

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

JAMES WILLIAM HILL, III,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

	PAGE
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUE.....	2
STATEMENT OF THE CASE.....	2
1. <i>Factual Background</i>	3
2. <i>Procedural History</i>	4
SUMMARY OF THE ARGUMENT	9
ARGUMENT	
SECTION 249(a)(2) IS CONSTITUTIONAL AS APPLIED IN THIS CASE BECAUSE HILL’S ASSAULT INTERFERED WITH THE VICTIM’S ONGOING PREPARATION OF GOODS FOR INTERSTATE SHIPMENT	11
A. <i>Standard Of Review</i>	12
B. <i>Section 249(a)(2) Has A Commerce Element That Ensures That The Statute As Applied Falls Within Congress’s Commerce Clause Authority</i>	12
C. <i>Section 249(a)(2) Is Constitutional As Applied In This Case Because Congress Can Regulate Interference With Ongoing Commercial Activity And Because The Government Proved That Hill’s Assault Interfered With Tibbs’s Preparation Of Packages For Interstate Shipment</i>	17
D. <i>The District Court Made Several Errors In Concluding That This Prosecution Fell Outside Congress’s Commerce Clause Authority</i>	23

TABLE OF CONTENTS (continued):	PAGE
1. <i>The District Court Erred In Stating That Hill’s Assault, By Itself, Needed To Substantially Affect Interstate Commerce Or That The Assault Needed To Adversely Affect Amazon’s Commercial Activity</i>	23
2. <i>The District Court Erred In Concluding That Application Of Section 249(a)(2) In This Case Would Render The Statute Limitless</i>	25
CONCLUSION	29
STATEMENT REGARDING ORAL ARGUMENT	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Arizona v. Gant</i> , 556 U.S. 332 (2009)	14
<i>Jones v. United States</i> , 529 U.S. 848 (2000)	17, 21
<i>Russell v. United States</i> , 471 U.S. 858 (1985).....	17
<i>Taylor v. United States</i> , 136 S. Ct. 2074 (2016).....	18-19, 23, 27
<i>United States v. Aman</i> , 480 F. App’x 221 (4th Cir.), cert. denied, 568 U.S. 919 (2012).....	18
<i>United States v. Carr</i> , 652 F.3d 811 (7th Cir.), cert. denied, 565 U.S. 1084 (2011).....	21, 23
<i>United States v. Clausen</i> , 328 F.3d 708 (3d Cir.), cert. denied, 540 U.S. 900 (2003).....	23
<i>United States v. Cristobal</i> , 293 F.3d 134 (4th Cir.), cert. denied, 537 U.S. 963 (2002).....	27
<i>United States v. Danks</i> , 221 F.3d 1037 (8th Cir. 1999), cert. denied, 528 U.S. 1091 (2000).....	14
<i>United States v. Darby</i> , 312 U.S. 100 (1941)	20
<i>United States v. Dorsey</i> , 418 F.3d 1038 (9th Cir. 2005)	14
<i>United States v. Gallimore</i> , 247 F.3d 134 (4th Cir. 2001)	12
<i>United States v. Gibert</i> , 677 F.3d 613 (4th Cir.), cert. denied, 568 U.S. 889 (2012).....	24
<i>United States v. Hill</i> , 700 F. App’x 235 (4th Cir. 2017)	<i>passim</i>
<i>United States v. Jimenez</i> , 256 F.3d 330 (5th Cir. 2001), cert. denied, 534 U.S. 1140 (2002).....	27-28

CASES (continued):	PAGE
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	7, 12-13, 24
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	7, 13
<i>United States v. Patton</i> , 451 F.3d 615 (10th Cir. 2006), cert. denied, 549 U.S. 1213 (2007).....	21
<i>United States v. Rodia</i> , 194 F.3d 465 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000).....	16
<i>United States v. Simpson</i> , 659 F. App'x 158 (4th Cir. 2016)	24-25
<i>United States v. Terry</i> , 257 F.3d 366 (4th Cir.), cert. denied, 534 U.S. 1035 (2001).....	18
<i>United States v. Umaña</i> , 750 F.3d 320 (4th Cir. 2014), cert. denied, 135 S. Ct. 2856 (2015).....	15
<i>United States v. Wang</i> , 222 F.3d 234 (6th Cir. 2000)	21
<i>United States v. Wells</i> , 98 F.3d 808 (4th Cir. 1996).....	14
<i>United States v. Williams</i> , 342 F.3d 350 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004).....	23, 27
<i>United States v. Wilson</i> , 118 F.3d 228 (4th Cir. 1997).....	12
STATUTES:	
Hobbs Act, 18 U.S.C. 1951.....	10
18 U.S.C. 1951(a)	18
18 U.S.C. 1951(b)(3)	18
Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 18 U.S.C. 249(a)(2)	2, 4
18 U.S.C. 249(a)(2)(B)	2, 9, 16
18 U.S.C. 249(a)(2)(B)(iv)	2

