Nos. 20-2078 and 20-2079

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

MAURICE DIGGINS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Maurice Diggins on October 27, 2020. Add. 1.[1] Diggins filed timely notices of appeal on October 30 and November 5, 2020. Docs. 261-262. This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "Add. ___" refers to page numbers in Diggins's Addendum. "App. ___" refers to page numbers in Diggins's Appendix. "Doc. __, at __" refers to the

(continued…)

STATEMENT OF ISSUES

1. Whether 18 U.S.C. 249(a)(1), which criminalizes racially-motivated violence, is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment, and whether this Court should otherwise affirm Diggins's convictions for violating Section 249(a)(1).

2. Whether the government's certification under 18 U.S.C. 249(b)(1) is judicially reviewable and, if so, whether the government properly exercised its discretion to certify that Diggins's prosecution was in the public interest and necessary to secure substantial justice.

3. Whether, assuming Diggins did not waive the argument, the district court properly admitted evidence of swastikas and other white-supremacist images tattooed on Diggins's body and permitted an expert witness to testify as to their meaning.

STATEMENT OF THE CASE

Defendant Maurice Diggins violently attacked two Black men because of their race. As relevant here, a jury convicted him of two counts of violating 18 U.S.C. 249(a)(1), part of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

(…continued)
district court docket number and page number, respectively. "Br. __" refers to page numbers in Diggins's opening brief.

1. Factual Background

a. The Attack Outside The 7-Eleven

Late one evening in April 2018, Daimon McCollum, a Black man, walked to his neighborhood 7-Eleven in Biddeford, Maine to buy some groceries. App. 325, 327. At the same time, Maurice Diggins, a white man, was driving to the 7-Eleven with his nephew. App. 294, 296, 299. Diggins sped into the parking lot, drove right up to McCollum, and yelled, "nigger, who you eyeballing?" App. 328; Gov. Ex. 10-H.[2] Diggins repeated the word "nigger" again as he was talking to McCollum. App. 318.

Diggins then got out of the truck and aggressively approached McCollum, blocking his path to the door of the 7-Eleven. App. 329-330. While Diggins distracted McCollum, Diggins's nephew snuck up behind McCollum. App. 330, Gov. Ex. 10-H. Diggins's nephew then sucker-punched McCollum in the face, shattering his jaw. App. 330-331, 345-346; Gov. Ex. 10-H. As McCollum staggered backwards and fell down, Diggins and his nephew continued walking toward him. App. 330; Gov. Ex. 10-H. Feeling unexplainable pain and fearing that Diggins and his nephew would kill him, McCollum got up and ran. App. 330-331. Diggins's nephew briefly followed him on foot and yelled, "run, nigger."

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[2] Government Exhibit 10-H is surveillance video from the 7-Eleven that was admitted into evidence at trial. App. 301.

App. 355; Gov. Ex. 10-H. Then, Diggins and his nephew got back in the truck, laughing. App. 355. They drove off in McCollum's general direction, yelling, "We're going to find you, nigger." App. 303, 356-357; Gov. Ex. 10-H.

McCollum returned safely to his house. App. 331. He later had emergency surgery at Maine Medical Center, a Level I trauma center, to repair his broken jaw. App. 261, 275-276. McCollum's jaw was wired shut for a month, preventing him from eating, working, and speaking with his children. App. 277-278, 333. McCollum managed to communicate with the police, and he identified Diggins from a photo lineup. App. 298-299.

b. The Attack Outside The Silver House Tavern

During their investigation of the assault at the 7-Eleven, the FBI learned of a similar attack on another Black man just an hour earlier in Portland, Maine. App. 363. That other man was Akok Nyang, a Sudanese refugee. App. 473, 476. The night he was attacked, Nyang had been watching sports on television at the Silver House Tavern. App. 479.

The attack occurred shortly before the tavern closed, when Nyang stepped outside to smoke a cigarette. App. 479. Nyang noticed two white men suddenly start to walk toward him. App. 480. Nyang, who had never seen or spoken to these men before then, tried to move away, but the bigger of the two men punched him in the face. App. 481-482. In pain, with blood seeping from his mouth and

jaw, Nyang fled. App. 482. Nyang was chased by the smaller of the two men, and Nyang heard someone yell behind him, "come here, nigger, come here, nigger." App. 483.

Nyang managed to get home safely, and like McCollum, he needed emergency surgery at Maine Medical Center. App. 485-486. A metal plate was attached to his jaw, which was wired shut for several weeks. App. 264-268, 486. He could not eat, work, or pick up his infant daughter while he recovered. App. 501-502.

Nyang later described the two men who attacked him outside the Silver House Tavern as white, one bigger than the other, and wearing Air Jordan sneakers. App. 481. Diggins and his nephew were both at the Silver House Tavern that night; Diggins and his nephew are both white; Diggins is taller and huskier than his nephew, and Diggins wears Air Jordan sneakers. App. 365, 421, 559. Diggins and his nephew were also seen running to their truck shortly after Nyang was attacked. App. 447.

c. Diggins's White-Supremacist Tattoos

While investigating the attacks on Nyang and McCollum, the FBI discovered that Diggins had several tattoos on his body with white-supremacist imagery. App. 367. These tattoos included four swastikas near two lightning bolts, the letters "WPWW" (referring to "White Pride World Wide") and an

Absolut Vodka bottle with the phrases "white pride" and "We must secure the existence of our people and a future for our white children." App. 157-160.

2. Procedural History

a. A federal grand jury returned a three-count superseding indictment against Diggins and his nephew in connection with the two attacks: Count 1 charged a conspiracy to violate 18 U.S.C. 249 by willfully causing bodily injury to Nyang and McCollum because of their race, in violation of 18 U.S.C. 371; Count 2 charged a violation of 18 U.S.C. 249(a)(1) for the race-based assault on Nyang; and Count 3 charged a violation of 18 U.S.C. 249(a)(1) for the race-based assault on McCollum. App. 33-36. For Counts 2 and 3, as required by 18 U.S.C. 249(b)(1), the Assistant Attorney General for the Civil Rights Division (using authority delegated from the Attorney General) certified that the prosecution was "in the public interest and necessary to secure substantial justice." App. 37.[3]

b. Diggins moved to dismiss the indictment, arguing, as relevant here, that Congress lacked the authority to enact Section 249(a)(1) under the Thirteenth Amendment and that the Assistant Attorney General's certification under Section 249(b)(1) was invalid. App. 38-59. The district court rejected these arguments.

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[3] Diggins's nephew, Dusty Leo, pleaded guilty to Counts 1 and 3. See *United States* v. *Leo*, No. 2:18-CR-00122-NT-2, 2021 WL 4189755, at *1 (D. Me. Sept. 9, 2021). This appeal concerns only Diggins.

App. 127-139 (reported at *United States* v. *Diggins*, 435 F. Supp. 3d 268 (D. Me. 2019).

