APPENDIX

TABLE OF APPENDICES

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 21-2730 and 21-2989

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIE T. JOHNSON and ANESSA R. FIERRO,

Defendants-Appellants.

Appeals from the United States District Court for the
Western District of Wisconsin.
No. 20-cr-00134 — **James D. Peterson**, *Chief Judge*.

ARGUED MARCH 29, 2022 — DECIDED AUGUST 2, 2022

Before FLAUM, ST. EVE, and JACKSON-AKIWUMI, *Circuit Judges*.

FLAUM, *Circuit Judge*. Defendants-appellants Willie Johnson and Anessa Fierro were charged with arson under federal law after they participated in riots in Madison, Wisconsin, following the shooting of a Black man by a white police officer in Kenosha, Wisconsin. They moved to dismiss the indictment against them, arguing that the federal arson statute, 18 U.S.C. § 844(i), is unconstitutional because Congress overstepped its

Commerce Clause authority when it enacted the provision. The district court denied the motion. Johnson and Fierro now appeal after entering into guilty pleas preserving that right. For the following reasons, we affirm the decision of the district court holding that 18 U.S.C. § 844(i) is constitutional.

I. Background

The offense conduct in this case was largely caught on camera and is not disputed. In the summer of 2020, Anessa Fierro and her boyfriend, Willie Johnson, were living at the YWCA homeless shelter in downtown Madison, Wisconsin. After a white Kenosha police officer shot Jacob Blake, a young Black man, protests and riots broke out in Madison in the early morning hours of August 25, 2020. Fierro and Johnson had been drinking that night, and they eventually joined the throng of protesters.

Fierro and Johnson retrieved a baseball bat and a can of gasoline from a family member's work van (which the pair had borrowed for the weekend) and followed the crowd. After a few blocks, they descended on an office building. Johnson used the baseball bat to strike the building's windows, and Fierro poured gasoline along the front of it. Johnson and others lit the gasoline, and there was a burst of flames. After the two left, others hurled lit Molotov cocktails into the building as well.

The mob walked across the street to a second building, which housed a jewelry store with apartments above it. Fierro poured what remained of the gasoline along the storefront. Both made brief attempts to light the gasoline using a cigarette lighter, but they were unsuccessful and fled when the police arrived shortly thereafter.

The pair were indicted by a grand jury under the federal arson statute, 18 U.S.C. § 844(i). That statute provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both ….

18 U.S.C. § 844(i). The defendants moved to dismiss the indictment, arguing that the federal arson statute is facially unconstitutional because its enactment exceeded Congress's authority under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3.

The district court denied the motion. In doing so, it applied the Supreme Court's Commerce Clause decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005), as well as Supreme Court decisions interpreting § 844(i) both before and after *Lopez* and *Morrison* (*United States v. Russell*, 471 U.S. 858 (1985) and *United States v. Jones*, 529 U.S. 848 (2000)). The district court held that, as construed by the Supreme Court in *Russell* and *Jones*, the federal arson statute permissibly targets activities substantially affecting interstate commerce (as the Supreme Court explained that concept in *Lopez*, *Morrison*, and *Raich*) due to its jurisdictional requirement that the target of the arson be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." It further emphasized that no other circuit has invalidated the federal arson statute. Significantly, every court

to consider the issue has concluded that the statute contains an adequate jurisdictional hook.

After the district court upheld the indictment, both defendants entered into conditional plea agreements that reserved their right to appeal the constitutional issue. The district court sentenced both Fierro and Johnson to the minimum term of five years' imprisonment, with three years of supervised release.[1] Fierro and Johnson now appeal.

II. Discussion

Fierro and Johnson concede that their conduct falls within the scope of 28 U.S.C. § 844(i), so we will sustain their convictions unless the statute is facially unconstitutional.

We review a district court's decision concerning the constitutionality of a statute de novo. *United States v. Wilson*, 73 F.3d 675, 678 (7th Cir. 1995). The task of "assessing the scope of Congress' authority under the Commerce Clause … is a modest one." *Raich*, 545 U.S. at 22–23. As the Supreme Court has instructed, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607; *see also United States v. Harris*, 106 U.S. 629, 635 (1883)

[1] But for the statutory minimum, both defendants' Guidelines ranges would have been 37 to 46 months' incarceration. Fierro and Johnson point out that they could have been charged locally under Wisconsin's arson statute, Wis. Stat. § 943.02, which carries no minimum sentence and a maximum sentence of 40 years. In fact, they assert, most defendants charged with arson under the Wisconsin statute receive a sentence of probation, and only ten percent receive a sentence of between five- and twenty-years' incarceration.

(explaining that courts must "give effect to the presumption that congress will pass no act not within its constitutional power …. unless the lack of constitutional authority to pass an act in question is clearly demonstrated").

A. The Supreme Court's Commerce Clause Jurisprudence

Our analysis of § 844(i)'s constitutionality begins with *Lopez*, where the Supreme Court struck down a statute enacted pursuant to Congress's Commerce Clause power for the first time in over fifty years. The case involved the Gun-Free School Zones Act of 1990, Pub. L. 101-647 § 1702, in which "Congress made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V))). The Supreme Court invalidated the statute because it "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession [of the firearm] be connected in any way to interstate commerce." *Id.*

In doing so, the *Lopez* Court identified "three broad categories of activity that Congress may regulate under its commerce power." *Id.* at 558. "First, Congress may regulate the use of the channels of interstate commerce." *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964); *United States v. Darby*, 312 U.S. 100, 114 (1941)). "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *S. Ry. Co. v. United States*, 222 U.S. 20 (1911); *Perez v. United States*, 402 U.S. 146, 150 (1971)). "Finally, 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." *Id.* at 558–559 (citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Only the third category—activities having a substantial relation to interstate commerce—is relevant to this appeal.[2]

Next, in *Morrison*, the Supreme Court struck down 42 U.S.C. § 13981, which, as part of the Violence Against Women Act of 1994, Pub. L. No. 103-322 § 40302, provided a federal civil remedy for the victims of gender-motivated violence. 529 U.S. at 601–02. The Court concluded that Congress exceeded its authority under the Commerce Clause when enacting § 13981 because "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 618.

In reaching that holding, the Supreme Court set forth four "significant considerations" relevant to determining whether a statute is permissible under the substantial effects category. 529 U.S. at 609. First, a court must consider whether the statute regulates a commercial or economic activity. "Where economic activity substantially affects interstate commerce,

---

[2] The government also argues that § 844(i) "protect[s] the *instrumentalities* of interstate commerce," *see Lopez*, 514 U.S. at 558 (emphasis added), because the statute encompasses the destruction of vehicles. Fierro and Johnson, however, were indicted for the attempted arson of buildings, not vehicles. As discussed below, we conclude that Congress permissibly criminalized the arson of buildings pursuant to its power to "regulate those activities having a substantial relation to interstate commerce," *see id.* at 558–59, so we need not separately evaluate the arson of vehicles.

legislation regulating that activity will be sustained." *Id*. at 610 (quoting *Lopez*, 514 U.S. at 560).

The second important consideration is whether the statute contains an "express jurisdictional element which might limit its reach to a discrete set of [activity] that [has] an explicit connection with or effect on interstate commerce." *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).

Third, a court should consider whether the statute or its legislative history contains express congressional findings regarding the effects of the activity on interstate commerce. *Id.* at 612. "While Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, … the existence of such findings may enable [courts] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Id.* (some alterations in original) (citations and internal quotation marks omitted). Nonetheless, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id.* at 614.

