Nos. 21-3661 & 22-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

EMILY CLAIRE HARI,
Formerly known as MICHAEL BENJAMIN HARI

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF FOR THE UNITED STATES AS APPELLEE

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SUMMARY OF THE CASE

Defendant-appellant Emily Hari led a white supremacist militia and bombed a mosque with help from two co-defendants. A federal jury convicted Hari on five counts for her role in the attack, and the district court sentenced her to 636 months' imprisonment.

On appeal, Hari asks this Court to vacate her convictions based on two legal arguments that no court has ever adopted: first, that Congress lacked the authority under the Commerce Clause to enact 18 U.S.C. 247(a); and second, that the charged offenses under Section 247 do not qualify as crimes of violence under 18 U.S.C. 924(c). This Court should reject both arguments, as every other court of appeals to have considered these arguments has done.

Hari also challenges the district court's fact-bound determination that the government did not knowingly intrude into Hari's attorney-client relationship—much less cause her any prejudice—when the government inadvertently received some of her privileged communications. Because the record fully supports the district court's ruling that no Sixth Amendment violation occurred, this Court should decline to disturb the judgment.

Given the nature of the questions presented, the United States does not oppose oral argument and requests 15 minutes per side.

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LEGISLATIVE HISTORY:

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STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case in the District of Minnesota. The district court had jurisdiction under 18 U.S.C. 3231. The court entered judgment against defendant-appellant Emily Hari on November 9, 2021. R. Doc. 487; Def. Add. 2-9.[1] Hari timely filed a notice of appeal on

[1] No joint appendix was filed in this case. "R. Doc. __" refers to the district court docket number. "Br. __" refers to page numbers in Hari's opening brief. "Tr., Vol. __, __" refers to the trial transcript by volume and page number. "Def.

(continued…)

November 16, 2021. R. Doc. 489. On December 1, 2021, the court entered an amended judgment that included restitution. R. Doc. 504; Def. Add. 10-17. Hari then timely filed a second notice of appeal on December 9, 2021. R. Doc. 507. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF ISSUES

Defendant Emily Hari[2] was convicted on five counts after she and two co-defendants bombed a mosque: (1) intentionally damaging, defacing, or destroying religious real property because of its religious character; (2) intentionally obstructing by force the free exercise of religious beliefs; (3) conspiring to commit a federal felony by means of fire or explosive; (4) carrying or using a destructive device during or in relation to a crime of violence; and (5) possessing an unregistered destructive device. Prior to trial, Hari filed two motions to dismiss the indictment. The first motion alleged legal deficiencies in the charges, and the second alleged Sixth Amendment violations by the government. The district court denied both motions, and Hari now challenges three parts of those rulings:

Add. __" refers to page numbers in Hari's addendum. "U.S. Sealed App. __" refers to page numbers in the sealed appendix filed on July 1, 2022.

[2] Most documents in the record refer to Hari by her prior name, Michael Hari. After trial, Hari transitioned to a female identity and legally changed her name to Emily Hari. The district court amended the case caption to reflect this change. R. Doc. 486.

1. Whether Congress validly exercised its authority under the Commerce Clause when it enacted Section 247(a), which applies when an offense "is in or affects foreign or interstate commerce."

United States v. *Lopez*, 514 U.S. 549 (1995)

United States v. *Roof*, 10 F.4th 314 (4th Cir. 2021),
petition for certiorari pending, No. 21-7234 (filed Feb. 24, 2022)

United States v. *Ballinger*, 395 F.3d 1218 (11th Cir.) (en banc),
cert. denied, 546 U.S. 829 (2005)

2. Whether the charged offenses under Section 247 require the use or threatened use of physical force against the person or property of another and thus qualify as crimes of violence under 18 U.S.C. 924(c)(3)(A).

United States v. *Roof*, 10 F.4th 314 (4th Cir. 2021),
petition for certiorari pending, No. 21-7234 (filed Feb. 24, 2022)

3. Whether the district court correctly determined that the government did not knowingly intrude into Hari's attorney-client relationship and that the government's actions did not prejudice Hari.

United States v. *Sawatzky*, 994 F.3d 919 (8th Cir.),
cert. denied, 142 S. Ct. 364 (2021)

United States v. *Singer*, 785 F.2d 228 (8th Cir.),
cert. denied, 479 U.S. 883 (1986)

Clark v. *Wood*, 823 F.2d 1241 (8th Cir.),
cert. denied, 484 U.S. 945 (1987)

STATEMENT OF THE CASE

1. Factual Background

a. Hari And Her Militia Members Bomb The Dar al-Farooq Islamic Center

On the morning of August 5, 2017, Emily Hari and two co-defendants detonated a 20-pound pipe bomb at Dar al-Farooq Islamic Center in Bloomington, Minnesota. Tr., Vol. I, 176; Tr., Vol. IV, 908; Tr., Vol. V, 1044-1045. The bomb, fueled by explosive powder and gasoline, blew up the imam's office just as morning prayers were concluding. Tr., Vol. I, 77-78, 127, 129-130, 187, 196; Tr., Vol. IV, 913-914; Tr., Vol. V, 1178. The explosion terrified and disoriented the worshippers, who avoided physical injuries but suffered lasting emotional trauma. Tr., Vol. I, 79; Sent. Tr., 102, 106-108, 138, 201.

The attack was the first by Hari's newly formed militia, known as the "White Rabbits." Tr., Vol. III, 666, 693. The militia was a white supremacist paramilitary organization governed by a handbook Hari authored that stated that Islam was incompatible with American government and should be stopped using guerilla warfare. Tr., Vol. III, 671-677; Tr., Vol. VI, 1465-1466. Hari's co-defendants, Joe Morris and Michael McWhorter, were the first two members Hari recruited to the militia. Tr., Vol. IV, 885, 899-902; Tr., Vol. III, 578, 595-596.

The attack on the Dar al-Farooq mosque followed weeks of careful planning by Hari. Tr., Vol. III, 611. Among other steps, Hari rented a pickup truck and

drove with McWhorter from Illinois to an ammunition store in Indiana, where Hari purchased ten containers of explosive powder. Tr., Vol. III, 612-614, 619, 805. After returning to Illinois, Hari told McWhorter and Morris that they would be leaving soon for a "job up north" and directed them not to bring any cellphones or electronics which could be tracked. Tr., Vol. IV, 903.

The night before the attack, Hari loaded the rented pickup truck with a pipe bomb, two assault rifles, and a sledgehammer. Tr., Vol. IV, 905-909. Hari then picked up Morris and McWhorter, who met for the first time. Tr., Vol. IV, 905. While driving from Illinois to Minnesota, Hari informed them that the trio would bomb the Dar al-Farooq mosque before morning prayers. Tr., Vol. IV, 915; Tr., Vol. III, 634. Along the way, they stopped at two gas stations, where Hari filled a plastic jug with a mixture of gasoline and diesel fuel. Tr., Vol. IV, 913-914.

