Case No. 15-1983

In the Supreme Court of the United States

UNITED STATES OF AMERICA

Petitioner,

v.

ROY CAMPBELL

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Thirteenth Circuit

BRIEF FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Constitutional Provisions

Legislative Materials

STATEMENT OF JURISDICTION

The United States appeals the Thirteenth Circuit Court of Appeals' reversal of the United States District Court of the Southern District of Old York's decision denying Officer Roy Campbell's motion to suppress evidence and convicting Campbell of a hate crime under 18 U.S.C. § 249. The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and entered a final judgment on October 20, 2015. The United States timely filed a petition for a writ of certiorari. This Court granted the petition on November 3, 2015 and has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE ISSUES

I. Evidence discovered through a warrantless search is admissible if the defendant did not have a reasonable expectation of privacy in the searched premises or if the search did not otherwise violate the defendant's Fourth Amendment rights. Where one police officer, upon suspicion of professional misconduct, searches a colleague's police-station locker secured with a personal lock, did the Thirteenth Circuit err in holding that the search violated the officer's Fourth Amendment rights?

II. 18 U.S.C. § 249 criminalizes violence committed "because of" race. During a contentious traffic stop, a white supremacist police officer shot a black teenager. Did the Thirteenth Circuit err in vacating the officer's hate crime conviction on the grounds that § 249 does not apply to police officers and that the prosecution failed to produce sufficient evidence that the defendant acted solely because of racial animus?

STATEMENT OF THE CASE

This case arises out of events that occurred at a manufactured traffic stop during which Officer Roy Campbell, a white supremacist police officer with the New Jacksonville Police Department, drew his gun and fired a bullet into the groin of Michael Jennings, an unarmed black honor-roll student. The gunshot inflicted injuries from which Michael may never fully recover.

Following the incident, Campbell lied to investigators, claiming that he did not know the whereabouts of the body camera he was required to wear, and that he had not worn it on the day of the incident. He also replaced the department-issued lock on his police-station locker with a personal lock. In light of Campbell's suspicious behavior, Officer Randall Graham searched Campbell's locker at the police station and discovered the purportedly missing body camera. The body camera contained incriminating video footage of the shooting. During a bench trial, the District Court of the Southern District of Old York denied Campbell's motion to suppress the body camera footage and subsequently convicted Campbell on hate crime charges. Campbell appealed, and the Thirteenth Circuit reversed both of the District Court's rulings. The United States then petitioned this Court for a writ of certiorari.

I. Course of Proceedings

The United States indicted Campbell on federal criminal charges under 18 U.S.C. § 249 for perpetrating the June 19, 2013 shooting of Michael Jennings. R. at 2. Campbell waived his right to a jury trial and was tried in the United States District

Court of the Southern District of Old York. R. at 3.

At trial, Campbell moved to suppress body camera evidence documenting his shooting of Jennings. R. at 5. He argued that the United States obtained the evidence in violation of his Fourth Amendment rights because the body camera had been discovered during a warrantless search of his police-station locker. *Id.* The District Court, however, denied Campbell's motion to suppress, holding that he did not have a reasonable expectation of privacy in his government-issued workplace locker. R. at 10. The court subsequently found Campbell guilty of a hate crime under 18 U.S.C. § 249 on the grounds that Campbell shot Jennings because of his race. R. at 13.

Campbell appealed both the denial of his motion to suppress and his conviction. R. at 14. On October 20, 2015, the Thirteenth Circuit Court of Appeals reversed the District Court on both issues. R. at 17. First, it held that the District Court erred in denying Campbell's motion to suppress, concluding that Campbell had a reasonable expectation of privacy in his station locker such that the search required a warrant. *Id.* Second, the Court of Appeals vacated Campbell's conviction, deeming the evidence insufficient to prove Campbell shot Jennings because of racial animus. *Id.* On November 3, 2015, this Court granted the United States' petition for certiorari. R. at 18.

II. Statement of the Facts

Defendant Roy Campbell is a 23-year-old police officer with the New Jacksonville police department. R. at 3. Aside from his membership on the police

force, Campbell also belongs to the League of the South and Kingdom Identity Ministries—two organizations "dedicated to hate and to the preservation of racial purity." R. at 6.

On June 19, 2013, Campbell was on his first solo patrol when he saw 18-year-old African-American honor student Michael Jennings driving his new black Mercedes sedan through an exclusive neighborhood in New Jacksonville, Old York. R. at 3. Jennings had received the car as a birthday present from his father, but Campbell later testified that he thought Jennings "just didn't look right behind the wheel of that car," driving through an upscale neighborhood. *Id.* Although there were no reports of stolen cars in the area, Campbell tailed Jennings for half a mile. R. at 3, 5. Campbell finally found his excuse to make Jennings pull over when the youth changed lanes without signaling. R. at 3.

Campbell approached the car and requested Jennings' license and registration, but refused to say why he pulled Jennings over. *Id.* Instead, Campbell asked Jennings where he obtained such a nice car. *Id.* Jennings explained it was a birthday gift from his father, and officers investigating the shooting later found his registration stored in the glove box. *Id.* But Campbell never looked at Jennings' documents. *Id.* Instead, he responded, "likely story" and told Jennings to step out of the car. *Id.*

Jennings refused, and asked if he had been pulled over for "DWB," or "driving while black," a term commonly used to express the belief that police treat black drivers differently from others. R. at 4. He stated that white police officers needed to

stop antagonizing innocent black people, and also said, "black lives matter." R. at 6. Growing agitated, Campbell retorted that he had the authority to pull over any person for any reason—"especially your kind." *Id.* Then, spotting Jennings' smartphone, Campbell asked if Jennings was recording their interaction, and shouted, "turn that thing off right now!" *Id.* He ordered Jennings to remove his seatbelt, opened the driver-side door, and knocked Jennings' phone out of his hand. *Id.* At this point, the phone stopped recording, and Campbell's Axon body camera documented the remainder of the encounter.[1] *Id.*

Jennings pulled the door closed and restarted his car. *Id.* Campbell stepped back and the vehicle's engine revved, but the car did not move—indicating that Jennings had not put the car in gear, and could not drive away. *Id.* With his left hand, Campbell reached into Jennings' car and grabbed the steering wheel.[2] *Id.* He yelled at Jennings to "stop" and "turn off the engine." *Id.* With his right hand, Campbell drew his gun and shot Jennings in the groin. *Id.*

Campbell then fell backward, and Jennings' car began rolling. *Id.* Campbell chased the car until it eventually crashed into the curb. R. at 4–5. Jennings was bleeding profusely from a severe groin wound, and although he has somewhat

[1] Per department policy, officers must wear the cameras and upload the videos after each shift. R. at 4. The camera automatically uploads videos to a server, but only if the officer first connects the camera to a charging dock. *Id.*

[2] Expert testimony at trial established that officers are taught not to reach into cars during traffic stops because this move can put the officer in greater danger and require more force than otherwise needed. R. at 6.

recovered from his injuries, he may have lost the ability to father children. R. at 5.

When other officers arrived at the scene, Campbell told the investigating officer, Officer James Roberts, that Campbell's arm had been stuck in the car's steering wheel, and that Jennings had dragged him. *Id.* Roberts' report and trial testimony stated that Campbell claimed his arm hurt, but that he had not been injured.[3] *Id.* Roberts also testified that Campbell claimed he had to fire his weapon because the car had dragged him, and he needed to prevent Jennings from escaping. R. at 4.

