No. 21-10369

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OLE HOUGEN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant Ole Hougen appeals his judgment of conviction. The district court had jurisdiction under 18 U.S.C. 3231 and entered final judgment on December 6, 2021. 1-ER-2-8. Hougen filed a timely notice of appeal on December 17, 2021. 5-ER-1043-1044; Fed. R. App. P. 4(b)(1)(A)(i) and (3)(A). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Hougen waived his claim that the district court's COVID-19 protocols violated his Sixth Amendment public-trial right when he failed to object in district court. If not, whether Hougen's claim fails plain-error review.

2. Whether 18 U.S.C. 249(a)(1) is a valid exercise of Congress's Thirteenth Amendment powers.

3. Whether the district court committed reversible error under the Fifth Amendment when it admitted video evidence depicting Hougen's racist and belligerent responses to *Miranda* advisements and when it permitted witnesses and prosecutors to reference that evidence at trial.

4. Whether the district court committed reversible error under Federal Rules of Evidence 404(b) and 403 when it admitted evidence of Hougen's three prior racially motivated attacks.

5. Whether the district court committed reversible error under Rules 404(b) and 403 when it excluded evidence concerning an assault allegedly committed by Hougen's victim on the eve of trial.

6. Whether the cumulative effect of any errors requires reversal.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Pertinent constitutional provisions, statutes, and rules are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case arises under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, Div. E, 123 Stat. 2835 (2009). Among other things, that statute criminalizes certain violent acts undertaken "because of [a victim's] actual or perceived race." 18 U.S.C. 249(a)(1). A jury found Hougen, a white man, guilty on one count of violating Section 249(a)(1) for his racially motivated attack on S.B., a Black man.[1] Hougen appeals his conviction.

1. Factual Background

On July 5, 2020, S.B. attempted to cross the street in Santa Cruz, California. 3-ER-523-527. As he did so, Hougen—who had never met S.B.—approached him and asked to buy $2 worth of marijuana. S.B. declined, saying "what the fuck," and walked away. 3-ER-549-550; 4-ER-798. Hougen then charged at S.B. and slashed at his head and chest with a sharp knife at least 10-20 times while repeatedly yelling that S.B. was a "nigger," "fucking nigger," or "dumb nigger." 3-ER-404-406, 525-533; 4-ER-723-734, 763, 819-823. S.B. put his empty hands up in a defensive posture and attempted to get away. 3-ER-526-530; 4-ER-726, 737.

[1] This brief refers to crime victims by their initials to protect their privacy.

Two bystanders saw the attack as they were driving by and were so concerned about S.B. that they immediately called 911. 3-ER-528; 4-ER-727. One of the bystanders urged Hougen to stop and S.B. to run; warned that she was calling the police; and pulled over, at which point S.B. ran towards her car. 4-ER-726-727. The Santa Cruz police responded within a minute. 4-ER-755.

After the police arrived, Hougen continued making racially charged comments. At the scene, for example, he asked Juan Becerra, a Hispanic officer, what "color" he was. 4-ER-841. Hougen then directed his attention to a nearby white officer, saying, "That's better." 4-ER-842. As officers booked Hougen into jail 20-30 minutes later, Hougen yelled out to Joshua Garcia, a Hispanic officer, calling him "bean dip," "spico," "spic boy," and "brown boy." 4-ER-770-772, 845-849. When Garcia attempted to read Hougen his *Miranda* rights, Hougen told Garcia, "[Y]ou're a colored person, and I'm a white person," further stating that he "[did]n't understand it from [Garcia]." Trial Ex. 8, at 00:57-01:04. Kevin Bailey, a white officer, then attempted to complete the *Miranda* advisements. 4-ER-846-847. As Bailey did so, Hougen belligerently shouted, "I don't give a fuck," "You are a liar," "[G]et the fuck out of here," and similar statements. Trial Ex. 9, at

00:27-01:21. Hougen's comments during the two *Miranda* advisements were captured on body-camera videos.[2]

2. Procedural Background

A federal grand jury returned an indictment charging Hougen with one count of racially motivated violence, in violation of 18 U.S.C. 249(a)(1). 5-ER-1038-1042.

Before trial, the government provided notice under Federal Rule of Evidence 404(b)(3) that it intended to introduce evidence that Hougen had previously committed three racially motivated attacks on Black men, each of which resulted in a conviction. 4-ER-975-981. Hougen objected under Rule 403 (1-SER-7-11), but the district court allowed the evidence to prove Hougen's racial motive and intent (1-ER-94-99).

A few days before the trial began, Hougen moved under Rule 404(b) to admit evidence relating to an assault S.B. had allegedly committed against a third party—D.B.—one week earlier. 4-ER-925. The district court excluded the evidence under Rules 404(b) and 403. 1-ER-63-78.

The case proceeded to a six-day jury trial in April 2021 (5-ER-1064-1066) under the district court's COVID-19 protocols, which granted individual judges

[2] Hougen has filed a motion to transmit from the district court to this Court these and other videos cited in this brief. C.A. Doc. 13.

discretion in determining who may attend trials in person, see, *e.g.*, N.D. Cal. General Order No. 73, at 1 (amended May 21, 2020), https://perma.cc/U3XG-332V, abrogated by N.D. Cal. General Order No. 78 (June 23, 2021), https://perma.cc/EJ5H-8HT7. The only contested issues were whether Hougen acted in self-defense and with racial animus. 1-ER-13. Pursuant to the parties' stipulation, the district court admitted (4-ER-756) the two videos showing Hougen's racist and aggressive behavior when Garcia and Bailey attempted to read him his *Miranda* rights (Trial Exs. 8 and 9). The government relied on the videos to establish Hougen's racial animus (2-ER-124-125) and to show that he was the aggressor in the altercation with S.B. (2-ER-129). After deliberating for less than an hour, the jury found Hougen guilty. 2-ER-117; 1-SER-3-4, 6.

The district court denied Hougen's subsequent motion to dismiss the indictment or for a new trial. 1-ER-9-23. As relevant here, the court ruled that Section 249(a)(1) is a valid exercise of Congress's authority under the Thirteenth Amendment. 1-ER-22. The court also held that the government had not relied on any invocations by Hougen of his Fifth Amendment right to remain silent when it introduced and discussed video evidence depicting Hougen's behavior during his *Miranda* advisements. 1-ER-18-20. Finally, the court reaffirmed its pretrial rulings (1) admitting evidence of Hougen's three prior racially motivated attacks

(1-ER-16-18); and (2) excluding evidence relating to S.B.'s alleged assault on D.B. (1-ER-20-21).

The district court sentenced Hougen to 82 months' imprisonment, to be followed by three years' supervised release. 1-ER-2-4.

SUMMARY OF ARGUMENT

This Court should affirm Hougen's conviction.

1. Under *Levine* v. *United States*, 362 U.S. 610, 618-620 (1960), Hougen waived his public-trial claim by not timely objecting to the district court's protocols for providing the public access to his trial. Even if his claim is not waived, it does not survive plain-error review. Hougen has not established plain error because the record does not make clear whether the district court precluded the public from attending his trial in person. In addition, Hougen has not made a case-specific showing that any error resulted in fundamental unfairness.

2. The district court correctly concluded that 18 U.S.C. 249(a)(1) falls within Congress's Thirteenth Amendment authority to combat the badges and incidents of slavery. Applying the Supreme Court's well-established rational-determination test, every court to consider the question—including five other courts of appeals—has upheld the constitutionality of Section 249(a)(1), and this Court upheld a similar hate-crime statute in *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003).

3. This Court should reject Hougen's claim that the government improperly relied at trial on invocations of his Fifth Amendment right to remain silent. All but one of Hougen's challenges are reviewable only for plain error, and the district court did not commit reversible error here. Indeed, it was entirely proper for the district court to admit the video evidence Hougen challenges because it showed nothing more than Hougen's racist and belligerent outbursts in response to *Miranda* advisements, not any invocations of his right to remain silent. Hougen's derivative challenges to commentary by witnesses and prosecutors on that properly admitted evidence therefore also fail. Moreover, even if some of Hougen's statements in the videos were protected by the Fifth Amendment, it was permissible for the government to rely on his unprotected racist and aggressive behavior in the videos to show he acted with racial animus and not in self-defense when he attacked S.B. In any event, because of the limited nature and impact of any Fifth Amendment errors, and because other evidence of Hougen's guilt was overwhelming, any errors do not warrant reversal.

4. The district court properly admitted evidence of Hougen's three prior racially motivated attacks on Black men. The court did not plainly err in admitting the evidence under Rule 404(b) to establish Hougen's racial motivation in attacking S.B.—an element of the crime and a permissible purpose under the rule. The court likewise acted well within its broad discretion in balancing the highly

probative nature of the evidence against countervailing considerations under Rule 403. The evidence—principally four witnesses concisely describing the three attacks—was appropriately limited, and the court took care to avoid any unfair prejudice, including by twice issuing limiting instructions to the jury. In any event, other evidence of Hougen's guilt was overwhelming, and thus any error does not warrant reversal.

5. The district court acted well within its discretion in excluding evidence that S.B. allegedly assaulted an acquaintance a week before trial and then lied to the police about it. Contrary to Hougen's arguments, that evidence has no logical bearing on whether S.B. was biased when interacting with the police about Hougen's earlier attack on him, nor does it shed light on whether the completed investigation of Hougen's attack was flawed. At bottom, Hougen sought to rely on the evidence to establish that S.B. has a violent and mendacious character—a forbidden purpose under Rule 404(b). The district court also properly concluded that Rule 403 independently required exclusion. Hougen's unpersuasive attack on just one of the court's reasons for excluding the evidence—its concern about holding a mini-trial—falls far short of establishing an abuse of discretion. In any case, any erroneous exclusion of the minimally probative evidence was harmless.

6. Hougen's cumulative-error claim fails. The district court committed no errors, and, even if it did, reversal is unwarranted.

