ORAL ARGUMENT REQUESTED
No. 12-2040

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM HATCH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE BRUCE D. BLACK

BRIEF FOR THE UNITED STATES AS APPELLEE

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MISCELLANEOUS:

STATEMENT OF RELATED CASES

There have been no prior or related appeals in this case.

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STATEMENT OF JURISDICTION

Defendant-Appellant William Hatch was 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 on March 5, 2012. Br. Attachment A.[1] Defendant filed a timely notice of appeal on March 7, 2012. This Court has jurisdiction under 28 U.S.C. 1291.

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[1] Citations to "Br. __" refer to page numbers in, or attachments to, defendant's opening brief. Citations to "R. __ at __" refer to documents in the (continued…)

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 18 U.S.C. 249(a)(1) creates racial classifications subject to strict scrutiny.

STATEMENT OF THE CASE

On November 10, 2010, a federal grand jury returned a two-count indictment charging William Hatch, along with two others (Paul Beebe and Jesse Sanford), in connection with the assault of a twenty-two-year-old developmentally disabled man of Navajo descent, identified in the indictment as V.K. R. 3. Count 1 charged the three defendants with conspiring to violate 18 U.S.C. 249 by "willfully caus[ing] bodily injury to V.K., who is Native American, because of his actual and perceived race, color, and national origin," in violation of 18 U.S.C. 371. R. 3 at 2-4. Count 2 charged the three defendants with violating 18 U.S.C. 249 (and 18 U.S.C. 2) by willfully causing bodily injury to V.K. because of his actual and perceived race, color, and national origin. R. 3 at 4-5. Count 2 alleged that "defendants used a heated wire hanger to brand a swastika into the bare skin of

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(…continued)
district court record, as numbered on the district court's docket sheet, and page numbers within the documents.

V.K.'s arm because V.K. is not white, thereby causing bodily injury." R. 3 at 5. Count 2 further charged that the "offense included kidnapping; that is, the defendants restrained and confined V.K. by force, intimidation and deception with intent to cause bodily injury to V.K." R. 3 at 5.[2]

On May 20, 2011, the defendants filed a joint motion to dismiss the indictment, asserting that Congress lacked the authority to enact 18 U.S.C. 249(a)(1). R. 59. The crux of defendants' argument was that Section 249(a)(1) exceeds Congress's power under Section 2 of the Thirteenth Amendment. R. 59 at 3-20. The United States opposed the motion. R. 70.

On June 17, 2011, Hatch pled guilty to Count 1, reserving the right to challenge the constitutionality of Section 249. As part of the agreement, the United States dismissed Count 2.[3]

On August 4, 2011, the district court denied the motion to dismiss the indictment, concluding that "Section Two [of the Thirteenth Amendment] provided Congress with ample authority to pass [S]ection 249(a)(1)." R. 85 at 1; R. 86.

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[2] On November 15, 2010, pursuant to 18 U.S.C. 249(b)(1), the government filed a Certificate of the Assistant Attorney General certifying that the prosecution for violations of 18 U.S.C. 249 "is in the public interest and necessary to secure substantial justice." Br. Attachment I.

[3] Beebe and Sanford entered into similar plea agreements, but they have not appealed.

On February 7, 2012, Beebe was sentenced to 102 months' imprisonment, and Sanford was sentenced to 60 months' imprisonment. Br. Attachments G, H.[4] On March 5, 2012, Hatch was sentenced to the lesser of 14 months' imprisonment or time served.[5] Br. Attachment A. On March 7, 2012, Hatch filed a timely notice of appeal.

STATEMENT OF FACTS

The facts of the case are summarized below as alleged in the indictment.

On April 29, 2010, Beebe met V.K. at a McDonald's. Beebe took V.K. to his apartment, where Hatch and Sanford later joined them. R. 3 at 1-2. V.K. "was a young adult male of Navajo descent who lived on the Navajo Reservation in Navajo, New Mexico and who was born with a severe developmental disability." R. 3 at 1. "As a result of his developmental disability, V.K. functioned at a diminished cognitive level." R. 3 at 1. Beebe "espoused white supremacist views and displayed various Nazi memorabilia and other items symbolizing 'white pride'

[4] Beebe and Sanford pled guilty to state court charges and, on February 22, 2012, were each given prison sentences of 102 months; their federal sentences were to run concurrently with their state sentences, and *vice versa*. See Br. 3-4 & Attachments E, F.

[5] Hatch was also prosecuted in state court for the same acts. He was convicted of conspiracy to commit aggravated battery involving great bodily harm and, on September 1, 2011, sentenced to 18 months' imprisonment. See Br. 3 & Attachment D.

in his apartment, including * * * a large swastika flag mounted on a wall, a woven symbol called a 'dream catcher' with a swastika hanging above his bed, and a baseball bat with a swastika painted on it." R. 3 at 2.

After V.K. fell asleep on the couch, Hatch, Beebe, and Sanford used markers to draw on V.K. When V.K. woke up, Hatch, Beebe, and Sanford told V.K. that they would draw "feathers" and "native pride" on his back. Instead, they "drew a pentagram labeled '666' and an ejaculating penis and testicles with the words 'I love cock …mmm.'" R. 3 at 3. Sanford used his cellular phone to record the drawings on V.K.'s back while asking him if he liked his "feather" and his "native pride." R. 3 at 3. The video was labeled "My Artwork." R. 3 at 3.

Hatch, Beebe, and Sanford also shaved V.K.'s head, "leaving the remaining hair in the shape of a swastika on the back of V.K.'s head." R. 3 at 3. They then outlined the swastika with a marker and wrote "KKK" and "White Power" within the swastika. R. 3 at 3.

Hatch, Beebe, and Sanford told V.K. that they would "brand" him. R. 3 at 4. They decided, however, that they needed V.K.'s "consent." Therefore, they "took advantage of V.K.'s cognitive disability to induce him to make a video in which he 'asked' to be branded, doing so in an effort to make their racially-motivated assault of V.K. appear to be a consensual act." R. 3 at 4. This video was labeled "The Agreement." R. 3 at 4.

