No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

ANDREA FORSYTHE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

Section 844(i), 18 U.S.C., prohibits the arson or attempted arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

The questions presented are:

1. Does Section 844(i) apply to arson of a single-family rental home, and, if so, does its application exceed Congress' authority under the Commerce Clause?

2. When evaluating an as-applied challenge to a federal criminal statute that regulates noneconomic activity and has a jurisdictional element, such as Section 844(i), may a court apply the *Wickard* aggregation principle?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Andrea Forsythe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on October 12, 2017.

OPINION BELOW

The not precedential opinion of the Court of Appeals for the Third Circuit (Appendix A) is at *United States v. Forsythe*, No. 17-1019, __ F. App'x __ (3d Cir. 2017).

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The district court's order was affirmed by unpublished opinion filed October 12, 2017. The Petition for Writ of Certiorari is due on or before January 10, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision Involved:

Article I, Section Eight of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States; * * *

Federal Statutes Involved:

18 U.S.C. § 844(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 * * *.

STATEMENT OF THE CASE

This case concerns whether the federal crime of burning "property used . . . in any activity affecting interstate . . . commerce," 18 U.S.C. § 844(i), applies, and constitutionally may apply, to petitioner's arson of her single-family home, which she was renting from another person who resided in the same state.

Enactment and Amendment of 18 U.S.C. § 844(i)

Section 844(i) was enacted as part of Title XI of the Organized Crime Control Act of 1970, in order "to curb the use, transportation, and possession of explosives." *Russell v. United States*, 471 U.S. 858, 860 n.5 (1985) (quoting Hearings 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., 1 (1970) (hereinafter "Hearings")). One bill, H.R. 16699, would have criminalized the bombing or attempted bombing of "any . . . property used for business purposes by a person engaged in commerce or in any activity affecting commerce." *Id.* (quoting Hearings, at 30).

At hearings on H.R. 16699 and other bills, Assistant Attorney General William R. Wilson testified that H.R. 16699 had been drafted to protect "any property used for business purposes" to the extent permitted by the Commerce Clause, but that it would not apply to private homes under normal use. *See Russell v. United States*, 471 U.S. 858, 860 & n.7 (1985). After witnesses at the hearings expressed concern that the "business purposes" limitation would bar the statute's

application to bombings of public buildings such as police stations, universities, courthouses, and churches, the limitation was removed. *Id.*

H.R. 16699 was reported out of the House Judiciary as part of S.30, the Organized Crime Control Act of 1970. During floor debate over S.30, Representative Hungate asked whether Section 844(i) would criminalize the bombing of a private residence. 116 Cong. Rec. 35,359. Chairman Celler responded that "the mere bombing of a private home even under this bill would not be covered because of the question whether the Congress would have the authority under the Constitution." *Id.* The Senate passed S.30 with no mention of private residences. *See id.* at 36,296.

As originally enacted, Section 844(i) prohibited only the destruction or attempted destruction of property by means of "an explosive," and did not apply to arson generally. As this limitation caused problems in practical application, Congress enacted the Anti-Arson Act of 1982, which amended various provisions of Title 18, including Section 844(i), to apply to arson or attempted arson committed "by means of fire or an explosive." H.R. Rep. No. 97-678, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2631, 2631.

"The jurisdictional circumstances enumerated in . . . Section 844 . . . remain[ed] unchanged by the 1982 amendment. *Id.* at 1. Representative Rodino, Chairman of the House Judiciary Committee and co-sponsor of the bill, assured his colleagues that it was "*not* intended to expand Federal jurisdiction over arson offenses generally." 128 Cong. Rec. 18,816 (1982) (emphasis added).

As amended, 18 U.S.C. § 844(i) reads in relevant part:

> 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 . . .

This Court Issues Two Decisions Interpreting 18 U.S.C. § 844(i).