ARGUMENT

I

HOUGEN IS NOT ENTITLED TO A NEW TRIAL BASED ON HIS BELATED PUBLIC-TRIAL CLAIM

Hougen first argues (Opening Brief (Br.) 18-25) that he was denied his Sixth Amendment "right to a * * * public trial." U.S. Const. Amend. VI. Hougen bases (Br.20-22) his public-trial claim on a decision this Court issued following his trial—*United States* v. *Allen*, 34 F.4th 789 (9th Cir. 2022), which concerned a suppression hearing and criminal trial in late 2020. *Id.* at 792-793. Due to the COVID-19 pandemic, the district court in *Allen* granted the public access to the proceedings solely through an Internet audio stream, but this Court held that the court's protocol violated the defendant's Sixth Amendment public-trial right. *Ibid.* *Allen* recognized that the Sixth Amendment permits a court to order a courtroom closure that is "narrowly tailored" to serve an "overriding interest" after considering "reasonable alternatives" and making "findings." *Id.* at 797 (citations omitted). *Allen* concluded, however, that the "total closure" of the courtroom in that case was not narrowly tailored to the district court's overriding interest in stemming the spread of COVID-19, explaining that reasonable alternatives—such as "allowing a limited number of spectators to be present in the courtroom"—were available. *Id.* at 797-800.

Although Hougen contends (Br.20) that the district court followed the same COVID-19 protocol during his April 2021 trial, *Allen* does not compel a new trial here for multiple independent reasons. Hougen concedes (Br.23) that, unlike the defendant in *Allen*, 34 F.4th at 793, he did not timely object to the district court's protocol for providing public access to his trial. Hougen thus waived his public-trial claim, foreclosing any relief from this Court. Even if Hougen did not waive his claim, he has not established entitlement to relief under the demanding plain-error test. Not only is it unclear from the record whether the district court precluded the public from attending Hougen's trial in person, but also Hougen has not shown that any error seriously affected the fairness of the proceedings.[3]

A. Hougen Waived His Public-Trial Claim, Foreclosing Appellate Review

The Supreme Court and this Court have held that when a defendant does not object to a courtroom closure in district court, he waives any public-trial challenge, foreclosing appellate review. In *Levine* v. *United States*, 362 U.S. 610 (1960), the Supreme Court so held in the context of evaluating criminal contempt proceedings, which are governed by the Fifth Amendment's Due Process Clause. Specifically,

[3] Hougen also asserts (Br.18) that the district court's protocol violated the First Amendment, but he has waived that claim by inadequately developing it in his opening brief. *United States* v. *Alonso*, 48 F.3d 1536, 1544-1545 (9th Cir. 1995). In any event, any First Amendment claim would fail for the same reasons Hougen's Sixth Amendment claim fails.

Levine concluded that the "exclusion of the public in this case is not to be deemed contrary to the requirements of the Due Process Clause without a request having been made to the trial judge to open the courtroom"—a request that would have "giv[en] notice of the claim" and "afford[ed] the judge an opportunity to" address it. *Id.* at 619. The Court emphasized that "[c]ounsel was present throughout, and it is not claimed that he was not fully aware of the exclusion of the general public." *Ibid.*[4]

Although *Levine* evaluated the public-trial right grounded in the Fifth Amendment's Due Process Clause, its analysis applies with equal force in the Sixth Amendment context. *United States* v. *Rivera*, 682 F.3d 1223, 1233 n.6 (9th Cir. 2012); *United States* v. *Christi*, 682 F.3d 138, 143 n.1 (1st Cir. 2012) (Souter, J.). Indeed, the Supreme Court has cited *Levine* for the general proposition that "failure to object to [the] closing of [a] courtroom is [a] waiver of [the] right to [a] public trial." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991).

This Court has applied *Levine* in two Sixth Amendment decisions. In *Rivera*, this Court held that a defendant preserved his Sixth Amendment public-trial claim by lodging a timely objection in district court, thus doing "precisely

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[4] *Levine* also explained that the case presented no countervailing considerations sufficient to excuse the waiver, such as a "judge [who] deliberately enforced secrecy" to be "free of the safeguards of the public's scrutiny." 362 U.S. at 619. Such unusual circumstances are likewise not present here.

what *Levine* requires." 682 F.3d at 1233-1235. Significantly, however, *Rivera* recognized that *Levine* held that the *lack* of a "contemporaneous request to open the proceedings" was a "forfeit[ure]," meaning that the "exclusion of the public" was "not to be deemed contrary to the right of public trial." *Id.* at 1233 (citation and internal quotation marks omitted). This Court applied that principle in *United States* v. *Cazares*, 788 F.3d 956 (9th Cir. 2015), holding that the defendants who failed to object to a courtroom closure in district court, *id.* at 967, "waive[d]" their Sixth Amendment public-trial claims, foreclosing appellate review. *Id.* at 971 (citing *Levine* and not relying on any express waiver of the defendants' public-trial rights); accord *Geise* v. *United States*, 265 F.2d 659, 660 (9th Cir. 1959).[5]

The only other court of appeals to have squarely addressed this question—the Fifth Circuit—has also held that the failure to timely raise a Sixth Amendment

[5] In *United States* v. *Ramirez-Ramirez*, 45 F.4th 1103 (9th Cir. 2022), this Court determined that plain-error review applied to a public-trial claim not raised in district court. *Id.* at 1109. That conclusion is not controlling here, however, because in that case, the parties and the Court did not address whether waiver principles instead apply, much less whether that conclusion is dictated by the binding precedent discussed above. See, *e.g.*, *United States* v. *Kirilyuk*, 29 F.4th 1128, 1134 (9th Cir. 2022) (prior decisions of this Court are "not precedential for propositions not considered") (citation omitted); *United States* v. *Cassel*, 408 F.3d 622, 633 & n.9 (9th Cir. 2005) (Supreme Court holdings are, "of course, binding," even when "in tension" with this Court's prior decisions). Statements in *United States* v. *Mikhel*, 889 F.3d 1003, 1032-1033 (9th Cir. 2018), and *United States* v. *Withers*, 638 F.3d 1055, 1065 & n.4 (9th Cir. 2011), that plain-error review applies to unpreserved public-trial claims do not control for the same reasons and because they are dicta.

public-trial claim in district court constitutes a waiver extinguishing the claim. *United States* v. *Reagan*, 725 F.3d 471, 488-489 (5th Cir. 2013); *United States* v. *Hitt*, 473 F.3d 146, 155 (5th Cir. 2006); cf. *United States* v. *Moon*, 33 F.4th 1284, 1299 (11th Cir. 2022) (recognizing agreement of Fifth and Ninth Circuits), petition for cert. pending, No. 22-318 (filed Oct. 3, 2022). Some other circuits have stated in dictum that plain-error review applies when a defendant fails to object to a courtroom closure, but those courts have not squarely addressed whether such a failure instead constitutes a waiver. See, *e.g.*, *Christi*, 682 F.3d at 142-143 (1st Cir.); *United States* v. *Bansal*, 663 F.3d 634, 661 (3d Cir. 2011); *Addai* v. *Schmalenberger*, 776 F.3d 528, 534 (8th Cir. 2015). And although *Walton* v. *Briley*, 361 F.3d 431, 433-434 (7th Cir. 2004), "said that a failure by the [defendant] to object to barring the public from attending the trial did not constitute a waiver," the Seventh Circuit recently explained that *Walton* "was a special case" because—unlike here—the trial judge "had made up his mind," and so "an objection to the judge's decision wasn't going to do Walton any good." *Pinno* v. *Wachtendorf*, 845 F.3d 328, 331 (7th Cir. 2017).

The rule that a defendant must raise a public-trial objection in district court to preserve his claim for appellate review makes practical sense. A late-raised public-trial claim is particularly likely to reflect a "classic sandbagging of the trial judge," *Bansal*, 663 F.3d at 661, because a defendant with no desire to open the

courtroom has no incentive to make a contemporaneous objection, and every reason to allow an improper closure so he can later advance it as grounds for reversal. Moreover, as this case demonstrates (see pp. 17-18, *infra*), when a public-trial claim is raised belatedly, the record may be undeveloped as to whether there was in fact a courtroom closure. Such a belated claim likewise "deprive[s]" the district court of the "chance to cure [any] violation either by opening the courtroom or by explaining the reasons for closure." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1912 (2017). By treating a failure to object to a known courtroom closure as a waiver, courts encourage defendants who object to a closure to raise a defect when the scope of any closure can be ascertained, and any improper closure can be cured.

Under this well-established case law, Hougen waived his public-trial claim—thereby foreclosing appellate review—by not timely objecting to the district court's protocols for providing public access to his trial. Hougen contends (Br.23) that his failure to object should be excused because "there was no discussion on the record" or "official order" regarding the asserted "restriction of public access to an audio-only stream." But the materials on which Hougen relies (Br.6, 20-22) in arguing that the district court ordered a non-public trial—two general orders issued by the U.S. District Court for the Northern District of

California,[6] clerk's notices providing audio access to the proceedings (5-ER-1057-1062 (Docket Entries (DE) 88, 120, 127)), and minute entries confirming the provision of audio access (5-ER-1060-1065 (DE 118, 126, 145, 151, 157, 162, 165))—were all available to counsel before or during Hougen's trial (5-ER-1064-1066). Because counsel could have raised Hougen's public-trial claim in district court, this case is nothing like *United States* v. *Gupta*, 699 F.3d 682 (2d Cir. 2012), where the defendant's failure to raise a contemporaneous objection was excused because his counsel "was unaware of the closure at the time it occurred." *Id.* at 689-690.

B. Even If The Plain-Error Standard Applies, Reversal Is Not Warranted

Even if this Court concludes that Hougen did not waive his public-trial claim, it would be entitled to no more than plain-error review. *Greer* v. *United States*, 141 S. Ct. 2090, 2096 (2021). To obtain relief under that test, the defendant must establish (1) an unwaived error, (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affects the fairness, integrity or public reputation of judicial

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[6] See N.D. Cal. General Order No. 73 (amended May 21, 2020) (General Order 73), https://perma.cc/U3XG-332V, abrogated by N.D. Cal. General Order No. 78 (June 23, 2021) (General Order 78), https://perma.cc/EJ5H-8HT7; N.D. Cal. General Order No. 72-6 (Sept. 16, 2020) (General Order 72-6), https://perma.cc/BTD5-ATW8, abrogated by General Order 78.

proceedings." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (brackets and citation omitted); *Greer*, 141 S. Ct. at 2096-2097. "Meeting all four prongs" of this test "is difficult, 'as it should be."' *Puckett*, 556 U.S. at 135 (citation omitted).

Assuming *arguendo* that Hougen can satisfy the first and third prongs of the plain-error test, he has not established the others.

