No. 14-5356

IN THE
Supreme Court of the United States

CHARLES CANNON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when there is at best only the most attenuated Thirteenth Amendment federal interest at stake, the potential for double prosecutions imposes unacceptable burdens on the criminal justice system and on the fundamental rights of the accused.

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, 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 Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution to its preparation or submission. All parties were given timely notice of *amici*'s intent to file.

The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

This case concerns *amici* because it implicates the potential violation of the right to be free from double jeopardy as well as the increasing federalization of criminal law, which developments both go against the Constitution's protections for individual liberty.

SUMMARY OF ARGUMENT

The George Zimmerman case was the most recent example of a highly publicized, controversial episode in which a state acquittal results in vociferous public demands for federal re-prosecution under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 ("HCPA"), 18 U.S.C. § 249. There will no doubt be future cases where emotions run high. The Court should hold that Section 249(a)(1) is not authorized by the Thirteenth Amendment now, because waiting risks that a case will capture the public's imagination in a way that will make it more painful and institutionally costly for the Court to invalidate the provision.

HCPA Section 249(a)(1) adds yet another provision to the federal criminal code that will be

used by the government to preempt adequate state prosecution or to re-prosecute people who have already been prosecuted by state authorities. The federal government will face enormous public pressure to re-prosecute or preemptively prosecute in the high-profile, racially-charged cases that Section 249(a)(1) often covers, which increases the chances of double prosecutions and the unnecessary expansion of federal criminal jurisdiction.

Instances where state authorities have dealt inappropriately with a crime that Section 249(a)(1) prohibits are exceedingly rare. And yet there was considerable pressure on Congress to pass a federal hate-crimes law. Emotions run high in cases in which the defendant is accused of a hate crime. These are exactly the kinds of cases for which the guarantee against double jeopardy was written. Sadly, the government's ability to re-prosecute and take over otherwise adequate prosecution is likely a large part of HCPA's purpose, at least to its supporters. The breadth of Section 249(a)(1), which includes all violent crimes in which the perpetrator acts "because of the actual or perceived race, color, religion, or national origin" of the victim, further increases the chances of double prosecution and intrudes on the core police powers of the states. Actual hatred is not an element of the crime.

Although there is a dual-sovereignty exception to the Fifth Amendment's guarantee that persons will not face a second prosecution for the same offense, that exception does not apply to federal re-prosecutions brought under Section 249(a)(1). For the reasons discussed in the cert petition and the amicus brief of U.S. Civil Rights Commissioners Gail

Heriot, and Peter Kirsanow, Section 249(a)(1) is not a legitimate exercise of authority under Section 2 of the Thirteenth Amendment. The provision does not prohibit slavery or involuntary servitude. Nor is it a prophylactic measure intended to assist in preventing the return of slavery or involuntary servitude. The federal government thus does not have jurisdiction over the prohibited acts in Section 249(a)(1), and the dual sovereignty rule does not apply to a government that lacks jurisdiction. *See United States v. Lanza*, 260 U.S. 377, 384 (1922).

ARGUMENT

I. THE DUAL-SOVEREIGNTY RULE, WHICH ALLOWS THE UNITED STATES TO SUBJECT AN ACCUSED TO WHAT WOULD OTHERWISE BE DOUBLE JEOPARDY, DOESN'T GIVE CONGRESS INDEPENDENT AUTHORITY TO PASS LEGISLATION

A. Double-Jeopardy Protections, The Dual-Sovereignty Rule, And The Explosive Growth Of Federal Criminal Jurisdiction Are In Deep Tension With Each Other

The rule against double jeopardy is a cherished right of the American people. Blackstone wrote that it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 W. Blackstone, *Commentaries on the Laws of England* 329 (1769). A quarter-century later that universal maxim was enshrined in the U.S. Constitution's Bill of Rights, which provides: "[N]or shall any person be subject for the same offense to be twice put in

jeopardy of life or limb." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 795 (1969) (holding that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted" and applying the guarantee against the states via the incorporation doctrine).

In *United States v. Lanza*, 260 U.S. 377 (1922), this Court, by adopting a "dual sovereignty rule," made it clear that the right not to be put twice in jeopardy is by no means absolute. It held that the federal government cannot be ousted from jurisdiction over a legitimate federal crime by an earlier state prosecution. At least one scholar has taken issue with the dual sovereignty rule as a matter of original meaning. *See* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693, 709-15 (1994).[2]

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[2] Not until *Lanza* was this Court squarely presented with the issue of successive state and federal prosecutions for the same act. *See Abbate v. United States*, 359 U.S. 187, 193 (1959) (successive prosecutions for same act first "directly presented" to the Court in *Lanza*). The Court expressed concern that weak state enforcement could undermine the federal government's ability to enforce Prohibition, which may have significantly influenced the Court to adopt a broad dual-sovereignty rule. *See Lanza*, 260 U.S. at 385; Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. Soc. Change 383, 401 (1986) ["Murchison, *The Dual Sovereignty Exception*"] ("[A]n important force influencing [the *Lanza* Court] was its inclination, as well as the public's, to support enforcement authorities during the early years of prohibition.").

Legislative history shows that Congress did not intend or anticipate a dual-sovereignty exception when it passed the

At this point, *amici* note only that, in an earlier day, the dual-sovereignty rule would have been a small exception to an otherwise robust protection against double jeopardy—a mere curiosity. But the reach of federal criminal law has become astonishingly broad of late. *See generally* James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese III, chair of the ABA Task Force on Federalization of Criminal Law, there were at least 3,000 federal crimes as of 1997. *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn*?, 11 Fed. Sentencing Rep. 129, 129 (1998). The number of federal crimes has only grown since then.

In most cases, the conduct Congress has added to the list of prohibited activities was already illegal under state law. Indeed, at this point, the overlap is extraordinary and creates the potential for federal

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Eighteenth Amendment, and pre-Prohibition legal authorities did not uniformly recognize this exception to double jeopardy. *See* Murchison, *The Dual Sovereignty Exception* at 398; Daniel A. Braun, *Praying to False Sovereigns: The Rule of Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 23 (Fall 1992) (arguing that "the rule permitting successive prosecutions is not a vital or cherished component of the federal system . . . [and] has been the subject of disagreement and doubt"). This Court nevertheless affirmed the dual-sovereignty rule after Prohibition. *See Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

re-prosecutions after state acquittals to become a routinely available option. And in many cases, that potential has become a reality.

B. The Federal Government Has Re-Prosecuted Individuals For The Conduct At Issue In Their State Trials, Often Under Public Pressure To Do So

Consider the following high-profile examples: In 1992, four police officers involved in the Rodney King beating were acquitted in state court. Following the Los Angeles riots and great public pressure, the government filed federal civil rights charges against the four officers. Ultimately, two of the officers were convicted in the federal case. Jim Newton, *2 Officers Guilty, 2 Acquitted*, L.A. Times, Apr. 18, 1993, at A1.

In 1991, Gavin Cato, a black seven-year-old, was run over and killed by a member of a Hasidic cleric's motorcade in the Brooklyn neighborhood of Crown Heights. Cato's death sparked a riot, and a few blocks from the accident scene a crowd spotted and descended on Yankel Rosenbaum, a history student visiting from Australia, who was stabbed four times and died a few hours later. One of those in the crowd, Lemrick Nelson, was acquitted of Rosenbaum's murder in state court in 1992. Following the acquittal, "Jewish and other civic leaders pressed for federal intervention." Andy Newman, *Penalty in Crown Hts. Case Means a Little More Jail Time*, N.Y. Times, Aug. 21, 2003, at B2. U.S. Senator Alfonse D'Amato "vigorously demanded a Federal grand jury investigation." Joseph P. Fried, *Crown Heights Case "Very Difficult,"* N.Y. Times, Jan. 30, 1994, § 4 at 31. In 1994, the federal government charged Nelson with

violating Rosenbaum's civil rights for attacking him because he was Jewish and using a public street. Nelson was convicted in 1997 and sentenced to 19 1/2 years in prison, but the conviction was overturned in 2002 because the judge had gone too far in ethnically balancing the jury. At the second federal trial, Nelson was convicted of stabbing Rosenbaum but not of causing his death, and was sentenced to ten years in prison. Newman, *supra*, at B2.

After two Pennsylvania men were acquitted in state court of the most serious charges arising from the 2008 beating death of a Mexican immigrant, the federal government won criminal convictions against them for violating the victim's civil rights under the Fair Housing Act. *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012) (defendants' prosecution not barred on double jeopardy grounds); Sabrina Tavernise, 2 *Pennsylvania Men Guilty in 2008 Killing of Mexican*, N.Y. Times, Oct. 15, 2010, at A22. In that case, the Justice Department filed charges following the state trial after public outcry and after Governor Ed Rendell wrote DOJ a letter requesting that it consider bringing civil rights charges against the defendants. *Piekarsky*, 687 F.3d at 139.

Even when the federal government declines to re-prosecute, that decision is made despite strong public pressure to bring charges after a state acquittal. For example, in 2006, eight staff members at the Bay County, Florida, Sheriff's Office Boot Camp, a detention center for young offenders, were charged in the death of 14-year-old Martin Lee Anderson. Video records showed guards coercing Anderson to exercise. All defendants were acquitted of aggravated manslaughter in the state trial. Susannah A.

Nesmith, *Boot-Camp Death: 7 Guards, Nurse Acquitted in Boot Camp Death*, Miami Herald, Oct. 13, 2007, at A1. The Florida NAACP organized protests and requested that the Justice Department investigate possible civil rights violations. Stephen D. Price, *Hundreds March Calling for Justice*, Tallahassee Democrat, Oct. 24, 2007, at 1A. After a thorough investigation, DOJ declined to pursue federal charges. Press Release, U.S. Dep't of Justice, Federal Officials Close the Investigation into the Death of Martin Lee Anderson (Apr. 16, 2010), available at http://www.justice.gov/opa/pr/2010/April/10-crt-428.html.

Pressure from the opposite direction has been weak to non-existent. The ACLU, which one might assume would take a consistent stand against double jeopardy in keeping with its traditional role as an advocate for the accused, has instead had a split personality on this issue. The national ACLU board and the Los Angeles board publicly disagreed during the Rodney King trial, with the national board announcing that the federal case should not have been brought and the L.A. board supporting the federal prosecution. Renee Tawa, *ACLU Takes Position at Odds with L.A. Board*, L.A. Times, Apr. 5, 1993, at A20. The ACLU initially called for a federal investigation of George Zimmerman for the shooting death of Trayvon Martin, but later rescinded that position on double-jeopardy grounds in a letter to Attorney General Holder. Josh Gerstein, *ACLU Pulls Statement on Zimmerman*, Politico, July 22, 2013, http://www.politico.com/blogs/under-the-radar/2013/07/aclu-pulls-statement-on-zimmerman-168911.html; Letter from Laura W. Murphy and Jesselyn McCurdy, ACLU, to Eric H. Holder, Jr.

(July 18, 2013), available at http://images.politico.com/ global/2013/07/20/acluletterholder.pdf.

In *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995), Judge Guido Calabresi discussed several cases in which the federal government had prosecuted individuals after state-court acquittals. While he expressed no opinion about the merits of these cases, he noted that "there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts" and that it was "to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted." It "is especially troublesome," he stated, "that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern."[3]

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[3] Proponents of the broad federalization of crime and of the HCPA in particular argue that the actual risk of abuse at the Justice Department in connection with the dual-sovereignty rule is small. DOJ has its own internal guidelines, known as the "*Petite* Policy," named after *Petite v. United States*, 361 U.S. 529 (1960). Under it, double prosecutions are in theory limited to cases that meet certain standards. Unfortunately, the standards are vague and easily manipulated. For example, they authorize double prosecutions whenever there are "substantial federal interests" that have been "unvindicated." These federal interests are undefined. Moreover, circuit courts have noted that the policy is merely an internal rule, not a regulation, and they have routinely refused to enforce it against the government on motions from the accused. *See, e.g.*, *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990) (*Petite* Policy an "internal rule" that "criminal defendants may not invoke"); *accord United States v. Schwartz*, 787 F.2d 257, 267

C. When There Is At Best Only The Most Attenuated Federal Interest At Stake, The Intrusion Into State Police Powers And The Potential For Double Prosecutions Impose Unacceptable Burdens On The Criminal Justice System And The Accused's Fundamental Rights

The dual-sovereignty rule is arguably an inevitable byproduct of a federal system. *Amici* do not argue otherwise. But if a dual-sovereignty rule gives the federal government the power to re-prosecute persons who have already been convicted or acquitted in state court for the same conduct, there must be a genuine federal interest at stake. At minimum, the criminal statute at issue must be promulgated pursuant to one of Congress's enumerated powers.

The Court in *Lanza* held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." 260 U.S. at 382. This rule only applies, however, "'to cases where the act sought to be punished is one over which both sovereignties have jurisdiction.'" *Id.* at 384 (quoting *Southern Ry. Co. v. R.R. Comm'n*, 236 U.S. 439, 445 (1915)). For the reasons discussed in the cert petition, as well as

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(7th Cir. 1986); *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir. 1985); *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983); *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir. 1979); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978); *United States v. Wallace*, 578 F.2d 735, 740 (8th Cir. 1978). Whatever DOJ determines in a given case, the "*Petite* Policy" is not an effective substitute for the Bill of Rights.

the *amicus* brief for Commissioners Heriot and Kirsanow, HCPA Section 249(a)(1) is not a legitimate exercise of Congress's authority under Section 2 of the Thirteenth Amendment. Section 249(a)(1) does not prohibit slavery or involuntary servitude. Nor is it a prophylactic measure intended to assist in preventing the return of slavery or involuntary servitude. The federal government thus does not have jurisdiction under the Thirteenth Amendment over the acts proscribed in Section 249(a)(1).

If Congress fails to remain within its enumerated powers, this Court must step in. The alternative is a criminal justice system in which federal prosecutors have a blank check to enforce racial justice and due process protections are a cruel joke. Every alleged offense will result in two bites at the apple. If double-jeopardy protections can be so easily dispensed with, what of our other fundamental rights?

II. HATE CRIME LAWS ARE ESPECIALLY LIKELY TO GENERATE DOUBLE PROSECUTIONS DUE TO THEIR EMOTIONALLY CHARGED NATURE AND CONTESTABLE FACTS

A. The Federal Government Often Faces Considerable Pressure To Re-Prosecute High-Profile, Racially Charged Cases, But There Is Scant Evidence That States Fail To Prosecute Them

Emotions run high in cases in which the defendant is accused of a hate crime. These situations are exactly the kind for which prohibitions on double jeopardy were created. Sadly, the fact that

the HCPA gives the federal government the power to re-prosecute is likely a large part of the Act's purpose—at least in the minds of some. For example, after the Rodney King and Yankel Rosenbaum acquittals, the government faced enormous public pressure to charge the defendants, with Senator Alfonse D'Amato urging a grand jury investigation in the latter case. Similarly, after the *Piekarsky* defendants were acquitted of the most serious charges in state court, *supra*, the federal government faced public demands, including from Governor Ed Rendell, to re-prosecute them in federal court.

There was considerable pressure to pass a federal hate-crimes law, despite the lack of evidence that state authorities were falling down on the job. In 2007, thousands of demonstrators, led by Al Sharpton and Martin Luther King III, encircled the Robert F. Kennedy Justice Department Building in Washington, demanding that the government "crack down harder on hate crimes." *Rally Urges Hate Crimes Prosecution, New AG Responds*, CNN.com, Nov. 16, 2007, http://www.cnn.com/2007/POLITICS/11/16/justice.rally/index.html. The Human Rights Campaign sent 300 clergy from all 50 states to lobby for the bill's passage. Anna Palmer, *A Hate Crime Offensive, But Bill Faces Stiff Opposition*, Roll Call, May 4, 2009, available at http://www.rollcall.com/issues/54_124/-34521-1.html. Victims and relatives of victims, in coordination with traditional civil rights and gay and lesbian groups, lobbied, made public appearances, and otherwise helped in the public relations effort to pressure Congress. *See* James Warren, *Hate Crimes Measure Has GOP Senators on the Spot*, Chicago Trib., Oct. 1, 2000, at C2; Andrea Stone, *11 Years After Shepard's Death, Mom Pushes*

for Hate Crime Law, USA Today, Sept. 7, 2009, http://usatoday30.usatoday.com/news/nation/2009-09-07-shepard_N.htm.

In spite of the public pressure on the federal government to preemptively prosecute or re-prosecute that often arises in racially-charged cases, when testifying before a congressional committee, Attorney General Holder was only able to cite one case in which state authorities dealt, in his opinion, inappropriately with a crime that the HCPA prohibits—a 2007 California case in which state hate-crime charges were dismissed (though the two defendants were convicted in state court of misdemeanor assault and battery charges and served four and eight months in jail, respectively). The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Senate Comm. on Judiciary, 111th Cong. 171 (2009) (statement of Attorney General Eric H. Holder, Jr.).[4] On the other hand, both Wyoming and Texas successfully prosecuted the individuals responsible for the murders of Matthew Shepard and James Byrd, Jr.—the victims for whom the statute was named—and Texas has executed one of Byrd's killers. Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. Times, Nov. 5, 1999, at A1; Allan Turner, *Hate Crime Killer Executed*, Houston Chron., Sept. 21, 2011, http://www.chron.com/news/houston-texas/article/Hate-crime-killer-executed-2182684.php. Cases in which state authorities unreasonably fail to bring adequate

[4] *See also* George Warren, *Fairfield Couple Convicted Twice for Tahoe Beach Beating*, ABC News10, Mar. 11, 2010, http://archive.news10.net/news/article/77067/0/Fairfield-couple-convicted-twice-for-Tahoe-beach-beating.

prosecutions seem to be quite rare, though *amicus* believes they occur. The "current burdens" imposed by Section 249(a)(1) on the criminal justice system and the fundamental rights of the accused, however, "must be justified by current needs." *Shelby County v. Holder*, 133 S.Ct. 2612, 2619 (2013) ("'the [Voting Rights] Act imposes current burdens and must be justified by current needs'") (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

B. Section 249(a)(1)'s Coverage Of Such A Broad Swath Of Violent Crime Will Potentially Result In More Double Prosecutions

The fact that Section 249(a)(1) is drafted broadly to include all violent crimes in which the perpetrator acts "because of" someone's race, color, religion, or national origin means that it covers a broad swath of violent crime. And that makes the potential for problems even greater, further increasing the likelihood of double prosecutions.

"Hate crime" is a misnomer. Hatred is not an element of the offense. For example, a robber who chooses white victims because in his mind they are more likely to have property worth stealing violates Section 249(a)(1). Moreover, any violent crime in which racial epithets are uttered can potentially be prosecuted under Section 249(a)(1) if federal authorities are so motivated.[5]

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[5] While Section 249(a)(2) is not at issue here, its breadth should be noted, too. Section 249(a)(2) is premised on the Commerce Clause rather than the Thirteenth Amendment and

Because some hate crimes turn out to be hoaxes or not to be hate crimes at all, hate-crime prosecution may lead to a disproportionate number of acquittals in state court that are perfectly appropriate. *See*, *e.g.*, *Police: Va. Minister Painted Racial Slurs on House Before Setting It On Fire*, CBS DC, Apr. 4, 2013, http://washington.cbslocal.com/2013/04/04/police-va-minister-painted-racial-slurs-

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requires an inter-state commerce nexus. It bans violent crimes occurring "because of" someone's "religion, national origin, gender, sexual orientation, gender identity, or disability." But consider: Rapists are seldom indifferent to the gender of their victims, who are always chosen "because of" their gender. A robber might well rob only from the disabled because they are less able to defend themselves. Such victims would literally be chosen "because of" their disability.

