U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, DC 20530*

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Dear Speaker Johnson:

In recent years, there has been a significant increase in the volume and frequency of hate crimes in the United States. According to Federal Bureau of Investigation Uniformed Crime Reporting data from the last five years (2018-2023), law enforcement agencies reported 37,300 hate incidents, which included a bias towards race, ethnicity, ancestry, and religion. The most recent data shows 9,189 incidents in 2023 alone, an increase of 228 incidents compared to 2022.

Hate crimes are not only an attack on the victim—they are meant to threaten and intimidate an entire community. On behalf of the Administration, I am pleased to present for the consideration of the Congress a legislative proposal that would address gaps within the current prosecutorial authority of the Department of Justice to combat acts of hate. Its provisions would ensure that our hate crimes laws adequately combat solicitations, threats, and attempts to commit hate crimes; strengthen conspiracy provisions; and make other technical changes to improve hate crime enforcement.

Notably, these provisions will allow for the prosecution of those who plan to commit hate crimes or acts of racially motivated domestic violent extremism and who prompt others to commit such offenses. They will help ensure that individuals can be punished—even when a crime is interrupted by law enforcement and thus is never carried out. It will also ensure that threats, which can do so much to disrupt the lives of the recipients, are prohibited and punished.

We welcome the opportunity to discuss these proposals with you and your colleagues and are grateful for your consideration.

Sincerely,

CARLOS URIARTE

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Date: 2024.12.16 10:07:40 -05'00'

Carlos Felipe Uriarte
Assistant Attorney General

Enclosures

cc:

The Honorable Steve Scalise
Majority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Hakeem Jeffries
Minority Leader
U.S. House of Representatives
Washington, DC 20515

A BILL

To create a new hate crime offense punishing conspiracies and solicitations, to amend section 249 of title 18, United States Code, to penalize threats and attempts to cause bodily injury because of a characteristic described in that section, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as _____.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. FINDINGS.

Congress finds the following:

(1) The incidence of violence and threats of violence motivated by actual or perceived race, color, religion, ethnicity, national origin, gender, sexual orientation, gender identity, or disability continues to pose a serious national problem.

(2) The problem has roots deep in American history. In the wake of the Civil War, the Ku Klux Klan, and other equally deadly racist organizations like the Knights of the White Camellia, terrorized formerly enslaved individuals, other people of color, and the allies of such individuals. The racist organizations that formed in the wake of the Civil War were some of this nation's first domestic terrorist organizations.

(3) The terror unleashed by the Ku Klux Klan took the form of public lynchings, arsons, assaults, shootings, and beatings.

(4) In addition, these terrorist groups subjected formerly enslaved people to virulent threats, such as cross burnings, to render them too frightened to exercise rights newly conferred upon them by the Constitution, such as the right to vote and to engage in free political discourse.

(5) Such violence is not a relic of the past. The FBI's most recent hate crime statistics, detailed in the 2021 Uniform Crime Report (UCR), indicates that in 2021, there were 7,262 hate crime incidents involving 8,673 offenses. In 2020, there were 8,263 hate crime incidents involving 11,129 offenses, the highest number in twelve years.

(6) The UCR further indicates that 64.8% of victims were targeted because of racial, ethnic, or ancestry bias. Together, incidents related to sexual orientation and gender identity represented 19.7% of all single-bias incidents. 14.2% of victims were targeted because of religious bias; 1.48% were targeted because of disability bias; and 1.0% were victimized because of gender bias. 2021 Hate Crimes Statistics (justice.gov).

(7) According to the FBI, within the category of crimes motivated by race, ethnicity, or ancestry, the greatest proportion of such crimes were against Black Americans. According to FBI statistics, there were 2,217 incidents involving anti-African-American bias in 2021.

(8) The Anti-Defamation League (ADL) reported that Antisemitic incidents reached an all-time high in the United States in 2021, with a total of 2,717 incidents of assault, harassment, and vandalism reported to ADL, the highest number of incidents on record since ADL began tracking antisemitic incidents in 1979 – an average of more than seven incidents per day and a 34% increase year over year. ADL Audit Finds Antisemitic Incidents in United States Reached All-Time High in 2021 | ADL.

(9) In modern times, extremists have engaged in acts of mass murder and mass terror based upon racial and religious bias. Examples include the 2016 conspiracy to bomb an apartment complex in Garden City, Kansas, where Muslims from Somalia lived and worshipped; the 2017 murder of a counter-protestor by a neo-Nazi in Charlottesville, Virginia; the 2012 mass shooting at a Sikh temple in Oak Creek, Wisconsin; and the 2015 murder of nine Black worshippers at "Mother Emanuel" African Methodist Episcopal Church in Charleston, South Carolina.

(10) A Bureau of Justice Statistics Report from June 2022 reported that the rate of violent victimization of lesbian or gay persons (43.5 victimizations per 1,000 persons age 16 or older) was more than two times the rate for straight persons (19.0 per 1,000). Violent Victimization by Sexual Orientation and Gender Identity, 2017–2020 | Bureau of Justice Statistics (ojp.gov).

(11) Transgender people are over four times more likely than cisgender people to experience violent victimization, including rape, sexual assault, and aggravated or simple assault, according to a new study by the Williams Institute at UCLA School of Law. Transgender people over four times more likely than cisgender people to be victims of violent crime - Williams Institute (ucla.edu). Similarly, in 2020, the Human Rights Campaign (HRC) tracked a record number of violent fatal incidents against transgender and gender non-conforming people. A total of 44 fatalities were tracked by HRC, marking 2020 as the most violent year on record since HRC began tracking these crimes in 2013. Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021 - Human Rights Campaign (hrc.org).

(12) A Bureau of Justice Statistics Report from 2021, analyzing data from 2017-2019, found that the rate of violent victimization against persons with disabilities (46.2 per 1,000 persons age 12 or older) was almost four times the rate for persons without disabilities (12.3 per 1,000). Crime Against Persons with Disabilities, 2009–2019 – Statistical Tables | Bureau of Justice Statistics (ojp.gov).

(13) One legacy of bias-motivated extremism is that many who have traditionally been targeted for violence live in fear that they, or a loved one, might become the victim of a hate crime. Threats of violence prey upon that fear, creating panic and dread in those communities.

(14) According to the Pew research center, about one in five Asian Americans say they worry daily (7%) or almost daily (14%) that they might be threatened or attacked because of their race or ethnicity. Similarly, almost a third of Black adults (32%) and 14% of Hispanic adults say they worry every day or almost every day that they might be threatened or attacked due to their race or ethnicity, compared with just 4% of White adults. How Asian Americans view the threat of violence against them | Pew Research Center.

(15) Although the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Shepard-Byrd Act), signed into law in 2009, provides federal prosecutors with an important tool to combat such violence, it does not prohibit threats of violence. In fact, one of the most frightening and vitriolic threats of all—a burning cross set deliberately outside a home with the intent to terrorize its occupants—cannot be prosecuted under the Shepard-Byrd Act.

(16) Although virulent threats like cross burnings may, in certain circumstances, be reached through other federal hate crime laws, those laws have limitations, requiring, for example, that the threat be associated with an individual's exercise of an identified federal right.

(17) Moreover, not all federal hate crime laws protect the LGBTQI+ community or persons with disabilities. For these reasons, it is the intent of Congress to reach more consistently threats to use force or violence when such threats are made because of actual or perceived race, color, religion, ethnicity, national origin, gender, gender identity, sexual orientation, or disability.