First, the district court held that Section 249(a)(1) is an appropriate exercise of Congress's power under Section 2 of the Thirteenth Amendment because Congress rationally determined that racially motivated violence is a badge and incident of slavery. App. 130-131. The court also held that recent Supreme Court decisions addressing Congress's power to enforce the Fourteenth and Fifteenth Amendments did not alter binding Supreme Court precedent addressing Congress's power to enforce the Thirteenth Amendment. App. 131-132. Further, the court rejected Diggins's challenges under the Tenth Amendment and principles of federalism, explaining that the law "does not usurp or otherwise interfere with the states' power to prosecute racially motivated violence." App. 133-134.

Second, the court rejected Diggins's argument that the government did not satisfy Section 249(b)(1)'s certification provision, which requires that the Attorney General or his designee certify that certain conditions exist before commencing a prosecution under the statute. App. 135-138. The court concluded that the certification was facially valid because it attested that Diggins's prosecution was "in the public interest and necessary to secure substantial justice" and was signed by the Assistant Attorney General for the Civil Rights Division. App. 135. The court also held that the Assistant Attorney General's decision to file the

certification was an unreviewable act of prosecutorial discretion and thus declined to review the reasons for the Assistant Attorney General's certification. App. 136-138.

c. Prior to trial, the government provided notice that it intended to introduce pictures of Diggins's white-supremacist tattoos as evidence relevant to Diggins's motive, *i.e.*, that he acted because of racial animus. Doc. 166, at 8-11. The government also stated that it intended to call an expert witness on white supremacy symbolism to explain the significance of Diggins's tattoos. Doc. 166, at 8-9, 12. Diggins filed a motion in limine to exclude this evidence, contending that the tattoo evidence was irrelevant, unfairly prejudicial, and violated his Fifth Amendment rights. App. 140-144. Diggins also argued that the expert witness testimony was not necessary for the jury to understand the tattoos. App. 145-149.

The district court denied Diggins's motion, concluding that "evidence that Diggins has several potentially racially charged tattoos tends to show that Diggins holds racist beliefs, which is relevant to determining an essential element of the crime charged—namely, whether he acted because of racial animus on the night of the alleged assaults." App. 198 (reported at *United States* v. *Diggins*, No. 2:18-cr-00122, 2020 WL 1066979 (D. Me. Mar. 5, 2020)). The court also concluded that this evidence was not unfairly prejudicial under Federal Rule of Evidence 403, and that a limiting instruction could ameliorate any such risk. App. 198-199. The

court further declined to exclude the evidence on Fifth Amendment grounds. App. 199-200. Finally, the court concluded that expert testimony could assist the jury in understanding the significance of some of Diggins's tattoos. App. 200-201.

d. A jury found Diggins guilty on all three counts. Add. 1. The district court sentenced Diggins to a within-Guidelines sentence of 120 months' imprisonment: 60 months on Count 1 and 120 months on Counts 2 and 3, all to be served concurrently. Add. 2. At sentencing, the court noted the seriousness of Diggins's crimes and observed that Diggins's "bigotry, ignorance, and violence" harmed not just the individual victims, but the larger community as well. Doc. 275, at 42.[4]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In separate incidents on the same evening, defendant Maurice Diggins violently attacked two Black men while using racial slurs. Both victims suffered severe physical and emotional trauma from these racially motivated assaults. As relevant here, Diggins was convicted on two counts of violating 18 U.S.C. 249(a)(1), the provision of the Shepard-Byrd Act that criminalizes racially motivated violence.

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[4] The State of Maine initiated criminal proceedings against Diggins related to one of the assaults, but those charges were later dismissed. App. 53, 207; Br. 28.

In this appeal, Diggins does not dispute that he brutally attacked the victims because of their race or that his actions satisfied the elements of Section 249(a)(1). Rather, Diggins challenges (1) the constitutionality of Section 249(a)(1); (2) the validity of the government's certification under Section 249(b); and (3) the district court's admission of evidence of the swastikas and other white-supremacist images tattooed on his body, and the expert testimony addressing the meaning of the tattoos. None of these arguments has merit.

1. The district court correctly rejected Diggins's argument that Section 249(a)(1) exceeds Congress's enforcement power under Section 2 of the Thirteenth Amendment. Indeed, every federal court to have addressed this issue has upheld the constitutionality of Section 249(a)(1). As these courts recognize, more than 50 years ago the Supreme Court held that Section 2 of the Thirteenth Amendment grants Congress the power to do "much more" than abolish slavery, reaffirming Congress's authority to enact "all laws necessary and proper for abolishing all badges and incidents of slavery." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

Here, in enacting Section 249(a)(1), Congress specifically found that "eliminating *racially motivated violence* is an important means of eliminating * * * the badges, incidents, and relics of slavery." 34 U.S.C. 30501(7) (emphasis added). Congress also found that slavery was enforced

"through widespread public and private violence directed at persons because of their race." *Ibid.* These findings are amply supported by the legislative record and further demonstrate the constitutionality of Section 249(a)(1).

Diggins asserts that the analysis in *Jones* no longer reflects the correct approach to assessing the constitutionality of legislation passed under Section 2 of the Thirteenth Amendment. Br. 16. That argument has no bearing on this Court, which is bound by *Jones* and its progeny. In any event, Diggins offers no persuasive reason to apply here the Fourteenth Amendment's congruence and proportionality test, see *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), or the Fifteenth Amendment's "current needs standard," see *Shelby Cnty.* v. *Holder*, 570 U.S. 529 (2013). The Thirteenth Amendment has a different history and purpose from the Fourteenth and Fifteenth Amendments, and it alone among those Amendments applies to private conduct. But no matter what standard applies, the conclusion is the same: Section 249(a)(1) is a valid exercise of Congress's power to enforce the Thirteenth Amendment.

Relatedly, Diggins also argues—in what he characterizes as an "as applied" challenge to the application of the Thirteenth Amendment here—that his conduct does not fall within the scope of Section 249(a)(1). Br. 24-25. This argument fails, however, because Diggins does not challenge that the government proved beyond a reasonable doubt all elements of a Section 249(a)(1) violation.

2. Diggins fares no better challenging the Shepard-Byrd Act's certification requirement. Br. 26. Under that provision, the Attorney General or a designee must certify that an adequate federal interest exists before the Justice Department can prosecute an offense under the Shepard-Byrd Act. See 18 U.S.C. 249(b). Notably, the statute does not provide for judicial review of these certifications. This statutory silence demonstrates that Congress did not intend for courts to second-guess these certification decisions. To the contrary, the Attorney General's certification decision epitomizes the type of prosecutorial decision-making that is "particularly ill-suited to judicial review." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985).

If this Court were nonetheless to conclude that certifications are reviewable, the Court should defer to the government's certification that Diggins's prosecution for committing race-based hate crimes was in the public interest and necessary to secure substantial justice. Race-based violence is one of the primary badges and incidents of slavery that the Thirteenth Amendment sought to abolish, and the government was thus justified in certifying Diggins's violent crime for federal prosecution. In arguing otherwise, Diggins contends that the State of Maine could have prosecuted him, but that is beside the point. Putting aside that Maine had no criminal hate-crimes statute at the time, the Shepard-Byrd Act specifically contemplates dual prosecutions, see 18 U.S.C. 249(b)(1)(C), and the longstanding

dual-sovereignty doctrine permits parallel state and federal prosecutions, see *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019).

