IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	**JUDGE DAN A. POLSTER**
	)	
Plaintiff,	)	
	)	**Case No. 5:11-CR-00594**
vs.	)	
	)	
SAMUEL MULLET, SR.,	)	**Defendant Samuel Mullet,**
LESTER S. MULLET, ET AL.	)	**Sr.'s and Lester Miller's**
	)	**Motion to Dismiss Due to**
	)	**Unconstitutionality of**
Defendants.	)	**18 U.S.C. §249(a)(2)**

The Defendants, Samuel Miller, Sr., and Lester Miller, by and through undersigned counsel, move this Court to dismiss the indictment, pursuant to Fed. R. Crim. Proc. 12(b)(3)(B), because 18 U.S.C. § 249(a)(2), part of the "Hate Crimes Prevention Act," is unconstitutional. If this Court finds that that statute is unconstitutional on its face or as applied, then the attendant conspiracy charge and the destruction of evidence charge would also be dismissed as they are predicated upon a Hate Crimes Prevention Act (the "Act") violation.

The Defendants ask this Court to find 18 U.S.C. § 249(a)(2) unconstitutional on its face or as applied, because:

I. Congress does not have the necessary and proper powers to enact this statute as there is no interstate commerce connection to the purpose of the statute; thus, the statute exceeds Congress' authority by attempting to regulate an activity historically regulated by the States in violation of the Tenth Amendment.

II. Congress does not have the necessary and proper powers to enact this statute as it relates to religious activity under the First Amendment, and specifically, as to actions between private parties within the same religion.

III. The Executive's use of this statute to prosecute the conduct involved in this case violates the Separation of Powers Doctrine of the United States Constitution.

WHEREFORE, for the reasons stated in the attached Memorandum in Support of this Motion, the Defendants ask this Court to find 18 U.S.C. § 249(a)(2) unconstitutional on its face or as applied and dismiss the indictment for lack of jurisdiction and the failure to state an offense.

Respectfully submitted,

/s/ J. Dean Carro
J. DEAN CARRO (0003229)
Counsel for Defendant Lester M. Miller
Appellate Review Office
The University of Akron School of Law
Akron, Ohio 44325-2901
330 972-7751 ● 330-972-6326 (fax)
E-mail carro1@uakron.edu

/s/ Wendi L. Overmyer
WENDI L. OVERMYER (0071000)
Counsel for Defendant Samuel Mullet, Sr.
Office of the Federal Public Defender
50 S. Main Street, Suite 700
Akron, Ohio 44318
(330) 375-5739; Fax: (330) 375-5738
E-mail: wendi_overmyer@fd.org

MEMORANDUM IN SUPPORT

This Court is not to enter lightly into this issue, as all federal statutes are presumed to be constitutional. See e.g. INS v. Chadda, 462 U.S. 919, 949 (1983). Yet, where Congress has exceeded its enumerated powers and passed a law that has no basis under Congress' admittedly broad Commerce Clause Power, or any other power given to it, the Executive Branch through the Department of Justice may not prosecute under that statute.

Congress had no power to regulate the activity sought to be regulated as 18 U.S.C. § 249(a)(2) is applied here. There is no substantial affect on interstate commerce. The alleged intra-religious actions between private individuals do not fall within the statute or federal authority. The actions are not alleged to have been taken out of prejudice or hatred against the Amish religion. Rather, the alleged acts are doctrine-based Old Order Amish beliefs. The Act is not to be applied in a manner that interferes with the practice of religion or speech under the First Amendment. See 18 U.S.C. § 249(d); Pub.L. 111-84, Div. E, § 4710, 123 Stat. 2841 (Oct. 28, 2009) ("Rules of Construction"). Therefore, the statute on its face, or as applied here, violates the federalism principles of the Tenth Amendment, which bars Congress from regulating an area historically left to the States.

I. Congress had no power to enact 18 U.S.C. § 249(a)(2) as the activity regulated does not have a substantial affect on interstate commerce.

Congress may only enact statutes according to its enumerated powers, which are "few and defined", whereas the powers of the States are "numerous and indefinite." United States v. Lopez, 514 U.S. 549, 552 (1995); U.S. Const., Amend. X.

