

Nos. 13-3177, 3181, 3182, 3183, 3193,  
3194, 3195, 3196, 3201, 3202, 3204, 3205, 3206, 3207, 3208, 3214

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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United States of America,

Plaintiff-Appellee,

v.

Lovina Miller, *et al.*,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO, No. 11-CR-594  
The Honorable Dan Aaron Polster

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***AMICUS* BRIEF FOR *AMICI CURIAE* ANTI-DEFAMATION LEAGUE,  
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS,  
AND 38 ADDITIONAL *AMICI* IN SUPPORT OF THE UNITED STATES  
OF AMERICA AND AFFIRMANCE**

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**COMPLETE LIST OF *AMICI CURIAE* ON THIS PROPOSED *AMICUS*  
BRIEF IN SUPPORT OF THE UNITED STATES OF AMERICA  
AND AFFIRMANCE**

American-Arab Anti-Discrimination Committee, American Association of People with Disabilities, American Association of University Women, American Federation of Teachers, American Jewish Committee, Anti-Defamation League, Asian Americans Advancing Justice, Bend the Arc: A Jewish Partnership for Justice, B'nai B'rith International, GLSEN, Central Conference of American Rabbis, Hindu American Foundation, Human Rights Campaign, Human Rights First, Interfaith Alliance Foundation, Japanese American Citizens League, Jewish Council for Public Affairs, Jewish Women International, The Leadership Conference on Civil and Human Rights, Muslim Advocates, National Association for the Advancement of Colored People, National Center for Transgender Equality, National Council of Jewish Women, National Disability Rights Network, National Organization of Black Law Enforcement Executives, National Organization for Women Foundation, National Urban League, OCA – Asian Pacific American Advocates, People For the American Way Foundation, PFLAG National, Police Executive Research Forum, Sikh American Legal Defense and Education Fund, Sikh Coalition, Society for Humanistic Judaism, South Asian Americans Leading Together, Southern Poverty Law Center, Union of Reform Judaism, UNITED SIKHS, Women of Reform Judaism, and Women's League for Conservative Judaism.

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Sikh Coalition, Society for Humanistic Judaism, South Asian Americans Leading Together, Southern Poverty Law Center, Union of Reform Judaism, UNITED SIKHS, Women's League for Conservative Judaism, and Women of Reform Judaism, each states that it does not have a parent corporation and that no publicly held corporation owns any stock in it.

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5. No publicly owned corporation has a financial interest in the drafting or content of this *amicus* brief or the outcome of this appeal in relation to this *amicus* brief.

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Before the Committee on the Judiciary United States Senate,

Hearing: The Matthew Shepard Hate Crimes Prevention Act of 2009

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STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the Anti-Defamation League (“ADL”),<sup>1</sup> The Leadership Conference on Civil and Human Rights (“The Leadership Conference”), and 38 other *amici* representing a broad cross-section of organizations, each committed to the importance of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (“HCPA”).

ADL was founded in 1913 “to stop the defamation of the Jewish people and to secure justice and fair treatment to all.”<sup>2</sup> A premier civil rights organization combating anti-Semitism and all forms of bigotry, ADL educates and informs the public about prejudice and discrimination and has appeared as *amicus curiae* in a broad range of cases. ADL works to safeguard religious freedom under the United States Constitution and federal and state law. It is therefore vigilant in ensuring that no laws infringe on these critical rights.

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<sup>1</sup> No counsel for a party or a party to this proceeding authored this brief in whole or in part and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than proposed *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> ADL Mission Statement, at <http://www.adl.org/about-adl/>.

Having been immersed in the issues surrounding hate crime legislation and the application of hate crime laws for more than thirty years, ADL is uniquely qualified to serve as *amicus* in this matter. ADL drafted a model hate crime law (“ADL Model Law”) 32 years ago.<sup>3</sup> Forty-five states<sup>4</sup> and the District of Columbia now have enacted hate crime laws, many of which were modeled on the ADL Model Law. On the federal level, ADL led a “broad coalition of civil rights, religious, educational, professional, law enforcement, and civic organizations” working in support of expanded federal hate crime legislation for more than a decade.<sup>5</sup> These efforts culminated in the enactment of the HCPA.

**The Leadership Conference** is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation’s oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil

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<sup>3</sup> The complete text of the ADL Model Law is available on ADL’s website at <http://www.adl.org/combating-hate/hate-crimes-law/>.

<sup>4</sup> Only Arkansas, Georgia, Indiana, South Carolina, and Wyoming have not enacted a hate crime law.

