No. 23-3962

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL J. ZACHARIAS,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with defendant-appellant that oral argument is unnecessary. Should this Court determine otherwise, the United States will appear.

JURISDICTIONAL STATEMENT

This appeal is taken from an entry of a judgment in a criminal case in the Northern District of Ohio. The district court had jurisdiction under 18 U.S.C. 3231. The court entered judgment on November 17, 2023. Judgment, R.128, PageID#2890-2897; Amended Judgment, R.146, PageID#3046-3053.[1] Defendant-appellant Michael Zacharias filed a timely notice of appeal. Notice of Appeal, R.131, PageID#2910. This Court has jurisdiction under 28 U.S.C. 1291.

INTRODUCTION AND STATEMENT OF THE ISSUES

Defendant-appellant Michael Zacharias was a Catholic priest who served in several parishes in Northwest Ohio between 1999 and 2020. A jury convicted him on five sex trafficking charges: two counts of sex trafficking of a minor and by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), (b)(1) and (b)(2); and three counts of sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1) and (b)(1). Superseding Indictment, R.45, PageID#118-121. The district court imposed a sentence of life imprisonment. Amended Judgment, R.146, PageID#3047. There are five issues on appeal:

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[1] "R.__, PageID#__" refers to the docket entry and page number of documents filed on the district court's docket. "Tr.__" refers to the volume of the trial transcript. "GX __" refers to the number of the government exhibit, provided to the Court via CD/DVD. "Br. __" refers to the internal pagination of defendant-appellant's opening brief.

1. Whether the district court violated Zacharias's constitutional rights by reciting this Court's pattern *Allen* instruction to the jury outside the presence of the parties and counsel, after defense counsel had the opportunity to review and object to the content of the instruction before it was given.

2. Whether the district court abused its discretion by admitting evidence that Zacharias viewed gay pornography and related searches as probative of his interest in seeking commercial sex from minors.

3. Whether the district court abused its discretion by admitting expert testimony regarding "grooming" to aid the jury in understanding how Zacharias's conduct served his ultimate goal of engaging in sexual acts with his victims.

4. Whether a single remark during rebuttal was not plainly improper and did not affect Zacharias's substantial rights given that the remark was neither flagrant nor likely to affect the outcome of Zacharias's trial.

5. Whether any cumulative error exists that warrants a new trial.

STATEMENT OF THE CASE

A. Factual Background

During the 1999-2000 school year, Zacharias worked at a Catholic elementary school in Toledo, Ohio, as part of his studies to become a priest. Tr.7, R.110, PageID#2246. There, Zacharias met the three victims of his crimes—brothers Robert, a sixth-grader, and Grant, a kindergartener, and an eighth-grader

named Graham. Tr.2, R.104, PageID#837, 850; Tr.7, R.110, PageID#2249, 2259. As further explained below, Zacharias began to groom his victims during that year, a process that continued in the years after he left the parish. His insidious efforts led to more than a decade of coerced commercial sex acts with his victims that ended in 2020, and, even then, only because law enforcement intervened. *See*, pp. 3-14, *infra*.

1. Robert (1999-2020)

When Zacharias met 11-year-old Robert, Zacharias quickly learned that Robert's home life was unstable: his absent father had been abusive, his mother worked constantly to make ends meet, his house was a mess, and Robert shouldered much of the burden of caring for his siblings in his mother's absence. Tr.2, R.104, PageID#856-861. Recognizing Robert's difficulties, Zacharias mentored Robert, making frequent visits to his family's home and befriending his mother. Tr.2, R.104, PageID#870; Tr.7, R.110, PageID#2252-2255, 2276-2278. His visits often occurred when Robert's mother was not home, and he would also take Robert on walks around the neighborhood. Tr.2, R.104, PageID#870, 873; Tr.7, R.110, PageID#2255. When Robert got meningitis in June 2000, Zacharias sat with Robert in his hospital room, playing video games and gifting him a special rosary blessed by the pope. Tr.2, R.104, PageID#865-868, 1002-1005; Tr.7, R.110, PageID#2256-2257.

a. Zacharias's commercial sex acts with Robert as a minor

Robert saw Zacharias as a friend with whom he could be open about his struggles, and as "one of the only people that cared about [him] in [his] life." Tr.2, R.104, PageID#1008-1009. Zacharias left Robert's parish after one year, but he continued to be a constant in Robert's life as Robert faced problems during junior high and high school with drugs and alcohol. *Id.* at PageID#1008, 1012-1014, 1020-1024; Tr.7, R.110, PageID#2256-2257. When Robert was in juvenile detention, Zacharias used his "special privileges . . . []as a [p]riest" to visit Robert there. Tr.2, R.104, PageID#1020-1021; Tr.7, R.110, PageID#2278-2279. Even without a license, Robert drove to visit Zacharias at a parish two hours away in Mansfield, Ohio. Tr.2, R.104, PageID#1021-2022. Zacharias would always give Robert a little money when he visited him in Mansfield, which Robert thought of as friendly help. Tr.2, R.104, PageID#1025. Zacharias did so even though he knew that Robert was regularly using opioids because he observed Robert suffering from withdrawal sickness and snorting crushed opioid pills. *Id.* at PageID#1046, 1058.

During their continued visits and phone calls, Zacharias started asking Robert about his girlfriends and about sex in graphic terms, including whether Robert's girlfriend had performed oral sex on him. Tr.2, R.104, PageID#1026-1028. Robert thought it was just "guy talk"; a high school girlfriend, however,

thought Zacharias was trying to "get in [Robert's] pants." *Id.* at PageID#1028-1029. While Robert laughed it off, Zacharias, who was on the phone when she made the comment, told Robert that "she's right, that's what he wants." *Id.* at PageID#1029-1030.

After that discussion, and knowing that Robert was financially unstable and struggling with drug use, Zacharias repeatedly offered Robert money if he allowed Zacharias to perform sexual acts with him. Tr.2, R.104, PageID#1030-1032, 1048-1050, 1058. Eventually, Robert "gave in" and took increasing amounts of money from Zacharias in exchange for escalating sexual acts. *Id.* at PageID#1030-1036, 1045-1048. This culminated in Zacharias paying Robert $1500 in exchange for allowing Zacharias to perform oral sex on him for the first time at the rectory in Mansfield. *Id.* at PageID#1030-1037, 1039, 1043-1045. Zacharias performed oral sex on Robert several more times at the Mansfield parish. *Id.* at PageID#919-921, 1048-1049; *see also id.* at PageID#892-894. Robert was under 18 years old at the time of these sexual encounters. *Id.* at PageID#1050-1059, 1064-1065. Zacharias told Robert that if anyone found out about what they were doing, "the church would suffer" or "[Robert] could be arrested for prostitution." *Id.* at PageID#1059.

b. Zacharias's commercial sex acts with Robert as an adult

Zacharias continued to perform oral sex on Robert in exchange for money after Robert turned 18 years old and as Robert struggled with drug addiction. Tr.2,

R.104, PageID#1057-1061, 1096-1097, 1103-1115. Zacharias would pay Robert in cash, checks, gift cards, or a combination of these payments. *See, e.g.*, *id.* at PageID#1025-1026, 1032, 1057; GX 1059-1061, 1063-1070, 1092. When Zacharias did not perform commercial sex acts on Robert during visits, they would talk about Robert's problems; Robert felt as though he "had [his] friend back" during these times. Tr.2, R.104, PageID#1072-1074. When commercial sex acts did occur, Robert would often try to be in withdrawal from opioids, which would hasten the conclusion of these acts, and he would try to distract himself with heterosexual pornography. *Id.* at PageID#1073.

Though Robert's drug use continued to worsen, Zacharias never tried to help Robert end his addiction—rather, he exploited it. Tr.2, R.104, PageID#1076-1077, 1087, 1096-1097. When Zacharias visited Robert when he was living in filthy conditions, Zacharias did not offer resources for Robert to find better housing or to get support for his addiction. *Id.* at PageID#1077-1078. Instead, Zacharias handed Robert hospital wipes to cleanse himself and then paid Robert to let Zacharias perform oral sex. *Id.* at PageID#1077-1078. Robert, in turn, used this money to pay for drugs. *Id.* at PageID#1080-1081.

Even after Robert went to prison for two years from 2010 to 2012, Zacharias continued to exploit Robert's drug addiction and financial instability. Tr.2, R.104, PageID#1103-1105; Tr.3, R.106, PageID#1368-1369, 1375, 1379-1382, 1385-

1388, 1398. He would regularly send Robert texts of a sexual nature, requesting oral sex, sexual photographs or videos, or role play of Zacharias's sexual fantasies. Tr.3, R.106, PageID#1373, 1397-1398; *see also* GX 85 and 87, 102-103.

In 2015, Zacharias paid Robert to film an "action" video of Zacharias performing oral sex on Robert and a "confession" video in which Zacharias confessed his sexual attraction to Robert as a minor. Tr.2, R.104, PageID#1103-1111; Tr.3, R.106, PageID#1364-1367, 1391-1395; GX 65, 67-68. While filming the confession video, Zacharias said that he was attracted to Robert when they first met during Robert's time in sixth grade and that he started "grooming" Robert to engage in sex acts. Tr.3, R.106, at PageID#1391-1395. This was the first time Robert ever heard this term used to describe their relationship, and he realized that Zacharias "had his own agenda" and "just trained [Robert] the whole way." *Id.* at PageID#1395.

