No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

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EMILY CLAIRE HARI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

For its constitutional authority to enact the Church Arson Prevention Act of 1996, Pub. L. 104-155 (1996)—codified as amended at 18 U.S.C. § 247—Congress invoked the broadest "substantially affects" category of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. The legislation embodies direct federal regulation with respect to acts of obstruction against another's free exercise of religion, as well as and including religiously-motivated property damage. The statutory scheme includes a "jurisdictional element," which the circuit court held to shield the Act from Commerce-Clause-authorization challenge. This petition presents the following question of national importance for the Court's consideration:

I.

Whether the "jurisdictional element" contained within 18 U.S.C. § 247, standing alone, serves to authorize congressional enactment of a criminal statute regulating non-economic acts of obstruction of another's free exercise of religion, under the "substantially affects" category of the Commerce Clause.

## PARTIES TO PROCEEDING

All parties to this proceeding appear in the caption of this Petition.

## CORPORATE DISCLOSURE STATEMENT

No non-governmental corporation is a party to this proceeding.

## RELATED PROCEEDINGS

No state or federal proceeding is "directly related" to the present case, as the term is defined under the Court's rules. S.Ct. R. 14.1(b)(iii).

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## INTRODUCTION

Pursuant to Rules 10 and 12.2 of the Rules of the Supreme Court of the United States (S.Ct. R.), Petitioner Emily Hari respectfully submits this Petition for a Writ of Certiorari from the judgment of the Eighth Circuit Court of Appeals (Eighth Circuit). As described in the Question Presented above, this Petition involves a federal criminal statute which regulates non-economic acts of obstruction against another's free exercise of religion, including real or personal property damage leading to that outcome. This statute was enacted under authority of the "substantially affects" category of the Commerce Clause, and the Eighth Circuit reasoned that a jurisdictional element contained within the statutory text—standing alone—is sufficient to uphold the statute over a congressional-authorization challenge. Circuit

courts of appeals are divided on the question as to whether inclusion of a statutory jurisdictional element, standing alone, may overcome a Commerce-Clause-authorization challenge. The reasoning of the Eighth Circuit and like-minded circuit courts implies sweeping congressional authority to regulate actions of religious organizations and houses of worship, including regulation akin to national land use and security requirements, amongst much else. For reasons that follow, Petitioner Hari respectfully asks the Court to grant the requested writ of certiorari.

## OPINION BELOW

The opinion of the Eighth Circuit is reported as *United States v. Hari*, 67 F.4th 903 (8th Cir. 2023). The slip opinion is reproduced in the Appendix to this Petition. Pet. App., at 1a-13a. The Eighth Circuit also issued an order denying a timely petition for rehearing, which is likewise reproduced in the Appendix. Pet. App., at 14a.

## JURISDICTION

The decision of the Eighth Circuit was filed on May 10, 2023, Pet. App., at 1a, and the order denying a timely motion for rehearing was filed on July 14, 2023, Pet. App., at 14a. This Petition is being filed within 90 days from the latter date, which is timely under S.Ct. R. 13.1 & 13.3. This Court has jurisdiction to review the decision and judgment of the Eighth Circuit, pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The Question Presented involves provisions of the United States Constitution and the United States Code, reproduced in the Appendix in their entirety. Pet. App. at 15a-19a. Relevant excerpts include:

Interstate Commerce Clause
U.S. Const., Art. I, § 8, cl. 3

> The Congress shall have the Power * * * To regulate Commerce * * * among the several States * * *.

18 U.S.C. § 247(a)

> Whoever in any of the circumstances referred to in subsection (b) of this section—
>
> (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so; or
>
> (2) intentionally obstructs, by force or threat of force, including by threat of force against religious real property, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so;
>
> shall be punished as provided [by statute].

18 U.S.C. § 247(b)

> The circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce.

## STATEMENT OF THE CASE

1. In criminal proceedings before United States District Court ("district court"), the United States ("government") alleged that Petitioner Hari had been the leader of a domestic "paramilitary organization." Pet. App., at 1a-2a. It was further alleged that this same group committed a string of criminal offenses—including those involving robbery, extortion, firearms, and explosives—primarily in Illinois and Minnesota. Pet. App., at 20a-24a.

