GRANTED

No. 99-5739

In The

Supreme Court of The United States

DEWEY JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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Questions Presented

Whether, in light of *United States v. Lopez*, 514 US 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, see *Debartolo Corp. v. Florida Coast Trade Council*, 485 US 568, 575 (1988), section 844 (i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. One of the missions of NACDL is to ensure justice and due process for persons so accused. NACDL has a membership of over 10,000 and an additional 28,000 affiliate members in all fifty States. NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of AFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Amici believe that, in deciding this case, the Court will necessarily address a question of substantial importance in federal criminal practice: whether predominately intrastate acts,

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than amici curiae, made a monetary contribution to the preparation or submission of this brief.

which have no substantial effect on interstate commerce, may be regulated and criminally punished by the federal government. The answer to this question will implicate how federal crimes are charged by the executive branch, how they are submitted to a jury by trial courts and how judges will, in future cases, review jury determinations of jurisdictional elements. Therefore, the Court's action in this case will affect what charges a citizen may face in the federal courts. For that reason, NACDL and AFD seek to address the interests of defendants who may not be situated precisely as the petitioner in this case, but who are affected by the Court's resolution of this issue. NACDL and AFD believe they are in a unique position to assist the Court in examining the important constitutional questions raised by this case.[2]

STATEMENT OF THE CASE

Petitioner Dewey Jones, after a dispute with his cousin James Walker, tossed a Molotov cocktail into the living room of Walker's Fort Wayne, Indiana, residence. *See United States v. Jones*, 178 F.3d 479 (7th Cir. 1999). A federal grand jury returned a three-count indictment charging Jones with arson, a violation

[2] Amici have obtained consent to the filing of this consolidated brief in support of the petitioner from all interested parties. These letters of consent have been filed separately with the Clerk of this Court.

of 18 U.S.C. § 844(i), as well as violations of 18 U.S.C. § 924(c) (using a destructive device during and in relation to a crime of violence) and 26 U.S.C. § 5861(f) (making an illegal destructive device). *See id.* Only Mr. Jones' arson conviction is at issue in this appeal.

The federal arson statute, 18 U.S.C §844(i), includes a jurisdictional element that the property implicated in the act of arson was used in or affected interstate commerce. It is undisputed that the Walkers' residence was a private residence, not used for any business purpose. See Brief for the United States on Petition for Certiorari at 2, *United States v. Jones*, (No. 99-5739). To satisfy the jurisdictional element of the charge, the government argued three connections between the house and interstate commerce: The mortgage on the property held by an out-of-state company; the house's connection to a natural gas supply that is federally regulated; and the insurance on the house which implicates a federally regulated industry. *See Jones*, 178 F.3d at 480.

The Seventh Circuit found that the "interstate connections are pretty slight for a single building; [and] they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.*[3] However, the Seventh Circuit

[3] It is questionable at best whether the arson had even the slightest effect on any of these interstate activities. An out-of-state mortgage company held the mortgage on the Walkers'

(continued...)

affirmed the jury's conviction, holding that this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), required the government to prove no more than a "small effect" on interstate commerce. *See Jones*, 178 F.3d at 480. In reaching this conclusion, the Seventh Circuit analyzed Jones' arson not as an independent act, but rather speculated on the effect of all such acts in aggregation, in order to determine whether the interstate contact was substantial. *See id.* The court below reasoned that, although the interstate impact of this particular act was slight, because the crime might in some small way touch the residential housing industry, goods and materials for housing, gas, electricity, insurance markets and loan companies the crime was

