No. 18-7485

IN THE SUPREME COURT OF THE UNITED STATES

MARCUS NOEL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a prosecution for taking hostage a U.S. national by a foreign national outside of the United States, in violation of 18 U.S.C. 1203, requires proof that the defendant knew that the victim was a national of the United States.

2. Whether a conviction for hostage-taking of a U.S. national by a foreign national outside the United States, in violation of Section 1203, requires proof of a nexus to international terrorism.

3. Whether Congress had the authority under the U.S. Constitution to enact Section 1203.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-7485

MARCUS NOEL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 893 F.3d 1294.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2018. A petition for rehearing was denied on October 18, 2018 (Pet. App. A2). The petition for a writ of certiorari was filed on January 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of one count of conspiracy to commit hostage taking and one count of hostage taking, both in violation of 18 U.S.C. 1203. Judgment 1. Petitioner was sentenced to 235 months of imprisonment, to be followed by a five-year term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1.

1. On July 5, 2014, petitioner and co-conspirator Moise Louinis approached S.S., a U.S. national who had been living in Haiti since 2012, as she stood by her car on a road outside of Port au Prince, Haiti. C.A. App. 22; Presentence Investigation Report (PSR) ¶¶ 8-9. Louinis brandished a firearm, and after S.S. held up her hands to indicate that she was compliant, petitioner directed Louinis to put S.S. into the backseat of S.S.'s car. C.A. App. 22; PSR ¶ 9. Petitioner then got into the driver's seat, directed Louinis to keep the gun pointed at S.S., and drove the car toward Port au Prince. Ibid. While in the car, petitioner and Louinis took from S.S. her "two cellular telephones, her wedding rings, her Haitian driver's license, and some Haitian and United States currency." C.A. App. 23.

After petitioner parked on a side street in Port au Prince, he and Louinis kept S.S. inside the car, against her will, for approximately four hours. C.A. App. 23; PSR ¶ 12. They demanded that she provide telephone numbers for her family members and

directed her to make multiple calls to her husband and her father, during which petitioner and Louinis "demanded a ransom of $150,000 in United States dollars for [her] safe release." C.A. App. 23; see PSR ¶ 12.

Later that evening, petitioner and Louinis drove S.S. to a school in Port au Prince, where they blindfolded, handcuffed, and gagged S.S. and locked her in a small room. C.A. App. 23; see PSR ¶ 14. Over the next three days, petitioner held S.S. against her will in various locked rooms inside the school. C.A. App. 23; PSR ¶¶ 15, 22-24. During this time, petitioner kept S.S. blindfolded and handcuffed, provided her minimal food and water, and left her to sleep on dirt floors with a bucket for a toilet. PSR ¶¶ 15, 22-24. Meanwhile, S.S.'s family members received multiple phone calls demanding $150,000 in ransom for her release. C.A. App. 23; PSR ¶ 22. During those calls, petitioner threatened to kill S.S. and her children if the ransom was not paid. C.A. App. 23; PSR ¶¶ 16-17.

On July 7, 2014, phone records associated with the ransom calls led Haitian law enforcement to the school, where petitioner had an office. C.A. App. 23; PSR ¶¶ 18-19. After officers found S.S.'s driver's license in petitioner's pocket, petitioner admitted that S.S. was being held inside the school. C.A. App. 23; PSR ¶ 18. Haitian police found a blindfolded and bound S.S. crouching in a corner of a locked room. Ibid. A search of petitioner's office at the school turned up a firearm, personal

items belonging to S.S., and the keys to S.S.'s car. C.A. App. 23; PSR ¶ 19. Haitian police found S.S.'s car parked in front of petitioner's residence and recovered several cellular phones and SIM cards, including one SIM card in Louinis's possession that was registered to S.S. C.A. App. 24; PSR ¶ 19. Analysis of those items and associated phone records revealed that the phones had been used during the kidnapping, including to make ransom calls to S.S.'s family. Ibid.

2. Based on the foregoing conduct, a grand jury in the Southern District of Florida issued an indictment charging petitioner with separate counts of hostage taking and conspiracy to commit hostage taking, both in violation of 18 U.S.C. 1203, and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Indictment 1-3. Section 1203(a) by its terms imposes criminal penalties on

> whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so.

18 U.S.C. 1203(a). Section 1203(b)(1) then provides that "[i]t is not an offense under this section if the conduct required for the offense occurred outside the United States unless" (A) "the offender or the person seized or detained is a national of the United States," (B) "the offender is found in the United States," or (C) "the governmental organization sought to be compelled is

the Government of the United States." 18 U.S.C. 1203(b)(1)(A). Congress first enacted 18 U.S.C. 1203 in 1984 to satisfy the United States' obligations under the International Convention Against the Taking of Hostages (Hostage-Taking Convention), done Dec. 17, 1979, T.I.A.S. No. 11,081, 1983 WL 144724 (entered into force June 3, 1983), to which the United States is a party. See Act for the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. No. 98-473, Tit. II, Ch. XX, Pt. A, §§ 2001-2003, 98 Stat. 2186 (enacting 18 U.S.C. 1203 (Supp. II 1984)).

After his extradition to the United States, see PSR ¶ 18, petitioner entered into a plea agreement in which he agreed to plead guilty to the two hostage-taking charges in the indictment, in exchange for the dismissal of the firearm count. C.A. App. 15-21. The district court accepted petitioner's guilty plea and later sentenced him to 235 months of imprisonment, to be followed by a five-year term of supervised release.[1] Judgment 1-3.

