No. 22-2701

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TOU THAO,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Tou Thao, a former Minneapolis police officer, appeals his convictions on two counts of violating 18 U.S.C. 242, which prohibits the willful deprivation of federal rights under color of law. Thao's convictions stem from his failure to intervene in former officer Derek Chauvin's use of unreasonable force against George Floyd, and Thao's deliberate indifference to Floyd's serious medical needs, which resulted in Floyd's death.

On appeal, Thao challenges the sufficiency of the evidence showing that his conduct was willful, and alleges that his convictions should be reversed because of prosecutorial misconduct. Both of these arguments lack merit. The government introduced extensive evidence establishing that Thao acted willfully. Such evidence included testimony and multiple video recordings demonstrating that in failing to act, Thao ignored both the urgent pleas of bystanders and his own training as a police officer. Moreover, the record indicates that the government acted properly throughout the trial and that to the extent any instances of impropriety occurred, they did not prejudice Thao's substantial rights.

The government believes that because the issues presented on appeal are straightforward, oral argument is unnecessary; however, if the Court wishes to hear oral argument, the government requests 15 minutes.

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STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered its final judgment against defendant-appellant Tou Thao on July 27, 2022. Thao timely appealed on August 10, 2022. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether sufficient evidence supported the jury's finding that Thao acted willfully in failing to intervene to stop another officer from using unreasonable force against George Floyd and in disregarding Floyd's serious medical needs.

United States v. *Blakeney*, 876 F.3d 1126 (8th Cir. 2017), cert. denied, 139 S. Ct. 98 (2018)

United States v. *Proano*, 912 F.3d 431 (7th Cir. 2019)

2. Whether the district court properly exercised its discretion in denying Thao's motion for a mistrial based on allegations of prosecutorial misconduct.

United States v. *Alaboudi*, 786 F.3d 1136 (8th Cir. 2015)

United States v. *Fenner*, 600 F.3d 1014 (8th Cir. 2010), cert. denied, 562 U.S. 1141 (2011)

United States v. *Sigillito*, 759 F.3d 913 (8th Cir. 2014), cert. denied, 574 U.S. 1104 (2015)

United States v. *Wadlington*, 233 F.3d 1067 (8th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)

STATEMENT OF THE CASE

1. Procedural History

Defendant-appellant Tou Thao, a former officer with the Minneapolis Police Department (MPD), was charged with two counts of deprivation of rights under color of law resulting in bodily injury and death, in violation of 18 U.S.C.

242. R.Doc. 1, at 2-4.[1] Count 2 was based on Thao's failure to intervene in the unlawful force used against Floyd by former MPD officer Derek Chauvin, while Count 3 was based on Thao's deliberate indifference to Floyd's serious medical needs. R.Doc. 1, at 2-4. Thao was tried before a jury.[2]

At the close of the government's case, Thao moved for a judgment of acquittal under Rule 29, arguing that the government had failed to introduce evidence sufficient to prove that Thao acted willfully. R.Doc. 266. The district court reserved ruling on the motion. R.Doc. 265.

After the 21-day trial in which the jury found Thao guilty on both counts, Thao moved for a mistrial based on alleged prosecutorial misconduct. Add. 28; R.Docs. 281, 291. In his motion, Thao argued, among other things, that the government had introduced unfairly duplicative evidence and cumulative

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[1] "R.Doc. __" refers to the docket entry number of documents filed in the district court. "Tr., Vol. __" refers to the trial transcript by volume. "Br. __" refers to Thao's opening brief. "Add. __" refers to Thao's addendum. "GX __" refers to the government's trial exhibits. "DX __" refers to Thao's trial exhibits. Where a government exhibit is a video with a time stamp, "GX __, at __:__:__" refers to the number and time stamp of the video. Where a government exhibit is a video without a time stamp, "GX __, at __:__" refers to the minute and second of the video.

[2] Count 1, which charged only Chauvin, and to which Chauvin pleaded guilty, is not at issue in this appeal. See R.Doc. 1, at 2. In addition to Thao, Count 2 charged former MPD officer J. Alexander Kueng, and Count 3 charged both Kueng and former MPD officer Thomas Lane. R.Doc. 1, at 2-4. Kueng and Lane were tried alongside Thao and were convicted of the counts against them. R.Docs. 282, 283. Neither Kueng nor Lane appeals his conviction.

testimony; had elicited evidence violating the court's pretrial orders prohibiting eliciting emotional responses and speculation; had made inappropriate arguments when questioning witnesses and during closing argument; and had made unprofessional statements in front of the jury. R.Doc. 291, at 3-7.

The district court issued a written order denying Thao's Rule 29 motion for judgment of acquittal and his motion for a mistrial. Add. 17-27. With respect to the Rule 29 motion, the court held that "there was sufficient evidence presented that the jury could have relied on, and obviously did rely on, to determine that the Government had met its burden to establish [Thao's] willfulness." Add. 20. The court explained that the government had "submitted evidence regarding the training provided to Defendants" and that "the jury instructions provided that the jury could use training evidence to evaluate whether Defendants' actions were willful." Add. 20-21.

With respect to Thao's motion for a mistrial, the court stated that it had "reviewed all instances Defendants list in their memoranda," and though the court had "admonished the prosecution regarding leading questions and repetitive evidence, this conduct did not permeate the trial in such a way to have a prejudicial effect on Defendants' rights." Add. 25. The court noted that it had "repeatedly cautioned *all* counsel, defense and prosecution alike, regarding leading questions and repetitive evidence." Add. 25 (emphasis added). The court concluded that

"[n]one of the instances of alleged misconduct to which Defendants point, taken individually or cumulatively, meets the high bar necessary for a mistrial on the basis of prosecutorial misconduct." Add. 25.

On July 27, 2022, the district court sentenced Thao to 42 months' imprisonment on both counts, to be served concurrently, along with two years' supervised release. Add. 29-30.

Thao timely appealed. R.Doc. 488.

2. Factual Background

a. Defendant Tou Thao

Defendant Tou Thao joined the MPD as a recruit in 2009. Tr., Vol. XVI, 3056-3057, 3105. Upon joining the MPD, Thao underwent six months of training at the police academy on, among other things, MPD policies, defensive tactics, and the proper use of force. Tr., Vol. XVI, 3056-3059. After graduating from the police academy, Thao was laid off for budgetary reasons and worked for several years as a security guard. Tr., Vol. XVI, 3091. Thao was rehired by the MPD in 2011, and went through several months of additional training. Tr., Vol. XVI, 3105-3106.

During the approximately eight years that Thao worked full-time as an MPD police officer, he received training on an annual basis, including on the use of force and on providing medical assistance. Tr., Vol. XVI, 3165-3167; see also GX 61,

62. Consistent with MPD policy, Thao received refresher training in cardio-pulmonary resuscitation (CPR) every other year. Tr., Vol. XVI, 3166.

b. The May 25, 2020, Killing Of George Floyd

i. On May 25, 2020, MPD was dispatched to the Cup Foods convenience store in Minneapolis based on a report that a man had tried to pay with a counterfeit $20 bill. Tr., Vol. IV, 416. Former officers Alexander Kueng and Thomas Lane responded to the scene at 8:08 p.m. and encountered George Floyd in a parked vehicle outside the store. Tr., Vol. IV, 471; GX 27, at 08:08:18. Kueng and Lane removed Floyd from the vehicle, handcuffed him, and escorted him to their police squad car. Tr., Vol. IV, 471-475; GX 5, at 20:11:28; GX 27, at 08:14:31. When Kueng tried to put Floyd in the squad car, Floyd resisted, stating that he was claustrophobic. Tr., Vol. IV, 475-476, 510; see also GX 5, at 20:14:47-20:16:00.

ii. Defendant Thao and his partner, Derek Chauvin, arrived at Cup Foods at 8:17, approximately nine minutes after Kueng and Lane. GX 9, at 20:17:05; GX 27, at 08:17:07. Chauvin tried to help Kueng and Lane put Floyd into the squad car, while Thao stood a few feet away. GX 9, at 20:17:29-20:19:12; GX 27, at 08:17:29-08:19:15.