1. Hougen Has Not Shown "Clear Or Obvious" Error

Starting with the second prong, Hougen cannot establish the existence of "clear or obvious" error because, unlike in *Allen*, the record does not clearly disclose whether or to what extent the courtroom was actually closed to the public. Hougen acknowledges (Br.20) that his trial was "subject to the same general orders at issue in *Allen*"—General Orders 72-6 and 73. As *Allen* recognized, those orders gave individual judges within the Northern District of California discretion in determining who may attend trials in person. See General Order 73, at 1 (providing that "persons having official court business authorized" by "a presiding judge" may enter courthouses, and defining "[o]fficial court business" to "include attorneys, parties, witnesses, or other persons who are required or permitted to attend a specific in-person court proceeding"); General Order 72-6, at 1; *Allen*, 34 F.4th at 793 (explaining that, "[n]otwithstanding these general orders," the judge in *Allen* "adopted additional COVID restrictions" when he granted the public audio-only access to the proceedings).

The record is ambiguous as to whether the judge in this case intended to—and did—preclude members of the public from attending Hougen's trial in person. As Hougen emphasizes (Br.6, 20-21), clerk's notices in the district court docket specified that the trial and certain pretrial proceedings "w[ould] be held by AT&T Conference Line" and that the court was "circulat[ing]" a dial-in telephone number "to allow the equivalent of a public hearing by telephone." 5-ER-1057, 1060-1062 (DE 88, 120, 127). At the same time, the transcript shows that on the third day of trial, a member of the public—S.B.'s "mom"—was in the courtroom when the court questioned S.B. outside the presence of the jury about his ability to testify. 3-ER-454-455, 460.

The uncertainty in the record about whether and to what extent the public was permitted to attend Hougen's trial in person is attributable to Hougen's failure to make a contemporaneous objection. Hougen has not established "clear or obvious" error, and this Court should reject Hougen's public-trial claim on that ground alone. See, *e.g.*, *United States* v. *Yijun Zhou*, 838 F.3d 1007, 1011 (9th Cir. 2016); *United States* v. *Crisolo*, 620 F. App'x 601, 602 (9th Cir. 2015).

2. Hougen Has Not Shown That Any Error Seriously Affected The Fairness, Integrity, Or Public Reputation Of The Proceedings

Hougen's public-trial claim independently fails because he has not established that any error "seriously affect[ed] the fairness, integrity or public reputation" of the proceedings. *Puckett*, 556 U.S. at 135 (citation omitted).

Although the Supreme Court has classified deprivation of the public-trial right as a "structural error," *Weaver*, 137 S. Ct. at 1908-1910, it does not follow that every public-trial violation satisfies the plain-error test's fourth prong. The Supreme Court has emphasized that this prong should "be applied on a case-specific and fact-intensive basis"; courts are not to use a "*per se* approach." *Puckett*, 556 U.S. at 142 (citation omitted). And the Court has twice denied defendants relief under that prong after assuming *arguendo* that they had established structural error. *United States* v. *Cotton*, 535 U.S. 625, 632-634 (2002); *Johnson* v. *United States*, 520 U.S. 461, 468-470 (1997). Moreover, in *Weaver*, the Supreme Court evaluated the reasons that public-trial violations are deemed structural and held that "in some cases," trials conducted in violation of the Sixth Amendment "will be fundamentally fair." 137 S. Ct. at 1910 (evaluating ineffective-assistance-of-counsel claim).[7]

Significantly, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly

[7] This Court recently concluded that because public-trial errors are structural, they "necessarily" satisfy the fourth prong of the plain-error test. *Ramirez-Ramirez*, 45 F.4th at 1109-1110. That conclusion is not binding here because in *Ramirez-Ramirez*, the parties did not raise—and this Court did not evaluate—the contrary Supreme Court holdings discussed above. See *Flexible Lifeline Sys., Inc.* v. *Precision Lift, Inc.*, 654 F.3d 989, 997 (9th Cir. 2011); *Cassel*, 408 F.3d at 633 & n.9.

condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984) (citation and internal quotation marks omitted). Here, at a minimum, any member of the public in any location was able to listen to Hougen's trial by using a call-in number, and the transcript of the trial is publicly available. These features, together with the media attention Hougen highlights (Br.22), "may have had a similar effect on the proceedings' participants" as visual access "would have had, keeping them 'keenly alive to a sense of their responsibility and to the importance of their functions.'" *United States* v. *Williams*, 974 F.3d 320, 346-347 & n.13 (3d Cir. 2020) (quoting *Waller*, 467 U.S. at 46) (relying on similar considerations in rejecting public-trial claim under prong four), cert. denied, 142 S. Ct. 309 and 142 S. Ct. 310 (2021).

Furthermore, the record contains "no suggestion of misbehavior by the prosecutor, judge, or any other party; and no suggestion that any of the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Williams*, 974 F.3d at 347 (quoting *Weaver*, 137 S. Ct. at 1913). Any public-trial violation therefore did not seriously affect the fairness or reputation of the proceedings in which Hougen was convicted of a serious hate crime. See *United States* v. *Santos*, 501 F. App'x 630, 632-633 (9th Cir. 2012).

Contrary to Hougen's argument (Br.25), *United States* v. *Becerra*, 939 F.3d 995 (9th Cir. 2019), is inapposite because its analysis was case-specific and concerned a different right not governed by the Supreme Court's pronouncements in *Weaver*. *Id.* at 1006. Indeed, *Becerra* concluded that the error there "seriously affect[ed] the public reputation of [the] judicial proceedings" because the district court "flagrant[ly]" contravened longstanding and "definitive" precedent. *Ibid.* (citation omitted); see *id.* at 998-999. No such circumstances are present here, given that this Court decided *Allen* well after Hougen's trial. Hougen is likewise mistaken in relying (Br.25) on *United States* v. *Negrón-Sostre*, 790 F.3d 295, 306 (1st Cir. 2015), which pre-dated *Weaver* and rested on a decision that *Weaver* abrogated. *Williams*, 974 F.3d at 345 n.12. This Court should reject Hougen's tardy public-trial claim.

II

SECTION 249(a)(1) IS A VALID EXERCISE OF CONGRESS'S THIRTEENTH AMENDMENT POWERS

Hougen next contends (Br.26-36) that Congress lacked authority under the Thirteenth Amendment to enact 18 U.S.C. 249(a)(1) as applied to isolated incidents of private violence. This Court reviews constitutional challenges de novo. *Cazares*, 788 F.3d at 989. As explained below, every court to consider the question—including five other courts of appeals—has agreed that Section 249(a)(1) is an appropriate exercise of Congress's Thirteenth Amendment powers.

This Court should affirm the district court's decision joining that chorus (1-ER-22).

A. Congress Rationally Determined That Racially Motivated Violence Is A Badge Or Incident Of Slavery

The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude * * * shall exist within the United States" and provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. Amend. XIII. Modern Thirteenth Amendment jurisprudence dates back to *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which explained that the Thirteenth Amendment empowers Congress to do "much more" than abolish slavery. *Id.* at 439. Reaffirming a conclusion the Supreme Court initially reached in 1883, *Jones* held that the Thirteenth Amendment authorizes Congress to enact "all laws necessary and proper for abolishing all badges and incidents of slavery." *Ibid.* (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)). *Jones* further concluded that Congress has the "power * * * rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. Applying that test, the Court upheld a federal statute prohibiting racial discrimination in the sale of property on the ground that Congress had rationally determined that such discrimination is a badge and incident of slavery. *Id.* at 412, 437, 440-444.

Since *Jones*, the Supreme Court has repeatedly upheld Thirteenth Amendment legislation under the rational-determination test. In *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-105 (1971), for example, the Court upheld a private cause of action for conspiring to violate civil rights. And in *Runyon* v. *McCrary*, 427 U.S. 160, 168, 179 (1976), the Court upheld a prohibition on racial discrimination in making and enforcing contracts.

Section 249(a)(1)—which criminalizes certain violent acts undertaken "because of the actual or perceived race, color, religion, or national origin of any person," 18 U.S.C. 249(a)(1)—easily passes muster under the rational-determination test. In enacting Section 249(a)(1), Congress expressly found that "[s]lavery and involuntary servitude were enforced * * * through widespread public and private violence directed at persons because of their race, color, or ancestry." 34 U.S.C. 30501(7). "Accordingly," Congress concluded, "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." *Ibid.*

Congress acted rationally in determining that racially motivated violence is a badge or incident of slavery, as five courts of appeals and every other court to have considered the question have held in upholding Section 249(a)(1). See *United States* v. *Diggins*, 36 F.4th 302, 309-311 (1st Cir. 2022), petition for cert. pending,

No. 22-5512 (filed Aug. 29, 2022); *United States* v. *Roof*, 10 F.4th 314, 392 (4th Cir. 2021), cert. denied, 2022 WL 6572117 (Oct. 11, 2022); *United States* v. *Cannon*, 750 F.3d 492, 500-502 (5th Cir. 2014); *United States* v. *Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); *United States* v. *Hatch*, 722 F.3d 1193, 1205-1206 (10th Cir. 2013); see also, *e.g.*, *United States* v. *Earnest*, 536 F. Supp. 3d 688, 716-717 (S.D. Cal. 2021).

Indeed, "[a]s 'over a century of sad history' demonstrates, 'concluding there is a relationship between slavery and racial violence is not merely rational, but inescapable.'" *Diggins*, 36 F.4th at 309-310 (some internal quotation marks omitted) (quoting *Roof*, 10 F.4th at 392). As the Tenth Circuit explained, antebellum courts characterized "unrestrained master-on-slave violence as one of slavery's most necessary features." *Hatch*, 722 F.3d at 1206. In addition, racially motivated violence was "widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement." *Cannon*, 750 F.3d at 501-502; accord *Metcalf*, 881 F.3d at 645. Congress could therefore reasonably "conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position." *Hatch*, 722 F.3d at 1206.

