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 REPLY BRIEF

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Introduction

In her opening brief ("K. Miller Br."), Kathryn Miller pointed out that the Government's theory of national power would lead to the conclusion that Congress could set speed limits through local towns and enact other local traffic regulations; pass laws on the use of bicycle helmets; criminalize local petty crimes in which some car, bicycle, bus, knapsack, purse, or other "device" capable of transporting someone or something over a state line (regardless of whether it ever had) was used; and regulate the use of any object that *ever* had crossed a state or national boundary and the conduct of any person that had *ever* crossed a state line in their lives. K. Miller Br. 16-17, 23-24.

Remarkably, the Government disputes none of this. To the contrary. It argues for a national power just that broad, stating only that "there is a difference between the potential scope of Congress's power and the exercise of that power." Brief of the United States ("Govt. Br.") 99-100. In short, the Government asks this Court to take comfort in, as Justice O'Connor famously put it, Congress's "underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting). *See also, e.g.*, *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820, 860 (4th Cir. 1999) (en banc)

("To these sweeping implications of their arguments, appellants offer little response other than that Congress here has enacted a more limited statute. Such a meager response is palpably insufficient . . . "), *aff'd sub nom.*, *United States v. Morrison*, 529 U.S. 598 (2000).

Moreover, a reliance on Congress's *future* self-restraint ignores the arguments regarding the breadth of *this statute*. As Kathryn Miller's opening brief noted, the Government's theories would mean, for example, that Section 249(a)(2) covered most sexual assaults or rapes that take place in this country. K. Miller Br. 15. Again, the Government disputes not one word of this. Thus, even if Congress's purported self-restraint were legally adequate, it would do the Government no good here. The Government's legal position is already a blueprint for an extraordinary exercise of national power. *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

As for the Religious Freedom Restoration Act, the Government argues that the incident that it called a "religious purification ritual" in the district court – a position it does not disavow here on appeal (*e.g.*, Govt. Br. 113 n.33 ("defendants believed that cutting the Miller's [sic] hair would make them lead a proper Amish life") – is

nonetheless not an "exercise of religion" under RFRA. As one might suspect, the Government can argue such a counterintuitive position only by ignoring the actual words of the statute.

Argument

The Government offers a theory of the Commerce Clause inconsistent with the Supreme Court's admonition that any such theory must distinguish between truly national activities and truly local activities. Under its interpretation of precedent, the latter group either does not exist or is exceedingly small.

Instead, the Government focuses on the good intentions behind Section 249 and the importance of combating "hate crimes." The irony of this emphasis is that, when it comes to defending the Government's compelling interest in this prosecution, the Government quickly forgets this interest, and focuses on the breadth of the statutory language and its reach to inflictions of bodily injury, including the ones here, that do not fit under any reasonable "hate crimes" rubric.

The Government's arguments are wrong and should be rejected.

I. THE GOVERNMENT ERRS IN ITS COMMERCE CLAUSE ARGUMENTS

The Government justifies application of Section 249(a)(2) here based on three purported facts: the use of automobiles to go from one place to another in Ohio, the use of hair clippers and/or horse shears that crossed a state line, and the use of the mails. In doing so, it barely addresses, must less refutes, the arguments in Kathryn Miller's opening brief.

A. The Use Of A Car

Kathryn Miller's opening brief demonstrates that not all uses of any automobile (or other vehicle or any "device" capable of carrying something across a state line) is the use of an "instrumentality of interstate commerce," and that the district court's ruling on her motion to dismiss and its objected-to jury instruction (Doc. No. 541, Page ID ##7205-06, (9/11/12 Tr., pp. 2280-81)) were both wrong. K. Miller Br. 21-29. She specifically went through the authorities that the Supreme Court cited in *United States v. Lopez*, 514 U.S. 549, 558 (1995) to support that decision's identification of the second area of Congressional authority under the Commerce Clause (*viz.*, the power 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). K. Miller Br. 24-26. Her brief thus shows that, under this branch, the Court has permitted Congress only to regulate vehicles that actually engage in interstate commerce or are part of a larger group of such vehicles that engage in interstate commerce, or to protect from harm vehicles that have the potential to engage in interstate commerce.

The Government does not respond to this analysis at all. Govt. Br. 93-101. It cites *Lopez* only in passing (Govt. Br. 94), and never even mentions the cases that *Lopez* cited to identify the scope of this power. It simply cites a series of lower court cases to defend its expansive interpretation of the "instrumentality" category. And, even with that, it never bothers to defend the district court's extraordinary jury instruction.