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[3](...continued)
house, however a witness from the mortgage company testified that the company suffered no loss as a result of the fire. See Memorandum of Decision and Order, *United States v. Jones*, Northern District of Indiana, No. 1:98-CR-16, June 23, 1998. Natural gas was supplied to the Walker residence by the Northern Indiana Public Service Company, which received its gas from outside the state. There was no evidence, however, that the supply of natural gas to the Walker residence was interrupted as a result of the fire. *See Jones*, 178 F.3d at 480. Finally, a company with an out-of-state headquarters, which paid the Walkers' insurance claim with a draft from an out-of-state bank, insured the Walker residence. The insurer had about 20 employee agents in Fort Wayne, however, and an employee claims adjuster who had authority to settle claims only in Fort Wayne settled the Walkers' insurance claim. *See id.*

considered to have "national if not international scope." *Id.* The court went on to hold that arson has the *potential* to substantially affect each of these industries and concluded that the jurisdictional element requires proof only of some effect on interstate commerce as "the sum of many small effects can be a large effect." *Id.*[4]

SUMMARY OF ARGUMENT

When Congress enacts a statute, as in the instant case, which contains a jurisdictional element that the act "affects interstate commerce," the executive must prove that the specific acts underlying the crime substantially affected interstate commerce. Such proof must relate to the specific acts alleged, and not be determined by a court's post-hoc aggregation analysis.

"The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). Although the federal government's power to regulate the

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[4] In order to reach this conclusion, the court of appeals also relied upon an aggregation study conducted by the Federal Bureau of Investigation which reported a loss of approximately $280 million in 1997 due to residential arson. *See Jones*, 178 F.3d at 480. The court of appeals went on to note the effect such activity has, in the aggregate, on insurance markets, utilities, hotels, and the travel and commerce of friends and loved ones of arson victims. *See id.*

conduct of its citizens is great, it is not unlimited. Even under the Commerce Clause, which provides the federal government with its broadest regulatory power, this Court has recognized limits on the power to enact criminal statutes. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court identified three limited categories of activity that Congress may regulate under its commerce power: channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce. *See id.* at 558.

Congress enjoys two ways of regulating seemingly local acts under its Commerce Clause power: legislative general findings and the inclusion in legislation of a specific jurisdictional element. In the case of general findings, the federal courts should give great deference to the findings of Congress and employ an aggregation analysis. However, when Congress enacts a statute which includes a specific jurisdictional element, federal courts should not employ an aggregation analysis. Rather, courts must require proof that the specific acts prosecuted have a substantial effect on interstate commerce. The instant case is an elements case which requires the application of a strict "substantial effects" test to the specific acts alleged as a violation of a federal sovereign interest.

The Seventh Circuit Court of Appeals, in the instant case, incorrectly applied aggregation analysis, holding that the "collective effect" of local acts of arson on interstate commerce is substantial. *See United States v. Jones*, 178 F.3d 479, 481 (7th Cir. 1991). The lower court disregarded as constitutionally meaningless the local arson's trivial connection with interstate commerce. To the contrary, it reasoned that the combined effect of all arsons of residential property committed in this country have sufficient effect on the interstate natural gas and the insurance industries to qualify as "substantial." The application of this analysis is misplaced as the result would be that any time Congress required a jurisdictional element, the executive (and the courts) would be left free to read the element wholly out of the statute. The effect of such analysis would be to supply the federal executive with unlimited discretionary power to prosecute any action, regardless of its connection to commerce.

In order to maintain the fundamental division of sovereign power between the States and federal government, this Court must stand ready to check any attempt by the federal legislature or executive to possess or exercise the power to indiscriminately prosecute wholly local activity. In the instant case, this Court should overturn the court below and prevent the federal executive from creating and employing a general police power.

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ARGUMENT

I

THE FUNDAMENTALS OF THE DUAL SOVEREIGNTY SYSTEM REQUIRE THIS COURT TO CHECK EXECUTIVE PROSECUTORIAL OVERREACHING WHICH THREATENS TO ALTER THE BALANCE BETWEEN THE STATE AND FEDERAL GOVERNMENTS.

