No. 16-4299

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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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

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# REPLY BRIEF FOR THE UNITED STATES

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## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**

**STATUTES:** **PAGE**



**LEGISLATIVE HISTORY:**

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## INTRODUCTION

The issue presented in this appeal is whether a provision of the federal hate crimes statute—18 U.S.C. 249(a)(2)—is a constitutional exercise of Congress's Commerce Clause authority as applied to a discriminatory workplace assault that interfered with the victim's active preparation of goods for interstate shipment. As the United States argued in its opening brief, Congress has Commerce Clause

power to regulate such conduct for two independent reasons. U.S. Br. 13-33.[1] First, the victim was actively preparing packages for shipment in interstate commerce when he was assaulted, and the assault interfered with that work—and consequently interstate commerce—by preventing him from continuing to do so. U.S. Br. 14-26. Second, Congress has the power to regulate workplace conduct—whether that conduct is discrimination, harassment, or violence—at large multinational employers that affect interstate commerce, which is what the hate crimes statute does here. U.S. Br. 27-33. Therefore, this Court should reverse the district court's dismissal of the indictment.

Hill makes two principal arguments to the contrary. Neither has merit. First, Hill contends that even though his assault interfered with the victim's active preparation of goods for interstate shipment, Congress cannot (or did not) regulate the assault because *this specific assault* did not "individually and substantially" interfere with interstate commerce. Hill Br. 11-29. This Court, however, has consistently held that interference with active commerce is sufficient to trigger federal jurisdiction, even if the interference in the particular case had a minimal effect on interstate commerce or the affected commerce was purely intrastate. See

[1] References to "U.S. Br. ___" are to page numbers in the United States' opening brief. References to "Hill Br. ___" are to page numbers in Hill's answering brief. References to "J.A. ___" are to page numbers in the Joint Appendix filed by the United States on July 28, 2016.

*United States* v. *Cristobal*, 293 F.3d 134, 146 (4th Cir.), cert. denied, 537 U.S. 963 (2002). Here, as we explained in our opening brief, the effect of the assault was neither minimal—it affected the shipment of thousands of packages—nor purely intrastate—the packages were destined for locations outside of Virginia. U.S. Br. 8. Hill contends that *Cristobal* and its progeny are inapplicable because the statutes implicated in those cases directly regulate commerce, while Section 249(a)(2) regulates violent conduct. Hill Br. 18-20. This might be true if Section 249(a)(2) regulated violent conduct standing alone, but it does not. On the contrary, Section 249(a)(2)'s jurisdictional element ensures that it criminalizes only violent conduct that is connected to commerce. See U.S. Br. 19-22 & n.8.

Second, Hill contends that Section 249(a)(2) as applied in this case does not fall within Congress's Commerce Clause power to ensure equal employment opportunities by proscribing animus-based workplace violence. Hill Br. 32-39. He asserts that, unlike workplace anti-discrimination laws, the legislative record underlying Section 249(a)(2) does not contain factual findings linking animus-based assaults to interstate commerce. Hill Br. 32-36. But "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." See *United States* v. *Lopez*, 514 U.S. 549, 562 (1995). Hill further argues that existing anti-discrimination laws only cover "pervasive and ongoing" harassment and provide causes of action against

employers rather than coworkers. Hill Br. 36-39. Neither purported distinction is relevant here because the underlying conduct at issue in this case—that is, employee-on-employee harassment and violence—is the type of conduct that Congress has long-regulated through employment discrimination laws. U.S. Br. 28. In upholding these laws, courts have recognized that there is an interstate employment market, and that workplace harassment or violence, in the aggregate, substantially affects that market. See *United States* v. *Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 500 (5th Cir. 2003). All Section 249(a)(2) does, as applied here, is prohibit such violence.

Perhaps as important as what Hill argues is what he does not. Hill has not cited a single case where a court has dismissed an indictment or reversed a conviction for exceeding the scope of the Commerce Clause where a federal offense includes a jurisdictional element. If accepted, Hill's arguments would impose novel limits on Congress's authority to regulate conduct that affects commercial activity.

Finally, Hill fundamentally errs in asserting that "[p]unching someone in the face has nothing to do with commerce." Hill Br. 11. It is true that punching someone in the face *can* have nothing to do with commerce. But punching a coworker who is preparing goods for interstate shipment, and thereby preventing that coworker from continuing to engage in that work, certainly has *something* to

do with commerce. It affects the commerce in which the victim was actively engaged, and it affects the interstate market in employment. In this as-applied challenge, the question is not whether punching someone in the face in general disrupts commerce, but rather whether under the undisputed circumstances of *this* case, Hill's assault of C.T. affected commerce. It did.