Kathryn Miller's principal brief already has addressed the one Sixth Circuit authority cited by the Government, *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1997). K. Miller Br. 26. The Government chooses not to respond to that argument, presumably for the same reason that (as discussed in the Introduction) it deflects attention from the implications of its arguments. If Congress can not just *protect* automobiles that have the potential to engage in interstate commerce, but can also comprehensively regulate the use of such automobiles, then its authority over local

parking and traffic rules would be plenary. In any event, *McHenry* only speaks to constitutional authority, not statutory interpretation. The anti-carjacking statute there applied to a "motor vehicle that has been transported, shipped, or received in interstate or foreign commerce," 18 U.S.C. § 2119, and no one argued that a car is not a "motor vehicle." Even if Congress *could* constitutionally criminalize all local crimes in which a car is used, that does not mean that it intended to do so when it enacted the phrase "uses a . . . instrumentality of interstate commerce" in Section 249(a)(2)(B)(ii). For the reasons set forth in Kathryn Miller's opening brief, K. Miller Br. 27-28, all relevant canons of statutory interpretation militate against such an expansive interpretation of that phrase.

Finally, the Government repeatedly refers to alleged "hired drivers" or refers to the vehicles used as "commercially hired" vehicles. *E.g.*, Govt. Br. 13, 58, 79, 93, 95, 98. It is unclear why it does so. Its argument, like the jury instructions it sought and received, makes no distinction between "commercial" vehicles and others, and it concedes that it is not relying on the third branch of congressional authority under the Commerce Clause, the power to regulate economic activities that substantially affect interstate commerce. Govt. Br. 74 ("the final *Lopez* prong is not at issue in this case"). Of course, if the Government is now arguing that *only* commercial vehicles can be

instrumentalities of interstate commerce, then the district court's ruling on the motion to dismiss and the jury instruction (K. Miller Br. 22) was error, and Kathryn Miller's conviction should be vacated.[1] In any event, the argument would be wrong. While it is possible that a hired car could be part of a larger fleet substantially engaged in interstate commerce, it is hardly a given that it will be, and no evidence to that effect even was offered at trial here.

B. The Use Of The Hair Clippers

Kathryn Miller's opening brief demonstrates that (1) the Government presented no evidence that any weapon used in the September 6 Incident had crossed a state line and (2) in any event, the mere fact that something or someone involved in an activity once crossed a state or national line at some unidentified time in the past is an insufficient basis to invoke Congress's power to regulate interstate or foreign commerce. K. Miller Br. 29-36.

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[1] Nor could such a serious error be deemed harmless. The jury was never asked to determine whether any vehicles were "commercial." Further, as noted in Kathryn Miller's opening brief, the Government never established the personal knowledge of the sole witness who claimed that the driver of the vehicle in which Kathryn Miller rode on September 6, 2011 was paid. K. Miller Br. 10. Of course, that testimony was also irrelevant (or, at least, of very little importance) under both the district court's previous ruling, and the Government's theory, that *any* motor vehicle was an instrumentality of interstate commerce. Thus, the erroneous instrumentality instruction was not harmless. *See also* Part D, *infra*.

The Government disputes both of these propositions. It argues that there was evidence that the Wahl hair clippers came from China and that Congress has the power to regulate any activity so long as some thing involved in that activity once crossed any state or national border, regardless of when it did so. Govt. Br. 80-90. These arguments are wrong.

1. This Court Should Reject The Government's New Argument That The Hair Clippers Once Traveled In Interstate or Foreign Commerce. – The Government now asserts that "the clippers bore a notation indicating that they were made in China" (Govt. Br. 28), and that it is relying on the clippers to support Kathryn Miller's conviction. Govt. Br. 80 n.26. It claims that the clippers "traveled in interstate commerce." Govt Br. 13, 58, 79, 80, Attachment C. The Government never made this argument in the district court, and, accordingly, it should be deemed waived. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (holding that government waived one theory of the validity of stopping a car, where government did not present this theory at trial, and instead relied solely on another theory); *Giordenello v. United States,* 357 U.S. 480, 487-88 (1958) (holding government waived any argument that petitioner's arrest was legal apart from the validity of the arrest warrant, where it had not made any such argument at trial but instead had relied

on the validity of the warrant); *United States v. Hughes,* 606 F.3d 311, 317 (6th Cir. 2010); *United States v. Archibald,* 589 F.3d 289, 295-96 (6th Cir. 2009) (holding government waived argument that protective sweep was valid under theory it did not present at trial); *United States v. Barajas-Nunez,* 91 F.3d 826 (6th Cir. 1996) (holding government waived error in defendant's sentence by failing to object to downward departure at sentencing); *United States v. Jones,* 713 F.3d 336, 351 (7th Cir. 2013) (holding that the government either waived or forfeited an aiding and abetting theory it did not present at trial).

