No. __-_____ (19A596)

IN THE

Supreme Court of the United States

JAMES WILLIAM HILL, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 21, 2020

QUESTION PRESENTED

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249, criminalizes, among other things, assaults based on the victim's perceived sexual orientation. The Act sets forth several jurisdictional "circumstances" when it applies. The one at issue here makes it a federal crime to commit a bias-motivated assault if that conduct "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct." 18 U.S.C. § 249(a)(2)(B)(iv)(I). It does not require that the victim be engaged in interstate or foreign commerce, and it does not require a substantial effect on commerce. Petitioner James Hill was charged under this jurisdictional prong for punching a co-worker.

The question presented here has divided lower-court judges: Does 18 U.S.C. § 249(a)(2)(B)(iv)(I) exceed Congress's power under the Commerce Clause?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Hill*, No. 18-4660, United States Court of Appeals for the Fourth Circuit. Judgment entered June 13, 2019, and rehearing denied September 24, 2019.

(2) *United States v. Hill*, No. 16-4299, United States Court of Appeals for the Fourth Circuit. Judgment entered August 18, 2017, and rehearing denied September 7, 2017.

(3) *United States v. Hill*, No. 3:16-CR-009, United States District Court for the Eastern District of Virginia. Judgment of acquittal entered August 15, 2018.

(4) *Commonwealth v. Hill*, No. GC15004288-00, Chesterfield County, Virginia, General District Court. Nolle prosequi entered August 11, 2015.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Constitutional Provision, Statutes, and Rule

Legislative Materials

Other Sources

PETITION FOR WRIT OF CERTIORARI

Petitioner James William Hill, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at pages 1a to 39a of the appendix to the petition and is reported at 927 F.3d 188 (4th Cir. 2019). The unpublished ruling of the district court appears at pages 40a to 48a of the appendix to the petition and is available at 2018 WL 3872315 (E.D. Va. Aug. 15, 2018).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the government's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3731. That court issued its opinion and judgment on June 13, 2019. The court of appeals denied Petitioner's timely petition for rehearing en banc on September 24, 2019. The Chief Justice granted two extensions of time, first to January 22, 2020, and then to February 21, 2020, in which to file this petition, in application 19A596. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution provides, in relevant part, that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3 ("the Commerce Clause").

Section 249(a) of Title 18, United States Code, provides in relevant part:

> (2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.–
>
> > (A) In general.–Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person . . . because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person–
> >
> > > (i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both[.] . . .
> >
> > (B) Circumstances described.–For purposes of subparagraph (A), the circumstances described in this subparagraph are that– . . .
> >
> > > (iv) the conduct described in subparagraph (A)–
> > >
> > > > (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct[.] . . .

18 U.S.C. § 249(a)(2) (the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009).

STATEMENT OF THE CASE

Introduction

Petitioner James Hill was charged with a federal felony offense for punching a co-worker. Mr. Hill and the victim, Curtis Tibbs, were working a shift together at an Amazon warehouse in Chester, Virginia, when Mr. Hill punched Mr. Tibbs in the face. Mr. Tibbs left work, but Amazon did not suffer any impact at all on its warehouse operations. The government alleged that Mr. Hill assaulted Mr. Tibbs because Tibbs was gay, which brought the assault within the scope of the federal Hate Crimes Prevention Act.

This case turns on the validity of the jurisdictional prong in the HCPA that the government relied on in charging Mr. Hill. That provision extends federal jurisdiction to an assault that "interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct." Mr. Hill argues that Congress cannot regulate non-economic violent crimes unless they have a substantial effect on interstate commerce. Because the HCPA's jurisdictional prong at issue requires no nexus between the regulated violent crime and interstate commerce, let alone a substantial one, it exceeds the power granted to Congress by the Commerce Clause.

The district court agreed with Mr. Hill and held the statutory provision unconstitutional. But a sharply divided panel of the Fourth Circuit reversed, with the majority finding the HCPA to be an economic regulation within Congress's authority to enact. The majority's decision conflicts with this Court's rulings on the scope of the Commerce Clause power in *United States v. Morrison* and *United States v. Lopez*. The Court should grant Mr. Hill's petition and reverse the Fourth Circuit's judgment, in order to ensure that federal law remains within its proper bounds and does not encroach on the state's traditional police power.

Motion to Dismiss and the Government's First Appeal

Mr. Hill was originally arrested and charged with a state misdemeanor assault arising from the incident at the Amazon warehouse. App. 40a.[1] Soon, however, the federal government asserted an interest. At the time, Virginia's hate crimes statute

[1] "App. __" refers to the appendix to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

did not include sexual orientation.[2] The government alleged that a federal statute did apply. A federal grand jury charged Mr. Hill under the Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249(a)(2). The indictment further charged that Mr. Hill committed the assault because of Mr. Tibbs's sexual orientation. App. 7a.

The government relied on one of the HCPA's jurisdictional "circumstances" in asserting that the assault fell within federal authority to prosecute. That prong stated that the assault "interfered with commercial or other economic activity in which [Tibbs] was engaged at the time of the conduct." App. 7a; *see* 18 U.S.C. § 249(a)(2)(B)(iv)(I).

Mr. Hill moved to dismiss the indictment, arguing that the HCPA was unconstitutional. App. 9a, 40a-41a. The district court agreed, holding that the act went beyond the limits of congressional power under the Commerce Clause of the Constitution. App. 9a; *United States v. Hill*, 182 F. Supp. 3d 546, 555-56 (E.D. Va. 2016). Applying the test set out in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the district court concluded that a purely local assault, motivated by alleged bias and not by any economic interest, did not have a substantial effect on interstate commerce. *Hill*, 182 F. Supp. 3d at 552-55.

The government appealed and a divided panel of the Fourth Circuit reversed and remanded for trial. *See United States v. Hill*, 700 F. App'x 235 (4th Cir. 2017). The panel majority did not address the merits of the Commerce Clause challenge, but

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[2] In its 2020 legislative session, the Virginia General Assembly amended the state hate crimes offense to include sexual orientation as a protected category. *See* H.B. 276, 2020 Gen'l Assemb., Reg. Sess. (Va. 2020).

instead decided that the district court's action was premature. *Id.* at 236-37. The court remanded the case for trial, in order for a sufficient factual record to be developed. *Id.* at 237-38. Judge Wynn dissented. *Id.* at 238. He contended that the Commerce Clause issue was cognizable at the pre-trial stage, and that on the merits, the HCPA was constitutional. *Id.* at 239-50.

In remanding the case, the Fourth Circuit observed that the central issue at trial would be "determining whether Hill's conduct *substantially* affected interstate commerce." *Id.* at 237 n.5 (emphasis in original).

The Trial, Acquittal, and the Government's Second Appeal

1. The case proceeded to a jury trial in January of 2018. The evidence at trial showed the following facts. *See* App. 40a.

At the Amazon warehouse, Mr. Hill was a "re-binner," whose job was to take items off a conveyer belt and place them into bins in a wall. Mr. Tibbs worked as a "packer." He took items from the bins, scanned them, placed them into boxes for packaging, and then placed the boxes on a conveyer belt. App. 40a.

During their shift one day in May 2015, Mr. Hill assaulted Mr. Tibbs by punching him in the face. Mr. Tibbs had some cuts and bruises, and he went to the Amazon in-house clinic for a bandage and an ice pack. He later went to a hospital to get checked out, and he missed the rest of his shift. When questioned by Amazon security and a police officer, Mr. Hill made statements indicating that he assaulted Mr. Tibbs because he thought that Tibbs was homosexual. App. 40a.

Amazon shut down the immediate area around where the incident occurred for approximately 30 to 45 minutes to clean it up. Other areas of the warehouse absorbed any work that would have taken place in that area, and the company did not need to call in any replacement workers. An Amazon manager testified that the assault did not cause the facility to miss any "critical pull times," which are "deadlines by which they needed to package orders to reach the customers in time." App. 40a.

A defense expert witness examined Amazon's records for the warehouse and concluded that "I can tell you with complete certainty that Amazon's performance during that shift [when the incident occurred] was no different than any other shift during the month of May." C.A.J.A. 475. More specifically, as the district court described the expert's testimony,

> Amazon shipped 3.3 late packages out of about 48,000 during that shift, which matches the company's performance throughout May of 2015. Amazon shipped 99.9931% of orders on time during the shift at issue, 99.9932% on time for the shift immediately following, and 99.9939% on time during May. Finally, Amazon maintained its performance on May 22 without increased costs, such as overtime.

App. 40a.

The district court instructed the jury that it only had to decide whether the assault "interfered with the commercial or economic activity in which Tibbs was engaged at the time of the conduct." The court rejected Mr. Hill's request to include a requirement that the assault substantially affected interstate commerce. App. 22a. The jury convicted Mr. Hill. App. 41a.

Mr. Hill moved for a judgment of acquittal, which the district court granted. App. 47a. The court held that (1) the HCPA did not regulate economic activity; (2) the legislative findings underpinning the act did not support the exercise of Commerce Clause power; (3) the assault did not have a nexus to interstate commerce; and (4) the act's jurisdictional elements did not save the statute. App. 43a-47a. For those reasons, the court concluded that the HCPA was unconstitutional as applied to Mr. Hill, because Congress could not use its Commerce Clause power to regulate a local incident of violent crime that did not substantially affect interstate commerce. App. 47a.

2. The government appealed again, and a divided panel of the Fourth Circuit reversed. App. 1a-39a. The majority held that the Act was constitutional. App. 8a-21a. The majority analogized the HCPA to the Hobbs Act, 18 U.S.C. § 1951, and the federal arson statute, 18 U.S.C. § 844, and reasoned that the law's jurisdictional prong rendered it a regulation of economic activity within Congress's purview. App. 11a-14a.

Judge Agee dissented. App. 23a-39a. He applied the factors set out in *Lopez* for analyzing the constitutionality of a statute under the Commerce Clause. In his opinion, the jurisdictional hook in the HCPA did not alter what the law regulated at its core: intrastate violent conduct. Because the Act did not require a substantial effect on interstate commerce, it exceeded the scope of what Congress could make into a federal crime. Noting that the majority opinion did not contain a limiting principle, Judge Agee expressed concern that adopting its reasoning would create a general federal police power that would "barely have an end." App. 36a. Finally, in addition to these concerns about federalism, the doctrines of constitutional avoidance and the

rule of lenity counseled in favor of construing the statute not to apply to Mr. Hill's conduct. App. 39a.