<sup>5</sup> Abraham H. Foxman and Michael Lieberman, *The Federal Hate Crime Bill is Now Law— What’s Next? The Hate Crimes Prevention Act Finally Passes*, The Hill (Nov. 9, 2009), <http://www.adl.org/press-center/c/the-federal-hate-crime-bill-is-now-law.html>.

rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters, Roy Wilkins of the NAACP, and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals. It was a leader in the efforts to pass the HCPA. The Leadership Conference believes that hate-motivated violence requires a strong, coordinated response and supports the HCPA as a measured, responsible, and constitutional way of responding.

The **American-Arab Anti-Discrimination Committee** (“ADC”) is the largest Arab-American grassroots civil rights organization. Founded in 1980 by a former U.S. Senator, ADC is committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC is at the forefront in addressing discrimination and bias against Arab Americans wherever it is practiced. ADC has served as counsel and has been granted *amici* status in a number of cases, including cases involving hate crimes laws.

The **American Association of People with Disabilities** (“AAPD”) is the largest national nonprofit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for

change. AAPD works to uphold the civil rights of all Americans with disabilities through the effective enforcement and implementation of civil rights laws including the HCPA.

In 1881, the **American Association of University Women** (“AAUW”) was founded by like-minded women who had defied society’s conventions by earning college degrees. Since then, AAUW has worked to break through barriers for women and girls through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 bipartisan members and supporters, approximately 1,000 branches, and approximately 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW’s priority issues, including civil rights. In adherence to its member-adopted Public Policy Program, AAUW supports freedom from violence and fear of violence, including hate crimes, in homes, schools, workplaces, and communities.

The **American Federation of Teachers** (“AFT”), founded in 1916, today represents more than 1.5 million educators and school personnel, higher education faculty and professionals, state and local employees, and healthcare and childcare providers. AFT is committed to advancing the principles of fairness, democracy in the workplace, and the right for workers to be represented by a union of their choosing, as well as collective bargaining, community engagement, and civil and human rights. AFT is a strong supporter of the HCPA and frequently expresses

AFT's support for civil and human rights issues in the United States and around the world.

**American Jewish Committee** ("AJC"), the nation's global Jewish advocacy organization, was founded in 1906 for the purpose of protecting the civil and religious rights of Jews at home and abroad. It is AJC's conviction that the security and constitutional rights of Jewish Americans can best be protected by helping to preserve the security and constitutional rights of all Americans, without respect to race, religion, national origin, sex, or sexual orientation. The constitutionality of criminal statutes such as the HCPA is of special concern to AJC because Jews and Jewish religious institutions have been and continue to be particular targets of bias-motivated criminal activities.

**Asian Americans Advancing Justice | AAJC** ("Advancing Justice | AAJC") is a national non-profit, non-partisan organization working to advance the civil and human rights of Asian Americans and build a fair and equitable society for all. Founded in 1991, Advancing Justice | AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including race relations, hate crimes, and anti-Asian violence. Advancing Justice | AAJC worked extensively toward the passage of the HCPA and continues to support vigorous enforcement of the law.

**Bend the Arc: A Jewish Partnership for Justice** (“Bend the Arc”) is the nation’s leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation’s most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

**B’nai B’rith International** has advocated for global Jewry and championed the cause of civil and human rights since 1843. B’nai B’rith is recognized as a vital voice in promoting Jewish unity and continuity, as well as combating anti-Semitism and other forms of discrimination.

**GLSEN** strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression. Since homophobia and heterosexism undermine a healthy school climate, GLSEN works to educate teachers, students, and the public at large about the damaging effects these forces have on youth and adults alike. GLSEN recognizes that other forces such as racism, sexism, and xenophobia have similarly adverse impacts on communities and works to redress all such inequities.

**Hindu American Foundation** (“HAF”) is an advocacy organization for the Hindu American community. The Foundation educates about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions

and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, public policy, media, academia, and interfaith relations. HAF seeks to cultivate leaders and empower future generations of Hindu Americans. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation, religious discrimination, and hate crimes to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated the courts and Americans at large about various aspects of Hinduism and issues impacting the Hindu American community, either as a party to the case or an *amicus curiae*.

**Human Rights Campaign** ("HRC"), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work, and in the community. HRC has over 1.5 million members and supporters all committed to making this vision of equality a reality.

**Human Rights First** promotes laws and policies that advance universal rights and freedoms and exists to protect and defend the dignity of each individual through respect for human rights and the rule of law.

**Interfaith Alliance Foundation** celebrates religious freedom by championing individual rights, promoting policies that protect both religion and

democracy, and uniting diverse voices to challenge extremism. Founded in 1994, its members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation was an early and strong supporter of the HCPA as a valuable tool to prevent and prosecute hate crimes.

**Japanese American Citizens League** (“JACL”) was founded in 1929. It is the oldest and largest civil rights organization representing persons of Japanese ancestry, as well as others, in the United States. It has over 10,000 members and chapters throughout the Nation. JACL has a long history of fighting racial, ethnic, and religious discrimination. It was a leading organization in removing state alien land laws and in securing redress for Japanese Americans imprisoned during World War II. JACL also has a long history of advocacy in issues relating to immigration, naturalization, voting rights, and hate crimes.

