IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4299

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES WILLIAM HILL, III,

Defendant-Appellee

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

PETITION FOR PANEL REHEARING

INTRODUCTION

On August 18, 2017, this Court issued a decision in this case, reversing and remanding (copy of opinion attached). Pursuant to Federal Rule of Appellate Procedure 40, the United States files this petition for panel rehearing. The United States respectfully requests that this Court delete one phrase from footnote 5 of the majority's opinion because that phrase conflicts with precedent from the Supreme Court, this Court, and other circuit courts. Fourth Cir. Loc. R. 40(b)(iii). Specifically, the United States seeks removal of the following phrase from that

footnote: "as the challenge involves determining whether Hill's conduct *substantially* affected interstate commerce." Op. 6 n.5 (emphasis in original).[1]

BACKGROUND

This appeal concerns an as-applied constitutional challenge to a provision of a federal hate crimes statute, 18 U.S.C. 249(a)(2). The statute prohibits willful acts of violence based on, among other classifications, sexual orientation. As an element of the offense, the statute requires the government to prove a nexus to interstate commerce. 18 U.S.C. 249(a)(2)(B). As relevant here, that element is satisfied where the violent offense "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct" or "otherwise affects interstate or foreign commerce." 18 U.S.C. 249(a)(2)(B)(iv).

The indictment alleged that the defendant, James William Hill, III, assaulted the victim because of the victim's sexual orientation. J.A. 5. Tracking the statutory language, the indictment further alleged that this conduct "interfered with commercial and other economic activity in which [the victim] was engaged at the time of the conduct" and "otherwise affected interstate and foreign commerce."

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[1] Citations to "Op. __" refer to page numbers in this Court's August 18, 2017, opinion issued in this case. Citations to "U.S. Br. __" refer to page numbers in the United States' opening brief, which was filed on July 28, 2016. Citations to "Hill Br. __" refer to page numbers in the defendant's answering brief, which was filed on September 12, 2016. Citations to "J.A. __" refer to page numbers in the Joint Appendix filed by the United States on July 28, 2016.

J.A. 5. Hill moved to dismiss the indictment, contending that Section 249(a)(2) as applied in this case exceeded Congress's Commerce Clause authority. J.A. 7-31. In its opposition to Hill's motion, the United States proffered additional facts indicating that Hill's workplace assault of his coworker at an Amazon warehouse interfered with ongoing preparation of goods for interstate shipment. J.A. 36-37.

The district court dismissed the indictment, finding that applying Section 249(a)(2) in this case would exceed the scope of Congress's Commerce Clause authority. J.A. 114-128. The United States appealed. J.A. 130.

A divided panel of this Court reversed and remanded for reinstatement of the indictment. Op. 3-7. The panel majority concluded that, "[o]n its face, the indictment is legally sufficient and does not present an unconstitutional exercise of Congressional power." Op. 4-5. The Court also concluded that further factual development was needed to address the as-applied constitutional challenge. Op. 4-7. The Court stated that the question of "whether Hill's conduct sufficiently affects interstate commerce as to satisfy the constitutional limitations placed on Congress' Commerce Clause power may well depend on a consideration of facts" and, therefore, "it is premature to determine the constitutional issues." Op. 5. The Court did not address the merits of the Commerce Clause issue; rather, the Court stated that "[a]t this stage, it is sufficient for the government to allege that the jurisdictional element is satisfied." Op. 5 n.3.

In remanding, the Court stated in footnote 5:

> [T]he proffered facts fail to indicate the precise effect on interstate commerce that Hill's actions may or may not have had. For example, the facts relating to the items not shipped because of the assault are based on Amazon benchmarks, not the specific facts of this case. *See* J.A. 37. These factual uncertainties must be resolved before a court can properly rule on Hill's as-applied constitutional challenge, as the challenge involves determining whether Hill's conduct *substantially* affected interstate commerce.

Op. 6 n.5 (emphasis in original).

