No. 18-4660

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES HILL, III,

Defendant-Appellee

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

OPPOSITION OF THE UNITED STATES TO THE PETITION FOR REHEARING EN BANC

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In response to this Court's order dated July 30, 2019, the United States submits this opposition to the petition for rehearing en banc.

STATEMENT

1. Defendant-Appellee James Hill assaulted Curtis Tibbs at an Amazon warehouse in Chester, Virginia, while both men were actively preparing goods for interstate shipment. Op. 3-4.[1] Tibbs's job included loading items into boxes for packaging, scanning the packages, and placing them on a conveyor belt. Op. 4. On May 22, 2015, Tibbs was carrying items to load into a box when Hill, without provocation, punched him repeatedly in the face. Op. 4. The items Tibbs was carrying flew into the air and scattered across the warehouse floor. Op. 20. Hill admitted to an Amazon investigator and to a local police officer that he had assaulted Tibbs because Tibbs was gay. Op. 4.

Hill's attack on Tibbs caused injuries to Tibbs's face and required Tibbs to go to the hospital and miss the rest of his shift. Op. 4. Amazon closed the area where Tibbs and Hill had been working to clean Tibbs's blood off the floor. Op. 4. However, Amazon did not miss an unusual number of shipping deadlines because it reassigned their work to other areas. Op. 4.

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[1] "Op. __" refers to the panel's slip opinion in this case by page number. "Br. __" refers to Hill's petition for rehearing en banc by page number.

2. a. The government charged Hill with willfully causing bodily injury to Tibbs because of his actual or perceived sexual orientation in violation of the Hate Crimes Prevention Act, 18 U.S.C. 249(a)(2). Op. 5. To satisfy the statute's commerce element, the indictment alleged that the assault "interfered with commercial and other economic activity in which [Tibbs] was engaged at the time of the conduct" and that it "otherwise affected interstate and foreign commerce." Op. 5; 18 U.S.C. 249(a)(2)(B)(iv).

Hill moved to dismiss the indictment, arguing, among other things, that Section 249(a)(2) was unconstitutional on its face and as applied to him. Op. 5. The district court granted the motion, concluding that Section 249(a)(2) was unconstitutional as applied to Hill because it exceeded Congress's Commerce Clause authority. *United States* v. *Hill*, 182 F. Supp. 3d 546, 555-556 (E.D. Va. 2016). The district court did not address Hill's facial challenge.[2]

b. The United States appealed, and this Court reinstated the indictment without resolving the constitutional question. *United States* v. *Hill*, 700 F. App'x 235 (4th Cir. 2017). The Court held that the indictment was "legally sufficient" on its face, because it "specifically allege[d] that Hill's conduct had an effect on interstate commerce." *Id.* at 236-237.

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[2] Throughout the appeals in this case, Hill has challenged the statute only as applied to his conduct.

c. On remand, the government relied exclusively on the theory that Hill's actions "interfere[d] with commercial or other economic activity in which the victim [was] engaged at the time of the conduct" to satisfy the statute's commerce element. Op. 6-7 (quoting 18 U.S.C. 249(a)(2)(B)(iv)(I)). A jury convicted Hill. Op. 7.

The district court granted Hill's motion for a judgment of acquittal, finding that application of Section 249(a)(2) to Hill's conduct exceeded Congress's Commerce Clause power. *United States* v. *Hill*, No. 3:16-cr-00009-JAG, 2018 WL 3872315 (E.D. Va. Aug. 15, 2018). Purporting to apply the Supreme Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000),[3] the court first found that Section 249(a)(2) regulates "discriminatory crimes of violence" rather than "economic activity." *Hill*, 2018 WL 3872315, at *6. Second, the court found insufficient Congress's findings that violent hate crimes substantially affect interstate commerce. *Id.* at *7-8. Third, the court found that the "attenuated connection between an assault

[3] In *Lopez*, the Supreme Court struck down under the Commerce Clause the Gun-Free School Zones Act, 18 U.S.C. 922(q)(1)(A), because "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567. Similarly, in *Morrison*, the Court invalidated the Violence Against Women Act, 42 U.S.C. 13981, because Congress may not "regulate noneconomic, violent criminal conduct based *solely* on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617 (emphasis added).

based on sexual orientation and interstate commerce * * * does not support applying [Section 249(a)(2)] to Hill," because the "fulfillment center performed as usual." *Id.* at *8.

