was engaging in a petition to redress grievances. *Id.* at p. 392 and p. 401. III-ER-296. III-ER-305.

E. He was petitioning the Speaker of the House with grievances. *Id.* at p. 402. III-ER-306.

F. He was petitioning grievances and engaging in civil disobedience. *Id.* at p. 412. III-ER-316.

G. He was petitioning redress or grievances. *Id.* at p. 425-426. III-ER-329–330.

Thus, the record is clear and uncontroverted that Richard did not possess the intent to harass or threaten with his calls, let alone engage in the calls with the sole purpose of harassing another individual.

In this case, the Government’s chief witness gave several conflicting statements regarding Rogers’s statements. The star complaining witness, Payson Thomas, gave conflicting accounts as to the nature of the phone calls. Payson’s testimony and statements are inconsistent and irreconcilable. In light of this fact, the Ninth Circuit erred in upholding the denial of Rogers’s Rule 29 motion.

D. The District Court Erred in Its Jury Instructions

The final issue that the Ninth Circuit rejected relates to certain proposed and rejected jury instructions. The Court improperly accepted Government instructions that did not match the pattern jury instructions, while rejecting instructions that accurately described First Amendment jurisprudence and that were crucial to Richard’s defense.

The defense objected to the instruction as it did not match the elements of the statute pertaining to Count 2. *Id.* at pages 472-473. III-ER-376–377. The Government’s proposed instruction No. 38 added language to the elements of the offense that is not in the applicable

statute of 47 U.S.C. §223(a)(1)(E). Specifically, language was added to the instruction that the phone calls were made solely to harass a person “at the called number and the person who received the communication.” See 47 U.S.C. §223(a)(1)(E); see also Jury Instruction No. 34, Doc. 112 page 44.

The defense made a similar objection to Government’s proposed jury instruction No. 40 (Doc. 93, page 54) which was given as jury instruction No. 36 (Doc. 112. Page 46). The addition of this language added provisions to the instruction describing the statute that had no basis in the relevant statute. The addition of this language was not supported by the pattern jury instruction.

This language had the risk of confusing the jury. The appellate court reviews *de novo* whether a jury instruction misstates a required element of a charged offense. *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). Ordinarily, such an error requires reversal unless it is harmless beyond a reasonable doubt. *United States v. Pierre*, 254 F.3d 872, 877 (9th Cir. 2001). *United States v. Tydingco*, 909 F.3d 297, 302, (9th Cir. 2018).

Here, the additional language improperly focused on the recipient of the phone calls as opposed to the intent, or lack thereof, that Richard had in making the calls. This had the effect of shifting the burden of proof to Richard to prove that he had no intent to call the individual, solely for the purpose of harassment. Further, the additional language shifted the appropriate focus from Richard’s intent, or lack thereof to harass, in making the phone calls to the calls specific effect on the recipient. This additional language manipulated the actual statutory language to Richard’s detriment.

The United States objected to certain instructions proposed by Richard. See Defendant’s Proposed Jury Instructions #1, #3, #4, and #5.Vol. 2, Tr. Transcript pages 477-489. III-ER-381–393. The Court improperly refused Richard’s proposed jury supplemental instructions 1, 2, 3, 4,

and 8. See Doc. 114. I-ER-11–17. The Court erred in rejecting jury instructions that were vital to Richard’s 1st Amendment based defense. Richard appropriately cited to First Amendment case law. His citation-supported jury instructions were crucial to his defense. The District Court erred in rejecting the proposed instructions.

“A criminal defendant is entitled to jury instructions related to a defense theory so long as there is ‘any foundation in the evidence’ ” and the instruction is “supported by law.” *United States v. Doe*, 705 F.3d 1134, 1144 (9th Cir.2013) (quoting *United States v. Burt*, 410 F.3d 1100, 1103 (9th Cir.2005)). Richard’s instructions were supported by First Amendment jurisprudence.

“An error in criminal jury instructions requires reversal unless there is no reasonable possibility that the error materially affected the verdict or, in other words, that the error was harmless beyond a reasonable doubt.” *United States v. Pierre*, 254 F.3d 872, 877 (9th Cir.2001) (citation, quotation marks, and alteration omitted). Where the error is the wholesale failure to give an instruction, we must reverse if the evidence supports giving the instruction: “[a] criminal defendant is entitled to jury instructions related to a defense theory so long as there is ‘any foundation in the evidence.’ ” *Doe*, 705 F.3d at 1144 (quoting *Burt*, 410 F.3d at 1103); see also *858 *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987) (“[A] defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful credibility.”). *United States v. Cortes*, 757 F.3d 850, 857–58, (9th Cir. 2014).

Here, the refusal of the requested instructions reasonably could have effected the verdict. The Court refused instructions related to Richard’s ability to speak his mind, even if “not always with perfect good taste” and this opportunity was to be afforded with “vigorous advocacy.” See Proposed Supplemental Jury Instruction No. 1; Doc. 114, page 1. I-ER-11–17. Similarly, proposed jury instruction No. 2 noted that the First Amendment protected a significant amount of verbal criticism and that such speech was often provocative and challenging, yet such speech remains protected against punishment absent a clear and present danger. *Id.* at page 2. I-ER-12. Proposed supplemental jury instruction 3 referenced that even obscene words are protected. *Id.* at page 3. I-ER-13. Proposed supplemental instruction No. 8 appropriate described the “threat” that should

have been by the jury in making a determination about the purpose and effect of the phone calls to the Speaker's Office, to the NTOC, and whether the call with Payson Thomas actually constituted a threat.

