No. 12-1444

In the Supreme Court of the United States

RANDEEP MANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence supported the interstate commerce jurisdictional element of petitioner's conviction for conspiring to use, and aiding and abetting the use of, a weapon of mass destruction, in violation of 18 U.S.C. 2332a.

2. Whether sufficient evidence supported the interstate commerce jurisdictional element of petitioner's conviction for aiding and abetting the malicious damage or destruction of a vehicle by means of an explosive, in violation of 18 U.S.C. 844(i).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-75a) is reported at 701 F.3d 274.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2012. Petitions for rehearing and rehearing en banc were denied on March 13, 2013. (Pet. App. 2a). The petition for a writ of certiorari was filed on June 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of conspiring to use, and aiding and abetting the use of, a weapon of mass destruction, in violation of 18 U.S.C. 2332a (Count 1); causing the damage or

destruction of a vehicle by means of an explosive resulting in personal injury, in violation of 18 U.S.C. 844(i) (Count 2); possession of unregistered grenades and an unregistered machine gun, in violation of 26 U.S.C. 5861(d) (Counts 3 & 5); unlawful possession of a machine gun, in violation of 18 U.S.C. 922(*o*) (Count 6); conspiring to corruptly obstruct an official proceeding, in violation of 18 U.S.C. 1512(k) (Count 7); and aiding and abetting in the corrupt concealment of documents in an official proceeding, in violation of 18 U.S.C. 1512(c) (Count 8). Pet. App. 3a-4a, 6a-7a; Gov't C.A. Br. 1-3. The district court sentenced petitioner to life imprisonment on Count 1; 360 months on Count 2; 120 months on Counts 3, 5, and 6; and 60 months on Counts 7 and 8, with all sentences to run concurrently and to be followed by five years of supervised release. Pet. App. 7a. The court of appeals affirmed in part, reversed in part, and remanded for resentencing. *Id.* at 3a-69a.

1. On February 4, 2009, Dr. Trent Pierce, Chairman of the Arkansas State Medical Board (Board), left his home in West Memphis, Arkansas, and walked to his car. Pet. App. 4a. Before entering his vehicle to drive to a Board meeting in Little Rock, Arkansas, Dr. Pierce noticed a spare tire leaning against the car. *Ibid.* When the doctor attempted to move the tire, it exploded, leaving him severely and permanently injured. *Ibid.*

In its subsequent investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives determined that the explosion had been caused by an MK3A2 hand grenade placed in the spare tire. Pet. App. 4a. During the investigation, agents interviewed petitioner, a doctor who had a long history of disciplinary actions before the Medical Board. *Id.* at 4a-5a. Dr. Pierce had been particularly vocal about his belief that petitioner was

providing improper care to his patients and, at one point, had publicly admonished petitioner before the Medical Board. *Id.* at 36a. Petitioner also once told a friend that he wished he could kill members of the Board because they had made him suffer by taking away his Drug Enforcement Agency license. *Ibid.*

During his interview with agents, petitioner stated that he had a federal firearms license and showed agents his collection of weapons, including a grenade launcher. Pet App. 5a. City workers by chance later discovered 98 grenades buried in a wooded area near petitioner's residence. *Ibid.* Agents subsequently executed a search warrant on petitioner's residence and found canisters similar to those containing the buried grenades, as well as 46 practice grenades, a grenade launcher, and 18 other firearms. *Ibid.* Petitioner was arrested for ownership of illegal grenades. *Ibid.*

While petitioner presented an alibi for the time period of the attack on Dr. Pierce, agents determined that petitioner had access to the unique weapons used in the bombing. Pet. App. 36a-37a. He had previously purchased eight MK3A2 "concussion grenades," the rare type of grenade that was used in the bombing, and one witness had seen similar grenades in petitioner's residence in 2004. *Id.* at 37a; Gov't C.A. Br. 26-27. Moreover, the tire used in the bombing was a Firestone that had been mounted on a Nissan wheel and manufactured on April 29, 2002. Gov't C.A. Br. 27. Pete Patel, petitioner's business partner, owned a Nissan Altima manufactured in 2002, whose spare tire agents were unable to locate. *Ibid.* Before the bombing, Phil Barthelme, a friend of petitioner's, had gone to Patel's house with petitioner, and petitioner stated that he was picking up a tire. *Id.* at 27-28. Petitioner also sent a picture of Dr.

