No. 16-4006

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RANDY JOE METCALF, A/K/A RANDY JOE WEYKER,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is the fourth case before a federal court of appeals—and the second case before this Court—to address the constitutionality of Section 249(a)(1) of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (Shepard-Byrd Act), Pub. L. No. 111-84, 123 Stat. 2835 (2009). Each court, including this one, has rejected defendants' challenge to Congress's authority under Section 2 of the Thirteenth Amendment to enact this statute.

A jury convicted defendant Randy Metcalf of one count of violating Section 249(a)(1), which prohibits willfully causing bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1). The evidence established that defendant repeatedly kicked and stomped on the head of an African-American man, Lamarr Sandridge, while yelling "die nigger." Prior to the attack, defendant spent the evening professing hatred for African-American people, offering to commit violence against them, proudly displaying his swastika tattoo, bragging about participating in cross burnings, and yelling racial slurs at Sandridge. Sandridge was seriously injured by the attack.

Defendant argues on appeal that Congress lacked the authority to enact Section 249(a)(1), the evidence was insufficient to sustain his conviction, and the court erred by not providing a requested jury instruction. These arguments lack merit. The United States requests oral argument of 15 minutes per side.

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JURISDICTIONAL STATEMENT

Defendant Randy Metcalf was indicted and convicted under the criminal laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on October 5, 2016. R. 149.[1] Defendant timely

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[1] Citations to "R. __, at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within the documents. Citations to "Br. __" refer to page numbers in defendant's opening brief. Citations to "Tr. __" are to page numbers in the transcript of the jury trial. Citations to "U.S. Ex. __" are to the government's exhibits admitted at trial.

filed a notice of appeal on October 20, 2016. R. 153. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether 18 U.S.C. 249(a)(1) is a valid exercise of Congress's power under Section 2 of the Thirteenth Amendment.

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968)

United States v. *Cannon*, 750 F.3d 492 (5th Cir.), cert. denied, 135 S. Ct. 709 (2014)

United States v. *Hatch*, 722 F.3d 1193 (10th Cir. 2013), cert. denied, 134 S. Ct. 1538 (2014)

United States v. *Maybee*, 687 F.3d 1026 (8th Cir.), cert. denied, 133 S. Ct. 556 (2012)

2. Whether the evidence was sufficient to support defendant's conviction.

United States v. *Maybee*, 687 F.3d 1026 (8th Cir. 2012)

United States v. *Spears*, 454 F.3d 830 (8th Cir. 2006)

3. Whether the district court abused its discretion in not providing a jury instruction on character evidence.

United States v. *Krapp*, 815 F.2d 1183 (8th Cir.), cert. denied, 484 U.S. 860 (1987).

STATEMENT OF THE CASE

A. Procedural History

1. On December 15, 2015, the United States filed a one-count indictment charging Randy Metcalf with violating Section 249(a)(1) of the Shepard-Byrd Act, 18 U.S.C. 249(a)(1), by willfully causing bodily injury to Lamarr Sandridge, an African-American man, because of his race. See R. 2.[2]

Prior to trial, defendant filed a motion to dismiss the indictment, arguing that Section 249(a)(1) exceeds Congress's legislative authority under the Thirteenth Amendment. R. 15. Defendant argued that recent Supreme Court decisions limiting Congress's authority to legislate under the Fourteenth and Fifteenth Amendments apply equally to the Thirteenth Amendment, and therefore Congress lacked the power to enact Section 249(a)(1). Defendant also argued that the statute is not aimed at ending slavery and violates principles of federalism. The United States opposed the motion. R. 16.

The court denied the motion to dismiss. R. 21. Recognizing that the Thirteenth Amendment permits Congress to "pass all laws necessary and proper

[2] Section 249(a)(1) provides: "Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person" shall be subject to various criminal penalties.

for abolishing all badges and incidents of slavery" (R. 21, at 2 (citation omitted)), including "threatened and actual violence" that "creates a race-based power dynamic of aggressor and victim" (R. 21, at 8), the court upheld the constitutionality of the statute. R. 21, at 8-9. The court determined that the Supreme Court cases cited by defendant do not disturb the "binding precedent" applicable to Congress's Thirteenth Amendment power. R. 21, at 6. Additionally, the court reaffirmed that violence was a "vital component[] of the institution of slavery," and therefore "targeting a victim because of any characteristic enumerated in § 249(a)(1)" is a badge of slavery. R. 21, at 8. Finally, the court concluded that "because the Constitution granted Congress the power to enact § 249(a)(1), the statute does not improperly intrude on the state police power and comports with the Tenth Amendment." R. 21, at 9-10.

2. A jury trial was held between March 28-30, 2016. R. 34-36. At trial, the parties stipulated to the first two elements of the offense charged—*i.e.*, that Metcalf *willfully* caused *bodily injury* to the victim. As a result, the central issue before the jury was whether Metcalf acted "because of" the victim's race. The government presented evidence of Metcalf's racial animus towards the victim through the testimony of six witnesses. Each of these witnesses was present the night of the attack and variously testified to witnessing Metcalf repeatedly express his hatred of African Americans; use racial epithets when speaking to and about

the victim; display his swastika tattoo and brag about participating in cross burnings; offer to commit violence against African Americans; and assault the victim by kicking and stomping on his head while screaming "die nigger." See Tr. 343-353.

The defendant sought to impeach the credibility of the government's witnesses during cross-examination and through the direct testimony of three witnesses. Tr. 227, 230, 289-292. The defendant also presented testimony to portray the assault as a non-race-based, alcohol-induced bar fight. Tr. 215-217, 229-230, 308, 316-318. Further, the defendant presented testimony from several acquaintances who testified that the defendant is not a racist person. Tr. 233-234, 242-243, 248-250, 257-258, 264, 276-277, 283-284.

At the close of the government's evidence, and again at the conclusion of trial, Metcalf moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, arguing that the evidence was insufficient to show that he acted because of the victim's race. Tr. 313, 334. The court determined both times that there was "more than sufficient evidence for this case to go to the jury." Tr. 314; accord Tr. 334.

3. On March 30, 2016, the jury found Metcalf guilty. R. 100. On April 13, 2016, Metcalf filed a motion for judgment of acquittal and, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33, again arguing that

there was insufficient evidence that he acted because of the victim's race. R. 105, at 3-5. The United States opposed the motion. R. 108. On April 20, 2016, the court denied the motion, finding that the evidence was more than sufficient to sustain the jury's verdict. R. 109, at 5-9. The court further concluded that "the evidence did not preponderate sufficiently heavily against the verdict to warrant a new trial" and "[n]o miscarriage of justice occurred." R. 109, at 10 (citation and internal quotation marks omitted).

On October 5, 2016, the court entered final judgment and sentenced Metcalf to 120 months' imprisonment. R. 149. On October 20, 2016, Metcalf filed a timely notice of appeal. R. 153.

B. Underlying Facts

1. Metcalf's Racial Hostility Before The Assault

In January 2015, Lamarr Sandridge was enjoying a drink with a friend at the Northside Bar in Dubuque, Iowa. Tr. 104-105. After his friend left, Sandridge struck up a conversation with two women, Sarah Kiene and Katie Flores, whose husband is friends with Sandridge. Tr. 105-107. The three chatted, had drinks, and played darts for the next several hours. Tr. 107. Sandridge is African-American. Kiene and Flores are white. Tr. 61.

The defendant was also at the Northside Bar that night, along with his fiancée, Noelle Weyker; a childhood friend, Jeremy Sanders; and Jeremy's son,

Joseph Sanders. These four socialized with each other while drinking and playing pool. Tr. 142, 316. All four are white, as was every other patron of the bar that night (except Sandridge). Tr. 29, 143.

Later in the evening, defendant came over to Flores, Kiene, and Sandridge and berated the two women for allegedly using some of the money his fiancée had put in the jukebox. Tr. 32-33, 123-125. Sandridge stepped in and, in front of Metcalf's white friends, reproached Metcalf for using profanity towards women and asked him to stop. Tr. 33, 69, 110, 146-147. Metcalf's anger then became tinged with racial animus—he began calling the women "nigger-loving whore[s]," "nigger lovers," and "nigger-loving cunts." Tr. 64, 123, 183-184, 194-195. After Flores apologized and offered Metcalf some money to avoid conflict, it appeared that the parties had made amends. Tr. 124, 193. But it soon became clear that this incident unleashed Metcalf's racial animosity, culminating in his racially motivated assault on Sandridge a few hours later. Tr. 193-197.