2. Based upon the above allegations, the government charged Petitioner with multiple federal offenses in separate district courts, *i.e.,* one multi-count criminal prosecution filed in the Central District of Illinois ("Illinois Case"), and another filed in the District of Minnesota ("Minnesota Case"). Pet. App., at 20a-24a.

3. In the Illinois Case, Petitioner was charged with federal firearms, arson, and conspiracy offenses, none of which bear specific-offense-conduct commonality with the charged offenses in the Minnesota Case. Pet. App, at 20a-22a. Petitioner ultimately pled guilty to the offenses charged in the Illinois Case, and received a 168-month prison sentence. Pet. App., at 20a-22a. The Illinois Case conviction and sentence are not at issue in this Petition, and would be unaffected by any decision the Court were to render here. Pet. App., at 20a-22a.

4. In the Minnesota Case—which is solely at issue in this Petition—the government alleged that Petitioner and others had placed a homemade "pipe bomb" within a religious house of worship, causing property damage to the building (but not injury to any person). Pet. App., at 1a-2a.

5. Based upon these last factual allegations, the government charged Petitioner with four standalone and compound offenses, reliant upon the Church Arson Prevention Act of 1996, Pub. L. 104-155 (1996), *codified as amended at* 18 U.S.C. § 247. Specifically:

(a). Damage to "religious property," proscribed by § 247(a)(1);

(b). "Obstructing" the free exercise of religious beliefs of another, under § 247(a)(2);

(c). Conspiracy to commit felonies by means of explosives, under 18 U.S.C. § 844, paired with the above § 247(a)(1) & (a)(2); and

(d). Carrying and using a destructive device during and in relation to a "crime of violence," under 18 U.S.C. § 924(c)(1)(B)(ii) & (3)(A), paired with the above § 247(a)(1) & (a)(2).

(collectively the "§ 247-reliant charges"). Pet. App., at 23a. In addition, in the Minnesota Case, Petitioner was charged with unlawful possession of a destructive device, under 26 U.S.C. § 5861(d). Pet. App., at 23a.

6. Petitioner filed a pretrial motion to dismiss the § 247-reliant charges, arguing that enactment of the Church Arson Prevention Act exceeded legislative authority conferred to Congress under the "substantially affects" category of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3. Pet. App., at 2a-3a. The district court denied the motion to dismiss, ruling that § 247 is a lawful exercise of congressional authority under that same constitutional provision and sub-category thereof. Pet. App., at 2a-3a.

7. The Church Arson Prevention Act requires the jury to find the alleged offense conduct "is in or affects interstate or foreign commerce." § 247(b). The district

court instructed the jury that this element is met so long as the offense conduct affected interstate commerce "in any way" and "even if minor." Pet. App., at 29a. The jury was further instructed that the "effect of the conduct on interstate commerce does not need to be substantial nor must the effect on interstate commerce be certain"; but rather "[i]t is enough that such an effect was the natural, probabl[e] consequence of the offense." Pet. App., at 29a-30a.

8. Petitioner was convicted of all charged counts in the Minnesota Case, and the district court imposed a 636-month term of imprisonment. Pet. App., at 23a-24a. Petitioner took a direct appeal to the Eighth Circuit, *inter alia* raising the issue as to whether enactment of § 247 exceeded congressional authority as permitted under the "substantially affects" category of the Commerce Clause. Pet. App., at 3a-10a.

9. In evaluating this question, the Eighth Circuit acknowledged the multi-factor test established by this Court in *United States v. Lopez,* 514 U.S. 549 (1995), which had invalidated a federal firearm-possession statute because: "[1] it was a criminal statute having nothing to do with commerce or an intrastate activity substantially affecting commerce; [2] it contained no express jurisdictional element limiting its reach to activity having a connection with or effect on commerce; [3] Congress made no findings in the statute or legislative history regarding effects on interstate commerce; and [4] the link between gun possession and a substantial effect on interstate commerce was attenuated." Pet. App., at 6a.

10. Though acknowledging the *Lopez* test, the Eighth Circuit aggregated and summarily dismissed factors [1], [3] & [4], with the generalized observations that "[c]hurch buildings are used for a broad range of educational, recreational, and financial activities," and the "legislative history references numerous ways in which houses of worship broadly contribute to commercial activities." Pet. App., at 6a.