Pierce to his brother, stating that Dr. Pierce was in the picture and that he hoped the picture was a good one. Pet. App. 39a.[1]

While petitioner was incarcerated in the Pulaski County Detention Facility after his arrest on the firearms charges, he discussed the bombing with another inmate. Gov't C.A. Br. 21. Petitioner offered to pay him $50,000 to murder Dr. Pierce, stating that "Dan and them didn't do a good job the first time." Pet. App. 38a. Petitioner's son went by the name Dan. *Id.* at 39a. Petitioner further told the inmate that Dr. Pierce "was messing up his life and suspended his right to prescription meds . . . and was hating on him because he was Hindu and he wanted Dr. Trent Pierce dead." *Id.* at 38a.

2. On January 6, 2010, the grand jury returned a second superseding indictment, charging petitioner with crimes related to the bombing of Dr. Pierce (Doc. 63). In addition to connecting petitioner to the crime, the government during his jury trial presented evidence that the bombing affected interstate commerce and that Dr. Pierce had used his vehicle in interstate commerce, in order to establish the jurisdictional elements of the weapons of mass destruction and vehicle explosion charges, 18 U.S.C. 2332a and 18 U.S.C. 844(i). See Gov't C.A. Br. 33-38. The bombing resulted in significant losses to Dr. Pierce's medical clinic, a sole proprietorship where Dr. Pierce was the only physician doing business as the Family Practice Center of West Memphis. Pet. App. 33a. The clinic was closed the two days

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[1] On the night before the bombing, Dr. Pierce's housekeeper saw a suspicious man jogging in place near the Pierce home and that the man may have been "Iranian or something." Pet. App. 39a. Petitioner's family was of Indian decent. *Ibid.*

after the bombing, reopened only after other doctors volunteered to cover the clinic while Dr. Pierce was in the hospital, and profits declined by $269,343 in the year after the bombing. *Ibid.* Moreover, the government also presented evidence that the clinic routinely ordered medical supplies from outside of Arkansas and used out-of-state companies to service its equipment and remove its waste. *Id.* at 33a-34a. The clinic also regularly treated patients from out-of-state. *Id.* at 34a.

The government also presented evidence about the use of Dr. Pierce's vehicle. Dr. Pierce testified that he drove the vehicle every other month to Little Rock, Arkansas, from West Memphis, Arkansas, for Medical Board meetings. Pet. App. 48a. Among its other responsibilities, the Medical Board credentials, and receives licensing fees from, physicians who live outside of Arkansas, and it sells "information relating to those credentials to hospitals and insurance companies located outside of Arkansas."[2] *Id.* at 51a. As a Board member, Dr. Pierce was reimbursed for the mileage he drove on these trips and paid for his attendance at the meeting. *Id.* at 48a. Dr. Pierce also used his vehicle to transport Board files to the meetings in Little Rock, and on the day of the bombing, he was preparing to travel to Little Rock for such a meeting with Board files in his car. *Ibid.*

The jury acquitted petitioner on one count of possession of an unregistered shotgun in violation of 26 U.S.C. 5861(d), and convicted him on all other counts. Pet.

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[2] The Board also sends information regarding "disciplinary actions to the Federation of State Medical Boards, located in Texas," and it "provides that information to the National Practitioner Data Bank." Pet. App. 51a.

App. 7a. The district court denied petitioner's motion for judgment of acquittal. Gov't C.A. Br. 5.