Hatch, Beebe, and Sanford then had V.K. sit in a chair in order to be branded. R. 3 at 4. Beebe fashioned a wire hanger into the shape of half a swastika, and used the stove to heat the hanger. R. 3 at 4. Hatch, Beebe, and Sanford "twice placed the heated wire hanger on V.K.'s bare skin, causing the flesh to burn and scar, and thereby 'branding' V.K. with a swastika." R. 3 at 4. Sanford used his cellular phone to also record the swastika "brand" on V.K.'s arm. This video was labeled "The Results." R. 3 at 4.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

1. In 1968, four years after the enactment of the Civil Rights Act of 1964, Congress enacted 18 U.S.C. 245, the first modern federal "hate-crime" statute. Section 245(b)(2)(B) addresses race-based violence, but 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, it requires the specific intent to interfere with a victim's enjoyment of a federally protected right. 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.

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., 2nd 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 (Shepard-Byrd 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. Section 249(a)(1) applies to conduct 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 to eradicate badges and incidents of slavery.[6]

2. Defendant William Hatch, and his two accomplices, were the first defendants to be charged under the Shepard-Byrd Act, and this is the second case to reach a United States Court of Appeals addressing Congress's Thirteenth Amendment authority to enact Section 249(a)(1). See *United States* v. *Maybee*, No. 11-3254 (8th Cir.) (argued June 15, 2012). Hatch pled guilty to one count of conspiracy to violate Section 249(a)(1) in connection with, among other conduct,

[6] A separate subsection of Section 249, Section 249(a)(2), applies to hate crimes based on, *inter alia*, gender, disability, or sexual orientation, and was enacted pursuant to Congress's Commerce Clause power (and includes a Commerce Clause element that the government must also prove). That section, and the scope of Congress's power under the Commerce Clause, is not relevant to this appeal.

the use of a heated wire hanger to brand a swastika on the arm of a twenty-two year-old developmentally disabled man of Navajo descent. Hatch preserved the right to challenge the constitutionality of the statute, and this appeal followed.

Section 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment. In a series of cases addressing Congress's power under that provision, the Supreme Court has made clear that Section 2 grants Congress broad authority to pass laws abolishing badges and incidents of slavery, 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 that "[s]lavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th Amendment[,] * * * through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry," and that "[a]ccordingly, eliminating racially motivated violence is an important means of eliminating * * * the badges, incidents, and relics of slavery." Shepard-Byrd Act, Section 4702(7), 123 Stat. 2836. Those findings are not irrational. Moreover, in this case defendant *branded* the victim with a swastika. It is difficult to imagine a badge or incident more redolent of slavery than branding.

Defendant argues that Section 249 violates principles of federalism by legislating in an area traditionally left to the States. But Section 2 of the Thirteenth

Amendment expressly grants Congress the authority to pass legislation enforcing the Amendment, and federal laws often criminalize conduct within traditional areas of state law, regardless whether States have also criminalized the same conduct.

Defendant also argues that this Court should not apply the "rational basis" test the Supreme Court has always applied to Congress's exercise of its Thirteenth Amendment power, but rather the test the Supreme Court adopted in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) – the "congruence and proportionality" test – in the context of Congress's power under Section 5 of the Fourteenth Amendment. *Boerne*, however, did not overrule (or even mention) the Supreme Court's cases addressing Congress's power under the Thirteenth Amendment. In any event, the congruence and proportionality test is ill-suited for Congress's Thirteenth Amendment enforcement power because, unlike with the Fourteenth Amendment, it is Congress, not the courts, that determines what are badges and incidents of slavery, and therefore there is no basis to determine whether Congress's remedial legislation appropriately responds to violations of judicially defined rights. Moreover, the Thirteenth Amendment legislation applies to private actors, not States.

Finally, defendant argues that Section 249(a)(1) creates a racial classification and cannot survive strict scrutiny. But because the Thirteenth Amendment grants Congress power to address *all* badges and incidents of slavery,

regardless whether the victim is a member of a class disadvantaged by American slavery, Section 249(a)(1) proscribes race-based conduct *regardless* of the race of the victim. In other words, the statute applies to crimes against victims of all races. As such, it does not make race-based classifications, but rather addresses a race-related matter in a racially neutral fashion.

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. *Carel*, 668 F.3d 1211, 1216 (10th Cir. 2011), cert. denied, 132 S. Ct. 2122 (2012). Statutes "are presumed constitutional." *Ibid.* (citation omitted). 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. of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012) (internal quotation marks, brackets, and citation 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."

Defendant asserts that Congress does not have the authority to enact this provision under Section 2 of the Thirteenth Amendment. Br. 16-48. The district court correctly rejected this argument.

1. Congress's Power Under Section 2 Of The Thirteenth Amendment

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). Rather, it "was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag." *Ibid.*; see also *The 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. *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").

Section 2 of the Thirteenth Amendment grants Congress the "power to enforce this article by appropriate legislation." The Supreme Court has made clear that Congress's power under Section 2 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." *The 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).

Over 80 years after *The Civil Rights Cases*, the Court reaffirmed and applied 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, stating that Congress's Section 2 power "include[d] the power to eliminate all racial barriers to the acquisition of real and personal property." *Jones* v. *Alfred H. Mayer Co.*, 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).[7]

[7] 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 be

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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 under 42 U.S.C. 1985(3) after they were forced from their car and attacked when 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 remedial [under Section 2] extend far beyond the actual imposition of slavery or involuntary servitude." *Id*. at 105. The Court further explained 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. To keep that promise, 'Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of

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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.