University of San Diego law professor (and U.S. Civil Rights Commissioner) Gail Heriot reports that when she inquired of Justice Department officials a decade before the HCPA's passage "[t]hey repeatedly refused to disclaim the view that all rape will be covered, and resisted efforts to correct any ambiguity by re-drafting the language." *See* Gail Heriot, *Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill That May Put Double Jeopardy Protections in Jeopardy*, 10 Engage 4 (Feb. 2009). The inclusion of all rape as a "hate crime" would be in keeping with at least one previous congressional statement. For example, Senate Report 103-138, issued in the connection with the Violence Against Women Act, stated that "[p]lacing [sexual] violence in the context of the civil rights laws recognizes it for what it is—a hate crime." *See also* Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 St. John L. Rev. 315 (2001) (arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, Harv. Women's L. J. 157 (1994) (arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act).

on-house-before-setting-it-on-fire; Stephen Jimenez, *The Book of Matt: Hidden Truths About the Murder of Matthew Shepard* (2013). The cost of allowing double prosecutions may thus be especially high.

III. THE COURT SHOULD DECIDE SECTION 249(a)(1)'S CONSTITUTIONALITY NOW—BECAUSE WAITING RISKS THAT A CASE WILL ARISE THAT MAKES UPHOLDING THE CONSTITUTION MORE PAINFUL AND INSTITUTIONALLY COSTLY

The prosecution of George Zimmerman for the murder of Trayvon Martin is a good example of a highly publicized, controversial case in which a state acquittal is followed by public demands for federal re-prosecution under HCPA Section 249(a)(1). Although the Justice Department will not re-prosecute Zimmerman, political pressure forced them to consider it, and there will be future cases about which emotions run similarly high.

President Obama himself felt it necessary to ask for calm after the Zimmerman verdict. Rallies were held across the country, with 1,000 to 2,000 demonstrators marching to Times Square, "slowing or stopping traffic." Protests were organized in Boston, San Francisco, San Diego, and Sacramento. Ellen Wulfhorst & Barbara Liston, *Obama Calls for Calm After Zimmerman Acquittal, Protests Held*, Reuters, July 15, 2013, http://www.reuters.com/article/2013/07/15/us-usa-florida-shooting-idUSBRE96C07420130715. Civil rights leaders such as Jesse Jackson, Al Sharpton and NAACP President Benjamin Jealous called on the Justice Department to re-prosecute. Mark Felsenthal, *Obama Walks*

Tightrope in Reacting to Zimmerman Verdict, Reuters News, July 15, 2013, http://www.reuters.com/article/2013/07/15/us-usa-florida-shooting-whitehouse-idUSBRE96E00920130715.

If this Court is ever going to decide the constitutionality of Section 249(a)(1), the present case offers the ideal opportunity. This case revolves around a simple assault, which represents a less inflammatory crime compared with that of the *Hatch* case—and especially compared with the despicable Shepherd and Byrd murders for which the statute is named. This minimally inflammatory set of facts offers the Court the best opportunity yet presented—or likely to be presented—to judge the constitutional merits of § 249(a)(1) absent the emotion and distraction of a more high profile case.

Further, Judge Elrod's special concurrence in the opinion below and *Hatch* make it clear that while the circuit courts view themselves as bound by precedent, they are troubled by the deep tensions developing within the Reconstruction Amendments' doctrine. *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014) (Elrod, J., specially concurring); *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013), cert. denied, 134 S. Ct. 1358 (2014). There is a patent need for clarity that only this Court can provide.

Waiting will only make it more controversial and painful for the public, many of whom now have the expectation that the federal government always stands ready to re-prosecute in cases where race may be involved. Local authorities were prepared to adequately prosecute the defendants here and to punish them more severely due to the nature of their motives. It is not clear why the federal government

believed it had an interest in intervening into the heart of Texas's police power, especially when such interventions erode the federal structure of our government and trivialize a bedrock principle of American criminal justice.

As the petitioner and *amicus* commissioners argue, these significant burdens must be justified by current needs. Impairing federalism and the fundamental right to be free from double prosecution is too high and too immediate a price to pay to combat the intangible and unrealistic return of slavery to the United States—whether that cost is to be borne by racists or not.

CONCLUSION

For the above reasons, this Court should grant the petition.

Respectfully submitted,

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