Campbell later changed his account of the events, testifying that he shot Jennings by accident. *Id.* At work, however, Campbell had made a statement indicating that he had not shot Jennings accidentally, explaining "it was a clean shoot," and adding, "at least I made sure that one of them won't be able to breed." R. at 6.

The police department placed Campbell on desk duty pending a standard investigation of an officer-involved shooting. R. at 6–7. Campbell lied to investigators, telling them that he did not wear his body camera the day he shot Jennings because he could not locate it. R. at 7. However, one day after shooting Jennings, Campbell

[3] Even absent the video evidence that conclusively showed Jennings did not drag him, Campbell presented no evidence that he was dragged. R. at 5. In particular, he had no injuries consistent with being dragged. *Id.*

replaced the department-issued lock—which his superiors can unlock[4]—on his department-provided locker with a personal lock. *Id.*

Officer Randall Graham—a black police officer of equal rank to Campbell—noticed that Campbell had changed the lock on his station locker and grew suspicious. *Id.* Graham heard Campbell brag about sterilizing Jennings, and knew that Campbell had made racial slurs on multiple prior occasions. *Id.* Graham believed that Campbell had hidden the body camera in his station locker. *Id.* Acting on this suspicion, Graham cut Campbell's lock two days after the incident and found the body camera containing footage of the shooting. *Id.*

Although Graham hoped that "a more thorough investigation" would follow his discovery of the body camera, he had no involvement in the internal investigation of Campbell, and searched Campbell's locker because of his disgust for Campbell's professional misconduct. *Id.* Campbell's derogatory, racist comments angered Graham, and Graham feared that Campbell would destroy or dispose of the camera to prevent the department from witnessing his misconduct. *Id.* Graham searched Campbell's locker to "force that lying, racist asshole to tell the truth for once." *Id.*

III. Standard of Review

Courts review facts and reasonable inferences underlying a district court's order on a motion to suppress evidence for clear error and the application of those facts

[4] The department has previously exercised this authority: a year before Campbell shot Jennings, the department performed an "unannounced search of all officer lockers" during a corruption investigation. R. at 9.

and inferences to its legal conclusion de novo. *United States v. Gil,* 204 F.3d 1347, 1350 (11th Cir.) (per curiam), *cert. denied,* 531 U.S. 951 (2000). Courts review the sufficiency of evidence supporting conviction de novo, considering all evidence "in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

SUMMARY OF THE ARGUMENT

I. The Thirteenth Circuit erroneously granted Campbell's motion to suppress video evidence.

This Court should reverse the Thirteenth Circuit's decision granting Campbell's motion to suppress body camera footage documenting his shooting of Michael Jennings. Graham's search of Campbell's police-station locker—where he hid his government-issued body camera following the shooting—did not violate Campbell's Fourth Amendment rights for three independent reasons.

First, Campbell did not have a reasonable expectation of privacy in his station locker. A reasonable expectation of privacy only exists where a person demonstrates both a subjective expectation of privacy, and that society would recognize this expectation as reasonable. Here, Campbell's act of replacing his department-issued lock with a personal lock demonstrated the subjective belief that his station locker was in jeopardy of intrusion. Additionally, society would not recognize as reasonable a police officer's expectation that his workplace locker would be free from investigation upon suspicion of professional misconduct. Without a reasonable expectation of privacy, Graham's search did not violate Campbell's Fourth Amendment rights.

Second, even if Campbell had a reasonable expectation of privacy in his station locker, Graham performed a reasonable search. A warrantless search to investigate a government employee's workplace misconduct is reasonable so long as it is limited in scope and likely to uncover evidence of professional impropriety. Here, Graham

performed an appropriately limited search of Campbell's station locker to investigate work-related misconduct based upon Campbell's suspicious behavior. Graham's justified, targeted search was therefore reasonable and did not violate Campbell's Fourth Amendment rights.

Alternatively, Graham's search did not violate Campbell's Fourth Amendment rights because Graham performed the search as a private citizen. The evidence demonstrates that Graham independently searched Campbell's locker without direction from supervising officers, and acted out of personal animus, not with the primary purpose of assisting law enforcement. Therefore, Campbell failed to carry his burden of proving that Graham acted as a government agent and receives no Fourth Amendment protection for the intrusion.

II. The Thirteenth Circuit erred in reversing Campbell's conviction.

The Thirteenth Circuit erred in concluding that § 249 should not apply to the police, and in finding the evidence insufficient to convict Campbell. This Court should reverse its decision and reinstate Campbell's conviction.

First, any challenges to § 249's constitutionality must fail. Section 249 makes it a hate crime to inflict bodily injury "because of" the victim's "actual or perceived race." Congress passed this law under its Thirteenth Amendment power to abolish the badges and incidents of slavery. Under this Court's long-established jurisprudence, which allows Congress to rationally determine what constitutes a "badge or incident of slavery," § 249 is constitutional. Additionally, this Court need not revisit the

decision granting Congress this power. Slavery could not exist without racially motivated violence, so even if Congress has too much power to determine the "badges and incidents of slavery," it did not overreach by passing § 249.

Second, police officers do not have immunity from prosecution under § 249. The Thirteenth Circuit reasoned that police officers must make quick decisions in high-pressure situations, and so § 249 should not apply to them. Yet the statute's plain text makes no exceptions, and this Court has long refused to read into statutes non-textual, policy-based exceptions that Congress did not specifically include. Additionally, the Thirteenth Circuit wrongly vacated Campbell's criminal conviction using principles of qualified immunity, a civil affirmative defense. Finally, sound policy counsels against reading an exception for the police into the statute. First, this arbitrarily exempts the police from a subset of criminal assault or murder—laws already applicable to the police. Second, this exception would necessarily apply to all people who must make "quick decisions" in the course of their "high-pressure" employment.

Finally, § 249 does not require proof that the defendant acted solely "because of" racial animus. First, the Thirteenth Circuit improperly added the non-textual element of racial animus to the statute. Neither § 249's text nor its legislative history suggest Congress intended that the prosecution prove the defendant's racial animus. The statute only requires proof that the defendant attacked the victim "because of" the victim's race. Second, "because of" does not require a showing of "solely but-for"

causation. Rather, "because of" should carry the same meaning courts assigned to it in the pre-§ 249 hate crime statute: "substantial motivating factor." Even if "because of" does require "but-for" causation, this Court's decisions do not require *sole* causation, so § 249 still permits convictions in mixed motive cases. Thus, the evidence sufficiently demonstrates that Campbell shot Jennings because of Jennings' race, and that but for Jennings' race, Campbell would not have shot him.

ARGUMENT

I. The Court of Appeals erred in granting Campbell's motion to suppress body camera evidence because Graham's search did not violate Campbell's Fourth Amendment rights.

The Thirteenth Circuit incorrectly granted Campbell's motion to suppress body camera evidence discovered during Graham's search of Campbell's police-station locker. This Court should reverse that decision because Campbell did not have a reasonable expectation of privacy in the locker. Even if Campbell did have a reasonable expectation of privacy, Graham performed a reasonable search that did not violate Campbell's Fourth Amendment rights. Alternatively, Graham performed the search in his capacity as a private citizen, so Campbell is not entitled to Fourth Amendment protection.