This Court has interpreted § 844(i)'s reach in two cases. The first of these two cases, *Russell v. United States*, 471 U.S. 858 (1985), addressed whether the statute applied to an arson of a two-unit rental apartment building solely as a matter of statutory construction, not constitutional law. *Id.* at 858-859. This Court interpreted the statute's reference to "any building . . . used . . . in any activity affecting interstate or foreign commerce," its jurisdictional element, as expressing Congress' intent "to exercise its full power under the Commerce Clause." *Id.* at 859. The Court asked whether the property at issue was being "used" in an "activity" that affects interstate commerce, and answered "yes," reasoning as follows:

> The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and "the interstate movement of people," to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. 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 (citing *Perez v. United States*, 402 U.S. 146, 153-154 (1971)). The Court thus held that because petitioner was renting out the units in the apartment building at the time he committed the offense, the property was being used in an

activity affecting commerce within the meaning of § 844(i)'s jurisdictional element. *Id.*

This Court had a second occasion to interpret § 844(i)'s jurisdictional element in *Jones v. United States*, 529 U.S. 848 (2000) – this time, in the context of an as-applied constitutional challenge. *Jones* presented the question of whether arson of an owner-occupied residence fell within § 844(i)'s scope. *Id.* at 850. Interpreting § 844(i)'s jurisdictional element, the Court held that "[t]he proper inquiry . . . 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.'" *Id.* at 854. Use in "an activity affecting commerce" means "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id* at 855. Because in *Jones*, "[t]he home's only 'active employment' . . . was for the everyday living of Jones's cousin and his family," *id.* at 856, and not for any trade or business, the home did not come within § 844(i)'s reach. The Court noted its view that its approach in *Jones* was consistent with its prior holding in *Russell*. *Id.* at 856.

Justice Thomas, joined by Justice Scalia, wrote a concurring opinion as follows:

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

Id. at 860 (Thomas, J., concurring).

Andrea Forsythe Is Convicted Under 18 U.S.C. § 844(i) For Starting A Fire Which Destroyed Her Rental Home.

In August 2011, Andrea Forsythe and her boyfriend, Robert Benard, began renting a single-family home at 128 McVey Street in Sturgeon, Pennsylvania, which they used as their residence. Their landlords also lived in Pennsylvania.

While working as a nanny, Ms. Forsythe stole a diamond necklace from her employer. Before pawning the necklace, Ms. Forsythe purchased a renter's insurance policy, which included coverage for the necklace. She later started a fire which destroyed the home.

Ms. Forsythe was charged with *inter alia* malicious destruction of property for causing the fire, in violation of 18 U.S.C. § 844(i).

Ms. Forsythe moved to dismiss the § 844(i) count on jurisdictional grounds, arguing that that intrastate rental of a residential property was insufficient to satisfy § 844(i)'s jurisdictional element – that is, the property was not "used . . . in any activity affecting interstate commerce" by any constitutional definition of that phrase. The district court denied the motion.

The parties entered a conditional plea of guilty under Rule 11(a)(2) of the Federal Rules of Criminal Procedure, preserving Ms. Forsythe's right to appeal on the jurisdictional issue raised in her motion to dismiss based on stipulated facts. Following her guilty plea, Ms. Forsythe was sentenced to 60 months' imprisonment, and ordered to pay roughly $179,000 in restitution.

The Court Of Appeals Affirms Ms. Forsythe's Conviction, Expressly Relying On The Continued Vitality Of This Court's Decision In Russell

The Court of Appeals affirmed, finding itself "bound to follow [this Court's] decision in *Russell*," App. A at 9, notwithstanding subsequent Commerce Clause jurisprudence casting doubt on *Russell*'s foundational principles.

The Court went on to hold that even if it was not technically bound by *Russell*, it would uphold the application of § 844(i) in this instance because "there cannot be any doubt that renting property is economic activity and because § 844(i) has a jurisdictional element." App. A at 11 (citing cases emphasizing whether the activity is economic in nature). In other words, the court found that *Russell*'s reasoning remained persuasive. Here, the court treated § 844(i) as a regulation of economic activity based on the presence of a jurisdictional element, even though the activity regulated – arson – is decidedly not economic activity.