3. The court of appeals affirmed in relevant part.[3] Pet. App. 3a-69a. As pertinent here, petitioner argued that insufficient evidence supported the jurisdictional elements of his convictions for conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a, and aiding or abetting the malicious damage or destruction of a vehicle by means of an explosive, in violation of 18 U.S.C. 844(i). The court of appeals rejected both arguments. Pet. App. 30a-53a.

a. As the court of appeals recognized, Section 2332a requires proof that "the offense, or the results of the offense, affected interstate commerce." Pet. App. 31a. The court held that the government's evidence satisfied this element. *Id.* at 31a-35a. In its analysis, the court examined cases on the Hobbs Act, 18 U.S.C. 1951, which contains a similar jurisdictional element. Pet. App. 32a. Under the Hobbs Act, if a business is robbed, the government can satisfy that statute's jurisdictional element by proving either that "the robbery depleted the assets of a business operating in interstate commerce" or that the robbery resulted "in a business temporarily closing

[3] The court of appeals held that petitioner's convictions for possessing an unregistered machinegun, in violation of 26 U.S.C. 5861(d), and possessing a machinegun, in violation of 18 U.S.C. 922(*o*), were multiplicious. Pet. App. 12a-13a. The court also held that no evidence supported the district court's imposition of enhancements pursuant to Sentencing Guidelines § 2K2.1(b)(4)(A) and (B) for possessing stolen grenades and possessing grenades containing altered serial numbers. Pet. App. 66a-68a & n.17. While the court affirmed petitioner's convictions on the counts relevant here, it vacated petitioner's sentence and remanded the case to the district court with instructions to "set aside" one of the multiplicious convictions. *Id.* at 69a.

to recover from the robbery." *Id.* at 32a-33a (citing *United States* v. *Quigley*, 53 F.3d 909, 910 (8th Cir. 1995)). The court therefore concluded that "depletion of assets—including lost business opportunities—of a business operating in interstate commerce" similarly satisfies Section 2332a's jurisdictional element. *Id.* at 33a.

The court of appeals then held that "there was ample evidence to support the jury's finding that the bombing of Dr. Pierce affected interstate commerce because it resulted in a depletion of assets of his clinic, which did business in interstate commerce." Pet. App. 34a. The court noted that Dr. Pierce's clinic closed following the bombing and that its profits declined by $269,343 in one year. *Id.* at 33a. Moreover, the business operated in interstate commerce: The clinic had ordered its medical supplies from outside Arkansas, used the services of out-of-state companies, and "the clinic routinely treated patients from a variety of states." *Id.* at 34a.

Relying on *United States* v. *Williams*, 308 F.3d 833 (8th Cir. 2002) and *United States* v. *McCraney*, 612 F.3d 1057 (8th Cir. 2010), cert. denied, 131 S. Ct. 1784 (2011), the court of appeals rejected petitioner's argument that the depletion-of-assets theory cannot extend to an attack on an individual, holding that "where an individual [also] functions as a business," depletion of business assets proves an effect on interstate commerce. Pet. App. 34a; see *Williams*, 308 F.3d at 839 (holding that the robbery of an owner-driver of a taxicab affected interstate commerce); *McCraney*, 612 F.3d at 1064-1065 (holding that the robbery of drugs from an individual drug trafficker affected interstate commerce). Because Dr. Pierce's medical clinic was a sole proprietorship, the

court held that "Dr. Pierce functioned both as a business and as an individual." Pet. App. 35a.

The court of appeals alternatively held that even if the attack had targeted Dr. Pierce solely as an individual, federal jurisdiction still exists where "the acts cause or are likely to cause the individual victim to deplete the assets of an entity engaged in interstate commerce." Pet. App. 35a (quoting *Quigley*, 53 F.3d at 910-911). Because Dr. Pierce was the sole proprietor of his medical practice, the court reasoned, the attack was likely to result in "lost business opportunities for his clinic." *Ibid.*

b. The court of appeals also held that the evidence was sufficient to fulfill Section 844(i)'s jurisdictional requirement that the crime involve "a vehicle used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Pet. App. 46a (citing 18 U.S.C. 844(i)). Following this Court's guidance, the court of appeals noted that this element "mean[s] active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 47a (quoting *Jones* v. *United States*, 529 U.S. 848, 855 (2000)).

The court of appeals discussed *United States* v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984), where it had previously held that an attack on a union organizer's automobile used for union business affected interstate commerce, and compared two Tenth Circuit cases employing similar analyses. Pet. App. 48a-50a; see *United States* v. *Grassie*, 237 F.3d 1199, 1212 (10th Cir.) (holding use of personal truck to seasonally transport pecans to broker was in interstate commerce even though the vehicle was not being used for this purpose when damaged) , cert. denied, 533 U.S.

960 (2001); *United States* v. *Monholland*, 607 F.2d 1311, 1316 (10th Cir. 1979) (holding that judge's truck, which was used only to transport judge "back and forth" from work, was not "used in" commerce). The court held that *Michaels* was controlling and that Dr. Pierce's vehicle was "used in" commerce because "there was a nexus between the vehicle and the Board's work that made the use more than a means of traveling to and from work, but rather property used in a 'trade or business.'" Pet. App. 52a-53a (citing *Jones*, 529 U.S. at 856).

The court of appeals found it significant that Dr. Pierce "received an 'allowance as reimbursement for using his personal automobile to conduct [Board] business.'" Pet. App. 51a (quoting *Michaels*, 726 F.2d at 1310). "Dr. Pierce's vehicle was an integral part of his Board membership" because it was used "not only to transport Pierce to Board meetings and other trips made on behalf of the Board, but it was also used to transport Board files to the meetings, instead of shipping them." *Id.* at 52a. Moreover, the court held that Dr. Pierce's vehicle was "actively employed" in interstate commerce at the time of the bombing because he was preparing to get in the vehicle to drive it to a Board meeting, and Board files were in the vehicle. *Ibid.*

c. Judge Smith dissented from the court's holding that Dr. Pierce's vehicle was used in interstate commerce but "otherwise concur[red] in the majority opinion." Pet. App. 69a; see *id.* at 69a-75a.

ARGUMENT

Petitioner renews his contentions (Pet. 5-13) that insufficient evidence supported the interstate-commerce elements of his convictions for use of a weapon of mass destruction, 18 U.S.C. 2332a, and malicious damage to a vehicle by means of an explosive, 18 U.S.C. 844(i). The

court of appeals correctly rejected those factbound arguments, and its decision does not conflict with any decision by this Court or another court of appeals. Further review is not warranted.

1. a. Section 2332a makes it unlawful to, "without lawful authority, * * * conspire[] to use, a weapon of mass destruction * * * against any person or property within the United States" when "the offense, or the results of the offense, affect interstate or foreign commerce." 18 U.S.C. 2332a(a)(2)(D). When Congress uses "affects interstate commerce" as the jurisdictional element in a statute, this language "signal[s] Congress' intent to invoke its full authority under the Commerce Clause." *Jones* v. *United States*, 529 U.S. 848, 854 (2000). "For statutes that contain [this] jurisdictional element—a category that includes section 2332a as well as the Hobbs Act, 18 U.S.C. § 1951—evidence of even a *de minimis* effect on interstate commerce will satisfy that element." *United States* v. *Davila*, 461 F.3d 298, 306 (2d Cir. 2006), cert. denied, 549 U.S. 1266 (2007).

In determining what activities fulfill Section 2332a's jurisdictional element, the courts of appeals have analogized to cases interpreting the Hobbs Act, which contains a similar jurisdictional element. See Pet. App. 32a; *Davila*, 461 F.3d at 306; see also 18 U.S.C. 1951(a) (criminalizing robbery or extortion that "obstructs, delays, or affects commerce or the movement of any article * * * in commerce"). The courts of appeals have held in the Hobbs Act context that an extortion or robbery affects interstate commerce when it targets a business that buys goods that have moved in interstate commerce because the robbery or extortion causes the "depletion of assets of a business engaged in interstate commerce." *United States* v. *Gray*, 260 F.3d 1267, 1276

(11th Cir. 2001) (robbery of restaurant) (internal citation omitted), cert. denied, 536 U.S. 963 (2002); see *United States* v. *Ossai*, 485 F.3d 25, 30-31 (1st Cir.) (robbery of doughnut shop), cert. denied, 552 U.S. 919 (2007); *United States* v. *Elias*, 285 F.3d 183, 187-189 (2d Cir.) (robbery of grocery store), cert. denied, 537 U.S. 988 (2002); *United States* v. *Robinson*, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (robberies of check-cashing stores), cert. denied, 522 U.S. 1139 (1998).

