No. 12-20514

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES CANNON,
BRIAN KERSTETTER,
MICHAEL MCLAUGHLIN,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Because the central issue on appeal is the constitutionality of the federal hate crimes act under which defendants were convicted, the United States respectfully requests oral argument in this matter.

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STATEMENT OF JURISDICTION

Defendants-Appellants Charles Cannon, Brian Kerstetter, and Michael McLaughlin were indicted and convicted under the criminal laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment as to the defendants on July 26, 2012 (McLaughlin), and July 30,

2012 (Cannon and Kerstetter). M.R. 432; C.R. 444; K.R.E. 39-43.[1] Defendants filed timely notices of appeal (Cannon, July 24, 2012; Kerstetter, July 30, 2012; McLaughlin, July 31, 2012). C.R. 423; K.R.E. 32; M.R. 426. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether 18 U.S.C. 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

2. Whether the evidence was sufficient to support Cannon's and McLaughlin's convictions.

STATEMENT OF THE CASE

1. On January 18, 2012, a federal grand jury returned a one-count indictment charging the three defendants-appellants (along with Joseph Staggs[2]) with violating 18 U.S.C. 249, the criminal provision of the Matthew-Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (Shepard-Byrd Act). C.R. 17.

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[1] Citations to "M.R. __" refer to the page number following the Bates stamp "USCA5" in McLaughlin's record on appeal. Citations to " C.R. __" refer to the page number following the Bates stamp "USCA5" in Cannon's record on appeal. Citations to "K.R.E. __" are to pages numbers in Kerstetter's Record Excerpts (Kerstetter did not file a separately paginated record on appeal). References to "R. __" are to docket numbers on the district court docket sheet. Citations to "Cannon Br. __," "McLaughlin Br. __," and "Kerstetter Br.__" refer to page numbers in Cannon's, McLaughlin's, and Kerstetter's opening briefs, respectively.

[2] Prior to trial, the indictment against Staggs was dismissed. C.R. 184-185, 1008-1009. Staggs testified as a government witness. See C.R. 1008-1130.

The indictment alleged that defendants, while aiding and abetting one another, "willfully caused bodily injury to Y.J. [Yondell Johnson], who is African American, because of his actual or perceived race, color, and national origin." C.R. 17. Pursuant to 18 U.S.C. 249(b), the Assistant Attorney General certified that the prosecution "is in the public interest and is necessary to secure substantial justice." C.R. 398-400.

On February 21, 2012, Cannon and McLaughlin filed motions to dismiss the indictment. C.R. 49; M.R. 69.[3] The crux of their arguments was that 18 U.S.C. 249(a)(1) is unconstitutional because Congress lacked the authority to enact it. The United States opposed the motions, asserting that Section 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment. C.R. 93. On March 6, 2012, the district court denied the motions. C.R. 135.

A four-day joint jury trial was held between April 11-16, 2012. C.R. 520-1348. At the end of the government's evidence, and again at the close of all of the evidence, defendants moved for judgments of acquittal, which the court denied. C.R. 1190-1204, 1231. On April 16, 2012, the jury found defendants guilty. C.R. 1345-1347. On April 30, 2012, defendants filed motions for a judgment of acquittal or a new trial, again arguing, *inter alia*, that Section 249(a)(1) was

[3] On March 12, 2012, Kerstetter filed a motion to adopt the motions of the other defendants, specifically including the motions to dismiss. C.R. 148-150.

unconstitutional. C.R. 401-407; M.R. 400-405; R. 167. The court denied the motions. C.R. 422.

The court entered final judgment as to the defendants on July 26, 2012 (McLaughlin), and July 30, 2012 (Cannon and Kerstetter). M.R. 432; C.R. 444; K.R.E. 39-43. Kerstetter was sentenced to 77 months' imprisonment; Cannon was sentenced to 37 months' imprisonment; and McLaughlin was sentenced to 30 months' imprisonment. K.R.E. 40; C.R. 445; M.R. 422.

Defendants filed timely notices of appeal (Cannon, July 24, 2012; Kerstetter, July 30, 2012; McLaughlin, July 31, 2012). C.R. 423; K.R.E. 32; M.R. 426.

STATEMENT OF THE FACTS

This case arises out of the unprovoked, violent attack by the defendants against Yondell Johnson, an African-American male, on August 13, 2011, while Johnson waited at a bus stop in downtown Houston. The evidence at trial established that defendants – all shirtless and displaying white supremacist tattoos – approached Johnson, a stranger, called him a "nigger," surrounded him, and then physically assaulted him, causing bodily injury.

1. Events Leading Up To The Assault

Cannon and Kerstetter were close friends who sometimes lived on the streets. C.R. 1167-1170, 1179. They often drank together, which would "pump them up" and make them angry. C.R. 1173. Both had numerous tattoos.

Cannon had tattoos of lightning or "SS" bolts above his eyebrows. C.R. 754, 970. According to the government's expert witness, Michael Squyres, lightning bolts were the insignia of the Nazi SS. C.R. 970-971. Cannon also had tattoos on his chest, one of which states "100 Percent Wood"; the term "wood[s]" is commonly used by members of white supremacy organizations to describe themselves or other white people. C.R. 971. Squyres testified that such a tattoo reflects "pride in the White race" and "maybe some supremacist type beliefs." C.R. 971. In addition, Cannon had a tattoo of an iron cross on this right arm, and a tattoo of a swastika on the back of his neck; Squyres indicated that both are Nazi symbols and common in white-supremacy tattooing. C.R. 973. Finally, Cannon had tattoos of a woodpecker with boxing gloves, the letters "TKO," and the word "Solid" on his right hand. C.R. 973. Squyres testified that a woodpecker is a symbol commonly used by "woods" or "peckerwoods." C.R. 972-974.

Kerstetter had tattoos that said "Peckerwood" and "Texas Wood," as well as bolts. C.R. 975, 1170-1171. According to Kerstetter's one-time girlfriend, Courtney Savell, the tattoos were a symbol of a gang and to be a "peckerwood" meant that you did not like "niggers." C.R. 1170-1171.[4] On his arm, Kerstetter

[4] Savell also testified that both Kerstetter and Cannon referred to African Americans as "niggers," and Kerstetter said that "they all did him wrong; so, he was going to do them wrong." C.R. 1172-1173.

had a tattoo of the shape of the State of Texas and the words "Texas Wood," a reference to being a "wood" from Texas. C.R. 975. Inside the outline of Texas there is a swastika (backwards). C.R. 975. Kerstetter also had a tattoo of the Roman numerals "XXIII"; according to Squyres, white supremacist often use either that Roman numeral or the number 23, which refers to the 23rd letter of the alphabet – "W." C.R. 975. Squyres also testified that, among gang members, tattoos are generally intended to be advertisements for one's beliefs. C.R. 978.[5]

McLaughlin first met Joseph Staggs a few days before the assault at a Houston Salvation Army mission where they slept and received free meals. C.R. 1012-1013, 1054-1056. They were both homeless and looking for work. C.R. 1012-1014, 1056. On the evening of August 13, 2011, they decided to walk around downtown Houston. They bought a bottle of wine and drank it in a parking lot. C.R. 1015, 1043-1044, 1063. At approximately 11:30 p.m., they went looking for a store that was open to buy more alcohol. C.R. 1017-1018, 1064-1065. At this time, both Staggs and McLaughlin were clean shaven with very short hair. C.R. 1017-1018.

Staggs and McLaughlin wound up at a metro rail platform. C.R. 1019-1020, 1022, 1093. They noticed two guys, Cannon and Kerstetter, without shirts,

[5] At the same time, Squyres made clear that he was not offering any opinion about what the defendants may or may not have believed on August 13, 2011, or what transpired that day. C.R. 981, 989-990, 1003.

running across the street toward them – "two [w]hite guys that also had hairdos just like [theirs]." C.R. 1020. Cannon and Kerstetter had started drinking that day in the afternoon, and were also out looking for more alcohol. C.R. 1173-1174.

Cannon and Kerstetter appeared happy to see Staggs and McLaughlin, and one of them said to the other, "[s]ee, I told you them are woods." C.R. 1021-1022, 1066. Cannon and Kerstetter introduced themselves, and they all shook hands and exchanged names; neither Staggs nor McLaughlin had met Cannon or Kerstetter before. C.R. 1022-1023. In response to the statement that Staggs and McLaughlin appeared to be "woods," McLaughlin lifted up his shirt to show off his tattoos. C.R. 1023-1025, 1068-1069, 1120-1121. These included tattoos stating "White Pride," a swastika, and the phrase "Brotherhood, Loyalty, Solidarity and Dedication" (according to Squyres, the motto of the Aryan Circle gang in Texas). C.R. 976. In addition, McLaughlin had tattoos of a man holding a dagger preparing to stab a face that has the Star of David on it, a klansman standing in flames with a swastika behind him, and the word "Anti" on one shin and "Semitic" on the other. C.R. 977-978. Further, McLaughlin had tattoos of lightning bolts on the back of his fingers, which Staggs recognized as white supremacist symbols. C.R. 1025, 1118-1119.

McLaughlin told Cannon and Kerstetter that they were looking for some beer, and Cannon responded that he knew a place where they could buy it. C.R.

1025. They decided to take the train. Cannon and Kerstetter boarded the train; on each side of the train cars there is a display that indicates where the train is going and the date and time. C.R. 1175-1176. The conductor, however, told them to get off the train because they were not wearing shirts. C.R. 1025-1026, 1069.

The four of them then decided to walk down Lamar Street toward Travis Street. C.R. 1093-1094. At that time, Staggs and McLaughlin removed their shirts so that all four of them were shirtless and all three defendants were displaying their white supremacist tatoos. C.R. 1027-1029, 1038-1039, 1071. Squyres testified that among gang members uncovering one's tattoos is significant because it lets others see what gang that person is aligned with or what group they want to "disrespect[]." C.R. 978. Squyres further testified that uncovering one's tatttos allows the person to "put[] a lot of information out there without the person having to actually say it." C.R. 978.

Staggs and Kerstetter walked together approximately 20-30 feet ahead of Cannon and McLaughlin. C.R. 1029-1030. After a short while, Staggs looked back to see Cannon and McLaughlin talking to an African-American man who was sitting on a bench at a bus stop. C.R. 1030-1031.

2. Defendants' Assault Of Yondell Johnson

On the evening of August 13, 2011, Yondell Johnson, an African-American resident of Houston, left his daughter's house at approximately 10:00 p.m. to return

home. C.R. 836, 878. He took the bus, which required him to change buses at a bus stop downtown near the corner of Lamar and Travis Streets. C.R. 836-837, 914. Johnson arrived at that bus stop in time to wait for an 11:45 p.m. bus. C.R. 839. While he was sitting down, alone, waiting, he saw "four White dudes coming around the corner with their shirts off, bald heads, loud and rowdy." C.R. 839. They were walking in pairs; Cannon and McLaughlin were lagging behind the other two. C.R. 864, 1046. When Johnson first saw them, he looked down to try not to attract their attention. C.R. 841. But Cannon and McLaughlin stopped a few feet away from where Johnson was sitting. C.R. 1047, 1124-1125. Then Cannon said: "Yo, bro, do you have the time." C.R. 841, 866, 886.

In response, Johnson looked up and noticed that the person had tattoos on his face; that person was Cannon. C.R. 842-843. Johnson responded that he did not have the time. C.R. 844. As they were walking closer, Johnson noticed that the tattoos were lightning bolts, which he believed was a Nazi symbol. C.R. 844-845.