The Court of Appeals read this Court's opinion in *Jones* as wholly consistent with *Russell*, and cited cases casting *Jones* as a reaffirmation of *Russell*'s holding. App. A at 12-13 (citing *United States v. Hang Le-Thy Tran*, 433 F.3d 472, 477 (6th Cir. 2006) ("The Supreme Court's later ruling in *Jones* . . . did not disturb the Court's holding in *Russell* that the arson statute applies to rental properties."); *United States v. Logan*, 419 F.3d 172, 180 (2d Cir. 2015) ("[T]he Supreme Court cited *Russell* with approval in *Jones*, which was decided after *Morrison* and *Lopez*."); *United States v. Grassie*, 237 F.3d 1199, 1208 (10th Cir. 2001) ("Indeed, the Court relied upon its prior decision in *Russell*. . ."); *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 207 (5th Cir. 2000) ("This recognition was

reaffirmed in the recent *Jones* decision"); *id.* at 207 n.23 ("In the instant case, the house is functioning as a rental unit for disabled individuals, which under *Russell* can be regulated under the commerce power.")).

This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court's Decision In *Russell v. United States* Should Be Overruled.

A. *Russell*'s Statutory Holding Is Inconsistent With This Court's Commerce Clause Jurisprudence.

In *Russell*, this Court interpreted § 844(i)'s jurisdictional element to reach the arson of any rental property – even if used solely as a residence by its occupants. *See Russell v. United States*, 471 U.S. 858 (1985). *Russell*, and the Court's subsequent citation of *Russell* with approval in *Jones*, has meant that as-applied challenges to § 844(i)'s application to residential rental properties have been nonstarters in the lower courts. This Court's prior holding in *Russell* is inconsistent with its Commerce Clause jurisprudence, the doctrine of constitutional avoidance, and the rule of lenity, and thus should be overruled.

The defendant in Russell argued that a two-unit rental apartment building was not "used . . . in an activity affecting interstate or foreign commerce." *Id.* at 859. The Court read § 844(i)'s jurisdictional element expansively, observing 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." *Id.* at 862. The Court held that while "[t]he statute only applies to property that is 'used' in an 'activity' that affects commerce, . . . [t]he rental of real estate is unquestionably such an activity" because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" and "[t]he 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.* (citing *Perez v. United States*, 402 U.S. 146, 153-54 (1971)) (emphasis added). Because the property at issue in *Russell* was rented at the time of the attempted arson, the Court concluded that the property was "being used in an activity affecting commerce within the meaning of § 844(i)." *Id.*

Since *Russell*, the Court's Commerce Clause jurisprudence had undergone an evolution which cracked *Russell*'s core rationale. This Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), taught that where Congress legislates in an area of "traditional state concern," and its aim is "activity in which 'neither the actors nor their conduct has a commercial character," the legislation may exceed congressional authority under the Commerce Clause if insufficiently tied to interstate commerce. *Jones*, 529 U.S. at 858 (holding that the Gun-Free School Zones Act, which made it unlawful for any individual knowingly to possess a firearm in a school zone, exceeded Congress' power to legislate under the Commerce Clause). *Lopez* made clear that the commerce power extends only to "those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Lopez*, 514 U.S. at 555 (internal quotations and citations omitted).

Striking a further blow to *Russell*'s rationale, in *Morrison*, this Court "rejected the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" in *United States v. Morrison*, 529 U.S. 598, 618 (2000) (striking down, as unconstitutional, the Violence Against Women Act because the activity being regulated, gender-motivated violence, did not substantially affect interstate commerce).

Like the statute at issue in *Morrison*, § 844(i) regulates noneconomic activity – arson. However, in upholding the application of § 844(i) to rental properties, the Court in *Russell* engaged in precisely the sort of aggregation analysis which it later shunned in *Morrison*. *See Russell*, 471 U.S. at 862 (citing *Perez*, 402 U.S. at 153-54). Consequently, *Russell* cannot be reconciled with *Morrison*.