The court stated that Section 249(a)(2) "comes closest to passing constitutional muster as applied to Hill through its jurisdictional element, which requires the offense to interfere with the victim's commercial or economic activity." *Hill*, 2018 WL 3872315, at *8. The court acknowledged that the "government met its burden of proof on this jurisdictional element." *Id.* at *9. But, the court explained, that finding did not resolve the question of "whether the conduct in this case substantially affected interstate commerce." *Id.* at *9.

d. The government again appealed, and a panel of this Court reversed. Recognizing that whether Section 249(a)(2) "may be constitutionally applied to an unarmed assault of a victim engaged in commercial activity at his place of work appears to be an issue of first impression in this Circuit or any other," Op. 12, the panel sought guidance from Supreme Court decisions on other federal statutes passed under Congress's Commerce Clause power.

The panel first looked to *Taylor* v. *United States*, 136 S. Ct. 2074 (2016), which upheld application of the Hobbs Act to the attempted robbery of marijuana and cash from two drug dealers. Op. 13. The Hobbs Act requires proof that the defendant's conduct interfered with "commerce over which the United States has

jurisdiction." 18 U.S.C. 1951(b)(3). As the panel observed, *Taylor* held that "Congress's authority to regulate purely intrastate production, possession, and sale of marijuana—due to the aggregate effect of those activities on interstate commerce—compelled the conclusion that Congress may likewise regulate conduct that interferes with or affects such activities." Op. 14. The panel explained that *Taylor* stands for the point that, "pursuant to its power under the Commerce Clause, Congress may proscribe violent conduct when such conduct interferes with or otherwise affects commerce over which Congress has jurisdiction." Op. 14-15.

The panel next discussed *Russell* v. *United States*, 471 U.S. 858, 862 (1985), which upheld application of the federal arson statute to a defendant who set fire to an apartment building. Op. 16. That statute's commerce element requires proof that the property burned was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Op. 16 (quoting 18 U.S.C. 844(i)). The panel explained that the "rental property at issue [in *Russell*] was 'unquestionably' covered by the statute * * * because 'the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties,' and '[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate

individual activity within that class.'" Op. 16-17 (quoting *Russell*, 471 U.S. at 862).

The panel concluded that, "[t]aken together, the Supreme Court's decisions," and circuit precedent applying those decisions, "establish that when Congress may regulate an economic or commercial activity, it also may regulate violent conduct that interferes with or affects that activity." Op. 18. Because it is "beyond dispute" that "Congress enjoys the authority to regulate the underlying commercial activity Tibbs was engaged in at the time of the assault—the preparation of goods for sale and shipment across state lines," Op. 19 (citing *United States* v. *Darby*, 312 U.S. 100, 113 (1941))—the panel concluded that it need only "graft" that principle onto the commerce element of Section 249(a)(2) to uphold Hill's conviction. Op. 19 (citation omitted).

The panel found the Supreme Court's decisions in *Lopez* and *Morrison* "readily distinguishable" from Hill's prosecution because the statutes at issue in those cases lacked elements requiring a finding that the challenged conduct affected interstate commerce. Op. 24-25. Section 249(a)(2), on the other hand, includes an element requiring that the defendant's conduct "interfere[d] with commercial or other economic activity in which the victim is engaged at the time of the conduct." Op. 25 (quoting 18 U.S.C. 249(a)(2)(B)(iv)(I)). This element, the panel explained, "ensures that the statute regulates only *economic*, violent criminal

conduct, not the type of '*noneconomic*, violent criminal conduct' at issue in *Morrison*." Op. 25-26 (citation omitted).

Finally, in response to the district court's concerns about the potential reach of Section 249(a)(2), the panel explained that its holding was narrow—that the government's prosecution of Hill "complied with the Commerce Clause because his assault of Tibbs interfered with ongoing commercial activity." Op. 27. The panel explained that the statute would not reach all hate crimes in the workplace or in private homes, and emphasized that its "holding in no way usurps the States' authority to regulate violent crimes—including hate crimes—unrelated to ongoing interstate commerce." Op. 26-27.

Judge Agee dissented. Op. 38-69. He would have affirmed the district court's decision to vacate Hill's conviction and held that the prosecution exceeded Congress's Commerce Clause authority "for two principal reasons": (1) the commerce element used to prosecute Hill did not a require a finding that the regulated conduct be *interstate* in nature, and (2) a bias-motivated assault is not inherently "economic." Op. 38.