## 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. Section 249(a)(2) Is Constitutional As Applied Because Hill's Assault Interfered With Commercial Activity In Which C.T. Was Actively Engaged, And Hill's Arguments To The Contrary Either Ignore Or Misread The Statutory Jurisdictional Element*

As we explained in our opening brief, Hill's assault of C.T. interfered with C.T.'s active preparation of packages for interstate shipment by preventing C.T.'s continued work and therefore interfered with interstate commerce. U.S. Br. 14. The assault thus fell within the plain language of the first prong of 18 U.S.C. 249(a)(2)'s fourth jurisdictional element, which prohibits bias-motivated assaults that "interfere[] 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). Congress also had Commerce Clause authority to regulate the assault. Criminalizing Hill's interference with C.T.'s active engagement in commercial activity is analogous to the prohibition on interference with property that is "actively employed for

commercial purposes," which, under this Court's precedent, falls within Congress's Commerce Clause authority. See *United States* v. *Cristobal*, 293 F.3d 134, 146 (4th Cir.), cert. denied, 537 U.S. 963 (2002). Neither of Hill's two arguments to the contrary has merit.

*1. Hill's Argument That Each Application Of The Statute Must Substantially Affect Interstate Commerce Ignores Relevant Precedent And Section 249(a)(2)'s Jurisdictional Element*

Hill's primary argument is that Section 249(a)(2) regulates violent crime, rather than commerce, and that therefore each *individual application* of the statute must substantially affect interstate commerce. Hill Br. 11-20. That is, Hill contends that the United States must prove that by assaulting C.T., Hill "individually and substantially affect[ed] interstate commerce." Hill Br. 12.

a. This argument is contrary to this Court's precedent, which makes clear that Congress has the power to regulate interferences with, or disruptions of, active commerce regardless of whether that commerce is purely intrastate or the effect of the interference at issue is minimal. See *Cristobal*, 293 F.3d at 146. As this Court has explained, in as-applied challenges "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." *United States* v. *Gibert*, 677 F.3d 613, 627 (4th Cir.), cert. denied, 133 S. Ct. 393 (2012); see also *United States* v. *Forrest*, 429 F.3d 73, 79 (4th Cir. 2005)

(Defendant's "constitutional challenge, which rests entirely on the asserted *de minimis* economic effect of his own activities, must fail." (internal citation omitted)).

Applying this principle, this Court has upheld convictions for violations of federal law where the offense affected ongoing commercial activity, even though the individual conduct did not, by itself, substantially affect interstate commerce. In *United States* v. *Aman*, this Court upheld an arson conviction where the defendant had set fire to a building that was actively used as a local restaurant. 480 F. App'x 221, 225 (4th Cir.), cert. denied, 133 S. Ct. 366 (2012). This Court held that "commercial use of the property is enough to establish the necessary connection to interstate commerce." *Id.* at 224. The defendant in *Aman* argued, as Hill does here, that the arson could not be the subject of federal regulation because the arson did not, by itself, substantially affect commerce. *Id.* at 223. Specifically, he argued that "[s]imply engaging in business does not *ipso facto* create a *substantial* [e]ffect on commerce" and that therefore Congress lacked power to regulate arson targeting the restaurant. *Id.* at 225 (brackets in original) (quoting appellant Aman's brief). This Court rejected that argument, relying on Supreme Court precedent that made clear that "arson of property that was actively employed for commercial purposes" necessarily substantially affects interstate commerce and raises no constitutional concerns. *Ibid.* (citing *Jones* v. *United States*, 529 U.S.

848, 857-858 (2000)). *Aman*, therefore, stands for the proposition that Congress has the power to regulate conduct that interferes with ongoing commercial activity even if the conduct did not, by itself, substantially affect commerce because in the aggregate, such interference does have that substantial effect.