(18) Due to the growing prevalence of the internet and similar cyber technology in daily American life, there is an increasing use of the internet and cyber technology to send threatening messages to targeted victims and an increasing use of such technology to solicit like-minded individuals to perform acts of violence.

(19) In 2021, ADL conducted a survey of Americans' online experiences. It found that 27% of respondents had experienced severe online harassment comprising sexual harassment, stalking, physical threats, swatting, doxxing, and sustained harassment. A third of all survey respondents reported identity-based harassment. LGBTQ+ respondents reported higher rates of overall harassment than all other demographics for the third consecutive year, at 64%. Asian-American respondents have experienced the largest single year-over-year rise in severe online harassment compared to other groups, with 17% of respondents

reporting it this year compared to 11% last year. Likewise, African-American respondents reported a sharp rise in race-based harassment, up from 42% last year to 59% this year. Online Hate and Harassment: The American Experience 2021 (adl.org).

(20) Not only has there been an increased use of the internet to convey express threats, but there is also an increase in publishing private and sensitive information on the internet, a practice known as doxing or doxxing. Publishing this information can facilitate hate crimes by making it easy for people in like-minded hate groups to locate and identify victims. This practice makes people feel unsafe in their homes, jobs, and houses of worship, and can cause them to fear for the safety of their children in school and daycare centers. Congress intends to punish such practices when done in order to facilitate the commission of a federal hate crime.

(21) Like threats, attempts to commit bias-motivated crimes undermine the feeling of safety and security of the victim of the attempt, as well as among community members who share the characteristic that prompted the attempt.

(22) Unlike other federal hate crime statutes, the Shepard-Byrd Act does not penalize all attempts to violate its provisions. It penalizes only those attempts in which dangerous weapons are used. Other hate crime statutes (*e.g.*, 18 U.S.C. §§ 245, 247, and 42 U.S.C. § 3631) punish all attempts to violate their provisions; thus, federal hate crime law is currently inconsistent, leaving gaps in coverage. Because any attempt to commit a bias-motivated crime adds to the feelings of fear and vulnerability in targeted communities, Congress accordingly intends, to the fullest extent of its power, to criminalize all attempts to commit hate crimes.

(23) It is the intent of Congress, as it was in enacting the Shepard-Byrd Act, to protect from bias-motivated violence persons of all races, colors, religions, ethnicities, national origins, genders, gender identities, sexual orientations, and disabilities to the fullest extent authorized by the Constitution.

(24) Congress draws upon its Thirteenth Amendment authority in enacting this legislation. Many acts of bias-motivated terrorism are a direct legacy of chattel slavery. For generations, the institutions of slavery and involuntary servitude were defined by the race, color, or ancestry of those held in bondage. Slavery and involuntary servitude were enforced through widespread public and private violence directed at persons because of their

actual or perceived race, color, or ancestry. Eliminating racially motivated violence and threats of racially motivated violence is an important means of abolishing, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude, and it is within Congress's power to enact such legislation under the Thirteenth Amendment to the Constitution. Congress relies not only on its own observation but on the holdings of multiple federal courts that "over a century of sad history demonstrates" that "a relationship between slavery and racial violence is not merely rational, but inescapable." *United States v. Diggins*, 36 F.4th 302, 309 (1st Cir. 2022) (collecting case law).

(25) As it did in enacting the Shepard-Byrd Act, Congress intends to exercise to the fullest extent the power vested in it by Section 2 of the Thirteenth Amendment.

(26) At the time the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were adopted and continuing to the present day, members of certain religious, national origin, and ethnic groups were perceived to be distinct "races." Congress intends this legislation, like pre-existing hate crimes legislation, to protect the maximum range and number of characteristics that can be protected under the Thirteenth Amendment. Congress intends to use its full Thirteenth Amendment authority to prohibit and punish assaults, conspiracies, solicitations, and threats engaged in because of any racial, religious, ethnic, national origin, or other characteristic that would have been regarded as defining a race at the time of the adoption of the Thirteenth Amendment.

(27) In enacting this legislation, Congress also draws upon the authority vested in it by the Commerce Clause, which gives it authority to prohibit and punish crimes committed through the use of the internet, cellphones, motor vehicles, and other channels, facilities, and instrumentalities of interstate and foreign commerce; crimes committed through the mail; and crimes otherwise affecting interstate or foreign commerce. In enacting the current legislation, as in pre-existing hate crimes legislation, Congress intends to exercise to the fullest extent its Commerce Clause authority.

(28) Under the current version of the United States Sentencing Guidelines, law enforcement officers and others acting under color of law are not subject to the hate-crime adjustment applicable to all other defendants convicted of a crime that was motivated by a prohibited bias. Specifically,

§ 3A1.1 of the United States Sentencing Guidelines Manual expressly prohibits its application if an offender's sentence has been adjusted under U.S.S.G. § 2H1.1(b)(1) because he or she acted under color of law. This means that, uniquely among all federal defendants, police officers, correctional officers, and similar public officials bear no additional sentencing consequences when acting out of bias motivation. But the color-of-law adjustment serves a different purpose and addresses a different wrong from the hate-crime adjustment, which applies when a defendant intentionally targets a victim or property because of a person's actual or perceived race, color, religion, ethnicity, national origin, gender, gender identity, sexual orientation, or disability. Law enforcement officers and others acting under color of law should be treated the same as every other offender and be subject to the hate-crime adjustment when warranted by the facts.

SEC. 3. PROHIBITING CONSPIRACIES AND SOLICITATIONS TO COMMIT HATE CRIMES AND DOXXING TO FACILITATE HATE CRIMES.

(a) IN GENERAL. – Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"**§ 251. Conspiracies and solicitations to commit hate crimes and doxxing to facilitate hate crimes.**

(a) Conspiracies to commit hate crimes.—Whoever conspires to violate section 245(b)(2), 245(b)(4), 245(b)(5), 247, or 248 of this title, or section 901 of the Civil Rights Act of 1968 (42 U.S.C. § 3631), shall be punished according to the provision, from among the following provisions, that sets forth the highest applicable maximum:

(1) If death or serious bodily injury (as defined in section 2246 of this title) results and if the object of the conspiracy is to kill another person, imprisoned for any number of years or for life, fined in accordance with this title, or both.

(2) If death or serious bodily injury (as defined in section 2246 of this title) otherwise results, imprisoned for not more than 30 years, fined in accordance with this title, or both.

(3) If the offense involves kidnapping, attempted kidnapping, or an attempt to kill, imprisoned for not more than 30 years, fined in accordance with this title, or both.

(4) If the object of the conspiracy offense, if achieved, would constitute a felony violation of one of the enumerated statutes set forth above, imprisoned for not more than 10 years, fined in accordance with this title, or both.

(5) If the offense involves sexual misconduct, punished in accordance with section 250 of this title.

(6) In any other case, imprisoned for not more than three years, fined in accordance with this title, or both.

(b) Solicitations to commit hate crimes.—

(1) Offenses.—Whoever, with intent that another person engage in conduct that violates section 245(b)(2), 245(b)(4), 245(b)(5), 247, 248, or 249 of this title, or section 901 of the Civil Rights Act of 1968 (42 USC § 3631), solicits another person to engage in such conduct, or conspires to solicit or attempts to solicit another to engage in such conduct, shall be punished in the same manner as if that person had committed the act that is the object of the underlying solicitation.

(2) Indirect and remote solicitations.—It is not a defense to a prosecution under this section that the solicitor did not communicate directly with the person or persons solicited.