Nonetheless, when this Court interpreted § 844(i)'s constitutional limits in *Jones v. United States*, 529 U.S. 848 (2000), no attempt was made to reconcile *Russell*'s rationale with the Court's new admonitions about Congress' limited ability to regulate noneconomic under an aggregation theory. After all, the property at issue in *Jones* was an owner-occupied residence, and thus, readily distinguishable from *Russell* on the facts, and Mr. Jones argued that a holding in his favor could did not require a departure from *Russell*. Consequently, in its *Jones* opinion, this Court later cited *Russell* with approval, although Justice Thomas and Justice Scalia signaled their doubt that § 844(i) had such broad applicability. *Id.* at 860 (Thomas, J., dissenting).

B. *Russell*'s Statutory Holding Violates The Principle Of Constitutional Avoidance And The Rule of Lenity.

This Court has long recognized 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," this Court's "duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

Section 844(i) regulates the paradigmatic common-law state crime of arson. *See Jones*, 529 U.S. at 858. "The consequences of arson are typically local, and we have traditionally left it to the states to determine the appropriate penalty, just as we have traditionally left educational policy to localities, which 'may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Corona*, 108 F.3d 565, 569 (5th Cir. 1997). As this Court acknowledged in *Jones*, "[g]iven the concerns brought to the fore in *Lopez*," § 844(i) must be construed so as "to avoid the constitutional question" that would arise were it to be read in a manner "to render the 'traditionally local criminal conduct'" involved here "a matter for federal enforcement." *Jones*, 529 U.S. at 858.

Russell's employment of aggregation analysis to bring all rental properties – even single-family rental homes – within § 844(i)'s ambit ignores this command. As the Fifth Circuit observed:

> Taking the "effects test" to its logical extreme would for all practical purposes grant the federal government a general police power, the very danger the *Lopez* Court warned us against. . . The aggregate effect of

> arsons of private homes may have a substantial effect on interstate commerce. But if each arson in the aggregation is negligible, the calculation of their effect becomes speculative in the same way that the effect of gun possession near schools is speculative.

Corona, 108 F.3d at 570 (internal citation omitted). In this way, *Russell*'s statutory holding violates the principle of constitutional avoidance.

This Court has also "instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" and "that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Jones*, 529 U.S. at 858. When enacting § 844(i) and choosing the language of "use" in "interstate commerce," or "in any activity affecting interstate commerce," Congress did not express clear and definite intent to bring rental homes within the statute's scope. A single-family home is primarily used as a home, whether owner-occupied or rented. The intra-state rental of such a home does not affect interstate commerce. *Russell*'s employment of an aggregation principle drawing upon the entire rental property market essentially rewrites the statute to apply to arson of buildings that are used in an activity which, as an entire class, affects interstate commerce. This expansive statutory reading violates the rule of lenity and is not supported by clearly-expressed congressional intent.

Read together, *Russell* and *Jones* mean that arsons of residential properties fall on different sides of the federal and state criminal divide depending on whether the person residing in the home owns or rents the home. In addition to perpetuating

discord in this Court's Commerce Clause jurisprudence, this divide wholly lacks intuitive appeal, and thus raises questions about fair notice to citizens. Moreover, there is little to no evidence that this divide was contemplated by Congress when it enacted § 844(i).

C. The Circuits Consider Themselves Bound By *Russell*'s Statutory Holding In Assessing As-Applied Constitutional Challenges To Prosecutions Involving Residential Rental Properties.

