No. 17-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DYLANN STORM ROOF,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

OPPOSITION OF THE UNITED STATES TO THE PETITION FOR PANEL REHEARING

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INTRODUCTION

On June 17, 2015, Dylann Storm Roof shot and killed nine members of the Emanuel African Methodist Episcopal Church (Mother Emanuel), in Charleston, South Carolina, during a Bible study class. A jury convicted him of federal hate crimes and firearms charges and sentenced him to death.

In a thorough, published, 149-page decision, a panel of this Court unanimously affirmed. Roof filed a petition for rehearing and rehearing en banc. The Court requested that the United States respond to Roof's petition for panel rehearing. The panel should deny the petition.

Roof seeks rehearing on two grounds—first, that the Court erred in holding that the government proved the interstate commerce nexus required to sustain his convictions for intentional obstruction of persons in the free exercise of religious beliefs, in violation of the Church Arson Prevention Act of 1996, 18 U.S.C. 247(a)(2) and (d)(1); and second, that the Court erred in permitting the government to argue for death based on certain victim-impact evidence. The Court's rulings were correct, and there is no reason to revisit them.

First, as to his religious-obstruction convictions, Roof complains that by relying on his internet use to tie his crimes to interstate commerce, the opinion opens up "a new and undefined universe" of criminal offenses to federal regulation and violates the First Amendment. Pet. 6. Roof also protests that the statute's

jurisdictional element, 18 U.S.C. 247(b), requires that the "'offense' itself, not pre-offense conduct," be in interstate commerce. Pet. 8 (emphasis omitted).

Roof is wrong on all fronts. The Court did not establish a new test for when Congress can reach "pre-offense conduct" under the Commerce Clause. Instead, it issued a fact-bound ruling that Roof's use of the internet both to select Mother Emanuel as his target and magnify his offense by posting his racist, violent call to action only hours before the attack, satisfied Section 247(b) and placed his offense "in interstate commerce." That ruling does not violate the First Amendment. Roof was not prosecuted for posting his "manifesto"; he was prosecuted for heeding his own call for "drastic action" (JA-4625) by shooting and killing nine Black churchgoers at Mother Emanuel. His internet use simply satisfied the jurisdictional element.

Tellingly, Roof glosses over the Court's reliance on his use of the internet to research historic African-American churches in South Carolina, which led him to target Mother Emanuel, and on his multiple uses of other channels and instrumentalities of interstate commerce. As the Court correctly recognized, in amending Section 247(b) in 1996, Congress intended to punish such attacks when accomplished through the use of the channels and instrumentalities of interstate commerce.

Second, as to Roof's arguments on victim-impact evidence, he is wrong to suggest that *Payne* v. *Tennessee*, 501 U.S. 808 (1991), or *Humphries* v. *Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc), prohibit a jury from considering a victim's unique characteristics or worth in assessing a proper penalty. This Court explained in *Humphries* that "[a]t most," *Payne* disapproves of comparisons between the victims and other hypothetical victims of society, *id.* at 224, which did not occur here. Nor does the Court's approval of victim-impact evidence of a religious nature conflict with Supreme Court or circuit precedent. The jury was entitled to hear about these unique victims, and Roof's selection of victims in a Bible study to magnify the impact of his crime was also relevant to a separate "selection of victims" aggravator.

STATEMENT

1. A jury convicted Roof of federal hate-crimes and firearms charges and sentenced him to death. A panel of this Court affirmed.

2. As relevant here, the Court rejected Roof's as-applied challenge to his religious-obstruction convictions under 18 U.S.C. 247. Op. 101-115. The Court held that Roof's "internet research and postings" provided a sufficient tie to interstate commerce to satisfy the statute's jurisdictional element (Op. 111), which requires that "the offense is in or affects interstate or foreign commerce," 18 U.S.C. 247(b). It also held that even if his internet use alone did not suffice, Roof

engaged in "multiple other connections to the means of commerce that, taken together, would serve to defeat his as-applied constitutional challenge." Op. 114.

3. The Court rejected Roof's argument that the government introduced evidence and argument that exceeded the permitted purpose of victim-impact evidence under *Payne* v. *Tennessee*, 501 U.S. 808 (1991). Op. 92-96. It explained that evidence of a victim's personal characteristics and the harm inflicted on the victim's family and community is constitutionally permitted. Op. 93-94. The Court further explained that the religious nature of some victim-impact evidence was proper given the "occupations, volunteer work, and daily activities" of the victims and the separate aggravating factor that Roof had targeted a Bible study to magnify the societal impact of his crime. Op. 92, 95-96.