In any event, the "notation" on the clippers is not competent evidence. To the extent that the "notation" is an effort to show that the clippers were made in China, it is obvious hearsay and subject to the plain error rule. *United States v. Dunn,* 299 F.2d 548, 554 (6th Cir. 1962) (holding unobjected to, inadmissible hearsay prejudicial).

2. The Hair Clippers Were Not A "Thing In Commerce". – Kathryn Miller's opening brief demonstrates that the fact that something once traveled in interstate commerce does not permit Congress to regulate any subsequent use on the ground that such use "substantially affects" interstate commerce. K. Miller Br. 30-36. Further, a jurisdictional element that requires only that the activity involve some object that once crossed a state line is inadequate to render a statute otherwise having

nothing to do with interstate commerce constitutional. *Id.*

The Government concedes the first point. It disclaims any argument that Section 249(a)(2) is constitutional under the third area of Congressional power that *Lopez* identified. Govt. Br. 74 ("the final *Lopez* prong is not at issue in this case"), 88 (statute is not part of a larger economic regulation).[2] Instead, it argues that the hair clippers were a "thing in commerce" pursuant to the second area of Congressional power identified in *Lopez*. Govt. Br. 58 ("defendants used instrumentalities of, or things in, interstate commerce to effectuate the assault"), 73 ("the government proved beyond a reasonable doubt below that each of the assaults implicated instrumentalities of interstate commerce, or things in interstate commerce . . . ."), 80 ("In each of these circumstances, defendants used instrumentalities of interstate commerce, or things in interstate commerce, consistent with *Lopez*'s second prong, to effectuate the assault.").

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[2] Given this concession, the Government's reliance upon *Scarborough v. United States*, 431 U.S. 563 (1977) is, to say the least, baffling. Govt. Br. 81-82. That case involved a statute that prohibited the possession of a gun "in commerce or affecting commerce." *Id.* at 564. The Court plainly relied on the latter part of that disjunction in concluding that the possession in question met the requirement. *Id.* at 571-72. And, of course, *Scarborough* only involved a question of statutory interpretation, not constitutional power. *Cf. Lopez*, 514 U.S. at 559 (noting that prior cases had been unclear as to whether "an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause," but concluding that the proper test requires that the activity "substantially affect" interstate commerce).

The Government is just wrong. No court ever has held that a thing that once crossed a state line is "in commerce" forever. Rather, the courts have held that once a thing "in commerce" is held in a warehouse with no specific customer in mind, it leaves the flow of commerce and is longer "in commerce." *E.g.*, *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 285 (1975) (holding that acquired janitorial services companies doing business in southern California were not engaged "in commerce" even though they "used janitorial equipment and supplies manufactured in large part outside of California" because "they did not purchase them directly from suppliers located in other States," but instead "those products were purchases in intrastate transactions from local distributors"; "[b]y the time the [acquired] companies purchased their janitorial supplies, *the flow of commerce had ceased*.") (emphasis added); *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4, 9 n.7 (5th Cir. 1969) ("The fact that a firm manufactures products which are later sold to distributors in another state is not dispositive on the issue as to whether a subsequent sale to a retailer is in interstate commerce."); *Flotken's West, Inc. v. Nat'l Food Stores, Inc.*, 312 F. Supp. 136, 137 & n.4 (E.D. Mo. 1970) (holding that self-service retail supermarket's sales to its customers were not "in commerce" even though it "purchases in other states large quantities of merchandise which is shipped to its

warehouse in St. Louis and from there distributed in smaller lots to defendant's individual stores" and "some merchandise is drop-shipped from out of state to particular stores").