The fourth and final consideration is whether the link between the activity and a substantial effect on interstate commerce is attenuated. *Id.* at 612. Notably, if the government's argument in support of the constitutionality of the statute "seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce" such that the "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," then the link is too attenuated. *Id.* at 615.

Five years after articulating these four factors in *Morrison*, the Supreme Court decided *Gonzales v. Raich*, 545 U.S. 1. In that case, the petitioners brought an as-applied challenge to the Controlled Substances Act, Pub. L. No. 91-513 (1970) (codified at 21 U.S.C. § 801 *et seq.*), through which Congress aimed to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Raich*, 545 U.S. at 12. Following federal agents' destruction of one petitioner's privately cultivated medical marijuana plants, the petitioners sought to enjoin the enforcement of the Controlled Substances Act to the extent it would prevent them from possessing, obtaining, or manufacturing cannabis for their personal medical use in compliance with California law. *Id.* at 7. Although the Controlled Substances Act's reach is broad, the Supreme Court upheld its application to the petitioners' "purely local activities," reasoning that "[w]hen Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class." *Id.* at 17 (internal quotation marks omitted).

Most importantly for our purposes, the Supreme Court in *Raich* did not strictly rely on the *Morrison* factors to sustain the Controlled Substances Act. *Id.* at 15–33. Instead, the Court primarily analogized the statutory scheme at issue, regulating the market for drugs, with the one it upheld in *Wickard v. Filburn*, 317 U.S. 111 (1942), which regulated the market for wheat. *Raich*, 545 U.S. at 17. The Supreme Court discussed two of the four *Morrison* considerations—whether the Controlled Substances Act regulated economic activity, as well as Congress's legislative findings to that effect—but it did not

explicitly analyze the remaining two factors—the existence of a jurisdictional element and whether the link to commerce was too attenuated. *Id.* at 15–33. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 551–58 (2012) (holding that the Patient Protection and Affordable Care Act of 2010 was not a valid exercise of the Commerce Clause power after focusing solely on whether it regulated "economic activity" without discussing the remaining *Morrison* factors). Based on this, we observe that the considerations articulated by the Supreme Court in *Morrison* need not be applied mechanically, and no single factor is dispositive.

We now turn to 18 U.S.C. § 844(i) and evaluate its constitutionality based on these considerations.

B. Application to 18 U.S.C. § 844(i)

Our review of the four considerations laid out in *Morrison* reveals that the federal arson statute falls within Congress's authority to regulate interstate commerce. We discuss each factor in turn.

1. Economic Activity

In this case, the district court concluded that "arson is typically economically motivated, and setting fire to property actively employed for commercial purposes is inherently an economic activity in the sense that it directly affects economic transactions." Fierro and Johnson attack this conclusion as inconsistent with *Lopez*, arguing that "the activity itself must be economic," not its motivation or effect. They argue that this is the "central factor" of the *Lopez* analysis. On their view, if the activity is not economic, then Congress cannot regulate it under the "substantial effects" category of its Commerce Clause power.

We need not decide whether, as the district court found, an "economic[] motivat[ion]" suffices under *Lopez*, because we disagree with the defendants' implication that this factor is dispositive. Although the Supreme Court wrote in *Morrison* that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," significantly, it also stated that it was "not adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity." 529 U.S. at 613.

In fact, the Supreme Court has previously sustained federal statutes that criminalize noneconomic activity as long as the statute contained an adequate jurisdictional element. On this front, it is useful to contrast the Supreme Court's decision in *Lopez*, which struck down the Gun-Free School Zones Act, with its treatment of 18 U.S.C. § 922(g) (and its predecessor, 18 U.S.C. § 1202), commonly known as the "felon-in-possession statute," *see United States v. Lemons*, 302 F.3d 769, 770 (7th Cir. 2002). The felon-in-possession statute is an illuminating comparator to the Gun-Free School Zones Act because both criminalize the "mere possession" of a firearm. *See Lopez*, 514 U.S. at 562 (contrasting §§ 922(g) and 922(q)).

When interpreting the felon-in-possession statute's predecessor, 18 U.S.C. § 1202(a), which punished certain categories of person, including those "convicted ... of a felony," who "receive[d], possesse[d], or transport[ed] in commerce or affecting commerce … any firearm," the Supreme Court held that the postpositive modifier "in commerce or affecting commerce" applied to the possession and receipt of a firearm, in addition to its transportation. *United States v. Bass*, 404 U.S. 336, 337 n.1, 349–50 (1971). While this decision was nominally one of statutory—not constitutional—dimensions, the

Supreme Court noted that "[a]bsent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction." *Id.* at 350. The constitutional overtones are clear. *See Lemons*, 302 F.3d at 771 (noting that "the constitutional question was not far from the Court's mind in either [*Bass* or *Scarborough*]"); *see also United States v. Chesney*, 86 F.3d 564, 571 (6th Cir. 1996) ("When the Court construes a statute to avoid a constitutional question, the Court's construction must itself be constitutional."). The Supreme Court also commented that "the inclusion of such a phrase mirror[s] the approach to federal criminal jurisdiction reflected in many other federal statutes." *Bass*, 404 U.S. at 341 (alteration in original) (internal quotation marks omitted).

Additionally, when interpreting the modern version of the felon-in-possession statute, 18 U.S.C. § 922(g), the Supreme Court acknowledged that "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of [the statute]." *Scarborough v. United States*, 431 U.S. 563, 575 n.11 (1977). Section 922(g) states that it "shall be unlawful" for certain categories of person, including those convicted of felonies, "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g). In *Scarborough*, the Supreme Court considered the sufficiency of the evidence on the jurisdictional element and held that § 922(g) required the government to prove "no … more than the minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. Although, again, the decision was one of statutory interpretation, it has been viewed as determining the "*constitutionally* minimal" nexus with

commerce necessary to sustain a criminal statute under Congress's Commerce Clause power. *See United States v. Lewis*, 100 F.3d 49, 52–53, (7th Cir. 1996) (emphasis added) (noting that "the [Supreme] Court's evident belief that a minimal nexus to interstate commerce [in *Scarborough*] ... was, indeed, sufficient to avoid [the constitutional] inquiry altogether, suggests that no more is necessary to satisfy the Commerce Clause [after *Lopez*]" and relying on *Scarborough* to hold that 18 U.S.C § 922(g) was constitutional).

In *Lopez*, the Supreme Court reapproved its decision in *Bass* (and by extension, *Scarborough*). It expressly noted that a jurisdictional hook—even the minimal one in the felon-in-possession statute—could bring the regulation of noneconomic activity within the purview of Congress's Commerce Clause authority. *Lopez*, 514 U.S. at 562. When discussing the Gun-Free School Zones statute's lack of jurisdictional requirement tying possession of a gun in a school zone to interstate commerce, the *Lopez* Court wrote:

> [Section] 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in [*United States v. Bass*], the Court interpreted former 18 U.S.C. § 1202(a) …. to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." … The Court thus interpreted the statute to reserve the constitutional question whether Congress could

> regulate, without more, the "mere possession" of firearms…. Unlike the statute in *Bass*, [the Gun-Free School Zones Act] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Lopez, 514 U.S. at 561–62 (citations omitted). In other words, the jurisdictional hook in the felon-in-possession statute required the government "to prove exactly what *Lopez* found missing …." *Lewis*, 100 F.3d at 51 (quoting *United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995)) (collecting cases in agreement from the Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits).

