No. 19-7778

IN THE

Supreme Court of the United States

JAMES WILLIAM HILL, III,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does Congress's power to regulate commerce among the several states extend so far as to allow for the federalization of prosecutions for violent crimes motivated by identity-based animus?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To that end, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case interests Cato because ensuring that the Constitution remains a grant of limited powers is the cornerstone of preserving its structural protections for individual freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article I, Section 8 allows Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. While it was interpreted narrowly until the Progressive Era, this power has been relied upon more than any other as the basis of federal legislation. Since the 1930s, Commerce Clause doctrine has authorized nearly unlimited federal power with only a few cases in recent decades establishing any limits on Congress's purvey.

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) states in relevant part: "Whoever . . . willfully causes bodily injury to any person . . . because of the . . . actual or perceived religion,

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission

national origin, gender, sexual . . . orientation, gender identity, or disability of any person—shall be imprisoned not more than 10 years," so long as such conduct "interferes with commercial or other economic activity in which the victim is engaged at the time." 18 U.S.C. § 249(a)(2). While the HCPA is clearly not an economic regulation, its authority is grounded in the Commerce Clause on the basis of that last jurisdictional element.

Some of the Court's modern opinions have limited the Commerce Clause's sweep to economic regulations. Although the HCPA attempts to tie jurisdiction to economic or commercial behavior, the Court should not allow Congress to regulate noneconomic behavior through a transparent—almost comical—attempt to circumvent *Lopez*, *Morrison*, and *NFIB*. The Gun-Free School Zones Act would still be invalid if it banned having a gun near a school while shopping online.

Finally, the Court could take the opportunity to clarify and roll back the worst aspects of *Wickard v. Filburn*, 317 U.S. 111 (1942), the font of so much congressional mischief. The so-called "substantial effects" test was wrong when it was created and went beyond what was necessary to decide Mr. Filburn's case. Mr. Filburn grew wheat and knew he was avoiding the interstate market. Instead of creating a "substantial effects" test that ensured it would be 53 years before any law would be held to violate Congress's (theoretically) limited powers, the Court could have held that there was no *de minimis* exception to Commerce Clause jurisdiction as long as the activity was in some way economic. A more faithful and historically informed interpretation of the Commerce Clause would certainly invalidate the HCPA—which does not even claim to regulate economic activity or interstate commerce.

Whether through a synthesis of modern Commerce Clause cases, or a return to a substantive understanding of original meaning, the HCPA is an unconstitutional exercise of federal authority. The Court should grant certiorari and reverse the court below.

ARGUMENT

THE HCPA EXCEEDS CONGRESSIONAL AUTHORITY UNDER THE COMMERCE CLAUSE

The HCPA regulates noneconomic, criminal conduct that has only frivolous ties to interstate commerce. As commerce power jurisprudence has evolved, a few principles have emerged. First, the rule in *Wickard* is not absolute and does not give Congress an unlimited police power. Second, even when copying and pasting the words "affecting interstate commerce" into statutes, Congress cannot regulate noneconomic activity unconnected to a broader regulatory scheme.

A. Under Current Doctrine, the Commerce Power Can Sometimes Regulate Noneconomic Activity When It Is Part of a Broader Regulatory Scheme

"The Federal Government is a government of limited and enumerated powers," *NFIB v. Sebelius*, 567 U.S. 519, 521 (2012), a sentence that has become constitutional boilerplate—rarely taken seriously, yet copied from opinion to opinion. While the statement may be technically true, and is somewhat supported by the decisions in *Lopez*, *Morrison*, and *NFIB*, it would be difficult to argue that it is functionally true. After all, there is still a Gun-Free Schools Act—at least two, in fact. After *Lopez*, the relevant statutory section was amended to prohibit knowingly possessing "a firearm that has moved in or that otherwise affects interstate

or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A). A different act conditions a school's federal funding on adopting certain policies toward guns. 20 U.S.C. § 7961(b)(1).

A cynic might believe that Congress is making a mockery of the Constitution's system of carefully enumerated powers. There's little doubt that James Madison would agree. Adding the words "affects interstate commerce" to a statute would not, under any reasonable system of enumerated powers, magically cure obvious jurisdictional defects, and even modern, expansive Commerce Clause doctrine doesn't authorize the regulation of an intrastate crime with a tenuous connection to commerce.

Since the New Deal era, the Court's opinions have flirted with a definition of interstate commerce that is almost functionally limitless. *Wickard v. Filburn*, the *ne plus ultra* of Commerce Clause jurisprudence, found that produce grown on a private farm, including crops consumed by their growers, fell under federal power due to the "effects" on interstate commerce produced by the farmer's decision to hold himself apart, both as a producer and consumer, from the market in food. 317 U.S at 125. This standard looks to the aggregate economic effect of the regulated category of behavior rather than the impact of a discrete individual. *United States v. Morrison*, 529 U.S. 598, 617 (2000).

