APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. 4:20-cr-288-DPM-1

MUJERA BENJAMIN LUNG'AHO DEFENDANT

ORDER

1. Lung'aho moves to dismiss counts one, two, six, seven, ten, and eleven of the Superseding Indictment, which allege violations of the federal arson statute, 18 U.S.C. § 844(f)(1). He also moves to dismiss counts three, eight, and twelve, which allege possession of a destructive device in furtherance of a crime (or an attempted crime) of violence. The Court previously denied without prejudice his embedded motion to dismiss count four. *Doc. 188 at 3.*

2. Arson Counts. Lung'aho's main argument is that 18 U.S.C. § 844(f)(1) is unconstitutional as applied to him because Congress exceeded its enumerated powers in enacting this law. This 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 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.

Lung'aho is accused of damaging, or attempting to damage, three police cars with Molotov cocktails during civil disturbances in Little Rock in 2020. One car belonged to the Little Rock Police Department, one to the North Little Rock Police Department, and one to the Arkansas State Police. The State Police and North Little Rock Police Department cars were burned up. By stipulation and agreed exhibits, the parties have clarified the material facts about the federal financial assistance received by each of these law enforcement agencies.

Federal dollars did not, directly or indirectly, pay for any of these vehicles. Each agency received some federal financial assistance during the relevant years. None of this assistance, though, paid for police cars.

- The Little Rock Police Department participates in the Edward Byrne Memorial Justice Assistance Grant Program, the leading source of federal criminal justice funding to state and local governments. The Department received $280,392 in funding from this program in the four years between 2017 and 2021. In 2020, the Department also received a federal grant for $786,845 in COVID emergency supplemental funding and a Project Safe Neighborhoods

Award for $46,123. The Department's annual budget was approximately $80 million in 2020.

- From 2017 to 2020, the North Little Rock Police Department received approximately $40,000 each year from the same program. The Department also received $132,168 in COVID emergency relief funds in 2020. The Department's 2020 budget was approximately $24 million.

- In the three years between 2017 and 2020, the Arkansas State Police received federal grants totaling approximately $10 million. The State Police's budget was more than $123 million in 2020.

Congress enacted 18 U.S.C. § 844(f)(1) pursuant to the Property Clause. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const. art. IV, § 3, cl. 2. The Clause's history and purpose, as well as the precedent construing it, are ably sketched in *United States v. Brown*, 384 F. Supp. 1151 (E.D. Mich. 1974), *reversed on other grounds*, 557 F.2d 541 (6th Cir. 1977).

As applied to Lung'aho, the statute cannot be sustained under the Property Clause. The damaged police cars were not federal property. They were not paid for with federal financial assistance, either directly or indirectly. *Compare United States v. Apodaca*, 522 F.2d 568, 571-72 (10th Cir. 1975); *United States v. Hersom*, 588 F.3d 60,

65-68 (1st Cir. 2009). The Congress's property power does not extend to criminalizing arson of property having no federal aspect. *Hersom*, 588 F.3d at 65-67.

Invocation of the Property Clause by Congress, however, is not dispositive. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012). Before a court can take the extraordinary step of declaring a statute unconstitutional, it must consider alternatives that would sustain the law. The United States presses that this statute is a valid exercise of congressional power granted in the Spending Clause coupled with the Necessary and Proper Clause. Under the former, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]" U.S. Const. art. I, § 8, cl. 1. Under the latter, Congress has the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . [.]" U.S. Const. art. I, § 8, cl. 18.

The United States analogizes 18 U.S.C. § 844(f)(1) to 18 U.S.C. § 666, which criminalizes bribery connected to programs that receive federal funds. *United States v. Sabri*, 326 F.3d 937 (8th Cir. 2003), *affirmed and remanded*, 541 U.S. 600 (2004). Lung'aho responds that important differences exist. Under § 666, the bribe must include a thing of value worth more than $5,000; and the non-federal agency involved must receive at least $10,000 a year in federal funds. No such

guardrails, he emphasizes, are in § 844(f)(1). He hypothesizes that one who set fire to a trash can belonging to an organization that is receiving federal financial assistance would risk federal prosecution. Lung'aho also points to some undisputed facts. Considered in terms of their 2020 budgets, the three affected law enforcement agencies received modest federal financial assistance. The Little Rock Police Department got 1% of its budget covered by federal dollars; the North Little Rock Police Department got .001%; and the Arkansas State Police got 2%. Yes, the United States acknowledges, but law enforcement, it continues, is a cooperative endeavor, and the United States has a substantial interest in law enforcement throughout our nation.

