NO. 12-10273

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENNIS MAHON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Amici Curiae Brief of the National Association of Criminal Defense Lawyers and the Ninth Circuit Federal Public and Community Defenders in Support of Appellant's Petition for Rehearing En Banc

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IDENTITY, INTEREST AND AUTHORITY OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 9,200 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice including preventing overcriminalization, over-federalization, and prosecutorial overreaching. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because broad and overly expansive

interpretations of federal criminal statutes provide little notice of the conduct criminalized and give prosecutors far too much discretion to decide whom to punish. This case provides the Court with an opportunity to begin to restore the Constitutionally limited scope of federal criminal jurisdiction.

The Ninth Circuit Federal Public and Community Defenders listed in the Appendix provide representation, pursuant to 18 U.S.C. § 3006A, to indigent federal criminal defendants in the Ninth Circuit. Because they are repeat players in the federal criminal cases, they have a strong interest in the subject matter of this appeal. *Amici* also represent the interests of defendants who will in the future face charges in the Ninth Circuit under the statute in question and similarly expansive statutes – a group whose members cannot be ascertained or organized, but share a strong interest in the subject matter of this appeal.

We file this brief with the consent of counsel of record for both parties. *See* Fed. R. App. P. 29(a); 9th Cir. R. 29-2(a). A party's counsel did not author this brief in whole or part, nor did a party's counsel contribute money to fund it. Nor did any other person contribute money to fund it. 9th Cir. R. 29-2(c).

ARGUMENT

The Court should grant en banc review because the Panel has misconstrued the jurisdictional element of the federal arson statute, 18 U.S.C. § 844(i), such that the statute is unconstitutional as applied to defendant Dennis Mahon.

The Supreme Court has established what question a court must ask to decide whether § 844(i)'s jurisdictional element is satisfied: Is the building's function to be used in commerce? *Jones v. United States*, 529 U.S. 848, 854-55 (2000). The Panel, however, asked a different question. It asked: Did the building's occupant engage in activity that affects interstate commerce? Supreme Court precedent makes it clear that the Panel's test for federal jurisdiction is far too broad. That is so because everyone engages in activity that affects interstate commerce. As construed by the Panel, the federal arson statute encompasses "[p]ractically every building" in the country, which makes it unconstitutional. *Jones*, 529 U.S. at 857. Because the Panel's decision gives Congress the general police power that the Framers deliberately withheld, it is a dangerous precedent and should be reconsidered.

A. Congress lacks the power to prohibit crime against a building just because its occupants engage in activities that affect interstate commerce.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*,

134 S. Ct. 2077, 2086 (2014). While the States have a general "police power" to punish crimes, Congress does not. *Id.* A "criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'" *Id.* (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

Because Congress lacks a general police power, "the clearest example of traditional state authority is the punishment of local criminal activity." *Bond*, 134 S. Ct. at 2089. Accordingly, the first Congress enacted a penal code that prohibited only a handful of crimes, *e.g.,* treason, piracy on the high seas, and violent crime on federal property, thereby leaving the punishment of all other criminal activity to the states. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. Since then Congress has encroached on traditional state authority by creating punishments for many crimes already forbidden by the states. Today, most federal prisoners are serving sentences for such crimes. *See* Frank O. Bowman*, Freeing Morgan Freeman: Back-End Release Authority in American Prisons*, 4 Wake Forest J. L. & Pol'y 9, 45 (2014).

In 1995 in *United States v. Lopez*, and again in 2000 in *United States v.*

Morrison,[1] the Supreme Court drew the line against this encroachment on traditional state authority. Until then, Congress had been able to encroach so far because federal criminal legislation was so often upheld as a permissible exercise of Congress's power under the Commerce Clause. *See Bond*, 134 S. Ct. at 2087. While acknowledging the breadth of the modern Commerce Clause, the *Lopez* Court emphasized that the Constitution demands some limit to the commerce powers because "'[t]he enumeration [of federal powers] presupposes something not enumerated.'" *Lopez*, 514 U.S. at 553 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 194-95 (1824)). The *Lopez* Court ultimately refused to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567. It insisted on preserving "a distinction between what is truly national and what is truly local." *Id.* at 567-68.

To that end, the *Lopez* Court confirmed there existed only three "categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558; *see Perez v. United States*, 402 U.S. 146, 150 (1971). The first two categories are relatively concrete and not at issue here.[2] The third category is less

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[1] *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

[2] "Congress may regulate the use of the channels of interstate commerce. . . . [and] Congress is empowered to regulate and protect the instrumentalities of

concrete and potentially expansive: "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. This category is so "far reaching," *id.* at 560, that it has allowed Congress to regulate a local farmer's wheat production even though it was grown strictly for use and consumption on the farm because Congress was regulating the national wheat market. *Wickard v. Filburn*, 317 U.S. 111 (1942).

But how does that power to "regulate . . . activities" affecting commerce, 514 U.S. at 558, translate to a power to protect society from crime? Certainly it allows Congress to criminalize violations of its economic regulatory schemes. Indeed, because the Controlled Substance Act aims to comprehensively regulate the market for illegal drugs like marijuana, it can prohibit even the wholly intrastate use of drugs. *Gonzales v. Raich*, 545 U.S. 1, 18, 25-26 (2005). But what power does Congress have to protect people and their property from violent crime unrelated to a comprehensive, economic regulatory scheme?

Morrison and *Lopez* show that, when Congress is not criminalizing acts that undermine such a scheme – *viz.*, when Congress is simply prohibiting violent

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interstate commerce, or persons or things in interstate commerce[.]" *Lopez*, 514 U.S. at 558.

crime because it is harmful – its power to legislate federal crimes is necessarily and significantly limited by the Constitution.

The *Morrison* Court considered a statute penalizing gender-motivated violence. *Morrison*, 529 U.S. at 601. That statute was enacted accompanied by extensive and express congressional findings about the economic impact of such violence. *Id.* at 614. Congress had determined that such violence deterred potential victims from traveling, working, or consuming in the interstate market as they normally would. *Id.* And Congress found that such violence thereby impacted the economy. *Id.*

This rationale was deemed invalid because everyone in the United States travels, works, or consumes in interstate commerce. *Morrison*, 529 U.S. at 614-15. The *Morrison* Court explained, "[i]f accepted, [this] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* at 615. It would allow Congress to prohibit *any* violent crime because in the aggregate all such crime has such impact. *Id.* "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. That is, it rejected the argument that Congress can prohibit violent

crime against a person just because he or she engages in activities that affect interstate commerce.

That principle likewise animated the analysis in *Lopez*. There the Court addressed a federal statute making it illegal to carry a firearm in a school zone. *Lopez*, 514 U.S. at 551. Congress wanted to protect schools from gun crime. The statute was defended by arguing that a school's work is to produce a "productive citizenry," and the presence of guns, which generate violent crime, would thwart that work, thereby impacting the economy. *Id.* at 564. The Court rejected that "'costs of crime'" rationale because under that rationale "Congress could regulate not only all violent crime, but all activities that might lead to violent crime[,]" thereby giving it a "general federal police power." *Id.* Neither the school zone nor its occupants could be protected by Congress from crime simply because its occupants engaged in activities that affected interstate commerce. *Id.*

The gist of *Lopez* is similar to that of *Morrison*: the Commerce Clause does not allow Congress to protect an area – or, *a fortiori*, a building – from violent crime just because its occupants engage in activity that affects interstate commerce. Thus, the Commerce Clause does not authorize a statute that makes it a federal crime to burn a building that is occupied by someone who engages in activity that affects interstate commerce. Everyone engages in such activities.

See Morrison, 529 U.S. at 614-15. Such an arson statute would turn virtually every building into an enclave of federal criminal jurisdiction, draining the concept of enumerated powers of all meaning.

B. The *Jones* Court deliberately construed § 844(i) to avoid the pitfall identified by *Morrison* and *Lopez*.

The week after issuing *Morrison*, the Supreme Court issued *Jones v. United States*, 529 U.S. 848, 854-55 (2000). The *Jones* Court construed the jurisdictional element of § 844(i) and stated that its construction followed "the interpretive rule that constitutionally doubtful constructions should be avoided where possible." *Id.* at 851.