Thus, the federal arson statute at issue here, 18 U.S.C. § 844(i), will be constitutional if its jurisdictional hook as written will successfully "limit [the statute's] reach to a discrete set of [arsons] that … have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562; *see also United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001) ("Section 844(i) regulates non-economic activity, arson. The government, therefore, must show that this arson affects interstate commerce by showing how the function of this particular building was used in or affected interstate commerce."); *United States v. Hill*, 927 F.3d 188, 205–06 (4th Cir. 2019) (stating in dicta that federal arson statute complies with Commerce Clause "*not* because robbery and arson are 'inherently economic,'" but because it contains a jurisdictional element that limits its reach to arsons that interfere with interstate commerce).

We turn next to that question.

2. Legislative History

In order to properly understand § 844(i)'s jurisdictional element, it is helpful to start with its legislative history and the Supreme Court's treatment of it. In an attempt to demonstrate that "Congress went out on a limb when drafting § 844(i)…. [and] went too far," Fierro and Johnson point out that some congressional representatives raised concerns about the scope of § 844(i) in committee. That debate addressed a previous version of the statute, which would have criminalized the destruction by certain means of any property "used for business purposes by a person engaged in commerce or in any activity affecting commerce." Fierro and Johnson recount one exchange in particular, between the Judiciary Committee Chairman and a representative from Ohio:

> Mr. WYLIE. I think the bombing of any building should be included…. As far as I am concerned we could leave out the word "used for business purposes," and it would help the situation.
>
> The CHAIRMAN. You feel we should broaden it? … Has Congress the power to broaden it to cover a private dwelling?
>
> Mr. WYLIE. I think so…. I feel Congress can in and of itself make a finding that a specific act involves interstate commerce if it so desires.
>
> The CHAIRMAN. We can make a declaration but will the Supreme Court sustain us?
>
> Mr. WYLIE. I do not think they have overruled Congress on this question since the 1930's, have they? I do not know that they have.

Explosives Control: Hearing on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. 300–01 (1970) (statement of Rep. Chalmers P. Wylie, Ohio).

The Supreme Court evaluated this legislative history in *Russell v. United States*, where "[t]he question presented [wa]s whether 18 U.S.C. § 844(i) applies to a two-unit apartment building that is used as rental property"—the type of building the defendant had been convicted of trying to burn down. 471 U.S. 858, 858 (1985). The Court sustained the conviction after using the legislative history to help interpret the statute's scope. *Id.* at 862.

Specifically, after acknowledging the comments from Mr. Wylie that Fierro and Johnson now highlight, *see id.* at 861 n.7, the Supreme Court emphasized that even after the words "for business purposes" were removed from the statute, the House Report still stated that the law was directed to "business property." H.R. Rep. No. 91-1549, at 69–70 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4046 (noting that "[w]hile this provision is broad, the committee believes that there is no question that it is a permissible exercise of Congress [*sic*] authority to regulate and to protect interstate and foreign commerce"); *see also Russell*, 471 U.S. at 861 & n.8. The Court held that this "legislative history suggests that Congress at least intended to protect all business property, as well as some additional property that might not fit that description, but perhaps not every private home." *Russell*, 471 U.S. at 862.

Clearly, this is not the kind of legislative history identified as useful in *Lopez* and *Morrison*. It merely reiterates Congress's belief in § 844(i)'s constitutionality, and it does not "enable us to evaluate the legislative judgment that the activity in

question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye." *Morrison*, 529 U.S. at 612 (alterations in original) (quoting *Lopez*, 514 U.S. at 563). Accordingly, it carries little weight in our analysis. Nonetheless, it is worth noting that the Supreme Court in *Russell* did not raise any constitutional concerns based on this legislative history; it simply determined that the statutory "reference to 'any building … used … in any activity affecting interstate or foreign commerce' expresses an intent by Congress to exercise its full power under the Commerce Clause." *Id.* at 859 (quoting 18 U.S.C. § 844(i)).

3. Jurisdictional Element

With this legislative history in mind, we turn to the crucial question in this case: whether § 844(i)'s jurisdictional element "is sufficiently tied to interstate commerce" such that the statute was validly enacted "in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 612–13.

The Supreme Court has twice interpreted § 844(i)'s jurisdictional hook. First, in *Russell*, the Court held that—whatever Congress's intent about the scope of the statute—"[b]y its terms, … the statute only applies to property that is 'used' in an 'activity' that affects commerce." 471 U.S. at 862. In that case, the Supreme Court found that it need not evaluate the statute's outer limits (the constitutional question was not presented) since "[t]he rental of real estate is unquestionably" an "'activity' that affects commerce" within the meaning of the statute. *Id.* Accordingly, the Supreme Court upheld the defendant's conviction for attempted arson of a rental property.

The Supreme Court had another occasion to interpret 18 U.S.C. § 844(i) in *Jones v. United States*, 529 U.S. 848 (2000),

which was decided after *Morrison*. In *Jones*, the defendant was convicted of arson for using a Molotov cocktail to severely damage a private home. The Supreme Court granted certiorari on the question of "[w]hether, in light of [*Lopez*], and the interpretive rule that constitutionally doubtful constructions should be avoided, … 18 U.S.C. § 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." *Id.* at 852 (citations omitted). The Supreme Court held that the words "used in" in the statute "requir[e] that the damaged or destroyed property *must itself* have been used in commerce or in an activity affecting commerce," and it was not sufficient that the "*damage or destruction* [of the property] might affect interstate commerce." *Id.* at 854 (emphasis added) (quoting *United States v. Mennuti*, 639 F.2d 107, 110 (2d. Cir. 1981)). Based on this, the Supreme Court set forth a two-part test for determining whether a particular property was "used in" commerce: first, a court must inquire "into the function of the building itself," and then it must "determin[e] … whether that function affects interstate commerce." *Id.* (citation omitted).

Turning to the case before it, the Supreme Court rejected the government's argument that the statute should reach the private residence damaged in that case and vacated the defendant's conviction. *Id.* at 855–57. The government proffered three ways in which the private residence was "used in" commerce: first, the homeowner "used" the residence as collateral to secure a mortgage from an out-of-state lender; similarly, the home was "used" to obtain a casualty insurance policy from an out-of-state insurer; and, finally, the homeowner "used" the residence to receive natural gas from out-of-state sources. *Id.* at 855. The Supreme Court found that this was not enough, holding that "used in" is "most sensibly read to mean

active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id*.

The Supreme Court noted that, under the government's reading of the statute, "hardly a building in the land would fall outside the federal statute's domain" because "[p]ractically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce." *Id.* at 857. Invoking the canon against surplusage, the Supreme Court emphasized that "[i]f such connections sufficed to trigger § 844(i), the statute's limiting language, 'used in' any commerce-affecting activity, would have no office." *Id.* To illustrate the role "used in" plays, the Court contrasted these passive connections to commerce with the rental property at issue in *Russell*, or a hypothetical residence that "serve[s] as a home office or the locus of any commercial undertaking." *Id.* at 856.

After highlighting the "concerns brought to the fore in *Lopez*," the Supreme Court explicitly stated that its "reading of § 844(i) is in harmony with the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Id.* at 857–58 (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). This language indicates that the Supreme Court believed its interpretation of § 844(i)'s jurisdictional hook passed

constitutional muster.[3] *See Chesney*, 86 F.3d at 571 ("When the Court construes a statute to avoid a constitutional question, the Court's construction must itself be constitutional.").

