No. 18-4660

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES WILLIAM HILL, III,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

James William Hill, III, punched his coworker Curtis Tibbs in the face because of Tibbs's sexual orientation while Tibbs was actively preparing goods for interstate shipment, causing the packages to scatter across the warehouse floor and preventing Tibbs from continuing to prepare goods for shipment. The question presented here is whether 18 U.S.C. 249(a)(2)(B)(iv)(I), which prohibits bias-motivated assaults that "interfere[] with commercial or other economic activity in

which the victim is engaged at the time of the conduct," can, consistent with the Commerce Clause, be applied to these facts.

As we argued in our opening brief, application of the statute is constitutional here. That is because Section 249(a)(2), unlike other statutes that courts have found unconstitutional, contains a commerce element that requires the United States to prove a connection to commerce in each case. U.S. Br. 12-16.[1] Here, that element required the United States to prove that Hill's conduct interfered with the victim's ongoing commercial activity. 18 U.S.C. 249(a)(2)(B)(iv)(I). The jury found that the government proved that element beyond a reasonable doubt because Hill's assault directly interfered with Tibbs's ongoing preparation of goods for interstate shipment. U.S. Br. 3; J.A. 551. As the Supreme Court has made clear, Congress has the authority to criminalize precisely this sort of interference with ongoing, active commerce where it can regulate the underlying commercial activity. U.S. Br. 17-22.

Hill makes a number of arguments in his response brief, but what is more important is what he does *not* argue. Hill has cited no Supreme Court or Fourth Circuit case where a court has reversed a conviction notwithstanding a jury's

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[1] References to "U.S. Br. ___" are to page numbers in the United States' opening brief. References to "Hill Br. ___" are to page numbers in Hill's answering brief. References to "J.A. ___" are to page numbers in the Joint Appendix.

conclusion that the facts of the case satisfied a federal statute's commerce element. To the contrary, courts have uniformly upheld applications of federal statutes where Congress has required proof of a sufficient nexus to interstate commerce in each case and a jury has specifically found such a nexus. Hill's arguments that Section 249(a)(2) cannot constitutionally apply here lack merit and, if accepted, would impose novel limits on Congress's authority to regulate conduct that affects commercial activity.

Hill's alternative argument—that the district court should have instructed the jury that to convict, it must find that Hill's assault substantially affected interstate commerce—is not properly before this Court. Hill did not cross-appeal the judgment and thus he cannot argue for relief other than affirmance. Even if the Court reaches the merits, Hill's proposed jury instructions incorrectly stated the law and the district court did not abuse its discretion by instructing the jury with language that tracked the statute.

ARGUMENT

I

SECTION 249(A)(2) AS APPLIED IN THIS CASE VALIDLY REGULATES INTERFERENCE WITH ONGOING COMMERCIAL ACTIVITY

As we explained in our opening brief, application of Section 249(a)(2) is constitutional in this case because courts have long upheld applications of statutes that criminalize violent interference with ongoing commercial activity. Hill's entire argument relies on the four-factor test set forth in *Lopez* and *Morrison*. See Hill Br. 16-17. But that test generally applies to facial challenges to federal statutes. The test is designed to determine whether a statute in the abstract regulates conduct that substantially affects commerce. This case, unlike *Lopez* and *Morrison*, presents an as-applied challenge. The Court must thus look to whether the facts presented at trial are sufficient, in light of the statute, to bring the case within a recognized area of Congress's Commerce Clause power. The facts do so here because they establish that Hill's assault directly interfered with Tibbs's ongoing preparation of goods for interstate shipment, which is a connection to commerce that courts have found sufficient in as-applied challenges.

Hill's arguments to the contrary lack merit. Hill first contends that Section 249(a)(2) regulates non-economic violent conduct. Hill Br. 16-23. But this rewrites the statute by ignoring the statute's commerce element. As written and applied here, the statute criminalizes violent conduct *that interferes with ongoing*

commerce, not violent conduct by itself. Hill's second argument, that application of the statute can only be constitutional if his conduct, by itself, substantially and individually affects interstate commerce (Hill Br. 17), ignores relevant precedent from this Court and the Supreme Court. Under existing case law, any individual application of a federal statute need not by itself target conduct that substantially affects interstate commerce. U.S. Br. 23-25. Such a requirement would not only contradict case law but would significantly undermine federal criminal law. Finally, Hill's contention that the United States' position in this case creates a slippery slope that would permit Congress to criminalize all conduct that may have a downstream commercial effect misapprehends our argument. Hill Br. 29-33. We do not rely, as he contends, on a theory that his conduct has downstream commercial effects. Rather, the portion of the statute at issue here requires direct interference with ongoing commerce. Our argument is thus limited to circumstances akin to this case where conduct directly and immediately impairs ongoing commerce. U.S. Br. 25-28.