STATUTES (continued):	PAGE
18 U.S.C. 249(a)(2)(B)(iv)(I)	<i>passim</i>
18 U.S.C. 249(a)(2)(B)(iv)(II)	6, 26
18 U.S.C. 844(i)	10, 17
18 U.S.C. 922(q)(2)(A)	13
18 U.S.C. 1959(a)	15
18 U.S.C. 1959(a)(1)	15
18 U.S.C. 1959(b)(2)	15
18 U.S.C. 3231	1
18 U.S.C. 3731	1
28 U.S.C. 1291	1

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

On August 15, 2018, the district court entered a judgment of acquittal. J.A. 42.¹ On September 11, 2018, the United States filed a timely notice of appeal. J.A. 552. The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 18 U.S.C. 3731 and 28 U.S.C. 1291.

¹ “J.A. ____” refers to the page number of the Joint Appendix filed by the United States along with this brief.

STATEMENT OF THE ISSUE

It is a federal crime to commit certain bias-motivated acts of violence that “interfere[] 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). A jury found that the defendant in this case violated Section 249(a)(2) when he assaulted a coworker who was actively preparing goods for interstate shipment at an Amazon warehouse. The question presented is whether this application of Section 249(a)(2) fits within Congress’s Commerce Clause authority.

STATEMENT OF THE CASE

This case concerns Section 249(a)(2), a provision of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, which criminalizes “willfully caus[ing] bodily injury to any person * * * because of the [person’s] actual or perceived * * * sexual orientation” when there is an adequate nexus between the assault and interstate commerce. 18 U.S.C. 249(a)(2). Section 249(a)(2) requires the government to prove such a nexus to interstate commerce in each case as an element of the offense. 18 U.S.C. 249(a)(2)(B). The government can meet the commerce element by proving, among other things, that the offense “interfere[d] with commercial or other economic activity in which the victim [was] engaged at the time of the conduct” or that the offense “otherwise affect[ed] interstate or foreign commerce.” 18 U.S.C. 249(a)(2)(B)(iv).

1. *Factual Background*

James William Hill, III, the defendant, assaulted his coworker Curtis Tibbs at an Amazon warehouse in Virginia while both men were actively preparing goods for interstate shipment. J.A. 327-329. Hill's duties included taking products off conveyor belts and placing them into bins, while Tibbs's duties included collecting products from these bins, packaging them, and placing them on another conveyor belt. J.A. 319, 321. Video of the assault shows Tibbs carrying products in his hands when Hill punches him several times in the face without provocation, causing the products to fly into the air and scatter across the warehouse floor.² The assault left Tibbs with significant bruising and cuts on his face as well as a bloody nose. J.A. 329, 337-338. Tibbs went to the hospital and did not return to work for the remainder of his shift. J.A. 335-336. Amazon closed the area where Tibbs and Hill had been working to clean Tibbs's blood off the floor but did not miss an unusual number of shipment deadlines because it reassigned their work to other areas. J.A. 364, 429, 431-432, 462. Hill admitted to both an Amazon investigator and a local police officer that he assaulted Tibbs because Tibbs was gay. J.A. 353, 383.

² The entire assault was captured on video, which was admitted into evidence. The United States has sent a CD copy of the relevant trial exhibits to the Clerk's Office for inclusion in the appellate record.

2. *Procedural History*

a. A grand jury in the Eastern District of Virginia returned a one-count indictment, charging Hill with willfully causing bodily injury to Tibbs by punching him because of his actual or perceived sexual orientation in violation of 18 U.S.C. 249(a)(2). To establish the nexus to interstate commerce that the statute requires, the indictment alleged that the offense “interfered with commercial and other economic activity in which [Tibbs] was engaged at the time of the conduct” and that the offense “otherwise affected interstate and foreign commerce.” J.A. 19. Hill moved to dismiss the indictment, arguing, as relevant here, that Section 249(a)(2) was unconstitutional on its face and as applied to him. J.A. 43-67. The district court granted the motion, concluding that Section 249(a)(2) is unconstitutional as applied to Hill because it exceeded Congress’s Commerce Clause authority. J.A. 71-86.

The United States appealed, and this Court reinstated the indictment without resolving the constitutional question. *United States v. Hill*, 700 F. App’x 235 (4th Cir. 2017). The panel majority held that the indictment was “legally sufficient” on its face because it “specifically allege[d] that Hill’s conduct had an effect on interstate commerce.” *Id.* at 236-237. The Court explained that it would be premature to decide the constitutional issue because that decision “may well

depend on a consideration of facts” that had not yet been developed. *Id.* at 237. The Court thus reversed and remanded for factual development. *Id.* at 237-238.