Judge Wynn wrote separately. Op. 8-33. In his view, further factual development was not necessary to address the as-applied challenge because the undisputed facts proffered by the United States demonstrated that application of the statute in this case was a valid exercise of Congress's Commerce Clause power. Op. 11-33. Judge Wynn noted that the effect of Hill's conduct "on interstate commerce * * * renders it susceptible to federal regulation," and that quantifying the precise nature of that effect was not necessary. Op. 26-27. Specifically, in a footnote, Judge Wynn, responding to footnote 5 in the majority opinion, stated

> [T]he Supreme Court has made clear that, for purposes of assessing an as-applied challenge under the Commerce Clause, "it makes no difference . . . that any actual or threatened effect on commerce in a particular case is minimal." *Taylor* [v. *United States*], 136 S. Ct. [2074,] 2081 [(2016)]. Rather, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 193 (1968)). Thus, the Supreme Court has

> rejected Commerce Clause challenges when the charged conduct interfered with even a miniscule amount of interstate commerce. *Taylor*, 136 S. Ct. at 2078, 2081-82 (affirming Hobbs Act conviction based on attempted drug robberies that netted only jewelry, $40, three cell phones, and a single marijuana cigarette).
>
> Accordingly, as long as Defendant's assault of C.T. affected some shipments, the exact number of shipments affected by his assault has no bearing on the resolution of Defendant's Commerce Clause challenge.

Op. 27 n.3.

ARGUMENT

Panel rehearing is appropriate where the Court has "overlooked or misapprehended" a point of law or fact. Fed. R. App. P. 40(a)(2). Under this Court's local rules, panel rehearing is appropriate where "[t]he opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals and the conflict is not addressed in the opinion." Fourth Cir. Loc. R. 40(b)(iii). The Court may, after granting rehearing, "make a final disposition of the case without reargument." Fed. R. App. P. 40(a)(4). The United States requests that this Court grant this petition for panel rehearing and, without any further argument, make a final disposition that omits the last phrase of footnote 5 but is otherwise identical to the August 18, 2017, opinion.

This issue on appeal is whether 18 U.S.C. 249(a)(2) is a constitutional exercise of Congress's Commerce Clause authority as applied to a workplace assault that interfered with the victim's active preparation of goods for interstate

shipment. U.S. Br. 2. In other words, the question is whether the facts of this case fall within Congress's power to regulate "activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). As noted above, the panel majority stated in footnote 5 that, given the procedural posture of the case, factual uncertainties remain that "must be resolved before a court can properly rule on Hill's as-applied constitutional challenge, as the challenge involves determining whether Hill's conduct *substantially* affected interstate commerce." Op. 6 n.5.

Although the United States does not agree with the Court's conclusion that further factual development is necessary before resolving Hill's as-applied Commerce Clause challenge, it does not challenge that conclusion in this petition. Rather, the United States challenges only this Court's characterization that resolution of that issue "involves determining whether Hill's conduct *substantially* affected interstate commerce." Op. 6 n.5. This phrase, focusing on Hill's specific conduct and its effect on commerce in this case, is incorrect, conflicts with applicable precedent, and is unnecessary to the Court's ultimate resolution of the appeal.

Specifically, both the Supreme Court and this Court have held that, to survive an as-applied Commerce Clause challenge, the United States need not plead or prove that the *defendant's conduct itself* substantially affected interstate

commerce. See *Taylor* v. *United States*, 136 S. Ct. 2074, 2081 (2016) ("[I]t makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal."); *United States* v. *Gibert*, 677 F.3d 613, 627 (4th Cir.) (holding that on an as-applied challenge, "the relevant question for purposes of a Commerce Clause analysis is not whether one particular offense has an impact on interstate commerce, but whether the class of acts proscribed has such an impact"), cert. denied, 568 U.S. 889 (2012). Rather, where a class of conduct in the aggregate substantially affects commerce, the United States only needs to establish that the individual defendant's conduct had *some* effect on interstate commerce. See *United States* v. *Williams*, 342 F.3d 350, 354 (4th Cir. 2003) ("[T]he Hobbs Act's jurisdictional predicate still requires only a minimal effect on commerce."), cert. denied, 540 U.S. 1169 (2004). In line with these cases, this Court has affirmed federal convictions even where the effect of the defendant's conduct on commerce was minimal. See, *e.g.*, *United States* v. *Stevens*, 539 F. App'x 192, 194 (4th Cir. 2013) (affirming federal conviction, based on minimal commercial impact, where the defendants robbed a local pawn shop employee), cert. denied, 134 S. Ct. 1014 (2014); see also *United States* v. *Terry*, 257 F.3d 366, 367, 370 (4th Cir.) (finding sufficient connection to interstate commerce where arson

targeted a daycare center that engaged in purely intrastate commerce and did not turn a profit), cert. denied, 534 U.S. 1035 (2001).[2]