A. Hill's Argument That Section 249(a)(2) Criminalizes Violent Conduct Ignores The Commerce Element At Issue Here, Which Ensures That The Statute Criminalizes Only Violent Conduct That Directly Interferes With Ongoing Commerce

Hill repeatedly and erroneously contends that Section 249(a)(2) is unconstitutionally applied in this case because Section 249(a)(2) "prohibits violent crimes, not economic crimes." Hill Br. 16. He contends, for example, that

"Congress made clear that it enacted the HCPA in order to criminalize violent acts." Hill Br. 19. In making this argument, however, Hill ignores the statute's commerce element and conflates conduct that *affects* commercial or economic activity with conduct that is *motivated* by commercial or economic reasons.

1. In contending that Section 249(a)(2) criminalizes violent crime rather than economic offenses, Hill ignores the statute's commerce element. Properly read, Section 249(a)(2)(B)(iv)(I) targets violent crime that interferes with the victim's ongoing commercial activity, not violent crime by itself. That is, to prosecute an offense under the portion of the statute at issue here, the United States must specifically allege and prove beyond a reasonable doubt that an assault interfered with the victim's ongoing economic or commercial activity. 18 U.S.C. 249(a)(2)(B)(iv)(I); see *United States* v. *Gibert*, 677 F.3d 613, 627 (4th Cir.) (explaining that the United States must prove a commerce element like any other element), cert. denied, 568 U.S. 889 (2012). The United States could not rely on Section 249(a)(2)(B)(iv)(I) to prosecute bias-motivated offenses that lacked such a direct commercial connection. Hill's argument that Section 249(a)(2) "criminalizes assault—here, a punch in the face—without an economic aspect" (Hill Br. 22) is thus wrong. The United States cannot prosecute a mere punch in the face; the United States can only use Section 249(a)(2)(B)(iv)(I) to prosecute a punch in the face that interferes with the victim's ongoing commercial activity—

here, preparation of goods for interstate shipment. See *United States* v. *Hill*, 700 F. App'x 235, 250 (4th Cir. 2017) (Wynn, J., dissenting) ("[T]his provision does not give the federal government general license to punish crimes of violence motivated by discriminatory animus.") (citation and internal quotation marks omitted).

Hill's contention that "Congress did not intend the jurisdictional element in the HCPA to transform it from a statute regulating violence to one regulating economic activities" (Hill Br. 24) is also incorrect. As discussed in our opening brief, Congress included a commerce element in Section 249(a)(2) precisely to ensure that any conduct the statute regulated bore a sufficient connection to commerce and thus fell within its Commerce Clause power as interpreted in *Lopez* and *Morrison*. U.S. Br. 15.[2] Congress routinely drafts statutes to include commerce elements in this manner, and courts routinely uphold applications of those statutes. That is, Congress takes something that it may not be able to regulate by itself—such as arson or here, a bias-motivated assault—and brings it within federal jurisdiction when that conduct affects commerce. To do so, Congress requires proof of a commercial effect in each prosecution. See, *e.g.*, 18 U.S.C. 2332a(a)(2) (prohibiting use of weapon of mass destruction, including any

[2] Hill's argument that Section 249(a)(2)'s "language prohibiting 'willfully caus[ing] bodily injury to any person' is, like the statutes in *Lopez* and *Morrison*, 'a criminal statute that by its terms has nothing to do with 'commerce'" (Hill Br. 18) ignores the fact that Section 249(a)(2), unlike the statutes in *Lopez* and *Morrison*, contains an element specifically requiring a connection to commerce.

biological agent, toxin, or vector where results of such use "affect interstate or foreign commerce"); 18 U.S.C. 844(i) (federal arson statute concerning "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce"); 18 U.S.C. 922(g) (felony firearms possession laws, applicable to firearms "in or affecting commerce"); 18 U.S.C. 1951 (Hobbs Act, prohibiting robbery or extortion that "affects commerce"); 18 U.S.C. 247 (Church Arson Prevention Act); 18 U.S.C. 2119 (federal carjacking statute).