ARGUMENT

In this as-applied challenge, the only question is whether applying Section 249(a)(2) to the facts of this case exceeds Congress's authority under the Commerce Clause. As set forth below, the Supreme Court has made clear that as

long as Congress has the authority to regulate an economic or commercial activity, it also may regulate violent conduct that interferes with or affects that activity. It is undisputed that Congress has the authority under the Commerce Clause to regulate the activity in which Tibbs was engaged when Hill assaulted him—the preparation of packages for interstate sale and shipment. Thus, Hill's attack on Tibbs easily falls within Congress's Commerce power.

En banc review is "not favored" and is warranted only where a panel decision conflicts with a decision of the Supreme Court or this Court, or where "the proceeding involves one or more questions of exceptional importance." Fed. R. App. P. 35(a) and (b). Hill claims only that the panel's decision conflicts with decisions of the Supreme Court and "would create a troubling precedent." Br. 6. Because the panel's thoroughly reasoned decision is based on and consistent with Supreme Court precedent, and because its conclusion that Section 249(a)(2) is constitutional as applied to Hill's conduct is both narrow and correct, this Court should deny the petition.

A. The Panel Correctly Applied The Framework Set Forth In The Supreme Court's Decisions Under The Hobbs Act And Federal Arson Statute

The panel majority correctly recognized that the Supreme Court's decision in *Taylor* v. *United States*, 136 S. Ct. 2074 (2016), compels the conclusion that Congress had authority under the Commerce Clause to prohibit Hill's conduct in this case. In *Taylor*, the Supreme Court considered a challenge to the application

of the Hobbs Act to the attempted robbery of a marijuana dealer. The Court observed that under *Gonzales* v. *Raich*, 545 U.S. 1 (2005), the market for marijuana was, "as a matter of law, * * * commerce over which the United States has jurisdiction." *Taylor*, 136 S. Ct. at 2081 (internal quotation marks omitted). Thus, the Court held, it was "a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." *Id.* at 2080.

The Court rejected the defendant's argument that the government must prove that the drugs targeted were "destined for sale out of State" or that the drug dealer "operated an interstate business." *Taylor*, 136 S. Ct. at 2080. Though there was "no question" that the government had to prove that the Commerce element was satisfied, "the meaning of that element is a question of law." *Ibid.* Because *Raich* had "established that the purely intrastate production and sale of marijuana [wa]s commerce over which the Federal Government has jurisdiction," the Commerce element was established. *Id.* at 2080-2081.

The same reasoning applies here. The panel explained that it was undisputed "that Congress enjoys the authority to regulate the underlying commercial activity Tibbs was engaged in at the time of the assault—the preparation of goods for sale and shipment across state lines." Op. 19 (citing

United States v. *Darby*, 312 U.S. 100, 113 (1941)). In other words, as in *Taylor*, the preparation of goods for interstate sale and shipment is, "as a matter of law, * * * commerce over which the United States has jurisdiction." *Taylor*, 136 S. Ct. at 2081 (internal quotation marks omitted); see *Darby*, 312 U.S. at 113 ("[T]he shipment of manufactured goods interstate" is interstate commerce.). Thus, "Congress also may prohibit violent crime that interferes with or affects" that "ongoing economic or commercial activity, including the type of bias-motivated assaults proscribed by the Hate Crimes Act." Op. 18.

The panel also correctly applied *Russell* v. *United States*, 471 U.S. 858 (1985), and *Jones* v. *United States*, 529 U.S. 848, 855-856 (2000), involving constitutional challenges to the federal arson statute. In *Russell*, the Court upheld application of the statute to a rental property. 471 U.S. at 862. The panel explained that, as in *Taylor*, the Court in *Russell* held that "Congress may regulate violent conduct when such conduct interferes with or affects commerce subject to congressional regulation—there, the commercial market in rental properties." Op. 16. Conversely, in *Jones*, the Court held that the statute could *not* be applied to "private residences lacking a nexus to interstate commerce." Op. 17 (citing *Jones*, 529 U.S. at 859). The panel recognized that *Jones* reinforced *Russell*'s holding that "when a defendant's conduct interferes with or otherwise affects commerce

subject to congressional regulation, that conduct may be federally regulated under the Commerce Clause." Op. 17.