The Court is persuaded that 18 U.S.C. § 844(f)(1) is constitutional as applied to Lung'aho. *Sabri*, 326 F.3d at 949. Under the Spending Clause, Congress has the power to send federal resources to state and local agencies such as police departments to provide for the general welfare, and it has the right to protect those resources from being destroyed by fire or explosives. *Ibid.* That much is common ground. The disputed question is whether criminalizing the destruction of any property that happens to be owned by these agencies "is an appropriate means plainly adapted to achieving Congress's end." *Ibid.* Settled Eighth Circuit precedent therefore sets the bar low. *Sabri*, 326 F.3d at 951. The United States clears it.

Lung'aho also argues that § 844(f)(1) could be construed narrowly and sustained: It is, he says, constitutional if limited to federal property, property purchased with federal funds, or property owned by agencies or organizations that receive almost all their funding from the federal government. But the Court of Appeals has rejected this type of argument, concluding that such statutes need not be narrowly construed to withstand challenge. *Sabri*, 326 F.3d at 951-953.

Lung'aho also points out that § 844(f)(1) lacks threshold requirements. See his example of the torched trash can. But a concern about potential overbreadth does not render the statute unconstitutional as applied against Lung'aho. Section 844(f)(1) is not completely without limiting conditions. It does not apply to any organization that has ever received federal funds, for example, but rather only those organizations that were receiving federal assistance when the property was damaged or destroyed. More importantly, Lung'aho is not accused of setting a trash can on fire. He's accused of destroying two police cars with Molotov cocktails and trying to burn another one up. The arson statute is constitutional as applied to him.

3. Destructive Device Counts. 18 U.S.C. § 924(c)(1)(B) prescribes a thirty-year mandatory minimum sentence for using a destructive device during a crime of violence. The statute defines a crime of violence as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property

of another." 18 U.S.C. § 924(c)(3)(A). The issue here is whether the federal arson statute satisfies that definition. Surprisingly, it does not. Here's why.

Courts use the categorical approach to determine whether an offense qualifies as a crime of violence. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). The facts of the case do not make any legal difference. *United States v. Boose*, 739 F.3d 1185, 1186 (8th Cir. 2014). The only question is whether the offense always requires that the government prove—as an element of its case in chief—the use, attempted use, or threatened use of force against the person or property of another. *Ibid.* If someone could be convicted of the crime without having used force, having attempted to use force, or having threatened to use force, then the offense is not a crime of violence—regardless of what the defendant actually did.

The Supreme Court recently held that offenses criminalizing reckless conduct do not qualify as violent felonies for the purposes of the Armed Career Criminal Act. *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion construing 18 U.S.C. § 924(e)(2)(B)(i)). The Court reasoned that the statute's definition of a violent felony, which is essentially the same as a crime of violence, required that the offender direct or target his actions against another person. Reckless conduct does not qualify. The Court reserved the question of whether

crimes involving extreme recklessness or a "depraved heart" fit the definition. *Borden*, 141 S. Ct. at 1825 n.4.

A defendant must act "maliciously" to violate § 844(f)(1). The statute does not define that term. At common law, a person "acts maliciously if she acts intentionally or with willful disregard of the likelihood that damage or injury will result." *United States v. Sweet*, 985 F.2d 443, 445 (8th Cir. 1993). That definition is included in Eighth Circuit Model Criminal Jury Instruction § 6.18.844 (2021), which the Court of Appeals has cited in passing with approval. *United States v. Scharber*, 772 F.3d 1147, 1150 (8th Cir. 2014). Lungaho argues that this definition of maliciousness includes ordinary recklessness. The United States responds that it requires an intent more akin to extreme recklessness or depraved-heart recklessness.

