No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE DIGGINS
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR WRIT OF CERTIORARI

William T. Murphy
Counsel for Petitioner in the Court of Appeals, by appointment
PO Box 9623
Providence, RI 02940-9623
(401) 744-2336
wtm@wtmurphy.com

QUESTION PRESENTED

Does a United States district court constitutionally have jurisdiction under the Thirteenth Amendment when the United States prosecutes a defendant for a racially motivated assault under 18 USC Sec. 249(a) without the Government stating clearly pursuant to 18 USC 249(b)(1)(D) the reason why that prosecution is "in the public interest and necessary to secure substantial justice?"

PARTIES TO THE PROCEEDING

Petitioner is Maurice Diggins, defendant-appellant below. The United States of America is the respondent on review.

STATEMENT OF RELATED PROCEEDINGS

Un*ited States v. Diggins*, 435 F. Supp. 3d 268 (D. Me. 2019)

United States v. Diggins, 36 F.4th 302 (2022)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

PAGE NUMBER

CASES

STATUTES AND RULES

PETITION FOR WRIT OF CERTIORARI

Maurice Diggins respectfully petitions the Court for a write of certiorari to review the judgement of the United States Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is available at *United States v. Diggins*, 36 F.4th 302 (2022).

The opinion of the United States District Court for Maine appears at Appendix B to the petition and is reported at 435 F. Supp. 3d 268 (D. Me. 2019).

JURISDICTION

The United States Court of Appeals entered judgment on June 8, 2022. Fewer than ninety days have passed between the date of judgment and the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following sections of the Constitution:

(1) Article X (Reserved Powers)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(2) Amendment XIII (Thirteenth Amendment – Slavery and Involuntary Servitude)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The case also involves the Hate Crimes Act, 18 U.S.C. Sec. 249, the pertinent sections of which state:

(a) In General.—

(1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

…….

(b) Certification Requirement.—

(1) In general.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that—

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

18 U.S.C. Sec. 249, 123 STAT. 2840, PUBLIC LAW 111–84—OCT. 28, 2009

The full statute is reproduced in Appendix C.

STATEMENT OF THE CASE

On April 18, 2018, Diggins, his wife, and several adults had gathered for a family celebration at cafes in the Old Town section of Portland Maine. Diggins' nephew and codefendant invited himself. The group moved from bar to bar. Along the way the nephew picked a fight with members of a local college's hockey team. Then the nephew assaulted two men of color, one an African immigrant and the other a transplanted citizen from New York. Later, near Diggins' home, the two engaged in an assault on another black man.

Maine prosecuted Diggins for battery and offered him a plea bargain under which he would have served five years in jail.

The Justice Department began a prosecution. A grand jury returned a superceding indictment on March 1, 2019. It charged two counts of racially motivated assault under 18 U.S.C Sec. 249 (a)(1) and (2) and conspiracy to violate Section 249 under 18 U.S.C. Sec. 371. On March 14, 2019 the Assistant Attorney General for the Civil Rights Division filed the certificate required by 18 U.S.C Sec. 249 (b)(1).

On July 19, 2019 Diggins moved to dismiss the indictment for want of jurisdiction and for deficiency in the certification. The Government responded on October, 2019, and Diggins filed his rebuttal on October 18. The District Court heard oral argument on December 5, 2019. The Court denied the motion in a written opinion on December 30, 2019.

There was a *Frye* hearing on March 6, 2020. The Assistant United States Attorney reported that the Justice Department had authorized her to enter a plea agreement. The agreement would have involved a guilty plea to the count under 18 U.S.C. Sec. 371 (with a statutory maximum of five years) and dismissal of the counts under 18 U.S.C Sec. 249 (a)(1). The State of Maine had agreed to Diggins being sentenced on the parallel state charge to no more than five years, all to be served concurrently with the federal sentence.

Diggins rejected that proposal. Later the government offered a plea agreement pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) with a maximum sentence of seven years.

At trial, Diggins moved to dismiss the indictment. He argued that 18 U.S.C Sec. 249 (a)(1) exceeded Congress' authority under the Thirteenth Amendment and that, therefore, the Court had no jurisdiction. He also argued that the certification by the Assistant Attorney General was deficient.

The District Court sentenced Diggins to 120 months imprisonment.

REASONS FOR GRANTING THE PETITION

The fundamental issue underlying this petition – the nature and extent of the Thirteenth Amendment's Guarantee -- is persistent. Stated in other terms, the issue is who has the ultimate authority to define the meaning of "badges and incidents" of slavery. The issue is present in another petition pending in the Court, *Roof v. United States of America*, No. 21-7234. It has been raised before in *United States v. Hatch*, 722 F.3d 1193 (10th Cir., 2013), cert. denied, ___ U.S. ____, 113 S. Ct. 1538, 188 L. Ed.2d 561(2014). It continues to demand an answer. Congress needs the Court's guidance as it addresses within the structure of Federalism the

nation's persistent issues of racial bias, unequal economic opportunity, and perverted social development.

This case is a paradigm of the deficiencies in the current analysis of the Thirteenth Amendment. It is the prosecution a racially motivated assault under a statute which does not require a rational demonstration to anyone of a Federal interest.

There is serious tension between the Court's decision in *Jones v. Mayer Co.*, 392 U.S. 409 (1968) ruling that Congress can determine the "badges and incidents of slavery" and the Court's rule of judicial review stated in *Marbury v. Madison*, 5 U.S. 137 (1803) and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

The jurisdictional base for 18 USC Sec. 249 is the Thirteenth Amendment. *Hatch*, 722 F.3d at 1194. The Thirteenth, Fourteenth and Fifteenth Amendments became law almost contemporaneously. They share a "unity of purpose" rooted in the time of their adoptions, and that purpose is to eliminate slavery and its associated atrocities. *Hatch*, at 1202. Their enabling clauses are almost identical. Each enlightens the purpose and application of the others.

Unlike the Fourteenth and Fifteenth Amendments, the Thirteenth Amendment's application is not limited to state action. It reaches private action. The Thirteenth Amendment Enabling Clause empowers Congress to enact laws "necessary and proper" to eliminate of the "badges and incidents of slavery." *United States v Stanley*, 109 U.S. 3 (1883).

The Court's interpretation of "badges and incidents of slavery" was narrow until 1968. George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367 (2008). In 1968, this Court ruled that the Enabling Clause of the Thirteenth Amendment grants the Congress the authority "rationally to determine what are the badges and the incidents

of slavery, and the authority to translate that determination into effective legislation." *Jones v. Mayer Co.*, *supra*, at 440 (1968).

The Court has made no effort to define further "badges and incidents of slavery." *United States v Metcalf*, 881 F.3d 641 (8th Circuit 2018). Likewise, this Court has ruled that it cannot declare a determination by Congress to be irrational. *Jones,* at 441. This expansion of Congress' authority "has raised the disturbing possibility that Congress has virtually unlimited power to apply the Amendment to [1369] private activity in the absence of any state action requirement and any effective limit on what constitutes "the badges and incidents of slavery.' " Rutherglen, *supra* at 1368-69.

Neither the Civil Rights Amendments nor particularly the Thirteenth Amendment authorizes Congress to repeal other portions of the Constitution. Congress cannot "convert our national government of enumerated powers into a central government of unrestricted authority." Congress can only "enforce" the amendments and may do so only by "appropriate" legislation. *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970).

Congress recognized these restrictions in enacting 18 U.S.C. Sec. 249(a). It placed limits on the kinds of racial assaults the Government may prosecute under Section 249(a). It stated that the Attorney General must certify to a district court that particular conditions exist. Racially motivated assaults can be prosecuted in federal courts under three sets of conditions: (1) the state has no jurisdiction; (2) the state has requested the Federal Government to prosecute; or (3) the state's prosecution has left "demonstratively unvindicated the Federal interest in eradicating bias-motivated violence." Sec. 249(b)(1)(A)-(C). These three sets of conditions are stated in clear, concrete, categorical terms and recognize the states' sovereignty, as required by Article Ten of the Constitution. They also state unequivocal Federal interests.

None of these conditions exists in this case. This case involves unplanned racial assaults fueled by alcohol. The Government's sole justification as required by 18 U.S.C. 249(b) is that a "prosecution by the United States is in the public interest and necessary to secure substantial justice." 18 U.S.C. Sec. 249(b)(1)(D). Under the current understanding of the power of Congress, Congress can – and has in this case --- delegated to the Attorney General the power to determine what particular set of facts in a particular case involves a "Federal interest." The reasoning underlying the determination cannot be challenged. It need not even be revealed. *United States v. Diggins*, 36 F.4th 302, 318 (1st Cir. 2022).

The *Jones* analysis equates rationality with constitutionality. There are many situations in which the constitution does not authorize Congress to adopt a clearly rational policy, such as setting the speed limit on ancient roads neither constructed nor maintained with Federal funds. The *Jones* analysis makes the Thirteenth amendment a super-constitutional provision. It enlarges Congress' authority beyonda the limits of Article I. As long as Congress by a bare majority can think of a "rational" justification for legislation eliminating the "badges and incidents of slavery" or settling the meaning of "slavery", the Thirteenth Amendment supports it. Many commentators have advanced theories in well-respected journals that the Thirteenth Amendment can support remedies to perceived injustices which are unrelated to the historical notions of slavery, bondage, or disenfranchisement. Ruthergen, at 1403, fn 101; William J. Carter, Jr., *Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, Vol 40, No. 4 April 2007 UC Davis Law Review 1311, 1355 – 57 listing some such cases.

The *Jones* analysis eliminates meaningful judicial scrutiny of legislation enacted pursuant to the Thirteenth Amendment and thus enlarges the power of Congress beyond what Article I of

the Constitution authorizes. It attempts to change the Constitution. The analysis invades the notion of separation of powers and surrenders the authority of the Supreme Court to determine whether the Congress has exceeded its constitutional power. *Marbury v. Madison*, 5 U.S. 137 (1803); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussed below).

Several courts and legal scholars have recognized this flaw. *Hatch*, s*upra*, addressed an argument questioning the constitutionality of 18 U.S.C. Sec 249(a) based on *City of Boerne.* The argument did not address the precise issue raised here, the absence of limits of any kind on 18 U.S.C. 249(b)(1)(D) on the Justice Department's power. Regarding the Federalism concerns, the Tenth Circuit said:

> "At its core, Hatch's argument raises important concerns we share. 'Badges and incidents of slavery' taken at face value, puts emphasis solely on the conduct Congress seeks to prohibit, and it seems to place few limits on what that conduct might be…. In effect, this interpretation gives Congress the power to define the meaning of the Constitution—a rare power indeed." *Hatch*, at1204 (10th Cir. 2013).