As discussed in our opening brief, the clearest example of this is the Gun-Free School Zones Act, which the Supreme Court struck down in *Lopez*. U.S. Br. 13-14. After that decision, Congress added a commerce element to the statute, and courts have since upheld the amended statute. U.S. Br. 13-14 (collecting cases). "Statutes prohibiting noncommercial conduct that include such jurisdictional elements are universally upheld as within Congress's Commerce Clause powers." *United States* v. *Roof*, 225 F. Supp. 3d 438, 453 (D.S.C. 2016) (collecting cases).[3]

[3] When Hill discusses the commerce element, he misstates its import. For example, Hill cites *Torres* v. *Lynch*, 136 S. Ct. 1619, 1624 (2016), for the proposition that commerce elements are "limitations rather than * * * defining elements of a statute." Hill Br. 25. It is unclear what he means by this because there is no doubt that the commerce element is an essential element that the government must prove in each case. But in any event, *Torres* is inapplicable. The Supreme Court there held that a prior state felony conviction constituted an "aggravated felony" under the Immigration and Nationality Act (INA) even though the state offense did not contain the commerce element that the federal offense did. 136 S. Ct. at 1623, 1634. The Court's rationale was that the particular definitions

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Hill's argument on this point relies on the faulty premise that there is a bright line between statutes regulating violent crime on the one hand and statutes regulating economic or commercial activity on the other. But that is not correct. *Hill*, 700 F. App'x at 247 ("[T]he distinction between purely economic property crimes and purely non-economic violent crimes is not as clear as Defendant suggests.") (Wynn, J., dissenting). Take arson, for example, which is undoubtedly a violent crime. Congress cannot constitutionally criminalize all arson. See *Jones* v. *United States*, 529 U.S. 848, 858 (2000).[4] Indeed, the Supreme Court has suggested that federally criminalizing arson that targets owner-occupied residences

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and context of the INA made clear that state offenses that did not include commerce elements should also qualify as aggravated felonies. *Id.* at 1626-1630. *Torres* provides no basis to disregard a commerce element when considering whether an application of a federal statute falls within Congress's Commerce Clause power. To the contrary, *Torres* clarifies that commerce elements exist for the precise purpose of ensuring that applications of federal statutes fall within Congress's power to criminalize the offenses at issue. *Id.* at 1624.

[4] Hill suggests that arson is an "inherently economic crime[]," but he cites nothing other than the district court's erroneous conclusion for that proposition. Hill Br. 21. That is because there is no precedent supporting that assertion. There is nothing inherently economic about arson, which is why the Supreme Court expressed skepticism about applying the statute to buildings that are not used for some commercial purpose. See *Jones*, 529 U.S. at 858. The arson statute, like Section 249(a)(2), targets economic activity only because the statute has a commerce element that limits its enforcement to buildings that are actively used for some commercial purpose. See *United States* v. *Patton*, 451 F.3d 615, 633 (10th Cir. 2006) ("[T]he jurisdictional hook serve[s] the purpose of limiting the statute to arson cases where there really was a substantial and non-attenuated effect on interstate commerce."), cert. denied, 549 U.S. 1213 (2007).

would raise constitutional questions. *Id*. at 857-858. But Congress can criminalize arson where it targets some building, such as a restaurant, a daycare center, or a rental property, that is actively used for ongoing commercial activity. See *Russell* v. *United States*, 471 U.S. 858, 862 (1985); *United States* v. *Aman*, 480 F. App'x 221, 224-225 (4th Cir.), cert. denied, 568 U.S. 919 (2012); *United States* v. *Terry*, 257 F.3d 366, 369 (4th Cir.), cert. denied, 534 U.S. 1035 (2001). The federal arson statute therefore targets violent crime *and* commercial activity by protecting buildings that are actively used for commercial activity from violent crime.

The same is true here. Section 249(a)(2)(B)(iv)(I) regulates violent crime *and* commercial activity by protecting individuals who are actively engaged in commercial activity from the violent crime of bias-motivated assaults. As Judge Wynn explained, "[i]t is not the violent *act* itself that triggers Congress's regulatory authority under the Commerce Clause, but the *effect* of that act on interstate commerce that renders it susceptible to federal regulation." *Hill*, 700 F. App'x at 247 (Wynn, J., dissenting).