At 8:19, Chauvin, Kueng, and Lane forced the handcuffed Floyd face-down on the street. GX 5, at 20:19:12; GX 7, at 20:19:12; GX 27, at 08:19:15. Chauvin

placed his left knee on Floyd's neck, back, and shoulder, and his right knee on Floyd's left arm and upper back. GX 5, at 20:19:15-20:28:00; GX 7, at 20:19:12-20:28:00. Kueng placed his right knee on Floyd's upper legs and pressed Floyd's left wrist into Floyd's lower back. GX 5, at 20:19:12-20:28:00; GX 7, at 20:19:12-20:28:00. Lane intermittently held down Floyd's legs. GX 5, at 20:19:12-20:24:00; Tr., Vol. XIX, 3804-3805.

iii. Approximately five seconds into Floyd's restraint, Thao suggested that the officers "hog-tie" Floyd, meaning that they could use a device called a "hobble" to restrain his legs. GX 9, at 20:18:48; see also Tr., Vol. VI, 904-905; Tr., Vol. XVI, 3128. After retrieving the hobble, Thao asked the other officers if they wanted to use it. Chauvin responded, "no," and Thao remarked, "[b]ecause if we hobble him the sergeant's going to have to come in." GX 9, at 20:20:37; GX 9A, at 5; Tr., Vol. XVI, 3133-3134.

iv. Lane radioed for medical assistance because Floyd was bleeding from his mouth. GX 5, at 20:19:48; GX 5A, at 19; Tr., Vol. XIX, 3874, 3899. Lane told the dispatcher that the situation was a "Code 2," meaning that there was no emergency and that responding medical personnel need not use lights or sirens. GX 9A, at 4; Tr., Vol. IV, at 538-539. Approximately two minutes later, Thao asked the other officers if EMS was coming "Code 3," meaning that medical personnel should arrive quickly, and should use lights and sirens. GX 9, at

20:21:12; GX 9A, at 6; Tr., Vol. XVI, 3140. Lane responded that EMS had been called at a Code 2, and suggested "we can probably step it up." GX 9, at 20:21:15; GX 9A, at 6. Thao contacted dispatch and asked them to change the request for medical assistance from a Code 2 to a Code 3. Tr., Vol. IV, 540; Tr., Vol. XVI, 3140.

v. For nearly five minutes between 8:19 and 8:24, Floyd struggled on the ground, telling officers no fewer than 25 times that he could not breathe. See GX 9A (stipulated transcripts of audio from Thao's body-worn camera). Floyd also exclaimed: "[t]ell my kids I love them," "I'm about to die you see," "[o]h my god, I'm dead," "[p]lease man, somebody help me," "[p]lease, the knee on my neck," and "[t]hey gonna kill me." GX 17, at 0:20-3:09; see also GX 5, at 20:19-20:24; GX 7, at 20:19:12-20:23:59. During that time, Thao was standing directly next to Chauvin and Floyd, and often was looking down at them. GX 17, at 0:00-4:30. Thao saw Chauvin pressing his knee into Floyd's neck and heard Floyd complain of being unable to breathe. Tr., Vol. XVI, 3228-3230, 3239, 3244-3245; Tr., Vol. XVII, 3281.

Beginning at 8:21, several bystanders assembled on the sidewalk and began to express concern to the officers about Floyd's well-being. One bystander urged, "[y]ou've got him down. Let him breathe at least man." GX 9, at 20:21:33; GX 9A, at 6. Among other things, the bystanders said: "[t]hat's wrong right there with

his knee on his neck man," "[h]e ain't even resisting arrest," "[h]e is human, bro," "[y]ou don't gotta sit there with your knee on his neck," "he ain't fine," "[y]ou're trappin' his breathing right there," and "[h]e's not sayin' [anything] right now." GX 9, at 20:19:00-20:24:00; GX 9A, at 6-9; see generally GX 17, 20. Thao responded to the bystanders, "[t]his is why you don't do drugs, kids." GX 9, at 20:23:17; GX 17, at 2:27. Thao heard the bystanders expressing concern for Floyd and urging the officers to help him. See, *e.g.*, Tr., Vol. XVI, 3146, 3148, 3256; Tr., Vol. XVII, 3295. Thao did not help Floyd, but instead continued to watch Chauvin kneeling on Floyd's neck. Tr., Vol. XVII, 3297-3298.

vi. Just before 8:24, Floyd uttered his last words— "Please. I can't breathe." GX 9, at 20:23:55; GX 9A, at 9; GX 17, at 3:06. Thao was standing next to Floyd and was aware that Floyd had stopped speaking. Tr., Vol. XVI, 3251. A bystander yelled that Floyd was "about to pass out." GX 9, at 20:24:44; GX 9A, at 9; GX 17, at 3:54. At approximately 8:25, while Thao still stood directly next to Chauvin and Floyd, Floyd lost consciousness. GX 9, at 20:24:30-20:25:30; GX 17, at 4:20. Thao looked back and observed that Floyd appeared to be unconscious. Tr., Vol. XVI, 3231.

At this time, Thao moved closer to the crowd of gathered bystanders, who were frantically urging him to help Floyd. See generally GX 9, at 20:25:16. One bystander exclaimed that Floyd was not responsive and urged Thao to "look at

him!" GX 9, at 20:25:10. The bystanders told Thao and the other officers, "[y]ou're just sitting there stoppin' his breathing right now," "[g]et the f*** off him. What is wrong with ya'll," "[y]ou're just gonna choke him like that," "[h]e cannot breathe," and "he's not responsive right now." GX 9, at 20:25:00-20:25:40; GX 9A, at 9-10. The bystanders repeatedly urged the officers, including Thao, to check Floyd for a pulse. GX 9, at 20:25:00-20:28:00; GX 9A, at 10-13; GX 17, at 4:55-6:30. One bystander specifically urged, "Check his, pulse, Thao! Thao! Check his pulse!" GX 9, at 20:25:57; GX 9A, at 11.

At 8:25, Genevieve Hansen, an off-duty Minneapolis firefighter, came upon the scene while taking a walk. GX 9, at 20:25:30; GX 17, at 4:40; Tr., Vol. V, 723. Hansen approached Thao and identified herself as a firefighter. GX 9A, at 11; GX 17, at 4:40; Tr., Vol. V, 736. Thao responded that if she were really a firefighter, then she would know to get off the street. GX 9, at 20:25:37. Hansen urged Thao repeatedly to get help for Floyd, who was "definitely unconscious." GX 9A, at 11-13; Tr., Vol. V, 737, 739-745. In response to Hansen's pleas that Thao check Floyd's pulse, Thao responded that he was "busy dealing with [the crowd]." GX 9, at 20:27:09; Tr., Vol. V, 742.

vii. Between 8:25 and 8:27, bystanders continued to plead with the officers to help Floyd. GX 9, at 20:25:00-20:27:00; GX 9A, at 11-13. A bystander asked Thao, "[a]re you serious? You gonna just let him sit there with that on his neck?"

GX 9, at 20:25:48. They continued to urge the officers to check Floyd's pulse. GX 9, at 20:25:48-20:25:55. Thao responded by asking, "[h]ow long are we gonna have this conversation?" GX 9, at 20:25:56. One bystander repeatedly asked Thao if Thao believed that what Chauvin was doing was okay, and pointed out that Floyd was not moving. GX 9, at 20:26:09; GX 9A, at 12-13. At 8:27, a bystander yelled to the officers, "[h]e's still on the ground? You're still on him? Get the f*** off him! He's like dying, bro! What are you doing? He's dying!" GX 9, at 27:18:32. Thao did not respond, except to tell bystanders to "[g]et back on the street." GX 9, at 20:27:46; GX 9A, at 13.

After Thao stepped away from where Chauvin knelt on Floyd's neck, Thao repeatedly looked back at Floyd and the other officers. GX 9, at 20:25:00-20:27:23. He did not take any steps to ascertain Floyd's medical condition or assist him in any way. See GX 9, at 20:25:00-20:27:23; GX 14, at 8:25:20-8:27:23; GX 17, at 4:31-6:50.

viii. Paramedic Derek Smith and his partner arrived on the scene at 8:27. GX 27, at 08:27:23; Tr., Vol. V, 589-591, 596, 610. Upon arrival, Smith examined Floyd and determined that he was not breathing, did not have a pulse, and that his pupils were dilated. Tr., Vol. V, 593-594. Smith suspected that Floyd was already dead. Tr., Vol. V, 594-595. The paramedics moved Floyd into an ambulance and drove to another location to continue providing care. Tr., Vol. V, 603. The

paramedics were not able to revive Floyd, who was in cardiac arrest. Tr., Vol. V, 606-607. Floyd was pronounced dead at a hospital. Tr., Vol. VI, 947. In all, the officers had restrained Floyd face-down on the ground for approximately nine-and-a-half minutes. GX 7, at 20:19:12-20:28:43.

ix. After an autopsy, the medical examiner concluded that Floyd's cause of death was "cardiopulmonary arrest, complicating law enforcement subdual[,] restraint and neck compression." Tr., Vol. VIII, 1390. Expert testimony indicated that if Floyd had been repositioned, his respiratory failure would have been "imminently reversible * * * right up until the time he lost consciousness," and that even after he lost consciousness, Floyd's chances of survival would have "doubled or tripled," if defendants had started CPR. Tr., Vol. X, 1705-1706, 1709-1710; see also Tr., Vol. XII, 2174, 2178 (similar testimony from additional medical expert).

SUMMARY OF THE ARGUMENT

This Court should affirm Thao's convictions. Thao argues that the evidence was insufficient for the jury to find that he acted willfully when he failed to intervene in Chauvin's use of unreasonable force and when he disregarded Floyd's serious medical needs. He also argues that the government engaged in misconduct, which deprived him of a fair trial. These arguments lack merit.

1. a. Sufficient evidence supported the jury's finding that Thao acted willfully when he failed to intervene in Chauvin's use of unreasonable force against Floyd. The evidence—including testimony from six eyewitnesses, 15 video recordings, and Thao's own testimony—showed that Thao stood directly next to Chauvin and the other officers while they restrained Floyd and that he looked down at them repeatedly for the first six minutes of Floyd's restraint. During this time, Floyd was lying face-down on the street, was handcuffed, and was not resisting the officers. Floyd repeatedly told the officers that he could not breathe, and Thao admitted at trial that he heard those statements. After Floyd lost consciousness, Thao moved several feet away from Floyd and the officers but continued to look back at them. Thao was aware at all times that Chauvin continued to kneel on Floyd's neck.