The same can be said of the unbridled power ultimately delegated to the Justice Department under Section 249(b)(1)(D). In *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014), the Court acknowledged it was bound to follow the *Jones* precedent. 750 F.3d at 505. However, Judge McElrod wrote a special concurrence. Addressing the argument that *Shelby County. v. Holder,* —— U.S. ——, 133 S.Ct. 2612, 2623, 186 L.Ed.2d 651 (2013) required a reexamination of Sec. 249(a) relying on current data, she noted there was "tension" between *Jones* and *Shelby County*, never discussed in *Hatch*, and that the courts "would benefit from additional guidance from the Supreme Court on how to harmonize these lines of precedent." *Cannon*, at 509. *Cannon* did not address the particular issue raised here, the Justice Department's latitude under Section 249(b)(1)(D). She further observed that there must be a "federal nexus" to justify constitutionally a Federal prosecution, that some of the most "heinous

crimes" are entrusted to state prosecution, and that forty-five states have statutes imposing harsher penalties for crimes motivated by racial bigotry. *Cannon* at 512. See, also, the Brennan Center, *State Hate Crime Statutes*, available at https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes. (There appears to be no other citation for this study.)

The scholarship addresses the deficiencies of *Jones.*

Professor McAward has examined the extent to which *City of Boerne,* (1997), discussed below, modified the applicability of *Jones*. Jennifer M. McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power* After *City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77 (2010-2011).

Boerne ruled that Congress did not have the power to adopt the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq*., (hereinafter "RFRA") under Section 5 of the Fourteenth Amendment because RFRA attempted to "decree the substance of the Fourteenth Amendment's restrictions on the States" or "to determine what constitutes a constitutional violation."' ' *Boerne*, at 119. *City of Boerne* holds that Congress cannot enlarge a constitutional right.

Congress had enacted RFRA to reverse this Court's holding in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *Smith* involved the denial of unemployment compensation on account of the applicant's use of a controlled substance in religious observances. *Employment Division* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. *Id*., at 884-85.

RFRA reinstated the test which predated *Smith*. RFRA stated that generally applicable laws could be applied to religious practices provided that the state had a "compelling state interest" and that the state use the least restrictive method of compelling that interest. *Boerne* thus holds that Congress cannot enlarge or retract the limits of a Constitutional doctrine.

This case presents a narrow question: whether the Government can prosecute an assault under 18 U.S.C. Sec. 249(a) without clearly and rationally describing the facts and analysis which, in the Government's view, show a nexus with a Federal interest such that the prosecution is a "prosecution by the United States [that] is in the public interest and necessary to secure substantial justice." In this case, the government has failed to do so.

The Court should grant *certiorari* to reexamine its holding in *Jones* and to state the kind of nexus with a Federal interest is needed to allow intrusion into areas traditionally belonging to the states.

CONCLUSION

For the above reasons, the Court should grant the petition for *certiorari*.

Respectfully submitted,

/s/ William T. Murphy
Counsel for the Petitioner in the
Court of Appeals, by appointment
1 Turks Head Place, Suite 312
PO Box 9623
Providence, RI 02940-9623
Tel: 401-744-2336
Email: wtm@wtmurphy.com
DATE August 29, 2022

United States v. Diggins

United States Court of Appeals, First Circuit Jun 8, 2022

36 F.4th 302 (1st Cir. 2022)

Nos. 20-2078 20-2079

06-08-2022

UNITED STATES of America, Appellee, v. Maurice DIGGINS, Defendant-Appellant.

William T. Murphy, on brief for appellant. Darcie N. McElwee, United States Attorney; Benjamin Block, Assistant United States Attorney; Kristen Clarke, Assistant Attorney General; Pamela S. Karlan, Principal Deputy Assistant Attorney General; and Thomas Chandler and Brant S. Levine, Attorneys, Appellate Section, Department of Justice, on brief for appellee.

GELPÍ, Circuit Judge.

William T. Murphy, on brief for appellant.

Darcie N. McElwee, United States Attorney; Benjamin Block, Assistant United States Attorney; Kristen Clarke, Assistant Attorney General; Pamela S. Karlan, Principal Deputy Assistant Attorney General; and Thomas Chandler and Brant S. Levine, Attorneys, Appellate Section, Department of Justice, on brief for appellee.

Before Lynch, Thompson, and Gelpí, Circuit Judges.

304 GELPÍ, Circuit Judge.*304 A jury convicted Maurice Diggins ("Diggins") of two counts of committing a hate crime and one count of conspiring to commit a hate crime under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (the "Shepard-Byrd Act"), 18 U.S.C. §§ 249(a)(1),

APPENDIX A

371.[1] On appeal, Diggins challenges Congress's ability under § 2 of the Thirteenth Amendment to pass § 249(a)(1), contending that the Supreme Court's expansive articulation of § 2 authority in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), has been curtailed or overruled by the Court's subsequent decisions in City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), and Shelby County v. Holder, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). He further asserts that the government failed to satisfy the procedural requirements of 18 U.S.C. § 249(b)(1). Lastly, Diggins contests the admission into evidence of his white-supremacist tattoos and expert testimony relating to the same. We affirm the judgment of the district court, holding that Diggins's first two arguments are unavailing and the third argument has been waived.

[1] In pertinent part, 18 U.S.C. § 249(a)(1) makes it a crime to "willfully cause[ ] bodily injury to any person ... because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. § 371, in turn, proscribes "two or more persons conspir[ing] ... to commit any offense against the United States" where "one or more of such persons do any act to effect the object of the conspiracy."

BACKGROUND

I. The Attacks

On the night of April 15, 2018, Diggins and his nephew violently attacked two Black men in separate incidents. In each attack, Diggins and his nephew hurled racial slurs at their target, striking him in the head and shattering his jaw. Both victims suffered serious injuries which required emergency surgery and hospitalization. They continue to suffer lasting physical, emotional, and financial consequences.

In the first attack, Diggins and his nephew approached A.N., a Black man and Sudanese refugee who was quietly smoking on the sidewalk outside a bar in Portland, Maine. Diggins and his nephew are both white men, with Diggins being the taller and larger of the two. Neither man had ever met A.N. before. Without any provocation, and before A.N. was able to react, Diggins punched A.N. in the face. A.N. fled, bloodied and in pain, pursued by the smaller man. As A.N. escaped, he heard someone yell behind him, "[C]ome here, nigger, come here, nigger." A.N. required emergency surgery for his broken jaw the following day at the Maine Medical Center. The

surgeon implanted a metal plate into A.N.'s jaw and wired it shut for several weeks, during which time he was unable to eat, work, or even hold his infant daughter.

Later that evening, Diggins and his nephew drove to a 7-Eleven in Biddeford, Maine, where D.M., a Black man, had gone to buy snacks. D.M. had never encountered Diggins or his nephew prior to that evening. Diggins
305 sped into the parking lot and pulled up toward D.M., who was on *305 foot, yelling, "[N]igger, who you eyeballing?" Diggins proceeded to exit his vehicle and aggressively approach D.M., distracting him while Diggins's nephew came from behind the vehicle and punched D.M. in the face. The force of the punch broke D.M.'s jaw and knocked him to the ground. D.M. testified that after he fell, Diggins punched him in the back of his head. Suffering "unexplainable" pain and fearing for his life, D.M. fled. As Diggins or his nephew laughed, Diggins's nephew pursued him on foot, yelling, "un, nigger." Subsequently, Diggins and his nephew re-entered their vehicle and drove in D.M.'s direction, shouting, "We're going to find you, nigger."

The next day, D.M. underwent emergency surgery at the Maine Medical Center, where his jaw was wired shut. In the weeks following the attack, D.M. lost both of his jobs and incurred substantial medical expenses. As a consequence, he has also faced financial challenges as well as long-lasting physical and psychological harm.

II. Procedural History

Following an initial federal indictment in August 2018, a grand jury in March 2019 returned a superseding indictment charging Diggins and his nephew with two counts of committing a hate crime in violation of 18 U.S.C. § 249(a)(1) and one count of conspiring to commit a hate crime in violation of 18 U.S.C. §§ 249(a)(1)(A), 371.[2] Along with the indictment, the Assistant Attorney General for the Civil Rights Division filed a certificate pursuant to 18 U.S.C. § 249(b)(1) averring that prosecuting Diggins and his nephew for violating § 249 would be "in the public interest and necessary to secure substantial justice."[3] Diggins moved to dismiss the superseding indictment, challenging the constitutionality of 18 U.S.C. § 249(a)(1) and separately contending that the certification did not satisfy the requirements of 18 U.S.C. § 249(b)(1).[4] The district court rejected both arguments. United States v. Diggins, 435 F. Supp. 3d 268 (D. Me. 2019). Diggins also filed a pretrial motion in limine to exclude evidence and expert

APPENDIX A

testimony relating to certain of his tattoos associated with white-supremacist ideology, including four swastikas, two lightning bolts associated with the Nazi SS, the letters "WPWW" (referring to "White Pride World Wide"), and an image of an Absolut Vodka bottle containing the phrases "white pride" and "We must secure the existence of our people and a future for white children." The district court denied the motion, and at trial the expert witness testified that Diggins's tattoos are extensively associated with extremist and white-supremacist ideologies. A jury subsequently convicted Diggins on all charges, and Diggins was sentenced to 60 months' imprisonment for the conspiracy charge and 120 months' imprisonment for each hate crime charge, to be served concurrently. At sentencing, the court stressed the gravity of Diggins's conduct, noting that his "crimes were among the most serious that [the court] ha[s] ever seen" 306 and highlighting the severe impact of his "bigotry, ignorance, *306 and violence" both on his direct victims and the "entire minority community."

[2] Diggins was initially charged in state court for conspiracy to commit aggravated assault in violation of Maine law, but said criminal action was later dismissed following Diggins's federal indictment.

[3] That statement, subparagraph (D) of § 249(b)(1), is one of four grounds the Assistant Attorney General may offer as reason to invoke the federal prosecutorial power. We discuss the Assistant Attorney General's certification infra Section I.D and Part II.

[4] Diggins's nephew subsequently pleaded guilty. Hence, this appeal pertains only to Diggins.

On appeal, Diggins does not dispute that he attacked both A.N. and D.M. because of their race, to wit, the basis of his conviction.[5] Rather, he challenges the constitutionality of 18 U.S.C. § 249(a)(1) and asserts deficiencies in the certification process pursuant to 18 U.S.C. § 249(b)(1). Diggins also appears to challenge the denial of his motion to suppress evidence and expert testimony relating to his tattoos, although he does not mention the issue in the Argument section of his opening brief.

[5] The record evidences that Diggins did not object at trial to the jury instructions pertaining to whether his actions satisfied the elements of § 249(a)(1), or to the verdict form used. On appeal, he makes no claims as to these matters, nor does he challenge his sentence.

DISCUSSION

APPENDIX A

Congress exercised its enforcement powers under § 2 of the Thirteenth Amendment to enact 18 U.S.C. § 249(a)(1), a provision of the Shepard-Byrd Act, under which Diggins was convicted. The government contends said provision is constitutional under the rational-determination test the Supreme Court articulated in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), to evaluate legislation enacted under § 2 of the Thirteenth Amendment. Diggins disagrees and contends that § 249(a)(1) fails the Jones test. He further contends that the constitutional landscape established by Jones has been eroded by the Supreme Court's subsequent decisions in City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), and Shelby County v. Holder, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), which dealt with the Fourteenth and Fifteenth Amendments, respectively. He avers that the same federalism concerns driving those cases are presented here, and we should therefore apply the tests articulated there -- as opposed to that in Jones -- to evaluate the constitutionality of § 249(a)(1). We reject Diggins's arguments here, as well as his two others, for the reasons discussed seriatim.

I. Constitutionality of 18 U.S.C. § 249(a)(1)

A. Standard of Review

We review the constitutionality of federal statutes de novo. See United States v. Booker, 644 F.3d 12, 22 (1st Cir. 2011).

B. The Thirteenth Amendment Enforcement Power Under Jones

Our analysis begins by reviewing the Thirteenth Amendment's enforcement power. Ratified in the wake of the Civil War, the Thirteenth Amendment declares in its first section that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. Section Two provides that "Congress shall have power to enforce this article by appropriate legislation." Id. § 2.[6] Uniquely among the Reconstruction Amendments, the
307 Thirteenth Amendment's *307 Enforcement Clause lacks a state-action provision, instead empowering Congress to directly regulate private conduct. See The Civil Rights Cases, 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883) (noting that § 2 authorizes legislation that is "primary and direct in its character; for the amendment is not a mere prohibition of State laws

APPENDIX A

establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States"); Griffin v. Breckenridge, 403 U.S. 88, 105, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) ("[T]here has never been any doubt of the power of Congress to impose liability on private persons under § 2 of th[e Thirteenth] [A]mendment ....").

[6] The wording of Section Two alludes to the Supreme Court's language in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421, 4 L.Ed. 579 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (emphasis added)). See Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801, 1810 & n.34 (2010).

Modern Thirteenth Amendment jurisprudence dates back fifty-four years to Jones, which reconsidered an earlier line of post-Reconstruction caselaw wherein the Supreme Court took a narrower view of Congress's enforcement powers under § 2.[7] Adopting in substantial measure Justice John Marshall Harlan's dissents in those cases,[8] Jones reassessed the scope of Congress's ability to legislate against the "badges and incidents of slavery," affirming that § 2 "empower[s] Congress to do much more" than merely effect the abolition of slavery announced in § 1. Jones, 392 U.S. at 439, 88 S.Ct. 2186.

[7] Beginning with the 1888 Civil Rights Cases, the Court affirmed that § 2, in theory, "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." The Civil Rights Cases, 109 U.S. at 20, 3 S.Ct. 18. In practice, however, the Court consistently invalidated legislation enacted under the Thirteenth Amendment, adopting a highly restrictive interpretation of the "badges and incidents of slavery." See id. at 20, 22, 3 S.Ct. 18 (holding that § 2 did not authorize passage of the Civil Rights Act of 1875); Plessy v. Ferguson, 163 U.S. 537, 542, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (determining that segregation "cannot be justly regarded as imposing any badge of slavery"), overruled by Brown v. Bd. of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ; Hodges v. United States, 203 U.S. 1, 8, 27 S.Ct. 6, 51 L.Ed. 65 (1906) (holding that § 2 only empowers Congress to outlaw private conduct so extreme as to impose "the state of entire subjection of one person to the will of another"), overruled in part by Jones, 392 U.S. 409, 88 S.Ct. 2186.

APPENDIX A

8 In a series of vociferous dissents, Justice Harlan excoriated the Court's restrictive reading of § 2. See The Civil Rights Cases, 109 U.S. at 26, 3 S.Ct. 18 (Harlan, J., dissenting) ("The opinion in these cases proceeds, as it seems to me, upon grounds entirely too narrow and artificial. The substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."); Plessy, 163 U.S. at 562, 16 S.Ct. 1138 (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution."); Hodges, 203 U.S. at 37-38, 27 S.Ct. 6 (Harlan, J., dissenting) ("The interpretation now placed on the 13th Amendment is ... entirely too narrow, and is hostile to the freedom established by the Supreme Law of the land."); see also United States v. Nelson, 277 F.3d 164, 181-83 (2d Cir. 2002) (summarizing the evolution in caselaw from the Civil Rights Cases to Jones and concluding that "Justice Harlan's reading of the Thirteenth Amendment's enforcement clause, including, critically, his account of the scope of congressional discretion under that clause, has in principal part prevailed"). For a historical account of Justice Harlan's dissents in the Court's post-Reconstruction caselaw, see generally Peter S. Canellos, The Great Dissenter: The Story of John Marshall Harlan, America's Judicial Hero 256-70, 329-51 (2021).

Jones concerned a challenge to 42 U.S.C. § 1982, originally passed as a provision of the Civil Rights Act of 1866, which forbids racial discrimination in the lease and sale of private property. As described by Senator Lyman Trumbull, who authored the Thirteenth Amendment and
308 *308 first introduced the Civil Rights Act of 1866 on the Senate floor, the Act was "intended to give effect" to the Thirteenth Amendment's guarantee of liberty, "secur[ing] to all persons within the United States practical freedom." Jones, 392 U.S. at 431, 88 S.Ct. 2186 (quoting Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Sen. Trumbull)); see also Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701, 714-22, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (recounting the passage of the Act and extensively quoting Senator Trumbull); Springer v. Seaman, 821 F.2d 871, 881 (1st Cir. 1987) (noting that the "unequivocal language" and "legislative history" of the Civil Rights Act of 1866 "manifests Congress' purpose to enact sweeping legislation implementing the [T]hirteenth [A]mendment to abolish all the remaining badges and vestiges of the slavery system" (quotation omitted)), abrogated on other grounds by Jett, 491 U.S. 701, 109 S.Ct. 2702.

APPENDIX A

In reconstructing the meaning and scope of § 2 of the Thirteenth Amendment, the Jones Court closely examined the legislative history of the Civil Rights Act, quoting at length Senator Trumbull's description of the "fair meaning of the amendment":

> I have no doubt that under this provision ... we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.

Jones, 392 U.S. at 440, 88 S.Ct. 2186 (alteration in original) (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (statement of Sen. Trumbull)). Endorsing Senator Trumbull's interpretation, the Court announced a very broad standard to evaluate legislation passed under Congress's § 2 authority: "Surely Senator Trumbull was right. Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Id. Applying this rational-determination framework, the Court held that racial discrimination in sales and leases of property constituted "a relic of slavery." Id. at 440-43, 88 S.Ct. 2186. Accordingly, the Court held that Congress acted rationally -- and thus, constitutionally -- in exercising its § 2 authority to proscribe such discrimination. Under Jones, so long as Congress rationally determines that conduct is a "badge" or "incident" of slavery, statutes passed in reliance on Congress's § 2 authority pass constitutional muster. Jones, 392 U.S. at 440, 88 S.Ct. 2186.

The Fourth Circuit recently held that " Jones remains the seminal Supreme Court case on Congress's enforcement power under § 2 of the Thirteenth Amendment," providing the "governing standard" for challenges to legislation enacted thereunder. United States v. Roof, 10 F.4th 314, 392 (4th Cir. 2021), petition for cert. filed, No. 21-7234 (U.S. Feb. 24, 2022). Indeed, subsequent Supreme Court caselaw has repeatedly reaffirmed that § 2 vests Congress with authority to legislate against racial discrimination and violence in a variety of contexts, and that courts are to review such
309 legislation under Jones's rational-determination standard. See, e.g., *309

APPENDIX A

Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 435, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973) (Jones extends to the racially discriminatory membership policy of a local swimming club); Runyon v. McCrary, 427 U.S. 160, 168, 179, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (§ 2 enables legislation prohibiting racial discrimination in private contracts); Breckenridge, 403 U.S. at 104-05, 91 S.Ct. 1790 (§ 2 authorizes creation of a private right of action for victims of conspiracies to be deprived of privileges and immunities or equal protection of the laws); Patterson v. McLean Credit Union, 491 U.S. 164, 171, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (reaffirming Runyon).

C. 18 U.S.C. § 249(a)(1) Is Constitutional Under Jones

Applying Jones's rational-determination standard, which Diggins concedes is "controlling" of and "binding" on his case, we conclude that § 249(a)(1) is a constitutional exercise of Congress's power under the Thirteenth Amendment. In so holding, we are joined by every other circuit to have considered the question. See Roof, 10 F.4th at 392 ; United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018) ; United States v. Cannon, 750 F.3d 492, 502 (5th Cir.), cert. denied, 574 U.S. 1029, 135 S.Ct. 709, 190 L.Ed.2d 445 (2014) ; United States v. Hatch, 722 F.3d 1193, 1204-05 (10th Cir. 2013), cert. denied, 572 U.S. 1018, 134 S.Ct. 1538, 188 L.Ed.2d 561 (2014) ; United States v. Maybee, 687 F.3d 1026, 1031 (8th Cir.), cert. denied, 568 U.S. 991, 133 S.Ct. 556, 184 L.Ed.2d 362 (2012).

In 2009, Congress passed the Shepard-Byrd Act to combat hate crimes motivated by race and other protected characteristics. Diggins was convicted of violating a provision of the Act codified at 18 U.S.C § 249(a)(1), which in relevant part makes it illegal to "willfully cause[ ] bodily injury to any person ... because of the actual or perceived race, color, religion, or national origin of any person." Congress expressly relied on its authority under § 2 in enacting § 249(a)(1), determining in its legislative findings of fact that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." 34 U.S.C. § 30501(7). Congress thus passed § 249(a)(1) in recognition of the intrinsic and inconvertible connections between racial violence and slavery:

APPENDIX A

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.

Id.

As "over a century of sad history" demonstrates, "concluding there is a relationship between slavery and racial violence 'is not merely rational, but inescapable.' " Roof, 10 F.4th at 392 (quoting United States v. Beebe, 807 F. Supp. 2d 1045, 1052 (D.N.M. 2011), aff'd sub nom. Hatch, 722 F.3d 1193); see also United States v. Nelson, 277 F.3d 164, 189-90 (2d Cir. 2002) (summarizing a wealth of scholarship on the "indubitable connections ... between American slavery and private violence" and concluding that proscribing "private violence motivated by the victim's race ... falls comfortably within Congress's" § 2 authority). Racial subjugation through physical violence was indispensable to maintaining slavery. See Hatch, 722 F.3d at 1206 (noting that antebellum courts recognized "unrestrained
310 master-on-slave violence as one of slavery's most necessary *310 features" and collecting sources); State v. Mann, 13 N.C. 263, 266-67 1829 (characterizing "uncontrolled authority over the body" as "inherent in the relation of master and slave"). Indeed, the violence in the record before us -- attacks against two Black men born of white-supremacist ideology -- constitutes the paradigmatic "badge and incident" or "relic of slavery" that the Thirteenth Amendment exists to eliminate. Jones, 392 U.S. at 441, 443, 88 S.Ct. 2186. As such, we join every other circuit to have evaluated the provision to conclude that § 249(a)(1) constitutes "appropriate legislation" under § 2.

Despite overwhelming judicial consensus, Diggins urges that we forge a separate path and adopt a more restricted interpretation of Jones, arguing that a straightforward application of the rational-determination standard might countenance all manner of purported legislative overreaching. To this end, Diggins cites the Tenth Circuit's dicta in Hatch stating that a wide range of conduct could hypothetically "be analogized to slavery" and be "thereby labeled a badge or incident of slavery under Jones's rational determination test," if the latter were taken at face value. Hatch, 722 F.3d at

APPENDIX A

1204. Diggins appears to insist on reading Jones narrowly to invalidate § 249(a)(1), either as an exercise in irrational policymaking, or "as applied" to his conduct.[9]

[9] Diggins does not allege that the government failed to prove the elements of § 249(a)(1) beyond a reasonable doubt, so the nature of his "as applied" challenge -- by which he purports to distinguish cases such as Roof -- is unclear. To the extent Diggins argues here that the government erred in choosing to prosecute him under § 249(a)(1), his claim merely restates his separate challenge to the certification process of § 249(b)(1), which we consider and reject infra Part II.

We are wholly unpersuaded. As the Tenth Circuit explained in Hatch, regardless of the facial breadth of Jones, § 249(a)(1) adopts "a limited approach to badges-and-incidents" that "focuses on three connected considerations: (1) the salient characteristic of the victim, (2) the state of mind of the person subjecting the victim to some prohibited conduct, and (3) the prohibited conduct itself." Id. at 1205-06. Accordingly, Congress drafted § 249(a)(1) to extend "only to persons who embody a trait that equates to 'race' as that term was understood in the 1860." Id. at 1206.[10] Section 249(a)(1) further requires a clear nexus between the protected characteristic and the prohibited conduct, covering only violence that occurs "because of" the victim's "actual or perceived race, color, religion, or national origin." 18 U.S.C. § 249(a)(1). Finally, this provision only targets conduct -- "willfully cause[d] bodily injury" -- whose connection to slavery
311 is, as we just detailed, beyond contestation. *311 Id.; see Roof, 10 F.4th at 392 ; Nelson, 277 F.3d at 189-90.

[10] While § 249(a)(1) covers "religion" and "national origin" in addition to "race" and "color," Congress was careful to note in its legislative findings that "at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races.' " 34 U.S.C. § 30501(8). Thus, "at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution," Congress concluded that "prohibit[ing] assaults on the basis of real or perceived religions or national origins" similarly served to eliminate the "badges, incidents, and relics of slavery." Id.; see Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617, 107 S.Ct. 2019, 95 L.Ed.2d 594 (1987) (noting that 19th-century "definitions of race ... were not the same as they are today," frequently encompassing characteristics

APPENDIX A

better understood today as matters of religion or national origin); Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610-13, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987).

In sum, § 249(a)(1) employs a conservative framework, solicitous of the "limiting principles to congressional authority" under Jones, for evaluating whether conduct perpetuates a badge or incident of slavery. Hatch, 722 F.3d at 1205. To be clear, the Tenth Circuit expressly disclaimed holding that this tripartite approach is required by Jones, id. at 1206, and likewise we do not hold so here. It suffices that § 249(a)(1) exists well within the parameters of the test articulated in Jones. As such, Diggins's attempts to invoke the specter of unbridled § 2 authority fail, because the phantasm of overzealous enforcement does not haunt the provision at issue. By any measure, Congress's judgment that racially motivated violence constitutes one of the badges and incidents of slavery easily satisfies Jones's rational-determination test.

D. Section 249(a)(1) Does Not Implicate Federalism Concerns

Perhaps recognizing his fate under Jones, Diggins also contends that the analyses in the Supreme Court's decisions in City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), and Shelby County v. Holder, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), effectively render Jones a dead letter.[11] We are in no position to overrule binding Supreme Court precedent. See United States v. McIvery, 806 F.3d 645, 653 (1st Cir. 2015) ("Unless and until the Supreme Court overrules [its precedent], we must continue to adhere to it." (citing Rodríguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989))). Regardless, we absolutely disagree with Diggins's postulation.

11 In support of this argument, Diggins points to cautionary language about Jones in Judge Elrod's special concurrence in Cannon and highlights dicta to similar effect in Hatch. See Cannon, 750 F.3d at 514 (Elrod, J., specially concurring) (asserting that cases such as City of Boerne and Shelby County expose "tensions between several lines of the Supreme Court's constitutional jurisprudence"); Hatch, 722 F.3d at 1204-05 (speculating that "broad use of Section 2 power ... would arguably raise the sort of federalism concerns articulated in City of Boerne"). For the reasons stated below, we flatly reject any notion that City of Boerne and Shelby County cast doubt on Jones's reasoning.

APPENDIX A

We start our analysis with City of Boerne, whose backdrop begins with Sherbert v. Verner, 374 U.S. 398, 402-03, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), in which the Supreme Court held that governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, i.e., strict scrutiny.[12] Then, in Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court limited the applicability of the Sherbert test and held that free exercise challenges to neutral, generally applicable laws are subject only to rational basis review. See Smith, 494 U.S. at 888-90, 110 S.Ct. 1595 (1990). Responding to Smith, Congress enacted the Religious Freedom Restoration Act, commonly known as RFRA. Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C §§ 2000bb to bb-4). Congress expressly crafted RFRA "to restore the compelling interest test as set forth in Sherbert ... and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)" and to abrogate Smith, see 42 U.S.C § 2000bb(a)(4)-(5), (b)(1), and thus supplied a rule of decision for constitutional free exercise claims.

312 RFRA prohibited both the federal government and state *312 governments from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability, except" when the government could show that the burden was the "the least restrictive means of furthering [a] compelling governmental interest." See id. § 2000bb-1(a), (b).

12 In practice, application of the Sherbert test was more nuanced. See generally Eugene Volokh, A Common-Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465, 1494-1501 (1999).

City of Boerne held RFRA unconstitutional as applied to states. The analysis turned on two separation of powers issues, one horizontal and one vertical. See 521 U.S. at 517-520, 117 S.Ct. 2157. The horizontal issue was whether Congress could define the substance of the rights protected by the Fourteenth Amendment. See id. Examining the amendment's structure, ratification history, and subsequent caselaw, the Court held that Congress could not do so. See id. at 520-25, 117 S.Ct. 2157. Section 5 of the Fourteenth Amendment, the Court explained, affords Congress an "enforcement power" of "remedial and preventive nature," id. at 524, 117 S.Ct. 2157 (citing The Civil Rights Cases), not the power to define the substantive scope of the rights defined by § 1 of that Amendment and enforce the same against the states, id. at 527-29, 117 S.Ct. 2157. The Court grounded this holding in its extensive recounting of the ratification history

APPENDIX A

of the amendment, finding that "[t]he Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." Id. at 520, 117 S.Ct. 2157. Equally, the Court emphasized that the limited "nature of Congress' enforcement power ... w[as] confirmed in our earliest cases on the Fourteenth Amendment." Id. at 524, 117 S.Ct. 2157. "If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' " Id. at 529, 117 S.Ct. 2157 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)). Not only would a substantive, rather than remedial, interpretation of § 5 upset the judiciary's authority to interpret the Constitution, it would also allow Congress to trample on the states. See id. at 527, 117 S.Ct. 2157 (citing Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970)).

The Court then turned to the vertical question: whether Congress could constitutionally impose RFRA on the states under its authority to remedy violations of the Fourteenth Amendment. This question, too, it answered in the negative. The Court held that Congress may sometimes enact legislation to prevent future harms, but only when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 530, 117 S.Ct. 2157. RFRA, said the Court, failed that congruence and proportionality test, because it was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id. at 532, 117 S.Ct. 2157. RFRA's "[s]weeping coverage" impermissibly "ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." Id. Congress imposed that sweeping coverage on states despite no examples in the legislative record of state laws of general applicability "passed because of religious bigotry." Id. at 530, 117 S.Ct. 2157. The Court thus held that the "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," id. at 534, 117 S.Ct. 2157, fell outside Congress's limited
313 legislative *313 authority and upset the "federal balance," id. at 536, 117 S.Ct. 2157. This holding, however, was limited to the states as RFRA continues to govern the federal government. See Burwell v. Hobby Lobby

APPENDIX A

Stores, Inc., 573 U.S. 682, 695, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) ; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006).

Our discussion and analysis of City of Boerne clearly suggests why Congress's enactment of § 249(a)(1) under the Thirteenth Amendment was nothing like its enactment of RFRA under the Fourteenth Amendment. First, we note that nowhere does City of Boerne mention either Jones or the Thirteenth Amendment. Rather, the cases concern two different amendments, each with its own unique history, structure, and caselaw. Diggins furnishes no reason to believe that City of Boerne's examination of the Fourteenth Amendment's Enforcement Clause displaces Jones's separate analysis of the of the Thirteenth Amendment. In fact, the Court in Jones and City of Boerne conducted similar inquiries into each amendment, employing parallel methodologies and modes of reasoning. Compare, e.g., Jones, 392 U.S. at 437-43, 88 S.Ct. 2186 (reviewing the ratification history of the Thirteenth Amendment and concurrent congressional debates concerning the 1866 Civil Rights Act), with City of Boerne, 521 U.S. at 517-27, 117 S.Ct. 2157 (examining the history of the Fourteenth Amendment). The fact that the two cases' shared reasoning may have led to different conclusions reflects that the underlying amendments, and therefore their applications, may vary correspondingly.

Nor was Jones's rational-determination standard -- which Diggins contends "strips all checks on Congress'[s] power" -- undermined by City of Boerne. This distinction, too, is driven by the varied histories of the Thirteenth and Fourteenth Amendments. The Fourteenth Amendment permits Congress to enforce only those rights discussed in that amendment, see U.S. Const. amend. XIV, § 5, and "there is a long, well-established, doctrinally rich, and highly sophisticated tradition of judicial interpretation of the substantive protections established by Section One of the Fourteenth Amendment," Nelson, 277 F.3d at 185 n.20. Yet the same does not hold true for Section One of the Thirteenth Amendment, the meaning of which "has almost never been addressed directly by the courts, in the absence of specific congressional legislation enacted." Id. Read together, then, City of Boerne and Jones do not expose a tension in the caselaw, but rather reveal a key structural, textual, and historical dissimilarity between the Reconstruction Amendments.[13]

APPENDIX A

13 Indeed, it has been long recognized -- in caselaw relied on in both City of Boerne and Jones -- that the enforcement clauses of the Thirteenth and Fourteenth Amendments differ at least insofar as the latter imposes a state-action requirement absent in the former. Compare The Civil Rights Cases, 109 U.S. at 20, 3 S.Ct. 18 (noting that § 2 of the Thirteenth Amendment empowers "Congress to adopt direct and primary, as distinguished from corrective, legislation"); with id. at 19, 3 S.Ct. 18 (Congress had exceeded its legislative authority under the Fourteenth Amendment in enacting the Civil Rights Act of 1875 because the latter was "not corrective legislation" but rather "primary and direct" in character); see also City of Boerne, 521 U.S. at 525, 117 S.Ct. 2157 (noting that the Fourteenth Amendment's Enforcement Clause "did not authorize Congress to pass 'general legislation upon the rights of the citizen, but corrective legislation ... for counteracting such laws as the States may adopt or enforce' " (quoting The Civil Rights Cases, 109 U.S. at 13-14, 3 S.Ct. 18)).