To be sure, Hill is correct that "a jurisdictional element by itself is not sufficient to bring a criminal statute within Congress's power to regulate under the Commerce Clause." Hill Br. 25; see U.S. Br. 16 n.6. Rather, the analysis is whether the commerce element ensures that application of the statute falls within a recognized area of Congress's Commerce Clause authority. The commerce

element here does so because the Supreme Court and this Court have long recognized that Congress has the power to regulate conduct that interferes with ongoing commerce where Congress can regulate that underlying commerce. U.S. Br. 17-20; see also *United States* v. *Cristobal*, 293 F.3d 134, 146 (4th Cir.), cert. denied, 537 U.S. 963 (2002) (Congress can prohibit interference with property that is "actively employed for commercial purposes" under its Commerce Clause powers.). That is precisely what Section 249(a)(2)(B)(iv)(I) requires, and, as the jury found, the facts developed at trial satisfy that statutory test because Hill's conduct interfered with Tibbs's active, ongoing preparation of goods for interstate shipment. U.S. Br. 19-20.

2. In making the argument that Section 249(a)(2) does not regulate economic activity, Hill also conflates whether a statute targets economic activity with whether a statute targets economically *motivated* activity. That is, he suggests that Congress can only regulate conduct that is the result of some sort of commercial or economic motivation. Hill Br. 19-20 (contending that Section 249(a)(2) is unconstitutional because the "statute does not prohibit violence related to an economic act, such as assaults done in order to further an economic interest").

Hill is incorrect. Courts routinely uphold applications of federal statutes, where, as here, there is some commercial *effect* of the conduct, even if there is no

commercial *motive* for the conduct. As this Court has stated, a federal statute is constitutional under the Commerce Clause even where it "does not require proof that a defendant intended to affect commerce." *United States* v. *Williams*, 342 F.3d 350, 354 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004). Courts have routinely applied that basic principle. The Fifth Circuit, for example, upheld a federal arson conviction notwithstanding defendants' contention that they did not know that the home to which they set fire contained a home office. See *United States* v. *Jimenez*, 256 F.3d 330, 339 (5th Cir. 2001), cert. denied, 534 U.S. 1140 (2002). Similarly, this Court upheld a federal arson conviction where a defendant set fire to victims' business vehicles even though the defendant was motivated by a family feud rather than anything to do with commerce. *Cristobal*, 293 F.3d at 146. And, on the other side of the ledger, courts have reversed arson convictions where the defendants targeted otherwise commercial buildings that lacked any viable commercial business. *United States* v. *Ryan*, 227 F.3d 1058, 1063-1064 (8th Cir. 2000) (abandoned fitness center); *United States* v. *Gaydos*, 108 F.3d 505, 511 (3d Cir. 1997) (house that defendant knew was a rental but was uninhabited at the time and had been permanently removed from the rental market).

These cases make clear that the critical question for Commerce Clause purposes is whether an offense had a commercial effect, not whether the offense had a commercial motive. As Judge Wynn explained, "the Supreme Court has

recognized that the economic or non-economic nature of proscribed conduct turns on whether the conduct can be shown to *affect* economic activity subject to congressional regulation—and therefore interstate commerce—and not whether the perpetrator of the conduct was *motivated* by economic interest." *Hill*, 700 F. App'x at 246 (Wynn, J., dissenting). That is exactly what Section 249(a)(2)(B)(iv)(I) requires and what the facts of the case demonstrate. Hill's motive was bias, not commercial. Yet, the impact of his offense was an interruption of ongoing commerce; it prevented Tibbs from continuing to package goods for interstate shipment. That brings Hill's offense within Congress's Commerce powers.

In sum, properly construed, Section 249(a)(2)(B)(iv)(I) is a valid commercial or economic regulation because it protects individuals who are engaged in ongoing commercial activity from bias-motivated assaults. This Court should reject Hill's attempts to read the commerce element out of the statute and his suggestion that the statute must require a commercial motive.