Evidence further demonstrated that Thao knew that the force Chauvin used against Floyd was unreasonable. The commander of MPD's training division, MPD's medical support coordinator, and MPD's lieutenant in charge of the homicide unit testified that MPD officers are trained that once a suspect is handcuffed and no longer resisting, officers should stop using force. The same testimony also established that MPD training teaches that neck restraints should be used only to gain control of arrestees, but that after an arrestee is handcuffed and under control, the neck restraint should stop, and that MPD does not train officers

to use their knees to apply pressure to an arrestee's neck. MPD personnel testified that this training applies regardless of whether an officer believes that an arrestee is experiencing symptoms of "excited delirium."

The government also introduced extensive testimony showing that Thao was aware from his MPD training that officers have a duty to intervene in another officer's use of unreasonable force. Indeed, Thao himself acknowledged on the stand that he knew he had a duty to intervene. Video evidence and witness testimony showed that despite the fact that Thao was trained on the proper use of force and on his duty as an officer to intervene in another officer's use of unreasonable force, Thao did not attempt to intervene to stop Chauvin from kneeling on Floyd's neck. Accordingly, sufficient evidence supported the jury's finding that Thao acted willfully in failing to intervene in Chauvin's use of unreasonable force.

b. Sufficient evidence also supported the jury's finding that Thao acted willfully when he disregarded Floyd's serious medical needs. Again, video footage and Thao's own testimony demonstrated that Thao stood directly next to Floyd and the other officers while Floyd repeatedly stated that he could not breathe. Thao failed to move Floyd to the side-recovery position, as his MPD training required. Video evidence showed bystanders urgently and repeatedly telling Thao that Floyd had passed out and was dying, and Thao confirmed in his

own testimony that he heard the bystanders' pleas and that Floyd appeared to him to be unconscious. The same evidence showed that Thao knew that, despite the fact that Floyd had passed out, Chauvin continued to kneel on Floyd's neck. Though his MPD training required him to immediately start CPR under such circumstances, Thao did nothing.

2. The district court properly denied Thao's motion for a mistrial based on alleged prosecutorial misconduct, and this Court need not consider his claims of prosecutorial misconduct on appeal. Thao's opening brief consists largely of bulleted lists of string citations to the trial transcript where he claims the government acted improperly. But he does not explain how the challenged statements and questions were improper or how any impropriety deprived him of a fair trial. Because Thao fails to meaningfully develop his arguments on appeal, this Court should deem them waived.

In any event, none of the government's questions or statements that Thao complains of in his brief rises to the level of reversible misconduct, either on their own or cumulatively. The properly admitted evidence of Thao's guilt, which consisted of, among other things, multiple video recordings, testimony from bystander witnesses, and testimony from numerous MPD personnel, was more than sufficient to support the jury's verdict. And the district court's admonishments that

the jury should disregard any questions or comments to which an objection was sustained, and that statements by attorneys are not evidence, cured any prejudice.

ARGUMENT

I

SUFFICIENT EVIDENCE SHOWED THAT THAO ACTED WILLFULLY

A. Standard Of Review

This Court "review[s] de novo the sufficiency of the evidence to sustain a conviction, viewing the evidence in a light most favorable to the verdict and accepting all reasonable inferences supporting the verdict." *United States* v. *Colton*, 742 F.3d 345, 348 (8th Cir. 2014) (per curiam). The Court must affirm "[i]f there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt." *United States* v. *Blakeney*, 876 F.3d 1126, 1131 (8th Cir. 2017) (citation omitted; brackets in original), cert. denied, 139 S. Ct. 98 (2018). The Supreme Court has made clear that "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos* v. *Smith*, 565 U.S. 1, 2 (2011) (per curiam). "Reversal is not appropriate '[e]ven where the evidence rationally supports two conflicting hypotheses.'" *Blakeney*, 876 F.3d at 1131 (citation omitted; brackets in original). Rather, reversal "is required 'only if no reasonable jury could have found guilt beyond a reasonable doubt.'" *Ibid.* (citation

omitted). Because of this "strict" standard, *Colton*, 742 F.3d at 348 (citation omitted), "[a] defendant challenging the sufficiency of the evidence 'confronts a high hurdle.'" *United States* v. *Bell*, 477 F.3d 607, 614 (8th Cir. 2007) (citation omitted).

B. Section 242 Requires Proof That Thao Acted Willfully

Section 242 makes it a crime for anyone acting under color of law to "willfully subject[] any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. Thao was charged with two counts of violating Section 242, the first for willfully failing to intervene in Chauvin's use of force against George Floyd (Count 2), and the second for willfully disregarding Floyd's serious medical needs (Count 3).

"To prove willfulness, the government [is] required to show that [the defendant] acted with specific intent to deprive [the victim] of his constitutional rights." *United States* v. *Boone*, 828 F.3d 705, 711 (8th Cir. 2016), cert. denied, 137 S. Ct. 676 (2017). "The issue of willfulness is a question of fact to be determined by the jury." *Smith* v. *Chase Grp., Inc.*, 354 F.3d 801, 809 (8th Cir. 2004).

The district court instructed the jury that to find that Thao acted willfully, it must find that he "committed [an] act with a bad purpose or improper motive to

disobey or disregard the law, specifically intending to deprive the person of that right." Tr., Vol. XXI, 4156, 4160. The court explained to the jury that it "may consider any statements made and acts done by the defendant and all of the facts and circumstances in evidence which may aid in a determination of the defendant's willfulness, knowledge or intent." Tr., Vol. XXI, 4164. The court also explained that "evidence of the training [Thao] received" may be used "to determine whether [he] acted willfully." Tr., Vol. XXI, 4164; see also Tr., Vol. XXI, 4164-4165 (stating that "if you determine that [Thao] acted contrary to the training he received, you should consider that evidence only in determining whether the defendant acted willfully").

Thao does not challenge any of the jury instructions on willfulness but instead argues that the evidence was insufficient to prove that element for both of his Section 242 convictions. As explained below, his argument lacks merit.

C. Sufficient Evidence Supported The Jury's Finding That Thao Acted Willfully In Failing To Intervene To Stop Chauvin's Use Of Unreasonable Force Against Floyd

Count 2 alleged that Thao, "while acting under color of law, willfully deprived George Floyd of the right, secured and protected by the Constitution and laws of the United States, to be free from an unreasonable seizure." R.Doc. 1, at 2. Specifically, the government alleged that Thao was "aware that Defendant Chauvin was holding his knee across George Floyd's neck and Floyd lay handcuffed and

unresisting, and that Defendant Chauvin continued to hold Floyd to the ground even after Floyd became unresponsive, and [Thao] willfully failed to intervene to stop Defendant Chauvin's use of unreasonable force." R.Doc. 1, at 2-3.[3]

It is undisputed that Chauvin applied unreasonable force when he knelt on George Floyd's neck for more than nine minutes, killing him. It is also undisputed that Thao observed Chauvin using unreasonable force but did nothing to stop it. The only question, then, is whether sufficient evidence supported the jury's finding that Thao's failure to intervene was willful. The district court correctly held that it did.

1. The Evidence Demonstrated That Thao Knew From His Training That Chauvin's Use Of Force On Floyd Was Unreasonable

The government introduced substantial evidence regarding the training that MPD officers, including Thao, received on the use of force. Police inspector Katie Blackwell, the commander of MPD's training division from 2019 through 2021, testified that MPD's use-of force policy is "based on the Fourth Amendment's reasonableness standard" and provides "that sworn MPD employees shall only use the amount of force that is objectively reasonable in light of the facts and circumstances known to the employee at the time the force is use[d]." Tr., Vol. VI,

[3] As this Court has recognized, "an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment." *Nance* v. *Sammis*, 586 F.3d 604, 612 (2009), cert. denied, 562 U.S. 827 (2010).

792-793, 875. And she explained that MPD policy requires that once a detainee stops resisting, officers should stop using force. Tr., Vol. VI, 873.

Inspector Blackwell testified that officers are trained that as soon as a detainee in the face-down, or "prone," position is handcuffed and under control, officers should move the detainee to the side-recovery position and then to the upright position.[4] Tr., Vol. VI, 971-972. She explained that this is done to avoid "positional asphyxia[,] which inhibits their breathing if they are on their chest too long." Tr., Vol. VI, 972, 976; see also GX 76 (video shown to officers on the dangers of keeping a detainee in the prone position).

Inspector Blackwell also testified about officers' training with respect to handling a person suspected of suffering from "excited delirium."[5] For example, she explained that once a detainee with suspected excited delirium becomes compliant, officers should stop using force. Tr., Vol. VIII, 1330-1331. She testified that even where officers suspect that a detainee has excited delirium, as soon as the detainee is handcuffed, officers should move the detainee to the side-

[4] Moving an arrestee to the "side-recovery" position means turning the individual onto his side to facilitate breathing. See, *e.g.*, Tr., Vol. VI, 906.

[5] "Excited delirium" is a term used by MPD to describe extreme agitation and physical strength associated with the use of certain narcotics. See, *e.g.*, Tr., Vol. VIII, 1234.

recovery position and then sit him upright while waiting for EMS. Tr., Vol. VIII, 1325, 1327, 1332.

