No. 13-3181

United States Court of Appeals
For The Sixth Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

KATHRYN MILLER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

APPELLANT KATHRYN MILLER'S BRIEF

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Statement Regarding Oral Argument

Appellant Kathryn Miller respectfully requests oral argument on this appeal, which presents important issues of first impression regarding the scope of Congressional authority under the Commerce Clause, the interpretation of 18 U.S.C. § 249(a)(2), and the interplay between that section and the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb *et seq.*) when the acts allegedly violating Section 249(a)(2) are motivated by religion.

Statement of Jurisdiction

The district court had jurisdiction over this matter because the relevant indictment in this action charged violations of federal criminal law. 18 U.S.C. § 3231. This appeal is from a final judgment as to Kathryn Miller filed on February 19, 2013. Final Judgment, Doc. No. 410, Page ID ##4546-50. After being sentenced on February 8, 2013, Kathryn Miller filed a notice of appeal on February 18, 2013, which is treated under the rules as having been filed the next day. Notice of Appeal, Doc. No. 400, Page ID #4509. *See* Fed. R. App. P. 4(b)(2); Minutes of Sentencing Hearing, Doc. No. 385, Page ID ##4436-37. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues

1. In passing 18 U.S.C. § 249(a)(2), did Congress criminalize any infliction of "bodily injury" motivated by gender, religion, and other prohibited criteria -- provided only that a car or bicycle or any other thing *capable* of moving someone or something across a state line was used?

2. Does Congress have the authority under the Commerce Clause to regulate any and all uses of an automobile, or anything else *capable* of moving someone or

something across a state line, and to regulate any act, no matter how local, in which an automobile (or such other device) is used?

3. Does Congress have the authority under the Commerce Clause to regulate any conduct provided that some object used during the course of that conduct has crossed over a state or national boundary at any time in the past?

4. Is Section 249(a)(2), which prohibits (*inter alia*) the intentional infliction of "bodily injury" because of religion, limited by the Religious Freedom Restoration Act when the infliction of "bodily injury" is motivated by religion, intended to facilitate the eternal salvation of those who incurred the injuries, characterized by the Government as a "religious purification ritual," and primarily involved the cutting of hair and beards?

5. Did the court below correctly instruct the jury on the definition of "kidnapping" for purposes of Section 249?

6. Did the court below correctly instruct the jury on the requirement under Section 249(a)(2) that the infliction of bodily injury be "because of" religion?

7. Did the court below improperly admit irrelevant and prejudicial

evidence?

8. Was the evidence sufficient to convict Kathryn Miller for the crimes she was indicted on?

Statement of the Case

Kathryn Miller was tried along with fifteen co-defendants in a consolidated criminal trial. The case against seven of those defendants (not including Kathryn Miller) was commenced by the filing of complaints with a single supporting affidavit by Special Agent Michael Sirohman of the Federal Bureau of Investigation ("FBI") on November 22, 2011. The affidavit stated that five of the seven had been charged with state crimes of kidnapping and aggravated burglary on October 7, 2011, and had been detained in a county jail. Complaint Attachment A, Doc. 1-1, Page ID #15, ¶ 30.

A. The Indictment

The Government filed an indictment in the district court on December 20, 2011 against the seven defendants identified in the original complaint as well as five additional defendants (albeit not Kathryn Miller). Indictment, Doc. No. 10, Page ID ##646-61. It filed a superseding indictment on March 28, 2012, this time including all

sixteen defendants, including Kathryn Miller. Superceding Indictment, Doc. No. 87, Page ID ##1184-1204.

The superseding indictment (the "Indictment") asserted two claims against Kathryn Miller: Count One, alleging conspiracy, and Count Two, alleging a violation of Section 249(a)(2). Count One alleged that the defendants conspired to commit violations of Section 249(a)(2) by forcibly cutting off the beards of various individuals because of "religious disagreements." *Id.*, Page ID #1188 (¶¶ 3, 5). It also alleged a conspiracy to destroy and conceal evidence from law enforcement investigators and to make false and misleading statements to agents of the FBI. *Id.*, ¶¶ 6-7.

Count Two of the Indictment alleged that, on or about September 6, 2011, Kathryn Miller and her husband and co-defendant Raymond Miller, as well as a number of Raymond's siblings and their spouses, and Samuel Mullet, Sr. and others, caused bodily injury to Raymond's parents (Martin and Barbara Miller) because of his parents' "actual and perceived religion." *Id.*, Page ID #1197 (¶ 2). (This brief occasionally will refer to this event as the "September 6 Incident.") The Indictment alleged that the named defendants "hired a driver to transport them in a motor vehicle" to the home of Martin and Barbara Miller, and used a scissors and hair clippers to "forcibly remov[e]" Martin Miller's "beard and head hair" and Barbara Miller's "head

hair." *Id.*, ¶ 3. It further alleged that the conduct occurred as "a result of travel . . . using an instrumentality of interstate and foreign commerce" (*id.* ¶ 4) and "as a result of . . . [defendants and others] employed (sic) dangerous weapons, to wit, a pair of scissors and Wahl battery-operated hair clippers which had traveled in and affected interstate commerce" (*id.,* Page ID #1198, ¶ 5). *See also id.*, Page ID #1189, ¶ 9 (alleging that Kathryn Miller and others "hired a driver to transport them from the Bergholz area to the residence of [Martin and Barbara Miller] in Trumbull County, Ohio."); *id.* ¶ 8 ("The Wahl battery-operated hair clippers were purchased at Walmart and had travelled in and affected interstate commerce in that they were manufactured in Dover, Delaware.").

Count Two also alleged that the conduct "involved . . . kidnapping" Martin and Barbara Miller. *Id.*, Page ID #1198 (¶ 6).

Kathryn Miller was not charged in any of the other eight counts of the Indictment. (As noted above, Count 1 alleged conspiracy and the Government ultimately asked for, and received, a *Pinkerton* instruction on all of the underlying substantive claims. *See* discussion *infra* at 54.). Counts 3 through 6 alleged other violations of Section 249(a)(2). Like Count 2, each of those counts alleged that those accused used instrumentalities of interstate commerce and/or dangerous weapons that

had traveled in interstate commerce. *E.g.*, *Id.*, Page ID #1199 ¶ 4 (alleging that "the conduct described herein occurred as a result of the travel of [a victim and his wife] using an instrumentality of interstate and foreign commerce"); *Id.,* Page ID ##1199-1200, ¶¶ 4-5 (alleging that certain defendants "employed dangerous weapons, to wit, the 8" horse mane shears . . . and the Wahl battery-operated hair clippers, both of which had traveled in and affected interstate and foreign commerce" and "occurred as a result of the travel of [defendants] using an instrumentality of interstate and foreign commerce"); *Id.*, Page ID #1201, ¶¶ 4-5 (same); Page ID #1202 ¶ 4 (alleging that "[t]he conduct . . . occurred as a result of the travel of [the victims] using an instrumentality of interstate and foreign commerce, and [defendant] Emanuel Shrock using an instrumentality of interstate and foreign commerce"). The allegations incorporated into Count 6 also referred to one of the defendants in that count using the mail. *Id.*, Page ID #1195 ¶¶ 39-41.

Count 7 alleged that Samuel Mullet, Sr. obstructed justice by burning a bag with victims' hair. Count 8 charged certain defendants with obstruction of justice by concealing a disposable camera. Count 9 alleged that Lester Miller obstructed justice by concealing horse shears used in certain of the underlying acts. Count 10 alleged that Samuel Mullet, Sr. knowingly made false statements to FBI agents.

B. The Motions To Dismiss

Kathryn Miller moved to dismiss the Indictment against her (as did each of the other defendants). She specifically adopted the arguments set forth in an amicus brief. Motion to Dismiss, Doc. No. 121, Page ID #1366; Motion to Dismiss, Doc. No. 139, Page ID #1461. Among other things, she argued that (1) the Government could not allege use of an instrumentality of interstate commerce merely by alleging the use of an automobile, (2) to the extent that the statute purports to regulate the use of any objects that ever have crossed a state or international border, it is unconstitutional, (3) the statute was not a necessary and proper exercise of any of Congress's enumerated powers, and (4) the application of the statute to the acts in question violated the Religious Freedom Restoration Act. Amicus Brief, Doc. No. 95, Page ID ##1263-76; Motion To Dismiss, Doc. No. 73, Page ID #1129-30.