11. Rather, the Eighth Circuit trained its focus upon factor [2], which is solely concerned with whether the challenged statute contains a "jurisdictional element." Pet. App., at 7a. The opinion refers to this as "perhaps the most important factor," and goes on to make clear that it is actually outcome-determinative. Pet. App., at 7a. The decision rejected the Eighth Circuit's prior precedent, which had refused to "say that the presence of a jurisdictional element *per se* demonstrates that a statute meets the substantial effects test"; but instead dismissed this and similar language from this Court's *Lopez* decision as mere "precautionary dicta." Pet. App., at 7a. To emphasize the newly announced principle that the "jurisdictional element" factor predominates over all others, the Eighth Circuit held:

> The prudent cautions in *Lopez* * * * made no attempt to define when an express jurisdictional element should be overruled or disregarded. [Petitioner] makes no attempt to fill the void. [W]e conclude the district court properly rejected Hari's Commerce Clause challenge to § 247.

Pet. App., at 7a.

## REASONS TO GRANT THE WRIT OF CERTIORARI

Petitioner Hari respectfully requests that the Court grant a writ of certiorari to decide the Question Presented, for reasons that follow:

### I. The Court should grant the writ of certiorari to decide whether, in considering a congressional-authority challenge to a statute enacted under the "substantially affects" category of the Commerce Clause, the presence of a statutory "jurisdictional element" is outcome-determinative.

In the case at hand, the Eighth Circuit acknowledged this Court's multi-factor test announced in *United States v. Lopez,* 514 U.S. 549 (1995), for evaluating congressional authority to enact a given statute under authority of the "substantially affects" category of the Commerce Clause. Pet. App., at 6a. However, the Eighth Circuit deemed the presence of a jurisdictional element within the statute as the "most important factor" in the analysis. Pet. App., at 7a. And went on to say this factor actually predominates all others, taking the view that *Lopez* and other decisions of this Court "made no attempt to define when an express jurisdictional element should be overruled or disregarded." Pet. App., at 7a. Any language to the contrary in *Lopez* or any other prior precedents, says the Eighth Circuit's opinion, amounts to mere "precautionary dicta." Pet. App., at 7a. Petitioner respectfully requests that the Court grant this petition for a writ of certiorari, to rule upon whether the "jurisdictional element" factor of this Court's *Lopez* precedent does or does not predominate over all other factors, as the Eighth Circuit has now held.

### A. The question presented is an important one of national concern, which also divides the circuit courts of appeals.

The question of proper operation of the *Lopez* test—and hence the scope of congressional legislative authority under the broad "substantially affects" category of the Commerce Clause—is of great national importance. This Court has repeatedly said so, noting the stakes amount to whether there is to be a "conver[sion] of congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez,* 514 U.S. at 567. Or put differently, whether to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557 (citation and punctuation omitted).

To prevent any such counter-constitutional outcome, this Court has laid out the "proper framework" to evaluate whether a statute enacted under the "substantially affects" category of the Commerce Clause constitutes a proper exercise of congressional authority. *United States v. Morrison,* 529 U.S. 598, 609 (2000). In doing so, this Court has announced four "significant considerations" which double as "principles underlying [the Court's] Commerce Clause jurisprudence": (1) whether the regulated activity constitutes "economic activity," or instead is "noneconomic" in nature; (2) whether the statute contains an "express jurisdictional element which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce"; (3) whether the legislative history of the statute includes "express congressional findings regarding the effects [of the regulated activity] upon interstate commerce"; and (4) whether the "link between [the

regulated activity] and a substantial effect on interstate commerce was attenuated." *Morrison,* 529 U.S. at 610-13.

This Court's precedents have not elevated any one of these factors over any other. However—at least in *Lopez* and *Morrison* which struck down criminal and criminal-adjacent statutes under the above test—this Court emphasized the importance of the first factor, *i.e.,* "the noneconomic, criminal nature of the [regulated] conduct at issue was central" to this Court's conclusions that Congress lacked authority to enact the challenged legislation. *Morrison,* 529 U.S. at 610. And this factor comes into sharp relief in the context of federal statutes which regulate bias-motivated acts of violence, sometimes referred to as "hate crimes," again as demonstrated by this Court's precedents:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, 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.