Mr. Hill petitioned for rehearing en banc, which the Fourth Circuit denied. App. 49a. But in a statement respecting the denial, Judge Agee wrote that "[t]he issues here are of significant national importance and are best considered by the Supreme Court at the earliest possible date in order to address the essential jurisdictional question under the Commerce Clause." App. 50a. He observed that "[i]n the almost two decades since the Supreme Court opined on how a jurisdictional element could theoretically bring the regulation of noneconomic activity within Congress' Commerce Clause power, it has not applied the broad principles discussed in *Lopez* and *Morrison* to any specific statutory language." Judge Agee suggested that Mr. Hill's case "provides the clear opportunity for the Court to revisit those decisions and provide clarity and direction on an essential constitutional question." App. 53a. He went on to state that, "[g]iven the number of ways in which the Court's decision in this case fails to adhere to the Supreme Court's holdings in *Lopez* and *Morrison* and the unusual statutory language Congress used in subsection (B)(iv)(I), this case is prime for Supreme Court review." App. 53a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for three reasons. First, this case is on all fours with *United States v. Morrison*. Both cases involve statutes regulating bias-motivated violent conduct. Neither statute has a sufficient nexus to interstate commerce. The legislative findings underpinning the HCPA are the same as those

present in *Morrison*. The only difference is that the HCPA has a jurisdictional prong, but it cannot save the statute. That provision does not require a substantial effect on interstate commerce. It merely requires an indirect or tangential connection to commerce. An application of the test from *United States v. Lopez* demonstrates that the HCPA regulates conduct that falls well outside of anything this Court has ever held to be within Congress's domain. The Court should once again limit federal power to its proper scope, by holding that § 249(a)(2)(B)(iv)(I) violates the Commerce Clause.

Second, the Fourth Circuit's ruling incorrectly used the jurisdictional prong to transform the HCPA from a regulation of violent crimes into a regulation of economic activity. This holding conflicts with *Morrison* because a jurisdictional element cannot change the fundamental object of a statute. The Fourth Circuit let the tail wag the dog. And its comparisons to robbery and arson statutes fail as well, both because their jurisdictional language is different, and because those crimes have a closer connection to commerce than a simple assault does.

Finally, the Fourth Circuit's decision would upend the balance between federal and local power. The decision would federalize commercial property and allow for federal prosecution of any workplace violence. All of us spend much of every day engaged in some form of economic activity—either working, or browsing the internet, or consuming commodities shipped in interstate commerce. Under the Fourth Circuit's interpretation of the Commerce Clause, Congress's reach would have no meaningful limit. The implications of the Fourth Circuit's decision are profound, and demand this Court's attention.

The court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). This Court should grant Mr. Hill's petition and reverse the Fourth Circuit's judgment.

I. The Hate Crimes Prevention Act Exceeds Congress's Power Under The Commerce Clause.

A. The Commerce Clause does not create a general federal police power.

"[T]he government of the United States is one of delegated, limited, and enumerated powers." *United States v. Harris*, 106 U.S. 629, 635 (1883). Since the time of the Founding, it was understood that the powers belonging to Congress were "few and defined," whereas those possessed by the States are "numerous and indefinite." The Federalist No. 45, p. 328 (B. Wright ed. 1961) (J. Madison).

"The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) ("*NFIB*"); *see also Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). And the express enumeration of specific categories of commerce that are subject to federal regulation "presupposes something not enumerated," namely, "the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). This system of dual sovereignty serves both as a check on the federal government and as a protector of individual liberty. *See Gamble v. United States*, 139 S. Ct. 1960, 1968-69 (2019).

Among the powers reserved to the States is the "police power"—the ability to "perform many of the vital functions of modern government," including "punishing street crime." *NFIB*, 567 U.S. at 535. "But the Constitution does not grant the federal government a police power or a general authority to combat violent crime." *United States v. Patton*, 451 F.3d 615, 618 (10th Cir. 2006) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) ("Congress has . . . no general right to punish murder committed within any of the States.")).

One of the powers entrusted to the federal government is the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The reach of the Commerce Clause is expansive, but not boundless. The Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB*, 567 U.S. at 536.

The HCPA represents the enactment of a classic police-power statute. It is a regulation of violent crime, and in Mr. Hill's case, a crime committed with no weapons, no interstate travel, and no substantial effect on interstate commerce. The HCPA is simply a federal assault statute, albeit one that only applies to a particular set of victims. Two centuries ago, Chief Justice Marshall recognized that Congress has "no general right to punish" crimes like this. *Cohens*, supra, at 426. The Court should re-affirm that understanding now.

B. The HCPA fails this Court's test for compatibility with the Commerce Clause.

1. The HCPA Framework

The HCPA criminalizes acts of violence motivated by animus based upon "gender, sexual orientation, gender identity or disability." In relevant part, the statute reads as follows:

> (A) Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) . . ., willfully causes bodily injury to any person . . . because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person . . . shall be imprisoned not more than 10 years. . . .

18 U.S.C. § 249(a)(2)(A).

The members of Congress who supported the HCPA wanted to rely upon and invoke the "full scope of [its] Commerce Clause power." App. 9a (quoting H.R. Rep. No. 111-86, pt. 1, at 13 (Apr. 27, 2009) ("House Report")); *see also* 155 Cong. Rec. S10,772-73 (Oct. 27, 2009) (statement of Sen. Leahy) (stating that the HCPA "is desired to apply to the full extent of congressional authority under the Commerce Clause"); *United States v. Jenkins*, 909 F. Supp. 2d 758, 766 (E.D. Ky. 2012).[3]

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[3] To the extent the Court deems the HCPA's legislative history to be a useful interpretive tool, it is not uniformly in support of the act's constitutionality. Various legislators raised constitutional objections to the HCPA when it was attached as an amendment to the National Defense Authorization Act for Fiscal Year 2010. *See, e.g.*, 155 Cong. Rec. S7,676 (July 20, 2009) (statement of Sen. Sessions) ("The Supreme Court has held that violent conduct that does not target economic activity is among the types of crimes that have the least connection to Congress's commerce power. However, this is precisely the sort of violent, noneconomic conduct that this amendment would federalize."); 155 Cong. Rec. H4,942 (Apr. 29, 2009) (statement of Rep. Smith) ("[T]he bill itself is probably unconstitutional and will be struck down by the courts.").