3. Finally, among his "Issues Presented," Diggins includes whether the district court erred in admitting evidence of his tattoos and permitting expert testimony on their meaning. But he does not further address or even mention these issues in the Argument section of his brief. His failure to do so constitutes a waiver of these issues. But in any event, the district court did not abuse its discretion in admitting the tattoo evidence or the expert testimony. This evidence was highly probative of an essential element of the crime—that Diggins assaulted the victims because of their race. Thus, courts have routinely allowed such evidence, including expert testimony, in other hate-crimes cases.

ARGUMENT

I

SECTION 249(A)(1) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT AND THIS COURT SHOULD AFFIRM DIGGINS'S CONVICTIONS UNDER THAT STATUTE

A. Standard Of Review

The Court reviews a defendant's challenge to the constitutionality of a statute de novo. See *United States* v. *Volungus*, 595 F.3d 1, 4 (1st Cir. 2010). The Court may strike down an act of Congress "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of*

Indep. Bus. v. *Sebelius*, 567 U.S. 519, 538 (2012) (brackets, citation, and internal quotation marks omitted).

B. Section 249(a)(1) Is A Valid Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment

The Shepard-Byrd Act prohibits willfully causing bodily injury to a person when the assault is motivated by a specific, statutorily-defined bias. 18 U.S.C. 249(a)(1)-(3). Section 249(a)(1) applies to violent acts undertaken "because of the actual or perceived race, color, religion, or national origin of any person." Congress enacted this subsection under its Thirteenth Amendment authority to eradicate badges and incidents of slavery, which includes race-based violence. 34 U.S.C. 30501(7) and (8); H.R. Rep. No. 86, 111th Cong., 1st Sess. 15 (2009).

1. The Thirteenth Amendment Broadly Authorizes Congress To Enact Legislation To Combat The Badges And Incidents Of Slavery

Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII. Although the "immediate concern" of this Amendment was with the pre-Civil War enslavement of African Americans, the Amendment was not limited to its "primary purpose" of "abolish[ing] the institution of African slavery as it had existed in the United States at the time of the Civil War." *United States* v. *Kozminski*, 487 U.S. 931, 942

(1988). Rather, as one of its sponsors explained, the amendment was designed to "obliterate the last lingering vestiges of the slave system" and protect "the sacred rights of human nature." Statement of House Judiciary Chair James Wilson, Cong. Globe, 38th Cong., 1st Sess. 1324 (1864).

Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." U.S. Const. Amend. XIII. Longstanding Supreme Court precedent establishes that Congress has broad power to legislate under Section 2. In *The Civil Rights Cases*, for example, the Court explained that although Section 1 was "self-executing," "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit." 109 U.S. 3, 20 (1883). Therefore, Section 2 "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United State[s]." *Ibid.*

Congress first used its powers under the Thirteenth Amendment when it passed the Civil Rights Act of 1866, providing universal rights to citizens "of every race and color," ranging from enforcing contracts to purchasing property. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. 1982). That legislation "was a response to the perception held by Congress that former slaves were being denied basic civil rights" and aimed to dismantle the

"Black Codes" adopted in southern States shortly after the Thirteenth Amendment was enacted. *City of Memphis* v. *Greene*, 451 U.S. 100, 131-135 (1981) (White, J., concurring). And just as Congress has amended the Civil Rights Act of 1866 over the years, so too has the Supreme Court upheld the law's various protections.

In fact, more than 80 years after *The Civil Rights Cases*, the Court reaffirmed and expanded Congress's authority to broadly legislate under the Thirteenth Amendment in a series of cases beginning with *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In *Jones*, the Court upheld the constitutionality of 42 U.S.C. 1982, prohibiting racial discrimination in the sale of property, stating that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property." *Id.* at 439. The Court, quoting *The Civil Rights Cases*, 109 U.S. at 20, reaffirmed that "the Enabling Clause [Section 2]" of the Thirteenth Amendment empowered Congress to do "much more" than abolish slavery; it "clothed Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery*." *Jones*, 392 U.S. at 439. (citation and internal quotation marks omitted). The Court also made clear that, under the Thirteenth Amendment, *it is Congress* that "determine[s] what are the badges and the incidents of slavery." *Id.* at 440.

A few years later, in *Griffin* v. *Breckenridge*, the Court upheld the constitutionality of 42 U.S.C. 1985(3), stating that "Congress was wholly within its

powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." 403 U.S. 88, 105 (1971). The Court explained that "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under Section 2] extend far beyond the actual imposition of slavery or involuntary servitude." *Ibid.*

Next, in *Runyon* v. *McCrary*, the Court held that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts is "appropriate legislation" for enforcing the Thirteenth Amendment. 427 U.S. 160, 179 (1976). In so holding, the Court rejected a school's contention that the law could not reach private acts of racial discrimination, finding that view to be "wholly inconsistent" with *Jones*'s interpretation of the law. *Id.* at 173.

As these cases demonstrate, Congress has the authority not only to prevent the actual imposition of slavery or involuntary servitude, "but to ensure that none of the badges and incidents of slavery or involuntary servitude exists in the United States." S. Rep. No. 147, 107th Cong., 2d Sess. 16 (2002) (citation and internal quotation marks omitted). To that end, the Supreme Court has made clear that Congress determines what are badges and incidents of slavery—a distinctly "legislative task." *Kozminski*, 487 U.S. at 951. And although no precise definition

exists, the phrase "badges and incidents of slavery" at a minimum recognizes slavery as a system of many components, which Congress is empowered to rationally identify and proscribe. See *United States* v. *Maybee*, 687 F.3d 1026, 1030 n.2 (8th Cir.) (addressing the notion of "badges and incidents of slavery" as "a term of art"), cert. denied, 568 U.S. 991 (2012); see also Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 577-578 (2012).

Finally, Congress's determination that a law is necessary and proper under Section 2 must be given effect so long as it is rational. In *Jones*, the Court stated that Congress has the power "rationally to determine what are the badges and incidents of slavery," and concluded that Congress had not made an "irrational" determination when it enacted legislation under Section 2 to abolish both private and public discrimination in the sale of property. 392 U.S. at 439-443; see also *Griffin*, 403 U.S. at 105 (citation omitted) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the

incidents of slavery, and the authority to translate that determination into effective legislation.").[5]

In sum, under Supreme Court precedent interpreting Section 2 of the Thirteenth Amendment: (1) Congress's power is not limited to abolishing slavery or involuntary servitude; (2) Congress has the power to pass all laws necessary and proper to abolish "badges and incidents" of slavery; (3) Congress may determine what are badges and incidents of slavery; and (4) Congress's determination of what is a badge and incident of slavery must be upheld if rational. It is this analysis, giving Congress broad discretion to define and target badges and incidents of slavery, that applies to challenges to Congress's enactment of Section 249(a)(1).