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) (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). It follows that Congress 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 (internal quotation marks and citation omitted); see also *Fisher* v. *Shamburg*, 624 F.2d 156, 159 (10th Cir. 1980) (noting that Section 2 authorizes Congress to determine what are the badges and incidents of slavery, citing *Jones*).[8]

Congress's authority under Section 2 to determine what are badges and incidents of slavery,[9] and to proscribe them, is not limited by the scope of Section

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[8] Defendant states that when the Thirteenth Amendment was enacted, "there was considerable uncertainty as to whether it would permit legislation that did more than merely abolish slavery and involuntary servitude." Br. 17. Any such uncertainty, however, was put to rest in *The Civil Rights Cases*, *Jones*, and *Griffin*. See *Jones*, 392 U.S. at 441 n.78 (emphasizing that earlier cases more narrowly applying Congress's Section 2 power are no longer valid); R. 85 at 11-12 (district court rejecting defendant's argument that the Thirteenth Amendment is limited to ensuring economic rights) (citing *United States* v. *Kaufman*, 546 F.3d 1242, 1262-1263 (10th Cir. 2008)).

[9] There is no precise meaning for the phrase "badges and incidents of slavery." The phrase was used in 1883 in *The Civil Rights Cases*, but given a

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1 of the Thirteenth Amendment. The Second Circuit, noting the Supreme Court decisions cited above,[10] concluded that "it is clear from many decisions of the

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narrow application, helping to usher in the era of Jim Crow laws and segregation. *The Civil Rights Cases*, 109 U.S. at 23-25. Defendant notes (Br. 20-21) that in that case the Court held 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, and that in *United States* v. *Harris*, 106 U.S. 629 (1883), the Court held that Congress could not rely on the Thirteenth Amendment to enact a statute criminalizing private conspiracies to deprive another of equal protection of the laws. The Court's narrow application of badges and incidents of slavery in *The Civil Rights Cases*, however, was repudiated in *Jones* and its far more expansive view of the phrase. See *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"). With respect to *Harris*, in *Griffin* the Court upheld under the Thirteenth Amendment the civil counterpart to the same statute, thereby affirming the broad scope of Congress's Thirteenth Amendment authority. *Griffin*, 403 U.S. at 104-106. Defendant nevertheless asserts that the Court has recognized the "enduring vitality" of *The Civil Rights Cases* and *Harris*, and that they remain authoritative interpretations of the Thirteenth and Fourteenth Amendments, citing *United States* v. *Morrison*, 529 U.S. 598, 624 (2000). Br. 21. The Court in *Morrison*, however, was referring to the principle that Congress's enforcement power under Section 5 of the Fourteenth Amendment does not apply to private conduct; it was not referring to Congress's power under the Thirteenth Amendment. *Morrison*, 529 U.S. at 623-624. 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.

[10] Defendant cites two other cases he suggests support a more limited construction of Congress's power under Section 2. Br. 23 (citing *Palmer* v. *Thompson*, 403 U.S. 217, 226-227 (1971)) (city's decision to close rather than desegregate a municipal swimming pool did not violate Section 1 of the Thirteenth Amendment, but explaining in dicta that Congress might have the authority to regulate such action under Section 2); *City of Memphis* v. *Greene*, 451 U.S. 100, 128 (1981) (closing of a city street which traversed predominantly black and white

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Supreme Court that Congress may, under its Section Two enforcement power, now reach conduct that is not directly prohibited under Section One." *United States* v. *Nelson*, 277 F.3d 164, 181 (2d Cir. 2002) (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. This broad authority includes the power to criminalize private, individual conduct that runs afoul of the Thirteenth Amendment's purpose of ensuring universal civil freedom. See *Jones*, 392 U.S. at 438 ("It has never been doubted * * * that the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation, includes the power to enact laws direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.") (internal quotation marks and citation omitted); see also *Murray* v. *Earle*, 334 F. App'x 602, 607 (5th Cir. 2009) (Section 2 of the

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(…continued)
neighborhoods did not violate the Thirteenth Amendment, but suggesting that this activity "does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to [Section] 2"). *Palmer* and *Greene* do not undermine the rationale of *Jones*, but clarify that while Congress is empowered to identify and target badges of slavery, absent federal legislation the Court will not *sua sponte* identify such badges and enjoin them under the Thirteenth Amendment. See also R. 85 at 11 n.4 (district court below rejects defendant's argument that the Court in *Palmer* and *Greene* "retreated from its rationale in *Jones*," stating that "[i]n this case, like *Jones* and unlike *Palmer* and *Greene*, the conduct at issue has been identified and targeted by Congress as a badge of slavery").

Thirteenth Amendment empowers Congress to both "define" and "legislatively abolish" badges and incidents of slavery).

Finally, these decisions make clear that 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 439-441; 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").

In sum, the Supreme Court has made clear 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 Congress that determines 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 that the Court must apply to Congress's enactment of Section 249(a)(1).

b. The issue of Congress's power under the Thirteenth Amendment to enact Section 249(a)(1) does not arise against a blank canvass. Several courts of appeals have applied *Jones* and *Griffin* to challenges to the constitutionality of 18 U.S.C. 245(b)(2)(B), the predecessor statute to Section 249, also enacted pursuant to Congress's Thirteenth Amendment, Section 2 power. In so doing, as discussed below, those courts have upheld Section 245(b)(2)(B) as a valid exercise of Congress's Section 2 authority, and have accepted that Congress may rationally link slavery and racial violence.

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 *United States* v. *Makowski*, 120 F.3d 1078, 1081 (9th Cir. 1999); 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, *i.e.*, to address racial violence "used to deny affirmative federal rights." S. Rep. No. 721 at 4. 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) reflects the link between private, race-based violence and slavery, the same link Congress relied upon in enacting Section 249. 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 relied upon the same rationale. See S. Rep. No. 721 at 3 (Section 245 was enacted "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").

