UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, :
: **Judge Dan A. Polster**
Plaintiff, :
: **Case No. 5:11-CR-00594**
v. :
:
SAMUEL MULLET, SR., *et al.* :
:
Defendants. :

PROPOSED AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS

The Center for Individual Rights ("CIR") submits this proposed amicus brief in support of defendants' motion to dismiss. This brief focuses on the argument that the indictment does not allege circumstances meeting one of the requirements of the statute, and that the application of 18 U.S.C. § 249(a)(2) here exceeds Congress's enumerated powers under Article I, § 8 of the United States Constitution, and thus contravenes the Tenth Amendment. It also argues that the application of Section 249(a)(2) is prohibited by the Religious Freedom Restoration Act.

Introduction

In relevant part, section 249(a)(2) makes it illegal for anyone to

> willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person

if

> 1. The conduct . . . occurs during the course of, or as the result of, the travel of the defendant or the victim (a) across a state line or national border; or (b) using a channel, facility, or instrumentality of interstate or foreign commerce;
>
> 2. The defendant uses a channel, facility, or instrumentality of interstate commerce in

connection with the conduct.

3. In connection with the conduct . . . , the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce.

4. The conduct described . . . (a) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (b) otherwise affects interstate or foreign commerce.

18 U.S.C. § 249(a)(2)(B).

The superseding indictment (the "Indictment") in this case (Doc. No. 87) alleges that the defendants engaged in various religiously-motivated attacks (despite the apparent fact that both the defendants and the victims are Amish). Specifically, the indictment alleges that the defendants (1) on September 6, 2011 (the "Sept. 6 Attack"), hired a driver to transport them to and from the home of several victims, restrained them while at the home, and used a battery-operated hair clippers and a scissors to cut off the victims' beard and head hair (Indictment, Count 1, ¶¶ 9-11, 13); (2) placed a telephone call to entice a victim to hire a driver to visit the home of one of the defendants on September 24, 2011 (the "Sept. 24 Attack"), surreptitiously used a product designed to make that victim ill, restrained that victim and removed his beard and head hair (*Id.* ¶¶ 19-22); (3) on October 4, 2011 (the "Oct. 4 Attacks"), purchased a 8" horse mane shears, hired a driver to take them to and from the homes of other victims, restrained those victims, and removed their beard and head hair (*Id.* ¶¶ 24, 26-31); (4) enticed by letters another victim to visit a defendant on November 9, 2011 (the "Nov. 9 Attack"), restrained that victim (and another who tried to intervene), and removed his beard and head hair (*Id.* ¶¶ 39-41, 43-44).

Counts 2 through 6 of the indictment allege violations of Section 249(a)(2). Count 2 states that the conduct of the defendants in the Sept. 6 Attack "occurred as a result of travel [of the

defendants] . . . using an instrumentality of interstate and foreign commerce" and "employed dangerous weapons, to wit, a pair of scissors and Wahl battery-operated hair clippers which traveled in and affected interstate and foreign commerce" (Count 2 ¶¶ 4-5).

Count 3 focuses on the Sept. 24 Attack and alleges 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" (Count 3 ¶ 4).

Counts 4 and 5 summarize the Oct. 4 Attacks (each count identifying a different victim) and alleges that the 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" (Count 4, ¶¶ 4-5; *see also* Count 5, ¶¶ 4-5).

Count 6 describes the Nov. 9 Attack and alleges that the 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" (Count 6 ¶ 4).

The language in the indictment thus suggests (although it nowhere states) that the government is attempting to meet the "circumstances" requirement of Section 249(a)(2) by claiming that the indictment alleges circumstances meeting the requirements of Section 249(a)(2)(B)(i)(II) (conduct resulting from, or in the course of, travel using an instrumentality of interstate commerce)[1]

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1 Section 249(a)(2)(B)(i)(II) identifies conduct using a channel, facility, or instrumentality of interstate commerce that occurs "during the course of, or as the result of, the travel of the defendant or the victim" as within the statute. Section 249(a)(2)(B)(ii) identifies conduct in which the defendant uses a channel, facility, or instrumentality of interstate commerce "in connection with the conduct" as covered by the statute. The Indictment seems primarily to use the language of the former. Part I of the Argument section, which focuses on the phrase "instrumentality of interstate

and Section 249(a)(2)(B)(iii) (conduct using a dangerous weapon that traveled in interstate commerce). Defendants Samuel Mullet, Sr. and Lester Miller moved to dismiss the initial indictment on March 5, 2012. Doc. No. 73. Various other defendants have joined in that motion or filed their own.