Similarly, in *United States* v. *Terry*, this Court held that Congress could prohibit the arson of a church building that contained a daycare center that was "was actively engaged in commercial activity." 257 F.3d 366, 367, 370 (4th Cir.), cert. denied, 534 U.S. 1035 (2001). This Court rejected an argument akin to that Hill makes here in concluding that it was "not dispositive that the commercial activity of providing daycare services took place entirely within the city of Raleigh." *Id.* at 370. The Court based this conclusion on "Congress' ability to aggregate the economic effects of local activities." *Ibid.* Indeed, as the Supreme Court recently reiterated, individual acts "may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." *Taylor* v. *United States*, 136 S. Ct. 2074, 2079 (2016). Accordingly, where, as here, a defendant's conduct interferes with ongoing commercial activity over which Congress has authority, both the Supreme Court and this Court have long held that the mere fact that the conduct *itself* did not substantially affect interstate commerce is irrelevant. See, *e.g.*, *id.* at 2081 ("[I]t makes no difference under our cases that any actual or threatened effect

on commerce in a particular case is minimal," and "courts have no power to excise, as trivial, individual instances" of conduct where Congress can regulate the relevant class of activities. (citation and internal quotation marks omitted)).

b. Hill argues that these cases are inapplicable because Section 249(a)(2) regulates *violent crime* rather than *commerce*. Hill Br. 13-16. Hill contends that the aggregation principle underlying the federal arson cases—that is, the idea that the federal government can criminalize arson that targets property that is actively used for a commercial purpose because such crimes in the aggregate affect interstate commerce—does not apply where the target of federal regulation is violence rather than commerce. Hill Br. 18-19.

This argument, however, ignores the jurisdictional element in Section 249(a)(2). That element is part of the offense and renders Section 249(a)(2) a regulation of not just violent crime, but of violent crime that affects commerce in one of the enumerated ways. See 18 U.S.C. 249(a)(2)(B). The jurisdictional element is an essential element of the crime, and the United States is required to allege and prove that element beyond a reasonable doubt, just as it must allege and prove the other elements of the crime (such as bodily injury and bias motivation). See 18 U.S.C. 249(a)(2); see also *Gibert*, 677 F.3d at 627 (noting that the United States must prove a jurisdictional element like any other element). In each case,

therefore, the United States must prove that the regulated conduct actually affected commerce.

Accordingly, Section 249(a)(2), read in its entirety, does not criminalize bias-motivated crimes of violence per se; rather, it criminalizes bias-motivated crimes that interfere with commerce in particular ways. See U.S. Br. 18-22. As Hill acknowledges, the jurisdictional element is a "significant limiting principle[]" that ensures that Section 249(a)(2) criminalizes only those bias-motivated crimes that affect commerce and thus fall within Congress's Commerce Clause authority. Hill Br. 15 (brackets in original) (quoting H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. [14] (2009)). Under Section 249(a)(2), the United States cannot prosecute all bias-motivated crimes, only those that bear a statutorily required connection to commerce. Thus, Section 249(a)(2)—like the federal arson statute—targets violent crimes that affect commerce, rather than violent crime by itself.[2]

[2] Hill cites *United States* v. *Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012), for the proposition that Section 249(a)(2) regulates violence rather than commerce. Hill Br. 14. The district court in *Jenkins* erred when initially reading the statute without the jurisdictional element to reach this conclusion. But the court ultimately acknowledged that Section 249(a)(2), read in full, regulates commerce. 909 F. Supp. 2d at 772 ("By including a sufficient jurisdictional element, Congress provides a limiting factor to ensure that in a case-by-case inquiry the statute sweeps no broader than the categories of activity that Congress is empowered to regulate under the Commerce Clause.").

c. Hill also argues that "[t]he addition of a jurisdictional element does not transform a statute regulating violence into one regulating commerce." Hill Br. 15. This argument is akin to contending that certain elements of the crime—particularly those that limit the scope of the statute—can or should be ignored in ruling on an as-applied challenge to the statute.

That is not correct, and the cases Hill cites are inapposite. See Hill Br. 15-17. In *United States* v. *Buculei*, this Court found that Congress had Commerce Clause power to criminalize attempts to produce sexual depictions of minors that the defendant knew would be transported in interstate commerce. 262 F.3d 322, 330 (4th Cir. 2001), cert. denied, 535 U.S. 963 (2002). And in *Gibert*, this Court affirmed Congress's power to criminalize exhibiting animals in fighting ventures that affect interstate commerce. 677 F.3d at 626-627. In both cases, this Court noted that the jurisdictional elements in the statutes were important to limiting the scope of their reach to circumstances that Congress plainly has the power to regulate and thus bolstered their constitutionality. See *id.* at 626 (The "express requirement in the animal fighting statute of a connection to, or effect on, interstate commerce thus satisfies the Supreme Court's concern, as expressed in *Lopez* and *Morrison*, that the statute at issue have a nexus to interstate commerce as an element of the offense."); *Buculei*, 262 F.3d at 329 (The "jurisdictional element represents a limitation of § 2251(a) to a discrete set of activities—defendants who

plan to transport visual depictions of minors engaged in sexually explicit conduct in interstate commerce—which is exactly what the Court seems to have had in mind in *Lopez*.").[3]