This Court's decision in *United States* v. *Allen*, 341 F.3d 870 (9th Cir. 2003), reinforces that conclusion. *Allen* applied *Jones*'s rational-determination test

to uphold a hate-crime statute similar to the one at issue here—18 U.S.C. 245(b)(2)(B), which criminalizes certain violent acts when undertaken (1) because of the victim's race, color, religion, or national origin; and (2) because the victim is or has been enjoying certain public benefits or facilities. 341 F.3d at 884. This Court agreed with the Second and Eighth Circuits that Congress "could rationally have determined that the acts of violence covered by § 245(b)(2)(B) impose a badge or incident of servitude on their victims." *Ibid.* (quoting *United States* v. *Nelson*, 277 F.3d 164, 185 (2d Cir. 2002), and citing *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984)); accord *Cazares*, 788 F.3d at 989.

Hougen attempts to distinguish *Allen* on the ground that Section 249(a)(1) "does not require any nexus to public facilities." Br.36. But, as explained above, Congress rationally determined that racially motivated violence alone is a badge or incident of slavery, and thus Hougen points to a distinction without a difference. See also *United States* v. *Maybee*, 687 F.3d 1026, 1031 (8th Cir. 2012) (rejecting same distinction); *Nelson*, 277 F.3d at 190 & n.25 ("emphasiz[ing]" that it was "not holding" that the public-facilities element of Section 245(b)(2)(B) was "necessary to the statute's constitutionality").

B. This Court Should Reject Hougen's Alternative Tests For Assessing Section 249(a)(1)'s Constitutionality

Hougen argues in the alternative that this Court "should follow the Supreme Court's approach to criminal statutes" in *United States* v. *Kozminski*, 487 U.S. 931

(1988), rather than "*Jones*' approach to a civil statute." Br.35. But *Kozminski* addressed questions of "statutory construction" and thus has no bearing here. 487 U.S. at 939-940. As *Allen* recognized in addressing a criminal statute, *Jones* instead supplies the applicable analytical framework. 341 F.3d at 884.

Hougen also invokes (Br.31-34) the Supreme Court's decisions in *Shelby County* v. *Holder*, 570 U.S. 529 (2013), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), as a basis for questioning the constitutionality of Section 249(a)(1). *Shelby County* invalidated under the Fifteenth Amendment Section 4(b) of the Voting Rights Act of 1965 in part because the provision imposed requirements on certain States based on factual circumstances that existed "[n]early 50 years" earlier, not "current needs." 570 U.S. at 535-536 (citation omitted); *id.* at 542-557. *Boerne*, in turn, held that Congress exceeded its authority under the Fourteenth Amendment when it enacted a statute governing States that was not "congruen[t] and proportional[]" to the constitutional injury that Congress sought to prevent or remedy. 521 U.S. at 520, 530-535. Hougen asserts that "courts and commentators" have "expressed concerns" about whether Section 249(a)(1) passes muster under these decisions. Br.32-34.

To the extent Hougen argues that this Court should import the analytical approaches employed in *Shelby County* and *Boerne* into the Thirteenth Amendment context, his argument fails on three independent grounds. First,

because "neither case mentions the Thirteenth Amendment, [and] neither cites *Jones*," this Court must adhere to the Supreme Court's "well-established Thirteenth Amendment jurisprudence." *Roof*, 10 F.4th at 394-395. Indeed, courts of appeals "should follow [any] [Supreme Court] case which directly controls," even if it "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Accordingly, every court of appeals that has been invited to extend *Shelby County* or *Boerne* to the Thirteenth Amendment context has declined. See *Diggins*, 36 F.4th at 311 (1st Cir.); *Nelson*, 277 F.3d at 185 n.20 (2d Cir.); *Roof*, 10 F.4th at 394-395 (4th Cir.); *Cannon*, 750 F.3d at 505 (5th Cir.); *Metcalf*, 881 F.3d at 645 (8th Cir.); *Hatch*, 722 F.3d at 1204-1205 (10th Cir.).

Second, Hougen provides no reason why the standards in *Shelby County* and *Boerne* should also govern in the distinct Thirteenth Amendment context, and there is none. As the First Circuit recently explained when it "flatly reject[ed] any notion that *City of Boerne* and *Shelby County* cast doubt on *Jones*'s reasoning," *Diggins*, 36 F.4th at 311 n.11, "[t]he Thirteenth, Fourteenth, and Fifteenth Amendments are independent and distinct constitutional provisions, each with its unique scope, enforcement clause, and ratification history, and each spawning its own unique jurisprudence." *Id.* at 317; *id.* at 306-309, 311-316 (exhaustively analyzing relevant text, structure, history, and precedent). "Accordingly," it is

inappropriate to "simply graft doctrines articulated and crafted for entirely separate constitutional provisions onto the Thirteenth Amendment context." *Id.* at 317; see also *Nelson*, 277 F.3d at 185 n.20 (describing the "crucial disanalogy between the Fourteenth and Thirteenth Amendments").

Third, as the First Circuit has concluded, even if Section 249(a)(1) were subject to the standards set forth in *Shelby County* and *Boerne*, it would satisfy them. *Diggins*, 36 F.4th at 314-316. Hougen does not contend otherwise with respect to *Boerne*'s congruence-and-proportionality test. And Section 249(a)(1) plainly responds to "current conditions" under *Shelby County*, 570 U.S. at 557. Congress enacted Section 249(a)(1) in 2009, after considering extensive hate-crime data from 1991 to 2007 and evaluating existing hate-crime laws. It concluded that, notwithstanding those laws, "[b]ias crimes are disturbingly prevalent." H.R. Rep. No. 86, 111th Cong., 1st Sess. 5-8 & nn.1, 4 (2009) (House Report); 34 U.S.C. 30501(1), (3), (4) and (10). Hougen contends that the data showed that hate crimes "ha[d] been in decline in the past decade" (Br.33), but any decline was slight. House Report 5, 43 (citing FBI data documenting 7624 hate crimes in 2007 and 8049 hate crimes in 1997). Modest improvements do not disempower Congress from addressing problems that remain serious. This Court should reject Hougen's constitutional challenge.

III

HOUGEN IS NOT ENTITLED TO A NEW TRIAL BASED ON REFERENCES TO ALLEGED INVOCATIONS OF HIS RIGHT TO REMAIN SILENT

Hougen contends (Br.37-46) that the government impermissibly relied at trial on invocations of his Fifth Amendment right to remain silent. In particular, Hougen challenges (Br.39-43) (1) the introduction of video evidence depicting his racist and aggressive behavior in response to police officers' attempts to read him his *Miranda* rights (Trial Exs. 8 and 9); and (2) trial testimony and prosecutorial comments about his behavior in those videos. The government relied on the videos for a narrow purpose: it argued that Hougen's racist comments showed his racial animus (2-ER-124-125), and it contended that his belligerent behavior suggested he was the aggressor—not the victim—in the altercation with S.B. (2-ER-129).

Hougen never objected before or during his trial to the video evidence (Trial Exs. 8 and 9); quite the opposite, his counsel stipulated to its admission (4-ER-756). Hougen also did not object at trial to the testimony and prosecutorial statements he challenges on appeal (Br.42-43), with one exception: his challenge to certain testimony by Joshua Garcia (4-ER-815). Rather, Hougen raised some of his objections for the first time in a motion for a new trial, which the district court denied (1-ER-18-20), and he raises others for the first time in this Court. As a

result, all but one of Hougen's challenges—including his challenges to the district court's denial of his new-trial motion—are reviewable only for plain error. *United States* v. *Garcia-Morales*, 942 F.3d 474, 475 (9th Cir. 2019) (standard of review generally); *United States* v. *Atcheson*, 94 F.3d 1237, 1244-1246 (9th Cir. 1996) (standard of review for challenge to denial of new-trial motion). Hougen has not established that he is entitled to relief under that demanding standard, nor is he entitled to relief under the harmless-error standard with respect to his sole preserved challenge to Garcia's testimony.[8]

A. Hougen Is Not Entitled To Relief Under The Plain-Error Standard With Respect To His Unpreserved Challenges

1. Hougen Has Not Established Error, Much Less Plain Error

Under the second prong of the plain-error test, "an error is plain if it is clear or obvious under current law." *United States* v. *Gonzalez Becerra*, 784 F.3d 514, 518 (9th Cir. 2015) (citation omitted). An "error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *Ibid.* (citation omitted). Hougen has not established

[8] Although Hougen also baldly asserts that the government impermissibly relied on an "Invo[cation]" of his "Right to Counsel" (Br.37), he has waived that claim by inadequately developing it. *Alonso*, 48 F.3d at 1544-1545; cf. *United States* v. *Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) (discussing considerations unique to the right-to-counsel context). Regardless, any such claim would fail for reasons similar to those explained here.

error, let alone plain error, with respect to his unpreserved Fifth Amendment challenges.

a. Video Evidence

i. The Fifth Amendment's Self-Incrimination Clause provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The touchstone of the Clause is compulsion, and thus "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Miranda* v. *Arizona*, 384 U.S. 436, 478 (1966). Even after a suspect is in custody, his statements are voluntary when he is not subject to an "interrogation," *Rhode Island* v. *Innis*, 446 U.S. 291, 299-300 (1980), including when an officer reads him his *Miranda* rights, *Guam* v. *Ichiyasu*, 838 F.2d 353, 357-358 (9th Cir. 1988).

Under this Court's precedent, the Fifth Amendment nonetheless precludes the government from relying in its case-in-chief on a defendant's post-arrest "exercise of his right to remain silent," including "statement[s] invoking his right to silence." *United States* v. *Bushyhead*, 270 F.3d 905, 912-913 (9th Cir. 2001) (citation omitted) (citing *Doyle* v. *Ohio*, 426 U.S. 610, 618-619 (1976)). This Court has held that a defendant's "explanatory refusal[s]"—*i.e.*, explanations for invoking his Fifth Amendment rights—are entitled to the same protection. *Hurd* v. *Terhune*, 619 F.3d 1080, 1089 (9th Cir. 2010).