**Jewish Council for Public Affairs** (“JCPA”), the coordinating body of 15 national and 125 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. The JCPA views with alarm the continuing scourge of hate crimes in American society. Strong hate crimes laws are necessary to send a strong message that crimes based on prejudice and hatred are anathema to the fundamental values of democracy upon which this nation is founded.



**Jewish Women International** (“JWI”) is the leading Jewish organization working to prevent gender-based violence and empower women and girls through economic literacy, healthy relationship education, and leadership training. With over 50,000 members and supporters, JWI works in partnership with national and local coalitions to ensure that all people are able to live free from hatred and discrimination. Since 2001, JWI has hosted Prejudice Awareness Summits in local communities, an intensive year-long program for middle school students that increases awareness, knowledge, and acceptance of ethnic and cultural differences.

**Muslim Advocates**, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. It advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. It serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates’ work fighting institutional discrimination and acts of hate against the American Muslim community.

Founded in 1909, the **National Association for the Advancement of Colored People** (“NAACP”) is the nation’s oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred

and racial discrimination. From the early 1900s until today, the NAACP has a long and distinguished history of fighting against hate crimes, and a long history of working to end lynching and other forms of domestic terrorism. In recent times, the NAACP vigorously and successfully advocated for the passage of the HCPA.

**National Center for Transgender Equality** is a national social justice organization devoted to ending discrimination and violence against the transgender community through education and advocacy on national issues of importance to the transgender community. It empowers transgender people and their allies to educate and influence policymakers and others, and facilitates a strong and clear voice for transgender equality in our nation's capital and around the country.

**National Council of Jewish Women** ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Laws and policies that provide equal rights for same-sex couples." NCJW's Principles state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must

be eliminated.” Consistent with its Resolutions and Principles, NCJW joins this brief.

**National Disability Rights Network (“NDRN”)**, is the non-profit membership association of the federally authorized Protection and Advocacy (“P&A”) agencies located in all 50 states, including Disability Rights Ohio, the District of Columbia, United States Territories, and the Native Tribes in the four corners region. P&A agencies investigate abuse and neglect of individuals with disabilities in a variety of settings, and provide legal representation and related advocacy services. The P&A System is the largest provider of legally based advocacy services for persons with disabilities in the nation. In support of its members’ goals seeking the enactment and vigorous enforcement of laws protecting the rights of people with disabilities, NDRN successfully advocated for the inclusion of disability as a characteristic of bias-motivated violence subject to prosecution under the HCPA.

**National Organization of Black Law Enforcement Executives (“NOBLE”)**. Founded in 1976, NOBLE is comprised of primarily African-American law enforcement CEOs and command-level officials who are committed to improving the quality of law enforcement service in this nation. Its Mission is to ensure equity in the administration of justice in the provision of public service to

all communities, and to serve as the conscience of law enforcement by being committed to justice by action.

The **National Organization for Women** (“NOW”) Foundation is devoted to furthering women’s rights through education and litigation. Created in 1986, the NOW Foundation is affiliated with NOW, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters and with chapters in every state and the District of Columbia.

Established in 1910, the **National Urban League** is the nation’s oldest and largest community-based movement devoted to empowering African Americans and other disadvantaged people to enter the economic and social mainstream. The mission of the National Urban League movement is to enable African Americans and disadvantaged people to secure economic self-reliance, parity, power, and civil rights. Today, the National Urban League spearheads the non-partisan efforts of 95 local affiliates in 36 states and the District of Columbia to deliver services and resources in underserved communities. Given its presence in predominantly African American communities, the National Urban League has had a long history of concern about hate crimes and has supported the enactment and implementation of the HCPA.

**OCA – Asian Pacific American Advocates** (“OCA”) is a national membership-driven organization dedicated to advancing the political, social, and

economic well-being of Asian Pacific Americans (“APAs”). Founded in 1973 as the Organization of Chinese Americans, OCA aims to embrace the hopes and aspirations of APAs in the United States. OCA is engaged in organizing its over 100 chapters and affiliates across the nation to encourage civic engagement on issues of equity and equality for all APAs. OCA is dedicated to combating hate crimes and advancing the civil rights of all APAs. In this regard, OCA has supported various *amicus curiae* briefs in support of hate crime laws challenged in the courts and worked in coalition to advance anti-hate crime policies.

**People For the American Way Foundation** (“PFAWF”) is a nonpartisan citizens’ organization established to promote civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation’s heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation, policy work, and other efforts nationwide in support of hate crimes legislation.

