No. 22-13822

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JORDAN LEAHY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as appellee certifies that there are no additional persons who may have an interest in the outcome of this case.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Janea L. Lamar
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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose defendant-appellant's request for oral argument in this case to the extent argument is helpful to this Court.

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STATEMENT OF JURISDICTION

This appeal is from a final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The district court entered final judgment on November 7, 2022. Doc. 104, at 1.[1] Defendant filed a timely notice of appeal. Doc. 106, at 1. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

A jury convicted defendant-appellant Jordan Leahy of interfering with federally protected rights, in violation of 18 U.S.C. 245(b)(2)(B), after he attempted to run a Black man in a car off the road because the man was a "nigger" and an "animal" who needed to be "ke[pt] in [his] areas." Leahy raises the following issues on appeal:

1.a. Whether Congress exceeded its authority under the Thirteenth Amendment when it enacted Section 245(b)(2)(B) to criminalize violence committed because of a victim's race and his enjoyment of a public facility.

1.b. Whether Section 245(b)(2)(B) can be constitutionally applied to Leahy where he attacked his victim because he is Black and was using a public road.

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[1] Citations to "Doc. __, at __" refer to the documents in the district court record and the page numbers within those documents. Citations to "GX __" refer to the government exhibits admitted at trial. Citations to "Br. __" refer to page numbers in defendant's opening brief.

2.a. Whether the district court properly instructed the jury that Section 245(b)(2)(B)'s requirement that a defendant act "because" of a victim's enjoyment of a public facility required but-for causation.

2.b. Whether the district court abused its discretion when it declined to give a "theory of defense" instruction that incorrectly defined the "because"-of-the-enjoyment-of-a-public-facility element.

2.c. Whether the district court abused its discretion when it declined to answer the jury's question about what evidence could satisfy the "because"-of-the-enjoyment-of-a-public-facility element.

3.a. Whether the evidence that Leahy attempted to run his victim off the road because his victim is Black and was enjoying a public facility is sufficient to sustain Leahy's conviction for forcefully interfering with federally protected activities.

3.b. Whether the district court abused its discretion in denying Leahy's motion for a new trial.

STATEMENT OF THE CASE

A. Factual Background

On the evening of August 8, 2021, Jordan Leahy drove down Starkey Road, a public street administered by Pinellas County, Florida. Doc. 84, at 37-41, 144-146. Leahy, who is white, frequently talked about wanting to attack or kill Black

people he saw around town. Doc. 84, at 127, 151-153, 156-158. He also would brag about "tail[ing] people [while driving] and . . . try[ing] to crash into their bumper." Doc. 84, at 154, 156-157.

While on Starkey Road, Leahy drove his car alongside the car of his soon-to-be victim, J.T. Doc. 84, at 35, 37-39. J.T., who is Black, was driving his girlfriend and his four-year-old daughter home. Doc. 84, at 35-37. While both cars were moving, Leahy leaned out of his car window and started gesturing at J.T. Doc. 84, at 38, 40-41, 98. J.T. rolled down his passenger-side window thinking that Leahy was telling him something was wrong with his car; instead, J.T. heard Leahy yelling "fuck you nigger" repeatedly while gesturing with his hands like he was shooting at J.T. and his girlfriend. Doc. 84, at 38-41, 61-62, 74-75. J.T. responded by saying something along the lines of Leahy being "fucking crazy" and rolled up his window hoping that Leahy would drive away. Doc. 84, at 42-43.

Instead of driving away, Leahy tried to push J.T.'s car off the road from the passenger side where his girlfriend and four-year-old daughter sat. Doc. 84, at 43. J.T. sped up to try to avoid Leahy's attempts to push him into the median. Doc. 84, at 43-44. Leahy then drove his car directly behind J.T. and started following so closely that J.T. and his girlfriend could no longer see Leahy's headlights. Doc. 84, at 43, 76-77. J.T., who is a personal trainer and former fight coach with EMT training (Doc. 84, at 33, 53), recognized that Leahy was maneuvering to hit his

bumper to cause him to lose control and spin out (Doc. 84, at 43-44). J.T. sped up to avoid Leahy, but Leahy again approached J.T. and his family from the passenger side and again tried to push their car off the road. Doc. 84, at 43-44.

J.T. moved into a left turning lane to avoid Leahy and slowed down, hoping that this time Leahy would drive away. Doc. 84, at 44. As J.T. pulled over, Leahy swiped the passenger side of J.T.'s car. Doc. 84, at 44-46, 77-78. J.T.'s girlfriend saw Leahy approaching and braced herself for the impact; while the contact did not heavily damage the car, J.T.'s girlfriend felt and heard Leahy's car hit their vehicle. Doc. 84, at 45, 78. After side-swiping J.T.'s car, Leahy finally drove off. Doc. 84, at 46, 78.

Up until this point, J.T. had not called the police for several reasons: he did not think officers would arrive quickly enough to do anything; he did not think it was worth it when Leahy was just yelling and threatening him; and he did not expect Leahy to escalate things by continuing to physically push him off the road. Doc. 84, at 47-48. But once Leahy hit J.T.'s car, J.T. wanted to file a police report. Doc. 84, at 48. To that end, J.T. drove up to Leahy's car at the next intersection to take a picture of Leahy's license plate so that he could call the police from his girlfriend's home half a block away. Doc. 84, at 48-49.

As J.T. photographed Leahy's license plate, Leahy exited his car and walked towards J.T.'s car. Doc. 84, at 49-50. J.T. became concerned that Leahy might

have a gun and fire into his car where his family sat. Doc. 84, at 50-52. J.T. immediately told his girlfriend to call 911. Doc. 84, at 79. To protect his family, J.T. got out of the car, told his girlfriend to lock the doors, and walked away from his car and towards Leahy. Doc. 84, at 50.

Leahy approached J.T. while repeatedly yelling, "fuck you, nigger." Doc. 84, at 51. When Leahy reached J.T., Leahy swung a punch at J.T. Doc. 84, at 51, 81. J.T. dodged Leahy's punch and maintained control over Leahy until police arrived and arrested Leahy. Doc. 84, at 51-55, 113, 130.

Leahy made several comments to police while he was in their custody. Initially, he told the officers that J.T. randomly grabbed him out of his car and tried to fight him. Doc. 84, at 110-111; GX 4; GX 4T. He said J.T. "started attacking [him] like some random like, like criminal," "you know, negro," and further stated that "these guys are animals," "[y]'all have to maintain these people, keep them in their, in their areas." GX 4; GX 4T, at 3. He later told officers that J.T. had committed a "hate crime" because Leahy was white. GX 5-2; GX 5T. Once in a patrol car, Leahy stated it was "crazy" that they were "gonna let this monkey fucking beat up on this fucking suburban white kid." GX 8; GX 8T. He continued, "what happened to America bro? Y'all let the fuckin mother fuckers from the ghetto beat up on the white suburban kid." GX 8; GX 8T. Later, Leahy

told officers that he was "[a]lways manipulating shit," "doing whatever the fuck [he] want[ed]. Always act like the nice ass little white kid." GX 10-2; GX 10T.

