No. 01-5632

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

GERALD RAYBORN,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REQUESTING ORAL ARGUMENT

This appeal presents an important question regarding the meaning of the interstate commerce clause of the federal arson statute, 18 U.S.C. 844(i), and the application of that statute to the arson of a church. The Court's consideration of that question will be aided by oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal from an order dismissing one count of an indictment for violation of a federal criminal statute, 18 U.S.C. 844(i). The district court had jurisdiction under 18 U.S.C. 3231. The district court order dismissing the 844(i) count was entered on August 25, 2000 (R. 86, Order Granting Defendant's Motion

To Reconsider And Dismissing The Charge Of Arson; Apx. at) .[1] The district court's order denying the United States' motion for reconsideration was entered on April 17, 2001 (R. 129, Order Denying Plaintiff's Motion For Reconsideration; Apx. at) . The United States filed a notice of appeal on May 11, 2001 (R. 133; Notice of Appeal; Apx. at). This Court has appellate jurisdiction under 28 U.S.C. 3731.

STATEMENT OF THE ISSUE

Whether the church building burned by the defendant was used in an activity affecting interstate commerce.

STATEMENT OF THE CASE

On December 16, 1999, defendant Gerald Rayborn was indicted by a federal grand jury in connection with the arson of the New Mount Sinai Missionary Baptist Church (NMSMBC) in Memphis, Tennessee (R. 1, Indictment; Apx. at). Count 1 of the indictment charged the defendant with violation of 18 U.S.C. 844(i).[2] Counts 2 and 3 charged violations of 18 U.S.C. 1341 (mail fraud). The indictment alleged that Rayborn had set fire to the church building as part of a scheme to defraud the insurance company that held the casualty policy on the church building

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[1] "R. __" refers to documents in the record, by docket number. "Apx. at __" refers to pages in the Joint Appendix.

[2] Section 844(i) provides criminal penalties for "[w]hoever 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[.]"

(R. 1, Indictment at 2-4; Apx. at). Only the Section 844(i) charge is at issue in this appeal.

Defendant filed a motion to dismiss the indictment for failure to allege a crime (R. 34, Motion To Dismiss Indictment For Failure To Allege A Crime). He argued (1) that the indictment was defective because the church building was not used in interstate commerce or in an activity affecting interstate commerce; and (2) that Congress had exceeded its authority in enacting Section 844(i) (R. 35, Memorandum Of Points And Authorities In Support Of Motion To Dismiss Indictment). Upon the recommendation of the magistrate judge, the district court initially denied the motion (R. 59, Report And Recommendation Concerning Defendant's Motion To Dismiss Indictment; Apx. at ; R. 65, Order Adopting Magistrate Judge's Report And Recommendation, Order Denying Motion To Dismiss; Apx. at). The court ruled that the indictment was sufficient because it alleged that the church was used in interstate commerce or in an activity affecting interstate commerce (R. 59, Report And Recommendation Concerning Defendant's Motion To Dismiss Indictment at 3; Apx. at). Whether the evidence was sufficient to establish the interstate commerce element of the offense, the court held, was a matter to be determined after the presentation of the government's case at trial (R. 59, Report And Recommendation Concerning Defendant's Motion To Dismiss Indictment at 3-4; Apx. at). The district court also rejected the contention that Section 844(i) was unconstitutional, relying upon this Court's holding that "Congress did not exceed its authority under the Commerce Clause when it enacted 18 U.S.C. § 844(i)." (R. 59, Report And Recommendation

Concerning Defendant's Motion To Dismiss Indictment at 5-6; Apx. at , citing *United States* v. *Sherlin*, 67 F.3d 1208, 1213-1214 (6th Cir. 1995). Subsequently, upon reconsideration, the district court dismissed the Section 844(i) count (R. 86, Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson; Apx. at). In light of the intervening decisions in *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Jones* v. *United States*, 529 U.S. 848 (2000), the district court concluded that:

> [T]he law appears to be that a federal statute regulating non-economic criminal activity will be upheld if the prosecution can show one of the following: 1) the regulated violence is directed at an instrumentality, channel, or good involved in interstate commerce or 2) the regulated violence has a direct and substantial effect on interstate commerce and the property in question was used in interstate commerce or used in an activity that substantially affects interstate commerce. Accordingly it would appear that *Morrison* and *Jones* have the effect of overruling previous decisions of the Sixth Circuit which have applied the aggregate test for determining if there is a substantial effect on interstate commerce. *See, e.g., United States v. Latouf*, 132 F.3d 320, 327 (6th Cir. 1997) *cert. denied*, 523 U.S. 1101 (1998). What must be present is a substantial effect on interstate commerce and that substantial effect must be a direct result of the individual act and not the result of an aggregation of *de minimis* effects.