Thus, these cases provide no support for Hill's contention that the Court should ignore the jurisdictional element in deciding whether application of Section 249(a)(2) is constitutional here. To the contrary, they support understanding jurisdictional elements as limitations on the scope of federal statutes that ensure that applications of the statutes regulate commerce and thus fall within Congress's Commerce Clause power.[4]

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[3] Hill also cites *Torres* v. *Lynch*, 136 S. Ct. 1619 (2016), for the proposition that jurisdictional elements are "limitations rather than * * * defining elements of a statute." Hill Br. 16. But *Torres* is inapplicable. The Supreme Court there held that a prior state felony conviction constituted an "aggravated felony" under the Immigration and Nationality Act (INA) even though the state offense did not contain the federal jurisdictional element that the federal offense did. *Id.* at 1623, 1634. The Court's rationale was that the particular definitions and context of the INA made clear that state offenses that did not include jurisdictional elements should also qualify as aggravated felonies. *Id.* at 1626-1630. Accordingly, *Torres* provides no basis to disregard a federal jurisdictional element when considering whether an application of a federal statute falls within the jurisdictional purview of the federal government. To the contrary, *Torres* clarifies that jurisdictional elements exist for the precise purpose of ensuring that applications of federal statutes fall within the federal government's powers to criminalize the offenses at issue. *Id.* at 1624.

[4] It is true that both cases noted that even without the jurisdictional elements, the regulated conduct—production of child pornography and animal fighting—implicated commercial activity. *Gibert*, 677 F.3d at 624-625; *Buculei*, 262 F.3d at 329. But the fact that those statutes would be constitutional even

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The history of the Gun-Free School Zones Act of 1990 (GFSZA) also demonstrates the error in Hill's argument that a jurisdictional element cannot transform a noneconomic statute into a statute that regulates commerce. See Hill Br. 15-17. Originally, the GFSZA prohibited knowing possession of a firearm in a school zone. 18 U.S.C. 922(q)(2)(A) (1990). The Supreme Court struck down the statute in *United States* v. *Lopez* because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 514 U.S. 549, 551 (1995). Congress then reenacted GFSZA, adding a jurisdictional element. The amended statute makes it "unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. 922(q)(2)(A) (emphasis added). Courts have upheld the amended statute from Commerce Clause challenges under *Lopez* because the addition of the jurisdictional element requires proof of a nexus between the charged conduct and commerce, thus ensuring that particular applications of the statute regulate commerce. See *United States* v. *Danks*, 221 F.3d 1037, 1038 (8th Cir. 1999), cert.

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without jurisdictional elements provides no support for the proposition that Section 249(a)(2)'s jurisdictional element can be ignored in considering whether the statute regulates commerce.

denied, 528 U.S. 1091 (2000) (rejecting the argument that "the mere insertion of a 'commerce nexus' does not cure the original Act's defect"); *United States* v. *Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005) ("The *Lopez* decision did not alter th[e] rule that a jurisdictional element will bring a federal criminal statute within Congress's power under the Commerce Clause."), overruled on other grounds by *Arizona* v. *Gant*, 556 U.S. 332 (2009). Contrary to Hill's unsupported assertion, the addition of a jurisdictional element *does* meaningfully change a statute and *can* ensure that its applications regulate commerce and fall within Congress's Commerce Clause powers.

d. Hill's error in trying to separate the jurisdictional element from the other elements of Section 249(a)(2) becomes even clearer when he attempts to distinguish between statutes that target "inherently economic crimes" and "those regulating violence." Hill Br. 19-20. He argues that "[e]conomic statutes are fundamentally different from those regulating violence." Hill Br. 19. At best, this distinction is overly simplistic. For example, Hill characterizes the federal arson statute, 18 U.S.C. 844(i), as targeting "inherently economic crimes" and as having "a direct connection with commerce separate from [its] jurisdictional element[]." Hill Br. 18-19. But there is nothing *inherently economic* about arson. In *Jones* v. *United States*, the Supreme Court noted that simple arson is not necessarily a crime that affects commerce because, for example, arson of certain owner-occupied

dwellings does *not* affect commerce. 529 U.S. at 859. That is why the Supreme Court in *Jones* interpreted the jurisdictional element in 18 U.S.C. 844(i) to limit the federal arson statute to circumstances where arson targets a building that is actively employed for commercial purposes, that is, to the circumstances where arson *is* economic. *Id.* at 855; see also *Aman*, 480 F. App'x at 224; *Terry*, 257 F.3d at 369.