Lung'aho has the better argument. The Tenth Circuit and at least two district courts have interpreted this definition, and all have held that a *mens rea* of recklessness meets it. *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998); *Rudolph v. United States*, 551 F. Supp. 3d 1270, 1284 (N.D. Ala. 2021); *United States v. Sweatt*, 2021 WL 3022695, at *5 (D. Md. 16 July 2021). In an appeal of the case against one of the Boston Marathon bombers, for example, the parties did not even dispute that this definition of "maliciously" included reckless acts. *United States v. Tsarnaev*, 968 F.3d 24, 101 (1st Cir. 2020), *reversed on other grounds*, 142 S. Ct. 1024 (2022). The United States has provided no

authority supporting its argument that the looser part of the definition—willful disregard of the likelihood that damage or injury would result—does not include reckless conduct, and the Court is not aware of any. Extreme recklessness requires more targeting, a stronger intentionality than what is required to obtain a conviction under § 844(f)(1). *See, e.g., Alvarado-Linares v. United States*, 44 F.4th 1334, 1344-45 (11th Cir. 2022); *United States v. Begay*, 33 F.4th 1081, 1093-95 (9th Cir. 2022); *United States v. Baez-Martinez*, 950 F.3d 119, 128-29 (1st Cir. 2020). Under the categorical approach, federal arson is not a crime of violence.

At least one court has avoided reaching this rather confounding result with an information-providing verdict form. As in this case, the defendant was charged with violating § 844(f) and § 924(c), with the arson charge serving as the predicate offense for the destructive-device count. *Elliott v. United States*, 2022 WL 2759168, at *1 (D. Wyo. 14 July 2022). The District Court decided before trial that acting maliciously included both intentional and reckless behavior. 2022 WL 2759168, at *13. But the Court refused to apply the categorical approach "blindly." 2022 WL 2759168, at *11-13. Instead, the Court tailored the verdict form: the jury could only find the defendant guilty on the § 924(c) count if it first found him guilty on the arson count and specifically found that the defendant acted intentionally. *Ibid.* The jury made the required findings and rendered a guilty verdict.

The defendant challenged this protocol in a *habeas* petition, lost, and has appealed. That appeal is pending before the Tenth Circuit.

The *Elliot* Court's approach makes good sense. If followed here, it would eliminate any potential error about Lung'aho's state of mind, eliminating the possibility of a conviction based on less than extreme recklessness or recklessness motivated by a depraved heart. But the Supreme Court has held—unequivocally—that § 924(c)'s text requires using the categorical approach to determine if a predicate offense in a pending prosecution qualifies as a crime of violence. *United States v. Davis*, 139 S. Ct. 2319, 2327-28 (2019); *see also Taylor*, 142 S. Ct. at 2020. This Court cannot avoid that precedent with a verdict form that lifts the veil of ignorance prescribed by the categorical approach. The § 924(c) counts therefore must be dismissed.

* * *

Lungaho's motion to dismiss, *Doc. 164*, is partly granted and partly denied. The Court dismisses counts three, eight, and twelve of the Superseding Indictment. The remainder of Lung'aho's motion is denied.

So Ordered.

D.P. Marshall Jr.

D.P. Marshall Jr.
United States District Judge

18 October 2022

United States Court of Appeals
For the Eighth Circuit

No. 23-3696

United States of America

Plaintiff - Appellee

v.

Mujera Benjamin Lung'aho

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Arkansas - Central

Submitted: January 17, 2025
Filed: July 18, 2025

Before GRASZ, STRAS, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

In 2020, Mujera Benjamin Lung'aho threw Molotov cocktails that damaged or destroyed three police cars. He was indicted for maliciously destroying, by means of fire, law enforcement vehicles possessed by local police departments receiving federal financial assistance, 18 U.S.C. § 844(f)(1). Lung'aho moved to dismiss the indictment, arguing that the statute was unconstitutional as applied to him. The

district court[1] held that the Property Clause did not apply because the police cars were not federal property and were not bought with federal financial assistance. But the court denied the motion because the prosecution was constitutional under the Spending Clause coupled with the Necessary and Proper Clause. We agree.