A. Campbell did not have a reasonable expectation of privacy in his workplace locker.

This Court should reverse the Thirteenth Circuit's decision granting Campbell's motion to suppress body camera evidence because he did not have a reasonable expectation of privacy in his office locker. *See Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001) ("Without a reasonable expectation of privacy, a workplace search by a public employer will not violate the Fourth Amendment, regardless of the search's nature and scope."). To establish a reasonable expectation of privacy in his office locker, Campbell must show both that he manifested a subjective expectation of privacy, and society would recognize his expectation as reasonable. *Katz v. United*

States, 389 U.S. 347, 361 (1967) (explaining that a reasonable expectation of privacy requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable") (internal quotations omitted). By switching to a personal lock, Campbell indicated his subjective expectation that the precinct had a right to inspect his locker. Additionally, the public's substantial interest in maintaining police integrity weakens an officer's workplace privacy rights. The Thirteenth Circuit therefore erred in finding that Campbell had a reasonable expectation of privacy in his station locker.

First, Campbell did not demonstrate a subjective expectation of privacy in his office locker. By exchanging the department-supplied lock with his personal lock, he manifested a clear concern that the government could access his station locker. The Court of Appeals conceded that "the [police] department provided locks for the lockers and thus would presumably have access to the lockers in normal circumstances . . . ." R. at 16. However, the court failed to explain why an officer's unilateral use of a foreign lock defeats the presumption of access. Changing the lock does not change the government's preexisting right to access what the lock secures. The Thirteenth Circuit's interpretation is particularly misguided in light of the police department's "unannounced search of all lockers" only one year before this incident. R. at 7. By installing a new lock, Campbell evidenced his subjective belief that the police department maintained the right to access his locker. He therefore had no subjective expectation of privacy in his station locker.

Second, the state's interest in regulating its police force precludes Campbell from having a reasonable expectation of privacy in his locker. When determining whether a public employee has an objectively reasonably expectation of privacy, courts must consider the totality of circumstances at the workplace. *See O'Connor v. Ortega*, 480 U.S. 709, 720 (1987).

This Court has routinely emphasized that public employees—especially police officers—occupy "trusted positions in society." *Garcetti v. Ceballos,* 547 U.S. 410, 419 (2006). Public trust thus reduces public employees' expectation of workplace privacy, and diminishes the constitutional protection they receive in their capacities as government officials. *Id.* (denying a public employee First Amendment protection for statements he made in the course of his official duties); *Kelley v. Johnson,* 425 U.S. 238, 245 (1976) (holding that police officers can be held to higher standards of conduct than private citizens); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 679 (1989) ("[T]he operational realities of the [government] workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts."); *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 603 (1989) (upholding a government-mandated drug testing program because the government's "special needs" outweighed its employees' privacy interests). Police officers have—and need—particularly high levels of public trust. Because of the "substantial public interest in ensuring the appearance and actuality of police integrity," the Fourth Amendment provides only limited protection for police

officers in matters reasonably relating to their employment. *See Biehunik v. Felicetta*, 441 F.2d 228, 230–31 (2d Cir. 1971) ("We do not believe that the public must tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty, merely because measures appropriate to those ends would be improper if they were directed solely toward the objective of criminal prosecution."). Under these circumstances, public trust overrides officers' privacy.

The Thirteenth Circuit relied on five cases to justify its finding that Campbell had a reasonable expectation of privacy. Yet all of those cases *actually* support the proposition that the government's need to monitor police behavior trumps officers' Fourth Amendment rights. *See Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489 (9th Cir. 1986) ("The government has an interest in the integrity of its police force which may justify some intrusions on the privacy of police officers which the Fourth Amendment would not otherwise tolerate."); *Chicago Fire Fighters Union, Local 2 v. City of Chicago*, 717 F. Supp. 1314, 1318 (N.D. Ill. 1989) ("[T]he highly regulated nature of the fire department serves to lower the expectation of privacy of individual fire fighters."); *Schowengerdt v. United States*, 944 F.2d 483, 488 (9th Cir. 1991) (explaining that the "the operational realities" and importance of "compliance with security precautions" precluded a naval officer from "having an objectively reasonable expectation of privacy in his office, desk or credenza"); *O'Connor*, 480 U.S. at 720 (noting that some public employees' expectations of privacy may be unreasonable in

light of "the government's need for supervision, control, and the efficient operation of the workplace"); *United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991) (same). In spite of these cases, the Thirteenth Circuit altogether neglected to consider the state's interest in a trustworthy police force or whether society would recognize as reasonable Campbell's expectation of privacy in his station locker.

The Thirteenth Circuit departed from courts' clearly established trend rejecting law enforcement officers' claimed expectations of workplace privacy. It cited four cases where courts decided whether public employees had reasonable expectations of privacy in searched premises.[5] All but one held that the government employees did not have a reasonable expectation of privacy against workplace searches by their employers or employers' representatives. *See Chicago Fire Fighters Union*, 717 F. Supp. at 1318; *Schowengerdt*, 944 F.2d at 488; *Taketa*, 923 F.2d at 673.[6] Only *O'Connor* held that the public official had a reasonable expectation of privacy. *O'Connor*, 480 U.S. at 720. But unlike the other three cases, *O'Connor* considered the privacy interests of a public healthcare administrator, not a law enforcement officer. *Id.* Unlike public healthcare administrators, law enforcement officers "voluntarily accept the unique stat[us] of

[5] The *Kirkpatrick* the court resolved the case without deciding the reasonable expectation of privacy issue.

[6] To be sure, the *Taketa* Court held that *one* of the two agents—the Nevada Bureau of Investigation officer—had a reasonable expectation of privacy in his office. However, that official's scenario differs from the others cited in that his reasonable expectation of privacy in his office protected against searches by a *different* government entity: the Drug Enforcement Agency. The court did not address whether he had a reasonable expectation of privacy in his office against searches by his own government employer.

watchman of the social order." *Felicetta*, 441 F.2d at 231. Police officers' special responsibility demands a level of accountability and transparency not required of public healthcare officials. That distinction therefore renders *O'Connor's* outcome inapplicable to this case.

The Court of Appeals did not even mention the most instructive case on point: *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975). The *Bunkers* Court—applying the same "reasonableness" standard announced in *O'Connor*—held that postal inspectors' search of a postal employee's office locker for stolen mail did not constitute a Fourth Amendment violation because the postal employee had no reasonable expectation of privacy in the locker. 521 F.2d at 1220. Like Campbell's locker, which the police department assigned to facilitate his police work, the postal employee's locker was government property issued "as an incident of her employment." *Id.* And just like the postal employee, Campbell sought to use his government-issued locker to hide evidence of his on-the-job misconduct. But the *Bunkers* court rejected the postal employee's claimed reasonable expectation of privacy. Instead, it stated, "[w]e decline to believe that society is prepared to recognize Bunkers' use of the [government-issued workplace] locker to hold in privacy the [stolen] parcels as reasonable." *Id.* at 1220 (internal quotations omitted). As a result, it found that the post office had every right to inspect the employee's locker for evidence of misconduct. This Court should do the same.

The Thirteenth Circuit erred in departing from the series of cases—*Bunkers*,

Chicago Fire Fighters Union, *Schowengerdt*, and *Taketa*—finding that the defendant law enforcement officials had no expectation of privacy in their searched workplace premises. In doing so, it allowed Campbell's unilateral act of switching locks to convert police department property into a private domain for shielding his on-the-job misconduct. As the *Bunkers* Court stressed, society would not consider such an expectation of privacy reasonable. *Id.* This Court therefore should hold that Campbell did not have a reasonable expectation of privacy in his office locker, and reinstate the District Court's denial of his motion to suppress.

