No. 16-4299

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES WILLIAM HILL, III,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLANT

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BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

On April 22, 2016, the district court dismissed the indictment. J.A. 129.[1] On May 18, 2016, the United States filed a timely notice of appeal. J.A. 130-131. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3731.

[1] "J.A. ___" refers to the page number of the Joint Appendix filed by the United States along with this brief.

STATEMENT OF THE ISSUE

Whether 18 U.S.C. 249(a)(2)—which criminalizes willful acts of violence that are based on, among other classifications, sexual orientation—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.

STATEMENT OF THE CASE

1. Procedural History

This case arises out of an assault of a gay employee at an Amazon Fulfillment Center in Chester, Virginia. J.A. 115. Defendant James William Hill, III, was initially charged with assault and battery under Virginia law. J.A. 114-115. The state prosecutor, however, referred the matter to the United States Attorney's Office because Virginia's hate crime law does not cover offenses motivated by sexual orientation. J.A. 66-67.

A grand jury in the Eastern District of Virginia returned a one-count indictment, charging Hill with violating 18 U.S.C. 249(a)(2). J.A. 5-6. Section 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (HCPA), criminalizes "willfully caus[ing] bodily injury to any person * * * because of the [person's] actual or perceived * * * sexual orientation." 18 U.S.C. 249(a)(2). Section 249(a)(2) also contains a commerce

element, which requires the government to establish that the charged conduct falls within the scope of Congress's Commerce Clause authority. 18 U.S.C. 249(a)(2)(B). The government can meet the commerce element by proving that the offense interfered with commercial activity in which the victim was engaged at the time of the offense or that the offense otherwise affected interstate or foreign commerce. 18 U.S.C. 249(a)(2)(B)(iv).

The indictment charged Hill with "willfully caus[ing] bodily injury to C.T. [the victim] by assaulting C.T., including by punching C.T., because of C.T.'s actual or perceived sexual orientation." J.A. 5. The indictment also charged that, in connection with the offense, Hill "interfered with commercial and other economic activity in which C.T. was engaged at the time of the conduct, and [that the] offense otherwise affected interstate and foreign commerce." J.A. 5. Pursuant to 18 U.S.C. 249(b)(1)(D), the Attorney General certified that the prosecution "is in the public interest and is necessary to secure substantial justice." J.A. 65. The state law charges were subsequently dropped. J.A. 115-116.

Hill moved to dismiss the indictment, arguing, as relevant here, that Section 249(a)(2) is unconstitutional on its face and as applied. J.A. 7-31. The United States opposed the motion. J.A. 35-64. On April 22, 2016, the district court granted the motion, concluding that Section 249(a)(2) is unconstitutional as applied

to Hill because it exceeds Congress's authority under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. J.A. 114-128.

The court recognized that Congress, under its Commerce Clause power, may regulate three broad categories of commercial activity: "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and activities that have a substantial relation to or that substantially affect interstate commerce. J.A. 121 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)). The court found that application of Section 249(a)(2) here could only be justified under the third category, *i.e.*, if Section 249(a)(2) regulates an activity that substantially relates to or affects interstate commerce. J.A. 121. The court recognized, in turn, that this analysis considers four factors: "the statute's (1) economic nature, (2) legislative findings, (3) connection to interstate commerce, and (4) express jurisdictional elements." J.A. 121 (citing *United States* v. *Morrison*, 529 U.S. 598, 610-613 (2000); *Lopez*, 514 U.S. at 559-565).

The court found that the first three factors, as applied to Hill, cut against a finding of constitutionality. First, the court found that crimes of violence are generally not economic activity, and therefore, "as applied to Hill, the Court [could not] uphold [Section 249(a)(2)] based on the statute's economic nature." J.A. 122. Second, the court concluded that the legislative findings regarding the effect of violence on interstate commerce were akin to the legislative findings regarding the

Violence Against Women Act of 1994 (VAWA), which the Supreme Court found unpersuasive in *Morrison*, where the Court struck down a provision of VAWA that created a civil cause of action but lacked a jurisdictional element. J.A. 122-123. Third, the court found that the "attenuated connection between gay-bashing and interstate commerce is not enough to hold the HCPA constitutional as applied to Hill." J.A. 124.

The court stated that the statute "comes closest to passing constitutional muster as applied to Hill by including a 'jurisdiction element' requiring the offense to affect interstate commerce." J.A. 124. The court found (J.A. 125) that Hill's prosecution could be permissible only under the fourth statutory jurisdictional element of Section 249(a)(2)(B), which permits federal jurisdiction where a crime "interferes with commercial or other economic activity in which the victim [was] engaged" or "otherwise affects interstate or foreign commerce." 18 U.S.C. 249(a)(2)(B)(iv). The court characterized that provision as conferring federal jurisdiction where an assault "interferes with commercial or economic activity or otherwise affects interstate commerce." J.A. 125.[2]

[2] As discussed below, the court's characterization of this jurisdictional element omitted a key part of the statutory text requiring interference with commercial or economic activity "in which the victim is engaged at the time of the [offense]." 18 U.S.C. 249(a)(2)(B)(iv)(I).