Accordingly, in this case, the United States is not required to prove that the defendant's conduct by itself substantially affected interstate commerce. As long as the United States can show that the regulated class of acts in the aggregate substantially affects interstate commerce—an issue that the Court's opinion does not address—the United States need only establish that the defendant's conduct had some effect on interstate commerce.[3]

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[2] Other circuits are in accord. See, *e.g.*, *United States* v. *Carr*, 652 F.3d 811, 813 (7th Cir.) ("[T]he law of this circuit requires the government to show only that the charged crime had a '*de minimis*' or slight effect on interstate commerce."), cert. denied, 565 U.S. 1084 (2011); *United States* v. *Baylor*, 517 F.3d 899, 901-902 (6th Cir.) (collecting cases from several circuits), cert. denied, 544 U.S. 920 (2008); *United States* v. *Clausen*, 328 F.3d 708, 711 (3d Cir.) ("In any individual case, proof of a *de minimis* effect on interstate commerce is all that is required."), cert. denied, 540 U.S. 900 (2003); *United States* v. *Smith*, 182 F.3d 452, 456 (6th Cir. 1999) ("[I]n *Lopez*, the Court recognized that if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence.") (citation and internal quotation marks omitted), cert. denied, 530 U.S. 1206 (2000).

[3] The defendant argued that the aggregation principle should not apply in this case because aggregation is only appropriate where the crime is economic in nature and in his view, the prohibition on hate crimes targets non-economic conduct. Hill Br. 17-20. The United States argued to this Court that the aggregation principle should apply because the Section 249(a)(2) only regulates conduct that bears a close nexus to economic activities. U.S. Br. 18-22; see also Op. 26-32 (Judge Wynn's separate opinion agreeing with the United States). The panel majority did not address whether aggregation is appropriate here, and

(continued…)

In sum, this Court's statement in footnote 5 that the case concerns "whether Hill's conduct *substantially* affected interstate commerce" could be misread to suggest, contrary to the authorities cited above, that the United States must show that Hill's individual conduct *by itself* substantially affected interstate commerce. See Op. 6 n.5. Such a reading would prejudice the United States and could be insulated from this Court's review if, for example, the misreading leads to a jury instruction that, in turn, leads to acquittal. See *Evans* v. *Michigan*, 568 U.S. 313, 328-329 (2013) (holding that an acquittal precludes review of even clear legal errors that led to the acquittal); see also Op. 5-6. Moreover, the phrase is not necessary to this Court's ultimate holding—that a factual record should be developed on remand before the district court addresses the as-applied constitutional challenge. Op. 4-7. Accordingly, the United States requests that this Court remove that portion of footnote 5 from its opinion.

(…continued)
therefore, the question remains open for the district court to resolve on remand after factual development pursuant to the Court's opinion. See Op. 5 (noting that it is premature to decide the legal questions presented).

CONCLUSION

The United States respectfully requests that this Court grant this petition and remove the following phrase from footnote 5 of the majority opinion: "as the challenge involves determining whether Hill's conduct *substantially* affected interstate commerce." Op. 6 n.5. The United States further requests that the Court reissue the remainder of its opinion without reargument.

Respectfully submitted,

DANA J. BOENTE
United States Attorney for the
Eastern District of Virginia

S. DAVID SCHILLER
Assistant United States Attorney for the
Eastern District of Virginia
600 East Main Street, Suite 1800
Richmond, VA 23219
(804) 819-5480

JOHN M. GORE
Acting Assistant Attorney General

s/ Vikram Swaruup
THOMAS E. CHANDLER
VIKRAM SWARUUP
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-5633

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 40(b), that the attached PETITION FOR PANEL REHEARING:

(1) contains 2162 words; and

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

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Dated: September 1, 2017

CERTIFICATE OF SERVICE

I certify that on September 1, 2017, I electronically filed the foregoing PETITION FOR PANEL REHEARING with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney