

IN THE SUPREME COURT OF THE UNITED STATES

DEWEY J. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>United States v. Johnson</i> , __ F.3d __, 1999 WL 988249 (5th Cir. Nov. 1, 1999)	<i>passim</i>
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	<i>passim</i>
Constitutional and Statutory Provisions	
U.S. CONST., art. I, § 8	<i>passim</i>
18 U.S.C. § 844(i)	<i>passim</i>

SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to call this Court's attention to a significant development that has occurred since the filing of petitioner's reply brief. On November 1, a unanimous panel of the United States Court of Appeals for the Fifth Circuit held that 18 U.S.C. § 844(i) could not be applied, consistent with *United States v. Lopez*, 514 U.S. 549 (1995), to the arson of a Texas church. See *United States v. Johnson*, ___ F.3d ___, 1999 WL 988249 (5th Cir. 1999).¹ The Fifth Circuit's holding conflicts in several respects with the holding of the Seventh Circuit in this case. The deepening of the conflict among the circuits on the constitutional limits of the application of the jurisdictional provision of Section 844(i) should remove any doubt about whether this case warrants prompt review.

1. In *Johnson*, the Fifth Circuit held that a district court had committed plain error in accepting a plea of guilty to a violation of Section 844(i) because there was an inadequate factual basis to establish "an explicit connection or effect on interstate commerce." 1999 WL 988249, at *5. The government had asserted the following connections between the burned church and interstate commerce: (1) an out-of-state insurer paid an \$89,000 claim related to the fire; (2) the church contributed 16% of the funds raised from its congregation to a state-wide church conference; (3) the statewide organization forwarded most of its funds to a national church organization; and (4) the national organization distributed those funds throughout the United States and the world. See *id.* at *1. Those connections, we submit, exceed the connections with interstate commerce shown in this case. See Pet. 2; Pet. App. 2a.

¹ For the Court's convenience, we have attached copies of the decision in *Johnson* as an appendix to this supplemental brief.

Although the opinion of Judge Benavides was presented as the lead opinion of the court, Judge Barksdale joined Judge Garwood's special concurrence, so that the "concurrence" in fact represents the views of the majority. See 1999 WL 988249, at *6. Judge Garwood's opinion makes clear that the majority of the Fifth Circuit panel decided the case on the ground that "it was plain error for the district court to conclude that the factual basis for the plea reflected a *constitutionally adequate* relation to interstate commerce." *Ibid.* (emphasis added).

In square conflict with the decision of the Seventh Circuit in this case, see Pet. App. 2a-3a, the Fifth Circuit majority maintained that "[a]rsons under section 844(i) are simply not a meaningful 'class of activities' suitable for aggregation." *Johnson*, 1999 WL 988249, at *7. The majority noted that Section 844(i) applies to "all arsons of personal as well as business property" that is "'used . . . in any activity affecting interstate commerce,' which would include, for example, the cowboy's boots." *Ibid.* (quoting 18 U.S.C. § 844(i). Because Section 844(i) "involves no effort to regulate any interstate market nor any related regulatory scheme," the majority concluded that "[a]pplication of the aggregation principle * * * in effect gives Congress the Commerce Clause power to regulate all arsons, a result not supported by the language of the Constitution or the intent of its framers." *Id.* at *8. Such "essentially unlimited aggregation would allow Congress * * * to enact a preemptive national criminal and civil code applicable to all conduct and activity of a purely local nature," because "every individual action no matter how local will ultimately have some at least minute interstate [e]ffect, and it will always and inevitably be the case that the aggregation of all such conduct would substantially affect commerce." *Ibid.* (footnote omitted).

The reasoning of the Fifth Circuit majority cannot be reconciled with the self-consciously unlimited aggregation analysis applied by the Seventh Circuit in this case. See Pet. App. 3a. Indeed, Judge Benavides’ opinion, while applying an aggregation analysis that superficially resembles that applied by the Seventh Circuit, nonetheless interpreted *Lopez* to require far greater limits on aggregation than the Seventh Circuit imposed. See *Johnson*, 1999 WL 988249, at *4. In Judge Benavides’ view, “aggregation” does not “obliterate[], or even circumscribe[] materially, our federal system” precisely because, “[i]n order to aggregate, the government must show that the arson has ‘an explicit connection with or effect on interstate commerce.’” *Ibid.* (quoting *Lopez*, 514 U.S. at 562). Judge Benavides read that constitutional requirement to preclude application of the jurisdictional element of Section 844(i) based on a “speculative” or “attenuated” connection to interstate commerce. *Ibid.* That approach — and its recognition of the limiting effect of *Lopez* — conflicts with the Seventh Circuit’s application of Section 844(i) to arsons that have only “slight” connections with interstate commerce. Pet. App. 3a.

Judge Benavides recognized that “[a]t most, the impact on interstate commerce” of the church’s “filing of a claim and its payment by an out-of-state insurer is speculative.” 1999 WL 988249, at *5. Crucially for purposes of the deepening conflict here, Judge Benavides observed that “[t]o find otherwise would be to federalize the arson of any building * * * insured by an out-of-state company.” *Ibid.* The absurdity of that result, while clear to Judge Benavides, escaped the Seventh Circuit in this case. See Pet. App. 2a-3a. Judge Benavides likewise found no substance in the connection with interstate commerce represented by the church’s payment

of dues that were conveyed to larger, interstate church organizations; that payment, in his view, “does not establish an explicit connection or effect on interstate commerce.” *Johnson*, 1999 WL 988249, at *5. But that collection and forwarding of funds vastly exceeded the effects on commerce shown in this case.

2. The Fifth Circuit’s decision in *Johnson* undeniably deepens the conflict among the circuits with respect to the constitutional limits on the application of Section 844(i). All members of the *Johnson* panel agreed that Section 844(i) could not be applied to arsons of property that, like the church at issue in *Johnson* and the residence at issue in this case, was not actively used in any commercial activity and lacked substantial, rather than attenuated connections with interstate commerce. That holding cannot be reconciled with the Seventh Circuit’s conclusion (Pet. App. 3a) that “a slight connection between the particular arson and interstate commerce” is enough to bring *any* arson within the scope of Section 844(i).

3. The decision in *Johnson* also underscores the need for immediate and plenary review of this case. The constitutional limits on the application of this typical jurisdictional element presents entirely different issues than does the extent of Congress’ bare power to proscribe conduct in the absence of such an element, which is at issue in the *Morrison* cases (Nos. 99-5 & 99-29). Whether the mere inclusion of a jurisdictional element essentially nullifies the limits on the commerce power, so as to permit, in Judge Garwood’s words, the enactment of “a preemptive national criminal and civil code” (1999 WL 988249, at *8) is an important and entirely separate issue that warrants this Court’s review without delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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