Our decisions applying *Jones* in this Circuit show that the jurisdictional test the Supreme Court set forth is not merely perfunctory. For example, in *United States v. Craft*, 484 F.3d 922 (7th Cir. 2007), we applied the *Jones* test to arson convictions involving multiple rental properties, as well as a property used as a clubhouse for local members of the Hell's Angels motorcycle club. We upheld the convictions pertaining to the rental properties but invalidated the conviction related to the motorcycle clubhouse. *Id.* at 927–29. The government argued that the clubhouse was "used in" interstate commerce because its members paid dues, which were occasionally used to reimburse members for trips taken across state lines. *Id.* at 929. We held that "any affect that those dues had on interstate commerce was too passive, too minimal, and too indirect to place the clubhouse property in § 844(i)'s reach." *Id.* (citing *Odom*, 252 F.3d at 1296-97, and *United States v. Rea*, 223 F.3d 741, 743 (8th Cir. 2000), which held that churches' out-of-state

---

[3] Justice Thomas, joined by Justice Scalia, concurred separately to note:

> In joining the Court's opinion, I express no view on the question whether the federal arson statute, 18 U.S.C. § 844(i) (1994 ed., Supp. IV), as there construed, is constitutional in its application to all buildings used for commercial activities.

Jones, 529 U.S. at 860 (Thomas, J., concurring). This was the entirety of the concurrence, which may imply that Justices Thomas and Scalia were prepared to strike down § 844(i) in its entirety. Nonetheless, in the more than twenty years since *Jones* was decided, the Supreme Court has not done so.

donations and purchases were insufficient to find that the church buildings were "used in" interstate commerce).

Thus, it is clear that § 844(i)'s jurisdictional element, as interpreted in *Jones*, "limit[s] [the statute's] reach to a discrete set of [arsons] that … have an explicit connection with or effect on interstate commerce." *See Morrison*, 529 U.S. at 611–12 (quoting *Lopez*, 514 U.S. at 562); *see also United States v. Tocco*, 135 F.3d 116, 123 (2d Cir. 1998) (holding that "in light of the fact that, unlike the statute in *Lopez*, § 844(i) does contain a jurisdictional element, *Lopez* did not elevate the government's burden in establishing jurisdiction in a federal arson prosecution," and "we see no reason to conclude … that *Lopez* overruled the Court's holding in *Russell*"); *United States v. Laton*, 352 F.3d 286, 297 (6th Cir. 2003) (concluding that "[t]he prominent issue raised by this appeal is not constitutional in scope" because "[u]nlike [the statute at issue in *Lopez*], § 844(i) does contain a jurisdictional element, and we accordingly follow the lead of previous post-*Lopez* decisions, which focus on interpreting the words of similarly phrased jurisdictional elements," and applying the *Jones* test); *Rea*, 300 F.3d at 963 (reviewing the defendants' conviction for burning down a church, holding that "[w]e do not find *Lopez*'s analysis applicable due to … § 844(i)'s express jurisdictional element," and vacating the conviction because the church was not "use[d] in" interstate commerce); *United States v. Mahon*, 804 F.3d 946, 953 (9th Cir. 2015) (rejecting a facial challenge to § 844(i) because "[u]nlike the statutes in *Morrison* and *Lopez*, § 844(i) has the necessary jurisdictional element"); *United States v. Garcia*, 768 F.3d 822, 829–31 (9th Cir. 2014) (concluding that "nothing in *Morrison* undermined *Russell*'s *per se* rule that damage to a rental apartment building satisfies the jurisdictional provisions of 18 U.S.C. § 844(i)," and holding that it must "apply

this binding precedent in affirming [the defendant's] convictions" based on damage to rental buildings caused by a pipe bomb). *Cf. United States v. Forsythe*, 711 F. App'x 674, 678–80 (3d Cir. 2017) (construing *Russell* as holding that "Congress constitutionally could and did regulate the destruction of rental property in § 844(i)" and stating in dicta that "this case is decidedly different from … *Lopez* and *Morrison*, … because as *Russell* explained, there cannot be any doubt that renting property is economic activity and because § 844(i) has a jurisdictional element"); *Odom*, 252 F.3d at 1293 (declining to reach the question whether § 844(i) was constitutional because the church that the defendants burned down was not "used in" interstate commerce pursuant to *Jones*).

4. Is the Link to Interstate Commerce Too Attenuated?

Finally, we consider whether "the link between [arson] and a substantial effect on interstate commerce [i]s attenuated." *Morrison*, 529 U.S. at 612. Recall that a link will be too attenuated if the chain of reasoning "would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'" *Id.* at 612–13 (quoting *Lopez*, 514 U.S. at 564).

This factor is easily disposed of; as discussed above, the Supreme Court in *Jones* already interpreted § 844(i)'s jurisdictional hook to avoid a link that is too attenuated to pass constitutional muster. In that decision, which was issued just a few days after *Morrison*, the Supreme Court rejected the government's proposed reading of the statutory term "used in" because the government's focus on whether the building was "constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate

connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce," would sweep "[p]ractically every building … in the land" within § 844(i)'s scope. *Jones*, 529 U.S. at 857. In rejecting this interpretation, the Supreme Court addressed the "concerns brought to the fore in *Lopez*," and it expressly invoked the canon of constitutional avoidance. *Id.* at 857–58. The Court concluded, "§ 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in commerce or in an activity affecting commerce." *Id.* at 859. By using this interpretation of the statute's scope in its application of the constitutional avoidance canon, the Court necessarily concluded that such an interpretation was constitutionally sound. *See Chesney*, 86 F.3d at 571 ("When the Court construes a statute to avoid a constitutional question, the Court's construction must itself be constitutional.").

Therefore, as construed by the Supreme Court's decision in *Jones*, § 844(i)'s link to interstate commerce is not too attenuated.

* * *

After considering each factor identified by the Supreme Court in *Morrison*, we find that § 844(i) was validly enacted pursuant to Congress's authority under the Commerce Clause.

III. Conclusion

For the foregoing reasons, the district court's decision denying Fierro and Johnson's motion to dismiss the indictment is AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. OPINION and ORDER

ANESSA RENEE FIERRO and WILLIE TREMAINE JOHNSON, 20-cr-134-jdp

Defendants.

Defendants Anessa Renee Fierro and Willie Tremaine Johnson are indicted on two counts of arson under federal law. Dkt. 37. Defendants move to dismiss the indictment, contending that the federal arson statute, 18 U.S.C. § 844(i), is unconstitutional because Congress exceeded its authority under the Commerce Clause in enacting it. Dkt. 65 and Dkt. 67.[1] Defendants entered conditional plea agreements, reserving their right to press their constitutional challenge. *See* Dkt. 73 and Dkt. 74.

The case arises from events that occurred in Madison during the civil unrest following the shooting of Jacob Blake in Kenosha. Count 1 of the indictment charges that on or about August 25, 2020, defendants "maliciously attempted to damage and destroy, by means of fire, BUSINESS A, a commercial building in Madison, Wisconsin, which was used in interstate and foreign commerce." Dkt. 37, at 1. Count 2 charges the same conduct directed at a second victim, BUSINESS B. *Id.* The government reports that Business A is an office complex used by

[1] Defendant Fierro filed the initial brief in support, Dkt. 66, which Johnson joined, Dkt. 67. The defendants filed a joint reply, Dkt. 72, to the government's response in opposition, Dkt. 70.

multiple organizations; Business B is a mixed-use rental property with apartments on the upper floors and retail space at street level. Dkt. 70, at 1.

The challenged statute, 18 U.S.C. § 844(i), states:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both . . . .

The comparable state crime, Wis. Stat. § 943.02, has no mandatory minimum, but it provides for a maximum 40-year prison term.