4. Roof filed a petition for rehearing and rehearing en banc and a motion requesting designation of an en banc panel. The Court requested that the United States respond to Roof's petition for panel rehearing.

ARGUMENT

THE COURT SHOULD DENY THE PETITION FOR PANEL REHEARING

A. The Court Correctly Rejected Roof's As-Applied Challenge To His Convictions Under 18 U.S.C. 247

1. The Court's Determination That Roof's Internet Use Satisfied Section 247(b) Is Both Fact-Bound And Consistent With The First Amendment

Roof asserts (Pet. 1, 4, 6-7) that in concluding that his significant internet use tied his offense to interstate commerce, the Court established a "novel" and "unbounded" standard permitting federal jurisdiction over any crime "*preceded* by" driving on highways, using the internet, or placing a telephone call, "so long as those acts satisfy an undefined threshold of 'importance' and temporal proximity to the offense." He also claims (Pet. 1-2) that the Court's reliance on his internet postings "violates bedrock First Amendment principles" by basing federal jurisdiction on the content of "pre-offense speech." These claims are unfounded.

a. The Court's explanation for why Roof's internet use satisfied the jurisdictional element is a fact-bound ruling. To be sure, in that discussion, the Court noted the "importance" Roof attached to his internet activities and those activities' "temporal proximity" to the crime. Op. 111. But the Court did not articulate a new test. Rather, it simply pointed to the facts that supported its conclusion. The Court highlighted that "Roof conducted internet research to pick his church target and to maximize the impact of his attack" and that "[h]e used his

foreign-hosted website to spread his racist ideology" and "advertise" the "rampage he would undertake a few hours later." Op. 112. It found that "Roof's use of the internet was thus closely linked, both in purpose and temporal proximity" to his violation of the statute. Op. 112. Relying on Congress's well-established power to "keep the channels of interstate commerce free from immoral and injurious uses" (Op. 112 (citation omitted)), the Court held that "Roof's internet usage rendered his prosecution under the religious-obstruction statute constitutional" (Op. 113).

The Court correctly relied on Roof's internet postings (in addition to his internet research) to connect his offense to interstate commerce. As it noted, "mere hours before he made a historic house of prayer into a charnel house" (Op. 110), Roof posted his manifesto on his foreign-hosted website, "foreshadowing his attack" and describing his racist motives (Op. 102). The manifesto issued a call to arms, urging that it was not "too late" to take America back and "by no means should we wait any longer to take drastic action." JA-4625. The Court recognized that Roof's use of the internet, "an instrumentality of interstate commerce," was thus "not merely a part of the preparations for this attack," but was "part of his effort to target Mother Emanuel and other predominantly African American churches, to strike fear in the hearts of worshipers, and to spread his toxic racial views." Op. 110.

The Court did not announce a general standard for when conduct preceding an *actus reus* falls within Congress's commerce authority. And it specifically disavowed suggesting that "a defendant's internet usage before or even while committing a federal offense will always place his conduct" within reach of Congress's commerce power. Op. 113. The Court's holding was "simply that Roof's admitted use of the internet to research a historic African American church as a target" and his reliance on the internet's "ubiquity" "to amplify the effect of his planned attack"—a use that "continued until shortly before the attack"—is "sufficient to establish federal jurisdiction in this case." Op. 113.

b. Roof argues that, in relying on his internet postings, the opinion "violates bedrock First Amendment principles" by "hinging federal jurisdiction on the content and viewpoint of pre-offense speech." Pet. 1-2 (citing *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), and *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123 (1992)); see also Pet. 10-11. He is wrong again.

First, the Court's rationale did not "hinge" on Roof's posting of his manifesto. To the contrary: the Court also relied on Roof's internet research to target Mother Emanuel, as well as his multiple other uses of the channels and instrumentalities of interstate commerce to commit his offense (Op. 111-114), as discussed below.

Second, the Court's ruling does not violate the First Amendment. Citing *R.A.V.*, 505 U.S. at 382, 391-392, and *Forsyth County*, 505 U.S. at 134, Roof contends that the First Amendment generally prevents the government from "proscribing" or "penalizing" speech based on disapproval of ideas expressed or listeners' reactions. Pet. 10. But his argument conflates Section 247's substantive and jurisdictional elements. "[T]he substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority." *Torres* v. *Lynch*, 136 S. Ct. 1619, 1630 (2016). The "evil" for which Roof was prosecuted was not his posting of racist writings online, and the Court never suggested his speech was unprotected. Instead, the government prosecuted him for killing nine parishioners and attempting to kill three others at Mother Emanuel. Roof's "internet research and postings" simply provided an interstate commerce nexus to satisfy the jurisdictional element. Op. 111.