Staggs then stated: "Yo, bro, why you call that nigger a bro? You know we don't supposed to call a nigger bros." C.R. 846, 867, 872, 888-889, 925. Cannon next said: "You heard him, nigger. He called you a 'nigger,' nigger." C.R. 848. By this time, Johnson was surrounded. C.R. 848. He was also shocked by what he heard. C.R. 868. Feeling threatened, Johnson stood up; as he got into a defensive

boxing position,[6] Cannon took a swing at him. C.R. 848-849, 870. Johnson dodged the punch and swung back at Cannon, hitting him. C.R. 849-850, 871-872. At that point, all four of them "jumped in on" Johnson and began punching him in the head. C.R. 850, 872, 875. Johnson tried to protect himself, but Staggs grabbed his ankles and Johnson fell to the ground. C.R. 850-851, 872. One of them then got on top of Johnson while the other three "stomped" on his head. C.R. 851, 887-888, 922. During the attack, defendants and Staggs did not demand or try to take any money or property from Johnson. C.R. 859-860.[7]

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[6] Johnson testified that he was an amateur boxer. C.R. 849, 861, 865-866, 906-907.

[7] Surveillance videos were introduced at trial, but they do not show the assault at the bus stop. See, *e.g.*, C.R. 759-760, 892. There were no witnesses to the assault; the testimony concerning the assault came from Johnson and Staggs, and from police officers who testified as to what Johnson and Staggs told them about the assault. See C.R. 835-860 (Johnson); C.R. 1008-1041 (Staggs); C.R. 1132-1135 (Officer Stanley Nguyen); C.R. 940-944 (Officer James Kneipp); C.R. 1157, 1160 (Officer Alex Roberts). None of the three defendants testified at trial. Staggs, who was approximately 30 feet away from Johnson, testified that it appeared that Johnson got mad after either Cannon or McLaughlin said something to him, stood up, and then a boxing match started between Cannon and Johnson. C.R. 1031-1033, 1039, 1048, 1074-1075, 1127. Staggs variously testified that he could not say "for sure" who threw the first punch, that he did not see any punches actually land, that he "couldn't tell" who landed the first punch, that he "thought maybe Mr. Johnson had thrown the first punch," and that he thought Johnson was the aggressor. C.R. 1032-1033, 1048-1051. Staggs also testified that he saw "a lot of grappling and * * * some punching," but no "stomping" and "maybe one kick." C.R. 1034. He further testified that he did not grab Johnson's ankles and was not involved in the assault. C.R. 1040, 1051, 1076-1077.

Eventually, the defendants stopped hitting Johnson and walked away. C.R. 851, 892. Johnson got up, and then chased after his assailants because he was angry and did not want them to get away. C.R. 852-853, 873-874, 892. He caught up to Staggs and hit him, knocking him to the ground. C.R. 854-855, 894-895, 919-920, 1036-1037, 1052-1053. Johnson then went after a second one, hit him, and then began fighting with the other two. C.R. 855, 895, 911-912. Johnson was again knocked to the ground, and defendants and Staggs walked away. C.R. 855-856, 1037. Johnson followed them for a second time, picked up a sandbag, and tried to throw it at them. C.R. 855-857, 1038, 1053. By this time, Johnson saw a police car coming down the street, waived it down, and pointed down the street toward the four assailants. C.R. 857-858, 909.[8]

As a result of the assault, Johnson was taken to a hospital emergency room by ambulance. C.R. 828, 859, 876. His face was swollen, his left eye was closed, he had cuts on his elbow and hip, and blood was draining out of his mouth and nose. C.R. 858, 877-878, 1157. In addition, his body was bruised and sore and he was in pain. C.R. 858-859. Officer Alex Roberts, who interviewed Johnson at the hospital, testified that Johnson's injuries were consistent with an assault. C.R. 1163.

[8] Sometime after the initial assault, Lorie Garcia drove past the defendants and Johnson, saw what looked like a fight, and called 911. C.R. 927-938.

3. The Police Response

Officer Jose Mireles was the first police officer at the scene, responding to a dispatch call of an assault in progress. C.R. 752. As he drove up, he saw Johnson, standing in the middle of the street, waving his arms, trying to get his attention. C.R. 752. Johnson pointed in the direction of the defendants, and Mireles drove up to them, jumped out of his vehicle, ordered them to put their hands up, and then directed them to lie face down on the ground. C.R. 753. As other police cars arrived, each of the assailants was taken into custody by a different officer. C.R. 811, 814, 824-825, 946. Mireles handcuffed Cannon and put him in the back of his car. C.R. 753-754.

Several supervisory officers also arrived on the scene, including Sergeants Thomas and McFarland, both African-American. C.R. 755-756, 812. When Thomas and McFarland were standing outside Mireles' police car, Cannon, from inside the car, said to the officers: "What are you niggers staring at?" C.R. 756-757. Cannon then repeatedly used the word "nigger" in reference to Thomas and McFarland in a hostile and aggressive manner. C.R. 757. Sergeant Thomas could hear Cannon's racial epithets. C.R. 812, 818. During this same time, Cannon was polite to the white officers. C.R. 754-755, 757.

Officer Bruk Tesfay arrested McLaughlin; McLaughlin resisted and repeatedly referred to the African-American officers who were present as

"[f]ucking niggers." Tesfay Dep. 8.[9] Officer Stanley Nguyen took custody of Staggs. C.R. 1132. After Staggs was in the police car, Staggs told Nguyen that he and defendants "messed with" Johnson – *i.e.*, that someone said something that got Johnson angry – and that is "why the fight started." C.R. 1133, 1136-1137. Staggs did not tell Nguyen that Johnson had started the fight or that Johnson was the aggressor. C.R. 1133.

One of the police cars stopped near Johnson. Officer James Kneipp put Johnson in handcuffs; at that time he did not know whether Johnson was a suspect or a victim. C.R. 941-942. Because Johnson was bleeding heavily from his nose, Kneipp pressed Johnson's shirt against his nose to try to stop the bleeding. C.R. 857-858, 910, 942-943. Johnson was also panting and staggering as he walked. C.R. 943, 948, 957-958. Johnson told Kneipp that he was approached by a couple of white males while he was waiting at the bus stop, they asked him for the time, then called him a "nigger" and starting beating him. C.R. 943.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. a. In the aftermath of the passage of the Thirteenth Amendment, "a wave of brutal, racially motivated violence against African Americans swept the South.

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[9] "Tesfay Dep." refers to the deposition testimony of Officer Tesfay that was played to the jury at trial but not transcribed by the court reporter. See C.R. 831. Along with the filing of this brief, we have filed a motion to supplement the record with a partial transcript of this testimony.

* * * Local law enforcement officials generally refused to prosecute offenders, and southern states enacted Black Code laws, which were intended to perpetuate African American slavery. The post-Civil War violence and state legislation reflected whites' determined resistance to the establishment of freedom for African-Americans." Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. Rev. 1, 11-12 (Winter 1995) (footnotes omitted). Race-based violence against African Americans continued throughout the "Second Era of Reconstruction" and the Civil Rights Movement of the 1950's and 1960's.

In 1968, four years after the enactment of the Civil Rights Act of 1964, Congress enacted the first modern federal "hate-crime" statute directed at race-based violence. 18 U.S.C. 245. Section 245(b)(2)(B) makes it a crime to, among other things, use force to injure a person because of the person's race and because the person was exercising a federally protected right. The latter requirement – the second "because of" – was included because the statute was intended to address the violent interference with those activities protected by the Civil Rights Act of 1964 as well as the Constitution. Every court of appeals to address the issue has upheld Section 245(b)(2)(B) as a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment to determine and proscribe badges and incidents of slavery, including race-based violence.

Because of Section 245(b)(2)(B)'s limited reach, and the sharp increase in the number of hate crimes reported in the 1990s, in 1998 new hate crimes legislation was proposed. See S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002) (S. Rep. No. 147). Although that legislation was not enacted, 11 years later, on October 28, 2009, similar legislation was – the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act. Pub. L. No. 111-84, Div. E, 123 Stat. 2835 (2009).

The Shepard-Byrd Act created a new federal hate crime statute, codified at 18 U.S.C. 249. 123 Stat. 2838-2839. Section 249(a)(1) applies to violent conduct causing bodily injury undertaken "because of the actual or perceived race, color, religion, or national origin of any person." It is similar to Section 245(b)(2)(B), but does not require proof of interference with a federally protected activity. Like Section 245(b)(2)(B), Section 249(a)(1) was enacted pursuant to Congress's authority under Section 2 of the Thirteenth Amendment.

b. This Court is the third court of appeals to be presented with the question of Congress's authority to enact Section 249(a)(1). The Eighth Circuit rejected defendant's challenge to Congress's power to enact the statute. *United States* v. *Maybee*, 687 F.3d 1026 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012). A similar case is pending before the Tenth Circuit. *United States* v. *Hatch*, No. 12-2040 (10th Cir.) (argued Nov. 9, 2012). The district court in *Hatch* rejected a broad-

based challenge to the constitutionality of the statute. *United States* v. *Beebe*, 807 F. Supp. 2d 1045 (D.N.M. 2011). In the instant case – involving the race-based assault of an African-American as he waited at a bus stop – this Court should do the same.

In a series of cases addressing Congress's power under Section 2 of the Thirteenth Amendment, the Supreme Court has made clear that Section 2 grants Congress broad authority to pass laws abolishing badges and incidents of slavery. The Court has also made clear that it is for Congress to determine what are badges and incidents of slavery, and Congress's determination will be upheld if rational. In enacting Section 249(a)(1), Congress specifically found that "eliminating *racially motivated violence* is an important means of eliminating * * * the badges, incidents, and relics of slavery," noting that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th [A]mendment[,] * * * through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry." Shepard-Byrd Act, Section 4702(7), 123 Stat. 2836 (emphasis added). Congress had made similar findings in enacting Section 245(b)(2)(B). Those findings are amply supported by the legislative record and support the constitutionality of Section 249(a)(1).

Defendants (and amici[10]) principally argue that: (1) Section 249(a)(1) is beyond Congress's power to effectuate the Thirteenth Amendment because it criminalizes any race-based violence, "no matter how trivial"; and (2) badges and incidents of slavery cannot be correctly understood to include race-based violence. These arguments are not correct. Section 249's requirement that the defendant act willfully, to cause bodily injury, *because of the victim's race* (or color, national origin, or religion) brings the statute squarely within Congress's Section 2 power to eradicate vestiges of slavery. Within these confines, it is of no moment that the statute may sweep broadly. Moreover, no race-based violence that causes bodily injury is "trivial," and given the Civil War and its aftermath, it is difficult to conceive of a more quintessential *federal interest* than ensuring that race-based violence no longer exists. Section 249, therefore, appropriately provides a nationwide remedy to that nationwide problem, and does so by supplementing, not usurping, state authority.

Defendants' exceedingly cramped formulations of badges and incidents of slavery are contrary to settled law and therefore must be rejected by this Court. Defendants suggest that a badge and incident of slavery must both mirror a historic incident of slavery and carry the potential to reenslave African Americans, and

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[10] See Amicus Brief of Todd Gaziano, Gail Heriot & Peter Kirsanow in Support of the Appellant, No. 12-20514 (filed Dec. 21, 2012) (Amicus Br.).

therefore does not include mere race-based violence. That argument is foreclosed by Supreme Court decisions making clear that the Thirteenth Amendment is not limited to abolishing the institution of slavery. Indeed, neither the denial of the right to enter into a contract to attend private school, nor the refusal to sell property on the basis of race, can fairly be said to lead the "reenslavement" of African Americans, but the Supreme Court has upheld Congress's authority to reach such conduct under Section 2 of the Thirteenth Amendment. See *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439-443 (1968).