When they arrived, Hari pointed to a window and said, "go do it there." Tr., Vol. IV, 920. Morris smashed the window with the sledgehammer and threw the container of gasoline and diesel fuel inside. Tr., Vol. IV, 920-923. McWhorter then lit the fuse of the pipe bomb, tossed it through the shattered window, and returned to the truck. Tr., Vol. IV, 923. While speeding away from the scene, the three high-fived and congratulated one another on a job well done. Tr., Vol. IV, 925-926.

b. The FBI Arrests Hari And Corroborates Morris's And McWhorter's Confessions

For more than seven months, the FBI carried out a massive investigation to find those responsible for the bombing, ultimately arresting Hari, Morris, and McWhorter. Tr., Vol. I, 208-212; Tr., Vol. II, 436. Morris and McWhorter confessed soon after their arrests. Tr., Vol. II, 448. The FBI continued its investigation and corroborated their accounts by executing search warrants, interviewing witnesses, and conducting forensic analyses, among other steps. Tr., Vol. VII, 1633-1640.

During its investigation, the FBI seized dozens of pieces of physical evidence, including Hari's laptop computer and the sledgehammer Morris used to break the mosque's window. Tr., Vol. II, 492, 512, 565. Forensic analysis of the laptop computer revealed substantial evidence related to the bombing, the formation of the White Rabbits, and Hari's hatred of American Muslims. Tr., Vol. VI, 1399, 1404-1477. Forensic analysis of Hari's cell phone further showed her travelling from Illinois to the ammunition store in Indiana the week before the Minnesota bombing and through Iowa back to Illinois the day after the bombing, as described by both McWhorter and Morris. Tr., Vol. IV, 859-861, 864-865. Financial records and purchase receipts also showed that Hari funded not only the bombing, but also the militia's startup costs and later missions. Tr., Vol. VII, 1592-1614.

2. Procedural History

a. Hari Is Indicted

A federal grand jury in the District of Minnesota charged Hari, McWhorter, and Morris with five counts for their alleged roles in the Dar al-Farooq bombing:

Count 1:	Intentionally damaging, defacing, or destroying religious real property because of its religious character in violation of 18 U.S.C. 247(a)(1);
Count 2:	Intentionally obstructing by force the free exercise of religious beliefs in violation of 18 U.S.C. 247(a)(2);
Count 3:	Conspiracy to commit a federal felony by means of fire or explosive in violation of 18 U.S.C. 844(h) and (m);
Count 4:	Carrying or using a destructive device during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and
Count 5:	Possession of an unregistered destructive device, in violation of 26 U.S.C. 5845(a) and 5861(d).

R. Doc. 14; Def. Add. 68-75. In a separate case, a federal grand jury in the Central District of Illinois indicted Hari, McWhorter, Morris, and another militia member for other alleged violent criminal conduct. See *United States* v. *Hari, et al.*, No. 2:18-cr-20014 (C.D. Ill.). McWhorter and Morris entered plea agreements to resolve both cases, waiving their right to appeal. R. Docs. 43, 44. They were sentenced to 190 and 170 months in prison, respectively. R. Docs. 545, 547.

b. The District Court Denies Hari's First Motion To Dismiss The Indictment

Hari moved to dismiss Counts 1 through 4 of the indictment on several grounds, including two that she continues to pursue on appeal: first, that 18 U.S.C. 247(a) is facially unconstitutional because Congress exceeded its authority under the Commerce Clause when enacting the statute; and second, that the charged offenses under Section 247 do not qualify as crimes of violence under 18 U.S.C. 924(c). R. Doc. 94. The magistrate judge rejected both arguments, recommending that Hari's motion to dismiss be denied in full. R. Doc. 131; Def. Add. 18-41.

On Hari's constitutional challenge, the magistrate judge concluded that Section 247(a) is a valid exercise of Congress's Commerce Clause authority under *United States* v. *Lopez*, 514 U.S. 549 (1995). R. Doc. 131, at 4-13; Def. Add. 21-30. The magistrate judge also rejected Hari's challenge to the Section 924(c) charge, finding that the predicate offenses—18 U.S.C. 247(a)(1) and 18 U.S.C. 247(a)(2)—both categorically require the use or threatened use of physical force against the person or property of another and thus qualify as crimes of violence under 18 U.S.C. 924(c)(3)(A). R. Doc. 131, at 19-23; Def. Add. 36-40.

The district court adopted the report and recommendation in full, finding that that magistrate judge reached conclusions that "are both factually and legally correct." R. Doc. 152, at 4; Def. Add. 45.

c. The Court Denies Hari's Second Motion To Dismiss, Finding No Sixth Amendment Violation

Hari later filed a second motion to dismiss the indictment, this time arguing that the indictment should be dismissed because the government improperly interfered with privileged attorney-client communications. Br. 11-12. Hari cited recordings by locally operated jails that captured some of her telephone calls to defense counsel. Br. 12. Hari also pointed to instances where one of the locally operated jails searched her cell and forwarded copies of purportedly privileged papers to the federal prosecution team. Br. 12. Hari argued that these actions carried an unacceptable risk of prejudice at her upcoming trial and required the dismissal of all charges. Br. 11-12. In response, the government acknowledged that an FBI report mistakenly summarized some of Hari's conversations with her attorney, and the government did not contest that Hari's handwritten notes contained privileged information and had been sent to the prosecution team. Br. 12; R. Doc. 241 (under seal); U.S. Sealed App. 1-18. But the government argued that these actions failed to establish a Sixth Amendment violation. R. Doc. 241 (under seal); U.S. Sealed App. 1-18.

The district court agreed with the government that no Sixth Amendment violation occurred. R. Doc. 248; Def. Add. 47-54. First, the court held that the government did not knowingly intrude on Hari's attorney-client relationship, describing the disclosures as "inadvertent[]." R. Doc. 248, at 6; Def. Add. 52.

Second, the court determined that Hari could not show any threat of prejudice because there was "no risk that the prosecution [would] use any substance of any of the attorney-client communications at trial." R. Doc. 248, at 7; Def. Add. 53. Thus, the court denied Hari's motion to dismiss the indictment. R. Doc. 248, at 7; Def. Add. 53.

d. Hari Is Tried, Convicted, And Sentenced

The case proceeded to a five-week trial, during which the government presented 25 witnesses and nearly 300 exhibits. R. Docs. 279, 282, 285-286, 301, 303, 305, 321. The jury found Hari guilty on all five counts. R. Doc. 323. At sentencing, the district court stated that "the evidence clearly established that apart from attacking [the mosque] as religious property, the bombing was clearly done to scare, intimidate, and terrorize the Islamic place of worship, and frighten and terrorize the individuals of Muslim faith and really to send a message." Sent. Tr., 199. The court sentenced Hari to a total of 636 months' imprisonment. R. Doc. 504, at 2, 6; Def. Add. 11, 15.

SUMMARY OF THE ARGUMENT

1. This Court should join every other court that has reached the question and hold that 18 U.S.C. 247(a) represents a valid exercise of congressional authority under the Commerce Clause. As these other courts have recognized, Congress included a jurisdictional element in Section 247 to ensure that every offense will

have a sufficient nexus to interstate commerce. That jurisdictional element also reflects Congress's intent to use its full authority under the Commerce Clause, permissibly covering all three categories of interstate commerce under *United States* v. *Lopez*, 514 U.S. 549 (1995). Although Hari contends that Section 247(a) is unconstitutional under one of those categories, she does not contest that Section 247(a) is constitutional under the other two categories. This concession dooms her facial challenge because a statute must be unconstitutional in *all* of its applications to be struck down. This Court should thus reject Hari's facial challenge to the statute.