B. The Commerce Clause Does Not Require That The Government Prove That A Defendant's Conduct Individually And Substantially Affected Interstate Commerce In Every Case

Hill's contention that for the prosecution to be constitutional, "the assault in this case must have individually and substantially affected interstate commerce" is not correct. Hill Br. 17. As we stated in our opening brief, the Supreme Court has

made clear that "it makes no difference * * * that any actual or threatened effect on commerce in a particular case is minimal." U.S. Br. 23 (quoting *Taylor* v. *United States*, 136 S. Ct. 2074, 2081 (2016), and collecting additional cases). Indeed, both the Supreme Court and this Court have held that in as-applied challenges "the relevant question for purposes of a Commerce Clause analysis is not whether one particular offense has an impact on interstate commerce, but whether the class of acts proscribed has such an impact." *Gibert*, 677 F.3d at 627; see also *United States* v. *Forrest*, 429 F.3d 73, 79 (4th Cir. 2005) (Defendant's "constitutional challenge, which rests entirely on the asserted *de minimis* economic effect of his own activities, must fail.") (internal citation omitted).[5]

Applying this principle, this Court has upheld convictions for violations of federal law where the offense interfered with ongoing commercial activity, even though the individual conduct did not, by itself, substantially affect interstate commerce. In *Aman*, this Court upheld an arson conviction where the defendant had set fire to a building that housed a local restaurant. 480 F. App'x at 225. This Court held that "commercial use of the property is enough to establish the

[5] Here, the relevant "class of acts" is bias-motivated assaults that interfere with ongoing commercial activity. Just as arson offenses that target buildings actively used for some commercial purpose are a class of acts that has a substantial effect on commerce, the class of bias-motivated assaults that interfere with individuals actively engaged in commercial activity has a substantial effect on commerce.

necessary connection to interstate commerce." *Id.* at 224. The defendant in *Aman* argued, as Hill does here, that the arson could not be the subject of federal regulation because the arson did not, by itself, substantially affect commerce. *Id.* at 223. Specifically, he argued that "[s]imply engaging in business does not *ipso facto* create a *substantial* [e]ffect on commerce" and that Congress therefore lacked power to regulate arson targeting the restaurant. *Id.* at 225 (quoting appellant Aman's brief). This Court rejected that argument, concluding that "arson of property that was actively employed for commercial purposes" sufficiently interferes with ongoing commerce for purposes of the Commerce Clause, and each instance of such arson need not individually and substantially affect commerce. *Ibid.* (citing *Jones*, 529 U.S. at 857-858).

Accordingly, where, as here, Congress has enacted a statute prohibiting interference with ongoing commerce, both the Supreme Court and this Court have long held each interference need not by itself substantially affect interstate commerce. As the Supreme Court recently explained, "courts have no power to excise, as trivial, individual instances" of conduct where Congress can regulate the relevant class of activities. *Taylor*, 136 S. Ct. at 2081 (citation and internal quotation marks omitted).[6]

[6] Hill contends that the principle that each individual assault need not by itself substantially affect interstate commerce does not apply here because "the

(continued…)

Hill has cited no case holding the contrary, *i.e.*, that a prosecution is constitutional only if the defendant's conduct by itself substantially affected interstate commerce. To our knowledge, no such case exists, which is not surprising given that such a standard would be unworkable. Many federal crimes do not, by themselves, substantially affect interstate commerce, but they nonetheless remain federal crimes because they have a commercial nexus. For example, it is a federal crime to set fire to a daycare center that operates entirely within a single State or to business-owned vehicles. See *Terry*, 257 F.3d at 370; *Cristobal*, 293 F.3d at 146. It is also a federal crime to take small sums of money from a drug dealer or a food-delivery driver. See *Taylor*, 136 S. Ct. at 2080; *United States* v. *Simpson*, 659 F. App'x 158, 161 (4th Cir. 2016). An individual defendant who engages in any of those activities does not "individually and substantially" affect interstate commerce. Accepting Hill's arguments would call into question all of those convictions and undermine application of a significant swath of criminal law. Hill's argument is thus not only foreclosed by precedent but is also impractical.

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regulated act is noneconomic." Hill Br. 22. But as discussed above, that argument ignores the commerce element. The statute as a whole regulates bias-motivated assaults that interfere with ongoing commerce, which is economic in nature.

C. The Downstream Economic Effects Of Hill's Conduct Are Irrelevant Because Hill's Assault Directly Affected Ongoing Commercial Activity

Hill also contends that the only connection between his conduct and commerce is that his assault of Tibbs may have some downstream effect on productivity, which is the chain of causation the Supreme Court found insufficient in *Morrison*. Hill Br. 29-33. Specifically, he argues that "the only connection between the assault and interstate commerce rests on the weak 'but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.'" Hill Br. 29 (quoting *United States* v. *Morrison*, 529 U.S. 598, 615 (2000)).