*Id.* at 613.

Nonetheless, in the intervening years from the *Lopez-Morrison* decisions to today, the circuit courts of appeals ("circuit courts") have developed a split of authority on the question as to whether Congress has authority to regulate even "noneconomic criminal" activity under the "substantially affects" category of the Commerce Clause, so long as some form of "express jurisdictional element" is included within the statutory text.

A number of circuit courts have required examination of *all* the *Lopez-Morrison* factors in concert, reasoning that mere existence of a jurisdictional element—standing alone—can at most guaranty the legislation in question bears a "minimal" connection with interstate commerce, not a "substantial" one as is required by the United States Constitution, as construed by this Court's *Lopez-Morrison* line of precedents. *United States v. Rodia,* 194 F.3d 465, 472 (3d Cir. 1999) ("A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce."); *United States v. Kallestad,* 236 F.3d 225, 229 (5th Cir. 2000) (holding a "jurisdictional element is not alone sufficient to render [a challenged statute] constitutional" as the argument "has no principled limit"; "Where the relationship between the interstate and local activity is attenuated, a jurisdictional hook alone cannot justify aggregating effects upon interstate commerce to find Congressional power under the Commerce Clause."); *United States v. Johnson,* 42 F.4th 743, 749-55 (7th Cir. 2022) (evaluating challenged statute under all four *Lopez-Morrison* factors rather than sole reliance upon the jurisdictional-element factor, deeming it necessary to determine whether "the link between [the challenged statute] and a substantial effect on interstate commerce is attenuated"); *United States v. Patton,* 451 F.3d 615, 632 (10th Cir. 2006) (" A jurisdictional hook is not * ** a talisman that wards off constitutional challenges. * * * The ultimate inquiry is whether the prohibited activity has a substantial effect

on interstate commerce, and the presence of a jurisdictional hook, though certainly helpful, is neither necessary nor sufficient.").

By contrast, a separate cohort of circuit courts has held that placement of such a "jurisdictional element" within the statutory text will shield the legislation from any *Lopez-Morrison* challenge, notwithstanding the "the noneconomic, criminal nature" of the regulated conduct in question. *United States v. Hill,* 927 F.3d 188, 208-09 (4th Cir. 2019) ("[T]he Hate Crimes Act's interstate commerce element ensures that each prosecution under the Hate Crimes Act will bear the necessary relationship to commerce that renders the crime within Congress's purview."); *United States v. Coleman,* 675 F.3d 615, 620 (6th Cir. 2012) ("Where a statute lacks a clear economic purpose, the inclusion of an explicit jurisdictional element suffices to ensure, through case-by-case inquiry, that the violation in question affects interstate commerce. Indeed, we regard the presence of such a jurisdictional element as the touchstone of valid congressional use of its Commerce Clause powers to regulate non-commercial activity.") (internal citations and punctuation omitted); *United States v. Cunningham,* 161 F.3d 1343, 1345-46 (11th Cir. 1998) ("[A] statute regulating noneconomic activity necessarily satisfies *Lopez* if it includes a jurisdictional element which would ensure, through case-by-case inquiry, that the defendant's particular offense affects interstate commerce.").

Until recently, the Eighth Circuit had been firmly in the former camp of circuit courts holding that mere inclusion of a jurisdictional element was <u>*insufficient*</u> under this Court's *Lopez-Morrison* line of precedents:

> Although *Lopez* and *Morrison* acknowledge that the presence of a jurisdictional element lends support to the facial constitutionality of a statute, those cases do not suggest that a jurisdictional element obviates the need for applying the substantial effects test. Nor do we read those cases to say that the presence of a jurisdictional element *per se* demonstrates that a statute meets the substantial effects test. Indeed, the district court in this case instructed the jury that it need only find that the enterprise had a "minimal" effect on interstate commerce in order to convict the defendants. Requiring the government to prove a minimal effect on interstate commerce in particular cases does not seem adequate by itself to establish that the regulated activity on the whole "substantially affects" interstate commerce.

*United States v. Crenshaw,* 359 F.3d 977, 985 (8th Cir. 2004) (internal citations and punctuation omitted).