Police later discovered Robert's commercial sex acts with Zacharias upon arresting Robert on drug charges. Tr.2, R.104, PageID#1036-1038. After searching Robert's phone, they found messages with Zacharias, which prompted the investigation into Zacharias's conduct. *Id.* at PageID#1036-1038. Robert did not want to come forward about these allegations and never spoke about them with anyone before this investigation in 2020. *Id.* at PageID#1036-1037.

2. Grant (2010-2013)

When Robert went to prison in 2010, Zacharias starting reaching out more often to Robert's brother Grant, who was a minor at the time. Tr.2, R.104, PageID#1090-1093; Tr.4, R.107, PageID#1627-1631. By that time, Grant was struggling with opioid addiction and the challenges of withdrawal sickness. Tr.4, R.107, PageID#1620-1626. Because of Zacharias's longstanding relationship with Robert and his family, Grant considered Zacharias someone he could trust; for this reason, he confided in him about his struggle with opioids. *Id.* at PageID#1608-1613, 1623. Zacharias even visited Grant at home when Grant was going through withdrawal sickness. *Id.* at PageID#1627-1631. Zacharias also gave money to Grant, and Grant was aware that he had done the same for Robert. *Id.* at PageID#1614-1615. Zacharias was the only father figure in Grant's life when Robert went to prison and after his grandfather's tragic death. *Id.* at PageID#1655-1656. Despite being aware of Grant's drug problems, Zacharias never made any attempt to help Grant overcome them. *Id.* at PageID#1623-1624. Rather, he exploited them.

a. Zacharias's commercial sex acts with Grant as a minor while Robert is in prison from 2010-2012

As with Robert, Zacharias began to ask Grant about sex with his girlfriend, eventually admitting that Zacharias "wishe[d] it was him" and not Grant's girlfriend performing oral sex on Grant. Tr.4, R.107, PageID#1624-1625. Grant

first succumbed to Zacharias's requests for oral sex when he was 15 years old and home from school with withdrawal sickness just after Robert's arrest. *Id.* at PageID#1631-1637. Grant told Zacharias he was "dope sick"; when Zacharias offered Grant money if Zacharias could perform oral sex on Grant, Grant considered how the money would help recover from withdrawal and eventually agreed. *Id.* at PageID#1632-1637. After performing oral sex, Zacharias paid Grant $50, which Grant told Zacharias was the cost of one opioid pill, and quickly left Grant's house. *Id.* at PageID#1632-1637.

After that, Zacharias called Grant more frequently and his calls and texts became more sexually explicit. Tr.4, R.107, PageID#1638-1640, 1644-1649. Grant's drug addiction continued to worsen and cause problems in his life. *Id.* at PageID#1644-1660. Shortly after the first incident, and before Robert was out of prison, Grant again let Zacharias perform oral sex on him in exchange for money to buy drugs. *Id.* at PageID#1638-1641. Grant was a minor until five days before Robert's release from prison. *Id.* at PageID#1661.

b. Zacharias's commercial sex act with Grant when Robert is in drug rehabilitation in 2013

With Robert's release from prison in 2012, Grant had fewer and fewer visits from Zacharias. Tr.4, R.107, PageID#1668-1669. But in May 2013, Zacharias visited Grant at his house and asked him if he needed money; Grant said yes and allowed Zacharias to perform oral sex on him. Tr.4, R.107, PageID#1661-1667.

Zacharias paid Grant more money this time because Grant's drug addiction had moved on to heroin, which was more expensive than the opioid pills he had been taking. *Id.* at PageID#1666-1667. Grant knew that Zacharias was aware that Grant said yes to his advances only because of his withdrawal sickness, because Zacharias had asked Grant if he knew any other drug addicts who might want to make money by engaging in commercial sex acts. *Id.* at PageID#1668-1670. As he did with Robert, Zacharias told Grant not to tell anyone because Zacharias would get in trouble. *Id.* at PageID#1664-1665, 1667. And like Robert, Grant never wanted to tell anybody about Zacharias's conduct, but he had little choice once Robert's story came to light. *Id.* at PageID#1670-1671.

3. Graham (1999-2000 and 2008-2020)

During Graham's eighth-grade year in Toledo, he developed a close relationship with Zacharias. Tr.5, R.108, PageID#1884-1886; Tr.7, R.110, PageID#2261-2262. Graham saw Zacharias daily at school and also worked with him as an altar boy. Tr.5, R.108, PageID#1884-1886, 1894-1898. Graham thought of Zacharias as a friend—Zacharias came to Graham's house, visited with him at school sporting events, and made Graham feel like the center of attention and more grown up when they talked. *Id.* at PageID#1896-1901. Zacharias took an interest in Graham's home life and interests; he also asked Graham about girls, which made Graham feel cool. *Id.* at PageID#1902-1905.

a. Zacharias's sexual abuse of Graham as a minor (1999-2000)

While Graham was in eighth grade, Zacharias made repeated efforts to see or touch Graham's penis. Tr.5, R.108, PageID#1902-1918. The first time, Graham was running in the hallway at school, and Zacharias felt Graham's penis as he passed him. *Id.* at PageID#1904-1907. Zacharias then told Graham that the "rumor" around school was that Graham had a big penis; Zacharias told Graham that the rumor was true. *Id.* at PageID#1907. Another time at a house near the school, Zacharias asked to see Graham's penis, and Zacharias slid his hand up Graham's shorts to feel his penis while acting like it was a joke. *Id.* at PageID#1908-1911. Zacharias told Graham that Graham's penis was "so big" and used other terms describing its size. *Id.* at PageID#1911. Graham pushed Zacharias away, and later that same night he got "really drunk for the first time." *Id.* at PageID#1911-1915. He tried to report Zacharias's conduct to the head pastor at school, but the pastor was dismissive, saying it was "all in [Graham's] head." *Id.* at PageID#1914-1915. As a result, Graham never again tried to tell anyone about the abuse he faced at that time. *Id.* at PageID#1915.

Graham tried to avoid being alone with Zacharias, but unexpectedly encountered Zacharias in the basement of the house near school. Tr.5, R.108, PageID#1915-1919. Zacharias again jokingly grabbed Graham's penis and then pulled Graham's shorts down. *Id.* at PageID#1915-1918. Zacharias began to

perform oral sex on Graham, and Graham froze. *Id.* at PageID#1915-1918. Graham eventually "snapped out of it" and stopped Zacharias. *Id.* at PageID#1915-1918. Because of the head pastor's earlier reaction, Graham never told anyone about this incident and hoped it would all go away when he left the school after eighth grade. *Id.* at PageID#1918-1919. Graham did not speak about these events until the police investigation in 2020. *Ibid.*

b. Zacharias's commercial sex acts with Graham as an adult (2008-2020)

After eighth grade, Graham had no direct contact with Zacharias until Zacharias called his cell phone out of the blue in 2009. Tr.5, R.108, PageID#1936-1938. At that time, Graham had an opioid addiction that cost around $150 per day to avoid withdrawal sickness, and he was struggling financially. *Id.* at PageID#1936. Graham answered Zacharias's call because he thought Zacharias was going to apologize for what had happened years earlier. *Id.* at PageID#1937. Instead, they talked about Graham's struggles—the bad car accident he recently suffered and his resulting abuse of opioids. *Id.* at PageID#1937-1939. Zacharias offered to help Graham financially if he ever needed anything. *Id.* at PageID#1939. The two continued to talk on the phone after that call. *Id.* at PageID#1939-1940.

Eventually, their conversations shifted in a sexual direction, with Zacharias requesting pictures of Graham's penis in exchange for money. Tr.5, R.108,

PageID#1941-1943. Zacharias also wanted Graham to speak to him in a way that fulfilled his sexual fantasy of submissiveness. *Id.* at PageID#1941-1946; GX 256. Zacharias would pay Graham for these interactions by ordering things on eBay that Graham could sell for cash. *Id.* at PageID#1942-1945. Eventually, Zacharias let Graham use his credit card number for this purpose and later paid Graham by check or other means. *Id.* at PageID#1944, 1946-1949; GX 1100.

When Graham lost all of his money playing poker, he called Zacharias who offered Graham $3500 to see him in person and let Zacharias perform oral sex on him. Tr.5, R.108, PageID#1963-1971. Graham traveled to Zacharias at his parish in Fremont, Ohio, and Graham tried to be as high as possible so he would forget about the experience. *Id.* at PageID#1963-1971. Because Graham was high, he could not maintain an erection, which angered Zacharias. *Id.* at PageID#1970-1971. Graham explained the impact of the drugs on his erection; Zacharias told Graham that he would not pay him during future encounters unless Graham was in withdrawal when he arrived. *Id.* at PageID#1963-1971. Zacharias paid Graham less than was promised, giving him a $1500 check and some cash. *Id.* at PageID#1972. After this visit, Zacharias began to offer Graham less money in exchange for their remote sexual interactions. *Id.* at PageID#1972-1973.