(R. 86, Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson at 4; Apx. at , footnote omitted). Applying this standard, the district court found that the arson in this case did not have a substantial effect on interstate commerce, because the church's activities were purely local (R. 86, Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson at 5-6; Apx. at). Next, it found that the church was not used in interstate commerce or an activity affecting interstate commerce; the church was

used for local worship, and any effect its activities might have on interstate commerce was *de minimus* (R. 86, Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson at 6-7; Apx. at).[3]

The United States then moved for reconsideration of the court's order and for an evidentiary hearing to permit it to introduce evidence that would establish the requisite connection to interstate commerce (R. 95, Plaintiff's Motion For Reconsideration And Request For An Evidentiary Hearing). With its motion, the United States submitted two affidavits summarizing this evidence (R. 95, Affidavits of Lisa Foster and Paul Kwiatkowski; Apx. at). The court granted the motion for an evidentiary hearing (R. 110, Order Granting An Evidentiary Hearing). At the hearing, on February 7, 2001, the parties submitted an extensive stipulation of facts (R. 116, Stipulation Of Facts; Apx. at).

On April 17, 2001, the district court denied the United States' motion for reconsideration, concluding that it lacked subject matter jurisdiction over the Section 844(i) count (R. 129, Order Denying Plaintiff's Motion For Reconsideration; Apx. at). The district court concluded that the evidence set forth in the stipulation was insufficient to establish that the church was a building used in an activity affecting interstate commerce (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 7-11; Apx. at). Relying on *Jones* v. *United*

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[3] The court also rejected the United States' contention that the motion should not be decided before trial, because it involved factual issues, concluding that the requisite interstate connection was "a question of jurisdiction in that the very power of the court to hear this matter is questioned" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 8; Apx. at).

States, 529 U.S. 848 (2000), it applied a "two-prong 'function test,'" asking, first, if the building was actively used in an activity affecting commerce, and, second, if the building's function substantially affected commerce (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 3-4; Apx. at). In analyzing the second prong, the district court distinguished between commercial and non-commercial activities. "Congress's commerce power," the court held, "is fully extended when it reaches *commercial* activity that, in the *aggregate*, substantially affects interstate commerce" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 5; Apx. at , citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)). Thus, the district court reasoned, Congress has the authority to regulate non-commercial activity only where that activity, "by *itself*," substantially affects commerce (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 5; Apx. at). The effects on interstate commerce may be aggregated, the district court concluded, only where the activity regulated is commercial (*ibid.*).

Applying these principles to this case, the district court concluded that many of the church's activities -- purchase of vehicles, construction of new facilities, insurance and mortgage coverage, and employment of individuals to perform maintenance -- were passive activities, "hav[ing] no bearing on SMBC's actual function" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 8; Apx. at). The court acknowledged that the church engaged in other, more "active" endeavors: worship services, gospel programs, picnics, breakfast buffets, and radio broadcasts (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 8-9; Apx. at). But it concluded that, in large part because of

their religious nature, these activities were non-commercial (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 9; Apx. at):

> SMBC is a church. Its main function is to facilitate worship, and is therefore used for non-commercial activities. Unlike a manufacturer, or a retailer, SMBC is not engaged in the production or the selling of goods. The Supreme Court has held that a church *camp* provides commercial services because it provided recreational services. *Camps [New found/Owatonna, Inc.* v. *Town of Harrison*], 520 U.S. [564,] 572 [(1997)]. In the present case, however, SMBC's activities are all integral to worshiping. Tithing is necessary to sustaining worship services and rooted in the Christian doctrine. SMBC's radio programs do not sell goods or services, but instead broadcast its sermons. Its gospel programs, although in one sense entertainment, are also worship-centered and part of the ministry of the church. Therefore, the Court finds that SMBC's buildings were used for non-commercial activities.

The district court distinguished this church's activities from those of the Mormon church in *United States* v. *Grassie*, 237 F.3d 1199 (10th Cir.), cert. denied, 121 S. Ct. 2614 (2001). First, the court noted, the parties in *Grassie* had stipulated that the church had been "engaging in activities affecting interstate commerce" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 8; Apx. at). Second, the church in *Grassie* "was part and parcel of a unified, national LDS organization. Though LDS engaged in mostly non-commercial activities, as a unit, LDS operated a multi-million dollar organization that substantially affected interstate activity" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 10; Apx. at).

The district court next concluded that the economic consequences of the New Mount Sinai Missionary Baptist Church's activities were too trivial to have a substantial effect on interstate commerce by themselves. Thus, "[t]o subject SMBC to federal regulation, in such circumstances, would disturb the established

and constitutionally mandated balance between national and local spheres of influence" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 11; Apx. at).