Founded in 1972 with the simple act of a mother publicly supporting her gay son, **PFLAG National** (“PFLAG”) is the nation’s largest family and ally organization. Made up of parents, families, friends, and straight allies united with people who are lesbian, gay, bisexual, and transgender (“LGBT”), PFLAG is committed to advancing equality and societal acceptance of LGBT people through

its threefold mission of support, education, and advocacy. PFLAG now has over 350 chapters and 200,000 members and supporters crossing multiple generations of American families in major urban centers, small cities, and rural areas in all 50 states. This vast grassroots network is cultivated, resourced, and serviced by PFLAG National, the National Board of Directors, and 13 Regional Directors.

**Police Executive Research Forum** (“PERF”) is an independent research organization that focuses on critical issues in policing. Since its founding in 1976, PERF has identified best practices on fundamental issues, such as reducing police use of force, developing community policing and problem-oriented policing, using technologies to deliver police services to the community, and evaluating crime reduction strategies. PERF’s work is informed by its membership of police officials, academics, federal government leaders, and others with an interest in policing and criminal justice.

**Sikh American Legal Defense and Education Fund** (“SALDEF”) was founded in 1996 and is the oldest national Sikh American civil rights and educational organization. A religious minority with distinct articles of faith, Sikhs have been in America for over 100 years. SALDEF is dedicated to empowering Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for

all Americans. In this connection, SALDEF has supported the constitutionality of hate crime laws.

The **Sikh Coalition** is a community-based organization that works towards the realization of civil and human rights for all people. The Sikh Coalition pursues its mission by providing direct legal services to persons whose civil or human rights are violated, advocating for law and policies that are respectful of fundamental rights, promoting appreciation for diversity through education, and fostering civic engagement in order to promote local community empowerment. The issues at stake in this case directly relate to the Sikh Coalition's work to ensure federal law empowers law enforcement to appropriately respond to criminal acts motivated by bias or prejudice related to the victim's actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.

**Society for Humanistic Judaism** ("SHJ") is the congregational arm of the Humanistic Judaism Movement. The SHJ mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews. The SHJ holds a position condemning intimidation and harassment, especially when motivated out of disability, handicap, physical attribute, gender, sexual orientation, race, religion, cultural expression or ethnic background. SHJ responds with

outrage that such terrorism exists and asks that federal law be enforced to protect the dignity and safety of all citizens.

**South Asian Americans Leading Together** (“SAALT”) is a national nonprofit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. South Asians in the U.S. have faced increasing incidents of bias, discrimination, and hate violence post-9/11. SAALT is committed to the importance of law that protects all members of society from such incidents and makes us safer as a nation. SAALT joins this brief to ensure that the HCPA remains, as it is constitutional and necessary to the protection of all Americans.

**The Southern Poverty Law Center** is dedicated to fighting hate, teaching tolerance, and seeking justice for the most vulnerable members of society. It has brought a series of landmark cases against organized hate groups for the injurious actions of their members. It also provides analyses of hate crime trends to law enforcement officials at the local, state, and federal levels and has testified on numerous occasions before congressional committees concerned with hate crime issues.

The **Union for Reform Judaism**, whose 900 congregations across North America includes 1.3 million Reform Jews, the **Central Conference of American**



**Rabbis**, whose membership includes more than 2000 Reform rabbis, and the **Women of Reform Judaism**, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue as a people who know all too well the dangers that stem from a failure to speak forcefully and act effectively to bar discrimination and prevent the demonization of the "other." The HCPA makes clear that violence rooted in bigotry and hate is unwelcome in American society.

**UNITED SIKHS** is a U.N.-affiliated, international, non-profit organization dedicated to advocacy for Sikh Americans around the world. This includes people of the Sikh faith in the United States who have fallen victim to hate and ignorance in the post-9/11 atmosphere through hate crimes, bullying, and discrimination. For this reason, UNITED SIKHS is signing onto this *amicus* brief defending the HCPA due its relevance and importance for this country's minority groups.

**Women's League for Conservative Judaism** ("WLCJ") is the largest synagogue-based women's organization in the world. As an active arm of the Conservative/Masorti movement, WLCJ provides service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide.

## SUMMARY OF THE ARGUMENT

*Amici* respectfully submit this *amicus* brief in support of Plaintiff-Appellee, the United States of America (the “Government”), to provide this Court with information regarding the background of, scope, and need for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 (“HCPA”) and why the HCPA is constitutional both as written and as applied.

The HCPA is a logical response to the prevalence and impact of hate crimes. The HCPA was created to fill gaps in existing federal and state hate crime laws and was enacted to respond to an urgent need to provide a strong, coordinated response to bias crimes.<sup>6</sup> Bias-motivated crimes—crimes that target victims because of actual or perceived immutable personal characteristics—cause unique harm. Not only does the victim suffer, the entire community with which the victim is identified is affected.