CONCLUSION

The Petitioner, Richard Lee Rogers, respectfully requests that the Court grant this petition for certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D. Ball', is written over a horizontal line.

DANIEL BALL
Counsel of Record

August 18, 2026

APPENDIX A

**United States Court of Appeals
for the Ninth Circuit**

Memorandum Opinion

United States v. Richard Lee Rogers, No. 25-1267
United States v. Richard Lee Rogers, No. 25-4001

Filed August 18, 2026

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 21 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD LEE ROGERS,

Defendant - Appellant.

No. 25-1267

D.C. No.

1:23-cr-00112-SPW-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD LEE ROGERS,

Defendant - Appellant.

No. 25-4001

D.C. No.

1:23-cr-00112-SPW-1

Appeal from the United States District Court
for the District of Montana

Susan P. Watters, District Judge, Presiding

Submitted May 19, 2026**
Seattle, Washington

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: TALLMAN, OWENS, and R. NELSON, Circuit Judges.

Defendant Richard Lee Rogers appeals his jury conviction stemming from making hundreds of harassing calls to the FBI's National Threat Operations Center (NTOC) and to the Office of the Speaker of the House. The jury convicted Rogers on one count of threatening to injure a member of the United States Congress in violation of 18 U.S.C. § 115(a)(1)(B), (b)(4) (Count 1), and two counts of making harassing telephone calls in violation of 47 U.S.C. § 223(a)(1)(E) (Counts 2 and 3). We have jurisdiction under 28 U.S.C. § 1291, and we affirm the conviction.¹

1. The district court did not err by admitting into evidence recordings of the calls Rogers placed to the NTOC public tip line and text messages between Rogers and FBI Special Agent Matthew Deurmeier. First, the recordings were direct evidence of Count 3, which charged Rogers with making harassing phone calls to the NTOC. Accordingly, they are not subject to Federal Rule of Evidence (Rule) 404(b), and the district court properly deemed Rogers's motion to exclude those recordings moot. *See United States v. Loftis*, 843 F.3d 1173, 1176 (9th Cir. 2016) (holding that evidence of a crime being charged is not subject to Rule 404(b)). The district court also conducted a reasonable balancing under Rule 403, comparing the

¹ Rogers filed a separate notice of appeal as to the district court's revocation of his probation and we consolidated his two appeals. However, he has not addressed or otherwise raised any arguments as to the revocation in his briefs. We therefore deem his challenge to the revocation of probation abandoned and appeal No. 25-4001 is **DISMISSED**. *See United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir. 1995).

recordings' relevance and probative value, on the one hand, and the potential for unfair prejudice due to their cumulative nature, on the other.

Second, the district court reasonably applied the four-part test under Rule 404(b) to the text messages. *See United States v. Kindred*, 931 F.2d 609, 612–13 (9th Cir. 1991). It also reasonably concluded that the text messages were not more prejudicial than probative under Rule 403.

2. Nor did the district court err in concluding that Rogers's calls were true threats. As to Count 1, the plain language of the phone call forming the basis for the indictment and the context in which it was made were more than sufficient to send the question of the phone call's threatening nature to the jury. *See United States v. Merrill*, 746 F.2d 458, 462–63 (9th Cir. 1984), *overruled on other grounds by Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc). As to Counts 2 and 3, the indictment charged Rogers under 47 U.S.C. § 223(a)(1)(E) for his conduct, not his speech; that is, he was charged for placing the calls to the NTOC and the Speaker's office with the intent to harass. *See United States v. Waggy*, 936 F.3d 1014, 1019–20 (9th Cir. 2019). Section 223(a)(1)(E)'s intent requirement also ensures that Rogers was convicted for his conduct, not for speech protected by the First Amendment. *See id.* at 1020.

3. The Government adduced sufficient evidence to support Rogers's

conviction. For Count 1, a staff aide testified at trial that Rogers said, “I’m gonna put this clearly for you. I’m gonna fucking kill him for not shooting down the Chinese balloon.” A rational jury could conclude that this statement constituted a direct threat to the Speaker because of his performance of official duties, particularly when it was corroborated by a threat form that was contemporaneously filled out by the aide who took the call.

For Counts 2 and 3, the Government adduced sufficient evidence (including the sheer volume of calls and the abusive and inflammatory language used) for a rational jury to reasonably conclude that the calls made to the Speaker’s office and to the NTOC line were done solely with the intent to harass. The jury was not required to credit Rogers’s testimony that he made the calls with the intent to air his grievances and engage in civil disobedience. *Cf. Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (“[W]e must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts.” (cleaned up)).

4. The district court did not abuse its discretion as to its formulation of the jury instructions. The instructions for Counts 2 and 3 tracked the elements of the statute and did not eliminate or alter the burden the Government was required to prove. Rather, the instructions were tailored “to fit the specific facts of this case and the allegations.” Doing so was not an abuse of discretion, particularly given the

“substantial latitude” district courts have in fashioning instructions. *United States v. Powell*, 955 F.2d 1206, 1210 (9th Cir. 1991) (citation omitted). Moreover, refusing Rogers’s Proposed Supplemental Instructions 1–3 did not prevent Rogers from putting on his defense theory of the case where a First Amendment defense was adequately covered by other instructions and the proposed instructions would have been confusing to the jury. Nor did the district court err in refusing Proposed Supplemental Instructions 4 and 8, the contents of which were addressed in other instructions. *See United States v. Singh*, 979 F.3d 697, 714 (9th Cir. 2020).

AFFIRMED.