Congress's determination in enacting Section 245 that violent interference with a person based on the person's race and use of a public facility imposed a "badge of slavery" was not irrational. The same year in which Congress enacted

Section 245(b)(2)(B) the Court decided *Jones*, upholding the prohibition of racial discrimination in the sale of real and personal property under Congress's power to enforce the Thirteenth Amendment. *Jones*, 392 U.S. at 439. The Court explained that "when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." *Id*. at 441-443. If Congress could have rationally concluded that *non-violent discrimination* in the sale of housing 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. Indeed, the Court in *Jones* expressly overruled *Hodges* v. *United States*, 203 U.S. 1 (1905), to the extent it held that a racially motivated assault was not a badge of slavery, 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." *Id.* at 441 n.78; see R. 85 at 10-11 (district court addressing *Jones* and *Hodges*).

Against this background, the Eighth Circuit 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." *United States* v.

Bledsoe, 728 F.2d 1094, 1097 (8th Cir. 1984); see also *United States* v. *Sandstrom*, 594 F.3d 634, 659-660 (8th Cir. 2010) (also upholding Section 245(b)(2)(B) (citing *Bledsoe*)). The Second Circuit in *Nelson*, in concluding that Section 245(b)(2)(B) was "a constitutional exercise of Congress's power under the Thirteenth Amendment," 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. Citing various studies, the court 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.*; see also *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (also upholding Section 245(b)(2)(B) under the Thirteenth Amendment). Therefore, as the district court concluded, "[t]he weight of this precedent * * * confirms that it was rational for Congress to conclude that racially motivated violence is a badge or incident of slavery." R. 85 at 11.

2. In Enacting Section 249, Congress Again Rationally Determined That Bias-Motivated 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 address 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).[11]

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

[11] 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.[12] 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, 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 evidence addressing the prevalence of hate crimes and the need for further federal involvement to address this problem and 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. 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.*[13]

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[12] 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.

[13] Further, Congress, in addressing in 2002 proposed legislation that ultimately became Section 249, noted that "the number of reported hate crimes has

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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 Security 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:

> (7) 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

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grown almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 straight years." S. Rep. No. 147 at 2.

> 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.
>
> (8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct races. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

Shepard-Byrd Act, Sections 4702(7) & (8), 123 Stat. 2836.

b. It follows that, applying the analysis mandated by the Supreme Court in *Jones* and *Griffin*, Congress rationally determined that racially motivated violence is a badge or incident of slavery, and therefore it had authority under Section 2 to enact Section 249(a)(1) and prohibit racially-motivated violent conduct. As the district court recognized in rejecting defendant's argument to the contrary, "[r]acially charged violence, perpetuated by white men against black slaves, was a routine and accepted part of the American slave culture," and "[i]n light of this history, this 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." R. 85 at 10.

The district court's conclusion is consistent with that of the only other court that has addressed this issue. In *United States* v. *Maybee*, No. 11-30006, 2011 WL 2784446, at *4-6 (W.D. Ark. July 15, 2011), appeal pending, No. 11-3254 (8th Cir. argued June 15, 2012), the court denied defendants' motion to dismiss the indictment charging a violation of Section 249(a)(1), noting 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. The court 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 also 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.*

Finally, a conclusion to the contrary would be squarely at odds with the purpose of Section 2 of the Thirteenth Amendment. In *Jones*, the Court noted congressional opposition to the passage of Section 1982's predecessor statute, Section 1 of the Civil Rights Act of 1866, and the argument that Section 2 of the Thirteenth Amendment "merely authorized Congress to dissolve the legal bond by

which the Negro slave was held to his master." 392 U.S. at 439. The Court noted that "majority leaders in Congress – who were, after all, authors of the Thirteenth Amendment – had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act." *Ibid.* The Court quoted the statement of Senator Trumbull, the chief proponent of the bill, who rejected the narrow view of Congress's Section 2 power:

> [If the narrower construction 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; 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 the 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.

Id. at 440 (internal quotation marks omitted). The Court in *Jones* stated that "[s]urely Senator Trumbull was right." *Ibid.* As discussed above, in enacting Section 249(a)(1), Congress determined legislation addressing race-based *violence* was *appropriate*, just as it did with respect to race-based discrimination in other contexts, such as purchasing real property.[14]

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[14] The district court 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

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For these reasons, Congress acted within its Section 2 authority in enacting Section 249(a)(1), and the statute is constitutional on its face. Moreover, in this case, the government charged the defendant with willfully causing bodily harm because the victim was Native American, *i.e.*, "because of [his] actual and perceived race, color, and national origin." See R. 3 at 2. Further, defendant *branded* the victim with a swastika. Along with race-based violence, it is difficult to imagine a badge or incident more redolent of slavery than branding. See R. 85 at 13 (district court noted that "[h]istorians have * * * specifically identified branding as a punishment regularly dealt to slaves"). Therefore, the charged conduct in this case falls squarely within Section 249(a)(1), and Section 249(a)(1) is constitutional as applied. In this regard, it is also difficult to improve on the district court's summary of its similar conclusion: "The attack at issue here allegedly involved at least one avowed white supremacist and his white friends branding a swastika, a well known symbol of white power, on the arm of a Navajo man[.] * * * Whatever may be said of the limits of Congress' power under Section Two, these facts fall well within the scope of conduct that Section Two of the Thirteenth Amendment empowered Congress to ban. Consequently, this Court

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of slavery] is not merely rational, but inescapable." R. 85 at 9. The court also noted that "[r]acially charged violence, perpetuated by white men against black slaves, was a routine and accepted part of the American slave culture." R. 85 at 10.

easily finds that Congress' determination that racially motivated violence is a badge of slavery is rational." R. 85 at 14.[15]

3. Defendant's Arguments Against The Constitutionality Of Section 249(a)(1) Are Without Merit

Notwithstanding settled law addressing Congress's power under Section 2, defendant argues that Section 249(a)(1) is invalid because: (1) it violates the Tenth Amendment and principles of federalism, and (2) it is not a "congruent and proportional" remedy under the heightened standard of review adopted in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). Br. 24-38, 42-48. These arguments are not correct.