Following this confrontation, Metcalf started chatting with the bar owner, Ted Stackis. Tr. 35. He boasted to Stackis that he had burned crosses with the McDermott brothers, locally renowned white supremacists and self-proclaimed admirers of the Ku Klux Klan, who were convicted of hate crimes against African Americans in Dubuque in the late 1980s, including for burning a fifteen-foot tall cross in a public park in an attempt to intimidate African Americans from using the

park. Tr. 35. According to Stackis, Metcalf *bragged* about his participation in these infamous events. Tr. 37. Metcalf declared that he "hate[s] fucking niggers" and asked Stackis if he had "any you want me to take care of," offering to commit violence against African Americans. Tr. 35-36. Then he flashed a swastika tattoo and repeated, "I hate them fuckers." Tr. 39-40.

For the rest of the night, Metcalf repeatedly yelled racial epithets at Sandridge, Kiene, and Flores, loud enough for Ted Stackis to overhear at the other end of the bar. Tr. 33, 48, 125-126, 143-145, 149-150, 195-197. Among his friends, he also revealed a near obsessive animosity towards Sandridge, continuously talking about him as a "nigger" and seething "I hate them fucking niggers." Tr. 38, 40, 145. He "proud[ly]" showed his friends the swastika tattoo he had emblazoned on his stomach, declaring "this is what I'm all about." Tr. 149-150, 222-223. What's more, he again explicitly offered to "take care of" any African-American people for Jeremy Sanders. Tr. 149.

2. Metcalf Assaults Lamarr Sandridge, While Yelling "Die Nigger"

After a night of enduring derogatory insults, Kiene and Flores confronted Metcalf about his behavior. Tr. 196-197. Metcalf's fiancée began filming the verbal confrontation with her cell phone. Tr. 317. Flores took offense to this, and swatted the phone from her hand. Tr. 127. In response, Metcalf lunged at Flores, grabbed her by her hair, and threw her head into the bar, knocking down the

bartender who was attempting to stop the fight. Tr. 128. Sandridge attempted to prevent Metcalf from hurting Flores, but Jeremy Sanders grabbed Sandridge from behind and put him in a headlock. Tr. 150. Joseph Sanders then began repeatedly punching Sandridge in the face while his father held him. Tr. 150. When Jeremy Sanders finally released him, Sandridge lost consciousness and fell to the floor. Tr. 151; U.S. Ex. 1.[3]

This brief brawl ended quickly and immediately all was calm. Tr. 128. Metcalf got up from the floor and walked over to Sandridge's unconscious body. U.S. Ex. 1. Metcalf began viciously kicking and stomping on Sandridge's head, while shouting "die nigger." Tr. 85-86, 128. As the bartender testified, "the entire time" Metcalf was kicking and stomping on Sandridge, he was saying "fucking nigger, die nigger." Tr. 85-86.

After repeatedly stomping on Sandridge's head, Metcalf left the bar with his friends. Tr. 327. The bartender, a registered nurse, turned Sandridge over on his side to keep him from choking on his own blood and called the police. Tr. 85. Moments later, Metcalf reentered the bar. Tr. 327. After retrieving his coat, he went back to where Sandridge was lying on the floor bleeding and unconscious. For the second time, Metcalf kicked and stomped on Sandridge's head. Kiene tried

[3] U.S. Ex. 1 is a videotape of the assault, which was admitted as evidence and played to the jury at trial.

to save Sandridge by pushing Metcalf away. He responded by slapping her unconscious and leaving. U.S. Ex. 1.

After the assault, Metcalf ran away to Jeremy Sanders's house. Tr. 328. There, Metcalf stated that the "nigger" "got what he had coming to him." Tr. 154.

As a result of the assault, Sandridge was taken to the hospital. Tr. 88, 111. He suffered a fractured cheekbone, cuts on his eye and nose, bruising and swelling in his face, a blood clot in his eye, and a sprained ankle. Tr. 113-114, 187. He could not see out of one eye for days. Tr. 115. The injuries to his face made it very difficult to eat, which restricted him to an all-liquid diet. Tr. 115. At the time of trial, over a year after his assault, he still suffered from the effects of the assault. Tr. 115.

When the police arrived at the scene, they recovered security camera footage. The tape shows the assault in full (without sound). U.S. Ex. 1-4. Over the next several weeks, the police interviewed all of the witnesses. Both Joseph and Jeremy Sanders pled guilty to misdemeanor assault in state court, and subsequently testified in this case before the grand jury and at trial. Tr. 152, 219, 221. Neither entered a cooperation agreement with state or federal authorities, nor received any promises that their testimony would affect their current charges or jail time. Tr. 152, 185, 221.

SUMMARY OF THE ARGUMENT

1. This is the second time this Court has addressed the constitutionality of Section 249(a)(1) of the Shepard-Byrd Act. See *United States* v. *Maybee*, 687 F.3d 1026 (8th Cir. 2012). In *Maybee*, this Court rejected a "narrow challenge" to the constitutionality of that provision. *Id.* at 1031. But defendant's broader challenge here fares no better. Indeed, the same arguments have been rejected by the Fifth and Tenth Circuits. See *United States* v. *Cannon*, 750 F.3d 492 (5th Cir. 2014); *United States* v. *Hatch*, 722 F.3d 1193 (10th Cir. 2013). As those courts correctly concluded, Congress had the constitutional authority to enact Section 249(a)(1) under Section 2 of the Thirteenth Amendment.

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 439-440 (1968), the Supreme Court held that Congress may rationally determine the "badges and the incidents of slavery" and "pass all laws necessary and proper for abolishing" them. Ample historical evidence shows that race-based violence was a pivotal feature of American slavery, making it one of the "badges and incidents" of that institution. The Court's binding precedent in *Jones*, therefore, makes clear that Congress has the authority to enact Section 249(a)(1).

Defendant asserts that *Jones* no longer reflects the correct analysis to assess the constitutionality of legislation passed under Section 2 of the Thirteenth Amendment. That argument has no bearing on this Court, which is bound by

Jones and its progeny. In any event, defendant offers no persuasive reason to overrule and replace *Jones* with the Fourteenth Amendment's congruence and proportionality test, see *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the "current needs standard" applicable to select Fifteenth Amendment legislation, see *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), or any other test. The Thirteenth Amendment has a different history and purpose from the Fourteenth and Fifteenth Amendments, and it alone among those Amendments applies to private conduct. Regardless, even under *City of Boerne* and *Shelby County*, Congress had sufficient authority to enact Section 249(a)(1). Finally, because the Thirteenth Amendment permits Congress to enact Section 249(a)(1), the law does not violate principles of federalism.

2. Ample evidence supports the jury's verdict that defendant willfully caused bodily injury to the victim *because of* the victim's race when he stomped and kicked Sandridge while he was lying unconscious on the floor. The jury heard testimony that shortly before the assault Metcalf repeatedly referred to the victim as a "nigger"; proudly displayed his swastika tattoo and declared "that's what he's all about"; bragged about cross burnings; and reiterated how he hated "niggers" and offered to assault them. Further, defendant yelled "die nigger" while he was stomping on Sandridge's head. As the district court twice concluded, a reasonable

jury could infer from this evidence that Metcalf attacked Sandridge by kicking and stomping on his head *because of* Sandridge's race.

3. The district court did not abuse its broad discretion in formulating jury instructions by declining to give defendant's requested jury instruction on character evidence. Metcalf requested that the district court instruct the jury that it may consider evidence of his alleged "reputation and character for lack of racism" and that such evidence alone may create a reasonable doubt as to defendant's guilt. This Court, however, disfavors instructing the jury that character evidence alone is sufficient to create reasonable doubt. Additionally, the instructions given adequately instructed the jury to consider the testimony that defendant was not a racist person in determining whether the government proved that he acted because of the victim's race.

ARGUMENT

I

SECTION 249(a)(1) IS A VALID EXERCISE OF CONGRESS'S POWER UNDER SECTION 2 OF THE THIRTEENTH AMENDMENT

A. Standard Of Review

Questions of law, including the constitutionality of a statute, are reviewed *de novo*. See, *e.g.*, *United States* v. *Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012). This Court may strike down an act of Congress "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *National Fed'n of*

Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012) (brackets, citation, and internal quotation marks omitted).

B. Section 249(a)(1) Is A Valid Exercise Of Congress's Power Under Section 2 Of The Thirteenth Amendment

Section 249(a)(1) makes it a crime to willfully cause bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." The statute is a valid exercise of Congress's Thirteenth Amendment power to eradicate the badges and incidents of slavery, including race-based violence.