But that is not the case. The effect of Hill's assault on commerce was immediate. Indeed, video of the assault shows that the assault caused packages that were being prepared for interstate shipment to fly into the air and scatter across the warehouse floor. And, as a direct and immediate result of the assault, Tibbs was unable to continue his commercial and economic activity, preparing packages for shipment, for the rest of the day. These facts are sufficient to bring the application of Section 249(a)(2) to Hill's conduct within Congress's Commerce Clause power.

Application of Section 249(a)(2) here does not implicate the Supreme Court's concern in *Lopez* and *Morrison* about reliance on the downstream effects

of violent conduct. In those cases, the Supreme Court refused to consider the downstream economic effects of gun-based crime and gender-based violence on the economy and productivity generally, because that reasoning would allow Congress to regulate "not only all violent crime, but all activities that might lead to violent crime." *Morrison*, 529 U.S. at 612-613 (citation omitted); accord *United States* v. *Lopez*, 514 U.S. 549, 564 (1995). That is, Congress cannot rely on its Commerce Clause power based on the "costs of crime" or conduct's generalized effect on "national productivity." See *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 564).

But here, unlike in those cases, a jury has found that Hill's conduct had a direct and immediate impact on commerce. As a result, our theory is not that there is some downstream effect of the offense conduct on national productivity in general, but rather that there is an immediate effect on the commercial activity of the victim in this case. Unlike in *Lopez* or *Morrison*, no elaborate, but-for causal chain between the regulated conduct and commerce is necessary in Hill's case, and there is no reason to "pile inference upon inference" to connect the regulated conduct to commercial activity. See *Lopez*, 514 U.S. at 567. To the contrary, a jury specifically found that the impact on commerce was evident and direct.[7]

[7] Hill's contention that "commerce rolled on without missing a beat" notwithstanding his assault (Hill Br. 30) ignores not only the jury's finding but also (continued…)

In short, there is a "close" and "direct" connection between Hill's conduct and commerce, and it is not the case that "[t]he only connection is the weak, but-for causal chain" that courts have rejected. Hill Br. 10. Our theory would not, as Hill suggests, "allow Congress to regulate all violent crime and all causes of crime." Hill Br. 30. Rather, accepting our argument would allow Congress to regulate direct interference with ongoing, active commerce, which is already established under the federal arson and Hobbs Act cases.

II

HILL'S CHALLENGE TO THE JURY INSTRUCTIONS IS NOT PROPERLY BEFORE THIS COURT AND LACKS MERIT BECAUSE THE DISTRICT COURT'S INSTRUCTIONS TRACKED THE STATUTE, WHILE HILL'S PROPOSAL INCORRECTLY STATED THE LAW

Hill argues that if this Court reverses the district court's judgment of acquittal, it should remand for a new trial rather than for reinstatement of the jury's verdict. Hill Br. 39-48. Hill contends that a new trial is necessary because the district court should have accepted his proposed jury instructions on the commerce

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the impact on the victim. Certainly, Tibbs's commercial activity—his work packaging goods for shipment—did *not* roll on without missing a beat. He had to leave the warehouse floor and missed the remainder of his shift. If Hill is trying to suggest that *Amazon's* commercial activity continued, that is entirely irrelevant, as we discussed in our opening brief. U.S. Br. 24. Hill has cited no case holding that to be federally prosecuted, a crime has to interfere with a corporation's commercial activity, as opposed to an individual's.

element, rather than giving an instruction that tracked the statutory language. Hill Br. 39. Hill's arguments are procedurally improper and substantively incorrect.