Zacharias also continued to pay Graham to let him perform oral sex on him. Tr.5, R.108, PageID#1977-1979. When Graham went through a period of stability

in 2014, he stopped interacting with Zacharias in person but continued texting Zacharias to play out Zacharias's sexual fantasies. *Id.* at PageID#1980-1982. But when Graham again needed money in 2018, he went back to seeing Zacharias in person for commercial sex acts. *Id.* at PageID#1981-1982. Graham eventually ended all contact with Zacharias in January 2020, but not before Zacharias commented on how attractive Graham's younger brother was and how Graham's young son was going to be "really good-looking" someday. *Id.* at PageID#1979-1982, 2010. After Zacharias's arrest in August 2020, Graham's sister called the tip line and identified Graham as a possible victim, given his relationship with Zacharias. Tr.4, R.107, PageID#1848-1849; Tr.5, R.108, PageID#1856, 1881-1883.

B. Procedural History

A grand jury charged Zacharias in a five-count Superseding Indictment. Superseding Indictment, R.45, PageID#118-121. In Counts 1 (Robert) and 4 (Grant), the grand jury charged Zacharias with sex trafficking of a minor and by force, fraud, and coercion, in violation of 18 U.S.C. 1591(a)(1), (b)(1) and (b)(2). *Id*. at PageID#118-120. The grand jury also charged Zacharias in Counts 2 (Robert), 3 (Graham), and 5 (Grant) with sex trafficking by force, fraud, and coercion, in violation of 18 U.S.C. 1591(a)(1) and (b)(1). *Ibid*. Zacharias proceeded to trial on all charges.

1. Zacharias's motion in limine regarding expert testimony

In advance of trial, Zacharias filed a motion to preclude expert testimony from Federal Bureau of Investigation (FBI) Special Agent (SA) Dan O'Donnell regarding the grooming of minor victims of sexual abuse. Expert Motion in Limine, R.77, PageID#365-367. In particular, Zacharias argued that the court should exclude SA O'Donnell's testimony under Federal Rule of Evidence 401 because it lacked relevance and under Rule 403 because its probative value did not substantially outweigh its prejudicial effect. *Id.* at PageID#366. The government opposed the motion, arguing that SA O'Donnell's testimony was probative to the elements of sex trafficking and would aid the jury in understanding the victims' behavior, as well as how Zacharias was able to "successfully recruit, entice, obtain the victims, and . . . coerce them into engaging in commercial sex." Government's Response, R.84, PageID#636.

The district court denied Zacharias's motion. Order, R.89, PageID#664-666. In ruling that SA O'Donnell could testify, the court found his testimony on grooming proper because, even though grooming is not an element of sex trafficking, "the term is used to describe a variety of behaviors that appear calculated to prepare a child for a future sexual encounter." *Id.* at PageID#665 (internal quotation marks and citation omitted). The court also considered that other federal circuits "have permitted such testimony in similar instances," even

though the Sixth Circuit had not specifically ruled on this type of expert testimony. *Ibid.*

2. Zacharias's trial objection to evidence of his pornographic internet activity

During the trial, Zacharias objected to the government's introduction of evidence from his electronic devices demonstrating his internet activity, including pornographic websites and search terms. Tr.3, R.106, PageID#1547-1549. Zacharias argued that this evidence of web searches including "gay pornography sites" was not relevant and unduly prejudicial. *Id.* at PageID#1547. The government argued that where Zacharias denied that he "committed any sex acts on any minors," the evidence was relevant because the searches included words like "teen boy." *Id.* at PageID#1547-1548. The district court overruled the objection, finding that the materials were relevant to countering Zacharias's denial and sufficiently probative to outweigh any prejudice provided the government did not show any of the underlying content. *Id.* at PageID#1549.

3. Zacharias's absence during the district court's reading of an *Allen* charge

On the second day of deliberations, the jury asked what they should do if they were "not unanimous on only one count." Jury Question, R.95-2, PageID#712. Because Judge Zouhary, the presiding judge, was absent from the courthouse, Judge Knepp held a telephonic conference in his chambers with Judge

Zouhary, the prosecutors, and defense counsel. Tr.9, R.112, PageID#2567-2574. The parties agreed that Judge Knepp should respond to the jury's question with the "Pattern Sixth Circuit Allen charge, 9.04 Deadlocked Jury." *Id.* at PageID#2570. In consenting to the instruction, Zacharias's counsel stated his "preference" that Zacharias be present with counsel for the actual instruction. *Id.* at PageID#2569-2570. To ensure the jury question was answered as "efficiently and promptly as possible," however, Judge Zouhary instructed Judge Knepp to read the *Allen* charge to the jury "without parties or counsel" present. *Id*. at PageID#2570. Defense counsel objected to the instruction "being given without the defendant and his counsel present," and Judge Zouhary noted the objection. *Id.* at PageID#2574. Judge Knepp read the pattern *Allen* instruction to the jury in the jury room with a court reporter present. *Id.* at PageID#2575-2577.

4. Zacharias's conviction and sentence

Following the *Allen* instruction, the jury convicted Zacharias on all counts. Verdict Form, R.97, PageID#718-721. The district court sentenced Zacharias to life imprisonment and entered judgment. Amended Judgment, R.146, PageID#3047. Zacharias timely appealed. Notice of Appeal, R.131, PageID#2910.

SUMMARY OF ARGUMENT

This Court should affirm Zacharias's sex-trafficking convictions because his arguments lack merit and, in any event, do not warrant relief.

1. Zacharias's absence from the courtroom when the district court read the *Allen* charge to the jury was not a reversible error based on Zacharias's due process rights. A defendant has the right to be present at all "critical stages" of trial. But the actual reading of a pattern *Allen* instruction to the jury when Zacharias's counsel reviewed and approved the instruction is not a stage requiring Zacharias's presence. Contrary to Zacharias's argument, the jury would infer nothing from his absence under the circumstances, and any error would be harmless based on the evidence at trial.

2. The district court did not abuse its discretion in admitting evidence of Zacharias's pornographic internet activity. This evidence was probative of Zacharias's sexual interest in minor boys and also corroborated testimony about Zacharias's commercial sex acts. The evidence was not unduly prejudicial. Indeed, the government took steps to limit any shock value by showing only search terms and webpage titles and not any pornographic imagery or content. If anything, the evidence paled in comparison to the videos Zacharias made, and text messages he exchanged, with his victims.

3. The district court also did not abuse its discretion in admitting expert testimony on grooming. Several courts of appeals have permitted this type of expert testimony in cases, as here, involving sexual crimes against a minor. Such testimony is admissible as evidence of a sexual predator's *modus operandi* and to aid the jury in understanding how behavior that seems benign can actually be calculated to obtain a minor's compliance in future sexual acts. In addition, the government limited any potential prejudice or bias by using a "blind expert" who did not know the facts of the case. The court also provided a limiting instruction that further minimized any undue prejudice.

4. The prosecutor's remark about whether the jury would let Zacharias "watch their kids" was a stray remark in rebuttal that was not plainly improper and, in any event, did not affect Zacharias's substantial rights. The remark was not a textbook example of a "golden rule" argument asking the jurors to put themselves in the victim's shoes. However, even if it was a golden rule violation, this stray improper remark was not flagrant enough to require reversal on plain error review.

5. Because Zacharias has not identified any errors, let alone a series of harmless errors, there is no cumulative error. And a new trial would not be warranted in any event.

ARGUMENT

I. The district court's decision to give the *Allen* instruction in the jury room does not constitute reversible error.

The Due Process Clause of the Fifth Amendment and the Confrontation Clause of the Sixth Amendment together provide a defendant with the right to be present at all "critical stages" of a criminal trial. *United States v. Hills*, 27 F.4th 1155, 1187 (6th Cir.) (citation omitted), *cert. denied*, 143 S. Ct. 305 (2022) and 143 S. Ct. 606 (2023); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam). When a defendant "is not actually confronting witnesses or evidence against him," the right to be present derives from due process protections for a "fair and just hearing" rather than a criminal defendant's right to confrontation. *Gagnon,* 470 U.S. at 526 (citation omitted). These due process protections depend on whether defendant's "presence has a relation, reasonably substantial, to the fullness of [the] opportunity to defend against the charge." *United States v. Brika*, 416 F.3d 514, 526 (6th Cir. 2005) (citations omitted). Thus, a defendant has the right to be present "at any stage of a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Because Zacharias's absence occurred during a supplemental jury instruction, the due process standard governs here.

A. Standard of review

This Court reviews *de novo* a preserved constitutional challenge. *United States v. Dedman*, 527 F.3d 577, 591 (6th Cir. 2008).

B. The district court's reading of the *Allen* instruction to the jury was not a "critical stage" requiring Zacharias's presence.