STATEMENT OF FACTS

Defendant Gerald Rayborn is the pastor of the New Mount Sinai Missionary Baptist Church (NMSMBC), in Memphis, Tennessee (R. 116, Stipulation of Facts at 1; Apx. at). On August 25, 1998, the NMSMBC building was destroyed by fire (*ibid.*).

NMSMBC had 6,000 members from Tennessee, Arkansas, and Mississippi, and drew between 600 and 1,000 people to its services each Sunday (R. 116, Stipulation of Facts at 4-5; Apx. at). The church building included a sanctuary, choir loft, kitchen, secretary's office, pastor's office, tape room (where tapes of NMSMBC radio programs were stored), pastoral facility, and vehicle garages (R. 116, Stipulation of Facts at 2; Apx. at). The congregation financed construction of the building with a mortgage (*ibid.*). Later additions to the building were paid for through a building fund derived from the contributions of NMSMBC's members (*ibid.*). The church building was insured for $700,000 (*ibid.*).

NMSMBC was a tax-exempt, non-profit organization governed by a Board of Trustees and a Finance Committee (R. 116, Stipulation of Facts at 3; Apx. at). The Board of Trustees, which was selected by Rayborn and confirmed by the NMSMBC body, had the power to vote on church matters, to remove the pastor, and to spend NMSMBC's funds (*ibid.*). The Finance Committee, appointed by Rayborn, was responsible for collecting and counting the money contributed at

services each Sunday (R. 116, Stipulation of Facts at 5; Apx. at). The Committee also had the authority to spend NMSMBC's funds, but generally did so only with Rayborn's authorization (*ibid.*).

NMSMBC had two regular employees: Rayborn and a part-time financial secretary (R. 116, Stipulation of Facts at 5-6; Apx. at). The church also had "quasi-employees" who cleaned and performed maintenance on the church building for compensation (R. 116, Stipulation of Facts at 8; Apx. at). NMSMBC paid Rayborn $500 per week in cash (*ibid.*). In addition, the church paid for Rayborn's utilities, furniture, lawn service, and automobile insurance, and provided him with use of church-owned vehicles (R. 116, Stipulation of Facts at 8, 11; Apx. at). Rayborn had power of attorney to make unilateral decisions and to spend NMSMBC's funds without restriction (R. 116, Stipulation of Facts at 3-4, 9, 12; Apx. at). He did not maintain a personal checking account (R. 116, Stipulation of Facts at 10; Apx. at). Instead, he paid his personal expenses from the NMSMBC's bank account, including payment of credit cards issued in his name, clothing, construction and repairs on his personal property, and the purchase of two Chevrolet Corvettes (R. 116, Stipulation of Facts at 4, 8-12; Apx. at). Rayborn also maintained as much as $40,000 in church funds in a briefcase (R. 116, Stipulation of Facts at 11-12; Apx. at).

NMSMBC collected an average of $9,000 and $10,000 from its members, including residents of Mississippi and Arkansas as well as Tennessee, at its Sunday

services every week (R. 116, Stipulation of Facts at 5; Apx. at).[4] In addition to payments to and on behalf of its employees, NMSMBC used the funds it collected to pay the mortgage and other expenses for the church building, including construction of several additions to the building over the years (R. 116, Stipulation of Facts at 2, 4, 8; Apx. at); to pay for advertising and regular radio broadcasts of its services (R. 116, Stipulation of Facts at 6-7; Apx. at); to purchase goods and services, including food, utilities and office equipment for its activities; and to aid its needy members (R. 116, Stipulation of Facts at 6-9; Apx. at).

To increase its membership and promote its mission, NMSMBC paid from $1200 to $1500 per month to advertise and to broadcast its services on four radio stations, with listening audiences in three States (R. 116, Stipulation of Facts at 6-7; Apx. at). One of these stations was located out-of-state in Mississippi (*ibid.*) . Through these broadcasts, the church invited the general public to its services and other activities. During one broadcast, for example, NMSMBC advertised a gospel concert to be held at the church, for which it charged $10 to $12 admission, and which featured singers from outside Tennessee (*ibid.*; see Kwiatkoski Affidavit at 3; Apx. at). NMSMBC also sponsored church picnics and invited the public to free buffet breakfasts held at the church each Sunday, and expended thousands of dollars each year purchasing food for these and other events (R. 116, Stipulation of

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[4] Substantial deposits to the church's bank account came from several States other than Tennessee, including Mississippi, Illinois, Massachusetts, California, Arkansas, and Georgia (R. 95, Exhibit 1 to Foster Affidavit; Apx. at).

Facts at 7-8; Apx. at). The church also purchased food and flowers for funerals and other activities (R. 116, Stipulation of Facts at 8; Apx. at).