2. The Court Correctly Determined That Roof's Additional Uses Of The Channels And Instrumentalities Of Interstate Commerce, Along With His Internet Use, Brought His Conduct Within Congress's Commerce Power

In addition to his internet use, the Court cited Roof's "multiple other connections to the means of commerce that, taken together, would serve to defeat his as-applied constitutional challenge." Op. 114. These connections all involved Roof's use of channels and instrumentalities of interstate commerce. The Court

highlighted Roof's use of a phone to call Mother Emanuel, a GPS to navigate to the church, and an interstate highway to visit Mother Emanuel both before and on the day of the attack, which, when viewed in conjunction with his internet usage, sufficed to place his offense "in interstate commerce." Op. 114 (citing *United States* v. *Ballinger*, 395 F.3d 1218, 1228 (11th Cir. 2005) (en banc) (combining multiple aspects of the defendant's conduct, such as "travel in a van (an instrumentality of commerce) along interstate highways (a channel of commerce)" to conclude the Commerce Clause nexus was satisfied)). The Court's assessment, again, was correct.[1]

Roof mistakenly claims (Pet. 6-7) that the Court's reliance on such "everyday" actions conflicts with *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), and "open[s] up a new and undefined universe" of criminal offenses to Commerce Clause regulation. Neither *Lopez* nor *Morrison* considered whether particular facts would have satisfied a jurisdictional element such as Section 247(b)'s. Op. 108 n.44. Those cases involved facial challenges to statutes that contained no jurisdictional element.

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[1] The Court did not address the government's additional argument that Roof's use of a gun, ammunition, and pouch that had all traveled in interstate commerce also proved the required interstate commerce nexus. Op. 114 n.46; see Appellee's Br. 172-174.

Roof dismisses the Court's reliance on his multiple uses of the channels and instrumentalities of interstate commerce, claiming that it depended on cases finding Commerce Clause jurisdiction "by aggregating the economic impacts of *interstate commercial* activity." Pet. 9-10 (citing Op. 113 (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964))). But the Court cited these decisions in its separate, earlier discussion of Roof's internet usage to make the undeniable point that racial discrimination is a national problem that disrupts commerce. *Heart of Atlanta* stands for the proposition that Congress has authority "to keep the channels of interstate commerce free from immoral and injurious uses." *Lopez*, 514 U.S. at 558 (quoting *Heart of Atlanta*, 379 U.S. at 256). Here, the Court had no need to "aggregate" the impacts of Roof's acts because, under the first two *Lopez* prongs (channels and instrumentalities of interstate commerce), Congress had the power to reach—and did reach—Roof's conduct. Op. 110-115; see also *Ballinger*, 395 U.S. at 1227-1228 (defendant's convictions under Section 247(a)(1) fell squarely within Congress's power under the first two *Lopez* prongs).

The Court's conclusion that Roof's multiple uses of the channels and instrumentalities of interstate commerce together satisfied the required interstate commerce nexus in no sense *expands* Congress's commerce power in reaching what Roof calls "pre-offense conduct." Pet. 2, 4. A legion of cases already

establishes, without raising any existential doubts, that Congress has power to prohibit the use of the channels or instrumentalities of interstate commerce (*e.g.*, the internet, telephones, cars, GPS, and interstate highways) to facilitate or further the commission of the evil that Congress seeks to prohibit—whether or not the use occurs "before" or "during" the *actus reus*.

For example, in *United States* v. *Morgan*, the Tenth Circuit upheld kidnapping convictions where the defendants used a GPS device, cell phone, and the internet to locate the victim and "accomplish the abductions." 748 F.3d 1024, 1031-1032 (2014); accord *United States* v. *Campbell*, 783 F. App'x 311, 312 (4th Cir. 2019) (affirming conviction where defendant's "use of a cell phone directly furthered" the kidnapping), cert. denied, 140 S. Ct. 2544 (2020). Similarly, courts have upheld murder-for-hire convictions where the defendants' use of instrumentalities and channels of interstate commerce facilitated or furthered the crime. See, *e.g.*, *United States* v. *Mandel*, 647 F.3d 710, 712, 716, 720-722 (7th Cir. 2011) (use of cell phone and automobile "in furtherance of a murder for hire scheme"); *United States* v. *Marek*, 238 F.3d 310, 318-320 (5th Cir. 2001) (en banc) (Western Union employed "to advance murder-for-hire"); see also Appellee's Br. 174-177 & n.10.