Judge Wynn wrote separately, stating that he would have upheld Section 249(a)(2) as applied in this case. In his view, the constitutional question was ripe for the Court’s resolution under existing Fourth Circuit precedent. *Hill*, 700 F. App’x at 239-242. Judge Wynn stated that because Congress could regulate the “commercial activity [Tibbs] was engaged in at the time of the assault (*i.e.*, preparing goods for sale and shipment across state lines),” Congress could also criminalize the violent conduct that directly interfered with that activity under existing Supreme Court precedent. *Id.* at 246. Judge Wynn rejected Hill’s argument (and the district court’s conclusion) that Section 249(a)(2) regulates violent conduct rather than economic activity because “[i]t is not the violent *act* itself that triggers Congress’s regulatory authority under the Commerce Clause, but the *effect* of that act on interstate commerce that renders it susceptible to federal regulation.” *Id.* at 247.³

³ The United States filed a petition for panel rehearing, which the Court denied. Without challenging the Court’s conclusion that further factual development was necessary, the United States asked the Court to remove dicta from a footnote that stated that the factual uncertainties in the case “must be resolved before a court can properly rule on Hill’s as-applied constitutional challenge, as the challenge involves determining *whether Hill’s conduct substantially affected interstate commerce.*” *Hill*, 700 F. App’x at 237 n.5 (emphasis added). The United States explained that this language was contrary to
(continued...)

b. On remand, the United States narrowed the case by dropping reliance on the statutory element that the offense “otherwise affect[ed] interstate or foreign commerce.” 18 U.S.C. 249(a)(2)(B)(iv)(II). Instead, the government focused exclusively on the theory that the assault “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); see J.A. 440. The case proceeded to a two-day trial. Regarding the commerce element, the district court instructed the jury that the government must prove beyond a reasonable doubt “that Mr. Hill’s conduct interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct.” J.A. 541. The jury found Hill guilty. J.A. 551.

The district court granted the defendant’s motion for judgment of acquittal and overturned the jury’s verdict in a written opinion. J.A. 23-42. Although the court acknowledged that the evidence was sufficient to satisfy the statute’s commerce element, the court nonetheless concluded that Congress did not have power under the Commerce Clause to reach Hill’s conduct. J.A. 30, 38.⁴

(...continued)

Supreme Court precedent, as described in more detail below. See pp. 23-25, *infra*. The panel majority denied the petition without explanation, while Judge Wynn voted to grant it. J.A. 120-121.

⁴ The district court’s decisions in this case are the first (and only) to find that an application of Section 249(a)(2) exceeds Congress’s Commerce Clause
(continued...)

The district court concluded that Section 249(a)(2), as applied in this case, does not regulate activity that substantially affects interstate commerce.⁵ See J.A. 31. In reaching this conclusion, the court discussed the four factors set forth in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). First, the court found that Section 249(a)(2) regulates “discriminatory crimes of violence” rather than “economic activity.” J.A. 33. The court rejected the United States’ argument that the statute, which included a commerce element, was akin to other federal criminal statutes that target criminal interference with ongoing commerce. See J.A. 33-34. Second, the court found that, under *Morrison*, Congress’s findings that violent hate crimes substantially affect interstate commerce were insufficient to uphold application of the statute. J.A. 35-36. Third, the court found that the “attenuated connection between an assault based on sexual orientation and interstate commerce * * * does not support applying [Section 249(a)(2)] to Hill” because the “fulfillment center

(...continued)

authority. See *Hill*, 700 F. App’x at 244 (Wynn, J., dissenting) (summarizing Section 249(a)(2) case law).

⁵ Congress can regulate in three areas under its Commerce Clause power: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce”; and (3) activities that have a substantial relation to or that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). The parties agree that Congress’s power to enact the portion of Section 249(a)(2) at issue in this case can stem only from the third category.

performed as usual.” J.A. 37. The court thus concluded that whether one “looks at [Tibbs’s] activity of putting items into boxes or Amazon’s unaffected performance, any connection between the [Section 249(a)(2)] violation and interstate commerce is too attenuated to justify applying the statute to Hill.” J.A. 37.

Finally, the court found that Section 249(a)(2) “comes closest to passing constitutional muster as applied to Hill through its jurisdictional element, which requires the offense to interfere with the victim’s commercial or economic activity.” J.A. 37. The court acknowledged that the “government met its burden of proof on this jurisdictional element” but noted that the jury’s finding “does not resolve the constitutional question of law—whether the conduct *in this case* *substantially* affected interstate commerce.” J.A. 38 (emphasis added). Relying on a series of line-drawing concerns, the court concluded that the jury’s finding was insufficient to make the prosecution constitutional. J.A. 38-39. The court reasoned that if it “applied [Section 249(a)(2)] to Hill, the reach of [the statute] would barely have an end, as the statute could cover any conduct that occurs anywhere, as long as the government can show the victim was ‘engaged’ in some sort of economic activity.” J.A. 38-39 (citation omitted). The court feared that this could “effectively federalize commercial property” even where the conduct “has no connection to the commercial nature of the premises” and that Section 249(a)(2)

“could even extend into someone’s home if, for example, they prepared, packaged, and shipped merchandise out-of-state.” J.A. 39.