B. Procedural Background

1. Pre-Trial Proceedings

a. A grand jury charged Leahy with two violations of 18 U.S.C. 245(b)(2)(B), one for his attack on J.T. and his family with his car and one for attempting to assault J.T. when he was outside of his car. Doc. 1, at 1-2. In both counts, the jury charged Leahy with using force (and in the case of Count 1, using a dangerous weapon) and threats of force to willfully attempt to injure, intimidate, or interfere with J.T. because of J.T.'s race and color and because J.T. was enjoying a publicly administered facility, specifically Starkey Road. Doc. 1, at 1-2.

b. Leahy moved to dismiss the indictment arguing, among other things, that Congress did not have constitutional authority to enact 18 U.S.C. 245(b)(2)(B). Doc. 20. He argued that neither the Thirteenth Amendment nor the Commerce Clause granted Congress the power to criminalize "private, racially motivated" violence committed on a local road. Doc. 20, at 1. Leahy argued that the district court should ignore the Supreme Court's Thirteenth Amendment precedent and instead rely on tests the Supreme Court has applied to different constitutional amendments. Doc. 20, at 3-17. He further argued that Congress could not

rationally consider racially motivated violence committed because the victim is enjoying a public street as within Congress's Thirteenth Amendment authority. Doc. 20, at 7, 17-18. Nor in his view could Congress use the Commerce Clause to criminalize conduct that was not economic in nature and occurred entirely intrastate. Doc. 20, at 18-25.

The district court denied Leahy's motion. It rejected Leahy's suggestion that it should ignore Supreme Court precedent, stating that despite any "tension" between the Supreme Court's case law, "the task of harmonizing [such] decisions rests with the Supreme Court." Doc. 36, at 6. The court held that, under governing law, Congress may rationally determine which things may be prohibited under the Thirteenth Amendment, and that racial violence—especially racial violence done because someone is using a public facility—is rationally considered a badge or incident of slavery. Doc. 36, at 6-9. Because the district court found that the Thirteenth Amendment empowered Congress to pass Section 245(b)(2)(B), it declined to consider Leahy's Commerce Clause arguments. Doc. 36, at 3.

c. During a pretrial conference, Leahy sought to insert a specific intent requirement into Section 245(b)(2)(B). *See* Doc. 113, at 56-64. He argued that the provision's second—but not its first—use of "because" did not mean "but-for," but instead required proof that he intended to retaliate against J.T. for using Starkey Road or to dissuade J.T. from using that road in the future. Doc. 113, at 57-58.

The court concluded that the term "because" should be given the same meaning across the statute and therefore required "but-for" causation as to each element. Doc. 114, at 10-11.

2. Trial

a. The case proceeded to trial, which lasted one day. At the close of the government's case, Leahy moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. Doc. 84, at 165. He argued that to show he acted because of J.T.'s use of a public facility, the government had to prove "a specific intent . . . to punish or prevent or dissuade [J.T.] from using the public facility." Doc. 84, at 165-166. Recognizing that the district court had earlier rejected this standard, Leahy also argued that no rational jury could find that he acted but-for J.T.'s use of Starkey Road because there was no evidence that he was "exclusively looking for victims on Starkey Road" or that his behavior "had anything to do with Starkey Road." Doc. 84, at 167. The court rejected this argument, finding that the evidence that Leahy wanted to keep Black people "in their area" sufficed to allow a reasonable jury to find but-for causation. Doc. 84, at 167-170.

b. During the final charge conference, Leahy requested that the court give the jury a theory of defense instruction. Doc. 84, at 167, 207-211. Specifically, Leahy wanted the court to instruct the jury that if they found that Leahy "would have behaved in the same way" if J.T. had not used Starkey Road, they must find

Leahy not guilty. Doc. 69, at 3; Doc. 84, at 167, 207-211. Leahy's counsel argued this during his closing (Doc. 84, at 210), stating that because Leahy would have done "[e]xactly the same thing" if he had encountered J.T. on another public road, he did not act because of J.T.'s use of a public facility (Doc. 84, at 188-190). The court declined to give the requested instruction, finding that it was inconsistent with the showing required under Section 245(b)(2)(B). Doc. 84, at 210-211.

c. As the jury deliberated Leahy's guilt, it sent the court a question about what evidence would prove that Leahy acted because J.T. was using a public facility—*i.e.*, "[d]oes the fact that both parties were on the road at the same time suffice part four of charges? [sic]." Doc. 86, at 11. Leahy asked the court to answer "no." Doc. 86, at 11. The court, however, was concerned both that the jury was asking the court to do its job and that the question was unclear. Doc. 86, at 11-12. For these reasons, the court offered to tell the jury that it could not answer the question as written but would consider a more detailed question. Doc. 86, at 13-14. Leahy's counsel responded, "I think that's worth a try." Doc. 86, at 14. The government expressed its preference to not invite additional back-and-forth with the jury (Doc. 86, at 14), but the court recognized that the jury was "clearly struggling" and sought to "work with them a little bit" (Doc. 86, at 14). The court then instructed the jury as follows:

> We have been able to answer your questions so far, but this particular question, as phrased, we cannot answer; however, if you are able to

> formulate a different or more detailed question on this point, we can take a look at it and see if we can answer that question. But the one that you have phrased here, we cannot answer.

Doc. 86, at 16.

Shortly thereafter, the jury found Leahy guilty of Count 1 for violating 18 U.S.C. 245(b)(2)(B) by trying to run J.T. and his family off the road, and not guilty of Count 2. Doc. 86, at 25; Doc. 74, at 1-2.

3. Post-Trial Proceedings

Leahy filed a Rule 33 motion arguing that the interests of justice required a new trial. Doc. 89. First, he argued that the government "presented no evidence whatsoever" that he was "seeking out victims on Starkey Road." Doc. 89, at 1. He then argued that his comment about keeping Black people "in their area" was a "farfetched lie" that "only obliquely suggested that he could have been motivated by [J.T.'s] use of the road." Doc. 89, at 1, 8-13. Finally, he sought a new trial based in part on the court's decisions not to give a theory-of-defense instruction and not to answer a jury question. Doc. 89, at 2, 13-19. The court denied Leahy's motion, finding that the court properly instructed the jury and that sufficient evidence supported the verdict. Doc. 93; *see also* Docs. 94, 102; Doc. 115, at 3-5.

The court sentenced Leahy to thirty months' imprisonment and three years of supervised release. Doc. 115, at 30. Leahy timely appealed. Doc. 106.

SUMMARY OF ARGUMENT

On appeal, Leahy primarily invites this Court to disregard governing Thirteenth Amendment precedent and hold Section 245(b)(2)(B) unconstitutional on its face and as applied to the facts of his case. But this Court lacks authority to impose a new constitutional test, and Section 245(b)(2)(B) easily satisfies the correct constitutional standard. Because neither Leahy's constitutional arguments nor his other arguments have merit, this Court should affirm.

1. Leahy's constitutional challenge fails. Section 245(b)(2)(B) is a valid exercise of Congress's Thirteenth Amendment enforcement power, as all circuits to consider the issue have found. The statute is also constitutional as applied to Leahy's attempts to run J.T., a Black man, off a road because of his enjoyment of that public facility.

2. Leahy's challenges to the jury instructions also fail. First, Section 245 requires proof that Leahy acted because of J.T.'s race and because J.T. was using a public facility. It neither requires specific intent nor proof that Leahy chose to attack J.T. on Starkey Road at the exclusion of all other public roads. Next, the district court did not abuse its discretion by declining to provide a "theory of defense" instruction that distorted the "because" of a public facility element. And, finally, the court did not abuse its discretion by declining to answer the jury's

question. The court had wide latitude in how it instructed the jury and its instructions to the jury here accurately reflected governing law.

3. No other basis exists to disturb the verdict. The evidence that Leahy tried to run J.T. off a public road three times while yelling racial slurs, coupled with his insistence to police that "animals" like J.T. must be kept "in their areas" sufficed to submit the case to the jury. Neither the evidence nor Leahy's misunderstanding of the meaning of "because" warrants a new trial.