1. Section 1 of the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This clause abolished the institution of slavery as it existed in the United States at the time of the Civil War, and also "establish[es] and decree[s] universal civil and political freedom throughout the United States." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

Section 2 of the Thirteenth Amendment grants Congress the "power to enforce" Section 1's ban on slavery "by appropriate legislation." Soon after the passage of this Amendment, the Supreme Court held that Section 2 empowers Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. at 20. Nearly a century later, in *Jones* v. *Alfred H. Mayer Co.*, the Supreme Court

confirmed that Section 2 grants Congress the power to do "much more" than abolish slavery, reaffirming Congress's authority to enact "all laws necessary and proper for abolishing all badges and incidents of slavery." 392 U.S. 409, 439 (1968) (emphasis omitted) (quoting *The Civil Rights Cases*, 109 U.S. at 20).[4] The Court also made clear that, under the Thirteenth Amendment, it is Congress that "determine[s] what are the badges and the incidents of slavery." *Id.* at 440.[5] Accordingly, "if Congress rationally determines that something is a badge or incident of slavery, it may broadly legislate against it through Section 2 of the Thirteenth Amendment." *United States* v. *Hatch*, 722 F.3d 1193, 1201 (10th Cir. 2013); see also *United States* v. *Cannon*, 750 F.3d 492, 501 (5th Cir. 2014)

[4] As this Court has recognized, the "phrase 'badges and incidents of slavery' is a term of art * * * analogous to the burdens and disabilities of a servile character * * * and other servitudes, inequalities, and observances which were imposed by [law] or by long custom which had the force of law." *Maybee*, 687 F.3d at 1030 n.2 (citation and internal quotation marks omitted). After the Reconstruction Amendments outlawed the legal apparatuses that enforced an inferior status on freed slaves, the term "came to mean 'less formal but equally virulent means—including widespread violence and discrimination, disparate enforcement of racially neutral laws, and eventually, Jim Crow laws—to keep the freed slaves in an inferior status.'" *United States* v. *Cannon*, 750 F.3d 492, 501 (5th Cir. 2014) (quoting Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 581-582 (2012)).

[5] The Court in *Jones* upheld the constitutionality of 42 U.S.C. 1982, which prohibits racial discrimination in the sale of property. 392 U.S. at 413.

(Thirteenth Amendment jurisprudence "afford[s] Congress ample deference in defining what private actions qualify as 'badges' and 'incidents' of slavery.").

The Court in *Jones* rooted its holding on the scope of Congress's Section 2 authority in the particular text and history of the Thirteenth Amendment. It noted that the Amendment's supporters and opponents alike repeatedly emphasized that the Amendment would grant Congress broad power to enact positive legislation "for the protection of Negroes in every State." *Jones*, 392 U.S. at 439. The Court relied heavily on the views of Senator Lyman Trumbull, the Chairman of the Senate Judiciary Committee, who "brought the Thirteenth Amendment to the floor of the Senate in 1864" and was the "chief spokesman" of "the authors of [that] Amendment." *Id.* at 439-440. As the Court noted, Senator Trumbull defended the constitutionality of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, by explaining that Section 2 of the Thirteenth Amendment granted Congress broad power to identify the "badges and incidents of slavery." *Id.* at 440. The Court quoted Senator Trumbull as follows:

> I have no doubt that under [Section 2] * * * we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of [the Thirteenth A]mendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end.

Ibid. (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866)). The Court went on to declare that "[s]urely Senator Trumbull was right" and that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Ibid.*[6]

Since *Jones*, the Supreme Court has repeatedly reaffirmed and applied this broad interpretation of Congress's Section 2 powers. For example, in *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971), the Court upheld the constitutionality of 42 U.S.C. 1985(3), which creates a cause of action for conspiracy to violate civil rights. The Court explained that under Section 2, "the varieties of private conduct

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[6] In reaching this conclusion, the Court expressly overruled *Hodges* v. *United States*, 203 U.S. 1 (1906), an earlier case in which it had invalidated the conviction of "a group of white men [who] had terrorized several Negroes to prevent them from working in a sawmill." *Jones*, 392 U.S. at 441 n.78. The Court rejected its prior conclusion in *Hodges* that "only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment." *Ibid.* The Court observed that *Hodges*'s "concept of congressional power under the Thirteenth Amendment [is] irreconcilable with the position taken by every member of this Court in *The Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself." *Id.* at 443-444 n.78. As the Tenth Circuit explained, the ultimate infirmity with the Court's decision in *Hodges* was that it "gave no weight to the element that distinguished a civil rights offense from an ordinary offense, namely, that the defendant acted because of the victim's race." *Hatch*, 722 F.3d at 1199 (citing Justice Harlan's dissenting view in *Hodges* that the challenged statute was constitutional because it required a defendant to act "because of" race).

that [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude." *Griffin*, 403 U.S. at 105. The Court also reaffirmed *Jones*'s statement that Congress is empowered "rationally to determine what are the badges and the incidents of slavery" and "translate that determination into effective legislation." *Ibid.* (quoting *Jones*, 392 U.S. at 440). The Court reached a similar conclusion in *Runyon* v. *McCrary*, 427 U.S. 160, 168, 179 (1976), where it relied on *Jones* to uphold 42 U.S.C. 1981's prohibition of racial discrimination in the making and enforcement of private contracts.[7]

Following this settled precedent, every court of appeals that has addressed the constitutionality of Section 249(a)(1) has upheld that provision under *Jones*'s interpretation of Section 2.[8] This Court, in *Maybee*, recognized Congress's power

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[7] See also *City of Memphis* v. *Greene*, 451 U.S. 100, 125 n.39 (1981) (quoting *Jones*, 392 U.S. at 440, for the proposition that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 302 n.41 (1978) (opinion of Powell, J.) (citing *Jones* and noting "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures"); *Palmer* v. *Thompson*, 403 U.S. 217, 226-227 (1971) (noting that under *Jones*, Congress has broad power to outlaw "badges of slavery").

[8] Most recently, the United States District Court for the District of South Carolina also rejected a challenge to the constitutionality of Section 249(a)(1) in the trial of Dylann Roof, accused of violating the statute by murdering nine

(continued…)

under Section 2 to rationally determine the badges and incidents of slavery and to abolish them. 687 F.3d at 1031. This Court explained, "Congress rationally could designate as a badge and incident of slavery the willful infliction of injury on a person because of that person's race and because that person has enjoyed a public benefit." *Id.* at 1030-1031.

Although *Maybee* addressed a narrower challenge to the constitutionality of Section 249(a)(1) than this case presents,[9] the Fifth and Tenth Circuits have squarely rejected the same arguments defendant makes here. In *Cannon*, the Fifth Circuit held that Section 249(a)(1) "is a valid exercise of congressional power because Congress could rationally determine that racially motivated violence is a badge or incident of slavery." 750 F.3d at 505. The court noted that such "violence was essential to the enslavement of African-Americans and widely employed after the Civil War in an attempt to return African-Americans to a position of de facto enslavement." *Id.* at 502. Further, the court expressly rejected

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(…continued)
parishioners as they worshipped in the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. Order & Op., *United States* v. *Roof*, No. 2:15-cr-00472-RMG (D.S.C. Dec. 5, 2016), ECF No. 735.

[9] In *Maybee*, the defendant argued that Congress lacked power to enact Section 249(a)(1) because, unlike 18 U.S.C. 245(b)(2)(B), it does not include, as an element of the offense, that the defendant acted because the victim was enjoying a public benefit. 687 F.3d at 1031.

the argument that the changing "legal landscape regarding the Reconstruction Amendments" called for the court to abandon its prior precedents and the Supreme Court's binding precedent in *Jones*. *Id.* at 505.

Likewise, the Tenth Circuit in *Hatch* held that "the Supreme Court has never revisited the rational determination test it established in *Jones*," and "none of the [Court's recent] federalism authorities" undermines *Jones*. 722 F.3d at 1204. Further, the court found that *Jones* does establish limiting principles and that Section 249(a)(1) respects those limits by punishing only those who commit race-based violence, as such violence is "intended to enforce * * * social and racial superiority" and so is a badge or incident of slavery. *Id.* at 1206; see also *id.* at 1205.[10]

2. In 2009, pursuant to this settled authority, Congress enacted the Shepard-Byrd Act. Congress expressly found that race-based violence was an intrinsic feature of slavery:

> For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage.