Defendants contend that because arson is "a paradigmatic common law state crime," § 844(i) violates the Tenth Amendment. Although Congress "attempted to give § 844(i) the veneer of constitutionality" by "paying lip service to the Commerce Clause," the Supreme Court's Commerce Clause rulings in *Lopez, Morrison*, and *Raich* demonstrate "that § 844(i) is not a valid exercise of Congress's power to regulate interstate and foreign commerce."[2] Because Congress did not have the authority to enact the statute in the first place, defendants contend that it is facially invalid and cannot be the basis for prosecuting them. Dkt. 65, at 2–3. The government disagrees, contending that § 844(i) is a valid exercise of Congress's power under the Commerce Clause that passes muster under the tests applied by the Supreme Court; as a result, the statute does not run afoul of the Tenth Amendment. Dkt. 70. Critical to the

[2] *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzalez v. Raich*, 545 U.S. 1 (2005).

government's position is the express requirement in § 844(i) that the targeted property be used in interstate commerce or in an activity affecting interstate commerce.

Defendants ground their argument in high-level principles of Commerce Clause jurisprudence, but they find scant support in cases dealing specifically with § 844(i). The weight of authority is stacked against them. Thirty-six years ago, in *Russell v. United States*, 471 U.S. 858 (1985), the Court upheld a conviction under § 844(i) for the attempted arson of an apartment building. The defendant in *Russell* contended that the statute could not be applied to an apartment building that was not otherwise commercial or business property. The Court held that the legislative history showed Congress's intent to exercise its full power to protect business property; by its terms, the statute applies only to property that is used in an activity that affects commerce. *Id.* at 860–62. Although the precise issue was framed as a matter of statutory interpretation, the Court expressed its view that Congress had the authority to enact the statute: "The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." *Id*. at 862. *Russell* has never been overruled.

Fifteen years later, in *Jones v. United States*, 529 U.S. 848 (2000), the Court clarified that only property "used" in an activity that affected interstate commerce properly fell within the ambit of § 844(i). Therefore, § 844(i) could not be used to prosecute the arson of an owner-occupied private residence. *Id.* at 856–57. Limiting the reach of the statute in this fashion avoided the constitutional concerns brought to the fore in *Lopez*. *Id.* at 858. In joining the Court's opinion, Justices Thomas and Scalia expressed no view as to whether § 844(i), as the Court had construed it, was constitutional in its application to all buildings used for commercial

activities. Despite Thomas and Scalia's stated reservation, it's hard to read *Jones* and conclude that the Court harbored doubts about Congress's authority to enact § 844(i).

In 2017, the Court of Appeals for the Third Circuit observed in an unpublished opinion that in the 17 years since the Supreme Court had decided *Morrison* and *Jones*, not one court had held that *Russell* was no longer controlling precedent. *United States v. Forsythe*, 711 F. App'x 674, 679 n.5 (3rd Cir. 2017).[3] This observation remains accurate in 2021: every court that has considered the constitutionality of § 844(i) has concluded that the statute is a valid exercise of Congress's authority under the Commerce Clause. *See United States v. Mahon,* 804 F.3d 946, 953–54 (9th Cir. 2015) (rejecting facial challenge to § 844(i) under *Lopez* and *Morrison* because the statute has the necessary jurisdictional element); *United States v. Garcia*, 768 F.3d 822, 829–30 (9th Cir. 2014) (*Russell* still good law after *Morrison* because § 844(i) possesses the requisite jurisdictional element); *United States v. Laton*, 352 F.3d 286, 297 (6th Cir. 2003) (§ 844(i) remains valid after *Lopez*; Congress's inclusion of a jurisdictional element appropriately limits its reach); *United States v. Tocco*, 135 F.3d 116, 123 (2d Cir. 1998) ("We hold that in light of the fact that, unlike the statute in *Lopez*, § 844(i) *does* contain a

[3] The court further held that even if Forsythe *were* correct that *Lopez*, *Morrison*, and *Jones* undermined *Russell,* the Third Circuit, as an appellate court, was bound to follow the Supreme Court's decision in *Russell*. 711 F. App'x at 678. That seems to be the Seventh Circuit's general position as well. *See United States v. Faulkner*, 793 F.3d 752, 756 (7th Cir. 2015) ("Faulkner argues that [*Witte v. United States*, 515 U.S. 389 (1995)] should not control here, but he has not explained why we, a lower court, are authorized to disregard binding precedent from the Supreme Court."); *United States v. Schellong*, 717 F.2d 329, 336 (7th Cir. 1983) ("We remain bound by the Supreme Court's holding in *Luria v. United States*, 231 U.S. 9 [1913]."); *United States v. Mitchell*, 299 F.3d 632, 635 (7th Cir. 2002) ("Until the Supreme Court overrules [*United States v. Bass*, 404 U.S. 336 (1971)], we will continue to adhere to our view that section 922(g) was a valid exercise of Congressional power under the commerce Clause.").

jurisdictional element, *Lopez* did not elevate the government's burden in establishing jurisdiction in a federal arson prosecution." (emphasis in original)); *United States v. Craft*, 484 F.3d 922, 927–29 (7th Cir. 2007) (pursuant to *Russell* and *Jones,* government could charge defendant under § 844(i) for arson to empty rental properties, but not for arson to a Hell's Angels clubhouse; no mention of *Morrison* or *Lopez*); *United States v. Rea*, 300 F.3d 952, 963 (8th Cir. 2002) ("We do not find *Lopez*'s analysis applicable due to . . . § 844(i)'s express jurisdictional element.") (quoting *United States v. Melina*, 101 F.3d 567, 573 (8th Cir. 1996)); *United States v. Hicks*, 106 F.3d 187, 188–89 (7th Cir. 1997) (in post-*Russell*, pre-*Jones* case, court rejects defendant's *Lopez*-based challenge to § 844(i)); *United States v. Sherlin*, 67 F.3d 1208, 1213 (6th Cir. 1995) ("Unlike the unconstitutional statute in *Lopez*, 18 U.S.C. § 844(i) does contain a jurisdictional element, which insures, through proper inquiry, that the arson in question affects interstate commerce. . . . Thus, *Lopez* is distinguished from the present case, and we find that Congress did not exceed its authority under the Commerce Clause when it enacted 18 U.S.C. § 844(i).").

To the same effect, cases that have tangentially addressed § 844(i)'s nexus to the Commerce Clause have found the statute unobjectionable. *Cf. Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016) (in INA case considering whether a state arson conviction qualified as an "aggravated felony," Court compares § 844(i)'s elements to New York's state arson law, noting without concern that the only difference is the federal statute's interstate commerce element of the standard, jurisdictional kind); *cf. id.* at 1641 (Sotomayor, J., dissenting) (deeming § 844(i)'s interstate commerce requirement "far from . . . token" because it "serve[s] to narrow the kinds of crimes that can be prosecuted, not just to specify the sovereign who can do the

prosecuting"); *cf. United States v. Hill*, 927 F.3d 188, 205–06 (4th Cir. 2019) (stating in dicta that federal arson statute complies with Commerce Clause because it contains a jurisdictional element that limits its reach to arsons that interfere with interstate commerce); *United States v. Patton*, 451 F.3d 615, 632–33 (10th Cir. 2006) (noting in dicta that *Jones* Court found that § 844(i)'s "jurisdictional hook served the purpose of limiting the statute to arson cases where there really was a substantial and non-attenuated effect on interstate commerce"); *cf. United States v. McFarland*, 311 F.3d 376, 421–22 (5th Cir. 2002) (per curiam) (Jones, J., dissenting) (stating in dicta in Hobbs Act case that Supreme Court got it right in *Jones* with § 844(i)'s jurisdictional hook: the statute does not reach purely local conduct).[4]

According to defendants, all of these courts got it wrong: application of the requirements of *Lopez*, *Morrison*, and *Raich* "yields a clear answer: Section 844(i) is not authorized by the Commerce Clause and violates the Tenth Amendment." Dkt. 66, at 9. I am not persuaded.