ARGUMENT

I. Section 245(b)(2)(B) is constitutional, including as applied to this case.

This Court should hold—as have all courts of appeals that have addressed the issue—that Congress appropriately exercised its Thirteenth Amendment enforcement authority when it enacted 18 U.S.C. 245(b)(2)(B). *See United States v. Allen*, 341 F.3d 870, 883-884 (9th Cir. 2003); *United States v. Nelson*, 277 F.3d 164, 174-191 (2d Cir. 2002); *United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984). Section 245(b)(2)(B) prohibits, *inter alia*, violence and attempts at violence committed because of a victim's race and because the victim is using a public facility. 18 U.S.C. 245(b)(2)(B).

Further, Section 245(b)(2)(B) is constitutional as applied to Leahy attacking J.T. because J.T. is Black and was using a public road. Despite Leahy's challenge, even he concedes that using violence to interfere with a person's right to move

freely because of their race is a badge or incident of slavery. *See* Br. 33 (citing *The Civil Rights Cases*, 109 U.S. 3, 22 (1883)).

A. Standard of review.

This Court reviews the constitutionality of a federal statute *de novo*. *United States v. Spoerke*, 568 F.3d 1236, 1244 (11th Cir. 2009). "Proper respect for a co-ordinate branch of the government requires [courts] to . . . [presume] that [C]ongress will pass no act not within its constitutional power." *Benning v. Georgia*, 391 F.3d 1299, 1303 (11th Cir. 2004) (third alteration in original) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)). "This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated." *Ibid.* (citation omitted).

"[W]hen a [party] mounts a facial challenge to a statute or regulation, the [party] bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). "This heavy burden makes such an attack the most difficult challenge to mount successfully against an enactment." *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001) (citation and internal quotation marks omitted).

B. Congress acted within its Thirteenth Amendment enforcement authority when it enacted Section 245(b)(2)(B).

1. The Thirteenth Amendment empowers Congress to identify and proscribe badges and incidents of slavery.

a. Congress has the authority to pass legislation that enforces the Thirteenth Amendment. Section 1 of the Thirteenth Amendment states, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amend. XIII, § 1. Section 2 grants Congress the "power to enforce" this ban on slavery "by appropriate legislation." U.S. Const., Amend. XIII, § 2.

The Supreme Court held that Section 2 empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. at 20. This includes "much more" than simply abolishing slavery. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-443 (1968). The Thirteenth Amendment "establish[es] and decree[s] universal civil and political freedom throughout the United States." *The Civil Rights Cases*, 109 U.S. at 20. To keep this promise of freedom, the Court has concluded that badges and incidents "extend far beyond" conduct strictly limited to "the actual imposition of slavery or involuntary servitude." *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

b. The Supreme Court—and this Court—has held that Congress is empowered to rationally decide "what are the badges and the incidents of slavery" and "translate that determination into effective legislation." *Jones*, 392 U.S. at 440. The Supreme Court also has upheld Congress's authority to legislate across contexts. In *Jones*, the Court considered the constitutionality of 42 U.S.C. 1982, which guarantees that all citizens have equal rights to, *inter alia*, purchase property. *Jones*, 392 U.S. at 412. In holding Section 1982 constitutional, the Court explained that "if Congress w[as] powerless to assure that a dollar in the hands of a [Black man] will purchase the same thing as a dollar in the hands of a white man," the Thirteenth Amendment's promise of freedom would be reduced to "a mere paper guarantee." *Id.* at 441-443.

The Court has reaffirmed this conviction since *Jones*. *See Runyon v. McCrary*, 427 U.S. 160, 169 (1976); *Griffin*, 403 U.S. at 105. In *Runyon*, the Court determined that 42 U.S.C. 1981's prohibition against racial discrimination in the making of contracts for educational services was constitutional. 427 U.S. at 179. The Court found that, just as in *Jones*, Congress rationally determined that "[t]he prohibition of racial discrimination that interferes with the making and enforcement of contracts for private education" was within its Thirteenth Amendment power. *Ibid.* The Court again upheld Congress's power under the Thirteenth Amendment in *Griffin*, where it considered the constitutionality of 42

U.S.C. 1985 in a case where defendants conspired to assault people because they were enjoying equal rights and privileges by, *inter alia*, traveling the public highways. *See* 403 U.S. at 90-92, 104-106. There, the Court concluded that Congress "was wholly within its powers under [Section 2] of the Thirteenth Amendment" in protecting the right to travel freely. *Id.* at 105-106; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 197 (1989) (Brennan, J. concurring in part) (explaining that Congress may "identify and legislate against the badges and incidents of slavery"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008).

Consistent with this precedent, this Circuit has recognized that *Jones* and its rational basis test governs challenges to Congress's Thirteenth Amendment authority. In a case considering the constitutionality of a Fair Housing Act provision, this Court found that "the mandate of *Jones* is clear." *United States v. Bob Lawrence Realty*, 474 F.2d 115, 120-121 (5th Cir. 1973).[2] Absent "any argument that impugns the reasonableness of" Congress's determination that certain acts are badges and incidents of slavery, "the Thirteenth Amendment

[2] All former Fifth Circuit decisions issued before October 1, 1981, are binding precedent in this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

empowers Congress to enact" legislation proscribing such acts. *Ibid.*; *see also NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990) (recognizing *Jones* as the leading precedent governing Congress's Thirteenth Amendment authority); *Arnold v. Board of Educ.*, 880 F.2d 305, 315 (11th Cir. 1989) (overruled on other grounds) (same).

Accordingly, it is well established that Congress is empowered under the Thirteenth Amendment to determine what constitutes badges and incidents of slavery and how to prohibit them by federal legislation.

2. Congress rationally identified and proscribed race-based violence done because a victim is exercising their rights as a badge or incident of slavery.

a. Leahy challenges the constitutionality of Section 245(b)(2)(B). But Congress acted rationally when it prohibited violence committed because of a victim's race and use of a publicly administered facility. While the Supreme Court has yet to consider whether such violence is a badge or incident of slavery, each circuit to do so has concluded that Section 245(b)(2)(B)'s specific prohibition of race-based violence connected to federally protected activities is "a constitutional exercise of Congress's authority under the Thirteenth Amendment." *Allen*, 341 F.3d at 883-884; *see also Nelson*, 277 F.3d at 175-192; *Bledsoe*, 728 F.2d at 1097.

The Eighth Circuit confronted the issue first. In *Bledsoe*, a defendant challenged the constitutionality of Section 245 as applied to him for killing a Black

man he sought out, chased, and attacked in a park. 728 F.2d at 1095-1096. The court held that there could be no doubt that "interfering with a person's use of a public park because he is [B]lack is a badge of slavery." *Id.* at 1097. Citing *Jones*, the court concluded that forcing Black people to use "segregated facilities" such as public parks for threat or fear of violence is a "spectacle of slavery unwilling to die." *Ibid.* (quoting *Jones*, 392 U.S. at 445 (Douglas, J., concurring)). The Second and Ninth Circuit reached similar conclusions in *Nelson* and *Allen*, respectively holding that Section 245 constitutionally applied to violence and attempted violence committed against persons because of their race and because of their use of public streets and parks. *Nelson*, 277 F.3d at 169-171, 188-191; *Allen*, 341 F.3d at 874-875, 883-884.