In *Berghuis* v. *Thompkins*, 560 U.S. 370 (2010), the Supreme Court held that a suspect in custody who wishes to invoke his right to remain silent must "do so unambiguously." *Id.* at 381-382. In a decision that is controlling under *Marks* v. *United States*, 430 U.S. 188, 193 (1977), a plurality of the Supreme Court concluded that a suspect who is not subject to a custodial interrogation must also invoke his right to remain silent expressly. *Salinas* v. *Texas*, 570 U.S. 178, 181, 183-186 (2013) (noting exceptions not pertinent here). Observing that *Berghuis* outlined "similar invocation requirements," *id.* at 188, 190, *Salinas* held that the principles enunciated in both decisions apply when determining whether the government may use a claimed invocation in its case-in-chief.[9] *Id.* at 188. "Context and circumstances matter[]" in evaluating whether a defendant has invoked his Fifth Amendment rights. *Sessoms* v. *Grounds*, 776 F.3d 615, 625, 627, 629 (9th Cir. 2015) (en banc) (citing cases).

ii. The district court did not err, much less plainly err, in concluding that Hougen did not invoke his Fifth Amendment right to remain silent in the challenged videos. 1-ER-18-19. That conclusion follows under the unambiguous-

[9] Given that holding, Hougen is wrong when he argues (Br.44 n.22) that even if his statements in the videos were "ambiguous," the "government could not use [them] as evidence of guilt." *Hurd* is not to the contrary. Indeed, when *Hurd* evaluated whether the government had improperly relied on statements claimed to be invocations, it applied the unambiguous-invocation rule, not some lesser standard. 619 F.3d at 1085, 1088-1089.

invocation standard that governs under *Berghuis* and *Salinas*, and it likewise follows even if Hougen is correct that ambiguous invocations of the right to remain silent are protected by the Fifth Amendment (but see note 9, *supra*).

In the first video, Garcia, a Hispanic Santa Cruz police officer, attempted to read Hougen his *Miranda* rights soon after his arrest while Hougen was in the back of a squad car. 4-ER-844-849. As Garcia approached, Hougen said, "How you doin', amigo? You gonna press charges against a white guy?" Garcia told Hougen, "You have the right to remain silent," and "anything you say can and will be used against you in court." Hougen responded, "I don't know what you're talking about," and he asked Garcia for his name. After Garcia answered, Hougen said, "Garcia, you're a colored person, and I'm a white person," and "I don't understand it from you at all." Garcia asked, "Do you wish to speak with me?" Hougen responded, "I don't want to speak to you," and Garcia left. Trial Ex. 8, at 00:15-01:11; see 1-SER-36-37 (transcript not offered into evidence at trial).

The district court did not plainly err in concluding that Hougen did not invoke his Fifth Amendment rights when he told Garcia that he "[did]n't want to speak to [him]." Given Hougen's immediately preceding racist comments to Garcia—and other racist comments that Hougen had directed at Garcia and another Hispanic officer (4-ER-770-772, 841-849)—Hougen instead was communicating only that he did not wish to speak with Garcia specifically or with any officer of

color. See *United States* v. *McWhorter*, 515 F. App'x 511, 517 (6th Cir. 2013) (holding the defendant's statement, "I don't want to talk to you anymore," was not an "unambiguous assertion of his right to remain silent" because "context ma[de] it clear" that he "directed his statement only to [a specific officer]"); cf. *Salinas*, 570 U.S. at 189 (plurality opinion) (not every "explanation for silence" is "protected by the Fifth Amendment"); *Rhoades* v. *Henry*, 638 F.3d 1027, 1037-1038, 1041-1042 (9th Cir. 2011) (holding that, "in context," the suspect's statement, "I don't want to talk about it," was "at best ambiguous, indicating that he did not want to talk about" one of two crimes).

The second video was recorded shortly after the first and depicted efforts by Kevin Bailey, a white officer, to complete the *Miranda* advisements. 4-ER-846-847. As Bailey read Hougen his *Miranda* rights, Hougen shouted over him:

> I don't wanna hear it. Just go away. I don't give a fuck. I don't wanna hear it. It doesn't matter if you say it or not. I don't wanna hear it. Go away. Go the fuck away. I have the right to tell you to shut up. Get away from me. You don't know what the fuck you're talking about. You don't know the rights. You have to read 'em. Because you don't know them. You are a liar. Go away. * * * Let me talk to my lawyer. Just go, just get the fuck out of here. Just shut up. No, I don't understand you, I don't understand any of you.

Trial Ex. 9, at 00:27-01:21. After this tirade, Bailey left. *Ibid.*

The district court did not plainly err in concluding that Hougen did not invoke his Fifth Amendment right to remain silent in this video. Rather, Hougen's bellowing response to a straightforward *Miranda* advisement was nothing more

than a belligerent outburst. The Seventh Circuit's decision in *United States* v. *Mills*, 122 F.3d 346 (7th Cir. 1997), is instructive. In *Mills*, a suspect said, "Get the f—— out of my face"; "I don't have nothing to say," when an officer asked if he would waive his *Miranda* rights after placing him in a squad car. *United States* v. *Banks*, 78 F.3d 1190, 1196 & n.6 (7th Cir.) (cross-referenced by *Mills*, 122 F.3d at 347), vacated and remanded, 519 U.S. 990 (1996). After evaluating "the totality of the circumstances," the Seventh Circuit upheld the district court's conclusion that the suspect's statement was "a general expression of anger" rather than an unambiguous invocation of his right to remain silent. *Mills*, 122 F.3d at 350-351; see also *Wesson* v. *Shoop*, 17 F.4th 700, 706 (6th Cir. 2021) (similar); *United States* v. *Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006) (similar).

The context here—including the extreme language Hougen used, his uncontrolled shouting, the length of his rant, and the fact that he was not being asked for any information or a waiver of his rights—makes it even clearer than in *Mills* that Hougen did not invoke his right to remain silent. Given that context, this case is materially different from this Court's decisions deeming statements such as "I don't want to talk no more" to be invocations under very different circumstances. See, *e.g.*, *Jones* v. *Harrington*, 829 F.3d 1128, 1132, 1137-1140 (9th Cir. 2016) (noting, for example, that the defendant had made such a statement after hours of questioning).

Hougen argues that Garcia and another officer, Juan Becerra, "subjectively understood [his] responses as unambiguous refusals," Br.44 (citation omitted), a consideration this Court has found relevant, *Hurd*, 619 F.3d at 1089. But the cited testimony shows only that the officers recognized that Hougen had "elected not to provide a statement." 3-ER-509-510; 4-ER-813-815 (similar). The officers did not say whether that was due to Hougen's invocation of his Fifth Amendment rights or some other reason—such as his racism and anger. See also 4-ER-846 (testimony by Becerra indicating that he thought Hougen was unwilling to talk to Garcia because of his race); 1-SER-37-38 (similar).

b. Testimony And Prosecutorial Statements

Hougen's remaining Fifth Amendment claims—his challenges to certain testimony and prosecutorial statements—are derivative of his challenge to the video evidence. Hougen challenges that material on the sole ground that it made "impermissible use of the[] colloquies" in the videos. Br.42; see also Br.39-40. Because introduction of the videos was not error, much less plain error, it follows that the district court did not err in permitting testimony and prosecutorial statements discussing the videos. *Garcia-Morales*, 942 F.3d at 477 (holding that because the defendant had not invoked his right to silence in an interrogation, it was not error to "introduce evidence of, and comment on," the interrogation).

Moreover, even if this Court were to conclude that some of Hougen's statements in the challenged videos were protected under the Fifth Amendment, Hougen's unpreserved challenges to the testimony and prosecutorial statements discussing the videos (Br.42-43) would still fail. That is so because six of the seven challenged references to the videos focused on Hougen's racist and belligerent statements for purposes of establishing his racial animus and aggressive behavior shortly after he was arrested. See 2-ER-124-125 (prosecutor's closing argument referencing Hougen's "racial taunts," including his "colored person" comment to Garcia); 3-ER-676 (prosecutor's opening statement making same point); 4-ER-773 (prosecutor's question referencing "colored person" comment); 2-ER-129 (prosecutor's closing argument discussing evidence that Hougen was the "aggressor," including Hougen's "violent, angry outbursts" in the video with Bailey); 2-ER-177-178 (prosecutor's rebuttal argument making same point); 4-ER-847 (testimony by Becerra that Bailey "was only met with shouting, saying things like nobody has rights, you don't have any rights, go away, get away from me[,] [t]hings like that"). At no point did any of that commentary discuss any expression by Hougen of a desire to remain silent or any protected "explanatory refusal"—*i.e.*, an explanation for an invocation. Cf. *Hurd*, 619 F.3d at 1089 (providing protection to statement, "I don't want to act [the shooting] out because that—it's not that clear").

The seventh challenged reference to the videos concerns certain testimony by Becerra (3-ER-509-510), but the district court properly deemed that testimony permissible for a different reason (1-ER-19). In the challenged testimony, Becerra responded to a series of questions by Hougen's counsel designed in part to suggest that the Santa Cruz police did not conduct an adequate investigation. 3-ER-504-510; cf. 3-ER-497 (describing purpose of questions). Counsel asked Becerra whether, if he had heard a statement made by Hougen at the crime scene, it "would have resulted in a further interview, on-scene interview of Mr. Hougen." 3-ER-509. Becerra responded that "[a]n interview would have been conducted regardless," and he explained that Hougen had "an opportunity to make a statement when he was provided his *Miranda* warning and elected not to provide a statement." 3-ER-509-510.

Because Becerra fairly responded to defense counsel's suggestion of investigative failure, Becerra's testimony did not run afoul of the Fifth Amendment. Indeed, the Supreme Court has held that references to a defendant's silence are permissible when they are a "fair response to a claim made by defendant." *United States* v. *Robinson*, 485 U.S. 25, 32 (1988). Applying that principle, this Court concluded in *United States* v. *Norwood*, 603 F.3d 1063 (9th Cir. 2010), that a prosecutor fairly commented on the defendant's failure to tell the police about certain evidence in response to the defendant's "implication of

investigative misconduct." *Id.* at 1067, 1070; see also, *e.g.*, *Cook* v. *Schriro*, 538 F.3d 1000, 1018-1020, 1022 (9th Cir. 2008). Hougen has not established plain error.

2. Hougen Has Not Shown That Any Error Affected His Substantial Rights And Seriously Affected The Fairness, Integrity, Or Public Reputation Of The Proceedings

Even if this Court were to conclude that Hougen established plain error, he is not entitled to a new trial because he has not satisfied his burdens on the third and fourth prongs of the plain-error test.

a. With respect to the third prong, Hougen must show that any error "affect[ed] [his] 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Greer*, 141 S. Ct. at 2096 (citation omitted). When determining whether "reference to a defendant's post-arrest silence was prejudicial," this Court "consider[s] the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant's guilt." *United States* v. *Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000) (citation omitted).