The court denied the motions in an opinion and order dated May 31, 2012. Opinion and Order, Doc. No. 145, Page ID ##1492-1500. The district court first concluded that the inclusion of any "jurisdictional hook" to interstate commerce permits Congress to regulate the conduct in question, and so the statute did not exceed Congress's power under the Commerce Clause. It relied upon the Indictment's

allegations that the defendants used scissors and hair clippers which had traveled from out of state, the mail system, and motor vehicles to facilitate the assaults. *Id.*, Page ID #1497. It further held that the statute did not violate the defendants' First Amendment religious rights because "it is the religious belief or expression of the victim that matters. Indeed, the statute says nothing about the religion and beliefs of the defendant." *Id.*, Page ID #1497-98.[1] It further concluded that "[t]he First Amendment has never been construed to protect acts of violence against another individual." *Id.*, Page ID #1498.

The court below further rejected the argument that the statute does not apply to intra-religious acts (*id.*, Page ID #1499) and that the acts alleged were protected by the Religious Freedom Restoration Act (*id.*, Page ID ##1499-1500). As to the latter, the court below claimed that none of the defendants had raised the argument, and that, in any event, "violence is not a protected form of religious exercise," and that the Government has a compelling interest in preventing "crimes motivated by religious animus." *Id.*, Page ID #1500.

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[1] Of course, this was a complete misreading of – or, more likely, just a failure to read – the statute. The statute criminalizes the act of willfully causing bodily injury "because of the actual or perceived religion . . . of *any person*." 18 U.S.C. § 249(a)(2)(A) (emphasis added). Persons motivated solely by their own religion can violate the statute.

C. The Trial And Verdict

The trial of all the defendants was held from August 28, 2012 to September 12, 2012. The jury found Kathryn Miller guilty on the two counts with which she was charged, Counts 1 and 2 of the Indictment. It also concluded that the September 6 Incident with Martin and Barbara Miller involved "kidnaping." Verdict Form, Doc. No. 230, Page ID ##2051, 2126-27. The court below sentenced Kathryn Miller to imprisonment for 12 months and 1 day, supervised release for 2 years, and a $200 fine. Doc. No. 410, Page ID ##4547-49.

Each of the other defendants was found guilty on the charges against him or her, except as follows. The jury acquitted all of the defendants charged in Count 3 (Levi Miller, Eli Miller, Emanuel Shrock and Samuel Mullet, Jr.) on that count, involving an alleged assault on David Wengerd. It acquitted Lester Miller on Count 5 (although three other defendants were found guilty on that count), involving an alleged assault on Myron Miller, and the Count 9 obstruction charge. It acquitted Levi Miller on the Count 8 obstruction charge (although two other defendants were found guilty), and it acquitted Samuel Mullet, Jr. on the Count 7 obstruction charge. Verdict Form, Doc. No. 230, Page ID ##2057, 2064, 2084, 2089, 2093, 2100, 2108-09.

Statement of Facts

Martin and Barbara Miller have seven children, six male (Martin Jr., Alan, Billy, Lester, Eli, and Raymond Miller) and one female (Nancy Burkholder). Doc No. 528, Page ID #5405 (Aug. 29, 2012 transcript, p. 530). Martin, Jr., Lester, Eli, and Raymond were defendants in the court below, as were each of their wives. Alan Miller's wife, Emma Miller, and Nancy Burkholder's husband, Freeman Burkholder, were also defendants. Kathryn Miller is Raymond Miller's wife. *Cf. Id.*, Page ID ##5441-42 (8/29/12 Tr., pp. 566-67).

The Government presented evidence that five of the Miller children (Martin, Jr., Lester, Alan, Raymond, and Nancy Burkholder) and their spouses, plus Lovina Miller (Eli's wife), went to the home of Martin and Barbara Miller by car, on September 6, 2011. *Id.*, Page ID ##5440-42 (8/29/12 Tr., pp. 565-67); Doc. No. 529, Page ID #5596 (Aug. 30, 2012 transcript, p. 721). Although she did not identify the source of her information, Nancy Burkholder testified that the driver had been hired to take them there. *Id.*, Page ID ##5595-96 (8/30/12 Tr., pp. 720-21). They left Bergholz (where they lived) at approximately 8:30 p.m., and arrived at the home of Martin and Barbara Miller, in Mesopotamia in Trumbull County, Ohio, at about 10:30 p.m. *Id.*, Page ID

#5597 (8/30/12 Tr., p. 722); Doc. No. 528, Page ID #5438 (8/29/12 Tr., p. 563). The men proceeded to cut Martin Miller's beard off over his strong objections, and with much yelling and shouting, with a hair clipper and a scissors. Doc No. 528, Page ID #5447 (8/29/12 Tr., p. 572); Doc. No. 529, Page ID ##5553, 5555, 5599 (8/30/12 Tr., pp. 678, 680, 724). The women cut Barbara Miller's hair, using a pair of scissors. *Id.*, Page ID #5525, 5600-01 (8/30/12 Tr., pp. 650, 725-26). Barbara Miller ended up with bruises on her wrist, *id.*, Page ID #5561 (8/30/12 Tr., p. 686), Doc. No. 528, Page ID #5446 (8/29/12 Tr., p. 571), but she was not cut. *Id.*, Page ID #5465, (8/29/12 Tr., p. 590). The episode lasted between fifteen and thirty minutes. Doc. No. 529, Page ID #5602 (8/30/12 Tr., p. 727).

Two eyewitnesses to the event testified at trial: Barbara Miller and Nancy Burkholder, the latter of whom testified pursuant to a grant of immunity. *Id.*, Page ID #5574 (8/30/12 Tr., p. 699). The two witnesses differed on the scope of Martin Miller's injuries although, given the court's broad definition of "bodily injury," *see* n.2, *infra*, the difference in their testimony was immaterial on that point. Barbara Miller testified that her husband had a razor burn or burns on his neck and blood "pouring" from one side of his head. Doc. No. 528, Page ID #5454 (8/29/12 Tr., p. 579); Doc. No. 529, Page ID #5562 (8/30/12 Tr., p. 687). Nancy Burkholder

testified only that her father had a small razor cut on his head. *Id.*, Page ID #5664 (8/30/12 Tr., p. 789). She also testified that they only had wanted to cut hair, not skin. *Id.*, Page ID #5613 (8/30/12 Tr., p. 738).

Nancy Burkholder testified that she and her brothers, and the spouses, were motivated by concern for her parents' salvation. They wanted only to help them with their lives, and to help them see their mistakes. Doc. No. 529, Page ID ##5593 (8/30/12 Tr., p. 718) ("help them become more Amish"), 5633-34 (8/30/12 Tr., pp. 758-59) (concerned "that they might not achieve salvation"), 5635 (8/30/12 Tr., p. 760) ("done out of compassion and love"), 5665, 5667 (8/30/12 Tr., pp. 790, 792) (salvation is important in the Amish religion and she was concerned about her parents' salvation). The Government, in its efforts to emphasize the defendants' religious motivation, highlighted this testimony in its closing argument. Doc. No. 542, Page ID ##7285, 7287, 7464, 7467 (9/12/12 Tr., pp. 2360, 2362, 2539, 2542). *Cf. Id.*, Page ID #7472 (9/12/12 Tr., p. 2547) (conceding that the hair cutting may have been done out of love, but "you can't love someone to the point where you injure them because of religion"), #7289 (9/12/12 Tr., p. 2364) ("religious purification ritual"), and #7298 (9/12/12 Tr., p. 2373) ("means of purifying people").

Summary of Argument

The Government's interpretation of Section 249(a)(2) is breathtaking. Consider, for example, Jewish grandparents concerned that their newly-born grandson has not been circumcised in accordance with Jewish law because of his parents' concerns about the procedure. When the infant is left in their care, they have a ritual circumcision done. The foreskin is cut and (as is typical) the child cries.[2] This is a "hate crime" subject to prosecution by the United States – provided only that the grandparents used a car or a baby stroller to bring the child (or any other "device" *capable* of carrying a person or a thing across a state line, regardless of whether it ever has, *see* Doc. No. 542, Page ID #7254 (9/12/12 Tr., p. 2329)) to the ceremony, or that the mohel drove a car or rode a bicycle to the circumcision, or carried his surgical tools in a briefcase or kit, or used a knife that had been manufactured in another state forty years earlier (*id.*, Page ID #7255 (9/12/12 Tr., p. 2330)). Federal prosecutors willing to apply Section 249(a)(2) outside the normally-understood context of "hate crimes," as the Government here was willing to do, would face few obstacles under

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[2] This easily meets the definition of "bodily injury" adopted by Section 249(a)(2) and given to the jury. *See* 18 U.S.C. § 249(c); 18 U.S.C. § 1365(h)(4). Doc. No. 542, Page ID #7252 (9/12/12 Tr., p. 2327) ("any injury to the body no matter how temporary, and includes a cut, . . . disfigurement, physical pain, . . . or other injury to the body, no matter how temporary").

the Government's theory of the statute.

The foregoing hypothetical uses a grandparents-without-the-parents'-knowledge scenario under the questionable assumption that, in a normal ritual circumcision, the parents' consent would be a defense to a Section 249(a)(2) prosecution. But no such defense appears in the statute, and it is specifically excluded as a defense from the separate federal law that prohibits female circumcision. 18 U.S.C. § 116(a), (c); Alicia Ouellette, *Body Modification And Adolescent Decision Making: Proceed With Caution*, 15 J. Health Care L. & Pol'y 129, 141 n.93 (2012). Indeed, current theories now question whether parental consent should ever by permitted as a legal defense to ritual circumcision. *See e.g.*, Ross Povenmire, *Do Parents Have The Legal Authority To Consent To The Surgical Amputation of Normal, Healthy Tissue From Their Infant Children?: The Practice of Circumcision In The United States*, 7 Am. U. J. Gender Soc. Pol'y & L. 87, 89 (1999) (arguing that "parental authorization for this procedure is legally insufficient to constitute effective consent"); J. Steven Svoboda, et al., *Informed Consent for Neonatal Circumcision: An Ethical and Legal Conundrum*, 17 J. Contemp. Health L. & Pol'y 61, 62-63 (2000) ("because routine circumcision causes significant harm while providing no appreciable medical benefits, parental consent to the procedure is invalid").

The Government's theories here also would permit prosecution under Section 249(a)(2) for most sexual assaults or rape. Such attacks are motivated by the sex of the perpetrator *and* victim, as well as the sexual orientation of the perpetrator. *E.g.*, *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) ("Rape is also, by definition, a form of harassment based on sex."). They frequently will involve physical pain or a cut or an abrasion meeting the definition of "bodily injury." *See* n.2, *supra*. So, under the Government's theory, any sexual assault or rape can be a federal "hate crime" violating Section 249(a)(2), provided only that the perpetrator or victim happened to use a car, bus, or bicycle to arrive at the place of the crime, or the perpetrator carried a weapon in a back pack or in the pockets of pants, or used a knife or other weapon that had been in a different state at some distant time in the past.

The irony is that, when passing 42 U.S.C. § 13981 – the statute that provided a civil remedy for gender-based animus-motivated violent attacks, passed as part of the Violence Against Women Act, and declared *un*constitutional in *United States v. Morrison*, 529 U.S. 598 (2000) – Congress took great pains in limiting that statute to ensure that it did *not* cover most rapes and sexual assaults. S. Rep. 103-138 at 51 (1993) (the law "does not create a general Federal law for all assaults or rapes against women"); 139 Cong. Rec. 30,107 (1993) (Sen. Hatch) ("Despite some

misconceptions, this measure does not make every sexual assault or rape a Federal offense. Rather, it recognizes that there is a proper role for the Federal Government in assisting the States in fighting violence against women."). Yet, with an extraordinarily broad understanding of Congress's commerce power, the Government here does what Congress tried to avoid in VAWA.

The Government arrogates powers it does not possess. The Supreme Court repeatedly has said that the powers of the federal government are not so broad as to support a general police power. *Morrison*, 529 U.S. at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims."); *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."). The theories of Commerce Clause power behind this prosecution would lead to precisely that. Congress could comprehensively regulate the use of cars, motorcycles, bicycles, and other vehicles in this nation. It could set speed limits through local towns, regulate the car pick-up and drop-off policies at local schools, prohibit (or permit) "right on red" nationally, or permit bicyclists to ride (or prohibit them from riding)

without helmets in parks. Moreover, any theft or assault where the victim or perpetrator used a car or a bicycle or mass transit to arrive at the place of the crime would be fair game for Congress's regulation. It could turn local pickpockets into federal criminals.

Congress could also regulate the conduct of any person who happened to use or wear any object that had once crossed a state line – or, for that matter, who himself or herself had crossed a state line, since Congress's power to regulate commerce includes the regulation of human travel as much as the trade of commercial products and services. And, that, of course, would mean that Congress could regulate virtually any conduct, and federalize any petty crime, so long as it attached a broad "jurisdictional element" to the conduct that could be met in all instances. One would be hard-pressed to come up with any real-life situation that Congress could not regulate.

Finally, in rejecting Kathryn Miller's RFRA argument, the court below ignored not only her specific adoption of that argument, but repeated Supreme Court precedent that requires a case-by-case approach to the application of RFRA. The question is not, as the court below claimed, whether the federal government has a compelling interest in regulating, generally, "crimes motivated by religious

animus," but whether it had a compelling interest in regulating *these* specific events in which religion was a motivation. (And, of course, the court below never required the Government to demonstrate religious *animus*, if that means animosity against a religion. *Cf. Loesel v. City of Frankenmuth*, 692 F.3d 452, 466 (6th Cir. 2012).) For Kathryn Miller specifically, the question is whether the federal government had a compelling interest in regulating the involuntary hair removal from her in-laws during the September 6 Incident. Assaults of all kinds have traditionally been punished under state law. Accordingly, the federal government lacks a compelling interest.

In order to demonstrate the defendants' religious motivation, the Government went to great pains to elicit testimony, and emphasize, that the Miller defendants were trying to assist their parents/in-laws in achieving eternal salvation. That it simultaneously waved away RFRA as irrelevant to the prosecution should be troubling. The court below was wrong to reject that defense.

Argument

The court below erroneously rejected Kathryn Miller's legal arguments concerning the insufficiency of the Indictment. This Court reviews those legal

arguments *de novo*.

I. KATHRYN MILLER'S CONVICTION UNDER SECTION 249(a)(2) SHOULD BE REVERSED

Count Two of the Indictment alleged that Kathryn Miller violated 18 U.S.C. § 249(a)(2) by engaging in a religiously-motivated infliction of bodily injury using an instrumentality of interstate commerce and/or a dangerous weapon that moved in interstate commerce. That count should have been dismissed because the Indictment did not allege (and the evidence did not demonstrate) a use of an instrumentality of interstate commerce, no evidence was presented that Kathryn Miller used a dangerous object that crossed a state line, Congress lacks authority to regulate the use of an object simply because it crossed a state or national border at some undefined time in the past, and the Religious Freedom Restoration Act precludes the application of Section 249(a)(2) to the specific exercise of religion at issue in Count 2.

A. The Acts Alleged And Proven Lacked An Adequate Connection To Interstate Commerce

"The Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. "As James Madison wrote: 'The powers delegated by the

proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *Id.* (quoting The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961)). Under Article I, Section 8 of the United States Constitution, Congress has authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Enforcing substantive limits to the Commerce Power, or any other enumerated power, is not done for the benefit of the states, but rather for the benefit of the people. The division of authority between the state and federal governments enhances and protects the people's liberty. Indeed, it was the chief means of protecting that liberty in the original Constitution. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived."); *id.* ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their activities."); *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority

between federal and state governments for the protection of individuals.").