(3) Solicited person.—It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

(4) Affirmative defense.—It is an affirmative defense to a prosecution under this subsection that, under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant prevented the commission of the solicited crime. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone

the commission of the crime until another time or to substitute another victim or another similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) Doxxing to facilitate hate crimes.—Whoever

(1) knowingly publishes or discloses to any other person, potentially identifying information of an individual with the intent that others will use the personal information to commit or facilitate a violation of any offense set forth in paragraph (a) or (b) of this provision, section 245(b)(2), 245(b)(4), 245(b)(5), 247, 248, or 249 of this title, or section 901 of the Civil Rights Act of 1968 (42 U.S.C. § 3631); or

(2) knowingly discloses to a particular person potentially identifying information of an individual, with knowledge that the particular person receiving the information intends to use it to commit or facilitate a violation of an offense listed in paragraph (1) or with knowledge of a substantial risk that the particular person to whom the communication is directed will use it to commit or facilitate a violation of an offense listed in paragraph (1); or

(3) knowingly publishes or discloses to any other person potentially identifying information of any individual with the corrupt intent to

(i) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States information relating to the commission or possible commission of any offense set forth in paragraph (a), (b), (c)(1), or (c)(2) of this provision, section 245(b)(2), 245(b)(4), 245(b)(5), 247, 248, or 249 of this title, or section 901 of the Civil Rights Act of 1968 (42 U.S.C. § 3631);

(ii) retaliate against any person for having communicated to a law enforcement officer or judge of the United States information relating to the commission or possible commission of any offense listed in paragraph (c)(3)(i); or

(iii) otherwise obstruct or interfere with the federal investigation of an offense listed in paragraph (c)(3)(i),

shall be fined under this title, imprisoned not more than five years, or both.

(4) In a prosecution for an offense under section (c)(3), no state of mind need be proven with respect to the circumstance that the law enforcement officer to whom the communication was – or would have been – made was a federal employee or that the judge to whom the communication was – or would have been – made was a judge of the United States, so long as there is proof that, at the time potentially identifying information was published or disclosed, it was reasonably likely that the communication would be provided to a federal law enforcement officer or a judge of the United States.

(i) Definitions.—As used in this subsection,

(A) the term "solicit" includes all forms of solicitation recognized in other federal criminal statutes including commanding, inducing, procuring, or endeavoring to persuade any person to engage in conduct constituting one of the identified hate-crime offenses;

(B) the term "potentially identifying information" means the following information identifiable to an individual, which may facilitate the commission of a solicited crime against the individual to whom the information pertains or the targeting or victimization of such an individual or an immediate family member of such an individual: bank account numbers, biometric information or other digital identifiers, social security numbers, credit card numbers, dates of birth, any physical address, internet protocol address latitude and longitude, or other geolocation information of a home office, or school, photographs or video, personal email addresses, personal fax numbers, personal or home phone numbers, or addresses of a home, house of worship, daycare center, or school; and

(C) the term "immediate family member" has the meaning provided in section 115(c)(2) of this title, and includes a significant other living in the household.

(j) Certification.—No prosecution of any offense described in this section may be undertaken by the United States, except under the certification in writing

of the Attorney General, or a designee, that a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(k) Statute of limitation.—

(1) Offenses not resulting in death.—Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than seven years after the date on which the offense was completed.

(2) Death-resulting offenses.—An indictment or information alleging that an offense under this section resulted in death may be found or instituted at any time without limitation.

(l) TABLE OF SECTIONS AMENDMENT.—The table of sections for chapter 13 of title 18, United States Code, is amended by inserting after the item relating to section 250 the following:

"251. Conspiracies and solicitations to commit hate crimes, and doxxing to facilitate hate crimes."

SEC. 4. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be invalid, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance other than those as to which it is held invalid, shall not be affected thereby.

SEC. 5. AMENDMENTS TO THE SHEPARD-BYRD HATE CRIMES PREVENTION ACT.

Section 249(a) of title 18, United States Code, is amended—

(1) in paragraph (1)—

(A) in the heading, by inserting "ethnicity," after "religion,";

(B) in the matter preceding subparagraph (A), by—

(i) inserting “ethnicity,” after “religion,”;

(ii) striking “or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person” and inserting, “or threatens or attempts to do so,”; and

(iii) inserting “shall be punished according to the provision, from among the following provisions, that sets forth the highest applicable maximum” after “national origin of any person”

(C) by striking subparagraphs (A) and (B) and inserting the following:

“(A) imprisoned not more than 3 years and fined in accordance with this title;

(B) imprisoned not more than 10 years and fined in accordance with this title if—

(i) bodily injury results from the offense; or

(ii) the offense includes the use, attempted use, or threatened use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device;

(C) punished in accordance with section 250 of this title if the offense involves sexual misconduct; and

(D) imprisoned for any term of years or for life and fined in accordance with this title if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap or an attempt to kill.”;

(2) in paragraph (2)—

(A) in the heading, by inserting “ethnicity,” after “religion,”

(B) in subparagraph (2)(A), in the matter preceding clause (i), by—

(i) inserting “ethnicity,” after “religion,”;

(ii) striking “or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person” and inserting “or threatens or attempts to do so,”; and

(iii) inserting “shall be punished according to the provision, from among the following provisions, that sets forth the highest applicable maximum” after “national origin of any person,”

(C) in subparagraph (2)(A), by striking clauses (i) and (ii) and inserting the following:

“(i) imprisoned not more than 3 years and fined in accordance with this title;

(ii) imprisoned not more than 10 years and fined in accordance with this title if—

(I) bodily injury results from the offense; or

(II) the offense includes the use, attempted use, or threatened use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device;

(iii) punished in accordance with section 250 of this title if the offense involves sexual misconduct; and

(iv) imprisoned for any term of years or for life and fined in accordance with this title if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap or an attempt to kill.";

(D) in subparagraph (2)(B), in the heading, inserting after the phrase "this subparagraph" and before the word "are", the phrase ", singly or in combination,"

(E)in subparagraph (2)(B) clause (iii), by—

(i) inserting "ammunition," after "firearm,";

(3) By amending paragraph (3) "Offenses occurring in the special maritime or territorial jurisdiction of the United States" by adding, after "United States," and before "engages in conduct", the phrase "or in a federal prison,";

(4) By amending paragraph (5) "Lynching.—" by inserting, after the title and before "Whoever":

"(A) Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if death or serious bodily injury (as defined in section 2246 of this title) results and if the object of the conspiracy is to kill another person, be imprisoned for any number of years or for life, fined in accordance with this title, or both; (B)"

(5) By amending paragraph (6) "Other conspiracies" by adding, after the title and before the word "Whoever":
"(A)".

And by striking, after "attempt to kidnap" and before "or an attempt to kill", the phrase ", aggravated sexual abuse or an attempt to commit aggravated sexual abuse,".

And by adding, after "both.":

"(B) Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if the offense includes sexual misconduct, be punished in accordance with section 250 of this title.

(C) Whoever otherwise conspires to commit any offense under paragraph (1), (2), or (3) shall be imprisoned for no more than 10 years."

(6) by adding at the end of subsection "(6) Other Conspiracies.—":

"**(7) Causation.**—In a prosecution under this section, the actual or perceived race, color, religion, ethnicity, national origin, gender, sexual orientation, gender identity, or disability of any person need not be the sole or primary cause of the offense, so long as the offense would not have occurred without at least the incremental effect of that characteristic. An offense can, and often does, have more than one cause."

SEC. 6. DIRECTIVE TO SENTENCING COMMISSION.

