

In the  
**United States Court of Appeals**  
**for the Fourth Circuit**

United States,

Plaintiff-Appellant,

v.

James William Hill, III,

Defendant-Appellee.

On appeal from the United States District Court  
for the Eastern District of Virginia  
No. 3:16-cr-00009 (Gibney, J.)

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**Brief of the Matthew Shepard Foundation,  
Freestate Justice, Inc., Lambda Legal Defense and Education Fund,  
Inc., the Anti-Defamation League, the Trevor Project, the Public  
Justice Center, and the Japanese American Citizens League  
as *Amici Curiae* in Support of Appellant**

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## Identity and Interest of Amici Curiae<sup>1</sup>

*Amici Curiae* are organizations dedicated to eradicating bias-motivated violence and discrimination across the country.<sup>2</sup>

Unfortunately, violence against marginalized communities, including lesbian, gay, bisexual, and transgender (“LGBT”) people, is rising. 2017 saw nearly 1,500 hate crimes motivated by gender, gender identity, or sexual orientation bias.<sup>3</sup> That was a 12.5% increase in hate crimes in America’s ten largest cities.<sup>4</sup> Among the hate crimes were 52 hate-driven homicides of LGBT people, the highest number ever recorded by National Coalition of Anti-Violence Programs and an “86% increase in

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<sup>1</sup> This brief was not prepared or authored, in whole or in part, by any party to this appeal. No party or counsel to any party contributed money that was intended to fund preparing or submitting this brief. No person—other than amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

<sup>2</sup> *Amici* file this brief under Federal Rule of Appellate Procedure 29(a)(2). All parties consent to its filing.

<sup>3</sup> Fed. Bureau of Investigations, U.S. Dep’t of Justice, *Hate Crimes Statistics, 2017* (Fall 2018), <https://tinyurl.com/y8snk7x5>.

<sup>4</sup> BRIAN LEVIN AND JOHN DAVID REITZEL, CTR. FOR THE STUDY OF HATE AND EXTREMISM, REPORT TO THE NATION: HATE CRIMES RISE IN U.S. CITIES AND COUNTIES IN TIME OF DIVISION & FOREIGN INTERFERENCE (2018), *available at* <https://tinyurl.com/ydx4tfff>.

single incident reports.”<sup>5</sup> Twenty-nine transgender people—the highest number ever recorded—were killed in 2017.<sup>6</sup> This year has been just as horrific; as of November 2018, at least 22 transgender people have been killed in the United States.<sup>7</sup>

Amid this rising violence, the District Court held that a critical federal protection for LGBT people is unconstitutional as applied to this Defendant. The judicially acquitted conduct is heinous—viciously beating a co-worker because of his perceived sexual orientation. The court rejected the unanimous jury conviction even though the victim, when he was attacked, was performing a quintessential interstate commercial activity: packaging and shipping goods across the country.

*Amici* submit this brief because bias-motivated violence against the LGBT community is a pervasive national problem—one that affects

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<sup>5</sup> NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS (NCAVP), A CRISIS OF HATE: A REPORT ON HOMICIDES AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE 6 (2018), *available at* <https://tinyurl.com/y9h6o3hf>.

<sup>6</sup> HUMAN RIGHTS CAMPAIGN, A NATIONAL EPIDEMIC: FATAL ANTI-TRANSGENDER VIOLENCE IN AMERICA IN 2018 (2018), *available at* <https://tinyurl.com/y86j9yc4>.

<sup>7</sup> *Id.*

not only LGBT individuals' safety and well-being, but also the streams of commerce and our national economy.

Founded in 1998, the **Matthew Shepard Foundation** was created by Dennis and Judy Shepard following the murder of their son Matthew in Laramie, Wyoming. Matthew was violently attacked and killed by two assailants because he was gay. The mission of the Foundation is to empower individuals to embrace human dignity and diversity through outreach, advocacy, and resource programs. The Foundation strives to replace hate with understanding, compassion, and acceptance. Since its formation, the Foundation has centered its efforts on providing a voice and support for LGBT youth with its online resource center Matthew's Place; was a driving force behind this historic federal hate crimes legislation; and has fostered dialogue about hate and acceptance within communities across the United States.

Formerly Equality Maryland and FreeState Legal Project, **FreeState Justice, Inc.** is a legal advocacy organization fighting for LGBT Marylanders' lived equality through direct legal services and policy change. As Equality Maryland, the organization worked to pass

an expanded state hate crimes act that includes crimes motivated by the victim's sexual orientation and gender identity.

Formed in 1973, **Lambda Legal Defense and Education Fund, Inc.** is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or amicus in seminal cases regarding the rights of LGBT people and people living with HIV. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal won an early landmark case involving a highly-publicized hate crime against a transgender man, *Brandon v. County of Richardson*, 264 Neb. 1020 (Neb. 2002).

Founded in 1998, **The Trevor Project** is the world's largest suicide prevention and crisis intervention organization for LGBTQ young people. The Trevor Project works to save young lives by providing the only accredited, free, and confidential phone, instant message, and text messaging crisis intervention services for LGBTQ youth, along with

running TrevorSpace, a safe space social networking site for LGBTQ youth. The Trevor Project also operates innovative education, research, and advocacy programs.