The court rejected the government's argument that, because C.T. was engaging in economic activity at the time of the assault by preparing goods for interstate shipment, the assault fell within the statutory jurisdictional element and Congress's Commerce Clause authority. J.A. 125-126. The court reasoned that the government's argument would open the door to regulating "any conduct that occurs at any commercial establishment." J.A. 126. The court was concerned that "the government's argument could extend the HCPA into someone's home if, for example, a person prepared, packaged, and eventually shipped merchandise out-of-state." J.A. 126.

The court also rejected the government's argument regarding the effect of the assault on the productivity of both Hill and C.T.—neither could continue preparing goods for interstate shipment for the remainder of his shift—and the resulting impact on interstate commerce. J.A. 126. The court stated that the facts of this case "have a closer connection with decreased productivity than the situations presented in *Lopez* and later *Morrison*" but nonetheless rejected the government's argument because of concerns regarding the limits of that line of argument. J.A. 127. Specifically, the court stated that "[u]nder this argument, the HCPA would reach Hill's conduct if he had assaulted C.T. in the parking lot on the way into work, preventing C.T. from completing his entire ten-hour shift and

precluding the delivery of packages. Indeed, this argument would also extend to an assault of C.T. at C.T.'s home prior to his ten-hour shift." J.A. 127.

Because the court found that the Section 249(a)(2) was unconstitutional as applied to Hill, it did not reach Hill's arguments that the statute is facially unconstitutional.[3] J.A. 127.

On May 18, 2016, the United States filed a timely notice of appeal. J.A. 130-131.

2. Factual Background

On May 22, 2015, Hill and C.T. were working at an Amazon Fulfillment Center—essentially, a warehouse—when Hill repeatedly punched C.T. in the face. J.A. 115. As a result, C.T. suffered a sore right arm, a heavily bruised left eye, cuts near that eye, a bloody nose, and abrasions on his nose and cheeks. J.A. 36. The assault was unprovoked, and Hill did not say anything during the assault. J.A. 36.

Following the assault, neither Hill nor C.T. continued working for the remainder of their ten-hour shifts. J.A. 115. C.T. was taken to the hospital where his injuries were treated. J.A. 66. Later that day, Hill provided a voluntary

[3] In his motion to dismiss, Hill also argued that the catch-all jurisdictional prong of Section 249(a)(2)(B)(iv) was unconstitutionally vague and overbroad and that the requirement in Section 249(b)(1) that the Attorney General certify hate crimes prosecutions had not been satisfied. The district court did not reach the first issue and ruled in favor of the government on the second. J.A. 117-120, 127. Neither argument is at issue on appeal.

statement to his employer and to the local police. J.A. 36. Hill told the police that he punched C.T. because he does not like homosexuals and that he was offended by C.T.'s homosexuality. J.A. 36. He offered no other explanation for the assault. J.A. 36.

As a result of Hill's and C.T.'s absence for the remainder of the work day, Amazon suffered approximately nine hours of lost productivity at Hill's and C.T.'s work stations. J.A. 115. During that time, Hill was responsible for moving items from bins on a conveyor belt to cubbyholes for aggregation prior to packaging, and C.T. was responsible for moving items from the cubbyholes to boxes for packaging. J.A. 115. Applying Amazon's benchmark rates for employee productivity, the government calculated that the assault prevented C.T. from packaging 1710 items, most of which were destined for locations outside of Virginia, and prevented Hill from moving 3897 items to the cubbyholes. J.A. 115 n.3.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the indictment. In enacting Section 249(a)(2), Congress intended to invoke the full scope of its Commerce Clause power. The statute thus includes a jurisdictional element that requires the government to prove in each case a nexus between the offense conduct and interstate commerce. Here, the workplace assault satisfies Section 249(a)(2)'s

commerce element and falls within Congress's Commerce Clause power for two independent reasons.

First, C.T., the victim, was actively engaged in commercial activity—the shipping of goods interstate—when Hill attacked him. The assault thus interfered "with commercial * * * activity in which [C.T. was] engaged at the time of the [offense]" and falls squarely within Section 249(a)(2)(B)(iv)(I). Moreover, this Court has recognized that Congress has Commerce Clause authority to prohibit criminal interference with property or individuals who are "actively employed for commercial purposes, with more than a passive, passing or past connection to commerce." See *United States* v. *Cristobal*, 293 F.3d 134, 146 (4th Cir.), cert. denied, 537 U.S. 963 (2002). That was the case here.

Second, the assault on C.T. "affect[ed] interstate commerce" within the meaning of Section 249(a)(2)(B)(iv)(II) and the Constitution. Both Congress and the courts have long recognized that the Commerce Clause permits regulation of conduct in the workplace. Congress has exercised this power in promulgating anti-discrimination statutes that prohibit workplace harassment and discrimination, along with laws that criminalize violent interference with equal employment opportunities. Courts have consistently upheld these civil and criminal statutes as valid exercises of Congress's Commerce Clause authority. Section 249(a)(2), as applied in this case, is an equal employment statute that falls within this tradition.

Specifically, Section 249(a)(2) in this case criminalizes a discriminatory assault at the workplace of a major multinational corporation, which is within Congress's Commerce Clause powers.