Inspector Blackwell also testified about MPD's policies on neck restraints, which officers may use to gain control of arrestees who are resisting by restricting their blood flow. Tr., Vol. VI, 895. She described "conscious" neck restraints as the application of light pressure to the neck of an arrestee who is resisting, with the officer using his arm to protect the arrestee's throat. Tr., Vol. VI, 895. She testified that "if [the arrestee is] escalating, get[s] combative, we can use the unconscious neck restraint," which involves the application of "moderate pressure * * * to render the person unconscious to get them to comply and get them under control." Tr., Vol. VI, 895.

Inspector Blackwell explained that it is against MPD policy and training to use *any* kind of neck restraint on a person who is in the prone position, is handcuffed, and is not actively resisting. Tr., Vol. VI, 880, 898-900. And she explained that even in circumstances where a detainee is actively resisting and is combative, a neck restraint should be used to render the person unconscious for no longer than six to 15 seconds. Tr., Vol. VI, 901.

Inspector Blackwell testified that MPD does not train officers to use their knees to apply pressure to a detainee's neck. Tr., Vol. VII, 1104-1105. Lieutenant Zimmerman, the head of MPD's homicide unit, corroborated this, testifying that

officers are trained that they may use their knees to restrain a person in order to handcuff them, "but that's it." Tr., Vol. XIII, 2462. He stated that "[o]nce [a detainee is] handcuffed, you have to * * * put him in the recovery position." Tr., Vol. XIII, 2462, 2464. Inspector Blackwell testified that once Floyd stopped actively resisting, the use of *any* force, including a neck restraint, was no longer appropriate under MPD policy. Rather, she testified, officers should have rolled Floyd onto his side. Tr., Vol. VII, 1102; see also Tr., Vol. VIII, 1336.

The government also introduced evidence about specific use-of-force trainings that Thao attended. For example, Inspector Blackwell testified that Thao attended a training in 2018 that included a refresher course on the use of reasonable force. Tr., Vol. VII, 1008-1013; see also GX 61, at 52-54. The training included instruction on the proper use of neck restraints, including that "conscious" neck restraints should be used only when a person is actively resisting, and that "unconscious" neck restraints should be used *only* when the person is "exhibiting active aggression," and not "against subjects who are demonstrating passive resistance." Tr., Vol. VII, 1017-1018; GX 61, at 53. She also testified that Thao attended a 2019 training that reinforced how a neck restraint should be performed. The training taught that an officer should use his forearm and bicep to perform the restraint, stabilizing the head and neck and protecting the detainee's airway. Tr., Vol. VII, 1024-1025; GX 62, at 5.

Thao admitted on the stand that he was aware that "if you're arresting someone who fought with you initially, once they stop fighting, you then have to lessen your force * * * because force that was reasonable in one situation might stop being reasonable some seconds later." Tr., Vol. XVI, 3174-3175; see also Tr., Vol. XVI, 3223. He testified that this general principle—that force should be used only on suspects who are resisting—holds true even when officers suspect that the detainee is experiencing "excited delirium." Tr., Vol. XVI, 3223, 3263. He agreed that it is unreasonable to use force on someone who is unconscious or who has no pulse. Tr., Vol. XVI, 3177.

Thao admitted that kneeling on a detainee's neck, as Chauvin did to Floyd, is not the sort of neck restraint that MPD trains its officers to perform to gain control. Tr., Vol. XVI, 3194-3195. He acknowledged that he was trained that a "conscious" neck restraint should be used only if "someone is actively resisting" and that an "unconscious" neck restraint should not be used "unless someone is exhibiting active aggression." Tr., Vol. XVI, 3195. He testified that he was trained that if a neck restraint rendered someone unconscious, the person should wake up in six to 15 seconds. Tr., Vol. XVI, 3195.

2. The Evidence Demonstrated That Thao Knew From His Training That He Had A Duty To Intervene In Another Officer's Use Of Unreasonable Force

The government also presented evidence that Thao was trained on the duty of a police officer to intervene in another officer's use of unreasonable force. Inspector Blackwell testified about MPD's policy on intervention, in place since 2016, which states that "[i]t shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required." Tr., Vol. VI, 881, 883-884; GX 46, at 3. She testified that "[i]t's often said to us in policy and in training [that] [w]hen someone is in your custody they're in your care." Tr., Vol. VI, 882. She testified that the duty included an obligation to protect individuals in custody from other police officers. Tr., Vol. VI, 882. Specifically, if an officer sees another police officer using "or about to use an unreasonable amount of force, [the first officer] ha[s] that duty to intervene." Tr., Vol. VI, 883. She testified that MPD's duty-to-intervene policy does not distinguish between officers of different ranks or experience. Tr., Vol. VI, 889; Tr., Vol. VII, 1031; see also Tr., Vol. XIII, 2438-2440, 2469 (similar testimony from MPD's lieutenant in charge of the homicide unit).

Inspector Blackwell's testimony also confirmed that Thao received training on the duty to intervene. For example, she explained that MPD refresher trainings

in both 2018 and 2019, which Thao attended, instructed that if an officer is "present when inappropriate physical force is being applied, or is no longer required, it is [the officer's] DUTY to stop the application of force." GX 61, at 15; see also Tr., Vol. VII, 1014, 1027, 1031; GX 63, at 13. And Thao admitted during his testimony that he was trained on his duty "to stop excessive force if [he saw] it happening." Tr., Vol. XVI, 3177-3178.

Inspector Blackwell testified that Thao's actions on the day Floyd died were inconsistent with MPD's policy and training regarding his duty to intervene. Tr., Vol. VII, 1120-1121. She further testified that nothing that the crowd of bystanders was doing at the time should have prevented Thao from complying with his training and intervening in Chauvin's use of force. Tr., Vol. VII, 1122-1123.

In sum, the evidence that Thao was aware that Chauvin's use of force against Floyd was unreasonable and that Thao, ignoring his police training, failed to do anything to intervene to stop the use of unreasonable force, was sufficient for a reasonable jury to find that Thao acted willfully under Count 2. See *United States* v. *Proano*, 912 F.3d 431, 439 (7th Cir. 2019) (in appeal from Section 242 use-of-force conviction, sufficient evidence supported jury's finding of willfulness where officer disregarded his police training); see also *United States* v. *Brown*, 934 F.3d 1278, 1296-1297 (11th Cir. 2019), cert. denied, 140 S. Ct. 2826 (2020) (similar); *United States* v. *Rodella*, 804 F.3d 1317, 1337-1338 (10th Cir. 2015),

cert. denied, 137 S. Ct. 37 (2016) (similar).

3. Thao's Arguments That His Failure To Intervene Was Not Willful Are Unsupported By The Record

Thao offers several arguments as to why his failure to intervene in Chauvin's use of force was not willful. None undermines the district court's conclusion that sufficient evidence supported the jury's finding that Thao acted willfully.

First, Thao contends that willfulness is negated because he suggested getting a hobble to restrain Floyd and then fetched the hobble from a squad car, and because if the officers had used the hobble, they would have put Floyd in the side-recovery position. Br. 34. But audio from the officers' body-worn cameras showed that this discussion of the hobble occurred only a few seconds after Floyd's restraint began, and Floyd had been on the ground for just over one minute when the officers decided to forgo using the hobble. See GX 9A, at 4-5. Thus, Thao's suggestion to use a hobble does nothing to negate his failure to intervene during the remaining *approximately eight minutes* that Chauvin knelt on Floyd's neck.

Thao also points to his own testimony that he believed Floyd was experiencing excited delirium to explain his failure to intervene in Chauvin's use of force. Br. 35; see also Br. 6-12, 15-16, 18-19. But MPD training personnel testified that even when officers suspect a person is experiencing excited delirium,

once the detainee is no longer resisting, officers should stop using force and should move the detainee to a side-recovery position and then sit them upright. See, *e.g.*, Tr., Vol. VIII, 1325-1332. They also testified that regardless of whether Floyd was experiencing excited delirium, once he stopped resisting, a neck restraint was not appropriate under MPD policy. Tr., Vol. VI, 880, 898-900. On the other hand, *no* evidence suggested that it was permissible for an officer to kneel on the neck of an individual with excited delirium (let alone for more than nine minutes), including after the individual lost consciousness.