2. In Enacting Section 249(a)(1), Congress Rationally Determined That Racially Motivated Violence Is A Badge And Incident Of Slavery

a. In 2009, pursuant to this settled authority, Congress enacted the Shepard-Byrd Act. Congress expressly found that race-based violence was an intrinsic feature of slavery:

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[5] As the Second Circuit has explained, Congress's authority under Section 2 of the Thirteenth Amendment is not limited by the scope of Section 1: "it is clear from many decisions of the Supreme Court that Congress may, under its Section Two enforcement power, now reach conduct that is not directly prohibited under Section One." *United States* v. *Nelson*, 277 F.3d 164, 181 (2d Cir.), cert. denied, 537 U.S. 835 (2002). Put another way, "Congress, through its enforcement power under Section Two of the Thirteenth Amendment is empowered * * * to control conduct that does not come close to violating Section One directly." *Id.* at 185.

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the [Thirteenth A]mendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.

34 U.S.C. 30501(7).

Congress's conclusion that race-based violence was a core feature of slavery is amply supported by historical evidence. See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 189-190 (2d Cir.) (citing modern and antebellum sources discussing the issue), cert. denied, 537 U.S. 835 (2002). Indeed, "over a century of sad history" shows the intrinsic link between race-based violence and slavery. *United States* v. *Roof*, 10 F.4th 314, 392 (4th Cir. 2021). As the Tenth Circuit has stated, "physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery." *United States* v. *Hatch*, 722 F.3d 1193, 1206 (10th Cir. 2013), cert. denied, 572 U.S. 1018 (2014). "Just as master-on-slave violence was intended to enforce the social and racial superiority of the attacker and the relative powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races." *Ibid.*

Race-based violence persisted following passage of the Thirteenth Amendment, when "a wave of brutal, racially motivated violence against African Americans swept the South" in an effort "to perpetuate African American slavery." Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 11-12 (1995). Race-based violence continued into the twentieth century, when the Ku Klux Klan instituted a "reign of terror" in the South to thwart Reconstruction and maintain white supremacy. *Virginia* v. *Black*, 538 U.S. 343, 352-353 (2003). Considering this history, Congress was well within its authority to conclude that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." 34 U.S.C. 30501(7); accord 34 U.S.C. 30501(1) and (8).

Moreover, Congress weighed extensive evidence of the continued prevalence of hate crimes today. The House Report stated that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86, 111th Cong., 1st Sess. 5 (2009). Specifically, it noted that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and that in 2007 alone the FBI documented more than 7600 hate crimes, including nearly 4900 (64%) motivated by bias based on race or national origin. *Ibid.* Further, a 2002 Senate Report, addressing proposed legislation that ultimately became Section 249, noted that "the number of

reported hate crimes has grown by almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147, at 2. These extensive findings, combined with the historical evidence, sufficiently show that the relationship between slavery and racial violence is "not merely rational, but inescapable." *Roof*, 10 F.4th at 392 (citation and internal quotation marks omitted) (applying *Jones*).

b. Diggins acknowledges that *Jones* applies to his case and that "subordinate appellate courts must follow the Supreme Court's precedent." Br. 15. This settles the matter. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Therefore, even assuming more recent Supreme Court cases somehow undermine *Jones*'s approach to the Thirteenth Amendment—which, as discussed below, they do not—it is not for this Court to "blaze a new constitutional trail simply on that basis." *Hatch*, 722 F.3d at 1204; see also *United States* v. *Cannon*, 750 F.3d 492, 505 (5th Cir.) ("Even if the legal landscape regarding the Reconstruction Amendments has changed * * * , absent a clear directive from the Supreme Court, we are bound by prior precedents."), cert. denied, 574 U.S. 1029 (2014).

3. Courts Have Unanimously Upheld The Constitutionality Of Section 249(a)(1) Under Congress's Power To Enforce The Thirteenth Amendment

Given the longstanding links between slavery and racial violence, courts have had "no trouble" concluding that Section 249(a)(1) represents a valid exercise of congressional power to "rationally determine the badges and incidents of slavery." *Hatch*, 722 F.3d at 1206. Indeed, every court to address the constitutionality of the Shepard-Byrd Act's prohibition on racially motivated violence has upheld that provision as a valid exercise of Congress's Thirteenth Amendment authority. See *Roof*, 10 F.4th at 391; *United States* v. *Metcalf*, 881 F.3d 641, 645 (8th Cir.), cert. denied, 139 S. Ct. 412 (2018); *Cannon*, 750 F.3d at 502; *Hatch*, 722 F.3d at 1206; *Maybee*, 687 F.3d at 1031; *United States* v. *Hougen*, No. 20-CR-00432-EJD-1, 2021 WL 5630680, at *8 (N.D. Cal. Dec. 1, 2021); *United States* v. *Earnest*, No. 3:19-CR-01850, 2021 WL 3829129, at *19 (S.D. Cal. May 5, 2021); *United States* v. *Bowers*, 495 F. Supp. 3d 362, 368 (W.D. Pa. 2020); *United States* v. *Henery*, 60 F. Supp. 3d 1126, 1130 (D. Idaho 2014).

These courts have all relied on *Jones*'s reasoning. As the Fourth Circuit recently explained in *Roof*, "[i]n light of *Jones*, it is abundantly clear" that Section 249(a)(1) is "appropriate legislation" under the Thirteenth Amendment. 10 F.4th at 392. Indeed, to show that Congress acted irrationally when it determined that

racially motivated violence is a badge and incident of slavery would be an "impossible task." *Id.* at 393.

Roof's holding mirrors those of other circuits. In *Hatch*, for example, the Tenth Circuit explained that "Congress could rationally conclude that physically attacking a person of a particular race" because of racial animus "is a badge or incident of slavery." 722 F.3d at 1204, 1206. Likewise, in *Cannon*, the Fifth Circuit ruled that the Shepard-Byrd Act's racial-violence provision "is a valid exercise of congressional power because Congress could rationally determine that racially motivated violence is a badge or incident of slavery." 750 F.3d at 505. The court explained that "violence was essential to the enslavement of African-Americans and was widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement." *Id.* at 502. And in *Metcalf*, the Eighth Circuit agreed that "Congress rationally determined that racially motivated violence constitutes a badge and incident of slavery" when it passed the Shepard-Byrd Act. 881 F.3d at 645.[6]

[6] Courts have also unanimously upheld a similar law that criminalizes race-based violence—18 U.S.C. 245(b)(2)(B)—as a valid exercise of Congress's Thirteenth Amendment authority. See *Nelson*, 277 F.3d at 190-191; *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir.), cert. denied, 469 U.S. 838 (1984); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004). These holdings apply just as forcefully to Section 249(a)(1).

In sum, prior cases upholding the constitutionality of Section 249(a)(1) recognize that Congress may rationally conclude that racially motivated violence is a badge or incident of slavery. This Court should reach the same conclusion here and uphold Section 249(a)(1) as a valid exercise of Congress's power to enforce the Thirteenth Amendment.

C. Diggins's Arguments Against The Constitutionality Of Section 249(a)(1) Are Unavailing

Diggins argues that *Jones* "is wrongly decided and undercut by the [Supreme] Court's more recent decisions" setting the standards for laws enacted to enforce the Fourteenth and Fifteenth Amendments. Br. 16. Specifically, Diggins asserts that this Court should import the "congruence and proportionality" test from *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and the "current needs" test from *Shelby County* v. *Holder*, 570 U.S. 529 (2013). But there is no basis to apply either test in the context of the Thirteenth Amendment, which has a different history and purpose from the Fourteenth and Fifteenth Amendments and alone among those Amendments applies to private conduct. And even if these tests did apply, Section 249(a)(1) would easily satisfy them.