B. Even if Campbell had a reasonable expectation of privacy in his workplace locker, the search did not violate his Fourth Amendment rights because it was reasonable.

Regardless of whether Campbell had a reasonable expectation of privacy in his office locker, Graham uncovered the Axon body camera through a reasonable search, and therefore did not violate Campbell's Fourth Amendment rights. Specifically, Graham's inspection qualified as a permissible search for the purpose of investigating workplace misconduct that was justified at its inception, and permissible in its scope. *See O'Connor*, 480 U.S. at 726 (explaining that a search is reasonable if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place").

1. Public employers do not need a warrant to investigate work-related misconduct.

This Court in *O'Connor* recognized the validity of warrantless searches where obtaining a warrant would be impractical—in other words, "when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *O'Connor*, 480 U.S. at 720. It eschewed the heightened "probable cause" standard applied in criminal investigations and held that the warrant requirement does not apply to searches involving governmental employees' work-related misconduct. *Id.* at 724. Courts judge the reasonableness of a "public employer's work-related search of its employees' offices, desks, or file cabinets" by balancing "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *Id.* at 719–20. Because "public employees are entrusted with tremendous responsibility," a search of a public employee's workspace differs from other types of searches in that the state's interest often supersedes the employee's Fourth Amendment rights. *Id.*

Here, the state had an overriding interest that justified Graham's warrantless search of Campbell's locker. Because Campbell had not been arrested, discharged, or even suspended from the police department premises after shooting Jennings, he retained unfettered access to his locker and the ability to move its contents at any time. The state's substantial interest in obtaining footage of what transpired in the field therefore warranted Graham's actions to recover the camera before Campbell could exercise his ability destroy it.

Campbell's case differs from *Lowe v. City of Macon*, 720 F. Supp. 994 (M.D. Ga. 1989), which the Thirteenth Circuit used to support its warrant requirement here. There, the court required a warrant in a work-related investigation of the defendant police officer. However, unlike here, officials searched the *Lowe* defendant's office while he was out of town, and "there was no justifiable fear that any evidence of wrongdoing which might have been present in his office or desk was in immediate danger of being destroyed." 720 F. Supp. at 994. But here, a warrant requirement would "frustrate the governmental purpose" by affording Campbell time to move the target of the search. *O'Connor*, 480 U.S. at 720. Requiring the state to obtain a warrant under these circumstances would undermine its ability to monitor officers' field conduct. (Indeed, requiring a warrant to obtain footage from the mandatory body cameras—worn to enhance officer accountability—would undercut the efficacy of body cameras altogether.) The government's need to ensure a trustworthy police force therefore outweighed Campbell's privacy interests.

Nor do the potential criminal implications of Campbell's conduct reclassify Graham's locker search from a work-related search to a criminal investigation (which would require a warrant). Where a work-related misconduct investigation has criminal implications, the purpose of the search defines whether it is work-related or criminal in nature. *See Wiley v. Dep't of Justice*, 328 F.3d 1346, 1351–52 (Fed. Cir. 2003) ("[I]n looking to ascertain whether the investigation is criminal in nature, the proper focus is not on the positions or capabilities of the persons conducting the search, but rather

the reason for the search itself."). Graham's search targeted work-related misconduct. He executed the search independent of any criminal investigation, with nothing more than an ancillary hope that "a more thorough investigation would follow." R. at 7. Notwithstanding the Thirteenth Circuit's suggestion to the contrary, the inevitability of criminal prosecution upon the discovery of the body camera does not determine the necessity of a warrant. Only the purpose of the search matters.

Here, Graham searched the locker to "force [Campbell] to tell the truth for once"—one police officer investigating the professional integrity of another. R. at 7. *See United States v. Johnson*, 16 F.3d 69, 74 (5th Cir.) *decision clarified on reh'g*, 18 F.3d 293 (5th Cir. 1994) (holding that an office search was reasonable despite the criminal implications because it was "directed at uncovering work-related employee misconduct"). Therefore, Graham did not need a warrant to search Campbell's locker, so this Court should affirm the District Court's ruling.

2. Graham's search was justified at its inception.

Graham's search was justified at its inception because "specific articulable facts, and inferences from those facts" gave him reasonable grounds to suspect that Campbell's office locker contained evidence of his on-the-job misconduct. *Kirkpatrick*, 803 F.2d at 490; *see O'Connor*, 480 U.S. at 726 (stating that a search is justified at its inception if there are "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct"). Specifically, Graham knew that Campbell belonged to two organizations devoted to racial purity,

that he commented positively about shooting Jennings, and that he claimed his camera had gone missing the same day he switched locks. In *Bunkers*, witnessing the postal employee enter the locker room with a package and exit without it created a reasonable suspicion sufficient to justify the locker search. 521 F.2d at 1220. Certainly, then, Graham had sufficient articulable facts giving him a reasonable suspicion that justified his locker search at its inception.

To be sure, Graham does not hold a higher rank than Campbell. R. at 7. Nor did Graham consult with a superior official before searching the locker. *Id.* But police officers occupy a position of trust precisely because society often demands that they act quickly and independently in furtherance of the law and public safety. The Thirteenth Circuit's suggestion that "[Graham] should have reported his suspicions to his superiors and let them handle it" is not only antithetical to an officer's duty to act, but undermines the best check on police impropriety. R. at 14. Officers are uniquely situated to identify and curb their colleagues' misconduct and brutality. The Thirteenth Circuit's condemnation of Graham's search, however, would force the public to "tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty." *See Felicetta*, 441 F.2d at 230–31.

3. Graham's search was permissible in scope.

Two reasons support finding that Graham's search was permissible in scope. First, the police department's "operational realities" diminished Campbell's privacy

expectations. *See Von Raab*, 489 U.S. at 671 (noting that the "operational realities . . . of certain forms of public employment may diminish privacy expectations even with respect to such personal searches"). Second, Graham only searched an area likely to house evidence of Campbell's work-related misconduct. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (explaining that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the infraction").

First, the public interest in monitoring police conduct diminishes officers' expectations of privacy and loosens the restrictions imposed by the permissible scope requirement. *See City of Ontario, Cal. v. Quon*, 560 U.S. 746, 757 (2010) (noting that diminished expectations can "be taken into consideration when assessing the reasonableness of a workplace search" and "the extent of an expectation is relevant to assessing whether the search was too intrusive"). This Court in *Quon* held that the police department's review of text messages transmitted via an officer's department-issued mobile pager was reasonable in light of the officer's reduced expectation of privacy. *Id.* at 766. The officer had a limited expectation of privacy because he "had received no assurances of privacy" and "could have anticipated that it might be necessary for the City to audit pager messages to assess the [officers'] performance." *Id.* The same reasoning applies here. Campbell had a limited expectation of privacy because the New Jacksonville police department never guaranteed Campbell privacy in his locker. He should have equally anticipated the department's need to access his

locker to investigate misconduct—especially since the department had searched officers' lockers a year earlier. These "operational realities" broadened the permissible scope of the search.