However, with the decision at issue here, the Eighth Circuit has now reversed itself, firmly joining the cohort of circuit courts which deems inclusion of a jurisdictional element to be "most important." Pet. App., at 7a. And indeed, outcome determinative:

> The Fourth Circuit has not found, and we have not found, any case in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause.

Pet. App., at 7 (internal punctuation omitted).

Further still, the Eighth Circuit has gone so far as to declare any and all prior precedent to the contrary as amounting to mere "precautionary dicta." Pet. App., at 7a. In so holding, the Eighth Circuit refers not only to its own prior precedents such as *Crenshaw* above, but expressly to this Court's *Lopez-Morrison* line of cases as well:

> The prudent cautions in *Lopez, Morrison,* and *Crenshaw* made no attempt to define when an express jurisdictional element should be overruled or disregarded.

Pet. App., at 7a. That is to say, with the its decision at issue here, the Eighth Circuit has obviated the four-factor test established by this Court in *Lopez* and *Morrison*, at least where the statute in question includes a jurisdictional element.

Hence, with its decision at issue here, the Eighth Circuit has declared the inclusion of a "jurisdictional element" within a given statute to shield any statute from a Commerce Clause legislative-authority challenge. And going well beyond even this, has purported to reduce this Court's four-factor test announced in *Lopez* and *Morrison* to mere "precautionary dicta," to be freely disregarded by the Eighth Circuit, or indeed by any court. Pet. App., at 7a. This alone—in combination with the above circuit court divide—presents compelling reason for the Court to grant a writ of certiorari in the case at hand. In addition, the Eighth Circuit's decision here presents an apt vehicle by which to review the question, as explained next.

### B. The case at hand presents a compelling vehicle for the Court to consider the question presented.

For a number of reasons beyond the above-described divide of circuit court authority and declaration of this Court's precedents as non-binding "precautionary dicta," the instant case presents an apt and compelling opportunity to consider the Question Presented:

#### 1. Absence of *Lopez* factors apart from jurisdictional element

Aside from mere inclusion of a statutory jurisdictional element in § 247(b), the Church Arson Prevention Act is severely lacking with respect to the remaining *Lopez* factors meant to evaluate whether the regulated activity "substantially affects interstate commerce." This is an important case-specific factor in terms of whether to

use the present case to review the Question Presented. For the statute may be upheld only if the statutory jurisdictional element—standing alone—permits the congressional action.

**(a). Non-economic, criminal activity**

The Church Arson Prevention Act, under § 247(a)(1), penalizes anyone who "defaces, damages, or destroys any religious real property, because of the religious character of that property." And § 247(a)(2) penalizes anyone who "obstructs, by force or threat of force, including by threat of force against religious property, any person in the enjoyment of that person's free exercise of religious beliefs." Hence, by its plain terms, § 247 regulates conduct which is quintessentially "noneconomic" and "criminal" in nature. *Morrison,* 529 U.S. at 610. "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to [this Court's] decision in that case." *Id.*

The reach of the § 247(a) goes well beyond the prior established limits of congressional authority for regulation of crimes against private property, *e.g.,* the arson statute of 18 U.S.C. § 844(i), which expressly limits its reach to "property used in interstate or foreign commerce or in any activity affecting interstate commerce." *Jones v. United States,* 529 U.S. 848, 855-56 (2000). Rather, the plain terms of § 247 reach property damage and/or free-exercise obstruction due to mere damage or destruction of any "religious object," even those with no connection to interstate commerce whatsoever, *e.g.*, a container of holy water or handmade prayer beads.

### (b). Congressional findings

The legislative history of the Church Arson Prevention Act reveals no *bona fide* nexus between the regulated acts and interstate commerce. Rather, the express congressional findings state only, *inter alia*:

- "The incidence of arson or other destruction or vandalism of places of religious worship, and the incidence of violent interference with an individual's lawful exercise or attempted exercise of the right of religious freedom at a place of religious worship pose a serious national problem."

- "Although local jurisdictions have attempted to respond to the challenges posed by such acts of destruction or damage to religious property, the problem is sufficiently serious, widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions."

- "Congress has authority, pursuant to the Commerce Clause of the Constitution, to make acts of destruction or damage to religious property a violation of Federal law."