The court thus concluded that Hill’s conduct does not “bear a substantial relation to interstate commerce” and, as a result, that Section 249(a)(2) “as applied to Hill exceeds Congress’s authority under the Commerce Clause.” J.A. 40.

c. The United States timely appealed the district court’s judgment of acquittal. J.A. 552-553.

SUMMARY OF THE ARGUMENT

Section 249(a)(2), as applied in this case, is a valid exercise of Congress’s authority to regulate interstate commerce because Congress has power under the Commerce Clause to criminalize a workplace assault that interfered with a fellow worker’s ongoing preparation of goods for interstate shipment. Section 249(a)(2), unlike statutes that the Supreme Court has struck down, includes a commerce element that requires the government to prove a nexus to commerce in each case. See 18 U.S.C. 249(a)(2)(B). The jury found that element satisfied here because it concluded that “Mr. Hill’s conduct interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct,” namely, packing boxes for interstate shipment at an Amazon warehouse. J.A. 541.

That finding and the evidence here suffices not only to satisfy the statutory commerce element but also to meet the requirements of the Commerce Clause.

Courts have consistently held that Congress can regulate interference with ongoing commercial activity that Congress can otherwise regulate. Cases applying and interpreting the federal arson statute, 18 U.S.C. 844(i), and the Hobbs Act, 18 U.S.C. 1951, demonstrate this. Courts have described both statutes as regulating conduct that is not inherently economic: arson and robbery, respectively. But both statutes contain commercial-nexus requirements, requiring the government to prove a connection to commerce in each case. In interpreting and ruling on challenges to both statutes, courts have consistently held that the statutes can be applied where the government proves interference with ongoing commercial activity. That is, the federal government can prosecute arson of a building that is used for some commercial purpose or robbery of an individual or business that is engaged in commercial activity. The same principle applies here. Bias-motivated assaults are not, standing alone, economic conduct. But where, as here, a bias-motivated assault directly interferes with a worker's preparation of packages for interstate shipment, Congress has the power to criminalize it.

The district court erred in reaching a contrary conclusion. The court stated incorrectly that the issue was whether Hill's assault *by itself* substantially affected interstate commerce. It is true that Congress can only exercise its Commerce Clause authority under the relevant portions of *Lopez* and *Morrison* if the *category* of conduct that it seeks to regulate substantially affects interstate commerce. But

each individual *application* of a federal statute need not itself target conduct that substantially affects interstate commerce. Moreover, contrary to the district court's suggestion, the application of a federal statute is not limited to activity that has an adverse economic impact on a commercial entity; rather, interference with the ongoing commercial activity of an individual suffices.

Finally, the district court's concern that Section 249(a)(2) would be boundless if applied in this case is unwarranted. The statutory text meaningfully limits the reach of the statute, and the as-applied challenge at issue is by definition limited to the facts of this case.

ARGUMENT

SECTION 249(a)(2) IS CONSTITUTIONAL AS APPLIED IN THIS CASE BECAUSE HILL'S ASSAULT INTERFERED WITH THE VICTIM'S ONGOING PREPARATION OF GOODS FOR INTERSTATE SHIPMENT

Section 249(a)(2) is constitutional as applied here because the relevant commerce element, which was satisfied, required interference with ongoing commercial activity in which the victim was engaged. That is, the district court instructed the jury that the government must prove "that Mr. Hill's conduct interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct" (J.A. 541), and the jury's guilty verdict means that the government proved that requisite commercial nexus beyond a reasonable doubt. This prosecution is thus well within Congress's Commerce Clause authority

because courts have long recognized that Congress has the power to regulate direct interference with commercial activity (here, the assault) where Congress could regulate the underlying commercial activity (here, Tibbs's preparation of goods for interstate shipment).

A. *Standard Of Review*

This Court reviews "the district court's grant of a motion for a judgment of acquittal *de novo*." *United States v. Wilson*, 118 F.3d 228, 234 (4th Cir. 1997). To the extent that there are factual disputes, the Court must view the facts in the light most favorable to the government. See *United States v. Gallimore*, 247 F.3d 134, 136 (4th Cir. 2001).

B. *Section 249(a)(2) Has A Commerce Element That Ensures That The Statute As Applied Falls Within Congress's Commerce Clause Authority*

Section 249(a)(2)(B)(iv)(I)'s commerce element requiring proof of direct interference with ongoing commerce ensures that each application of the statute under that element falls within a recognized area of Congress's Commerce Clause power.