2. Hari's challenge to her conviction under 18 U.S.C. 924(c) fares no better because the indictment charged two offenses that qualify as crimes of violence, and only one qualifying predicate offense is necessary. Hari does not dispute that Sections 247(a)(1) and 247(a)(2) each categorically require the use or threatened use of physical force. Rather, Hari contends that because, as a theoretical matter, the force could be used against one's own property, the use of force would not satisfy Section 924(c)'s requirement that the force be used against the person or property *of another*. No court has ever adopted this interpretation of Sections 247(a)(1) and 247(a)(2). As the magistrate judge rightly recognized, Hari's arguments are "not [] reasonable or logical" under these sections and would lead to

an "absurd" result. R. Doc. 131, at 21-23; Def. Add. 38-40. This Court should thus affirm Hari's conviction under Section 924(c).

3. Finally, this Court should affirm the district court's ruling that the government did not violate Hari's Sixth Amendment right to counsel. As the district court correctly found, Hari presented no evidence that the government intentionally intruded into her attorney-client relationship, much less that Hari suffered any prejudice from the limited disclosure of any attorney-client communications. Thus, this Court should reject Hari's request to vacate her convictions or order a new trial.

ARGUMENT

I

THIS COURT SHOULD AFFIRM HARI'S CONVICTIONS UNDER 18 U.S.C. 247(a) BECAUSE THAT LAW IS FACIALLY CONSTITUTIONAL

The district court properly upheld the constitutionality of 18 U.S.C. 247(a). In arguing that this Court should reverse that decision, Hari falls far short of the high standard required to invalidate an act of Congress. Indeed, every court to consider a facial challenge to Section 247(a) has ruled that the statute represents a valid exercise of Congress's Commerce Clause power. This Court should do the same and affirm Hari's convictions on Counts 1 through 4, which rest on Section 247(a)'s validity.

A. Standard Of Review

This Court reviews the constitutionality of a federal statute de novo. *United States* v. *Anderson*, 771 F.3d 1064, 1066 (8th Cir. 2014), cert. denied, 575 U.S. 924 (2015). The Court may strike down an act of Congress "only if the lack of constitutional authority to pass the act in question is clearly demonstrated." *Id.* at 1067 (quoting *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 538 (2012)) (brackets and internal quotation marks omitted); see also *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that [the judicial branch] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

B. Congress Validly Exercised Its Authority Under The Commerce Clause When It Enacted Section 247(a)

Hari fails to meet her heavy burden to show that Section 247(a) is facially unconstitutional. As the Supreme Court has cautioned, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Indeed, in the more than 30 years since Section 247(a) was enacted, no defendant has successfully mounted such a challenge.

In fact, courts have repeatedly upheld Section 247(a) both on its face and as applied to defendants, concluding that Congress properly exercised its authority

under the Commerce Clause. Most recently, the Fourth Circuit rejected a facial challenge to the law, explaining that the statute's jurisdictional element ensures that any offense will be tied to interstate commerce. *United States* v. *Roof*, 10 F.4th 314, 383 (4th Cir. 2021), petition for certiorari pending, No. 21-7234 (filed Feb. 24, 2022). As the Tenth Circuit has likewise held, "by making interstate commerce an element of the crime under both § 247 and § 844(i), to be decided on a case-by-case basis, constitutional problems are avoided." *United States* v. *Grassie*, 237 F.3d 1199, 1209-1211 (10th Cir.), cert. denied, 533 U.S. 960 (2001). The Eleventh Circuit similarly had "little trouble concluding that § 247, both facially and as applied to [the defendant], is a constitutional expression of Congress' well-established power to regulate the channels and instrumentalities of interstate commerce in order to prevent their use for harmful purposes." *United States* v. *Ballinger*, 395 F.3d 1218, 1222 (11th Cir.) (en banc), cert. denied, 546 U.S. 829 (2005). As explained below, this Court should follow a similar approach to these courts in rejecting Hari's challenge to Section 247(a).

1. Congress Exercised The Full Extent Of Its Commerce Power In Section 247(a)

The decisions upholding Section 247(a) have relied on the Supreme Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Supreme Court identified three categories that Congress may regulate under its commerce power: (i) the channels of interstate commerce; (ii) the instrumentalities of

interstate commerce; and (iii) activities that substantially affect interstate commerce. 514 U.S. at 558-559. The first category comprises "the interstate transportation routes through which persons and goods move." *Morrison*, 529 U.S. at 613 n.5 (citation omitted). These include highways, railroads, navigable waters, and airspace, as well as telecommunications networks. See *Ballinger*, 395 F.3d at 1225-1226. The second category comprises persons or things moving in interstate commerce. *Lopez*, 514 U.S. at 558. These include cars, planes, boats, and trains. *Ballinger*, 395 F.3d at 1226. The third category includes purely intrastate activity if it is part of a class of activity that has a substantial effect on interstate commerce. See *Gonzales* v. *Raich*, 545 U.S. 1, 17-18 (2005).

Section 247(a) is a valid exercise of Congress's commerce authority under all three *Lopez* categories because it applies when an offense "is in or affects interstate or foreign commerce." 18 U.S.C. 247(b). When Congress invokes this particular language, Congress asserts "its full Commerce Clause power." *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977) (quoting *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975)); see also *American Bldg. Maint. Indus.*, 422 U.S. at 277 n.6. (stating that a jurisdictional clause like this is "coextensive with the constitutional power of Congress"). This Court has likewise recognized that "[t]he phrase 'in or affecting commerce' is a term of art that indicates a congressional intent to invoke the full extent of its commerce power."

United States v. *Mosby*, 60 F.3d 454, 456 (8th Cir. 1995) (citation omitted), cert. denied, 516 U.S. 1125 (1996).

Section 247's legislative history confirms its broad reach. As originally enacted, Section 247 applied only if "in committing the offense, the defendant travels in interstate or foreign commerce, or uses a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce." Pub. L. No. 100-346, § 1, 102 Stat. 644 (1988). That legislation proved to be "totally ineffective" because of its "highly restrictive and duplicative language" that required the government to prove that a defendant either traveled in interstate or foreign commerce, or used an instrumentality of interstate commerce *and* did so in interstate or foreign commerce. H.R. Rep. No. 621, 104th Cong., 2d Sess. 4 (1996) (H.R. Rep. No. 621); see also *id.* at 8-10 (Department of Justice Views).

To address this problem, Congress amended Section 247(b) to remove the restrictive language and "broaden[] the jurisdictional scope of the statute" to cover "any conduct which falls within the interstate commerce clause of the Constitution." H.R. Rep. No. 621, at 7; accord 142 Cong. Rec. 17,212 (1996) (Joint Statement of Floor Managers); see Pub. L. No. 104-155, § 3(3), 110 Stat. 1392-1393 (1996). In doing so, Congress carefully considered the confines of *Lopez*, explaining that Section 247 "specifically limits its reach to conduct which can be shown to be in or to affect interstate commerce." H.R. Rep. No. 621, at 7.

This conduct, according to the House Report, could include "many factual circumstances," such as "where in committing, planning, or preparing to commit the offense, the defendant either travels in interstate or foreign commerce, or uses the mail or any facility or instrumentality of interstate or foreign commerce." *Ibid.* As this legislative history shows, "Congress could not have made clearer its intention to exercise its full commerce power." *Ballinger*, 395 F.3d at 1240.