Pursuant to its authority under section 994 of title 28, the United States Sentencing Commission shall—

(a) review and amend § 3A1.1 of the United States Sentencing Guidelines Manual, including the Commentary and Application Notes to that section, and any other guidelines, commentary, application notes, and policy statements, to ensure that the offense level increase under § 3A1.1(a) applies regardless of whether the offense level increase under § 2H1.1(b)(1) applies.

(b) review and amend provisions of the United States Sentencing Guidelines, and promulgate any new guidelines, policy statements, and commentary, which the Commission determines are necessary to ensure that the Sentencing Guidelines are consistent with and adequately address the new offenses and new penalties created by this Act, and to carry out the purposes of this Act.

Contents

The Civil Rights Division recommends enacting new hate crime legislation to address the bias-motivated violence that is devastating communities across America. New legislation would accomplish a number of important Department of Justice goals and build on the Emmett Till Antilynching Act. First, and most importantly, it would fill gaps in the existing hate crime enforcement scheme and, thus, ensure that federal laws adequately address bias-motivated mass violence and terrorist threats. New legislation would meet this moment in history both by expressly addressing the increasing threat from ideologically-driven hate groups and by targeting the rising threat posed by those using the internet as a tool to solicit and carry out such crimes.

I. The Need for New Hate Crime Legislation

It is essential that we respond to the increasing threat to our nation posed by domestic violent extremism, and it is important that the form of that redress includes hate crime legislation. According to the hate crime statistics published through the FBI's Uniform Crime Reporting Program, most hate crimes that have taken place over the past decade have been motivated by racism, anti-Semitism, Islamophobia, and other forms of religious intolerance. Examples include the mass shooting of Black individuals in a Tops store in Buffalo, New York; the racially motivated killing of Ahmaud Arbery; the shooting of Hispanic shoppers in El Paso, Texas; the plot to bomb an apartment complex in Garden City, Kansas, where Muslims from Somalia lived and worshipped; the killing of a counter-protestor by a neo-Nazi in Charlottesville, Virginia; the mass shooting at a Sikh temple in Oak Creek, Wisconsin; and the murder of nine worshippers at "Mother Emanuel" African Methodist Episcopal Church in Charleston, South Carolina, by a man determined to start a race war.

In 1870, in part as a result of the ongoing violent suppression of civil rights by groups like the Ku Klux Klan (Klan), Congress created the Department of Justice to coordinate the nation's response to the continuing acts of insurrection in the reconstructed South. At the same time, Congress enacted a series of statutes to protect those individuals newly freed from bondage. This legislation included America's first criminal civil rights laws, expressly aimed at stopping Klan terrorism.

The Civil Rights Division was established in 1957, at a time when civil rights were again in the forefront of the American consciousness. In the wake of civil rights protests in the 1960s, violence exploded once again in the South and in many northern cities where the Klan's membership swelled. Congress responded by enacting two hate crime laws in 1968, which punished those who used threats or force to interfere with the right to undertake certain activities free of racial bias, such as the occupation of a home, attendance at school, employment, and enjoyment of public accommodations.

In the 1990s, many white supremacists targeted Black churches, which served as meeting places for civil rights protests and provided solace to the Black community in troubled times. In response to the arsons, Congress enacted a law prohibiting defacing, damaging, or destroying religious real property, which also included prohibitions on taking such actions because of the race of a person associated with that property. This new law also protected religious liberties, prohibiting using force or threats to interfere with the free exercise of religion.

In the new millennium, America became increasingly aware that members of the LGBTQI+ community were being targeted for violent attacks. In response to horrific anti-LGBTQI+ crimes, like the murder of Matthew Shepard, Congress enacted a new hate crime law that included protection for LGBTQI+ individuals and also increased the Department's ability to prosecute all bias-motivated assaults.

Today, the country faces new challenges. The Covid-19 pandemic has focused renewed attention on longstanding violence perpetuated against the Asian-American community, while violence committed against people of color and the rise of extremist groups continue to dominate the news cycles. These new challenges once again require new laws to combat violent extremism and to ensure that America lives up to its promise that all persons enjoy equal rights and receive equal protection under the law. Congress has taken some steps to combat these problems by recently enacting the Emmett Till Antilynching Act; however, that act was limited to penalizing lynchings and a limited number of hate crime conspiracies. More needs to be done to fully prohibit and punish these crimes.

II. Section-by-Section Analysis

The Department now has several hate crime laws at its disposal, which it has used to great effect. However, there are significant gaps in the current federal hate crime enforcement scheme. We recommend that Congress fill these gaps by taking the following steps:

(1) enact new legislation to expressly prohibit the following offenses:

- **a.** conspiracy to commit federal hate crimes;
- **b.** solicitation to commit federal hate crimes;
- **c.** doxxing to facilitate the commission of a federal hate crime or to obstruct investigation into a federal hate crime;

(2) amend the current version of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA), 18 U.S.C. § 249, to do the following:

- **a.** make it a federal crime to *threaten* to cause bodily injury;
- **b.** cover *all* attempts to violate its provisions, regardless of whether the attempt involves a dangerous weapon;
- **c.** create lesser penalties to provide punishment commensurate to such threats and attempts;
- **d.** add "ethnicity" as a protected characteristic under § 249(a)(1);

e. clarify that but-for causation should be construed broadly, consistent with existing Supreme Court precedent;

f. clarify that the various ways the statute specifies that a crime may be in or affecting interstate or foreign commerce may be considered either singly or in combination;

g. add, as an additional jurisdictional basis, offenses occurring in federal prison; and

h. clarify that the use of ammunition that has traveled in interstate commerce is sufficient to confer interstate commerce jurisdiction;

(3) direct the Sentencing Commission to review and amend the Sentencing Guidelines to apply the existing hate-crime adjustment (U.S.S.G. § 3A1.1) to persons convicted of color-of-law offenses in those circumstances where the defendant selected the victim because of bias.

A. Create a Hate Crime Conspiracy Offense and Amend § 249(a)(5) and (a)(6) to Provide Commensurate Penalties

We have proposed the creation of a new hate crime conspiracy law to be codified at 18 U.S.C. § 251(a). A new conspiracy statute would ensure that all those who participate in hate crimes will be held fully accountable for their crimes. The language of the conspiracy offense we propose is in many ways similar to that set forth in the Emmett Till Antilynching Act (now codified at 18 U.S.C. § 249(a)(5) and (6)). The Emmett Till Antilynching Act applies only to conspiracies to violate § 249, while our proposal would apply to conspiracies to violate federal criminal civil rights laws other than § 249. We also propose building on the Emmett Till Antilynching Act to create both a greater and a lesser conspiracy penalty.

Before the enactment of the Emmett Till Antilynching Act, there were no hate-crime specific conspiracy statutes in the federal code. The Department of Justice used two statutes to prosecute conspiracies to violate hate crime laws, but both statutes have gaps in coverage.

First, federal prosecutors used the civil rights conspiracy statute, codified at 18 U.S.C. § 241, to prosecute certain bias-motivated conspiracies. This statute requires proof of a conspiracy to violate a constitutional or other federal right, such as the rights established by civil provisions of the Fair Housing Act. It is insufficient under § 241 to prove a conspiracy to violate an existing hate crime statute. This is so because the Supreme Court has held that criminal sanctions do not create rights

enforceable under § 241.[1] Using § 241 to prosecute a hate crime conspiracy can present litigation challenges. Explaining what constitutes a violation of rights created by civil law is often more difficult than explaining a simple conspiracy to violate a clear hate crime law. Additionally, many civil laws that create actionable federal rights do not expressly protect the rights of LGBTQI+ individuals. Using rights established by civil law as a basis for § 241 offenses could leave a gap in coverage in which some individuals are not fully protected from hate crime conspiracies.