The **Anti-Defamation League** (“ADL”) is a 105-year-old civil rights and human relations organization that works against bigotry and hate, seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Having been immersed in issues surrounding hate crime legislation and the application of hate crime laws for more than forty years, ADL is uniquely qualified to serve as *amicus* here. ADL led a broad coalition in support of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which included more than 250 civil rights, education, religious, civic and professional organizations, and virtually every major law enforcement organization in the country.

The **Public Justice Center** (“PJC”) is a non-profit civil rights and anti-poverty legal services organization dedicated to advancing the rights of the under-represented. Through its Appellate Advocacy Project, it expands and improves the representation of indigent and disadvantaged persons and civil rights issues before the Maryland and

federal appellate courts. PJC has longstanding commitments to combating workplace discrimination and discrimination against the LGBT community. *See, e.g., Boyer-Liberto v. Fountainebleau Corp.*, 786 F.3d 264 (4th. Cir. 2015); *Conaway v. Deane*, 401 Md. 219 (2007).

Founded in 1929, the **Japanese American Citizens League** (“JACL”) is the nation's oldest and largest Asian American civil rights organization. JACL’s perspective is framed by the Japanese American community’s experience of mass incarceration during World War II that resulted directly from the racism and bigotry faced prior to the war. JACL seeks to ensure we, as a nation, do not repeat the same mistake of allowing hatred and bias to flourish unchecked.

*Amici* submit that their experience and knowledge will assist the Court in resolving the questions raised in this appeal.

### **Summary of Argument**

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 (“HCPA”), responds to prevalent and devastating bias-motivated violence—hate crimes. It is the most important and inclusive federal hate crime law enacted in the past 40

years.<sup>8</sup> The HCPA fills gaps in existing federal and state laws and responds to an urgent need for a strong, coordinated response to hate crimes. Bias-motivated crimes affect the victims, the victims' communities, and our nation.

Defendant James Hill ambushed his coworker Curtis Tibbs while Tibbs was preparing packages for shipping in interstate commerce. After the assault, Tibbs's face was so bloody that their employer, Amazon, recommended he go to the hospital. J.A. 329:9–331:23. Hill admitted that he attacked Tibbs because he thought Tibbs was gay. Along with a black eye, cuts, and pain medications came the subtext of workplace discrimination: *you are not welcome at work*.

Hill's conviction under the HCPA, J.A. 551, was constitutional and the facts here showcase why the HCPA was an authorized exercise of Congress's Commerce Clause powers. The attack was workplace discrimination, which Congress has traditionally regulated. Hill's conviction also falls within Congress's established authority to regulate economic conduct. Workplace discrimination—especially when violent—

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<sup>8</sup> See ADL Blog, *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act Four Years Later: Demonstrating Its Value* (Oct. 28, 2013), <https://tinyurl.com/ybgl5mgw>.

is economic conduct because it intimidates workers out of jobs, markets, and economies. Hill's terrorizing a coworker to make him feel unwelcome at work was economic violence, which had immediate economic effects on Tibbs and his employer, Amazon. And because Tibbs was packing boxes for interstate and international shipping, Hill's attack literally intervened in interstate commerce. Taken separately or together, acts of discriminatory workplace violence harm workers, their communities, their employers, and their nation. Systemic workplace discrimination, including violent discrimination, disrupts interstate markets and decreases productivity.

The District Court's conclusion that convicting Hill was unconstitutional is wrong. The District Court focused myopically on an intraoffice conveyor belt, minimizing that the attack took place in, and interfered with, an interstate shipping warehouse. The District Court also misapplied Supreme Court precedent upholding convictions under analogous criminal statutes in as applied challenges.

Hill committed a hate crime at work. He admitted to that hate crime. It was constitutional to convict him.

## Argument

Tibbs and Hill were at work packing boxes for interstate (and international) delivery when Hill viciously assaulted Tibbs. Hill attacked Tibbs at work because Hill thought Tibbs was gay. Hill's attack was designed to hurt Tibbs now and to terrorize him at work later. The statute under which Hill was convicted confronts precisely this conduct: violent discrimination with a proven (beyond a reasonable doubt) effect on interstate commerce.

Congress designed the HCPA<sup>9</sup> to adhere to Supreme Court precedent. The HCPA falls within Congress's well-established power to regulate both discrimination and labor, and adds federalist safeguards. It requires that the Attorney General certify any HCPA prosecution and that a jury find that a defendant's conduct affected interstate commerce beyond a reasonable doubt.

The District Court found application of the statute to Hill's conduct unconstitutional because "bias-motivated violence" is

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<sup>9</sup> Congress enacted 18 U.S.C. § 249 as Division E of the National Defense Authorization Act for Fiscal Year 2010. Congress separately titled this section the "Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act." 123 Stat. 2190 (2009).

categorically “noneconomic.” J.A. 33. But violent discrimination, particularly under the circumstances here, is economic because it substantially affects interstate commerce, both for the parties involved and in the aggregate. Hill’s specific assault was also economic because it interfered with ongoing interstate commerce. The District Court’s reasoning—that violent discrimination is *per se* noneconomic—deviates from precedent, misunderstands workplace discrimination, mischaracterizes Hill’s prosecution, and unreasonably overrules the jury. This Court should reverse.