Comparing § 249(a)(1) with RFRA reveals other crucial dissimilarities. 314 Most importantly, *314 unlike RFRA, § 249(a)(1) does not involve congressional interpretation of the scope of substantive rights protected by the Constitution. The Supreme Court, not Congress, determined that the Thirteenth Amendment bans not just slavery but "substitutes for the slave system." See Jones, 392 U.S. at 442, 88 S.Ct. 2186. The Supreme Court, not Congress, determined that review of Congressional determinations of what constitute the "badges and incidents of slavery" are reviewed under the rational-determination standard. Id. at 440, 88 S.Ct. 2186. The Supreme Court, not Congress, determined that Congress rationally determined that racially motivated violence is a relic of slavery, and thus its prohibition fell within Congress's Thirteenth Amendment enforcement power to obliterate the relics of slavery. See Griffin, 403 U.S. at 105, 91 S.Ct. 1790. Thus, in enacting § 249(a)(1), Congress did not usurp the judiciary's role in interpreting the Constitution and in defining the balance of power between the federal government and the state governments. Congress enacted § 249(a)(1) within the scheme announced by the Supreme Court, and did not purport to pronounce the scheme the Supreme Court ought to apply. Additionally, unlike RFRA, § 249(a)(1) does not operate on state governments. The statute does not diminish the states' police power in any way.

APPENDIX A

Moreover, even if we were to accept Diggins's invitation to apply City of Boerne here, § 249(a)(1) would still be constitutional. Unlike with RFRA, Congress made extensive findings about the need for federal assistance to combat the pervasive problem of racially motivated violence. Congress enacted § 249(a)(1) as part of the Shepard-Byrd Act to address racially motivated violence as a badge or incidence of slavery. The scope and gravity of that harm, Congress determined, is considerable and widespread. In passing the law, Congress expressly found that "[t]he incidence of violence motivated by the actual or perceived race[ ] [or] color[ ] ... of the victim poses a serious national problem." Pub. L. 111-84 § 4702(1), 123 Stat. at 2835 (codified at 34 U.S.C. § 12361(1)). It further explained:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.

Pub. L. 111-84 § 4702(7), 123 Stat. at 2836 (codified at 34 U.S.C. § 12361(2)). Congress thus concluded that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." Id. To support those findings and conclusions, Congress made extensive findings on a pervasive national pattern of racially motivated hate crimes.[14] The Supreme Court has similarly recognized the unique harms of racially
315 motivated acts of violence, see *315 Wisconsin v. Mitchell, 508 U.S. 476, 488, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), reinforcing Congress's finding.

[14] See H.R. Rep. 111-86 at 5 (2009) (reporting that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," of which, for the most recent year, "[r]acially-motivated bias accounted for approximately half (50.8%) of all incidents"); id. at 6-9 (describing the inadequacies of prior federal statutes); id. at 7 (articulating state and local needs for "the Federal Government's resources, forensic expertise, and experience in the identification and proof of bias-motivated violence and criminal networks").

APPENDIX A

Further, unlike RFRA, § 249(a)(1) does not prohibit facially constitutional conduct. See United States v. Georgia, 546 U.S. 151, 158–59, 126 S.Ct. 877, 163 L.Ed.2d 650 (2006). Section 249(a)(1) prohibits persons from actually violating the Thirteenth Amendment by perpetuating a badge or incident of slavery, to wit, racially motivated violence. As we have explained, Congress targeted a narrow category of conduct. It sought to "obliterate," Civil Rights Cases, 109 U.S. at 21, 3 S.Ct. 18, violence designed to communicate and enforce ideas of racial superiority and inferiority, see Hatch, 722 F.3d at 1206. It does not target "facially constitutional conduct[ ] in order to prevent and deter unconstitutional conduct." Nev. Dept. Hum. Res. v. Hibbs, 538 U.S. 721, 727-28, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003).

And unlike RFRA, § 249(a)(1) is congruent and proportional to the harm Congress sought to address. The remedy Congress chose is narrow. To address the long and pervasive history of violence targeted at racial minorities, Congress crafted a narrow criminal prohibition, which addresses only actual acts of willful racially motivated violence. Prosecutions may be brought federally only in limited circumstances, each of which Congress connected to an important federal interest or to the lack of a state interest. 18 U.S.C. § 249(b)(1). Given those circumstances, § 249(a)(1) "cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.' " Tennessee v. Lane, 541 U.S. 509, 533, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) (quoting City of Boerne, 521 U.S. at 532, 117 S.Ct. 2157).

Diggins also relies on Shelby County as another case supposedly undermining Jones, but that case offers him even less support than City of Boerne. In Shelby County, the county challenged the constitutionality of §§ 4(b) and 5 of the Voting Rights Act of 1965, 52 U.S.C. §§ 10303(b), 10304, which Congress enacted using authority under the Fourteenth and Fifteenth Amendments. Those provisions prohibited jurisdictions with a history of racially discriminatory voting restrictions from changing any of their voting rules without prior approval of the Department of Justice. See 52 U.S.C. § 10304. The Court agreed with Shelby County, enjoining enforcement of those provisions of the Voting Rights Act. The Court held that "[t]he Voting Rights Act sharply departs from [several] basic principles" of the American constitutional order: that the federal government may not veto state laws, that "[s]tates retain broad autonomy in structuring their governments and

APPENDIX A

pursuing legislative objectives," and that states enjoy "equal sovereignty" and must be treated alike. Shelby Cnty., 570 U.S. at 542-544, 133 S.Ct. 2612. While those extraordinary measures had once been justified, the Court held that they were no longer constitutionally sanctioned. Id. at 545-47, 133 S.Ct. 2612. Instead, pointing to improvements in racial disparities in voter turnout since 1965, the Court held that "Congress — if it is to divide the States -- must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." See id. at 553, 133 S.Ct. 2612. This, the Court determined, Congress failed to do. See id. at 554, 133 S.Ct. 2612.

We reiterate that, like City of Boerne, Shelby County neither expressly nor impliedly overrules Jones. The Supreme Court did not pronounce on how or whether this standard might apply to different exercises of legislative
316 authority under the Fourteenth *316 and Fifteenth Amendments, much less announce a test applicable to the Thirteenth Amendment's Enforcement Clause. Further, even if Shelby County can be read to impose a general obligation on Congress to update civil rights laws to account for current conditions, we see no issue with § 249(a)(1). Congress adopted the law after looking at conditions in 2009, which it found were broadly consistent with historical data. H.R. Rep. 111-86 at 5 (2009). Although Diggins insinuates that hate crimes are no longer matters of national significance, he has given us absolutely no reason to think that conditions have shifted enough to deprive Congress of the ability to legislate against racially motivated violence. To the contrary, in May 2021, Congress found a "dramatic increase in hate crimes and violence against Asian-Americans and Pacific Islanders," and allocated additional resources to federal programs combatting hate crimes. See COVID-19 Hate Crimes Act, Pub. L. 117-13, 135 Stat. 265.

Diggins contends that § 249(a)(1) displaces state authority, implicating the same federalism concerns as §§ 4 and 5 of the Voting Rights Act. Not so. Unlike the provisions at issue in Shelby County, § 249(a)(1) does not represent an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Shelby Cnty., 570 U.S. at 557, 133 S.Ct. 2612 (quoting Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500–01, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)). Rather, § 249(a)(1) is a cornerstone of a scheme of cooperative federalism, representing an ordinary example of one of many parallel state and federal penal laws. See Gamble v. United States, —— U.S. ——, 139 S. Ct. 1960,

APPENDIX A

1965-67, 204 L.Ed.2d 322 (2019). Indeed, Congress asserted federal jurisdiction to allow the Department of Justice to "work together as partners" with state and local law enforcement. 34 U.S.C. § 30501(9). Section 249(a)(1) does not allow the federal government to veto state laws or restructure state governance; it says nothing on the subject. Nor does § 249(a)(1) discriminate between states; it applies uniformly nationwide.

Aware of federalism concerns, see H.R. Rep. 111-86 at 14-15, Congress limited federal prosecutions under § 249(b)(1) to four scenarios, when the Attorney General (or a designee) certifies that:

> **(A)** the State does not have jurisdiction;
>
> **(B)** the State has requested that the Federal Government assume jurisdiction;
>
> **(C)** the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
>
> **(D)** a prosecution by the United States is in the public interest and necessary to secure substantial justice.

18 U.S.C. § 249(b)(1). The first and second grounds cannot possibly encroach on state authority. When the state lacks jurisdiction, there is no state authority to usurp. And when the state asks for a federal prosecution, its consent alleviates any federalism concerns. The third ground, in turn, allows for federal jurisdiction only when a state has acted and a federal interest remains. The federal government does not diminish state authority when it undertakes a second prosecution after the state has already taken its case to trial. Finally, the fourth ground, while allowing for a more robust assertion of federal interests, still allows the state to undertake any prosecution it wishes to. See Gamble, 139 S. Ct. at 1965-67. In sum, none of the cases in which Congress authorized prosecutions under § 249(a)(1)
317 weaken state authority in *317 any way. Nor can Congress be said to have arrogated to itself a general police power, see Hatch, 722 F.3d at 1203-04, when it targets only racially motivated violence through cooperation with the states.

APPENDIX A

The cooperative nature of the federalism here is further evidenced by the statutory context. Congress enacted § 249(a)(1) as part of the Shepard-Byrd Act. Far from usurping state authority, the act enhances state power. It authorizes the Attorney General to "provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of" violent hate crimes under state law. Pub. L. 111-84 § 4704(a)(1), 123 Stat. at 2837 (codified at 34 U.S.C. § 30503(a)(1)). It similarly authorizes the Attorney General to award grants to state and local law enforcement agencies "for extraordinary expenses associated with the investigation and prosecution of hate crimes." Pub. L. 111-84 §§ 4704(b)(1), 4705 123 Stat. at 2837 (codified at 34 U.S.C. §§ 30503(b)(1), 30504).[15] That is why twenty-eight state attorneys general lobbied Congress to enact the law, expressing a belief that "federal assistance is critical in fighting the invidious effects of hate crimes." Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1589 Before the Subcomm. on Crime, Terrorism & Homeland Sec., H. Comm. on the Judiciary 18 (2007) (letter from twenty-seven state attorneys general); accord id. at 23 (letter from Florida attorney general).

[15] Amendments to the Shepard-Byrd Act, enacted in May 2021, provide for even more resources to help states investigate and prosecute hate crimes. Khalid Jabara and Heather Heyer National Opposition to Hate, Assault, and Threats to Equality Act of 2021, Pub. L. 117-13 § 5, 135 Stat. 265, 266-72 (codified at 34 U.S.C. § 30507).

* * *

Contrary to Diggins's arguments, then, the Court's decisions in City of Boerne and Shelby County neither undermine Jones nor indicate that § 249(a)(1) poses federalism concerns. The mere fact that the Reconstruction Amendments possess similarly worded enforcement clauses and "disclose[ ] a unity of purpose" at a broad level, see The Slaughter–House Cases, 83 U.S. 36, 67, 16 Wall. 36, 21 L.Ed. 394 (1872), does not obviate the obvious. The Thirteenth, Fourteenth, and Fifteenth Amendments are independent and distinct constitutional provisions, each with its unique scope, enforcement clause, and ratification history, and each spawning its own unique jurisprudence. Accordingly, we cannot simply graft doctrines articulated and crafted for entirely separate constitutional provisions onto the Thirteenth Amendment context. Section 249(a)(1) is an attempt to supplement state efforts to address the continuing problem of racially

APPENDIX A

motivated violence. It supports rather than offends principles of federalism. Wherever the boundary on Congress's enforcement power under the Thirteenth Amendment lies, § 249(a)(1) easily falls within it.

II. Certification under § 249(b)(1)

Diggins next alleges deficiencies in the government's certification of the prosecution pursuant to 18 U.S.C. § 249(b)(1). As described supra Section I.D, prosecutions of offenses under § 249(a) require the "certification in writing of the Attorney General[ ] or a designee" that one of four conditions exist warranting federal intervention. 18 U.S.C. § 249(b)(1). Pursuant to this provision, the Assistant Attorney General, acting as the Attorney General's designee, certified shortly before the grand jury returned the superseding indictment that the prosecution of Diggins and his nephew
318 under § 249(a)(1) was "in the public interest *318 and necessary to secure substantial justice," one of the four situations contemplated by § 249(b)(1). See id. § 249(b)(1)(D).

Diggins argues that this statement was deficient, suggesting that the Assistant Attorney General's certification must also explain why he made his decision. But Diggins explicitly disclaims arguing that the certification is judicially reviewable, contending that although "[t]he certification can be reviewed, ... the reviewers are not courts," but rather "the voters." Given this concession, it is unclear what remains of Diggins's contention. Assuming he has not waived his challenge to the certification, he points to no basis in the Constitution or the statute for imposing an additional procedural hurdle on the Attorney General's exercise of prosecutorial discretion. We find none, either. Rather, it is well established that the decision to prosecute is vested exclusively in the executive branch and is generally not subject to judicial review. See United States v. Santos-Soto, 799 F.3d 49, 62 (1st Cir. 2015) (noting that indictment decisions are "a matter within the sole discretion of the prosecution").

While we have not previously ruled on the reviewability of certifications under § 249(b), along with all but one of our sister circuits we have held unreviewable a similar certification requirement in federal juvenile law, codified at 18 U.S.C. § 5032, which in relevant part requires the Attorney General to confirm that "there is a substantial Federal interest in the case." United States v. Smith, 178 F.3d 22, 25 (1st Cir. 1999) ; accord United States v. F.S.J., 265 F.3d 764, 768 (9th Cir. 2001) ; United States v. Doe, 226 F.3d 672, 676–78 (6th Cir. 2000) ; United States v. Jarrett, 133 F.3d 519, 538–41 (7th Cir. 1998) ; United States v. Juv. Male, J.A.J., 134 F.3d

APPENDIX A

905, 906–09 (8th Cir. 1998) ; In re Sealed Case, 131 F.3d 208, 212–15 (D.C. Cir. 1997) ; United States v. Juv. No. 1, 118 F.3d 298, 303–07 (5th Cir. 1997) ; Impounded (Juv. R.G.), 117 F.3d 730, 733–36 (3d Cir. 1997) ; United States v. I.D.P., 102 F.3d 507, 510–13 (11th Cir. 1996).[16] Our holding in Smith that certification under § 5032 is an unreviewable exercise of prosecutorial discretion was based largely on the fact that the provision "does not specifically provide for judicial review of a certification and fails to articulate any standards for determining the existence of a substantial federal interest."[17] Smith, 178 F.3d at 25.

16 The Fourth Circuit is unique among appellate courts to hold that certifications of a substantial federal interest under § 5032 are subject to judicial review. See United States v. Juv. Male No. 1, 86 F.3d 1314, 1317–21 (4th Cir. 1996). In Roof, the Fourth Circuit "assume[d] without deciding" that § 249 certifications are reviewable, but affirmed the certification on the merits and noted that its "scope of review [wa]s limited because the Attorney General's certifications must be afforded substantial deference." 10 F.4th at 396-97.

17 Analogously, we have held in the context of capital cases that "because the exercise of prosecutorial discretion is a 'core executive constitutional function,' " the guidelines contained in the United States Attorneys' Manual for determining whether to seek the death penalty do not confer substantive rights on defendants. See United States v. Lopez-Matias, 522 F.3d 150, 156 (1st Cir. 2008) (quoting United States v. Armstrong, 517 U.S. 456, 465, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996)); see also id. (noting that "[w]e are reluctant to interfere with internal prosecutorial measures" in large part out of "a respect for the separation of powers").

For the same reason, we now hold that certifications made under § 249(b) are exempt from judicial review, as the government urges us to determine. See also United States v. Bowers, 495 F. Supp. 3d 362, 374 (W.D. Pa. 2020)
319 (finding *319 certifications under § 249(b) unreviewable); United States v. Jenkins, 909 F. Supp. 2d 758, 774 (E.D. Ky. 2012) (same). Like § 5032, § 249(b) neither expressly provides for judicial review nor specifies any standards to evaluate the nature of the federal interest at stake. As such, certifications under § 249(b) are "unreviewable act[s] of prosecutorial discretion." Smith, 178 F.3d at 26.[18] Diggins's challenge to the certification of his prosecution thus fails.[19]

APPENDIX A

18 Diggins attempts to distinguish Smith by asserting that the certification here was "constitutionally defective" rather than a simple exercise of prosecutorial discretion, but this argument merely adverts to the same putative concerns about federalism and the scope of the Thirteenth Amendment that we have already rejected supra Part I. Cf. Hatch, 722 F.3d at 1207 ("We see no constitutional significance in the certification requirement.").

19 By way of a letter submitted pursuant to Fed. R. Civ. P. 28(j), Diggins also belatedly suggests that the certification requirement somehow represents an unconstitutional delegation of legislative power, citing as persuasive authority the Fifth Circuit's recent decision in Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022). In that case, a divided panel applied the nondelegation doctrine to strike down a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a), 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78u-2(a)) giving the SEC the authority to choose whether to bring certain enforcement actions in Article III courts or in administrative proceedings. See Jarkesy, 34 F.4th at 459–63.

This contention fails on multiple grounds. First, because Diggins did not raise any such argument in his opening brief, it is waived. See Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 239-40 (1st Cir. 2013) ("[A]rguments not raised in an opening brief are waived."). Second, Jarkesy is wholly inapposite. Exercises of prosecutorial discretion are emphatically not administrative delegations, but are -- as noted above -- quintessentially executive decisions. See Santos-Soto, 799 F.3d 49 at 62 ; see also Jarkesy, 34 F.4th at 461–62 (holding that the decision whether to "assign certain actions to agency adjudication" is a legislative power, but the mere "deci[sion] whether to bring enforcement actions in the first place" is indeed "an executive, not legislative power"). As such, there is no possible nondelegation issue here. And third, even if nondelegation concerns were somehow applicable, the direction that prosecutions under § 249(b)(1)(D) be "in the public interest and necessary to secure substantial justice" indisputably satisfies the lax "intelligible principle" standard under our precedents and those of the Supreme Court. See United States v. Parks, 698 F.3d 1, 7 (1st Cir. 2012) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)); see also id. at 8 (noting that "modern case law tends regularly to disfavor" nondelegation arguments).

III. The District Court's Evidentiary Rulings

APPENDIX A

Diggins lastly attempts to challenge the district court's evidentiary rulings concerning the admission into evidence of his white-supremacist tattoos and expert testimony relating to the same. But Diggins fails to develop this argument in his brief, mentioning it only in his statement of the issues and then (obliquely) in his summary of the argument and articulation of the standard of review. He does not again discuss the matter in his argument. This perfunctory treatment is insufficient. We have repeatedly made clear that a party waives an argument when it "neither develops the argument nor accompanies it with even a shred of authority." United States v. González, 981 F.3d 11, 23 (1st Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 1710, 209 L.Ed.2d 477 (2021). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work ...." United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Rather, "a litigant has an obligation to spell out its arguments squarely and
320 distinctly, or else forever hold its peace." Id. (quoting *320 Rivera–Gómez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988)) (internal quotation marks omitted). Because Diggins's opening brief did not develop his contention that the district court abused its discretion in its evidentiary rulings, he has waived the argument.

CONCLUSION

The judgment below is **affirmed** .

APPENDIX A

United States v. Diggins

435 F. Supp. 3d 268 (D. Me. 2019)
Decided Dec 30, 2019

2:18-cr-00122-JDL

2019-12-30

UNITED STATES of America v. Maurice DIGGINS and Dusty Leo, Defendants.

Sheila W. Sawyer, U.S. Attorney's Office, Portland, ME, for United States of America. Randall J. Bates, Bates Law Firm, Yarmouth, ME, for Defendant Maurice Diggins. Amy L. Fairfield, Fairfield & Associates, P.A., Lyman, ME, for Defendant Dusty Leo.

JON D. LEVY, CHIEF U.S. DISTRICT JUDGE

270 *270

Sheila W. Sawyer, U.S. Attorney's Office, Portland, ME, for United States of America.

Randall J. Bates, Bates Law Firm, Yarmouth, ME, for Defendant Maurice Diggins.

Amy L. Fairfield, Fairfield & Associates, P.A., Lyman, ME, for Defendant Dusty Leo.

ORDER ON DEFENDANTS' MOTION TO DISMISS THE SUPERSEDING INDICTMENT

JON D. LEVY, CHIEF U.S. DISTRICT JUDGE

Maurice Diggins and Dusty Leo are charged in a Superseding Indictment (ECF No. 58) with two counts of committing a hate crime in violation of 18 U.S.C.A. § 249(a)(1) (West 2019) and one count of conspiring to commit a hate crime in violation of 18 U.S.C.A. § 371 (West 2019) and § 249(a)(1). Diggins and Leo move to dismiss the Superseding Indictment (ECF Nos. 89, 92) under Fed. R. Crim. P. 12(b), arguing that § 249(a)(1) is unconstitutional and that the Government failed to certify the prosecution as required by 18 U.S.C.A. § 249(b)(1) (West 271 *271 2019). For the reasons set forth below, I deny the motion.

I. BACKGROUND

On March 1, 2019, a federal grand jury returned a Superseding Indictment against Diggins and Leo, alleging that they "knowingly and willfully combined, conspired, and agreed with each other to commit ... violations of [18 U.S.C.A. § 249] ..., by willfully causing bodily injury to [two men] because of their actual and perceived race and color" in the District of Maine on or about April 15, 2018. ECF No. 58 at 1. Specifically, the Superseding Indictment alleges that Diggins and Leo approached a Black man on a sidewalk in Portland and

APPENDIX B

struck him in the head, breaking his jaw, while calling him a "nigger." *Id.* at 1-2. It further alleges that Diggins and Leo approached a second Black man on the same night in a 7-Eleven parking lot in Biddeford and similarly struck him in the head, breaking his jaw, while calling him a "nigger." *Id.* at 2.

On March 4, 2019, the Government filed a document certifying that the prosecution against Diggins and Leo "is in the public interest and necessary to secure substantial justice" under 18 U.S.C.A. § 249(b). ECF No. 63. The certification was signed by Eric S. Dreiband, Assistant Attorney General for the Civil Rights Division of the United States Department of Justice, on February 26, 2019—three days before the grand jury returned the Superseding Indictment.

II. LEGAL ANALYSIS

Diggins and Leo move to dismiss the Superseding Indictment for two reasons. First, they argue that the federal hate-crime statute they are charged with violating and conspiring to violate, 18 U.S.C.A. § 249(a)(1), is unconstitutional. Second, they argue that even if the statute is constitutional, the Superseding Indictment must be dismissed because the certification filed by the Government does not satisfy 18 U.S.C.A. § 249(b)(1), which is a prerequisite for prosecution under § 249(a)(1). Both arguments present questions of first impression in this circuit. After considering the parties' arguments in their memoranda and at a hearing held on December 5, 2019, I conclude that § 249(a)(1) is constitutional as it applies to Diggins and Leo and that the certification filed by the Government satisfies § 249(b)(1).

A. Constitutionality of 18 U.S.C.A. § 249(a)(1)

As relevant here, § 249(a)(1) makes it a federal crime to "willfully cause[ ] bodily injury to any person ... because of the actual or perceived race, color, religion, or national origin of any person." Congress enacted § 249(a)(1) pursuant to its authority under the Thirteenth Amendment to the Constitution of the United States, which provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII ; *see* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702(7-8), 123 Stat. 2190, 2836 (2009).

Section 2 of the Thirteenth Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery" in the United States. *The Civil Rights Cases* , 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883). "Congress has the power under *272 the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery...." *Jones v. Alfred H. Mayer Co.* , 392 U.S. 409, 440, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). Therefore, "if Congress rationally determines that something is a badge or incident of slavery, it may broadly legislate against it through Section 2 of the Thirteenth Amendment." *United States v. Hatch* , 722 F.3d 1193, 1201 (10th Cir. 2013), *cert. denied* , 572 U.S. 1018, 134 S.Ct. 1538, 188 L.Ed.2d 561 (2014) ; *see also Griffin v. Breckenridge* , 403 U.S. 88, 104-05, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) ; *United States v. Metcalf* , 881 F.3d 641, 644-45 (8th Cir. 2018), *cert. denied* , —— U.S. ——, 139 S.Ct. 412, 202 L.Ed.2d 339 (2018) ; *United States v. Cannon* , 750 F.3d 492, 499-500 (5th Cir. 2014), *cert. denied* , 574 U.S. 1029, 135 S.Ct. 709, 190 L.Ed.2d 445 (2014) ; *United States v. Allen* , 341 F.3d 870, 884 (9th Cir. 2003), *cert. denied* , 541 U.S. 975, 124 S.Ct. 1876, 158 L.Ed.2d 471 (2004); *United States v.*

APPENDIX B

Nelson , 277 F.3d 164, 185 (2d Cir. 2002), *cert. denied* , 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002). Thus, in *Jones* , the Supreme Court upheld 42 U.S.C. § 1982, which "prohibit[s] all racial discrimination, private and public, in the sale and rental of property," finding that Congress had rationally designated such discrimination a badge and incident of slavery. *Jones* , 392 U.S. at 437-44, 88 S.Ct. 2186.

Here, § 249(a)(1) punishes racially motivated violence, and Congress determined that racially motivated violence is a badge and incident of slavery. When adopting § 249, Congress explained:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act § 4702(7). Diggins and Leo suggest that § 249(a)(1) "exceeds anything related to slavery" and "is not remedial to slavery" because "it addresses bodily injury" motivated by race, not actual enslavement. ECF No. 111 at 4. But the Supreme Court squarely rejected this argument in *Griffin* , stating that "the varieties of private conduct that [Congress] may make criminally punishable ... extend far beyond the actual imposition of slavery or involuntary servitude." 403 U.S. at 105, 91 S.Ct. 1790. Under the expansive view of "badges and incidents" articulated in *Jones* and *Griffin* , Congress's identification of racially motivated violence as a badge and incident of slavery is "not merely rational, but inescapable." *United States v. Beebe* , 807 F. Supp. 2d 1045, 1052-53 (D.N.M. 2011) (reviewing history and case law related to slavery), *aff'd sub nom. United States v. Hatch* , 722 F.3d 1193 (10th Cir. 2013), *cert. denied* , 572 U.S. 1018, 134 S.Ct. 1538, 188 L.Ed.2d 561 (2014) ; *see also Cannon* , 750 F.3d at 501-02 (quoting *Hatch* , 722 F.3d at 1206) (same).

Diggins and Leo contend that even if Congress rationally determined that racially motivated violence is a badge or incident of slavery, § 249(a)(1) is not rationally related to abolishing such violence because it is overbroad, encompassing religiously motivated violence as well. But the question of overbreadth is not presented here
273 *273 because the Superseding Indictment alleges only racially motivated violence and not religiously motivated violence. Thus, I do not decide this issue. *See United States v. Raines* , 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). As to racially motivated violence, there is no doubt that § 249(a)(1) is rationally related to eradicating such violence, especially given Congress's explicit findings to that effect. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act § 4702(1-5), (7), (9-10). Thus, I conclude that § 249(a)(1), as applied to Diggins and Leo, falls within the scope of Congress's Thirteenth Amendment enforcement authority and is constitutional under *Jones*.

Diggins and Leo nevertheless contend that § 249(a)(1) is unconstitutional, arguing that *Jones* should not control this case for several reasons. First, Diggins and Leo argue that the Supreme Court disavowed *Jones* by adopting a more limited view of Congressional authority under the Fourteenth Amendment in *City of Boerne v. Flores* , 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), and under the Fifteenth Amendment in *Shelby County v. Holder* , 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). Because the Thirteenth, Fourteenth, and Fifteenth Amendments share a common origin and are sometimes collectively referred to as the "Civil War Amendments," *see, e.g.* , *Oregon v. Mitchell* , 400 U.S. 112, 143, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (Douglas, J., concurring in part and dissenting in part), Diggins and Leo assert that the reasoning of *Flores* and

Shelby County applies equally in the Thirteenth Amendment context, rendering § 249(a)(1) unconstitutional. However, neither decision purported to analyze the legislation at issue under the Thirteenth Amendment. Indeed, neither *Flores* nor *Shelby County* even mentioned *Jones* or any other Thirteenth Amendment precedent.[1] Thus, there is no reason to believe that either decision implicitly overruled *Jones.* Additionally, "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.* , 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Therefore, *Flores* and *Shelby County* provide no basis for disregarding *Jones* , which is binding precedent.

[1] At oral argument, counsel for Diggins and Leo noted that *Flores* and cases construing it, including *United States v. Morrison* , 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), rely upon the *Civil Rights Cases* , 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), which is Thirteenth Amendment precedent. However, the *Civil Rights Cases* analyzed the challenged legislation separately under both the Thirteenth Amendment and the Fourteenth Amendment. *Compare id.* at 10-19, 3 S.Ct. 18 (discussing Section 5 of the Fourteenth Amendment) *with id.* at 20-25, 3 S.Ct. 18 (discussing Section 2 of the Thirteenth Amendment). The Court explained that the scope of Congress's authority differs under each Amendment. *See id.* at 23-24, 3 S.Ct. 18. Both *Flores* and *Morrison* cite only to portions of the *Civil Rights Cases* discussing the Fourteenth Amendment, which have no application here.

Second, Diggins and Leo argue that *Jones* , which upheld a civil statute prohibiting racial discrimination in the sale or rental of property, is limited to the civil context and thus does not apply to criminal statutes such as § 249(a)(1). But Diggins and Leo do not point to any authority supporting the proposition that civil and criminal legislation should be treated differently under the Thirteenth Amendment, and the relevant case law rejects
274 such a distinction. The Supreme Court has explicitly *274 stated that Congress has the power to make badges and incidents of slavery "criminally punishable," *Griffin* , 403 U.S. at 105, 91 S.Ct. 1790, and three circuits have applied the *Jones* standard to uphold another criminal statute, 18 U.S.C.A. § 245(b)(2)(B). *See Allen* , 341 F.3d at 884 ; *Nelson* , 277 F.3d at 190-91 ; *United States v. Bledsoe* , 728 F.2d 1094, 1097 (8th Cir. 1984), *cert. denied* , 469 U.S. 838, 105 S.Ct. 136, 83 L.Ed.2d 76 (1984) ; *see also United States v. Comstock* , 560 U.S. 126, 136, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010) (recognizing that "Congress routinely exercises its authority to enact criminal laws in furtherance of ... its enumerated powers," including its power "to enforce civil rights" (citing U.S. Const. amend. XIII)).

Diggins and Leo further assert that extending *Jones* to uphold the criminal statute at issue here would violate the Tenth Amendment by transferring the police power, which is reserved to the states, to the federal government. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. By its text, the Tenth Amendment permits the federal government to exercise powers when they are "delegated to [it] by the Constitution." Because the Thirteenth Amendment grants Congress the authority to pass § 249(a)(1), as discussed above, the powers encompassed in § 249(a)(1) are "delegated" to the federal government by the Constitution and are thus not reserved to the states under the Tenth Amendment. *See Hatch* , 722 F.3d at 1202 (quoting *New York v. United States* , 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)).

Finally, Diggins and Leo contend that, even if extending *Jones* to the criminal context does not violate the Tenth Amendment, it contravenes fundamental principles of federalism by permitting the federal government to "usurp" police power from the states. ECF No. 89 at 13. But § 249(a)(1) does not usurp or otherwise interfere with the states' power to prosecute racially motivated violence. It merely makes a federal prosecution available

APPENDIX B

in addition to any state prosecution. This arrangement is "commonplace under the dual-sovereign concept and involve[s] no infringement per se of states' sovereignty in the administration of their criminal laws." *United States v. Bunnell* , 106 F. Supp. 2d 60, 66 (D. Me. 2000) (quoting *United States v. Johnson* , 114 F.3d 476, 481 (4th Cir. 1997)).

Nor does upholding § 249(a)(1) effectively grant Congress a "plenary police power that would authorize enactment of every type of legislation," as Diggins and Leo suggest. ECF No. 89 at 14-15 (quoting *United States v. Lopez* , 514 U.S. 549, 566, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and collecting additional authorities). Because § 249(a)(1) addresses only racially motivated violence, its scope is limited and any intrusion on state sovereignty is minor. *See Hatch* , 722 F.3d at 1206 ; *see also United States v. Henery* , 60 F. Supp. 3d 1126, 1130 (D. Idaho 2014) (discussing *Hatch*); *cf. Nelson* , 277 F.3d at 185-86.[2]

[2] Contrary to Diggins and Leo's argument, § 249(a)(1) is constitutional regardless of whether the certification requirement contained in § 249(b)(1) effectively limits the exercise of federal prosecutorial power. *See Hatch* , 722 F.3d at 1207-08. As such, I do not examine the effectiveness of the certification requirement here.

For these reasons, I apply *Jones* as binding precedent and find that Congress properly exercised its authority
275 under Section 2 of the Thirteenth Amendment in enacting § 249(a)(1).[3] *275 **B. Sufficiency of Certification under 18 U.S.C.A. § 249(b)(1)**

[3] Accordingly, I do not consider whether § 249(a)(1) is also authorized under the Commerce Clause or the Fourteenth Amendment.

Diggins and Leo further argue that, even if § 249(a)(1) is constitutional, the Superseding Indictment must be dismissed because the Government did not comply with § 249(b)(1)'s certification requirement. Section 249(b)(1) provides:

> No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that
>
> (A) the State does not have jurisdiction;
>
> (B) the State has requested that the Federal Government assume jurisdiction;
>
> (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
>
> (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

Here, the Government produced a written certification that Diggins and Leo's prosecution was "in the public interest and necessary to secure substantial justice." ECF No. 63. The certification was signed by Eric S. Dreiband, Assistant Attorney General for the Civil Rights Division, three days before the Superseding Indictment was issued. The Assistant Attorney General for the Civil Rights Division is the Attorney General's designee with respect to § 249 certifications. *See* 28 C.F.R. § 0.50(n). Thus, the certification appears sufficient on its face. Nevertheless, Diggins and Leo contend that it is insufficient because there is "no evidence beyond a signature line" that Dreiband is the Assistant Attorney General for the Civil Rights Division or that Dreiband is the person who signed the certification. ECF No. 111 at 6. At oral argument, Diggins and Leo suggested that a

APPENDIX B

§ 249(b)(1) certification is insufficient unless supported by a jurat, a form of oath or affirmation by a signatory as to the truthfulness of a document's contents. But a jurat is not required by § 249(b)(1), and absent any evidence suggesting that this certification contains misrepresentations about the signatory, I will not impose procedural requirements upon the Government not contemplated by the statute. Because the certification on its face satisfies § 249(b)(1), I conclude that it is procedurally sound. *See United States v. Maybee* , No. 3:11-cr-30006-002, 2013 WL 3930562, at *2 (W.D. Ark. July 30, 2013) (approving a similar § 249(b)(1) certification).

Diggins and Leo further argue that the certification is deficient because it is not supported by a record explaining why the Assistant Attorney General deemed this prosecution "in the public interest and necessary to secure substantial justice." Thus, Leo and Diggins seek substantive review of the § 249(b)(1) certification. Although this is a matter of first impression in this Circuit, the First Circuit determined in *United States v. Smith* , 178 F.3d 22 (1st Cir. 1999), that certifications issued under a similar statute, 18 U.S.C. § 5032, are substantively unreviewable. *Id.* at 25-26, 26 n.2. In *Smith* , the Government certified that there was a "substantial Federal interest" in the defendant's prosecution under § 5032, and the defendant sought substantive review of the certification. *Id.* at 25 (quoting § 5032). The district court denied review, and the First Circuit affirmed, citing the text, structure, and legislative history of § 5032. *Id.* at 25-26. The First Circuit further explained that the certification was similar to an ordinary charging decision, which "falls squarely within the
276 parameters of prosecutorial discretion *276 that is unreviewable." *Id.* at 26 (alterations omitted) (quoting *United States v. I.D.P.* , 102 F.3d 507, 511 (11th Cir. 1996)).

Though § 249 is not identical to § 5032, it is similar in important respects. Just as § 5032(3) permits the prosecution of a juvenile for a violent felony upon a certification that such prosecution promotes "a substantial Federal interest," § 249(b)(1)(D) permits a hate-crime prosecution upon a certification that it is "in the public interest and necessary to secure substantial justice." Neither statute "articulate[s] any standards for determining" when these conditions are met, and neither "specifically provide[s] for judicial review of a certification." *Smith* , 178 F.3d at 25. These structural and textual similarities suggest that § 249(b)(1) certifications, like § 5032 certifications, are "unreviewable act[s] of prosecutorial discretion." *Id.* at 26. Every court considering this issue to date has similarly found the two statutes sufficiently alike to apply § 5032 precedent in the context of § 249(b)(1) certifications. *See United States v. Beckham* , No. 3:18-cr-00075-1, 2019 WL 2869189, at *2 (M.D. Tenn. July 3, 2019) ; *United States v. Hill* , No. 3:16-cr-00009-JAG, 2018 WL 3872315, at *3-5, *4 n.5 (E.D. Va. Aug. 15, 2018), *rev'd on other grounds* , 927 F.3d 188 (4th Cir. 2019) ; *United States v. Jenkins* , 909 F. Supp. 2d 758, 773-74 (E.D. Ky. 2012).

Diggins and Leo do not point to anything in the text, structure, or legislative history of § 249 to distinguish it from § 5032, nor do they attempt to otherwise distinguish this case from *Smith.* Instead, they contend that the mere existence of the certification requirement compels substantive review because without review, certification does not meaningfully limit prosecutorial discretion as Congress intended. However, the First Circuit implicitly rejected this argument in *Smith* by finding § 5032 certifications unreviewable. Moreover, this argument speculates as to Congress's intent, failing to account for the equally plausible explanation that Congress believed the certification process alone would meaningfully check prosecutorial discretion by subjecting local prosecutors' judgments to the oversight of the Assistant Attorney General for the Civil Rights Division. I am not persuaded that denying substantive review contravenes Congress's intent, especially given that Congress could have explicitly provided for judicial review and did not do so.

Finally, Diggins and Leo assert that substantive review is available under *Marbury v. Madison* , 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803), and *McLaughlin v. Hagel* , 767 F.3d 113, 118 (1st Cir. 2014), but both cases are inapposite. Though both cases indicate that substantive review of executive action is sometimes

APPENDIX B

available in civil disputes, neither refutes the well-settled principle that "the decision to prosecute is particularly ill-suited to judicial review." *Smith* , 178 F.3d at 26 (quoting *Wayte v. United States* , 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). Thus, I conclude that *Smith* controls, and I decline to review the reasons underlying the Government's decision to certify this prosecution under § 249(b)(1). *See Smith* , 178 F.3d at 26 ; *see also Maybee* , 2013 WL 3930562, at *3 ; *Jenkins* , 909 F. Supp. 2d at 774.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED** that the Defendants' Motion to Dismiss the Superseding Indictment (ECF No. 89) is **DENIED** .

SO ORDERED.

APPENDIX B

18 U.S.C. § 249

Section 249 - Hate crime acts

(a) IN GENERAL.-

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.-Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person-

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if-

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(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 or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, 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; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if-

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED.-For purposes of subparagraph (A), the circumstances described in this subparagraph are that-

(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

APPENDIX C

(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 traveled 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.

(3) OFFENSES OCCURRING IN THE SPECIAL MARITIME OR TERRITORIAL JURISDICTION OF THE UNITED STATES.-Whoever, within the special maritime or territorial jurisdiction of the United States, engages in conduct described in paragraph (1) or in paragraph (2)(A) (without regard to whether that conduct occurred in a circumstance described in paragraph (2)(B)) shall be subject to the same penalties as prescribed in those paragraphs.

(4) GUIDELINES.-All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be included in the United States Attorneys' Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.

(5) LYNCHING.-Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if death or serious bodily injury (as defined in section 2246 of this title) results from the offense, be imprisoned for not more than 30 years, fined in accordance with this title, or both.

(6) OTHER CONSPIRACIES.-Whoever conspires to commit any offense under paragraph (1), (2), or (3) shall, if death or serious bodily injury (as defined in section 2246 of this title) results from the offense, or if the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, be imprisoned for not more than 30 years, fined in accordance with this title, or both.

(b) CERTIFICATION REQUIREMENT.-
(1) IN GENERAL.-No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that-
(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

APPENDIX C

(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(2) RULE OF CONSTRUCTION.-Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(c) DEFINITIONS.-In this section-

(1) the term "bodily injury" has the meaning given such term in section 1365(h)(4) of this title, but does not include solely emotional or psychological harm to the victim;

(2) the term "explosive or incendiary device" has the meaning given such term in section 232 of this title;

(3) the term "firearm" has the meaning given such term in section 921(a) of this title;

(4) the term "gender identity" means actual or perceived gender-related characteristics; and

(5) the term "State" includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.

(d) STATUTE OF LIMITATIONS.-

(1) OFFENSES NOT RESULTING IN DEATH.-Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date on which the offense was committed.

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

(e) SUPERVISED RELEASE.-If a court includes, as a part of a sentence of imprisonment imposed for a violation of subsection (a), a requirement that the defendant be placed on a term of supervised release after imprisonment under section 3583, the court may order, as an explicit condition of supervised release, that the defendant undertake educational classes or community service directly related to the community harmed by the defendant's offense.

18 U.S.C. § 249

Added and amended Pub. L. 111-84, div. E, §§4707(a)4711,, 47114711,, 123 Stat. 2838, 2842; Pub. L. 117-13, §5(h), May 20, 2021, 135 Stat. 272; Pub. L. 117-107, §2, Mar. 29, 2022, 136 Stat. 1125.

EDITORIAL NOTES

AMENDMENTS2022*-Subsec. (a)(5), (6). Pub. L. 117-107 added pars. (5) and (6).* ***2021****-Subsec. (e). Pub. L. 117-13 added subsec. (e).****2009****-Subsec. (a)(4). Pub. L. 111-84, §4711, added par. (4).*

APPENDIX C

STATUTORY NOTES AND RELATED SUBSIDIARIES

SEVERABILITY *Pub. L. 111-84, div. E, §47094709,, 123 Stat. 2841, which related to severability of provisions, was editorially reclassified as section 30505 of Title 34, Crime Control and Law Enforcement.*

RULE OF CONSTRUCTION *Pub. L. 111-84, div. E, §47104710,, 123 Stat. 2841, which related to construction, was editorially reclassified as section 30506 of Title 34, Crime Control and Law Enforcement.*

FINDINGS *Pub. L. 111-84, div. E, §47024702,, 123 Stat. 2835, which set out Congressional findings related to hate crimes, was editorially reclassified as section 30501 of Title 34, Crime Control and Law Enforcement.*

APPENDIX C