ARGUMENT

SECTION 249(a)(2) IS CONSTITUTIONAL AS APPLIED TO HILL'S WORKPLACE ASSAULT OF HIS COWORKER WHO WAS ACTIVELY PREPARING GOODS FOR INTERSTATE SHIPMENT

A. Standard Of Review

This Court reviews dismissals of indictments based on legal questions de novo. See *United States* v. *Hatcher*, 560 F.3d 222, 224 (4th Cir. 2009). In reviewing the dismissal of an indictment, the Court can rely not only on allegations in the indictment but also on facts proffered by the United States. See *United States* v. *Terry*, 257 F.3d 366, 367 (4th Cir.), cert. denied, 534 U.S. 1035 (2001). The United States set forth its view of the facts in its response to the motion to dismiss, J.A. 36-38, and Hill did not dispute any of those facts, J.A. 74 (Hill's characterization of the facts as "undisputed" in his reply brief).

B. Statutory Background

Section 249(a)(2), a provision of the HCPA, criminalizes acts of violence committed "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. 249(a)(2). This subsection was enacted pursuant to Congress's Commerce Clause

power. See H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 15 (2009) (House Report).[4] Congress recognized that "the Commerce Clause provides Congress ample authority to prosecute acts of violence motivated by animus based on * * * [*e.g.*, sexual orientation] where the act has the requisite connection to interstate commerce." *Ibid*. In enacting Section 249(a)(2), Congress intended to invoke the "full scope of [its] Commerce Clause power." *Ibid.*

To this end, Section 249(a)(2) "requires that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution." House Report 15. Specifically, the government must prove that the offense satisfies one of four jurisdictional elements:

> (i) the conduct * * * occurs during the course of, or as the result of, the travel of the defendant or the victim--
>
> > (I) across a State line or national border; or
> > (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
>
> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct * * * ;

[4] Another subsection of Section 249 criminalizes acts of violence committed "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1). Appellate courts have unanimously upheld that subsection as a valid exercise of Congress's Thirteenth Amendment powers. See, *e.g.*, *United States* v. *Cannon*, 750 F.3d 492, 502 n.7 (5th Cir.) (citing cases), cert. denied, 135 S. Ct. 709 (2014).

> (iii) in connection with the conduct * * * , the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
>
> (iv) the conduct * * * --
>
> > (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
> > (II) otherwise affects interstate or foreign commerce.

18 U.S.C. 249(a)(2)(B). Both parts of the last jurisdictional element are at issue in this case.[5]

In addition to the jurisdictional nexus requirement, Section 249 also contains a "certification" provision, which requires the Attorney General to certify that federal intervention is appropriate because the State does not have jurisdiction, the State requested that the federal government assume jurisdiction, a state court verdict or sentence "left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence," or federal prosecution "is in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1). The

[5] The jurisdictional elements fatally undermine Hill's facial challenge to Section 249(a)(2)—an issue the district court did not reach and thus is not at issue on appeal, J.A. 127. See generally *United States* v. *Wells*, 98 F.3d 808, 811 (4th Cir. 1996) (rejecting facial challenge to the felon-in-possession statute "because existence of [a] jurisdictional element, requiring the Government to show that a nexus exists between the firearm and interstate commerce to obtain a conviction under § 922(g), distinguishes *Lopez*"); *United States* v. *Mason*, 993 F. Supp. 2d 1308, 1317 (D. Or. 2014) (rejecting facial challenge to Section 249(a)(2) because "the jurisdictional element of the HCPA * * * is sufficient to satisfy the requirements of the Commerce Clause").

certification requirement ensures that there is a federal interest in prosecuting a particular case. See House Report 14.

C. Section 249(a)(2) Is Constitutional As Applied To Hill's Workplace Assault Of His Coworker Who Was Preparing Goods For Interstate Shipment

Resolution of this as-applied challenge implicates two questions: (1) whether this workplace assault falls within either of the two prongs of the statutory jurisdictional element charged in the indictment, and (2) if so, whether Congress can regulate the conduct under its Commerce Clause authority. The indictment refers only to the two prongs of the fourth jurisdictional element—that is, that the assault "interfered with commercial and other economic activity in which C.T. was engaged at the time of the conduct" and that the assault "otherwise affected interstate and foreign commerce." J.A. 5. Therefore, those are the sole jurisdictional elements at issue in this case. Because these jurisdictional elements reach to the limits of Congress's Commerce Clause authority, the statutory and constitutional questions merge. See *Jones* v. *United States*, 529 U.S. 848, 854 (2000) (noting that statutes that use the phrase "affecting commerce[,]" "when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause"); House Report 15. The workplace assault here satisfies the

statutory commerce element and falls within Congress's Commerce Clause authority for two independent reasons.[6]

1. Section 249(a)(2) Is Constitutional As Applied Because C.T. Was Actively Engaged In Commercial Activity Affecting Interstate Commerce When Hill Assaulted Him And The Assault Interfered With That Activity

At the time of the attack, C.T. was actively preparing packages for shipment in interstate commerce, and the attack interfered with his work (and interstate commerce) by preventing him from preparing approximately 1700 such packages. J.A. 115 & n.3. The assault thus fell squarely within the first prong of the fourth jurisdictional element, which confers federal jurisdiction over an assault that