Mindful of the potential "constitutional litigation" that could follow a statute criminalizing intrastate violence, Congress included jurisdictional elements. House Report at 13. These jurisdictional elements were "drawn to comport with Supreme Court guidance" in *Lopez* and *Morrison*, which set forth the "outer reaches of commerce power." *Id.* at 13-14.

The statute provides four "circumstances" (or "jurisdictional elements") to which it applies:

> (i) the conduct described in subparagraph (A) 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 described in subparagraph (A);
>
> (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has travelled in interstate or foreign commerce; or
>
> (iv) the conduct described in subparagraph (A) –
>
> (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).

At Mr. Hill's trial, the government proceeded only under subparagraph (B)(iv)(I) of the HCPA, which required the government to prove merely that the assault interfered with commercial or economic activity in which Mr. Tibbs was engaged at the

time.[4] The Act's other jurisdictional prongs—dealing with interstate travel, the channels of commerce, items that have moved in interstate commerce, or the like—are not at issue here, and those prongs appear to be closer matches to the *Lopez* categories.

The prong used in this case, (B)(iv)(I), violates the Commerce Clause because it does not fall within any of the *Lopez* categories and encroaches more on the traditional state police power than anything this Court has ever blessed before. This Court's review is necessary in order to, as Judge Agee suggested, apply the broad principles laid out in *Lopez* and *Morrison* to actual statutory language. App. 55a.

2. The HCPA fails the *Lopez* test because this case is materially indistinguishable from *Morrison*.

Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state activities." *Lopez*, 514 U.S. at 558. Instead, "a general regulatory statute" must have a "substantial relation to commerce." *Id.* The activity at issue here—an intrastate assault—lacks any such nexus and is therefore beyond the scope of federal legislative power. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 611 (2000) (noting that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor"). As in *Lopez* and *Morrison*, "neither the actors nor their conduct has a

[4] *See* App. 8a (noting that at trial, the government "dropped reliance on the statutory element that the offense 'otherwise affect[ed] interstate or foreign commerce'" located in § 249(a)(2)(B)(iv)(II)).

commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

This Court has articulated "three general categories of regulation in which Congress is authorized to engage under its commerce power." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). These are "the channels of interstate commerce"; "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and "activities that substantially affect interstate commerce." *Id.*; *see also Lopez*, 514 U.S. at 558. Only the third category is at issue in this case. App. 11a.

Section 249(a)(2)(B)(iv)(I) regulates certain types of violent crimes, which do not require the use of the channels of interstate commerce or the instrumentalities of interstate commerce, and are not limited to persons or things in interstate commerce. The statute is only constitutional, therefore, if it regulates "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559.

The substantial-effects test set forth in *Lopez* and applied in *Morrison* lists several factors to consider in determining whether the regulated criminal conduct has a substantial impact on commerce: (1) whether the statute regulates economic activity or is an essential part of a larger regulation of economic activity; (2) whether an appropriate jurisdictional element limits the statute's reach to conduct that has an explicit connection to or effect on interstate commerce; (3) the legislative findings; and (4) whether the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated. *Lopez*, 514 U.S. at 562; *Morrison*, 529 U.S. at 610-12. As in *Morrison*, the HCPA fails this test.

a. First, the HCPA regulates violent conduct, not economic activity. This Court has explained that the starting place in any Commerce Clause challenge to a criminal statute is determining whether the activity regulated is "economic in nature." *See Morrison*, 529 U.S. at 610, 613 (criminal nature of conduct "central" to decision). The statutory language prohibiting "willfully caus[ing] bodily injury to any person" is, like the statute in *Morrison*, "a criminal statute that by its terms has nothing to do with 'commerce.'" *Morrison*, 529 U.S. at 613 (Violence Against Women Act providing civil penalties against persons committing crimes of violence motivated by gender); *see also Lopez*, 514 U.S. at 558-61 (Gun-Free School Zones Act proscribing the knowing possession of a firearm within a school zone).

Congress made clear that it enacted the HCPA in order to criminalize violent acts. "The conduct prohibited by the HCPA is bias-motivated violence, which is the same type of activity the Supreme Court in *Morrison* identified as noneconomic." *Jenkins*, 909 F. Supp. 2d at 768; *see also* House Report 5. In comparison, laws upheld by courts under the third *Lopez* category of commerce power typically involve regulation of an "activity [that] has been some sort of economic endeavor." *Morrison*, 529 U.S. at 611.

Federal statutes regulating violent conduct may fall within the third *Lopez* category where the statute regulates an economic endeavor that includes violence. *See, e.g.*, *United States v. Gibert*, 677 F.3d 613, 624 (4th Cir. 2012) (rejecting Commerce Clause challenge to animal-fighting statute, 7 U.S.C. § 2156(g)(1), and noting that "[t]here can be no serious dispute that the terms 'sport,' 'wagering,' and 'entertainment'

each are closely aligned in our culture with economics and elements of commerce"). But the HCPA does not regulate an economic endeavor that includes violence or other commercial conduct. It criminalizes the violent conduct itself—here, a punch in the face—without an economic aspect. As this Court has recently reiterated, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Taylor v. United States*, 136 S. Ct. 2074, 2079-80 (2016) (quoting *Morrison*, 529 U.S. at 613).