This Court must resolve the doctrinal tension caused by *Russell* because every circuit has found itself bound to apply *Russell*'s statutory holding in the context of as-applied constitutional challenges to Section 844(i). *See United States v. Hang Le-Thy Tran*, 433 F.3d 472 (6th Cir. 2006) (treating *Russell*'s holding with respect to rental properties as binding after *Jones*); *United States v. Logan*, 419 F.3d 172, 180 (2d Cir. 2005) ("Courts of Appeals are therefore obligated to follow *Russell* until the Supreme Court itself sees fit to reconsider the decision"); *United States v. Soy*, 413 F.3d 594 (7th Cir. 2005) ("although *Jones* removed owner-occupied residences from the scope of § 844(i), it did not disturb the holding of *Russell* that rental properties satisfy the interstate commerce requirement"); *United States v. Gaydos*, 108 F.3d 505, 509 (3d Cir. 1997) ("We believe that *Russell*'s interpretation of § 844(i), and its holding, that the statute constitutionally regulates arson of business property that satisfies the requisite jurisdictional element, is still authoritative precedent"); *United States v. Nguyen*, 117 F.3d 796, 798 (5th Cir. 1997) ("Pursuant to *Russell*, the rental property damaged . . . was property being ' "used" in an "activity" that

affects commerce,' and thus interstate commerce, within the meaning of § 844(i)"); *United States v. Chowdry*, 118 F.3d 742 (11th Cir. 1997) ("*Russell* remains authoritative precedent" after *Lopez*); *United States v. Little*, 132 F.3d 43 (10th Cir. 1997) (finding *Russell* "control[ing]" in examining as-applied challenge to § 844(i)); *United States v. McMasters*, 90 F.3d 1394, 1399 (8th Cir. 1996) ("We do not believe that *Lopez* overruled *Russell sub silentio*"); *United States v. Gomez*, 87 F.3d 1093, 1094 (9th Cir. 1996) ("we find nothing in *Lopez* to suggest that the Court intended to overrule *Russell*, nor does *Lopez* undermine *Russell*'s reasoning or its holding"); *United States v. Parsons*, 993 F.2d 38, 40 (4th Cir. 1993) (applying *Russell*, and rejecting as-applied constitutional challenge to prosecution of arson of rented single-family dwelling); *United States v. Medeiros*, 897 F.2d 13, 16 (1st Cir. 1990) ("After *Russell*, if the property to be burned is in the rental market, it is unquestionably sufficiently connected to interstate commerce to confer jurisdiction").

Without a ruling from this Court, the circuits will continue to apply *Russell*, perpetuating § 844(i)'s encroachment on criminal enforcement in an area traditionally left to the states and incongruity in Commerce Clause jurisprudence.

II. The Circuits Are Split Regarding Whether 18 U.S.C. § 844(i) Regulates Economic Activity.

In analyzing as-applied challenges to regulation under the Commerce Clause, this Court has instructed that a determination of whether the regulated

activity is economic or noneconomic in nature has implications for whether aggregation principles apply. *Compare Morrison*, 529 U.S. at 617, *and Gonzalez v. Raich*, 545 U.S. 1, 25 (2005). Most recently, in *Raich*, this Court employed a definition of "economics" as "the production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 25 (quoting Webster's Third New International Dictionary 720 (1966)).

As this Court did not reach the constitutional question in *Jones*, lower courts have been left to analyze as-applied challenges to § 844(i) with little guidance regarding the application of Commerce Clause doctrine. This has resulted in a circuit split on perhaps the most basic question – whether § 844(i) regulates economic activity.

The First, Fifth, and Eleventh Circuits hold that § 844(i), which prohibits arson, regulates non-economic activity. *United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001) ("Section 844(i) regulates non-economic activity, arson"); *United States v. Johnson*, 246 F.3d 749, 752 n.5 (5th Cir. 2001) (recognizing controlling nature of prior opinion holding that "[s]ection 844(i) is not a regulation of any interstate market or economic activity"); *United States v. DiSanto*, 86 F.3d 1238, 1245 (1st Cir. 1996) ("the federal arson statute is similar to that struck down in *Lopez* in that it does not regulate commercial or economic activity").