The FBI’s Annual Hate Crime Statistics Report highlights the critical need for this law. The data from 2012, the most recent data available, counts 7,164

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<sup>6</sup> *See, e.g.*, Chart of Hate Crimes Statutory Provisions by State (updated March 2013), which shows the breadth of coverage of the nation’s hate crime laws, at <http://www.adl.org/combatting-hate/hate-crimes-law/c/older-hate-crimes-law.html>.

victims. Of those who reported, nearly 19% of victims were targeted because of their actual or perceived religion.

The HCPA does not and cannot be read to create an exception for crimes committed against people who may share the same faith as the perpetrator. Rather, the HCPA addresses crimes that target a victim because of the victim's actual or perceived religion, and is silent with respect to the perpetrator's religion. The fact that Appellants claim to identify as the same religion as the victims cannot shield them from culpability under the HCPA. To engraft such a limitation on the HCPA would cause many hate crimes to go unpunished and force courts to make inappropriate determinations as to whether the victim and perpetrator were truly of the "same religion."

The HCPA does not infringe on the First Amendment. The statutory language of the HCPA does not criminalize thoughts or beliefs, but rather provides investigative and prosecutorial jurisdiction for certain bias-motivated violent acts. The United States Supreme Court has unanimously upheld the constitutionality of hate crime laws, deciding conclusively in *Wisconsin v. Mitchell* that physical assault is not expressive conduct entitled to First Amendment protection. Congress provided strict rules of construction to assuage First Amendment concerns. As written and as applied, the Hate Crimes Prevention Act is a constitutional and necessary tool to combat hate crimes for the protection of all members of society.

## ARGUMENT

### I. THE HATE CRIMES PREVENTION ACT RESPONDS TO AN URGENT NEED TO PROVIDE A STRONG, COORDINATED RESPONSE TO BIAS CRIMES

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (“HCPA”), is the most important, comprehensive, and inclusive federal hate crime enforcement law enacted in the past 40 years.<sup>7</sup>

Congress passed the HCPA in response to the “serious national problem” in the United States of bias-motivated violence, including religious violence.<sup>8</sup> *See* Pub. L. No. 111-84, Div. E, Sec. 4702(2), 123 Stat. 2190, 2385 (Oct. 28, 2009).

The HCPA expanded existing federal hate crimes laws to address crimes committed because of a victim’s gender, sexual orientation, gender identity, or disability. In addition, it closed a critical loophole in the prior law, 18 U.S.C. § 245, which allowed hate crime prosecutions only when the victim was engaged

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<sup>7</sup> *See* ADL Blog, *Matthew Shepard And James Byrd, Jr. Hate Crimes Prevention Act Four Years Later: Demonstrating Its Value* (Oct. 28, 2013), at <http://blog.adl.org/civil-rights/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-four-years-later-demonstrating-its-value>.

<sup>8</sup> *Amici* adopt the Government’s position regarding the constitutionality of the HCPA under the Commerce Clause of the United States Constitution. *Amici* believe there is no doubt regarding the statute’s constitutionality and Congress’s authority to act.

in one of six enumerated federally protected activities such as serving on a jury or attending public school.<sup>9</sup> The HCPA also allows the federal government to become involved as a partner to state and local authorities, including in instances where the state law does not provide jurisdiction for hate crime prosecutions.<sup>10</sup>

The HCPA gives local law enforcement officials important tools to combat violent, bias-motivated crime. Federal support – through training or direct assistance – helps ensure that bias-motivated violence is effectively investigated and prosecuted. The legislation also facilitates certain federal investigations and prosecutions when local authorities are unwilling or unable to proceed.

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<sup>9</sup> ADL, *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, What You Need To Know*, at <http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf>.

<sup>10</sup> Attorney General Eric Holder testified that the HCPA is intended to “assist State, local, and tribal jurisdictions by providing funds and technical assistance to investigate and prosecute hate crimes.” Before the Committee on the Judiciary United States Senate. Hearing: The Matthew Shepard Hate Crimes Prevention Act of 2009 (June 25, 2009), at <http://www.judiciary.senate.gov/pdf/06-25-09HolderTestimony.pdf>.

**A. Bias-Motivated Crimes, Targeting Victims Because Of Actual Or Perceived Immutable Personal Characteristics, Cause Unique Harm**

Criminal activity motivated by bias is distinct from other criminal conduct. These crimes, which involve criminal activity—murder, arson, vandalism, assault—occur when the perpetrator’s bias or animus prompts him or her intentionally to target a victim or victims for a crime because of actual or perceived status—race, religion, ethnicity, national origin, sexual orientation, gender, gender identity, or disability. In the vast majority of these crimes, but for the victim’s personal characteristic, no crime would occur at all.