Second, federal prosecutors were able to use the general, federal conspiracy statute, 18 U.S.C. § 371, to prosecute conspiracies to commit hate crimes. Section 371 prohibits conspiring to violate any existing federal criminal law (which necessarily includes conspiracies to violate federal hate crimes). Although this statute encompasses a wider swath of conduct than does § 241, in many cases, the penalty structure is not commensurate with the criminal conduct involved. For example, the maximum statutory penalty for violating § 371 is five years. This means that a defendant who conspires to commit the most egregious hate crime, resulting in multiple deaths, may be sentenced under § 371 to only five years for the conspiracy. Moreover, unlike violations of § 241, which are always felonies and, therefore, result in a felony sentence even when the underlying violation would be only a misdemeanor, § 371 creates a one-year maximum sentence for a conspiracy to commit a misdemeanor. This means that, despite the fact that the involvement of multiple individuals agreeing to carry out a hate crime increases the odds that the crime will occur, the maximum statutory sentence for such a conspiracy does not account for this fact.

The Emmett Till Antilynching Act, signed into law in March 2022, for the first time created a hate-crime specific conspiracy law. However, the conspiracy offense created by the Emmett Till Antilynching Act is limited in scope. The Emmett Till Antilynching Act (now codified at 18 U.S.C. § 249(a)(5) and (a)(6)) provides a 30-year penalty for conspiracies to violate § 249 in two circumstances. First, it criminalizes "lynching" conspiracies if the conspiracy to violate § 249 resulted in death or serious bodily injury. Second, it provides for prosecution of other conspiracies to violate § 249 if death or serious bodily injury resulted *or* if the offense involved kidnapping, attempted

[1] *United States v. Kozminski*, 487 U.S. 931, 940 (1988).

kidnapping, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill.

This law, while useful, does not prohibit conspiracies to violate federal hate crime laws other than § 249. In addition, the Emmett Till Antilynching Act does not prohibit conspiracies to violate § 249 *unless* they result in death or serious bodily injury or involve kidnapping, aggravated sexual abuse, or an attempt to kill. Thus, less egregious conspiracies remain uncovered by a specific hate crime conspiracy law. Finally, the highest penalty possible under the Emmett Till Antilynching Act is 30 years' imprisonment, which may be insufficient for the most egregious hate crimes, such as a conspiracy to commit mass murder for bias-motivated reasons. As explained below, during discussion of a proposal to amend 18 U.S.C. § 249, we propose adding additional conspiracy penalties to § 249.

However, we *also* propose creating a new general hate crime conspiracy provision -- to be codified at 18 U.S.C. § 251(a) -- that would apply to conspiracies to violate criminal civil rights laws other than § 249. Our proposed § 251(a) would provide graded penalties, allowing a defendant to be penalized for three years, ten years, 30 years, or up to life imprisonment. Specifically, we propose a six-part penalty structure for conspiracies to violate 18 U.S.C. § 245, § 247, § 248, and 42 U.S.C. § 3631. **First**, our proposed statute would provide for up to life imprisonment for a defendant convicted of conspiracy to violate any of these enumerated statutes when two conditions are met: (1) the object of the conspiracy is to kill someone, and (2) the conspiracy resulted in death or serious bodily injury. **Second**, our proposed statute would create a 30-year penalty, consistent with the Emmett Till Antilynching Act, if the conspiracy resulted in death or serious bodily injury (regardless of whether such death or serious bodily injury was the intended object of the conspiracy). **Third**, consistent with the Emmett Till Antilynching Act, our proposed statute would create a 30-year penalty for a conspiracy to violate these enumerated hate crime statutes if the conspiracy involved kidnapping, attempted kidnapping, or an attempt to kill.[2] **Fourth**, our proposed statute would create a maximum penalty of ten years for other conspiracies whenever the conspiracy, if achieved, would be a *felony*

[2] The Emmett Till Antilynching Act also provides a 30-year penalty for crimes involving aggravated sexual abuse or its attempt. This part of the provision has been obviated by recent Violence Against Women Act (VAWA) legislation, incorporated with the Consolidated Appropriations Act of 2022. This statute created a specific series of penalties for civil rights offenses involving sexual misconduct. *See* CONSOLIDATED APPROPRIATIONS ACT 2022, PL 117-103, March 15, 2022, 136 Stat 49, Title XII, § 1201 et. seq (codified at 18 U.S.C. § 250).

violation of one of the enumerated federal hate crime laws. **Fifth**, consistent with new sexual assault provisions recently created by the Violence Against Women Act (VAWA), our proposed statute would specify that offenses involving sexual misconduct would be penalized in accordance with 18 U.S.C. § 250. **Finally**, any other conspiracy (including conspiracies to commit misdemeanors) would be penalized by up to three years' imprisonment. Because some offenses may violate both 18 U.S.C. § 251(a) and § 250, which may have varied or overlapping penalties, the penalty provision would impose the highest applicable maximum.

In sum, newly proposed 18 U.S.C. § 251(a) would penalize conspiracies to violate substantive hate crime laws other than § 249 (18 U.S.C. §§ 245(b)(2), (b)(4), or (b)(5), § 247, and 42 U.S.C. § 3631), as well as conspiracies to violate the FACE Act (18 U.S.C. § 248); would capture a broader range of bias-motivated conspiracies; and would provide appropriate penalties for violating hate crime statutes enacted by Congress. It would work in conjunction with proposed amendments to § 249's Antilynching provisions to create a cohesive enforcement scheme.

B. Create a Hate Crime Solicitation Offense

We recommend enactment of a strong solicitation law that would expressly prohibit soliciting and attempting to solicit others to commit hate crimes. We propose that this law be codified at 18 U.S.C. § 251(b). A hate crime solicitation law, like the one we propose, would facilitate prosecution of a defendant *before* an intended act of violence is carried out, even where the evidence is insufficient to prove a conspiracy, and also will ensure that the individual who causes a hate crime to be committed is punished as much as the person who carries out an act of violence. This legislation will be particularly effective at preventing violence and ensuring that *all* individuals responsible for acts of bias-motivated violence are held criminally responsible.

We propose a statute that would prohibit solicitations to violate *all* existing federal hate crime statutes (18 U.S.C. §§ 245(b)(2), (b)(4), or (b)(5), § 247, § 249, and 42 U.S.C. § 3631), as well as the FACE Act (18 U.S.C. § 248), and that would punish solicitations to commit these offenses in the same manner as the law currently punishes completed offenses. This new statute would cover solicitations to commit both felony and misdemeanor hate-crime offenses and would apply regardless of whether the particular hate crime solicited was a crime of violence, as defined under case law that is continuously evolving and often difficult to apply. Congress's authority to enact this solicitation

provision rests upon its authority to enact the underlying hate crime offense (*i.e.*, under the Thirteenth Amendment or the Commerce Clause).

Currently, no hate-crime-specific solicitation statute exists. Some solicitations may be prosecuted using a conspiracy statute, but conspiracy requires proof of a "meeting of the minds" regarding criminal activity. Because it is not always possible to prove beyond a reasonable doubt that there was such a meeting of the minds, it is not always possible to prosecute the person who, by soliciting the offense, was directly responsible for the crime's commission.