2. Section 247(a) Can Be Constitutionally Applied To Hari's Crimes

In attacking Section 247(a), Hari skips over the first two *Lopez* categories and focuses only on the third one, claiming that Section 247 regulates activity that does not substantially affect interstate commerce. Br. 45-51. Not only is Hari wrong on this point, but her failure to contest Section 247's validity under the first two *Lopez* categories dooms her facial challenge. A facial challenge can succeed only if "the law is unconstitutional in *all* of its applications." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added). Likewise, with certain exceptions that do not apply here, a court may not entertain a constitutional challenge to a statute unless the statute is unconstitutional as applied to the challenger in the case at hand. See *United States* v. *Raines*, 362 U.S. 17, 22 (1960). As this Court has explained, "when possible, we must narrowly read a statute to be constitutional as applied to the facts of the

case before us and cannot consider other arguably unconstitutional applications of that statute." *United States* v. *Lemons*, 697 F.2d 832, 835 (8th Cir. 1983).

When those two principles are applied here, Hari's challenge fails because she does not contest that Section 247(a) can be constitutionally applied when defendants use the channels and instrumentalities of commerce to commit their crimes. See *Roof*, 10 F.4th at 384 (holding that Section 247's "appropriate application" to the defendant "defeats any claim of facial invalidity"). As the Fourth Circuit explained in upholding Section 247(a), Congress's commerce power "extends to regulating instrumentalities of interstate commerce even when the threat of their misuse 'may come only from intrastate activities.'" *Id.* at 386 (quoting *Lopez*, 514 U.S. at 558).

Likewise, as the Eleventh Circuit held in *Ballinger*, where Congress invokes the full scope of its Commerce Clause power, as it has done for Section 247, it may regulate "the channels and instrumentalities of commerce in order to prevent their use to facilitate harmful acts, which may be consummated—and whose effects ultimately may be felt—outside the flow of commerce." 395 F.3d at 1228. Indeed, *Ballinger* rattled off a dozen different criminal statutes that, like Section 247, "clearly illustrate Congress' power to punish offenders * * * who rely on the channels and instrumentalities of commerce in committing criminal acts." *Id.* at 1229.

Here, Hari and her co-defendants relied on the channels and instrumentalities of commerce to commit their offenses. Among other things, they rented a truck in Illinois; drove across state lines (from Illinois to Indiana) in that rented truck to purchase explosive powder to build a pipe bomb; drove back to Illinois to load up the truck with the bomb, two assault rifles, and a sledgehammer; and then drove the rented truck across state lines again (from Illinois to Minnesota) to bomb the mosque using that pipe bomb, while armed with the two assault rifles. Tr., Vol. III, 611, 628, 639, 780, 805; Tr., Vol. IV, 906-909. As *Ballinger* explained in upholding Section 247(a),

> Congress acted well within the bounds of its commerce power when it enacted legislation to prevent conduct like Ballinger's, which entailed weeks of travel in a van (an instrumentality of commerce) along interstate highways (a channel of commerce) and at least six separate interstate border crossings, all for the specific purpose of spreading the evil of church burning through four different states.

395 F.3d at 1228. Hari does not argue otherwise, and her facial challenge should thus be rejected.

3. Section 247's Jurisdictional Element Defeats A Facial Challenge

Section 247's jurisdictional element also defeats Hari's argument that the statute criminalizes more conduct than the Commerce Clause allows. Br. 43. This Court has repeatedly held that jurisdictional elements "ensure, through case-by-case inquiry, that [the prohibited conduct] affects interstate commerce." *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (alterations omitted) (quoting

Lopez, 514 U.S. at 561) (upholding 18 U.S.C. 992(g) under the Commerce Clause), cert. denied, 517 U.S. 1125 (1996); see also *United States* v. *House*, 825 F.3d 381, 386 (8th Cir. 2016) (upholding the Hobbs Act under the Commerce Clause because that law "contains an express nexus requiring the charged criminal conduct to affect interstate commerce"), cert. denied, 137 S. Ct. 1124 (2017). Here, Section 247's jurisdictional clause likewise ensures that any prosecution will establish a nexus to interstate commerce through one or more of the *Lopez* categories.

Indeed, Section 247's jurisdictional clause is a key reason why other courts have upheld the constitutionality of the law under the Commerce Clause. For example, in *Roof*, the Fourth Circuit held that Section 247's express jurisdictional element "allows application of the statute only where the defendant's conduct falls within the regulatory scope of the Commerce Clause." 10 F.4th at 383. Likewise, in *Ballinger*, the Eleventh Circuit emphasized that "§ 247 contains unambiguous jurisdictional language—covering offenses *in* or *affecting commerce*—that must be given its proper effect." 395 F.3d at 1235. Finally, in *Grassie*, the Tenth Circuit recognized that "by making interstate commerce an element of the crime under both § 247 and § 844(i), to be decided on a case-by-case basis, constitutional problems are avoided." 237 F.3d at 1209-1211.

To be sure, as Hari points out (Br. 50), this Court has stated that a jurisdictional element will not always guarantee that a statute will pass muster

under the Commerce Clause. See *United States* v. *Crenshaw*, 359 F.3d 977, 985 (8th Cir. 2004). Yet this Court's post-*Lopez* decisions have consistently upheld criminal statutes with a jurisdictional element like Section 247's. See *id.* at 985-986; see also *House*, 825 F.3d at 386 (citing *United States* v. *Vong*, 171 F.3d 648, 654 (8th Cir. 1999)). In essence, a defendant will face an exceedingly difficult (if not impossible) task of showing that a statute is facially unconstitutional when that statute includes a jurisdictional element that invokes the full extent of Congress's commerce power, thus ensuring that the government proves a nexus to interstate commerce in each case. In fact, in another hate crime prosecution, the Fourth Circuit emphasized that it could not find any case "in which a federal criminal statute including an interstate commerce jurisdictional element has been held to exceed Congress's authority under the Commerce Clause." *United States* v. *Hill*, 927 F.3d 188, 204 (4th Cir. 2019) (upholding conviction for bias-motivated assault under 18 U.S.C. 249(a)(2)), cert. denied, 141 S. Ct. 272 (2020).

Nor does Hari cite any case where a court invalidated a statute with a jurisdictional clause like Section 247's. This is not surprising. As the Fourth Circuit explained in *Roof*, "the religious-obstruction statute's jurisdictional element," like that of many other criminal statutes, "requires the government to prove that the conduct of each prosecuted defendant is sufficiently in or affecting

interstate commerce to warrant exercise of the federal government's power." 10 F.4th at 383 n.43.

Even in *Crenshaw*, which Hari invokes (Br. 50), this Court relied on the jurisdictional element in the challenged statute—there, 18 U.S.C. 1959—to uphold the law against a facial challenge under the Commerce Clause. 359 F.3d at 985-986. *Crenshaw* also shows why Hari goes astray by comparing Section 247 with the laws the Supreme Court struck down as facially unconstitutional in *Lopez* and *Morrison*. Br. 46-47. As *Crenshaw* explains, a jurisdictional element "demonstrates a fundamental difference" from the laws at issue in *Lopez* and *Morrison*, which had no similar restrictions on their application. *Id.* at 986.

In *Lopez*, the Court emphasized that the Gun-Free School Zones Act, which criminalized possessing a firearm in a school zone, "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." 514 U.S. at 561. But after Congress later amended the statute to add a jurisdictional element requiring that the firearm "has moved in or * * * otherwise affects interstate or foreign commerce," 18 U.S.C. 922(q)(2)(A), courts, including this Court, upheld the law. See, *e.g.*, *United States* v. *Danks*, 221 F.3d 1037, 1038-1039 (8th Cir. 1999).