2. Cannon and McLaughlin argue that their convictions must be reversed because there is insufficient evidence that they acted *because of race*. The evidence established, however, that Cannon and Staggs, as they surrounded Johnson at the bus stop, repeatedly called him a "nigger" and then assaulted him. Defendants' racial animus is also supported by testimony that Cannon and McLaughlin referred to some of the arresting officers as "niggers." In short, Cannon and McLaughlin, with nearly shaved heads, no shirts, and white supremacist tattoos advertising their racist beliefs, approached Johnson; Cannon (and Staggs) called him a "nigger"; and then the defendants assaulted him. This evidence was sufficient to establish that defendants assaulted Johnson because of his race.

ARGUMENT

I

SECTION 249(a)(1) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

A. Standard Of Review

The Court reviews challenges to the constitutionality of a statute *de novo*. See, *e.g.*, *United States* v. *Crook*, 479 F. App'x 568, 572 (5th Cir. 2012). The Court may strike down an act of Congress "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012) (brackets, citation, and internal quotation marks omitted).

B. Section 249(a)(1) Is A Valid Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment

Section 249(a)(1) makes it a crime to willfully cause bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." The statute is a valid exercise of Congress's Thirteenth Amendment power to eradicate badges and incidents of slavery, including race-based violence.

1. The Thirteenth Amendment And Congress's Power To Enforce It

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

their jurisdiction." Although the "immediate concern" of this Amendment was with the pre-Civil War enslavement of African Americans, the Amendment was not limited to abolishing slavery. *Bailey* v. *Alabama*, 219 U.S. 219, 240-241 (1911); see also *United States* v. *Kozminski*, 487 U.S. 931, 942 (1988) (Thirteenth Amendment not limited to its "primary purpose" of "abolish[ing] the institution of African slavery as it had existed in the United States at the time of the Civil War"); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (the Thirteenth Amendment "establish[es] and decree[s] universal civil and political freedom throughout the United States"); *United States* v. *Kaufman*, 546 F.3d 1242, 1262-1263 (10th Cir. 2008) (Thirteenth Amendment applies to more than economic relationships); *United States* v. *Nelson*, 277 F.3d 164, 175-176 (2d Cir. 2002) (addressing the scope of the Thirteenth Amendment).

Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." There is a well-established body of Supreme Court cases addressing Congress's power under Section 2, which makes clear that this power is to be interpreted broadly. In the *Civil Rights Cases*, the Court explained that although Section 1 was "self-executing," "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit." *Civil Rights Cases*, 109 U.S. at 20. Therefore, Section 2 "clothes congress with

power to pass all laws necessary and proper for abolishing all *badges and incidents of slavery* in the United State[s]." *Ibid.* (emphasis added).[11]

More than 80 years after the *Civil Rights Cases*, the Court reaffirmed and expanded these principles in a series of cases addressing modern federal civil rights statutes that had their genesis in Reconstruction Era legislation. In *Jones* v. *Alfred H. Mayer Co.*, the Court upheld the constitutionality of 42 U.S.C. 1982, prohibiting racial discrimination in the sale of property, stating that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property." 392 U.S. 409, 439 (1968). The Court, quoting the *Civil Rights Cases*, reaffirmed that "the Enabling Clause [Section 2]" of the Thirteenth Amendment empowered Congress to do "much more" than abolish slavery; it "clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery." *Id.* at 439 (internal quotation marks omitted).[12] The Court also made clear that, under the Thirteenth

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[11] As discussed below (p. 24 n.14), this formulation of Congress's Section 2 power has retained its vitality, but the *Civil Rights Cases*' narrow interpretation and application of that formulation has not.

[12] The Court applied the test for the scope of federal legislative power set forth in *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819): "Let the end b[e] 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 consistent with the letter and spirit of the constitution, are constitutional." *Jones*, 392 U.S. at 443-444.

Amendment, *it is Congress* that "determine[s] what are the badges and the incidents of slavery." *Id.* at 440.

A few years later, in *Griffin* v. *Breckenridge*, the Court upheld the constitutionality of 42 U.S.C. 1985(3), stating that "Congress was wholly within its powers under [Section] 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971). In that case, African-American plaintiffs sued for damages after they were forced from their car and attacked because the defendants thought that the driver of the car was a civil rights worker. *Id.* at 89-91. The Court stated that "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under Section 2] extend far beyond the actual imposition of slavery or involuntary servitude," and that "[b]y the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free." *Id*. at 105. The Court then reiterated that, "to keep that promise, '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.'" *Ibid.* (quoting *Jones*, 392 U.S. at 440); see also *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976)

(addressing racial discrimination in private education and concluding that 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of contracts is "appropriate legislation" for enforcing the Thirteenth Amendment) (citation omitted).[13]

Congress, therefore, has the authority, not only to prevent the actual imposition of slavery or involuntary servitude, "but to ensure that none of the badges and incidents of slavery or involuntary servitude exists in the United States." S. Rep. No. 147 at 16 (citation and internal quotation marks omitted). To that end, the Supreme Court has made clear that it is Congress that determines

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[13] Both 42 U.S.C. 1981 and 1982 derive from Section 1 of the Civil Rights Act of 1866, which was the first legislation enacted pursuant to Section 2 of the Thirteenth Amendment. See, *e.g.*, *Runyon*, 427 U.S. at 170. That legislation was principally directed at the "Black Codes" adopted in southern States shortly after the Thirteenth Amendment was enacted. See, *e.g.*, *City of Memphis* v. *Greene*, 451 U.S. 100, 131-135 (1981) (White, J., concurring); *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 386-387 (1982). The Black Codes "defined racial status; forbade blacks from pursuing certain occupations or professions * * *; forbade owning firearms or other weapons; controlled the movement of blacks by systems of passes; required proof of residence; prohibited the congregation of groups of blacks; restricted blacks from residing in certain areas; and specified an etiquette of deference to whites, as, for example, by prohibiting blacks from directing insulting words at whites." *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 672-673 (1987) (Brennan, J., concurring in part and dissenting in part) (citation and internal quotation marks omitted). The Court in *Jones* explained that the majority leaders in Congress that passed the Civil Rights Act of 1866 were "the authors of the Thirteenth Amendment [and] had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act." 392 U.S. at 439-440.

what are badges and incidents of slavery – a distinctly "legislative task."[14] *Kozminski*, 487 U.S. at 951. The Court in *Jones* quoted the statement of Senator Trumbull, the chief proponent of the Civil Rights Act of 1866, who rejected the more narrow view that Congress's power under Section 2 was limited to "dissolv[ing] the legal bond" of slavery:

> [I]f the narrower construction of Section 2 were correct, * * * the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. * * * I have no doubt that under this provision * * * we may destroy all these discriminations in civil rights against the black man;

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[14] There is no precise meaning for the phrase "badges and incidents of slavery." In the *Civil Rights Cases* and *United States* v. *Harris*, 106 U.S. 629 (1883), the Court gave the phrase a narrow application, helping to usher in the era of Jim Crow laws and segregation. See *Civil Rights Cases*, 109 U.S. at 23-25 (holding that certain forms of discrimination – *e.g.*, discrimination by the owner of an inn or place of amusement – are not badges and incidents of slavery); *Harris*, 106 U.S. at 640-641 (Congress could not rely on the Thirteenth Amendment to enact a statute criminalizing private conspiracies to deprive another of equal protection of the laws). But in *Jones*, the Court repudiated the *Civil Rights Cases*' narrow application of badges and incidents of slavery and adopted a far more expansive view of the phrase. *Jones*, 392 U.S. at 441 n.78 (also noting that "the present validity" of the *Civil Rights Cases*' view of badges and incidents of slavery is "rendered largely academic by Title II of the Civil Rights Act of 1964"). And in *Griffin*, the Court upheld under the Thirteenth Amendment the civil counterpart to the statute at issue in *Harris*, thereby affirming the broad scope of Congress's Thirteenth Amendment authority. *Griffin*, 403 U.S. at 104-106. At a minimum, the phrase "badges and incidents of slavery" recognizes slavery as a system of many components, which Congress is empowered to rationally identify and proscribe. See generally *United States* v. *Maybee*, 687 F.3d 1026, 1030 n.2 (8th Cir. 2012) (addressing the notion of "badges and incidents of slavery" as a word of art). See also pp. 41-43, *infra* (addressing defendants' argument for a narrow construction of badges and incidents of slavery).

> 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.

392 U.S. at 440 (internal quotation marks omitted). The Court in *Jones* stated that "[s]urely Senator Trumbull was right." *Ibid.*

Moreover, Congress's authority under Section 2 of the Thirteenth Amendment is not limited by the scope of Section 1. As the Second Circuit explained, noting the Supreme Court decisions cited above, "it is clear from many decisions of the Supreme Court that Congress may, under its Section Two enforcement power, now reach conduct that is not directly prohibited under Section One." *Nelson*, 277 F.3d at 181 (upholding 18 U.S.C. 245(b)(2)(B) under Section 2 of the Thirteenth Amendment). Put another way, the court stated that "Congress, through its enforcement power under Section Two of the Thirteenth Amendment is empowered * * * to control conduct that does not come close to violating Section One directly." *Id.* at 185; cf. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional," addressing Section 5 of the Fourteenth Amendment). Defendants acknowledge that the Supreme Court has

"articulated an expansive view" of Congress's power under Section 2. See, *e.g.*, Kerstetter Br. 17.

Finally, Congress's determination that a law is necessary and proper under Section 2 must be given effect so long as it is "rational." In *Jones*, the Court stated that Congress has the power "rationally to determine what are the badges and incidents of slavery," and concluded that Congress had not made an "irrational" determination in legislating under Section 2 when it enacted legislation to abolish both private and public discrimination in the sale of property. 392 U.S. at 439-443; see also *Griffin*, 403 U.S. at 105 ("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."); *Nelson*, 277 F.3d at 185 (addressing "whether Congress could rationally have determined that the acts of violence covered by [Section] 245(b)(2)(B) impose a badge or incident of servitude on their victims").

b. This Court has long recognized these principles. In *Wong* v. *Stripling*, 881 F.2d 200, 203 (5th Cir. 1989), the Court stated that "[a]lthough the [Thirteenth] [A]mendment speaks directly only to slavery and involuntary servitude," Section 2 "empowers Congress to define and abolish the badges and incidents of slavery" (internal quotation marks omitted). In *Murray* v. *Earle*, 334 F. App'x 602, 607 (5th Cir. 2009), the Court, citing *Griffin*, stated that the

"Supreme Court has recognized that section two of the Thirteenth Amendment empowers Congress to define and legislatively abolish the 'badges and incidents of slavery.'" Earlier, in *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1578 (5th Cir. 1984) (en banc), addressing the scope of affirmative action remedies under Title VII of the 1964 Civil Rights Act, Judge Wisdom, concurring in part and dissenting in part, explained:

> The congressional debates on the thirteenth amendment reveal that both its opponents and its proponents recognized its far-reaching potential. The abolition of slavery mandated by the amendment is not confined to the elimination of the "auction block[,]" that is, the institution of legally enforced servitude. It also extends to the badges and incidents of a slavery system that were imposed upon blacks as a race. The abolition of slavery was intended to leave in its wake universal civil freedom. In granting Congress the power to carry out this mandate, the amendment necessarily grants the power to eliminate practices that *continue to burden blacks with badges of inferiority and to hinder the achievement of universal freedom*.