Second, Graham's search was proportionate to the extent of his suspicion. *T.L.O.*, 469 U.S. at 342. That suspicion stemmed from the missing body camera and replacement lock, which naturally pointed to Campbell's locker. R. at 7. *See Gossmeyer v. McDonald*, 128 F.3d 481, 491 (7th Cir. 1997) (deeming the search reasonable because the "targets of the search were those places where [the defendant] would likely store the [evidence of workplace misconduct]"). Graham's search only included Campbell's locker—a logical area to investigate given the nature of Graham's reasonable suspicion. This minimally intrusive,[7] targeted search therefore satisfied the permissible scope requirement.

Because of the operational realities stemming from police officers' trusted role in society and the fact that the New Jacksonville Police Department never guaranteed the privacy of officers' lockers, Campbell had a diminished expectation of workplace privacy in his station locker. *Quon*, 560 U.S. at 764. Nor was Graham's targeted search excessively intrusive, given his cause for suspicion. *Id.* Because Graham's search therefore was reasonable, he did not violate Campbell's Fourth Amendment rights

[7] Even still, as this Court has consistently emphasized, Graham had no obligation to perform the "least intrusive search practicable" for it to be reasonable under the Fourth Amendment. *Quon*, 560 U.S. at 763. *Cf. Kirkpatrick*, 803 F.2d at 488 (invalidating a "highly intrusive" strip search of police officers).

and the Court of Appeals erred in granting the motion to suppress.

C. The Fourth Amendment does not protect Campbell from Graham's search because Graham searched the locker in his capacity as a private citizen, not as a government agent.

Alternatively, Graham performed the search in his capacity as a private citizen, not as a government official, and therefore did not violate Campbell's Fourth Amendment rights. The Fourth Amendment only protects citizens from unlawful searches and seizures conducted by the government or government agents. Because Graham had no part in investigating the Jennings shooting, searched Campbell's locker without direction from supervising officers, and acted out of personal animus, Graham's actions cannot be attributed to the state and Campbell has no claim under the Fourth Amendment.

The state is not responsible for the unconstitutional conduct of government officials acting as private citizens. *See United States v. Kinney*, 953 F.2d 863, 865 (4th Cir. 1992) ("The Fourth Amendment is directed exclusively at state action and evidence secured by private searches, even if illegal, need not be excluded from a criminal trial."). Campbell therefore bears the burden of proving that Graham performed the allegedly unconstitutional search while acting as an agent of the state. *See United States v. Snowadzki*, 723 F.2d 1427, 1429 (9th Cir. 1984) ("The burden of establishing government involvement in a private search rests on the party objecting to the evidence."). Two factors determine whether an individual committed a search and seizure as a government official or as a private citizen: first, "whether the government

knew of and acquiesced in the intrusive conduct," and second, "whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Id.* Under either factor, the evidence indicates that Graham searched the locker in his capacity as a private citizen.

First, the government did not know of or endorse Graham's search. He acted independently without notifying or receiving directions from superior officers. *See United States v. Day*, 591 F.3d 679, 686 (4th Cir. 2010) (rejecting the argument that the government acquiesced to a security guard's intrusive conduct where the security guard "had received no instructions from the Chesterfield police department . . . and expected no reward from the police department for his actions"). Nor has Campbell contributed any evidence to carry his burden of proving an agency relationship between Graham and the state at the time of the search. Graham unilaterally decided to search the locker. The mere fact that his search uncovered evidence useful to the police department fails to establish a sufficient agency relationship to provide Campbell with constitutional protection. *Id.* at 685 ("[T]here must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional.").

Second, Graham searched the locker without the requisite desire to assist law enforcement. He disavowed a connection between his search and any formal law enforcement initiatives. Further, he had no role in the investigation of Campbell's shooting, and did not perform the search as part of any ongoing inquiry. R. at 7; *see*

United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997) (holding that a security guard acted as a private citizen when he apprehended a criminal suspect—even though he eventually delivered the suspect to law enforcement—because the security guard's primary purpose was to provide "safety and security"). Rather, Graham acted for personal reasons—namely, contempt for Campbell's outward racism. He testified that Campbell on multiple occasions made "derogatory comments about ethnic minorities" and that Campbell's racist comments angered him. R. at 7. This is why he searched the locker. In *United States v. Ginglen*, 467 F.3d 1071, 1076 (7th Cir. 2006), the court relied on the police officer's "uniquely personal motivation" to hold that the he performed the search as a private citizen, not a government official. Likewise, Graham acted as a private citizen because he harbored a "uniquely personal motivation" for searching Campbell's locker.

Campbell failed to carry his burden of proving that Graham performed the locker search in his capacity as a government official. The evidence demonstrates that the government did not know about or acquiesce to Graham's search, and that Graham undertook the search without the primary purpose of assisting law enforcement. Because Graham acted as a private citizen, Campbell receives no Fourth Amendment protection for the intrusion and his motion to suppress should be denied.

II. The Court of Appeals erred in overturning Campbell's conviction under § 249, which Congress properly enacted under its Thirteenth Amendment power, because Campbell violated § 249 in his capacity as a police officer when he shot Jennings because of his race.

President Barack Obama signed into law the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act on October 28, 2009. In relevant part, it states, "[w]hoever, whether or not acting under color of law, willfully causes bodily injury to any person . . . because of the actual or perceived race . . . of any person . . . shall be imprisoned not more than 10 years." 18 U.S.C. § 249(a)(1). This Court should reverse the Thirteenth Circuit's erroneous findings that § 249 cannot apply to police officers, and that the law requires the defendant to act solely "because of" his racial animus. Additionally, as a primary matter, Congress had full authority to pass § 249 under the Thirteenth Amendment, and this Court need not revisit its Thirteenth Amendment jurisprudence today.

A. Section 249 is a constitutional exercise of Congress's Thirteenth Amendment power to eradicate the "badges and incidents of slavery."

Ratified in 1865, the Thirteenth Amendment declared, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. Amend. XIII § 1. Section 2 empowers Congress "to enforce this article by appropriate legislation." *Id.* Under this banner, Congress has passed laws designed to abolish conduct kept slavery alive. Congress enacted § 249 under its

Section 2 power to eliminate racially motivated violence—one of the most abhorrent remnants of slavery. The law is constitutional under this Court's Thirteenth Amendment jurisprudence, and gives the Court no reason to reconsider its past rulings.

1. Congress properly exercised its Thirteenth Amendment powers when it passed § 249.

The Thirteenth Amendment's Enabling Clause "clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Congress rationally determines what constitutes a "badge or incident" of slavery.[8] *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."). Specifically, the Thirteenth Amendment permits Congress to reach individual conduct that perpetuates the "badges and incidents" of slavery, even absent state action. *Civil Rights Cases*, 109 U.S. at 23 ("Under the Thirteenth Amendment the legislation, so far

[8] In reaching this conclusion, the Court closely examined the Thirteenth Amendment's history and enactment, relying heavily on a floor speech by Senator Lyman Trumbull. He stated, in part, "under this provision . . . we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted . . . and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end." *Jones*, 392 U.S. at 440 (internal citations omitted).

as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."). This Court's Thirteenth Amendment cases establish that Congress has the power to address the social ills that attend slavery comprehensively and holistically.