#### **I. The HCPA Targets Only Economic Conduct.**

The HCPA surgically targets hate crimes within Congress’s Commerce Clause authority. Its jurisdictional element, Attorney-General-certification requirement, and factual findings ensure that its applications are within Congress’s Commerce Clause power.

##### *A. Congress May Prohibit Discrimination, Regulate Labor, and Regulate Activities That Intervene in Economic Conduct.*

Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3. Three things fall under the Congress’s Commerce Clause Power:

(1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.”

*Taylor v. United States*, 136 S. Ct. 2074, 2079–80 (2016) (quoting *United States v. Lopez*, 514 U.S. 549, 558–559 (1995)). Congress may regulate activities that “‘substantially affect’ commerce,” so long as there is a significant impact on “interstate commerce in the aggregate, even if their *individual impact* on interstate commerce is *minimal*.” *Id.* (emphasis added) (citing *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

Reflecting Congress’s “broad authority” to legislate in this area, a court reviewing whether a law is a valid exercise of the Commerce Clause power inquires “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce” in enacting the law. *Lopez*, 514 U.S. at 557; *NFIB v. Sebelius*, 567 U.S. 519, 603 (2012) (courts strike down Commerce Clause statutes “only on a ‘plain showing’ that Congress acted irrationally”).

Indeed, Congress may “regulate intrastate activity that is not itself commercial” if the activity affects an interstate market. *Gonzales*

*v. Raich*, 545 U.S. 1, 18 (2005). Many seemingly intrastate activities are thus interstate economic conduct under Supreme Court precedent. The “consumption of homegrown wheat” is economic enough to fall within Congress’s authority. *Wickard*, 317 U.S. at 127. “A loan shark’s extortionate collections from a neighborhood butcher shop” is economic conduct, even though it is “seemingly local.” *NFIB*, 567 U.S. at 537 (citing *Perez v. United States*, 402 U.S. 146 (1971)).

Congress may also use its commerce clause power to “anticipate the *effects* on commerce of an economic activity” like when it regulates discrimination. *NFIB*, 567 U.S. at 537 (emphasis in original). Indeed, Congress can prohibit “discrimination by hotel operators” and “discrimination by restaurant owners.” *Id.* (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964)). Congress may even predict issues likely to cause “an outbreak of industrial strife” and regulate labor to avoid that strife. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221 (1938) (“it cannot be maintained that the exertion of federal power must await the disruption of that commerce”).

And when the conduct *intervenes* in economic conduct, it is itself economic. For example, the defendant in *Taylor* participated in two “home invasions” targeting drug dealers (or “attempted drug robbery”). 136 S. Ct. at 2078. Although Taylor was not charged with buying or selling drugs, the Court noted that Taylor’s attempt to disturb “the activity at issue, the sale of marijuana, is unquestionably an economic activity.” *Id.* at 2080. Taylor’s otherwise non-economic activity would have impacted an interstate market, so it was economic activity. *See also Russell v. United States*, 471 U.S. 858, 860 (1985) (holding that attempted arson, which, if successful, would have interfered in the market for rental apartments, fell within Congress’s Commerce Clause authority).

*B. Congress Tailored the HCPA to Ensure that Prosecutions Under the Act Would Be Adequately Related to Interstate Commerce.*

Though the Commerce Clause is very broad, the Supreme Court has identified some limits. *Taylor*, 136 S. Ct. at 2080; *NFIB*, 567 U.S. at 549, 535–6. When drafting the HCPA, Congress reviewed and adapted to Supreme Court cases that struck down unreasonably broad statutes.

Because of that effort, the HCPA is a narrowly tailored statute that carefully targets conduct within Congress’s authority.

An exception to Congress’s otherwise broad commerce authority is that Congress may not “regulate noneconomic, violent criminal conduct based *solely* on that conduct’s aggregate effect on interstate commerce.” *United States v. Morrison*, 529 U.S. 598, 617 (2000) (emphasis added). Congress must demonstrate more than just an “attenuated effect upon interstate commerce” to justify federal convictions. *Id.* at 615. And Congress’s reasoning must be specific enough to avoid justifying a general federal police power capable of touching upon any violent crime or family matter. *Id.* at 615–619.

In *Lopez* and *Morrison*, the Supreme Court struck down two statutes not reasonably related to interstate commerce. *Lopez* struck down the Gun-Free School Zones Act of 1990 for failing every possible Commerce Clause test. 514 U.S. at 551. First, the statute’s text did not regulate commerce or regulate under the Commerce Clause. *Id.* at 561. Second, the statute did not try to tailor its jurisdiction to activity affecting commerce (“no express jurisdictional element”). *Id.* at 562. Third, there were no “congressional findings regarding the effects upon

interstate commerce.” *Id.* Fourth, the Court concluded that it could not rationally discern an aggregate economic effect, because gun possession in a school could not “substantially affect any sort of interstate commerce.” *Id.* at 567. No rationale could save the Gun-Free School Zones Act, so it was unconstitutional.