Id. at 1578 (emphasis added; citation and internal footnote omitted). Further, in holding that the "antiblock-busting" provision of the Fair Housing Act is authorized by the Thirteenth Amendment, the Court stated: "We think that the mandate of *Jones* is clear. This Court will give great deference, as indeed it must, to the congressional determination that [the statute] * * * will effectuate the purpose of the Thirteenth Amendment by aiding in the elimination of the badges and incidents of slavery." *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115, 121 (5th Cir. 1973) (internal quotation marks omitted).

In sum, the Supreme Court has made clear, and this Court has appropriately recognized, that under Section 2 of the Thirteenth Amendment: (1) Congress's power is not limited to abolishing slavery or involuntary servitude; (2) Congress has the power to pass all laws necessary and proper to abolish "badges and incidents" of slavery; (3) it is for Congress to determine what are badges and incidents of slavery; and (4) Congress's determination of what is a badge and incident of slavery must be upheld if rational. It is this analysis, giving Congress broad discretion to define and target badges and incidents of slavery, that the Court must apply to Congress's enactment of Section 249(a)(1).

c. Amici assert that *Jones* was wrongly decided and therefore no longer reflects the correct analysis to apply in this case. Amicus Brief 14-21. That argument has no bearing in this Court, which is bound by the Supreme Court decisions discussed above. See *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). In addition, in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 170-175 (1989), the Court expressly declined to overrule *Runyon* and "reaffirm[ed] that § 1981 prohibits racial discrimination in the making and enforcing of private contracts." Further, the

Court rejected the notion that *Runyon* has become "outdated" and after being "tested by experience * * * inconsistent with the sense of justice." *Id*. at 174 (citation omitted). The Court stated:

> In recent decades, state and federal legislation has been enacted to prohibit private racial discrimination in many aspects of our society. Whether *Runyon's* interpretation of § 1981 * * * is right or wrong as an original matter, it is certain that it is not inconsistent with the prevailing sense of justice in this country. To the contrary, *Runyon* is entirely consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.

Ibid.; see also *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 451-453 (2008) (holding that 42 U.S.C. 1981 applies to retaliation claims and noting the "well-embedded interpretation" of Section 1981 and "considerations of *stare decisis*").

2. Congress Recognized The Link Between Race-Based Violence And The Legacy Of Slavery In Enacting 18 U.S.C. 245(b)(2)(B), The Predecessor To Section 249

The issue of Congress's power under the Thirteenth Amendment to enact Section 249(a)(1) does not arise against a blank canvass. In 1968, Congress enacted 18 U.S.C. 245(b)(2)(B), which also applies to race-based violence. All of the courts of appeals that addressed this issue have concluded, applying *Jones* and *Griffin*, that Section 245(b)(2)(B) is a valid exercise of Congress's Section 2 authority and that Congress may rationally conclude that racial violence is a badge and incident of slavery.

Section 245(b)(2)(B) makes it a federal crime, in part, to use force, or the threat of force, to "willfully injure[] * * * or attempt[] to injure * * * any person because of his race, color, religion, or national origin and because he is or has been participating in or enjoying any [public] benefit, service, privilege, program, facility or activity." Section 245(b)(2)(B) therefore includes an element that Section 249(a)(1) does not: the defendant must have the specific intent to interfere with a victim's enjoyment of a federally protected right. See S. Rep. No. 721, 90th Cong., 1st Sess. 8 (1967) (S. Rep. No. 721). Section 245 includes the "federally protected activities" element because it was intended to address the violent interference with activities protected by the then-recently enacted Civil Rights Act of 1964 and the Constitution. S. Rep. No. 721 at 4. As Senator Hart, a leading sponsor of Section 245 stated, "[i]f racial violence directed against activities closely related to those protected by the 1964 act is permitted to go unpunished, the exercise of the protected activities will also be discouraged." 114 Cong. Rec. 2269 (1968). At the same time, Section 245(b)(2)(B) is broader than Section 249 because it also applies to *threats of force*, whereas Section 249 does not.

The legislative history of Section 245(b)(2)(B) emphasizes the link between private, race-based violence and slavery. The House Committee found that "[v]iolence and threats of violence have been resorted to in order to punish or discourage Negroes from voting, from using places of public accommodation and

public facilities, from attending desegregated schools, and from engaging in other activities protected by Federal law." H.R. Rep. No. 473, 90th Cong., 1st Sess. 3-4 (1967). The Senate Committee similarly recognized that "a small minority of lawbreakers has resorted to violence in an effort to bar Negroes from exercising their lawful rights. Brutal crimes have been committed * * * against Negroes. * * * Acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights." S. Rep. No. 721 at 4. The Senate Committee therefore explained that the purpose of Section 245 was "to strengthen the capability of the Federal Government to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721 at 3. As discussed below, Congress relied upon this same link in enacting Section 249.

The Second Circuit in *Nelson* concluded that Section 245(b)(2)(B) was "a constitutional exercise of Congress's power under the Thirteenth Amendment," and addressed at length the association of race-based private violence and slavery. *Nelson*, 277 F.3d at 189-191. The court explained that the "practice of race-based private violence both continued beyond [emancipation] * * * and was closely connected to the prevention of former slaves' exercise of their newly obtained civil and other rights." *Id.* at 190. The court related that the pervasiveness of violence directed at African Americans in the aftermath of the Civil War "reflected whites'

determination to define in their own way the meaning of freedom and their determined resistance to blacks' efforts to establish their autonomy, whether in matters of family, church, labor, or personal demeanor." *Ibid.* (quoting Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* 120 (1988)). Further, the court noted that "[i]n an effort to reassert control, whites beat or killed African-Americans for such 'infractions' as failing to step off sidewalks, objecting to beatings of their children, addressing whites with deference, and attempting to vote." *Ibid.* (quoting Randall Kennedy, *Race, Crime, and the Law* 39 (1997)). The court therefore concluded that "there exist indubitable connections (a) between slavery and private violence directed against despised and enslaved groups and, more specifically, (b) between American slavery and private violence and (c) between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places." *Ibid.*

Other courts of appeals are in accord. In *United States* v. *Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984), the court upheld Section 245(b)(2)(B) as applied to the beating death of an African American in a city park, concluding that the statute "does not exceed the scope of the power granted to Congress by the Constitution" because there can be little doubt "that interfering with a person's use of a public park because he is black is a badge of slavery." See also *United States* v.

Sandstrom, 594 F.3d 634, 659-660 (8th Cir. 2010) (upholding Section 245(b)(2)(B) (citing *Bledsoe*)); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (upholding Section 245(b)(2)(B) under the Thirteenth Amendment).

These cases confirm that it was rational for Congress to conclude that racially motivated violence is a badge or incident of slavery. Moreover, Section 245(b)(2)(B) was enacted the same year the Court decided *Jones.* If Congress could have rationally concluded that *non-violent discrimination* in the sale of housing, or access to private education, constituted a badge and incident of slavery, Congress certainly could have also rationally concluded that *violent* race-based interference with a person's use of a public facility constituted a badge of slavery.[15]

[15] Indeed, the Court in *Jones* expressly overruled *Hodges* v. *United States*, 203 U.S. 1 (1906), to the extent it held that Congress's Section 2 power did not reach a racially motivated conspiracy to use force to prevent African Americans from exercising their right to contract for employment, stating that it rested "upon a concept of congressional power under the Thirteenth Amendment irreconcilable with * * * [the *Civil Rights Cases*] and incompatible with the history and purpose of the Amendment itself." *Jones*, 392 U.S. at 443 n.78. The Court in *Hodges* also suggested that Congress's power under Section 2 was limited to addressing the condition of slavery and involuntary servitude. *Hodges*, 203 U.S. at 8-10. Kerstetter discusses at length *Hodges* and the *Civil Rights Cases* and their narrow reading of Congress's power to address badges and incidents of slavery. Kerstetter Br. 18-22. As Kerstetter acknowledges, however, in *Jones* the Court "reject[ed] in its entirety the position in *Hodges*." Kerstetter Br. 22.

3. In Enacting Section 249, Congress Again Rationally Determined That Race-Based Violence Is A Badge And Incident Of Slavery

a. On October 28, 2009, President Obama signed into law the Shepard-Byrd Act. Section 249 was intended, as relevant here, to expand the limited reach of Section 245, which applies only to hate-motivated violence in connection with the victim's participation in specifically defined federal activities. See H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 5-6 (2009) (H.R. Rep. No. 86).[16]

Section 249(a) contains three distinct provisions prohibiting willfully causing bodily injury to a person when the assault is motivated by a specific, statutorily-defined bias. 18 U.S.C. 249(a). All three provisions are directed at private conduct, and each was enacted pursuant to a different source of constitutional authority. Section 249(a)(1), the provision relevant here, applies to violent acts undertaken "because of the actual or perceived *race*, *color*, *religion, or national origin* of any person" (emphasis added). This subsection was enacted

[16] The House Report noted, for example, that "[j]uror accounts in several Federal hate crime prosecutions resulting in acquittal suggest that the double intent requirement in section 245(b)(2), particularly the intent to interfere with the specified federally protected activity, has frustrated the aims of justice. * * * Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victims of the right to participate in any federally protected activity." H.R. Rep. No. 86 at 8 (internal quotation marks omitted). The House Report further noted that the "current Federal hate crimes statute turns on such arbitrary distinctions as whether a racially motivated assault occurs on a public sidewalk as opposed to a private parking lot across the street." H.R. Rep. No. 86 at 9.

pursuant to Congress's Thirteenth Amendment authority to eradicate badges and incidents of slavery. Shepard-Byrd Act, Section 4702(7) & (8), 123 Stat. 2836; H.R. Rep. No. 86 at 15.[17] No federal prosecution may be undertaken under this provision unless the Attorney General certifies that the State does not have jurisdiction, the State has requested that the federal government assume jurisdiction, a verdict or sentence obtained in state court "left demonstrably unvindicated the Federal interest in eradicating bias-motivated violence," or federal prosecution "is in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1).

During its consideration of Section 249, Congress heard extensive evidence addressing the prevalence of hate crimes and the need for further federal involvement, particularly in light of the limitations of Section 245. The House Report states that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86 at 5. The House Report noted that "[s]ince 1991, the FBI has

[17] Section 249(a)(2) criminalizes acts of violence committed because of the actual or perceived religion, national origin, gender, disability, sexual orientation, or gender identity of any person. This subsection was passed pursuant to Congress's Commerce Clause authority, and contains a "jurisdictional element" requiring proof that the crime was in or affecting interstate or foreign commerce. Section 249(a)(3) applies to hate crimes that occur within the Special Maritime and Territorial Jurisdiction of the United States.

identified over 118,000 reported violent hate crimes," and that in 2007 alone the FBI documented more than 7600 hate crimes, including nearly 4900 (64%) motivated by bias based on race or national origin. *Ibid.* Further, a 2002 Senate Report addressing proposed legislation that ultimately became Section 249 noted that "the number of reported hate crimes has grown almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147 at 2. The Senate Report also noted that "[r]ecent hate-motivated killings in Virginia, Texas, Wyoming, California, Illinois, and Indiana have demonstrated the destructive and devastating impact the [hate] crimes have on individual victims and entire communities." *Id.* at 2.

