No. 03-2497

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

GARY SIGMUND CORUM,

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 AND REQUEST FOR ORAL ARGUMENT

Defendant-appellant Gary Corum was convicted of three counts of violating the Church Arson Prevention Act, 18 U.S.C. 247(a)(2), and three counts of using an instrument of interstate commerce to convey threats, 18 U.S.C. 844(e). These convictions arise from threats of violence that he made by telephone to three synagogues in the Twin Cities area on a single night in July 2001. On appeal, appellant questions the sufficiency of the evidence required to establish the interstate commerce elements of both statutes, as well as the constitutionality of both statutes. The United States believes that oral argument will be helpful to the Court in resolving these questions.

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LEGISLATIVE HISTORY:

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UNITED STATES OF AMERICA,

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v.

GARY SIGMUND CORUM,

Defendant-Appellant

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of conviction and sentence. Defendant-appellant was charged and convicted of violating federal criminal statutes – 18 U.S.C. 247(a)(2) and 18 U.S.C. 844(e). Final judgment was entered May 22, 2003. Defendant filed a timely notice of appeal June 4, 2003. The district court had jurisdiction under 18 U.S.C. 3231. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to satisfy the interstate commerce element of 18 U.S.C. 844(e), which requires proof that the defendant used a telephone to convey a threat.

United States v. *Weathers*, 169 F.3d 336 (6th Cir. 1999)
United States v. *Clayton*, 108 F.3d 1114 (9th Cir. 1997)
United States v. *Gilbert*, 181 F.3d 152,158 (1st Cir. 1999)
United States v. *Baker*, 82 F.3d 273 (8th Cir.), cert. denied, 519 U.S. 1020 (1996)

2. Whether the application of Section 844(e) to threats made by intrastate telephone calls is within Congress's Commerce Power.

United States v. *Lopez*, 514 U.S. 549 (1995)
United States v. *Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999)
United States v. *Baker*, 82 F.3d 273 (8th Cir.), cert. denied, 519 U.S. 1020 (1996)

3. Whether the evidence was sufficient to establish the interstate commerce element of the Church Arson Prevention statute, 18 U.S.C. 247(b), which requires proof that the offense was in or affected interstate commerce.

United States v. *Farmer*, 73 F.3d 836 (8th Cir. 1996)
United States v. *Carlisle*, 118 F.3d 1271 (8th Cir. 1997)
United States v. *Grassie*, 237 F.3d 1199 (10th Cir.), cert. denied, 533 U.S. 960 (2001)
United States v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

4. Whether the Church Arson Prevention statute violates the Establishment Clause of the First Amendment.

Lemon v. *Kurzman*, 403 U.S. 602 (1971)
Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987)
Agostini v. *Felton*, 521 U.S. 203 (1997)
Lynch v. *Donnelly*, 465 U.S. 668, 680 (1984)

STATEMENT OF THE CASE

1. Appellant Gary Corum was indicted by a federal grand jury for three counts of violating 18 U.S.C. 247(a)(2), and three counts of violating 18 U.S.C. 844(e) (R. 14).[1]

Section 247(a)(2) of Title 18, a part of the Church Arson Prevention Act, provides a criminal penalty for:

> Whoever, in any of the circumstances referred to in subsection (b) of this section –
>
> * * * * *
>
> (2) intentionally obstructs, by force or threat of force, any person in the enjoyment of that person's free exercise of religious beliefs, or attempts to do so[.]

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[1] Citations to "R. __" refer to documents in the record, as identified on the district court docket sheet. Citations to "Add. __" refer to documents in the Addendum to appellant's brief in this Court. Citations to "Def. Br. __" refer to pages in the appellant's opening brief in this Court. Citations to "Tr. __" refer to pages in the trial transcript.

Subsection (b) of Section 247 provides that "[t]he circumstances referred to in subsection (a) are that the offense is in or affects interstate or foreign commerce." Section 844(e) of Title 18 provides a criminal penalty for:

> Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat * * * concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building * * * or other real or personal property by means of fire or an explosive[.]

The indictment charged that on or about July 28, 2001, Corum made telephone calls threatening to burn down or blow up three synagogues (Add. E). Counts 1 through 3 alleged that, by placing the threatening calls, Corum "did intentionally obstruct and attempt to obstruct, under circumstances in and affecting interstate commerce, by threat of force, the enjoyment of the free exercise of religious beliefs of the members of" the synagogues in violation of Section 247(a)(2) (Add. E-1-3). Counts 4 through 6 alleged that Corum "by means and use of an instrument of interstate commerce, that is, the telephone, willfully threatened to injure the members of the Jewish organizations described in each Count, and to unlawfully damage the buildings housing the Jewish organizations, by means of fire or explosives" in violation of Section 844(e) (Add. E-3-5).

2. Defendant filed pretrial motions to dismiss the charges in the indictment (R. 31, 32, 33, 35, 36). He contended, *inter alia*: that Section 247 is unconstitutional on its face because it violates the Establishment Clause of the First Amendment (R. 31); and that both the Section 247 counts and the Section 844(e) counts should be dismissed because the indictment failed to allege a sufficient nexus with interstate commerce (R. 32, 33). Following a hearing, the magistrate judge issued a report recommending that the motions to dismiss be denied (Add. D). The district court adopted the magistrate judge's report and recommendation and denied the motions to dismiss (Add. C).