[6] Since Congress enacted the HCPA in 2009, five courts have addressed whether Section 249(a)(2) exceeds Congress's Commerce Clause authority. The district court's decision here is the first to find that it does. The constitutionality of an application of Section 249(a)(2) was before the Sixth Circuit in *United States* v. *Miller*, 767 F.3d 585 (6th Cir. 2014), but the court reversed the convictions due to instructional error and did not reach the constitutional issue. The three other district courts that have considered challenges to the constitutionality of Section 249(a)(2) under the Commerce Clause have all upheld the statute, but none of these cases addressed the jurisdictional element at issue in this case (18 U.S.C. 249(a)(2)(B)(iv)). See *Mason*, 993 F. Supp. 2d at 1317 (rejecting as-applied challenge because jury must decide whether weapon used in crime traveled interstate under 18 U.S.C. 249(a)(2)(B)(iii)); *United States* v. *Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012) (rejecting as-applied challenge because defendants' use of a car on a highway met the requirements of 18 U.S.C. 249(a)(2)(B)(ii)); *United States* v. *Mullet*, 868 F. Supp. 2d 618 (N.D. Ohio 2012) (rejecting as-applied challenge because defendants used scissors and hair clippers that traveled in interstate commerce under 18 U.S.C. 249(a)(2)(B)(iii)), rev'd on other grounds *sub nom. Miller*, 767 F.3d 585.

"interferes with commercial or other economic activity *in which the victim is engaged at the time of the [assault]*." 18 U.S.C. 249(a)(2)(B)(iv)(I) (emphasis added). The application of Section 249(a)(2) to Hill's interference with commercial activity in which C.T. was actively participating is well within Congress's Commerce Clause power.

a. This Court has recognized that Congress may regulate interference with property that is "actively employed in a commercial activity that affects interstate commerce." *United States* v. *Aman*, 480 F. App'x 221, 224 (4th Cir.), cert. denied, 133 S. Ct. 366 (2012); see also *United States* v. *Cristobal*, 293 F.3d 134, 146 (4th Cir.), cert. denied, 537 U.S. 963 (2002) (criminalizing violence targeting vehicles that were "actively employed for commercial purposes, with more than a passive, passing or past connection to commerce," is within Congress's powers); *Terry*, 257 F.3d at 370 (Congress's Commerce Clause power extends to conduct that "was not removed from or passively connected to commerce").[7] The conduct at issue in this as-applied challenge—an assault on an employee who was actively engaged in packaging goods for interstate shipment—implicates the sort of interference with ongoing commercial activity that falls within Congress's Commerce Clause power.

[7] While some courts have noted that vehicles per se are instrumentalities of interstate commerce that Congress can regulate, this Court in *Cristobal* focused on whether the vehicles "were used in activities affecting interstate commerce." 293 F.3d at 144.

Courts have addressed this issue in analogous criminal cases involving the federal arson statute, 18 U.S.C. 844(i). In *Jones*, 529 U.S. at 855-857, the Supreme Court held that the statute criminalizes the burning of buildings used for commercial purposes but not owner-occupied residences that are not used for such purposes. The Court interpreted the federal arson statute as such to avoid constitutional questions under the Commerce Clause. *Id.* at 858; see also *Aman*, 480 F. App'x at 223 (noting that the interpretation of the arson statute in *Jones* ensures that there is a "substantial and non-attenuated effect on interstate commerce" under *Lopez* (citation omitted)). Under *Jones*, therefore, the reach of the arson statute under Congress's Commerce Clause power depends on the function of the building and whether that function affects interstate commerce. 529 U.S. at 854; see also *Russell* v. *United States*, 471 U.S. 858, 862 (1985) (holding that a two-unit apartment building used as rental property fell within the federal arson statute).

Applying *Jones* and *Russell*, this Court has affirmed federal convictions for arson where the targets of the offense were a restaurant and a church with daycare services. See *Aman*, 480 F. App'x at 224; *Terry*, 257 F.3d at 369. In both cases, the Court emphasized that the buildings were "actively engaged in commercial activity," and that it did not matter whether that commercial activity was the building's principal use or whether the economic activity was purely intrastate.

Terry, 257 F.3d at 370; accord *Aman*, 480 F. App'x at 223-224. This Court also affirmed a federal arson conviction where a defendant used explosives to target vehicles, one of which was used by a man with whom the defendant's wife was having an affair and the other of which was used by the wife's brother. See *Cristobal*, 293 F.3d at 137. Because the vehicles were owned by businesses that employed the two men, the businesses engaged in interstate commerce, and the two men used their vehicles to drive to and from work, the Court held that application of the statute fell within Congress's Commerce Clause authority. *Id.* at 146.

Jones and its progeny thus establish that Congress may protect interstate commerce by criminalizing offenses that target buildings or other objects that are actively used for some commercial purpose. The logic of these cases requires similar treatment of *individuals* who are involved in commerce. Congress therefore has the power to protect interstate commerce by criminalizing violent crime that targets individuals who are actively engaged in a commercial endeavor with which the crime interferes, as is the case here.

The Supreme Court's recent decision in *Taylor* v. *United States*, 136 S. Ct. 2074 (2016), confirms that analysis. *Taylor* addressed the Hobbs Act, which criminalizes robberies that affect "commerce over which the United States has jurisdiction." 18 U.S.C. 1951(a) and (b)(3). The Supreme Court, affirming this

Court, held that when a person "robbed or attempted to rob a drug dealer of drugs or drug proceeds," the government need not introduce further evidence of the robbery's impact upon interstate commerce: "By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction." *Taylor*, 136 S. Ct. at 2078.