Congress was also presented with testimony that "[r]acially-motivated violence, from the First Reconstruction on, was in large part a means of maintaining the subjugation of Blacks[.] * * * Violence was an integral part of the institution of slavery, and post-Thirteenth Amendment racial violence was designed to continue *de facto* what was constitutionally no longer permitted *de jure*." *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. 59 (2007) (statement of Prof. Frederick M. Lawrence). Moreover, as one of the *opponents* of previous similar legislation acknowledged, "it was nearly impossible for a white slave owner to be

found guilty of murdering a slave" and slave owners were "free to do what they wanted with their 'property.'" *Hate Crimes Violence: Hearing Before the H. Comm. on the Judiciary*, 106th Cong., 1st Sess. 28, 31 (1999) (statement of Daniel E. Troy) (footnote omitted).

The congressional "Findings" section of the statute reflects this testimony: "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." Shepard-Byrd Act, Sections 4702(7), 123 Stat. 2836 (emphasis added).

b. Following the analysis mandated by the Supreme Court in *Jones* and *Griffin*, Congress rationally determined that racially motivated violence is a badge and incident of slavery, and therefore Congress had authority under Section 2 to enact Section 249(a)(1) and prohibit racially motivated violent conduct. This conclusion is consistent with the decisions of the other courts that have addressed this issue. In *Maybee*, the Eighth Circuit rejected the argument that Section

249(a)(1) was constitutionally infirm because, unlike 18 U.S.C. 245(b)(2)(B), Section 249(a)(1) does not require that defendant's conduct also be motivated by the victim's use of a public benefit (in addition to the victim's, *e.g.*, race). *Maybee*, 687 F.3d at 1030-1031.[18] In *Beebe*, the district court denied defendants' motion to dismiss the indictment charging a violation of Section 249(a)(1), concluding that Congress "expressly identified racially motivated violence as a badge or incident of slavery," and that because the statute "targets a badge or incident of slavery * * * it contains a legitimate enforcement purpose under the Thirteenth Amendment." *United States* v. *Beebe*, 807 F. Supp. 2d 1045, 1056 (D.N.M. 2011), appeal pending *sub nom.*, *United States* v. *Hatch*, No. 12-2040 (10th Cir.) (argued

[18] The district court in *Maybee*, in denying defendants' motion to dismiss the indictment charging a violation of Section 249(a)(1), addressed the constitutionality of Section 249(a)(1) more broadly. *United States* v. *Maybee*, No. 11-30006, 2011 WL 2784446 (W.D. Ark. July 15, 2011), aff'd, 687 F.3d 1026 (2012), cert. denied, 133 S. Ct. 556 (2012). The district court noted that Congress's power under Section 2 extends beyond the prohibition of actual slavery and involuntary servitude expressed in Section 1, and permits Congress to rationally determine badges and incidents of slavery. *Id.* at *4-6. The court also noted that, in enacting the Shepard-Byrd Act, Congress made findings that slavery was enforced through public and private violence directed at persons because of their race, color, or ancestry, and that eliminating racially motivated violence is an important means of eliminating badges and incidents of slavery. *Id.* at *6. The court concluded that there was no "precedential authority which would plainly require or counsel this Court to hold that Congress exceeded its expansive authority under the Thirteenth Amendment when it enacted 18 U.S.C. 249(a)(1)." *Ibid.*

Nov. 9, 2012). In addition, the court, citing numerous authorities, stated that "[a] cursory review of the history of slavery in America demonstrates that Congress' conclusion [that eliminating racially motivated violence is an important means of eliminating the badges and incidents of slavery] is not merely rational, but inescapable." *Id.* at 1052. Indeed, "[r]acially charged violence, perpetuated by white men against black slaves, was a routine and accepted part of the American slave culture." *Ibid.* Moreover, "American slavery was a brutal system based upon physical force, threats, torture, sexual exploitation, and intimidation." *Ibid*. (citation and internal quotation marks omitted). The court concluded that "[i]n light of this history, the Court could not possibly find irrational Congress' identification of racially motivated violence as a badge of slavery. Rather, the history indicates that such a conclusion is ineluctable." *Ibid.*[19]

[19] To the extent more authority is necessary to demonstrate the link between race-based violence and the legacy of slavery, see *Virginia* v. *Black*, 538 U.S. 343 (2003), addressing a First Amendment challenge to a state statute prohibiting cross-burning. The Court recounted the history of the Ku Klux Klan's "reign of terror" in the South to thwart Reconstruction and maintain white supremacy. *Id.* at 353. The Court explained that "[v]iolence was * * * an elemental part" of the Klan, noting that a newspaper had documented that by September 1921 there were "152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings." *Id.* at 354. The Court further noted that its decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the Civil Rights Movement of the 1950's and 1960's, "sparked another outbreak of Klan violence," including "bombings, beatings, shootings, stabbings, and mutilations." *Id.* at 355.

In sum, as these courts concluded, Congress acted within its Section 2 authority in enacting Section 249(a)(1), and therefore the statute is constitutional on its face. Moreover, in this case, the government charged the defendants, decorated with white supremacist tattoos, with willfully causing bodily harm to Johnson, while he was waiting at a bus stop, because he is African-American, *i.e.*, "because of [his] actual and perceived race, color, and national origin." See p. 3, *supra*. Therefore, the charged conduct in this case falls squarely within Section 249(a)(1), and Section 249(a)(1) is constitutional as applied.

4. Defendants' Arguments Against The Constitutionality Of Section 249(a)(1) Are Without Merit

Notwithstanding settled law addressing Congress's power under Section 2, defendants argue that Section 249(a)(1) exceeds Congressional authority because: (1) a badge and incident of slavery must entail more than simply race-based violence; (2) unlike Section 245(b)(2)(B), it does not contain a federal "activities" element; (3) it violates principles of federalism because it creates a general federal law of criminal assault where race is a motivating factor, and (4) it is not a "congruent and proportional" remedy under the heightened standard of review adopted in *Boerne*, 521 U.S. 507. Cannon Br. 16, 24-25; McLaughlin Br. 23-26; Kerstetter Br. 25-32. These arguments are not correct.

a. Under Controlling Law, Badges And Incidents Of Slavery Are Not Limited To Conduct Or Practices That Mirror Slavery Or Create The Risk Of The Reenslavement Of African Americans

Defendants and amici argue that badges and incidents of slavery must entail much more than simply race-based violence. McLaughlin, relying on a recent law review article, suggests that a "badge and incident" of slavery must both "mirror a historical incident of slavery" and "pose a risk of causing the renewed legal subjugation of the targeted class." McLaughlin Br. 24 (quoting Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 622-623 (2012)). Amici similarly assert that "badges and incidents" of slavery must relate to "dismantling actual slavery," and not to its "historical byproducts." Amicus Br. 13, 19-21. Kerstetter's version of this argument is that badges and incidents of slavery are limited to "the legal consequences of slavery which distinguish that condition from the legal status of a free citizen," and therefore do not include race-based violence. Kerstetter Br. 30.

These exceedingly cramped formulations of the scope of badges and incidents of slavery are contrary to settled Supreme Court law and have no application here. See *Jones*, 392 U.S. at 439-443; *Griffin*, 403 U.S. at 104-105; *Runyon*, 427 U.S. at 179. Further, as noted above (p. 20), the Supreme Court has made clear that the Thirteenth Amendment is not limited to abolishing slavery, but "decree[s] universal civil and political freedom throughout the United States." *The*

Civil Rights Cases, 109 U.S. at 20. Indeed, neither the denial of the right to enter into a contract to attend private school (*Runyon*), nor the refusal to sell property on the basis of race (*Jones*), can fairly be said to lead the "reenslavement" of African Americans, but the Court has upheld Congress's authority to reach such conduct under Section 2 of the Thirteenth Amendment. See *Runyon*, 427 U.S. at 179; *Jones*, 392 U.S. at 439-443; see generally pp. 21-23, *supra*.[20] Likewise, it is difficult to see how racial discrimination in employment necessarily leads to the "reenslavement" of African Americans, but the Court has upheld Congress's Thirteenth Amendment power to enact such legislation. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (42 U.S.C. 1981 applies to discrimination in private employment on the basis of race); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (42 U.S.C. 1981 applies to racial discrimination in private employment against white persons as well as nonwhites). The cases upholding Congress's Thirteenth Amendment power to proscribe race-based assaults under Section 245(b)(2)(B) also directly undermine defendants' argument. See, *e.g.*, *Bledsoe*, 728 F.2d at 1097 (interference with a person's use of

[20] Nor can membership in a swim club or a recreation facility, but the Court has held that Section 1982 reaches racial discrimination in both of these circumstances. See *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973) (racially discriminatory membership policy of swimming pool association); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (racial discrimination in assignable membership shares in recreational facilities).

a park because he is black is a badge of slavery); *Nelson*, 277 F.3d at 180-191; pp. 29-33, *supra*.

Finally, these arguments ignore the history of the Jim Crow South in the aftermath of the Civil War, as well as the massive resistance to the implementation of various provisions of the 1964 Civil Rights Act, and the racial violence that was intended to thwart the rights of African Americans to full and equal freedom. As one court explained in concluding that Congress could reach race-based violence as a badge and incident of slavery:

> Those who are not students of American racial history might ask: "What does the beating of black litigants in this case have to do with the 'badges and incidents' of slavery? How can the attitudes of defendants be related to the institution of slavery that was eradicated more than 100 years ago?" The answer is that these racist acts are as related to the incidents of slavery as each roar of the ocean is related to each incoming wave. For slavery was an institution which was sanctioned, sustained, encouraged, and perpetuated by federal constitutional doctrine. Today's conditions on race relations are a sequelae and consequence of the pathology created by the nation's two and a half centuries of slavery.

Pennsylvania v. *Local Union No. 542, Int'l Union of Operating Eng'rs*, 347 F. Supp. 268, 299 (E.D. Pa. 1972), aff'd, 478 F.2d 1398 (3d Cir. 1973) (table).[21]

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[21] We note that Professor McAward accepts that race-based violence satisfies the first of her two requirements for a badge or incident of slavery – that there is a "historical link" to slavery. McAward, *supra*, at 622-623. Quoting, in part, from the Second Circuit in *Nelson*, she states that racially motivated hate crimes "have a long and intimate historical association with slavery and its cognate institutions," and that "[r]ace-based private violence against slaves was decriminalized and continued in staggering portions in the immediate aftermath" of

(continued…)

b. Congress's Authority Under Section 2 Of The Thirteenth Amendment Is Not Limited To Addressing Interference With Federally Protected Activities

As discussed above, Section 249 was intended, in part, to cure limitations in the reach of Section 245 that "confined [the statute] to hate-motivated violence in connection with the victim's participation in one of six narrowly defined 'federally protected activities.'" H.R. Rep. No. 86 at 5; see note 16, *supra*. McLaughlin suggests, however, that the federal activities element is essential to Congress's exercise of its Section 2, Thirteenth Amendment power to address race-based violence. McLaughlin Br. 23. This argument is not correct. As we have noted, the Supreme Court has made clear that Congress "has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*, 392 U.S. at 440; see also *Griffin*, 403 U.S. at 105. This formulation of Congress's Thirteenth Amendment power is not limited to interference with protected activities. Courts addressing the constitutionality of Section 245(b)(2)(B) refer to this additional element not because it is essential to uphold the exercise of Congress's Section 2 power, but because it is an element of

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(…continued)
the Civil War "to dissuade the exercise, by Black Americans, of the rights and habits of free persons." *Id.* at 623 (internal quotation marks and footnotes omitted).

the statute before it. See pp. 29-30, *supra*; *Nelson*, 277 F.3d at 191 n.25 (that 18 U.S.C. 245(b)(2)(B) requires proof both that the activity occurred because of race, color, or national origin and because the victim was participating in a specific activity makes the court's constitutional ruling "easier," but the court is "not holding that both (and in particular the second) of the conditions are necessary to the statute's constitutionality").