The general federal solicitation statute, 18 U.S.C. § 373, is another option, but there are limitations on using it because it contains a stringent proof requirement—namely, that the government prove not only that the defendant intended to solicit a crime (a common *mens rea* in the federal code) but also that the crime occurred in circumstances "strongly corroborative of intent." We believe that this is an overly burdensome requirement and is not needed, so long as the government shows intent beyond a reasonable doubt. Indeed, the federal murder-for-hire statute, 18 U.S.C. § 1958, which essentially prohibits solicitation of murder, does not require proof of circumstances "strongly corroborative of intent." Furthermore, several state solicitation statutes require proof that the defendant intended only that a crime be carried out; they do not require the heightened burden of proof of circumstances "strongly corroborative of intent." *See, e.g.*, Cal. Penal Code § 653f; Va. Code Ann. § 18.2-29; Off. Code of Georgia Ann. § 16-4-7; Mich. Comp. Laws Serv. § 752.796; Ann. Laws of Mass. § 8. The same is true in the District of Columbia. *See* D.C. Code Ann. § 22-2107. The proposed statute would eliminate the "strongly corroborative" requirement, while requiring proof beyond a reasonable doubt that the defendant intend that the person solicited engage in conduct constituting a federal hate crime.

Another reason that the current solicitation statute, 18 U.S.C. § 373, is inadequate is that it requires proof that the solicited crime be a felony. This requirement precludes prosecution of a defendant who solicited a misdemeanor offense (for example, one who solicits the defacement of religious real property, such as a synagogue). The proposed statute would apply to solicitation to commit any federal hate crime offense, whether it be a felony or a misdemeanor.

Finally, the existing solicitation statute requires proof that the solicited felony be a "crime of violence," thus inviting litigation, common post-*Davis*,[3] about whether a particular hate crime necessarily has—as an element—the use, attempted use, or threatened use of physical force. Here, we propose criminalizing solicitations to commit all current federal hate crimes, regardless of whether the solicited offense is interpreted to be a crime of violence. Doing so would foreclose a possible defense on that issue.

C. Create an Offense Prohibiting Doxxing to Facilitate a Hate Crime

We also propose a new offense, to be codified at § 251(c), that would punish those who publish certain potentially identifying information to facilitate a hate crime. Specifically, this offense would penalize those who provide or publicize certain potentially identifying information (such as their victim's social security number or the home address—or other identifying information—of the victim's home or school) when done with the intent to have another commit a hate crime or facilitate its commission, or when done to obstruct a hate crime investigation. Such conduct (known as "doxing" or "doxxing") can cause particularly grievous harm, including increasing the likelihood that the victim will be subject to violent threats, and enabling others to carry out acts of violence.

Our anti-doxxing provision would address a problem that has grown exponentially with the proliferation of internet use and social media: members of extremist groups often use inflammatory statements while revealing a target's potentially identifying information to deliberately encourage

[3] In *United States v. Davis*, the Supreme Court struck down as vague one of two alternative definitions of the term "crime of violence" contained in 18 U.S.C. § 924(c). 139 S. Ct. 2319 (2019) (striking down § 924(c)(3)(B)). Since *Davis*, defendants often allege that, despite the fact that the defendant committed a horrific crime, the offense for which he was convicted would have allowed the prosecution of a non-violent offense and thus the offense was not categorically a crime of violence. This formulation would avoid such litigation as it would prohibit solicitation of all hate crimes, regardless of whether they were categorically violent. For example, Dylann Roof, who fired 74 bullets that killed nine Black worshippers who were engaged in Bible study at a church, argued that he had not committed a crime of violence. *See United States v. Roof*, 10 F.4th 314, 397 (4th Cir. 2021). Although the argument was rejected, it was an issue on appeal, and has been made in similar cases. Most recently, Robert Bowers, who brought multiple firearms to the Tree of Life synagogue, opened fire, killed three worshippers, and injured multiple others (including responding law enforcement officers), sought to dismiss various counts of his indictment on the ground that neither 18 U.S.C. § 249 nor 18 U.S.C. § 247(a)(2) is a crime of violence. *See United States v. Bowers*, No. 18-292 (W.D. Pa.). The district court ruled that 18 U.S.C. § 249 is not a crime of violence, but that 18 U.S.C. § 247(a)(2) is. *United States v. Bowers*, No. 18-292 (W.D. Pa.), 2022 WL 17718686 (Dec. 15, 2022). Prohibiting solicitation of all federal hate crimes would eliminate the need to prove that the solicited hate crime was a crime of violence under an evolving area of law. We understand that the Criminal Division is attempting to secure a legislative fix for this issue but, as of this writing, none has been enacted.

like-minded individuals to commit violent crimes. This may inhibit members of the targeted group from engaging in civic life (*e.g.*, by expressing their views on issues of importance, by voting, or by participating in political activity) and may keep them from reporting threats or even acts of violence. This disturbing and disquieting act can be difficult to prosecute under current law.

We note that the criminal code already contains an anti-doxxing statute, prohibiting publication of similar information about certain federal officials when made with the intent to threaten, intimidate, or incite the commission of a crime of violence against the person or a family member. *See* 18 U.S.C. § 119. We have created a separate hate crime statute, codified with other federal hate crimes, to stress its importance to hate crime enforcement.

The proposed anti-doxxing statute has three substantive provisions. First, it would penalize those who knowingly publish certain potentially identifying information *with the intent* that it be used to commit or to facilitate an enumerated federal hate crime. The *mens rea* of this subsection is modeled on existing 18 U.S.C. § 119.

Second, the proposed anti-doxxing statute would penalize those who knowingly publicize such potentially identifying information to a particular person, *knowing* that that person intends to commit an enumerated federal hate crime or knowing that there is *a substantial risk that* that person will use the information to commit such a crime. This language, while otherwise modeled on § 119, uses a "knowing" *mens rea* approved by the Supreme Court in connection with 18 U.S.C. § 875(c). *See Elonis v. United States*, 575 U.S. 723, 740 (2015) (holding, in analyzing a threat statute, that the *mens rea* is satisfied if the defendant makes a communication "with knowledge that the communication will be viewed as a threat"). This subsection requires proof that the defendant transmitted a communication knowing it would be viewed as a solicitation. The second subsection also contains an alternative "recklessness" standard using language suggested by *Elonis*. *Id*. at 740 (not reaching issue whether it would be sufficient to prove reckless state of mind),744-746 (Alito, J. concurring) (opining that *mens rea* in threat statute would be satisfied by proof that a defendant consciously disregarded the risk that a communication would be viewed as a threat).

Finally, the proposed anti-doxxing statute prohibits the knowing publication of potentially identifying information done with the corrupt intent to hinder, delay, or prevent any person from reporting a commission or possible commission of a federal hate crime to federal authorities, to retaliate against someone for making such a report, or with the corrupt intent of otherwise obstructing

the federal investigation of a hate crime. Like 18 U.S.C. § 1512, the provision would make clear that the government need not prove that the defendant knew any investigation was federal in nature. *See* 18 U.S.C. § 1512(g)(1). The government would need to show that there was a reasonable likelihood that, but for the obstructive doxxing, a communication would have been made to federal officials. *See Fowler v. United States*, 563 U.S. 668, 677–78 (2011) ("[W]here the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.").

The statutory maximum for the offense would be five years, just as it is for violations of § 119.

D. Amend the Shepard-Byrd Hate Crime Prevention Act

We propose several amendments to the Shepard-Byrd Hate Crimes Prevention Act (HCPA).