[15] Defendant correctly acknowledges that the Supreme Court "has upheld Thirteenth Amendment protection of members of groups other than African Americans who belonged to a race considered distinct from the Caucasian race at the time of Reconstruction," citing the companion cases of *Shaare Tefila Congregation* v. *Cobb*, 481 U.S. 615 (1987), and *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 613 (1987). Br. 23-24. In those cases, the Court held that Jews and Arabs were races protected by 42 U.S.C. 1982 and 1981, respectively. In *Saint Francis College*, the Court explained that Congress intended the term "race" to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Saint Francis College*, 481 U.S. at 613. Defendant does not suggest that Section 249(a)(1) cannot be applied to a Native American victim, which, in any event, would certainly not be correct. See Shepard-Byrd Act, Section 4702(8), 123 Stat. 2836; *Nelson*, 277 F.3d at 176 (addressing "race" as used in Thirteenth Amendment jurisprudence).

a. Section 249(a)(1) Does Not Violate The Tenth Amendment Or Principles Of Federalism

i. Defendant argues that Congress's enactment of Section 249(a)(1) runs afoul of principles of federalism and the Tenth Amendment because: (1) it is the States' role to prosecute hate crimes, and therefore the statute encroaches on state sovereignty and state police power; (2) there is no evidence that States are failing to punish racially motivated hate crimes; and (3) notwithstanding the certification provision, the statute grants the federal government unlimited discretion to prosecute hate crimes. Br. 24-38. These arguments fail.

First, because Section 2 expressly grants Congress the authority to rationally identify and proscribe badges and incidents of slavery, and Congress did so in Section 249(a)(1) in addressing private race-based violence, 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. Given the principle of dual sovereignty, such laws "involve no infringement *per se* of State sovereignty in the administration of their criminal laws." *United States* v. *Johnson*, 114 F.3d 476, 481 (4th Cir. 1997); cf. *Cleveland* 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").

Moreover, as the district court recognized, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." R. 85 at 19 (quoting *New York* v. *United States*, 505 U.S. 144, 155 (1992)).[16] 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 in violation of the Tenth Amendment. See R. 85 at 19-20; *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, Inc.*, 452 U.S. 264, 292 (1981) (Tenth Amendment does not "prohibit[] Congress from displacing state police power laws regulating private activity"); *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 implicated."); cf. *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980) (the

[16] 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" (emphasis added).

Fifteenth Amendment was "specifically designed as an expansion of federal power and an intrusion of state sovereignty").

Section 249(a)(1) also does not impermissibly infringe on state sovereignty because it applies to individuals, not States, and, as noted above, federal laws criminalizing private conduct within "traditional areas of state law" are "commonplace." *Johnson*, 114 F.3d at 481.[17] Moreover, it is difficult to conceive of a more quintessential *federal interest* than ensuring, in the aftermath of the Civil War and the Civil War Amendments, that badges and incidents of slavery no longer exist. See, *e.g.*, *Griffin*, 403 U.S. at 105.[18] Further, in contrast to other

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[17] See also *United States* v. *Napier*, 233 F.3d 394, 404 (6th Cir. 2000) (Tenth Amendment is not violated by federal statute prohibiting felony gun possession because "the statute is not directed at states as such, but at individual behavior") (citation omitted); *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); *United States* v. *Loveland*, No. 1:11Cr13, 2011 WL 4857980, at *6 (W.D.N.C. Sept. 7, 2011) (same); cf. *United States* v. *Fuentes*, 119 F. App'x 248, 250 (10th Cir. 2004) (fact that State does *not* forbid possession of firearms by convicted felons does not preclude the federal government from doing so, and such laws do not violate the Tenth Amendment) .

[18] See generally *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

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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 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); *Ponca Tribe of Okla.* v. *Oklahoma*, 37 F.3d 1422, 1433-1434 (10th Cir. 1994) (under the Tenth Amendment, "Congress may not usurp state discretion by commanding the states to enact or enforce a federal program, but it may direct a state to consider implementing a federal program so long as the states retain the prerogative to decline Congress' invitation" (citing *New York*)), vacated, 517 U.S. 1129 (1996).

Finally, 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. Rep. No. 86 at 14. To this end, the "statutory animus requirement * * * will limit the pool of potential Federal

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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" (footnote omitted).

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. Rep. No. 86 at 14. Moreover, 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. Rep. No. 86 at 14.

ii. Defendant relies on Supreme Court decisions addressing the scope of the congressional power to address violent crime, but these cases are inapplicable here. Defendant principally relies upon *United States* v. *Morrison*, 529 U.S. 598, 617-618 (2000), and its statement that the "regulation of punishment of intrastate violence" that is not directed at interstate commerce "has always been the province of the states," and that there is "no better example of [the states'] police power * * * than the suppression of violent crime." Br. 25. That language, however, comes from the Court's discussion of whether Congress had authority under the Commerce Clause to enact portions of the Violence Against Women Act; specifically, whether the statute targeted activities that "substantially affect" interstate commerce. *Morrison*, 529 U.S. at 609-613. In concluding that Congress may not regulate *under the Commerce Clause* "noneconomic, violent criminal conduct based solely on that conduct's aggregate affect on interstate commerce," the Court was not suggesting that Congress could not, under an express grant of

authority, address conduct that may also constitute a state crime. See *id.* at 617-618 (making clear that the Court was addressing Congress's power under the Commerce Clause to address criminal conduct subject to state police power). [19]

Defendant also relies upon *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), which upheld Congress's authority under the Necessary and Proper Clause to enact a federal statute permitting a district court to order the civil commitment of a sexually dangerous federal prisoner beyond the prisoner's release date. Defendant notes that the Court based its conclusion on several considerations, including that the statute "properly accounts for state interests" and does not "improperly limit the scope of powers that remain with the States." *Comstock*, 130 S. Ct. at 1962 (internal quotation marks and citation omitted). He asserts that, by contrast, Section 249(a)(1) fails to adequately accommodate state sovereignty interests. Br. 26-29. But the Court's discussion of Congress's power *under the*