This argument was rejected by the Eighth Circuit in *Maybee*. The court stated that "Maybee provides no reason why a finding of constitutional sufficiency of a statute based on two elements establishes a precedent that both elements are necessary to avoid constitutional infirmity." *Maybee*, 687 F.3d at 1031. In addition, the court rejected Maybee's reading of *Bledsoe*, *Allen*, and *Nelson* that would hold that the federally protected activities element is necessary to Congress's exercise of its Section 2 power. *Ibid*.

In short, given that Congress, in enacting Section 249(a)(1), specifically found that eliminating racially motivated violence is an important means of eliminating badges or incidents of slavery, and that these findings are rational, Section 2 provides ample authority for Congress to prohibit racially-motivated violence, regardless of whether a defendant also intended to interfere with certain protected activities.

c. Section 249(a)(1) Does Not Violate Principles Of Federalism

Defendants variously argue that Congress's enactment of Section 249(a)(1) runs afoul of principles of federalism because: (1) it usurps the traditional authority of the states to prosecute bias-motivated assaults as simple "street crimes"; (2) there is no evidence that States are failing to punish racially motivated hate crimes; and (3) it creates a general federal law of criminal assault. Cannon Br. 24-25; McLaughlin Br. 12, 23-26; Kerstetter Br. 13, 32-33. These arguments fail.

i. First, Section 249(a)(1) is not infirm simply because States may – and do – also prosecute such violence. Federal laws often criminalize conduct within traditional areas of state law, and regardless whether States have also criminalized the same conduct.[22] Given the principle of dual sovereignty, such laws "involve no infringement *per se* of states' sovereignty in the administration of their criminal laws." *United States* v. *Johnson*, 114 F.3d 476, 481 (4th Cir. 1997); cf. *Cleveland*

[22] The 2002 Senate Report, in addressing federalism concerns, noted that there "are already more than 3,000 Federal crimes," and that "[s]ince 1995 alone, Congress has enacted more than 37 laws that create new Federal crimes or impose new Federal criminal penalties for conduct that is already criminal under State law." S. Rep. No. 147 at 12-13. The Report also listed numerous areas in which "Federal law reaches aspects of * * * traditional state offenses," and noted that "combating a growing trend of hate-motivated violence is an important function of the Federal government." *Id.* at 13; see, *e.g.*, *United States* v. *Bostic*, 168 F.3d 718, 723-724 (4th Cir. 1999) (18 U.S.C. 922(g)(8), a criminal firearms statute, does not violate the Tenth Amendment by impermissibly infringing on state sovereignty because overlapping federal and state criminal laws are commonplace and involve no infringement of a State's sovereignty in administering its criminal laws).

v. *United States*, 329 U.S. 14, 19 (1946) ("fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States"). Indeed, as we have noted, it is difficult to conceive of a more quintessential *federal interest* than ensuring that badges and incidents of slavery no longer exist. See, *e.g.*, *Griffin*, 403 U.S. at 105.[23]

Moreover, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992); *United States* v. *DeCay*, 620 F.3d 534, 542 (5th Cir. 2010) ("When Congress properly exercises its authority under an enumerated constitutional power, the Tenth Amendment is not

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[23] See generally Mark D. Rosen, *Was Shelly v. Kraemer Incorrectly Decided? Some New Answers*, 95 Ca. L. Rev. 451, 498 (April 2007), explaining: "The Thirteenth Amendment is one of the only constitutional limitations that applies directly to private citizens, and this constitutional exception can be understood to mean that slavery is of such significance that it cannot be permitted to exist even outside the formal state-defined legal framework. The Thirteenth Amendment's limitation on both states and private individuals reflects an unusual choice for nationwide uniformity across not only polities but across the private sector as well. This uniformity provides a textual basis for concluding that matters tending to reinforce slavery or its badges and incidents are *uniquely federal interests*" (emphasis added; footnote omitted).

implicated.").[24] For this reason, the conclusion that Congress acted within its Section 2 power in enacting Section 249(a)(1) *is* a conclusion that the legislation does not impermissibly address a realm of power reserved to the States. See *New York*, 505 U.S. at 159 ("[i]n the end, * * * it makes no difference whether one views the question * * * as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment"); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981) (Tenth Amendment does not "prohibit[] Congress from displacing state police power laws regulating private activity"). Moreover, the Civil War Amendments were intended to be an expansion of federal law at the expense of the states. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976) (noting that the Court has "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the * * * legislative sphere[] of autonomy previously reserved to the States"); *Abner* v. *Kansas City S. R.R. Co.*, 513 F.3d 154, 157-158 (5th Cir. 2008). Finally, in contrast to other statutes found to have run afoul of the Tenth Amendment, Section 249(a)(1) does not use the States as a means of implementing federal

[24] The Tenth Amendment states: "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."

regulation. See *New York*, 505 U.S. at 160-161 (Congress may not under the Tenth Amendment commandeer the state legislative process and compel the state to enact and enforce a federal regulatory program).

ii. Kerstetter notes that when the Shepard-Byrd Act was passed nearly all States had hate crimes laws and there is no evidence that States were failing to investigate and prosecute such cases. Kerstetter Br. 32. He therefore asserts that there was no need for Congress to "step into the prosecution of violent street crime which previously had been the exclusive jurisdiction of the States." Kerstetter Br. 32.

These arguments are beside the point. What the Supreme Court's analysis in *Jones* and *Griffin*, as well as those cases upholding Section 245(b)(2)(B), require is that, in enacting Section 249, Congress have, as here, a rational basis to conclude that race-based violence is a badge and incident of slavery. That is all that is required when Congress is legislating under the express grant of authority afforded by Section 2. There is no basis for an *additional requirement* that Congress must show that States have abdicated their enforcement responsibilities before legislating. Moreover, the legislative history makes clear that Congress (and the Attorney General) were concerned about the number of hate crimes being committed (see pp. 35-37, *supra*); in response, Congress enacted a comprehensive remedy for a nationwide problem that would *supplement* state authority.

The fact that Section 249 was intended to supplement, not replace, state authority is reflected in the statute and its legislative history. The Findings section of the statute notes, for example, that hate crimes are a "serious national problem," state and local governments will "continue to be responsible for prosecuting the overwhelming majority" of such crimes, and can "carry out their responsibilities more effectively with greater Federal assistance." Shepard-Byrd Act, Section 4702(1) & (3), 123 Stat. 2835. The Findings further state that federal jurisdiction over such crimes "enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes," and the problem of hate crimes is sufficiently serious and widespread "to warrant Federal assistance to States, local jurisdictions, and Indian tribes." Shepard-Byrd Act, Section 4702(9) & (10), 123 Stat. 2836; see also H.R. Rep. No. 86 at 8 ("By expanding the reach of Federal criminal law, this bill will similarly expand the ability of the FBI and other Federal law enforcement entities to provide assistance to State law enforcement authorities. It is expected that this cooperation will result in an increase in the number of hate crimes solved by arrests and successful prosecutions."); Shepard-Byrd Act, Section 4704 (providing federal financial and non-financial support for the states' investigation and prosecution of hate crimes). Moreover, the certification provision specifically contemplates that in some cases, as here, there would be a federal prosecution of a hate crime even where the State has also

prosecuted the crime. See Section 249(b)(1)(C).[25] Finally, any fear that Section 249 will result in the "federalization" of wide swaths of crimes prosecutable under state law is belied by the fact that, in the more than three years since the enactment of Section 249, there have currently been only 15 cases charged under the statute.

In short, as its legislative history makes clear, Congress was not unmindful of federalism concerns in enacting Section 249. Section 249 "was carefully drafted to ensure that the Federal Government will continue to limit its prosecutions of hate crimes * * * to [a] small set of cases that implicate the greatest Federal interest and present the greatest need for Federal intervention." H.R. Rep. No. 86 at 14. To this end, the "statutory animus requirement * * * will limit the pool of

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[25] As noted above, the certification provision ensures that a high ranking Department of Justice official has reviewed the potential prosecution and determined that it is in the public interest and necessary to secure substantial justice (or meets other criteria in Section 249(b)). See *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearings before the S. Comm. on the Judiciary*, 111th Cong., 1st Sess. 6-7 (2009); p. 35, *supra*. There are similar provisions in two other federal criminal civil rights statutes, 18 U.S.C. 245 and 247. As the Attorney General stated, these provisions have "served the Department well for many years" and the Department has and will continue to consult with its state and local colleagues in these cases. *Id.* at 67-68. The Attorney General also noted that, as of the time of his testimony, under the Department's Dual and Successive Prosecution Policy (the Petite Policy) "the Civil Rights Division has prosecuted only 31 hate crime cases * * * since 1981," *id.* at 68. Given that, for example, from 1997 to 2007 there were 66,431 reported hate crimes against persons, it is clear that, as the Attorney General stated, the Department has "judiciously exercise[d] its discretion and authority to prosecute cases under the Petite Policy." *Ibid.* That discretion has continued under Section 249.

potential Federal cases to those in which the evidence of bias motivation is sufficient to distinguish them from ordinary crimes of violence left to State prosecution." H.R. Rep. No. 86 at 14. Further, the certification requirement is "intended to ensure that the Federal Government will assert its new hate crimes jurisdiction only in a principled and properly limited fashion, and is in keeping with procedures under the current Federal hate crimes statute." H.R. Rep. No. 86 at 14.

iii. Finally, defendants' suggestion that Section 249(a)(1) is constitutionally infirm because it creates a general federal law of criminal assault lacking a "federal nexus," applies to "street crime," or applies to racially motivated violence "no matter how trivial," is not accurate. Cannon Br. 16, 25; see also McLaughlin Br. 12, 23-26; Kerstetter Br. 33. Section 249's requirements that the defendant act willfully, to cause bodily injury, *because of* the victim's race (or color, national origin, or religion) squarely address – and satisfy – these concerns. As the Supreme Court stated in *Griffin*, "[t]he constitutional shoals that would lie in the path of interpreting [Section] 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, * * * invidiously discriminatory motivation." *Griffin*, 403 U.S. at 102. Therefore, the "federal nexus" follows necessarily from the exercise of Congress's Thirteenth Amendment, Section 2 power to address badges and

incidents slavery, and from Congress's findings, in exercising that power, that private race-based violence was used after the Civil War to maintain the subjugation of African Americans and that race-based violence remains "disturbingly prevalent." H.R. Rep. No. 86 at 5; see pp. 35-37, *supra*. Moreover, no race-based violence that causes bodily injury is "trivial." Finally, the argument that the statute *might* be applied in violation of the Constitution is not a challenge defendants can make. Federal statutes often sweep broadly, and the Court "need not find the [statute] now before [it] constitutional in all its possible applications in order to uphold its facial constitutionality and its application to * * * this case." *Griffin*, 403 U.S. at 104. The certification requirement further cabins the statute.