On the other hand, the Ninth Circuit has held that, "[a]s applied to a rental property, . . . section 844(i) regulates conduct that is economic or

commercial in nature." *Gomez*, 87 F.3d at 1096. And, in this case, the Third Circuit signaled its conclusion that § 844(i) regulates economic activity, at least as applied to rental properties. Pet. App. 11-12 (citing cases drawing distinction between legislation regulating economic and non-economic activity).

This Court should grant the writ to resolve this basic question perplexing the circuits. The question of whether § 844(i) regulates economic activity has important implications for analysis of as-applied challenges to the statute, as this Court has advised that application of the aggregation principle from *Wickard v. Filburn*, 317 U.S. 111 (1942), is appropriate only where the regulated conduct is economic in nature. *Compare Morrison*, 529 U.S. at 617, *and Raich*, 545 U.S. at 25. This Court should grant the writ to settle the issue of whether § 844(i) regulates economic activity.

III. The Circuits Are Split Regarding Whether *Wickard v. Filburn*'s Aggregation Principle Applies When Analyzing An Individual Application Of § 844(i).

This Court, in both the civil and criminal regulatory context, has approved the concept of "aggregation" to justify certain exercises of federal Commerce Clause power. *See Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The aggregation doctrine allows federal regulation of purely local acts, when viewed on a national scale, substantially affect interstate commerce. In *Wickard*, this Court held that the Commerce Clause allowed the federal government to prohibit a farmer from harvesting wheat solely for his own consumption as part of its regulatory power over wheat production. *See id.* at 125. In reaching this conclusion, the Court

reasoned that although one farmer growing wheat for himself may have a trivial effect on the wheat market, his conduct was "far from trivial" when "taken together with that of many others similarly situated." *Id.* at 128.

Thus, even if an individual's activities do not significantly affect interstate commerce, they may be regulated if Congress finds that they are part of a class of activity that does. *See Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968) (stating "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (employing the "class of activities" test to sustain Civil Rights Act requiring hotels or motels to accommodate minority guests based on finding that their business per se affects commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (applying aggregation principle in case involving congressional findings of effect on interstate commerce).

This principle has been cautiously extended to criminal regulation where Congress has made findings regarding the regulated activity's impact on interstate commerce in the aggregate. *See Perez v. United States*, 402 U.S. 146 (1971) (upholding federal loan sharking regulation based on congressional findings that loan sharks who use extortion to collect payments for loans belong to a class largely controlled by organized crime): *Huddleston v. United States*, 415 U.S. 814 (1974) (upholding portions of Gun Control Act based on congressional findings that prohibited transactions, even if wholly intrastate, affect interstate commerce).

Notwithstanding the absence of congressional findings with respect to rental properties and the arson of such properties, the *Russell* Court made its own effects findings based on a theory of aggregation, which courts have applied as a *per se* rule that rental properties come within the statute's ambit. *Russell*'s statutory holding is based on a theory of aggregation – specifically, that "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" and "[t]he 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." *Russell*, 471 U.S. at 862. The Court's citation to *Perez v. United States*, 402 U.S. 146, 153-154 (1971), for this proposition demonstrates that it was employing the aggregation theory to the jurisdictional element even though no congressional findings regarding the impact of the regulated activity (arson) on interstate commerce had been demonstrated.

However, in *Morrison*, 529 U.S. 598 (2000), this Court made clear that there are constitutional limits on federal authority to regulate local, noneconomic activity under an aggregation theory, even where Congress has made specific findings regarding those affects, reasoning that:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.

Id. at 617. However, the Court in *Jones* made no effort to reconcile *Russell*'s aggregation rationale with its insistence in *Morrison* that aggregation could not save federal criminal statutes that regulate noneconomic activity. Instead, the

Court's citation of *Russell* with apparent approval in *Jones* signaled to lower courts that, notwithstanding *Morrison*, aggregation principles apply when analyzing whether § 844(i)'s jurisdictional element is satisfied in a particular case.