Hougen has not established prejudice here. For the reasons already described, the jury was presented with little if any evidence referencing invocations of Hougen's right to remain silent. In addition, prosecutors did not

"stress[]" an "inference of guilt from silence" to the jury, *Whitehead*, 200 F.3d at 639 (citation omitted), unlike in the cases Hougen cites (Br.45-46). Quite the opposite, prosecutors relied on Hougen's racist comments during the *Miranda* advisements to establish his racial animus, and they highlighted the bellicose nature of Hougen's statements to Bailey as evidence that Hougen was the aggressor—not the victim—in the attack. See, *e.g.*, p. 37, *supra*.

Finally, Hougen is incorrect (Br.46) that the jury might have concluded that he acted in self-defense in the absence of the challenged evidence and comments. As the district court held in rejecting Hougen's separate challenge to the sufficiency of the evidence, there was "ample" other evidence that "Hougen did not reasonably believe the force he used" (1-ER-13-14)—slashing at S.B.'s chest and head with a knife at least 10-20 times (3-ER-525-527; 4-ER-723-724)—"was necessary to prevent death or great bodily harm." 1-ER-13-14; cf. 2-ER-193 (jury instructions on self-defense). In particular, the two bystanders closest to the attack testified that Hougen was unequivocally the aggressor and that S.B. assumed a defensive posture—without holding any weapon—in response to Hougen's repeated stabbing attempts. 3-ER-525-533; 4-ER-723-727, 730, 735-737. A third eyewitness who saw the attack from farther away also testified that Hougen was "the aggressor" and that a weaponless S.B. responded merely by "defending himself." 4-ER-819-823, 832-833; accord 2-ER-395-396; 3-ER-403-406, 410-412.

And immediately after fleeing the attack, a visibly upset S.B. told a bystander that Hougen was "trying to kill him." 4-ER-732-734.

Hougen emphasizes (Br.46, 62) that he claimed to officers that he was acting in self-defense (4-ER-840-841, 850), but he also told officers at the scene that "nothing happened" (3-ER-519-520; 4-ER-839-841), and he ultimately admitted to the FBI that he angrily followed S.B. after unsuccessfully initiating a marijuana transaction with him (3-ER-549-551). Furthermore, although Garcia testified that S.B. is "always armed," he explained that he meant only that S.B. "always has a knife with him." 4-ER-801. Significantly, Garcia and other law-enforcement officials found no reason to believe that S.B. had *used* his knife during the altercation. 2-ER-386; 3-ER-543; 4-ER-805, 815.[10] This evidence—and testimony that S.B. has a reputation for aggression (2-ER-236-237; 4-ER-828)—does not come close to undermining the substantial, uniform evidence establishing Hougen as the aggressor. Underscoring how clear-cut the case was, the jury reached its verdict after deliberating for less than an hour. 1-SER-3-4, 6.[11]

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[10] Accord, *e.g.*, 4-ER-767, 805-806, 810-811 (testimony relied upon by Hougen (Br.62) that suggests only that S.B. retrieved his knife from the ground after it fell from its torn sheath during the altercation, not that S.B. ever used it against Hougen).

[11] For substantially the same reasons that Hougen has not established prejudice under the plain-error test, he would likewise not be entitled to reversal

b. Finally, Hougen has not attempted to show that any error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"—the showing required under the plain-error test's fourth prong. *Puckett*, 556 U.S. at 135 (citation omitted). Nor could he, given the limited nature and impact of any errors here and his stipulation admitting the video evidence. See, *e.g.*, *Guam* v. *Cruz*, 70 F.3d 1090, 1093 (9th Cir. 1995).

B. Hougen Is Not Entitled To Relief Under The Harmless-Error Standard With Respect To His Sole Preserved Challenge

As explained (at 29-30), only one of Hougen's Fifth Amendment challenges was preserved and thus is reviewable for harmless error. See, *e.g.*, *Bushyhead*, 270 F.3d at 911. That challenge concerns Garcia's testimony that he determined Hougen was the aggressor based on others' statements, and because "[Garcia] was not able to get a statement from the suspect." 4-ER-815.

On appeal, Hougen argues (Br.42) that this testimony violated his Fifth Amendment rights because it made "impermissible use of the[] colloquies" in the two challenged videos. But because introduction of the videos did not violate Hougen's Fifth Amendment rights, Hougen's derivative challenge to Garcia's testimony necessarily fails. See *Garcia-Morales*, 942 F.3d at 477.

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under the harmless-error standard he urges the Court to apply (Br.37). See, *e.g.*, *Bushyhead*, 270 F.3d at 913-914.

In any event, any error was harmless beyond a reasonable doubt. The challenged statement was all of 11 words, whereas Garcia's full testimony spanned 57 pages (4-ER-751-784, 793-795, 797-816) in the 1046-page transcript (2-ER-210). Immediately after the statement, the district court admonished the jury about Hougen's Fifth Amendment rights (4-ER-815-816), and the government never mentioned the statement or Hougen's silence in making arguments to the jury. Finally, as explained above, other evidence overwhelmingly supported the jury's determination that Hougen did not act in self-defense—a determination it reached in less than one hour. See *United States* v. *Lopez*, 500 F.3d 840, 845-847 (9th Cir. 2007) (relying on similar considerations to conclude error harmless).

IV

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING EVIDENCE OF HOUGEN'S PRIOR RACIALLY MOTIVATED ATTACKS

Invoking Federal Rules of Evidence 404(b) and 403, Hougen challenges (Br.47-55) the admission of evidence of his three prior racially motivated attacks on Black men. That evidence consisted of testimony from four witnesses describing the attacks[12] and a stipulation describing Hougen's resulting convictions

[12] See 3-ER-684-700 (Black man testifying that in 2014, Hougen approached him and questioned why he was eating lunch with "white people," repeatedly called him a "nigger," brandished a knife, and shoved a backpack into his gut, saying, "Here, nigger, * * * carry my backpack"); 4-ER-702-709 (police

(3-ER-576-578). Before trial, the district court concluded that this evidence was admissible under Rules 404(b) and 403 solely to prove Hougen's racial motive and intent (1-ER-94-99), and the court reaffirmed that conclusion when it denied Hougen's post-trial motion (1-ER-16-18).

In district court, Hougen did not argue that the challenged evidence was inadmissible under Rule 404(b) (1-SER-7-11), and thus the district court's Rule 404(b) determination is reviewed for plain error. *United States* v. *Banks*, 514 F.3d 959, 976 (9th Cir. 2008); *Morgan* v. *Woessner*, 997 F.2d 1244, 1260 n.18 (9th Cir. 1993). The district court's Rule 403 ruling addressing Hougen's timely objection (1-SER-7-11) is reviewed for abuse of discretion, but any error is not reversible if it is harmless. *United States* v. *Carpenter*, 923 F.3d 1172, 1181-1182 (9th Cir. 2019). As explained below, the district court properly admitted the challenged evidence under both rules, and any error was not prejudicial.

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officer testifying that in 2018, Hougen repeatedly called a Black man a "nigger" while acting aggressively towards him and threatening to kill him); 3-ER-581-603 (Black man testifying that during a different incident in 2018, Hougen angrily scowled at him and his white girlfriend as they rode a train; repeatedly called him and a Black train conductor "niggers"; acted aggressively towards both Black men; and threatened to kill them); 2-ER-316-332 (train official testifying that during the 2018 train incident, Hougen used the word "nigger" at least 15-20 times, pulled out a noose, and told the Black victim he was going to hang him).

A. The District Court Did Not Plainly Err In Admitting The Evidence Under Rule 404(b)

Under Rule 404(b), "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," but "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, [or] intent." Fed. R. Evid. 404(b)(1)-(2). Accordingly, other-acts evidence is admissible if it is "relevant" to show a defendant's motive or intent using a "[character]-propensity-free chain of reasoning." *United States* v. *Charley*, 1 F.4th 637, 640 (9th Cir. 2021). Indeed, "[e]xtrinsic acts evidence may be critical" to establishing an "actor's state of mind." *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988).

The district court did not err, much less plainly err, in concluding that evidence of Hougen's prior acts of racial violence was admissible to show that "[Hougen's] attack on S.B. was motivated by race"—"an essential element of the offense" and a permissible purpose under Rule 404(b). 1-ER-17, 94, 96, 98-99; see 18 U.S.C. 249(a)(1). Supporting the district court's conclusion, it is well established that evidence of prior racial animosity is relevant to establishing that a defendant's later conduct was motivated by discriminatory intent. See, *e.g.*, *Allen*, 341 F.3d at 886-887; *United States* v. *McInnis*, 976 F.2d 1226, 1231-1232 (9th Cir. 1992); *United States* v. *Curtin*, 489 F.3d 935, 951 n.5 (9th Cir. 2007) (en banc).

Moreover, contrary to Hougen's argument (Br.49), such evidence is relevant not based on a character-propensity theory but because it sheds light on the defendant's *beliefs* regarding a particular racial group that he might have acted upon during the charged crime. See *Heyne* v. *Caruso*, 69 F.3d 1475, 1479-1480 (9th Cir. 1995) (reaching similar conclusion in holding other-acts evidence admissible in employment-discrimination case); cf. *United States* v. *Berckmann*, 971 F.3d 999, 1002 (9th Cir. 2020) (making similar point in explaining that "[o]ther acts of domestic violence involving the same victim" are generally admissible to show, for example, a "grudge between the two"), cert. denied, 141 S. Ct. 2649 (2021); *United States* v. *Dunnaway*, 88 F.3d 617, 618-619 (8th Cir. 1996). Accordingly, acts of prior racial animosity are "squarely" admissible under Rule 404(b) to establish a defendant's discriminatory "motive and intent." *United States* v. *Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998); see also, *e.g.*, *United States* v. *Seale*, 600 F.3d 473, 493-495 (5th Cir. 2010).