The Hate Crimes Prevention Act was passed, in part, because the existing statute covering hate crimes, 18 U.S.C. § 245, required the act be committed in order to interfere with certain enumerated federally protected activities, and was believed by some to be too onerous on the prosecution. See H.R. Rep. No. 111-86, at 7-8, n.5 (2009). Thus, Congress passed the statute in question, 18 U.S.C. § 249, which has a much more tenuous connection to an existing federal interest – the Commerce Clause. Under 18 U.S.C. § 249(a)(2), the statute requires evidence of an injury's connection to interstate commerce as an element of the offense.

In Lopez, supra, the Supreme Court outlined the proper approach when any court considers a constitutional attack alleging a lack of an interstate commerce connection. In Lopez, the Court held Congress exceeded its power under the Commerce Clause when it enacted the Gun-Free School Zone Act of 1990. Congress had intended to punish criminally any person who knowingly possessed a firearm knowing it was within a school zone, but the Court found

Congress exceeded its power to regulate criminal activity under the Commerce Clause.

Like Lopez, Congress has sought to criminalize, under the Commerce Clause, conduct that is more appropriately left to the police powers of the States as this conduct lacks an interstate commerce connection. The case at bar involves members of the Old Order Amish religion. These members do not normally travel between states but have almost an entirely local, intra-state existence. This further complicates Congress' effort to regulate the activity of the Amish as applied in this case. And as the statute is applied here to the defendants' activity, all of the alleged criminal activities occurred in Ohio with only a minimal and tangential connection to interstate commerce – the hired use of a vehicle and a pair of scissors.

The indictment states the commerce connection to be "travel . . . using the instrumentality of interstate and foreign commerce" and "scissors . . . which has traveled in interstate commerce." [Doc. #10, Indictment, Count 1, paragraph 2.A (travel and scissors); Count 2, paragraph 4 (travel); Count 3, paragraph 4 (travel); Count 4, paragraphs 4-5 (travel and scissors); Count 5, paragraph 4-5 (travel and scissors); Count 6, paragraph 4 (travel)]. Furthermore, according to the indictment, the scissors, manufactured in New York, were purchased on October 4, 2011 and

were used in only two of the five alleged incidents. [Doc. #10, Indictment, Counts 3 and 4].

Congressional authority under the Commerce Clause has significant limitations. Absent a substantial affect on interstate commerce, Congress is powerless to act. See also, United States v. Morrison, 529 U.S. 598 (2000)(finding the Violence Against Women Act of 1994 to be unconstitutional as it exceeded Congress' authority).

There are three bases upon which Congress could regulate interstate commerce: (1) by regulating the channels of interstate commerce, such as roads, rivers and highways, etc.; (2) by regulating the instrumentalities of interstate commerce, such as items that pass through commerce; or (3) relevant to the case at bar, those activities that bear a substantial relationship to interstate commerce. Lopez, 514 U.S. at 558. The last basis is the only arguable commerce clause power even remotely relevant here.

The Lopez case was analyzed under the third basis – a substantial relationship to interstate commerce. The Court found no substantial relationship between the possession of guns within a school zone and the Commerce Clause power. The Court rejected the Government's contentions that guns within school zones would inhibit people from buying homes or moving between States, stating: "if we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress

is without power to regulate." Lopez 514 U.S. at 564. The Court reasoned that "To uphold the government's contentions, here, we would have to pile inference upon inference in the manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." Lopez 514 U.S. 567. Because the defendant in Lopez was a local student enrolled in a local school, "there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce." Lopez, 514 U.S. at 567.

A similar case, Morrison, supra, held a statute aimed at reducing gender-based violence to be unconstitutional based on the overreaching of Congressional power under the Commerce Clause. Applying the Lopez analysis, the Court found that "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Morrison, 529 U.S. at 613.

Significantly, even though the Court found in the legislative record numerous congressional findings of an interstate affect of gender-motivated violence, the Court declined to give credit to those findings. Similarly, the purported connections to interstate commerce listed in the statute here are inadequate. See 18 U.S.C. § 249(a)(2)(B). The question whether Congress has properly identified one of its enumerated powers to support a piece of legislation is itself a "judicial rather than legislative

question" and can be settled only by the Supreme Court. Morrison, 529 U.S. at 614 (citations omitted).