Relatedly, McLaughlin asserts that if Section 249(a)(1) is upheld, "every street assault, bar fight, etc. will be become a federal felony as long as the actor in the fight has white supremacist tattoos or uses the word 'nigger.'" McLaughlin Br. 25-26. Cannon similarly asserts that, "in the absence of deliberation or planning," the "incidental relics of racism espoused or displayed" by defendants are beyond federal power to regulate as badges and incidents of slavery. Cannon Br. 25; see also Kerstetter Br. 31-33. Section 249, however, does not reach expression and beliefs; the statute applies only to violent conduct directed at the victim *because of* the victim's, *e.g.*, race. Indeed, the statute itself makes clear that it may be applied only in ways that are consistent with the First Amendment. See Shepard-Byrd Act,

Section 4710(4) & (5), 123 Stat. 2842 (nothing in the Act shall be construed to "allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs," or "to diminish any rights under the first amendment to the Constitution of the United States"). As discussed above, it is the requirement that the defendant caused bodily injury *because of race* that brings the statute within Congress's Thirteenth Amendment, Section 2 power. Therefore, the existence of white supremacist tattoos, or the utterance of a racial epithet during an assault, will likely be relevant to whether the defendant acted with the requisite race-based intent. But in determining whether the defendant intentionally caused bodily injury because of the victim's race, the jury considers all of the evidence presented. See C.R. 1263 (jury instructions). Finally, there is no requirement that the defendant have "deliberated" or "planned" a violent assault apart from proof that the defendant acted intentionally to cause bodily injury and acted with the knowledge that his conduct was unlawful (*i.e.*, "willfully" caused bodily injury). See generally C.R. 1268 (jury instructions).

d. The Standard Of Review For Congressional Legislation Adopted In City of Boerne *v.* Flores *Is Not Applicable To The Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment*

Kerstetter argues that this Court should not apply the more deferential "rational basis" test of *Jones* and *Griffin* to Congress's exercise of its Thirteenth

Amendment, Section 2 power, but rather the test adopted in *Boerne*, addressing Congress's power under Section 5 of the Fourteenth Amendment – the "congruence and proportionality" test. Kerstetter Br. 25-33. Kerstetter further argues that Section 249(a)(1) does not represent a "congruent and proportional" remedy under the *Boerne* standard. Kerstetter Br. 31. There is no basis, however, to apply the *Boerne* test in the context of the Thirteenth Amendment; this is not an open question. But even if that test did apply, Section 249(a)(1) easily satisfies it.[26]

i. In *Boerne*, the Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, which, *inter alia*, limited *States* from burdening the free exercise of religion, was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.[27] In so doing, the Court set forth the test for determining whether Congress has enacted

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[26] Amici make this same argument, asserting the *Boerne* "effectively overruled" *Jones* and its use of a rational basis test, and that Section 249(a)(1) cannot satisfy the "more detailed scrutiny" of the *Boerne* test. Amicus Br. 3, 14-21.

[27] Section 5 of the Fourteenth Amendment, in language similar to Section 2 of the Thirteenth Amendment, provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." RFRA prohibited States and their political subdivisions from "substantially burden[ing]" a person's free exercise of religion unless the government could show that the burden serves a compelling state interest and is the least restrictive means of doing so. See *Boerne*, 521 U.S. at 515-516 (citation omitted).

"appropriate" legislation in exercising its enforcement power pursuant to Section 5. The Court first explained that Section 5 grants Congress *remedial* (*i.e.*, corrective or preventive) power, and that although in exercising that power Congress can prohibit conduct that is not itself unconstitutional, it cannot determine what constitutes a violation. *Boerne*, 521 U.S. at 517-520. In other words, "it falls to this Court, not Congress, to define the substance of constitutional guarantees." *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 728 (2003). The Court further explained that Congress's remedial power is not unlimited, and that therefore in exercising that power there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. Put another way, Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). "Lacking such a connection, legislation may become substantive in operation and effect," thereby exceeding Congress's power and "contradict[ing] vital principles necessary to maintain separation of powers and the federal balance." *Boerne*, 521 U.S. at 520, 536.

The Court concluded that the RFRA failed this test because there was little support in the legislative record for the concerns underlying the law, its provisions

were out of proportion to its supposed remedial object, and it was "not designed to identify and counteract state laws likely to be unconstitutional." *Boerne*, 521 U.S. at 534. The Court noted that "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530. Moreover, noting the law's "[s]weeping coverage," the Court found that "RFRA is 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. Because RFRA "appear[ed], instead, to attempt a substantive change in constitutional protections," *ibid.*, *i.e.*, it sought to change the meaning of the Free Exercise Clause as interpreted by the Court, the Court concluded that it exceeded Congress's power under Section 5 of the Fourteenth Amendment.

ii. *Boerne's* congruence and proportionality test does not apply to Congress's power under Section 2 of the Thirteenth Amendment, and defendant has cited no authority suggesting that it does. As discussed above, there is a well-established body of Supreme Court law addressing Congress's Section 2 power. See pp. 20-26, *supra*. Nothing in *Boerne* (and its progeny) suggests that that decision somehow overruled the Court's Thirteenth Amendment decisions in *Jones*

and *Griffin*; indeed, *Boerne* does not even cite those cases.[28] Because the Supreme Court has not overruled *Jones* and *Griffin*, this Court is bound to apply the rationale of those decisions to Section 249(a)(1). See p. 28, *supra* (citing *Rodriguez de Quijas*; *CBOCS West, Inc.*); cf. *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221, 246 (D.D.C. 2008) (three-judge court) (declining to apply *Boerne* to Fifteenth Amendment legislation, noting that it was bound by Supreme Court precedent applying rational basis test, "even if we thought the *Boerne* cases cast some doubt on those cases"), rev'd on other grounds, 557 U.S. 193 (2009).[29]

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[28] Kerstetter nevertheless asserts that the Court in *Boerne* rejected its conclusion in *Jones* that "Congress has the authority to determine what constitutes a constitutional violation." Kerstetter Br. 27. This assertion, however, mischaracterizes *Jones*. The Court in *Jones* stated that Congress has the remedial power under Section 2 of the Thirteenth Amendment to determine what are the badges and incidents of slavery and to enact legislation to abolish them; the Court was not addressing Congress's power to determine what constitutes a violation of Section 1 of the Thirteenth Amendment. 392 U.S. at 437-443.

[29] The district court in *Beebe* concluded that there was no basis to find that *Boerne* overruled the Court's Thirteenth Amendment cases *sub silento*. *Beebe*, 807 F. Supp. 2d at 1048-1050. The court noted that, in addition to the Thirteenth and Fourteenth Amendments, five other amendments include a similar enforcement provision. *Id.* at 1049. The court concluded that *Boerne* "did not intend to overrule the standards relating to any other amendment's enforcement provision," and therefore "*Jones* remains the controlling relevant precedent in interpreting Section Two of the Thirteenth Amendment." *Id.* at 1049. The Second Circuit reached the same conclusion in *Nelson*, stating that the cases limiting Congress's power under Section 5 of the Fourteenth Amendment "do not refer to the

(continued…)

iii. Even if this Court was not constrained by Supreme Court precedent to apply the *Jones* framework to Congress's power under Section 2, the concerns underlying *Boerne* in the context of the Fourteenth Amendment, resulting in less deferential review, are not present with the Thirteenth Amendment. First, because the Thirteenth Amendment, unlike the Fourteenth Amendment, applies to private conduct, it does not raise the federalism concerns that may warrant heightened scrutiny. Legislation enacted under Section 5 of the Fourteenth Amendment, like the statute at issue in *Boerne*, imposes obligations on state and local governments. See *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001) ("Congress' [Section 5] authority is appropriately exercised only in response to state transgressions."). As a result, there is an inherent antagonism in our federal system between the exercise of Congress's power under Section 5 of the Fourteenth Amendment and the States as sovereigns, a tension that underlies the heightened scrutiny adopted in *Boerne* and is not present in the context of the Thirteenth Amendment.[30] Moreover, where, as here, the Thirteenth Amendment

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(…continued)
Thirteenth Amendment context and hence cannot be read * * * as applying to that context." *Nelson*, 277 F.3d at 185 n.20.

[30] In this regard, as Professor McAward has noted, "most of the Court's post-Boerne decisions have confronted legislation in which Congress attempted to use its Fourteenth Amendment enforcement powers to abrogate state sovereign immunity. This context raises concern[s] about safeguarding state sovereignty and (continued…)

legislation is directed at private conduct, a court cannot review the legislative record to determine whether the legislation appropriately responds to transgressions *by the State*.

Second, under the Fourteenth Amendment, Congress is enforcing rights under Section 1 that have been *judicially* defined and circumscribed (*e.g.*, the scope of rights under the Due Process Clause, including those in the Bill of Rights made applicable to the States by that clause). It is in this context that courts, in reviewing Section 5 legislation, determine whether Congress is enforcing rather than defining the guarantees of Section 1; *i.e.*, whether Congress has made the appropriate determination that there is a history of wrongful conduct by the State that warrants the particular legislative remedy. In other words, under *Boerne*, a reviewing court determines whether the Section 5 legislation is congruent and proportional to the *judicially* defined rights in Section 1 without altering the meaning of those rights.

By contrast, in the *Civil Rights Cases*, *Jones*, and *Griffin* the Court assigned Congress the power to determine what are the badges and incidents of slavery

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(…continued)
protecting the public fisc. The Court has been protective of these interests and has crafted the congruence and proportionality test to ensure that prophylactic legislation stays within narrow bounds. This particular federalism concern doesn't present itself in the Thirteenth Amendment context." Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77, 140-141 (2010).

against which it may direct its enforcement legislation. Therefore, reviewing courts cannot compare *Congress's* legislative determinations with *judicial* determinations of the scope of the underlying right. The latter simply does not exist. Accordingly, review of Thirteenth Amendment Section 2 legislation is necessarily more deferential than review of Fourteenth Amendment Section 5 legislation as mandated by *Boerne*.[31]

iv. In all events, even if the congruence and proportionality test applies to Thirteenth Amendment legislation, given the context of race the appropriate level of deference would not be inconsistent with *Jones*. When Congress combats racial discrimination under the Civil War Amendments, however, "it acts at the apex of its power." *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 860 (D.C. Cir.), cert. granted, No. 12-96 (Nov. 9, 2012); see also *Hibbs*, 538 U.S. at 736 (it is "easier for

[31] The Second Circuit in *Nelson* reasoned similarly, explaining: "There is * * * a crucial disanalogy between the Fourteenth and Thirteenth Amendments as regards the scope of the congressional enforcement powers these amendments, respectively, create. Whereas there is a long, well-established * * * tradition of judicial interpretation of the substantive protections established by Section One of the Fourteenth Amendment, the meaning of Section One of the Thirteenth Amendment has almost never been addressed directly by the courts, in the absence of specific congressional legislation enacted. Indeed, the Supreme Court has expressly referred to 'the inherently legislative task' of defining 'involuntary servitude.' *Kozminski*, 487 U.S. at 951. And the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative." 277 F.3d at 185 n.20 (citation omitted).