This precedent makes sense. The ability to exert race-based violence against a victim to keep them in their figurative and, in this case, literal place is strongly reminiscent of slavery in this country. Violence permeated slavery, which was characterized by "compulsion through physical coercion." *United States v. Kozminski*, 487 U.S. 931, 932 (1988). "[U]nrestrained master-on-slave violence [w]as one of slavery's most necessary features," and it operated to enforce the social and racial superiority of the attacker and the relative powerlessness of the

victim." *United States v. Hatch*, 722 F.3d 1193, 1206 (10th Cir. 2013).[3] States went so far as to decriminalize violence committed against the enslaved, as it was "thought necessary to assert and preserve white supremacy." *Nelson*, 277 F.3d at 189 (quoting Randall Kennedy, *Race, Crime and the Law* 30 (1997)). This violence "continued beyond the demise of the institution of chattel slavery and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights." *Id.* at 190. "[S]uch violence was specifically directed at the exercise by [B]lack Americans, of the rights and habits of free persons," for example, by using the public roads as they saw fit. *Ibid.* Notably, when the Thirteenth Amendment abolished slavery, violence against freed Black people "reached staggering proportions," and it was often "closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights." *Ibid.* (citations omitted).

This precedent and history easily favors the conclusion that Congress may prohibit racial violence through its Thirteenth Amendment enforcement power,

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[3] In *Hatch*, the Tenth Circuit upheld the constitutionality of 18 U.S.C. 249(a)(1), another federal criminal statute prohibiting race-based violence. As with Section 245(b)(2)(B), every court to consider Section 249(a)(1)'s constitutionality has found it to be a valid exercise of Congress's Thirteenth Amendment enforcement power. *See, e.g.*, *United States v. Diggins*, 36 F.4th 320, 317 (1st Cir.), *cert. denied*, 143 S. Ct. 383 (2022); *United States v. Metcalf*, 881 F.3d 641, 644-645 (8th Cir. 2018); *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014); *Hatch*, 722 F.3d at 1200-1201, 1206, 1209.

including where that racial violence is committed because a victim is exercising his civil and political rights.

b. Leahy disregards these sources in his argument attacking Section 245's constitutionality. He argues that violence committed because of someone's race and use of a public facility is too "attenuated" from slavery to be rationally considered a badge or incident of slavery. Br. 34-35. Leahy asserts that Section 245(b)(2)(B) is categorically different from those statutes the Supreme Court has concluded post-*Jones* are constitutional exercises of Congress's Thirteenth Amendment enforcement authority. Br. 35. Yet, one of those statutes concerned race-based violence committed against persons traveling on public roads. *See Griffin*, 403 U.S. at 91, 102-106.

In *Griffin*, the petitioners, who were Black, alleged that the respondents, who were white, "drove their truck into the path of" the petitioners' vehicle, "blocked [their] passage over the public road," threatened them, and ultimately "clubbed each of [them], severely injuring [] them." 403 U.S. at 90-91. The respondents did so, the petitioners argued, as part of a conspiracy to "prevent [petitioners] and other [Black people] from exercising their rights to travel the public highways without restraint in the same terms as white citizens." *Id.* at 90-91, 106 (internal quotation marks omitted). Instead of demonstrating that violence based on a victim's race and exercise of rights is "attenuated" from slavery, the Supreme Court's decision

upholding the constitutionality of Section 1985(3) in *Griffin* supports the conclusion that Section 245(b)(2)(B) is constitutional.

Finally, Leahy argues that Section 245(b)(2)(B)'s scope is not narrow enough to be constitutional because it does not require a specific intent to deny someone's fundamental rights. Br. 34-35. But neither the Thirteenth Amendment nor any of the cited case law requires the specific intent that Leahy posits. Leahy's desire to avoid conviction is not grounds for imposing such a requirement on Congress. Regardless, it does not matter here. Leahy cannot succeed on a facial constitutional challenge to Section 245(b)(2)(B) where it is constitutionally applied to his acts to interfere with a Black man's use of a public road, including under his own asserted standard. *See DA Mortg.*, 486 F.3d at 1262; *see* pp. 21-24, *infra*.[4]

C. Section 245(b)(2)(B) is constitutionally applied to Leahy.

The Supreme Court has held (and Leahy agrees) that restricting someone's right to move freely because of their race is a badge or incident of slavery.

[4] Leahy also appears to argue that Section 245(b)(2)(B) "does not protect a fundamental right." Br. 35. He does not explain, however, why the ability to use public facilities such as roads free from violent racial discrimination is not a fundamental right. Moreover, Supreme Court precedent makes plain that the ability to travel freely on roads is "among the rights and privileges of national citizenship." *Griffin*, 403 U.S. at 106 (quoting *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (overruled on other grounds)). For this reason, Leahy also cannot advance his argument by claiming that Section 245 "does not require showing that a perpetrator sought to deny a victim any individual right." Br. 35. Section 245(b)(2)(B) prohibits interference with federally protected activities that enable citizens' full participation in society. *See* pp. 22-23, *infra*.

Accordingly, Section 245(b)(2)(B) constitutionally proscribes Leahy's efforts to run J.T. off a public road because J.T. is Black and was not in his "area."

1. The Supreme Court has repeatedly recognized that restrictions on travel because of one's race were inherent components of slavery. In *The Civil Rights Cases*, the Court acknowledged that the nation held "very distinct" understandings that restraining a person's movement was a necessary incident of slavery. *The Civil Rights Cases*, 109 U.S. at 22. The freedom to move unencumbered was thus a "fundamental right[]," "the enjoyment . . . of which constitutes the essential distinction between freedom and slavery." *Ibid.* The Court reiterated this view in *Jones*. There, the Court looked to a statement by one of the authors of the Thirteenth Amendment that if he learned men freed from slavery were "deprived of the privilege to go and come when they please," he would introduce legislation through the Amendment's enforcement power to ensure them of that right. *Jones*, 392 U.S. at 430, 443.

Even Leahy cannot dispute the proposition that race-based restrictions on travel are a badge of slavery. At the same time Leahy argues that Section 245 "does not combat" a badge or incident of slavery, he concedes that "restraint of movements" is a badge or incident of slavery. Br. 32-33. Rightly so. Both precedent and reason dictate that Section 245(b)(2)(B) constitutionally applies to Leahy's conduct of attacking J.T. because J.T. is Black and was traveling on a

public road Leahy deemed to be outside of J.T.'s rightful area. Because Leahy's facial challenge requires proof that Section 245(b)(2)(B) "could never be applied in a constitutional manner," his facial challenge fails with his as-applied challenge. *DA Mortg.*, 486 F.3d at 1262.

2. Leahy cannot show that Section 245(b)(2)(B) is unconstitutional as applied to his conduct. He asserts that the statute's constitutionality depends on proof that he specifically "sought to prevent [J.T.] from using Starkey Road." Br. 34. In Leahy's view, the evidence shows at most that he engaged in racially motivated violence that "interfered, temporarily, with J.T.'s use of Starkey Road." Br. 34.

This argument makes little sense. First, as explained above, there is no specific intent requirement for Section 245(b)(2)(B). *See* p. 21, *supra*. The evidence requires only that Leahy acted because of J.T.'s race and his use of a public road. The government does not need to prove that Leahy specifically sought to prevent or dissuade J.T. from again traveling on that road. Second, Leahy ignores that even a "temporar[y]" interference denies someone the enjoyment of their rights. Br. 34. In fact, as Leahy interfered with J.T.'s use of the road, J.T. was prevented and denied the right to use the public road freely. Further, the Supreme Court has not required permanent deprivations in any of the statutes that it has upheld under the Thirteenth Amendment; once the encounter was over,

each victim was able to go to another house, school, or road absent additional interference from the defendants. *See Jones*, 392 U.S. at 412; *Runyon*, 427 U.S. at 164; *Griffin*, 403 U.S. at 91.