The Supreme Court has long held that Congress has the power to regulate activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). This power includes the authority to regulate categories of criminal conduct that substantially affect interstate commerce, but it does not permit Congress to "regulate noneconomic, violent criminal conduct based solely

on that conduct's aggregate effect on interstate commerce.” *United States v. Morrison*, 529 U.S. 598, 617 (2000). The Court in *Lopez* and *Morrison* thus refused to consider the downstream economic effects (such as lost productivity) of gun-based crime or gender-based violence on interstate commerce because that would allow Congress to regulate “not only all violent crime, but all activities that might lead to violent crime.” *Morrison*, 529 U.S. at 612-613 (citation omitted); accord *Lopez*, 514 U.S. at 564.

Critical to the Court's decisions in *Lopez* and *Morrison* was its observation that the statutes at issue in those cases lacked an element requiring proof of a nexus in each case between the regulated activity and commerce. *Morrison*, 529 U.S. at 611-612; accord *Lopez*, 514 U.S. at 561-562. The Court held in *Lopez*, for example, that the Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause power because the prohibition on firearm possession in a school zone “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.” 514 U.S. at 551.

Congress responded to the holding in *Lopez* by adding a commerce element to the statute. The amended statute now 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 held that the addition of this element transformed a non-economic statute into a statute that fell within Congress's Commerce Clause power and that the federal government can constitutionally enforce the statute whenever it can prove the commerce element. See, e.g., *United States v. Danks*, 221 F.3d 1037, 1038-1039 (8th Cir. 1999) (concluding that the addition of the commerce element brings the statute within Congress's Commerce Clause authority), cert. denied, 528 U.S. 1091 (2000); *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); see also *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996) ("The existence of this jurisdictional element, requiring the Government to show that a nexus exists between the firearm and interstate commerce to obtain a conviction under § 922(g), distinguishes *Lopez* and satisfies the minimal nexus required for the Commerce Clause.").

Indeed, courts routinely uphold applications of criminal statutes as valid exercises of Congress's Commerce Clause authority when the statutes require proof of a nexus to interstate commerce. See *United States v. Hill*, 700 F. App'x 235, 249 (4th Cir. 2017) (Wynn, J., dissenting) ("Defendant has identified no case in which a federal criminal statute including such a jurisdictional element has been

held to exceed Congress's authority under the Commerce Clause, nor have I found any.”). This Court, for example, has upheld a conviction for murder in aid of racketeering under 18 U.S.C. 1959(a)(1), rejecting the defendant's argument that it regulated “quintessential, noneconomic, local activity.” See *United States v. Umaña*, 750 F.3d 320, 336 (4th Cir. 2014), cert. denied, 135 S. Ct. 2856 (2015). The Court affirmed the conviction because the statute did not just regulate murder, but instead included an element that required a commercial connection. *Id.* at 337 (distinguishing *Lopez* and *Morrison* because those cases relied on “the lack of a limiting jurisdictional element”). The Court reasoned that the statute “includes a jurisdictional element that limits its reach to activities connected with enterprises ‘engaged in’ or whose activities ‘affect’ interstate commerce, thereby justifying its constitutionality under the Commerce Clause.” *Ibid.* (quoting 18 U.S.C. 1959(a) and (b)(2)).

Section 249(a)(2) was enacted after *Lopez* and *Morrison*, and Congress, in direct response to those cases, included a statutory element that requires the government prove a nexus to commerce beyond a reasonable doubt in each case. See *Hill*, 700 F. App'x at 243-244 (Wynn, J., dissenting) (discussing Section 249(a)(2)'s text and legislative history). Specifically, the government must prove that the bias-motivated offense satisfies one or more of the following commerce elements:

(i) the conduct * * * occurs during the course of, or as the result of, the travel of the defendant or the victim--

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct * * * ;

(iii) in connection with the conduct * * * , the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct * * * --

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

18 U.S.C. 249(a)(2)(B). Only one of these provisions is relevant to this appeal:

that the crime “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).⁶

⁶ A commerce element that is too broadly drafted may not satisfy the Commerce Clause. See *United States v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000). But Congress generally drafts commerce elements to comply with existing Commerce Clause precedent, as is the case here. See pp. 17-20, *infra*. Courts have therefore upheld prosecutions where the evidence is sufficient to satisfy those elements.

C. *Section 249(a)(2) Is Constitutional As Applied In This Case Because Congress Can Regulate Interference With Ongoing Commercial Activity And Because The Government Proved That Hill's Assault Interfered With Tibbs's Preparation Of Packages For Interstate Shipment*

Application of Section 249(a)(2) to the facts of this case falls well within Congress's Commerce Clause power because courts have long recognized that Congress can regulate interference with ongoing engagement in commercial activity, which the government proved here.

1. The federal arson statute, for example, validly criminalizes destruction of property that is used for a commercial purpose. The statute prohibits using fire or explosives to damage or destroy "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i). In *Jones v. United States*, the Supreme Court invoked the doctrine of constitutional avoidance to construe the statute as prohibiting the burning of buildings used for commercial purposes but not the burning of owner-occupied residences that are not used for commercial purposes. 529 U.S. 848, 855-858 (2000); see also *Russell v. United States*, 471 U.S. 858, 862 (1985) (upholding the federal arson statute as applied in a case involving destruction of a two-unit apartment building used as rental property).