1. The Fourteenth Amendment's "Congruence And Proportionality" Test Does Not Apply To Legislation Enacted Under Section 2 Of The Thirteenth Amendment

The standard of review adopted in *City of Boerne* for Fourteenth Amendment legislation does not apply here. Indeed, every court of appeals that

has considered this issue has rejected it. See *Roof*, 10 F.4th at 394-395; *Nelson*, 277 F.3d at 185 n.20; *Cannon*, 750 F.3d at 505; *Metcalf*, 881 F.3d at 645; *Hatch*, 722 F.3d at 1205.

a. In *City of Boerne*, the Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. That provision gives Congress the "power to enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment, including those rights protected by the Due Process and Equal Protection Clauses. The Court held that Congress has the power under Section 5 to enact legislation aimed at deterring or remedying violations of the core rights guaranteed by the Fourteenth Amendment's substantive clauses, "even if in the process it prohibits conduct which is not itself unconstitutional" and intrudes into traditional areas of state autonomy. *City of Boerne*, 521 U.S. at 518. But the Court made clear that this legislative power does not include the authority to expand or redefine the substantive scope of those rights. *Id.* at 519. The Court, therefore, held that legislation enforcing Fourteenth Amendment guarantees must have "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

The Court supported its view that Section 5 gives Congress "remedial, rather than substantive" authority by carefully examining the drafting history of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520-524. It emphasized that Congress had rejected an early draft of the Amendment that was seen as bestowing plenary authority to "legislate fully upon all subjects affecting life, liberty, and property." *Id.* at 521 (quoting 39 Cong. Rec. 1082 (daily ed. Feb. 28, 1866) (statement of Sen. William Stewart)); see also *id.* at 520-522. It also noted that the revised proposal retained the judiciary's "primary authority" to interpret the scope of the Fourteenth Amendment's substantive prohibitions on state action. *Id.* at 523-524. Finally, the Court emphasized that its interpretation of Congress's authority was consistent with its prior decisions stretching from *The Civil Rights Cases* through the twentieth century. *Id.* at 524-527 (noting its consistent view that the Section 5 power was "remedial," "corrective," and "preventive," but not "definitional").[7]

Nothing in *City of Boerne* undermines the Supreme Court's decision in *Jones*. *City of Boerne* did not cite *Jones* or mention the Thirteenth Amendment.

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[7] The Court ultimately concluded that RFRA, as applied to state governments, failed the congruence and proportionality test because there was little support in the legislative record for the concerns underlying the law, its provisions were out of proportion to its supposed remedial object, and it was "not designed to identify and counteract state laws likely to be unconstitutional." *City of Boerne*, 521 U.S. at 534; see also *id.* at 530-535.

Nor did the Court state or imply that its ruling would have any effect on the established line of cases recognizing Congress's power to rely on Section 2 of the Thirteenth Amendment to identify—and legislate against—the badges and incidents of slavery. Indeed, *City of Boerne* emphasized that its holding was consistent with the Court's prior civil rights decisions. 521 U.S. at 524-529.

Nor did *City of Boerne* undermine the historical analysis underpinning *Jones*. As discussed above, the Court's decision in *Jones* relied principally on its analysis of congressional debates surrounding the enactment of the Thirteenth Amendment. 392 U.S. at 440. *City of Boerne* did not question *Jones*'s analysis of the Thirteenth Amendment. Instead, it relied on the quite different history surrounding the later passage of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520-524. Diggins offers no reason why *City of Boerne*'s Fourteenth Amendment analysis undermines *Jones*'s review of the history and original understanding of the Thirteenth Amendment.

Important differences between the Thirteenth and Fourteenth Amendments further confirm that *City of Boerne* leaves *Jones* undisturbed. While the parallel enforcement provisions in each Amendment both authorize Congress to pass "appropriate" legislation to "enforce this article," the underlying substantive prohibitions in each Amendment are fundamentally different in nature. See *District of Columbia* v. *Carter*, 409 U.S. 418, 423 (1973) (recognizing the "great

significance" of the difference between a law passed under the Thirteenth Amendment and one passed under the Fourteenth Amendment). The Thirteenth Amendment's substantive ban on slavery permits Congress to legislate against "the badges and incidents of slavery"—a limited category that requires inherently legislative determinations. Indeed, the Supreme Court expressly referred to "the inherently legislative task of defining 'involuntary servitude'" in *Kozminski*, 487 U.S. at 951, and the Second Circuit has noted that "the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative," *Nelson*, 277 F.3d at 185 n.20.

By contrast, the Fourteenth Amendment's substantive protections against state action violating the Due Process, Equal Protection, and Privileges and Immunities Clauses sweeps far broader than the substantive scope of the Thirteenth Amendment, and involves legal rights that have always been the province of the judiciary. *City of Boerne*, 521 U.S. at 520-524. Moreover, unlike the Thirteenth Amendment, which Congress relies on to regulate private conduct, the Fourteenth Amendment applies only to State action, which means legislation under this

Amendment will often have a clear and direct impact on state sovereignty.[8] Accordingly, *City of Boerne* recognized that Congress lacks authority to redefine Fourteenth Amendment rights—and that its legislative power thus extends only to preventive or remedial measures that are congruent and proportional to those rights as interpreted by the courts. *Id.* at 520, 524.

Nothing in *City of Boerne* is inconsistent with *Jones*'s recognition that Congress has a broader role in determining what constitutes the "badges and incidents of slavery" for purposes of the Thirteenth Amendment. In other words, the limits on what is "appropriate" legislation under the Fourteenth Amendment do not necessarily apply to what is "appropriate" under the Thirteenth Amendment. Diggins's argument that the same standard should apply in the different contexts of these two Amendments thus ignores the "crucial disanalogy between the[se] Amendments as regards the scope of the congressional enforcement powers these amendments, respectively, create." *Nelson*, 277 F.3d at 185 n.20. Thus, consistent with *Nelson* and the other courts of appeals to have addressed this issue, this Court should decline to apply *City of Boerne*'s congruence and proportionality standard

[8] The Fifteenth Amendment also only applies to governmental action, but has a narrower substantive focus than the Fourteenth Amendment. Arguably, therefore, federalism principles counsel that Congress has the greatest latitude to legislate under the Thirteenth Amendment, and greater latitude to legislate under the Fifteenth Amendment than the Fourteenth Amendment.

to legislation enacted under the Thirteenth Amendment. See *Roof*, 10 F.4th at 394-395; *Nelson*, 277 F.3d at 185 n.20; *Cannon*, 750 F.3d at 505; *Metcalf*, 881 F.3d at 645; *Hatch*, 722 F.3d at 1205.

b. Even if *City of Boerne* were to be applied in the Thirteenth Amendment context, Section 249(a)(1)'s prohibition on racially motivated violence would still pass constitutional muster. Section 249(a)(1) is congruent and proportional to Congress's power to eradicate the badges and incidents of slavery. Congress's enforcement power under the Reconstruction Amendments "is broadest when directed to the goal of eliminating discrimination on account of race." *Tennessee* v. *Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (citation and internal quotation marks omitted). Indeed, when Congress "attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.).