In *Lopez*, the Court identified three broad categories of activity that Congress may regulate under its commerce power. First, it may regulate the channels of interstate commerce. Second, it is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the threat to them comes from intrastate activities. Third, it may regulate activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558-59.

The Indictment alleged that the defendants used instrumentalities of interstate commerce and used a dangerous object that had traveled in interstate commerce.

1. The Court Erred In Concluding That "Use" Of An "Instrumentality Of Interstate Commerce" Was Alleged Or Proven

In denying the motions to dismiss, the court below concluded that the Indictment alleged that "the defendants . . . used motor vehicles to facilitate each assault, establishing the jurisdictional element at section § 249(a)(2)(B)(ii)." Opinion and Order, Doc. No. 145, Page ID #1497. The referenced section states

that a religiously-motivated infliction of bodily injury violates the law when "the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce . . . . " (The court's opinion also referred to use of the mail system as establishing the jurisdictional element in § 249(a)(2)(B)(ii), but no such use of the mail was alleged with respect to Count 2 of the Indictment. In any event, as shown below at 55-57, the use of the mails is not the use of an instrumentality of interstate commerce under Section 249(a)(2)(B)(ii).)

The court's conclusion that Congress chose to regulate (and is capable of regulating) *any* use of a wide variety of vehicles and things in the commission of the conduct set forth in Section 249(a)(2)(A) is reflected by its jury instruction on "instrumentality of interstate commerce":

> An instrumentality of interstate commerce is a vehicle, device, or mechanism capable of transporting goods or people across state lines. Cars, trucks, and other motor vehicles are instrumentalities of commerce . . . . If you find an alleged assault in this case occurred as a result of a Defendant's or victim's travel in a car or truck . . . you may find that this element is met regardless of whether the car, truck, or mail item actually crossed state lines in connection with the offense.

Doc. No. 542, Page ID #7254 (9/12/12 Tr., p. 2329).

An examination of the origin of the "instrumentalities" branch of the Supreme Court's Commerce Clause jurisprudence demonstrates that the court below erred in its overbroad understanding of the term. Prior to that examination, we "pause to consider the implications of the Government's arguments." *Lopez*, 514 U.S. at 564. A "hate crimes" label, of course, does not expand Congress's Commerce Clause power. *E.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 852 (4th Cir. 1999) (en banc) (rejecting argument that statute providing a civil remedy to victims of gender-based animus-motivated violence is constitutional because it is a "civil rights" statute), *aff'd sub nom.*, *United States v. Morrison*, 529 U.S. 598 (2000). If Congress can regulate religiously-motivated or gender-motivated inflictions of "bodily injury," provided a car, motorcycle, or purse is used by either perpetrator or victim, then it can regulate *any* run-of-the-mill assault, battery, or petty theft under the same circumstances.

The Government's theory would permit Congress to regulate a whole host of local crime heretofore thought to be the exclusive province of states and localities. There are innumerable "vehicles" and "devices" that are capable of carrying things over state lines. Not just cars, motorcycles, and bicycles, but knapsacks, purses, briefcases, wallets, and clothing with any kind of carrying compartment (like

pockets) are "devices" capable of doing so. (A "device" is "a thing made for a particular purpose." *See* Dictionary.com, available at http://dictionary.reference.com/browse/device?s=t. Perhaps, then, the Government might exclude horses and carrier pigeons from that category despite their ability to transport people or things.) Under the Government's approach, any crime in which such "devices" are used is within Congress's Commerce Clause power.

Moreover, if Congress has the power to regulate all cars or other "vehicles," it has the power to establish national drivers' license qualifications, national driving regulations, including speed limits in the streets of boroughs and towns throughout the country, national rules regarding the use of booster seats for children, and national rules regarding which streets bicycles may use and how they can use them. All of these things have traditionally been considered matters for regulation by state and local government.

Nothing the Supreme Court has said has ever suggested such expansive scope to Congressional power. *Lopez* cited three cases for the proposition that Congress can regulate and protect "instrumentalities" of interstate commerce, *Shreveport Rate Cases*, 234 U.S. 342 (1914), *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911), and *Perez v. United States*, 402 U.S. 146 (1971). *Lopez*, 514

U.S. at 558. In the first two of these cases, the "instrumentalities of interstate commerce" were railroads that trafficked in interstate commerce – that is, went from one state to another. It is true that the Court stated that Congress could regulate some of the *intrastate* commerce of those railroads, but only because that intrastate commerce was tied to and affected those railroads' interstate commerce.

> [Congress's] authority, extending to *these interstate carriers as instruments of interstate commerce*, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

Shreveport Rate Cases, 234 U.S. at 351 (emphasis added).

In *Perez*, the Court cited two statutes as examples of the "instrumentalities" branch, 18 U.S.C. § 32 and 18 U.S.C. § 659. *Perez*, 402 U.S. at 150. The former is limited to the protection of aircraft "in the special aircraft jurisdiction of the United States" or "civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1). Similarly, the latter statute involved the theft of things like "goods or chattels moving as or which are a part of or which

constitute an interstate or foreign shipment of freight, express, or other property." 18 U.S.C. § 659. *Id.* (also prohibiting the theft from vehicles or vessels "operated by any common carrier moving in interstate or foreign commerce").

Thus, Congress has the authority to regulate the intrastate activity of vehicles that regularly engage in interstate commerce. It can also regulate vehicles that are part of a larger group of such vehicles engaged in interstate commerce, and that regulation can encompass vehicles that do not themselves engage in interstate commerce. But those powers are a far cry from regulating all aspects of all cars (or motorcycles or bicycles or baby carriages) everywhere.

As *Lopez* stated, Congress also has the power to *protect* instrumentalities of interstate commerce. The protection power may be somewhat broader in that it is designed to protect the *potential* of an object to join interstate commerce. *United States v. McHenry*, 97 F.3d 125, 126 n.2 (6th Cir. 1997) (upholding carjacking statute that regulated theft of motor vehicles "transported, shipped, or received in interstate or foreign commerce"). But, again, neither this Court nor the Supreme Court has ever held that Congress has plenary power to regulate *all uses* of any device that is merely capable of carrying someone or something across a state line, having nothing to do with protecting the potential of that device to do so. The

Government's theory threatens any notion of a Congress with a *limited* set of powers that excludes a general police power.

The underlying power, after all, is a power to "regulate Commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art I, § 8. The acts being regulated here do not constitute commerce, and the Government provided no explanation as to how they affect commerce in any non-trivial way. The mere fact that a car is used as a part of a course of conduct otherwise entirely intrastate does not, by itself, render it subject to Congress's commerce power. "The Constitution requires a distinction between what is truly national and what is truly local. . . . In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted." *Morrison*, 529 U.S. at 617-18 (citations omitted). The fact that a car is used to travel *intra*state during an activity is insufficient to transform that activity from "truly local" to "truly national."

Three separate canons of statutory interpretation all militate against the Government's contention that the phrase "uses a[n] . . . instrumentality of interstate or foreign commerce" in 18 U.S.C. § 249(a)(2)(B)(ii) – which is, at best, a term of art, hardly unambiguous on its face – means any use of a vehicle or device capable

of transporting someone or something across a state line. First, the rule of lenity requires that, between two valid interpretations, this Court choose the less harsh interpretation unless Congress spoke in language that is clear and definite. *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). Second, the Government's interpretation would significantly change the federal-state balance in the prosecution of crimes, and the Court requires that Congress must state its purpose clearly if it wishes to do so. *Id.* Third, because the Government's theory itself would grant Congress substantial powers over local, non-economic activity, including plenary authority over automobiles and their use throughout the nation, the rule against constitutional doubt also militates against that theory. *Id.* ("Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read [federal arson statute] to render the 'traditionally local criminal conduct' in which petitioner . . . engaged a 'matter for federal enforcement.'") (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Indeed, if Congress did intend that any use of any device merely capable of carrying someone or something across a state line be sufficient under Section

249(a)(2), then, for the reasons described above, it exceeded its constitutional authority, and Section 249(a)(2)(b)(ii) is thus unconstitutional.