The Government offers no cases to support the proposition that a thing is "in commerce" forever, subject to plenary regulation over its use, after it has crossed a state or national line for the first time. *Cf. United States v. Angle*, 234 F.3d 326, 337 n.12 (7th Cir. 2000) ("We have some concern whether *Lopez* intended for category two to cover mere regulation (as opposed to protection) of things in interstate commerce."). Moreover, the Government presented no evidence in the court below as to how the hair clippers were acquired, much less that they were purchased from an out-of-state dealer. Accordingly, even if the Government had competent evidence that the hair clippers came from China, it would not be sufficient to demonstrate that they were a "thing in commerce."

The Government's argument here only reinforces the absence of any practical limits to its theory of national power. The power to regulate commerce it relies on is the power "to regulate and protect . . . persons or things in interstate commerce." Govt. Br. 72 (quoting *Lopez*). If an object that once has crossed a state line is a "thing in interstate commerce," then a person that once has crossed a state line must be a

"person in interstate commerce." Under the Government's theory, then, Congress can regulate the activities of any person that ever has crossed a state line. Indeed, the Government effectively concedes, by making no effort to rebut, Kathryn Miller's argument that this is precisely the consequence of accepting its extraordinary argument. K. Miller Br. 35-36.

The Government asserts that any jurisdictional element is sufficient to render any statute facially constitutional. It makes no effort to rebut Kathryn Miller's demonstration that such an argument is inconsistent with the Supreme Court's opinion in *Jones v. United States*, 529 U.S. 848 (2000). K. Miller Br. 31-32. Indeed, it never once *cites*, much less tries to distinguish or explain, *Jones*.

Moreover, the Government errs in asserting that this Court is powerless to declare a statute criminalizing the use of any weapon that "traveled in interstate commerce" facially unconstitutional. If the jurisdictional element is so weak that it fails to confine the statute to the regulation of activities that have some genuine and substantial connection to interstate commerce, then the statute itself (or that part of it that constitutes the defective jurisdictional element) is infirm. The Government's argument is that the Supreme Court can declare a statute regulating "gender-based animus-motivated violence" outside of Congress's Commerce Clause authority, but

that it is somehow precluded from declaring a statute regulating "gender-based animus-motivated violence by or against any person who ever has traveled in interstate commerce" unconstitutional. Since the two statutes would be, for all practical purposes, completely indistinguishable, the Government's argument simply makes no sense.[3]

C. The Use of Mail

Kathryn Miller's opening brief demonstrates that Congress did not intend to include mail as an "instrumentality of interstate commerce" in Section 249(a)(2)(b)(ii). K. Miller Br. 55-57. Specifically, she pointed out that Congress explicitly states in statutes when it wishes to regulate the use of the mails, and does not rely on broad phrases like "instrumentality of interstate commerce" to do so. The Government never responds to this argument at all. Govt. Br. 90-93.

Indeed, the one binding Sixth Circuit case the Government cites, *United States v. Cope*, 312 F.3d 757 (6th Cir. 2002) (Govt. Br. 90), further supports Kathryn Miller's

[3] Of course, even if the *entirety* of Section 249(a)(2) could not be declared facially unconstitutional, that does not mean that Section 249(a)(2)(B)(iii) cannot be so declared. *Cf.* Gillian Metzger, *Facial Challenges and Federalism*, 105 Col. L. Rev. 873, 885 (2005) (noting that, in the context of constitutional challenges, there is not much difference between application severability and text severability).

argument. The defendant in that case was convicted of the federal murder-for-hire statute which "requires that the actor 'use the mail *or* any facility in interstate or foreign commerce, with intent that a murder be committed.'" *Id.* at 771 (quoting 18 U.S.C. § 1958(a)) (emphasis as in *Cope*). In rejecting the defendant's argument that the government's case failed because it did not show that the letters he mailed crossed an interstate boundary, this Court held that the term "in interstate or foreign commerce" modified "facility," and not "mail." *Id.* Thus, this Court held that the use of "mail" and the use of a "facility of interstate commerce" were two separate and distinct bases that Congress chose for exercising its authority. And, if the mail were inherently a "facility" of interstate commerce (or, as the Government argues here, an "instrumentality"), Congress would have been redundant in including both.

The other cases cited by the Government stand only for the proposition that Congress *can* regulate crimes that use the mails under its general power to create and regulate post offices, a point Kathryn Miller does not dispute, or that private mail services or the telephone have been found to be instrumentalities of interstate commerce. Neither point addresses the issue of statutory interpretation that Kathryn Miller's opening brief raises.