Here, Leahy tried to run J.T. off the road because J.T. is Black and because Leahy thought J.T. did not belong in that area. He attempted to force J.T.'s car into the median twice and further tried to force his car into a tailspin by ramming his bumper. Throughout this, he yelled racial slurs and made threatening gestures at J.T. Once police arrived, he explained his behavior, insisting that "these people," "these animals" had to be kept in "their areas." The evidence showed that Leahy interfered with and denied (and did so willfully, as Section 245 requires) J.T. the right to move freely along Starkey Road, because J.T. is Black and because Leahy thought J.T. did not belong where he was. Neither Section 245(b)(2)(B) nor the Constitution requires anything more.

D. Leahy's attempts to apply a different constitutional test fail.

Seeking to avoid constitutional standards that would sustain his conviction, Leahy asks this Court to do something it is not empowered to do: disregard Supreme Court precedent. *See* Br. 19-32. This Court should decline Leahy's invitation and hold, as its sister courts have held, that Section 245(b)(2)(B) is constitutional.

1. Leahy's primary argument that Section 245(b)(2)(B) is unconstitutional is based in his disagreement with the Supreme Court's decision in *Jones*. *See* Br. 27-30. He first argues that there is tension between the Court's ruling in *Jones* and its ruling more than eighty years earlier in *The Civil Rights Cases*. *See* Br. 27-28. But any tension that exists is not for this Court to resolve. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Amer. Exp., Inc.*, 490 U.S. 477, 484 (1989). The Court spoke in *Jones* and has repeatedly reaffirmed its holding. *See Griffin*, 403 U.S. at 105; *Runyon*, 427 U.S. at 169; *Patterson*, 491 U.S. at 197 (Brennan, J., concurring in part). *Jones* is the current, governing authority explaining Congress's power under the Thirteenth Amendment, and neither Leahy nor this Court can ignore it.

2. Leahy argues next that under *Jones*, Congress's Thirteenth Amendment authority is too broad. Br. 28-30. But his imagined concern that Congress might "criminalize all forms of racial discrimination and racial disparity" is not a ground for finding Section 245(b)(2)(B) unconstitutional or ignoring the governing legal test. Leahy may not succeed on a constitutional challenge "with reference to hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22

(1960). Rather, to succeed on a facial constitutional challenge, Leahy must show that the statute "could never be applied in a constitutional manner." *DA Mortg.*, 486 F.3d at 1262. He cannot do that where Section 245 is constitutional as applied to him and countless other factual scenarios. *See* pp. 21-24, *supra*. A defendant in any of the cases Leahy imagines can make their own challenges to Section 245 as applied to them.

3. Leahy next argues that the Supreme Court's determination of the scope of Congress's authority under the Fourteenth and Fifteenth Amendments should supplant the Court's separate determination regarding Congress's power under the Thirteenth Amendment. *See* Br. 30-32. This argument similarly fails.

First, just as Leahy may not choose to be governed by *The Civil Rights Cases* where *Jones* speaks directly to the issue at hand, he also may not choose to be governed by *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Shelby County v. Holder*, 570 U.S. 529 (2013), where they neither address nor overturn *Jones* and its progeny. *See, e.g.*, *Rodriguez de Quijas*, 490 U.S. at 484; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring) ("[F]ederal courts have a constitutional obligation to follow a precedent of [the Supreme] Court unless and until it is overruled by [the Supreme] Court.").

Second, by their terms, neither *City of Boerne* nor *Shelby County* apply to the Thirteenth Amendment or otherwise explain why the three different amendments should be governed by the same rule. In *City of Boerne*, the Supreme Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA) was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. 521 U.S. at 516-536. Section 5 gives Congress the "power to enforce, by appropriate legislation," that Amendment's substantive guarantees, including rights protected by the Due Process and Equal Protection Clauses. U.S. Const. Amend. XIV. The Court held that legislation enforcing those guarantees must demonstrate "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end," *City of Boerne*, 521 U.S. at 520, and that RFRA, as applied to state and local governments, failed this test, *id.* at 534-536.

Nothing in *City of Boerne*, however, affects the Supreme Court's decision in *Jones*. *City of Boerne* did not cite *Jones*, mention the Thirteenth Amendment, or discuss Congress's power to identify and legislate against the badges and incidents of slavery. This makes sense as there are important differences between the Thirteenth and Fourteenth Amendments. Unlike the Thirteenth Amendment, which reaches private conduct, the Fourteenth Amendment applies only to state action, which means that legislation under the latter will often impact state

sovereignty. Accordingly, *City of Boerne* recognized that Congress lacks authority to redefine Fourteenth Amendment rights—and that its legislative power extends only to preventive or remedial measures that are congruent and proportional to those rights as judicially interpreted. 521 U.S. at 520, 524. Nothing in that conclusion contradicts *Jones*'s recognition that Congress has a broader role in determining the "badges and incidents of slavery."

Similarly, in *Shelby County*, the Supreme Court held that Section 4(b) of the Voting Rights Act of 1965, which prescribed a formula to identify jurisdictions subject to federal preclearance before enacting new voting laws, was invalid under the Fifteenth Amendment. 570 U.S. at 535-538. The Court held that Section 4(b) failed to respond to "current needs" because it imposed requirements based on factual circumstances that existed "[n]early 50 years" earlier and had since "changed dramatically." *Id.* at 547, 550-557. The Court also emphasized that "Congress may draft another formula based on current conditions." *Id.* at 557.

Shelby County did not announce a blanket rule that requires all legislation enforcing the Reconstruction Amendments to be based on "current conditions." Rather, the Court limited its holding to a provision that (1) imposed different obligations on different States, and (2) impinged on state sovereignty through the extraordinary step of demanding federal preclearance of changed electoral practices. 570 U.S. at 543-544. As with *City of Boerne, Shelby County* did not cite

Jones, mention the Thirteenth Amendment, or otherwise question Congress's authority to identify and proscribe the badges and incidents of slavery. And the federalism concerns that served as an impetus for the decision do not apply to Thirteenth Amendment legislation that does not regulate states. This important distinction counsels against interchanging the Reconstruction Amendments' governing standards. *See District of Columbia v. Carter*, 409 U.S. 418, 421-425 (1973) (detailing the differences between Thirteenth and Fourteenth Amendment enforcement legislation).

4. In any event, Section 245(b)(2)(B) nonetheless satisfies these constitutional tests.

In *City of Boerne*, while the Court required proportionality, it also emphasized that Congress has "wide latitude" in enacting enforcement legislation, 521 U.S. at 520, and that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States,'" *id.* at 518 (citation omitted). Importantly, Congress's enforcement power under the Reconstruction Amendments "is broadest when directed to the goal of eliminating discrimination on account of race." *Tennessee v. Lane*, 541 U.S. 509, 563 (2004)

(Scalia, J., dissenting) (internal quotation marks and citation omitted); *see also Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.).

The connection between Section 245(b)(2)(B) and the Thirteenth Amendment's prohibition on "slavery" and "involuntary servitude," U.S. Const. Amend. XIII, § 1, is direct and does not reflect a "substantive change in constitutional protections," *City of Boerne*, 521 U.S. at 532. The statute targets race-based violence based on a victim's exercise of civil and political freedoms previously denied to the enslaved. *See* S. Rep. No. 721, 90th Cong., 2d Sess. 1838-1839 (1968).

As to *Shelby County*'s "current needs" test, Section 245(b)(2)(B) also survives. At the time of Section 245's passage, white citizens committed "[b]rutal crimes" against Black (and other) citizens for exercising or attempting to exercise their rights. S. Rep. No. 721 at 1839-1840. This violence continues. In 2002, while discussing other hate crime legislation, Congress observed that "the number of reported hate crimes has grown by almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002) (discussing predecessor bill to 18 U.S.C. 249). A 2009 House Report concerning 18 U.S.C. 249, which prohibits willful violence committed because of a victim's protected trait, cited FBI data identifying more than 118,000 reported violent hate crimes since 1991. H.R. Rep. No. 86, 111th

Cong., 1st Sess. 5 (2009). This included nearly 4900 acts of violence done because of a victim's race, national origin, or ethnicity in 2007 alone, and shows that "[b]ias crimes are disturbingly prevalent." *Ibid.* Based on this evidence, Congress properly determined that there was—and remains—a "need for Federal action" to criminalize such violence. S. Rep. No. 721 at 1840.[5]

In sum, despite Leahy's attempts to challenge Section 245(b)(2)(B)'s constitutionality from numerous angles, the statute easily withstands his attacks. This Court should reject his facial and as-applied challenges.

II. Leahy's three challenges to the district court's jury instructions fail.

Leahy next challenges three aspects of the district court's instructions to the jury. Each challenge rests on Leahy's misunderstanding of Section 245's causation standard, and each fails.

[5] Leahy argued to the district court that Section 245 was unconstitutional under both the Thirteenth Amendment and the Commerce Clause, but the district court ruled only as to the former. Doc. 36, at 3. If this Court is inclined to disagree with the district court—and with its sister courts of appeals—as to the validity of Section 245(b)(2)(B) under the Thirteenth Amendment, it should remand to the district court for it to decide in the first instance if the Commerce Clause empowered Congress to pass Section 245(b)(2)(B). *See, e.g.*, *Resnick v. KrunchCash, LLC*, 34 F.4th 1028 (11th Cir. 2022); *see also Allen*, 341 F.3d at 879-883 (upholding Section 245(b)(2)(B) against both constitutional attacks).

A. Leahy's challenge to the district court's instruction defining "because" of J.T.'s use of a public facility fails.

1. Standard of review.

"A challenge to a jury instruction presents a question of law subject to *de novo* review." *United States v. Ndiaye*, 434 F.3d 1270, 1280 (11th Cir. 2006). "The district court has broad discretion in formulating its charge as long as the charge accurately reflects the law and the facts." *United States v. Spoerke*, 568 F.3d 1236, 1244 (11th Cir. 2009) (alterations and citation omitted).

2. The district court properly instructed the jury that "because" requires proof of but-for causation.

a. Section 245(b)(2)(B) has two causation elements: it requires a defendant to act (1) "because of" the victim's race or other protected characteristic, and (2) "because" the victim was enjoying or participating in, or had enjoyed or participated in, a protected activity. 18 U.S.C. 245(b)(2)(B).

Notably, Leahy agrees that the showing that the defendant acted "because of" the victim's race requires "but-for" causation. The district court instructed the jury that this "element is satisfied if [they] f[ou]nd that, but-for the fact that J.T. was Black," Leahy would not have tried to run him off the road. Doc. 77, at 9. The jury could "consider statements made or language used by [Leahy], the circumstances surrounding the alleged offense, and all other evidence that may shed light on [Leahy's] motives and intent." Doc. 77, at 9.

These instructions, which Leahy did not and does not now challenge, track language from the Supreme Court and this Court on how to interpret other criminal statutes that require "but-for" causation. *See Burrage v. United States*, 571 U.S. 204, 212 (2014); *United States v. Benjamin*, 958 F.3d 1124, 1132 (11th Cir. 2020). This standard "is not a difficult burden to meet." *United States v. Salinas*, 918 F.3d 463, 466 (5th Cir. 2019) (internal quotation marks and citation omitted). But it does require that where elements of a statute include "because" or "because of" language, the government must prove that the defendant would not have acted but-for the existence of that fact. *Burrage*, 571 U.S. at 212-213.

Just as this standard establishes the proof necessary to show that a defendant acted "because of" the victim's race, it also establishes the meaning of the element "because" of the victim's use of the public facility. As such, the district court correctly instructed the jury that the government had to prove but-for causation for both of Section 245's "because" elements. *See* Doc. 77, at 9-10.

b. Leahy's argument confuses the issue. He asserts that the "because of" included in the first intent element of Section 245(b)(2)(B) means something different than the "because" used in its second intent element. *See* Br. 39. "[I]dentical words used in different parts of the same act"—let alone within the same subsection and phrase—"are intended to have the same meaning." *United States v. Garcon*, 54 F.4th 1274, 1278 (11th Cir. 2022) (quoting *Utility Air Regul.*

Grp. v. Environmental Prot. Agency, 573 U.S. 302, 319 (2014)). Leahy's insistence that the issue is unclear (Br. 39)—an insistence made for the self-serving purpose of maintaining his innocence—does not make it so. "Because" means "because." And where the Supreme Court has determined that "because" requires proof of "but-for" causation, that is so for both the protected class and protected activity elements of Section 245(b)(2)(B).

Leahy next argues that Section 245(b)(2)(B) must be read to require specific intent to avoid encompassing all circumstances where the defendant simply holds animus toward a victim or their use of a public facility. Br. 39. As an initial matter, Leahy's reading of the statute conflicts with the statute's language. Congress chose where to include a showing of specific intent and it did not choose to do so with Section 245(b)(2)(B). In three other Section 245 subsections, Congress included a specific intent element, stating that a person violates those subsections if they interfere with any person "in order to intimidate such person or any other person or any class of persons" from engaging in protected activities. *See* 18 U.S.C. 245(b)(1), (b)(4), (b)(5). And, even there, Congress included it as one option to violate the statute, in addition to acting "because" the victim is engaging in certain activities. *Ibid.* "It is generally presumed that Congress acts intentionally and purposely where it includes particular language in one section of a statute but omits it in another." *Lippert v. Community Bank, Inc.*, 438 F.3d 1275,

1279 (11th Cir. 2006) (alteration and citation omitted). This Court should reject Leahy's efforts to rewrite Section 245.

Further, Section 245(b)(2)(B) requires proof that a defendant took specific action because of a victim's protected class and because the victim exercised his rights. 18 U.S.C. 245(b)(2)(B). Penalizing prohibited *action* a defendant has taken is different than penalizing certain beliefs, and doing so prevents Section 245 from criminalizing conduct solely because of a defendant's beliefs or racial animus. *See, e.g.*, *United States v. Miller*, 767 F.3d 585, 592 (6th Cir. 2014).

B. Leahy's challenge to the district court's refusal to give a theory of defense instruction fails.

1. Standard of review.

A district court's refusal to give a theory of defense instruction "is reversible error only when (1) the proposed instruction is correct, (2) the instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present an effective defense." *Ndiaye*, 434 F.3d at 1273. "If the instruction . . . [is] confusing, it need not be given at all." *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984) (citation omitted).

2. The district court did not abuse its discretion by declining to give a theory of defense instruction that misstated the second "because" element.

Leahy asked the district court to instruct the jury that if they found that Leahy "would have behaved in the same way" if J.T. had not used Starkey Road, they must find Leahy not guilty. Doc. 69, at 3; Doc. 84, at 167, 207-211. Leahy sought this instruction to summarize the central theory of his closing argument: "Now, change the one fact that matters. It's not on Starkey Road. It's on Ulmerton Road. . . . What do you think happens? Exactly the same thing that happened in this case. . . . That's because Jordan Leahy didn't care that [J.T.] was using Starkey Road." Doc. 84, at 189-190.

This theory is incorrect. Instructing the jury that they could not find Leahy guilty because he would have attacked J.T. if he had been using a *different* public road conflicts with the statute. Section 245 is not about any one, specific public facility. It is about ensuring that all citizens can use public facilities—whichever, and wherever they may be—without the threat of discriminatory violence. *See* S. Rep. No. 721 at 1838 (Section 245 is "designed to deter and punish interference by force or threat of force with activities protected by Federal law or the Constitution and specifically set out in the [statute].").