Courts of appeals also have found the requisite effect on commerce in Hobbs Act cases when the defendant's conduct caused a business engaged in interstate commerce to close. See, *e.g.*, *United States* v. *Vega Molina*, 407 F.3d 511, 527 (1st Cir.) (robbery caused company to close its offices the day after the robbery), cert. denied, 546 U.S. 919 (2005); *United States* v. *Diaz*, 248 F.3d 1065, 1088 (11th Cir. 2001) (extortion of officers of medical clinic caused it to close for several days); *United States* v. *Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (business forced to close for at least two hours).

These courts of appeals correctly applied these settled principles to the facts of this case. "The entire premise of the Government's prosecution was that Dr. Pierce was targeted precisely because of his Board activities," Pet. App. 52a, activities to which his role as a practicing physician was fundamental. Because Dr. Pierce's medical practice was a sole proprietorship, "Dr. Piece functioned both as a business and as an individual." *Id.* at 35a. As such, petitioner's attack on Dr. Pierce targeted both the doctor personally and the doctor's business. Accordingly, the evidence that Dr. Pierce's clinic—which used many out-of-state services and treated out-of-state patients—temporarily closed as the result of the bombing and had its profits decline by

$269,343 the following year, see *id.* at 33a, was sufficient to establish that petitioner's crime affected interstate commerce. See *United States* v. *Jimenez-Torres*, 435 F.3d 3, 7-10 (1st Cir. 2006) (holding that attack on sole proprietor of a gas station at his residence affected interstate commerce because it caused the gas station to close).[4]

b. Petitioner contends (Pet. 7-13) that the decision below is inconsistent with decisions of other courts of appeals addressing the application of the Hobbs Act to robberies of individuals (rather than businesses). Quite apart from the fact that this is not a Hobbs Act case and therefore could not implicate the asserted disagreement in the courts of appeals about that statute, petitioner's claim of a circuit split is incorrect.

As petitioner notes (Pet. 7), the courts of appeals have drawn a distinction between the robbery of an individual and the robbery of a business for the purposes of establishing Hobbs Act jurisdiction, and have on occasion reversed Hobbs Act convictions where individuals, rather than businesses, were robbed or extorted and the crime had only a speculative effect on a business engaged in interstate commerce. See, *e.g.*, *United States* v. *Perrotta*, 313 F.3d 33, 36-40 (2d Cir. 2002) (reversing Hobbs Act conviction for extortion of an individual where the only commerce nexus was that the victim worked for a company engaged in interstate commerce); *United States* v. *Wang*, 222 F.3d 234, 237-

[4] Petitioner contends (Pet. 12-13) that despite these facts, no proof established that the loss and closure of the clinic affected interstate commerce. That fact-specific contention warrants no review. In any event, the effect on interstate commerce is obvious when a business engaged in interstate commerce is forced to close temporarily and suffer financial loss.

240 (6th Cir. 2000) (reversing Hobbs Act conviction for robbery of individuals in private home where a portion of the stolen funds were proceeds of the victims' business); *United States* v. *Quigley*, 53 F.3d 909, 910-911 (8th Cir. 1995) (reversing Hobbs Act conviction for robbery of individuals en route to a convenience store); *United States* v. *Collins*, 40 F.3d 95, 99-100 (5th Cir. 1994) (reversing Hobbs Act conviction for robbery of an employee of a computer company when robbery prevented him from attending a business meeting and making business calls), cert. denied, 514 U.S. 1121 (1995).