D. The Errors Were Prejudicial

Because of these fundamental errors in the court's denial of the motion to dismiss the indictment and its jury instructions, Kathryn Miller's conviction should be vacated. This is true *even if* the Government were correct on one of its Commerce Clause arguments. First, the Government has not even argued harmless error, and, accordingly, has waived any such argument even if it were available here. *United States v. Johnson*, 467 F.3d 559, 564 (6th Cir. 2006) ("[I]n relying on such a perfunctory discussion of harmless error, the government has effectively waived the argument on appeal.").

Moreover, the jury may have based its conviction of her on one of the erroneous theories (with respect to Count 2, either that any use of a car or any object that ever has crossed a state line is subject to plenary federal regulation). When the jury is presented with an invalid theory upon which a conviction can be based, that conviction must be overturned except, perhaps, if the presentation of the invalid theory was harmless error. *E.g.*, *Street v. New York*, 394 U.S. 576, 588 (1969) (overturning conviction of defendant under law prohibiting the desecration of a United States flag by words or act where defendant both burned a flag and spoke derisively about it; the speech was protected by the Constitution and it was possible the jury's conviction was

based upon the speech); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931) (overturning conviction for displaying a red flag for any of three reasons, including as a sign of opposition to organized government, because displaying a flag as a sign of opposition to organized government was protected by the Constitution and the jury may have convicted based upon that reason; "The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.").

Even if harmless error were applicable (*but see Street*, *supra*; *Neder v. United States*, 527 U.S. 1, 7 (1999)), the ruling regarding instrumentalities of interstate commerce was not rendered harmless by the ruling regarding things that traveled in interstate commerce, and vice versa. With respect to the clippers, for example, as set forth in Argument Part B.2 above, there was no competent evidence at all, much less the kind of overwhelming evidence that could justify a "harmless error" finding, that the hair clippers traveled in interstate commerce. Moreover, even if there had been

such evidence, it would *also* have to be obvious that the battery-powered hair clippers were a "weapon" of some kind. 18 U.S.C. § 249(a)(2)(B)(iii). While the jury's verdict indicates that it found that some "dangerous weapon" was used during the events in the Miller home on September 6, 2011 (the "September 6 Incident"), that could have been the scissors that were used rather than the hair clippers. Govt. Br. 29, 158. (The district court instructed that a "dangerous weapon" was a "weapon, device, instrument, material, or substance animate or inanimate, used, for or is readily capable of, causing death or serious bodily injury." Doc. No. 542, Page ID #7254 (9/12/12 Tr., p. 2329). It did not separately define "weapon" or "serious" bodily injury.)

In any event, it is impossible to say what jurisdictional hook the jury relied upon here. Accordingly, any error requires reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993) ("The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action . . . ") (emphasis in original).

II. THE GOVERNMENT'S RFRA ARGUMENTS ARE WRONG

Kathryn Miller's opening brief demonstrates that the court below erred in ruling that she had not raised a RFRA argument and in using the categorical approach rejected by the Supreme Court in assessing the application of RFRA in this case. K. Miller Br. 37-49. The Government echoes the district court's procedural ruling, and tries to defend its substantive holding with different arguments. Govt. Br. 128-35. These arguments lack merit.

A. The Government's Waiver Argument Is Baseless

The Government concedes that Kathryn Miller filed "a motion to join the amicus brief" (*id.* at 131) that specifically raised a RFRA challenge in the court below, but asserts that that motion was "improper" (*id.* n.38) and, because the court below did not grant it, a "nullity" (*id.* at 131). The Government does not explain why Kathryn Miller's motion was "improper."

The Government's skimpy argument does not bother to explain why a litigant needs permission from the court to join an argument made by someone else (be it another party, an amicus, or anyone else). Fed. R. Crim. P. 51(b) ("A party may preserve a claim of error by informing the court – when the court ruling or order is . . .

sought – of the action the party wishes the court to take . . . and the grounds."). In this Court, for example, most of the appellants in the consolidated appeals have specifically joined other appeal briefs. This Court has not granted permission for them to do so, and the Government has raised no objection.

Nor does the Government explain why Kathryn Miller should be punished here for the failure of the court below. Waiver is a doctrine that applies when a *party* fails to do something, not when a court so fails. The Government offers no suggestion as to what Kathryn Miller should have done to make her RFRA argument, short of simply repeating the argument in full in a separately-filed brief of her own. The doctrine of waiver does not require engaging in wasteful repetition.