Similarly, in *Morrison*, the Supreme Court invalidated the civil remedy provision in the Violence Against Women Act, emphasizing that the statute

contained no interstate commerce jurisdictional element. 529 U.S. at 613. Notably, though, the Court in *Morrison* distinguished that civil provision from the law's criminal provision, which did have a jurisdictional element. *Id.* at 613 n.5 (recognizing that the courts of appeals had uniformly upheld the criminal provision as "properly fall[ing] within the first of *Lopez's* categories as it regulates the use of channels of interstate commerce") (citing *United States* v. *Lankford*, 196 F.3d 563, 571-572 (5th Cir. 1999)). The same can be said about Section 247: it "differs significantly from the statute invalidated in *Lopez*" because it has a jurisdictional element that allows a prosecution only if the offense is in or affects interstate commerce. *Ballinger*, 395 F.3d at 1235. Thus, Section 247's jurisdictional element extinguishes Hari's facial challenge.

4. Section 247 Properly Criminalizes Activities That Substantially Affect Interstate Commerce

Because Hari has not met her burden to show that Section 247(a) is unconstitutional in all applications or as applied to her case, this Court, like the Eleventh Circuit in *Ballinger*, 395 F.3d at 1227, need not consider whether the statute qualifies under the third *Lopez* category (Br. 45-51). Still, lest there be any doubt, Section 247(a) is a valid exercise of Congress's authority under the third *Lopez* category, as the Fourth Circuit concluded. *Roof*, 10 F.4th at 383-384.

Under the third *Lopez* category, a statute should be upheld as long as Congress had a "rational basis" for concluding that the activities it seeks to

regulate, taken in the aggregate, substantially affect interstate commerce. *Gonzales*, 545 U.S. at 22. *Lopez* and *Morrison* provide the framework for analyzing this issue. See *Morrison*, 529 U.S. at 610-612; *Lopez*, 514 U.S. at 559-564. Under that framework, Section 247(a) properly regulates offenses that substantially affect interstate commerce.

Although the offenses in Section 247(a) are not inherently commercial, the statute's jurisdictional element ensures the required nexus between the offense and interstate commerce. See *Roof*, 10 F.4th at 383. "When a statute expressly requires that the proscribed conduct have an appropriate nexus with interstate commerce, courts can 'ensure, through case-by-case inquiry,' that each application of the statute is constitutional, and thus the statute should not be struck down as being facially unconstitutional." *Ballinger*, 395 F.3d at 1228 n.5 (quoting *Lopez*, 514 U.S. at 561). Contrary to Hari's suggestion (Br. 46-47), a statute does not fail just because a law targets noneconomic conduct. As the Sixth Circuit has ruled, "[w]here a statute lacks a clear economic purpose, the inclusion of an explicit jurisdictional element suffices to 'ensure, through case-by-case inquiry, that the [violation] in question affects interstate commerce.'" *United States* v. *Coleman*, 675 F.3d 615, 620 (6th Cir.) (quoting *Lopez*, 514 U.S. at 561), cert. denied, 568 U.S. 826 (2012).

In addition to the jurisdictional element, "the legislative history of the religious-obstruction statute explicitly discusses the nexus to interstate commerce." *Roof*, 10 F.4th at 38. And although Congress is "not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," *Lopez*, 514 U.S. at 562-563, when it does, a court may "evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye." *Morrison*, 529 U.S. at 612 (brackets omitted) (quoting *Lopez*, 514 U.S. at 563). Here, as the Tenth Circuit highlighted in *Grassie*, the legislative history contains "references to a broad range of activities in which churches engage, including social services, educational and religious activities, the purchase and distribution of goods and services, civil participation, and the collection and distribution of funds for these and other activities across state lines." 237 F.3d at 1209.

Finally, "[i]t is well established that religious organizations can and do engage in and affect interstate commerce." *United States* v. *Corum*, No. 01-cr-236, 2002 WL 1285078, at *3 (D. Minn. June 5, 2002) (upholding validity of Section 247(a)(2) against an as-applied Commerce-Clause challenge) (citations omitted), aff'd, 362 F.3d 489 (8th Cir. 2004), cert. denied, 543 U.S. 1056 (2005). Indeed, courts have consistently held that where a defendant's conduct prevents an organization from engaging in an activity that affects interstate commerce, then a

federal statute punishing that conduct falls within Congress's authority to regulate activities that substantially affect interstate commerce. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573-574 (1997) (holding that a camp is engaged in commerce even if its goods and services are consumed locally); *United States* v. *Terry*, 257 F.3d 366, 369-371 (4th Cir.) (holding that arson of a church containing a daycare center satisfied the jurisdictional element of federal arson statute), cert. denied, 534 U.S. 1035 (2001); *United States* v. *Renteria*, 557 F.3d 1003, 1010 (9th Cir.) (holding that arson of a synagogue that operated a gift shop and daycare center satisfied the jurisdictional element of federal arson statute), cert. denied, 558 U.S. 919 (2009). Thus, Congress had a rational basis for concluding post-*Lopez* that Section 247 criminalizes offenses that substantially affect interstate commerce.

* * *

In sum, no matter how this Court addresses Hari's arguments, the conclusion is the same: Congress validly exercised its authority under the Commerce Clause when it enacted Section 247(a). This Court should thus reject Hari's facial challenge to the statute.

II

THIS COURT SHOULD AFFIRM HARI'S CONVICTION UNDER 18 U.S.C. 924(c) BECAUSE HARI COMMITTED CRIMES OF VIOLENCE

As the district court correctly ruled, Count 4 of the indictment properly charged Hari with using a destructive device "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). Here, two charged offenses qualify as crimes of violence: 18 U.S.C. 247(a)(1) and 18 U.S.C. 247(a)(2). Sections 247(a)(1) and 247(a)(2) are crimes of violence because they are both felonies that each require "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). Thus, either offense suffices to uphold Hari's conviction on Count 4.

In asking this Court to vacate her conviction for violating Section 924(c), Hari does not contest that both predicate offenses categorically require the use, attempted use, or threatened use of physical force.[3] Rather, in Hari's view, the offenses could theoretically be committed by using that force against one's *own* property and thus do not qualify as crimes of violence under Section 924(c), which

[3] Hari acknowledges (Br. 29-30, 36) that both offenses, as charged here, include as an element the "use of an explosive, fire, or a dangerous weapon." 18 U.S.C. 247(d)(3). Section 247(d)(3) categorically requires the use of physical force. See *United States* v. *Doggart*, 947 F.3d 879, 887-888 (6th Cir. 2020) ("Dangerous weapons are dangerous because, when used, they generate force capable of causing injury to people and damage to property.").

requires force or threatened force to be used against the person or property *of another*. These arguments, as the magistrate judge concluded, are "not [] reasonable or logical" and would lead to an "absurd" result. R. Doc. 131, at 21-23; Def. Add. 38-40.

A. Standard Of Review

Whether an offense qualifies as a crime of violence under Section 924(c) is a question of law reviewed de novo. *McCoy* v. *United States*, 960 F.3d 487, 489 (8th Cir. 2020), cert. denied, 141 S. Ct. 2819 (2021).