Hill argues (Br. 10-14) that the panel erred in relying on these cases because the Hobbs Act and federal arson statute regulate "fundamentally different conduct" (Br. 10) than Section 249(a)(2). He asserts that, here, the regulated activity is "violent conduct, not economic activity," and that the commerce element does not change that fact. Br. 13. This argument fails.

The panel correctly recognized that "[i]t is not the violent *act* itself, or the motivation behind that act, 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." Op. 33-34. For instance, in *Taylor*, the economic "activity at issue" was not the robbery itself, but "the sale of marijuana." *Taylor*, 136 S. Ct. at 2080. The panel correctly held that, as in *Taylor*, Congress's Commerce power "extends to intrastate violent conduct that *interferes with commercial or economic activity* over which Congress has regulatory power"—here, the packaging of goods for interstate sale and shipment. Op. 19 n.5 (emphasis added).

For example, arson is not an inherently economic activity and does not, in all instances, fall within Congress's Commerce power to regulate. See *Jones*, 529 U.S. at 855-856. But the statute's interstate commerce element brings some arsons

within Congress's regulatory authority. The same reasoning applies here. Just as Congress may legislate to prevent harm to *property* that is actively engaged in interstate commerce, so too may it legislate to protect a *person* who is actively engaged in interstate commerce. As the panel explained, Hill's argument to the contrary would mean that "Congress would have less authority to protect flesh-and-blood workers employed in interstate commerce than machines performing the very same tasks as those workers." Op. 33. There is no basis for that conclusion in law or in logic.

Similarly, as Hill admits, "[n]ot every street mugging is a Hobbs Act robbery, even though the victim's economic activity is surely affected." Br. 11. The panel recognized that the robbery of a private citizen likely would not be prosecutable under the Hobbs Act where the robbery had no connection to interstate commerce. Op. 28. Thus, it is not robbery's economic nature that brings Hobbs Act prosecutions under Congress's Commerce Clause power. Rather, Congress has power to prohibit a robbery that targets commercial activity that, in turn, is part of a larger "class of activities" that "in the aggregate" affects interstate commerce. *Taylor*, 136 S. Ct. at 2080.

B. The Panel Decision Is Consistent With Lopez *And* Morrison

Hill argues that the panel failed to apply a test derived from *United States* v. *Lopez*, 514 U.S. 549, 561-562 (1995)) and *United States* v. *Morrison*, 529 U.S.

598, 610-612 (2000), which includes consideration of (1) whether the statute regulates economic activity or is an essential part of a larger regulation of economic activity; (2) whether the statute contains an element that limits its reach to conduct that has a connection to or affects interstate commerce; (3) Congress's findings; and (4) whether the link between the conduct and interstate commerce was attenuated. Br. 7. Hill contends that the panel incorrectly "placed dispositive weight" on the statute's commerce element, but he is incorrect. Br. 7.

Although the panel majority considered the other *Lopez*/*Morrison* factors, it properly focused on the statute's commerce element to hold that Section 249(a)(2) is constitutional *as applied to Hill's conduct*.[4] The purpose of the four-factor test is to determine whether conduct bears a sufficient connection to interstate commerce to allow Congress to regulate it. See *Lopez*, 514 U.S. at 562; *Morrison*, 529 U.S. at 610-613. Where, as here, the statute contains an express element requiring the government to prove interference with commercial activity, that

[4] Although the panel majority did not expressly enumerate the other *Lopez*/*Morrison* factors, it considered the substance of those factors in its analysis. It began its analysis with a summary of Congress's findings that hate crimes are distinct from other violent crimes because they "substantially affect interstate commerce in many ways." Op. 8-9 (citation and alterations omitted). The panel also explained that Section 249(a)(2)'s prohibition of violent interference with commercial activity is part of a larger scheme that regulates economic activity—specifically, the preparation of goods for sale and shipment across state lines. Op. 19.

jurisdictional element by itself can be sufficient to show that the statute falls within Congress's Commerce Clause authority.[5] As set forth *supra*, here, as in *Taylor*, the commercial activity in which the defendant interfered—the packaging of goods for interstate sale and shipment—was, as a matter of law, activity that Congress has authority to regulate.

Hill also contends (Br. 8-11), for the first time in this case, that Section 249(a)(2)(B)(iv)(I)'s requirement that the offense conduct "interfere[] with commercial or other economic activity in which the victim is engaged at the time of the conduct" does not validly limit the statute's reach to conduct that affects interstate commerce, because the element does not contain the word "interstate." This is incorrect.