Congress passed § 249 in answer to continued episodes of racially motivated violence, It "explicitly justified [§ 249(a)(1),] the racial violence provision [at issue here], under its Thirteenth Amendment badges-and-incidents authority." *United States v. Hatch*, 722 F.3d 1193, 1200 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 1538 (2014). The congressional findings accompanying § 249 make clear Congress's intent to abolish racially discriminatory violence, the key tool enabling one race to enslave another. *See* 18 U.S.C. § 249 (2009) note (reprinting Pub. L. No. 111–84, § 4702(7)) ("Slavery [was] enforced . . . through widespread public and private violence directed at persons because of their race . . . Accordingly, eliminating racially motivated violence is an important means of eliminating . . . the badges, incidents, and relics of slavery and involuntary servitude."). In passing § 249, Congress has acted perfectly to the letter of this Court's law in *Jones*.

To that end, § 249(a)(1) has survived every challenge to its constitutionality in the circuit courts. *See United States v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012) (upholding § 249 under the Thirteenth Amendment); *Hatch*, 722 F.3d at 1193 (upholding § 249 under the Thirteenth Amendment because Congress could rationally

determine that racially motivated violence constitutes a badge or incident of slavery); *United States v. Cannon*, 750 F.3d 492, 501 (5th Cir.) *cert. denied,* 135 S. Ct. 709 (2014) (same). Elaborating on Congress' rational determination, the Fifth Circuit found that "racially motivated violence was essential to the enslavement of African–Americans and was widely employed after the Civil War in an attempt to return African–Americans to a position of de facto enslavement." *Id.* at 502. As such, these courts found that by passing § 249, Congress made the eminently rational decision to target one of the most damaging remnants of slavery existing in our society today. Under its current Thirteenth Amendment jurisprudence, this court must find § 249 constitutional.

2. This case does not require the Court to revisit **Jones** *because racially motivated violence constitutes an essential badge-or-incident of slavery that Congress undoubtedly has the authority to abolish.*

Several judges have questioned how the Court's current Thirteenth Amendment jurisprudence fits with its more recently pronounced Fourteenth and Fifteenth Amendment cases. *See, e.g. Cannon*, 750 F.3d at 509 (Elrod, J. specially concurring) (calling for a reexamination of Thirteenth Amendment jurisprudence in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997) and *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013)). However, the Court need not reexamine *Jones* today. As the Tenth Circuit noted, Congress took a "narrower approach . . . in the racial violence provision, and we need not speculate on whether a broader criminalization of conduct

under this rationale would pass constitutional review." *Hatch*, 722 F.3d at 1206. In other words, Congress narrowly drafted § 249 to eliminate the quintessential component of slavery: physical violence against the exploited race. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 Va. L. Rev. 1367, 1402 (2008) ("[V]iolence has been the means by which [slavery] was established and maintained."). Racially motivated violence has a firmly rooted connection to slavery, making it the most obvious "badge or incident."[9] Even if *Jones* gives Congress too much latitude to determine the meaning of that term, Congress did not go too far here, and the Court need not reevaluate *Jones* today.

B. Police officers do not have immunity from prosecution under § 249.

In overturning Campbell's hate crime conviction, the Thirteenth Circuit stated[10] that "[t]here is good reason" for exempting police officers from § 249, because "officers are required to make quick decisions under stressful circumstances." R. at 17. Yet neither the statute's plain language nor its legislative history excepts any individuals from § 249's reach. *See* H.R. Rep. 111-86, 8–9 (discussing the federal government's substantial interest in successfully prosecuting all hate-motivated violent

[9] Even the members of the Congressional Judiciary Committee who opposed § 249 (largely owing to its protections against sexual orientation-based hate crimes) acknowledged that racially motivated violence falls well within Congress' Thirteenth Amendment power to regulate. H.R. Rep. 111-86, 43 (referring to racially motivated violence as the "true effects of slavery.").

[10] Notably, that court cited no supporting authority—legal, scholarly, or otherwise—for this conclusion.

crimes); *id.* at 14 (noting that the statute provides the federal government with the authority to prosecute defendants who have acted on a discriminatory basis). Indeed, § 249 specifically accounts for racially motivated violence perpetrated by individuals "acting under color of law," like police officers. It punishes "[w]hoever, whether or not acting under color of law, willfully causes bodily injury to any person . . . because of [the person's] actual or perceived race." 18 U.S.C. § 249(a)(1).

Reading into the statute a non-textual exemption contravenes this Court's well-established statutory construction jurisprudence. *See Gardner v. Collins*, 27 U.S. 58, 93 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words."); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) ("Given this clear language, it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope."); *see also United States v. Miller*, 767 F.3d 585, 605 (6th Cir. 2014) ("[T]he Supreme Court advises against construing statutes to include non-textual elements."). Excusing police officers from criminal liability under § 249 flouts the statute's plain language, which targets conduct committed because of the victim's race. And the Thirteenth Circuit's policy concern notwithstanding, "[t]he role of this Court is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.' " *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). Section 249 does not separate the conduct from the actor based on the

actor's job. This Court must not read such an exception where Congress did not write it.

Further, the Thirteenth Circuit's "quick decisions" rationale improperly applies a qualified immunity gloss to a criminal statute. Under certain circumstances, qualified immunity protects state actors from paying civil tort damages in cases brought against them under 42 U.S.C. § 1983 for alleged constitutional violations. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Courts commonly point to the high-pressure atmosphere of law enforcement to justify police officers' qualified immunity defenses to *civil* claims. Because officers must make quick decisions under stressful circumstances, they cannot always spend time deliberating how their actions may affect another person's constitutional rights. *See, e.g. Wilkinson v. Austin*, 545 U.S. 209, 227 (2005). Moreover, qualified immunity exists to protect the state from defending itself against allegations of constitutional violations that are not "clearly settled" (typically by preexisting law establishing the conduct as a constitutional violation). *See, e.g. Harlow v. Fitzgerald*, 457 U.S. 800 (1982). That type of ambiguity does not exist in the context of a criminal statute, which by its terms proscribes specific conduct. The Thirteenth Circuit therefore wrongly exonerated Campbell by erroneously importing principles underlying a civil affirmative defense into a criminal proceeding.

Finally, sound public policy demands that police officers face § 249 liability.[11] First, singling out § 249 as inapplicable to the police constitutes an arbitrary exemption from the criminal law. The law does not immunize police officers from non-discrimination-based criminal convictions for their on-the-job conduct.[12] Section 249 targets a subset of such conduct: violence against members of a protected class "motivated by animus toward persons with that trait." *Hatch*, 722 F.3d at 1206. *See also* H.R. Rep. 111-86, 5 ("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."). Police officers are no different from the general public in their susceptibility to racial animus[13] and the possibility that this animus would motivate their on-the-job conduct (or

[11] The Thirteenth Circuit reasoned that since a police officer has not yet faced conviction under § 249, police officers as a whole are exempt. R. at 17. Yet the Justice Department has not endorsed this categorical exception. Following Eric Garner's death by chokehold at the hands of a New York City police officer, the Justice Department indicated it would exercise its prosecutorial discretion under § 249 if the state charged the officer involved. *See NYPD "Chokehold Arrest" Ruled Homicide*, CBS News (Aug. 1, 2014), http://www.cbsnews.com/news/nypd-chokehold-arrest-of-eric-garner-ruled-homicide-by-medical-examiner/.

[12] *See* Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 Fordham L. Rev. 1453, 1457 (2000) ("[A] police officer charged with murder is tried under the same homicide laws as any other citizen.").