Although Hougen points out (Br.52) that some of his prior convictions did not "include a judicial finding or admission" that he acted with racial animus, it is not evident why that fact has any bearing on the Rule 404(b) inquiry and Hougen

supplies no explanation. Hougen has therefore not shown error, let alone plain error.[13]

B. The District Court Acted Within Its Discretion In Admitting The Evidence Under Rule 403

1. Rule 403 permits a court to exclude relevant evidence if its "probative value" is "substantially outweighed" by a danger of, among other things, "unfair prejudice" or "needlessly presenting cumulative evidence." Fed. R. Evid. 403. Significantly, Hougen does not—and cannot—dispute the district court's conclusion that the other-acts evidence here was "highly probative" of Hougen's racially discriminatory intent. 1-ER-17; see pp. 45-46, *supra*. Although Hougen quibbles with how the district court balanced the probative value of that evidence with countervailing considerations, he falls far short of establishing that the district court abused its broad discretion under Rule 403.

Hougen first argues (Br.54) that the evidence was "overly redundant." But the district court carefully probed whether all of the other-acts evidence the government initially proposed was necessary. 1-ER-88-89, 93-97. Ultimately, the government called only four witnesses to describe the three prior acts, and their combined testimony was not extensive, spanning only 65 pages in the 1046-page

[13] For similar reasons, Hougen's Rule 404(b) challenge would fail even if he is correct (Br.47) that the abuse-of-discretion standard governs.

trial transcript. See note 12, *supra*; see also 3-ER-554-559 (overview testimony by FBI agent). The district court thus acted well within its discretion in determining that the significant "probative value" of the evidence was not "substantially outweighed" by a danger of "needlessly presenting cumulative evidence." Fed. R. Evid. 403. See, *e.g.*, *United States* v. *Cruz-Garcia*, 344 F.3d 951, 957 (9th Cir. 2003) (other-acts evidence "clearly" not cumulative when "it gave the jury information it learned from no other source"); *United States* v. *Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1991) (skinhead evidence not cumulative in hate-crime case in part because of "difficulty in establishing the requisite racial animus").

Hougen next argues (Br.54) that the challenged evidence was unduly "inflammatory or prejudicial." But the mere fact that "evidence may decimate an opponent's case is no ground for its exclusion under 403" because "[t]he rule excludes only evidence where the prejudice is 'unfair'—that is, based on something *other* than its persuasive weight." *Cruz-Garcia*, 344 F.3d at 956. Here, the district court closely scrutinized the proposed evidence to ensure that it would not unfairly inflame the jury. See, *e.g.*, 1-ER-86-87, 92-93; 3-ER-650-657. Although Hougen complains that two of his victims testified about their "personal emotional reaction as Black men to being called the N-Word" (Br.54 (citing 3-ER-593, 598-599, 689)), that testimony was brief and likely expected by the jury. Cf. *United States* v. *Cox*, 963 F.3d 915, 925 (9th Cir. 2020) (noting "other-act

evidence in sex-crimes cases is often emotionally charged and inflammatory, and this does not control the Rule 403 analysis"), cert. denied, 141 S. Ct. 1281 (2021).

Moreover, the district court twice instructed the jury that it must consider the other-acts evidence "only for the purpose of deciding whether [Hougen] had the intent" or "motive" to commit the "crime charged in the indictment," and "[not] for any other purpose." 3-ER-578-579 (instructions following introduction of stipulation identifying convictions); 2-ER-185, 188 (final instructions). As the district court explained in its post-trial ruling, any "potential unfair prejudice" was "substantially mitigated" by these "limiting instructions." 1-ER-17; see, *e.g.*, *Berckmann*, 971 F.3d at 1004. Hougen has thus fallen far short of establishing that the district court abused its discretion in conducting its Rule 403 balancing. Accord *Allen*, 341 F.3d at 886-887 & n.24 (holding "skinhead and other white supremacy evidence" properly admitted under Rule 403 to prove "racial animus"); *McInnis*, 976 F.2d at 1231-1232.

2. Hougen also argues (Br.53-54) that the district court did not "properly exercise its weighing discretion" under Rule 403 because the government assertedly did not provide pretrial notice of "many details to which the [other-acts] witnesses subsequently testified." In making this procedural argument, Hougen relies heavily on this Court's decisions holding that district courts must fully review any challenged *exhibits* before deciding whether to admit them under Rule

403. *United States* v. *McElmurry*, 776 F.3d 1061, 1068-1070 (9th Cir. 2015). But this Court has never extended that requirement to testimony, nor would it be practical or sensible to do so. *United States* v. *Major*, 676 F.3d 803, 809 (9th Cir. 2012); *United States* v. *Charles*, 691 F. App'x 367, 370 (9th Cir. 2017).

Instead, this Court has held that a district court may rule on a Rule 403 challenge before hearing testimony when it is able "to appreciate fully and to weigh accurately the challenged evidence's probative value and its potential for unfair prejudice." *Major*, 676 F.3d at 809. Here, the government's detailed pretrial notices ensured that the district court could do just that. 4-ER-975-981; 1-SER-12-15; see also 1-ER-82-89, 94-97. Contrary to Hougen's solitary argument suggesting otherwise (Br.54), the government adequately foreshadowed testimony that Hougen held up a noose during one of his prior attacks (2-ER-321-322, 331) when it explained in its pretrial notice that it would present evidence that Hougen "direct[ed] racial slurs toward [the victim]," "called [him] a 'nigger,'" and "threatened to stab him" (4-ER-977); see also 1-SER-14. In any event, any procedural error was harmless because the challenged testimony was substantively admissible, as the district court reaffirmed in its post-trial ruling (1-ER-17-18). *United States* v. *Jayavarman*, 871 F.3d 1050, 1064 (9th Cir. 2017).

C. Any Error Is Not Reversible

Even if the district court improperly admitted some or all of the other-acts evidence, any error was harmless because it is "more probable than not that the error did not materially affect the verdict."[14] *Carpenter*, 923 F.3d at 1182-1183 (citation omitted) (explaining that standard is satisfied when the government's evidence is "overwhelming"). As previously explained (at 40-41), plentiful evidence supported the jury's determination that Hougen was the aggressor in the altercation with S.B.—not a victim acting in self-defense. In addition, as the district court concluded in rejecting Hougen's post-trial challenge to the sufficiency of the evidence, there was "overwhelming evidence"—apart from the other-acts evidence—"that Hougen attacked S.B. because of S.B.'s race." 1-ER-14-16.

In particular, Hougen admitted that he did not know S.B.; that he angrily followed S.B. after unsuccessfully initiating a marijuana transaction with him; and

[14] As explained (at 44), the harmless-error standard governs any Rule 403 error, but the plain-error standard governs any Rule 404(b) error. For the same reasons that any error in admitting the other-acts evidence was harmless, it also did not "affect[] [Hougen's] substantial rights" under the third prong of the plain-error test, *Puckett*, 556 U.S. at 135. Moreover, Hougen has not attempted to satisfy his burden on the fourth prong of that test.

that he called S.B. a "nigger" during the altercation. 3-ER-549-552.[15] The only eyewitness who could hear Hougen (3-ER-526; 4-ER-725, 738) testified that Hougen yelled "nigger" at S.B. five or ten times during the attack. 4-ER-819-823; accord 3-ER-403-406. And immediately after S.B. escaped and ran to another bystander's car, he told her—while visibly upset—that Hougen had called him a "fucking nigger." 4-ER-732-734. Finally, soon after the attack, Hougen made racially charged comments to police officers, including yelling "bean dip," "spico," "spic boy," and "brown boy" at Garcia, a Hispanic officer. 4-ER-770-772, 841-849 (also describing other examples). Indeed, when Garcia attempted to read Hougen his *Miranda* rights, Hougen sneered at Garcia, "[Y]ou're a colored person, and I'm a white person," further stating that he "[did]n't understand it from [Garcia]." Trial Ex. 8, at 00:57-01:04; see also *id.* at 00:15-00:19.

Not only was the other evidence of guilt overwhelming, but also the district court twice issued limiting instructions to the jury (see p. 49, *supra*), which "mitigated [any] prejudice" of admitting the other-acts evidence. *United States* v.

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[15] Hougen is incorrect (Br.61-62) that "there was no real dispute" that one of the FBI agents to whom he made this statement was "impeached for bias" during the trial. Although Hougen's counsel asked the agent questions seeking to cast doubt on her testimony (3-ER-568-574), the agent's answers were sufficiently credible that Hougen's counsel did not even mention the testimony in her closing argument.

Lague, 971 F.3d 1032, 1042 (9th Cir. 2020), cert. denied, 141 S. Ct. 1695 (2021). Accordingly, any error in admitting the other-acts evidence was harmless.

V

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN EXCLUDING EVIDENCE RELATING TO AN ASSAULT ALLEGEDLY COMMITTED BY S.B. ON THE EVE OF TRIAL

Hougen also takes issue (Br.55-60) with the district court's ruling barring him from introducing evidence relating to an assault S.B. allegedly committed against D.B. one week before trial. That assault took place in a homeless encampment. According to witnesses, S.B. and another man approached D.B. in his tent, accused him of committing a sexual assault, and told him he should move out. S.B. then allegedly assaulted D.B. and was later arrested. 2-SER-41, 47-50, 52, 56-57. Invoking Rule 404(b), Hougen filed a pretrial motion seeking potentially to introduce (1) the testimony of D.B., another witness to the assault, and a police officer involved in the investigation; (2) a video of the assault; and (3) videos in which S.B. allegedly lied to the police about the assault. 1-ER-28-34, 65; 4-ER-925-926.

The district court denied the motion, ruling that the evidence was inadmissible for two independent reasons. First, the court determined that the proposed use of the evidence was not "even a tortured fit" with the permissible purposes identified in Rule 404(b). 1-ER-66-68, 70-71, 77-78. Second, the court

held that the evidence should be excluded under Rule 403 because it had limited probative value; would result in unfair prejudice; would require a mini-trial over collateral events that had not yet been adjudicated in state court; would result in undue delay; and could confuse the jury. 1-ER-63, 68-70, 72, 74, 77. The court reaffirmed both rulings when it denied Hougen's motion for a new trial. 1-ER-20-21.

This Court reviews the district court's exclusion of evidence under Rules 404(b) and 403 for abuse of discretion, *United States* v. *Comerford*, 857 F.2d 1323, 1324 (9th Cir. 1988), but any error is not reversible if it is harmless, *Cruz-Garcia*, 344 F.3d at 957. As explained below, this Court may affirm the district court's evidentiary ruling on three independent grounds: that the district court properly concluded that Rules 404(b) and 403 each foreclosed admission of the evidence, and that any error was harmless.