Thao also points to photographs of MPD trainings that, he asserts, show officers using their knees to restrain individuals. See Br. 4-5. As an initial matter, it is far from clear that these photos actually show officers kneeling on the necks of the people they are trying to restrain; indeed, only five of the photos even arguably show a trainee using his or her knee on an individual's neck.[6] But even if the jury believed—contrary to the testimony of Inspector Blackwell and Lieutenant Zimmerman—that MPD trains its officers to use their knees to apply force to a detainee's neck, nothing in the photos indicates that MPD policy permits officers to kneel on a detainee's neck even after the detainee is handcuffed and is no longer

[6] See DX T-27C, T-27D, T-27E, T-27O, T-12, at 31. These are still photographs portraying officers learning to handcuff individuals resisting arrest. They do not suggest that MPD trained its officers to kneel on arrestees' necks for prolonged periods of time, after they were handcuffed and no longer resisting.

resisting, and even after the detainee has lost consciousness. See Tr., Vol. XIII, 2462 (testimony of Lieutenant Zimmerman that officers are trained that they may use their knees to restrain a person in order to handcuff them, "but that's it"). Therefore, the photographs do not undermine the jury's finding that Thao was aware that Chauvin's use of force was unreasonable.[7]

Finally, Thao points to his own testimony that (1) he thought there was nothing wrong with Chauvin's use of force; (2) he could not see what was happening the entire time because he was charged with crowd control; and (3) he thought Floyd was fine because he did not see the other officers providing medical aid. See Br. 22-24. Thao's arguments in this regard fail to acknowledge the likelihood that the jury simply did not credit his testimony over the government's evidence of willfulness. See *United States* v. *Knight*, 800 F.3d 491, 512 (8th Cir. 2015) (holding that the district court erred in granting a judgment of acquittal where the government presented sufficient evidence of guilt and noting, though the defendant testified in his defense, "the jury could have disbelieved [his] testimony").

In short, Thao fails to point out anything in the record requiring this Court to disturb the jury's verdict. See *Cavazos*, 565 U.S. at 2.

[7] Indeed, in the Excited Delirium PowerPoint that Thao references (Br. 4 (citing DX T-12)), the photograph is accompanied by text stating, "Place the subject in the recovery position to alleviate positional asphyxia." DX T-12, at 31.

D. Sufficient Evidence Supported The Jury's Finding That Thao Acted Willfully In Disregarding Floyd's Serious Medical Needs

Count 3 alleged that Thao, "while acting under color of law, willfully deprived George Floyd of the right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law," including "an arrestee's right to be free from a police officer's deliberate indifference to his serious medical needs." R.Doc. 1, at 3. The government alleged that Thao "saw George Floyd lying on the ground in clear need of medical care, and willfully failed to aid Floyd, thereby acting with deliberate indifference to a substantial risk of harm to Floyd." R.Doc. 1, at 3.

It is undisputed that Floyd was suffering from a serious medical need.[8] It also is undisputed that Thao did not render medical assistance to Floyd and that even after Floyd lost consciousness, Thao did not check for a pulse or start CPR. See pp. 10-11, *supra*. Thao argues only that the evidence was insufficient to support a finding that he acted willfully in disregarding Floyd's serious medical needs.[9]

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[8] A "serious medical need" is one that either is diagnosed or is "so obvious that a layperson would easily recognize the need for treatment." *Jones* v. *Minnesota Dep't of Corr.*, 512 F.3d 478, 482 (8th Cir. 2008).

[9] Amicus curiae Association of American Physicians and Surgeons Educational Foundation argues that "bystander police officer[s]" should not be held liable for failure to provide medical care. See Amicus Curiae Br. 4-7. This

1. The Evidence Demonstrated That Thao Knew From His Training That He Had A Duty To Provide Floyd With Medical Assistance

The government demonstrated that MPD officers, including Thao, were trained on their duty to provide care when a person in their custody has a serious medical need. Inspector Blackwell testified that officers are trained to render medical aid to detainees while waiting for EMS to arrive, including by performing CPR and monitoring detainees' airways, breathing, and circulation. Tr., Vol. VI, 892-893; Tr., Vol. VII, 1034.

Nicole Mackenzie, MPD's medical support coordinator, testified that when officers "tak[e] somebody into custody, [they] have a responsibility to render aid to that person." Tr., Vol. X, 1794. Mackenzie discussed MPD's policy on medical aid, which provides that "[w]hile awaiting EMS, MPD employees assisting an individual having an acute medical crisis shall provide any necessary first aid consistent with MPD training, as soon as practical." GX 48; see also Tr., Vol. X, 1794-1795. She explained that MPD officers take refresher courses in CPR every

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argument is contradicted by this Court's binding precedent. See *Barton* v. *Taber*, 908 F.3d 1119, 1124 (8th Cir. 2018); see also *Thompson* v. *King*, 730 F.3d 742, 750 (8th Cir. 2013). And it appears to be grounded in an assumption—contradicted by the medical examiner and by multiple medical experts at trial—that Floyd died of a drug overdose rather than from Chauvin's use of unreasonable force and the other officers' inactions. Amicus Curiae Br. 8, 16-20. See Tr., Vol. VIII, 1392, 1434; Tr., Vol. X, 1703. Thao does not advance these arguments in his appeal, and this Court should decline to consider them. See *Peltier* v. *Henman*, 997 F.2d 461, 475 (8th Cir. 1993).

two years and that officers are trained that if they encounter an individual with no pulse, they should request an ambulance and start CPR. Tr., Vol. XI, 1869, 1880.

Officer Mackenzie further testified that MPD officers are trained that if a person in custody states that he cannot breathe, officers should reposition the person on his side, or to a sitting or standing position, and that keeping a person in the prone position while handcuffed is "inconsistent" with MPD's medical training. Tr., Vol. XI, 1892-1893. She testified that officers are trained that simply because a detainee can speak does not mean they can also breathe. Tr., Vol. XI, 1898-1899. Both Officer Mackenzie and Inspector Blackwell testified that officers are trained that even when a detainee is suspected of having "excited delirium," officers should place the detainee in the side-recovery position once he is handcuffed. Tr., Vol. XI, 1901, 2057; see also Tr., Vol. VIII, 1325-1332; GX 62, at 6.

With respect to neck restraints, Inspector Blackwell testified that if the detainee does not immediately regain consciousness after a few seconds, officers should "roll them onto their side for recovery and check [their] airway [and] pulse, [and] start rendering medical first aid." Tr., Vol. VI, 902-903; see also Tr., Vol. VII, 1112; Tr., Vol. XI, 2056 (MPD medical trainer offering similar testimony). And if a detainee stops breathing, then officers are trained to start CPR while waiting for medical assistance to arrive. Tr., Vol. VI, 903, 976.

In her testimony, Inspector Blackwell discussed a training course that Thao attended, which instructed that officers should bring a detainee who had passed out to a sitting position as soon as possible after a neck restraint, explained how to bring the detainee back to consciousness, and instructed that if a detainee was unconscious for more than 30 seconds, the officer should "[g]et medical help immediately." Tr., Vol. VII, 1025-1026; GX 62, at 6. Thao admitted in his testimony that he was trained to offer medical assistance to detainees with a serious medical need. He acknowledged that he knew from his training that it is "critical to start CPR even before [the] paramedics" arrive at a scene. Tr., Vol. XVI, 3168; see also Tr., Vol. XVI, 3260. He testified that he was aware that it was a "red flag if someone in [officer] custody suddenly stops talking," as Floyd did, and that "keeping someone in the prone position can make it harder for them to breathe." Tr., Vol. XVI, 3170.

Officer Mackenzie testified that Thao's actions with respect to the events leading up to Floyd's death were "inconsistent" with MPD's training on the duty to provide medical assistance, because Thao did not render any medical aid. Tr., Vol. XI, 1907-1908; see also Tr., Vol. XIII, 2477 (similar testimony from MPD lieutenant in charge of homicide). Similarly, Inspector Blackwell testified that as soon as Floyd lost consciousness, Thao should have provided him medical care. Tr., Vol. VII, 1117.

In sum, the government offered substantial evidence from which a reasonable jury could conclude that Thao's deliberate indifference to Floyd's serious medical needs was willful. See *United States* v. *Gonzales*, 436 F.3d 560, 569 n.5, 574 (5th Cir.) (upholding jury finding of willfulness where victim "was left alone on the bus floor, handcuffed, eyes swollen shut and foaming at the mouth, despite [law enforcement] training that," under the circumstances, he should have been "placed upright, never in a prone position, particularly if handcuffed"), cert. denied, 547 U.S. 1139, 547 U.S. 1180, and 549 U.S. 823 (2006), overruled on other grounds by *United States* v. *Garcia-Martinez*, 624 F. App'x 874, 879 n.12 (5th Cir. 2015) (per curiam), cert. denied, 577 U.S. 1111 (2016).

2. Thao's Arguments That He Did Not Act Willfully In Failing To Provide Floyd With Medical Care Are Unsupported By The Record

Thao asserts several arguments to justify his failure to attend to Floyd's medical needs. He appears to argue that he was not fully aware that Floyd was suffering from a serious medical need because he was occupied with crowd control, and that he assumed that if Floyd needed medical care such as CPR, then the other officers would have been providing it. See Br. 21-24, 35. Thao's testimony in this regard is undermined by (1) video evidence showing Thao standing directly next to and looking down at Floyd and the other officers for the majority of Floyd's restraint, and then after he moved several feet away, repeatedly

looking back at them; (2) multiple bystanders' repeated statements to Thao that Floyd could not breathe, had lost consciousness, and needed help; and (3) Thao's admission at trial that Floyd appeared to him to be unconscious. See pp. 8-11, *supra*.

Thao also argues that some of his actions demonstrate that his failure to render medical care to Floyd was not willful. For example, he cites his suggestion that the officers use a hobble to restrain Floyd, because "[i]f the hobble had been used, Floyd would have been in the recovery position." Br. 34. Again, the discussion surrounding the hobble took place at the very beginning of Floyd's restraint while Floyd was still conscious and speaking. It does not excuse Thao's failure to offer medical assistance later, particularly after Floyd lost consciousness. And this argument also ignores that under MPD policies and training, the officers should have placed Floyd in the recovery position *even without the use of the hobble*, once he stopped actively resisting. See pp. 20-22, 27, 31, *supra*.