This Court typically treats a district court's "reinstruction of the jury" during ongoing deliberations as a critical stage of a trial that requires the presence of defendant and his counsel. *Brika*, 416 F.3d at 525. In this context, the right ensures that a defendant can "assist his counsel" and, through presence in front of the jury, "act as a psychological brake on its deliberations." *Id.* at 527. But a defendant's right to be present is "not guaranteed when defendant's presence would be useless, or the benefit but a shadow." *Stincer*, 482 U.S. at 745 (internal quotation marks and citation omitted). The Supreme Court has held, for example, that a defendant's right to be present is not violated by his absence from a witness competency hearing involving no questions about substantive testimony at trial, *id.* at 745-746, or from an *in camera* discussion with a juror regarding concerns over the defendant's courtroom behavior, *Gagnon*, 470 U.S. at 527; *see also United States v. Davis*, 809 F.2d 1194, 1200-1201 (6th Cir. 1987) (permitting *in camera* discussion with government counsel regarding peremptory strikes challenged as discriminatory). Such a determination requires "careful[ly] weighing . . . the

context of the proceeding, as provided by the whole record." *Davis*, 809 F.2d at 1195.

Relying on these guiding principles, this Court has identified several instances in which a supplemental jury instruction does not constitute a critical stage of a criminal trial. One instance is when the "judge did nothing more than give jurors a technical and perfunctory rereading or explanation of previously-given jury instructions." *Brika*, 416 F.3d at 527; *see also United States v. Henderson*, 626 F.3d 326, 343 (6th Cir. 2010) (applying the same reasoning to the court's *ex parte* response rejecting the jury's request to postpone its deliberations until Monday). In a related context, this Court has held that "the actual moment of instructing the jury" *ex parte* is not a critical stage when defense counsel "was afforded the opportunity to preview, argue about, and object to the judge's proposed jury instructions." *Brika*, 416 F.3d at 525 (citing *Hudson v. Jones*, 351 F.3d 212, 217 (6th Cir. 2003)) (relating to a defendant's right to counsel); *cf. United States v. Collins*, 654 F.3d 454, 461-462 (2d Cir. 2012) (holding right to presence violated when district court gave an *ex parte* supplemental instruction to a juror "without first consulting counsel"). In neither instance would the defendant's presence "contribute to the fairness of the procedure." *Stincer*, 482 U.S. at 745.

The same is true here. Judge Knepp's *ex parte* recitation of the pattern *Allen* instruction was not a "critical stage" mandating Zacharias's presence to ensure

procedural fairness. Judge Knepp read only the pattern *Allen* charge to which all parties agreed. *Compare* Tr.9, R.112, PageID#2574-2577 *with* Sixth Circuit Pattern Criminal Jury Instructions 9.04 (demonstrating similarity in all meaningful ways). And, just as in *Brika*, Zacharias's counsel had the opportunity to review and object to the *Allen* instruction in advance of the court giving the charge. Tr.9, R.112, PageID#2569-2574.

Finally, the structure of the proceeding did not introduce any unfairness due to Zacharias's absence. No party or counsel was present for the actual instruction, and Judge Knepp instructed the jury on the record in the presence of a court reporter. Tr.9, R.112, PageID#2574-2577. Indeed, earlier during the jury's deliberations, the court had answered other jury questions *ex parte*, as counsel was aware. Tr.9, R.112, PageID#2574. For all of these reasons, the district court's "perfunctory" reading of the pattern instruction in Zacharias's absence did not "thwart[] a fair trial." *Brika*, 416 F.3d at 527.[2]

[2] Zacharias claims *Brika* is distinguishable because invited error doctrine was the basis for the decision. Br. 26-27. Not so. While this Court relied in part on the doctrine to assess whether Brika's right to counsel was violated, this Court's view of what constituted a "critical stage" did not rest on invited error. *Brika*, 416 F.3d at 525-526.

C. Alternatively, the alleged constitutional error was harmless.

1. Violation of a due process right to be present at the recitation of the *Allen* charge is not a structural error.

If the district court's delivery of the *Allen* instruction violated Zacharias's due process right to be present, a violation of this right is not a structural error mandating reversal. *United States v. Riddle*, 249 F.3d 529, 535 (6th Cir. 2001); *see also United States v. Thomas*, 724 F.3d 632, 641-642 (5th Cir. 2013) (noting violation of right to be present is not structural error). Instead, "there must be prejudice in the [defendant's] absence to warrant reversal." *Riddle*, 249 F.3d at 535.[3] For this reason, a violation of the right to be present is "generally subject to harmless-error analysis." *Bourne v. Curtin*, 666 F.3d 411, 413 (6th Cir. 2012) (citation omitted); *see also Rushen v. Spain*, 464 U.S. 114, 118-119 (1983) (per curiam) (applying harmless error to denial of defendant's right to be present for an *ex parte* communication with a juror); *United States v. Berger*, 473 F.3d 1080, 1096 (9th Cir. 2007) ("A violation of defendant's due process right to be present... is subject to harmless error analysis."); *United States v. Toliver*, 330 F.3d 607, 608,

[3] Zacharias relies (Br. 23-24) on *French v. Jones*, 332 F.3d 430, 438 (6th Cir. 2003), to argue that a violation of his right to be present is a structural error requiring automatic reversal. Br. 23-24. But *French* holds only that "the absence of *counsel* during a critical stage of a trial is per se reversible error." 332 F.3d at 438 (emphasis added).

611 (3d Cir. 2003) (applying harmless error to denial of defendant's right to be present and collecting cases doing the same).

2. Any alleged error was harmless.

A constitutional error is harmless "when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Zheng*, 87 F.4th 336, 345 (6th Cir. 2023) (internal quotation marks and citation omitted), *cert. denied*, No. 23-928 (June 3, 2024).[4] There is no reasonable possibility here that Zacharias's absence during the *Allen* charge contributed to the verdict for several reasons.

First, because neither the prosecution nor Zacharias's counsel were present during the *Allen* instruction, there is no reasonable possibility that the jury speculated adversely about Zacharias's absence. *See* Br. 29. Indeed, because the instruction was given in the jury room by Judge Knepp with only the court reporter present, it is unlikely the jury would infer anything about Zacharias's absence. By

[4] Zacharias argues that a different harmless-error standard applies when a defendant's right to be present is violated. Br. 27 (citing *United States v. Toliver*, 541 F.2d 958, 965 (2d Cir. 1976) and *United States v. Fontanez*, 878 F.2d 33, 37 (2d Cir. 1989)). But these cases say no such thing. Indeed, the "reasonable possibility" language they use is not meaningfully different than the standard relied upon in *Zheng*. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (noting lack of difference between "reasonable possibility" formulation of harmless error and "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained").

contrast, in *United States v. Fontanez*, 878 F.2d 33 (2d Cir. 1989), the Second Circuit found defendant's absence during the *Allen* charge was not harmless given several contributing factors creating a reasonable possibility of prejudice: (1) everyone except the defendant was in the courtroom during the *Allen* charge; (2) defendant was mere minutes from being in the room; and (3) defendant entered the room escorted by U.S. Marshals just as the jury was exiting to resume deliberations. *Id.* at 38. None of these circumstances were present here.

Second, Zacharias suggests that had he been present, he may have influenced his attorney to object to the *Allen* instruction. Br. 28-29. This argument fails because defense counsel had already approved the instruction during the telephonic conference and did not object to Zacharias's absence from that conference. It is also unlikely that Zacharias would have found a meritorious flaw in the pattern jury instruction.

Finally, Zacharias's only claim as to the strength of the government's case is that the case was "close" and ultimately "a credibility contest between [defendant] and his accusers." Br. 28, 50. But the jury indicated that it had already reached unanimity on four charges by the time it sought the court's guidance (Jury Question, R.95-2, PageID#712), and they returned guilty verdicts on all five counts less than an hour later. *See* Tr.9, R.112, PageID#2577-2578. Even if we did not know that the jury had already rejected Zacharias's testimony before the *Allen*

charge, the evidence corroborating the version of events to which Robert, Grant, and Graham reluctantly testified was overwhelming. This included similarities in the victims' testimony; financial, phone, and other records; the testimony of other witnesses; and Zacharias's own admissions:

Similarities in Victims' Testimony. The victims' testimony corroborated one another because they described many similarities in Zacharias's conduct despite never speaking with anyone about it until 2020. Tr.2, R.104, PageID#1036-1038; Tr.4, R.107, PageID#1670-1671; Tr.5, R.108, PageID#1915, 1949, 1954. This corroboration is all the more persuasive as Graham never had contact with either Robert or Grant. Tr.6, R.109, PageID#2146.

Graham and at least one of the two brothers (if not both) testified how Zacharias was a trusted confidante and helpful friend when they needed someone the most; how Zacharias escalated from discussions about sex with girls to revealing his own sexual desire for the victims; how Zacharias sought sexual role play in which he was submissive to them; how Zacharias negotiated and delivered payment; and how Zacharias exploited their drug addictions but did not try to get them help. *See* pp. 2-14, *supra*. Finally, Zacharias told both Graham and Robert that they were the "only one" with whom he was engaging in commercial sex acts but demonstrated interest in (and, in Grant's case, pursued) their younger male

family members. Tr.2, R.104, PageID#1076, 1092-1093; Tr.5, R.108, PageID#1982-1983, 2010.