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[10] Additionally, this Court and others have applied *Jones*'s analysis of Section 2 to uphold 18 U.S.C. 245(b)(2)(B)—a statute similar to Section 249(a)(1) that also prohibits certain forms of racially motivated violence. See, *e.g.*, *United States* v. *Bledsoe*, 728 F.2d 1094, 1096-1097 (8th Cir.), cert. denied, 469 U.S. 838 (1984); *United States* v. *Allen*, 341 F.3d 870, 883-884 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004); *United States* v. *Nelson*, 277 F.3d 164, 173-191 (2d Cir.), cert. denied, 537 U.S. 835 (2002).

> Slavery and involuntary servitude were enforced, both prior to and after the adoption of the [Thirteenth A]mendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry.

Shepard-Byrd Act, Pub. L. No. 111-84, § 4702(7), 123 Stat. 2836.

Congress's conclusion that race-based violence was a core feature of slavery is amply supported by historical evidence. See, *e.g.*, *United States* v. *Nelson*, 277 F.3d 164, 189-190 (2d Cir. 2002) (citing modern and antebellum sources discussing the issue). As the Tenth Circuit stated, "physically attacking a person of a particular race because of animus toward or a desire to assert superiority over that race is a badge or incident of slavery." *Hatch*, 722 F.3d at 1206. The court explained:

> The antebellum North Carolina Supreme Court * * * characterized unrestrained master-on-slave violence as one of slavery's most necessary features. *State v. Mann*, 13 N.C. (2 Dev.) 263, 1829 WL 252, at *2-3 [(1829)]. "[U]ncontrolled authority over the body," it said, is the only thing "which can operate to produce" a slave's necessary obedience. *Id*. at *2. "The power of the master must be absolute, to render the submission of the slave perfect." *Ibid*. * * * Just as master-on-slave violence was intended to enforce the social and racial superiority of the attacker and the relative powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.

Ibid.

Race-based violence persisted following passage of the Thirteenth Amendment, when "a wave of brutal, racially motivated violence against African

Americans swept the South" in an effort "to perpetuate African American slavery." Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 11-12 (1995). This "post-Civil War violence," together with establishment of the Black Codes in southern States, "reflected whites' determined resistance to the establishment of freedom for African Americans." *Ibid.*; see generally Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 119-123 (1988).

Race-based violence continued into the 20th century and intensified during the Civil Rights Movement of the 1950s and 1960s. As the Supreme Court explained in *Virginia* v. *Black*, 538 U.S. 343, 352-353 (2003), the Ku Klux Klan instituted a "reign of terror" in the South to thwart Reconstruction and maintain white supremacy. The Court noted that "[v]iolence was * * * an elemental part" of the Klan, describing its "tactics such as whipping, threatening to burn people at the stake, and murder." *Id.* at 353-354; see also *id.* at 355 (noting "the long history of Klan violence"). The Court further observed that its decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and the Civil Rights Movement of the 1950s and 1960s "sparked another outbreak of Klan violence," including "bombings, beatings, shootings, stabbings, and mutilations." *Black*, 538 U.S. at 355. In light of this evidence, Congress was well within its authority to conclude that "eliminating racially motivated violence is an important means of eliminating, to

the extent possible, the badges, incidents, and relics of slavery and involuntary servitude." Shepard-Byrd Act, § 4702(7), 123 Stat. 2836; accord § 4702(1) and (8), 123 Stat. 2835-2836.

Moreover, Congress weighed extensive evidence of the continued prevalence of hate crimes today. The House Report stated that "[b]ias crimes are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86, 111th Cong., 1st Sess. 5 (2009) (House Report). Specifically, it noted that "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and that in 2007 alone the FBI documented more than 7600 hate crimes, including nearly 4900 (64%) motivated by bias based on race or national origin. *Ibid.* Further, a 2002 Senate Report, addressing proposed legislation that ultimately became Section 249, noted that "the number of reported hate crimes has grown by almost 90 percent over the past decade," averaging "20 hate crimes per day for 10 years straight." S. Rep. No. 147, 107th Cong., 2d Sess. 2 (2002).

Finally, *Jones* itself supports Congress's determination that race-based violence is a badge or incident of slavery. *Jones* upheld Congress's determination that "the exclusion of Negroes from white communities" through restrictions on sales of property was among the "badges and incidents of slavery." 392 U.S. at 422, 441-443. It explained that "when racial discrimination herds men into ghettos

and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery" and that, "[a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." *Id.* at 442-443. Surely, if Congress may determine that racial restrictions on sales of property are badges and incidents of slavery, then it is entirely reasonable for Congress to determine that race-based violence is, as well.

3. Defendant concedes that *Jones* has direct application to this case and that the Supreme Court has *not* overruled *Jones*. Br. 15, 18-19. This settles the matter. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Therefore, even assuming more recent Supreme Court cases undermine *Jones*'s approach to the Thirteenth Amendment—which, as discussed below, they do not—it is not for this Court to "blaze a new constitutional trail simply on that basis." *Hatch*, 722 F.3d at 1204; see also *Cannon*, 750 F.3d at 505 ("Even if the legal landscape regarding the Reconstruction Amendments has changed * * * , absent a clear directive from the Supreme Court, we are bound by prior precedents.").

C. Defendant's Arguments Against The Constitutionality Of Section 249(a)(1) Are Unavailing

Notwithstanding settled law addressing Congress's power under Section 2, defendant argues that Section 249(a)(1) exceeds congressional authority by claiming: (1) the Supreme Court has implicitly overruled *Jones* by "pull[ing] back on Congress's power to legislate under the other 'Reconstruction Amendments'" in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013) (Br. 15-19); (2) race-based violence is not a badge or incident of slavery (Br. 21-22); and (3) the statute violates principles of federalism by creating a general federal police power (Br. 22-24). Each of these assertions is incorrect.

1. First, defendant argues that this Court should apply the congruence and proportionality test from *City of Boerne* and the "current needs" standard of *Shelby County*, rather than *Jones*'s rational basis test, to Congress's exercise of its power under Section 2 of the Thirteenth Amendment. There is no basis to apply either the *City of Boerne* test or the *Shelby County* test in the context of the Thirteenth Amendment. And even if these tests did apply, Section 249(a)(1) easily satisfies them.

a. In *City of Boerne*, the Court addressed whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. That provision

gives Congress the "power to enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment, including those rights protected by the Due Process and Equal Protection Clauses. The Court held that Congress has the power under Section 5 to enact legislation aimed at deterring or remedying violations of the core rights guaranteed by the Fourteenth Amendment's substantive clauses, "even if in the process it prohibits conduct which is not itself unconstitutional" and intrudes into traditional areas of state autonomy. *City of Boerne*, 521 U.S. at 518. But it made clear that this legislative power does not include the authority to expand or redefine the substantive scope of those rights. *Id.* at 519. The Court, therefore, held that legislation enforcing Fourteenth Amendment guarantees must have "congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

The Court supported its view that Section 5 gives Congress "remedial, rather than substantive" authority by carefully examining the drafting history of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520-524. It emphasized that Congress had rejected an early draft of the Amendment that was seen as bestowing plenary authority to "legislate fully upon all subjects affecting life, liberty, and property." *Id.* at 521 (quoting Cong. Globe, 39th Cong., 1st Sess. 1082 (1866) (statement of Senator William Stewart)); see also *id.* at 520-522. It also noted that

the revised proposal retained the judiciary's "primary authority" to interpret the scope of the Fourteenth Amendment's substantive prohibitions on state action. *Id.* at 523-524. Finally, the Court emphasized that its interpretation of Congress's authority was consistent with its prior decisions stretching from *The Civil Rights Cases* through the 20th century. *Id.* at 524-527 (noting its consistent view that the Section 5 power was "remedial," "corrective," and "preventive," but not "definitional").[11]

Nothing in *City of Boerne* undermines the Supreme Court's decision in *Jones*. *City of Boerne* did not cite *Jones* or mention the Thirteenth Amendment. Nor did it state or imply that its ruling would have any effect on the established line of cases recognizing Congress's power to rely on Section 2 of the Thirteenth Amendment to identify—and legislate against—the "badges and incidents of slavery." Indeed, *City of Boerne* emphasized that its holding was consistent with the Court's prior civil rights decisions. 521 U.S. at 524-529.