A. The District Court Acted Within Its Discretion In Excluding The Evidence Under Rule 404(b)

Although the Rule 404(b) standard of admissibility "need not be as restrictive" when the proponent of other-acts evidence is a criminal defendant, *United States* v. *Wright*, 625 F.3d 583, 608 (9th Cir. 2010) (citation omitted), Rule 404(b) flatly prohibits defendants from introducing other-acts evidence "purely for propensity." *United States* v. *McCourt*, 925 F.2d 1229, 1236 (9th Cir. 1991). The district court properly determined that Hougen sought to introduce evidence

concerning the D.B. assault for the "[p]rohibited" purpose of "prov[ing]" S.B.'s violent and mendacious "character" to show that S.B. "acted in accordance with the character" in connection with the altercation with Hougen, Fed. R. Evid. 404(b)(1). 1-ER-21, 68, 70. Hougen makes three arguments as to why the evidence was "admissible for another purpose, such as proving motive, opportunity, [or] intent," Fed. R. Evid. 404(b)(2), but each fails.

First, Hougen contends (Br.58) that the proposed evidence "showed [S.B.'s] bias," by which it appears Hougen means (Br.59) S.B.'s "motive to lie." But "bias" refers to extrinsic circumstances that might "lead [a] witness to slant, unconsciously or otherwise, his testimony in favor of or against a party"—circumstances such as a "witness' like, dislike, or fear of a party" or "the witness' self-interest." *United States* v. *Abel*, 469 U.S. 45, 52 (1984). As the district court properly concluded (1-ER-77-78), even if S.B. committed an assault and then lied about it on the eve of trial, that fact has no logical bearing on whether S.B. had a "bias" or "motive to lie" to the police about the earlier incident with Hougen, and Hougen cites no case law suggesting otherwise. At bottom, Hougen seeks to argue that because S.B. allegedly lied to the police about the D.B. incident, he must also have lied to the police about the Hougen incident. 1-ER-70. But that is classic character-propensity evidence that is forbidden by Rule 404(b)(1).

Second, Hougen argues (Br.58) that the proposed evidence "corroborated [his] self-defense theory that [S.B.] was the initial aggressor." As the district court explained, however, the two incidents involved "different parties and different circumstances." 1-ER-21. Hougen and S.B. did not know each other, and the incident between them started when Hougen approached S.B. to buy marijuana and then significantly escalated matters after S.B. refused. 3-ER-549-551. By contrast, the incident between D.B. and S.B.—who were acquaintances (2-ER-234-236)—was allegedly precipitated by an accusation that D.B. had committed a sexual assault. 2-SER-47-50, 56-57. Here, "there is no logical connection" between the two incidents "other than the implication that [S.B.] has a propensity for violence and was therefore the aggressor on the occasion here—an impermissible inference under Rule 404(b) and an improper consideration when determining whether self-defense was established." *Charley*, 1 F.4th at 648; Br.49; cf. *United States* v. *Keiser*, 57 F.3d 847, 853-857 (9th Cir. 1995) (holding that when a defendant claims self-defense, Rules 404(a) and 405 preclude the admission of evidence of a victim's other violent acts to show the victim's propensity for violence).

Hougen observes that other "assaultive acts by the alleged victim[] *may be* admissible under Rule 404(b) to corroborate theories of self-defense." Br.56 (emphasis added). But, as the decisions he cites underscore, such evidence is

admissible only if introduced for a permissible purpose under Rule 404(b), such as establishing the defendant's state of mind—not, as here, merely to prove the victim's propensity for violence. See, *e.g.*, *United States* v. *James*, 169 F.3d 1210, 1214-1215 (9th Cir. 1999) (en banc) (holding that evidence of the victim's prior violent acts should have been admitted to corroborate the defendant's testimony that the victim had told her about those acts and that she had reason to be afraid of the victim).

Finally, Hougen asserts (Br.58-60) that the proposed evidence would support his argument that a more "complete" police investigation would have shown that S.B. was the aggressor in their altercation. But it is hard to understand how that is so, given that the incident with D.B. took place well after the challenged investigation was complete. In each decision that Hougen cites (Br.56-57), the other-acts evidence existed at the time of the investigation and suggested that an alternative culprit—not the defendant—committed the crime. As a result, the defendants in those cases could sensibly point to the other-acts evidence as "exculpatory evidence [that] the police might have found had they conducted a more thorough investigation." *United States* v. *Crosby*, 75 F.3d 1343, 1347-1348 (9th Cir. 1996) (so holding under Rule 403). Not so for Hougen.

In short, the district court did not abuse its discretion in excluding evidence about the D.B. incident under Rule 404(b). This Court may therefore affirm the exclusion of the evidence on that ground alone.

B. The District Court Acted Within Its Discretion In Excluding The Evidence Under Rule 403

Alternatively, this Court may affirm the district court's exclusion of evidence relating to the D.B. incident on Rule 403 grounds. For the reasons just discussed, the court did not abuse its discretion in concluding that the proposed evidence had, at most, "minimal probative value." 1-ER-21, 68-69, 72. The court likewise acted well within its broad discretion in determining that any limited "probative value" of the evidence was "substantially outweighed" by a "danger" of "unfair prejudice, confusing the issues, misleading the jury, [and] undue delay," thus warranting exclusion under Rule 403, Fed. R. Evid. 403; 1-ER-21, 63, 68-70, 72, 74, 77.

In particular, as Hougen does not attempt to dispute, the proposed evidence would have posed a "substantial" risk of unfair prejudice to the government and S.B. because a jury could improperly "regard such evidence * * * as proof of [S.B.'s] turbulent character" and "conclude that he acted consistently with that character at the time [of the altercation with Hougen]." *United States* v. *Bettencourt*, 614 F.2d 214, 218 (9th Cir. 1980); *Comerford*, 857 F.2d at 1323-1324. The potential for unfair prejudice is amplified because of the inflammatory

nature of the central piece of evidence Hougen sought (Br.58-59) to introduce: a video of the assault showing the principal aggressor—allegedly S.B.—repeatedly striking D.B. with a long stick (Doc. 205, Ex. A, at 1:06:33-1:07:16; cf. *id.* at 24:00-24:58, 27:42-28:45).

Although Hougen takes issue (Br.58-59) with the district court's additional concern that admitting the proposed evidence would result in a mini-trial about "evidence in another separate case" that had not yet been adjudicated (1-ER-63, 69), that concern was well founded. Hougen suggests (Br.59) that the evidence would have been limited to the video showing S.B. allegedly assaulting D.B., but Hougen also argues (Br.57-58) that the district court should have allowed him to present evidence that S.B. lied to the police about the incident. Moreover, as the district court properly recognized, the jury would have needed "factual background[]" about the D.B. incident (1-ER-69), and Hougen's evidence would have opened the door to the government's presentation of additional documentary, testimonial, and video evidence to probe what happened before, during, and after the D.B. incident to show why it sheds no light on what happened during the Hougen incident.

Finally, Hougen does not dispute the district court's related determination that his proposed evidence about the D.B. incident had the potential to confuse the

jury (1-ER-21, 63, 70, 77). In short, Hougen fails to show that the district court abused its discretion.

C. Any Error In Excluding The Evidence Was Harmless

Even if the district court improperly excluded evidence about the D.B. incident, any error was harmless. Error in excluding other-acts evidence is harmless if there is a "'fair assurance' that the verdict was not substantially swayed by the error." *Cruz-Garcia*, 344 F.3d at 957 (citation omitted). In making such a harmless-error determination, this Court considers "the extent to which the evidence in question would have undermined the government's case." *Ibid.*

Because the probative value of Hougen's proposed evidence was minimal at best, it would not have substantially undermined the government's case, had the jury considered it only for proper purposes. Moreover, as previously explained (at 40-41), the government presented overwhelming evidence that Hougen did not act in self-defense—the only ultimate issue before the jury to which the excluded evidence was relevant, as Hougen concedes (Br.58-60). Accordingly, any error was harmless.[16]

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[16] Hougen tacks on (Br.60) a final argument not raised at trial that one of the prosecutors engaged in impermissible "vouching" during her closing argument when she said that "[w]e take our victims as we find them"; noted that "sometimes we don't find them in a great place" because, for example, they are "angry" or "poor"; and stated that that "does not make them any less of a victim or any less entitled to justice for crimes committed against them" (2-ER-181). Hougen offers

VI

NO CUMULATIVE ERRORS REQUIRE REVERSAL

As a final attempt at relief, Hougen argues (Br.60-62) that the cumulative effect of the alleged errors requires reversal.[17] As explained above, the district court committed no errors. Even if this Court disagrees, any errors the district court committed were marginal. Their cumulative effect thus does not warrant reversal. See *United States* v. *Karterman*, 60 F.3d 576, 579-580 (9th Cir. 1995) (reversal not warranted under cumulative-error doctrine where "each error is, at best, marginal"). Moreover, as explained above (at 40-41 and 51-52), even without the evidence and prosecutorial statements Hougen challenges on appeal, the government's case was strong, making clear that Hougen was not prejudiced by

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no explanation of why these statements constitute impermissible vouching, and thus this Court should deem his cursory argument waived.

In any event, this Court has explained that vouching "consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States* v. *Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (citation omitted). The prosecutor's general comments that all victims are entitled to justice do not come close to satisfying that standard.

[17] Although the heading of the final section of Hougen's brief also refers to a challenge to the sufficiency of the evidence (Br.60), Hougen does not develop any such argument. Instead, he contends (Br.61) only that reversal is required due to the "confluence" of "errors" in this case. Hougen has therefore waived any sufficiency-of-the-evidence argument.

the cumulative effect of any errors. See, *e.g.*, *Cazares*, 788 F.3d at 990-991; *United States* v. *Fernandez*, 388 F.3d 1199, 1256-1257 (9th Cir. 2004).

CONCLUSION

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

Respectfully submitted,

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9th Cir. Case Number(s) 21-10369

I am the attorney or self-represented party.

This brief contains 13,993 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ◉ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
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- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
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Signature s/ Sydney A.R. Foster **Date** Oct 17, 2022

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ADDENDUM

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CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

STATUTE:

18 U.S.C. 249. Hate crime acts

(a) In general.—

(1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

* * * *

RULES:

Fed. R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

Fed. R. Evid. 404. Character Evidence; Other Crimes, Wrongs, or Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.