1. Add Threats and Attempts Committed Without Weapons

Threats. Although the HCPA has been an effective tool for federal prosecutors, it has several defects. Most significant among them is that it does not cover *threats*. Ironically, this means that the most iconic hate crime – a cross-burning – is not prosecutable under § 249. Serious threats to commit bias-motivated acts of domestic terrorism, such as the threat to blow up a house of worship, or to commit mass murder, are likewise unreachable under § 249. Under its plain language, § 249 can be used to prosecute a hate crime only if an individual willfully causes bodily injury or attempts or conspires to do so with a dangerous weapon.

To be sure, many of the bias-motivated threats, including some set forth above, can be prosecuted under other federal hate crime statutes. A cross-burning outside a family's home can be prosecuted under the criminal provisions of the Fair Housing Act, codified at 42 U.S.C. § 3631. Threats to blow up a house of worship can be prosecuted under the Church Arson Prevention Act, 18 U.S.C. § 247. A threat to commit bias-motivated murder at a school or place of employment may be prosecuted under 18 U.S.C. § 245. These statutes have limitations of their own, however. Neither § 245 nor § 3631 expressly protects against anti-LGBTQI+ crimes, and § 245 does not protect against crimes committed "because of sex," so the government could not argue that it applies to LGBTQI+ groups by virtue of

the recent holding in *Bostock*.[4] Similarly, § 245 does not cover disability-based hate crimes. It can thus be difficult for the federal government to achieve justice when a defendant targets someone based upon these characteristics. Indeed, it was these limitations that motivated Congress to enact the HCPA in the first place. Moreover, these statutes require that the government prove, beyond a reasonable doubt, that the threat was made with the intent to interfere with one of the federally protected rights enumerated in the statutes, such as the right to occupy a dwelling or the right to enjoy a public facility. This means that if the government charges defendants with threatening to use force in violation of § 245 or § 3631, defense counsel can argue that their clients were so consumed by animus that they would have made the same threat even if the victim had *not* been enjoying the identified right. Accordingly, we propose amending the HCPA, which expressly protects the LGBTQI+ community and persons with disabilities, to criminalize *threats* to cause bodily injury.

Attempts. In addition, unlike other hate crime statutes (and indeed unlike virtually every other federal statute that contains an attempt provision), § 249 does not forbid *all* attempts to violate its prohibitions. Instead, it prohibits only those attempts committed with fire, firearms, explosive devices, or other dangerous weapons. This precludes the government from prosecuting a weaponless attempt to commit a § 249 offense, even if the attempt is an attempt to inflict death and even if the attempt was extremely unnerving for the victim. Moreover, there may be circumstances where the primary issue in dispute at trial is whether the offense was completed.[5] In such cases, the addition of an attempt provision would allow the government to charge both a completed offense and the lesser-included attempt offense.

[4] In a 2020 opinion, the Supreme Court construed the phrase "because of sex" to include sexual orientation and gender identity. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020) (interpreting "sex" to encompass sexual orientation and gender identity, such that an employer who fires an employee for being gay or transgender violates Title VII of the Civil Rights Act).

[5] For example, whether there is a completed offense or merely an attempt might be an issue if an incident is captured on a video that shows a defendant punching in the victim's general direction but in which it is unclear whether a punch landed due to something obstructing the view. Presumably, some witnesses will say the punches landed while the defendant will claim they did not. Without an attempt provision, the jury would acquit if it did not believe the punch landed, even if it was clear that the defendant, motivated by bias, was attempting to harm the victim. With the attempt provision, the defendant would be guilty of attempt if not convicted of a completed offense.

2. Amend Subsection 249(a)(5) To Provide Greater Conspiracy Penalties and Amend Subsection 249(a)(6) To Provide Lesser Conspiracy Penalties

The Emmett Till Antilynching Act added a conspiracy provision to the HCPA, but the provision creates only a 30-year offense. We propose modifying the conspiracy provisions to account for the wide range of conduct to which the statute might apply and to achieve appropriate penalties for particularly egregious conspiracies and for less egregious conspiracies. We propose amending § 249(a)(5) to include a life offense for the most serious hate crime conspiracies, and we propose amending § 249(a)(6) to include penalties consistent with 18 U.S.C. § 250 for any conspiracy that involves sexual misconduct, and a ten-year penalty for conspiracies to violate § 249(a)(1), (a)(2), or (a)(3) that do not result in either death or serious bodily injury, or that do not involve kidnapping, sexual misconduct, or an attempt to kill. While we recognize that the current language of the Emmett Till Antilynching Act is somewhat repetitive, we likewise recognize that it was achieved after considerable debate and compromise. In deference to Congress, our proposal would keep the 30-year penalties provided by the Emmett Till Antilynching Act and just add one greater and one lesser penalty, as well as a cross-reference to newly enacted § 250. Modified in this way, the provision will be consistent with the conspiracy provisions we proposed at 18 U.S.C. § 251(a).

Our proposal would amend the antilynching conspiracy provision currently codified at § 249(a)(5). It would keep the current language of § 249(a)(5) (language added by the recent Emmett Till Antilynching Act), but codify it at subsection (B) of § 249(a)(5). It would then add a greater penalty to § 249(a)(5), codifying it at subsection (A). The newly added subsection would create a higher penalty—of up to life imprisonment—for a § 249 conspiracy when the object of the conspiracy was to kill someone *and* when the offense resulted in death or serious bodily injury. This provision would encompass the most egregious hate crime conspiracies in which conspirators planned to kill someone and either fully succeeded or got close enough to cause serious injuries. Section 249(a)(5)(B) would retain the current language of the antilynching statute that provides a thirty-year penalty for conspiracies in which death or serious bodily injury resulted from the offense (regardless whether such death or injury was the object of the conspiracy).

Our proposal would amend the "other conspiracies" provision enacted by the Emmett Till Antilynching Act and currently codified at § 249(a)(6). It would take what is now one section and divide it into three subsections. Our proposal would be to preserve the majority of the current

language of § 249(a)(6), codifying it at § 249(a)(6)(***A***). This provision would maintain the current statutory language providing for a 30-year felony if either death or serious bodily injury resulted from the conspiracy, or if the conspiracy involved kidnaping or its attempt, or an attempt to kill. Our proposal would omit the current language relating to "aggravated sexual abuse or an attempt to commit aggravated sexual abuse," as such conduct is now penalized under § 250. It would be confusing to have § 249 create a 30-year felony while § 250 created a life offense for such conduct. Our proposal would, thus, create a second subsection, codified at § 249(a)(6)(***B***), which would provide for a felony offense subject to the penalties set forth at 18 U.S.C. § 250 for those conspiracies to violate § 249(a)(1), (2), or (3) where the offense includes sexual misconduct. Our proposal would create a third subsection, codified at § 249(a)(6)(***C***), which would provide for a ten-year felony for all other conspiracies to violate § 249(a)(1), (2), or (3).

In sum, our proposal would create a life-offense for a conspiracy to violate § 249 when both death was intended and when death or serious bodily injury resulted; it would maintain the 30-year penalty that now exists when the crime resulted in death or serious bodily injury or when the crime involved kidnapping, attempted kidnapping, or an attempt to kill; it would provide for penalties consistent with § 250 where the offense involved sexual misconduct; and it would create a 10-year offense for all other conspiracies to violate the substantive provisions of § 249.