This Court has relied on *Jones* to reject challenges to the application of the federal arson statute where defendants have burned buildings that are used for some commercial purpose. For example, the Court rejected a Commerce Clause

challenge to a prosecution for setting fire to a restaurant. *United States v. Aman*, 480 F. App'x 221 (4th Cir.), cert. denied, 568 U.S. 919 (2012). In reaching that conclusion, the Court reasoned that the building was “actively employed in a commercial activity.” *Id.* at 224. The Court similarly rejected a defendant’s challenge to his arson conviction where he set fire to a church. *United States v. Terry*, 257 F.3d 366 (4th Cir.), cert. denied, 534 U.S. 1035 (2001). Again, the Court upheld the conviction because the building contained a daycare center that “was actively engaged in commercial activity by participating in the market for childcare services.” *Id.* at 370.

Similarly, the federal Hobbs Act validly criminalizes robberies that interfere with commercial activity. The Act prohibits robberies that affect “commerce over which the United States has jurisdiction.” 18 U.S.C. 1951(a) and (b)(3). In *Taylor v. United States*, the Supreme Court held that when a person “robbed or attempted to rob a drug dealer of drugs or drug proceeds,” the government need not introduce further evidence of the robbery’s impact on interstate commerce. 136 S. Ct. 2074, 2078 (2016). The Court explained that “[b]y targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction.” *Ibid.* *Taylor* thus makes clear: Where Congress has Commerce Clause power to regulate the underlying commercial activity (there,

drug dealing), Congress also has the power to protect commerce by criminalizing violence against individuals that interferes with that activity.

The federal arson and Hobbs Act cases thus stand for the proposition that Congress can regulate violent interference with ongoing commercial activity if Congress could otherwise regulate the commercial activity itself. That is, where Congress can regulate the activities for which a building is used—restaurants, daycare centers, or rental properties—Congress can protect the commerce therein by prohibiting arson of such buildings. And where Congress can regulate the underlying commercial activity in which a victim is engaged—such as drug dealing—Congress can also criminalize a robber’s interference with that commerce.

The commerce element in Section 249(a)(2) at issue here is analogous because it protects interstate commerce by criminalizing violent acts against individuals who are actively engaged in commercial or economic activity when those violent acts interfere with such activity. See 18 U.S.C. 249(a)(2)(B)(iv)(I). Indeed, the commerce element in this case functions just like the application of the commerce element in *Taylor*. The underlying activity in *Taylor* was the “sale of marijuana”; because Congress has the authority to regulate that activity, Congress could also criminalize interference with that activity (*i.e.*, the robbery of an individual drug dealer). 136 S. Ct. at 2080. Here, the underlying activity is the

preparation of goods for interstate shipment, which Congress has authority to regulate under the Commerce Clause. See *United States v. Darby*, 312 U.S. 100, 113 (1941) (holding that the “the shipment of manufactured goods interstate” is commercial activity and that Congress has the power to prohibit shipment of such products in certain circumstances). Because Congress can regulate that activity, Congress also has the power to criminalize violent interference with individuals actively engaged in that activity, which is the nexus that Section 249(a)(2)(b)(iv)(I) requires. As Judge Wynn explained in the prior appeal:

The Supreme Court has consistently held that Congress has the authority to regulate criminal conduct that interferes with ongoing commercial activity subject to congressional regulation. And the Commerce Clause assuredly empowers Congress to regulate the sale and shipment of goods across state lines. Therefore, Congress may proscribe conduct—including violent assaults on individuals engaged in interstate commercial activity—that interferes with that activity.

Hill, 700 F. App’x at 238 (Wynn, J., dissenting) (citations omitted).

2. The district court erred when it found that Section 249(a)(2) was unlike the arson statute and the Hobbs Act because, in the court’s view, those statutes regulated inherently economic activity while Section 249(a)(2) did not. J.A. 33-34. All three statutes require a nexus to interstate commerce. They all regulate commercial or economic activity *because of* their commerce elements—not because the underlying offense conduct, in isolation, targets economic activity. It is true that there is nothing inherently economic about bias-motivated assaults

standing alone. But, as courts have noted, that is equally true of arson and robbery. Courts have found that the federal government cannot criminalize all arson or robberies. See *Jones*, 529 U.S. at 859 (holding that the arson statute cannot be applied to owner-occupied residences); *United States v. Wang*, 222 F.3d 234, 246 (6th Cir. 2000) (holding that the Hobbs Act cannot be applied to robbery of a family). Rather, the federal government can only prosecute those offenses that satisfy the statutes' commerce elements, which require a nexus to commerce in each case. See *United States v. Carr*, 652 F.3d 811, 813 (7th Cir.) ("Although robbery itself is not necessarily economic activity, Carr's crime targeted a business engaged in interstate commerce."), cert. denied, 565 U.S. 1084 (2011); *United States v. Patton*, 451 F.3d 615, 633 (10th Cir. 2006) ("[T]he jurisdictional hook serve[s] the purpose of limiting the statute to arson cases where there really was a substantial and non-attenuated effect on interstate commerce."), cert. denied, 549 U.S. 1213 (2007).