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[19] In addition, as the district court noted, it is also "unclear that the Tenth Amendment's federalist concerns limit the Thirteenth Amendment to the same extent that they limit the Commerce Clause, because unlike the Commerce Clause, the Thirteenth Amendment was passed after the Tenth Amendment and enacted a direct command on the states and individuals alike." R. 85 at 19 n.7 (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-456 (1976) (principle of state sovereignty embodied in the Eleventh Amendment limited by Congress's enforcement power under Section 5 of the Fourteenth Amendment)). Indeed, in *Fitzpatrick*, the Court noted that the Enforcement Clauses of the Civil War Amendments reflect an "expansion of Congress' powers with the corresponding diminution of state sovereignty * * * intended by the Framers." *Fitzpatrick*, 427 U.S. at 455.

Necessary and Proper Clause to enact legislation addressing the custody and care of federal prisoners has no bearing where, as here, the statute at issue was enacted under express authority granted by the Constitution. This is particularly true in the context of legislation enforcing the Thirteenth Amendment because, as noted above, the eradication of badges and incidents of slavery is one of the most fundamental federal interests.[20]

iii. Finally, defendant asserts that this case belies the Attorney General's congressional testimony that Section 249 would be a backstop for state prosecutions and used only in rare instances where justice is not served at the state level, noting that defendant (and his accomplices) were being prosecuted in state court when this case was indicted. Br. 30-32. Defendant also asserts that there was "almost no evidence" that States were failing to punish hate crimes, and

[20] Defendant principally emphasizes Justice Kennedy's concurrence, which emphasized, *inter alia*, that the statute did not intrude "upon functions and duties traditionally committed to the state." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring). Again, this discussion, except for its reiteration of general principles of federalism, is addressed to Congress's power under the Necessary and Proper Clause, not to its power under an express grant of authority relating to the aftermath of slavery and the Civil War. Defendant also notes that Justice Kennedy cited "approvingly" to this Court's decision in *United States* v. *Patton*, 451 F.3d 615, 628-631 (10th Cir. 2006), which upheld a federal body armor statute under the Commerce Clause. The concern expressed in that case – that the statute intruded on an area of "traditional state concern" – was in the context of analyzing whether the statute could be upheld as regulating activities substantially affecting interstate commerce.

therefore the statute's infringement on state power cannot be justified by "current needs." Br. 33-34.[21] Defendant therefore suggests that the congressional findings underlying the statute are inadequate to support the conclusion that Section 249 is "appropriate legislation" to enforce the Thirteenth Amendment.

These arguments are baseless. As set forth above, consistent with the Supreme Court's analysis in *Jones* and *Griffin* of Congress's power under Section 2 of the Thirteenth Amendment, as well as those cases upholding Section 245(b)(2)(B), in enacting Section 249 Congress had 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. In this context, therefore, there is no basis for an *additional requirement* that Congress must show that States have abdicated their enforcement responsibilities before legislating. In addition, the legislative history makes clear

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[21] Defendant cites *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193, 203 (2009), to support his argument that Section 249(a)(1) must be justified by current needs, *i.e.*, that Congress must have found that States have not been meeting their responsibility to prosecute hate crimes. Br. 34. *Northwest Austin*, however, addressed provisions of the Voting Rights Act that require "covered" jurisdictions (*e.g.*, States or political subdivisions of States) to "pre-clear" changes in voting laws before they are implemented. The Court, expressing sensitivity to the federalism concerns inherent in federal legislation regulating the conduct *of States as political entities*, suggested that the historic need for the legislation might not provide a sufficient basis for continuing regulation. *Id.* at 201-203. Such a concern has no bearing in the context of the Thirteenth Amendment and Section 249(a)(1), as the statute regulates private conduct and not the conduct of States or their political subdivisions.

that Congress (and the Attorney General) were concerned about the number of hate crimes being committed (see pp. 23-24, *supra*); in response, Congress enacted a comprehensive remedy for a nationwide problem that would supplement state authority.[22] In so doing, Section 249(b) 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.[23]

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[22] 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. 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."). Moreover, any fear that Section 249 will result in the "federalization" of wide swaths of crimes prosecutable under state law, like the notion that the statute's accommodation of state sovereign interests is a "mere artifice" (see Br. 37), is belied by the fact that, in the nearly three years since the enactment of Section 249, there have currently been only 11 indictments under the statute.

[23] See 18 U.S.C. 249(b)(1)(C) (prosecution may be undertaken if the Attorney General certifies that "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence"). Defendant suggests that this case reflects that the

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b. *The Standard Of Review For Congressional Legislation Adopted In* City of Boerne *v.* Flores *In The Context Of Section 5 Of The Fourteenth Amendment Is Not Applicable To The Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment*

Defendant argues that this Court should not apply the "rational basis" test of *Jones* and *Griffin* to Congress's exercise of its Thirteenth Amendment, Section 2 power, but rather the test adopted in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), addressing Congress's power under Section 5 of the Fourteenth Amendment – the "congruence and proportionality" test. Br. 42-47. Defendant further argues that

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certification provision in Section 249(b) does not meaningfully limit the government's discretion to bring prosecutions. Br. 31-32. The certification provision, however, ensures, as the Attorney General testified to the Senate Judiciary Committee, that "in any hate crime prosecution, there would have to be sign-off at the highest levels of the Department of Justice," *i.e.*, 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)). *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearings before the S. Comm. on the Judiciary*, 111th Cong., 1st Sess. 6-7 (2009). There are similar provisions in two other federal criminal civil rights statutes, 18 U.S.C. 245 and 247. As the Attorney General further 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.* As noted above (note 22), that discretion has continued under Section 249.