Section 247(b) has "the full jurisdictional reach constitutionally permissible under the Commerce Clause." Op. 109 n.45 (citation omitted). Thus, when, as

here, Congress has the *power* to punish Roof's offense where achieved through his multiple uses of the channels and instrumentalities of interstate commerce, then Section 247 *does* reach it.

3. The Court Correctly Construed Section 247(b) To Reach Roof's Use Of The Channels And Instrumentalities Of Interstate Commerce

Although Roof concedes that Section 247(b) extends to Congress's full commerce power (Appellant's Br. 222-223), he argues that "the offense" itself must be in interstate commerce, and thus the Court cannot rely on his use of the internet and other channels and instrumentalities of commerce to plan and prepare for the attack. Pet. 1, 8. He maintains that *Bond* v. *United States*, 572 U.S. 844 (2014), and *Jones* v. *United States*, 529 U.S. 848 (2000), require a "clear indication"—allegedly missing here—that Congress meant to reach "local" crimes like his. Pet. 4-5, 8-9. Indeed, he argues, "Congress indicated its intent not to reach pre-offense conduct" when it amended Section 247 "by deleting § 247's prior language that had extended federal jurisdiction to defendants who 'travel[ed] in interstate or foreign commerce or us[ed] a facility or instrumentality of interstate or foreign commerce' in committing the offense." Pet. 8-9 (brackets in original; citation omitted).

But Roof gets things backwards. Congress made its intent to punish crimes like Roof's clear when it amended Section 247 in 1996. As this Court recognized: "In passing the religious-obstruction statute, Congress intended to criminalize

precisely the type of conduct at issue in this case." Op. 114 n.46. "Concerned by attacks on African American churches in the South," Congress amended the statute's jurisdictional nexus to broaden its reach and "facilitate the prosecution of such racially motivated violence." Op. 114 n.46 (citing H.R. Rep. No. 621, 104th Cong., 2d Sess. 2-3 (1996) (House Report)); see also *Ballinger*, 395 F.3d at 1234-1235.

In citing Section 247(b)'s original language that Congress deleted, Roof misunderstands why Congress substituted text requiring that "the offense is in or affects interstate or foreign commerce." Pub. L. No. 104-155, § 3, 110 Stat. 1393 (1996). As the House Report explains (at 7), Congress enacted the simplification to "broaden[] the jurisdictional scope of the statute," enabling the Attorney General to prosecute cases "as to any conduct which falls within the interstate commerce clause." The original text had required that "in committing the offense, the defendant travels in interstate or foreign commerce, or uses a facility or instrumentality of interstate or foreign commerce *in interstate or foreign commerce*." Pub. L. No. 100-346, § 1, 102 Stat. 644 (1988) (emphasis added). That "highly restrictive and duplicative language," which Roof only partially quotes (Pet. 8-9), made the statute "nearly impossible to use." House Report 4. It was "not sufficient that a facility or instrumentality of interstate commerce be used; that facility or instrumentality must, in addition, be used in interstate

commerce." S. Rep. No. 324, 100th Cong., 2d Sess. 5 (1988); accord House Report 9 (Department of Justice explanation that "it is not enough for a defendant to use a telephone to help him commit the crime—the call itself must go out of state").

Thus, in amending Section 247(b), Congress did not, as Roof suggests, let its "intent" go "unenacted" (Pet. 9 n.4) (citation omitted) but instead "cure[d] the problem" by replacing the restrictive language with the broader formulation. House Report 2. Under the "in or affects commerce" standard—a term of art—the jurisdictional element is satisfied whenever "in committing, planning, or preparing to commit the offense," the defendant "either travels in interstate or foreign commerce, or uses the mail or any facility or instrumentality of interstate or foreign commerce." House Report 7; 142 Cong. Rec. 17212 (1996) (Joint Statement of Floor Managers). Roof's uses of the internet, telephone, GPS, car, and interstate highway to carry out his attack readily satisfy Section 247(b) as amended.

This Court recognized (Op. 112-113) that the Eleventh Circuit rejected a similar argument in *Ballinger*, *i.e.*, that Section 247(b) required that the defendant commit the ultimate *actus reus*—there, igniting a church—"in commerce." 395 F.3d at 1230-1238. As *Ballinger* explained, a more reasonable reading is that "the offense is more than the last step in a sequence of acts that add up to the statutorily

prohibited conduct" and includes, *e.g.*, travel and procurement of materials that are "necessary and indispensable steps" in committing the crime. *Id.* at 1236. This Court and the Eleventh Circuit are correct; a contrary reading would fail to give effect to Section 247(b)'s "in commerce" language. *Ibid.*

Thus, *Bond* and *Jones* are inapposite. No ambiguity exists regarding whether Congress intended Section 247 to prohibit the mass murder of worshipers in a church when facilitated by the defendant's use of the channels and instrumentalities of interstate commerce. It did.