Here, Congress enacted Section 249(a)(1) based on its well-supported finding that race-based violence was an intrinsic feature of slavery in the United States and continues today. 34 U.S.C. 30501(1); H.R. Rep. No. 86, at 5; S. Rep. No. 147, at 2. Section 249(a)(1)'s response to that problem is direct and limited. Accordingly, Section 249(a)(1) is not so "[l]acking" in proportionality with the

"injury to be prevented or remedied" that it may be considered a substantive redefinition of the rights protected by the Thirteenth Amendment. *City of Boerne*, 521 U.S. at 520. Rather, Section 249(a)(1) is narrowly targeted to accomplish its constitutional end, as it prohibits only "willfully" causing or attempting to commit bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1).

In short, Section 249(a)(1) is entirely reasonable when "judged with reference to the historical experience which it reflects." *Lane*, 541 U.S. at 523 (citation omitted). Thus, Section 249(a)(1) "would also survive under *City of Boerne*." *United States* v. *Beebe*, 807 F. Supp. 2d 1045, 1056 n.6 (D.N.M. 2011), aff'd *sub nom. Hatch*, *supra*.

2. The Fifteenth Amendment's "Current Needs" Test Does Not Apply To Legislation Enacted Under Section 2 Of The Thirteenth Amendment

Diggins similarly argues that the "current needs" analysis in the Supreme Court's decision in *Shelby County* should apply here. Br. 20. But this argument is also meritless, as again reflected in the decisions of other courts that have rejected it. See *Roof*, 10 F.4th at 395; *Metcalf*, 881 F.3d at 645; *Cannon*, 750 F.3d at 505; *Henery*, 60 F. Supp. 3d at 1131.

a. *Shelby County* involved a Fifteenth Amendment challenge to two provisions of the Voting Rights Act of 1965: first, Section 5, which prohibits covered jurisdictions from implementing changes in any voting standard, practice,

or procedure without first obtaining federal preclearance; and second, Section 4(b), which prescribes a formula, based on whether a jurisdiction had certain voting issues in the 1960s and early 1970s, for identifying the jurisdictions covered by Section 5's preclearance requirement. The Supreme Court invalidated Section 4(b)'s coverage formula because it failed to respond to "current needs." 570 U.S. at 557. At the same time, the Court emphasized that it was not invalidating Section 5 itself and that "Congress may draft another formula based on current conditions." *Ibid.*

As the Court noted, Section 4(b) differentiates between the States by subjecting some but not others to Section 5's preclearance requirement. *Shelby Cnty.*, 570 U.S. at 542-545. According to the Court, these Sections, taken together, created "extraordinary legislation otherwise unfamiliar to our federal system," *id.* at 545 (citation omitted), and hence for such a purpose, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions," *id.* at 553. The Court concluded that the Section 4(b) formula was seriously outdated and thus failed to respond to "current" conditions. *Id.* at 557.

Nothing in *Shelby County* undermines the Court's holding in *Jones*. *Shelby County* did not announce a blanket rule—even for the specific purposes of the Fifteenth Amendment, let alone all the Reconstruction Era amendments—that

requires legislation enforcing the Reconstruction Amendments to reflect "current conditions." Rather, the Court limited its holding to a particular (and unique) provision of the Voting Rights Act that (1) imposed different obligations on different States, and (2) impinged on state sovereignty through the extraordinary step of demanding federal preclearance of changed electoral practices. 570 U.S. at 543-544. Those concerns are not implicated by the Shepard-Byrd Act, which imposes no burden on States *at all*.

b. Even assuming *Shelby County*'s analysis were relevant to the Thirteenth Amendment, it would not undermine the validity of Section 249(a)(1). As explained above, Congress enacted the prohibition on racially motivated violence after considering extensive evidence concerning current conditions. For example, the House Report emphasized that "[b]ias crimes are disturbingly prevalent," and it noted that (1) "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and (2) in 2007 alone the FBI documented nearly 4900 hate crimes motivated by bias based on race or national origin. H.R. Rep. No. 86, at 5. That evidence establishes that Section 249(a)(1) responds to current conditions and is therefore "rational in both practice and theory." *Shelby Cnty.*, 570 U.S. at 550 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966)).

Diggins argues that Section 249(a)(1) fails the current needs test by citing to more recent statistics and asserting that "the data do not seem to suggest that

racially encountered assaults are frequent in contemporary America." Br. 22. Yet the statistics he cites—including that in 2019 the FBI reported nearly 5000 victims of race-based assaults—belie this contention. And in 2020, that number increased to nearly 6900. *Hate Crime Statistics*, UCR Publications (2021), https://go.usa.gov/xeYsJ. When more than 11,000 individuals are attacked because of their race or ethnicity over a two-year period, current needs do indeed justify congressional action.

Relatedly, Diggins relies on what he considers to be a low number of federal prosecutions under the Shepard-Byrd Act. Br. 22-23. But this argument misunderstands the nature and purpose of the law. Congress designed the Shepard-Byrd Act to supplement, not replace, state criminal laws. Indeed, the congressional findings specify that state and local governments will "continue to be responsible for prosecuting the overwhelming majority" of hate crimes. 34 U.S.C. 30501(3). See also *United States* v. *Roof*, 225 F. Supp. 3d 438, 443 (D.S.C. 2016) ("Congress intended the Hate Crimes Act to *assist* states' efforts against hate crimes."), aff'd, 10 F.4th 314 (4th Cir. 2021). Congress also noted that state and local governments can "carry out their responsibilities more effectively with greater Federal assistance," and that federal jurisdiction over such crimes would "enable[] Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes." 34 U.S.C. 30501(3)

and (9). As these findings reveal, "[t]he incidence of violence motivated by the actual or perceived race * * * of the victim poses a serious national problem." 34 U.S.C. 30501(1). Thus, even if the *Shelby County* standard applied here, current needs justify Section 249(a)(1).

D. Diggins's Other Arguments Challenging His Convictions Fail

Diggins also argues—in what he characterizes as an "as applied" challenge to the application of the Thirteenth Amendment here—that his particular conduct does not fall within the scope of Section 249(a)(1). Br. 24-25. Characterizing his crimes as "run of the mill assaults" and more akin to "adolescent, bullying behavior," he argues that those actions could not "lead to the de facto re-enslavement or legal subjugation of the targeted group." Br. 24-25 (citation and internal quotation marks omitted). That is hardly a fair characterization of the attacks. But even if it were, Congress can properly use its broad authority under the Thirteenth Amendment to criminalize racially motivated violence, like Diggins's brutal attacks here. As the Supreme Court has emphasized, "the varieties of private conduct that [Congress] may make *criminally punishable* or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude." *Griffin*, 403 U.S. at 105 (emphasis added).

Diggins further suggests (Br. 25-26) that his attacks do not fall within the statute because they were not "meticulously planned." This argument, even if true,

is beside the point. Diggins does not challenge that the government proved beyond a reasonable doubt all elements of a Section 249(a)(1) violation. See *Cannon*, 750 F.3d at 507 (rejecting the argument that "§ 249(a)(1) requires any such showing of premeditation").