2. Congress Has No Power To Regulate The Use Of All Products That Ever Have Crossed A State Line

As noted, Count 2 of the Indictment alleges that defendants used "dangerous weapons, to wit, a pair of scissors and Wahl battery-operated hair clippers which had traveled in and affected interstate commerce" (Doc. No. 87, Page ID #1198, ¶ 5). In denying defendants' motions to dismiss, the court below stated that the foregoing allegation was "in compliance with the jurisdictional element spelled out in section 249(a)(2)(B)(iii)." Doc. No. 145, Page ID #1497. That provision states that a religiously-motivated infliction of bodily injury violates the statute if "the defendant employs a . . . dangerous weapon . . . or other weapon that has traveled in interstate or foreign commerce." 18 U.S.C. § 249(a)(2)(B)(iii).

But the Government presented no evidence at trial that any weapon used in the September 6 Incident ever had crossed a state line. Accordingly, even if Congress had the power to regulate the use of such an object, the conviction against Kathryn Miller cannot be based upon unproven allegations.

Further, Congress lacks such a power. In the absence of any jurisdictional element, the activity being regulated by Section 249(a)(2) is indistinguishable from the activity being regulated by the statute at issue in *Morrison*: intrastate, non-economic activity indistinguishable from the kinds of crime normally considered the exclusive province of state law. Indeed, *Morrison* at least involved conduct that would constitute a felony, 42 U.S.C. § 13981(d)(2), and not just an infliction of any bodily injury.

The court below cited *United States v. Dorsey*, 418 F.3d 1038, 1045 (9th Cir. 2005) for the proposition that a jurisdictional element saves statutes from Commerce Clause challenges. The Ninth Circuit itself has not exactly spoken with one voice on this issue. *United States v. Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (holding that Congress could not prohibit the arson of a house that received natural gas from out of state; "[W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, . . . the government must satisfy the jurisdictional requirement by pointing to a 'substantial' effect on or connection to interstate commerce."), *abrogated on other grounds*, *Jones v. United States*, 529 U.S. 848 (2000). To the extent *Dorsey* suggests that any jurisdictional element will

do, it is just wrong.

It is true, of course, that the Supreme Court has said that "a jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce." *United States v. Morrison*, 529 U.S. 598, 612 (2000) (emphasis added). But it never has stated that *any* jurisdictional element renders a statute constitutional regardless of how tenuous the required connection to interstate commerce might be. To the contrary.

In *Jones v. United States*, 529 U.S. 848 (2000), the Court considered whether the phrase "used in interstate or foreign commerce" in the federal arson statute (18 U.S.C. § 844(I)) prohibited the destruction by fire of a house that, *inter alia*, received natural gas from out of state. The homeowner had also obtained a mortgage and insurance policy on the home from out of state. The Court held that the arson at issue was not covered by the statute. *Jones*, 529 U.S. at 855-57. Most importantly for purposes here, the Court held that its interpretation of the statute was supported by the rule that it should avoid interpretations that would raise "grave and doubtful constitutional questions." *Id.* at 857 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). That is, a statute that *unambiguously* covered the arson of all buildings that received

natural gas shipments in interstate commerce, or that had out-of-state insurance policies or mortgages, would be constitutionally problematic. And that cannot be so if *every* "jurisdictional element" that requires a connection to interstate commerce renders a statute a proper exercise of Congress's Commerce Clause power.

Thus, the better view – indeed, the only view consistent with *Jones*'s statement that broad jurisdictional elements raise serious and grave constitutional questions – is that a "'jurisdictional element is not alone sufficient to render [a challenged statute] constitutional.'" *United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002) (*quoting United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000)) (brackets in original). *See also* Brief of Anna Miller, Argument Sect. I.A.4.

Here, the jurisdictional element is manifestly inadequate to demonstrate that Congress was acting "in pursuance of [its] regulation of interstate commerce." *Morrison*, 529 U.S. at 612. The Court has held that a jurisdictional element might demonstrate that the conduct that Congress is regulating substantially *affects* interstate commerce by a jurisdictional connection ensuring that it affects interstate commerce in each instance. *United States v. Laton*, 352 F.3d 286, 292 (6th Cir. 2003) ("In [*Lopez*], the Supreme Court remarked that the Gun-Free School Zones

Act of 1990 (formerly 18 U.S.C. § 922(q)) 'contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question *affects* interstate commerce.'") (quoting *Lopez*, 514 U.S. at 562) (emphasis and brackets as in *Laton*). That is, a jurisdictional element might demonstrate that Congress is acting within the third area of Commerce Clause authority, the regulation of activities that substantially affect interstate commerce. The terms the Court repeatedly has used in describing that area of authority – consistent with the words in Article I, section 8 itself ("[t]o regulate commerce . . . among the several states") – are in the present tense. The activity being regulated, whether circumscribed by a jurisdictional element or not, must *currently* have a substantial effect on interstate commerce. But the use of an item that passed across a state line five, ten, twenty, or fifty years earlier does not necessarily *currently* affect interstate commerce any more than the use of an item that never passed across a state line. The history of the item is irrelevant to whether the *activity being regulated* substantially *affects* (in the present) interstate commerce.

To put the point another way, how can Congress be "regulat[ing] commerce . . . among the states" when the object that purports to connect the regulated activity to interstate commerce crossed a state line years before Congress passed

the statute?

Indeed, the prohibition of arson of houses that receive natural gas shipments in interstate commerce is *far more likely* to affect interstate commerce than conduct that simply uses an item that passed across a state line years earlier. Arson would likely affect the homeowner's ability to purchase natural gas shipments from out of state *in the present and future*, and thus could have a current effect on interstate commerce. Similarly, out-of-state insurance policies likely would be affected by arson of the covered property, probably leading to an interstate payment on the coverage. Yet the Court in *Jones* still found that a statute prohibiting such arson would have raised serious and grave constitutional questions. *A fortiori*, the statute here, which requires nothing to connect the acts being regulated to a current effect on interstate commerce, goes beyond Congress's power.

This Court's decision in *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996) is not to the contrary. In *Chesney*, this Court concluded – rightly or wrongly (*see id.* at 574 (Batchelder, J., dissenting)) – that the prohibition in 18 U.S.C. § 922(g)(1) of possession by a felon of a gun "in or affecting commerce" included the possession of a gun that crossed over a state line, and that the law as interpreted was constitutional. This Court concluded that the prohibition on possession was

"directly linked by Congress as part of a statute prohibiting the related economic activities of interstate shipping, transportation, or receiving of firearms" and was "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 570 (quoting *Lopez*, 514 U.S. at 561). Thus, this Court viewed the prohibition in Section 922(g)(1) as similar to the prohibition on possession of marijuana that later was upheld in *Gonzales v. Raich*, 545 U.S. 1 (2005). Here, there is no larger economic regulatory scheme of which the prohibition on the use of "weapons" such as scissors and the like that have once crossed a state line is an essential part.

Two other important considerations deserve mention. First, the theory that Congress can regulate any object that once has crossed a state line renders the entire "instrumentality of interstate commerce" branch of the Court's jurisprudence – even the Government's aggressive interpretation of that branch – more or less redundant. It seems highly unlikely that there is a car, bus, or train in America that has never crossed, and has no part that ever has crossed, a state line.

Second, Congress's power to regulate interstate commerce permits it to regulate the interstate travel of people as well as the interstate shipment and trade

of goods. *Caminetti v. United States*, 242 U.S. 470, 491-92 (1917). So, if Congress can add a jurisdictional element regulating conduct that uses a good that, at one time in the past, crossed a state line, there is no reason that it cannot regulate the conduct of any person that crossed a state line at one time in the past. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 996 (2010) ("[I]f Congress could regulate 'illicit sexual conduct' based solely on the fact that an individual had – at some previous point – crossed state lines, Congress could regulate literally everything done by anyone who had ever traveled in interstate commerce.").

Accordingly, even had the Government presented evidence that anything used to cut Martin and Barbara Miller's hair had come from out of state, Kathryn Miller's conviction should still be reversed because the regulation in Section 249(a)(2)(B)(iii) of conduct using objects that have "traveled in interstate commerce" is unconstitutional.