SUMMARY OF ARGUMENT

The district court erred in dismissing the Section 844(i) count of the indictment. The New Mount Sinai Missionary Baptist Church was a building used in an activity affecting interstate commerce. The district court's conclusion that the church's activities could not be considered commercial because they were undertaken for religious reasons is without basis, and is contrary to the Supreme Court's decision in *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 573 (1997), which adopted a functional analysis to determine that a nonprofit religious camp was "unquestionably engaged in commerce" because of the character of its activities, not its purpose. It is also contrary to decisions of the Tenth and Eleventh Circuits recognizing that churches' activities may be both religious and commercial at the same time. See *United States* v. *Grassie*, 237 F.3d 1199, 1210 (10th Cir.) cert. denied, 121 S. Ct. 2614 (2001); and *United States* v. *Odom*, 252 F.3d 1289, 1294 (11th Cir. 2001), pet. for panel reh'g pending, No. 98-6241.

The evidence produced by the United States in response to the motion to dismiss was sufficient to permit a rational jury to find that the New Mount Sinai Missionary Baptist Church was actively employed in commercial activities with an effect on interstate commerce. The church, which was governed by a Board of Trustees and a Finance Committee, took in substantial sums of money on a regular basis from members residing in at least three States. The church used those funds

to broadcast its services and advertise its activities on four radio stations heard over a three-State area, to purchase goods and services used in its public activities, and to compensate its employees. The church sponsored many public events, including gospel concerts for which admission was charged and which featured singers from out-of-state.

The application of Section 844(i) to this case did not require a constitutionally doubtful interpretation of the statute. The standard set forth in *Jones* recognizes that Congress's Commerce power may be used to protect as well as to regulate economic activities. Thus, because the church building was used in economic activities that, in the aggregate, affect interstate commerce, the district court erred in dismissing this count of the indictment.

ARGUMENT

THE NEW MOUNT SINAI MISSIONARY BAPTIST CHURCH WAS A BUILDING USED IN AN ACTIVITY AFFECTING INTERSTATE COMMERCE

The sole question in this appeal is whether the evidence produced by the United States in response to defendant's motion to dismiss was sufficient to establish that the New Mount Sinai Missionary Baptist Church was a building used in an activity affecting interstate commerce.[5] That question is controlled by the

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[5] The district court initially denied defendant's motion to dismiss on the ground that the sufficiency of the evidence to establish the interstate commerce element should be addressed after presentation of the government's evidence at trial (R. 59, Report And Recommendation Concerning Defendant's Motion To Dismiss Indictment at 3-4; Apx. at). The United States has now placed the factual basis for the element on the record. For that reason, and because this question is almost certain to arise again on remand in a motion under Rule 29, Fed. R. Crim. P., it is

(continued...)

standard set forth in *Jones* v. *United States*, 529 U.S. 848 (2000). *Jones* held that, in determining whether the interstate commerce element of Section 844(i) has been met, "the proper inquiry * * * is into the function of the building itself, and then a determination of whether that function affects interstate commerce." 529 U.S. at 854 (internal quotation marks and citations omitted). The requirement that the building be "used" in an activity affecting interstate commerce, the Court held in *Jones*, "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855. For purposes of this analysis, a building's function is not limited to its primary use. Rather, *Jones* requires an examination of the ways in which a building is actually used in identifying its function. The Court implicitly recognized that a building may have more than one use, noting twice that the private home at issue in *Jones* was used only as a residence and not also as a home office or in some other commercial enterprise. See *id*. at 856. The *Jones* Court explained that the legislation enacted as Section 844(i) originally required that the building be used "for business purposes," but that this qualifier was deleted in response to members who believed the statute should protect "schools, police stations, and places of worship." 529 U.S. at 853-854 n.5, citing *Russell* v. *United States*, 471 U.S. 858, 860-861 & n.5 (1985).

This Court should reverse the district court's order if the evidence submitted was sufficient to permit a rational jury to find that the church building was used in

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[5](...continued)
appropriate for this Court to resolve it now.

an activity affecting interstate commerce. Cf., *Jackson* v. *Virginia*, 443 U.S. 307, 318-319 (1979).

A. The District Court Erred In Ruling That Religious Activities Are Inherently Non-Commercial

The district court misapplied the *Jones* standard in this case. The court acknowledged that the building was "actively" used for certain activities, *i.e.*, "its radio broadcasts, its picnics, and its gospel programs" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 9; Apx. at). But it found these activities to be non-commercial in nature because the church's "main function is to facilitate worship," and its activities "are all integral to worshiping" (*ibid.*). Because the church did not actively engage in commercial activities, the district court concluded, it could be protected by Section 844(i) only if "its operations were extensive enough to substantially impact interstate commerce" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 10; Apx. at). The court found that the evidence did not demonstrate such a substantial effect: "The level of SMBC's operation, and its subsequent impact on interstate commerce, is just too de minimus to substantially impact interstate commerce" (*ibid.*).