Financial, Phone, and Other Records. Financial, phone, and other records also confirmed the victims' testimony about how Zacharias would negotiate and deliver payment for commercial sex acts, the sexual nature of the text messages exchanged, and the level of involvement Zacharias had in the victims' lives, including when they were minors. *See* GX 85 and 87, 95-103, 695-697, 710-712, 1059-1061, 1063-1070, 1091-1092, 1100-1101, 1110-1119, 1125-1126, 1145, 1148-1149, 1501. Text messages showed actual negotiations of monetary value, and phone and financial records together reflected the timeline that the victims' provided for the occurrence of commercial sex acts. *See, e.g.*, Tr.6, R.109, PageID#2091-2101, 2108-2119, 2122, 2130-2133, 2135-2139, 2141-2145, 2152-2153, 2155-2156. Several sets of phone and financial records also align with Robert and Grant's description of the timing of their commercial sex acts with Zacharias as minors. *Id.* at PageID#2097-2101, 2135-2139.

Testimony of Other Witnesses. Testimony from other witnesses also corroborated the victims' testimony. Robert and Grant's mother testified about how she told Zacharias about Robert's abusive father and Robert's drug problems. Tr.2, R.104, PageID#850-861, 896-900. She also testified that Zacharias was often at her home alone with her boys as minors when she was at work. *Id.* at

PageID#850-861, 907-908. A teacher at the victims' elementary school who befriended Zacharias confirmed that he was a mentor to Graham and Robert that school year, and that Zacharias often returned to Toledo after leaving the school. *Id.* at PageID#975-979. One of Robert's high school girlfriends confirmed Robert's frequent visits with Zacharias while he was still a minor. Tr.3, R.106, PageID#1495. Robert explained to her that he spent so much time with Zacharias because "he was getting money for it." *Ibid.*

Graham's mother and sister testified about Zacharias's relationship with Graham during eighth grade and how Graham's personality and behavior changed that year. Tr.4, R.107, PageID#1813-1820; Tr.5, R.108, PageID#1869-1874. His sister also called the tip line when the media was first covering Zacharias's arrest because she knew how close her brother had been with Zacharias. Tr.5, R.108, PageID#1882-1883. Had she not called, Graham would not have come forward. *Id.* at PageID#1961. Graham's long-time girlfriend also testified that she found graphic text discussions between Graham and Zacharias, but only at times when Graham was using drugs. Tr.5, R.108, PageID#2056-2060.

Finally, the testimony from a former student at Zacharias's parish in Findlay, Ohio, about Zacharias's conduct corroborated the victims' description of how Zacharias used his position to gain access to and prepare them as minors for future sexual encounters. The student testified that, in 2019, when he was still a minor,

Zacharias used a school project as an excuse to meet alone with the student in his office with the door closed. Tr.6, R.109, PageID#2076-2082. Zacharias then showed the student a picture of a statue of a female saint, and said, "[i]t looks like she's having a female orgasm, doesn't it?" *Id.* at PageID#2080-2081. When the student became silent and uncomfortable, Zacharias tried to explain the comment away. *Id.* at PageID#2081-2082. The student told his parents about the incident and they immediately reported it. *Id.* at PageID#2082-2083.

Zacharias's Own Admissions. Zacharias admitted to engaging in commercial sex acts with Robert in Van Wert and Findlay, Ohio, while Robert was an adult, and with Graham in Fremont, Ohio, while Graham was an adult. Tr.6, R.109, PageID#2170-2171. He also admitted to being attracted to or aroused by minors, including Graham and Robert when they were minors. *Id.* at PageID#2115, 2122-2123, 2147, 2156-2159; GX 726, 729, 770. Zacharias agreed that he may have paid Robert $1500 more than once, corroborating Robert's testimony that he received $1500 from Zacharias for oral sex in Mansfield (in addition to later in Van Wert). GX 757. Although Zacharias initially denied engaging in sexual activity with anyone, he freely admitted to rubbing a minor's back while at the parish in Mansfield but claimed he stopped himself from going further. *Id.* at PageID#2122-2123. Zacharias also admitted that he was aware of Robert's drug addiction and did nothing to help him. *Id.* at PageID#2133, 2172;

GX 743, 762. Most significantly, the jury saw and heard Zacharias confess on a video he chose to film that he groomed Robert and wanted to engage in sexual acts with Robert when Robert was just 11 years old. Tr.3, R.106, PageID#1392-1399; GX 65, 67.

For all of these reasons, there is no reasonable possibility that Zacharias's absence during the *Allen* instruction played a role in obtaining his guilty verdict. Any error here was harmless beyond a reasonable doubt.

II. The district court did not abuse its discretion by admitting evidence of Zacharias's pornographic internet activity demonstrating his sexual interest in minor boys.

Zacharias challenges the admission of certain evidence of his pornographic internet activity as irrelevant and unduly prejudicial. Br. 29-36. The district court did not abuse its discretion in overruling these objections. Tr.3, R.106, PageID#1549.

A. Standard of review

This Court reviews a district court's evidentiary determinations "as to relevance and unfair prejudice for abuse of discretion." *United States v. Whittington*, 455 F.3d 736, 738 (6th Cir. 2006). A district court abuses its discretion when it "relies on clearly erroneous facts, uses an erroneous legal standard, or improperly applies the law." *United States v. Hazelwood*, 979 F.3d 398, 408 (6th Cir. 2020). Because district courts have "broad discretion . . . in

determinations of admissibility based on . . . relevance and prejudice," their evidentiary determinations "will not be lightly overruled." *United States v. Hruby*, 19 F.4th 963, 968-969 (6th Cir. 2021) (citation omitted). In applying the abuse-of-discretion standard, this Court "must view the evidence in the light most favorable to [the government], giving evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Id.* at 969 (alteration in original; citation omitted). A reversal is appropriate only if this Court is "left with the definite and firm conviction that the district court committed a clear error of judgment." *Id.* at 966 (citation omitted).

B. The district court correctly found that Zacharias's pornographic internet activity was relevant to proving Zacharias sought commercial sexual acts with the victims as minors.

The district court correctly admitted Zacharias's pornographic internet activity as relevant to proving that Zacharias engaged in commercial sex acts with Robert and Grant as minors, as he was charged. Under the Federal Rules of Evidence, "the standard for relevancy is extremely liberal." *Whittington*, 455 F.3d at 738 (internal quotation marks and citation omitted). Evidence is relevant if it has "any tendency" to make a consequential fact "more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). In criminal cases, a fact is consequential "if it makes it more or less likely that the defendant committed the charged conduct." *Hazelwood*, 979 F.3d at 409. Relevant evidence does not need

to "directly prove or disprove an element of the offense," but the fact "must at least be a step on . . . [the] route to the ultimate fact." *Ibid.* (citation omitted). Under Rule 401, a district court may not exclude relevant "evidence if it has the slightest probative worth," even when it "believes the evidence is insufficient to prove the ultimate point for which it is offered." *Whittington*, 455 F.3d at 738-739 (citation omitted).

Zacharias challenges the admission of the following internet activity found on his electronic devices:

- Visits to **pornographic webpages**: (1) "HD images, sex boy teen, gay, first time teacher, Mike Manchester is working, porn video"; (2) "Gay porn videos and free gay men twink sex movies, porn hub"; (3) "Discreet gay section in basement while parents are asleep upstairs, Pornhub.com"; and (4) "hisfirstgaysex.com";

- Use of **pornographic search terms**: "Anal sex, giving head, Graham D. twice, tender d**k after c***ing"; and

- Visit to a **news article** entitled "Ex-priest accused of sexual abuse was killed after placing Craigslist ad, police say."

Br. 31 (citing Tr.3, R.106, PageID#1551-1552, 1554, 1557). He argues this evidence is irrelevant because his "legal pornography preferences" and whether he was gay "had nothing to do with . . . whether he had sex with a minor." Br. 31. But this pornographic internet activity is relevant because it demonstrates Zacharias's sexual interest in young boys, making it more probable that he engaged in commercial sex acts with Robert and Grant as minors. This evidence also

corroborates other testimony at trial regarding Zacharias's commercial sex acts with his victims. This is particularly so here, as the district court observed, where Zacharias denied engaging in sexual conduct with minors. Tr.7, R.110, PageID#2230; Tr.8, R.111, PageID#2515.

First, the **pornographic webpages** are evidence on the "route" to proving the "ultimate fact" that Zacharias engaged in commercial sex with Robert and Grant *as minors*. *Hazelwood*, 979 F.3d at 409 (citation omitted). This Court has "recognized the relevance of pornography that is similar to the charged sexual offenses." *United States v. Ingram*, 846 F. App'x 374, 380 (6th Cir. 2021). Here, each of the four webpages includes at least one term or phrase indicating pornographic material involving sexual activity with a minor: "sex boy teen," "first time teacher," "twink,"[5] "parents asleep upstairs," and "hisfirstgaysex.com." The first and third terms speak directly to the youth of the participant, while the remaining ones demonstrate contexts frequently associated with youth or minors. Zacharias counters that there is no evidence that these webpages actually depicted sexual activity with "underage minors." Br. 31. But such evidence is unnecessary—that the webpage titles demonstrate Zacharias's interest in pornography involving minors (if only nominally) is enough to make it more

[5] "[T]wink" is typically understood to refer to "an 18-year-old boy who has features of a much younger boy, looks very young." Tr.3, R.106, PageID#1551.

probable that Zacharias engaged in commercial sex acts with Robert and Grant as minors.