The Commerce Clause empowers Congress to regulate (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558–59. The parties agree that § 844(i) fits, if at all, into the third category, activities that substantially affect interstate commerce.

[4] Defendants cite Justice Breyer's dissent in *Lopez* as a backhanded acknowledgment that § 844(i) no longer passed muster after *Lopez*. Dkt. 66, at 5 (citing *Lopez*, 514 U.S. at 630 (Breyer, J., dissenting)). But Justice Breyer did not express a firm view that § 844(i) would no longer pass constitutional muster; he raised the rhetorical question about the effect of *Lopez* on other federal criminal statutes grounded in the effect on interstate commerce. As the Court later made clear in *Jones*, § 844(i) does not run afoul of *Lopez* because the statute "covers only property currently used in commerce or in an activity affecting commerce." 529 U.S. at 858.

In *Morrison*, the Court set forth four "significant considerations" relevant to the court's determination whether a statute falls within the substantial effects category. 529 U.S. at 609. First, the court must consider whether the statute regulates a commercial activity. "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 610, quoting *Lopez*, 514 U.S. at 560. "*Lopez* did not alter [the Court's] practical conception of commercial regulation . . . [and] Congress may regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.* at 611 (internal quotation marks omitted).

Defendants contend that § 844(i) does not regulate an economic activity: "It regulates setting fire to property. Setting fire to property is not an economic activity." Dkt. 66, at 13. Defendants are correct that, unlike robbery or extortion, the act of setting a fire is not inherently an economic activity. But arson is typically economically motivated, and setting fire to property actively employed for commercial purposes is inherently an economic activity in the sense that it directly affects economic transactions. This is what § 844(i) requires for federal jurisdiction to vest. *Jones*, 529 U.S. at 855. "The *Russell* opinion went on to observe . . . that [b]y its terms, § 844(i) applies only to property that is used in an activity that affects commerce." *Id.* at 856 (internal quotation marks omitted). "We conclude that § 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in commerce or in an activity affecting commerce." *Id.* at 859.

The second consideration from *Morrison* is whether the statute contains an express jurisdictional element that might limit its reach to a discrete set of acts that additionally have

an explicit connection with or an effect on interstate commerce. "Such a jurisdictional element may establish that the enactment is in pursuance of Congress's regulation of interstate commerce." *Morrison*, 529 U.S. at 611–12. As noted above, all of the courts that have considered this issue have concluded that § 844(i) contains an adequate jurisdictional hook. As Judge Posner noted in *Hicks*, "[T]he activity regulated by the arson statute is the burning of property used in or affecting commerce, and it doesn't take any fancy intellectual footwork to conclude that the aggregate effect of such arsons on commerce is substantial." 106 F.3d at 189. In short, § 844(i) regulates an economic activity as *Lopez* and *Morrison* use that term.

Defendants contend that the jurisdictional element in § 844(i) is deficient. In making this argument, defendants marginalize the Court's holding in *Jones* that the jurisdictional language in § 844(i) limits the statute to arsons within Congress's power under the Commerce Clause. According to defendants, "[T]he Court didn't decide what sorts of property could be covered by the text of § 844(i) or whether § 844(i) was constitutional; it held only that the arson of a privately owned house at issue in *Jones* could not be prosecuted under § 844(i)." Dkt. 66, at 31. In other words, the Court held that the arson of a privately owned house was beyond the reach of the statute, but it did not hold that the arson of a commercial building was within it. Defendants find a hint of support for their argument in the concurrence of Justice Thomas, joined by Justice Scalia; these justices expressed no view on whether the statute was constitutional in its application to all buildings used for commercial purposes. *Jones*, 529 U.S. at 860 (Thomas, J., concurring). But I read the opinion in *Jones* more broadly than defendants do, as do all of the courts in the cases cited above. It's hard to see how, in light of the majority opinion in *Jones*, I could conclude that the jurisdictional hook in § 844(i) is deficient.

Morrison's third factor directs a court to consider whether the statute or its legislative history contains express congressional findings regarding the effects of the activity on interstate commerce. "While Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye." *Morrison*, 529 U.S. at 612 (internal quotation marks omitted).

The legislative history of § 844(i) teems with pronouncements helpful to both sides, illustrating Judge Leventhal's observation that the use of legislative history is like entering a crowded cocktail party and looking over the heads of the guests for one's friends. *See Convoy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring.) But in this case, I don't have to decide which side's "friends" are more articulate and more persuasive. Justice Stevens did that in *Russell*, 471 U.S. at 860–62. His review of the legislative history of § 844(i) led the Court to conclude that the statute was an appropriate exercise of Congress's power under the Commerce Clause. *Id.* at 862. Defendants' arguments to the contrary have not persuaded me that the *Russell* Court was incorrect.

Finally, *Morrison's* fourth consideration is whether the link between the activity and a substantial effect on interstate commerce is attenuated. *Morrison*, 529 U.S. at 612. Defendants observe that when the Court struck down part of the Violence Against Women Act in *Morrison*, it found that the link between gender-motivated violence and interstate commerce was too weak to allow Congress to regulate such violence at the federal level. Dkt. 66, at 21–22. From this, defendants argue:

> If criminal acts against women—who make up half the population and regularly travel between the states, work in interstate businesses, and buy and sell goods and services on the interstate market—do not have a sufficient link to substantial effects on interstate commerce, then criminal acts against real and personal property cannot meet the mark. Women collectively affect interstate commerce at least as much as buildings and other types of property do. Yet *Morrison* held that Congress could not enact legislation aimed at deterring violence against women. Therefore, Congress cannot enact legislation aimed at deterring arson of property. To hold that § 844(i) shares a sufficient link to interstate commerce would be to hold that property matters more to the national economy than women do.

Dkt. 66, at 22 (footnotes omitted).

I appreciate the rhetorical flourish, but I don't find the argument persuasive. The root of the constitutional problem identified in *Morrison* was not that women are less significant than property to the national economy. The problem was actually the opposite: the aggregate effect of crimes against women is enormous, but if the aggregate effect alone justified federal regulation, then there would be no "distinction between what is truly national and what is truly local." 529 U.S. at 617–18. With no federal jurisdictional hook, the challenged section of the Violence Against Women Act was aimed at the general suppression of violent crime. And however widespread and grave the consequences of violent crime, its general suppression lies outside Congress's Commerce Clause authority.

Following the four-part *Morrison* framework, § 844(i) does not suffer from the constitutional defects of the Gun-Free School Zones Act or the Violence Against Women Act. Arson is typically, though not inevitably, an economic crime. Section 844(i) has an explicit jurisdictional hook on which the *Jones* Court relied to narrow the statute's reach to arsons that actually affect interstate commerce. Section 844(i) has a legislative history that the *Russell*

Court found adequate to support the statute's application to arsons that affected interstate commerce. And the link between the conduct prohibited by § 844(i) and interstate commerce is not attenuated, because it is not based merely on the aggregate effect of non-economic violent crime.

Congress's authority under the Commerce Clause is not unlimited, but it is capacious. In light of the Supreme Court's holdings in *Russell* and *Jones*, and the many cases applying them, it's hard to conclude that the federal arson statute is one of the rare instances where Congress has overstepped its authority. I conclude that Congress acted within its authority in enacting § 844(i), and thus it does not violate the Tenth Amendment. Defendants' motions to dismiss are denied.

ORDER

IT IS ORDERED that defendants' motions to dismiss, Dkt. 65 and Dkt. 67, are DENIED.

Entered June 15, 2021.