*Morrison* struck down a provision of the Violence Against Women Act of 1994 (“VAWA”) and relied heavily on analysis in *Lopez*. VAWA similarly did not have a jurisdictional element to isolate conduct affecting interstate commerce. *Morrison*, 529 U.S. at 613. And though VAWA did have explicit congressional findings (unlike in *Lopez*), the Court deemed those findings so general as to apply to virtually any criminal act. *Id.* at 614–616. The relationship between generalized violence against women and interstate commerce was so attenuated, in the Court’s view, that upholding VAWA would grant a general police power—which the Constitution does not permit. *Id.* at 617. In short, Congress may not use the Commerce Clause to regulate acts that “are not, in any sense of the phrase, economic activity.” *Id.* at 613.

In drafting the HCPA, Congress heeded the Supreme Court’s guidance in *Lopez* and *Morrison*. First, Congress added a “jurisdictional

element”—an element of the offense requiring the jury to consider the defendant’s effect on interstate commerce. Its jurisdiction element, 18 U.S.C. § 249(a)(2)(B), traces the boundaries of Congress’s commerce power. Moreover, the subsection under which Hill was convicted, (a)(2)(B)(iv)(I), mandates a direct connection to economic conduct: the government had to establish that Hill “interfere[d] with *commercial or other economic activity* in which the victim is engaged at the time of the conduct.” 18 U.S.C. § 249(a)(2)(B)(iv)(I). The government met its burden. The District Court acknowledged that “the government proved at trial that Hill’s assault satisfied the HCPA’s express jurisdictional element.” J.A. 40.

Second, the Act’s legislative history demonstrates Congress’s commitment to targeted federal intervention for crimes with a substantial impact interstate commerce:

The bill was carefully drafted to ensure that the Federal Government will continue to limit its prosecutions of hate crimes . . . to the *small set of cases* that implicate the *greatest Federal interest* and present the greatest need for Federal intervention. . . . Th[e] interstate commerce requirement, which the Government must prove beyond a reasonable doubt, will *limit Federal jurisdiction* in these new categories to cases that implicate Federal interests.

H.R. Rep. No. 111-86, at 14 (2009) (emphasis added).<sup>10</sup> Congress designed this limited federal intervention “to comport with Supreme Court guidance in *Lopez* and [*Morrison*]”:

To avoid constitutional concerns arising from [*Lopez*], the bill requires that the Government prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution brought under one of the newly created categories of 18 U.S.C. 249(a)(2). This interstate commerce element was drafted to invoke the full scope of Congress’s Commerce Clause power, and to ensure that hate crimes prosecutions brought under the new 18 U.S.C. 249(a)(2) will not be mired in constitutional litigation. The interstate commerce nexus required by the bill is analogous to that required in other Federal criminal statutes. The Church Arson Prevention Act of 1996, 18 U.S.C. § 247, for example, makes it a crime to destroy religious property if the offense “is in or affects interstate commerce.” 18 U.S.C. § 247(b).

*Id.* at 15.

The HCPA also contains explicit legislative findings in the enacted text. The HCPA lists five ways that violent discrimination affects interstate commerce. 123 Stat. 2190 § 4702(6) (2009).

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<sup>10</sup> Available at <https://www.congress.gov/111/crpt/hrpt86/CRPT-111hrpt86.pdf>. The HCPA was H.R. 1913 during the 111th Congress before Congress added it to the National Defense Authorization Act for Fiscal Year 2010.

Together, the jurisdictional element, certification requirement, factual findings, and legislative history demonstrate a thoughtfully constructed statute. The District Court erred when it found these safeguards insufficient.

For example, the District Court admitted that *this* Court “has upheld other criminal statutes because they included a jurisdictional element.” J.A. 37 (citing *United States v. Gibert*, 677 F.3d 613, 626 (4th Cir. 2012); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996)). Rather than rely on this Court’s precedents, the District Court relied on dicta from a Kentucky District Court and called the HCPA’s jurisdictional element “talismanic.” J.A. 38 (quoting *United States v. Jenkins*, 909 F. Supp. 2d 758, 767 (E.D. Ky. 2012)). While plucking snippets from *Jenkins*, the District Court missed the holding: because “the HCPA . . . regulates activity that is within the power of Congress under the Interstate Commerce Clause, *federal jurisdiction is appropriate* under this statute generally and as applied to this case.” *Jenkins*, 909 F. Supp. 2d at 773 (emphasis added).<sup>11</sup> In *Jenkins* and

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<sup>11</sup> Striking down the HCPA because of a distaste for the Act’s explicit jurisdictional requirement as “talismanic” improperly substitutes a court’s policy preferences for Congress’s. “It is well established that when the

here, as Congress intended, the jurisdictional element ensures that no conviction would exceed Congress’s Commerce Clause power.

The District Court also overgeneralized Hill’s conduct to “violence based on discriminatory animus.” J.A. 38–39. Hill’s conduct was violent *workplace* discrimination with a proven effect on his coworker and his employer. The HCPA’s jurisdictional element and certification requirement encourage prosecutors to use limited federal power for an important purpose. Hill’s prosecution met those criteria, and he was properly convicted. The District Court’s concern about hypothetical future prosecutions does not justify overturning Hill’s conviction.