As in Lopez and Morrison, the purported interstate commerce connection of religious motivated violence cannot support the statute at issue, 18 U.S.C.§ 249(a)(2). Nor can the government's attempt to support the indictment by alleging intra-state use of a vehicle and one item (scissors) supply that connection. If that were true, *every* crime now prosecuted in state courts would fall within federal power to regulate. That view has consistently been rejected. In the legislative history for 18 U.S.C. § 249(a)(2), Congress recognized a "nexus to interstate commerce for all federal hate crimes based on sexual orientation, gender, gender identity or disability" is required. H.R. Rep. No. 111-86, at 14. In the case at bar, however, there is no interstate commerce nexus present.

Furthermore, in Morrison there were numerous findings by Congress as to its power to legislate in the area; yet, the Court nonetheless found the statute did not fall within Congress' enumerated powers. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Morrison, 529 U.S. at 614. As the present case illustrates, Congress may not target acts of violence that do not involve interstate commerce:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact, we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.

Morrison 529 at 617-618 (citations omitted). Likewise, the dissenting members of Congress, in opposing the Hate Crimes Act, point out the "transparent" claim of a federal nexus:

> No matter how vehemently proponents of the bill try to defend a Federal nexus – there is simply no impact of such crimes on interstate or foreign commerce. The record evidence in support of such a claim is transparent and will be quickly brushed aside by any reviewing court.

H.R. Rep. No. 111-86, at 23.

Congress had no enumerated power to support its passage of the Hate Crimes Prevention Act. The activity regulated here is one which is historically within the broad police powers of the State. The Tenth Amendment, which was enacted after the Commerce Clause thereby further restricting overreaching federalism, states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., Amend. X. The Tenth Amendment "states a truism that all is retained which has not been surrendered." United States v.

Darby, 312 U.S. 100, 124 (1941). As applied here and as set forth below, the activity alleged in this case is at most an assault between private persons. See Ohio Revised Code § 2903.13 (Assault). There is no sufficient nexus of interstate commerce to warrant federal jurisdiction. Thus, the power to regulate this action is held only by the State.

II. Congress' intention in passing the Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(2), was to protect private individuals practicing minority religions against the actions of those outside of that religion.

Congress did not have the necessary and proper powers to enact 18 U.S.C. § 249(a)(2) as it relates to religious activity under the First Amendment, and specifically, as to actions between private parties within the same religion. According to the legislative history of 18 U.S.C. § 249, the statute is designed to protect persons from *outside* prejudice:

> Hate crimes involve the purposeful selection of victims for violence and intimidation based on their perceived attributes; they are a violent and dangerous manifestation of prejudice against identifiable groups.

H.R. Rep. No. 111-86, at 5.

In enacting the statute, Congress emphasized "state and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and are fully expected to continue to do so under the legislation." H.R. Rep. No. 111-86, at 6. The concurrent federal jurisdiction granted in the statute was meant

to aid the state as a "backstop," assisting in investigations by offering the vast resources, data and experience of federal authorities:

> Such a backstop is important, for example, where the state does not have an appropriate statute, or otherwise declines to investigate or prosecute; when the state requests that the federal government assume jurisdiction; or actions by state and local enforcement officials leave demonstratively unvindicated the federal interest in eradicating bias-motivated violence.

H.R. Rep. No. 111-86, at 6-8. To this end, the government is required to file a certification indicating why it is seeking jurisdiction under four enumerated possibilities. See 18 U.S.C. § 249(b)(1)(A)-(D). In this case, the government does not assert the state does not have jurisdiction, nor that the state failed to prosecute this claim, nor that the state requested the federal government to assume jurisdiction. Rather the government asserts, without further explanation, that jurisdiction is necessary "in the public interest and necessary to secure substantial justice." [Doc. #1-1, Attachment B, Certificate of the Assistant Attorney General (citing 18 U.S.C. § 249(b)(1)(D))]. The state's alleged lack of investigative resources or a vague need to "secure substantial justice" is insufficient, however, to provide Congressional authority for the Act. Rather, Congress must be specifically granted authority under a clearly enumerated constitutional power.