The district court first rejected the defendant's contention that Section 247 violates the Establishment Clause (Add. C-5-6, Add. D-5-7). In addressing this question, the court applied the three-part test established in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971): "1) a statute must have a secular purpose; 2) neither advance nor inhibit religion in its principal effect; and 3) not foster an excessive entanglement with religion" (Add. C-5; see Add. D-6). The Act's secular purpose, the court found, is to combat "the destruction of religious places of worship by unauthorized and unlawful use or threat of force" (Add. C-5, quoting Add. D-6). The court found that the statute is neutral in that it "does not favor one religion over

any other and it applies equally to all religious beliefs" (Add. C-5; see Add. D-6). Adopting the reasoning of the magistrate's report and recommendation, the court also concluded that the statute met the second and third prongs of the *Lemon* test (Add. C-5; see Add. D-6-7). As the magistrate judge explained, the statute "neither advances nor inhibits religion in its primary effect" (Add. D-6). Rather, its primary effect is to permit the prosecution of those who "target the destruction of places of worship" (Add. D-6). The statute, the magistrate held, "is neutral in regard to religions, because all places of worship are subject to protection and all who threaten or attack are subject to prosecution" (Add. D-7).

The district court next ruled that both Section 247(a)(2) and Section 844(e) are within Congress's power under the Commerce Clause, and that the facts alleged in the indictment were sufficient to satisfy the interstate commerce elements of the two statutes (Add. C-7-9; see Add. D-8-12). As the magistrate noted, both statutes include interstate commerce elements: Section 247 "requires proof that the offense *is in or affects interstate or foreign commerce,*" and Section 844(e) "requires proof that the offense was committed through the *use of an instrument of interstate or foreign commerce, or was committed in or affecting interstate or foreign commerce*" (Add. D-9, emphasis in the original).

As to Section 247(a)(2), the court found that the allegations that each synagogue was "engaged in business affecting interstate commerce" was sufficient to satisfy the statute's requirement that "the offense is in or affects interstate or foreign commerce" (Add. C-7-8; see Add. D-11-12). "[R]eligious organizations," the court noted "can and do engage in and affect interstate commerce" (Add. D-10, citing *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *United States* v. *Grassie*, 237 F.3d 1199, 1209 (10th Cir.), cert. denied, 533 U.S. 960 (2001); *United States* v. *Ballinger*, 153 F. Supp. 2d. 1361, 1366-1370 (N.D. Ga. 2001), rev'd, 312 F.3d 1264 (11th Cir. 2002), petition for rehearing pending, Nos. 01-14872, 01-15080).

As to Section 844(e), the court ruled that the allegation of intrastate use of a telephone satisfied the interstate commerce element, and that application of the statute to such use is within Congress's Commerce Power (Add. C-8-9; see Add. D-9-10).

3. Corum was convicted by a jury on all counts (R. 92). Following his conviction, he moved for a judgment of acquittal, arguing that there was insufficient evidence presented at trial to satisfy the interstate commerce elements of either of the statutes under which he was convicted (R. 96). With respect to

counts 1-3, charging violations of Section 247(a)(2), he argued that the United States had failed to prove that the offenses affected interstate commerce (R. 96 at 4-6). With respect to counts 4-6, charging violations of Section 844(e), he argued that the United States failed to prove that the means of committing the offense involved an instrumentality of interstate commerce (R. 96 at 6-10).

The district court denied the motion for judgment of acquittal (Add. B).

The court rejected the defendant's contention that he should be acquitted of the Section 247 counts because the trial evidence failed to establish that the offenses had had any effect on interstate commerce (Add. B-3-11). The court first emphasized that the offense under Section 247(a)(2) is the intentional obstruction of or attempt to obstruct the enjoyment of the free exercise of religious beliefs (Add. B-3). While it was necessary for the government to prove that there had been some effect on interstate commerce, the court ruled, it was not necessary to show that anyone's rights were actually obstructed (Add. B-3-4). The court also rejected the defendant's contention that the government was required to establish a "substantial connection" between the offense and interstate commerce (Add. B-4-11). The court noted that the defendant did not dispute that "all three synagogues were involved in interstate commerce to some degree" (Add. B-5 n.2). The court

also noted that the jury had been instructed that it needed only to find that the offense "affected interstate commerce to some extent, however slight" (Add. B-4, quoting R. 93 at 21, Instruction 14). The court reaffirmed that standard after a review of the decisions in other cases construing the interstate commerce element of Section 247 and of the Supreme Court's decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *Jones* v. *United States*, 529 U.S. 848 (2000) (Add. B-4-11).

In *Lopez*, the district court explained, the Court's invalidation of the Gun Free School Zones Act had been based upon four factors (Add. B-6). First, the Court concluded that the prohibited conduct "had 'nothing to do with commerce or any sort of economic enterprise'" (Add. B-6, quoting *Lopez*, 514 U.S. at 561). Second, the statute did not include a jurisdictional element that would limit its application to instances within Congress's Commerce Power (Add. B-6, citing 514 U.S. at 562). Third, the statute was unsupported by Congressional findings explaining its connection to the Commerce Power (Add. B-6, citing 514 U.S. at 562-563). And fourth, the connection between gun possession and any effect on interstate commerce was "highly attenuated" (Add. B-6, citing 514 U.S. at 563-567).