Thao also points to the fact that when Lane suggested that the EMS call should be "step[ped] up," Thao radioed dispatch to change the call from a Code 2 to a Code 3. Br. 36; see GX 9A, at 6. This action, which took place slightly over two minutes into Floyd's restraint while Floyd was still awake and talking, does not explain Thao's failure to provide any medical care for the remaining almost seven minutes that Chauvin knelt on Floyd's neck. Additionally, as MPD

personnel testified (and as Thao admitted), officers are trained to provide medical assistance—including CPR if necessary—*while they wait for EMS to arrive*. See pp. 20-21, 30-31, *supra*; cf. *McRaven* v. *Sanders*, 577 F.3d 974, 983 (8th Cir. 2009) ("An officer trained in CPR, who fails to perform it on a prisoner manifestly in need of such assistance, is liable under § 1983 for deliberate indifference.").

In short, Thao offers no reason for this Court to disturb the jury's finding that his failure to attend to Floyd's serious medical needs was willful. See *Cavazos*, 565 U.S. at 2.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THAO'S MOTION FOR A MISTRIAL BASED ON ALLEGATIONS OF PROSECUTORIAL MISCONDUCT

A. Standard Of Review

This Court reviews a district court's denial of a motion for a mistrial for abuse of discretion. *United States* v. *Sherman*, 440 F.3d 982, 987 (8th Cir. 2006). However, this Court need not review arguments on appeal that are not meaningfully developed. *United States* v. *Sigillito*, 759 F.3d 913, 933 (8th Cir. 2014), cert. denied, 574 U.S. 1104 (2015).

B. This Court Should Decline To Review Thao's Prosecutorial Misconduct Argument Because He Fails To Meaningfully Develop It

As an initial matter, this Court may decline to address Thao's prosecutorial misconduct argument (Br. 37-43) for failure to develop it. An appellant's brief

must include the reasons for appellant's contentions, "with citations to the authorities * * * on which the appellant relies." See Fed. R. App. P. 28(a)(8)(A). This Court "regularly decline[s] to consider cursory or summary arguments unsupported by facts or legal authorities." *Sigillito*, 759 F.3d at 933 (citation omitted); see also *United States* v. *Reed*, 972 F.3d 946, 955 n.5 (8th Cir. 2020) (declining to consider the merits of defendant's claims where he failed to "meaningfully develop or argue them"), cert. denied, 141 S. Ct. 2765 (2021).

For the vast majority of the conduct that Thao challenges, Thao merely lists a record cite and leaves it up to the government and this Court to divine why the conduct was allegedly improper and how, if at all, such conduct prejudiced his substantial rights. See, *e.g.*, Br. 25-30, 39-40. Because Thao fails to meaningfully argue why most of the government's questions and statements that he challenges were improper, and because he fails to explain why *any* such instances prejudiced him, either in isolation or cumulatively, this Court should deem his prosecutorial misconduct argument waived.

C. None Of The Alleged Incidents Of Prosecutorial Misconduct Thao Identifies Supports Reversal Of His Conviction

To obtain reversal of a conviction for prosecutorial misconduct, a defendant must demonstrate that "(1) the prosecutor's conduct or remarks were improper, and (2) the conduct or remarks prejudicially affected the defendant's substantial rights by depriving the defendant of a fair trial." *United States* v. *Alaboudi*, 786 F.3d

1136, 1141 (8th Cir. 2015) (citation omitted). "To determine whether the defendant was deprived of a fair trial, [the court] consider[s] three factors: the cumulative effect of the misconduct, the strength of the properly admitted evidence, and any curative actions taken by the district court." *United States* v. *Kopecky*, 891 F.3d 340, 343 (8th Cir. 2018).

Thao cannot meet his burden to justify reversal based on prosecutorial misconduct. As set forth below, the district court overruled (or did not rule on) Thao's objections to some of the conduct that he now challenges, and Thao fails to explain how any of that conduct was improper. But even where the court sustained an objection to a particular statement or question, Thao fails to explain how the challenged conduct prejudiced his substantial rights. Thao's everything-but-the-kitchen-sink approach seeks to recast the common disputes inherent in a complex criminal trial as prosecutorial misconduct. This Court should reject that strategy.

1. Thao Fails To Show How Conduct For Which There Was No Sustained Objection Was Improper

Thao grounds his prosecutorial misconduct claim partly on statements the government made during its closing argument for which the district court either overruled Thao's objections or did not have an occasion to rule. On appeal, Thao does not explain how any of these statements was improper. As explained below, the government's conduct was proper.

Confrontation Clause Objection. Thao contends (Br. 29, 39) that the government acted improperly during closing by referencing statements by Donald Williams, a non-testifying witness, urging Chauvin to get off of Floyd. See Tr., Vol. XX, 3983. These statements were contained in multiple videos of the incident and in stipulated transcripts, all of which already were in evidence. Tr., Vol. XX, 3983; *e.g.*, GX 9, at 20:27:40; GX 9A, at 13-14. Although the district court initially sustained Thao's Confrontation Clause objection, Tr., Vol. XX, 3983, the government explained that it was referencing Williams's statements not for the truth of the matter asserted, but because they demonstrated that Thao was aware that Chauvin was continuing to kneel on Floyd's neck. Tr., Vol. XX, 3984. The district court then overruled Thao's objection and permitted the government to continue. Tr., Vol. XX, 3984.

Credibility Remarks. Thao complains that the government "improperly call[ed] out Thao after stating[,] 'speaking of lying.'" Br. 40 (citing Tr., Vol. XX, 4025). During closing argument, the government stated, "[s]peaking of lying, you've heard some things on the stand you shouldn't believe. * * * Here are just a few." Tr., Vol. XX, 4025. The government then cited Thao's testimony that he believed that if a person could talk, that person could breathe, and noted that witnesses had pointed out to Thao that Floyd had stopped talking. Tr., Vol. XX, 4025-4026. The government continued, "[i]f Defendant Thao's true belief, in

direct opposition to his training, was if you can talk, you can breathe, he should have sprung into action when George Floyd stopped talking. But he didn't." Tr., Vol. XX, at 4026. Thao did not object.

Courts have held that such remarks are permissible under certain circumstances, such as where, as here, the accusation of lying is accompanied by references to the evidence. See *United States* v. *Francis*, 170 F.3d 546, 551 (6th Cir. 1999) ("[A] prosecutor may assert that a defendant is lying during her closing argument when emphasizing discrepancies between the evidence and that defendant's testimony."); see also *United States* v. *Shoff*, 151 F.3d 889, 893 (8th Cir. 1998) (finding proper prosecutor's statement that the defendant "exhibit[ed] all the signs of a liar," because the "closing was carefully limited to arguing what the evidence had proved, rather than improperly expressing the prosecutor's personal opinion").

For similar reasons, the government did not engage in improper "vouching." Br. 30. As the district court acknowledged (see Tr., Vol. XX, 4027), the government's comments regarding credibility were permissible in closing argument. See, *e.g.*, *United States* v. *Vazquez-Larrauri*, 778 F.3d 276, 283-285 (1st Cir. 2015).

"Disparaging the Defense." Thao lists several record citations under the general heading "Disparaging the defense," Br. 29, but provides no argument or

context for the citations. In any event, the cited comments were permissible for a closing argument. See Tr., Vol. XX, 3988 (referring to defendant Thao's position that the bystanders were threatening as "nonsensical"); Tr., Vol. XX, 4022 ("The defense wants you to think that there's nothing the defendants could have done."). The district court largely rejected defense counsel's objections, pointing out that the prosecutor could "choose her words [because] [i]t's final argument." Tr., Vol. XX, 4023-4024, see also Tr., Vol. XX, 4027, 4129, 4133.[10]

Calling on the Morals or Emotions of the Jury. Thao complains (Br. 29) that the government called upon the morals or emotions of the jury by reminding jurors that Floyd was "a human being, someone's son, father, friend, significant other." Tr., Vol. XX, 3975-3976. The district court neither sustained nor overruled the objection but told the government to continue. Tr., Vol. XX, 3976. Thao fails to explain why this was error. The court's pretrial order prohibited the government from "inquiring about any witness's emotional response to the incident or to videos of the incident" but did not limit what the government could argue in its closing remarks. See Add. 10.

[10] The district court also overruled defense counsel's objection based on "[v]iolating *Graham v. Connor*'s stance against 20/20 hindsight." Br. 29 (first citing Tr., Vol. XX, 3986; then citing *Graham* v. *Connor*, 490 U.S. 386 (1989)). Thao fails to argue how the closing argument violated *Graham*.

2. Even Where The District Court Sustained Thao's Objections, Thao Cannot Show That The Government's Conduct Prejudiced His Substantial Rights

Thao also challenges a number of the government's statements and questions to which the district court sustained an objection. Although the government disagrees with most of these rulings and does not concede that it ever acted improperly, the district court was correct in holding that even if some of the government's questions and statements were improper, Thao was not deprived of a fair trial. Add. 25.