As we argued in our opening brief, Section 249(a)(2) is analogous to the arson statute. U.S. Br. 15-17. Section 249(a)(2) does not regulate *all* bias-motivated crimes, just as the federal arson statute does not regulate *all* arson offenses. The jurisdictional elements of both statutes provide meaningful limitations that ensure that only those bias-motivated crimes or arson offenses that affect interstate commerce are subject to federal prosecution. In analyzing whether an application of Section 249(a)(2) regulates commerce and is thus within Congress's Commerce Clause power, therefore, a court cannot, as Hill suggests, ignore the existence of the jurisdictional element.[5] See Hill Br. 15-17.

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[5] Hill also cites the Hobbs Act, 18 U.S.C. 1951, which criminalizes robberies that affect commerce, as having a "direct connection with commerce separate from [its] jurisdictional element[]." Hill Br. 18-19. But like the arson statute, the Supreme Court has also viewed the jurisdictional element of the Hobbs Act as an important limitation on its application that ensures that the statute only regulates commerce. *Taylor*, 136 S. Ct. at 2081 ("The Act's commerce element ensures that applications of the Act do not exceed Congress's authority."). In *Taylor*, the Supreme Court, affirming this Court, found that the jurisdictional element was satisfied where the robbery targeted a drug dealer because "the market for illegal drugs is commerce over which the United States has jurisdiction." *Ibid.*

(continued…)

In sum, when considering an as-applied challenge under the Commerce Clause (as is the case here), a court must consider the jurisdictional element that the United States must prove, the facts it will use to prove that element, and whether those facts constitute conduct that Congress has Commerce Clause authority to regulate. See U.S. Br. 13. Here, the jurisdictional element requires that the United States prove beyond a reasonable doubt that Hill's conduct "interfere[d] 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). The critical fact is that C.T. was actively engaged in preparing goods for interstate shipment when Hill's assault prevented him from continuing to do so. J.A. 115. Congress has Commerce Clause power to regulate this conduct because, as this Court has long recognized, Congress has the power to regulate interference with property or individuals who are "actively employed for commercial purposes, with more than a passive, passing or past connection to commerce." *Cristobal*, 293 F.3d at 146. As discussed above, under this Court's precedent, there is no requirement that each such interference itself substantially affect interstate commerce.

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(internal quotation marks omitted) (quoting 18 U.S.C. 1951(b)(3)). The jurisdictional element is therefore an important part of the offense and ensures that conduct regulated by the law is connected to economic or commercial activity.

*2. Hill's Reading Of The Jurisdictional Element Ignores The Statute's Plain Language, And He Urges The Court To Avoid A Serious Constitutional Question That Does Not Exist*

Hill next recasts his constitutional argument that Congress can only regulate an assault if it directly and substantially affects interstate commerce as a statutory interpretation argument. Hill Br. 20-29. Specifically, Hill argues that the first prong of the fourth jurisdictional element—which covers conduct that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct," 18 U.S.C. 249(a)(2)(B)(iv)(I)—"should be interpreted in a way in which conduct falling within its grasp necessarily substantially affects interstate commerce." Hill Br. 23. That is, Hill argues that the statute should be read to cover only conduct that independently and directly has a substantial effect on interstate commerce. Hill Br. 27. Hill argues that this reading is necessary to avoid the "unconstitutional application[]" of the statute and is appropriate in light of the structure of the statute. Hill Br. 24-29.[6]

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[6] Hill advanced a different interpretation of this jurisdictional provision before the district court. Specifically, he argued that the provision should be "interpreted to mean the victim, as part of his/her commercial or economic activity, is physically travelling in interstate or foreign commerce." J.A. 74. This atextual reading of the first prong of the fourth jurisdictional element would render the first jurisdictional element—which prohibits bias-motivated crimes that occur "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," 18 U.S.C. 249(a)(2)(B)(i)—surplusage. See *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) ("As our cases

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Neither argument provides a basis for deviating from the plain text of the statutory provision. As a threshold matter, there is no "serious" constitutional question to avoid. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998) (application of constitutional avoidance canon should not create "statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate"). As discussed above and at length in our opening brief, Congress has the power to regulate conduct that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct," 18 U.S.C. 249(a)(2)(B)(iv)(I), because Congress has the power to proscribe interference with ongoing commercial activity that Congress can regulate. See U.S. Br. 14-22. Thus, conduct that falls within the plain text of the statute will necessarily in the aggregate substantially affect interstate commerce under *Lopez* and this Court's case law.