[13] *See generally* Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 Iowa L. Rev. 1079 (1996) (discussing the prevalence and danger of self-avowed white supremacists joining the police force).

misconduct).[14] The statute's *mens rea* element, discussed *infra* section II.C.2, protects officers who engage in legitimate uses of force by requiring proof that the victim's protected status served as the officer's substantial motive for using force. Given that safe harbor for good-faith actions, there is no reason to exempt police officers from this statute's reach.

Second, exempting police officers from § 249 liability because their duties call for quick decisions would immunize numerable professions, not simply police officers. Doctors, emergency medical technicians, and virtually any workers in high-pressure jobs could have their intentional acts of cross-racial violence excused. Moreover, these individuals may benefit from the forgiving gloss of their job's general characteristic when it may not have contributed to the specific hate crime, as was the case when Campbell shot Jennings. If a court can create an extra-textual exemption for police officers solely because they are *at times* required to make "quick decisions," then that exception would necessarily apply to everyone who must make "quick decisions" in the course of employment. And if police are categorically exempted for everything they do, high-stress or otherwise, then the law also exempts conduct undertaken in non-high-pressure situations. Such an interpretation perverts Congress's objectives and has no support from § 249's language. The statute therefore must apply to the police.

[14] *Id.* at 1092 ("Complaints of police brutality often surface from the same group of citizens routinely targeted by white supremacists for attack.").

C. "Because of" does not require proof either of a defendant's racial animus, or that the defendant attacked the victim solely on the basis of protected status.

Section 249 requires the defendant to have possessed an improper motive—namely, he must have acted "because of" the victim's race. Yet the Thirteenth Circuit improperly inserted into the statute an additional motive element, finding that the defendant must have acted "because of" racial animus. The statute's plain text does not require proof of animus as an element, and the legislative history indicates that Congress did not intend to impose such a requirement. Second, "because of" indicates that the victim's race must have motivated the defendant's conduct, but does not require race to serve as the defendant's *sole* motive. This Court's decisions indicate that "because of" permits convictions in cases where the defendant may have possessed mixed motives for his improper conduct. This Court should therefore reverse the Thirteenth Circuit's ruling and reinstate Campbell's conviction.

1. Section 249's requirement that a defendant harm a victim "because of [a victim's] actual or perceived race" does not require proof of a defendant's racial animus.

Although § 249 targets actions based on racist beliefs, the statute itself does not require proof of these beliefs. The Thirteenth Circuit erroneously concluded that § 249's use of "because of" mandates a causal connection between the defendant's racial animus and the victim's protected status. Thus, the Thirteenth Circuit would require evidence that Campbell's animus toward black people caused him to shoot Jennings. However, § 249 requires a causal link solely between the defendant's

conduct and the victim's membership in a protected class. Campbell's repugnant beliefs may bolster the case that he shot Jennings because Jennings is black, but the statute does not require proof that he holds those beliefs. Concluding otherwise improperly reads a non-textual element into the statute, and contravenes Congress's explicit intent for how § 249 treats evidence of racial animus.

First, § 249's text requires a causal connection between the defendant's *conduct* and the victim's protected status. It does not require a causal connection between the defendant's *beliefs* and the victim's race—although such statutes exist. *See Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993) (upholding a state law sentencing enhancement provision "for an offense whenever the defendant *[i]ntentionally selects* the person against whom the crime . . . is committed . . . because of the race . . . of that person.") (emphasis added) (internal quotations omitted). Section 249 does not include a "selection" or "animus" requirement. *See Miller*, 767 F.3d at 606 (Sargus, J. dissenting) ("The text of § 249(a), unlike the provision in *Mitchell,* requires only a causal connection between the assailant's infliction of the injury . . . and the victims' actual or perceived protected class."). *Miller* addressed religiously motivated violence between two clashing Amish sects. As the *Miller* dissent aptly stated, § 249 does not ask, "would the defendant have acted if he did not hate this particular group?" Rather, it asks, "would Defendants have cut the victims' hair and beards if the victims were Catholic, atheist, or any other non-Amish faith?" *Miller*, 767 F.3d at 605 (Sargus, J. dissenting). In the present case, § 249 asks whether Campbell would have shot

Jennings if Jennings were not black? The United States need not prove that the defendant harbored particular beliefs about the protected class affected to obtain a conviction. *See also United States v. Jenkins*, No. CRIM. 12-15-GFVT, 2013 WL 3338650, at *5 (E.D. Ky. July 2, 2013), *aff'd* (Sept. 12, 2014) ("Ultimately, judges should be modest in their statutory work to avoid raising freedom of speech concerns."). The statute's plain text only requires finding that the defendant attacked the victim because of his race. It does not require a finding of racial animus to prove guilt.

Moreover, reading such a requirement into the statute would violate congressional intent. The House of Representatives and the Senate, while considering their chambers' respective hate crimes bills, took into account free speech concerns. To avoid criminalizing points of view, Congress excluded racial animus from the statute, and instead focused on the connection between the conduct and the protected class. *See Miller*, 767 F.3d at 606 (Sargus, J. dissenting) ("[Section] 249(a) 'targets conduct, not bigoted beliefs,' requiring a causal connection between the assailant's conduct and the victim's protected class, not a causal connection between the assailant's bigoted beliefs and the victims protected class.") (quoting the *Miller* majority opinion, *id.* at 592). Legislative history bolsters this conclusion. Tellingly, the House of Representatives explicitly stated, "The bill only covers violent actions that result in death or bodily injury committed because *the victim has one of the specified actual*

or perceived characteristics." H.R. Rep. 111-86, 16 (emphasis added). The conduct must occur because of the victim's characteristic, not the defendant's beliefs.

Indeed, when drafting § 249, the House of Representatives specifically considered altogether prohibiting the introduction of evidence showing a defendant's racial bias. *Id.* The Senate, however, would have permitted courts to "consider relevant evidence of speech, *beliefs*, or expressive conduct *to the extent that such evidence is offered to prove an element* of a charged offense." Matthew Shepard Hate Crimes Prevention Act, S. 909, 111th Cong. 16 (as introduced by S. Judiciary, Apr. 28, 2009). This conflict indicates that Congress never viewed racial animus as an element of the offense. At most, Congress would have allowed evidence of animus to support the causal connection between the defendant's conduct and the victim's protected class. To require proof of animus now, by judicial fiat, would import an unintended element into the statute.

2. The "because of" requirement permits convictions in cases of mixed motives, so the District Court properly convicted Campbell of a hate crime.

Concerned that the previous federal hate crimes statute, 18 U.S.C. § 245, did not adequately address the problem of hate crimes, Congress sought to strengthen the law to reach more incidents of racially motivated violence. *See generally* H.R. Rep. 111-86. Interpreting "because of" to mean "but for"—rather than "substantially motivated by"—would nullify Congress's effort. This Court has previously found that "because of" permits hate-crime convictions even where a defendant acts with mixed motives.

Accordingly, this Court should adopt a more flexible motive requirement than "solely but-for."

a. "Because of" means "substantially motivated by."