The parties stipulated to the material facts. The police cars belonged to three different state or municipal police departments (Arkansas State Police, Little Rock Police, and North Little Rock Police), and combined there was $86,099.37 of damage. The Arkansas State Police received approximately $10 million in federal funding between 2017 and 2020, and their annual budget was more than $123 million in 2020. The Little Rock Police Department received $280,392 between 2017 and 2020, an additional $786,845 in COVID money in 2020, and had an annual budget of $80 million. And the North Little Rock Police Department accepted $160,000 between 2017 and 2020, an additional $132,168 in COVID money, and had a budget of around $24 million in 2020. This works out to be around 2%, 1%, and 0.7% respectively of the department budgets. No federal money directly paid for the police cars.

We review the district court's denial of a motion to dismiss an indictment *de novo*. *United States v. Williams*, 951 F.3d 892, 897 (8th Cir. 2020). Section 844(f)(1) criminalizes "maliciously damag[ing] or destroy[ing], or attempt[ing] to damage or destroy, by means of fire or an explosive, any . . . vehicle . . . in whole or in part owned or possessed by . . . any institution or organization receiving Federal financial assistance." Lung'aho's conduct falls within the plain meaning of the statute, so the only question is whether it is constitutional as applied to him.

"Section 844(f) was promulgated pursuant to Congress's power under the Property Clause," *United States v. Hersom*, 588 F.3d 60, 62 (1st Cir. 2009) (citing H.R. Rep. No. 91-1549 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4046), but

[1]The Honorable D.P. Marshall Jr., United States District Judge for the Eastern District of Arkansas.

the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

Under the Spending Clause, Congress has authority "to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605 (2004). *Sabri* upheld a federal indictment for attempted bribery of a city official because the city received federal funds. *Id.* at 602–03. As the Court explained, the bribery statute "addresses the problem at the sources of bribes, by rational means, to safeguard the integrity of the state, local, and tribal recipients of federal dollars." *Id.* at 605. The same applies here: preventing the arson of state and local police cars owned by departments receiving federal funding is a rational way of safeguarding federal dollars. And it doesn't matter that the police cars were not purchased with federal funds. "Money is fungible," so the dollars spent on the burned cars need not be "traceabl[e]" to "specific federal payments." *Sabri*, 541 U.S. at 605–06.

Lung'aho's main argument on appeal is that *Sabri* doesn't control because the bribery statute had a "threshold amount" (bribes of $5,000 or more involving agencies receiving $10,000 or more of federal money, 18 U.S.C. § 666) to ensure a substantial federal interest. *Sabri*, 541 U.S. at 606. By contrast, the arson statute has no minimum dollar amount to trigger federal prosecution. To illustrate his concern, he argued below that that he *could* have been charged with violating § 844(f)(1) for torching a five-dollar police trash can, and that can't possibly be constitutional.

Garbage cans, like decorative plants and doormats, *post*, at 9, are not police cars. Those facts could lead to different results. But consider the facts in *this* case. Lung'aho "cannot prevail on [his] *as-applied* challenge without showing that the law

has in fact been unconstitutionally *applied* to [him]." *Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017) (cleaned up) (quoting *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014)). It is undisputed that Lung'aho caused over $86,000 in damage to the three police cars and that the departments each received more than $10,000—the thresholds that Lung'aho admits were enough in *Sabri*. *See* 541 U.S. at 606. All told, based on the facts of this case we do not think the federal interest is "miniscule," *post*, at 6, but instead "certainly enough," *Sabri*, 541 U.S. at 606.

Lung'aho also suggests that arson, unlike bribery, is not "sufficiently related" to Congress's spending power because the bribery statute directly implicates anti-corruption. *See United States v. Fitzgerald*, 514 F. Supp. 3d 721, 746 (D. Md. 2021). But "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise,'" *United States v. Comstock*, 560 U.S. 126, 133–34 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)), and criminalizing the arson of police cars from police departments receiving federal funding is a "rational means" of ensuring federal funds are used "in the manner Congress intended," *Sabri*, 541 U.S. at 605; *Sebelius*, 567 U.S. at 576.

Because money is "fungible" and property is not "inherently interchangeable," the dissent suggests that the Government must show "a connection between" the burned police cars and the federal assistance. *Post*, at 9. We don't think so. Even though the cars were not bought with federal money, their destruction necessarily depleted the resources of the three departments. And because money is fungible, there is interference with the value of disbursed federal dollars—whether the federal funds were "drained off" via bribe, used to replace cars burned up by arson, or used to backfill other funding diverted to replace the cars. *See Sabri*, 541 U.S. at 606. *But see Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013) (fungibility of money limited when funding conditions "require [an organization] to pledge allegiance to the Government's policy").