Bias crimes are designed to intimidate the victim and the victim’s community. Members of the target community recognize the crime as a direct attack on their own identity, resulting in communities living in the shadow of anxiety, fear, and intimidation. These crimes damage the fabric of our society and fragment communities, causing division in the society as a whole and threatening core American values.

Because hate crimes are essentially identity crimes, it is difficult, if not impossible, for the victim or any person who shares the characteristic for which the victim was targeted to minimize the risk of future attacks. As such, the victims of these crimes, and the community to which they belong, or are perceived to belong, experience acute psychological and emotional harm when such crimes occur. As

Congress found, bias-motivated crimes “devastate[] not just the actual victim and the family and friends of the victim, but frequently savage[] the community sharing the traits that caused the victim to be selected.” Pub. L. No. 111-84, Div. E, Sec. 4702(5), 123 Stat. 2190, 2835 (Oct. 28, 2009).<sup>11</sup>

**B. The FBI’s Annual Hate Crime Statistics Report Highlights The Critical Need For This Law**

Hate crime statistics underscore the necessity of the HCPA to combat and address hate crimes. Pursuant to the 1990 Hate Crime Statistics Act, 28 U.S.C. § 534 (“HCSA”), Congress requires the Federal Bureau of Investigation (“FBI”) to compile an annual report of hate crime statistics based on voluntary reports made by state and local agencies.<sup>12</sup> Based on the hate crime statistics for 2012, released

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<sup>11</sup> The House of Representatives reported findings that bias-motivated criminal acts 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).

<sup>12</sup> The FBI Hate Crime Statistics are based on figures reported by U.S. law enforcement agencies, pursuant to the HCSA, 28 U.S.C. § 534 (1990), as amended. The HCSA requires the Justice Department to gather data from local law enforcement agencies across the country on crimes that “manifest prejudice based on race, religion, sexual orientation, or ethnicity” and, since 1994, disability, and to annually publish a report summarizing the findings. The HCSA serves as a tool for expanding the education of local law enforcement agencies as to what constitutes a hate crime. A summary of the FBI Hate Crime Statistics for the years 2000 to 2012 is available on ADL’s website, at

by the FBI in November 2013,<sup>13</sup> there were 7,164 victims of reported hate crimes.<sup>14</sup> Approximately 55% of the victims were individual victims of crimes against the person<sup>15</sup>—3,968 people—and of these persons, 39.6%, 37.5%, and 21.5% were victims of simple assault, intimidation, and aggravated assault, respectively.<sup>16</sup>

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<http://www.adl.org/assets/pdf/combating-hate/FBI-HCSA-2012-2000-Comparison-updated.pdf>.

<sup>13</sup> Following the release of the 2012 statistics, ADL expressed concern that the data are incomplete, reflecting significant under-reporting of hate crimes and under-participation by law enforcement agencies.

<sup>14</sup> FBI Hate Crime Statistics 2012, at [http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims\\_final](http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims_final).

<sup>15</sup> *Id.* The remaining 2,993 victims of hate crimes were victims of crimes against property. ADL notes that even with respect to property crimes, it is large communities of people who often are terrorized or intimidated by the hate crime. *See, e.g., People v. Assi*, 14 N.Y.3d 335, 341 (N.Y. 2010) (acknowledging, with respect to the defendant’s effort to bomb a synagogue, that “it is self-evident that, although the target of defendant’s criminal conduct was a building, the true victims were the individuals of Jewish faith who were members of the synagogue”).

<sup>16</sup> FBI Hate Crime Statistics 2012, at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/hate-crime>.



Nearly 19% of victims of hate crimes in 2012, constituting over 1,900 individuals, were targeted because of religion.<sup>17</sup> Of the 1,340 victims of an anti-religious hate crime:

- 62.4 percent were victims of anti-Jewish bias.
- 11.6 percent were victims of anti-Islamic bias.
- 7.5 percent were victims of a bias against groups of individuals of varying religions.
- 6.4 percent were victims of an anti-Catholic bias.
- 2.6 percent were victims of an anti-Protestant bias.
- 0.9 percent were victims of an anti-Atheist/Agnostic bias.
- 8.6 percent were victims of a bias against other religions (anti-other religion).<sup>18</sup>

The FBI statistics reflect the urgent need to provide a strong coordinated response to bias-motivated crimes at the federal, state, and local levels that the HCPA was intended to address. Recognizing the need for federal resources for and involvement with state and local authorities, Congress carefully crafted the HCPA as a constitutional law to address a serious national problem.

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<sup>17</sup> *Id.* at [http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims\\_final](http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/victims/victims_final).