The **pornographic search terms** are relevant because they corroborate the testimony of the victims, whose credibility Zacharias called into question (*e.g.*, Tr.8, R.111, PageID#2520-2523). Zacharias's search of these terms make it more likely that Zacharias engaged in commercial sex acts with Graham. On October 3, 2012, he searched "tender d**k after c***ing" mere minutes before he searched for Graham. Tr.6, R.109, PageID#2161; GX 258. This evidence is particularly relevant alongside the FBI case agent's testimony about payments Zacharias made to Graham in October 2012. Tr.6, R.109, PageID#2161. Taken together, this evidence makes it more probable that Zacharias gave Graham money in exchange for oral sex in 2012, as Graham testified (Tr.5, R.108, PageID#1977).[6]

Finally, Zacharias challenges the admission of a 2019 **news article** that is not pornographic in nature and to which he did not specifically object at trial. *See* Tr.3, R.106, PageID#1547-1549; Tr.6, R.109, PageID#2159-2160. For this reason, the district court did not specifically rule on the admission of this evidence, and this Court should review its admission for plain error. *See, e.g.*, *United States v.*

[6] Zacharias searched the remaining terms minutes before visiting "hisfirstgaysex.com" on September 6, 2011. GX 695, 710. At that time, he was in communication with Grant while he was still a minor. Tr.4, R.107, PageID#1655, 1661.

Hall, 20 F.4th 1085, 1100 (6th Cir. 2022) ("Evidentiary rulings . . . are reviewed under the plain-error standard if a defendant fails to object at trial."). Regardless, the district court did not err at all, much less commit plain error, by permitting its admission. Zacharias's internet activity revealed that he viewed the article, which described a priest "accused of sexually abusing minors." Tr.6, R.109, PageID#2160. Viewing this evidence in the light most favorable to the government, Zacharias's viewing of this article online—many years into what he alleged was consensual sex with the victims—makes it more likely that Zacharias had a guilty conscience (and was aware his behavior was wrong).

C. The district court properly ruled that evidence of Zacharias's pornographic internet activity was not unduly prejudicial.

The Federal Rules of Evidence permit the exclusion of relevant evidence "if its probative value is substantially outweighed by" the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. This "balancing test" is "strongly weighted toward admission" of relevant evidence. *United States v. Asher*, 910 F.3d 854, 860 (6th Cir. 2018). Given that all evidence the government introduces generates prejudice against the defendant, this Court looks to whether the evidence "suggest[s] decision on an improper basis." *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (citation omitted).

None of the evidence Zacharias challenges is unduly prejudicial. First,

"[p]robative evidence is not inadmissible solely because it has a tendency to upset or disturb the trier of fact." *United States v. Salameh*, 152 F.3d 88, 123 (2d Cir. 1998); *see also United States v. Boyd*, 640 F.3d 657, 687-688 (6th Cir. 2011) (finding evidence is not "unfairly prejudicial simply because it is . . . disturbing") (collecting cases). The pornographic nature of this evidence, particularly as it involved references to minors, may have "upset or disturb[ed]" the jury (*Salameh*, 152 F.3d at 123) but it is not the type of evidence that "shocks the conscience" and elicits a jury verdict based on emotion rather than evidence (*Asher*, 910 F.3d at 861). Importantly, the government introduced Zacharias's pornographic internet activity in a way that mitigated additional prejudice by limiting the evidence to the disturbing text rather than including the content itself. Tr.3, R.106, PageID#1548-1549. The discussion of this evidence at trial is also quite limited—just ten pages of the more than 1500 pages of trial transcripts. And any potential for this evidence to shock the conscience is certainly outweighed by the more voluminous and disturbing text messages, images, and videos showing or describing Zacharias's own sexual activity with the victims. *See* Tr.2, R.104, PageID#1112-1113; Tr.3, R.106, PageID#1373-1375; Tr.4, R.107, PageID#1635, 1648-1649, 1665; Tr.5, R.108, PageID#1974, 2158-2159. *See also* GX 67, 68, 85, 87.

Furthermore, that this evidence involves gay pornography does not mean it unfairly prejudiced Zacharias *because* he is gay (or a Catholic priest). *See* Br. 34-

35. This evidence is specific to Zacharias based on his own conduct—"[t]his case is not like those where the government first *elicits* and then *relies on* stereotypes to prove the offense." *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th Cir. 2015). Instead, the evidence fairly implies that Zacharias's sexual interests at a minimum include depictions of sex with minors (regardless of whether the pornography involved *actual* minors), making it more likely that Zacharias engaged in sexual activity with Robert, Grant, and Graham as minors.

Finally, Zacharias suggests (Br. 36) that the mere existence of jury questions during deliberation and the need to give the *Allen* instruction makes clear that *this* evidence was the difference in a close case. He is wrong. Evidence of his internet activity did not introduce for the first time at trial that Zacharias is gay or a priest; it also pales in comparison to the graphic nature of the evidence showing his *actual* conduct. Zacharias also mistakenly infers that this was a close case because the jury had questions or was deadlocked. Juries often have questions during deliberation, and the jury's questions seeking to better understand the legal requirements say nothing about the weight of the evidence here. *See* Tr.8, R.111, PageID#2558-2559; Tr.9, R.112, PageID#2562-2567. The same is true for the *Allen* instruction—a jury can deadlock at 11-1 or at 6-6.[7] Accordingly, an impasse

[7] And, as noted above, the jury was "not unanimous" on just one of five counts before the *Allen* instruction. Jury Question, R.95-2, PageID#712.

without additional information offers no insight about the purported closeness of the case.

For all of these reasons, the district court did not abuse its discretion in concluding that the probative value of Zacharias's internet activity outweighs the minimal prejudicial effect that could be attributed to it. But even were this Court to conclude that the district court improperly admitted this evidence, any error was harmless based on the other evidence of Zacharias's guilt. *See* pp. 25-31, *supra*; *see also United States v. Kettles*, 970 F.3d 637, 643 (6th Cir. 2020) (noting evidentiary errors are reviewed for harmlessness).

III. The district court did not abuse its discretion in admitting expert testimony about grooming victims of sexual abuse.

The district court did not abuse its discretion in holding that the probative value of SA O'Donnell's expert testimony about "grooming" substantially outweighed any undue prejudice to Zacharias. Order on Expert Testimony, R.89, PageID#665.

A. Standard of review

As explained above, this Court reviews a district court's evidentiary determinations under Rule 403 for an abuse of discretion. *See* pp. 31-32, *supra*.

B. The district court did not abuse its discretion by admitting expert testimony on grooming in the prosecution of a sex trafficking case involving minors.

Although this Court has yet to rule on the question, other courts of appeals agree that a district court does not abuse its discretion by admitting expert testimony on grooming in the prosecution of a sexual offense against a minor, as the district court recognized. *See United States v. Halamek*, 5 F.4th 1081, 1088-1089 (9th Cir. 2021); *United States v. Batton*, 602 F.3d 1191, 1201-1202 (10th Cir. 2010); *United States v. Hitt*, 473 F.3d 146, 158-159 (5th Cir. 2006); *see also United States v. Hayward*, 359 F.3d 631, 637 (3d Cir. 2004) (finding no abuse of discretion in admission of expert testimony as to the general "motives and practices of an acquaintance molester"). *See also* Order, R.89, PageID#665 (gathering cases). This Court should follow suit and adopt the same rule here.

Grooming is "a dynamic process involving a constellation of behaviors that are designed to gain the cooperation of a child . . . for the sexual gratification of an offender." Tr.4, R.107, PageID#1756. In cases involving sexual offenses against a minor, expert testimony on grooming is relevant and aids the jury by "explain[ing] the behavior of those accused of sexual offenses," *Hitt*, 473 F.3d at 158, including how "seemingly innocent conduct … could be part" of a "plan to engage" in sexual activity with a minor, *Halamek*, 5 F.4th at 1088-1089 (citation omitted). This type of testimony can explain how these behaviors "manipulate, coerce, and exploit"

minors not only for purposes of engaging in sexual activity, but also to "prevent[] or delay[] disclosure" of the abuse. Tr.4, R.107, PageID#1757. While grooming addresses relatively common behaviors, how sex offenders use these behaviors is "not necessarily common knowledge." *Batton*, 602 F.3d at 1202.[8]

For these same reasons, SA O'Donnell's expert testimony was admissible to help the jury better understand how Zacharias's relationship with Robert, Grant, and Graham as minors could be predatory. This testimony made it more probable that Zacharias's superficially benign conduct—*e.g.*, giving gifts, befriending other family members, frequent visits—was knowingly calculated to obtain the victims' cooperation in future sexual activity with him. This testimony also explained how Zacharias could procure the silence of Robert, Grant, and Graham for more than a decade to avoid responsibility and ensure that his victims were available to him over many years. Tr.6, R.109, PageID#1788-1796, 2134. Finally, this testimony is particularly probative as Zacharias characterized his own behavior towards Robert as "grooming" in his "confession" video. Tr.6, R.109, PageID#2111-2116;

[8] Zacharias points to just one case excluding expert testimony about grooming. Br. 37 (citing *United States v. Raymond*, 700 F. Supp. 2d 142 (D. Me. 2010)). In the absence of direct precedent, one district court case against the opinions of four courts of appeals cannot establish an error of law signaling an abuse of discretion. Furthermore, the *Raymond* court ruled on admissibility under Rule 702 based on challenges Zacharias has not made here. 700 F. Supp. 2d at 145.