Taylor thus confirms that where Congress has Commerce Clause power to regulate the underlying commercial activity, Congress also has the power to protect interstate commerce by criminalizing violence against individuals that interferes with that activity. Just like the activity regulated in *Taylor* was the "sale of marijuana," 136 S. Ct. at 2080, the activity regulated here is the interstate distribution of goods via online commerce. That is economic activity over which Congress has plenary authority. See *United States* v. *Darby*, 312 U.S. 100, 113 (1941) (holding that the "the shipment of manufactured goods interstate" is commercial activity and that Congress has the power to prohibit shipment of such products that were produced under substandard labor conditions). Because Congress has power to regulate that underlying economic activity, Congress also has the power to regulate interference with active engagement in that commercial activity, such as the assault at issue in this case.

b. Neither *Lopez* nor *Morrison* compels a different conclusion. In *Lopez*, the Court struck down a federal criminal statute that prohibited the knowing

possession of a firearm in a school zone. 514 U.S. at 551. In *Morrison*, the Court struck down part of VAWA, which created "a federal civil remedy for the victims of gender-motivated violence." 529 U.S. at 601-602. In both cases, however, (1) the acts were general criminal statutes that had "nothing to do with 'commerce' or any sort of economic enterprise"; (2) the acts contained "no express jurisdictional element" limiting their reach to cases with an "explicit connection with or effect on interstate commerce"; and (3) there was only an "attenuated" link between the offense and a substantial impact on interstate commerce. *Morrison*, 529 U.S. at 610-612; accord *Lopez*, 514 U.S. at 561-562.

In those contexts, the Court refused to consider the aggregate economic effects of gun-based crime or gender-based violence on interstate commerce, such as through lost productivity, because that rationale would allow Congress to regulate "not only all violent crime, but all activities that might lead to violent crime." *Morrison*, 529 U.S. at 612-613; accord *Lopez*, 514 U.S. at 564. The Court stated that "Congress may [not] regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617.

Unlike the statutes at issue in *Lopez* or *Morrison*, however, Section 249(a)(2) includes a jurisdictional element. As relevant here, Section 249(a)(2) criminalizes commission of a discriminatory assault that "interferes with

commercial or other economic activity in which the victim [was] engaged at the time of the conduct." 18 U.S.C. 249(a)(2)(B)(iv)(I). As a result, conduct targeted by this provision is not regulated "based solely on that conduct's aggregate effect on interstate commerce," a theory that the Court believed would potentially encompass highly attenuated effects. *Morrison*, 529 U.S. at 617-618. To the contrary, a prosecution under this prong must have a direct relationship with commerce and economic enterprise: it protects commerce from the interference that occurs when a person engaged in commerce at the time is the target of a hate crime. The government must prove beyond a reasonable doubt that the assault "interfere[d]" with or affected commerce that the person was engaged in "at the time" of the assault. 18 U.S.C. 249(a)(2)(B)(iv)(I). Therefore, unlike conduct regulated in the statutes overturned by *Lopez* and *Morrison*, where the regulated acts had "nothing to do with 'commerce,'" 514 U.S. at 561; 529 U.S. at 610, the acts regulated by Section 249(a)(2)(B)(iv)(I) will necessarily bear a close relationship to commerce.[8]

[8] Because the regulated acts necessarily relate to commerce, the direct impact of the act on *interstate* commerce can be minimal as long as the aggregated effect of similar conduct substantially affects interstate commerce. See *Taylor*, 136 S. Ct. at 2079 (holding that intrastate commercial activities "may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal").

That direct connection between the regulated conduct (*i.e.*, the assault) and commerce is particularly vivid here. Amazon is the quintessential internet-based retailer, and its principal business is to take orders via interstate commerce, for goods that Amazon acquired through interstate commerce, and to pack and ship them to customers nationwide through interstate commerce. At the time of the assault, C.T. was preparing goods for shipment, and the assault interfered with commerce by preventing him from doing so for the remainder of his shift. J.A. 115. Specifically, C.T.'s absence prevented him from preparing 1710 items for interstate shipment. J.A. 115 n.3.

Section 249(a)(2)'s jurisdictional element, which requires this direct connection, highlights one of the district court's errors. The district court concluded that Section 249(a)(2) regulates "violent crime" by itself, J.A. 121, but the Supreme Court's discussion of the jurisdictional element in *Taylor* confirms that this is incorrect. It is true that, *standing alone*, "crimes of violence motivated by discriminatory animus 'are not, in any sense of the phrase, economic activity.'" J.A. 122 (quoting *Morrison*, 529 U.S. at 613). But the first prong of the fourth jurisdictional element does not regulate hate crimes standing alone—just like the Hobbs Act in *Taylor* does not regulate robbery standing alone. See 136 S. Ct. at 2077-2078. Rather, like the Hobbs Act, Section 249(a)(2) regulates commerce

over which Congress has jurisdiction by using the criminal law to protect that commerce from wrongful obstruction or interference.

c. The district court concluded that the Commerce Clause requires some nexus between Hill's *motive* for the assault and the commercial aspects of C.T.'s activities, *i.e.*, by requiring a showing that Hill assaulted C.T. to interfere with C.T.'s commercial activities. Specifically, the district court stated that the government's "argument would effectively federalize commercial property and allow Congress to regulate conduct occurring on commercial premises, even when the conduct—here, violence based on discriminatory animus—has no connection to the commercial nature of the premises." J.A. 126. The court also noted the lack of "any sort of commercial motivation" for the assault. See J.A. 126 n.8.