Nor did *City of Boerne* undermine the historical analysis underpinning *Jones*. As discussed above, the Court's decision in *Jones* relied principally on its

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[11] The Court ultimately concluded that RFRA, as applied to state governments, failed the congruence and proportionality test because there was little support in the legislative record for the concerns underlying the law, its provisions were out of proportion to its supposed remedial object, and it was "not designed to identify and counteract state laws likely to be unconstitutional." *City of Boerne*, 521 U.S. at 534; see also *id.* at 530-535.

analysis of congressional debates surrounding the enactment of the Thirteenth Amendment, placing particular emphasis on Senator Trumbull's statements that the purpose of the Amendment was to empower Congress "to decide" what legislation would be "appropriate" to achieve its broad ends, and "to adopt such appropriate legislation as it may think proper." *Jones*, 392 U.S. at 440 (citation omitted). *City of Boerne* did not question *Jones*'s analysis of the Thirteenth Amendment. Instead, it relied on the quite different history surrounding the later passage of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 520-524. There, the Court explained that the critical events were (1) the rejection of the proposal to grant Congress "plenary" legislative authority and (2) the substitution of new language that was understood to restrain Congress's ability to intrude on States' rights or the traditional power of the judiciary to determine the scope of substantive constitutional rights. *Ibid.* Defendant offers no reason why *City of Boerne*'s Fourteenth Amendment analysis undermines *Jones*'s review of the history and original understanding of the Thirteenth Amendment.

Important differences between the Thirteenth and Fourteenth Amendments further confirm that *City of Boerne* leaves *Jones* undisturbed. While the parallel enforcement provisions in each Amendment both authorize Congress to pass "appropriate" legislation to "enforce this article," the underlying provisions in each Amendment are fundamentally different in nature. The Thirteenth Amendment's

substantive ban on slavery permits Congress to legislate against "the badges and incidents of slavery"—a limited category that requires fact-specific determinations that are inherently legislative. Indeed, the Supreme Court expressly referred to "the inherently legislative task of defining 'involuntary servitude'" in *United States* v. *Kozminski*, 487 U.S. 931, 951 (1988), and the Second Circuit has noted that "the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative," *Nelson*, 277 F.3d at 185 n.20.[12]

By contrast, the Fourteenth Amendment's substantive protections against state action violating the Due Process, Equal Protection, and Privileges and Immunities Clauses sweeps far broader than the substantive scope of the Thirteenth Amendment, and involves legal rights that have always been the province of the judiciary. *City of Boerne*, 521 U.S. at 520-524. Moreover, unlike the Thirteenth Amendment, which Congress relies on to regulate private conduct, the Fourteenth Amendment applies only to state action, which means legislation under this Amendment will often have a clear and direct impact on state sovereignty.[13]

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[12] In *Nelson*, the Second Circuit expressly rejected the argument that *City of Boerne* applies to the Thirteenth Amendment. 277 F.3d at 185 n.20.

[13] The Fifteenth Amendment also only applies to governmental action, but has a narrower substantive focus than the Fourteenth Amendment. Arguably, therefore, federalism principles counsel that Congress has the greatest latitude to legislate under the Thirteenth Amendment, and greater latitude to legislate under the Fifteenth Amendment than the Fourteenth Amendment.

Accordingly, *City of Boerne* recognized that Congress lacks authority to redefine Fourteenth Amendment rights—and that its legislative power thus extends only to preventive or remedial measures that are congruent and proportional to those rights as interpreted by the courts. *Id.* at 520, 524. Nothing in that conclusion is inconsistent with *Jones*'s recognition that Congress has a broader role in determining what constitutes the "badges and incidents of slavery" for purposes of the Thirteenth Amendment. In other words, what is "appropriate" legislation under the Thirteenth Amendment is not necessarily "appropriate" under the Fourteenth Amendment. Defendant's argument that the same standard should apply in the different contexts of these two Amendments thus ignores the "crucial disanalogy between the[se] Amendments as regards the scope of the congressional enforcement powers these amendments, respectively, create." *Nelson*, 277 F.3d at 185 n.20.

Finally, even if *City of Boerne* applied in the Thirteenth Amendment context, Section 249(a)(1)'s prohibition on racially motivated violence would still pass constitutional muster. Section 249(a)(1) is congruent and proportional to Congress's power to eradicate the badges and incidents of slavery. Congress's enforcement power under the Reconstruction Amendments "is broadest when directed to the goal of eliminating discrimination on account of race." *Tennessee* v. *Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (citation and internal

quotation marks omitted). Indeed, when Congress "attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Oregon* v. *Mitchell*, 400 U.S. 112, 129 (1970) (opinion of Black, J.).

Here, Congress enacted Section 249(a)(1) based on its well-supported finding that race-based violence was an intrinsic feature of slavery in the United States and continues today. See pp. 20-24, *supra*. Section 249(a)(1)'s response to that problem is direct and limited. Accordingly, it cannot be said that Section 249(a)(1) is so "[l]acking" in proportionality with the "injury to be prevented or remedied" that it is properly considered a substantive redefinition of the rights protected by the Thirteenth Amendment. See *City of Boerne*, 521 U.S. at 520. On the contrary, Section 249(a)(1) is narrowly targeted to accomplish its constitutional end, as it prohibits only "willfully" causing or attempting to commit bodily injury "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. 249(a)(1). In short, Section 249(a)(1) is entirely reasonable when "judged with reference to the historical experience which it reflects." *Lane*, 541 U.S. at 523 (citation omitted); see also *United States* v. *Beebe*, 807 F. Supp. 2d

1045, 1056 n.6 (D.N.M. 2011) (concluding that, if applicable, Section 249(a)(1) "would also survive under *City of Boerne*"), aff'd *sub nom. Hatch*.[14]

b. Defendant similarly argues that the analysis in the Supreme Court's decision in *Shelby County* should apply here. This argument is also meritless.

Shelby County involved a constitutional challenge to two provisions of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.*: (1) Section 5, which prohibits covered jurisdictions from implementing changes in any voting standard, practice, or procedure without first obtaining federal preclearance; and (2) Section 4(b), which prescribes a formula, based on whether a jurisdiction had certain voting issues in the 1960s and early 1970s, for identifying the jurisdictions covered by Section 5's preclearance requirement. The Supreme Court held that it was unconstitutional to use the coverage formula in Section 4(b) "as a basis for subjecting jurisdictions to preclearance" under Section 5. 133 S. Ct. at 2631. At

[14] Indeed, Section 249(a)(1) compares favorably with the types of legislation the Supreme Court has upheld under *City of Boerne*'s analysis in other cases. See, *e.g.*, *Lane*, 541 U.S. at 522, 533-534 (upholding Title II of the Americans with Disabilities Act of 1990 as appropriate enforcement of the Due Process Clause's protection against discrimination by providing access to the courts); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 740 (2003) (upholding Family and Medical Leave Act of 1993 as appropriate enforcement of the Equal Protection Clause's protection against gender discrimination in family leave benefits).

the same time, the Court emphasized that it was not invalidating Section 5 itself and that "Congress may draft another formula based on current conditions." *Ibid.*

As the Court noted, Section 4(b) differentiates between the States by subjecting some but not others to Section 5's preclearance requirement. *Shelby Cnty.*, 133 S. Ct. at 2623-2624. According to the Court, these Sections, taken together, created "extraordinary legislation otherwise unfamiliar to our federal system," *id.* at 2624 (citation omitted), and hence for such a purpose, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions," *id.* at 2629. The Court concluded that the Section 4(b) formula was seriously outdated and thus failed to respond to "current" conditions. *Id.* at 2631.

Nothing in *Shelby County* undermines the Court's holding in *Jones*. Like *City of Boerne*, *Shelby County* did not cite *Jones*, mention the Thirteenth Amendment, or otherwise question Congress's authority to identify and proscribe the badges and incidents of slavery.

Nor did *Shelby County* announce a blanket rule—even for purposes of the Fifteenth Amendment—calling into question any legislation based on the degree of its tie to "current conditions." Rather, the Court's analysis was limited to the particular context of those sections of the VRA that (1) impose different obligations on different States, and (2) impinge on state sovereignty through the

extraordinary step of demanding federal preclearance of changed electoral practices. *Shelby Cnty.*, 133 S. Ct. at 2623-2624; see also *id.* at 2631 (noting that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2"). The Court rejected Congress's imposing differential preclearance burdens on the States on the basis of what it concluded was stale data, but it did not establish any affirmative requirement that Congress provide empirical justification for other Fifteenth Amendment legislation that does not raise the same federalism concerns. And those concerns are not implicated by the Shepard-Byrd Act, which does not impose a burden like preclearance or differentiate between different States *at all*.