Hill supports his argument by selectively quoting from cases in which courts have *upheld* applications of federal statutes that contain jurisdictional clauses. See Hill Br. 20-21. These cases provide no support for the argument that Section 249(a)(2) must be interpreted here to avoid raising any serious constitutional

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(…continued)
have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." (citation omitted)).

questions. See *United States* v. *Cobb*, 144 F.3d 319, 321 (4th Cir. 1998) (upholding federal carjacking statute because the statute's jurisdictional element "distinguishes *Lopez* and satisfies the minimal nexus required for the Commerce Clause" (citation omitted)); *United States* v. *Rodia*, 194 F.3d 465, 480-481 (3d Cir. 1999) (upholding federal prosecution of possession of child pornography while noting in dicta that a jurisdictional element that did not necessarily require proof of a link between the crime and interstate commerce would be insufficient), cert. denied, 529 U.S. 1131 (2000); see also *United States* v. *Ho*, 311 F.3d 589, 601 (5th Cir. 2002) (upholding federal conviction for violation of a work practice standard for asbestos removal), cert. denied, 539 U.S. 914 (2003). None of these courts construed jurisdictional elements atextually or narrowly to avoid constitutional questions.

Hill's argument based on the structure of the statute is also strained. He argues that the first prong of the fourth jurisdictional element ("interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct") must be read to require *each application* to *substantially* affect interstate commerce because it is followed by the second prong ("otherwise affects interstate or foreign commerce"). Hill Br. 24-25 (citing 18 U.S.C. 249(a)(2)(B)(iv)). There is no basis in precedent or logic to interpret the statute

this way.[7] The better interpretation is just to read the plain text of the statute because all cases in which the first prong applies are cases in which the regulated conduct in the aggregate will substantially affect interstate commerce for purposes of the Commerce Clause. That is, Congress has Commerce Clause power to regulate individual instances of interference with ongoing commercial or economic activity under its power to regulate conduct that substantially affects interstate commerce. This interpretation is well grounded in this Court's precedent, under which Congress has Commerce Clause authority to criminalize conduct that interferes with property that "was actively engaged in commercial activity." *Terry*, 257 F.3d at 370.[8]

In sum, the first prong of the fourth jurisdictional hook, which ensures that Section 249(a)(2) criminalizes conduct that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct,"

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[7] The only case that Hill cites is *Begay* v. *United States*, 553 U.S. 137 (2008), superseded by *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Hill Br. 25. That case, however, stands for the proposition that an enumerated list can limit the breadth of a catch-all provision, *Begay*, 553 U.S. at 144, not for the proposition that Hill seeks to establish, *i.e.*, that a catch-all clause can limit the scope of the items in the enumerated list, Hill Br. 25.

[8] Hill also suggests in passing that the legislative history of Section 249(a)(2) supports his strained reading of the jurisdictional provision. Hill Br. 25-26. But Hill cites no legislative history in support of this assertion. In any event, there is no need to consider legislative history where, as here, the statute unambiguously applies to the facts of this case. See *United States* v. *Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009).

plainly applies in this case. Hill assaulted C.T. while C.T. was packaging goods for interstate shipment and prevented from C.T. from continuing to do so. There is no reason for this Court to adopt Hill's statutory interpretation argument to the contrary, which relies on reading words into the statute that do not exist to avoid a constitutional question that does not exist.

### *B. Congress Has The Power To Regulate Conduct, Including Employee-On-Employee Animus-Based Violence, In The Workplace Of Employers That Affect Commerce*

Because this case concerns the assault of a coworker in an Amazon Fulfillment Center, Section 249(a)(2) as applied here regulates workplace conduct at a large corporation, which is within Congress's Commerce Clause power. U.S. Br. 26-33. Courts have long recognized Congress's authority to proscribe workplace harassment and violence, which is what Section 249(a)(2) does in this case. U.S. Br. 32-33. Hill's arguments to the contrary are without merit.