Courts construing "because of" in 18 U.S.C. § 245, the pre-§ 249 federal hate crime statute, found that it requires the victim's protected class to serve as a "substantial motivating factor" for a defendant's criminal conduct. *See, e.g. United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984) (upholding a jury instruction requiring that "a substantial motivating factor must have been race," and finding that the instruction's "additional information concerning the possible presence of other motivating factors simply restates the law on mixed motives"); *see generally United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (repeatedly referring to "because of" as meaning "motivated by"); *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003) (same). Relying on this construction, the Eighth Circuit upheld a conviction under § 249 where the victim's national origin was a "substantial motivating factor" of the defendant's conduct. *Maybee*, 687 F.3d at 1032 ("Based on this evidence, a reasonable jury could have concluded that the race or national origin of the occupants of the sedan was 'a substantial motivating factor' in Maybee's decision to pursue the sedan and force it off the highway."). Given the long history of defining "because of" in anti-discrimination statutes as "substantially motivated by," this Court should apply that definition here.

Narrowly defining "because of" as "but-for" causes problems in the context of mixed motive cases, particularly in anti-discrimination cases, because people almost

always act on mixed motives. *See Nassar*, 133 S. Ct. at 2546 (Ginsburg, J. dissenting) ("[T]he word 'because' does not inevitably demand but-for causation to the exclusion of all other causation formulations. When more than one factor contributes to a plaintiff's injury, but-for causation is problematic."). This is particularly true where Congress has explicitly stated its intent to strengthen anti-discrimination laws, as it did in passing § 249. As Justice Ginsburg noted in the context of a Title VII anti-discrimination law, "a 'sole cause' standard would render the Act totally nugatory." *Nassar*, 133 S. Ct. at 2547 (Ginsburg, J. dissenting) ("If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."). In its attempt to strengthen the anti-hate crime law, Congress would not have employed a more restrictive sole causation standard.[15] Therefore, this Court should define "because of" as "substantially motivated by," the same meaning it had in § 245.

The courts finding that "because of" requires "but-for" causation rely on *Burrage*, 134 S. Ct. at 881, to reach this conclusion. *See Miller*, 767 F.3d at 594. In *Burrage*, this Court construed the phrase "results from" to require but-for causation, in a federal criminal drug distribution statute allowing for enhanced sentences if "death . . . results from" use of the drug the defendant sold. *Burrage*, 134 S. Ct. at 881. Yet reliance on *Burrage* is misplaced in the anti-discrimination context. Anti-discrimination

[15] Aaron J. Creuz, *But-for the Beard: An Analysis of Causation Under United States Code Section 249*, 16 Rutgers J. L. & Religion 200, 213 (2014) ("[I]t does not seem likely that Congress, in seeking to strengthen the ability of the courts to fight such offenses, would instead limit its application by mandating sole but-for causation.").

laws focus, in part, on an individual's subjective prejudice. A person's thought processes involve far more complexity than the interactions of a drug cocktail. People have multiple reasons for virtually every one of their undertakings. *See Nassar*, 133 S. Ct. at 2547 (Ginsburg, J. dissenting). A causation standard that requires the individual's predominant motive to have been improper leaves room for these mixed motives, and accomplishes the statute's goal of stamping out a badge or incident of slavery. Thus, this Court should find that "because of" requires a "substantially motivating factor."

b. If "because of" requires "but-for" causation, then the victim's protected class need only be *a*, not *the,* but-for cause of the defendant's conduct.

Even if this Court finds that "because of" requires but-for causation, a conviction may stand although the defendant possessed mixed motives. To be sure, this Court has previously interpreted "because of" and synonymous language as requiring "but-for" causation. *See Nassar*, 133 S. Ct. at 2517 (reading "because of" in a Title VII statute to require "but-for" causation), *Burrage*, 134 S. Ct. at 881 (reading "results from" to mean "but for"). Yet this Court has rejected the premise that a defendant's actions cannot satisfy "but-for" causation where he acts for multiple reasons. Therefore, even if this Court interprets "because of" to require "but-for" causation, Campbell's conviction should still stand because but for Jennings' race, Campbell would not have shot him.

This Court does not construe "but for" to require that a defendant act with a single motivation. *Burrage* proves particularly instructive on this issue. There, the Court disclaimed a "solely but-for cause" requirement. *See, e.g. id.* at 888 ("[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases *played a part* in his demise, so long as, without the incremental effect of the poison, he would have lived.") (emphasis added). In mixed cause cases, liability "follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back." *Burrage*, 134 S. Ct. at 888; *see also id.* at 892 (Ginsburg, J. concurring) ("I do not read 'because of' in the context of antidiscrimination laws to mean 'solely because of.' "); *Miller*, 767 F.3d at 605 (Sargus, J. dissenting) ("[A]s the *Burrage* Court made clear through its examples, regardless of whether other causes are necessary to the outcome, the pertinent inquiry is always this: in the absence of the cause or factor at issue, would the statutorily prohibited outcome have occurred?"). Even courts applying "but-for" causation concede that § 249 allows for mixed motives. One court stated:

> [T]his case stands for the rather unremarkable proposition that our actions are really never the consequence of one motivation. Congress could not have meant for "because of" to stand for the proposition that only when motivated by no other factors than sexual orientation should the law apply. That would fly in the face of common sense and what we know about human interaction.

Jenkins, 2013 WL 3338650 at *7.

Even if § 249 requires but-for causation, it does not require a finding that the defendant acted solely because of the victim's race. Race is a "necessary prerequisite" to the defendant's actions. *Id.* But if other factors fueled the defendant's state of mind—just as the sick man's diseases can help the poison do its work—then he may be properly convicted.

The district court properly convicted Campbell because in the course of an officer's job, he commits a hate crime if he uses deadly force because of the victim's race. Although the statute does not require proof of the defendant's racial animus, Campbell has never denied that he is a racist. And he demonstrated his bias during his encounter with Jennings by proclaiming he could pull anyone over for any reason, "especially your kind." Given that this comment followed Jennings' question about whether he had been pulled over for "driving while black," there can be little doubt that Campbell meant black people by "your kind."

Even under a stricter "but-for" standard, the United States has made the statutorily required showing because Jennings' race was the "straw that broke the camel's back." *Burrage*, 134 S. Ct. at 888. Jennings' race prompted Campbell to stop Jennings, attempt to force him out of the car, and to draw his own gun and shoot. Campbell did not have a reasonable belief that he needed to use force, as the car was not in gear to drive away and Jennings had not threatened him. Both the video evidence and Campbell's physical injuries contradict the story he told about his arm getting stuck in Jennings' steering wheel. Campbell had no fear for his life. He may

have had some concern that Jennings would drive away from the scene, but he possessed the ability to step away from the car and call for backup.

But for Jennings' race, Campbell never would have pulled him over. *But for* Jennings' race, Campbell never would have drawn his gun. And *but for* Jennings' race, Campbell never would have shot him. Campbell violated § 249. This Court should therefore reinstate his conviction.

CONCLUSION

This Court should reverse the Thirteenth Circuit's decision granting Campbell's motion to suppress body camera evidence. Graham's search of Campbell's police-station locker did not violate Campbell's Fourth Amendment rights. Without a constitutional violation, Campbell cannot support his motion to suppress and the Court of Appeals therefore erred in excluding the body camera footage.

This Court should also reinstate Campbell's conviction. Congress passed § 249 as a means of eliminating racially motivated violence, one of the most pervasive and repugnant "badges or incidents of slavery." Holding this law inapplicable to police officers, or finding that it requires proof of racial animus or "sole" causation, would contravene the statute's language and narrow a remedy Congress intended to broaden. This Court should affirm the District Court's conviction of Campbell and allow the § 249 to accomplish its much-needed purpose.