"This is a case about federalism. It concerns the respect that federal courts owe the States...." *Coleman v. Thompson*, 501 US 722, 726 (1991). Indeed, it is this Court which is placed in the constitutional role of assuring that neither the federal legislative branch nor the federal executive exercises general police power to prosecute primarily local conduct. As in all such cases, this Court must "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). In the instant case, as in *Lopez*, "first principles" require this Court to reassert, and require adherence to, the limited powers of the executive to prosecute crimes which are of an essentially intrastate nature. By prosecuting a non-commercial arson of a private home, the executive breached its limited powers.

In *Lopez*, this Court identified three categories of activity that Congress may regulate, and the executive may enforce, under the commerce power: channels, instrumentalities, and activities having a substantial relation to interstate commerce. *See id.* at 558. There is no dispute that it is the last category -- substantial relation -- that is before the Court. In *Lopez*, this Court found

that the Commerce Clause authority has always been limited to "the power to regulate those activities [which] have a *substantial* relation to interstate commerce." *Lopez*, 514 U.S. at 558-59 (citing *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)) (emphasis added).[5] Indeed, what this Court accomplished in *Lopez* was not the rewriting -- but the righting -- of the constitutional balance between sovereigns in criminal law jurisdiction. This case raises the questions of where the far edge of this constitutional balance rests, and whether in enforcing 18 U.S.C. § 844(i) the executive has gone over that edge. Amici

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[5] Mr. Justice Stewart presaged this issue, arguing that, under the Commerce Clause, Congress has the power to enact criminal laws only to prohibit or regulate those intrastate activities that have a demonstrably substantial effect on interstate commerce. Indeed, what Justice Stewart said of loan sharking is absolutely applicable to the arson statute at issue in the instant case: "In order to sustain this law we would, in my view, have to be able at the least to say that Congress could rationally have concluded that [arson] is an activity with interstate attributes that distinguish it in some substantial respect from other local crime. But it is not enough to say that [arson] is a national problem, for all crime is a national problem. It is not enough to say that some [arson] has interstate characteristics, for any crime may have an interstate setting.... I cannot escape the conclusion that this statute was beyond the power of Congress to enact." *Perez v. United States*, 402 U.S. 146, 157 (1971)(Stewart, J., dissenting). *Perez*, however, was a findings case, not an elements case. See, Part II, *infra*.

believe that the executive branch has ignored the very inherent limits of federalism that the executive is bound to enforce.

A. Criminal Law is Primarily the Province of the States.

The definition and prosecution of local, intrastate crime is reserved to the States under the Tenth Amendment to the Constitution.[6] The Framers of the Constitution certainly did not intend for the general government to possess the power to prosecute wholly local activity. "The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982)). State autonomy and the power of "formation, execution, or review of broad public policy... go to the heart of representative government." *Gregory v. Ashcroft,* 501 U.S. 452, 462 (1991) (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973)). This direct and primary political accountability reserved for the States would become illusory, however, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." *Lopez,* 514 U.S. at 577 (Kennedy, J., concurring).

Where the Constitution mandates an appropriate balance

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[6] U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

between state and federal jurisdictional powers, expansive Congressional legislation or overreaching executive prosecutions threatens that balance.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.... The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concerns lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist Papers, No.45. In our system of dual-sovereignty, the State's primary interest in criminal justice helps ensure that citizens feel close allegiance to their State of residence.[7]

> There is one transcendent advantage belonging to the province of State governments...I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. 17. For the federal sovereign to appropriate this power in an absolute fashion would certainly upset this "most attractive source of popular obedience."

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[7] Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Empowering the citizens' representatives -- be they legislative or executive -- to blur the lines of responsibility does not benefit the electorate. Rather, it introduces uncertainty in otherwise natural allegiances, denigrates the very concept of Statehood, and dissipates the democratic process.