Congress to show a pattern of state constitutional violations" when it enforces rights subject to heightened scrutiny); *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments."); *Guttman* v. *Khalsa*, 669 F.3d 1101, 1112 (10th Cir. 2012) ("Congress enjoys greater power under § 5 [of the Fourteenth Amendment] when it responds to a clearly discernible pattern of state encroachment on fundamental or other important constitutional rights"; therefore, congressional regulation is more likely to be congruent and proportional if the rights at issue are subject to heightened judicial scrutiny.); cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966) (applying rational basis test to Fifteenth Amendment legislation).[32]

[32] In *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999), which followed *Boerne* by two years, the Supreme Court relied on *South Carolina* to reaffirm the constitutionality of Section 5 of the Voting Rights Act without suggesting that its intervening decision in *Boerne* required a different analysis. More recently, in *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204-206 (2009), the Court expressly declined to resolve whether *Boerne's* congruence and proportionality test applies to Congress's enforcement power under Section 2 of the Fifteenth Amendment. See also *Shelby Cnty.* v. *Holder*, No. 12-96, cert. granted (Nov. 9, 2012) (addressing Congress's power under Section 2 of the Fifteenth Amendment in a challenge to the 2006 reauthorization of Section 5 of the Voting Rights Act).

Accordingly, when Congress addresses invidious race-based conduct, both *Jones* and *Boerne* grant Congress considerable leeway in determining when and by what means it may exercise its authority. By contrast, because the Fourteenth Amendment protects a broad range of rights, subject to differing levels of scrutiny, it may be appropriate for a court to examine more closely the legislative record of remedial legislation outside the context of race and gender. It follows that because Section 249(a)(1) is appropriate legislation under *Jones*, it would satisfy *Boerne*, properly applied.

v. In all events, the statute would also satisfy the heightened scrutiny mandated by *Boerne* for Fourteenth Amendment legislation outside of the context of race. Application of that test involves three steps: (1) identifying the constitutional right at issue; (2) determining whether Congress identified unconstitutional conduct warranting remedial action; and (3) determining whether Congress's remedial scheme is an appropriate response to the constitutional harm. *Garrett*, 531 U.S. at 365-374; *Tennessee* v. *Lane*, 541 U.S. 509, 522-534 (2004). Here, the constitutional right at issue is freedom from slavery, the badges and incidents thereof, and its continuing effects. Second, Congress made extensive findings that private race-based violence has long been used to continue *de facto* the legacy of slavery, and continues to pose a serious national problem. See pp. 35-37, *supra*. Third, Congress's response to this injury is direct and limited.

Section 249(a)(1) specifically requires proof as an element of the offense that the defendant acted because of, *e.g.*, race, and makes prosecution under Section 249 contingent upon certification by the Attorney General that prosecution of the particular case meets specific requirements ensuring that there is a federal interest. As a result, Section 249(a)(1) is hardly "an unwarranted response to a perhaps inconsequential problem." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 89 (2000). Rather, Section 249(a)(1) directly addresses the very private race-based violence identified in the congressional findings. See pp. 35-37, *supra*; *Beebe*, 807 F. Supp. 2d at 1056 n.6 (concluding that, if applicable, Section 249(a)(1) "would also survive under * * * *Boerne*").[33]

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[33] Kerstetter suggests that the statue is not congruent and proportional because of its "sweeping coverage" that makes minor assaults based on race a federal offense. Kerstetter Br. 31-32. But as with any statute targeting specific conduct, the statute can be said to be "sweeping" only within the confines of the specific elements of the offense, which limit application of the statute to the precise conduct found by Congress to implicate its power under the Thirteenth Amendment. Kerstetter also suggests that Section 249 is infirm under *Boerne* because there is no evidence that the *States* are failing to adequately prosecute hate crimes. Kerstetter Br. 32. But because the Thirteenth Amendment applies to both state action and private conduct, if *Boerne* applied in this context the relevant transgressions would not be that of the State, but rather those of the persons' committing bias-motivate assaults. Finally, Kerstetter and amici rely on their narrow interpretation of "badges and incidents" of slavery to suggest that Section 249(a)(1) cannot satisfy *Boerne* because the remedy is not proportional and congruent to addressing of slavery of involuntary servitude. Kerstetter Br. 28-31; Amcius Br. 21-25. Because under applicable law there is no basis for their interpretation of "badges and incidents" of slavery, see pp. 41-43, *supra*, this argument fails.

II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CANNON'S AND MCLAUGHLIN'S CONVICTIONS

A. Standard Of Review

The sufficiency of the evidence is reviewed to determine "whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States* v. *Ned*, 637 F.3d 562, 568 (5th Cir.), cert. denied, 132 S. Ct. 276 (2011). In making this determination, the court "considers the evidence in the light most favorable to the government, drawing all reasonable inferences and credibility choices made in support of the verdict." *Ibid.* "Under this highly deferential standard, the jury is free to chose among reasonable constructions of the evidence." *United States* v. *Diaz*, 420 F. App'x 456, 461 (5th Cir. 2011) (citation and internal quotation marks omitted). The evidence need not exclude every reasonable hypothesis of innocence to support a guilty verdict. *United States* v. *Michelena-Orovio*, 719 F.2d 738, 743 n.4 (5th Cir. 1983).

B. Sufficient Evidence Supports Defendants' Convictions

To establish a violation of Section 249(a)(1), the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) caused bodily injury to any person; (3) because of such person's "actual or perceived race, color, religion, or national origin." 18 U.S.C. 249(a)(1); see also C.R. 1268-1269 (jury

instructions); note 2, *supra*. Cannon and McLaughlin argue only that there was insufficient evidence that they acted because of race. Cannon Br. 30; McLaughlin Br. 27-28. This argument ignores the substantial evidence presented at trial from which a reasonable jury could conclude that defendants assaulted Johnson because he is African-American.

First, the testimony of Johnson and Staggs established that Cannon and Staggs, as they surrounded Johnson at the bus stop, repeatedly called him a "nigger" and then assaulted him. See pp. 9-11, *supra*; C.R. 848 (Cannon, responding to Staggs referring to Johnson as a "nigger," stated to Johnson: "You heard him nigger. He called you a 'nigger,' nigger"). The jury could have reasonably concluded, given these statements alone, that Johnson was assaulted because of his race. This is particularly true in a situation like this where there is no other apparent reason for the assault. The defendants and Johnson had never met before and there was no attempt to rob Johnson. Defendants' racial animus is also supported by testimony that after Cannon was placed inside a patrol car, he said to the African-American police officers standing by the car: "What are you niggers staring at?" Cannon then repeatedly used the word "nigger" in reference to the officers in a hostile and aggressive manner. Similarly, when McLaughlin was taken into custody at the scene, he repeatedly referred to the African-American officers who were present as "[f]ucking niggers." See p. 13, *supra*.

The evidence also established that the racial epithets directed at Johnson in connection with the assault did not arise in a vacuum. When Cannon and Kerstetter first met Staggs and McLaughlin shortly before the assault, they were happy to meet some fellow "woods." McLaughlin then confirmed Cannon's and Kerstetter's initial impression; McLaughlin lifted his shirt to show off his white supremacist tattoos. See pp. 5-7 (also describing the tattoos). At this time, Cannon and Kerstetter were both shirtless and heavily tattooed with white supremacist symbols (*e.g.*, swastikas) and various terms using the word "wood(s)," including the term "peckerwood." Clearly, defendants felt no embarrassment over the beliefs reflected in their tattoos, as they publicly bonded over them. In fact, McLaughlin and Staggs subsequently removed their shirts so that all four were shirtless and all three defendants were displaying the white supremacist tattoos that were inked all over their bodies. Testimony was admitted from an expert in the behavior of white supremacist gangs and their symbols (Squyres) explaining that many of defendants' tattoos and the term "wood(s)" are symbols or terms used by members of white supremacist organizations. Squyres also testified that the uncovering of one's tattoos can be significant, because gang members display their tattoos to let others know what gang they belong too or what groups they want to openly disrespect. In essence, the defendants' tattoos operated as a billboard of their beliefs. C.R. 978. The uncovering of their white supremacist tattoos is significant,

because the defendants' white supremacists tattoos were intentionally displayed as they approached the victim, an African-American man sitting alone at a bus stop. Finally, Kerstetter's former girlfriend (Savell) testified that, as his tattoos reflected, he was a "peckerwood," which meant that he "didn't like niggers." C.R. 1171. She also testified that both Kerstetter and Cannon referred to African Americans as "niggers," and Kerstetter said that "they all did him wrong[] so,[] he was going to do them wrong." C.R. 1171-1172.

To be sure, defendants' white supremacist tattoos or beliefs do not necessarily establish that, in connection with the specific assault at issue here, they acted because of Johnson's race. See Cannon Br. 30; McLaughlin Br. 27-28 (both suggesting that the mere use of racial epithets during the course of the assault, as well as their white supremacist tattoos, do not establish the requisite intent). That was made clear at trial. See C.R. 971-972, 980-981, 989-900, 1003 (making clear to jury that testimony concerning meaning of tattoos did not concern what defendants believed at time of assault). But that evidence is relevant to the jury's consideration of the defendants' intent. See, *e.g.*, *Wingfield* v. *Massie*, 122 F.3d 1329, 1333 (10th Cir. 1997) (In making its determination regarding a defendant's intent, "a jury is permitted to draw inferences of subjective intent from a defendant's objective acts."). Numerous cases in similar contexts have recognized that such evidence is relevant to establishing the kind of race-based intent at issue

here.[34] In short, the evidence, taken as a whole, supports the conclusion that defendants acted with racial intent: Cannon and McLaughlin, with nearly shaved heads, no shirts, and white supremacist tattoos advertising their racist beliefs, approached Johnson; Cannon (and Staggs) called him a "nigger," and then the defendants assaulted him.[35]

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[34] See, *e.g.*, *United States* v. *Allen*, 341 F.3d 870, 885-886 (9th Cir. 2003) (evidence of racist tattoos and literature, and skinhead paraphernalia such as combat boots and swastika arm-bands, relevant to proving racial animus); *United States* v. *Woodlee*, 136 F.3d 1399, 1410-1411 (10th Cir. 1998) ("[e]vidence of past racial animosity is relevant" to establishing that defendant acted because of race); *United States* v. *Dunnaway*, 88 F.3d 617, 618-619 (8th Cir. 1996) (evidence of defendant's "racist views, behavior, and speech" relevant to establishing element of the crime requiring "discriminatory purpose and intent"); *United States* v. *Franklin*, 704 F.2d 1183, 1187-1188 (10th Cir. 1983) (admitting testimony regarding the defendant's self-identification as a racist and strong dislike of blacks and Jews and the mixing of black and white races relevant given that statute requires that defendant have acted because of race); *United States* v. *Magleby*, 241 F.3d 1306, 1318-1319 (10th Cir. 2001) (evidence that defendant listened to CD with racist lyrics relevant to establishing that defendant targeted the victims because of their race); *O'Neal* v. *Delo*, 44 F.3d 655, 661 (8th Cir. 1995) (defendant's membership in Aryan Brotherhood relevant to question of whether racial animus was motive for murder); see also *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) (First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent").

[35] Defendants also suggest that the evidence is insufficient because there was no "plan" among the defendants to assault Johnson because of his race or even a prior discussion of race. Cannon Br. 28; McLaughlin Br. 27. These are not elements of the offense distinct from the element that defendants acted "because of" the victim's race. In addition, because the defendants were also charged as aiders and abettors, it is of no moment that there is no evidence that McLaughlin directed racial slurs at Johnson. The defendants acted in concert and all had white supremacist tattoos. See C.R. 1269-1272 (jury instructions on aiding and abetting).

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief for the United States as Appellee:

(1) contains 17,723 words (complying with Motion for Leave to File Extra-Length Brief);

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

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

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Date: February 15, 2013