Moreover, when the regulated act is noneconomic, Congress may not aggregate the impact of individual acts in order to permit regulation of the class of activities. *See Morrison*, 529 U.S. at 615. Congress has the power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17. But Congress does not have a free hand to do so with regard to noneconomic activities. *See Jenkins*, 909 F. Supp. 2d at 768 ("The conduct prohibited by the HCPA is bias-motivated violence, which is the same type of activity the Supreme Court in *Morrison* identified as noneconomic."). Because the HCPA regulates noneconomic activity, it fails this part of the *Lopez* test.

b. The second prong of the substantial effects test asks whether a jurisdictional element in the statute suffices to limit the law's reach to appropriate bounds. *Lopez*, 514 U.S. at 561-62. A jurisdictional element, also known as a jurisdictional "hook," is not dispositive, however. Such an element at most "*may* establish" or "*lend support* to the argument" that the statute is a valid exercise of Commerce Clause power. *Morrison*, 529 U.S. at 612-13 (emphasis added); *see also*

Jenkins, 909 F. Supp. 2d at 767 (holding that "the case law does not suggest that the talismanic use of jurisdictional element language can transform a law otherwise regulating violent activity into a law regulating channels or instrumentalities of interstate commerce").

Courts have relied in part on jurisdictional elements to uphold certain statutes challenged under the substantial effects test, but have only relied on them as one part of the test, not as being sufficient by themselves. *See, e.g.*, *United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002) (noting that a "jurisdictional element is not alone sufficient to render [a challenged statute] constitutional"); App. 26a-27a n.9 (Agee, J., dissenting) (collecting cases); Christopher DiPompeo, *Federal Hate Crime Laws and* United States v. Lopez*: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. Pa. L. Rev. 617, 649 (2008) (noting that "[n]early every federal court of appeals that has considered the question has held that the mere presence of a jurisdictional element is not sufficient to ensure a statute's constitutionality").

The lesson from *Lopez* and *Morrison* is that a jurisdictional element by itself is not sufficient to bring a criminal statute within Congress's Commerce Clause power. The jurisdictional element must serve to meaningfully tie the regulated activity to one of the *Lopez* categories. *See United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999) (considering jurisdictional element tying intrastate possession of child pornography to interstate market); *Jenkins*, 909 F. Supp. 2d at 770; *Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) (discussing distinction between jurisdictional and substantive elements generally).

The jurisdictional element at issue here does nothing to tie the regulated activity (violent crimes) to one of the *Lopez* categories, because the jurisdictional element does not require a substantial effect on interstate commerce. The jurisdictional hook in § 249(a)(2)(B)(iv)(I) is insufficient to satisfy this part of the *Lopez* test.

c. The third prong of the *Lopez* test asks whether congressional findings serve to link the regulated activity to interstate commerce. *Lopez*, 514 U.S. at 562-63. "But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614.

The HCPA findings are insufficient to demonstrate a sufficient link between violent crimes like assaults and interstate commerce. For example, Congress found that the violence prohibited by the Act prevents members of protected categories from "purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity." *See* Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702, 123 Stat. 2835, 2836 (2009) (codified at 18 U.S.C. § 249 note).

In *Morrison*, this Court considered Congress's similar findings that gender-motivated violence affects interstate commerce by, inter alia, deterring individuals from travelling and engaging in employment in interstate business, thereby diminishing national productivity. 529 U.S. at 615. The Court held that these findings are so broad that they could be used to justify congressional regulation of any crime because they set up a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Id.* The Court rejected

the reasoning that Congress could regulate any crime "as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* The findings at issue in *Morrison*, like those in the HCPA, rest on reasons that are "unworkable if we are to maintain the Constitution's enumeration of powers." *Id.*

One district court considered the HCPA's legislative findings at length and, although it ultimately found the HCPA to be constitutional as applied in that case—involving a different jurisdictional element—it noted the inherent constitutional problem of the HCPA: "[I]t is difficult to argue that [the HCPA] furthers the purpose of limiting the federal Commerce Clause power so that it does not 'obliterate the distinction between what is national and what is local" and restraining the federal government from encroaching on the areas that have been reserved to [the] State." *Jenkins*, 909 F. Supp. 2d at 770-73.

As the district court observed in this case, App. 45a, the findings in the HCPA are much weaker and more attenuated than those underlying congressional regulation of crimes with a tighter connection to an interstate market, such as child pornography. *See United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018); *Rodia*, 194 F.3d at 473-79. In contrast, there is no national market for bias-motivated assaults. A purely local incident of violence has no connection to interstate commerce. Congressional findings based on the same faulty reasoning rejected in *Morrison* do not change that conclusion.

d. The final factor in the *Lopez* substantial-effects test asks whether there is a link between the regulated activity and interstate commerce. *Morrison*, 529 U.S.

at 612. As just discussed with respect to the legislative findings, the only connection between the assault and interstate commerce rests on the weak "but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce." *Morrison*, 529 U.S. at 615. This Court warned in *Morrison* that "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence," yet that is precisely what Congress attempted to do in the HCPA. *Id.*

The link between bias-motivated assaults covered by the HCPA and interstate commerce is no more substantial than was present in *Morrison*. As noted, the impact of the assault on Amazon's stream of commerce was essentially nonexistent. App. 40a. Further, any consideration of the effect on Mr. Tibbs's own commerce would rely on the same logic that was rejected in *Morrison*.