II

THE ASSISTANT ATTORNEY GENERAL'S DECISION TO CERTIFY DIGGINS'S PROSECUTION UNDER 18 U.S.C. 249(B)(1) IS JUDICIALLY UNREVIEWABLE AND SUBSTANTIVELY SOUND

A. Standard Of Review

Whether the Attorney General's certification is subject to judicial review is a legal conclusion, which is reviewed de novo. See *United States* v. *Saccoccia*, 1 F.4th 64, 71 (1st Cir. 2021). If the certification is reviewable (which it is not), the government's decision to prosecute Diggins should be afforded substantial deference. See *United States* v. *Roof*, 10 F.4th 314, 396-397 (4th Cir. 2021) (assuming without deciding that a certification issued under the Shepard-Byrd Act is judicially reviewable).

B. The Assistant Attorney General's Discretionary Decision To Certify Diggins's Prosecution Is Not Subject To Judicial Review

The Shepard-Byrd Act requires the Attorney General or a designee to certify that certain conditions exist before a case may be prosecuted, but the law does not provide for review of that decision. 18 U.S.C. 249(b)(1). This legislative silence shows that Congress did not intend for courts to second-guess the government's

decision to prosecute someone under the Shepard-Byrd Act. Thus, as the district court correctly concluded, Diggins's challenge to the certification should be rejected because "Congress could have explicitly provided for judicial review and did not do so." App. 138.

1. The purpose of the certification requirement is "to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion." H.R. Rep. No. 86, 111th Cong., 1st Sess. 14 (2009). Consequently, to prosecute someone for violating the Shepard-Byrd Act, the Attorney General or a designee must certify that one of four conditions exist: (1) the State lacks jurisdiction; (2) the State requested the federal government to assume jurisdiction; (3) the verdict or sentence obtained under state charges left a federal interest unvindicated; or (4) a federal prosecution is in the public interest and necessary to secure substantial justice. 18 U.S.C. 249(b)(1)(A)-(D). Here, the Attorney General's designee (the Assistant Attorney General for the Civil Rights Division) certified that Diggins's prosecution was "in the public interest and necessary to secure substantial justice." App. 37; see also 28 C.F.R. 0.50(n).

Certifications under Section 249 are not subject to judicial review because they involve a quintessential prosecutorial decision that goes to the core of the Executive Branch's authority to prosecute violations of federal law. As the Supreme Court has emphasized, "the decision to prosecute is particularly ill-suited

to judicial review." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Indeed, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States* v. *Santos-Soto*, 799 F.3d 49, 62 (1st Cir. 2015) (quoting *United States* v. *Nixon*, 418 U.S. 683, 693 (1974)).

Recognizing this limitation on reviewing decisions to prosecute, this Court has declined to review similar certifications by the Attorney General. In *United States* v. *Smith*, this Court considered the reviewability of a certification requirement in federal juvenile law requiring the Attorney General to verify that "there is a substantial Federal interest in the case." 178 F.3d 22, 25 (1st Cir.) (quoting 18 U.S.C. 5032), cert. denied, 528 U.S. 910 (1999). Noting that the law "does not specifically provide for judicial review of a certification and fails to articulate any standards for determining the existence of a substantial federal interest," and recognizing the potential for "separation of powers concerns," this Court held that the Attorney General's certification is unreviewable. *Id.*, 178 F.3d at 25. The same rationale applies to federal hate-crimes certifications. Indeed, the district court here similarly explained that certification under the Shepard-Byrd Act is an unreviewable act of prosecutorial discretion because the statute does not articulate any standards for determining when its conditions are met. App. 137.

For these reasons, other federal courts have consistently declined to review certifications under federal hate-crime laws. See *United States* v. *Bowers*, 495 F.

Supp. 3d 362, 374 (W.D. Pa. 2020) (" § 249(b) lacks any language endorsing substantive judicial reviewability of the Attorney General's certification"); *United States* v. *Maybee*, No. 3:11-cr-30006-002, 2013 WL 3930562, at *3 (W.D. Ark. July 13, 2013) ("Judicial review of an Attorney General's certification under 18 U.S.C. § 249(b)(1) is inappropriate where the statute is devoid of any provision for judicial review or a standard of review under which such a review could be conducted."); *United States* v. *Jenkins*, 909 F. Supp. 2d 758, 774 (E.D. Ky. 2012) (stating that 18 U.S.C. 249(b)(1) "indicates Congress intended that judicial review of the certification process should be precluded in favor of the broad discretion of federal prosecutors"). This Court should hold accordingly.[9]

2. In arguing that this Court can and should delve into the reasons behind the Assistant Attorney General's certification, Diggins conflates his constitutional challenge with his certification challenge. Specifically, Diggins contends that judicial review of the certification is tantamount to determining whether the

[9] The only two federal courts that have allowed judicial review of a hate-crimes prosecution did so because Fourth Circuit precedent allows judicial review of juvenile certifications under 18 U.S.C. 5032—the only circuit to allow such review. See *United States* v. *Hill*, No. 3:16-CR-00009-JAG, 2018 WL 3872315, at *4 (E.D. Va. Aug. 15, 2018), rev'd and remanded on other grounds, 927 F.3d 188 (4th Cir. 2019); *United States* v. *Roof*, 225 F. Supp. 3d 438, 451 (D.S.C. 2016), aff'd, 10 F.4th 314 (4th Cir. 2021). As noted above, however, this Court does not allow review of certifications under federal juvenile law, so the rationale of these cases (assuming it is correct) does not apply here.

prosecution "is a proper exercise of the jurisdiction of the Federal Government under the Thirteenth Amendment." Br. 27. To be sure, this Court has the authority to determine whether Section 249(a)(1) is a valid exercise of Congress's power to enforce the Thirteenth Amendment (Issue I, *supra*), and thus whether Diggins could be prosecuted at all under the statute. But that is a separate question from whether, assuming the statute is constitutional, the Attorney General (or designee) properly certified a particular prosecution under the statute. See *United States* v. *Hatch*, 722 F.3d 1193, 1207 (10th Cir. 2013) ("We see no constitutional significance in the certification requirement."), cert. denied, 572 U.S. 1018 (2014). Thus, like the district court, this Court should reject Diggins's challenge to the Assistant Attorney General's certification because it is not subject to judicial review.

C. The Assistant Attorney General Properly Certified The Reasons For Diggins's Federal Prosecution

If this Court were nonetheless to conclude that the certification here is reviewable, it should defer to the Assistant Attorney General's determination that Diggins's prosecution was "in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1)(D). As the congressional findings of the Shepard-Byrd Act recognize, "[a] prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that

caused the victim to be selected." 34 U.S.C. 30501(5). That is especially true for Diggins's crimes, which "caused damage to the entire minority community" by affecting its "sense of security and safety." Doc. 275, at 42 (sentencing transcript). And as noted above, race-based violence epitomizes the badges and incidents of slavery that the Thirteenth Amendment sought to abolish. See I.B., *supra*. Thus, the Assistant Attorney General was well justified in concluding that Diggins's prosecution was "in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1)(D).