B. Section 247 Is Divisible Under The Modified Categorical Approach

When a defendant argues that an offense fails to qualify as a crime of violence, a court's "first step" should be to determine whether the categorical or modified categorical approach applies. *United States* v. *Quigley*, 943 F.3d 390, 393 (8th Cir. 2019). That inquiry turns on whether the statute criminalizing the conduct can be described as "divisible." *Ibid.* A divisible statute "comprises multiple, alternative versions of the crime" and is evaluated under the modified categorical approach. *United States* v. *Harper*, 869 F.3d 624, 625 (8th Cir. 2017) (citation omitted).

Section 247 is divisible in two ways. First, Section 247 specifies several distinct offenses with different elements, from intentionally damaging religious real property to intentionally using force to obstruct someone's free exercise of

religious beliefs. See 18 U.S.C. 247(a)(1)-(2) and (c). Second, Section 247's sentencing enhancements create multiple versions of those crimes, including a misdemeanor, a 3-year felony, a 20-year felony, a 40-year felony, a life-felony, or a death-eligible felony, depending on the circumstances of the offense. See 18 U.S.C. 247(d). Because these sentencing enhancements increase the statutory maximum penalty, they are additional elements that the government must plead and prove. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). Hari does not argue otherwise.

Because Section 247 contains several different offenses and penalty enhancements, courts have uniformly applied the modified categorical approach to it. As the Sixth Circuit explained, "[b]ecause § 247 defines divisible offenses, each with distinct elements, we apply the modified categorical approach." *United States* v. *Doggart*, 947 F.3d 879, 887 (6th Cir. 2020). Likewise, the Fourth Circuit held that the statute is divisible based on the penalty enhancement under Section 247(d) and thus applied the modified categorical approach. See *United States* v. *Roof*, 10 F.4th 314, 403 (4th Cir. 2021), petition for certiorari pending on other grounds, No. 21-7234 (filed Feb. 24, 2022).

Under the modified categorical approach, courts may examine "a limited class of documents, such as indictments and jury instructions," to determine which version of the offense formed the basis of the defendant's conviction. *Descamps* v.

United States, 570 U.S. 254, 257 (2013). Here, as Hari agrees (Br. 28), those documents specify two predicate crimes of violence—under Sections 247(a)(1) and 247(a)(2)—each with its own 20-year penalty enhancement for "the use, attempted use, or threatened use of an explosive, fire, or a dangerous weapon." R. Doc. 14, at 1-2, 6-7; Def. Add. 68-69, 73-74; R. Doc. 327, at 15, 19; Def. Add. 77, 81. Thus, this Court should separately examine whether either of these offenses satisfies Section 924(c)(3)(A).

C. Hari's Predicate Offenses Constitute Crimes Of Violence Under Section 924(c)(3)(A)

Hari's sole challenge to Count 4 rests on the mistaken belief that someone can violate Sections 247(a)(1) and 247(a)(2) simply by damaging their own property. Br. 28-42. But Hari's strained interpretation of Sections 247(a)(1) and 247(a)(2) ignores the essential elements of those offenses and rests on a fanciful application of the statute. As detailed below, both felonies qualify as crimes of violence under Section 924(c) and support affirming Hari's conviction because

both offenses require "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).[4]

1. Section 247(a)(1) Categorically Requires The Use, Attempted Use, Or Threatened Use Of Physical Force Against The Person Or Property Of Another

The elements of Hari's offense for destruction of religious property fit squarely within Section 924(c)'s definition of a crime of violence. Section 247(a)(1), as charged here, required the government to prove that Hari:

(1) intentionally;

(2) defaced, damaged, or destroyed any religious real property;

(3) because of the religious character of the property;

(4) the offense included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire; and

(5) the offense was in or affected interstate commerce.

[4] The magistrate judge rejected Hari's arguments in part because she relied on "legal imagination" and did not show a "realistic probability" that the government would prosecute conduct that fell outside the scope of Section 924(c)(3)(A). R. Doc. 131, at 22; Def. Add. 39 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007)). The Supreme Court recently applied a more "straightforward" approach than *Duenas-Alvarez* to determine whether a federal offense is a crime of violence under Section 924(c): "Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force [against the person or property of another]." *United States* v. *Taylor*, No. 20-1459, 2022 WL 2203334, at *8 (S. Ct. June 21, 2022) (142 S. Ct. 2015). As explained below, the answer to this question here is "yes."

18 U.S.C. 247(a)(1), (b) and (d)(3); R. Doc. 327, at 14-18; Def. Add. 76-80; Br. 29-30 (listing the same five elements).

Properly understood, these elements do not reach a defendant's destruction of her own property. As the magistrate judge explained, Hari's argument otherwise disregards two key aspects of Section 247. R. Doc. 131, at 22-23; Def. Add. 39-40. First, Section 247 defines "religious real property" to include only "any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship, or real property owned or leased by a nonprofit, religiously affiliated organization." 18 U.S.C. 247(f). Second, Section 247 requires that the damage to this religious real property occur "because of the religious character of that property." 18 U.S.C. 247(a)(1). Taken together, these two provisions effectively preclude someone from being prosecuted for damaging their own property.

The federal arson statute, 18 U.S.C. 844(i), which the government and courts agree cannot serve as the predicate for a Section 924(c) charge, does not help Hari's argument. See Br. 30-31. First, Section 844(i) covers substantially more property than Section 247(a)(1): it reaches "any building, vehicle, or other real or personal property" that is used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce and is maliciously damaged or destroyed

by someone using fire or an explosive. 18 U.S.C. 844(i). That personal or real property clearly includes a defendant's own possessions. By contrast, Section 247 narrowly defines "religious real property" to include only certain categories of property. 18 U.S.C. 247(f). Second, Section 247 requires that the defendant acted "because of the religious nature of the property," 18 U.S.C. 247(a)(1), while Section 844(i) contains no similar bias motivation—someone can be prosecuted for burning down their own property to obtain insurance proceeds. Finally, although the government has prosecuted individuals under Section 844(i) for damaging their own property, it has not done so under Section 247(a)(1).

Section 247's certification provision provides another textual indication that the offenses do not cover damaging one's own property. That provision requires the Attorney General to attest that every prosecution "is in the public interest and necessary to secure substantial justice." 18 U.S.C. 247(e). If a defendant were to destroy his own property for religious reasons, there would be no public interest in prosecuting him under Section 247(a) in particular. And no such certification requirement exists for a federal arson prosecution. The certification provision thus cements the natural understanding of Section 247's elements as requiring the use or threatened use of physical force against the person or property of another. Accordingly, this Court should reject Hari's argument that Section 247(a)(1) is not a valid predicate offense for her Section 924 conviction.

2. Section 247(a)(2) Categorically Requires The Use, Attempted Use, Or Threatened Use Of Physical Force Against The Person Or Property Of Another

Hari's related challenge (Br. 35-41) to Section 247(a)(2) fares no better because that provision also fits squarely within Section 924(c)'s definition of a crime of violence. Section 247(a)(2), as charged here, required the government to prove that Hari:

(1) intentionally;

(2) by force or threat of force, including by threat of force against religious real property[5];

(3) obstructed any person in the enjoyment of that person's free exercise of religious beliefs, or attempted to do so;

(4) the offense included the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire; and

(5) the offense was in or affected interstate commerce.