3. Section 249(a)(2) Is Not A "Proper" Exercise Of Congress's Commerce Clause Power

The Constitution also grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the other powers of the

federal government. U.S. Const., art. I, § 8, cl. 18. But the Court has made clear that laws that upset the structural limits of the Constitution are not "proper." "[T]he Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power." *Nat'l Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2646 (2012) (joint dissent); *accord id.* at 2592 (Roberts, C.J.). The Government's theories here would essentially grant Congress the police power that the Constitution denied it. Accordingly, they are not "proper" implementations of the enumerated powers (and, specifically, the Commerce Clause) and cannot be sustained.

B. The Court Below Erred In Rejecting Kathryn Miller's RFRA Argument

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, provides that the federal government may not substantially burden a person's free exercise of religion even from a law of general applicability unless the government demonstrates (that is, meets the burdens of going forward and persuasion) that the application of the neutral rule to that person furthers a compelling governmental interest and is the least restrictive means of furthering

that interest. 42 U.S.C. §§ 2000bb-1(a), (b), 2000bb-2(1), (3). The statute protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *cf.* 42 U.S.C. §§ 2000bb-2(4) (adopting that definition for "exercise of religion" under RFRA).

The Indictment, the evidence presented at trial, and the Government's theory of the case regarding the September 6 Incident demonstrate that RFRA was applicable here. According to the Indictment, defendants here were engaging in conduct that they believed was required by their religious leader and his interpretation of scriptures. Doc. No. 87, Page ID #1185 ¶ 4 (obligation of bishop was to ensure that members were living lives in a manner consistent with scriptural teachings and to ensure obeisance), Page ID #1188 ¶ 4 (removal of beards and head hair chosen "because beards and head hair are symbols of the Amish religion"). As noted previously, the Government presented and relied upon evidence at trial that concern over their parents and in-laws' eternal salvation motivated the defendants involved in the September 6 Incident. *See* discussion *supra* at 12. The Government's closing referred to the acts in question as a "religious purification ritual." Doc. No. 542, Page ID #7289 (9/12/12 Tr., p. 2364). Thus, their acts met the statute's definition of "exercise of religion," the Government's indictment of

them for it constituted a "substantial burden" on that exercise, and the Government was obligated to meet the exception in 42 U.S.C. § 2000bb-1(b).

The Government's effort to meet its RFRA burden cannot rely upon the general interest that the law seeks to achieve; rather, RFRA requires that it have a compelling interest in the *specific application* of the law to the defendants. 42 U.S.C. § 2000bb-1(b) (government must show that "application of the burden *to the person*" furthers a compelling interest in the least restrictive way) (emphasis added); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006) ("*O Centro Espirita*") (rejecting the government's interest in prohibiting the use of dangerous drugs in general because "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach."); *id.* at 431 ("Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances . . . cannot carry the day" even though "Schedule I substances such as [the drug in question] are exceptionally dangerous"); *Merced v. Kasson*, 577 F.3d 578, 592 (5th Cir. 2009) (relying on *Gonzales* in interpreting Texas RFRA and concluding that "[t]he government cannot rely upon general statements of its interests, but must tailor

them to the specific issue at hand"). *See also Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972) (concluding that Amish sect's First Amendment rights were violated by law requiring compulsory education to age 16; in determining Wisconsin's interest, Court examines only its interest in compulsory education past the 8th grade, the only part of the law to which the Amish objected); 42 U.S.C. § 2000bb-(b)(1) (adopting standard of *Yoder*).

To meet its burden as to Count 2, then, the Government had to show that the application of Section 249(a)(2) to the defendants charged in *that* Count was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that interest. For several reasons, it failed to do so.

First, the incident with the Millers did not involve grave bodily injury; to the contrary, the Government relied on the very broad definition of "bodily injury" that included any cut or any pain at all. *See* n.2, *supra*.[3]

Second, whatever interest the federal government may have in regulating

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[3] As noted previously, *supra* at 11, the testimony of the two eyewitnesses at trial disagreed on the degree of Martin Miller's injuries. The jury was not asked to resolve that dispute given that either version met the definition of "bodily injury" in the jury instructions. To the extent that the Government's interest depends upon the version suggesting a more serious injury, nothing in the jury's conclusions can support that interest.

serious violence motivated by blind hatred of an entire race or religion, that interest is just not present here. *Cf.* 18 U.S.C. § 249(b)(1)(c) (referring to the "Federal interest in eradicating bias-motivated violence"). In this case, defendants and the victims shared the same religion. The defendants in Count 2, under the Government's own theory, were motivated by love for Martin and Barbara Miller.

Third, the regulation of religiously-motivated inflictions of bodily injury is part of a much broader area of regulation, involving invasions of bodily integrity for *any* reason, that have traditionally been regulated by the states. *Morrison*, 529 U.S. at 627 (holding that "under our federal system," remedy for alleged gender-based animus-motivated attack "must be provided by the Commonwealth of Virginia"). Whatever the nature of the states' interest in regulating such conduct, the interest of the federal government is significantly less if only because of the traditional division of authority established by our federalist tradition. *Windsor v. United States*, 699 F.3d 169, 179 (2nd Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013):

> [W]hen it comes to marriage, legitimate regulatory interests of a state differ from those of the federal government. Regulation of marriage is 'an area that has long been regarded as a virtually exclusive province of the States.' . . . Therefore, our heightened scrutiny analysis of [the Defense of Marriage Act's] marital classification under federal law is distinct from the

> analysis necessary to determine whether the marital classification of a state would survive such scrutiny. (Internal citations omitted).

Id. at 186 (concluding that DOMA cannot survive intermediate scrutiny and that the federal government does not have an important government interest in maintaining a consistent definition of marriage; "[M]arriage is 'a virtually exclusive province of the States.' . . . DOMA was therefore an unprecedented intrusion 'into an area of traditional state regulation.' . . . This is a reason to look upon Section 3 of DOMA with a cold eye.") (internal citations omitted); *United States v. Stevens*, 533 F.3d 218, 233 (3rd Cir. 2008) (reformulating the purported compelling interest in prohibiting videos depicting animal cruelty, noting that where many other laws, including the laws of all states, ban animal cruelty, the federal government's interest can only be in aiding those statutes, and ruling that such an interest is not compelling; "[W]e do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime."), *aff'd*, 559 U.S. 460 (2010).

As with marriage, "[u]nder our federal system, the 'States possess the primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at

561 n.3. Indeed, Section 249 itself implicitly acknowledges the traditional role that the states have in regulating the invasions of bodily integrity it covers. 18 U.S.C. § 249(b) ("No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that" one of four conditions have been met, three of which involve a State's inability to prosecute, preference not to, or failure to vindicate the interest in eradicating bias-motivated violence). Here, the certification asserted only that the prosecution was "in the public interest and necessary to secure substantial justice," the vague recitation permitted by 18 U.S.C. § 249(b)(1)(d). Certification, Doc. No. 88, Page ID #1211-12. Count 2 did not involve interstate conduct that no one state could prevent. The federal government is not the only governmental entity that was capable of regulating defendants' actions.

Religiously-motivated harms have been with us for at least as long as recorded human history. Section 249(a)(2) was only enacted a few years ago. While the federal government is not precluded from identifying new compelling interests, when it steps into a very old problem traditionally regulated elsewhere, this Court should consider its claim quite carefully. *Yoder*, 406 U.S. at 226-27

(noting that "[t]he requirement for compulsory education beyond the eighth grade is a relatively recent development in our history" and holding that "[a]gainst this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail").

Finally, Section 249(a)(2) is not narrowly-tailored to achieve any compelling governmental interest in reducing religiously-motivated inflictions of bodily injury to the extent that its sweeping jurisdictional elements might actually omit some such assaults. *Stevens*, 533 F.3d at 233 (holding that federal criminal law precluding videos depicting animal cruelty was underinclusive, and thus not narrowly-tailored, because law did not regulate videos created and sold in the same state).