Further, the Government can hardly claim that it was prejudiced by the RFRA argument. The Government itself made a motion to respond to the amicus brief making that argument (Doc. No. 118), and the court below granted that motion (Docket entry dated 4/24/2013). The Government filed a brief devoting nearly five pages to the substance of the RFRA argument. Doc. No. 144 at 10-14, Page ID ##1486-90.

Additionally, the district court addressed the argument on the merits. This, too,

preserves it for appeal. *United States v. Clariot,* 655 F.3d 550, 556 (6th Cir. 2011) ("The defendants argue that the United States failed to press this exclusionary-rule argument below. . . . No one disagrees that the district court addressed the issue . . . When a district court resolves an issue, the losing party can challenge it.").

Finally, the issue has been fully briefed on the substance in *this* Court. *See United States v. Pickett,* 941 F.2d 411, 415 (6th Cir. 1991) ("[W]e will address issues not raised below to the extent the issue is presented with sufficient clarity and completeness. Both parties have extensively briefed the issues at stake, and as the issues are wholly legal we see no advantage to remanding this case to the district court for further factfinding before passing judgment.") (internal quotation marks and citations omitted).

B. The Government's Substantive Arguments Are Meritless

The Government does not defend the district court's categorical approach to RFRA. To the contrary. Govt. Br. 133 (agreeing that RFRA analysis must proceed on a case-by-case basis). Instead, it offers two arguments on the substance. First, it argues that the September 6 Incident was not an "exercise of religion" because it was not a "practice" that was "sincerely held" and "rooted in" defendants' "own religious

beliefs." Govt. Br. 132-33. Second, it claims that the federal government has a compelling interest in preventing the religiously-motivated beard and hair-cuttings that were at issue in the September 6 Incident. *Id.* at 133-35.

1. Exercise of Religion. – As to the first argument, the Government ignores the actual definition of "exercise of religion" in the statute, analogous state statutes, and the case law. K. Miller Br. 47-48. As noted in Katherine Miller's opening brief, the "exercise of religion" under the First Amendment prior to RFRA, and the understanding of that phrase that RFRA restored, was any religiously-motivated conduct. To be sure, that does require that the underlying religious *belief* be sincerely religious. *Gen'l Conf. Corp. Of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010) (holding that RFRA is applicable when "'governmental action . . . substantially burden[s] . . . a religious belief . . . which . . . is sincerely held'") (quoting *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996)). But the Government concedes that the acts were so motivated and never has questioned that the religious beliefs were sincere. Indeed, that was their case in chief. Govt Br. 132 (alluding to "the fact that defendants' assaults were motivated by their religion").

The Government's insistence that a religious "practice" must be "sincerely held" makes little sense. How does one "sincerely hold" a "practice"? Religious

practices (*e.g.*, prayer) are *performed*, based upon beliefs that are held.[4]

Further, to the extent that the Government offers an explanation of why the "practices" were not "sincerely held," it only demonstrates how divorced its argument is from RFRA. It argues that "[d]efendants do not contend that their religion *required* them to commit the assaults," and explains that they "could have taken a variety of lawful actions to persuade the victims to accept Mullet's interpretation of scripture." Govt. Br. 132 (emphasis added).[5] But the statute protects any "exercise of religion," not "practices," and it protects exercises of religion "*whether or not* compelled by, or

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[4] The Government cites the Eighth Circuit's decision in *United States v. Ali*, 682 F.3d 705 (8th Cir. 2012) to support its argument that it is the "practice" that must be "sincerely held." *Ali* did state that as the standard once (*id.* at 710), but its actual analysis under RFRA applied the standard of whether the defendant's *belief* was sincerely held. *Id.* at 710 (vacating various orders of criminal contempt for Muslim criminal defendant's refusal to rise when the court convened; whether other Muslims stood was "irrelevant in the RFRA context so long as Ali's objection [to standing] was rooted in her own sincerely held religious beliefs"); *id.* at 710-11 ("the court erred by evaluating the orthodoxy and sophistication of Ali's belief, instead of simply evaluating whether her practice was rooted in her sincerely held religious beliefs."). The two cases that *Ali* cited for the proposition that the "practice" must be "sincerely held" both held that it is the beliefs that must be so held. *United States v. Zimmerman*, 514 F.3d 851, 852 (9th Cir. 2007); *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000).