In *Morrison*, the district court explained, the Court had struck down a provision of the Violence Against Women Act, despite Congressional findings about the effect of gender-based violence on commerce, "because it was a non-economic crime and because the statute contained no jurisdictional element" (Add. B-7, citing *Morrison*, 529 U.S. at 612-618).

The district court acknowledged the Eleventh Circuit's holding, in *Ballinger*, that these decisions compel the conclusion that, to satisfy the interstate commerce element of Section 247, the offense must, by itself, substantially affect interstate commerce (Add. B-5, citing 312 F.3d at 1271; Add. B-7). But it disagreed with that conclusion (Add. B-5-7). Section 247, the district court noted, "has an express jurisdictional element and is supported by congressional findings on interstate commerce (Add. B-7, citing *Grassie*, 237 F.3d at 1209). Thus, the district court wrote, the Eleventh Circuit's ruling rested solely upon its conclusion that Section 247 "is a purely non-economic statute" (Add. B-8). And the district court attributed this conclusion, in turn, to the *Ballinger* court's characterization of the statute as a regulation of "the *activity* of arson" (Add. B-8, quoting 312 F.3d at 1271). That characterization, the district court wrote, misconstrues the statute (Add. B-9). Section 247 does not merely target arson, but rather the obstruction of

free exercise of religion, and, in this case, the threatened arson of a synagogue (Add. B-8-9). Because religious institutions may engage in activities that affect interstate commerce, the district court explained, the arson of a religious building "may be an economic offense" (Add. B-9). Thus, the district court concluded "that the aggregation principle does apply here, and that the instruction permitting a conviction based upon a *de minimis* effect on interstate commerce was correct" (Add. B-11). Because the defendant did not dispute that the synagogues in this case were involved in interstate commerce, the district court denied the motion for acquittal on the Section 247 counts (Add. B-11).

The district court also rejected the defendant's contention that the offenses did not meet the requirements of Section 844(e) because his threatening telephone calls were all made within the State of Minnesota (Add. B-11-13). The language of the statute, the district court explained, "requires no nexus [to interstate commerce] beyond a showing that Corum used a telephone to make his threat" (Add. B-11). And the court found that the evidence clearly established this element (Add. B-11). The court also rejected the defendant's contention that the application of the statute to intrastate telephone calls exceeded Congress's

Commerce Power (Add. B-11-12). A telephone, the district court held, is an instrumentality of commerce, even when used intrastate (Add. B-11-12).

The district court sentenced Corum to 16 months imprisonment (R. 103-105), but granted his motion for release pending appeal (Sentencing Tr. 23-25). This appeal followed (R. 106).

STATEMENT OF FACTS

Defendant Gary Sigmund Corum made telephone calls to three synagogues in the Twin Cities area shortly after midnight on July 28, 2001 (Tr. 9, 14, 31-33, 64, 68). In each call, he left a voice mail message containing explicit threats of violence against both the members of the congregations and the buildings belonging to the synagogues, based upon their Jewish faith (Add. F). In the first call, made to the Bais Yaakov School, housed in the Bais Yisroel Synagogue building, Corum said (Add. F-1):

> Listen there little Jewish gal. This is the White Aryan People's Party. We're gonna blow your fucking synagogue up this coming week and send you fuckers to the gas chambers. So good luck in trying to protect your fucking synagogues from the Aryan race. Heil Hitler!

In the second call, made to the Bet Shalom Temple, Corum said (Add. F-2):

> Listen my Jewish, Zionist friends, we're tired of playing games with you. We are going to take over the planet. You're going

> into gas chambers. We will burn down your synagogue this coming week; this is not a threat. Heil Hitler.

In the third call, made to the Mount Zion Temple, Corum said (Add. F-3):

> Okay listen you fucking Jews. You crucified Christ once, you're not going to pull a stunt again. We're putting (unintelligible) gas chambers (unintelligible) quickly. This week the (unintelligible) synagogue is going up in smoke and dynamite. Heil Hitler!

The recipients of the messages found them very frightening. Chaia Weinberg, the office manager of the Bais Yisroel School, testified that she was "frightened for the safety of the school, the synagogue, the Jewish community" (Tr. 10). The message was particularly frightening to her because of its mention of the gas chambers, which "sent a chill down [her] back" (Tr. 10). She immediately called the rabbi, and, at his suggestion, called the police department (Tr. 10). When the students at the school heard about the message, they were also frightened (Tr. 11)

Andrea Blumberg, the executive director of the Bet Shalom Congregation, testified that she was "very alarmed" when she heard Corum's threatening message (Tr. 34). She found the call particularly threatening because it gave a specific time for the threatened action (Tr. 34). After listening to the call, she spoke to the director of education and then called the police and the Jewish

Community Relations Council (Tr. 34). The rabbi found the message very hostile, particularly the inclusion of the phrase "Heil Hitler" (Tr. 53). He testified that "[i]t was clear that the person doing it was someone who had some knowledge of how to cause pain and terror to a synagogue" (Tr. 53). The synagogue's staff was also alarmed, and they took special security precautions. They went to the door when visitors arrived, rather than buzzing them in (Tr. 34-35). They were cautious of mail that came in; if it did not have a return address, they did not open it (Tr. 34-35, 38). The staff established a policy of having two people open the building in the morning and two people close it at night, and of driving around the building both morning and night to make sure it was secure (Tr. 35, 45-46, 54). The congregation was also affected. A number of congregants and students called the office and said they were not sure it was safe to come to the synagogue for services or education (Tr. 35, 45-46, 53-54). Some chose not to come to services for a time; attendance dropped off for about a month or a month and a half (Tr. 39).

Julie Beckman, a secretary at the Mount Zion Temple, was frightened when she heard the message left on that synagogue's voice mail (Tr. 65). The other staff were also frightened and they called the police (Tr. 66). Following receipt of the

threat, the staff took extra precautions. They made sure doors were locked or watched if they were unlocked (Tr. 66-67). They notified people in charge of setting up for a fundraising garage sale to be held that weekend at the synagogue to make sure that they watched the doors (Tr. 67-68).

The telephone calls made to these three synagogues affected the whole Jewish community in the Twin Cities area. Immediately after the calls, the Jewish Community Relations Council of Minnesota and the Dakotas notified more than 60 synagogues and Jewish organizations in the area and advised them about security guidelines (Tr. 87-88). Some of the synagogues immediately took steps to increase their security and to make congregants feel more secure, including hiring security guards and purchasing security cameras and coded locks (Tr. 88).

The Bais Yisroel Synagogue rents space in its building to a girl's high school (Tr. 4, 19). The school has two full-time and many part-time employees (Tr. 4). The synagogue is affiliated with national organizations, involving lectures and programming, and has affiliations with other synagogues throughout the United States (Tr. 19). The rabbi of Bais Yisroel is a scholar in residence at synagogues in New York, Ohio, and California, and the rabbis at those synagogues spend time at Bais Yisroel (Tr. 19-20). The synagogue purchases

supplies, such as prayer books, study guides, and aids, from other states, including New York, Ohio, and Illinois (Tr. 20). The synagogue has 120 member families (Tr. 21). Although all of its members are residents of Minnesota, some live part of the week in Iowa, and there are many visitors to the temple from out of state (Tr. 20). Visitors come for celebrations such as weddings, bar mitzvahs, and scholarly events (Tr. 20). The rabbi also travels out of state often as part of his rabbinical duties (Tr. 21). The synagogue pays some of the costs for students to go to camps in Michigan and New York (Tr. 21).

The Bet Shalom synagogue operates a religious school with 450 students (Tr. 42). The synagogue has ten employees, including a rabbi, associate rabbi, an executive director, a director of education, and administrative assistants (Tr. 27-28, 36-37, 39, 51). The temple is affiliated with and pays dues to the national organization of Reform synagogues, the Union of American Hebrew Congregations (UAHC), headquartered in New York, with a regional office in Chicago (Tr. 29). The temple and the school purchase supplies through the UAHC, in New York, as well as from publishing houses in New Jersey, Los Angeles, and Florida (Tr. 30, 43). The temple has several member families that are from out of state, including Colorado and Florida (Tr. 30). On a weekly basis,

guests come from all over the United States for bar and bat mitzvahs (Tr. 30). The synagogue provides scholarships for students, including scholarships to enable students to attend camp in Wisconsin (Tr. 44). Students also attend international programs and camps in Israel (Tr. 44). In addition to religious services, the synagogue conducts other activities, including tours for visitors, adult education programs, and ceremonies such as bar mitzvahs, weddings, and funerals (Tr. 52). The synagogue has approximately 700 member families (Tr. 52).

The Mount Zion Temple operates a gift shop, which sells items and purchases goods and supplies from all over the world (Tr. 75). The synagogue employs two rabbis, two cantors, several secretaries, an accountant, and an administrator (Tr. 63, 70, 73). The temple has approximately 715 member families, including some members who live out of state and abroad (Tr. 74). The temple also regularly has guests from out of state, to attend services, to speak, and to visit (Tr. 74). The temple is affiliated with The Reform Movement, headquartered in New York; it is a member of the Great Lakes region of that organization, located in Chicago (Tr. 74). Representatives from both the regional and national offices regularly visit the temple, and members of the Mount Zion Synagogue regularly visit the Chicago and New York offices (Tr. 74-75). The

temple also regularly purchases supplies such as prayer books and office supplies from all over the world (Tr. 75).

SUMMARY OF ARGUMENT

Corum's convictions for violating 18 U.S.C. 247(a)(2) and 844(e) should be affirmed.

The evidence was sufficient to establish violations of Section 844(e). Corum used a telephone to make threats to harm three synagogues and the members of those synagogues. The use of the telephone is sufficient to satisfy the interstate commerce element of the statute, which requires only that the threat be conveyed "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce[.]" 18 U.S.C. 844(e). Defendant's contention that the statute should be interpreted to require that the telephone be used to make interstate calls is thus contradicted by the plain language of the statute. It is well established that a telephone is an instrumentality of interstate commerce, whether used to make an intrastate or interstate call.

The application of Section 844(e) to defendant's conduct in this case is well within Congress's Commerce Power. Congress has the authority "to regulate and protect instrumentalities of interstate commerce * * * even though the threat may

come only from intrastate activities." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). Because a telephone is an integral part of an interstate communications system, Congress may regulate its intrastate use.