18 U.S.C. 247(a)(2), (b) and (d)(3) (2012); R. Doc. 327, at 19-22; Def. Add. 81-82. These elements ensure that any offense under Section 247(a)(2) will require that the defendant intentionally obstruct, "by force or threat of force," another person in the enjoyment of "that person's free exercise of religious beliefs." Thus, the

[5] The clause "including by threat of force against religious real property" was added to Section 247(a)(2) in 2018, after Hari committed her offense. See Pub. L. No. 115-249, 132 Stat. 3162 (2018). This new language does not affect the analysis here, as shown by the magistrate judge's decision that applied the amended language. R. Doc. 131, at 21; Def. Add. 38.

offense falls within Section 924(c), which similarly requires the use, attempted use, or threatened use of physical force against the person of another. 18 U.S.C. 924(c)(3)(A).

Hari, however, slightly changes the elements of the offense, writing in her brief that someone can violate Section 247(a)(2) "by force or threat of force against 'religious real property.'" Br. 36 (citing R. Doc. 327, at 17, 23-29, but misstating the jury instructions). That is not what the statute prohibits. The statute prohibits obstruction "by force or threat of force, *including by threat of force against religious real property*." 18 U.S.C. 247(a)(2) (emphasis added). This distinction is important because property damage alone can never violate Section 247(a)(2), as Hari implies. Rather, the defendant's use or threatened use of force under Section 247(a)(2) must intentionally obstruct *someone else's* religious free exercise, not simply destroy religious real property. As the Fourth Circuit explained in holding that Section 247(a)(2) qualifies as a crime of violence, "[e]ven if we assume that a defendant could use force against his own property * * * as a means to obstruct another person from exercising his or her religious beliefs, that force would necessarily amount to a threat of force against that person as well." *Roof*, 10 F.4th at 405 n.67.

Even examining the specific language on which Hari focuses (Br. 38)—obstruction by threats of force against religious real property—the law does not

prohibit property damage as such, but only certain *threats of force* against religious real property. 18 U.S.C. 247(a)(2). Importantly, such threats—such as a bomb threat to a church—trigger the statute only when the threat qualifies as a true threat of physical force that obstructs *another person's* free exercise of religion. See H.R. Rep. No. 456, 115th Cong., 1st Sess. 2 (2017) (explaining that a threat to religious buildings violates Section 247(a)(2) if "the threat causes such intimidation to intentionally obstruct an individual's ability to exercise his or her religious beliefs," such as with "a threat so serious that it caused someone to feel fear of bodily harm").

In fact, all of Hari's hypotheticals about someone destroying their own property still involve obstructing another person's religious exercise. For example, even if a religious sect leader sets fire to a sect-controlled property or a landlord sets fire to his own property "in a fit of pique" against a religious sect tenant (Br. 40), the resulting property damage is not what violates Section 247(a)(2). Rather, Section 247(a)(2) is violated by the defendant's intentional use of force or threatened force to obstruct *others*—the members of the religious sect—from freely exercising *their* religious beliefs. Section 247(a)(2) satisfies Section 924(c)(3)(A) because, even though the defendant in such circumstances may have destroyed his own property, he simultaneously conveyed a threat of physical force

against the person whose religious beliefs he sought to obstruct. Accordingly, this Court should affirm Hari's conviction under Section 924(c).

III

THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF HARI'S MOTION TO DISMISS BECAUSE NO SIXTH AMENDMENT VIOLATION OCCURRED

Hari also fails to show any Sixth Amendment violation. Br. 53-59. As the district court correctly found, no evidence exists to show that the government intentionally intruded into Hari's attorney-client communications or that Hari suffered any prejudice from the limited disclosure of her attorney-client communications. R. Doc. 248, at 7; Def. Add. 53. Thus, this Court should reject Hari's Sixth Amendment challenge.

A. Standard Of Review

This Court reviews claims of constitutional error under the Sixth Amendment de novo. See *United States* v. *Sawatzky*, 994 F.3d 919, 923 (8th Cir.), cert. denied, 142 S. Ct. 364 (2021). That being said, a district court's finding that no prejudice resulted from any knowing intrusion into the attorney-client relationship is reviewed under the "clearly erroneous standard." *United States* v. *Singer*, 785 F.2d 228, 237 (8th Cir.), cert. denied, 479 U.S. 883 (1986).

B. Hari Failed To Show A Sixth Amendment Violation

To establish a Sixth Amendment violation, a defendant must show "(1) 'the government knowingly intruded into the attorney-client relationship,' and (2) 'the

intrusion demonstrably prejudiced the defendant, or created a substantial threat of prejudice.'" *Sawatzky*, 994 F.3d at 923 (quoting *Singer*, 785 F.2d at 234). Hari did neither.

1. The Government Did Not Knowingly Intrude Into Hari's Attorney-Client Relationship

Hari cannot establish a Sixth Amendment violation merely by showing that some of her jailhouse phone calls with her attorney were recorded or that the government received some of her privileged communications. Rather, to prevail on a Sixth Amendment claim, a defendant must show a "*deliberate* government intrusion" into the attorney-client relationship. *United States* v. *Tyerman*, 701 F.3d 552, 559 (8th Cir. 2012) (emphasis added). No Sixth Amendment violation occurs when the government "only passively received the information." *Ibid.* Indeed, the Supreme Court has long rejected the argument that "whenever conversations with counsel are overheard the Sixth Amendment is violated and a new trial must be had." *Weatherford* v. *Bursey*, 429 U.S. 545, 551 (1977).

Here, nobody deliberately intruded into Hari's attorney-client relationship. Rather, the government mistakenly collected some of Hari's privileged communications on two occasions. The first instance occurred when the FBI prepared a report summarizing all of Hari's jailhouse telephone conversations during a three-week period, including two telephone calls between Hari and her attorney and four voicemails that Hari left for her attorney. R. Doc. 248, at 2-3;

Def. Add. 48-49. The second instance occurred when Hari was detained in a locally operated jail that seized papers from her cell and sent copies to the FBI. R. Doc. 248, at 5; Def. Add. 51. Although the papers were not marked as privileged, Hari contends that some were handwritten notes for her attorneys. R. Doc. 248, at 5; Def. Add. 51.

As the district court determined, neither of these instances amounted to a knowing intrusion into Hari's attorney-client relationship. R. Doc. 248, at 6; Def. Add. 52.[6] To the contrary, the district court found that the government acted appropriately to protect Hari's privileged communications. R. Doc. 248, at 6-7; Def. Add. 52-53; see also R. Doc. 241, at 9-11; U.S. Sealed App. 9-11 (explaining the specific actions the government had taken). First, as soon as the prosecution team noticed that the FBI document may have included telephone calls between Hari and her attorney, the government immediately halted its review of case documents and put together a privilege review team to examine the FBI's case file. R. Doc. 248, at 6; Def. Add. 52. Second, the government ensured that the FBI agents who reviewed the privileged communications would be walled off from

[6] The district court also addressed documents drafted by an Illinois police officer summarizing some of Hari's other recorded conversations at a different locally operated jail. R. Doc. 248, at 3; Def. Add. 49. These documents noted when Hari called her attorneys but did not include the content of those conversations, so there was no intrusion at all. R. Doc. 248, at 3; Def. Add. 49.

further participation in the case. R. Doc. 248, at 6; Def. Add. 52. Finally, the government removed the attorney-client information from the case file to ensure that no one from the prosecution team would have access it to it. R. Doc. 248, at 6-7; Def. Add. 52-53. These actions show appropriate concern for Hari's attorney-client relationship, not deliberate intrusion.