We reject the suggestion that we are improperly extending the reach of federal power because "arson is a paradigmatic common-law state crime," *Jones v. United States*, 529 U.S. 848, 858 (2000), and we do not risk "nullifying" *Jones*, *post*, at 7. Federal criminal jurisdiction may be extended to "traditional crimes of local concern." *See United States v. Hari*, 67 F.4th 903, 909 (8th Cir. 2023). And *Jones* invoked constitutional avoidance to interpret an ambiguous statute, *see* 529 U.S. at 857–58, but no one suggests that § 844(f)(1) is ambiguous—it clearly applies to Lung'aho's conduct. So we are left to apply the clear text of the statute and authoritative Supreme Court precedent.

But more to the point, *Sabri* rejected that it was "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." 541 U.S. 607–08 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)). Under the Spending Clause and the Necessary and Proper Clause, "Congress was within its prerogative to protect spending objects": the power to protect expenditures is "bound up with congressional authority to spend." *Id.* at 608. Because there is no reason to distinguish arson from bribery, and Lung'aho has not shown that criminalizing the arson of police cars from departments receiving federal funding "'has nothing to do with' the congressional spending power," *id.* (quoting *Lopez*, 514 U.S. at 561), *Sabri* controls.

The dissent finally argues that because Lung'aho did "not 'interfer[e] with the disbursement of federal funds,' Congress exceeds its power 'to ensure that [its appropriation] goes where it directs.'" *Post*, at 9 (quoting *Barnett v. Short*, 129 F.4th 534, 543 (8th Cir. 2025)). Religious Land Use and Institutionalized Persons Act, the law at issue in *Barnett*, "impose[s] conditions of federal funding on nonrecipients." 129 F.4th at 543. But unlike the law in *Sabri* or § 844(f)(1), RLUIPA does not "punish[] those who attempt[] to interfere with the disbursement of federal funds." *Id.* Simply put, RLUIPA is "too dissimilar." *Id.*

Our dissenting colleague warns: "*Sabri* need not be interpreted so broadly." *Post*, at 7. With respect, *Sabri is that broad*. 541 U.S. at 614 (Thomas, J., concurring

in judgment) ("[T]he Court's approach seems to greatly and improperly expand the reach of Congress' power under the Necessary and Proper Clause."). Based on the facts in this case and bound as we are by Supreme Court precedent, we are compelled to conclude that that § 844(f)(1) was constitutionally applied to Lung'aho.

The judgment of the district court is affirmed.

GRASZ, Circuit Judge, dissenting.

Fundamental to our federal system is the principle that the Constitution "withhold[s] from Congress a plenary police power." *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing U.S. Const., art. I, § 8). We have understood this principle for over two centuries. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821). But the majority's reasoning suggests Congress may simply purchase that police power through financial assistance — including miniscule assistance unrelated to the affected property. Under the doctrine of enumerated powers, even Congress's power under the Spending and Necessary and Proper Clauses is restrained. Thus, while Lung'aho's conduct was subject to severe penalties under state laws,[2] I would conclude application of § 844(f)(1) exceeded Congress's power under these facts, and therefore reverse.

"[A]rson is a paradigmatic common-law state crime." *Jones v. United States*, 529 U.S. 848, 858 (2000). As a result, important questions related to the balance of state and federal power enshrined in our Constitution arise when federal arson statutes turn "traditionally local criminal conduct" into "a matter for federal enforcement." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). In *Jones*, the Supreme Court addressed the statutory scope of 18 U.S.C. § 844(i), a sister provision to the § 844(f)(1) offense under which Lung'aho was charged. *See id.* at 852. Section 844(i) criminalizes malicious destruction by fire of any property used in interstate or foreign commerce or any activity affecting interstate or foreign

[2]*See* Ark. Code §§ 5-4-401(a), 5-38-301(a)(1)(A), 5-38-301(b).

commerce. 18 U.S.C. § 844(i). To avoid the constitutional concerns if § 844(i) were read to apply to "[p]ractically every building in our cities, towns, and rural areas," the Supreme Court held that "the provision covers only property currently used in commerce or in an activity affecting commerce." *Jones*, 529 U.S. at 857, 859. It was not enough that the property was constructed with supplies that had moved in interstate commerce or was served by some entity with a trace to interstate commerce. *Id.* at 857. *Jones* cautions that Congress cannot turn every arson into a federal crime.