The evidence was sufficient to establish the interstate commerce element of Section 247(a)(2). Defendant does not contest that all three synagogues involved in this case engaged in commercial activities affecting interstate commerce. For the charge of attempted obstruction of religious activities, by threat of force, on which he was convicted, no actual effect on interstate commerce was required. Rather, the evidence is sufficient as long as his conduct would have affected interstate commerce, had it fully succeeded.

The Church Arson Prevention Act meets the three-part test derived from *Lemon* v. *Kurzman*, 403 U.S. 602, 612-613 (1971), and therefore does not violate the Establishment Clause. The statute has a secular purpose: to curb threats and violence that affect interstate commerce. Section 247 was enacted in 1988 after Congress heard evidence of a "growing number of incidents of religiously motivated violence." S. Rep. No. 324, 100th Cong., 2d Sess. 2 (1988); see Pub. L. No. 110-346, 102 Stat. 644.

The statute does not have the primary effect of advancing or endorsing religion. The primary effect of the statute is to curb violence and threats that have an adverse effect on an aspect of interstate commerce that Congress found to be particularly vulnerable to violent interference. While Section 247(a)(2) may have the effect of protecting individuals from interference with the exercise of their religious beliefs, this does not constitute advancement of religion by the government itself. Finally, the statute does not foster excessive entanglement with religion. It prohibits violent interference with religious exercise. Its enforcement will not require government to engage in "pervasive monitoring" of or intrusion into the activities of religious institutions. *Agostini* v. *Felton*, 521 U.S. 203, 233 (1997).

ARGUMENT

I. CORUM'S CONVICTIONS FOR VIOLATION OF 18 U.S.C. 844(e) SHOULD BE AFFIRMED

A. The Evidence Was Sufficient To Establish Violations Of Section 844(e)

Corum was convicted on all three counts of violating 18 U.S.C. 844(e). He contends that his convictions on these counts should be reversed because his intrastate use of a telephone to commit the offenses did not satisfy the interstate

commerce element of the statute. In ruling on sufficiency of the evidence claims, this Court "views the evidence in the light most favorable to the government's case, reversing only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States* v. *Evans*, 272 F.3d 1069, 1080 (8th Cir. 2001), cert. denied, 525 U.S. 1029 (2002). As explained below, the evidence was sufficient to establish the interstate commerce element of Section 844(e), and the convictions should therefore be affirmed.

Section 844(e) prohibits threats made "through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce[.]" Corum's contention that this provision should be construed to apply only when a telephone is used to call across state lines or when the call involves a commercial transaction is foreclosed by the plain language of the statute. Moreover, as explained in the part I.B., *infra*, such limitations are not required to avoid an unconstitutional application of the statute.

By its terms, Section 844(e) applies to threats made "through the use of the * * * telephone." It is not limited to telephone calls made from one state to another, or telephone calls involving a commercial transaction. Such limitations

are not a part of the statute and should not be imposed upon it. Corum contends that the terms "mail," "telephone," and "telegraph" in the interstate commerce element of Section 844(e) are merely examples of "possible instruments of interstate commerce" (Def. Br. 28). But the statute does not say that. Its plain meaning is that the mail, the telephone, and the telegraph, by their very nature, are instruments of interstate commerce, and that the statute applies whenever one of these instruments is used to convey a threat.

Indeed, "[i]t is well established that telephones, even when used intrastate, are instrumentalities of interstate commerce." *United States* v. *Weathers*, 169 F.3d 336, 341 (6th Cir.) cert. denied, 528 US. 838 (1999); see also *United States* v. *Clayton*, 108 F.3d 1114, 1116-1117 (9th Cir.), cert. denied, 523 U.S. 893 (1997); *United States* v. *Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999) ("a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce").

The intrastate use of other instrumentalities of interstate commerce have been held to satisfy similar interstate commerce elements of federal criminal statutes. In *United States* v. *Baker*, 82 F.3d 273, 275 (8th Cir.), cert. denied, 519 U.S. 1020 (1996), this Court held that an interstate network of automatic teller

machines is a "facility in interstate or foreign commerce," and that even the use of an ATM machine to make a "an entirely intrastate electronic transfer" of funds between two local banks satisfied the interstate commerce element of the Travel Act, 18 U.S.C. 1952.[2] *United States* v. *Marek*, 238 F.3d 310 (5th Cir.) (en banc), cert. denied, 534 U.S. 813 (2001), held that an intrastate wire transfer satisfied the interstate commerce element of the federal murder-for-hire statute.[3]

Despite defendant's contention (Def. Br. 32), *United States* v. *Lefkowitz*, 125 F.3d 608, 616-617 (8th Cir. 1997), cert. denied, 523 U.S. 1079 (1998), is not to the contrary. *Lefkowitz* invalidated a conviction for wire fraud where there was no proof that the telephone call at issue was made between two states. *Id.* at 616. But the interstate commerce element of the wire fraud statute differs from that in Section 844(e). Wire fraud requires proof of the use of "wire, radio, or television communication *in* interstate commerce." 18 U.S.C. 1343. Section 844(e), in contrast, applies to the use of the telephone, without qualification, and identifies the telephone as an "instrument *of* interstate commerce." Cf. *Weathers*, 169 F.3d

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[2] The Travel Act requires proof that the offense was committed, *inter alia*, through the use of "the mail or any facility in interstate or foreign commerce." 18 U.S.C. 1952(a).