Argument

Insofar as the indictment alleges violations of 18 U.S.C. § 249(a)(2), it should be dismissed because (1) the indictment does not allege circumstances meeting the requirements of Section 249(a)(2)(B)(i)(II) or use of an "instrumentality of interstate commerce" and (2) the statute is unconstitutional to the extent that it regulates only conduct meeting the requirement of Section 249(a)(2)(B)(iii) because it regulates conduct that does not substantially affect interstate commerce and thus lies outside Congress's commerce clause authority.

"The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). "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."

In *Lopez*, the Court identified three broad categories of activity that Congress may regulate under its commerce power. First, it could regulate the channels of interstate commerce. Second, it is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things

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commerce" is equally applicable to any effort to employ Section 249(a)(2)(B)(ii).

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 559.

I. THE ALLEGATIONS OF THE INDICTMENT DO NOT ALLEGE THE THE USE OF AN "INSTRUMENTALITY OF INTERSTATE COMMERCE"

In each of Counts 2 through 6, the indictment asserts that the conduct being described took place as a result of travel using an "instrumentality" of interstate commerce. The indictment does not identify that "instrumentality." In fact, only the allegations related to the Oct. 4 Attacks (summarized in Counts 4 and 5) identify anything that could even *possibly* be an "instrumentality" of interstate commerce, *viz.*, a "motor vehicle" and "horse trailer." Indictment, Count 1 ¶¶ 24, 31.

For each of the other attacks, the indictment simply alleges that someone "hired a driver to transport" people. *Id.* ¶¶ 9, 13, 43. There is no indication as to whether the driver used a horse and buggy, a car, a pedicab, or something else, much less is there anything more than a conclusory allegation that whatever was used was an "instrumentality" of interstate commerce. Indeed, for the Sept. 24 Attack (summarized in Count 3), there is not even that; the indictment only alleges that defendant Levi Miller placed a phone call to entice a victim "to hire a driver." *Id.* ¶ 20. There is no allegation that a driver was actually hired or used, much less what transportation vehicle might have been used if a driver was hired.

But even with respect to the Oct. 4 Attacks, where vehicles are identified, the allegations are inadequate. As noted previously, Congress has the authority to regulate and protect the "instrumentalities" of interstate commerce. But the examples provided by *Lopez* make clear that an "instrumentality of interstate commerce" is something that actually carries products or people and moves *in interstate commerce* or where the regulated conduct *threatens its ability* to move in

interstate commerce. *Lopez* cited two cases for the proposition that Congress can regulate and protect "instrumentalities" of interstate commerce, *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) and the *Shreveport Rate Cases*, 234 U.S. 342 (1914). *Lopez*, 514 U.S. at 558. In both of those 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. Thus:

> [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).

The indictment here provides no indication that the "motor vehicle" and "horse trailer" referred to in the allegations relating to the Oct. 4 Attacks – much less the unidentified vehicles in the other counts alleging a violation of Section 249(a)(2) – are themselves instrumentalities of interstate commerce of the kind identified in the cases cited by *Lopez*. *Cf. 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"). There is no allegation that the motor vehicle or horse trailer was *ever* used to transport goods or people in interstate commerce, much less that such interstate commerce is a significant use.

Moreover, the statute does not purport to *protect* an instrumentality's *ability* to move in interstate commerce (by, for example, protecting it from theft). *Cf. McHenry*, *supra*. A vehicle is

not subject to *plenary* regulation by Congress, simply because it is *capable* of traveling in interstate commerce. That would leave all cars, motorcycles, bicycles, etc. subject to complete control by Congress even when their use (as the allegations here suggest) has nothing whatsoever to do with either commerce or interstate transportation and the conduct being regulated does not threaten such use. It would be a gross misinterpretation of both Congress's words and the Court's precedents to conclude that all such vehicles were intended to be covered by Section 249(a)(2)(B)(i)(II). It also would contravene the rule against lenity in interpreting criminal statutes, the rule requiring interpretations that avoid serious Constitutional questions, and the rule disfavoring interpretations that significantly change the federal-state balance in the prosecution of crimes. *See generally Jones v. United States*, 529 U.S. 848, 911-12 (2000) (applying all three interpretive rules in narrowing the scope of the "used in commerce" element of the federal arson statute).[2]