The court below offered two reasons for rejecting Kathryn Miller's RFRA argument. First, it claimed that neither she nor any other party had raised the argument. Second, it claimed that the acts in question were not covered by RFRA at all and that, even if they were, the Government met its burden. Both arguments are wrong.

1. Kathryn Miller Properly Preserved Her RFRA Argument

The court below's claim that none of the defendants raised the RFRA argument, Opinion and Order, Doc. No. 145, Page ID #1500, simply ignored that Kathryn Miller specifically adopted the arguments made in an amicus brief submitted by the Center for Individual Rights. Motion to Join, Doc. No. 139, Page ID #1461. That brief raised the RFRA argument. Amicus Brief, Doc. No. 95, Page ID ##1273-76. It would serve no sensible purpose to require every defendant in a multi-defendant case like this one, to repeat the arguments presented by others.

The purpose of a rule requiring parties to set forth the bases for the relief they seek is to prevent unfair surprise to the other side. Kathryn Miller's papers specifically apprised the Government that the indictment should be dismissed for the reasons given in an amicus brief, which included the argument that the application of Section 249(a)(2) violated RFRA. The Government has no basis for claiming unfair surprise or arguing that Kathryn Miller waived her RFRA argument.

2. The Court Below's Substantive Analysis Was Wrong.

In rejecting the substance of the RFRA claim, the court below first asserted that "violence is not a protected form of religious exercise." Opinion and Order, Doc. No. 145, Page ID #1500. The court below cited two cases for this proposition, neither of which says anything like that. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) had nothing whatsoever to do with religion or religious exercise, and the court below's reliance on the now-rejected *Davis v. Beason*, 133 U.S. 333 (1890) is just, plain bizarre. In *Beason*, the Supreme Court held that Idaho territorial statutes could properly preclude Mormons from voting because that religion promoted bigamous and polygamous relationships. In *Romer v. Evans*, 517 U.S. 620, 634 (1996), the Court noted that to the extent that *Beason* held that persons advocating a practice may be denied the right to vote, it was no longer good law, and to the extent it held that members of groups could be denied the right to vote, it would have to survive strict scrutiny, "a most dubious outcome." The court below conveniently omitted any reference to *Romer* in its citation of *Davis*.

In any event, whether "violence" can be a religious practice depends upon how one defines "violence" – a term that does not appear in the text of Section

249(a)(2). If the infliction of *any* cut or physical pain, all that *is* required under Section 249(a)(2), is "violence," then ritual circumcision qualifies as violence. If an unwanted touching is "violence," then pouring water over an infant's head can qualify. And if ritual circumcision or baptism does not qualify as a "religious exercise," then the Government would not even have to show *any* interest in regulating it, much less a compelling interest. The notion that RFRA could not even be *invoked* to protect such rituals, much less used to preclude government from imposing a substantial burden on them, is frightening indeed.

To be sure, the definition of "exercise of religion" in RFRA is a bit circular. (Section 2000bb-2(4) defines "exercise of religion" as "religious exercise, as defined in Section 2000cc-5 of this title." 42 U.S.C. § 2000bb-2(4). Section 2000cc-5, in turn, states that "religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).) The most common definition of an "exercise of religion" is an act or refusal to act motivated by religious belief. *See, e.g., Employment Div., Dept. Of Human Resources of Oregon v. Smith,* 494 U.S. 872, 894-95 (1990) (O'Connor, J., concurring) ("[W]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by

requiring the government to justify any substantial burden on *religiously motivated conduct* by a compelling state interest and by means narrowly tailored to achieve that interest.") (emphasis added), and cases cited therein. That is how most state analogues to RFRA define it. *E.g.*, Fla. Stat. § 761.02(3); Tex. Civ. Prac. & Rem. Code § 110.001(a)(1); N.M. Stat. § 28-22-2(A); 775 Ill. Comp. Stat. § 35/5; Idaho Code § 73-401(2).

Under that sensible definition, whether something is called "violence" or "infliction of any bodily injury" or a "ritual practice" is irrelevant, so long as the act is motivated by religious belief. Here, of course, it was the Government's primary contention that the acts were motivated by religious belief – that the defendants in Count 2 were motivated by religion and love for the victims and were trying to set them on the path for eternal salvation. It argued that the beard and hair-cuttings were "religious purification ritual[s]," emphasizing that "[y]ou don't forcibly perform a religious ritual on someone for reasons other than religion." Doc. No. 542, Page ID #7289 (9/12/12 Tr., p. 2364). Under any definition of "exercise of religion," a "religious purification ritual" must qualify.

Of course, the fact that an act is an "exercise of religion" does not preclude government regulation that imposes a substantial burden on it; RFRA permits the

Government to demonstrate that the application of the regulation to that exercise is a narrowly-tailored means of attaining a compelling governmental interest. But the assertion by the court below that the federal government has a compelling interest in deterring crimes motivated by religious animus is *precisely* the categorical approach that the Supreme Court rejected in *O Centro Espirita*, and would be wrong even if the court below had required animus (which it did not). Here, Count 2 did not involve "religious animus" (in the sense of "animus" used by this Court in *Loesel*) at all. Whether the federal government might have a sufficiently compelling interest in some other case involving Section 249(a)(2), where religious hatred was featured more prominently, is simply irrelevant. The categorical approach used by the court below was wrong. For the reasons stated above, the Government cannot meet its burden on Count 2.

II. KATHRYN MILLER'S CONSPIRACY CONVICTION SHOULD BE REVERSED

Count 1 of the Indictment charged Kathryn Miller with conspiring (1) to cause bodily injury because of religion not only to Martin and Barbara Miller, but to the victims of each of the incidents subsequently set forth in Counts 3 through 6 of the Indictment (each of which also alleged violations of Section 249(a)(2)), (2)

to obstruct justice in violation of 18 U.S.C. § 1519, and (3) to make false statements in violation of 18 U.S.C. § 1001. Indictment, Doc. No. 87, Page ID # 1187. The jury found a conspiracy to commit acts in violation of Section 249(a)(2) and to obstruct justice in violation of Section 1519, but did not find a conspiracy to conceal material facts and/or make false statements. Verdict Form, Doc. No. 230, Page ID ##2036-37. It did not identify the conspirators for each violation.

For each of three separate reasons, the conspiracy conviction must be reversed. First, to the extent that the conviction rested on the September 6 incident involving Martin and Barbara Miller, the absence of an underlying substantive crime, combined with the failure of the Government to prove any agreement to commit a crime that would have violated Section 249(a)(2), precludes a conviction resting on that incident. Second, there is no basis to conclude that the jury found that Kathryn Miller agreed to commit any other crime enumerated in Count 1, and, in any event, there was no evidence that Kathryn Miller agreed to commit any of the other underlying substantive crimes. Third, even if there were evidence that Kathryn Miller conspired to commit the other underlying substantive Section 249(a)(2) violations, those counts (Counts 3 through 6) were as invalid as Count 2.

A. The Conspiracy Count Cannot Be Based On Any Conspiracy Involving The September 6 Incident

As shown in Part I of the Argument, Kathryn Miller's conviction on Count 2 should be reversed because the jurisdictional element in Section 249(a)(2)(B)(ii) was not met, and the court below misinstructed the jury on it, and because the jurisdictional element in Section 249(a)(2)(B)(iii) renders that part of the statute unconstitutional. Accordingly, even if Kathryn Miller agreed to participate in the underlying September 6 Incident involving Martin and Barbara Miller, she did not agree to commit a violation of Section 249(a)(2) by agreeing to use a car to get to her in-laws' home or by agreeing to use scissors to cut hair. *United States v. Feola*, 420 U.S. 671, 695-96 (1975):

> Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.

Here, Kathryn Miller did not agree to use an instrumentality of interstate commerce, and did not agree to use any dangerous object in a manner that would

have been sufficient to invoke Congress's power to regulate commerce among the states.

So, too, the fact that Section 249(a)(2)'s reach is limited by RFRA, and that RFRA precluded the reach of Section 249(a)(2) to the facts in Count 2, means that a conspiracy to violate Section 249(a)(2) based upon an agreement related to the facts in Count 2 is also precluded by RFRA.