B. Federal Prosecution Power Is Not General or Unlimited.

This Court has recognized that the structure of federalism undergirds all governmental power in this country -- be it vested in the individual, State, federal executive, federal legislature, or federal judiciary. It is that balance between the State and federal government that protects the individual from oppression. "A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 551 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). This Court has concluded that this balance includes the broad, but not unlimited, power of the federal government to prosecute or punish conduct as criminal. *See id.*

The federal sovereign enjoys wide latitude in the criminal regulation of matters which primarily impact federal or interstate concerns. Some areas of criminal regulation are enumerated by the Constitution. These are counterfeiting, piracies and felonies committed on the high seas, treason against the United States, impeachment and offenses against the Law of Nations. *See* U.S. CONST. art. I, §8, cl. 6,10; art. II, §4; art. III, §3, cl. 1. All other federal crimes are congressional creations, legislated under the enumerated powers in the Constitution, such as the Commerce Clause, the Necessary and Proper Clause, or the War Powers Clause. *See* U.S. CONST., art. III, §2, cl. 1 (providing "[t]he judicial power shall extend to all Cases . . . arising under this

Constitution...").

Congress often invokes the specific grant of power found in the Commerce Clause to federalize criminal activities. The commerce power is, however, a limited power, subject to judicial review. The judiciary will limit the scope of federal criminal Commerce Clause statute application, guided by two significant policy concerns. *See United States v. Bass*, 404 U.S. 336, 349 (1971). First, courts must narrowly interpret federal criminal statutes because crimes are traditionally state matters. Second, courts will narrowly interpret criminal statutes when the meaning is less than plain and clear. *See id.*

Further narrowing should occur even after Congress has passed a valid criminal law pursuant to its commerce clause powers. Even when Congress has legislated to the full extent of its commerce power, it has recognized that the federal executive should impose criminal sanctions only to the extent that misconduct obstructs a specific federal function. When misconduct does not concern federal issues, punishment should be left to State and local governments. *See* SENATE COMM. ON THE JUDICIARY, CRIMINAL CODE REFORM ACT OF 1977, S. Rep. No. 95-605, 95th Cong., 1st Sess. 29 (1977).

The Framers did not contemplate that the executive branch would have unlimited power to enforce, in its sole discretion, congressional acts beyond all constitutional confines. To the contrary, the executive's discretion in enforcing federal law must reflect the founder's careful efforts to "check whatever propensity

a particular Congress may have to enact oppressive, improvident, or ill-considered measures." *INS v. Chadha,* 462 U.S. 919, 947-48 (1973).

> [The Executive] establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.....The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design.

Id. at 948 (quoting The Federalist Papers, No. 73). In this case, the executive did not act as a "salutory check," rather, it ignored the dictates and checks of federalism inherent in the limitations of federal power.

II

IN PROSECUTING CASES IN WHICH CONGRESS HAS DETERMINED THAT THE AFFECT ON INTERSTATE COMMERCE IS AN ELEMENT OF THE OFFENSE, THE GOVERNMENT MUST PROVE THAT SUCH EFFECT OF THE CHARGED ACT WAS "SUBSTANTIAL."

Given the executive's inability, or unwillingness, to adhere to the limits inherent in our federal system, the judiciary must act to ensure that constitutional limits are enforced. The power of Congress over interstate commerce is broad and is not confined to the regulation of specific acts of interstate commerce. *See*

United States v. Darby, 312 U.S. 100, 118 (1941). It extends to those intrastate activities which have an identifiable effect on interstate commerce, so long as those acts "substantially affect" interstate commerce. *See Lopez*, 514 U.S. at 558-59.

Congress can exercise this limited regulatory power through two distinct legislative tools: general findings and specific elements. When Congress relies on general findings to regulate conduct under the commerce clause, it may regulate behavior regardless of the case-by-case effect on interstate commerce. In specific element cases, Congress requires proof of impact upon interstate commerce as an element of the regulation; in effect requiring that each prohibited activity have a case-by-case effect on interstate commerce. This Court has noted the distinction between "findings" statutes and "elements" statutes.

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce.... It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect.... And sometimes Congress itself has said that a particular activity affects the commerce....

Darby, 312 U.S. at 120.