But *Wickard* did not expand on the original meaning of the word "commerce." *See*, Randy E. Barnett *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 593–94 (2010). *Wickard* is a Commerce Clause and a Necessary and Proper

Clause case. *Id.* Instead of redefining Mr. Filburn's activity as "commerce," the Court looked to what was necessary and proper to regulating commerce. As Justice Scalia wrote in *Gonzales*:

> unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring).

In one interpretation, in an interconnected society predominated by national markets, the substantial effects test seems to leave precious little outside the federal bailiwick. Yet "even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *United States v. Lopez*, 514 U.S. 549, 560 (1995). *Lopez* held that the Gun-Free School Zones Act of 1990 was invalid for lack of a sufficient connection to interstate commerce. *Id.* at 565–68. While maintaining the language of "substantial effects," *Lopez* also noted that it goes too far to deem everything as either "interstate commerce" or as "necessary and proper" to regulating interstate commerce.

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce." *Id.* at 567 (quoting *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935)). Justice Thomas's concurrence notes that "our substantial effects test is far removed from both the Constitution and from our early case law" *Id.* at 601 (Thomas, J. concurring), while calling for that test to be "tempered" but not overturned.

Similarly, *United States v. Morrison* found unconstitutional a civil remedy for gender-motivated violence. 529 U.S. 598. The Court found that Congress could not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" and that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *Id* at 617–18.

Gonzales v. Raich was an extension of *Wickard* to home-grown marijuana rather than wheat. The Court upheld the prohibition on the grounds that local home consumption had substantial interstate effects thanks to the mechanisms of supply and demand in the national market. Unlike *Lopez*, where "the Act did not regulate any economic activity," *Gonzales* concerned a statutory scheme "at the opposite end of the regulatory spectrum." 545 U.S. at 23–24. The Controlled Substances Act is a "lengthy and detailed statute creating a comprehensive framework for regulating . . . production, distribution, and possession" that is "unlike the discrete prohibition established by the Gun-Free School Zones Act of 1990." *Id.* at 24

Finally, *Wickard's* expansive effects test was further constrained by *NFIB v. Sebelius*, where the Court found that Congress lacked the power to mandate the

purchase of health insurance under the Commerce and Necessary and Proper Clauses. 567 U.S. at 548–57. The government argued, correctly, that the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce." *Id.* at 548–49. But the government was incorrect to believe that such effects would be enough to sustain the law as a commerce power regulation. But the Court didn't overrule *Wickard*; it merely explained that *Wickard* was concerned with the substantial, aggregate effects of a certain kind of behavior (economic activity) within a certain kind of comprehensive scheme. *Id.* at 552–53; *see also Perez v. United States*, 402 U.S. 146 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." (emphasis original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)). "The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce." *NFIB*, 567 U.S. at 553. It's extremely unlikely that even the *Wickard* court would have sustained a law requiring Roscoe Filburn to become a wheat farmer. And even though the Affordable Care Act was a comprehensive scheme, not purchasing health insurance was not the kind of activity, or inactivity, that Congress could regulate.

In this line of cases, there are some principles that can be extracted from the Court's commerce power jurisprudence. Federal schemes are often upheld when the issues they are structured to address are national economic issues, and when, per *NFIB*, those regulations do not compel commerce into existence. *NFIB*, 565 U.S. at 552 ("Construing the Commerce Clause to

permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.").

This approach is not based on a dogged adherence to the form and function of truly enumerated powers. Often the determinative question is not whether Congress has legislated narrowly enough to fall within the bounds of the Commerce Clause, but the opposite: whether its laws are broad and systematic enough to be considered truly national in scope. Here less is not more; more is more.

While the Court has not stated this rule directly, the pattern has been most transparent when analyzing "comprehensive statutory schemes." This came close to being made clear in *Gonzales*. "[C]omprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce" *Gonzales*, 545 U.S. at 125. This idea was suggested as early as the *Shreveport Rate Case*, which emphasized the "comprehensive terms of the provisions" *Hous., E. & W. T. R. Co. v. United States*, 234 U.S. 342, 358 (1914).

Instead of *Wickard*'s butterfly-effect logic, this approach looks to whether and how Congress is regulating an issue that has relatively unattenuated economic effects possibly via a connection to some national marketplace. But, as was seen in *NFIB*, the existence of a national market and "substantial effects" isn't sufficient—the form of the regulation also matters.

B. The HCPA Regulates Noneconomic Activity That Is Not Part of a Comprehensive Regulatory Scheme

The HCPA is not one of those "comprehensive schemes"; it regulates intrastate crime. The claim that it is constitutional because tied to interstate commerce through copy-and-pasted statutory language is laughable if it weren't so corrosive to our constitutional system. Saying "interstate commerce" doesn't create interstate commerce—just like the words *ceci n'est pas une pipe* don't negate a picture of a pipe.