A. Hill's Arguments Regarding The Jury Instructions Are Not Properly Before This Court Because He Failed To Cross-Appeal The Judgment

As appellee, Hill can defend the district court's judgment on any basis in the record. *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 481 (1976) (per curiam); *Reynolds* v. *American Nat'l Red Cross*, 701 F.3d 143, 155 (4th Cir. 2012) ("A cross-appeal is unnecessary where an appellee seeks nothing more than to preserve a judgment in its favor.") (alternations, citation, and internal quotation marks omitted). But "any effort to modify the judgment must be made by way of a cross-appeal." *Mercer* v. *Duke Univ.*, 50 F. App'x 643, 645 (4th Cir. 2002). As this Court has summarized, the "general rule is that without taking a cross-appeal, the prevailing party may present any argument that supports the judgment in its favor as long as the acceptance of the argument would not lead to a reversal or modification of the judgment rather than an affirmance." *JH ex rel. JD* v. *Henrico Cty. Sch. Bd.*, 326 F.3d 560, 567 n.5 (4th Cir. 2003) (citation omitted).

This rule applies even where the appellee has fully prevailed in district court. "Even a 'party who prevails in the district court is permitted to conditionally raise issues in a cross-appeal because if the appellate court decides to vacate or modify the trial court's judgment, the judgment may become adverse to the cross-appellant's interest.'" *Art Midwest Inc.* v. *Atlantic Ltd. P'ship XII*, 742 F.3d 206,

211 (5th Cir. 2014) (quoting *Cook* v. *Rockwell Int'l Corp.*, 618 F.3d 1127, 1153 (10th Cir. 2010), cert. denied, 567 U.S. 934 (2012), and collecting cases). Under these authorities, to seek anything other than affirmance, Hill must have cross-appealed the district court's judgment. But he has not done so. His arguments are thus procedurally barred.

In the Fourth Circuit, the rule that an appellee must cross appeal to challenge the judgment is a "rule of practice," rather than jurisdictional. See *Tug Raven* v. *Trexler*, 419 F.2d 536, 548 (4th Cir. 1969) (citation omitted), cert. denied, 398 U.S. 938 (1970). But there is no basis to depart from the general rule here. See *El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473, 480 (1999) ("[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule."). The United States has repeatedly made clear its position that the prosecution in this case is constitutional in light of the jury's findings, putting Hill on notice that to challenge the jury's verdict, he must cross-appeal. See *Mercer*, 50 F. App'x at 646 (refusing to depart from the general rule in similar circumstances). Moreover, it would not cause any injustice to refuse to consider Hill's jury-instruction argument at this stage. To the contrary, if the Court reverses the judgment of acquittal, Hill can appeal the judgment against him after he is sentenced. At that point, he can raise any

challenges he has to the final judgment, including any jury instruction or evidentiary challenges.

B. The District Court's Jury Instructions Appropriately Tracked The Statutory Language

If the Court reaches the merits, the district court's denial of Hill's requested instruction was not an abuse of its discretion. A "district court's refusal to provide an instruction requested by a defendant constitutes reversible error only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States* v. *Lewis*, 53 F.3d 29, 32 (4th Cir. 1995) (citation and internal quotation marks omitted). The defendant bears the burden of making a showing on each of these elements. *United States* v. *Sonmez*, 777 F.3d 684, 688 (4th Cir.), cert. denied, 136 S. Ct. 689 (2015).

The district court instructed the jury that to convict, it must find beyond a reasonable doubt "that Mr. Hill's conduct interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct." J.A. 541. This tracked the statutory language, which criminalizes conduct that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct." 18 U.S.C. 249(a)(2)(B)(iv)(I). Hill contends, incorrectly, that the district court's instruction was defective for two reasons: (1)

the court should have instructed the jury that to convict it must find a substantial effect on commerce, and (2) "commerce" has a technical meaning beyond the ordinary understanding of the word. Hill Br. 41.

1. The district court did not abuse its discretion in rejecting Hill's argument that the jury should have been instructed that it could only convict if Hill's conduct "substantially affected" commerce or caused a "relatively significant disruption to commerce." Hill Br. 40. Requiring a substantial effect on commerce of an individual's conduct would be an incorrect statement of the law. Hill's arguments to the contrary rely on a flawed constitutional-avoidance theory and a statutory interpretation that inappropriately departs from the plain language.

Hill's primary argument for requiring a substantial effect in his individual case is that such a requirement is necessary to avoid a constitutional question under the Commerce Clause. But that argument fails for the same reasons one of his arguments challenging application of Section 249(a)(2)(B)(iv)(I) to his conduct fails: there is no constitutional requirement that each individual application of a federal statute prohibiting interference with ongoing commercial activity by itself substantially affect interstate commerce, as discussed above. See pp. 13-16, *supra*. Hill's proposed jury instruction relies on a constitutional avoidance theory that would create a "statute[] foreign to th[at] Congress intended, simply through fear

of a constitutional difficulty that, upon analysis, will evaporate." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998).