The lower federal courts must not be allowed to conflate the analysis appropriate to "findings" cases with that necessary in "element" cases. In the first category -- findings cases -- Congress specifically sets out on its own to determine the purpose and scope of the enacted statute. In such cases, it is appropriate for

the courts to give great deference to the legislative branch when reviewing the constitutional scope of the act under the Commerce Clause. In contrast, in the latter category -- elements cases -- Congress enacts a statute which specifically leaves the determination of the constitutional limit of the act's application to the jury and the courts that review the jury's verdict. The instant case is an elements case which requires the application of a strict "substantial effects" test to the specific acts alleged as a violation of a federal sovereign interest.

A. Aggregation Analysis Is Approved for General Findings Cases.

This Court, in both the civil and the criminal regulatory context, has approved the concept of "aggregation" for findings cases. *See Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942). The aggregation doctrine allows federal regulation of purely local acts if those acts, when viewed on a national scale, substantially affect interstate commerce. In *Wickard,* a findings case, this Court held that the commerce clause allowed the federal government to prohibit a farmer from harvesting wheat solely for his own consumption as part of its regulatory power over wheat production. This Court concluded that the federal commerce power included this prohibition even though the specific act was not regarded as commerce. *See id.* at 125. In reaching this conclusion, the Court focused on the conduct of not just one farmer, but of all the other farmers subject to the regulation.

Although one farmer growing wheat for himself may have a trivial effect on the wheat market, his conduct was "far from trivial" when "taken together with that of many others similarly situated." *Id.* at 128. Thus, even if an individual's activities do not significantly affect interstate commerce, they may be regulated if Congress finds that they are part of a class of activity that does.

This doctrine of aggregation is utilized in cases in which Congress seeks to regulate an interstate market or which involve a related regulatory scheme. *See Maryland v. Wirtz,* 392 U.S. 183, 196 n. 27 (1968) (stating "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence"). In *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964), this Court employed the "class of activities" test, to sustain an act of congress requiring hotels or motels to accommodate minority guests. *See id.* at 247. The Civil Rights Act of 1964 declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce per se. Likewise, in *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court adhered to the aggregation principle and stated: "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Id.* at 303-04.

This aggregation analysis employed by the Court in the civil

"findings" context, has been cautiously extended to the criminal "findings" context. For example, in *Perez v. United States,* 402 U.S. 146 (1971), a "findings" case, this Court held Title II of the Consumer Credit Protection Act is within Congress' Commerce Clause power to control activities that affect interstate commerce. Further, this Court held that Congress' findings were adequate to support its conclusion that loan sharks who use extortion to collect payments for loans belong in a class largely controlled by organized crime. The loan shark racket, Congress therefore concluded, had a substantially adverse effect on interstate commerce. *See id.* at 156-57.[8]

In *Huddleston v. United States,* 415 U.S. 814 (1974), a findings case involving illegal firearm dealing prescribed by the Gun Control Act, this Court held that no interstate commerce nexus need be demonstrated at trial. *See id.* at 832. This Court

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[8] However, what Justice Stewart said as a caution in dissent in *Perez* with regards to loan sharking can be equally applied to arson:

> [I]t is not enough to say that [arson] is a national problem, for all crime is a national problem. It is not enough to say that some [arson] has interstate characteristics, for any crime may have an interstate setting. And the circumstance that [arson] has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets.

Perez, 402 U.S. at 157-58.

concluded that Congress intended, and properly so, that 18 U.S.C. §§ 922(a)(6) and (d)(1), were to reach transactions that are wholly intrastate, on the theory that such transactions affect interstate commerce. *See Id.* Conversely, in the case at bar, an element case, § 844(i) requires proof of a nexus between the alleged criminal activity and interstate commerce.