[3] The federal murder-for-hire statute requires, *inter alia*, the use of "the mail or any facility in interstate or foreign commerce[.]" 18 U.S.C. 1958(a).

at 341 (interpreting the term "facility *of* interstate commerce" more broadly than "facility *in* interstate commerce").

The express terms of Section 844(e) apply to the defendant's conduct in this case. He used a telephone to make threats. Nothing more is required to satisfy the interstate commerce element of the statute.

B. The Application Of Section 844(e) To Defendant's Conduct Is Within Congress's Commerce Power

Corum contends that, if Section 844(e) applies to his conduct, it exceeds Congress's power under the Commerce Clause. This Court reviews constitutional questions *de novo*. *United States* v. *Johnson*, 56 F.3d 947, 953 (8th Cir. 1995).

Defendant's contention that the application of Section 844(e) to his conduct is unconstitutional is baseless. Congress has the authority to regulate the intrastate use of the instrumentalities of interstate commerce, including telephones. As the Supreme Court explained in *United States* v. *Lopez*, 514 U.S. 549, 558 (1995), there are "three broad categories of activity that Congress may regulate under its commerce power" – the channels of interstate commerce; instrumentalities of interstate commerce; and "those activities having a substantial relation to interstate commerce." Section 844(e) falls within the second category, which authorizes Congress to "regulate and protect the instrumentalities of interstate commerce * *

* even though the threat may come only from intrastate activities." *Ibid.* Thus, Congress has the authority to regulate the local use of instrumentalities such as the telephone, mail, and telegraph.

As the First Circuit explained in *Gilbert*, "[b]oth intrastate and interstate telephone communications are part of an aggregate telephonic system as a whole. And as long as the instrumentality itself is an integral part of an interstate system, Congress has power, when necessary for the protection of interstate commerce, to include intrastate activities within its regulatory control." 181 F.3d at 158-159, quoting *Kerbs* v. *Fall River Indus., Inc.*, 502 F.2d 731, 738 (10th Cir.1974); see also *Baker*, 82 F.3d at 275 (Congress has authority to regulate intrastate use of automated teller network); *United States* v. *Gil*, 297 F.3d 93, 99-100 (2d Cir. 2002) (upholding constitutionality of mail fraud statute as applied to intrastate use of private mail carriers).

II. CORUM'S CONVICTIONS FOR VIOLATION OF 18 U.S.C. 247(a)(2) SHOULD BE AFFIRMED

A. The Evidence Was Sufficient To Establish The Interstate Commerce Element Of Section 247(a)

Corum was convicted on all three counts of violating 18 U.S.C. 247(a)(2). He contends that his convictions on those counts should be reversed because the

evidence at trial was insufficient to establish the interstate commerce element of the statute, which requires proof that "the offense is in or affects interstate or foreign commerce." 18 U.S.C. 247(b); see Def. Br. 15-22. In ruling on sufficiency of the evidence claims, this Court "view[s] the evidence in the light most favorable to the government's case, reversing only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States* v. *Evans*, 272 F.3d 1069, 1080 (8th Cir. 2001), cert. denied, 525 U.S. 1029 (2002). As explained below, the evidence was sufficient to establish the interstate commerce element of Section 247, and the convictions should therefore be affirmed.

Section 247(b) provides that the statute applies when the offense is "in or affects commerce." This language expresses Congress's intent to exercise fully its Commerce Clause authority. *United States* v. *Grassie*, 237 F.3d 1199, 1209 (10th Cir.), cert. denied, 533 U.S. 960 (2001); *Jones* v. *United States*, 529 U.S. 848, 854 (2000). Religious institutions, like other non-profit organizations, engage in a range of religious, social service, and educational activities that affect commerce. *Grassie*, 237 F.3d at 1209-1210, citing *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 584 (1997). "Such entities are major participants in

interstate markets for goods and services, use of interstate communications and transportation, raising and distributing revenues (including voluntary revenues) interstate, and so on." *Grassie*, 237 F.3d at 1209, citing *Camps*, 520 U.S. at 583-586. The Commerce Power permits Congress not only to regulate economic activity, but also to protect it from violent interference. *United States* v. *Farmer*, 73 F.3d 836, 843 (8th Cir.), cert. denied, 518 U.S. 1028 (1996). To the extent that religious institutions engage in commercial activities affecting interstate commerce, they are protected by Section 247. Cf. *United States* v. *Rayborn*, 312 F.3d 229 (6th Cir. 2002) (church protected under 18 U.S.C. 844(i)); *United States* v. *Terry*, 257 F.3d 366, 370 (4th Cir.) (church protected under Section 844(i)) cert. denied, 534 U.S. 1035 (2001).[4]

Defendant does not challenge the district court's finding that all three synagogues were engaged in commercial activities with an interstate nexus (see

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[4] *United States* v. *Rea*, 300 F.3d 952 (8th Cir. 2001), is not to the contrary. *Rea* invalidated a guilty plea for violating 18 U.S.C. 844(i) for the arson of a church annex that was used for weekly Sunday school classes, for meetings, and for tutoring sessions. While this Court found that the building thus "functioned as part of the church and was actively 'used in' commerce," it concluded that there was "not a sufficient factual basis to conclude that the annex's commercial functions affected interstate commerce *within the meaning of section 844(i)*." *Id.* at 962 (emphasis added). *Rea* is not controlling because it was a Section 844(i), not a Section 247 prosecution and it did not involve conviction for an attempt.