The remainder of Hill's statutory interpretation analysis fares no better. The text of the statute, which criminalizes bias-motivated assaults that "interfere[] with commercial or other economic activity in which the victim is engaged at the time of the conduct," 18 U.S.C. 249(a)(2)(B)(iv)(I), should be given a plain reading, as the district court did. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (citation and internal quotation marks omitted).

Nothing in the statutory structure requires inserting a substantiality requirement into this clear language. Hill argues that the relevant statutory text—criminalizing conduct that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct"—contains a requirement that the conduct substantially affect interstate commerce because of a separate catch-all commerce element that criminalizes conduct that "otherwise affects interstate or foreign commerce." Hill Br. 44 (citing 18 U.S.C. 249(a)(2)(B)(iv)). There is no basis in precedent or logic to interpret the statute this way. To be sure, courts have held that a catch-all provision must be interpreted in light of the enumerated list that precedes it, but no court has suggested that an enumerated list

must be interpreted based on the catch-all that follows it. See *Begay* v. *United States*, 553 U.S. 137, 144 (2008), superseded by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015).

2. The district court also did not abuse its discretion by rejecting Hill's proposed instruction defining the phrase "interfered with commercial and economic activity." Hill proposed defining the term "commerce" as "travel, trade, traffic, transportation or communication among the states." Hill Br. 40 (citing J.A. 140-141). The district court was well within its discretion in rejecting this proposed definition because Hill's proposal is an incorrect statement of the law.

There is no source of law defining "commercial or economic activity" as narrowly as what Hill proposed. Hill cited no case law, statute, or regulation in support of his definition of the term. He did not provide any such citation before the district court, and he provides no such citation in his appellate brief. See J.A. 140-141. Instead, he merely asserts that his narrow definition of commerce is necessary to avoid unsupported constitutional concerns.[8]

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[8] Hill relies principally on *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), but that case is inapposite. Hill Br. 44-45. There, this Court invalidated a regulation interpreting the Clean Water Act and thus reversed a jury instruction that relied on that regulation. *Id*. at 257. The Court reasoned that the regulation exceeded the scope of the statute. *Ibid.* *Wilson* has no bearing on this case because unlike here, the district court there did not give an instruction that tracked the statutory language. Indeed, the court's error was broadening the statute using the regulatory text. Hill also relies on *McDonnell* v. *United States*, 136 S. Ct. 2355 (continued…)

This Court has consistently held that the Commerce Clause does not require proof of interference with the types of commercial intercourse to which Hill points (travel, trade, traffic, transportation, or communication between States). To the contrary, Congress can criminalize interference with minimal amounts of intrastate commerce. In *United States* v. *Terry*, for example, this Court held that Congress could prohibit the arson of a church building that contained a daycare center that was "was actively engaged in commercial activity." 257 F.3d 366, 367, 370 (4th Cir.), cert. denied, 534 U.S. 1035 (2001). This Court rejected an argument similar to Hill's argument here—*i.e.*, that commerce has to be narrowly interpreted—in concluding that it was "not dispositive that the commercial activity of providing daycare services took place entirely within the city of Raleigh." *Id.* at 370.

Accordingly, the district court did not abuse its discretion by refusing to give Hill's incorrect instruction on what "commercial and economic activity" meant. See *Noel* v. *Artson*, 641 F.3d 580, 586 (4th Cir.) (court's instructions must "adequately inform[] the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party") (citation omitted), cert. denied, 565 U.S. 978 (2011).

(…continued)
(2016), but that case also sheds no light on his arguments here. Hill Br. 46. That case concerned the definition of "official act" under the federal bribery statute (18 U.S.C. 201). It had nothing to do with the Commerce Clause or how to define commerce elements in criminal statutes.

CONCLUSION

For these reasons, this Court should reverse the judgment of acquittal and remand for reinstatement of the jury's guilty verdict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached REPLY BRIEF FOR THE UNITED STATES:

(1) contains 6209 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Dated: February 4, 2019

CERTIFICATE OF SERVICE

I certify that on February 4, 2019, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that four paper copies of the foregoing brief were sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by Federal Express on February 4, 2019.

s/ Vikram Swaruup
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