The district court erred when it held that the New Mount Sinai Missionary Baptist Church's activities could not be considered commercial because they were religious in nature. Under the district court's analysis, only activities that bear on the church's "actual function," *i.e.*, its religious function, qualify as "active" uses of the building (see R.129, Order Denying Plaintiff's Motion For Reconsideration at 8; Apx. at). Yet such activities, under the district court's reasoning, are non-

commercial precisely because they are religious (R.129, Order Denying Plaintiff's Motion For Reconsideration at 9; Apx. at). This analysis would exclude almost all houses of worship from the statute's protection. Nothing in either the terms of the statute or the decision in *Jones* warrants such a limitation, particularly in light of the Court's citation of Congressional intent to *include* places of worship within its protections. See 529 U.S. at 853-854 n.5.

As *Jones* recognized, Section 844(i) "excludes no particular type of building." 529 U.S. at 855. By its terms, the statute applies to "*any* building" used in *"any* activity affecting interstate or foreign commerce." 18 U.S.C. 844(i) (emphasis added). Nor is a building's "use" limited to its "main function," as the district court here apparently assumed (see R. 129, Order Denying Plaintiff's Motion For Reconsideration at 9; Apx. at). *Jones* requires an examination of the ways in which a building is actually used in identifying its function. Indeed, the Court acknowledged that a building may have more than one use, noting twice that the private home at issue in *Jones* was used only as a residence and not also as a home office or in some other commercial enterprise. See 529 U.S. at 856.

The paradigmatic commercial entity is a for-profit business that offers a good or service for the purpose of profiting its owners. But an entity that engages in commercial activities is not so narrowly defined. In *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 567 (1997), the Supreme Court addressed whether a non-profit summer camp in Maine was an entity engaged in interstate commerce. The Court found that the camp offered its facilities and services to residents and non-residents of the state, that it purchased

goods and services on the competitive market, that it raised revenue from tuition and other in-state and out of state sources, and that those characteristics made it an entity engaged in interstate commerce. 520 U.S. at 572-574, 585-586. The Court rejected the notion that only an entity organized to make a profit could be considered commercial. *Id.* at 583-589. Thus, it employed a functional test, not one based on the purposes for which the services were offered.

Similarly, churches may be engaged in commercial activities when they offer facilities and services, purchase goods and services of others on the open market in order to provide facilities and services, and raise revenues to support their facilities and services. While they are not businesses in the conventional sense, it is the commercial nature of some of their activities that brings them within the scope of Section 844(i), when the church building is used in those activities. That does not detract from the fact that they are organized for religious reasons or that their activities are designed to serve religious purposes.

The district court was wrong when it concluded that the *Camps* holding was based upon the camp's provision of "recreational services," as distinct from activities "integral to worshiping" (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 9; Apx. at). Significantly, *Camps* concerned a non-profit camp operated "for the benefit of children of the Christian Science faith. The regimen at the camp include[d] supervised prayer, meditation, and church services designed to help the children grow spiritually and physically in accordance with the tenets of

their religion." *Id.* at 567. The *Camps* opinion recognized that the "product" in that case included "the special services" it provided to its campers. See 520 U.S. at 576-577. Although fully aware that those services were religious in nature (see *id.* at 567), the Court did not hesitate to conclude that the camp was engaged in commerce.

As the Tenth Circuit has held, the holding in *Camps* is fully applicable to "religious buildings actively used as the site and dynamic for a full range of activities." *United States* v. *Grassie*, 237 F.3d 1199, 1210 (10th Cir.) cert. denied, 121 S. Ct. 2614 (2001). Non-profit entities, the Court noted in *Camps*, "are major participants in interstate markets," and "the interstate commercial activities of nonprofit entities as a class are unquestionably significant." 520 U.S. at 586, citing *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); see *United States* v. *Sherlin*, 67 F.3d 1208, 1213 (6th Cir. 1995) (college providing educational services to students is engaged in activity affecting interstate commerce), cert. denied, 516 U.S. 1082 (1996). *Grassie* found that religious entities, as a component of the non-profit sector, also have an "enormous impact * * * on commerce and channels of commerce in this country, with houses of worship filling a central economic and animating role." *Id.* at 1210, citing *Religious Liberty Proctection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 2d Sess. 57-62 (1998) (prepared statement of

Marc D. Stern).[6] The Eleventh Circuit reached the same conclusion in *United States* v. *Odom*, 252 F.3d 1289, 1294 (11th Cir. 2001) (petition for panel rehearing pending, No. 98-6241):

> Churches are not commonly considered a business enterprise; nonetheless, churches can and do engage in commerce. The "business" or "commerce" of a church involves the solicitation and receipt of donations, and the provision of spiritual, social, community, educational (religious or non-religious) and other charitable services.