Add. B-5 & n.2, B-9-10; Def. Br. 20; pp. 15-18, *supra*). Rather, his argument rests entirely upon his contention that his conviction should be reversed because the United States failed to prove that his offenses had *any* effect on interstate commerce (Def. Br. 20-21).

This contention is wrong. Corum concedes that all of the synagogues engaged in commercial activities affecting interstate commerce. Therefore, had Corum succeeded in obstructing the synagogues' activities, his actions would have affected interstate commerce. Section 247(a)(2) prohibits not only obstruction of religious activities, but also "attempts to do so" by "threats of force." As to Corum's conviction for attempted obstruction (see Add. E-2-3), no actual effect on interstate commerce was required.

This Court has recognized that "a threatened effect on interstate commerce is sufficient to bring [the Hobbs Act] into play."[5] *United States* v. *Rabbitt*, 583 F.2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), citing *United States* v. *Staszcuk*, 517 F.2d 53, 57 (7th Cir.) (en banc), cert. denied, 423 U.S. 837

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[5] The Hobbs Act applies to "[w]hoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section[.]" 18 U.S.C. 1951(a).

(1975); cf. *United States* v. *Jannotti*, 673 F.2d 578, 591-594 (3d Cir.), cert. denied, 457 U.S. 1106 (1982) (conspiracy to violate Hobbs Act may be based upon evidence that conspiracy, if completed, would have affected interstate commerce). As the Seventh Circuit explained in *Staszcuk*: "An effective prohibition against blackmail must be broad enough to include the case in which the tribute is paid as well as the one in which a victim is harmed for refusing to submit. Since the payment would normally enable the business to continue without interruption, the inference is inescapable that Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect." 517 F.2d at 57. Thus, in *United States* v. *Farmer*, 73 F.3d 836, 839 (8th Cir. 1996), where the defendant was convicted of violating the Hobbs Act for attempted robbery of a convenience store, this Court found that the requisite threatened effect on interstate commerce was established solely by evidence that the store was part of an interstate chain and sold products from outside the state. *Id.* at 843.

This principle also applies to Section 247(a)(2). An effective prohibition on threats to obstruct or attempts to obstruct the exercise of religious beliefs must encompass cases, like this one, in which the defendant does not fully succeed in obstructing the operations of the religious institutions he has targeted for his

threats. The evidence is sufficient as long as his conduct would have affected interstate commerce, had it fully succeeded.

This case thus differs from *United States* v. *Evans*, 272 F.3d 1069, upon which the defendant relies. In *Evans*, the defendant was convicted of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The money laundering statute requires proof of a financial transaction "which in any way or degree affects interstate or foreign commerce." *Id.* at 1956(c)(4). The jury in *Evans* was instructed that it was not necessary for the prosecution to show "that commerce was actually affected," but only "that the natural and probable consequences of a defendant's actions would be to affect interstate commerce no matter how minimal." 272 F.3d at 1081. This Court ruled that the instruction was erroneous because it did not require the jury to find an actual effect on commerce, but that the error was harmless because there was sufficient evidence that the defendant's conduct had affected interstate commerce. *Id.* at 1081-1082; see *id.* at 1080 ("the transaction – the purchase of a car from a commercial used car dealer – is sufficient, by itself, to have an effect on interstate commerce"). Significantly, the question in *Evans* was whether the instruction was correct for a charge of money

laundering, *not* attempted money laundering. Nor did the charge in *Evans* involve any threats.

To establish an attempt, it is not necessary to prove successful completion of every element of the offense. Rather, the prosecution must prove that the defendant had the intent to engage in criminal activity and took a substantial step toward commission of the crime. *United States* v. *Carlisle*, 118 F.3d 1271, 1273 (8th Cir.), cert. denied, 522 U.S. 974 (1997). "A substantial step is conduct such that if it had not been extraneously interrupted would have resulted in a crime." *Id.* at 1273.

The jury in this case was properly instructed on the requirements for finding the defendant guilty for an attempt (See R. 93 at 23-24, Instructions 16, 17). As the district court found, the jury "could have found Corum guilty under Counts 1-3 even if it determined that nobody's right to free exercise was obstructed, as long as Corum took a substantial step toward such obstruction" (Add. B-4). The evidence established that Corum did take a "substantial step" toward the obstruction of religious activity when he made the threatening calls. Indeed, he succeeded in obstructing the activities of the synagogues to some extent. Only extraneous actions – the steps taken by the synagogues to reassure

their employees, members, and guests, and the employees', members', and guests' willingness to set aside their fears – prevented an even greater disruption of the synagogues' operations that would have led to the kind of economic consequences that Corum claims are required here. That he did not succeed in this extent of disruption does not negate his responsibility for the crime.

B. Section 247(a)(2) Does Not Violate The Establishment Clause Of The First Amendment

Corum also contends that Section 247 violates the Establishment Clause of the First Amendment (Def. Br. 45-54). This Court reviews constitutional questions *de novo*. *United States* v. *Johnson*, 56 F.3d 947, 953 (8th Cir. 1995). Consideration of this question begins "with the time-honored presumption that the [statute] is a 'constitutional exercise of legislative power.'" *Reno* v. *Condon*, 528 U.S. 141, 148 (2000), quoting *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883).