GX 65, 67. As a result, SA O'Donnell's testimony aided the jury in understanding the meaning and significance of Zacharias's own words and actions.

1. The probative value of SA O'Donnell's expert testimony is not substantially outweighed by the risk of undue prejudice.

Any risk of undue prejudice here does not substantially outweigh the probative value of this expert testimony. First, the United States and the district court took steps to mitigate any potential for undue prejudice. The United States called SA O'Donnell as a "blind expert" to educate the jury about grooming without using any specific factual information about Zacharias or his victims. Tr.4, R.107, PageID#1741-1742. The Federal Rules of Evidence expressly contemplate that it is "important in some cases for an expert to educate the factfinder about general principles," without applying them to the facts of the case. Fed. R. Evid. 702 advisory committee's note (2000 Amendments). One purpose of blind expert testimony is to avoid any unintentional bias that might prejudice the defendant.

Moreover, the district court gave a cautionary instruction immediately after SA O'Donnell testified:

> This is a reminder that this witness was offered to give testimony and opinions on the general principles of grooming behavior, or the grooming process to the extent it might assist you. He was not here, as stated at the outset, to offer testimony about the facts or specifics of this case. If, or how, or whether grooming applies to the testimony in this case is for you to decide, depending on the facts you find in this

> case. As with any witness, you may accept or reject all or any part of such testimony.

Tr.4, R.107, PageID#1796. This Court "presume[s]" that jurors "follow instructions," unless there is evidence to "rebut the presumption." *United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011). Zacharias has not provided any information to suggest the jury did not consider SA O'Donnell's testimony as instructed beyond a conclusory statement that the testimony was improper and noting that the government referenced it in closing. *See* Br. 42. Neither reason provides a basis to rebut the normal presumption.

Second, Zacharias's reasons that the grooming testimony is unduly prejudicial are not persuasive. He claims that the testimony was impermissible criminal profiling testimony used as substantive evidence of his guilt. Br. 39-40. But the grooming testimony here is unlike the type of character and criminal profile testimony that courts have ruled impermissible. The latter type of evidence is that which "illuminates the defendant's character or propensity to engage in criminal activity," while the grooming evidence "seeks to aid the jury in understanding a pattern of behavior." *United States v. Long*, 328 F.3d 655, 666 (D.C. Cir. 2003). Regardless, by explaining how certain behaviors can prepare minors for sexual abuse, the grooming testimony is also evidence of *modus operandi*—a permissible use of "profile" evidence. *United States v. Baldwin*, 418 F.3d 575, 581 (6th Cir. 2005).

Zacharias also argues that SA O'Donnell's testimony is unduly prejudicial because it is unreliable. Br. 39-42. But this argument conflates Rule 702's requirements on expert testimony with Rule 403's balancing test. And regardless, Zacharias is wrong. He faults SA O'Donnell for "hedg[ing]" in his description of behaviors associated with grooming. Br. 40. But speaking in terms of what "could" or "might be" (Br. 40) predatory is entirely consistent with having a blind expert apply his specialized knowledge to hypothetical situations or provide examples of such behavior.[9] At bottom, SA O'Donnell provided a five-step framework describing "clusters of behaviors, their various purposes, and how they are interconnected" to facilitate sexual abuse. Tr.4, R.107, PageID#1758. But he also made clear that the exact tactics a person uses can vary based on the context; for example, identifying which of a victim's vulnerabilities to exploit can depend on "the age and development" of that child. Tr.4, R.107, PageID#1762. For this reason, SA O'Donnell's word choice reflects a recognition that context matters in applying the five-step framework—not that his opinion is unreliable or confusing.

Accordingly, any prejudice attributable to SA O'Donnell's testimony does not substantially outweigh the probative value of educating the jury to better

[9] Zacharias does not include the prosecutor's full question to the expert accompanying the answer he quotes in his brief (Br. 39). The question specifically requested "some examples of what makes a child more or less available to an offender." Tr.4, R.107, PageID#1761.

understand grooming behaviors in reviewing the facts of this case, as the district court instructed. Regardless, any alleged error in admitting this testimony would have been harmless based on the other evidence of Zacharias's guilt, as already explained. *See*, pp. 25-31, *supra*.

IV. Nothing in the prosecutor's closing constitutes prosecutorial misconduct mandating reversal on plain error review.

Zacharias argues that one of the prosecutor's remarks in rebuttal constitutes prosecutorial misconduct warranting a new trial. But a singular statement in closing, even if improper, cannot mandate reversal on plain error review when it was not so flagrant as to affect Zacharias's substantial rights.

A. Standard of review

Because Zacharias did not object to the challenged remark at trial, this Court reviews "only for plain error." *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994). "Plain error is (1) error (2) that was obvious or clear, (3) that affected defendant's substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Hall*, 979 F.3d 1107, 1119 (6th Cir. 2020) (internal quotation marks and citations omitted). Because of the wide latitude given to prosecutors during closing statements, this Court will reverse on plain error review "[o]nly in exceptional circumstances in which the error is so plain that the trial judge and the prosecutor were derelict in

countenancing it." *United States v. Henry*, 545 F.3d 367, 377 (6th Cir. 2008) (citation omitted).

On plain error review, this Court analyzes the alleged prosecutorial misconduct to determine: (1) "whether the prosecutor's statements were improper enough to constitute plain error"; and (2) if so, "whether the statements were flagrant enough to affect the defendant's substantial rights." *Hall,* 979 F.3d at 1119. If defendant makes these showings, then this Court "may then address the fairness and integrity of the judicial proceedings." *Ibid.*

B. The prosecutor's single remark in rebuttal about how to view Zacharias's credibility was neither plainly improper nor flagrant.

Zacharias specifically challenges a remark at the end of the prosecutor's rebuttal:

> Would you rely on what he told you, based on everything you saw on the witness stand, based on everything you know that contradicts what he told you? **Would you let him watch your kids**?

Br. 43 (citing Tr.8, R.111, PageID#2550) (emphasis in brief). However, the lines preceding Zacharias's selected quotation provide relevant and essential context:

> **Use your common sense. Go back there and follow the evidence and the law, and ask yourselves this: If you were buying a house and the defendant told you there wasn't a leak, would you rely on him?** Would you rely on what he told you, based on everything you saw on the witness stand, based on everything you know that contradicts what he told you? Would you let him watch your kids?

Tr.8, R.111, PageID#2550. Under the circumstances, Zacharias cannot make either required showing with respect to this argument in the prosecutor's rebuttal.

1. The challenged remark during the government's rebuttal was not plainly improper.

Zacharias faults the prosecutor as improperly appealing to emotion by violating the "[g]olden [r]ule" in her rebuttal. Br. 44-45. A golden rule violation occurs when the prosecutor "urges jurors to identify individually with the victim with comments like 'it could have been you' or 'it could have been your children.'" *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th Cir. 2015) (citation omitted). Courts consider these arguments improper because they "[c]all[] on the jury's emotions and fears—rather than the evidence—to decide the case." *Johnson v. Bell*, 525 F.3d 466, 484 (6th Cir. 2008). Here, the prosecutor's final question did not violate the golden rule, or if it did, it is so close to the line it cannot be plainly improper.

The prosecutor's final question to the jury did not violate the golden rule because the prosecutor expressly directed the jury to consider the evidence in judging Zacharias's credibility, rather than appeal to the fear that Zacharias's victims "could have been [their] children." *Al-Maliki*, 787 F.3d at 795 (citation omitted). In particular, the prosecutor implored jurors to use their "common sense" to judge Zacharias's credibility by "follow[ing] the *evidence* and the *law*"

and focusing on "everything [they] saw *on the witness stand*." Tr.8, R.111, PageID#2550 (emphasis added).

To illustrate the function of "common sense" in this task, the prosecutor provided a hypothetical situation involving a relatively common decision jurors might face for which credibility is significant. The prosecutor asked jurors whether, based on the evidence at trial, they would "rely" on Zacharias if they "were buying a house and [he] told [them] there wasn't a leak." Tr.8, R.111, PageID#2550. In context, the prosecutor clearly intended the final question as another illustration of this same point, though it was an admittedly poor hypothetical on which she did not dwell. *See ibid.* Nothing about these last few words invites the jury to rely on fear or sympathy to reach a verdict. Instead, the context makes clear they should rely on their own common sense based on the evidence. As a result, there was no plainly improper golden rule violation in the prosecutor's rebuttal.