Even assuming *Shelby County*'s analysis were relevant to the Thirteenth Amendment, it would not undermine the validity of Section 249(a)(1). As explained above, Congress enacted the prohibition on racially motivated violence after considering extensive evidence concerning current conditions. See p. 23, *supra*. For example, the House Report emphasized that "[b]ias crimes are disturbingly prevalent," and it noted that (1) "[s]ince 1991, the FBI has identified over 118,000 reported violent hate crimes," and (2) in 2007 alone the FBI documented nearly 4900 hate crimes motivated by bias based on race or national origin. House Report 5. That evidence establishes that Section 249(a)(1) responds to current conditions and is therefore "rational in both practice and theory." *Shelby*

Cnty., 133 S. Ct. at 2627 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966)).

2. Next, defendant argues that race-based violence is not a badge or incident of slavery because the "focus" of the Thirteenth Amendment extends only to abolishing slavery and protecting the economic rights of freed slaves. Br. 21. This Court implicitly rejected this argument in *Maybee*, by noting that the "badges and incidents of slavery" are "analogous to the burdens and disabilities of a servile character," which include any "restraints on those fundamental rights which are the essence of civil freedom." 687 F.3d at 1030 n.2 (citation and internal quotation marks omitted). Moreover, the Supreme Court has made clear that the Thirteenth Amendment is not limited to abolishing slavery and protecting economic rights—it also "decree[s] universal civil and political freedom throughout the United States." *The Civil Rights Cases*, 109 U.S. at 20. In light of the ample evidence that racially animated violence is a core feature of racial slavery and inequality in the United States, race-based violence is certainly a "badge or incident" of slavery. See pp. 14-24, *supra*.

3. Finally, defendant argues that Section 249(a)(1) is in tension with the federalism principles that bear on Congress's legislative authority under the Tenth Amendment and the Commerce Clause. Br. 22-25. Defendant urges this Court to rely on these principles to prevent Congress's Thirteenth Amendment authority

from expanding into a general police power. Similar arguments were rejected by the Fifth and Tenth Circuits in *Cannon* and *Hatch*, respectively, and should also be rejected here. *Cannon*, 750 F.3d at 503-504; *Hatch*, 722 F.3d at 1201-1205.

First, although defendant is correct that Congress lacks a general police power, Congress's authority to enforce the Thirteenth Amendment poses no danger of creating a general police power, as it only authorizes legislation addressing slavery (and involuntary servitude) and the badges and incidents of slavery. This limit on Congress's authority ensures that federal intrusion on traditional areas of state power will be minimal. Under *Jones*, courts retain full authority to invalidate Thirteenth Amendment legislation that lacks any reasonable relationship to slavery. Thus, although Congress may not punish "all violence against those who embody a trait that equates to 'race,'" it may punish those who commit violence *because of* their victim's race. *Hatch*, 722 F.3d at 1205-1206.

Second, Section 249(a)(1) does not run afoul of the Tenth Amendment. That Amendment reserves to the States only those "powers not delegated to the United States by the Constitution." U.S. Const. Amend. X. Here, as discussed above, Congress was delegated authority to enact Section 249(a)(1) under the Thirteenth Amendment. Where, as here, "a power is delegated to Congress in the

Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York* v. *United States*, 505 U.S. 144, 156 (1992).[15]

Nor do the Supreme Court's Commerce Clause precedents suggest that Section 249(a)(1) exceeds Congress's power. *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), which defendant cites, invalidated federal criminal statutes because they lacked a sufficient connection to interstate commerce, thereby impinging on traditional state police power. Br. 23. But neither case suggests that Congress lacks authority under other provisions of the Constitution—such as the Thirteenth Amendment—to address criminal conduct that could otherwise also be addressed by the States. Indeed, *Morrison* itself noted that the Fourteenth Amendment "includes authority to prohibit conduct * * * and to intrude into legislative spheres of autonomy previously reserved to the States." 529 U.S. at 619 (brackets, citation, and internal quotation marks omitted). The Thirteenth Amendment, ratified 74 years after the Tenth Amendment, does the same. Further, to the extent that defendant simply objects to federal criminal liability for conduct that may also be punished by States, that

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[15] Although the Court in *Bond* v. *United States*, 134 S. Ct. 2077, 2083-2086 (2014), reaffirmed the longstanding principle that federal statutes are ordinarily construed in light of federalism principles, it expressly did not limit Congress's legislative authority under any provision of the Constitution and made no mention of the Thirteenth Amendment.

objection is misplaced. It is well established that when Congress enacts a criminal prohibition based on its enumerated constitutional powers, it does not impermissibly intrude on state sovereignty. See, *e.g.*, *ibid.*; *Mitchell*, 400 U.S. at 129 (noting that the "division of power between state and national governments * * * was expressly qualified by the Civil War Amendments' ban on racial discrimination.").

In any event, Congress appropriately crafted the Shepard-Byrd Act to protect federalism interests. Congress made explicit findings that state and local governments "are now and will continue to be responsible for prosecuting the overwhelming majority" of hate crimes. § 4702(3), 123 Stat. 2835. It noted, however, that such authorities can "carry out their responsibilities more effectively with greater Federal assistance," and that federal jurisdiction over such crimes would "enable[] Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes." § 4702(3) and (9), 123 Stat. 2835-2836.

Congress also found that the problem of hate crimes was sufficiently serious and widespread "to warrant Federal assistance to States, local jurisdictions, and Indian tribes." § 4702(10), 123 Stat. 2836. Indeed, Congress expressly found that "[t]he incidence of violence motivated by the actual or perceived race * * * of the victim poses a serious national problem." § 4702(1), 123 Stat. 2835. To that

end, the Shepard-Byrd Act grants the Attorney General the authority to provide financial and other support to state and local governments in their efforts to investigate and prosecute such crimes. 42 U.S.C. 3716, 3716a. And although the Shepard-Byrd Act contemplates federal prosecutions of hate crimes, it mitigates the potential for federal-state friction by requiring the Attorney General or her designee personally to certify that such prosecution is appropriate because (1) the relevant State lacks jurisdiction; (2) "the State has requested that the Federal Government assume jurisdiction"; (3) the "verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence"; or (4) "a prosecution by the United States is in the public interest and necessary to secure substantial justice." 18 U.S.C. 249(b)(1).

II

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION

A. Standard Of Review

This Court "review[s] *de novo* the sufficiency of the evidence to sustain a conviction." *United States* v. *Maybee*, 687 F.3d 1026, 1031 (8th Cir. 2012). It does so, however, deferentially, "viewing the evidence in the light most favorable to the Government and accepting all reasonable inferences that may be drawn in favor of the verdict." *Id.* at 1031-1032. This Court will not assess the credibility of any witness and must resolve all evidentiary conflicts and credibility issues in

favor of the verdict. *United States* v. *Spears*, 454 F.3d 830, 832 (8th Cir. 2006). This Court will reverse a conviction "only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Ibid*.

B. Sufficient Evidence Supports Defendant's Conviction

1. To establish a violation of Section 249(a)(1), the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) caused bodily injury to any person; (3) "because of" such person's "actual or perceived race, color, religion, or national origin." 18 U.S.C. 249(a)(1). Defendant challenges the sufficiency of the evidence as to the third element.[16] This argument ignores the abundant evidence supporting the verdict.

The evidence that defendant attacked the victim *because of* his race is overwhelming. The testimony of all eight people who interacted most closely with Metcalf on the night of the attack, including the six of these individuals who personally witnessed the attack and the events leading up to it, established that defendant assaulted Sandridge because of his race.[17] Witnesses testified that

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[16] There is no dispute that defendant willfully caused bodily injury to Lamarr Sandridge.

[17] These eight individuals are: Ted Stackis (bar owner), Rebecca Burks (bartender), Lamarr Sandridge (victim), Sarah Kiene and Katie Flores (friends of victim), Jeremy and Joseph Sanders (friends of defendant), and Noelle Weyker (defendant's fiancée).

Metcalf was using racial slurs throughout the night and repeatedly directed epithets such as "nigger" and "nigger-loving whores" at Sandridge, Flores, and Kiene. Tr. 33, 73, 80, 125-126, 143-145. The testimony also shows that defendant spent the night bragging about participating in cross burnings, proudly showing off his swastika tattoo, commenting that "this is what I'm all about," and declaring that he hated "fucking niggers" so much he wanted to "take care of some." See pp. 7-8, *supra*. There is video footage and uncontradicted testimony that Sandridge was not engaging in any aggressive or threatening behavior towards the defendant. Tr. 321; U.S. Ex. 1. At the time of his assault, Sandridge was already unconscious and severely injured. Tr. 153.