## **II. Violent Discrimination Has Immediate and Aggregate Economic Effects, Especially at Work.**

Hill’s conviction proves that Congress regulated conduct within its Commerce Clause authority when it passed the HCPA. Violent workplace discrimination is economic, because it has *immediate* economic effects on both the victim and the employer. Workplace

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statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal marks omitted).

discrimination also has *aggregate* economic effect on the worker, the employer, and the national economy.

*A. Violent Workplace Discrimination Has Immediate Economic Effects on the Victim.*

Workplace discrimination, particularly when violent, affects LGBT individuals' ability to make as much money as their non-LGBT peers. And when that bias goes unaddressed, particularly when it is violent, it impacts LGBT people at all stages of employment. Over one-fifth of LGBT individuals experience discrimination at the hiring stage.<sup>12</sup> When they find a job, LGBT people often face intolerable mistreatment at work. "Gay men and women . . . leave their employers due to workplace unfairness at twice the rate of straight white males."<sup>13</sup>

Consider Jameka Evans. Jameka was a security guard at Georgia Regional Hospital in Savannah, Georgia. She was physically assaulted, harassed, and denied equal pay and equal work because of her gender

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<sup>12</sup> HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 1 (2017), *available at* <https://tinyurl.com/y7z76esb>.

<sup>13</sup> CROSBY BURNS, THE COSTLY BUSINESS OF DISCRIMINATION, CTR. FOR AM. PROGRESS 10 (2012), *available at* <https://tinyurl.com/j2r8wtu> [hereinafter COSTLY BUSINESS].

nonconformity, including her sexual orientation. She describes the effects of this discrimination:

I remember on breaks just going into work closets and crying because I was so stressed out. I took the stress home with me every day. I didn't sleep well. And I dreaded going to work.

Out at Work, Lambda Legal, *Meet Jameka Evans*,

<https://www.lambdalegal.org/node/48337> (accessed Dec. 7, 2018).

Jameka is not alone. LGBT people continue to face alarming rates of discrimination and harassment in the workplace—discrimination that has immediate negative economic effects.<sup>14</sup> Many of these instances of discrimination and harassment occur through violent, verbal, or physical assaults. *Id.*

Individuals who suffer or fear discrimination in the workplace “experience a host of negative job attributes that adversely impact their job performance,” which in turn affects their economic success.<sup>15</sup>

“Employees who fear discrimination exhibit higher rates of absenteeism, are less committed to their current employer, receive

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<sup>14</sup> Crosby Burns & Jeff Krehley, Ctr. for Am. Progress, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment* (Jun. 2, 2011), <https://tinyurl.com/l9xp7x8> [hereinafter *High Rates*].

<sup>15</sup> *Id.* at 12.

fewer promotions, and report more physical and mental health problems than those who were less fearful of discrimination.”<sup>16</sup>

“Workers who report harassment and discrimination are less productive, more distracted, more fatigued at work, more likely to experience health issues, and more likely to search for a new job—all of which costs businesses money.”<sup>17</sup> In other words, those who experience or fear violent discrimination earn less money at work and spend more money at home. Violent discrimination hurts its victims *economically*.

And protecting workers from discrimination is an economic protection. LGBT employees covered by a nondiscrimination policy are “less likely to feel depressed than those who [are] not covered by such a policy (26% compared to 42%); [are] less likely to feel distracted (24% compared to 31%); and less likely to feel exhausted (20% compared to

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<sup>16</sup> *Id.* (citing Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 ACAD. OF MGMT. EXEC. 21 (1997); SYLVIA ANN HEWLETT & KAREN SUMBERG, CTR. FOR WORK-LIFE POLICY, *THE POWER OF ‘OUT’* (2011)).

<sup>17</sup> KAMDEN K. STRUNK AND WILLIAM C. TAKEWELL, *LGBT BIAS AND DISCRIMINATION: OCCURRENCE, OUTCOMES, AND THE IMPACT OF POLICY CHANGE* (2014), available at <https://tinyurl.com/y9un2vsw>.

25%).”<sup>18</sup> Meaningful protections that help LGBT people feel safe at work make them more economically productive workers.<sup>19</sup>

The HCPA thus regulates economic conduct twice. First, the HCPA’s existence adds assurances to at least some workers that discriminatory violence will not be tolerated. The mere presence of protections like these has an economic effect on LGBT employees. Second, convictions under the HCPA for discriminatory workplace violence punish economic misconduct. The injuries HCPA victims endure when violence drives them away from work are economic. The HCPA is a vital tool to help prevent bias-motivated violence from infecting American workplaces and diminishing LGBT people’s economic contributions, participation, and power.

*B. Violent Workplace Discrimination Has Substantial Aggregate Economic Effects.*

Violent workplace discrimination also has aggregate economic effects because, as Congress explicitly found, “a violent crime motivated by bias . . . devastates not just the actual victim and the family and

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<sup>18</sup> M.V. LEE BADGETT ET AL., THE WILLIAMS INST., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 9-10 (2013), *available at* <https://tinyurl.com/y7mtb6um> [hereinafter SUPPORTIVE POLICIES].

<sup>19</sup> SUPPORTIVE POLICIES at 6.

friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.”<sup>20</sup> 123 Stat. 2190 § 4702 (2009). In part because of invidious workplace discrimination, LGBT people experience poverty well above the national average. The discrimination also affects employers, who have less diverse and less productive workforces.