Complicating matters further, this Court reaffirmed the application of *Wickard*'s aggregation principle in the context of federal criminal regulation of local activity in *Gonzalez v. Raich*, 545 U.S. 1 (2005). *Raich* involved an as-applied challenge to the federal Controlled Substances Act (CSA) by medical marijuana users who sought to exempt drugs grown for personal use as allowed by the California Compassionate Use Act of 1996. *Id.* at 5, 6. In rejecting the as-applied challenge, this Court applied *Wickard*'s aggregation principle to allow regulation of individual activity if the failure to do so would undercut a wider regulatory scheme. *Raich*, 545 U.S. at 24-25. Because medical marijuana, aggregated to include all medical marijuana users, would impact the interstate market for illegal marijuana, the Court held that Congress could regulate it legitimately under the Commerce Clause. *Id.* at 22. The *Raich* Court distinguished *Morrison*, and its holding, on the grounds that unlike the regulation at issue in *Morrison*, "the activities regulated by the CSA are quintessentially economic." *Id.* at 25.

In the absence of coherent instruction regarding whether § 844(i)'s jurisdictional element may be satisfied in an individual case based on a theory that the property at issue is part of a larger market that, in the aggregate, has a substantial effect on interstate commerce, the circuits are split on that issue. Most circuits, including the Third Circuit, have explicitly relied on *Russell*'s aggregation-

driven rule to uphold individual applications § 844(i) to arson of rental residential properties in the face of as-applied constitutional challenges. *See United States v. Guzman*, 603 F.3d 99, 109 (1st Cir. 2010) ("The rule in this circuit is 'that rental property is per se sufficiently connected to interstate commerce to confer federal jurisdiction under § 844(i)'"); *Soy*, 413 F.3d at 603 (7th Cir.) (applying *Russell* aggregation reasoning to uphold conviction under § 844(i) for arson of residential rental property); *United States v. Minerd*, 112 F. App'x 841, 843 (3d Cir. 2004) (same); *Gomez*, 87 F.3d at 1096 (9th Cir.) (holding that because § 844(i) "regulates conduct that is economic or commercial in nature," "we must consider the aggregate effect on, or connection with commerce of a multi-unit rental property," and citing *Russell* in concluding that jurisdictional element was satisfied); *Parsons*, 993 F.2d at 40 (4th Cir.) (applying *Russell*'s holding and reasoning to rented single-family dwelling); *McMasters*, 90 F.3d at 1399 (8th Cir.) ("renting a house is the sort of economic activity that might, through repetition elsewhere, substantially affect interstate commerce").

Some circuits have applied *Russell*'s aggregation principle the context of arson of commercial properties used for business purposes as well. For example, in *United States v. Terry*, 257 F.3d 366, 370-71 (4th Cir. 2001), the Fourth Circuit applied the aggregation rationale of *Russell* to the property at issue, a daycare center, and found that daycare center was part of "broader commercial market for childcare services," and thus satisfied § 844(i)'s jurisdictional element. Similarly, the Second Circuit has found that *Russell*'s aggregation rationale "mandates

adoption of a similar *per se* rule regarding bars or restaurants" because "the local operation of a restaurant is merely an element of a much broader commercial market of food and drink delivery." *United States v. Joyner*, 201 F.3d 61 (2d Cir. 2000).

In the same vein, the Sixth Circuit upheld the use of a jury instruction that "[b]usiness related property, as opposed to residential property, is considered as being used in or affecting interstate commerce even if it has a ***minimal*** effect on interstate commerce," finding itself "bound by [*Wickard*'s] aggregate theory and its attending inferences that *de minimus* interstate economic activity can be substantial if taken in the aggregate." *United States v. Latouf*, 132 F.3d 320, 327-28 (6th Cir. 1997). The First Circuit and Seventh Circuit have also applied an aggregation principle to uphold an individual application of § 844(i). *See also Soy*, 413 F.3d at 603-604 (7th Cir.) (holding that *Russell*'s aggregation principle applies to bring arson of bars and restaurants within ambit of § 844(i)'s jurisdictional element); *Medeiros*, 897 F.2d at 16 (1st Cir.) (citing *Russell*'s aggregation reasoning and holding that "[a]fter *Russell*, if the property to be burned is in the rental market, it is unquestionably sufficiently connected to interstate commerce to confer jurisdiction").