"To determine whether the defendant was deprived of a fair trial," this Court considers "the cumulative effect of the misconduct, the strength of the properly admitted evidence, and any curative actions taken by the district court." *Kopecky*, 891 F.3d at 343. "[A]ppellate courts should not reverse for such improprieties unless persuaded that they probably prejudiced the defendant and that the prejudice was not removed effectively by the trial judge before submission of the case to the jury." *United States* v. *Hernandez*, 779 F.2d 456, 458 (8th Cir. 1985) (citation omitted). As explained below, Thao was not unfairly prejudiced.

a. Cumulative Effect

Unable to point to *any* serious instance of prosecutorial misconduct, Thao instead argues that individual instances of mostly sustained objections, taken together, deprived him of a fair trial. Br. 41-42. But as the district court

concluded, "[n]one of the instances of alleged misconduct," of which Thao complains, "taken individually or cumulatively, meets the high bar necessary for a mistrial on the basis of prosecutorial misconduct." Add. 25; see also *United States* v. *Londondio*, 420 F.3d 777, 789 (8th Cir. 2005) (declining to reverse based on the cumulative effect of prosecutor's use of leading questions, stating "[a]s the errors individually had no effect on the outcome of this case, aggregating them changes little").

Here, the alleged instances of misconduct took place over the course of a 21-day trial, involving testimony from 33 witnesses and constituting more than 4,000 pages of transcripts. Taken individually or cumulatively, these instances did not permeate the trial as to render it unfair. See *United States* v. *Bowie*, 618 F.3d 802, 815-816 (8th Cir. 2010) (finding no prejudice where the district court sustained defendant's objections as to leading twenty-four times over a nine-day trial, intimidating the defendant's supporters in the courtroom, and referring to the stricken testimony of one of the defendant's witnesses during closing), cert. denied, 562 U.S. 1157, and 562 U.S. 1263 (2011).

Thao contends that the misconduct "permeated multiple witnesses * * * and closing arguments" and that this case is like *United States* v. *Conrad*, 320 F.3d 851, 853-854 (8th Cir. 2003). Br. 41-42. But as the district court correctly held (Add. 23), *Conrad* is distinguishable because the government in that case

repeatedly violated a court order instructing it not to discuss the policy reasons behind the gun statute under which the defendant was charged. Nothing similar happened here.

Berger v. *United States*, 295 U.S. 78 (1935), cited by Thao without discussion (Br. 42), also is distinguishable. There, the prosecutor "was guilty of," among other things, "putting into the mouths of * * * witnesses things which they had not said," "suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered," "pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis," "bullying and arguing with witnesses; and, in general, * * * conducting himself in a thoroughly indecorous and improper manner." *Berger*, 295 U.S. at 84-85. Thao does not allege similar misconduct here, much less that such conduct permeated his trial.

b. Strength Of The Evidence

Even assuming for the purpose of argument that some of the government's conduct was improper, which the government does not concede, the second factor strongly weighs against reversing Thao's convictions. "When the evidence of guilt is strong, it is less likely that an improper argument affected the outcome." *Alaboudi*, 786 F.3d at 1143; see also *United States* v. *Ralston*, 973 F.3d 896, 908-910 (8th Cir. 2020) (declining to reverse conviction where the district court

"quickly cured the improper questioning and witness testimony, and [the defendant]'s guilty verdict [was] supported by sufficient evidence"); *United States* v. *Wadlington*, 233 F.3d 1067, 1080 (8th Cir. 2000) (upholding conviction where "the [g]overnment presented ample evidence of [the defendant]'s guilt," and "presumably effective curative instructions were given by the [d]istrict [c]ourt where appropriate"), cert. denied, 534 U.S. 1023 (2001).

Here, the evidence of Thao's guilt, including the evidence of willfulness, was more than sufficient on both counts of conviction. As discussed (section I, *supra*), the jury saw multiple video recordings of Thao failing to intervene in Chauvin's use of unreasonable force against Floyd. The evidence showed that Thao was aware—through his own observations and through comments from multiple bystanders—that Chauvin was kneeling on Floyd's neck for a prolonged period of time. Moreover, evidence showed that Thao was aware from his training that using *any* force against an individual who, like Floyd, was not resisting officers was prohibited under MPD policy and that neck restraints, if used at all, must be applied only briefly.

The evidence further showed that Thao was aware—again, through his own observations and from comments of bystanders—that Floyd was in serious medical distress. He listened as Floyd repeatedly told the officers that he could not breathe and knew that Floyd eventually lost consciousness. And despite the fact that he

was trained in CPR and knew that he should provide medical assistance while waiting for EMS to arrive, he did nothing.

In short, the properly admitted evidence of Thao's guilt was more than sufficient, which weighs against any finding that the alleged prosecutorial misconduct prejudiced Thao's substantial rights.

c. Curative Actions Taken By The District Court

Finally, any prejudice in this case was alleviated by the district court's curative actions. As set forth below, the district court sustained objections to the majority of the government's questions and statements on which Thao bases his prosecutorial misconduct claim. Before any evidence was presented, the court instructed the jury that it "must not consider any evidence to which an objection has been sustained or which I have instructed you to disregard." Tr., Vol. III, 200. After the close of evidence, the court again instructed the jury that "[i]f I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been." Tr., Vol. XXI, 4150; see also Tr., Vol. XXI, 4151 ("Testimony that I struck from the record or told you to disregard is not evidence and must not be considered.").

Additionally, the court explained that "[s]tatements, arguments, questions and comments by lawyers representing the parties in the case are not evidence." Tr., Vol. XXI, 4150. And the court informed jury members that "if [they] were

instructed that some evidence was received for a limited purpose only, [they] must follow that instruction." Tr., Vol. XXI, 4151. See *United States* v. *Flute*, 363 F.3d 676, 678 (8th Cir. 2004) ("A jury is presumed to follow its instructions.") (citation omitted), cert. denied, 547 U.S. 1009 (2006).

In such circumstances, this Court has declined to find prejudice. See *Alaboudi*, 786 F.3d at 1145 (upholding defendant's conviction against claim of prosecutorial misconduct where "[t]he district court sustained objections when [the defendant] raised them during the government's closing arguments," and the closing argument "focused overall on the strong evidence against [the defendant]"); *United States* v. *Fenner*, 600 F.3d 1014, 1022 (8th Cir. 2010) (declining to find prejudice where "the district court sustained [defense counsel's] objections and the government rephrased"), cert. denied, 562 U.S. 1141 (2011).

The district court's curative instructions described above and below ensured that any alleged impropriety did not affect Thao's substantial rights.

Repetitiveness. Thao complains that the government "repeatedly tried to play portions of the video of the incident after they had been played countless times to the jury." Br. 38. Thao cites an instance in which the government was cross-examining him after he had testified that he could not remember whether he could see the other defendants while they were holding Floyd to the ground. Tr., Vol. XVI, 3233-3234. The government attempted to play video footage from

Thao's body-worn camera to refresh his memory. See generally Tr., Vol. XVI, 3233-3239.

In response to Thao's counsel's objection that the video evidence had already been played, the government pointed out that Thao's counsel had skipped a significant segment of the video when he played it earlier. Tr., Vol. XVI, 3234-3235. The court stated that it was prejudicial to "have these arguments" over whether defense counsel had skipped parts of the video "in front[] of the jury." Tr., Vol. XVI, 3234. Thus, contrary to Thao's assertion (Br. 38), it was counsels' *argument* regarding the video, and not the fact that the government *sought* to play the video, that the district court called "highly prejudicial and highly wrong." Tr., Vol. XVI, 3234. The district court ultimately prevented the government from playing parts of the video and instructed the government to ask questions instead. Tr., Vol. XVI, 3238-3239. Thao fails to explain how a video that the court ultimately *prevented the government from playing* could possibly have prejudiced his case.

Thao also cites (Br. 38) an occasion where the government asked Inspector Blackwell a question about MPD's policy regarding neck restraints. There, Lane's counsel had asked Blackwell numerous questions on cross-examination about the neck restraint policy. See Tr., Vol. VIII, 1302-1303. On redirect, the government attempted to clarify that testimony by asking Blackwell what constitutes acceptable

pressure when using a neck restraint under the policy. Tr., Vol. VIII, 1342-1343. Thao's counsel objected that the question had been asked and answered. Tr., Vol. VIII, 1342. The court sustained the objection, preventing the government from inquiring any further about the policy. Tr., Vol. VIII, 1342-1343. Again, Thao fails to explain how a question that a witness was *prevented from answering* could possibly have prejudiced him. See *Wadlington*, 233 F.3d at 1078 (declining to find prejudice based on prosecutorial misconduct where "[t]he [d]istrict [c]ourt properly sustained defense counsel's prompt objection before it could be answered by" the witness).

Eliciting Testimony on Legal Questions. Thao asserts that the government "elicit[ed] testimony on the ultimate legal questions." Br. 38. In support, he cites only one instance, where the government asked witness Genevieve Hansen, a firefighter, whether Floyd had a right to receive medical care. Tr., Vol. V, 747. Lane's counsel objected that the question was a legal question, and the district court sustained the objection. Tr., Vol. V, 747.