The HCPA is quite similar to the Gun-Free School Zones Act in *Lopez* that wasn't able to survive despite the broad scope of *Wickard* that was endorsed by Justice Breyer in his *Lopez* dissent. 514 U.S. at 643 (Breyer, J. dissenting). *Wickard* could have authorized the act based on the fact that the possession of firearms on schools' premises has, on aggregate, an effect on both the market in firearms and the economics of education. Congress had not created a comprehensive scheme to regulate guns—perhaps by creating various "Schedules" of guns based on dangerousness—but focused on school safety, a local educational issue.

Conversely, while the Agricultural Adjustment Act and federal marijuana prohibition might have had the incidental effects of preempting state and local land use regulations, their goals, as evidenced by their structures, are far broader. A ban on possessing marijuana within 1000 feet of a school could have met the same fate as the first Gun-Free School Zone Act. Yet the comprehensive regulatory scheme upheld in *Gonzales* obviously applied to school zones.

Indeed, the Court from early on has recognized that intrastate activity may be incidentally caught up in federal regulatory schemes. But this inclusion implies an exclusion: Congress may not regulate intrastate activities on the basis that they are incidentally related to interstate commerce if Congress is not also regulating the interstate market to which the governed activity is related. "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power *to exercise that control*." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (emphasis added).

Again, that doesn't describe the HCPA. Crimes of all type affect interstate commerce broadly, yet the federal government does not, and properly cannot, criminalize simple assault, murder, and battery without some federal hook. There's no general federal assault statute, even though assaults—especially in the aggregate—affect commerce.

Racial and sexual minorities are of course to be protected in their basic personal rights via the Fourteenth Amendment's application against the states. But apart from the equal and impartial application of general criminal law, distinct motive-based crimes are exactly the kind of social question that the Constitution and this Court's modern approach to the Commerce Clause have left to the states.

As in *Lopez* and *Morrison*, Congress here has sought to address a local social issue. There is no market in hate crimes, national or otherwise, and the

HCPA addresses nothing else. Nor can national cultural trends be analogized to commerce. When a farmer refuses to sell his crops, the result is predictable: supply goes down and prices go up. A similar analysis can't be easily applied to hate crimes, even those "affecting" interstate commerce.

The legislative history of the HCPA speaks to its goals. Representative Conyers introduced an earlier version of what would become the HCPA in 2007. He noted that the legislation was intended to rectify two deficiencies in the existing law: that too few categories were protected and that violators had to have an intent to interfere with interstate commerce. That is, the proposal aimed to attenuate the crime's connection to interstate commerce while strengthening the emphasis on social issues. H.R. Rep. No. 110-113, at 6 (2007).

Perhaps if Congress constructed a "comprehensive regulatory scheme" federalizing the prosecution of all workplace violence, with the HCPA being a subset of such violence, it might be allowed under current doctrine. While there is no market in workplace violence, it would at least be clear that the legislation was addressing the integrity of the labor market. That is not what this law does.

The HCPA is not a comprehensive scheme. It does not reach the vast number of violent workplace incidents that impact interstate commerce but do not involve victims being targeted for group membership. A violent criminal conspiracy with the stated goal of impairing interstate commerce would escape the HPCA altogether. While such a scheme could run afoul of other federal statutes, the HCPA is not part of such a scheme in the way that, say, a prohibition on medical marijuana is part of the larger scheme of general drug

regulation/prohibition. No legislation addressing the national economy could be so narrow.

Contra the language in *Lopez*, 514 U.S. at 561, and *Morrison*, 529 U.S. at 612, that encourages Congress to include in its statutes Commerce Clause jurisdictional elements, those elements should make the constitutionality of an act more suspect, not less. No legitimate regulation of interstate commerce among the states requires a boilerplate clause to prevent it from violating the Commerce Clause. Nor do Commerce Clause jurisdictional elements realistically place substantive limitations on an act, because, as per the language and logic of *Wickard*, all actions have interstate effects if viewed in the aggregate. Whatever limits *Lopez* imposes on *Wickard*, it seems they currently can be defeated through perfunctory jurisdictional hooks.

But it is more likely that Commerce Clause jurisdictional elements will be used in bad faith, as a talisman to protect statutes from constitutional challenges. This too is demonstrated by the HCPA's legislative history, where supporters of the act argued in favor of its constitutionality by stating that its jurisdictional element was up to the standards of Supreme Court doctrine. Hearing on H.R. 1913, the "Local Law Enforcement Hate Crimes Prevention Act of 2009," 2009 HJH 0023 (2009). The Court should clarify that it isn't.

If the Court is intent on preserving its modern jurisprudence, it should use this opportunity to prove *Wickard's* critics wrong by demonstrating it has limits that can't be overcome through artful, if not devious, drafting. While the federal government may, under current doctrine, govern the internal goings-on of a family farm, it cannot address itself to the sentiments lodged in the mind of single person, even a criminal.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioner, this Court should grant certiorari and reverse the decision below.

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