The same is true of Section 249(a)(2). It regulates economic activity rather than violent crime because, like the arson statute and the Hobbs Act, it requires that the government prove a direct commercial connection in each case. The commerce elements in all three statutes ensure that the statutes regulate commerce even though Congress could not regulate the underlying conduct without a commercial nexus. *Hill*, 700 F. App'x at 250 (Wynn, J., dissenting) (noting that

Section 249(a)(2) “does not give the federal government general license to punish crimes of violence motivated by discriminatory animus”) (internal quotation marks and citation omitted).

3. The only issue on appeal here is whether the application of Section 249(a)(2) to the facts of *this* case satisfies the Commerce Clause. The answer is yes. The government proved the requisite interference with ongoing commercial activity because the evidence showed that Hill’s assault interrupted Tibbs’s packaging of goods for interstate shipment at an Amazon warehouse. The district court specifically instructed the jury that it could only convict when it found such interference. Tracking the statutory language, the court instructed the jury that the government must prove beyond a reasonable doubt “that Mr. Hill’s conduct interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct.” J.A. 541. The jury convicted, concluding that the commerce element was met and that there was interference with ongoing commercial activity (J.A. 551), and the district court agreed that the commerce evidence was sufficient under the statute (J.A. 38). The jury’s finding on the facts of this case brings this case within Congress’s well-established power to regulate interference with ongoing commercial activity. This Court should thus reject Hill’s as-applied challenge.

D. The District Court Made Several Errors In Concluding That This Prosecution Fell Outside Congress's Commerce Clause Authority

The district court committed a number of analytical errors in concluding that the application of Section 249(a)(2) in this case exceeded Congress's Commerce Clause authority.

1. The District Court Erred In Stating That Hill's Assault, By Itself, Needed To Substantially Affect Interstate Commerce Or That The Assault Needed To Adversely Affect Amazon's Commercial Activity

The district court stated incorrectly that the issue was “whether the conduct in this case substantially affected interstate commerce.” J.A. 38. The Commerce Clause does not require that the government prove a substantial effect on interstate commerce *in each individual case*. As the Supreme Court has made clear, “it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal.” *Taylor*, 136 S. Ct. at 2081; see *United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003) (noting that after *Lopez* and *Morrison*, courts “have uniformly held that the Hobbs Act’s jurisdictional predicate still requires only a minimal effect on commerce”), cert. denied, 540 U.S. 1169 (2004); see also *Carr*, 652 F.3d at 813 (“[T]he law of this circuit requires the government to show only that the charged crime had a ‘*de minimis*’ or slight effect on interstate commerce.”); *United States v. Clausen*, 328 F.3d 708, 711 (3d Cir.) (“In any individual case, proof of a *de minimis* effect on interstate commerce is all that is required.”), cert. denied, 540 U.S. 900 (2003).

To be sure, Congress may not legislate under the relevant portion of *Lopez* unless the regulated *category* of conduct substantially affects interstate commerce. *Lopez*, 514 U.S. at 559. But the government need not prove that each individual interference with commerce by itself substantially affects interstate commerce. In stating otherwise, the district court conflated the standard that Congress must meet to pass legislation with the standard that needs to be satisfied in each individual prosecution. “[T]he 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, 568 U.S. 889 (2012).

The district court also erred by relying on the assault’s supposed lack of adverse effect on Amazon’s commercial operations. J.A. 37. The Commerce Clause does not limit Congress’s authority to regulate commerce to only activity that adversely affects a particular commercial entity. Congress can protect people who are actively engaged in interstate commerce, not just property or businesses. For example, this Court affirmed a Hobbs Act conviction where a defendant robbed delivery drivers from two chain restaurants without requiring proof of an adverse effect on those restaurants’ business. See *United States v. Simpson*, 659 F. App’x 158 (4th Cir. 2016). The Court held that taking even “small sums” of money from the drivers, who were “performing tasks within the scope of

employment when they were robbed,” was sufficient to satisfy the statute’s commerce element and the Commerce Clause. *Id.* at 161. The Court did not inquire into whether the robbery prevented the delivery of meals or affected either company’s bottom line.

The dispositive question for Commerce Clause purposes is whether Hill’s conduct affected *the victim’s* ongoing commercial activity, which Section 249(a)(2)(B)(iv)(I) appropriately recognizes. Directly interfering with an individual’s economic or commercial activity is sufficient to satisfy the Commerce Clause; there need not be a significant adverse impact on the ongoing commercial or economic activity of any particular business entity. And here, the interference is plain given that Hill prevented Tibbs from preparing packages for interstate shipment at an Amazon warehouse.