Section 844(i) makes arson a federal crime when committed against "any building, vehicle, or other real or personal property *used* in interstate or foreign commerce or *in any activity affecting interstate or foreign commerce*." 18 U.S.C. § 844(i) (italics added). The *Jones* Court recognized that the italicized section of § 844(i)'s jurisdictional element aimed to invoke Congress' Commerce Clause regulatory power discussed above, which found its most far reaching application in *Wickard*. *Jones*, 529 U.S. at 854, 856. Because the defendant in *Jones* had caused about $75,000 in damage to a private home by exploding a Molotov

cocktail, the question for the Court was whether Congress had, or could, make it illegal to damage such a building through violent crime.

Naturally, the family that was victim to the arson – just like the crime victims discussed in *Morrison* – must have traveled, worked, and consumed products in interstate commerce. That is, the building's occupants must have engaged in activity that affects interstate commerce. But the government declined to argue that that simple fact sufficed for federal jurisdiction. Oral Arg. Tr., *Jones v. United States*, 2000 U.S. Trans. LEXIS 28, *38, *45 (Mar. 21, 2000). It did argue, however, that the occupants used the building to consume natural gas to heat the building. Brief of Respondent, *Jones v. United States*, 1999 U.S. Briefs 5739, *23 (Feb. 7, 2000) ("Destruction of the house, or damage sufficient to cause the residents to vacate the premises, would lead inevitably to a reduction in the quantity of gas shipped in interstate commerce."). That theory was essentially that the building was to its occupants as a pipe is to a tobacco smoker: it was their tool for consuming an interstate product. That theory would suffice to satisfy § 844(i)'s jurisdictional element because, in that technical sense, the house was used in an activity that affects interstate commerce.

The *Jones* Court, however, rejected that theory because it made § 844(i) too broad and robbed the word "use" of its ordinary meaning. The "key word,"

explained the Court, "is 'used.'" *Jones*, 529 at 854. That word "ordinarily signifies 'active employment.'" *Id.* at 855 (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)). Given that ordinary meaning, the jurisdictional element "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* Accordingly, the *Jones* Court identified the "proper inquiry" as being "'into the function of the building itself[.]'" *Id.* at 854-55 (quoting *United States v. Ryan*, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part)).

Because the "building itself" and its "function" is the proper focus of the inquiry, a court applying § 844(i) cannot simply ask: Do the building's occupants engage in activity that affects interstate commerce? Rather, it must ask: Is the building's function to be used in commerce? In some cases, the answer is clearly yes. Ford uses buildings to make cars. McDonald's uses buildings to sell hamburgers. Hilton uses buildings to sell short-term lodging.[3] The function of those buildings is for use in commerce. But that is not so for a private home. A family uses the building as a home. The function of that building is to give shelter and enable domestic life, not for use in commerce. Thus, in *Jones*, the outcome

[3]In *Russell v. United States*, 471 U.S. 858, 859 (1985), where the Supreme Court sustained a § 844(i) conviction, the owner used his building as a rental unit to sell longer-term lodging.

was not controlled by the fact that the building's occupants engaged in activities that affect interstate commerce. Instead it was controlled by the assessment of the function of their house.

C. The Panel erred by asking the question eschewed by *Jones*, thereby extending § 844(i)'s reach unconstitutionally.

Here the Panel faced a case much like *Jones*: Dennis Mahon, a local resident of Tempe, Arizona, was convicted under § 844(i) for allegedly causing a homemade pipe bomb to explode in a local government office building. The bomb's target was the City of Scottsdale's "Diversity Office," which had made some controversial policy decisions and was housed in that building.

Although the Panel started off describing the jurisdictional element correctly, it drifted into distortion. It took three steps for the Panel to go from stating the proper inquiry to stating the improper inquiry.

1. The Panel first acknowledged that *Jones* focused the inquiry on "'the function of the building itself.'" Op. 7 (quoting *Jones*).
2. The Panel next said that the jurisdictional element is satisfied "if *the building* actively engages in interstate commerce or activity that affects interstate commerce[.]" Op. 9 (italics added). This statement of the element, however, was imprecise because a "building" doesn't engage in any activities; rather, people do.

3. Finally, the Panel replaced the word "building" with "the Diversity Office." It said: "[W]e need determine only if *the Diversity Office* actively engages in interstate commerce, or activity that affects interstate commerce." Op. 11 (italics added).

That last question – which the Panel treated as dispositive – was the wrong question to ask. It was the very question that the *Jones* Court had deliberately refrained from adopting as dispositive. *See supra* pp. 8-9.