The district court's analysis is wrong. There need not be any connection between the motive for the crime and the commercial nature of the premises or the victim's conduct. In *Cristobal*, for example, this Court held that the federal arson statute could be applied to vehicles that were owned by a business even though the motivation for the arson had nothing to do with the commercial nature or commercial use of those vehicles. 293 F.3d at 145-146. Rather, the defendant's motive for the arson in *Cristobal* was a familial dispute unrelated to any commercial activity, and it is not clear whether the defendant even knew that the vehicles were used for commercial purposes or owned by a commercial entity. *Id.*

at 137. Similarly, in *United States* v. *Williams*, this Court rejected a Commerce Clause challenge to a Hobbs Act conviction, stating that the Act "does not require proof that a defendant intended to affect commerce." 342 F.3d 350, 353-354 (4th Cir. 2003) (discussing 18 U.S.C. 1951(a)), cert. denied, 540 U.S. 1169 (2004). Congress's power to protect interstate commerce from interference does not turn on the motives of those who cause such interference.

The district court's error may have resulted from the court's incomplete statement of the first prong of the fourth jurisdictional element in the key part of its analysis. Specifically, as noted above, the court suggested that under the first prong the federal government could prosecute any offense that "interferes with commercial or other economic activity." See J.A. 125. But this description ignores an important part of this particular provision, which requires interference with "commercial or other economic activity *in which the victim is engaged at the time of the [offense]*." 18 U.S.C. 249(a)(2)(B)(iv) (emphasis added). The district court could have avoided the issues raised by the hypotheticals that it found concerning—assaults in the parking lot before work and in the victim's home before work—if it had considered the full language of this provision. Cases in which the government must prove beyond a reasonable doubt that the charged conduct interfered with commercial activity in which the victim was engaged at the

time of the conduct raise no serious Commerce Clause questions because of the close nexus between any such conduct and commerce.

In short, the district court's reliance on the fact that Hill was not motivated by a desire to disrupt commercial activity was misplaced. The question is whether Hill's conduct interfered with interstate commerce as set forth in the statutory language, not whether he *intended* to affect interstate commerce or was driven by commercial motivations. See *United States* v. *Jimenez*, 256 F.3d 330, 339-340 (5th Cir. 2001) (holding that, for purposes of the federal arson statute, it is irrelevant whether the defendant even knew that the building he was targeting was used for commercial purposes), cert. denied, 534 U.S. 1140 (2002). Hill interfered with commercial activity in which C.T. was actively engaged at the time—the preparation of goods for interstate shipment—by assaulting him. Hill's conduct accordingly fell within Section 249(a)(2)(B)(iv)(I) and the scope of Congress's Commerce Clause power.

d. Finally, the district court's concern that "the government's argument could extend the HCPA into someone's home if, for example, a person prepared, packaged, and eventually shipped merchandise out-of-state" is also misplaced. See J.A. 126. If the conduct at the home were unrelated to the economic activity, the first prong of the fourth jurisdictional element would not, on its face, reach that conduct. However, if an individual were actively engaged in shipping merchandise

in her home when she was assaulted because of her membership in a class protected under Section 249(a)(2), and if the assault interfered with that economic activity, then the assault would have a direct effect on commerce and fall squarely within the statute's fourth jurisdictional element. Cf. *Taylor*, 136 S. Ct. at 2078 (affirming Hobbs Act convictions for robberies that targeted the homes of two drug dealers); *Jimenez*, 256 F.3d at 336 ("Despite the Supreme Court decisions in *United States v. Lopez*, and *United States v. Morrison*, the arson of a building—even a private home—containing an active business will often satisfy the constitutional requirement that the arson 'substantially affect[ ] interstate commerce.'" (brackets in original; citation and footnotes omitted)). There is no authority suggesting that federal prosecution is inappropriate merely because an assault occurs in a home. That is particularly true where circumstances suggest that the assault directly affected commercial activity.

In sum, this Court can resolve this as-applied challenge by concluding that Congress has the power to regulate and criminalize assaults that interfere with commercial activity in which the victim is actively engaged at the time of the offense. There is no need to consider hypotheticals of more attenuated links between assaults and commerce or to consider whether impairing productivity through some lengthy causal chain is sufficient to satisfy the Commerce Clause. See J.A. 126-127 (discussing hypotheticals with longer causal chains). This is not

a case where the Court needs to "pile inference upon inference" to connect the regulated conduct to commercial activity, *Lopez*, 514 U.S. at 567; to the contrary, no inferences are needed, as the connection is direct. C.T. was actively participating in commercial activity but could no longer do so because Hill assaulted him, and that is enough to fall within the scope of Congress's Commerce Clause authority.