As the Court stated in *Lopez*, "[a]ctivities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach." 514 U.S. at 555. The nexus between interstate commerce the violent crimes regulated in the HCPA is too indirect to surmount the fourth prong of the *Lopez* substantial-effects test.

e. Congress's power is limited and "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Rather, something more

than a "relatively trivial impact on commerce" is necessary under the Commerce Clause. *Lopez*, 514 U.S. at 558. Just like the portion of the VAWA at issue in *Morrison*, the portion of the HCPA at issue here fails the *Lopez* test, meaning that it does not regulate activity that has a substantial effect on interstate commerce. This Court should reach the same result as in *Morrison* and declare § 249(a)(2)(B)(iv)(I) unconstitutional.

II. The Fourth Circuit's Ruling Was Wrong, And In Conflict With This Court's Precedents.

The Fourth Circuit did not apply the *Lopez* test. Instead, the majority opinion made two analytical errors. First, it placed dispositive weight on the challenged jurisdictional element, conflating the jurisdictional prong with the regulated activity. App. 17a-21a. Second, the Fourth Circuit analogized the HCPA to the Hobbs Act and the federal arson statute, but those are inapt analogues. The result of the errors is that the Fourth Circuit's decision conflicts with *Lopez* and *Morrison*.

First, as discussed above, the jurisdictional provision that applied in Mr. Hill's case does not put any real limit on the class of activities potentially subject to federal regulation. As Judge Agee pointed out, the phrase "commercial or other economic activity" is not of the categories this Court identified in *Lopez* as subject to congressional regulation. App. 26a (Agee, J., dissenting). In fact, this Court has never approved such a broad category of federal power. For that reason, the expansive prong used in this case "is not properly labeled a 'jurisdictional element'" at all, because it does not limit the class of regulated activities to those with a substantial effect on interstate commerce. App. 29a (Agee, J., dissenting).

A valid jurisdictional element "limits the statute's reach to a discrete set of [regulated activities] that additionally have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. The majority's error was treating the jurisdictional prong as if it were the activity Congress sought to regulate. *See* App. 31a-32a (Agee, J., dissenting). But Congress does not have the power to regulate *all* economic activity. *See NFIB*, 567 U.S. at 555 (holding that the Commerce Clause does not give Congress power to regulate conduct merely because it has a "measurable economic effect[] on commerce"); *see also* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 Sup. Ct. Rev. 125, 130 (1995) (noting that, in "an act of fidelity" to the Constitution, *Lopez* rejected the premise that because "commerce today seems plainly to reach practically every activity of social life, it would seem to follow that Congress has the power to reach, through regulation, practically every activity of social life").

The Fourth Circuit majority's second analytical error was its comparison of the HCPA to the Hobbs Act, 18 U.S.C. § 1951, and the federal arson statute, 18 U.S.C. § 844. App. 11a-14a. Those statutes, however, have different jurisdictional elements, and ruling for Mr. Hill would not require the Court to declare them unconstitutional.

According to the majority, the HCPA is similar to the Hobbs Act because the latter has a jurisdictional element that requires the robbery "to affect commerce in some way or degree." App. 11a (quoting *Taylor v. United States*, 136 S. Ct. 2074, 2080 (2016)). But that is not a direct quote of the Hobbs Act, which is actually restricted,

as relevant here, to "commerce over which the United States has jurisdiction." 18 U.S.C. § 1951(b)(3).

Lopez teaches that "commerce over which the United States has jurisdiction" is something less than "all economic or commercial activity." Thus, not every street mugging is a Hobbs Act robbery, even though the victim's economic activity is surely affected. Only those robberies that have a *substantial* effect on *interstate* commerce interfere with commerce over which the federal government has jurisdiction.

Taylor does not alter this conclusion. In that case, the Court approved the application of the Hobbs Act to a robbery of a drug dealer, because it, like the personal use of drugs at issue in *Gonzales v. Raich*, dealt with intrastate activities that affected a broader and heavily regulated national market in controlled substances. *Taylor*, 136 S. Ct. at 2081 (citing *Raich*, 545 U.S. 1, 22 (2005)). There is no similar market for an assault that did not involve the movement in, or instrumentalities of, interstate commerce. App. 33a (Agee, J., dissenting).

The comparison to the federal arson statute fares no better. That law applies not to every burning of a building, but only to the destruction of "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i); *see United States v. Doggart*, 947 F.3d 879, 883-87 (6th Cir. 2020) (Sutton, J.) (vacating arson conviction "on the ground that the target of the crime—a mosque—is not 'used in' interstate commerce or in any activity affecting interstate commerce"). That jurisdictional hook is quite distinct from the one in the

HCPA at issue here, which is not limited to activities in or affecting interstate commerce. *See* App. 26a-28a & nn.9-10 (Agee, J., dissenting).

The combined effect of the Fourth Circuit majority's errors is that it treated the HCPA as a regulation of economic activity. But the actual "root activity" at which the statute is aimed is violent crime. App. 30a-32a (Agee, J., dissenting). *Lopez*, *Morrison*, and other cases have looked to the underlying substantive act being regulated, rather than the jurisdictional hook that brings those cases into federal court. *See Lopez*, 514 U.S. at 561 (observing that possession of a firearm, the act regulated by the Gun-Free School Zones Act, was not an economic or commercial enterprise); *Morrison*, 529 U.S. at 613 (stating that intrastate domestic violence is not an economic activity); *Torres*, 136 S. Ct. at 1624 (noting that "[t]he substantive elements primarily define the behavior that the statute calls a violation of federal law," while "[t]he jurisdictional element, by contrast, ties the substantive offense . . . to one of Congress's constitutional powers") (alteration omitted).