1. First, Hill argues that the cases in which courts have upheld Congress's power to regulate workplace harassment and violence are distinguishable because the underlying statutes contain specific legislative findings that are not present in Section 249(a)(2). Hill Br. 33-36. This contention, however, ignores the basic thrust of our argument: courts have long have upheld Congress's power to regulate the *type* of conduct at issue in this case (*i.e.*, workplace conduct, including discrimination, harassment, and violence).

In any event, it is irrelevant whether Congress made findings or heard evidence regarding the effect of Section 249(a)(2) on workplace conduct. While such findings can help a court in determining whether a statute is within Congress's Commerce Clause authority, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Lopez*, 514 U.S. at 562. Neither *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), nor *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)—which Hill cites and which upheld Congress's power to pass the public accommodation provisions of the Civil Rights Act of 1964—suggests that Congress is required to make specific factual findings or create a particular record to exercise its Commerce Clause power. Hill Br. 33. To the contrary, these cases recognize that the absence of formal Congressional findings "is not fatal to the validity of the statute." *Katzenbach*, 379 U.S. at 304. And even if Congressional findings were relevant to this inquiry, Congress did consider the effect of Section 249(a)(2) in regulating workplace conduct and specifically found that one of the ways that bias-motivated crimes affect commerce is that "[m]embers of targeted groups are prevented from * * * obtaining or sustaining employment." Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, Div. E, § 4702(6)(B), 123 Stat. 2835-2836.

Much of Hill's argument focuses on our analogy between the application of Section 249(a)(2) in this case and the application of 18 U.S.C. 245, an older hate crime statute, in *United States* v. *Lane*, 883 F.2d 1484, 1492-1493 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990). See Hill Br. 34-35; U.S. Br. 30-32. *Lane* upheld Section 245 against a Commerce Clause challenge, concluding that Congress's power to proscribe discrimination in employment also permits Congress to proscribe violent interference with employment opportunities. 883 F.2d at 1493. Hill contends that Section 245 is distinguishable from Section 249(a)(2) because (1) Section 245 is part of a "comprehensive regulatory scheme" that addresses racial discrimination in employment and (2) Section 245 requires that the "offense be motivated by the victim's participation in one of six enumerated federally protected activities." Hill Br. 34.

Neither purported distinction matters. The first distinction is simply another iteration of Hill's argument that the differences in the legislative record underlying Section 249(a)(2) render its application to Hill's conduct unconstitutional. See Hill Br. 34 n.11 (discussing the legislative history of the Civil Rights Act of 1964). As discussed above, however, Congress's particular factual findings are not relevant to the constitutional question. Indeed, the court in *Lane* rejected the very argument Hill makes here—that Congress had to point to specific findings to exercise its Commerce Clause authority—because "Congress is not required to make

particularized findings in order to legislate." 883 F.2d at 1492 (citation and internal quotation marks omitted).

The second distinction collapses in this as-applied case. Section 245 prohibits hate crimes that interfere with certain protected activities, including employment rights. See 18 U.S.C. 245(b)(2)(C). While the text of Section 249(a)(2) does not prohibit only interference with certain enumerated rights, its *application* in this case—which is all that is at issue on appeal—is not distinguishable from applications of Section 245. As applied, Section 249(a)(2), like Section 245(b)(2)(C), protects against bias-motivated violence that interferes with equal employment opportunities, which *Lane* found to be within Congress's Commerce Clause power. 883 F.2d at 1492-1493. That basic conclusion in *Lane* applies equally here and is sufficient to resolve this case: Congress has the power to proscribe violence that impedes equal employment opportunities.

2. Hill also argues that while Congress may have some powers to regulate workplace relations, Congress does not have the power to regulate an individual workplace assault like the one at issue here. Hill Br. 36-39. Hill's argument is premised on the notion that Title VII of the Civil Rights Act of 1964 (Title VII) does not reach sexual orientation and does not regulate employee-on-employee conduct except where the perpetrator is a supervisor or the conduct created a hostile work environment. Hill Br. 37-39.