During the assault, as defendant stood over an unconscious Sandridge and kicked and stomped on his head, defendant yelled "die nigger." Tr. 86. Finally, after the attack, defendant remarked that the "nigger got what he had coming." Tr. 154. Given this testimony, a reasonable jury could conclude that defendant was motivated to assault an unconscious Sandridge specifically because of his race.[18]

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[18] See *Maybee*, 687 F.3d at 1032 (rejecting Maybee's argument that no reasonable jury could conclude that he committed an attack because of his victims' race, as there was "uncontradicted testimony that [the victims] engaged in no aggressive or threatening behavior toward Maybee," co-defendants testified that "Maybee had directed racial epithets at the [victims] and continued to use those epithets while discussing his plans to assault them," and "after Maybee forced the [victims'] sedan off the road and it burst into flames, he stated that he hoped the 'fuckin' beaners burn and die.'").

Defendant sought to undermine the evidence of his racial animus through several witnesses who testified that Metcalf is not a racist person. But the government's cross-examination gave the jury reason to discount this evidence. The government showed that Metcalf had a strong motive to hide his racist beliefs from at least five of these witnesses, for fear of being fired or beaten or losing a girlfriend. Tr. 244, 267, 272, 278-279, 284-285. The government's cross-examination of two other witnesses who claimed Metcalf is not racist revealed that these witnesses held this opinion without any knowledge of defendant's behavior on the night he attacked Sandridge, which caused one witness to admit that if Metcalf had behaved as he did, then the witness did not know the real Metcalf. Tr. 253-254, 259. Further, the government sowed doubt into the testimony that Metcalf's swastika tattoo was a relic of prison gang life by showing video of Metcalf flaunting his swastika tattoo to three different people in the hours before the attack and by eliciting testimony from two prison employees that non-racists usually alter or remove such white supremacist tattoos once they leave prison, while real racists keep these tattoos, use the word "nigger," and declare that their tattoos represent "what they're all about." Tr. 236-238, 268-270. Finally, the government impeached defendant's two witnesses who stated they did not see or hear Metcalf acting racist in the bar that night by showing that one witness's testimony conflicted with her grand jury testimony (Tr. 322-325), and the other

witness only sat near Metcalf briefly and left the bar before Jeremy and Joseph Sanders even arrived (Tr. 295-298).

2. Defendant principally asserts that the testimony of his racial animus was unreliable. But, of course, "a witness's credibility is for the jury to decide." *Maybee*, 687 F.3d at 1032. Defense counsel cross-examined all of the government's witnesses. The jury was aware that the witnesses had consumed alcohol that night. Tr. 364-366. Further, defense counsel argued at length during closing that the testimony of Jeremy and Joseph Sanders, Ted Stackis, Rebecca Burks, and Sarah Kiene was unreliable. Tr. 205, 372-380. The jury, therefore, was well aware of defendant's challenges to the credibility of the government's witnesses. Finally, the jurors were specifically instructed on their role in making credibility determinations.[19]

At bottom, defendant asserts that this case amounts to no more than a bar fight that had nothing to do with race. But ample testimony belies that

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[19] For example, the jury was instructed that "[a] witness may be discredited or impeached by * * * showing the witness has a motive to be untruthful," and that it should consider "the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, [and] whether that witness said something different at an earlier time" in deciding what testimony to believe. R. 99, at 7-8. The court also instructed the jury that it may consider Jeremy Sanders's and Joseph Sanders's guilty pleas and the testimony about the character of Jeremy Sanders for truthfulness when determining whether, or how much, to believe their testimony. R. 99, at 9, 11.

characterization of defendant's assault on Sandridge. Viewing the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the verdict, and accepting all reasonable inferences drawn from the evidence to support the jury's verdict, as this Court must, sufficient evidence supports the conclusion that defendant acted because of Sandridge's race when he stood over him and stomped on his head while yelling "die nigger." Defendant may take issue with the jury's assessment of the evidence, but that is no reason to disturb the verdict.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION ON CHARACTER EVIDENCE

A. Standard Of Review

This Court "review[s] the district court's rejection of a defendant's proposed jury instructions for an abuse of discretion, recognizing that district courts have broad discretion in the formulation of instructions." *United States* v. *Walker*, 840 F.3d 477, 487 (8th Cir. 2016). This Court "will affirm so long as the jury instructions, taken as a whole, fairly and adequately submitted the issues to the jury." *Ibid.* "[J]ury instructions do not need to be technically perfect or even a model of clarity" to sufficiently submit the issues to the jury. *United States* v. *Gianakos*, 415 F.3d 912, 920 (8th Cir.), cert. denied, 546 U.S. 1045 (2005). "Even

where the court declines to give an instruction on a theory of defense that is supported by the evidence, there is no error if the instructions as a whole, by adequately setting forth the law, afford counsel an opportunity to argue the defense theory and reasonably ensure that the jury appropriately considers it." *United States* v. *Christy*, 647 F.3d 768, 770 (8th Cir. 2011). Thus, "[a] conviction will be reversed based on a district court's instructional error as to a particular instruction only upon a finding of prejudice to the parties." *United States* v. *Davis*, 812 F.3d 1154, 1157 (8th Cir. 2016) (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Declining To Give Defendant's Requested Instruction On Character Evidence

1. Metcalf's alleged reputation and character for lack of racism was central to his defense in showing that he did not assault Sandridge because of Sandridge's race. At trial, several defense witnesses testified to their opinion that the defendant was not a racist person. As a result, Metcalf sought the following jury instruction:

> You heard the testimony of [witness], who said that the defendant has a reputation and character for lack of racism. Along with all of the other evidence you have heard, you may take into consideration what you believe about the defendant's lack of racism when you decide whether the government has proved, beyond a reasonable doubt, that the defendant committed the crime. Evidence of the defendant's lack of racism alone may create a reasonable doubt whether the government proved that the defendant committed the crime.

R. 85, at 33. The court declined to give this instruction. The court explained that it did "not think that this particular instruction is needed in this case and the

instructions as a whole * * * take into account what the Government must prove and the ramifications of the Government not so proving." Tr. 338. The court concluded, therefore, that the requested instruction "did not add[] anything to the instructions" she would give the jury.

The jury was instructed on how to weigh the value of the testimony and assess the witnesses' credibility, including how to judge testimony "about the defendant's character for a lack of racism." R. 99, at 5, 7-11. Moreover, the court instructed the jury that each witness's testimony constitutes evidence and that the jury "may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence." R. 99, at 5. The court explained that "[t]here are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence," clarifying that circumstantial evidence is "the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts" (R. 99, at 6), and that a "defendant's motive may be proven by circumstantial evidence" (R. 99, at 15). The court further instructed that "[t]he law makes no distinction between direct and circumstantial evidence," and that the jury "should give all evidence the weight and value [it] believe[s] it is entitled to receive." R. 99, at 6.[20]

[20] As relevant here, the jury was also instructed on the elements of the offense charged (R. 99, at 15); that "the presumption of innocence alone is

(continued…)

2. Defendant now argues that the district court committed reversible error by declining to give the requested instruction. Specifically, defendant argues: (1) the court was required to give his requested instruction because character evidence was introduced and was crucial to his defense; (2) this Court should revisit its "hostility" to the "standing alone" jury instruction; and (3) even if the district court correctly omitted the "standing alone" portion of the requested instruction, the court should have given the remainder of the proposed instruction. Br. 31-36. These arguments are meritless. The jury instructions, taken as a whole, adequately set forth the law and reasonably ensured that the jury fairly considered the evidence of defendant's "lack of racism," as it related to the intent element of the charge against him.

a. First, the trial court was not required to give a specific instruction on the evidence of defendant's "reputation and character for lack of racism." This evidence concerned a "pertinent character trait" of the defendant; such evidence is offered to negate an element of the charged crime. *United States* v. *Krapp*, 815 F.2d 1183, 1187 (8th Cir. 1987). Where evidence of a "pertinent character trait" is

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(…continued)
sufficient to find the defendant not guilty and can be overcome only if the government proved during the trial, beyond a reasonable doubt, each element of the crime charged" (R. 99, at 14); and that reasonable doubt "is doubt based upon reason and common sense" and "may arise from careful and impartial consideration of all the evidence, or from a lack of evidence" (R. 99, at 13).

introduced, "a defendant is not entitled to a particularly worded instruction [on such evidence] if the instructions as a whole adequately cover the substance of the requested instruction." *Id.* at 1187-1188.[21] Accordingly, this Court has held that there is "no error in the trial court's failure to give a specific character instruction" on character trait evidence that goes to an element of the offense because a jury will fairly and adequately consider this evidence when instructed to consider all direct and circumstantial evidence presented at trial. *Id.* at 1187.[22]

That is the case here. The testimony concerning Metcalf's alleged reputation and character for lack of racism was evidence of a "pertinent character

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[21] The Notes on Use of Model Jury Instruction Section 4.02 provide a sample jury instruction if the trial court chooses to give a separate instruction on character trait evidence. The Notes on Use make clear, however, that a court is *not* required to give this instruction. *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* § 4.02 Notes on Use 1 (2014).