Finding otherwise would be akin to finding that a defendant could not be convicted of violating Section 245 for attacking a Black person because of his race

because, in an alternate reality, he also would have attacked a Latino person because of his race. The specific race is not the issue. Rather, it is the fact that a defendant would attack someone *because of their race* (and because of their use of a public facility), whatever that race may be, that brings his conduct within Section 245(b)(2)(B)'s reach. The fact that a defendant would commit the same crime in another set of circumstances that similarly satisfies the statute does not absolve him of the crime he committed in the charged circumstances. Leahy's contrary arguments are senseless, and the district court did not abuse its discretion in refusing to dignify his theory by including it in the jury instructions.

Even if Leahy's requested theory was an accurate statement of law, there is still no abuse of discretion because Leahy's defense was not seriously impaired. As Leahy conceded to the district court, the instruction he asked for was his "whole closing argument." Doc. 84, at 210; *see also* Br. 42 (acknowledging that his closing argument "almost exclusively focused on whether [he] acted 'because' of Starkey Road"). During closing argument, Leahy argued exactly what he asked the court to instruct the jury: that the evidence showed that he did not act because of J.T.'s use of the public road because Leahy would have acted the same way if he encountered J.T. on some other road. Doc. 84, at 189-190. Because the court allowed Leahy to put his theory of defense before the jury during his closing

argument, his defense was not impaired, and the court did not abuse its discretion. *United States v. Stanley*, 765 F.2d 1224, 1236 (5th Cir. 1985).[6]

Notably, Leahy does not argue otherwise. Using an older recitation of the rule, Leahy focuses on how important the instruction was to his defense and ignores whether that defense was "seriously impaired." *See* Br. 41-42. But reversal requires not only that the issue was important but also that denying the instruction impaired the defense. *See, e.g.*, *United States v. Anderson*, 1 F.4th 1244, 1260 (11th Cir. 2021). Because Leahy did not, and cannot, make that showing, this Court should affirm.

C. Leahy's challenge to the district court's answer to the jury's question fails.

1. Standard of review.

This Court reviews a trial court's refusal to give a requested jury instruction for an abuse of discretion. *United States v. Gumbs*, 964 F.3d 1340, 1347 (11th Cir.

[6] Importantly, Leahy's theory-of-defense was not a defense like the affirmative defenses of good faith or self-defense, which require the court to allow the jury to excuse a defendant's otherwise guilty acts. *See, e.g.*, *United States v. Opdahl*, 930 F.2d 1530, 1533-1534 (11th Cir. 1991) (finding that the trial court abused its discretion when it refused to give theory of defense that provided "legitimate and lawful alternative explanation[s] for defendant's actions"); *United States v. Ruiz*, 59 F.3d 1151, 1154-1155 (11th Cir. 1995) (finding that the trial court abused its discretion when it refused to give theory of defense on "mistake of fact").

2020), *cert. denied*, 141 S. Ct. 1282 (2021).[7] "We must have a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberation before reversing a conviction on a challenge to the jury charge." *United States v. Joyner*, 882 F.3d 1369, 1375 (11th Cir. 2018) (internal quotation marks and citation omitted).

2. The district court did not abuse its discretion by declining to answer the jury's question.

On its second day of deliberations, the jury asked the district court, "[d]oes the fact that both parties were on the road at the same time suffice part four of charges [sic]?" Doc. 86, at 11. The court did not abuse its discretion by declining to answer this yes-or-no question. "[T]he jury may not enlist the court as its partner in the fact-finding process," and courts should therefore "proceed circumspectly" when answering questions that seek "a simple affirmative or negative response [that] might favor one party's position, place undue weight on certain evidence, or indicate that the trial judge believes certain facts to be true when such matters should properly be determined by the jury." *United States v.*

[7] Where a defendant fails to object to an instruction, this Court reviews the instruction for plain error. *See United States v. Wright*, 392 F.3d 1269, 1277 (11th Cir. 2004). While Leahy argued in his Rule 33 motion that the district court should grant him a new trial because it declined to answer the jury's question (Doc. 89, at 18-19), Leahy did not object to the court's answer to the jury at the time (Doc. 86, at 14). To the extent the abuse of discretion standard applies to Leahy's challenge based on defense counsel's discussion with the court about its answer to the jury's question, Leahy cannot carry his burden. He also loses under plain error review.

Walker, 575 F.2d 209, 214 (9th Cir. 1978); *see also United States v. Jackson*, 249 F. App'x 130, 134 (11th Cir. 2007). Especially when a question seeks a "yes" or "no" answer, a district court's response may lead the jury to not only "place undue emphasis" on the court's answer, but also to believe that the court sees the evidence in accordance with the question. *Arizona v. Johnson*, 351 F.3d 988, 992-998 (9th Cir. 2003). Declining to answer a question like the jury's here, which "effectively ask[s] the court . . . whether a particular element of the offense had been proved under a hypothetical set of assumptions," is not an abuse of discretion. *United States v. Jackson*, 69 F.4th 495, 501 (8th Cir. 2023).

Leahy's arguments do not compel a different conclusion. He argues first that because an answer of "no" makes clear such evidence would be insufficient to convict him as a matter of law, the court should have instructed the jury accordingly. Br. 44. But answering the jury's question in this way may have implied that Leahy and J.T.'s presence on the road in fact *was* the only evidence that Leahy acted because of J.T.'s use of the road. That implication not only clearly favors Leahy—which the court was not authorized to do—but it also disregards other evidence which speaks to his intent, including his actions during his attack on J.T., his statements over the course of the evening, and his previous interactions with drivers and Black people. Accordingly, answering "no" to the jury's question could have done precisely what courts aim to avoid when they

decline to answer such a question. *See Walker*, 575 F.2d at 214; *Jackson*, 249 F. App'x at 134; *Johnson*, 351 F.3d at 992-998; *Jackson*, 69 F.4th at 501.

Leahy next argues that the district court erred in seeing any ambiguity in the jury's question. This argument is inconsistent with the record. Both Leahy and the prosecutors agreed with the district court that there was some ambiguity to the jury's question. *See* Doc. 86, at 11-15. Leahy's counsel stated that the court was right that they "need to understand [the jury's] question," and continued that "*if* the question is, as I think it is, the answer is no as a matter of law." Doc. 86, at 12 (emphasis added). Recognizing the ambiguity while still seeking to provide guidance, the court informed the jury that it could not answer their question but might be able to answer another question if they continued to struggle. Doc. 86, 13-16. In so doing, the court acted well within its discretion. Moreover, because earlier instructions accurately portrayed the law, this court can safely conclude that the absence of any "further inquiry" from the jury indicates that they resolved their confusion and acted in accordance with their instructions. *United States v. Batson*, 818 F.3d 651, 661-662 (11th Cir. 2016).

Leahy lastly argues that because the jury returned with a "split verdict that itself conflicted with a finding that Leahy acted 'because' of J.T.'s use of Starkey Road" shortly after the court declined to answer its question, this Court can fairly infer that the jury remained confused. Br. 45. Not so. To begin with, the jury's

verdict was not inconsistent or contradictory. The jury could consistently find that Leahy's attack on J.T. while he was in the car was because of J.T.'s use of the road, but that Leahy's attempted attack on J.T. while they faced-off in the street was not. Regardless, even where a jury returns an inconsistent verdict, that result does not negate the presumption that the jury understood and followed their instructions.

Ultimately, "[d]istrict courts have considerable discretion regarding the extent and character of supplemental jury instructions, so long as those instructions do not misstate the law or confuse the jury." *United States v. Moore*, 76 F.4th 1355, 1373-1374 (11th Cir. 2023) (internal quotation marks and citation omitted). By declining to answer the jury's factual question, the court neither misstated the law nor confused the jury, which was free to return with another question. There was no abuse of discretion.