Although the Court has in the past relied upon the aggregation doctrine to find Congress acted within its powers in a findings context, in *Lopez,* a majority of this Court identified the existence of limits even under an aggregation analysis. In invalidating a law barring gun possession near schools, the Court found that it

> is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Lopez, 514 U.S. at 561. This Court held that if the government's arguments regarding aggregation prevailed, there would exist no perceived limitation on federal power, even in areas such as criminal law enforcement or education where States historically are sovereign. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez,* 514 U.S. at 564. Therefore, this Court concluded, consistent

with the great weight of history, tradition and the proper balance of powers, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce. *See id.*

B. This Court Has Never Approved Aggregation Analysis in Elements Cases.

In statutes in which a jurisdictional element is explicitly required, this Court has never applied the aggregation principle. *See, e.g., Allied-Bruce Terminix Companies, Inc., v. Dobson,* 513 U.S. 265 (1995) (reading the Act's language as insisting that the transaction in fact involve interstate commerce); *U.S. Bulk Carriers, Inc., v. Arguelles,* 400 U.S. 351 (1971) (holding that the section of Labor Management Relations Act providing a federal remedy in an industry affecting commerce does not abrogate statutory remedy); *Evans v. United States,* 504 U.S. 255 (1992) (holding that, in a Hobbs Act element case, receipt of payment was an element of extortion charge);[9] *Gulf Oil Corporation v.*

[9] The Hobbs Act, 18 U.S.C. § 1951, has been subject to recent aggregation based challenges. *See, e.g., United States v. Hickman,* 179 F. 3d 230 (5th Cir.) (en banc), *petitions for cert. filed,* Nos. 99-464, 99-5614, 99-6258, 99-6302, 99-6378 (1999). Although this Court need not reach the effects of its decision on the Hobbs Act, Amici believe that the Commerce Clause requires any effect on interstate commerce in a "elements" case to be "substantial" in order to invoke federal jurisdiction. This is true even though the jurisdictional

(continued...)

Copp Paving Company, Inc., 419 U.S. 186 (1974) (declining to extend the Robinson-Patman Act to reach a multitude of local activities); *Caron v. United States,* 524 U.S. 308 (1998) (holding Massachusetts law that permitted convicted felon whose civil rights have been restored to possess rifles trumped federal statute regarding punishment); *Sedima, S.P.R.L., v. Imrex Company, Inc.,* 473 U.S. 479 (1985) (no aggregation analysis applied in case of civil remedies for criminal conduct); *AFL-CIO v. Local 334,* 452 U.S. 615 (1981) (holding that a union contract satisfies the commerce element for under the Taft-Hartley Act); *Scarborough v. United States,* 431 U.S. 563 (1977) (holding that proof was required that a firearm previously traveled in interstate commerce to satisfy the required nexus between possession and commerce); *United States v. Culbert,* 435 U.S. 371 (1978) (holding Congress intended to make criminal all conduct within the reach of the

[9](...continued)
elements of the arson statute and the Hobbs Act can be distinguished. The arson statute at issue in this case requires that the property involved be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Section 844 (i) of 18 U.S.C. The Hobbs Act, on the other hand, prohibits extortion which "in any way or degree . . . affects [interstate] commerce." 18 U.S.C. § 1951(a). The language of the latter statute seems to imply a lower level of the connection to interstate commerce. However, Amici believe that, in light of *Lopez*, wherever the term "affect" is used in a jurisdictional element, that term implies the qualifier "substantial" in order to meet constitutional muster.

statutory language, and did not intend to limit the statute's scope by reference to an undefined category of conduct termed "racketeering").

Legitimate challenges in jurisdictional element statute cases address the proper scope of the statutes rather than the limits on congressional authority. Specifically, the scope of the Commerce Clause, when employed to establish federal criminal jurisdiction is the proper focus for this Court . In order to satisfy the Congressionally mandated burden of proof on the jurisdictional element, the government must establish at trial a specific nexus between a particular crime and a substantial effect on interstate commerce for each charge. Indeed, to allow the same aggregation analysis in an elements case as allowed in a findings case would create just the unreviewable general police power so feared by the federalists and the representatives of the States at the time of the framing. This Court's decision in the instant case should stand to clarify this point.