2. *The District Court Erred In Concluding That Application Of Section 249(a)(2) In This Case Would Render The Statute Limitless*

The district court also erred when it stated that applying Section 249(a)(2) to Hill would mean that the “reach of the [statute] would barely have an end, as the statute could cover any conduct that occurs anywhere, as long as the government can show that the victim was ‘engaged’ in some sort of economic activity.” J.A. 38-39. But this is merely an as-applied challenge to Congress’s authority to criminalize the particular activity at issue here: an assault that interfered with the victim’s preparation of packages for interstate shipment at an Amazon warehouse.

That fits well within Congress’s authority under the Commerce Clause. The possibility that the statute could reach some other conduct in a different prosecution is irrelevant here and would be more appropriately addressed in a future as-applied challenge.

In any event, the district court was wrong when it stated that applying Section 249(a)(2) in this case would “effectively federalize commercial property, even when the conduct—here, violence based on discriminatory animus—has no connection to the commercial nature of the premises.” J.A. 39. The assault here had an obvious connection to the commercial nature of the premises (an Amazon warehouse): The assault interfered with Tibbs’s packaging of goods for interstate shipment at that warehouse.

Moreover, the relevant commerce element is carefully circumscribed to apply only where there is proof that the conduct *interfered* with *ongoing* commercial or economic activity. See 18 U.S.C. 249(a)(2)(B)(iv)(I).⁷ That is, the statute applies only where the prohibited conduct “*interferes* with commercial or other economic activity in which the victim is engaged *at the time* of the conduct.” *Ibid.* (emphasis added). If the victim was not engaged in commercial activity at

⁷ As already explained, Section 249(a)(2)(B)(iv)(II), which criminalizes bias-motivated assaults that “otherwise affect[] interstate or foreign commerce,” is no longer at issue in this case, and the outer limits of the application of that provision are not relevant to this appeal.

the time of the defendant's conduct (*e.g.*, the victim was on a lunch break or was walking from the parking lot to his work site), or if the bias-motivated conduct did not interfere with such commercial activity in any way, Section 249(a)(2)(b)(iv)(I) would not apply.⁸

The district court's more specific concern that Section 249(a)(2)'s application in this case would criminalize conduct inside a private home (J.A. 39) is similarly misguided. Again, this is an as-applied challenge to a prosecution for an assault of a worker who was preparing boxes for interstate shipment at an Amazon warehouse, not a challenge to a prosecution for an assault inside a private home. This Court accordingly need not address that hypothetical application of the statute. And in any event, the federal government may reach conduct inside a private home under the Commerce Clause if there is a sufficient nexus to interstate commerce, as the statute itself requires. See *Taylor*, 136 S. Ct. 2074 (affirming Hobbs Act convictions for robberies that targeted the homes of two drug dealers); *United States v. Jimenez*, 256 F.3d 330, 336 (5th Cir. 2001) ("Despite the Supreme

⁸ The United States need not prove that there was some sort of commercial motive or intent to interfere with ongoing commercial activity; neither the statute nor the Commerce Clause requires such a motivation. See, *e.g.*, *United States v. Cristobal*, 293 F.3d 134, 146 (4th Cir.) (arson that targets property owned by a business can be federally regulated even though the motive for the arson was a personal family dispute between the defendant and employees of the business), cert. denied, 537 U.S. 963 (2002); *Williams*, 342 F.3d at 354 (Hobbs Act "does not require proof that a defendant intended to affect commerce."); see also *Hill*, 700 F. App'x at 247 (Wynn, J., dissenting) (collecting additional cases).

Court decisions in *United States v. Lopez*, and *United States v. Morrison*, the arson of a building—even a private home—containing an active business will often satisfy” the Commerce Clause.) (citation omitted), cert. denied, 534 U.S. 1140 (2002).

In short, this as-applied challenge requires the Court to determine only whether Congress has the power under the Commerce Clause to criminalize an assault that directly and immediately prevented the victim from continuing to prepare goods for interstate shipment. Congress has that authority, because courts have long recognized Congress’s power to criminalize violent interference with ongoing commercial activity (such as the preparation of goods for interstate shipment) that Congress would otherwise have the power to regulate.

CONCLUSION

For these reasons, this Court should reverse the judgment of acquittal and remand for reinstatement of the jury's guilty verdict.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in this case.

CERTIFICATE OF COMPLIANCE

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

(1) contains 6338 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Vikram Swaruup
VIKRAM SWARUUP
Attorney

Dated: November 30, 2018

CERTIFICATE OF SERVICE

I certify that on November 30, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT with the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that one paper copy of the foregoing brief was sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by Federal Express on November 30, 2018.

s/ Vikram Swaruup
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