Even when enacting legislation under proper authority, the legislation may be deemed unconstitutionally void for vagueness or overbreadth. The statute, however, broadly defines a "hate crime" as "willfully caus[ing] bodily injury to any person . . . *because of* the actual or perceived . . . religion. . ." 18 U.S.C. § 249(a)(2)(A))]. Thus, the statutory language is unconstitutional due to vagueness and overbreadth as it improperly includes actions, such as those alleged in this case, that were not intended to be covered as "hate crimes." The actions alleged in this case are not alleged to be the result of anti-Amish bias.

The alleged perpetrators and the victims are all members of the same religion – the Old Order Amish. The actions are not alleged to have been taken out of bias or hatred against practitioners of the Amish religion. Rather, the alleged acts are doctrine-based Old Order Amish beliefs regarding punishment for any variety of sins. As such, the alleged intra-religious actions do not fall within the statute or federal authority. Congress has no general power to regulate private action between private parties.

In addition to claiming authority under the commerce clause, discussed *infra*, Congress also claimed authority from the Fourteenth Amendment in enacting this legislation. H.R. Rep. No. 111-86, at 19 ("Congressional Authority Statement"). As noted earlier, the Supreme Court in Morrison decided perhaps a closer

case to the one at bar, holding that Congress exceeded its authority in creating the Violence Against Women Act of 1994 under the Fourteenth Amendment. The petitioner, a student at Virginia Polytechnic Institute, alleged she was sexually assaulted by two members of the University football team. Intercollegiate disciplinary steps were taken but the victim sought further legal action, filing a federal civil claim. The Supreme Court held Congress could not enact the statute under its enumerated power set forth in § 5 of the Fourteenth Amendment to the United State Constitution:

> Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its terms, prohibits only state action. The principle has become firmly embedded in our constitutional law that the action prohibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

Morrison, 529 U.S. at 621 (citing Shelley v. Kraemer, 334 U.S. 1, (1948)). Thus, the attempt to enact 18 U.S.C. § 249(a)(2) under the authority of the Fourteenth Amendment also fails.

There is a dearth of case law for this relatively new Act. The few prosecutions to date under the Hate Crimes Prevention Act stem from the racial animus of the statute under the Thirteenth Amendment.[1] The only case to address the religious animus of the

[1] For example, in United States v. Beebe, 807 F. Supp. 2d 0145 (N.M. 2011), the court considered attacks by white-supremacists on

statute involved a pre-enforcement challenge and was dismissed due to lack of standing. See Glenn v. Holder, 738 F.Supp.2d 718 (E.D.Mich. 2010).

Absent congressional power to regulate private actions of members of the same religion through the First Amendment, this statute is unconstitutional. Merely stating the Act is not to be applied in a manner that interferes with the practice of religion, speech, or association under the First Amendment is insufficient to render the Act constitutional. See 18 U.S.C. § 249(d); Pub.L. 111-84, Div. E, § 4710, 123 Stat. 2841 (Oct. 28, 2009) ("Rules of Construction"). Congress simply does not have the authority to regulate intra-religious activity between private individuals, which is protected from unnecessary regulation under the First Amendment.

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a Native American motivated by racial hatred. Beebe, 807 F. Supp. 2d at 1047. The case focused on the power of Congress to regulate racially motivated violence under the Thirteenth Amendment. The Thirteenth Amendment reaches the private actions between private parties only when such action involves badges of, or incidents of, slavery, such as the actions in Beebe. Id. at 1051-1057; see also United States v. Maybee, 2011 WL 2784446 (W.D. Ark. July 15, 2011). In Jones v. Alfred H. Mayer Co, 392 U.S. 409, 438 (1968) the Supreme Court expressly held that the Thirteenth Amendment reaches purely private racial animus conduct. In contrast, the case at bar involves religious activities unrelated to badges or incidents of slavery and thus does not fall within the parameters of the Thirteenth Amendment. Furthermore, Congress claims authority under the Thirteenth Amendment for 18 U.S.C. § 249(a)(1) only, which is not at issue in this case. H.R. Rep. No. 111-86, at 13 n.31.

Concerns about the infringement on First Amendment freedoms of religions and speech are reflected in the Act's complicated legislative history. Before passing this Act in 2009, Congress declined to pass similar hate crimes legislation in the four prior congressional sessions. The 110th Congress was particularly concerned that "religious speech or expression by clergy could form the basis of a prosecution." H.R. Rep. No. 111-86, at 14. The Act was finally passed by the 111th Congress after considerable debate in both the House and Senate as an amendment to the National Defense Authorization Act for Fiscal Year 2010 and signed into law on October 28, 2009 by President Obama.