Like § 844(i), § 844(f)(1) includes similar expansive language capable of upending the federal-state balance. Section 844(f)(1) covers arson of "any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, . . . any institution or organization receiving Federal financial assistance." 18 U.S.C. § 844(f)(1). Countless institutions and organizations receive federal financial assistance today. Can Congress declare that burning property belonging to one of those organizations makes one a federal arsonist subject to five to twenty years of imprisonment, regardless of whether that property has any connection to federal assistance?

Jones responds no, but under the majority's approach, the answer is yes. *Jones* cautioned that the federal-state balance does not allow Congress to use the Commerce Clause "to make virtually every arson in the country a federal offense," so Congress could only protect property that was itself tied to commerce, the basis for the exercise of federal power. *Jones*, 529 U.S. at 859. Nevertheless, *Sabri v. United States*, 541 U.S. 600 (2004), the majority claims, allows Congress to safeguard federal spending by criminalizing any damage or destruction to any property of the funding recipient, regardless of the relationship between the exercise of federal power and the property at issue. *Ante*, at 3–5. This interpretation risks nullifying *Jones*, and *Sabri* need not be interpreted so broadly, especially in this case of first impression. *Sabri* dealt with a bribery statute that prohibited anyone from corruptly giving anything of value to someone with the intent to influence an agent of an organization in connection with any business exceeding $5,000 if that

organization receives over $10,000 in federal benefits in a year.[3] *See Sabri*, 541 U.S. at 603 (citing 18 U.S.C. § 666(a)(2), (b)). The defendant in *Sabri* brought a *facial* challenge, arguing that the statute was wholly unconstitutional because it did not "require proof of any connection between a bribe or kickback and some federal money." *Id.* at 604. The Supreme Court concluded the Spending and Necessary and Proper Clauses authorized Congress to ensure "taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." *Id.* at 605. The Supreme Court did not require the bribe to itself involve the funds from the federal benefit because "[m]oney is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value," so corruption could still "affect the federal interest" even if not directly traceable to those funds. *Id.* at 606. In other words, Congress can, consistent with the Constitution, root out financial corruption in an organization receiving federal benefits to ensure that the benefits are not squandered because corruption in one area signals corruption that undermines the federal benefits program.

Arson does not share these characteristics. Bribery of a funding recipient on one project indicates the recipient or its agents are susceptible to bribes involving federal money or are otherwise likely to waste it. But Lung'aho's destruction of

[3]This "benefits" element of the bribery statute requires more than mere "receipt of federal funds" or "participati[on] in a federal assistance program." *See Fischer v. United States*, 529 U.S. 667, 681 (2000). As the Supreme Court cautioned, if "benefits" included all fraud or bribery of any entity that receives some federal funds, it "would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Id.* To dispel this concern, the "benefits" element includes examining "the [federal assistance] program's structure, operation, and purpose" and "the conditions under which the organization receives the federal payments" to see if the alleged fraud or its effect on the recipient "threaten[s] the program's integrity." *Id.* The Supreme Court in *Sabri* did not discuss this aspect of the offense, likely because the defendant brought only a facial challenge, so the particularities of the benefits program received by the bribed organization were irrelevant to his arguments. *See Sabri*, 541 U.S. at 608–09.