2. Regardless, this singular ill-advised remark was not flagrant enough to affect Zacharias's rights.

Even if the remark were plainly improper, it was not flagrant. This Court uses a four-factor test to analyze whether such remarks are flagrant:

> (1) whether the [prosecutor's remarks] tended to mislead the jury or prejudice the defendant; (2) whether the [prosecutor's remarks] were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.

Hall, 979 F.3d at 1119. Because these four factors favor the government, the prosecutor's stray remark was not flagrant enough to have affected Zacharias's substantial rights.

a. The challenged remark was not prejudicial or misleading.

This Court has recognized that the "mere fact that a comment was improper does not itself establish prejudice." *Irick v. Bell*, 565 F.3d 315, 326 (6th Cir. 2009). As explained above, the context preceding the challenged remark make clear that the jury should rely on the evidence and the law to reach a verdict. As a result, the remark, even if improper, did not prejudice Zacharias or mislead the jury to decide the case based on impermissible bias or emotion. Furthermore, a prosecutor's comments during rebuttal "must be evaluated in light of the defense argument that preceded it." *Darden v. Wainwright*, 477 U.S. 168, 179 (1986). The prosecutor's rebuttal culminating in the challenged remark was a direct rejoinder to Zacharias's own closing argument on the credibility of the victims:

> If Grant told you in trying to sell you a house that the roof didn't leak, would you believe him, based upon everything you know[.]
>
> [I]f Robby tells you the transmission works in a car he's trying to sell you, would you believe him? Would you buy it just on face value?

Tr.8, R.111, PageID#2523. Because the prosecutor merely adopted the same tactic that Zacharias's counsel used, no doubt the jury understood the prosecutor's argument as a direct response to Zacharias's own.[10]

Zacharias argues that the remark was prejudicial because it encouraged a guilty verdict as the "only way [jurors] could guarantee" their own children's safety. Br. 45. Nothing in the challenged remark (or the line of argument it completes) expresses these sentiments. Nor does any testimony from the victims' mothers increase the likelihood the jury understood this remark as asking them to assume the position of the victims' mothers. Indeed, the expert testimony on grooming provided the framework for the jurors to use in considering the mothers' testimony about the victims' "vulnerabilities and struggles as a family." Br. 45.

Even if there were some potential for prejudice, "a court should not overturn a criminal conviction on the basis of a prosecutor's comments alone, especially where [as here] the district court has given the jury an instruction that may cure the error." *United States v. Carter*, 236 F.3d 777, 787 (6th Cir. 2001). This Court has previously found "that general curative instructions, given during the final jury instructions, may suffice to clear up any prejudice." *Hall*, 979 F.3d at 1120. Here,

[10] Zacharias claims that the remark "misled the jurors" to decide based on "the propriety of [Zacharias's] sexual morals" instead of based on his conduct. Br. 45. But Zacharias's conclusory assertion does not explain how the challenged remark, which is silent as to "sexual morals," could have done so.

the general jury instructions given just prior to closing arguments made clear that it was solely the juror's job "to decide how credible or believable each witness was" and to "act reasonably and carefully" in reaching their decisions. Most significantly, at the conclusion of the closing arguments, the court instructed how the jury should handle any potential feelings of sympathy:

> Circumstances in some cases may arouse sympathy for one party or the other. Sympathy is a common, human emotion. The law, however, expects you to be free of such normal reactions, and your oath as jurors, which requires you to disregard sympathy and not to permit it to influence your verdict.

Tr.8, R.111, PageID#2555. Juries are "presumed to understand and follow directions from the court," and nothing suggests that jury did otherwise here. *Carter*, 236 F.3d at 787. Most significantly, though general, this latter instruction came mere minutes after the challenged remark (Tr.8, R.111, PageID#2550, 2555). Especially given its timing, this instruction was sufficient to mitigate any potential prejudice.

b. The challenged remark was isolated and insignificant in the scope of the entire trial.

The challenged remark was also not flagrant because it was a singular comment that did not permeate the trial as a whole. This Court has found that "comments made only during closing argument can be isolated." *Hall*, 979 F.3d at 1121 (noting an isolated remark in closing was not flagrant). The challenged remark is just one sentence in the government's 60-page summation (including the

17-page rebuttal). *See* Tr.8, R.111, PageID#2468-2511, 2533-2550. Furthermore, Zacharias has not identified other related or problematic remarks from the prosecutor during trial. *See* Br. 43-49.

c. The challenged remark was not deliberate.

This Court infers from an improper remark's "strategic use" whether the remark was deliberate or accidental. *United States v. Acosta*, 924 F.3d 288, 307 (6th Cir. 2019) (citation omitted). In particular, this Court has often "found prosecutorial statements deliberate when they are repeated because that shows that the errors were not 'inadvertent slip[s] of the tongue.'" *Hall*, 979 F.3d at 1121 (alteration in original; citation omitted). This Court also considers "any indication" that the challenged remarks "stemmed from a deliberate plan to inflame the jury as opposed to unduly-zealous advocacy." *Ibid.* (quoting *United States v. Carson*, 560 F.3d 566, 577 (6th Cir. 2009)).

Here, the frequency and strategic use of the challenged remark make clear that the prosecutor was not deliberately attempting to inflame the jury. She made the challenged remark just one time in rebuttal, which, by its nature, is largely improvised. Indeed, the prosecutor "borrowed" the preceding line of argument from Zacharias's own closing (*see* Tr.8, R.111, PageID#2520-2523) suggesting that the entire argument about credibility, including the challenged remark, were improvised rather than prepared substantially in advance.

Zacharias argues that the remark was intentional because it came right before the request to find him guilty and shortly after the prosecutor's request that the jury not let him "deceive anyone else." Br. 46 (citation omitted). However, additional context connects these dots differently. First, the prosecutor's request that the jury not let Zacharias deceive anyone else followed comments on the injustice of the victims struggling while Zacharias ascended in the church, getting away with his crimes. Tr.8, R.111, PageID#2549-2550. Taken together, these statements constitute a proper "appeal[] to a juror's sense of justice," *Hall*, 979 F.3d at 1122, and not evidence that the prosecutor deliberately tried to inflame the jury (*see* Br. 46). Similarly, the statement's timing directly before the prosecutor asked the jury to find Zacharias guilty does not necessarily suggest a strategic decision to place emphasis on the challenged remark. It certainly does not negate the inference that the remark was unintentional here, where no other emphasis or repetition was used (*see* Tr.8, R.111, PageID#2549-2550) and given that the court had just admonished the prosecutor to "[w]atch [her] time." *Id.* at PageID#2549.

d. The government's case against Zacharias was strong.

The government's overall evidence against Zacharias was strong. Zacharias is wrong to argue (Br. 46-47) that the case was close and came down to credibility, as we have already explained. *See* pp. 26-31, 38-39, *supra*. While the only direct evidence that he had sex with minors comes from the victims' testimony, that

testimony is amply corroborated by phone records, text messages, videos and images, internet activity, financial records, and the testimony of others in the victims' lives. *See* pp. 26-31, *supra*. Zacharias may try to downplay his own admissions in the "confession" video. Br. 46. But he expressly stated his desire to have sex with Robert when Robert was 11 years old. The confession video has significant probative value that Robert, Grant, and Graham were truthful when they testified that Zacharias engaged in sexual acts with them as minors.

Finally, Zacharias's specific, isolated attacks on the victims' credibility based on cross-examination also fail. Br. 46-47. While Graham and Robert made statements suggesting that sexual acts with Zacharias were "voluntary" or "consensual" and not coerced (Br. 45, 52), this argument ignores the extensive expert testimony in the case on "grooming" and the effects of opioids on the body. Tr.4, R.107, PageID#1739-1796; Tr.5, R.108, PageID#2012-2040. This expert testimony provides ample context for understanding these remarks—such as how Zacharias's victims could see their own actions as voluntary at the same time Zacharias had groomed them and exploited their opioid addiction to gain their compliance with his demands.

***

Because all four factors favor the government, Zacharias has not shown that the prosecutor's remark was so flagrant as to affect his substantial rights. *Hall*, 979 F.3d at 1119.

V. There was no cumulative error because there was no error.

To receive a new trial based on cumulative error doctrine, Zacharias "must show that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair." *United States v. LaVictor*, 848 F.3d 428, 455 (6th Cir. 2017) (internal quotation marks and citations omitted). A trial does not have to "be 'perfect' to withstand [this type of] due process challenge." *Ibid.* (citation omitted). Furthermore, "the accumulation of non-errors cannot collectively amount to a violation of due process." *United States v. You*, 74 F.4th 378, 395 (6th Cir. 2023) (citation omitted). As explained above, Zacharias has not shown any error at trial, let alone a combination of errors prejudicial enough to warrant a new trial. And even if harmless errors did exist, they would not collectively merit reversal.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,580 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: June 27, 2024

CERTIFICATE OF SERVICE

On June 27, 2024, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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ADDENDUM

DESIGNATION OF RELEVANT RECORD CITATIONS

Record Entry No.	Document Description	Page ID Range
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