Diggins does not dispute that he inflicted violence upon his victims because of their race or that his actions harmed the community. Rather, Diggins's true grievance is that because the State of Maine charged him with assault, he should have been shielded from a prosecution under the federal hate-crimes statute for all of his racially-motivated violence that evening. Br. 28; see also Br. 31 (arguing that the remedy for the allegedly deficient certification is to "vacate the judgment, dismiss the indictment, and let the State of Maine do its work"). But Maine did not have a criminal hate-crimes statute at the time, and in any event, the Shepard-Byrd Act specifically contemplates parallel prosecutions. Section 249(b)(1)(C) allows for federal prosecutions when the Attorney General certifies that "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence." And as the Supreme

Court recently reaffirmed, the longstanding dual-sovereignty doctrine permits parallel state and federal prosecutions. *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). Thus, Diggins has failed to demonstrate any infirmity with the certification.

III

DIGGINS HAS WAIVED HIS CHALLENGES TO THE EVIDENTIARY RULINGS RELATING TO HIS WHITE-SUPREMACIST TATTOOS, BUT THOSE CHALLENGES ARE MERITLESS IN ANY EVENT

A. Standard Of Review

Diggins's evidentiary challenges regarding his white-supremacist tattoos, including the expert testimony explaining them, are not reviewable because he waived the arguments by not addressing them in the Argument section of his brief. This Court has made clear that a party "waives" an argument when it "neither develops the argument nor accompanies it with even a shred of authority." *United States* v. *Gonzalez*, 981 F.3d 11, 23 (1st Cir. 2020), cert. denied, 141 S. Ct. 1710 (2021). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990). Rather, "a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." *Ibid.* (citation and internal quotation marks omitted). Because Diggins raised these issues only in his Statement of the Issues (Br. 4), and then

only briefly and obliquely in the Summary of the Argument (Br. 14), he has waived them and this Court should not address them.

If the Court nonetheless reviews these issues, the district court's evidentiary rulings are reviewed for abuse of discretion. See *United States* v. *Ackies*, 918 F.3d 190, 205 (1st Cir.), cert. denied, 140 S. Ct. 662 (2019). And a district court's ruling under Rule 403 should be reversed only "rarely—and in extraordinarily compelling circumstances." *United States* v. *Gentles*, 619 F.3d 75, 87 (1st Cir.) (citation omitted), cert. denied, 562 U.S. 1053 (2010). There are no such circumstances here.

B. The District Court Did Not Abuse Its Discretion By Admitting Evidence Of Diggins's Tattoos And Expert Testimony Explaining Their Meaning

The district court correctly admitted evidence of Diggins's swastikas and other white-supremacist tattoos, which were relevant to Diggins's motive. App. 157-162. Moreover, the government's expert properly used his specialized knowledge to help the jury understand the meaning of Diggins's relevant tattoos. Thus, on the merits, Diggins's evidentiary challenges fail.

1. Tattoo (and similar) evidence is admissible to help prove racial intent. Other courts have repeatedly so held. For example, in *United States* v. *Allen*, 341 F.3d 870, 885-887 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004), the Ninth Circuit affirmed the admission of white-supremacist tattoos to establish that the defendant acted because of a victim's race in a hate-crimes prosecution, rejecting

the argument that such evidence was unfairly prejudicial. Likewise, in *United States* v. *Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996), the Eighth Circuit explained that because the defendant "was charged with a racially motivated crime, evidence of his racist views, behavior, and speech were relevant and admissible to show discriminatory purpose and intent, an element of the charges against him." And, analogously, in *United States* v. *Cannon*, 750 F.3d 492, 508 (5th Cir.), cert. denied, 574 U.S. 1029 (2014), the Fifth Circuit rejected defendants' argument that "speech-based evidence showing that [they] harbored white-supremacist views, such as their tattoos and use of racial epithets, was insufficient to show that the assault was motivated by race."

The same reasoning applies here. As the district court correctly recognized, "evidence that Diggins has several potentially racially charged tattoos tends to show that Diggins holds racist beliefs, which is relevant to determining an essential element of the crime charged—namely, whether he acted because of racial animus on the night of the alleged assaults." App. 198. Moreover, the district court instructed the jury to consider the tattoo evidence "only as it bears on the defendant's motive, intent, or plan and for no other purpose." Doc. 285, at 444 (Jury Trial Transcript, Vol. III). This type of limiting instruction has led other courts to conclude that Rule 403 does not prohibit evidence of white supremacy to prove intent for a hate crime. *Allen*, 341 F.3d at 886 n.24; cf. *United States* v.

Pelletier, 666 F.3d 1, 6 (1st Cir. 2011) (finding that a limiting instruction mitigated any potential unfair prejudice under Rule 404(b)), cert. denied, 566 U.S. 1023 (2012). For these reasons, the district court did not abuse its discretion in admitting evidence of Diggins's racist tattoos.

2. The district court likewise did not abuse its discretion in admitting expert testimony under Federal Rule of Evidence 702.[10] As the district court concluded, "it is unlikely that the jury would understand the significance of at least some of Diggins' tattoos" absent background information. App. 201. Thus, the government's expert, a senior investigative researcher with the Anti-Defamation League who has trained more than 17,000 law enforcement officers on identifying white supremacist symbols, including tattoos, explained the meaning of some of Diggins's relevant tattoos. App. 172-174, 379-385. For example, the expert testified that the tattoo containing the letters "WPWW" stands for White Pride World Wide. App. 157, 178, 397-398. The expert also explained that the lightning bolt tattoos mirror those used in Nazi Germany by the SS—the black-shirted police with SS bolts on their uniforms who committed atrocities during the Holocaust.

[10] Rule 702 allows expert testimony when: (1) the expert's specialized knowledge will help the trier of fact to understand the evidence or to determine a fact at issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case.

App. 159-160, 391. This testimony assisted the jury in understanding the meaning of words and imagery that otherwise may not have been apparent. Other courts have admitted such evidence in similar circumstances. See *United States* v. *Sandoval*, 6 F.4th 63, 84 (1st Cir. 2021), petition for cert. pending, No. 21-6268 (filed Nov. 15, 2021); *United States* v. *Garcia*, 793 F.3d 1194, 1213 (10th Cir. 2015), cert. denied, 577 U.S. 1088 (2016). The district court did not abuse its discretion in doing so here.

3. In all events, any error here would be harmless. See *United States* v. *Galindez*, 999 F.3d 60, 71 (1st Cir. 2021) (holding that any evidentiary error would be harmless because "the jury would in all likelihood have found him guilty"). Although Diggins suggests (in his Summary of Argument only, Br. 14) that the government did not introduce other evidence of racial animus besides the tattoos, that is not correct. The evidence showed that in both attacks, Diggins and his nephew approached a random Black man, distracted him, and then viciously sucker-punched him, while repeatedly using the racial slur "nigger" before and after the attacks. Where, as here, there is direct evidence of racial motivation, courts have concluded that any error in admitting other evidence of a defendant's racist views would be harmless. See *United States* v. *McInnis*, 976 F.2d 1226, 1232 (9th Cir. 1992).

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief:

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