2. Section 249(a)(2) Is Constitutional As Applied Because The Commerce Clause Empowers Congress To Prohibit Workplace Discrimination And Violence At Employers That Affect Commerce

This case concerns the discriminatory assault of an employee in the workplace of an employer that affects commerce. As applied here, Section 249(a)(2) thus regulates workplace conduct, which courts have long found to fall within Congress's Commerce Clause authority, particularly when the regulated conduct involves discrimination or harassment at the workplace of a large corporation. The prosecution here thus falls within the ambit of both Section 249(a)(2)(B)(iv)(II)—which reaches hate crimes that "otherwise affect[] interstate or foreign commerce" and invokes the full reach of Congress's Commerce Clause power—and the Constitution. See *Allied Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995) (noting that the phrase "affecting commerce" generally "signals Congress' intent to exercise its Commerce Clause powers to the full").

a. Congress has, for decades, passed legislation to regulate the terms and conditions of employment through laws establishing labor standards and proscribing workplace discrimination and harassment. For example, Congress passed Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which bans discrimination on the basis of race, color, religion, sex, and national origin by employers with more than 15 employees, "under its Commerce Clause power." *Nesbit* v. *Gears Unlimited, Inc.*, 347 F.3d 72, 81 (3d Cir. 2003), cert. denied, 541 U.S. 959 (2004). Some courts have reasoned that Title VII's definition of "employer" as an entity affecting commerce with more than 15 employees, 42 U.S.C. 2000e(b), reflects its conclusion that such employers' terms and conditions of employment affect interstate commerce. See *EEOC* v. *Ratliff*, 906 F.2d 1314, 1317 (9th Cir. 1990) ("[I]t is difficult to imagine any activity, business or industry employing 15 or more employees that would not in some degree affect commerce among the states." (citation omitted)). Further, in passing Title VII, members of Congress noted that "[t]he courts have held time and again that the commerce clause authorizes Congress to enact legislation to regulate employment relations which affect interstate and foreign commerce." 110 Cong. Rec. 6548 (1964); see also 110 Cong. Rec. at 7052-7054 ("The Fair Labor Standards Act and similar statutes, which have as their purpose the improvement of the condition of persons whose work affects interstate or foreign commerce, furnish ample authority for the

attempt in title VII to prohibit discrimination in employment practices."); 110 Cong. Rec. at 7207-7212.

Title VII, of course, is not limited to traditional hiring or firing decisions. It also prohibits workplace harassment. See *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998) (concluding that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII"). Title VII's prohibition on workplace harassment encompasses employee-on-employee conduct. See, *e.g.*, *id.* at 77 (noting that the petitioner had been harassed by his male coworker and supervisors); *Hoyle* v. *Freightliner, LLC*, 650 F.3d 321, 335 (4th Cir. 2011). Specifically, an employee can state a Title VII cause of action stemming from coworkers' conduct that creates a hostile work environment. See *Hoyle*, 650 F.3d at 335 (holding that plaintiff who had been sexually harassed by coworkers could pursue Title VII claim); *Ocheltree* v. *Scollon Prods., Inc.*, 335 F.3d 325 (4th Cir. 2003) (en banc) (affirming jury verdict on a Title VII claim where the plaintiff had proved that her coworkers engaged in harassing speech and conduct), cert. denied, 540 U.S. 1177 (2004).

Although Title VII is the principal federal law proscribing discrimination in employment, Congress has passed other similar statutes also based on its Commerce Clause authority. For example, Congress relied on the Commerce Clause in enacting the Age Discrimination in Employment Act of 1967 (ADEA),

29 U.S.C. 621 *et seq*. See, *e.g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 78 (2000) (holding that the ADEA constitutes a valid exercise of Congress's Commerce Clause power). Indeed, Congress made explicit findings that "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. 621(a)(4). As Justice Stevens stated, "there should be universal agreement on the proposition that Congress has ample power to regulate the terms and conditions of employment throughout the economy." *EEOC* v. *Wyoming*, 460 U.S. 226, 248 (1983) (concurrence).

Congress also passed the employment discrimination provisions of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12112, under its Commerce Clause authority. See *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 501 (5th Cir. 2003) (upholding the constitutionality of the ADA's prohibition on disability-based employment discrimination because "Congress rationally concluded that regulation of employment discrimination was necessary to regulate the national market of employment"); see also 42 U.S.C. 12101(b)(4) (ADA invokes "the sweep of congressional authority, including the power * * * to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."). As the Fifth Circuit has reasoned, citing *Morrison*, there is "compelling evidence supporting the proposition that there is a

national labor market and that even local acts of discrimination, when considered in the aggregate, can have a substantial effect on that market." *Mississippi Dep't of Pub. Safety*, 321 F.3d at 500-501 (rejecting Commerce Clause challenge to the ADA's employment discrimination provisions).

b. That Congress has the power to promulgate *civil* statutes that regulate the terms and conditions of employment (including conduct in the workplace such as harassment) under its Commerce Clause authority means that it also has the power to promulgate *criminal* statutes that regulate similar workplace conduct, including workplace violence. The Tenth Circuit has held just that. In *United States* v. *Lane*, 883 F.2d 1484, 1492-1493 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990), the court rejected a Commerce Clause challenge to the constitutionality of a provision of 18 U.S.C. 245, a federal hate crime law that predates Section 249.[9] In *Lane*, the defendants were convicted of killing a Jewish radio host who had spoken out against white supremacist groups. 883 F.2d at 1495-1496. The prosecution was brought under 18 U.S.C. 245(b)(2)(C), which criminalizes using force to