[5] Of course, the Government also argues – without any acknowledgment of the obvious contradiction – that the religious leader of the Bergholz community had a "high degree of control over the other defendants" (Govt. Br. 61). *See also* Govt. Br. 20, 137-38, 140-42.

central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). *See* K. Miller Br. 38. Under the Government's odd theory, confession of sin would not be an exercise of religion because, after all, the penitent could have avoided the sinful conduct to begin with.

And since the conduct in question is an exercise of religion under the statute, the Government's prosecution here obviously substantially burdens that practice. Jail time and other criminal penalties are a substantial burden.

2. Compelling Interest. – The Government also insists that it has a compelling interest in preventing the particular beard and hair cutting attacks (although its argument here mentions little about the September 6 Incident in particular).[6] In addressing Kathryn Miller's argument that the federal government lacked a compelling interest in these particular assaults given the traditional role that states play in dealing with local crime, the Government points to non-binding cases

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[6] What it does say is misleading. The Government asserts that, in the September 6 Incident, the defendants "yelled accusations at Marty [Miller] about various alleged offenses against Mullet." Govt. Br. 30; *id.* at 113 n.33. The testimony cited actually refers to people talking about *Wilma* Mullet. This is part of a general pattern in the Government's brief of using "Mullet" in a vague and confusing manner. *See also*, *e.g.*, Govt. Br. 153 ("Mullet acknowledged as much in his telephone call from jail to Mullet."). And the Government's insistence that Eli Miller acknowledged his involvement is supported only by a completely irrelevant citation. Govt. Br. 31-32.

decided under the Freedom of Access to Clinic Entrances Act (only one of which involved a prosecution by the federal government), and to Section 245 of the penal code. Govt. Br. 133-35.

The Government's cases do not address the question of the state's primary role in addressing local crime. In any event, FACE involves a specific federal right (to "reproductive health services," including the termination of pregnancies) and its prohibitions extend beyond the type of local crime traditionally handled by states. 18 U.S.C. § 248(a)(1) (prohibiting "interfer[ing] with" someone by "physical obstruction" because that person is or has been "obtaining or providing reproductive health services"). Indeed, it was this type of obstruction that was at issue in the two FACE cases the Government cites. *American Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995) (noting, in a pre-enforcement action filed on the day that FACE was passed into law, that plaintiffs "do not 'condone . . . nonpeaceable or violent conduct,'" and, accordingly, "a proscription on violence and force cannot substantially burden [plaintiffs'] religious exercise."); *United States v. Brock*, 863 F. Supp. 851, 855 (E.D. Wisc. 1994) (defendants were blocking clinic entrances), *aff'd sub nom.*, *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996).

As for Section 245, the Government itself acknowledges that it "prohibit[ed]

only hate-based violence in connection with the victim's participation in specifically defined federal activities." Govt. Br. 68 n.20. Indeed, according to the Government, it was Section 245's limited focus on areas with a specific federal interest that led to the passage of Section 249. *Id.*; Govt. Br. 106 ("limited reach").

The Government insists that Congress intended the states to be responsible for the "overwhelming majority" of hate crimes, and that Section 249 merely permits federal resources to be used to assist the states. Govt. Br. 68-69. But a criminal statute is not a "narrowly-tailored" means of assisting the states since Congress can always use its spending power for that purpose.

The Government also asserts that a compelling interest here is supported by the fact that state authorities "actually requested" the federal government to assert authority here. Govt. Br. 135. It is unclear why the state's abdication of its responsibility to enforce its criminal law (*see* Govt. Br. 47-49) would create a compelling interest for the federal government. In any event, it would appear that the state's request here came somewhat as an afterthought. The first three certificates filed pursuant to Section 249(b) – filed with the initial complaint, the indictment, and the superseding indictment – had no reference at all to any such request; all three refer only to Section 249(b)(1)(D), permitting prosecution when in the public interest. Doc.

No. 1-1, Page ID #23 (signed on November 21, 2011); Doc. No. 10-1, Page ID #662 (signed on December 19, 2011); Doc. No. 88, Page ID #1211-12 (signed on March 23, 2012). *Compare* Doc. No. 91, Page ID #1215 (signed on April 16, 2012, and referring for the first time to Section 249(b)(1)(B) as well as Section 249(b)(1)(D)).