Just last Term, in *Rehaif v. United States*, the Court explained that "[j]urisdictional elements do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct." 139 S. Ct. 2191, 2196 (2019). In contrast to the panel majority's interpretation of the HCPA, this Court observed that "jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct," and that courts usually set "[j]urisdictional elements aside" when "list[ing] the elements that make a defendant's behavior criminal." *Id.*

The Fourth Circuit majority acknowledged that Mr. Hill "is correct that there is nothing inherently economic about bias-motivated assaults." App. 18a (quotation omitted). But the court failed to appreciate the import of that statement, because it failed to recognize that those assaults (and not economic activity) were the focus of the HCPA. *See Jenkins*, 909 F. Supp. 2d at 768 ("The conduct prohibited by the HCPA is bias-motivated violence, which is the same type of activity the Supreme Court in *Morrison* identified as noneconomic.").

The Fourth Circuit's ruling conflicts with *Lopez* and *Morrison*, and neither *Raich* nor *Taylor* require affirming it. *Raich* and *Taylor* and *Lopez* may permit a prosecution under one of the HCPA's other jurisdictional prongs. But the Fourth Circuit has turned the prong in (B)(iv)(I) into a fourth *Lopez* category. If such a category exists, that means *Morrison* is wrong, and it should be this Court, and not the Fourth Circuit, to say so.

III. The Court Should Step In Now, Because The Consequences Of The Fourth Circuit's Ruling Are Vast And Troubling.

The district court and Judge Agee were correct that "allowing Hill's conviction to stand would mean that § 249(a)(2)(B)(iv)(I)'s scope 'would barely have an end, as [it] 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.'" App. 36a (Agee, J., dissenting) (quoting App. 46a). Such a fundamental reframing of the Commerce Clause power would truly "obliterate the distinction between what is national and what is local." *Jones & Laughlin Steel Corp.*, 301 U.S. at 37. This Court's review is necessary to reset the balance.

A. The Fourth Circuit's decision places no limit on federal power.

The implications of the decision below would stun the authors of the Commerce Clause. *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) (contending that the understanding of "commerce" at the time of ratification did not extend to "all gainful activity"). As Judge Agee put it, the majority's "unauthorized Commerce Clause expansion would result in a host of problems including the federalization of commercial property, the regulation of all aspects of employment and workplace conduct, and even the home, should individuals be engaged in work while there." App. 36a.

The majority claimed that its holding would not reach so far, and certainly not into "private homes." App. 18a. But it offered no clear limiting principle for why that would be so. Many people work from home, and while doing so are "engaged" in economic activity. An assault on one of them would easily fall within the Fourth Circuit's interpretation of the HCPA.

That interpretation is not limited to workers, either. According to *Raich*, the simple act of "consumption of commodities for which there is an established, and lucrative, interstate market" qualifies as "economic activity." 545 U.S. at 25-26. A person who is wearing clothes sewn overseas, or drinking a soda bottled out of state, is consuming commodities and engaged, to some degree, in economic activity.[5] A bias-

[5] Indeed, under *Raich* and *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942), even the consumption of homemade versions of these commodities would render one "engaged" in economic activity because of the effects of local acts on the interstate market.

motivated assault on that person would be subject to federal prosecution, whether or not that person is at work. Under the Fourth Circuit's reasoning, this case would have come out the same way if Mr. Tibbs had been in his home browsing the Amazon website at the time of the assault.

Even limiting the Fourth Circuit's rule to assaults in the workplace goes far beyond anything this Court has ever approved. It would federalize a staggering number of traditionally state offenses. The Occupational Health and Safety Administration reported in 2002 that "[s]ome 2 million American workers are victims of workplace violence each year." OSHA, *Workplace Violence Fact Sheet* (2002), *available at* https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.[6] More recently, the Justice Department stated that "[i]n 2009, approximately 572,000 nonfatal violent crimes (rape/sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work or on duty." *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Workplace Violence, 1993-2009*, at 1 (March 2011), *available at* http://www.bjs.gov/content/pub/pdf/wv09.pdf. Regardless of the precise current statistic, the number is high, and assaults account for the vast majority of violent workplace incidents. *Id.* at 3 (noting that "simple assaults" constituted approximately 78% of incidents, with "aggravated assaults" accounting for another 17% of incidents).

[6] All internet materials were last visited February 19, 2020. Copies of all internet materials are on file with counsel and will be lodged with the Court upon request.

Under the Fourth Circuit's decision, all of those instances of workplace violence could be charged as federal crimes. And the rule would not just apply to employees: An argument between two patrons on barstools that turns into a shoving match, or a brawl between Black Friday shoppers over the last discounted toy, would likewise be subject to federal jurisdiction. If any court is going to take such a position, one at odds with a centuries-long tradition of limited federal power, it should be this Court.

It is not reassuring to say that the majority's ruling would not reach so far because the HCPA only covers bias-motivated crimes against members of certain protected categories. If the Fourth Circuit's ruling stands, Congress could just add more categories to that list—or erase it altogether. After all, bias-motivated assaults are simply a subset of all assaults. App. 32a (Agee, J., dissenting). Nothing would stop Congress from making all assaults or other violent acts into federal crimes, so long as the victim had even the most tangential connection to commerce.