Section 249(a)(1) does not represent a "congruent and proportional" remedy under the *Boerne* standard. There is no basis, however, to apply the *Boerne* congruence test in the context of the Thirteenth Amendment. Even if that test did apply, Section 249(a)(1) easily satisfies it.

i. In *Boerne*, the Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA), 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.[24] In so doing, the Court set forth the test for determining whether Congress has enacted "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

[24] 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).

remedial power was 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, for example, 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. First, as discussed above, there is a well-established body of Supreme Court law addressing Congress's Section 2 power. See pp. 11-18, *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.[25] Because the Supreme Court has not overruled *Jones* and *Griffin*, this Court is bound to apply the rationality test to Section 249(a)(1). See *Rodriguez de Quijas* v. *Shearson/Am.*

[25] Defendant supports his argument that the *Boerne* test applies in the Thirteenth Amendment context by noting that the "Supreme Court has frequently analyzed the Reconstruction Amendments collectively." Br. 45. But the generalized statements he cites do little to resolve the applicable standard of review for remedial legislation under each amendment, particularly given that the Fourteenth and Fifteenth Amendments apply only to state action, but the Thirteenth Amendment does not. In this regard, we note that the Supreme Court has expressly declined to resolve whether *Boerne's* congruence and proportionality test applies to Congress's enforcement power under Section 2 of the Fifteenth Amendment. *Northwest Austin*, 553 U.S. at 204-206.

Express, Inc., 490 U.S. 477, 484 (1989); *Surefoot LC* v. *Sure Foot Corp.*, 531 F.3d 1236, 1243 (10th Cir. 2008) ("our job as a federal appellate court is to follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu"); cf. *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 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 the other grounds, 557 U.S. 193 (2009).[26]

iii. Even if this Court was not constrained by Supreme Court precedent to apply the rational basis test to Congress's power under Section 2, the congruence and proportionality test is ill-suited to apply to Thirteenth Amendment legislation. First, the Court's decision in *Boerne* was written against the backdrop of Congress's enforcement of rights under Section 1 of the Fourteenth Amendment

[26] The district court concluded that there was no basis to find that *Boerne* overruled the Court's Thirteenth Amendment cases *sub silentio*. R. 85 at 5-6. The court noted that, in addition to the Thirteenth and Fourteenth Amendments, five other amendments include a similar enforcement provision. R. 85 at 5. 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." R. 85 at 6. 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 Thirteenth Amendment context and hence cannot be read * * * as applying to that context." *Nelson*, 277 F.3d at 185 n.20.

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, as a general matter the meaning of Section 1 of the Thirteenth Amendment has not been shaped by the courts, but rather, as reflected in *The Civil Rights Cases*, *Jones*, and *Griffin*, by Congress. As noted above (pp. 11-14), those cases make clear that it is Congress that determines, in the first place, what are badges and incidents of slavery. Therefore, reviewing courts cannot compare, as is required under the congruence and proportionality test, *Congress's* legislative determinations with *judicial* determinations of the scope of the underlying right. The latter simply does not exist. Therefore, review of Thirteenth Amendment Section 2 legislation is necessarily more deferential than review of Fourteenth Amendment Section 5 legislation as mandated by *Boerne*. Indeed, it is hard to apply a more stringent test to Section 2 legislation than the rational basis test given

that, as a general matter, it is Congress that defines the scope of the protections encompassed by the Thirteenth Amendment, and therefore legislation enforcing those protections is necessarily remedial.[27]

Second, the congruence and proportionality test is ill-suited for Thirteenth Amendment legislation because the Thirteenth Amendment, unlike the Fourteenth Amendment, applies to private conduct. Legislation 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

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[27] 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.' *Kominski*, 487 U.S. at 951. * * * And the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative." *Nelson*, 277 F.3d at 185 n.20.

underlies the Court's decision in *Boerne* and is not present in the context of the Thirteenth Amendment. Moreover, where, as here, the Thirteenth Amendment 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*.

Finally, 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 the legislative record of remedial legislation outside the context of race and gender more closely, *i.e.*, under the congruence and proportionality test. 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. 2012), petition for cert. pending, No. 12-96 (filed July 20, 2012); see also *Hibbs*, 538 U.S. at 736 (it is "easier for Congress to show a pattern of state constitutional violations" when it enforces rights subject to heightened scrutiny). For this reason, when congressional legislation addresses invidious race-based conduct that is at the heart of the Civil War Amendments, rational basis review applies, a conclusion consistent not only with *Jones* and *Griffin*, but with the Supreme Court cases upholding provisions of the Voting Right Act. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966) (applying rational basis test to Fifteenth

Amendment legislation)[28]; see generally *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) ("Where Congress attempts to remedy racial discrimination under its enforcement power, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.").

iv. Even if the congruence and proportionality test applied to Thirteenth Amendment legislation, Section 249(a)(1) easily satisfies that test. Application of that test involves examining whether Congress identified a problem of unconstitutional conduct warranting remedial action, and 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, Congress made extensive findings that private race-based violence continues to pose a serious national problem.[29] Second, as the district court concluded,

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[28] In addition, 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 Fifteenth Amendment without suggesting that its intervening decision in *Boerne* required a different analysis.

[29] Given the Fourteenth Amendment context in which this test was recognized and has been applied, the Court's formulation of this element of the test refers to unconstitutional action *by the State*. As the district court correctly concluded, however, because the Thirteenth Amendment applies to both state action and private conduct, the relevant conduct is not only that of the States. See R. 85 at 18 n.6 (rejecting defendant's argument that under the congruence and proportionality test the relevant conduct must be that of the state). Therefore, defendant's argument that Section 249(a)(1) is infirm because there is no evidence

(continued…)

"Congress' response to this injury is limited," authorizing prosecution under Section 249 "only upon certification by the Attorney General that the State has failed to prosecute or that federal prosecution would further federal interests." R. 85 at 18 n.6.[30]

In short, 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. 23-25, *supra*. As such, its "measured response to this serious problem is congruent and proportional under *City of Boerne*." R. 85 at 18 n.6.