Likewise, no deliberate intrusion occurred when the federal government received copies of the handwritten notes from the locally operated jail that seized them from Hari's cell. The jail confiscated those notes during a routine search of Hari's cell, which the jail regularly conducted because it considered Hari to be an escape risk. R. Doc. 248, at 5; Def. Add. 51. Nothing on the face of the notes indicated they were privileged, and the county jail turned them over to the FBI. R. Doc. 248, at 5; Def. Add. 51. When an FBI case agent emailed those notes to the federal prosecution team late one night, a prosecutor responded early the next morning with an "urgent" message directing the rest of the team not to look at the document because "[i]t is possible it is notes Hari took for an upcoming meeting with [her] lawyers." R. Doc. 248, at 6; Def. Add. 52 (quoting R. Doc. 219-1, at 5).

Here, too, the government's swift response and thorough investigation dispel any notion of a deliberate intrusion into attorney-client communications. Simply put, this is not a case where the government "indiscriminately sought out documents of suspect origin that they knew to be privileged." *Singer*, 785 F.2d at

237. Rather, the government here took seriously its obligation to avoid privileged information, which shows that no knowing intrusion occurred. See *United States* v. *Voigt*, 89 F.3d 1050, 1070 (3d Cir.) (holding there was no purposeful intrusion into the defendant's attorney-client relationship where the government "steer[ed] clear of privileged information" and "was attentive to ethical constraints"), cert. denied, 519 U.S. 1047 (1996).

Perhaps recognizing that she cannot prevail merely by showing that the federal government passively received her handwritten notes from the county jail, Hari states that this Court has "presumed that actions of jailors and/or law enforcement officials are imputed to the government as a whole." Br. 56. Not so. Hari invokes *Sawatzky*, but that case offers her no help because this Court assumed without deciding that the government knowingly intruded into the defendant's privileged communications before rejecting the defendant's challenge for failure to show prejudice. 994 F.3d at 923. And regardless of whether a jailor's actions may be imputed to the prosecution, no evidence exists here to show that the county jail deliberately intruded on Hari's privileged communications. Rather, all indications are that Hari's notes and communications were seized during a routine search of

her cell.[7] Thus, both legally and factually, Hari falls short of establishing the deliberate government intrusion required for any Sixth Amendment violation.

2. Hari Cannot Show Any Prejudice Or Substantial Threat Of Prejudice

Hari's Sixth Amendment claim also fails because, as the district court properly found, she pointed to "no evidence * * * of prejudice or substantial threat of prejudice," stemming from the government's mere receipt of privileged information. R. Doc. 248, at 7; Def. Add. 53. To show prejudice, a defendant must "demonstrate that the substance of the overheard conversations were used against him." *Clark* v. *Wood*, 823 F.2d 1241, 1250 (8th Cir.), cert. denied, 484 U.S. 945 (1987). As this Court has explained, "the constitutionality of the conviction depends on whether the overheard conversations produced, directly or indirectly, any evidence offered at trial." *Id.* at 1249 (citation omitted). Here, the government did not introduce any evidence at trial that flowed directly or

[7] In fact, in a related civil suit, a different district court judge concluded that the temporary seizure of all materials in Hari's cell was appropriate under the jail's policies because Hari tampered with an electrical outlet in her cell and was "a maximum security prisoner based on her-then pending criminal charges related to the bombing of a mosque, her past conviction for child [abduction], and attempted escape from a United States Marshal Service transport van." *Laughlin* v. *Stuart*, No. 19-CV-2547, 2022 WL 666738, at *17 (D. Minn. Jan. 21, 2022), report and recommendation adopted, No. 19-CV-2547, 2022 WL 658701 (D. Minn. Mar. 4, 2022), appeal filed, No. 22-1742 (Apr. 11, 2022). The court thus rejected Hari's civil claim for damages against the county jailors, finding "no evidence that Hari suffered an actual injury on any nonfrivolous or arguably meritorious legal claim or that she was prejudiced by any possible intrusion into these materials." *Id.* at *18.

indirectly from the privileged communications. Hari does not contend otherwise. Br. 58.

Although Hari essentially concedes that she suffered no actual prejudice at trial, she contends that a substantial threat of prejudice still existed, citing hypothetical scenarios where her handwritten notes could have made their way to her co-defendants, who could have then colluded to provide false testimony. Br. 58. But as this Court has cautioned, a Sixth Amendment claim cannot succeed if it "rests on unsupported speculation." *Singer*, 785 F.2d at 236. Rather, a defendant must show that the disclosures impeded defense counsel's ability to provide effective representation. See *United States* v. *Morrison*, 449 U.S. 361, 366 (1981). Even "egregious behavior" will not justify dismissing an indictment when a defendant cannot show an "adverse impact upon the criminal proceedings." *Id.* at 367.

Hari cannot show any adverse impact here. First, as the district court correctly determined, there was "no risk that the prosecution [would] use any substance of any of the attorney-client communications at trial" because the government set aside those communications after a privilege review. R. Doc. 248, at 7; Def. Add. 53. Second, the defense thoroughly cross-examined Hari's co-defendants at trial, yet Hari still has not shown that her notes influenced their testimony. Third, although Hari describes her nearly indecipherable hand-scrawled

notes as reflecting "defense strategy" (Br. 58), Hari does not explain how the specific content of those notes, even if disclosed, would have advantaged the government and thwarted her defense. Indeed, as the district court concluded in denying another of Hari's motions that is not at issue on appeal, "[t]he overwhelming trial evidence, including other witness accounts, business documents, cellular records analysis, forensic computer analysis, and Hari's own writings, corroborates McWhorter's testimony and supports Hari's conviction of all counts." R. Doc. 454, at 10.

The primary case upon which Hari relies, *United States* v. *Singer*, illustrates the distance between her allegations and the kind of facts that could lead a court to consider dismissal of an indictment. In *Singer*, the defendant's unindicted co-conspirator enlisted an employee in defense counsel's office to copy the attorney's confidential file related to the defendant. 785 F.2d at 230-231. The government then "actively encouraged" the cooperator to turn over the attorney's file to the government for its use in attempting to prove that one of the defendant's witnesses lied. *Id.* at 231. The defendant further claimed that the government leaked content from the attorney-client file to the press to disrupt the attorney-client relationship and cause the attorney to withdraw. *Id.* at 232. Despite all this, the Court held that the defendant failed to establish the kind of prejudice necessary to justify dismissal of the indictment. *Id.* at 236. Specifically, the defendant "failed to point [this

Court] to any specific statement or area of testimony which reflects knowledge of the [privileged] file." *Ibid.* If the facts in *Singer* were insufficient to show prejudice, then the facts here surely cannot justify reversal.

Finally, this Court recently reiterated that to proceed with a Sixth Amendment claim, a defendant must show "particular prejudice" stemming from the disclosure of attorney-client communications. *Sawatzky*, 994 F.3d at 923. *Sawatzky* involved hundreds of pages of documents seized from a defendant's jail cell shortly before sentencing. *Id.* at 922. This Court held that the defendant could not show any effect on his federal sentencing, or "how either his state court proceedings or ongoing attorney-client relationship were prejudiced," where the government shielded the federal prosecutor from any privileged information and where no such material was used at sentencing. *Id.* at 924. So too here—Hari has not made a particularized showing of prejudice. Accordingly, this Court should reject her Sixth Amendment challenge.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 10,181 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman 14-point font.

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Brant S. Levine
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Date: July 1, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users. I further certify that, pursuant to Local Rule 28A(d), within five days of the receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record:

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