In *United States* v. *Terry*, 257 F.3d 366, 369 (4th Cir. 2001), the Fourth Circuit rejected an argument similar to the district court's rationale here, holding that a church building that housed a day care center was within the protections of Section 844(i). The defendants in *Terry* argued that "the daycare center was not interstate commerce because the center was nothing more than a missionary outreach of the church." The court of appeals found this distinction illusory (*ibid.*):

> [I]t does not matter whether religion was one of the reasons or even the primary reason why the daycare center was located inside the church building. An activity can have both a religious aspect and an economic one. We cannot close our eyes to the commercial nature of an activity solely because non-commercial considerations also underlie it. A contrary rule would altogether prevent Congress from protecting places of worship from criminal misconduct, even when they served a plainly interstate commercial function.

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[6] The cited Congressional testimony estimated that between $44 billion and $65.76 billion per year is donated to houses of worship; that revenues for religious institutions in 1992-1993 were $58.3 million, and current operating expenses $41 billion. The testimony also documented the extensive involvement of religious institutions in the provision of educational, medical, and social services, production of religious books and other articles, and religious broadcasting.

Congress also recognized that churches engage in activities that are commercial in nature when it enacted the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996). The legislative history of that statute indicates that churches often provide social services, such as day care and aid to the homeless. See, *e.g.*, 142 Cong. Rec. S7909 (daily ed. July 16, 1996) (Sen. Faircloth); 142 Cong. Rec. S6522 (daily ed. June 19, 1996) (Sen. Kennedy). Churches collect and contribute funds for charitable, educational, and religious activities in other states; they purchase goods and services in interstate commerce; and they provide salaries and benefits to their employees, sometimes advertising and recruiting for positions nationwide. See *Church Burnings: Hearings on the Federal Response to Recent Incidents of Church Burnings in Predominantly Black Churches Across the South Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. 37 (1996) (appendix to the prepared statement of James E. Johnson and Deval L. Patrick).

Thus, while it is true that most church buildings are used primarily for religious purposes, that does not mean that some of their functions are not also commercial, thus bringing them within the protections of Section 844(i).

B. The New Mount Sinai Missionary Baptist Church Was Actively Used For Commercial Purposes With An Effect On Interstate Commerce

The New Mount Sinai Missionary Baptist Church building was actively used for a variety of functions. In addition to the sanctuary used for religious services,

the building housed offices for the pastor and the church's secretary, who were paid by the organization for their services; it was used for the collection and accounting of substantial sums of money on a weekly basis; it was the site of gospel concerts open to the public and for which admission was charged, and of free events, such as breakfast buffets and picnics, to which the public was invited; and it was the site from which church services were broadcast and in which tapes of the broadcasts were stored. The church differed from the private home in *Jones* in significant ways. Unlike the residents of a private home, the church congregation was a tax-exempt non-profit organization, with a Board of Trustees, a Finance Committee, and a full-time and a part-time employee to carry out its functions. It collected large sums of money -- nearly half a million dollars per year, and used that money to purchase goods and services to provide a variety of services to its parishioners and to the public, including weekly breakfast buffets, church picnics, and aid to needy members and to other churches, as well as religious services. NMSMBC advertised its activities and broadcast its services on commercial radio stations. It held gospel concerts, which were advertised on the radio, and to which it charged admission. Even if they were not for-profit ventures, these activities were commercial in nature in that they involved the exchange of money for services. In this sense, the church was similar to other non-residential properties, such as museums, that are supported by a combination of membership fees and contributions and provide services both to contributing members and to

transient non-members. To provide services, these enterprises purchase materials not for personal consumption, but to provide services to their members and to the public-at-large. See *Odom*, 252 F.3d at 1294; *Camps*, 520 U.S. at 576-577 (religious camp's "product" is the "special services" it provides); *id.* at 585-586 (non-profit entities "purchase goods and services in competitive markets, offer their facilities to a variety of patrons, and derive revenues from a variety of sources, some of which are local and some out of State"). The function of the church building was to provide a site for these activities. It was actively used for commercial purposes.

The church building's commercial functions affected interstate commerce in several ways. Because of its location, and in response to its interstate radio broadcasts, NMSMBC drew members from Tennessee, Arkansas, and Mississippi. It received regular financial support from residents of all three States, as well as other States. It broadcast its services and advertised its activities on four radio stations (including one station located out-of-state), inviting the public from the three-State area to participate in functions at the church building. See *Camps*, 520 U.S. at 573 (summer camp advertised for campers in out-of-state periodicals). It purchased goods and services in interstate commerce to carry out its activities.