BY THE COURT:

/s/

_____

JAMES D. PETERSON
District Judge

Pub. L. 107–296, § 1112(e)(3), substituted ''Attorney General'' for ''Secretary'' in two places.

Subsecs. (d), (e). Pub. L. 107–296, § 1112(e)(3), substituted ''Attorney General'' for ''Secretary'' wherever appearing.

Subsec. (f). Pub. L. 107–296, § 1122(f), in first sentence, substituted ''Licensees and holders of user permits'' for ''Licensees and permittees'' and inserted ''licensees and permittees'' before ''shall submit'', in second sentence, substituted ''holder of a user permit'' for ''permittee'', and inserted at end ''The Secretary may inspect the places of storage for explosive materials of an applicant for a limited permit or, at the time of renewal of such permit, a holder of a limited permit, only as provided in subsection (b)(4).''

Pub. L. 107–296, § 1112(e)(3), substituted ''Attorney General'' for ''Secretary'' wherever appearing.

Subsec. (g). Pub. L. 107–296, § 1122(g), inserted ''user'' before ''permits''.

Subsec. (h). Pub. L. 107–296, § 1122(h), added subsec. (h).

Subsec. (i). Pub. L. 107–296, § 1124, added subsec. (i).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by sections 1112(e)(3) and 1124 of Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

Pub. L. 107–296, title XI, § 1122(i), Nov. 25, 2002, 116 Stat. 2283, provided that:

''(1) IN GENERAL.—The amendments made by this section [amending this section and sections 841 and 842 of this title] shall take effect 180 days after the date of enactment of this Act [Nov. 25, 2002].

''(2) EXCEPTION.—Notwithstanding any provision of this Act [see Tables for classification], a license or permit issued under section 843 of title 18, United States Code, before the date of enactment of this Act [Nov. 25, 2002], shall remain valid until that license or permit is revoked under section 843(d) or expires, or until a timely application for renewal is acted upon.''

CONTINUATION IN BUSINESS OR OPERATION OF ANY PERSON ENGAGED IN BUSINESS OR OPERATION ON OCTOBER 15, 1970

Filing of application for a license or permit prior to the effective date of this section as authorizing any person engaged in a business or operation requiring a license or a permit on Oct. 15, 1970 to continue such business or operation pending final action on such application, see section 1105(c) of Pub. L. 91–452, set out as a note under section 841 of this title.

§ 844. Penalties

(a) Any person who—

(1) violates any of subsections (a) through (i) or (*l*) through (*o*) of section 842 shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined under this title or imprisoned not more than one year, or both.

(c)(1) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(2) Notwithstanding paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture in which it would be impracticable or unsafe to remove the materials to a place of storage or would be unsafe to store them, the seizing officer may destroy the explosive materials forthwith. Any destruction under this paragraph shall be in the presence of at least 1 credible witness. The seizing officer shall make a report of the seizure and take samples as the Attorney General may by regulation prescribe.

(3) Within 60 days after any destruction made pursuant to paragraph (2), the owner of (including any person having an interest in) the property so destroyed may make application to the Attorney General for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Attorney General that—

(A) the property has not been used or involved in a violation of law; or

(B) any unlawful involvement or use of the property was without the claimant's knowledge, consent, or willful blindness,

the Attorney General shall make an allowance to the claimant not exceeding the value of the property destroyed.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency

thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to—

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Pipeline and Hazardous Materials Safety Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p), the term ''explosive'' means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

(k) A person who steals any explosives materials which are moving as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(*l*) A person who steals any explosive material from a licensed importer, licensed manufacturer, or licensed dealer, or from any permittee shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.

(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

(*o*) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3)) or drug trafficking crime (as defined in section 924(c)(2)) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

(p) THEFT REPORTING REQUIREMENT.—

(1) IN GENERAL.—A holder of a license or permit who knows that explosive materials have been stolen from that licensee or permittee,

shall report the theft to the Secretary[1] not later than 24 hours after the discovery of the theft.

(2) PENALTY.—A holder of a license or permit who does not report a theft in accordance with paragraph (1), shall be fined not more than $10,000, imprisoned not more than 5 years, or both.

(Added Pub. L. 91–452, title XI, § 1102(a), Oct. 15, 1970, 84 Stat. 956; amended Pub. L. 97–298, § 2, Oct. 12, 1982, 96 Stat. 1319; Pub. L. 98–473, title II, § 1014, Oct. 12, 1984, 98 Stat. 2142; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub. L. 100–690, title VI, § 6474(a), (b), Nov. 18, 1988, 102 Stat. 4379; Pub. L. 101–647, title XXXV, § 3522, Nov. 29, 1990, 104 Stat. 4924; Pub. L. 103–272, § 5(e)(7), July 5, 1994, 108 Stat. 1374; Pub. L. 103–322, title VI, § 60003(a)(3), title XI, §§ 110504(b), 110509, 110515(b), 110518(b), title XXXII, §§ 320106, 320917(a), title XXXIII, § 330016(1)(H), (K), (L), (N), Sept. 13, 1994, 108 Stat. 1969, 2016, 2018, 2020, 2111, 2129, 2147, 2148; Pub. L. 104–132, title VI, § 604, title VII, §§ 701, 706, 708(a), (c)(3), 724, Apr. 24, 1996, 110 Stat. 1289, 1291, 1295–1297, 1300; Pub. L. 104–294, title VI, § 603(a), Oct. 11, 1996, 110 Stat. 3503; Pub. L. 106–54, § 2(b), Aug. 17, 1999, 113 Stat. 399; Pub. L. 107–296, title XI, §§ 1112(e)(3), 1125, 1127, Nov. 25, 2002, 116 Stat. 2276, 2285; Pub. L. 108–426, § 2(c)(6), Nov. 30, 2004, 118 Stat. 2424.)

Editorial Notes

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (c)(1), is set out as Title 26, Internal Revenue Code.

Section 5845(a) of that Code, referred to in subsec. (c)(1), is section 5845(a) of Title 26.

AMENDMENTS

2004—Subsec. (g)(2)(B). Pub. L. 108–426 substituted ''Pipeline and Hazardous Materials Safety Administration'' for ''Research and Special Projects Administration''.

2002—Subsec. (c)(2), (3). Pub. L. 107–296, § 1112(e)(3), substituted ''Attorney General'' for ''Secretary'' wherever appearing.

Subsec. (f)(1). Pub. L. 107–296, § 1125, inserted ''or any institution or organization receiving Federal financial assistance,'' before ''shall''.

Subsec. (p). Pub. L. 107–296, § 1127, added subsec. (p).

1999—Subsec. (a). Pub. L. 106–54, § 2(b)(1), designated existing provisions as par. (1) and added par. (2).

Subsec. (j). Pub. L. 106–54, § 2(b)(2), inserted ''and section 842(p)'' after ''this section''.

1996—Subsec. (a). Pub. L. 104–132, § 604, amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''Any person who violates subsections (a) through (i) of section 842 of this chapter shall be fined under this title or imprisoned not more than ten years, or both.''

Subsec. (e). Pub. L. 104–132, §§ 708(a)(1), 724, substituted ''interstate or foreign commerce, or in or affecting interstate or foreign commerce,'' for ''commerce'' and ''10'' for ''five''.

Subsec. (f). Pub. L. 104–132, § 708(a)(2), amended subsec. (f) generally. Prior to amendment, subsec. (f) read as follows: ''Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than 40 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.''

Subsec. (h). Pub. L. 104–132, § 708(a)(3), in concluding provisions, substituted ''10 years'' and ''20 years'' for ''5 years but not more than 15 years'' and ''10 years but not more than 25 years'', respectively.