D. There was no error—cumulative or otherwise.

Leahy contends that the cumulative effect of the district court's allegedly improper instructions to the jury warrants a new trial. Br. 46. But "where there is no error or only a single error, there can be no cumulative error." *United States v. House*, 684 F.3d 1173, 1210 (11th Cir. 2012). For the reasons explained above, the district court did not abuse its discretion or otherwise err in its instructions to the jury. The accumulation of these non-errors does not warrant a new trial.

However, even if the district court did err, Leahy still would not be entitled to reversal. This Court may only reverse a conviction for cumulative error "where an aggregation of non-reversible errors yields a denial of the constitutional right to a fair trial." *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014); *see also United States v. Ladson*, 643 F.3d 1335, 1342 (11th Cir. 2011) ("There is no cumulative error where the defendant cannot establish that the combined errors affected his substantial rights." (internal quotation marks and citation omitted)). "A defendant is entitled to a fair trial but not a perfect one." *United States v. Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005) (citation omitted).

Here, the jury heard uncontested testimony that Leahy approached J.T. while driving, yelled racial slurs, gestured as if he was going to shoot him, and attempted to ram his car off the road three times. They heard that Leahy often talked about attacking and killing Black people he encountered around town, and that he bragged about his attempts to force cars off the road. They heard Leahy's own statements, which bolstered the conclusion that Leahy attacked J.T. because Leahy considered him "an animal" who, while driving down a public road, was not in his proper "area." This evidence easily warrants a conviction for forcefully interfering with someone because of their race and their use of a public facility. Given this, Leahy cannot plausibly show that the combination of his purported errors deprived him of the constitutional right to fair trial.

III. The district court properly denied Leahy's motions for acquittal and for a new trial.

A. There was sufficient evidence to withstand Leahy's motion for a directed verdict.

1. Standard of review.

This Court reviews *de novo* whether sufficient evidence exists to support a challenged conviction. *See United States v. Reeves*, 742 F.3d 487, 497 (11th Cir. 2014). Under this standard, the Court views the evidence in the light most favorable to the jury verdict, draws all inferences in favor of that verdict, and determines whether a reasonable jury could have found a defendant guilty beyond a reasonable doubt. *Ibid.* A jury's verdict "cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013).

2. The district court properly denied Leahy's motion for a directed verdict.

As the district court correctly determined, Leahy cannot meet his high burden to challenge the verdict. Leahy argues that there is insufficient evidence to sustain the verdict because the government did not prove that he would not have attacked J.T. (1) but-for Starkey Road in particular, and (2) but-for J.T.'s use of Starkey Road. Both arguments are misplaced.

First, as discussed above, the United States did not have to prove that Leahy had some intent specific to Starkey Road. *See* pp. 21, 36-37, *supra*. Rather, it had to prove that he attempted to use and did use force against J.T. because of, *inter alia*, J.T.'s use of a public facility. 18 U.S.C. 245(b)(2)(B).

Second, the government presented sufficient evidence for a jury to reasonably conclude that Leahy did act because J.T. was using a public facility. In particular, the evidence of Leahy's attack on J.T. included Leahy using threatening and racially offensive language, while gesturing as if he was going to shoot J.T. as J.T. drove down the road; Leahy trying to run J.T. off the road twice from the side and once from behind; and Leahy stating later that Black people were "animals" who had to be "ke[pt] in their areas." *See* pp. 2-6, *supra*. This evidence was sufficient for the jury to convict under Section 245(b)(2)(B). *See United States v. Price*, 464 F.2d 1217, 1218 (8th Cir. 1972) (finding a defendant's argument was frivolous when he contended that his attack on the victim "would have happened anywhere; [was] only incidentally [on] federal property; and that there was no showing that [the defendant] intended to deprive [the victim] of the use of the [public] facilities").

Leahy ignores the evidence of his actions during the attack and argues that the only evidence that he attacked J.T. because of J.T.'s use of the road was his post-incident statement about where Black people should be "kept." Br. 48-49.

But Leahy's conduct speaks for itself. Evidence that a defendant physically impeded (even if only temporarily) a victim's movement in a public facility is sufficient to show that the defendant acted because of the victim's use of the facility. *See Price*, 464 F.2d at 1218 (noting that "a person intends the natural and probable consequences of acts knowingly done"); Doc. 77, at 8 (instructing jury that they "may infer" the same). Regardless, a nearly identical statement has been deemed sufficient to support a Section 245 conviction. In *United States v. Baird*, a court found that there was "ample evidence to support the jury's verdict" relying on the defendant's statement that "we need to get these niggers out of our territory." No. 98-10114, 1999 WL 568862, at *2 (9th Cir. Aug. 3, 1999).

The government and Leahy both argued what they viewed the jury could appropriately infer from the evidence presented. The jury, in turn, was "free to choose between or among the reasonable conclusion to be drawn" and its verdict "cannot be overturned if any reasonable construction of the evidence would have allowed [it] to find the defendant guilty beyond a reasonable doubt." *Rodriguez*, 732 F.3d at 1303. The evidence here was sufficient for a jury to reasonably determine that Leahy attacked J.T. because J.T. was Black and was using a public road, and this Court should affirm.

B. The district court did not abuse its discretion by denying Leahy's motion for a new trial.

1. Standard of review.

This Court reviews a district court's denial of a Federal Rule of Criminal Procedure 33 motion for an abuse of discretion. *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009). "A motion for a new trial based on the weight of the evidence is not favored and is reserved for really exceptional cases." *United States v. Moore*, 76 F.4th 1355, 1363 (11th Cir. 2023) (internal quotation marks and citation omitted). While the court reviews both grants and denials of Rule 33 motions for an abuse of discretion, it "give[s] denials greater deference." *Ibid.* "For a new trial to be warranted, the evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019) (internal quotation marks and alteration omitted) (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)).

2. The district court acted within its discretion in denying a new trial.

This is not an exceptional case that warrants a new trial. As the district court found, there was "plenty of evidence to support the verdict." Doc. 115, at 5. The court pointed to Leahy's statements "together with the undisputed circumstances of

[how Leahy] attacked the victim because he was driving along Starkey Road." Doc. 93, at 3.

Leahy's conviction was not, as he argues, "based on a single statement about keeping [B]lack people in their areas." Br. 50. Rather, that statement provided additional context to Leahy's actions. And when considering Leahy's actions—specifically, yelling racial slurs and gesturing as if he was going to shoot J.T. while J.T. was driving down the road, and trying to ram J.T.'s car off the road three times—a jury could readily and reasonably find Leahy guilty of violating Section 245(b)(2)(B). No inconsistent evidence "preponderate[s] heavily against the verdict," *Brown*, 934 F.3d at 1297, and justice does not require granting a new trial.

While ignoring most of the evidence, Leahy instead argues that the jury's "clear confusion" about the second "because" element warrants a new trial. Br. 50. But a jury is presumed to follow—and thus understand—the court's instructions, and the court here properly instructed the jury on the meaning of "because" of J.T.'s use of a public facility. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Thus, this court can presume that the jury understood that if it had any additional questions about this element, it could bring that question to the court. It chose not to do so, "and it may fairly be presumed that they had nothing further to ask." *Ibid.* (quoting *Armstrong v. Toler*, 24 U.S. 258, 279 (1826)). Based on the

complete jury instructions, and their correct description of but-for causation on this element, *see* pp. 32-33, *supra*, the jury had all it needed to decide whether Leahy violated Section 245. No basis exists to disturb the verdict and order a new trial, and the district court did not abuse its discretion in failing to do so.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,610 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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