Accordingly, the jury's conviction of Kathryn Miller on Count 1 cannot be based on an agreement related to the underlying facts of Count 2.

B. Both The Jury Instructions And The Evidence Preclude Basing Kathryn Miller's Conspiracy Conviction On Any Other Agreement

Although the Indictment alleged that Kathryn Miller conspired to violate Section 249(a)(2) based upon alleged violations of that statute that she did not personally participate in, and conspired to obstruct justice and make false statements, the jury did not identify the object of the conspiracy that Kathryn Miller participated in. In fact, her conviction may have been based solely on an agreement to participate in the hair cutting of Barbara Miller, which, as shown above, cannot stand.

The court below instructed the jury that an individual defendant could be found guilty of conspiracy if (s)he had agreed to just one of the objects of the conspiracy. Doc. No. 542, Page ID #7245 (9/12/12 Tr., p. 2320) ("The Government does not have to prove that the Defendants agreed to commit each of these crimes, but you must unanimously agree that the Government has proved [sic] an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge."); *id.*, Page ID #7248 (9/12/12 Tr., p. 2323):

> In order to find a Defendant guilty of Count 1, you need only unanimously find that he or she entered into an agreement to bring about a religiously-motivated assault, *or* that he or she entered into an agreement to obstruct justice, *or* that he or she entered into an agreement to make false statements to the FBI, and that one of the overt acts alleged in the [Indictment] was actually committed. (Emphasis added).

The Government's closing stressed this point. *Id.*, Page ID #7271 (9/12/12 Tr., p. 2346) ("All the Government has to do to prove that a Defendant is part of a conspiracy is to show that he or she agreed with at least one other person to commit any one of the crimes that are the objects. That's it."). *See also, e.g.*, Doc. No. 314, Page ID #3483 (Aug. 20, 2012 Tr. at 17) (discussing the jury instructions on conspiracy charge and noting that the juror "can do two [objectives], they can do

three, but they have to do one. But they are not necessarily finding that each defendant has that objective.").

Moreover, there was simply no evidence that Kathryn Miller had any other objective, or agreed to do anything else, other than participate in the September 6 Incident. Indeed, the Government tacitly conceded this to be true by not charging her with any other substantive violation.

The Government asked for, and the court below gave, a *Pinkerton* instruction. *Pinkerton v. United States*, 328 U.S. 640 (1946). That is, the court below instructed the jury that a conspirator was liable for any substantive crime that a member of the conspiracy performed pursuant to the conspiracy and that was one that could have been reasonably anticipated as a consequence of the agreement. Doc. No. 542, Page ID ##7256-57 (9/12/12 Tr., pp. 2331-32). Thus, if the Government had evidence that Kathryn Miller had agreed to any of the other substantive Section 249(a)(2) violations, or that such violations were a natural consequence of any agreement she did make, it could have, and likely would have, charged her with additional substantive violations. Similarly, the Government's decision not to charge Kathryn Miller with obstruction suggests that it had no evidence that she agreed to any of the acts constituting that crime.

C. The Allegations On Counts 3 Through 6 Were Insufficient

To the extent that the Government wishes to rest Kathryn Miller's conspiracy conviction on a conspiracy to commit violations of Section 249(a)(2), and to the extent that those counts rely upon the same theories of statutory interpretation and Congressional power that Count 2 does, they fail for the same reason that Count 2 fails. (And, to the extent that it wishes to rest the conspiracy conviction on an agreement related to Counts 3 or 9, it has an additional obstacle: those charged with those underlying crimes were acquitted.)

As noted earlier, in the discussion of the Indictment's allegations, the Government did, in fact, base the other Section 249(a)(2) violations primarily on the same theory of national power on which it based Count 2. The only significant difference is that Count 6 alleged that the defendants on that substantive count used the United States mail. The court below, as already noted, accepted the idea that the mail is an "instrumentality of interstate commerce" in its memorandum opinion denying the motions to dismiss, and so instructed the jury. It was wrong because Congress did not intend to include use of the mail as a means of asserting federal power under Section 249(a)(2).

That this is so is a fairly straightforward matter of statutory interpretation. When Congress wants to regulate the use of the mail, it says so explicitly and does not rely on broad phrases like "instrumentality of interstate commerce." For example, Section 10(b) of the Securities Exchange Act makes it unlawful to use various manipulative or deceptive devices to sell or buy securities "by the use of any means or instrumentality of interstate commerce *or of the mails*, or of any facility of any national securities exchange . . . ." 15 U.S.C. § 78j (emphasis added). Congress has used this formulation in innumerable other statutes. *See, e.g.*, 15 U.S.C. § 77e(a)(1) (Securities Act); 15 U.S.C. § 80b-6 (Investment Advisors Act); 15 U.S.C. § 1679a(3)(A) (Credit Repair Organizations Act); 7 U.S.C. § 2156(c) (prohibiting advertising of an animal fighting venture using "the mail service of the United States Postal Service or any instrumentality of interstate commerce"); 7 U.S.C. § 6b(e) (Commodities Exchange Act); 18 U.S.C. § 1821 (transportation of dentures); 29 U.S.C. § 1001 (finding that "a large volume of the activities of [employee benefit] plans are carried on by means of the mails and instrumentalities of interstate commerce").

Under the theory of the Government and the court below, the references to the mails in all of these statutes are utterly redundant. That, of course, is directly

contrary to the manner of interpreting statutes stressed by the Supreme Court. *E.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The lesson of these statutes is clear. When Congress wants to regulate the use of the mails, it says so quite explicitly. It did not do so in Section 249(a)(2).

III. THE COURT BELOW MADE ADDITIONAL ERRORS REQUIRING THE REVERSAL OF KATHRYN MILLER'S CONVICTION

For the reasons set forth in the briefs of her co-defendants in their appeals, Kathryn Miller further submits that the court below improperly instructed the jury on the definition of "kidnapping" under Section 249(a)(2). Kathryn Miller also adopts the other parts of those briefs relevant to the Government's case against her, including those parts demonstrating that the court below (1) erred in instructing the jury with respect to the requirement that religion be "the motivating factor," (2) erred in permitting irrelevant and prejudicial evidence about Kathryn Miller's religious cohort and her co-defendants, and (3) erred in denying the motions to dismiss, at the close of the Government's case, the charges against the female defendants involved in the September 6 Incident. Fed. R. App. P. 28(I).

Conclusion

For the foregoing reasons, the judgment of the court below, and Kathryn Miller's conviction, should be reversed.

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Certificate of Compliance

I certify that the foregoing brief contains 12,382 words, excluding those parts that are excluded from the count by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

/s/ Michael E. Rosman
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Addendum: Designation of Relevant District Court Documents
(From Docket for Case No. 11-cr-00594-DAP)

Document	Doc. No.	Page ID ##
Complaint	1	1-359
Indictment	10	646-661
S. & L. Mullet MTD	73	1129-1147
Superceding Indictment	87	1184-1204
Proposed Amicus Brief	95-1	1263-1276
K. Miller's Motion to Join S. & L. Mullet MTD	121	1366
K. Miller's Motion to Join CIR's MTD	139	1461
Opinion and Order	145	1492-1500
Transcript of Proceedings on Aug. 20, 2012	314	3467-3550
Transcript of Proceedings on Aug. 28, 2012	527	5055-5222
Transcript of Proceedings on Aug. 29, 2012	528	5223-5510
Transcript of Proceedings on Aug. 30, 2012	529	5511-5741
Transcript of Proceedings on Sept. 5, 2012	538	6081-6384

Certificate of Service

I certify that on November 21, 2013, I served a copy of this brief to the following individual through the Court's ECF/CM system.

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In addition, on the same date, I served the following individuals (attorneys for defendants in the related appeals) by electronic mail:

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Damian Billick (for Lester Mullet)
Steven Jaeger (for Levi Miller)
James Gentile (for Eli Miller)
Nathan Ray (for Emanuel Schrock)
J. Dean Carro (for Lester Miller)
Wesley A. Dumas (for Raymond Miller)
Joseph Dubyak (for Linda Schrock)
David Jack (for Lovina Miller)
George Pappas (for Emma Miller)
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