police vehicles says little about the law enforcement entities' stewardship of federal dollars. It does not indicate the recipients are wasting taxpayer dollars on boondoggles or overpaid contractors. Nor does it show the recipients are likely to fail to protect the items secured by federal funds. Making arson a federal offense as to any property belonging to a recipient of financial assistance does not protect federal dollars when those dollars do not pay for the property in question and the government fails to show that the assistance could be used to purchase similar property. Money is fungible, but property is not inherently interchangeable. After all, if federal assistance is given to an organization so it can purchase equipment to improve its technology, burning its decorative shrubs or doormat does not undermine that expenditure — the organization's improved technology is unaffected. The same is true of Lung'aho's conduct in the absence of a connection between that property and the federal assistance. In these circumstances where the defendant's actions are not "interfer[ing] with the disbursement of federal funds," Congress exceeds its power "to ensure that [its appropriation] goes where it directs." *See Barnett v. Short*, 129 F.4th 534, 543 (8th Cir. 2025). It instead is trying to "impose liability on anybody it wants through Spending Clause legislation without that person's consent." *See id.* "*Sabri* simply doesn't go that far." *See id.*

If the majority's reading of *Sabri* is correct, what is outside Congress's power to police in today's age of massive federal assistance? Here, we deal with entities whose federal assistance is a negligible part of their overall budget, and not a cent of that assistance went to purchase the damaged property.[4] Yet the majority concludes preventing arson of these organizations' property is a "rational way of safeguarding federal dollars" simply because those entities receive federal money. *Ante*, at 3. If this conduct falls within Congress's power, it seems there is little or no property destruction that Congress could not federalize. Arson itself cannot be the limitation because arson is a "paradigmatic" state matter. *See Jones*, 529 U.S. at

[4]Nor is there evidence that the money was used to purchase other police vehicles or similar property. Indeed, the government failed to establish specifics on the actual purpose of the financial assistance received by the victim entities.

858. And, as another circuit has recognized, "a wide variety of organizations, both private and non-profit," as well as the state and local government entities here, "receive some form of federal financial assistance" to obtain property. *United States v. Hersom*, 588 F.3d 60, 67 (1st Cir. 2009). As a result, and contrary to *Jones*, "[a]pplying [§ 844(f)] to cover all property owned by such entities would transform a broad swathe of 'traditionally local criminal conduct' into a 'matter for federal enforcement.'" *See id.* (quoting *Jones*, 529 U.S. at 858).

The Spending and Necessary and Proper Clauses do not uniquely evade these federalism concerns, particularly when they are not invoked to create a contractual obligation on the recipient. *See Barnett*, 129 F.4th at 543; *Fischer*, 529 U.S. at 681 (discussing the potential for federalism concerns if the federal bribery statute were interpreted such that "federal funds disbursed under an assistance program will result in coverage of all recipient fraud"). And contrary to the majority's suggestion, *ante*, at 5, *Sabri* did not say otherwise because it rejected the charge of federal overreach based on characteristics of bribery inapplicable to arson. The bribery statute facially passed muster because Congress can "protect spending objects from the menace of local administrators on the take." *Sabri*, 541 U.S. at 608. Congress's ability to spend required it to be able "to keep a watchful eye on expenditures and on the reliability of those who use public money," which allowed it to impose liability even when the specific federal funds were not used because bribery in one area suggests wastefulness in all aspects of spending, including the ones given by Congress. *Id.* at 606, 608. Thus, the federal interest in the benefit recipient's treatment of its expenditures extends broadly. But for property, the federal interest applies only to the property for which Congress expects its funds to be used. If the federal funds were not used to purchase that property (or replacement property), Congress is not "protecting spending objects." *Cf. id.* at 608. It instead exceeds its enumerated authority.

Thus, I would not read *Sabri* to authorize this federalization of almost all arson. Instead, I would take the Supreme Court at its word when it has consistently declared that Congress lacks a general police power. *E.g.*, *Lopez*, 514 U.S. at 566;

Bond v. United States, 572 U.S. 844, 854 (2014); *Cohens*, 19 U.S. (6 Wheat.) at 428. Such instruction means little if we accept the idea that Congress can simply purchase police power by giving a few dollars to entities that later become arson victims. For these reasons, I disagree with the majority's construction of *Sabri* and would conclude that § 844(f)(1) cannot constitutionally apply where the property destroyed is not tied to the federal financial assistance. Lung'aho's conduct was undoubtedly wrong. But in our system of enumerated federal powers, it was a local crime that belonged to Arkansas to punish, not the federal government. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3696

United States of America

Appellee

v.

Mujera Benjamin Lung'aho

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:20-cr-00288-DPM-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 14, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

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