At the same time, the courts of appeals have upheld Hobbs Act convictions based on the robbery of an individual when "the harm or potential harm to the individual would deplete the assets of a company engaged in interstate commerce." *Perrotta*, 313 F.3d at 38. Courts have upheld convictions under the Hobbs Act when an individual was targeted for robbery because of the victim's employment or interest in a business. See *United States* v. *Powell*, 693 F.3d 398, 403 (3d Cir. 2012) (affirming Hobbs Act conviction when robbers "deliberately selected store owners as their victims, seeking to steal the stores' earnings and assets"), cert. denied, 133 S. Ct. 901 (2013); *United States* v. *Williams*, 308 F.3d 833, 839 (8th Cir. 2010) (affirming Hobbs Act conviction when defendant robbed individual taxicab driver); *Diaz*, 248 F.3d at 1088-1089 (affirming Hobbs Act conviction when defendants "targeted the [victims] *because of* their interest in Rosa Medical Center").

The decision below does not turn on these distinctions because the bombing targeted a business, that is, the sole proprietorship of Dr. Pierce. None of the cases petitioner cites (Pet. 7-13) presented such a scenario. In the specific context of a sole proprietor who is a service

professional, such as a doctor or lawyer, that individual does not simply own the business; he or she *is* the business. Cf. *Williams*, 308 F.3d at 838-839 (holding that the robbery of an independent taxicab driver affected interstate commerce). This case therefore does not conflict with decisions that have held that the robbery of individuals in different contexts did not affect interstate commerce.

c. Moreover, even if petitioner were correct and the bombing were solely an attack on Dr. Pierce individually, the evidence was still sufficient to establish the jurisdictional element. In cases concerning attacks on individuals, courts conduct a fact-specific inquiry into the likely extent of any impact on interstate commerce. For instance, the Fifth and Eighth Circuits have held that robbery or extortion of individuals is prohibited by the Hobbs Act where: "(1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) * * * the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) * * * the number of individuals victimized or the sum at stake is so large that there will be some 'cumulative effect on interstate commerce.'" *Collins*, 40 F.3d at 100 (footnotes omitted); see *Quigley*, 53 F.3d at 910-911. Other courts employ a similar analysis to determine whether a particular robbery or extortion of an individual has a direct effect on interstate commerce. See *United States* v. *Lynch*, 437 F.3d 902, 909-911 (9th Cir.) (per curiam) (en banc) (citing cases and noting consistency of results), cert. denied, 549 U.S. 836 (2006); *United States* v. *Verbitskaya*, 406 F.3d 1324, 1332 & n.10 (11th Cir. 2005), cert. denied, 546 U.S. 1096 (2006).

Because Dr. Pierce ran a sole proprietorship, the bombing created "the likelihood that [he would] deplete the assets of an entity engaged in interstate commerce." *Collins*, 40 F.3d at 100. Without its sole physician, Dr. Pierce's medical practice, which engaged in interstate commerce, was unable to function on the days following the attack, and its profits significantly declined the following year. Therefore, even if Dr. Pierce were attacked solely as an individual, sufficient evidence established the jurisdictional nexus with interstate commerce.[5]

2. Petitioner separately argues (Pet. 13-15) that the court of appeals incorrectly concluded that Dr. Pierce's vehicle was used in interstate commerce and that this Court should grant review because the circuits are in conflict on the proper interpretation of this jurisdictional element of 18 U.S.C. 844(i). No such conflict exists, and the court of appeals below correctly decided the issue.

a. Section 844(i) criminalizes "maliciously damage[ing] or destroy[ing] * * * 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." 18 U.S.C. 844(i). In *Jones*, this Court interpreted Section 844(i)'s jurisdictional element and emphasized that the statute requires that the target object be " 'used in' a commerce-affecting activity." 529 U.S. at 854. The Court explained that the jurisdictional requirement "is

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[5] Petitioner argues (Pet. 12) that the government offered no proof that petitioner intended to cause Dr. Pierce's medical clinic to suffer economic loss. But petitioner's "intent is irrelevant to establishing the commerce element of a Hobbs Act offense." *Jimenez-Torres*, 435 F.3d at 10.

most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855. The proper inquiry "is into the function of the [object] itself, and then a determination of whether that function affects interstate commerce." *Id.* at 854 (citation omitted).