Accordingly, the indictment lacks the "essential facts" to allege that the conduct took place as a result of, or during the course of, travel in an instrumentality of interstate commerce. Fed. R. Crim. Proc. 7(c)(1).[3] Each of the counts should be dismissed to the extent that they rely on allegations that the defendants and/or victims traveled in an instrumentality of interstate commerce. Since Counts 3 and 6 allege no other circumstance that meets the requirements of Section 249(a)(2), those counts

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[2] The Indictment also makes passing reference to a camera that came from out of state and the use of the United States mails. Indictment, Count 1, ¶¶ 18, 39-41. It is unclear what part of the statute these allegations relate to. Neither a camera nor a letter is an "instrumentality" of interstate commerce or a weapon. Moreover, Section 249(a)(2) does not authorize prosecution whenever the U.S. mails are used, and Congress did not purport to exercise its separate Article I authority to regulate the mails.

[3] If this Court were to disagree concerning the sufficiency of the indictment's allegations, it would be appropriate for it to exercise its authority to conduct a hearing to "'make preliminary findings of fact necessary to decide'" this question of law. *U.S. v. Dodson*, 2012 WL 553534, *2 (E.D. Mich. Feb. 21, 2012) (quoting *U.S. v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976)).

may be dismissed on this ground alone.

II. SECTION 249(a)(2) IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PURPORTS TO REGULATE CONDUCT SOLELY ON THE GROUND THAT OBJECTS USED MAY HAVE TRAVELED IN INTERSTATE COMMERCE AT SOME UNDETERMINED TIME IN THE PAST

Counts 2, 4, and 5 additionally allege that defendants used "dangerous weapons," *viz.*, a scissors and a Wahl battery-operated hair clippers in the Sept. 6 Attack (Count 2) and a 8" horse mane shears and the Wahl battery-operated hair clippers in the Oct. 4 Attacks (Counts 4 and 5). Skipping over whether a scissors and a hair-clipper qualify as "dangerous weapons" under the statute – and they are the only things identified in the allegations relating to the Sept. 6 Attack[4] – the indictment suffers from a more substantial flaw. Congress does not have the authority to regulate conduct just because it involves some object that crossed a state line at some point in the past.

In describing the third area of Congressional authority under the Commerce Clause, the power to regulate activities that substantially affect interstate commerce, the Court has stated that Congress may add a jurisdictional element that assures that each instance of the regulated activity has an effect on interstate commerce. *Lopez*, 514 U.S. at 561 (noting that the Gun-Free School Zones Act under consideration "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question *affects* interstate commerce") (emphasis added). But the Court has never said that any connection whatsoever to interstate commerce is sufficient.

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4 The government apparently does not contend that any scissors used in the Sept. 24 or Nov. 9 Attacks (Counts 3 and 6) is a dangerous weapon that traveled in interstate commerce. The allegations relating to each of those attacks states that the defendants used a scissors (Indictment, Count 1 ¶ 22, Count 3 ¶ 3, Count 6 ¶ 3), but neither Count 3 nor Count 6 alleges any use of a dangerous weapon that traveled in interstate commerce. The Indictment does not identify the difference between the scissors used in the Sept. 6 Attack (Count 2) and the ones used in these later attacks that permits the former to be deemed a "dangerous weapon."

E.g., *United States v. Morrison*, 529 U.S. 598, 612 (2000) ("[A] jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce") (emphasis added). *See also United States v. Stewart*, 348 F.3d 1132, 1135 (9th Cir. 2003) ("At some level, of course, *everything* we own is composed of something that once traveled in commerce. This cannot mean that everything is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless"); *United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002) (a "'jurisdictional element is not alone sufficient to render [a challenged statute] constitutional'") (*quoting United States v. Kallestad*, 236 F.3d 225, 229 (5th Cir. 2000)) (brackets in original).

This proposition is strongly supported by the Court's decision in *Jones v. United States*. There, 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 interstate shipments of natural gas. (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 855-56. Most importantly for purposes here, the Court held that an interpretation that would have included an arson of that house would have raised "grave and doubtful constitutional questions." *Id.* at 857. That is, a statute that *unambiguously* covered the arson of all buildings that received natural gas shipments in interstate commerce would be a constitutionally problematic statute. And that can only be because not every "jurisdictional element" that uses the words "interstate commerce" renders a statute a proper exercise of Congress's Commerce Clause power.

The Court has held that a jurisdictional element might demonstrate that the conduct that

Congress is regulating substantially *affects* interstate commerce by showing that it affects interstate commerce in each instance. 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 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 possession or 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 possession or 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.