<sup>18</sup> *Id.*

### **C. The Hate Crimes Prevention Act Includes Intra-Religious Hate Crimes**

Contrary to the Defendants-Appellants’ (collectively, “Appellants”) argument in the court below, the law does not—and, indeed, could and should not—create an exception for crimes committed against people who share the same faith as the perpetrator. *See United States v. Mullet*, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012) (noting there is “nothing in the language of the statute that limits its reach to acts of violence perpetrated by members of one religious group against members of another”). History, as the district court acknowledged, is “replete with examples of internecine violence” *id.*; it would be both illogical and arguably unconstitutional to treat perpetrators differently under the law based on their faith. “Either way,” as this Court has previously stated, “the words Congress chose offer no basis for drawing this kind of line, and it is not [the Court’s] place to second guess the judgment Congress put into law when [the Court] ‘interpret[s], rather than author[s], the federal criminal code.’” *Doe v. Boland*, 630 F.3d 491, 498 (6th Cir. 2011) (quoting *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 495, n.7 (2001)).

The victims in the case on appeal are members of the Old Order Amish faith. In September 2011, Appellants targeted these victims for punishment because of their religion. Acting individually and in concert, Appellants “ambushed” the victims in their homes or “lured [them] out through lies and deception,” and then

attacked them. (R. 390, Sentencing Tr. at 8:5-13.) Because of the victims' religion, Appellants cut off the beards and hair of the male victims and the hair of the female victims—recognized as having religious significance for the Old Order Amish—and otherwise “terrorized and traumatized” the victims. (*Id.*)

Before trial, Appellant Samuel Mullet informed the media that Appellants' actions “were intended as punishment for those who refused to listen to [Samuel Mullet, who was known as a bishop within his community,] or to obey his edicts. They were meant to send a message to the Amish community that the victims should be ashamed for the way they treated him and the community.” *Mullet*, 868 F. Supp. 2d at 621. At trial, the evidence also showed that Appellants believed the victims “had strayed from the true path and needed to be chastened or corrected to return to the true path.” (Sentencing Tr., R. 390, 13:16-19.) Appellants were charged with and subsequently convicted of, among other things, “committing kidnapping in conjunction with violating” the HCPA. (R. 390, Sentencing Tr., 6:15-21.)

Appellants' argument in the district court that their actions were “intra-religious actions between private individuals” and not “taken out of prejudice or hatred against the Amish religion” misses the point and ignores the plain language of the Act. (S. Mullet's Mot. to Dismiss, R. 73, at 1, 3.) The HCPA does not require hatred toward a particular religion; rather, it focuses on whether the victim

was targeted *because of* actual or perceived religion. Here, Appellants targeted the victims *because of* the victims' religion. The HCPA, moreover, is silent with respect to the perpetrator's religion. The fact that Appellants identify as the same religion as the victims does not shield them from culpability under the HCPA. 18 U.S.C. § 249(a)(2)(A).

Were the Court to interpret the HCPA to preclude enforcement against intra-faith violent acts, it would undermine the very purpose of the Act. Such an interpretation would illogically carve out enhanced sentencing based on a *defendant's* race, religion, or other characteristic. History is replete with bias-motivated violence among persons who, on a broadly viewed basis, are members of the same religion. To exempt intra-faith crimes from the HCPA would ignore many acts of bias-motivated violence that have devastating effects on communities. Moreover, it would result in courts making inappropriate and unconstitutional inquiries and impossible distinctions as to whether persons were or were not part of the same religion.

As the district court correctly held, there "is no logical reason why such acts of violence should be excepted from the reach of the Hate Crimes Prevention Act." *Mullet*, 868 F. Supp. 2d at 624. Such an interpretation of the HCPA would severely narrow the purpose of the Act, in contravention of its plain language and Congress's intent.

## **II. THE HATE CRIMES PREVENTION ACT DOES NOT INFRINGE ON THE FIRST AMENDMENT**

### **A. The Hate Crimes Prevention Act Does Not Criminalize Beliefs, Thoughts, Or Speech**

The HCPA does not criminalize beliefs or thoughts; rather, it criminalizes intentional conduct. Federal and state hate crime laws punish criminal acts committed where a perpetrator intentionally targets an individual or group for violence or vandalism because of the personal characteristics of that individual or group.

It is well settled that the First Amendment does not protect violence – and it does not prevent the government from imposing penalties for criminal conduct directed against victims because of their personal characteristics. Constitutional jurisprudence is clear on this. “The First Amendment has never been construed to protect acts of violence against another individual, regardless of the motivation or belief of the perpetrator.” *Mullet*, 868 F. Supp. 2d at 623 (citing *NAACP v. Claiborne Hardware*, 458 U.S. 886, 916 (1982)). Violence “has no sanctuary in the First Amendment.” *Claiborne Hardware*, 458 U.S. at 916 (quotations and citation omitted). “[P]hysical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.” *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (citations omitted).