Here, the evidence established that the functions of Dr. Pierce's vehicle included transporting him, along with Medical Board files, to Board meetings. Pet. App. 48a. The Board reimbursed Dr. Pierce for the mileage he drove on these trips and paid him $115 a day to attend the meetings. *Ibid.* The vehicle's function, which was integral to Dr. Pierce's role as Chairman of the Board, affected interstate commerce. Among other things, Dr. Pierce and the Board credentialed both Arkansas and out-of-state physicians and health providers and sold information relating to those credentials to companies located outside of Arkansas. *Id.* at 51a. The evidence was therefore sufficient to sustain petitioner's conviction.

b. Contrary to petitioner's arguments, the Tenth and Eighth Circuits are not in conflict on this issue. See Pet. 13 (discussing *United States* v. *Michaels*, 726 F.2d 1307 (8th Cir.), cert. denied, 469 U.S. 820 (1984), and *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979)). In *Monholland*, the Tenth Circuit held that a pick-up truck used by a state judge for commuting to and from the local courthouse was not used in interstate commerce because "[t]he vehicle in question was not even used on official business," and "movement to and from work is an activity which ordinarily has an existence independent from the work. It does not blend into and become a part of the career." 607 F.2d at 1316.

Subsequently, in *Michaels*, the Eighth Circuit affirmed a Section 844(i) conviction and held that the targeted vehicle, owned by a union organizer, was actively used in interstate commerce. 726 F.2d at 1310. The organizer used the vehicle to "travel[] to various job sites for the purpose of enrolling new members in the union and collecting money owed the union by current members." *Ibid.* Additionally, the union paid the organizer $200 per month as "reimbursement for using his personal automobile to conduct union business." *Ibid.* On this basis, the court concluded that the "use of the automobile was an integral and necessary part of [the victim's] job assignment and was not merely a means of traveling to and from work." *Ibid.* (noting this distinction with *Monholland*).

Michaels and *Monholland* do not conflict with each other, and both are consistent with the decision below. While the court in *Monholland* emphasized that the judge's vehicle was "not even used on official business," 607 F.2d at 1316, the union organizer in *Michaels* was paid to use his vehicle as an integral part of his job, 726 F.2d at 1310. And like the union organizer, Dr. Pierce was paid to use his vehicle as an integral part of his job, transporting both himself and Board files to meetings. Because the Board reimbursed Dr. Pierce for the mileage he drove on these trips, it is clear that unlike the judge in *Monholland*, Dr. Pierce did use his vehicle for "official business," and it therefore was involved in an activity affecting interstate commerce.

Petitioner is incorrect (Pet. 15) that "[t]he greater weight of authority" and *Monholland* stand for the proposition that "private vehicles occasionally used for business purposes" are not used in interstate commerce. The Tenth Circuit itself rejected this argument in a

subsequent case, *United States* v. *Grassie*, 237 F.3d 1199, cert. denied, 533 U.S. 960 (2001). See Pet. App. 49a-52a (analogizing this case to *Grassie* and distinguishing *Monholland*) While the court in *Grassie* recognized *Monholland*'s holding that "the nexus between [a] vehicle's use and interstate commerce cannot be so remote as to be * * * less than de minimis," 237 F.3d at 1212 (citing *Monholland*, 607 F.2d at 1316), it held that a victim's use of a personal truck to make several short commercial trips a year to transport pecans to a broker satisfied the interstate commerce prong of Section 844(i). *Ibid*. Despite the fact that the victim's use of his truck "was mostly * * * for personal purposes such as going to school," the court held that this "periodic" and "seasonal" work satisfied the *Jones* standard. *Ibid.* Petitioner's claim would thus have fared no better in the Tenth Circuit than it did below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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