Both the House Report and the Congressional floor debates reveal serious concerns about the overreaching of power, federalism, and the chilling effect on the freedom of religion, association, and speech. For example, Rep. Trent Franks (R-AZ) opposed the bill, foreseeing its use to attack religious leaders, such as in the case at bar:

> [I]t would expand the scope of the prosecution to include individuals or members of organizations or religious groups whose ideas or words may have influenced a person's thoughts or motivations when he committed a crime.
>
> ***
>
> This raises the very real possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech, association or other activities that have been specifically protected by the First Amendment of our Constitution for

> the last 220 years. . . . Advocacy groups and religious organizations will be chilled from expressing their ideas out of fear of criminal prosecution. In fact, 'chilled' is probably a profound understatement. Many will be simply terrified or intimidated into complete silence.

155 Cong. Rec. H4972-03 (daily ed. April 29, 2009) (statement of Rep. Trent Franks); see also, H.R. Rep. No. 111-86, at 22-23 ("the bill raises the possibility that religious leaders or members of religious groups could be prosecuted criminally based on their speech or protected activities. A chilling effect on religious leaders and others who express their beliefs will unfortunately result")(dissenting view). In fact, the dissenting members of Congress foresaw the exact scenario present in this case, where "religious leaders or members of religious groups could be prosecuted criminally. . . . Using conspiracy law or section 2 of title 18 [aiding and abetting]. . .it is easy to imagine a situation in which a prosecutor may seek to link hateful speech by one person to causing hateful violent acts by another." H.R. Rep. No. 111-86, at 24. Due to this risk, dissenting members of Congress warned the Act is "an unconstitutional threat to religious freedom, freedom of speech, equal justice under the law and basic federalism principles." H.R. Rep. No. 111-86, at 22.

Congress had no enumerated power to support its passage of the Act. The State of Ohio already criminalizes hate crimes. See Ohio Revised Code § 2927.12 (Defining the offense of "ethnic

intimidation" to cover certain enumerated offenses committed by reason of the victim's race, color, religion and national origin). The unauthorized expansion of Federal criminal law improperly encroaches on state authority under the Tenth Amendment: "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." Lopez, 514 U.S. at 561 n.3 (quoting Untied States v. Emmons,410 U.S. 396, 411-12 (1973)). Thus, the Act is unconstitutional because it exceeds Congressional authority.

III. **The federal government, through its Executive, has exceeded the authority granted to it by enforcing the Hate Crimes Prevention Act, 18 U.S.C. 249(a)(2), and therefore violates the Separation of Powers Doctrine.**

The Separation of Powers Doctrine recognizes the Framers' fear of a strong centralized government. "In the precedent of this Court, the claims of individuals — not of government departments — have been the principle source of judicial decisions concerning separation of powers and checks and balances." Bond v. United States, -- U.S. --, 131 S.Ct. 2355, 2365 (2011). A criminal defendant, even without joinder by the State, may assert a Tenth Amendment defect in a federal statute. Bond, 131 S.Ct. at 2365 ("An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government

and the States when the enforcement of the laws causes injury that is concrete, particular, and redressable").

Our history has long been marked by an awareness of the risks attendant to the consolidation of power. It was this evil that prompted the framers to divide the power granted by the people to the government. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584 (1952). This "separation of powers was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny." United States v. Brown, 381 U.S. 437, 443 (1965). Thus, because Congress lacked the authority to create the statute, as set forth above, the executive has no authority to bring this prosecution.

CONCLUSION

WHEREFORE, Mr. Mullet, Sr., and Mr. Miller ask this Court to find 18 U.S.C. § 249(a)(2) unconstitutional on its face or as applied here and dismiss the indictment.

Respectfully submitted,

/s/ J. Dean Carro
J. DEAN CARRO (0003229)
Counsel for Defendant
Lester M. Miller

/s/ Wendi L. Overmyer
WENDI L. OVERMYER (0071000)
Counsel for Samuel Mullet, Sr.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was served upon the assigned United States Attorneys through the ECF system on March 5, 2012.

/s/ J. Dean Carro
J. DEAN CARRO (0003229)