The HCPA addresses a small part of a large problem. 27% of LGBT people report experiencing at least one form of sexual orientation-based discrimination at work in the past five years, with 42% reporting they had experienced this discrimination at some point in their lives.<sup>21</sup> The workplace can be even more challenging for transgender people; 78% of transgender people report having experienced workplace discrimination or harassment.<sup>22</sup>

Workplace discrimination and harassment against LGBT people contributes to wage and employment disparities, decreased job stability,

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<sup>20</sup> Congress may properly evaluate the aggregate effect of conduct on interstate commerce. *Taylor*, 136 S. Ct. at 2079.

<sup>21</sup> BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 4 (2011), available at <https://tinyurl.com/ld8w42w>.

<sup>22</sup> *Id.* at 2.

and physical and mental health outcomes that sap worker productivity.<sup>23</sup> “One of the most significant barriers keeping many LGBTQ people from finding meaningful employment is the experience of discrimination and harassment in hiring and on the job.”<sup>24</sup>

These wage and employment disparities often cause poverty. Roughly 25% of LGBT individuals, or 2.4 million people, experienced “a period over the last year when they did not have enough money to feed themselves or their family, as compared to [18%] percent of non-LGBTQ individuals.”<sup>25</sup> “Discrimination directly causes job instability and high turnover, resulting in greater unemployment and poverty rates for gay and transgender people”<sup>26</sup> Again, this effect is worse for transgender people, who “are nearly *four times* more likely to have a household

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<sup>23</sup> Jennifer C. Pizer *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 734-742 (2012).

<sup>24</sup> *Id.* at 30.

<sup>25</sup> LOURDES ASHLEY HUNTER ET AL., INTERSECTING INJUSTICE: ADDRESSING LGBTQ POVERTY AND ECONOMIC JUSTICE FOR ALL 5 (2018), *available at* <https://tinyurl.com/ybuf2qlz>.

<sup>26</sup> *High Rates*.

income under \$10,000 per year than the population as a whole (15% vs. 4%).”<sup>27</sup>

On top of harming the LGBT community, discrimination against LGBT individuals harms businesses, broader communities, and the nation. Anti-LGBT discrimination and harassment harms businesses’ bottom lines through increased employee turnover. Discrimination causes workers—both LGBT and those who oppose discrimination—to leave their jobs at higher rates. 92% of federal contractors and Fortune 500 companies agree that diversity policies are good for their business’s bottom line; the most commonly cited economic benefit of LGBT-inclusive policies is the employer’s ability to “recruit and retain the best talent, which in turn makes the company more competitive.”<sup>28</sup>

Tibbs’s large employer, Amazon, can expect to save between \$3.2 and \$23.6 million dollars annually in employee replacement costs by

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<sup>27</sup> CENTER FOR AMERICAN PROGRESS & MOVEMENT ADVANCEMENT PROJECT, PAYING AN UNFAIR PRICE: THE FINANCIAL PENALTY FOR BEING LGBT IN AMERICA 4–6 (updated Nov. 2014) (emphasis added), *available at* <https://tinyurl.com/y8mu5scz>.

<sup>28</sup> BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES 2, 5 (2011), *available at* <https://tinyurl.com/yczx94vh>.

prohibiting discrimination and promoting LGBT diversity.<sup>29</sup> When bias-motivated violence in the workplace like Hill's is not eradicated, however, these efforts are diminished. Nationwide, the estimated cost of losing and replacing workers who leave their jobs because of discrimination is \$64 billion per year.<sup>30</sup>

Even when workplace discrimination does not cause turnover, it can suppress the victims' and their coworkers' productivity.<sup>31</sup> LGBT employees' productivity is hindered by the negative psychological effects of discrimination and harassment. Concealing one's sexual orientation can cause increased psychological distress and poor immune functioning.<sup>32</sup> These health outcomes threaten employers' bottom line by driving up health insurance costs and decreasing employee

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<sup>29</sup> IAN JOHNSON & DARREN COOPER, OUT NOW GLOBAL, LGBT DIVERSITY: SHOW ME THE BUSINESS CASE 47 (2015), *available at* <https://tinyurl.com/yaput4mn> [hereinafter BUSINESS CASE].

<sup>30</sup> COSTLY BUSINESS at 1.

<sup>31</sup> COSTLY BUSINESS at 7.

<sup>32</sup> SUPPORTIVE POLICIES at 6 (citing John E. Pachankis, *The Psychological Implications of Concealing a Stigma*, 133 PSYCHOL. BULL. 328 (2007)).

productivity.<sup>33</sup> By contrast, LGBT-supportive policies and workplace climates lead to better health and workplace outcomes.<sup>34</sup>

Discrimination also disturbs the productivity and retention of non-LGBT workers. Non-LGBT employees are less productive in workplaces that are hostile for LGBT workers.<sup>35</sup> When businesses have policies which allow LGBT employees to be themselves in the workplace, “everybody’s productivity is enhanced, including straight and nontransgender colleagues.”<sup>36</sup>

Workplace discrimination—particularly bias-motivated violence at work—also impacts the economic success of communities and the national economy. “As multiple studies have found, the level of inclusiveness of LGBT employees is strongly correlated with a jurisdiction’s ‘wealth, prospects for economic investment, and ability to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> COSTLY BUSINESS at 6, 13 (citing HEWLETT & SUMBERG, THE POWER OF ‘OUT’ (“When gay and transgender workers are unable to bring their full selves to work due to a discriminatory work environment, it is likely that the job performance of their straight and nontransgender peers also significantly suffers”)).