C. The Lower Courts Have Misapplied Aggregation Analysis in Elements Cases.

There is currently a mixed application of aggregation in "elements" statutes among various courts below, including the Circuit Courts of Appeals. Some courts have found aggregation-type arguments irrelevant to § 844(i) prosecutions; instead they have required proof of a "substantial" effect on interstate commerce in each federal arson case. *See, e.g., United States v.*

Pappadopolous, 64 F.3d 522, 527(9th Cir. 1995) (holding that the government must satisfy the jurisdictional requirement by pointing to a substantial effect on or connection to interstate commerce); *United States v. Denalli,* 73 F.3d 328, 330 (11th Cir. 1996) (holding that destruction of victims' private residence by fire did not have a sufficiently substantial effect on interstate commerce to support conviction under federal arson statute).[10]

The Seventh Circuit Court of Appeals, in the instant case, has followed the lead of other circuits and has introduced and applied aggregation analysis where it has no place -- in this elements case. The court below recognized that application of § 844(i) can only be justified, if at all, only as a regulation of an activity that "substantially affects" interstate commerce. *See United States v. Jones,* 178 F. 3d. 479, 480 (7th Cir. 1999). Specifically, the court noted that "these interstate connections are pretty slight for a single building; they don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce." *Id.* The court concluded, however, that it was appropriate to apply an aggregation analysis to this elements case and,

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[10] These courts take literally *Lopez's* statement that the effect on commerce must be a "substantial" one. The Ninth Circuit in *United States v. Gomez,* 87 F.3d 1093, 1095 (9th Cir. 1996), decided after *Pappadopolous,* held that intrastate economic or commercial activities must substantially affect interstate commerce in the aggregate to be regulated, while non-economic or non-commercial activities must individually have a substantial effect on interstate commerce.

therefore, a local arson's "collective effect" on interstate commerce is substantial. *See id.* The lower court disregarded as constitutionally meaningless the local arson's trivial connection with interstate commerce. To the contrary, it reasoned that the combined effect of all acts of arson against residential property committed in this country have sufficient effect on the interstate natural gas and the insurance industries to qualify as "substantial." The application of this analysis is misplaced as the result would be that any time Congress required a jurisdictional element, the executive (and the courts) would be left free to read the element wholly out of the statute. *See, e.g., United States v. McGuire*,178 F.3d. 203, 212 (3rd Cir. 1999) (stating "[w]e do not believe that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it").

This Court in *Lopez* rejected reasoning simlar to the Seventh Circuit's in this case. In *Lopez*, the government argued that possession of a firearm in a school zone substantially affects interstate commerce because it may result in violent crime, which in turn affects the national government and interstate commerce. In support of their argument, the government specifically cited the insurance costs of violent crime. *See Lopez,* 514 U.S. at 564. This Court refused to credit such contentions, reasoning that under such a theory "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or

education where states historically are sovereign." *Id.* This Court recognized that relying solely on the aggregated costs of crime, to uphold the application of a federal criminal statute under the Commerce Clause would "convert congressional authority under the commerce clause to a general police power of the sort retained by States." *Id.* at 567.

The arson crime at issue in this case has no discernible and definable connection with an interstate market or other interstate commercial process and therefore the limiting aspect of the jurisdictional element has not been met. The analysis of the court below, upholding the conviction, essentially nullifies the limiting role of the jurisdictional element in the statute. Contrary to the lower court's holding, the limited nature of the commerce power requires proof of a "substantial" connection between interstate commerce and any activity that Congress endeavors to make into a federal crime.

CONCLUSION

Amici Curiae therefore urges this Court to reverse the Seventh Circuit Court of Appeals in order to adequately limit the power of the executive *vis a vis* the Commerce Clause of the United States Constitution. Such a holding would complete the work begun by this Court in *Lopez* and would serve to re-balance the power enjoyed by the States and the federal government.

Respectfully submitted,

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