B. The Panel's Decision Does Not Conflict With Supreme Court Or Fourth Circuit Precedent On Victim-Impact Evidence

Roof contends (Pet. 12-15) that the panel opinion conflicts with *Payne* v. *Tennessee*, 501 U.S. 808 (1991), and *Humphries* v. *Ozmint*, 397 F.3d 206 (4th Cir. 2005) (en banc), by permitting prosecutors to argue for death based on victim worth. He is wrong.

In *Payne*, the Supreme Court held that evidence about a crime's impact on the victim and the victim's family are admissible at a capital trial's penalty phase because the jury "should have before it * * * evidence of the specific harm caused by the defendant" to "assess meaningfully the defendant's moral culpability and blameworthiness." 501 U.S. at 825. In *Humphries*, this Court confirmed that *Payne* "allows evidence of the victim's personal characteristics and the harm inflicted upon the victim's family and community." 397 F.3d at 217; see *id.* at

222. As this Court correctly recognized (Op. 95-96), those cases permit the jury to consider a victim's uniqueness or worth in assessing the proper penalty. Roof's suggestion to the contrary (Pet. 15) is wrong. And although in *Humphries*, this Court observed that "the *Payne* Court disapproved of comparisons between the victim and other victims of society," 397 F.3d at 224—*e.g.*, an argument by the prosecution that "the killer of a hardworking, devoted parent deserves the death penalty, but that the murder of a reprobate does not," *Payne*, 501 U.S. at 823—those concerns about comparative-worth arguments are not implicated here. The prosecution did not compare the parishioners to other hypothetical victims.

Roof contends (Pet. 14) that the government's descriptions of the parishioners as particularly good people "implicitly contrast[ed] the victims against less worthy hypothetical ones," and thus constituted comparative-worth evidence. Neither *Payne* nor *Humphries* adopted that view, and it should be rejected. Under Roof's view, any evidence about a victim's personal characteristics would be prohibited because it would "implicitly contrast[]" the victim with others who lack those characteristics. *Payne*, however, explicitly permits evidence about a victim's unique characteristics and the impact on society of that particular victim's death. 501 U.S. at 823.

Indeed, this Court in *Humphries* recognized that "a consequence of *Payne* is that a defendant can be put to death for the murder of a person more 'unique' than

another." 397 F.3d at 222 n.6. Roof suggests (Pet. 14-15) that the Court misread this footnote, which he contends was expressing concern that a defendant could be sentenced to death based on facts unknown to him, not condoning the practice of prosecutors arguing for death based on victim worth. The Court did not misread the footnote. The footnote is based on the background assumption that the prosecutor is permitted to argue, and the jury is permitted to consider, evidence of the victim's unique characteristics in deciding whether to impose a sentence of death. *Humphries*, 397 F.3d at 222.

Roof further contends (Pet. 15) that the Court's decision improperly "sanctions reliance on victims' religiosity as evidence of * * * heightened worth" by referring to the victims' preaching and praying as evidence that *Payne* allows a jury to consider. See Op. 95. He suggests (Pet. 15) that this conflicts with a statement in *Humphries* that "[s]ome comparisons, such as those based on race or religion," are unconstitutional. See 397 F.3d at 226 (citing *Zant* v. *Stephens*, 462 U.S. 862, 865 (1983)). That argument is misconceived.

The statement from *Humphries*, which the Court acknowledged (Op. 94), prohibits mention of a *defendant*'s race or religion at capital sentencing. Op. 95 (citing *Zant*, 462 U.S. at 865 (noting that religion of defendant is irrelevant to sentencing)). Nothing in *Humphries* prohibits the government from introducing evidence related to the *victims*' faith where their "occupations, volunteer work, and

daily activities" involved their church. Op. 95. As the Court correctly recognized, that is especially true here, where the government noticed a separate aggravating factor that Roof had targeted innocent people in a Bible study to maximize the societal impact of his crimes. Op. 92-93, 96.

CONCLUSION

The Court should deny the petition for panel rehearing.

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2) and the Court's order dated September 13, 2021, because it contains 3899 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2019, in 14-point Times New Roman font.

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