<sup>36</sup> *Id.*

recruit talent.”<sup>37</sup> A global study found a positive correlation between LGBT inclusion and GDP per capita, estimating that each additional right for LGBT individuals is linked to an increase in GDP of \$2065 per capita.<sup>38</sup> In the United States, the aggregate effect of anti-LGBT discrimination weakens the United States economy: “The U.S. economy could save as much as \$8.9 billion by protecting and welcoming LGBT employees in the workplace—more than any other country.”<sup>39</sup>

The HCPA is a star in the constellation of protections that make LGBT people safer and more secure at work. It is part of a group of public and private protections that contributes to a more productive, more vibrant economy. The benefits of its protections are felt by LGBT employees, their peers, employers, and the entire nation. It is reasonable and rational, then, for Congress to regulate violent

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<sup>37</sup> Brief of 76 Businesses and Organizations as Amici Curiae in Support of Petitioner, *Evans v. Ga. Regional Hospital*, No. 17-370, 2017 WL 4616829, at \*6–7 (2017) (quoting Lauren Box, *It’s Not Personal, It’s Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 995–96 (2015)).

<sup>38</sup> M.V. LEE BADGETT, ANDREW PARK & ANDREW FLORES, THE WILLIAMS INST., LINKS BETWEEN ECONOMIC DEVELOPMENT AND NEW MEASURES OF LGBT INCLUSION 5 (2018), available at <https://tinyurl.com/ycw9srd2>.

<sup>39</sup> BUSINESS CASE at 5, 47.

workplace discrimination under the Commerce Clause because this discrimination is deeply economic for everyone involved.

**III. Both the Facts Underlying Hill’s Prosecution and Supreme Court Precedent Demonstrate the Economic Nature of His Conduct and the Validity of His Conviction.**

When the District Court vacated Hill’s conviction because “discriminatory crimes of violence do not constitute economic activity,” J.A. 34, it committed two errors. First, though two paragraphs of the opinion confronted the specifics of this case, the District Court improperly dismissed them in favor of generalities about the statute. Second, the District Court misapplied or ignored cases upholding analogous federal statutes.

*A. The District Court Mischaracterized the Facts Underlying Hill’s Prosecution.*

When resolving the constitutionality of Hill’s prosecution, the District Court retreated to generalities. The court mostly applied principles of constitutional law “to the HCPA,” not to Hill’s actual prosecution. J.A. 33. The resulting holding, that “discriminatory crimes of violence do not constitute economic activity,” *id.*, is incorrect (*see* Section II above) and ignores the facts relevant to Hill’s conviction.

Hill attacked Tibbs at work, interfering in the economic conduct of Tibbs and his employer, Amazon. Describing a video introduced at trial, the Government summarized:

[When Tibbs] is snuck up behind and ambushed . . . , what is he doing? He is going to get a package to go put it in the box to send it out.

J.A. 499:3–20. Tibbs had to stop working, and Amazon had to “shut down” the area to “clean up blood off the floor.” J.A. 364:6–11. Tibbs was trying to ship items in interstate commerce when Hill attacked him. He missed the remainder of his shift because of Hill’s assault. As the jury necessarily found, Hill’s attack interfered with Tibbs’s commercial activity, so the attack was economic.

In reaching the opposite conclusion, the District Court ignored the interstate nature of shipping or employment and overemphasized the localized violence: “this incident occurred within one state.” J.A. 37. In the Court’s view, Tibbs was not shipping items interstate, he was “placing the boxes on a conveyor belt for further processing in another department.” *Id.* Rather than confront the relationship between Tibbs’s job and interstate shipping, the District Court characterized Tibbs’s job as purely local.

*Wickard, Raich, and Taylor* foreclose this analysis. The local nature of conduct is not dispositive in a Commerce Clause case. Again, “activities . . . that ‘substantially affect’ commerce [] may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal.” *Taylor*, 136 S. Ct. at 2079–80 (citing *Wickard*, 317 U.S. at 125). Whether one considers Tibbs’s job to be shipping in interstate commerce or sending items on an intrastate conveyor belt, his job is part of a large, interstate market in shipping goods. Congress may regulate that market, and Congress may prohibit Hill’s violent, discriminatory assault on his coworker. “Congress has constitutional power under the Commerce and Necessary and Proper Clauses to protect interstate commerce from the injuries bound to befall it from these discriminatory practices.” *Heart of Atlanta Motel*, 379 U.S. at 276 (Black, J., concurring).