As explained below, the statute meets the three-part test derived from *Lemon* v. *Kurzman*, 403 U.S. 602, 612-613 (1971); see *Children's Healthcare Is A Legal Duty, Inc.* v. *Min De Parle*, 212 F.3d 1084, 1093 (8th Cir.), cert. denied, 532 U.S. 957 (2000). It has a secular purpose. Its primary effect is not to advance or

inhibit religion. And it does not foster excessive entanglement with religion. It therefore is permissible under the Establishment Clause.

First, the statute has a secular purpose. The purpose of Section 247 is to curb threats and violence that affect interstate commerce. This is undeniably secular in nature. Section 247 was enacted in 1988 after Congress heard evidence of a "growing number of incidents of religiously motivated violence." S. Rep. No. 324, 100th Cong., 2d Sess. 2 (1988); see Pub. L. No. 110-346, 102 Stat. 644. The Senate Committee Report on the bill found that incidents of anti-Semitic and anti-Muslim violence were increasing, and that black churches, Catholics, Buddhists, and Unitarians were also being targeted. S. Rep. No. 324 at 2. The statute was amended by the Church Arson Prevention Act of 1996 in the wake of a national wave of church arsons. The 1996 enactment broadened the interstate commerce element of the statute, and added a provision prohibiting racially motivated attacks on houses of worship. 18 U.S.C. 247(b), (c). In the amendments, Congress made statutory findings that incidents of damage and destruction of religious property "pose a serious national problem," that "[c]hanges in Federal law are necessary to deal properly with this problem," and that "the problem is sufficiently serious,

widespread, and interstate in scope to warrant Federal intervention to assist State and local jurisdictions." Pub. L. No. 104-155, § 2, 110 Stat. 1392.

The purpose here is thus no different in nature than Congress's conclusion to act to prevent racial discrimination by private businesses that affect interstate commerce, see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), or racially motivated violent interference, by private individuals, with federally-guaranteed rights that affect interstate commerce, *United States* v. *Lane*, 883 F.2d 1484, 1488-1492 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990) (upholding 18 U.S.C. 245 as valid Commerce Clause legislation); *United States* v. *Allen*, 341 F.3d 870 (9th Cir. 2003) (same).

To the extent that considerations of protecting religious exercise may have been considered by some members of Congress as well, that does not affect the *Lemon* analysis. The first *Lemon* criterion only requires that there be *a* secular purpose for legislation, not that there be *solely* a secular purpose. As the Supreme Court noted in *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984), "[t]he Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute

or activity was motivated wholly by religious considerations." See also *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985) ("though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.") (citations omitted).

Moreover, to the extent that there is any religion-related purpose to Section 247 at all, it is not one of government advancement or endorsement of religion. The secular purpose requirement "does not mean that the law's purpose must be unrelated to religion – that would amount to a requirement 'that the government show a callous indifference to religious groups,' * * * and the Establishment Clause has never been so interpreted." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987), quoting *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Rather, it prohibits Congress "from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. Protecting citizens from violence to permit them to worship freely may be a State act that is cognizant of religion, but it does not evince any intent by the State to "promot[e] a particular point of view on religious matters." *Ibid.*

Second, the primary effect of Section 247(a)(2) is not to advance or inhibit religion. The primary effect of the section is to curb violence and threats that have an adverse effect on an aspect of interstate commerce that Congress found to be particularly vulnerable to violent interference. To the extent that the law also has the effect of helping religious congregations to be left in peace to worship, *Amos* makes clear that this would not amount to government advancement of religion: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. While Section 247(a)(2) may have the effect of protecting individuals from interference with the exercise of their religious beliefs, this does not constitute advancement of religion by the government itself. See *Carter* v. *Peters*, 26 F.3d 697 (7th Cir.), cert. denied, 513 U.S. 1003 (1994) (upholding Illinois statute providing enhanced penalty for crimes committed at houses or worship on the ground that it had neither a religious purpose nor the principal effect of advancing religion).

Finally, Section 247(a)(2) does not foster excessive entanglement with religion. The statute prohibits all violent interference with religious exercise. The

government's role in enforcing this statute is to prosecute violations. While this role may involve some interaction between religious organizations and state officials in the course of investigating and prosecuting violations, such as interviewing church employees as witnesses, enforcement of the statute will not require the government to engage in "pervasive monitoring" of or intrusion into the activities of religious institutions. *Agostini* v. *Felton*, 521 U.S. 203, 233 (1997). Defendant invokes "the lurking danger" that inconsistent enforcement of the statute will result in "the creation of a favored religion or religious beliefs" (Def. Br. 53). But he provides no basis for this suggestion other than "easily imagine[d]" instances in which the statute might be more aggressively enforced to protect some religious groups than others (Def. Br. 53). Any law is potentially subject to abuse by those who enforce it. The solution with this, as with all criminal statutes, is to be vigilant against abuse, not to invalidate the statute.

CONCLUSION

The defendant's convictions should be affirmed.

Respectfully submitted,

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I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because it contains 8,077 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 24, 2003

CERTIFICATE OF SERVICE

I certify that copies of the foregoing United States' brief as appellee, and a 3.5 inch virus-checked diskette with a digital copy of the brief in PDF format were served on the following counsel, by first class mail, this 24th day of September, 2003:

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