The absence of the word "interstate" in the phrase "commercial or other economic activity" simply reflects the well-established principle that Congress can

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[5] Hill is incorrect (Br. 9 n.1) that an element requiring a connection to interstate commerce is not, by itself, enough to bring a statute within Congress's Commerce power. See Op. 41 (Agee, J., dissenting) (acknowledging that a valid jurisdictional element may be the "sole basis for concluding that a particular statute is constitutional"). Although this Court in *United States* v. *Buculei*, 262 F.3d 322, 328-330 (4th Cir. 2001), cert. denied, 535 U.S. 963 (2002), and *United States* v. *Gibert*, 677 F.3d 613, 626 (4th Cir.), cert. denied, 568 U.S. 889 (2012), considered the other *Lopez*/*Morrison* factors, the Court emphasized that *the jurisdictional elements* ensured that the regulated conduct had the requisite nexus to interstate commerce.

regulate "purely intrastate" commercial activity if it is part of a "class of activities"—here, the preparation of goods for interstate sale and shipment—that "in the aggregate" affect interstate commerce. *Taylor*, 136 S. Ct. at 2079-2081; accord *Raich*, 545 U.S. at 17. The panel thus correctly recognized that the lack of the word "interstate" in no way undermines Congress's authority to regulate the particular conduct in which Tibbs was engaged at the time of the attack, because, consistent with *Lopez* and *Morrison*, Congress's power "extends to [the regulation of] intrastate violent conduct that interferes with commercial or economic activity over which Congress has regulatory power—here the interstate markets for labor and retail goods." Op. 19 n.5 (relying on *Raich*, 545 U.S. at 17). Accordingly, as the panel correctly held, Congress can prohibit violent interference with that activity. Op. 18-19.

Because application of Section 249(a)(2) to Hill's conduct is constitutional, his claim that the statute's commerce element is too broad must fail. On appeal, Hill has pursued only an as-applied challenge. But even if he had preserved a facial challenge, his argument would fail because, absent narrow exceptions not applicable here, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973); see also *United States* v.

Masciandaro, 638 F.3d 458, 474 (4th Cir.), cert. denied, 565 U.S. 1058 (2011) (because regulation prohibiting possession of loaded guns in national parks was constitutional under the Second Amendment as applied to the defendant, he lacked standing to assert a facial challenge to the rule).[6]

C. The Panel Decision Recognizes That Commerce Clause Authority Is Limited

Finally, Hill argues that letting the panel opinion stand in this case "would make Congress's authority under the Commerce Clause limitless." Br. 14. This concern is unfounded because the panel's opinion is limited to the application of Section 249(a)(2) to Hill's assault on Tibbs while Tibbs was packaging items for interstate sale and shipment, an activity that undisputedly falls within Congress's Commerce Clause authority. Op. 19 (citing *Darby*, 312 U.S. at 113).

The panel emphasized that its holding was narrow: Section 249(a)(2)(B)(iv)(I) "authorizes prosecution of *only* those bias-motivated violent crimes that interfere with or otherwise affect ongoing economic or commercial

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[6] The dissent's concern that Amazon did not miss any critical deadlines also is irrelevant. See Op. 61 (Agee, J., dissenting). The Supreme Court has made clear that "it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal." *Taylor*, 136 S. Ct. at 2081. As the panel correctly recognized, "Congress has no less authority to criminalize interference with economic or commercial activity at large enterprises like Amazon—which are more easily able to absorb productivity losses—than it does at sole proprietorships * * * for which a 45-minute halt in activity could constitute a substantial loss." Op. 21.

activity, as the jury found Defendant's assault of Tibbs did here." Op. 25 (emphasis added). The panel rejected the notion that its reasoning would allow federalization of all workplace conduct or conduct in private homes. Op. 26-27. Rather, it held only that Hill's prosecution "complied with the Commerce Clause because his assault of Tibbs interfered with ongoing commercial activity" and emphasized that its holding "in no way usurps the States' authority to regulate violent crimes—including hate crimes—unrelated to ongoing interstate commerce." Op. 27.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 3900 words.

2. This brief 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

Date: August 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, I electronically filed the foregoing OPPOSITION OF THE UNITED STATES TO THE PETITION FOR REHEARING EN BANC with the United States Court of Appeals for the Fourth Circuit by 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.

s/ Elizabeth P. Hecker
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