*B. Cases Upholding Other Federal Criminal Statutes Support the Constitutionality of Hill’s Conviction Under the HCPA.*

The District Court unreasonably distinguished the HCPA from two federal criminal statutes already upheld under the Commerce

Clause. J.A. 33–34. First, the District Court noted that the Hobbs Act, which prohibits certain robbery and extortion, was designed “to protect commercial, interstate activity from criminal disruption.” J.A. 33. Hill’s prosecution was also designed to protect commercial, interstate activity from criminal disruption. But the District Court did not consider *this prosecution*; it considered theoretical HCPA prosecutions: “the HCPA regulates noneconomic, hate-driven violence, which simply does not compare to robbery’s ‘fundamentally economic’ nature.” J.A. 34.

Supreme Court precedent forecloses any distinction based on the idea that “violence” is “noneconomic.” *Taylor* upheld a conviction under the Hobbs Act for home invasion when the defendant was also convicted of “using a firearm in furtherance of a *crime of violence*.” 136 S. Ct. at 2078 (emphasis added). *Morrison* prohibited regulation of “noneconomic, violent criminal conduct,” 529 U.S. at 617, but did not hold all violent conduct to be noneconomic. Hill’s conduct was a crime of violence just like Taylor’s. Both Hill’s and Taylor’s violence interfered with an interstate market. They were *violent*, economic conduct. Congress may constitutionally regulate both interventions.

Second, the District Court confronted federal arson prosecutions under 18 U.S.C. § 844(i) but ignored the most analogous case. In *Russell*, the Supreme Court unanimously affirmed a conviction for attempted (but failed) arson of a commercial rental property. 471 U.S. at 858–62. In the first appeal from Hill’s prosecution,<sup>40</sup> one judge discussed the proper application of *Russell* here: “*Russell* indicated that Congress may regulate crime when such crime interferes with or otherwise affects commerce subject to congressional regulation.” J.A. 108 (Wynn, J., dissenting).

But on remand, the District Court ignored *Russell*, instead relying on *Jones* for the proposition that “the proper inquiry in those cases concerns the function of the property itself.” J.A. 34. Jones threw a Molotov cocktail into his cousin’s house. *Jones*, 529 U.S. at 851. Intrafamily violence involving an owner-occupied home fell outside the arson statute’s meaning, *id.* at 854–857, and avoided a “grave and doubtful constitutional question,” *id.* at 857–858. Unlike in *Russell*, the property affected by Jones’s conduct was not part of an interstate market.

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<sup>40</sup> *United States v. Hill (Hill I)*, 700 F. App’x 235, J.A. 87–119 (2017).

*Russell* governs this case, because Hill's crime of violence interfered in active interstate commerce while working for an interstate shipping facility. And because Russell never impacted interstate commerce (he merely tried to), Hill had a greater effect on commerce than Russell. If Russell's conviction is constitutional, so is Hill's.

*Jones* is inapt, because Hill's federal prosecution does not justify or threaten a generalized federal policing power. It is one of a narrow class of cases in which workplace violence interfered with shipping in interstate commerce. The jury found beyond a reasonable doubt that Hill's conduct affected interstate commerce, and that finding limits the government's prosecutorial decisions. In this way, Congress has confronted a small portion of what it reasonably considers a large national problem.

But *Jones* is informative, even if it is distinguishable. In *Jones*, jurisdictional safeguards in 18 U.S.C. § 844 avoided a constitutional problem. The statute, especially considering its legislative history, only applied to "business property." *Jones*, 529 U.S. at 853 n.5. This detail enabled the Supreme Court to avoid constitutional issues by relying on the narrow tailoring of the statute itself. The HCPA similarly contains

jurisdictional safeguards to avoid unconstitutional application. As in *Russell* and *Jones*, the explicit terms of the HCPA authorize constitutional prosecutions and avoid potentially unconstitutional ones. *Jones* blessed Congress's efforts to build constitutional statutes involving difficult subject matter. This Court should similarly acknowledge the HCPA's careful drafting.

Violent workplace discrimination at a shipping facility interferes with interstate commerce, so it is economic under *Taylor* and *Russell*. To hold as much does not create a federal police power. *Cf. Morrison*, 529 U.S. at 617; *Jones*, 529 U.S. at 858. Congress designed the HCPA to enable collaborative federalism in hate crimes prosecution. 123 Stat. 2190 § 4702(10) (2009). Here, the collaboration succeeded.

## Conclusion

For these reasons, this Court should rule for the United States, reverse the judgment of acquittal below, and remand with instructions to reinstate Defendant Hill's conviction.

Respectfully submitted,

/s/ Joseph Dudek

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**  
**Effective 12/01/2016**

No. 18-4660      **Caption:** United States v. James William Hill, III

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(s) Joseph Dudek

Party Name Matthew Shepard Foundation et al.

Dated: Dec. 7, 2018

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Joseph Dudek

Date: Dec. 7, 2018

Counsel for: The Matthew Shepard Foundation

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Date: Dec. 7, 2018

Counsel for: FreeState Justice, Inc.

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Date: Dec. 7, 2018

Counsel for: Lambda Legal

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Signature: /s/ Joseph Dudek

Date: Dec. 7, 2018

Counsel for: The Anti-Defamation League

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Date: December 7, 2018

Counsel for: The Public Justice Center

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Date: Dec. 7, 2018

Counsel for: Japanese American Citizens League

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I also certify that one paper copy of the above brief was sent to the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by Federal Express on December 7, 2018.

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