3. Amend the Penalty Provision to Account for the Newly Added, Less-Serious Offenses of Threat and Attempt

If § 249 is expanded to include threats and *all* attempts (even those committed without dangerous weapons), then we recommend that lesser penalties be added to the statute to cover these new, less-serious violations. We recommend that threats or attempts to cause injury undertaken *without* weapons be penalized by up to three years of imprisonment. We further recommend that offenses that involve the use, threatened use, or attempted use of a dangerous weapons or that result in bodily injury continue to be penalized by up to ten years of imprisonment (which would be commensurate to punishment for other federal hate crimes that already exist in the code). We also recommend, consistent with new sexual assault provisions recently created by VAWA, that offenses involving sexual misconduct be penalized in accordance with 18 U.S.C. § 250. We recommend that the factors that currently allow for life sentences for civil rights felonies (*e.g.*, that the offense resulted in death or involved kidnapping or its attempt, or an attempt to kill) remain life felonies. We have amended the penalty provisions to reflect this recommendation.

4. Add Ethnicity as a Protected Characteristic

Ethnicity. Section 249(a)(1) can be rendered more effective by adding "ethnicity" to its list of covered characteristics. The term applies to individuals who share a common language and culture. The term also is broader than the term "national origin," while appreciably different from the term "race." For example, the term "Hispanic" does not constitute a distinct racial group, or a group with a shared "national origin," as people who identify as Hispanic do not come from a single country or even a single continent. The census asks individuals about whether they are Hispanic in questions asking about ethnicity. 2020 Census Frequently Asked Questions About Race and Ethnicity. Thus, the new provision would facilitate charging cases involving Hispanic victims under 249(a)(1).[6]

Our proposed amendment would bring the characteristics protected by § 249 in line with those covered by the Sentencing Guidelines' hate-crime-motivation enhancement, which provides for a three-level sentencing enhancement where a defendant targeted a victim "because of the actual or perceived race, color, religion, national origin, *ethnicity*, gender, gender identity, disability, or sexual orientation of any person . . . ." U.S.S.G. § 3A1.1(a) (emphasis added).

5. Clarify the Causation Requirement to Ensure That "Because Of" is Not Construed Narrowly

"*Because of*." In 2014, several years after § 249 was enacted, the Supreme Court established that, absent a statutory specification to the contrary, the term "because of" establishes a *but-for* test. *Burrage v. United States*, 134 S. Ct. 881 (2014). As a result, the government is currently required to prove, in any hate crime case, that the defendant would not have committed the crime but for the actual or perceived race or other covered characteristic of the targeted victim or group.

Before 2014, district courts often gave "mixed motive" jury instructions, expressly telling juries that so long as the defendant had the requisite bias motivation, it was no defense that the defendant also may have had additional motivations for his or her actions. *See United States v. Piekarsky*, 687 F.3d 134, 143 (3d Cir. 2012). Although the Court in *Burrage* established the "but-for" test, it expressly recognized that any one factor could be a very small part of the reason a result occurred, so

[6] Because Congress's power to enact § 249(a)(1) flows from its Thirteenth Amendment authority, prosecutors would not need to prove a link to interstate commerce to charge someone with violating § 249(a)(1) because of ethnicity.

long as the result would not have occurred without that factor (the Court used the straw-that-broke-the-camel's-back analogy to explain this concept).

However, since *Burrage*, defendants have routinely argued—contrary to most legal authority—that under *Burrage*, a defendant is entitled to an instruction requiring the government prove that the prohibited bias motivation was the *sole* reason for the defendant's criminal act. While we have been able to obtain reasonably good law on the meaning of but-for causation, there remain significant differences in the way district courts interpret the language. An amendment addressing this point would protect against courts construing the statute in an unnecessarily narrow way. We propose including a subsection emphasizing that the government need not prove that "the actual or perceived race, color, religion, ethnicity, national origin, gender, sexual orientation, gender identity, or disability of any person" was "the sole or primary cause of the offense, so long as the offense would not have occurred without at least the incremental effect of that characteristic," and noting that "[a]n offense can, and often does, have more than one cause."

6. Broaden Jurisdictional Provisions

Other Miscellaneous Jurisdictional Amendments. We recommend several amendments to the circumstances conferring federal jurisdiction so that § 249 applies more broadly. Section 249(a)(2)(B) provides for various facts that may be established to invoke federal jurisdiction.

Ensure commerce factors can be combined. The Fourth Circuit has recently recognized, in examining 18 U.S.C. § 247(a)(2), which also has a commerce clause jurisdictional hook, that various commerce clause factors may be aggregated. *United States v. Roof*, 10 F.4th 314, 387 (4th Cir. 2021). Section 247, at issue in *Roof*, differs from § 249 because § 247's jurisdictional provision merely provides that the government must prove that the offense "is in or affects interstate or foreign commerce." Section 249 does not use this general phrase; instead, it specifies the various ways in which an offense may be in or affecting commerce. Because these factors are separately listed, defense counsel might attempt to distinguish *Roof* and argue that juries must unanimously determine which § 249 factor was met. We believe adding "singly or in combination" will prevent this from happening.

Add ammunition that has travelled in commerce as a basis for jurisdiction. Section 249 already confers jurisdiction when a defendant uses a firearm, explosive, incendiary device, or other dangerous

weapon that has travelled in interstate or foreign commerce. Section 249 does not, however, currently expressly confer jurisdiction if a defendant uses *ammunition* that has travelled through interstate or foreign commerce. Congress has the authority to penalize possession of ammunition that has travelled in commerce. *See* 18 U.S.C. § 922(g) (penalizing prohibited persons, such as persons with felony convictions, from possessing, among other things, ammunition that has travelled in interstate or foreign commerce). Because it is recognized that Congress may penalize the mere possession of such ammunition, it necessarily follows that Congress may penalize committing a crime with such ammunition.

Add federal prisons to Section 249(a)(3). We also recommend that Congress add crimes occurring in federal prisons to § 249's coverage. Section 249(a)(3) currently applies to crimes occurring in the special maritime and territorial jurisdiction (SMTJ), but courts differ as to whether federal prisons automatically fall inside the SMTJ or whether some additional proof must be submitted to establish this fact. *Compare United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) (testimony that assault occurred in a federal prison sufficient to establish crime occurred in the SMTJ) *with United States v. Davis*, 726 F.3d 357, 365 (2d Cir. 2013) ("[T]he mere fact that the assault took place in a federal prison on federal land—the full extent of the evidence that the Government presented on the jurisdictional question—does not mean that the federal government had jurisdiction over the location of the assault. And, contrary to what the district court told the jury, the Government could not satisfy the jurisdictional element of the offense simply 'by proving that the alleged assault occurred in a federal prison on federal land.").

Expressly adding federal prisons to this provision would give federal prosecutors another avenue to address racially based gang violence in prison, where racial and ethnic differences often lead to gang violence.

E. Direct the Sentencing Commission to Review and Amend the Guidelines to Allow the Hate Crime Enhancement to Apply to Law Enforcement Officers

We propose that Congress direct the Sentencing Commission to review and amend § 3A1.1 of the Sentencing Guidelines to apply to police officers—and other defendants who act under color of law—in cases where defendants targeted their victims because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person. Section 3A1.1 currently allows federal courts to increase a defendant's guideline calculation

by three levels if the fact-finder determines, beyond a reasonable doubt, that the defendant intentionally targeted any victim or any property because of one of the enumerated characteristics. But the provision expressly prohibits application of this guideline if a color-of-law enhancement from U.S.S.G. § 2H1.1(b) already applies. This means that, alone of all defendants, law enforcement officers and other public officials are exempt from having their sentences increased to reflect that they acted out of bias motivation. We believe that the proposed change would allow the government to obtain appropriately severe sentences for those law enforcement officers and other public officials who not only violate an individual's civil rights, but are motivated by bias in doing so.