(…continued)
that the *States* are failing to adequately prosecute hate crimes, even if true, is beside the point. See Br. 48.

[30] For the same reasons discussed above (p. 46) that legislation enacted under the Civil War Amendments targeting racial violence or discrimination is appropriately subject to rational basis review, *if* the *Boerne* standard applies it should be applied more deferentially in the context of race. As this Court has explained, '[t]he Court has not arrived at a concrete definition of congruence and proportionality, but it is clear that Congress enjoys greater power under § 5 when it responds to a clearly discernible pattern of state encroachment on fundamental or other important constitutional rights." *Guttman* v. *Khalsa*, 669 F.3d 1101, 1112 (10th Cir. 2012). Put another way, "Congressional regulation is less likely to be congruent and proportional if the rights at issue are not subject to heightened judicial scrutiny." *Ibid.* Therefore, in the context of race, Congress's determination that the remedial legislation was necessary should be entitled to added deference and a less searching review.

II

SECTION 249(a)(1) DOES NOT CREATE RACIAL CLASSIFICATIONS SUBJECT TO STRICT SCRUTINY

A. Standard Of Review

The constitutionality of a statute under the Equal Protection Clause is a question of law subject to *de novo* review. See, *e.g.*, *Falaniko* v. *Mukasey*, 272 F. App'x 742, 745 (10th Cir. 2008).

B. Section 249(a)(1) Does Not Create Racial Classifications Subject To Strict Scrutiny

Defendant argues that even if Congress had authority to enact Section 249(a)(1), the statute violates the Equal Protection component of the Fifth Amendment's Due Process Clause and cannot survive strict scrutiny. Br. 48-53. Defendant essentially makes a three-step argument: (1) the Thirteenth Amendment authorizes Congress to protect *only* "members of groups disadvantaged by the legacy of slavery"; (2) as a result, Section 249(a)(1) necessarily "require[s] use of racial classifications," *i.e.*, protecting some racial groups but not others; and (3) the racial classification cannot survive strict scrutiny. Br. 52. These arguments are baseless.

First, as noted above, defendant's assertion that the Thirteenth Amendment protects only members of groups disadvantaged by slavery has been expressly rejected by the Supreme Court. See pp. 11-12, *supra* (citing *The Civil Rights*

Cases, 109 U.S. at 20[31]; *Bailey* v. *Alabama*, 219 U.S. at 241; and *Kozminski*, 487 U.S. at 942). For this reason, the Court has made clear that Congress's power under Section 2 is not limited to protecting those disadvantaged by American slavery. See *Hodges* v. *United States*, 203 U.S. 1, 8 (1906) (the Thirteenth Amendment "is the denunciation of a condition, and not a declaration in favor of a particular people"; therefore, Congress is authorized under Section 2 to legislate with respect to "every race and every individual"), overruled in part by *Jones*, 392 U.S. at 441 n.78; *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) (holding that 42 U.S.C. 1981 applies to discrimination against white employees, and noting that the legislative history of the predecessor statute, enacted in 1866 pursuant to Section 2 of the Thirteenth Amendment, makes clear that "Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves"). The district court therefore correctly concluded that "Congress is not limited to only protecting members of groups disadvantaged by the legacy of slavery, but rather may target racially motivated conduct against

[31] Defendant cites *The Civil Rights Cases* for the proposition that even members of groups victimized by slavery "may not be protected under the Thirteenth Amendment against all forms of race discrimination." Br. 51. As noted above (p. 14 n.9), the Court's narrow interpretation of badges and incidents of slavery in *The Civil Rights Cases*, upon which defendant relies, was repudiated in *Jones* and *Jones's* much broader view of badges and incidents of slavery and therefore Congress's power under Section 2. See *Jones*, 392 U.S. at 441 n.78.

persons of any race, color, or national origin that constitutes a badge of slavery." R. 85 at 21.[32]

Second, consistent with the scope of Congress's power to address *all* badges and incidents of slavery, regardless whether the victim is a member of a class disadvantaged by American slavery, Section 249(a)(1) proscribes race-based conduct *regardless* of the race of the victim (or whether the victim was a member of a group disadvantaged by slavery). In other words, the statute applies to crimes against victims of all races. As such, as the district court correctly recognized, it does not make race-based classifications, "but rather addresses a race-related matter in a racially neutral fashion." R. 85 at 20. As a result, it necessarily does not implicate the equal protection component of the Fifth Amendment.[33] See *Crawford* v. *Board of Educ.*, 458 U.S. 527, 538 (1982) (noting difference between

[32] Further, as noted above (pp. 14-17), it is well-settled that Congress's authority under Section 2 to determine what are badges and incidents of slavery, and to proscribe them, is not limited by the scope of Section 1 of the Thirteenth Amendment.

[33] By contrast, if the statute applied only when a violent crime was motivated by animus against *one* racial group, the Equal Protection Clause would be implicated.

government action that discriminates on the basis of race and that which addresses race-related matters in a neutral fashion).[34]

[34] Because Section 249(a)(1) does not create a racial classification, this Court need not address defendant's argument that it cannot withstand strict scrutiny, *i.e.*, that it does not serve a compelling governmental interest and is not narrowly tailored to further that interest. Br. 52 (citing *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 235 (1995)). In any event, the legislative history of Section 249 would support the conclusion that the statute satisfies this test.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's conclusion that 18 U.S.C. 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

STATEMENT REGARDING ORAL ARGUMENT

Because this case challenges the constitutionality of a federal statute, and raises important issues of constitutional law, the United States believes that oral argument is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 13,497 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

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Date: July 25, 2012

CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I hereby certify that a copy of the foregoing Brief for the United States as Appellee has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Thomas E. Chandler
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2012, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Tenth 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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