In response to Kathryn Miller's argument that her case does not involve the kind of animus against a religion that appeared to be the motivation for adopting Section 249 to begin with, the Government only asserts that the statute is broader than that. Govt. Br. 135. Perhaps so, but the question here is whether the federal government has a compelling interest in prosecuting those who participated in the September 6 Incident, not the scope of the statute. The Government and its amici emphasize that Congress was concerned with "bias crimes" and "hate crimes" because such crimes can affect entire communities and cause concern in others with similar characteristics that they may be victimized. Govt. Br. 67-69; Amicus Brief of the Anti-Defamation League, *et al.*, 22-23. Assuming *arguendo*, and despite the states' traditional responsibility for combating it, that reducing such crime would be a compelling interest for the federal government, the Miller children's misguided effort to get their parents to lead a righteous Amish life does not fit that mold.

Finally, the Government tries to avoid the consequences of its theory, arguing

that a circumcision would not "reasonably be considered 'violent'" because of parental consent. Govt. Br. 133. But, again, no form of the word "violent" appears in Section 249(a)(2). The statute is applicable whenever "bodily injury" is caused, and Kathryn Miller's opening brief demonstrated that reasonable people have concluded that parental consent for male circumcisions should be deemed legally insufficient (as it is for the criminal prohibition of female circumcision). K. Miller Br. 14. In any event, the Government does not dispute that the grandparent-driven circumcision that Kathryn Miller used in her opening brief (*id.* at 13) would violate Section 249.

III. THE GOVERNMENT'S WAIVER ARGUMENT WITH RESPECT TO THE JURY INSTRUCTIONS IS WRONG

Kathryn Miller adopts the arguments of her co-defendants regarding each of the other bases for reversal relevant to her appeal. She addresses here only the Government's contention that the defendants failed to object to the final jury instruction relating to causation and that, accordingly, that instruction can only be reviewed for plain error. Govt. Br. 105. As the Government's own brief demonstrates, the issue of the proper causation instruction was discussed at great length before the trial, with the court below rejecting defendants' proposed instructions and contentions, including the contention that "but-for" causation was

required. Govt. Br. 103-04. During the trial, the court below did not provide defendants with an opportunity to repeat those objections. The only additional discussion of the instructions came on the day before they were given, and the district court then only asked whether "we need to change anything *as a result of the evidence*." Doc. No. 541, Page ID #7195 (9/11/11 Tr., p. 2270) (emphasis added). The evidence obviously had not changed the legal arguments that the defendants previously had made regarding causation.

Rule 30(d), Fed. R. Crim. P., states that "[a]n opportunity must be given to object" to jury instructions. Assuming *arguendo* (as the Government apparently does) that the pre-trial discussion failed to constitute objections to the court's proposed jury instruction on causation, the court below did not comply with Rule 30(d). Accordingly, defendants cannot be prejudiced by any purported failure to object. *Cf.* Fed. R. Crim. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party."). Moreover, any objection after the court already had rejected defendants' contentions regarding causation before trial would have been futile.

Conclusion

Not surprisingly, the Government spends a great deal of space in its brief going over the details of each of the assaults for which the defendants were convicted in a standard effort to engender sympathy for the victims and antipathy for the defendants. It spends no time discussing the attack against David Wengerd on September 24, 2011 that was alleged in Count 3 of the superseding indictment (Doc. No. 87, Page ID ##1191, 1198-99) – also not surprising because the defendants were acquitted. Govt. Br. 6, 10. The facts of that attack differ little from the others, and may well have constituted an assault under state law. *E.g.*, Doc. No. 537, Page ID ##5923-5936 (9/6/11 Tr., pp. 1302-1315) (testimony of David Wengerd); *State v. Weiss*, 2010 WL 3722275 (Ohio Ct. App. Sept. 10, 2010) (affirming defendant's conviction for attempting to cause physical harm to another by throwing water balloons from an apartment balcony). The jury apparently concluded that the Government had not met one of the additional requirements of Section 249(a)(2), be it religious motivation, bodily injury, or some connection to interstate commerce. To our knowledge, those who were indicted in Count 3 for their attack on Mr. Wengerd have not been charged or convicted under state law or otherwise punished for that attack. And that is a direct consequence of the Government's decision to prosecute Mr. Wengerd's attackers

under federal law.

The judgment of the court below, and Kathryn Miller's conviction, should be reversed or vacated.

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Certificate of Compliance

I certify that the foregoing brief contains 6941 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).

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Certificate of Service

I certify that on March 31, 2014, 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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