Allowing the Fourth Circuit's decision to stand would rewrite *Lopez* and render *Morrison* a dead letter. Chief Justice Marshall's confident declaration in *Cohens* that Congress has "no general right to punish murder committed within any of the States," would only be true if the victim was not at work, or consuming commodities, or otherwise engaged in commercial or economic activity.[7] The Court should grant

[7] Unless this Court reaffirms the standards from *Lopez* and *Morrison*, even the minor limits on federal jurisdiction maintained by the Fourth Circuit might evaporate. Pending legislation would amend the HCPA to provide that "[w]hoever, whether or not acting under color of law, willfully, acting as part of any collection of people, assembled for the purpose and with the intention of committing an act of violence upon any person, causes death to any person, shall be imprisoned for any term of years or for life, fined under this title, or both." H.R. 35, 116th Cong. (2020). That is simply a federal

certiorari to ensure that its holdings retain their validity and that the spheres of federal and state control remain separate.

B. This case is a good vehicle, and there is no value in waiting.

The Court should grant certiorari now, and use Mr. Hill's case to restore the proper bounds on congressional power. The issue is outcome-determinative and has been thoroughly litigated over two rounds in both the district court and the court of appeals. The facts are not disputed, and there are no longer any jurisdictional or procedural entanglements that would prevent the Court from reaching the pure question of law raised in this petition. Most notably, the government proceeded against Mr. Hill *only* under § 249(a)(2)(B)(iv)(I), and did not include any of the other jurisdictional "circumstances" in the HCPA. So this is a clean vehicle, one that does not offer an alternative disposition or the specter of harmless error. Nothing should deter the Court from granting review now.

1. The government will likely respond that the issue is "splitless," and that the Court should wait for further percolation. But the Court should not accept that invitation. First, the judges in this case have split 2-to-2 over the result. Two judges writing in three opinions that a federal statute is unconstitutional is not something this Court should dismiss out of hand, nor is Judge Agee's vigorous request that the Court consider the issue "at the earliest possible date." App. 50a. The Fourth Circuit's decision has even already drawn scholarly attention. *See* R. George Wright, *The Limits*

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murder statute, lacking even the requirement that the victim be engaged in economic or commercial activity.

of the Interstate Commerce Power: How to Decide the Close Cases, 93 S. Cal. L. Rev. Postscript 45 (2019).

Second, even if it does not represent a pure circuit split, it bears mentioning that other courts have criticized the reach of the HCPA, although in those cases they were able to uphold the prosecution on other grounds. *See, e.g.*, *United States v. Mason*, 993 F. Supp. 2d 1308, 1317 (D. Or. 2014) (rejecting an as-applied challenge involving an assault with a weapon, but noting that "it might be unconstitutional to apply the HCPA to Mason if the weapon he used had not traveled in interstate or foreign commerce, or if he had not used any weapon at all"); *Jenkins*, 909 F. Supp. 2d at 764, 773 (concluding that a prosecution for a simple assault would not survive a Commerce Clause challenge, but reluctantly approving prosecution in that case because defendants had driven a car on a U.S. highway to accomplish assault). The outcome of Mr. Hill's case would have been different in those courts, because his case did not present the facts that those judges found sufficient to provide for federal jurisdiction. The issue has been vetted well enough. Future decisions will neither add much to the Court's ability to grasp the nuances of the issue or do anything to mitigate the implications of the Fourth Circuit's ruling.

Finally, this Court has not hesitated to grant review in cases raising important issues of federal criminal law, even in the absence of a circuit split, and even where the lower-court decisions were unanimous or contained less criticism than is present here. *E.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2112 (2019) (noting that every court to have considered Gundy's claim had rejected it, but that "[w]e nonetheless granted

certiorari"); *Gamble*, 139 S. Ct. at 1964 (noting that "170 years of precedent" were against Gamble's argument); *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting) (noting that "every single Court of Appeals to address the question" had agreed). In light of the existing disagreement and the importance of the question, the Court should not wait.

2. The government will likely respond that the case is too "fact-bound" or too narrow in its scope. In truth, Mr. Hill's case presents a legal issue that could apply to a great number of cases. As explained above, even if the issue is limited to simple assaults in the workplace, it could potentially apply to thousands of incidents every year. And the holding in Mr. Hill's case does not only apply to assaults based on sexual orientation. It would apply to all of the categories in § 249(a)(2), including assaults based on gender, which are more common.

Of course, as the district court and Judge Agee understood, the logic of the Fourth Circuit's ruling is not limited to simple assaults in the workplace, but would include any act of violence on anyone engaged in any economic or commercial activity. There is nothing narrow about the scope of the majority's decision. The only thing narrow would be the remaining exclusive dominion of the state police power.

The government will attempt to portray this case as an outlier, or at most a minor and unremarkable extension of federal authority into new "jurisdictional circumstances." But the Court should be mindful of Madison's warning that "there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." James

Madison, General Defense of the Constitution, Speech at the Virginia Convention (June 6, 1788). The Court should resist even a gradual or seemingly minor evasion of its Commerce Clause precedent.

Justice Kennedy wrote that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). The Fourth Circuit's decision has allowed Congress to tip the scale too far, and this Court should reaffirm the balance it struck in *Lopez* and *Morrison*. It should grant Mr. Hill's petition and reverse the Fourth Circuit's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted

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February 21, 2020