Indeed, the prohibition of arson of houses that receive natural gas shipments 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 an effect on interstate commerce. Yet the Court in *Jones* still found that a statute prohibiting such arson would have been constitutionally problematic.

Here, the indictment alleges that the various "dangerous weapons" – *viz.*, one of the scissors, the horse mane shears, and the battery-operated clippers – traveled in interstate commerce. There is no allegation that any of the defendants purchased them in another state and transported them to Ohio, had them shipped from out of state, or even knew that they were manufactured in another state. There is no allegation as to *when* any of these "dangerous weapons" crossed a state line. Indeed, with respect to the scissors and clippers, there is no allegation as to when they were first possessed

by one of the defendants. The defendants' use of these items does not affect interstate commerce, and does not contribute to a substantial effect on interstate commerce or a substantial relationship with interstate commerce, any more than would their use of identical items that had never passed across a state line.

Accordingly, Section 249(a)(2)(B)(iii) does not set forth a connection to interstate commerce sufficient to demonstrate that Congress was exercising its authority to regulate activity that substantially *affects* interstate commerce and, thus, does not satisfy the Commerce Clause. To that extent, Congress exceeded its authority under the Article I, § 8, and the indictment should be dismissed to the extent that it is based on any allegations that defendants violated Section 249(a)(2) because they used dangerous weapons that had traveled in interstate commerce.

III. THE APPLICATION OF SECTION 249(a)(2) TO THESE FACTS WOULD VIOLATE THE RELIGIOUS FREEDOM RESTORATION ACT

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 neutral application unless the government demonstrates (that is, meets the burden 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).

By the indictment's own allegations, defendants here were engaging in conduct that they believed were required by their religious leader and his interpretation of scriptures. Indictment, General Allegations ¶ 4 (obligation of bishop was to ensure that members were living lives in a manner consistent with scriptural teachings and to ensure obeisance), Count 1 ¶ 3 (attacks were

"because of previous and ongoing religious disagreements" with victims), ¶ 4 (removal of beards and head hair chosen "because beards and head hair are symbols of the Amish religion"), and ¶ 5 (similar attacks planned on others "with whom there were previous and ongoing religious disagreements"). Thus, the attacks were part of an exercise of religion and a prohibition of that exercise substantially burdens it. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (exercise of religion need not be compelled by or central to a system of religious belief).

And while the government has, of course, a compelling interest in the prevention of serious physical attacks, RFRA requires that it have a compelling interest in the specific application of the rule to the defendants. 42 U.S.C. § 2000bb-1(b); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006) (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-1(b)(1) (adopting standard of *Yoder*).

Here, three substantial considerations militate against any compelling government interest in the specific instance, and demonstrate that the government will be unable to meet its RFRA burdens. First, although CIR does not condone any assault, it must be acknowledged that the assaults alleged here did not involve grave bodily injury; thus the government's interest must be deemed less than it would be in such cases.

Second, the federal government's interest in religiously-motivated assaults is relatively new. Section 249 was first passed in 2009. That the federal government felt no need to displace or supplement the handling of such matters by local authorities prior to that time strongly suggests that the government's interest is not compelling. *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"); *Merced*, 577 F.3d at 593 (ruling that the government lacked compelling interest in preventing animal sacrifice where "it is undisputed that [plaintiff] conducted animal sacrifices for sixteen years in [city] without incident.").[5]

Third, whatever interest the federal government has here pales in comparison to the states' general interest in preventing *all* assaults. It would be one thing if the law involved interstate conduct that no one state could prevent and/or the federal government were the only entity capable of

[5] To the extent that the federal government asserts a particular interest in preventing assaults that are religiously-motivated (or motivated by some other relatively immutable characteristic), it seems that the usual justification for such a particular interest is not present here. Perhaps there is a special interest of the federal government in assaults motivated by religious (or other) animus against the victims – although again, the relatively recent promulgation of such laws suggests otherwise. But these assaults were not motivated by religious *animus*; defendants plainly have nothing against the

regulating defendants' actions. That is not the case here. A state's desire to have the federal government take over some of its responsibilities does not create a compelling interest for the latter.

For these reasons, application of Section 249(a)(2) to the facts alleged in the indictment would violate RFRA.

Conclusion

For the foregoing reasons, defendants' motion to dismiss the Section 249(a)(2) claims in the indictment pursuant to Fed. Crim. Proc. 12(b)(3)(B) should be granted.

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