In *Mitchell*, the Supreme Court considered a First Amendment challenge to Wisconsin’s penalty-enhancement hate-crime law, which provided for enhancement of a criminal defendant’s sentence where the defendant intentionally selected his victim based on race. The Wisconsin law “enhance[d] the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason. . . .” *Mitchell*, 508 U.S. at 485.

The Supreme Court upheld the Wisconsin law. In the unanimous decision, the Supreme Court held that courts may take bias motivation into account in sentencing. While a sentencing judge may not take into consideration a defendant’s abstract beliefs, no matter how obnoxious to most people, the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because they are protected by the First Amendment. *Id.* at 485-86. *Mitchell* makes clear that the Hate Crimes Prevention Act does not raise First Amendment concerns.

This Court itself has recognized that the HCPA “does not prohibit . . . hateful speech . . . and the legislative history shows that the term ‘violent acts’ . . . is not intended to include ‘violent thoughts,’ ‘expressions of hatred toward any group,’ or ‘the lawful expression of one’s deeply held religious or personal beliefs.’” *Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012) (citing H.R. Rep.

No. 86, 111th Cong. 1st Sess. 16 (2009)). The HCPA’s prohibition of “violent acts” rather than thoughts, speech or expression undermines First Amendment free speech challenges.

**B. The HCPA Does Not Interfere With Religious Free Exercise Rights, But Rather Safeguards Such Rights**

Similarly, both logic and the HCPA’s plain language compel rejection any argument that the HCPA violates religious freedom. By its very terms, the HCPA is triggered only if the perpetrator commits an underlying crime. Appellants are free to worship in any way they choose – the HCPA does not interfere with their free exercise rights. It is only when Appellants commit a crime, and target victims for that crime based on protected characteristics, that culpability under HCPA results. In addition, contrary to Appellants’ concern below that the law infringes on their religious freedom, Appellants actually infringed on the *victims*’ religious freedom. As the district court recognized, Appellants “did more than just terrorize, traumatize, disfigure [their] victims, [they] trampled on the Constitution, particularly the First Amendment which guarantees each and every American religious freedom. . . . [T]hrough force and violence, [Appellants] tried to ram [their] religious beliefs down [the victims’] throats.” (Sentencing Tr., R. 390, 10:14-19; 12:6-7.)

The HCPA does not infringe on First Amendment rights, whether as a matter of free expression or the freedom to worship. Appellants are, and always have

been, free to speak their minds and free to worship in any way they wish. They simply are not free to target victims for violent crimes because of religion.<sup>19</sup>

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<sup>19</sup> In denying Appellants’ motion to dismiss, the district court was unmoved by the argument presented by then-*amicus* Center for Individual Rights (“CIR”) (now representing Appellant Kathryn Miller) that the Hate Crimes Prevention Act violates the Religious Freedom Restoration Act (the “RFRA”). *Mullet*, 868 F. Supp. 2d at 624. The RFRA bars the government from “substantially burden[ing] a person’s exercise of religion” absent proof that the burden furthers a “compelling governmental interest” by the “least restrictive means.” 42 U.S.C. §§ 2000bb-1. That issue, however, was raised by CIR, as *amicus*, and not by a party, which as the district court noted is not permissible. *Mullet*, 868 F. Supp. 2d at 624. The district court added that “[i]n any event, the RFRA contention fails on the merits.” *Id.* *Amici* agree with the district court in both respects. Since the RFRA is not an issue properly before this Court, *Amici* will not opine further on why the HCPA does not violate the RFRA, but they are prepared to supplement this brief if the Court would find it helpful.




**CONCLUSION**

For the reasons set forth above, *Amici Curiae*, the Anti-Defamation League, The Leadership Conference, and all named *amici*, respectfully ask this Court to deny the Defendant-Appellants' appeal insofar as it implicates 18 U.S.C. § 249, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

Dated: March 6, 2014  
Washington, D.C.

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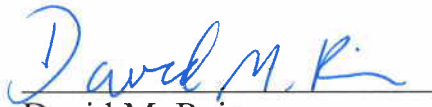
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## CERTIFICATE OF COMPLIANCE


This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,936 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief 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). The brief has been prepared in proportionally spaced typeface using Word 2010 in 14 Point Times New Roman font.

  
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## CERTIFICATE OF SERVICE

Per the instructions of Ms. Cheryl Borkowski, Deputy Clerk of the Court of Appeals for the Sixth Circuit and Case Manager for the cases cited by number on the cover of this proposed *Amicus* Brief, this proposed *Amicus* Brief, and all accompanying material will be served by the Deputy Clerk via ECF to all counsel of record. I caused this proposed *Amicus* Brief, a Motion to Grant the Filing of the proposed *Amicus* Brief, and eight Notices of Appearance of Counsel to be sent to Ms. Borkowski via electronic mail on March 6, 2014 for filing on the CM/ECF system.

  
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