Asking the wrong question led not only to the wrong answer but to an unconstitutional conviction. First, there is a material difference in the answers generated by the proper inquiry and by the Panel's inquiry. The answer to the proper inquiry would be "no" because the function of the building was to provide a space for local government agencies to operate; the City used the building to engage in its sovereign activities. It is not surprising that, in contrast, the answer to the Panel's inquiry was yes. Like any occupant of any building, the Diversity Office engaged in activity that affects interstate commerce, although those activities were, like those of the family in *Jones*, minimal and noncommercial.

Second, as construed by the Panel, § 844(i)'s jurisdictional element is unconstitutional and is unconstitutionally applied here. "[A]rson is a paradigmatic common-law state crime," *Jones*, 529 U.S. at 858, and, in the constitutional

balance of federal-state powers, "the clearest example of traditional state authority is the punishment of local criminal activity." *Bond*, 134 S. Ct. at 2089. Thus, if there is no logical stopping point to the application of the federal arson statute, it must be unconstitutional. *See Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 615-17.

As construed by the Panel, however, the federal statute has no logical stopping point because "[p]ractically every building," *Jones*, 529 U.S. at 857, in the country has an occupant that engages in activity that affects interstate commerce. For example, a church building is occupied by an institution that will typically draw members and funding from out of state, distribute publications out of state, and consume materials imported from out of state – all of which are activities that affect interstate commerce and which, consequently, subject it to federal jurisdiction under the Panel's approach. *See United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003) (holding that a building housing such a church falls *beyond* § 844(i)'s jurisdiction). Likewise, a private home is occupied by family members who, like the *Morrison* crime victims, travel, work and consume in interstate commerce, thereby subjecting their home to federal jurisdiction. *See Jones*, 529 U.S. at 860 (holding such a building falls beyond § 844(i)'s jurisdiction). And, as for local government office, "*[a]ll* governmental services

affect commerce at some level, whether those services are legislative, executive, or judicial," and so all such buildings will satisfy the Panel's question. *United States v. Laton*, 352 F.3d 286, 312 (6th Cir. 2003) (Sutton, J., dissenting) (italics in original).

This final aspect of § 844(i)'s breadth under the Panel's treatment is especially anomalous. Local government buildings, by virtue of their occupants engaging in their activities that inevitably affect interstate commerce, are for all practical purposes treated no differently than federal property with respect to federal criminal jurisdiction. In 1790, Congress prohibited traditional violent crime on federal property. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. Now, under the Panel's approach, Congress can prohibit violent crime in virtually all state and local buildings.

That situation causes the dissonance decried by Justice Kennedy in his *Lopez* concurrence. Justice Kennedy emphasized that "it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). Yet "the theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability[.]" *Id.* "Were 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, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.*

The Panel's approach grants the federal government responsibility for protecting a local government office building from the homemade bomb of a local resident, evidently angered by local government policy. Is it the federal government's fault that that bombing succeeded? Should federal penalties be responsible for deterring such acts? If the federal government failed to find the culprit, or got the wrong man, should the citizens of Scottsdale lay the blame at the President and Attorney General's door, or rather at the door of the Mayor and District Attorney? The complete overlap in federal and state jurisdiction over common-law violent crime of this sort will blur "political accountability," as Justice Kennedy warned in *Lopez*. *Id.*

In sum, the Panel reduced § 844(i)'s jurisdictional element to the wrong question. Doing so, it clearly breached core constitutional limits drawn by *Lopez* and *Morrison*, and it eschewed the guidance of *Jones*. It thereby gave Congress a blueprint for exercising a general police power against violent crime. That blueprint stands in violation of the Ninth and Tenth Amendments.

CONCLUSION

The arson conviction here is an unconstitutional exercise of federal power. *Amici Curiae* respectfully ask that the Court reconsider the Panel's decision.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Circuit Rule 29-2(c)(2), the foregoing *Brief of Amici Curiae in Support of Appellant's Petition for En Banc Review* is proportionately spaced, has a typeface of 14 points, and contains 3,107 words.

/s/ *Michael C. Holley*
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APPENDIX: Ninth Circuit Federal Public and Community Defenders

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2015, I electronically filed the foregoing *Brief of Amici Curiae in Support of Appellant's Petition for En Banc Review* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Michael C. Holley*
MICHAEL C. HOLLEY