[22] Character trait evidence is different from evidence of "good character," which is offered to raise an inference that the defendant was a person unlikely to commit the crime. *Krapp*, 815 F.2d 1187. Where "good character" evidence is introduced, the court must instruct the jury on the purpose of such evidence and that it may, along with other evidence, establish reasonable doubt. See *Salinger* v. *United States*, 23 F.2d 48, 53 (8th Cir. 1927). That evidence of overall good character should be treated differently from evidence of a pertinent character trait relevant to an element of the offense makes sense as a practical matter. It may not be inherently clear to a jury that the former type of evidence may create reasonable doubt as to whether the defendant committed the crime charged. Conversely, where, as here, a defendant offers evidence of a character trait that goes to an element of the crime charged, it is abundantly clear to the factfinder that this evidence is offered to establish reasonable doubt as to that element.

trait," directed at whether he assaulted Sandridge because of race. Indeed, the district court permitted defendant to introduce this evidence upon finding that racial tolerance or intolerance is a trait, admissible under Federal Rule of Evidence 405(b). Tr. 164-165; see also R. 89, at 3 (Def.'s Trial Memo.) ("[I]n this case, character evidence is admissible under [Fed. R. Evid.] 405(b), because it is an essential element of a charge, claim, or defense. Mr. Metcalf is charged with a hate crime for assaulting [Sandridge] *because of* his race. Character evidence showing Mr. Metcalf's lack of racism is an essential element of the charge and his defense.").[23]

For this reason, defendant's reliance on *Salinger* v. *United States*, 23 F.2d 48 (8th Cir. 1927), is inapposite. In *Salinger*, this Court held that a trial court must give a specific character evidence instruction only "where evidence of *good character* is introduced in behalf of a defendant." *Id.* at 53 (emphasis added). As noted above (note 22, *supra*), "good character" evidence is evidence of a defendant's overall reputation for honesty and integrity, not evidence regarding a specific character trait that goes to an element of the offense charged. Defendant did not introduce good character evidence at trial, and his requested instruction is

[23] The United States does not concede that defendant's alleged lack of racism goes to the question of his intent at the time of the assault. However, we assume that racial tolerance is a pertinent character trait for the purposes of this argument.

not a good character instruction within the meaning of *Salinger*. Accordingly, the district court was not required under *Salinger* to give the requested instruction.[24]

b. Second, this Court has long disfavored instructing the jury that character evidence alone is sufficient to create reasonable doubt. See *Krapp*, 815 F.2d at 1187 ("[S]uch a 'standing alone' instruction is disapproved in this circuit."); *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* § 4.03, cmt. (2014) ("The Eighth Circuit, along with some other circuits, has disapproved the giving of a 'standing alone' instruction * * * with regard to [evidence of character or a character trait]."). As numerous courts have recognized, the instruction is improper because it unnecessarily intrudes on the jury's role in determining the weight of the evidence. See, *e.g.*, *United States* v. *Winter*, 663 F.2d 1120, 1148 (1st Cir. 1981); see also *United States* v. *Foley*, 598 F.2d 1323, 1336-1337 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980) (noting

[24] Defendant's reliance on the Fifth Circuit case *United States* v. *John*, 309 F.3d 298 (2002), is similarly inapposite. Like *Salinger*, this case involved evidence of the defendant's "good general reputation for truth and veracity, or honesty and integrity, or [being a] law abiding-citizen," not evidence of a pertinent character trait that went to an element of the child molestation charge. *Id.* at 302 (brackets in original).

that the majority of circuits do not require this instruction). Defendant offers no reason to revisit this Court's decisions on this issue.[25]

c. Lastly, the district court did not abuse its discretion in declining to give the first portion of the requested instruction, directing the jury to consider testimony of Metcalf's alleged reputation and character for lack of racism when deciding whether he committed the crime. "District courts have broad discretion in the formulation of instructions" and do not commit an abuse of discretion "so long as the jury instructions, taken as a whole, fairly and adequately submitted the issues to the jury." *Walker*, 840 F.3d at 487. Where a court declines to give a specific instruction on a theory of defense, there is no error if the instructions as a whole "afford counsel an opportunity to argue the defense theory and reasonably ensure that the jury appropriately considers it." *Christy*, 647 F.3d at 770. Specifically, there is no error in declining to give a particularly worded character trait instruction where the court gives a "general instruction on credibility" and advises the jury that "it may consider all other facts and circumstances proved by the evidence that indicate [the defendant's] state of mind." *Krapp*, 815 F.2d at 1187-1188.

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[25] Defendant suggests that *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), requires that trial courts give a "standing alone" instruction. This Court specifically rejected that argument in *Black* v. *United States*, 309 F.2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963).

The instructions given in this case, taken as a whole, clearly directed the jury to consider the evidence of defendant's racial tolerance when deciding whether the government proved the intent element of the charge—*i.e.*, that Metcalf assaulted Sandridge *because of* Sandridge's race. The jury was instructed that it "may properly find the truth as to the facts of a case [through] direct evidence and circumstantial evidence" (R. 99, at 6), and that a "defendant's motive may be proven by circumstantial evidence" (R. 99, at 15). Further, the court gave a general instruction on assessing the credibility of the witnesses. R. 99, at 7; see also pp. 46-47, *supra*. The district court's refusal to give the exact instruction requested by defendant, therefore, was not an abuse of the court's broad discretion to formulate jury instructions.

3. Even assuming the district court erred in not giving the requested instruction, the failure to provide the instruction was harmless. This Court will reverse a jury verdict only where a jury instruction error "misled the jury or had a probable effect on the jury's verdict." *United States* v. *Thompson*, 686 F.3d 575, 579 (8th Cir. 2012). Otherwise, a jury instruction error "may be disregarded if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States* v. *Fiorito*, 640 F.3d 338, 349 (8th Cir. 2011).

First, the court's refusal to give the requested instruction was harmless because, as discussed above, the "jury instructions, taken as a whole, fairly and adequately submitted the issues to the jury." *Walker*, 840 F.3d at 487. The instructions given accurately stated the law and clearly directed the jury to weigh all the testimony presented—rendering the requested instruction superfluous. See pp. 51-52, *supra*. Simply stated, the instructions given made it clear that the jury was permitted to consider what it believed about defendant's lack of racism when deciding whether the government proved, beyond a reasonable doubt, that defendant committed the crime—exactly as defendant's requested instruction stated. See R. 85, at 33.

Second, the court's decision not to give the requested instruction was harmless because "giving [this] specific character instruction would [not] have had an impact on the jury's verdict." *Krapp*, 815 F.2d at 1188. The government's evidence regarding defendant's motivation in assaulting Sandridge was overwhelming. The government presented substantial evidence of Metcalf's racist animosity towards the victim on the night of the attack, his longtime propensity and current desire to commit race-based violence, and his fixation on Sandridge's race *during* the assault, as he yelled "die nigger" while stomping on Sandridge's head. See pp. 7-10, *supra*. Moreover, even if defendant was able to sow some doubt as to whether, as a general matter, he is a racist person, this fact does not

bear on the jury's finding, beyond a reasonable doubt, that Metcalf committed the one specific act at issue here—his assault on Sandridge—*because of* his victim's race.

In sum, the words and actions of defendant that night leave no reasonable doubt that Metcalf assaulted Sandridge because of his race. Indeed, defendant expressed a violent brand of racism *before, during, and after* perpetrating the assault. Accordingly, defendant's requested instruction would not have had any impact on the jury's verdict.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief Of The United States As Appellee:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 12,881 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

(3) the brief was scanned for viruses using Symantec Endpoint Protection version 12.1.6, and it is virus-free.

s/ Francesca Lina Procaccini
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Date: January 19, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I electronically filed the foregoing Brief Of The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express two-day delivery ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to counsel for appellant.

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