On the other side of the divide, other circuits hold that a theory of aggregate effects on interstate commerce cannot save an individual application of § 844(i) where the property at issue has only a *de minimus* connection to interstate commerce. For example, the Eleventh Circuit has read this Court's decision in

Morrison as casting doubt on the application of aggregation principle in the context of § 844(i), and held that "the government may not rely on the aggregate effect of arson" of specific types of buildings (there, a church) "to establish the requisite nexus." *United States v. Odom*, 252 F.3d 1289, 1297 (11th Cir. 2001). A divided Fifth Circuit held that applying the aggregation principle in the context of an as-applied challenge to § 844(i) would be inappropriate because it regulates noneconomic activity. *United States v. Johnson*, 246 F.3d at 750 n.2 (5th Cir.). And, although the Third Circuit easily employed *Russell*'s aggregation approach in this case involving residential rental property, it has previously declined to apply the aggregation principle to uphold the application of § 844(i) to the arson of property with a minimal connection to interstate commerce. In *United States v. McGuire*, 178 F.3d 203 (3d Cir. 1999), the Third Circuit rejected the government's argument that a personal car that was sometimes used for a catering business and which contained a bottle of orange juice produced in another state satisfied § 844(i)'s jurisdictional element, "agree[ing] that the concerns expressed in *Lopez* preclude applying the 'aggregation test' so broadly that it sweeps within its reach every use of every property that has an effect on interstate commerce no matter how diluted." *Id.* at 211.

This Court should grant certiorari to provide needed instruction regarding whether a court or jury may apply aggregation principles to determine whether § 844(i)'s jurisdictional element is satisfied, and, if so, whether the proper inquiry hinges on the aggregate effects of the *use of* that class of property on interstate

commerce, or the aggregate effects of the *arson* of that class of property on interstate commerce. If a court can aggregate in this context, in any manner it wishes to, then § 844(i)'s jurisdictional element becomes virtually meaningless, thus extending the statute's reach far beyond constitutional limits and encroaching in a realm traditionally left to the states. The patchwork of approaches currently employed throughout the country mean that the lines between state and federal arson are not clearly drawn. This confusion can only be resolved by this Court.

IV. This Case Is An Ideal Vehicle For Answering The Questions Presented.

Ms. Forsythe's case presents an ideal vehicle for resolution of the statutory and constitutional questions presented because the relevant facts are not in dispute – the property at issue was a single-family home Ms. Forsythe rented for her residential use from owners within the same state. In addition, Ms. Forsythe preserved her statutory and constitutional arguments below. Both the district court and the Court of Appeals considered the issues presented. Ms. Forsythe's as-applied constitutional challenge was denied based on this Court's statutory rule in *Russell*. The circuits are now deeply divided regarding the statutory and constitutional limits of § 844(i) due to the tension between this Court's decisions in *Russell*, and *Lopez*, *Morrison*, and *Jones*. This Court should grant certiorari in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

Dated: January 9, 2018

Respectfully submitted,



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CERTIFICATE OF MEMBERSHIP IN BAR

I, LISA B. FREELAND, Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

LISA B. FREELAND
Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

ANDREA FORSYTHE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

DECLARATION PURSUANT TO RULE 29.2 OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury that on the below listed date, as required by Supreme Court Rule 29, the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were delivered to a third party commercial carrier for next day delivery to the Clerk of the United States Supreme Court in Washington, D.C., postage and fees paid via Federal Express, on January 10, 2018, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

DATE: January 9, 2018 BY: 

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