No. 19-7778

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The district court correctly held that congressional authority to regulate interstate commerce could not extend to the enactment of a federal assault statute that does not require a substantial effect on interstate commerce. That holding was entirely in line with this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). The Fourth Circuit's reversal undermines those precedents by approving a new category of valid federal regulation: any conduct that occurs while someone is engaged in any kind of economic activity. The Commerce Clause does not reach that far, and this Court should take this opportunity to make that clear. The Court should grant the petition and hold that the prong of the Hate Crimes Prevention Act at issue in this case, 18 U.S.C. § 249(a)(2)(B)(iv)(I), does not cover the assault charge against Mr. Hill.

The government presents no compelling reasons for the Court to deny Mr. Hill's petition. At its core, the government's brief rests on flawed factual and legal premises. Once the case is viewed through the proper lens, the need for this Court's intervention is apparent.

I. *Lopez* and *Morrison* Make Clear That the Commerce Clause Power Cannot Extend to a Noneconomic Violent Crime That Had No Effect on Interstate Commerce.

The question this case presents is whether *Lopez* and *Morrison* will continue to establish meaningful limits on the federal government's authority, or whether, as the district court warned, Congress's ability to create criminal offenses "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. 46a. Mr. Hill's case presents an ideal vehicle for the Court to address and clarify the correct analytical framework for prosecutions founded on the Commerce Clause.

The government's arguments opposing review are thin. First, like the Fourth Circuit, the government compares this case to *Taylor v. United States*, where this Court upheld the prosecution under the Hobbs Act of a man who robbed a drug dealer. 136 S. Ct. 2074, 2081 (2016); *see* Opp. 13-14. But the Hobbs Act is limited to robberies that interfere with "commerce over which the United States has jurisdiction." 18 U.S.C. § 1951(b)(3). It does not reach all commercial or economic activity, because Congress does not have the power to regulate *all* activities that have an incidental effect on commerce. *NFIB v. Sebelius*, 567 U.S. 519, 555 (2012). The other jurisdictional prongs of the HCPA address violent crimes that affect commerce over which this Court has said the federal government has jurisdiction. *See* 18 U.S.C. § 249(a)(2)(B)(i), (ii), (iii), (iv)(II). But the one in (B)(iv)(I) is not comparable to the Hobbs Act's jurisdictional hook because it goes beyond the categories of federal authority this Court has defined. *See Lopez*, 514 U.S. at 558-59. *Taylor* does not dictate the outcome here.

Second, the government argues that the existence of a jurisdictional element renders the challenged prong constitutional. Opp. 15-16. The problem is that the element here ("interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct") does not "limit[] 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. As the Amicus notes, it would defeat the purpose of *Lopez*, and render *Morrison* a nullity, if that limit could be circumvented by a boilerplate, perfunctory jurisdictional hook. Br. of Cato Inst. as Amicus Curiae 12.

The government also argues that a court can look at the "context" of the jurisdictional prong to assess whether it sufficiently ties the regulated activity to interstate commerce. Opp. 16-17. The government notes that § 249(a)(2)(B)(iv)(I)—the element at issue here—sits next to (B)(iv)(II), which applies to assaults that "otherwise affect[] interstate or foreign commerce." According to the government, one can read these provisions together to find the necessary connection to interstate commerce. But before trial, the government expressly *disclaimed* any reliance on (B)(iv)(II), and proceeded only under (B)(iv)(I). App. 8a. Neither the government nor the Court should rely on a jurisdictional prong that was not at issue in the case and was not contested by either party (and which still does not require a *substantial* affect on interstate commerce). In this case, § 249(a)(2)(B)(iv)(I) should stand or fall on its own, because (B)(iv)(II) does not add enough "context" to make its counterpart constitutional.

The great irony of this case is that Mr. Hill's trial demonstrated that the essential function of a jurisdictional hook—restricting the statute to actual interference with interstate commerce—is not served by § 249(a)(2)(B)(iv)(I), because the evidence showed that the assault did not actually affect interstate commerce, let alone substantially so. In arguing otherwise, the government places heavy reliance on a misreading of the record below. It contends that the alleged victim, Curtis Tibbs, was

"preparing goods for *interstate* sale and shipment." Opp. 2 (emphasis added); *see also* Opp. I, 6, 8, 10, 14, 17, 18, 19, 20. But the trial record contains no such evidence. C.A.J.A. 363. And the jury made no such finding, precisely because the district court refused to instruct it that the case required a substantial impact on interstate commerce. App. 22a-23a.

This is not a mere factual dispute or request for error-correction. Once the facts are properly accounted for, it becomes clear that this case is an excellent vehicle for this Court's review. That is because the statutory prong at issue makes it irrelevant whether the conduct affected interstate commerce at all. Rather than tying the regulated activity to one of the *Lopez* categories, § 249(a)(2)(B)(iv)(I) creates a new realm of federal power that does not require any connection to interstate commerce. The facts of this case prove that the HCPA allows for a conviction without that nexus.

Finally, the government argues that the consequences of the Fourth Circuit's decision are simply not important enough to warrant review by this Court. Opp. 20. Judge Agee's dissent and statement respecting rehearing belie that notion. App. 23a-39a; 50a-53a. As he observed, "[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 M*orrison* to any specific statutory language." App. 53a. The Court should do so now, because otherwise those principles will survive in name only. As one commentator has stated, the Fourth Circuit's decision "took a significant step toward retiring the economic/noneconomic distinction from Commerce

Clause jurisprudence." Recent Case, *Constitutional Law–Hate Crimes Act–Fourth Circuit Upholds Conviction in As-Applied Commerce Clause Challenge*–United States v. Hill*, 927 F.3d 188 (4th Cir. 2019)*, 133 Harv. L. Rev. 2403, 2403 (2020). Any such "retirement" should be for this Court to announce.

Allowing the Fourth Circuit's decision to stand would make jurisdictional elements toothless, as doing so would signal that those elements do not act as a meaningful limitation on federal power, no matter what the evidence shows. Why would Congress ever bother with more genuine jurisdictional elements if the one here is good enough?

II. The Government's Attempt to Distinguish Between Facial and As-Applied Challenges Is Not a Reason to Deny Certiorari.

The government attempts to distract the Court with the distinction between "facial" and "as-applied" challenges to legislation. Opp. 9-10. The government avers that Mr. Hill's claim is an "overbreadth" challenge and notes the Court's traditional disfavor of facial attacks. Opp. 10 (citing, inter alia, *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This argument is misguided in this context, and it should not prevent the Court from granting the petition.

To begin with, "[t]he line between facial and as-applied challenges can sometimes prove amorphous, and not so well defined." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) (quotations and citations omitted). The difference is really one of remedy, or severability doctrine, rather than the constitutional rule to apply in the first instance. *Id.* at 1127-28. In other words, when it finds a constitutional violation, a court can either sever an entire provision of a statute, or sever unconstitutional

applications from a statute that has other valid applications. *See, e.g.*, *United States v. Booker*, 543 U.S. 220, 320-21 (2005) (Thomas, J., dissenting in part) (noting that "[t]he severability issue may arise when a court strikes either a provision of a statute or an application of a provision," and providing instances of the Court doing the latter). The government puts the cart before the horse by focusing on remedy concerns before addressing the merits.

Moreover, in the Commerce Clause context in particular, the facial/as-applied dichotomy is less clear, and it is certainly not an impediment to this Court's review. In Commerce Clause cases, applying a strict *Salerno* rule—that a defendant cannot make a facial challenge unless the statute is invalid in all its applications—would put challengers and the courts in an impossible bind. That is because this Court's "class of activities" test for congressional enactments asks whether the whole regulated category of activities has, in the aggregate, a substantial effect on interstate commerce. *E.g.*, *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *Gonzales v. Raich*, 545 U.S. 1, 8-9 (2005).

But suppose a challenger like Mr. Hill (or Ms. Raich or Mr. Filburn) argues that their conduct was wholly intrastate and noneconomic, even though some applications of the statute would be valid. In that situation, even if a court agreed that regulating the challenger's conduct was outside Congress's authority, a court applying a strict *Salerno* rule "would have exactly two choices—either strike down the entire statute because some portions of the undifferentiated text are unconstitutional or uphold the entire statute and ignore Congress's overreach." Scott A. Keller & Misha Tseytlin,

Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto, 98 Va. L. Rev. 301, 339 (2012). "Unsurprisingly, the Court has rejected this all-or-nothing proposition and has articulated the Commerce Clause decision rule as a hybrid decision rule." *Id.*

As one scholar recognized, *Lopez* and *Morrison* "quite clearly continue the Court's willingness to entertain facial challenges to the constitutionality of commerce power legislation. Indeed, they provide the strongest contemporary support for the use of facial challenges to invalidate federal statutes as exceeding congressional power." Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 907 (2005); *see also generally* Nathaniel Stewart, *Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 Case W. Res. L. Rev. 161 (2004).

The point is that, in Commerce Clause cases, this Court has not required a strict delineation between facial and as-applied challenges. Regardless of the label, Mr. Hill's argument would be exactly the same either way: that the jurisdictional prong used in his case was an unconstitutional exercise of congressional power. *See, e.g.*, Metzger, *supra*, at 882 (noting that "both facial and as-applied challenges can involve attacks on the constitutionality of some general rule").

For that reason, the government's concerns about forfeiture are misplaced. The government does not suggest that treating Mr. Hill's claim as a facial challenge would change the Court's constitutional analysis one iota. Nor does it explain how so much

as a word of the Fourth Circuit's decision would have changed had Mr. Hill adopted the "facial" label.

Notably, the government does not cite any Commerce Clause cases in that portion of its brief. In *Lopez* itself, however, the government downplayed the distinction between facial and as-applied claims and rejected the contention that the issue was too narrow for this Court's attention. The respondent there had argued that certiorari was unwarranted because the lower court had not invalidated the entire statute. The government replied that the narrowness of this holding did not matter, because the court of appeals (like the district court in Mr. Hill's case) "relie[d] on the Constitution to overturn petitioner's [*sic*] conviction." The government went on to argue that Lopez's conviction "rested on an indictment and evidence establishing conduct proscribed by the language of the statute" and that the "decision of the court of appeals invalidating that conviction thus invalidates Congress's decision to extend criminal sanctions to that conduct." Reply Br. for Pet'r 1-2, *United States v. Lopez*, No. 93-1260, 1994 WL 16011939 (Apr. 1, 1994). Here, as well, the Court should not rely on semantics to avoid addressing a fundamental question of congressional power where a lower court has invalidated a federal statute on constitutional grounds.

In sum, to the extent that the labels "facial" and "as-applied" have any bearing at all in Commerce Clause cases, it is an issue of remedy, and it does not alter the crux of Mr. Hill's argument, which has been unchanged throughout this case. This Court's analysis of the constitutional question would be the same no matter which label it

used. The government's invocation of *Salerno* should not dissuade the Court from granting the petition.

* * * *

When it enacted the HCPA, Congress created a federal assault statute, a regulation of noneconomic violent crime. The jurisdictional prong used in this case does not meaningfully connect the regulated conduct to interstate commerce, because it does not require any impact on interstate commerce at all, as Mr. Hill's trial proved. By upholding the statute, the Fourth Circuit contravened *Lopez* and *Morrison* and opened the door for Congress to regulate any conduct with even the slightest bearing on any economic or commercial activity. The Court should take this opportunity to re-affirm that something more than a "relatively trivial impact on commerce" is necessary to permit federal legislation. *Lopez*, 514 U.S. at 558. Mr. Hill's petition squarely presents the question of whether this Court's federalism decisions will retain their viability, and there are no obstacles to this Court's review. The Court should grant the petition and reverse the Fourth Circuit's judgment.

CONCLUSION

For these reasons and those set forth in the petition, the petition for a writ of certiorari should be granted

Respectfully submitted,

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