Unlike the church in *Odom*, which the Eleventh Circuit concluded was outside the protections of Section 844(i), NMSMBC's interstate connections were direct, regular, and substantial. In *Odom*, the evidence of interstate commerce

consisted of donations from two out-of-state donors, a "handful" of Bibles and prayer books purchased from out-of-state, and indirect contributions to a national church organization. 252 F.3d at 1296-1297. In this case, in contrast, the New Mount Sinai Missionary Baptist Church had numerous, regular out-of-state members and financial contributors; it advertised its activities and broadcast its services on interstate radio stations weekly and spent between $1200 to $1500 per month to do so; it spent thousands of dollars each year on food and other goods for its open-to-the-public activities; and, it sponsored and charged admission for a gospel concert featuring singers from out-of-state.

Nor is this case like *United States* v. *Johnson*, 194 F.3d 657 (5th Cir. 1999), petition for cert. granted, vacated, and remanded for reconsideration in light of *Jones*, 530 U.S. 1201 (2000), on remand, 246 F.3d 749 (5th Cir. 2001). In *Johnson*, the Fifth Circuit vacated a guilty plea for violation of Section 844(i) in connection with a church arson, because it found that the factual basis for the plea was insufficient to establish the interstate commerce element of the statute. 194 F.3d at 662-663; *id.* at 663 (Garwood, specially concurring); 246 F.3d at 752. The factual basis included the local church's transmission of funds to a national church organization, the use of those funds in missionary and educational activities, and an out-of-state insurer's payment of $89,000 as a result of the arson. 194 F.3d at 662-663. The fact that the local church was a member of a larger organization that submitted funds to a national organization, the court held, did not establish an

interstate nexus, particularly without more information about the nature of the relationship of the local church to the state and national church organizations. Nor did the payment of an insurance claim by an out-of-state insurer provide an explicit connection to interstate commerce. 194 F.3d at 662. In this case, in contrast, the NMSMBC itself directly participated in activities affecting interstate commerce in all the ways described above.

C. Constitutional Considerations Do Not Preclude Application Of Section 844(i) To This Church

The district court erroneously believed that its interpretation of the interstate commerce element of Section 844(i) was necessary to avoid a constitutionally doubtful application of the statute (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 3, 11; Apx. at). As *Jones* made clear, however, the application of Section 844(i) to protect property that is actively used for commercial purposes, such as the church in this case, does not exceed federal powers under the Commerce Clause.

To be sure, as the district court wrote (R. 129, Order Denying Plaintiff's Motion For Reconsideration at 4; Apx. at), *Jones* characterized arson as "a paradigmatic common-law state crime." 529 U.S. at 858. But *Jones* also made it clear that the federal-state balance would be preserved, and the application of Section 844(i) kept within constitutional bounds by ensuring that the statute was applied only to protect properties actively used for commercial purposes: "The proper inquiry, we agree, is into the function of the building itself, and then a

determination of whether that function affects interstate commerce." 529 U.S. at 854 (internal quotation marks omitted). After all, Congress' Commerce power authorizes legislation to *protect* as well as to regulate activities affecting interstate commerce. See *NLRB* v. *Jones & Laughlin Steel*, 301 U.S. 1, 36-37 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement' * * * to adopt measures 'to promote its growth and insure its safety' * * * 'to foster, protect, control, and restrain.' * * * That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"). As the Supreme Court recognized in both *Jones* and *Russell*, Congress has the power to make arson a federal criminal offense as long as the requisite connection to interstate commerce is established. As explained above, that connection was established in this case.

Nothing in *United States* v. *Morrison*, 529 U.S. 598 (2000), is to the contrary. *Morrison* held that Congress lacked the authority under the Commerce Clause to provide a federal civil remedy for victims of gender-motivated violence in the Violence Against Women Act of 1994 (VAWA), 42 U.S.C. 13981. The Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617; see also *id.* at 613 ("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"). The violence prohibited by the VAWA was attacks against individuals. The Court determined that the connection between such violence and interstate commerce was too attenuated, and that bringing it within the Commerce power would permit Congress to make federal offenses out of virtually all violent crime and intrude upon many other areas of traditional state regulation. *Morrison*, 529 U.S. at 615-616.

Section 844(i) differs significantly from the VAWA because it includes an express interstate commerce element that "'limit[s] its reach to a discrete set of [arsons] that additionally have an explicit connection with or effect on interstate commerce.'" *Morrison,* 529 U.S. at 611-612, quoting *United States* v. *Lopez*, 514 U.S. 549, 562 (1995); see *Sherlin*, 67 F.3d at 1213. As *Jones* implicitly recognized, no constitutional concerns arise from the application of Section 844(i) to the arson of a building that is actively used for a commercial function, since the effect on interstate commerce is quite direct. Cf. *United States* v. *McHenry*, 97 F.3d 125, 127 (6th Cir. 1996) (upholding federal carjacking statute, 18 U.S.C. 2119, and finding that "carjacking is itself an economic transaction, albeit a coercive one"), cert. denied, 519 U.S. 1131 (1997).