Pub. L. 104-155, § 2 (1996).

Whatever else may be said about them, congressional findings of this ilk fail to embrace the *Lopez-Morrison* factor aimed at enabling a court 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 (citation and internal punctuation omitted). To the contrary, similar congressional findings have been deemed insufficient for that purpose, instead evincing a constitutionally suspect federal encroachment upon traditional state police powers. *Morrison,* 529 U.S. at 615 ("Given these findings and Petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between

national and local authority seems well founded. The reasoning that petitioners advance 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."); *Patton,* 451 F.3d at 630-32 ("Far from establishing a substantial effect on interstate commerce, these findings raise concerns about federal intrusion and suggest that wearing body armor affects interstate commerce insofar as all crime hurts the economy—an argument the Supreme Court rejected in *Lopez* and *Morrison*.").

Further, the relevant statutory jurisdictional element is given by § 247(b), which requires the government to prove the "offense [conduct] is in or affects interstate or foreign commerce." The legislative history makes plain that this broad language was added in direct response to this Court's *Lopez* decision. H.R. Rep. 104-621, at 7 (1996). However, this legislative history offers no *bona fide* "substantial" nexus between the regulated activity and interstate commerce; but rather a superficial measure aimed at complying with *Lopez* in form, but not in substance. *Id.*

**(c). Attenuated nexus to commerce**

The Eighth Circuit opinion abandons the four-factor test under this Court's *Lopez-Morrison* precedents, instead permitting sole reliance upon the § 247(b) jurisdictional element. Pet. App., at 7a. However, this necessarily eliminates the *Lopez-Morrison* factor which asks whether "the link between [the regulated activity] and a substantial effect on interstate commerce [is] attenuated." *Morrison,* 529 U.S. at 612. This Court has recognized that ignoring this factor leads to congressional

authorization 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 613. This Court offered examples to include traditional spheres of exclusive State police power, such as family law and public education. *Id.*

Considering the same factor in the present case, the reasoning espoused by the Eighth Circuit would permit not only federal regulation of acts of free-exercise obstruction and religiously-motivated property damage as provided in § 247, but also "activities that might lead to violent crime" such as the establishment of houses of worship far from any law enforcement facility, or maintaining a house of worship with no security personnel or similar safety measures. *Morrison,* 529 U.S. at 612.

This constitutionally-suspect outcome is illustrated by existing statutory schemes enacted under the Commerce Clause. For example, the Endangered Species Act permits federal prohibition upon "taking" designated wild animals, even if the wild animal in question is found on private land and the private landowner wishes to conduct the harvest. *PETPO v. U.S. Fish & Wildlife Serv.,* 852 F.3d 990, 999-1008 (10th Cir. 2017). The Columbia River Gorge National Scenic Area Act authorizes federal oversight over local land use regulations. *Columbia River Gorge United v. Yeutter,* 960 F.2d 110, 111-13 (9th Cir. 1992). And the Occupational Safety and Health Act permits federal regulation of a private hospital's safety protocols to prevent "patient-on-staff violence." *BHC N.W. Psych. Hosp. v. Secretary of Labor,* 951 F.3d 558, 561-65 (D.C. Cir. 2020).

As described throughout, § 247 was enacted under the "substantially affects" category of the Commerce Clause, and regulates acts of obstruction against another's free exercise of religion, including and in addition to religiously-motivated damage to real or personal property. If § 247 is to be upheld as a proper exercise of congressional authority under this broadest category of the Commerce Clause, then the above cases require the conclusion that Congress may also enact legislation that regulates what religious objects may be kept or used by a house of worship. *Cf. PETPO,* 852 F.3d at 999-1008 (federal regulation of landowner's harvest of wild animals found on his/her own land). Or where a religious organization may build a house of worship. *Cf. Yeutter,* 960 F.2d at 111-13 (federal regulation of local land use). Or what counter-violence policies or procedures a religious organization must implement. *Cf. BHC N.W. Psych. Hosp.,* 951 F.3d at 561-65 (federal regulation of safety protocols to prevent violence).