Hill misapprehends our argument. Whether Title VII would apply in this case is irrelevant. The larger point is that Congress has authority under the Commerce Clause to regulate the *type of conduct* at issue in this case, as Title VII and other civil statutes that proscribe workplace discrimination and harassment demonstrate. In other words, the question is not whether preexisting employment laws cover the conduct at issue here; rather, it is whether the logic that Congress and the courts have used to pass and uphold these laws allows federal regulation of the conduct at issue here.[9]

It indisputably does. "[T]he Supreme Court has recognized that effects on employment affect commerce." *United States* v. *Mississippi Dep't of Pub. Safety*,

[9] In any event, Hill's argument that the conduct in this case is insufficiently severe to fall within Title VII's prohibition on harassment that creates a hostile work environment is contrary to this Court's precedent. See Hill Br. 36-37. This Court has held that "an isolated incident of harassment, if extremely serious, can create a hostile work environment." *Boyer-Liberto* v. *Fontainebleau Corp.*, 786 F.3d 264, 268 (4th Cir. 2015) (en banc); *id.* at 281 ("We reject, however, any notion that our prior decisions * * * were meant to require more than a single incident of harassment in every viable hostile work environment case."). Of particular import here, the en banc majority recognized that this Court had unanimously concluded that "a single, isolated incident of physical violence may be actionable." *Id.* at 286; *id*. at 302 (Niemeyer J., dissenting) ("[A] single incident of physical assault against a co-worker that is motivated by [discriminatory] animus can qualify as severe enough to constitute an alteration of the co-worker's conditions of employment." (brackets in original; citation omitted)). Thus, even if, as Hill suggests, it was important whether the conduct at issue here was sufficiently severe enough to be covered by existing anti-discrimination law, the conduct is covered under this Court's precedent.

321 F.3d 495, 500 (5th Cir. 2003) (citing *United States* v. *Morrison*, 529 U.S. 598, 615 (2000)). "[T]here is a national labor market and * * * even local acts of discrimination, when considered in the aggregate, can have a substantial effect on that market." *Ibid*. Accordingly, "even if the personnel decisions * * * are largely local, aggregating their effect with the effect of potential decisions * * * around the country provides a sufficient basis for Congress to regulate the activity under the Commerce Clause." *Id.* at 500-501. The same is true here. Bias-motivated *workplace* assaults—like bias-motivated workplace discrimination—in the aggregate have a substantial effect on the national employment market, and thus Congress has Commerce Clause authority to proscribe them.

Finally, Hill contends that the tradition of anti-discrimination laws' regulation of workplace conduct provides little support for the argument that Congress can regulate the workplace conduct at issue here because the causes of action under those laws run against the employer, rather than against a fellow employee. Hill Br. 39. That is immaterial. While an employment discrimination or harassment claim would run against the employer, the underlying *conduct* that Congress is targeting is employee-on-employee conduct akin to what Section 249(a)(2) criminalizes in this case. U.S. Br. 32-33.[10]

[10] The only case Hill cites for his argument that the employer's liability is the key factor in rendering Title VII constitutional is *Liberty University, Inc.* v.

(continued…)

In short, violent or harassing bias-motivated incidents in the workplace affect the interstate employment market, regardless of whether the employer knew about them or is liable for them. Section 249(a)(2) as applied in this case criminalizes only such assaults, and therefore its application here falls within Congress's Commerce Clause power.

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(…continued)
*Lew*, 733 F.3d 72 (4th Cir.), cert. denied, 134 S. Ct. 683 (2013). That case has no bearing here. There, this Court affirmed Congress's power to mandate that certain employers provide minimal health insurance coverage to employees. *Id.* at 93. This Court distinguished *National Federation of Independent Business* (*NFIB*) v. *Sebelius*, 132 S. Ct. 2566 (2012), where the Supreme Court concluded that Congress could not use the Commerce Clause to mandate that individuals purchase health insurance. This Court noted that unlike *NFIB*, Congress was regulating economic activity in which the employers were already engaged. *Liberty Univ., Inc.*, 733 F.3d at 93. Here, as in *Liberty University*, C.T. and Hill—the Amazon employees—were already participating in economic activity by being employed, and Section 249(a)(2) as applied regulates interference with that existing participation.

## CONCLUSION

This Court should reverse the district court's dismissal of the indictment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

(1) contains 6435 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
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Attorney

Dated: September 30, 2016

## CERTIFICATE OF SERVICE

I certify that on September 30, 2016, I electronically filed the foregoing REPLY BRIEF FOR THE UNITED STATES 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 four paper copies of the foregoing brief were sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by first-class certified mail on September 30, 2016.

s/ Vikram Swaruup
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