Subsec. (i). Pub. L. 104–294, which directed substitution of comma for '',,'' each place appearing, could not be executed because '',,'' did not appear in text subsequent to amendment by Pub. L. 104–132, § 708(a)(4). See below.

Pub. L. 104–132, § 708(c)(3), struck out at end ''No person shall be prosecuted, tried, or punished for any noncapital offense under this subsection unless the indictment is found or the information is instituted within 7 years after the date on which the offense was committed.''

Pub. L. 104–132, § 708(a)(4)(B), which directed substitution of ''not less than 7 years and not more than 40 years, fined under this title'' for ''not more than 40 years, fined the greater of a fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,'', was executed by making the substitution in text which read ''not more than 40 years, fined the greater of the fine under this title'' to reflect the probable intent of Congress.

Pub. L. 104–132, § 708(a)(4)(A), substituted ''not less than 5 years and not more than 20 years, fined under this title'' for ''not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,''.

Subsec. (n). Pub. L. 104–132, § 701, added subsec. (n).

Subsec. (*o*). Pub. L. 104–132, § 706, added subsec. (*o*).

1994—Subsec. (a). Pub. L. 103–322, § 330016(1)(L), substituted ''fined under this title'' for ''fined not more than $10,000''.

Subsec. (b). Pub. L. 103–322, § 330016(1)(H), substituted ''fined under this title'' for ''fined not more than $1,000''.

Subsec. (c). Pub. L. 103–322, § 110509, designated existing provisions as par. (1) and added pars. (2) and (3).

Subsec. (d). Pub. L. 103–322, § 330016(1)(L), (N), substituted ''fined under this title'' for ''fined not more than $10,000'' after ''ten years, or'' and for ''fined not more than $20,000'' after ''twenty years or''.

Pub. L. 103–322, § 60003(a)(3)(A), struck out before period at end ''as provided in section 34 of this title''.

Subsec. (e). Pub. L. 103–322, § 330016(1)(K), substituted ''fined under this title'' for ''fined not more than $5,000''.

Subsec. (f). Pub. L. 103–322, § 320106(1)(B), which directed the substitution of ''not more than 40 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,'' for ''not more than twenty years, or fined not more than $10,000'', was executed by making the substitution for ''not more than twenty years, or fined not more than $20,000'', to reflect the probable intent of Congress.

Pub. L. 103–322, § 320106(1)(A), substituted ''not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,'' for ''not more than ten years, or fined not more than $10,000''.

Pub. L. 103–322, § 60003(a)(3)(B), struck out before period at end ''as provided in section 34 of this title''.

[1] So in original. Probably should be ''Attorney General''.

Subsec. (g)(2)(B). Pub. L. 103–272 substituted ''chapter 51 of title 49'' for ''the Hazardous Materials Transportation Act (49 App. U.S.C. 1801, et seq.)''.

Subsec. (h). Pub. L. 103–322, §320106(2), in concluding provisions, substituted ''5 years but not more than 15 years'' for ''five years'' and ''10 years but not more than 25 years'' for ''ten years''.

Subsec. (i). Pub. L. 103–322, §320917(a), inserted at end ''No person shall be prosecuted, tried, or punished for any noncapital offense under this subsection unless the indictment is found or the information is instituted within 7 years after the date on which the offense was committed.''

Pub. L. 103–322, §320106(3), substituted ''not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,'' for ''not more than ten years or fined not more than $10,000'' and ''not more than 40 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed,'' for ''not more than twenty years or fined not more than $20,000''.

Pub. L. 103–322, §60003(a)(3)(C), struck out ''as provided in section 34 of this title'' after ''death penalty or to life imprisonment''.

Subsec. (k). Pub. L. 103–322, §110504(b), added subsec. (k).

Subsec. (*l*). Pub. L. 103–322, §110515(b), added subsec. (*l*).

Subsec. (m). Pub. L. 103–322, §110518(b), added subsec. (m).

1990—Subsec. (d). Pub. L. 101–647 substituted ''subsection,'' for ''subsection,,'' before ''shall be subject to imprisonment''.

1988—Subsec. (g). Pub. L. 100–690, §6474(a), designated existing provisions as par. (1), substituted ''Except as provided in paragraph (2), whoever'' for ''Whoever'', inserted ''in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or'' after ''possess an explosive'', inserted ''or airport'' after ''such building'', substituted ''not more than five years, or fined under this title, or both'' for ''not more than one year, or fined not more than $1,000, or both'', and added par. (2).

Subsec. (h). Pub. L. 100–690, §6474(b)(2), which directed the amendment of subsec. (h) by striking ''shall be sentenced'' through the end and inserting new provisions was executed by striking ''shall be sentenced'' the first time it appeared through the end of the subsection which resulted in inserting concluding provisions and striking out former concluding provisions which read as follows: ''shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.''

Subsec. (h)(2). Pub. L. 100–690, §6474(b)(1), in par. (2), struck out ''unlawfully'' after ''explosive''.

1986—Subsec. (c). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954''.

1984—Subsecs. (d), (f), (i). Pub. L. 98–473 substituted ''personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,'' for ''personal injury results'' and ''death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection,'' for ''death results''.

1982—Subsecs. (e), (f). Pub. L. 97–298, §2(a), inserted ''fire or'' after ''by means of'' wherever appearing.

Subsec. (h)(1). Pub. L. 97–298, §2(b), inserted ''fire or'' after ''uses''.

Subsec. (i). Pub. L. 97–298, §2(c), inserted ''fire or'' after ''by means of''.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–296 effective 60 days after Nov. 25, 2002, see section 4 of Pub. L. 107–296, set out as an Effective Date note under section 101 of Title 6, Domestic Security.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 604 of Pub. L. 104–132 effective 1 year after Apr. 24, 1996, see section 607 of Pub. L. 104–132, set out as a note under section 841 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103–322, title XXXII, §320917(b), Sept. 13, 1994, 108 Stat. 2129, provided that: ''The amendment made by subsection (a) [amending this section] shall not apply to any offense described in the amendment that was committed more than 5 years prior to the date of enactment of this Act [Sept. 13, 1994].''

EFFECTIVE DATE

Subsecs. (a) to (c) of this section effective 120 days after Oct. 15, 1970, and subsecs. (d) to (j) of this section effective on Oct. 15, 1970, see section 1105(a), (b), set out as a note under section 841 of this title.

§ 845. Exceptions; relief from disabilities

(a) Except in the case of subsection (*l*), (m), (n), or (*o*) of section 842 and subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this chapter shall not apply to:

(1) aspects of the transportation of explosive materials via railroad, water, highway, or air that pertain to safety, including security, and are regulated by the Department of Transportation or the Department of Homeland Security;

(2) the use of explosive materials in medicines and medicinal agents in the forms prescribed by the official United States Pharmacopeia, or the National Formulary;

(3) the transportation, shipment, receipt, or importation of explosive materials for delivery to any agency of the United States or to any State or political subdivision thereof;

(4) small arms ammunition and components thereof;

(5) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used solely for sporting, recreational, or cultural purposes in antique firearms as defined in section 921(a)(16) of title 18 of the United States Code, or in antique devices as exempted from the term ''destructive device'' in section 921(a)(4) of title 18 of the United States Code;

(6) the manufacture under the regulation of the military department of the United States of explosive materials for, or their distribution to or storage or possession by the military or naval services or other agencies of the United States; or to arsenals, navy yards, depots, or other establishments owned by, or operated by or on behalf of, the United States[1] and

(7) the transportation, shipment, receipt, or importation of display fireworks materials for delivery to a federally recognized Indian tribe or tribal agency.

[1] So in original. Probably should be followed by a semicolon.