In sum, three of the four *Lopez* factors point strongly to the conclusion that the Church Arson Prevention Act evinces no "substantial effect" upon interstate commerce. Hence, if the statute is to be upheld over congressional-authorization challenge, it must be because the statutory jurisdictional element alone is sufficient to permit the legislation. The point being that this particular case and this particular statute present a compelling opportunity to decide the Question Presented, and resolve the divide amongst the circuit courts.

**2. Statute-specific circuit decisions illustrate the split**

Two other reported circuit court decisions have ruled upon the Commerce-Clause-authorization of § 247 in response to facial challenges: the Fourth Circuit in

*United States v. Roof,* 10 F.4th 314, 380-84 (4th Cir. 2021); and the Eleventh Circuit *United States v. Ballinger,* 395 F.3d 1218, 1243 (11th Cir. 2005). Both reside within the cohort of circuits holding that a statutory "jurisdictional element" may inoculate federal legislation from *Lopez-Morrison* challenge, notwithstanding the "the noneconomic, criminal nature" of the regulated conduct in question. *Supra* § I.A. And indeed, both decisions place great emphasis upon the § 247(b) jurisdictional element. *Roof,* 10 F.4th at 383; *Ballinger,* 395 F.3d at 1228 n.5. The Fourth Circuit's *Roof* decision, for example, purports to examine all four of the *Lopez-Morrison* factors, but actually offers the § 247(b) jurisdictional element as support for three of them. *Roof,* 10 F.4th at 383-84 & n.44 (offering inclusion of jurisdictional element to support *Lopez-Morrison* factors (2), (3), & (4), including permitting consideration of "hypothetical conduct that satisfies the Commerce Clause"). Hence, the challenge to § 247 at issue here aptly illustrates the doctrinal divide of the circuit courts, discussed above. *Supra* § I.A.

**3. Case-specific facts and procedural posture**

(a). In this case, the government's specific theory required it to prove that that Petitioner had played a role in placing an explosive device within a house of worship, causing damage to the property. Pet. App., at 26a-33a. However, the government was expressly relieved of any burden to prove the building in question was "used in" interstate commerce as is generally required, under the § 844(i) arson statute, for example. *Jones,* 529 U.S. 855-56; *accord United States v. Rea,* 300 F.3d 952, 959-63 (8th Cir. 2002) ("[W]e conclude that there was not a sufficient factual

basis to support the conclusion that the church annex was used in interstate commerce or in any activity affecting commerce."). Instead, in the present case the district court instructed that a § 247 conviction was permissible with a showing that Petitioner's "conduct" somehow "affected interstate commerce * * * in some way, even if minor." Pet. App., at 29a-30a.

(b). No matter the outcome of this Petition, a lengthy prison term will remain in place. In the Illinois Case, Petitioner pled guilty to unrelated federal offenses, and received a 168-month prison sentence. Pet. App, at 20a-22a. And in the Minnesota Case, Petitioner was convicted of a 26 U.S.C. § 5861(d) offense, which yielded a 120-month prison sentence. Pet. App., at 23a-24a. None of these convictions are at issue in this Petition, nor would be affected should the Court grant the requested writ of certiorari.

(c). Under the Eighth Circuit's reasoning in this particular case, the hazard of near-boundless congressional authority under the Commerce Clause may be viewed in sharp relief. For if the inclusion of a statutory "jurisdictional element" is truly the start and end of the judicial inquiry as the Eighth Circuit now holds, then it must follow that Congress need only include such a statutory provision within *any* federal legislation to pass muster under Commerce-Clause-authorization analysis. Including federal legislation over traditional police powers, such as prevention of criminal activity at issue here. Or regulation of religious organizations and houses of worship, also at issue in this particular case.

## CONCLUSION

In sum, the Eighth Circuit decision squarely raises and expands upon doctrinal divide surrounding the Question Presented. The decision below holds that a federal statute enacted under the "substantially affects" category of the Commerce Clause may be upheld based upon inclusion of a statutory jurisdictional element, standing alone. Beyond this, the decision below dismisses this Court's *Lopez-Morrison* decisions as mere "precautionary dicta," and in doing so opens the door to expansive federal regulation of religious organizations and houses of worship under Commerce Clause. For these reasons, Petitioner respectfully requests that the Court grant this petition, and issue the requested writ of certiorari to review the Question Presented.

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Respectfully submitted,

***s/ Shannon Elkins***

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