[9] Section 249 was intended to build upon and expand Section 245, the first modern federal hate crime statute, enacted in 1968. Section 245 addresses violent interference with specifically enumerated activities protected by the Constitution or federal law (including the then-recently enacted Civil Rights Act of 1964). See House Report 5-9. The House Report explains that the narrow reach of Section 245 "limit[s] the Federal Government's ability to prosecute certain hate crimes, and its ability to assist State and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes." House Report 5.

injure, intimidate, or interfere with an individual's enjoyment of private employment due to that individual's race, color, religion, or national origin. In affirming the convictions, the court of appeals rejected the argument that the provision of Section 245 could have only been promulgated under Section 5 of the Fourteenth Amendment and thus could not have been applied to private individuals. *Lane*, 883 F.2d at 1492. The court found, based on the legislative history, that Congress invoked its Commerce Clause authority and that the invocation of that authority was valid. *Id.* at 1492-1493. The court concluded:

> If in an effort to rid interstate commerce of the burdens imposed on it by racial discrimination Congress may prohibit a person from denying another person equal employment opportunities by refusing to hire him or by firing him solely because of his race, then Congress may also prohibit a person from denying another person equal employment opportunities because of his race by violently injuring or killing him.

Id. at 1493. Thus, the Tenth Circuit affirmed Congress's authority under the Commerce Clause to pass a criminal statute to ensure equal opportunity in employment.

Congress's power to eradicate discrimination in employment, therefore, does not depend on whether the employment discrimination manifests itself in an employment practice (*e.g.*, hiring or firing) or bias-motivated violence against employees. Indeed, the Ninth Circuit upheld a separate subsection of Section 245 that criminalizes violent acts that interfere with individuals' abilities to enjoy state-conferred benefits or services even after *Lopez* and *Morrison* because the court

found that Congress had Commerce Clause authority to eradicate such discrimination. *United States* v. *Allen*, 341 F.3d 870, 882 (2003) (Section 245(b)(2)(B) "is based on the same findings about the effect of racial discrimination on interstate commerce."), cert. denied, 541 U.S. 975 (2004). Thus, as the Ninth Circuit recognized, "[v]iolence that interferes with the exercise of federal civil rights must be prohibited in order to protect these rights and give them meaning." *Ibid.*; see also *United States* v. *Nelson*, 277 F.3d 164, 191 n.28 (2d Cir.) (upholding Section 245(b)(2)(B) as a valid exercise of Congress's Thirteenth Amendment powers, but noting in dicta that the law may also be a constitutional exercise of Congress's Commerce Clause powers under *Lopez* and *Morrison* because "private violence motivated by a discriminatory animus against members of a race or religion, etc., who use public facilities, etc., is anything but intrinsically a matter of purely local concern"), cert. denied, 537 U.S. 835 (2002); *United States* v. *Furrow*, 125 F. Supp. 2d 1178, 1184 (C.D. Cal. 2000) ("Section 245 puts teeth into the enforcement of federal rights guaranteed by the Civil Right[s] Act and recognized by the Supreme Court since its passage as within Congress's constitutional authority. Nothing in *Lopez* or *Morrison* suggests an intention to turn back the clock.").

c. In light of this precedent, it is well settled that Congress can constitutionally protect employees of a large employer like Amazon from

discrimination in employment. It follows that Congress can also constitutionally protect those same employees against discriminatory assault in the workplace. If Congress can regulate the hurling of slurs in the workplace, it can also regulate the hurling of fists. That is what Section 249(a)(2) does here. In this case, Section 249(a)(2) criminalizes workplace assaults on the basis of certain protected characteristics because such violence—like discrimination or harassment—impedes opportunities for employment in interstate commerce. HCPA, Pub. L. No. 111-84, Div. E, § 4702(6)(B), 123 Stat. 2835-2836 (congressional finding that violence against members of protected classes affects interstate commerce because, among other reasons, "[m]embers of targeted groups are prevented from * * * obtaining or sustaining employment").

To reverse the district court's contrary holding in this case, this Court does not need to go any further or consider any hypotheticals about whether assaults outside the workplace could be regulated. The district court's hypotheticals—regarding an assault in the parking lot on the way to work or an assault of an employee at home before work—are not relevant to a case concerning conduct that occurs *in the workplace* of a large employer who operates in interstate commerce. See J.A. 126-127. Because only an as-applied challenge is at issue, the Court need not consider the precise boundaries of the constitutional application of the Section 249(a)(2) to address the merits of this case.

CONCLUSION

For the reasons stated, this Court should reverse the district court's dismissal of the indictment.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this case.

CERTIFICATE OF COMPLIANCE

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

(1) contains 7589 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 2007, in 14-point Times New Roman font.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Dated: July 28, 2016

CERTIFICATE OF SERVICE

I certify that on July 28, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that one paper copy of the foregoing brief was sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by first-class certified mail on July 28, 2016.

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