Moreover, as this Court has made clear, only a *de minimis* effect on interstate commerce is necessary to establish the interstate commerce element of Section 844(i) where property used in a commercial activity is the subject of the arson. *United States* v. *Latouf*, 132 F.3d 320, 327-328 (6th Cir. 1997), cert. denied,

523 U.S. 1086 (1998). The same *de mimimis* standard is applicable to other statutes with similar interstate commerce elements. See *United States* v. *Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000) (Hobbs Act, 18 U.S.C. 1951), cert. denied, 121 S. Ct. 1607 (2001); *United States* v. *Riddle*, 249 F.3d 529, 537 (6th Cir. 2000) (applying *de minimis* standard in prosecution under RICO, 18 U.S.C. 1962); cf., *United States* v. *Wang*, 222 F.3d 234, 239 (6th Cir. 2000) (declining to apply *de mimimis* standard in Hobbs Act case where an individual, rather than a business, was the victim).

Contrary to the district court's suggestion (see R. 86, Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson at 4; Apx. at), nothing in *Jones* calls this standard into question. *Jones's* holding, that a building that is not used in *any* commercial activity is not protected by Section 844(i), reflects a qualitative, not a quantitative limitation on the interstate commerce element. Jones "required only 'active employment' which affects commerce, not a particular quantum of effect." *United States* v. *Grassie*, 237 F.3d at 1208.

Indeed, *Jones* repeatedly cited *Russell* v. *United States*, the Court's previous decision on the reach of Section 844(i), without qualification. See 529 U.S. at 852-856. *Russell*'s holding, that Section 844(i) was validly applied to prosecute the attempted arson of a two-unit apartment building, thus remains undisturbed. The "dispositive fact" in *Russell*, the Court explained in *Jones*, was that the apartment

building was rented to tenants at the time of the attempted arson. 529 U.S. at 853. "It followed from that fact, the *Russell* opinion concluded, that '[t]he property was . . . being used in an activity affecting commerce within the meaning of § 844(i),'" *Ibid.*, quoting 471 U.S. at 862. As the Tenth Circuit noted, in discussing *Russell*, "where once the use of a building for rental purposes was established, the effect on commerce was simply presumed because of the nature of the activity. In other words, it was not necessary to show dollar amounts, dollar tracing, individual conduct or any other nexus between the two rental units in question and interstate commerce. Clearly, the dollar amount of activity involved in *Russell* was trivial as a proportion of commerce in rental properties, or all commerce, nationally; but that was not significant because of the nature of the activity in the aggregate." *Grassie*, 237 F.3d at 1208.

Finally, the district court's concern that applying Section 844(i) to protect this church would bring it "within the ambit of federal regulation under the Commerce Clause" is misplaced (See R. 129, Order Denying Plaintiff's Motion For Reconsideration at 11; Apx. at). The consequence of finding Section 844(i) applicable here is not that the activities of religious institutions are subject to federal *regulation*, but that houses of worship are subject to federal *protection*. The First Amendment, as well as statutory protections of religious liberty (*e.g.*, Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc) will protect religious organizations from intrusion (by federal, state, or

local governments) into their religious activities. The sincerity of a congregation's religious beliefs cannot render a church arsonist immune from federal prosecution.

As explained above, the New Mount Sinai Missionary Baptist Church building was actively employed for commercial purposes, which, in the aggregate, affected interstate commerce. For that reason the evidence submitted by the United States was sufficient to establish the interstate commerce element of Section 844(i).

CONCLUSION

The district court order dismissing the Section 844(i) count of the indictment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a), I certify that the foregoing proof brief for the United States as appellant complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief has been prepared in proportionally spaced typeface using Wordperfect 9, in Times New Roman, 14 point type. Exclusive of the exempted portions, the brief contains 7229 words.

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UNITED STATES APPENDIX DESIGNATIONS

1. District court docket sheet

2. Indictment (R. 1)

3. Report And Recommendation Concerning Defendant's Motion To Dismiss Indictment (R. 59)

4. Order Adopting Magistrate Judge's Report And Recommendation, Order Denying Motion To Dismiss (R. 65)

5. Order Granting Defendant's Motion To Reconsider And Dismissing The Charge Of Arson (R. 86)

6. Affidavit of Lisa Foster (attached to Plaintiff's Motion For Reconsideration And Request For An Evidentiary Hearing, R. 95)

7. Affidavit of Paul Kwiatkowski (attached to R. 95)

8. Stipulation Of Facts (R. 116)

9. Order Denying Plaintiff's Motion For Reconsideration (R. 129)

10. Notice of Appeal (R. 133)

CERTIFICATE OF SERVICE

I certify that copies of the foregoing proof brief for the United States as appellant was sent by first class mail to the following counsel of record this 12th day of September, 2001.

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