Violating Pretrial Orders. Thao cites several places in the record where, he claims, the government violated the district court's pretrial ruling prohibiting it from eliciting "[s]peculation regarding what another officer might have done when confronted with the situation at issue." Add. 7. As the government explained in its opposition to Thao's Rule 29 motion, *none* of the questions Thao cites violated this

order because none asked a witness to speculate about what another officer might have done. See R.Doc. 294, at 14-15. In any case, the district court sustained all of defense counsel's objections in the cited instances, and the government rephrased the question; thus, these questions did not prejudice Thao's rights.[11] See *Fenner*, 600 F.3d at 1022.

Thao also argues that the government violated the district court's pretrial order prohibiting it from inquiring about a witness's emotional response. Br. 27; see Add. 10. The government had shown a video in which a witness asked the officers to "[p]lease let [Floyd] breathe." Tr., Vol. IV, 484. The prosecutor then asked the witness what he had meant by that statement. Tr., Vol. IV, 484. Defense counsel objected that this question was intended to elicit an emotional response. Tr., Vol. IV, 484-487. The district court sustained the objection and asked the jury to disregard the question, and the government moved on. Tr., Vol. VI, 485-487. Thao does not explain how this question, which the court instructed the jury to disregard, prejudiced his substantial rights.[12]

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[11] Thao cites several other places in the record where defense counsel objected, but not on the basis of speculation. See Br. 28-29 (citing Tr., Vol. XII, 2141, 2152, 2155; Tr., Vol. XVI, 3216; Tr., Vol. XVIII, 3548).

[12] Thao points to additional sections of the record as examples of the government attempting to elicit an emotional response. Br. 27. He does not explain, and it is not apparent to the government, how they might have violated the order.

Statements Regarding Nine-Year-Old Witness. In closing, the government stated, "[Bystander witness] Darnella Frazier's little cousin was born right around the time Thao took his oath and became a police officer." Tr., Vol. XX, 3974. Thao objected that the government was "drawing on the jury's emotions by consistently referring to a nine-year-old child." Br. 39 (quoting Tr., Vol. XX, 3974). The district court sustained Thao's objection. Tr., Vol. XX, 3974-3975. Later, the government made a passing reference to "children on the scene," and defense counsel objected to the government's "referring to a juvenile witness who has not testified." Tr., Vol. XX, 4003. The court pointed out that there were numerous witnesses under the age of 18 at the scene, sustained the objection as to "the one person," presumably, the nine-year-old girl, but overruled the objection as to the rest of the minor witnesses. Tr., Vol. XX, 4003. Thao does not explain how these statements prejudiced him. The district court sustained his objections to references to the nine-year-old bystander, and the government already had introduced—without objection from defense counsel—evidence that a nine-year-old girl had watched the events that resulted in Floyd's death. See Tr., Vol. XIV, 2659; Tr., Vol. XV, 2962.

Burden-Shifting. Thao cites three of the government's statements during closing that he claims constituted improper burden shifting. Br. 39-40. First, he takes issue with the government's statement that "[m]aybe the reason the defense

wants to suggest that the bystanders should have looked the other way is because that's what each of the defendants did." Tr., Vol. XX, 3988. He also challenges the government's statement suggesting that Thao did not need help controlling the crowd of bystanders and that Lane could have helped him had it been necessary. Tr., Vol. XX, 3990. Thao also objected on the basis of burden shifting to the government's statement during closing that the defendants were the only witnesses who felt that their conduct surrounding Floyd's death was excusable and stated that "their self-interest is obvious." Tr., Vol. XX, 4003. On each of these occasions, the court sustained the objection, and the government moved on. Tr., Vol. XX, 3988, 3990, 4003.

As an initial matter, these statements do not constitute improper burden-shifting, because they were aimed only at demonstrating the weaknesses in Thao's testimony. "[C]omments intended to highlight the weaknesses of a defendant's case do not shift the burden of proof . . . where the prosecutor does not argue that a failure to explain them adequately requires a guilty verdict and reiterates that the burden of proof is on the government." *United States* v. *McBaine*, 999 F.3d 1131, 1133 (8th Cir. 2021) (per curiam) (citation omitted); see also *United States* v. *Kidd*, 963 F.3d 742, 752 (8th Cir. 2020) (The government is permitted "to address whether a particular defense explanation of the evidence raises a reasonable

doubt."). None of the government's statements in closing refer to a failure on Thao's part to explain his conduct.

But even if these statements constituted improper burden-shifting, they did not prejudice Thao's substantial rights because the jury repeatedly was instructed that the burden of proof remained, at all times, with the government. Before any evidence was presented, the district court instructed the jury that "[t]he burden is always on the government to prove every element of the offense charged beyond a reasonable doubt." Tr., Vol. III, 198.

Toward the end of its closing argument, the government told the jury that, "[t]he government here has the burden of proving beyond a reasonable doubt that Thao * * * failed to intervene to stop or attempt to stop Chauvin's unreasonable force and that they * * * failed to provide George Floyd with necessary medical aid." Tr., Vol. XX, 4030; see *United States* v. *Hernandez*, 145 F.3d 1433, 1438-1439 (11th Cir. 1998) (declining to reverse for prosecutorial misconduct based on burden-shifting statements in the government's rebuttal argument because the district court sustained the defendant's objections, and because "any potential prejudice regarding burden-shifting was diminished by the prosecution's statement in their closing argument that the burden of proof was theirs to carry and by the trial court's explicit instruction after closing arguments to that same effect").

Additionally, when charging the jury, the district court instructed that "[t]here is no burden upon a defendant to prove that he is innocent. Instead, the burden of proof remains on the government throughout the trial." Tr., Vol. XXI, 4155.

General Allegations of Impropriety. Thao contends that the government engaged in "improper argument" by contrasting evidence of Lane's actions with Thao's inaction and explaining that was why Lane was not charged with failure to intervene. Br. 40 (citing Tr., Vol. XX, 4023). Lane objected, and the district court sustained the objection. Thao fails to explain how these statements prejudiced him.

Thao also complains (Br. 40) that a government attorney misstated the evidence when she said during closing that Thao had been standing with Kueng when Kueng made certain statements about the incident to his sergeant. See Tr., Vol. XX, 4025. The court sustained the objection, and the government instead informed jury members that they would see for themselves on the video where Thao was standing at the time. Tr., Vol. XX, 4025. Thus, any prejudice was cured by both the video and the court's instruction that attorney arguments did not constitute evidence. See Tr., Vol. XXI, 4150; *United States* v. *Trevino-Rodriguez*, 994 F.2d 533, 535 (8th Cir. 1993) (finding no prejudice from prosecutor's

misstatement of the evidence where judge "remind[ed] the jury that opening statements were not evidence in the case").[13]

Thao further complains that the government told the jury that "evil happens when good men do nothing." Br. 29 (citing Tr., Vol. XX, 4142). As an initial matter, this statement was not improper. This Court has held that "[u]nless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible." *United States* v. *Sanchez-Garcia*, 685 F.3d 745, 753 (8th Cir. 2012) (citation omitted), cert. denied, 569 U.S. 959 (2013). But in any case, because the district court sustained Thao's objection, Thao was not unfairly prejudiced. See *Alaboudi*, 786 F.3d at 1145 (declining to reverse based on prosecutorial misconduct where the government told the jurors that they were "the only ones who could 'speak for' or 'stand up for' the victims," because defendant had not shown that such comments prejudiced him).

Additional Statements in Closing Argument. Finally, Thao re-raises objections to several statements made during the government's closing argument, some of which the district court sustained. Br. 39-40. Thao cites these statements

[13] Thao lists (Br. 29) other instances where the government allegedly misstated evidence during closing but does not discuss these instances or explain how they prejudiced him. In any event, any misstatement of the evidence was cured by the court's admonishments to the jury that attorneys' statements are not evidence. See *Trevino-Rodriguez*, 994 F.2d at 535.

in bullet points but offers no analysis as to why they were inappropriate or how they prejudiced him.

In any case, none of the government's statements during closing that Thao challenges, taken individually or on a cumulative basis, supports reversal for prosecutorial misconduct. Before any evidence was presented, the district court informed the jury that "[w]hat is said in closing argument is not evidence." Tr., Vol. III, 198. Later, when charging the jury, the court instructed that "[s]tatements, arguments, questions and comments by lawyers representing the parties in the case are not evidence." Tr., Vol. XXI, 4150. Thus, the government's statements during closing arguments did not prejudice Thao. *United States* v. *Eagle*, 515 F.3d 794, 806 (8th Cir. 2008) ("A district court's instruction that closing arguments are not evidence is a curative action that serves to alleviate any risk of prejudicial impact.").

* * *

In sum, none of the instances of alleged prosecutorial misconduct that Thao cites supports reversal of his conviction. Even if some of the government's individual questions and comments were improper, Thao has failed to show how their cumulative effect deprived him of a fair trial, given the strength of the evidence and the district court's curative actions.

CONCLUSION

For the foregoing reasons, this Court should affirm Thao's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,983 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f);

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word 2019 in a proportionally spaced typeface (Times New Roman) in 14-point font; and

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version 1.387.1643.0) and is virus-free according to that program.

s/ Elizabeth Parr Hecker
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Attorney

Date: April 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to the following counsel of record pursuant to Local Rule 28A(d):

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