3. The court of appeals affirmed. Pet. App. A1. As relevant here, the court understood petitioner to argue (1) that the government was required to prove that petitioner knew S.S. was an American citizen and that the record did not indicate that he had such knowledge; (2) that Congress intended Section 1203 "to apply only to acts of terrorism" and that his hostage taking was

[1] Louinis, petitioner's co-conspirator, also pleaded guilty to the hostage-taking counts in the indictment, and the district court sentenced him to 144 months of imprisonment, to be followed by a five-year term of supervised release. PSR 2.

not such an act; and (3) that Congress lacked the constitutional authority to enact Section 1203. Id. at 4-5. Although petitioner raised those arguments for the first time on appeal, the court of appeals reviewed them de novo. Id. at 5 (citing United States v. Santiago, 601 F.3d 1241, 1243 (11th Cir.), cert. denied, 562 U.S. 978 (2010), and United States v. Gray, 260 F.3d 1267, 1271 (11th Cir. 2001), cert. denied, 536 U.S. 963 (2002)).

The court of appeals first determined that petitioner "was not required to know that his victim was American because the requirement of [Section] 1203 that the victim be an American is purely jurisdictional." Pet. App. A1, at 5. The court accepted that a statute that "is silent as to mens rea" should typically be construed to "require proof of general intent," but explained that "no mens rea is necessary for elements that are purely jurisdictional." Ibid. The court further explained that Section 1203(b)(1)(A)'s nationality requirement is jurisdictional, observing that it is "set forth in a different subsection of the statute than the elements that are designated as punishable"; that the wording of that subsection "signals that the crime has already been defined and th[e] subsection merely provides jurisdictional requirements"; that "the conduct committed -- kidnapping -- would be criminal regardless of the nationality of the victim"; and that, as in United States v. Feola, 420 U.S. 671 (1975), "the protective effect of the statute would be undermined if the prosecution had

to show that the kidnapper knew that the victim was American." Pet. App. A1, at 6 & n.1.

The court of appeals next rejected petitioner's contention "that Congress intended to limit the application of [Section] 1203 to acts of terrorism." Pet. App. A1, at 7. The court recognized that the preamble of the Hostage-Taking Convention referred to "'international terrorism,'" and the court "agree[d] that a primary focus of the statute is on acts of terrorism." Ibid. The court observed, however, that "the plain meaning of the statutory language encompasses not only kidnapping and ransom demands seeking to compel action of a 'governmental organization,' but also kidnapping and ransom demands 'to compel a third person.'" Ibid. (citing 18 U.S.C. 1203(a)). Because it found that petitioner's offense conduct fell within the plain meaning of Section 1203 (and the Hostage-Taking Convention) "without regard to whether his crime [also] meets some definition of terrorism," the court declined to decide "the scope of the concept of terrorism, or whether [petitioner's] crime is itself an act of terrorism." Id. at 7 & n.4.

Finally, the court of appeals rejected petitioner's contention that Congress lacked the authority to enact Section 1203. Pet. App. A1, at 8-9. The court explained that it had "squarely addressed and rejected" the same argument in United States v. Ferreira, 275 F.3d 1020, 1027-1028 (11th Cir. 2001), cert. denied, 535 U.S. 977, 535 U.S. 1028, and 537 U.S. 926 (2002),

in which it had found that Congress "had the power to enact [Section] 1203 pursuant to the Necessary and Proper Clause and the Treaty Power" of the Constitution. Pet. App. A1, at 8-9. The court thus stated that it "need not decide," ibid., whether Congress additionally had authority to pass Section 1203 under its power "[t]o define and punish * * * Offences against the Law of Nations," U.S. Const. Art. I, § 8, Cl. 10. See Pet. App. A1, at 8-9.

ARGUMENT

Petitioner contends (Pet. 7-13) that (1) the hostage-taking statute, 18 U.S.C. 1203, required the government to prove that petitioner knew his victim was a U.S. national; (2) Section 1203 requires proof of a nexus to international terrorism; and (3) Congress lacked authority to enact Section 1203.[2] The court of appeals correctly rejected each of those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. This case would also be an unsuitable vehicle for reviewing petitioner's statutory and constitutional challenges. Further review is unwarranted.

1. Petitioner contends (Pet. 7-9) that, in a Section 1203 prosecution for hostage taking of a U.S. national outside the United States, the government must prove that the defendant knew

[2] The second and third questions are also presented by the petitions for writs of certiorari in Kadamovas v. United States, No. 18-7489 (filed Jan. 14, 2019), and Mikhel v. United States, No. 18-7835 (filed Feb. 4, 2019).

the victim's nationality. The court of appeals correctly rejected that contention; its decision accords with the only other court of appeals to squarely address that argument, see United States v. Vega Molina, 407 F.3d 511, 528-529 (1st Cir.), cert. denied, 546 U.S. 919 (2005); and the Court need not hold the petition pending its disposition of Rehaif v. United States, No. 17-9560 (argued Apr. 23, 2019).

a. The federal hostage-taking statute, 18 U.S.C. 1203, defines an offense with three substantive elements: (1) seizing or detaining another person and (2) threatening to kill, injure or continue to detain that person (3) with the purpose of compelling a third person or governmental entity to act in some way or to refrain from acting in some way. 18 U.S.C. 1203(a); see United States v. Lin, 101 F.3d 760, 766 (D.C. Cir. 1997) (listing the elements of the offense); United States v. Lopez-Flores, 63 F.3d 1468, 1476 (9th Cir. 1995), cert. denied, 516 U.S. 1082 (1996); United States v. Carrion-Caliz, 944 F.2d 220, 223 (5th Cir. 1991), cert. denied, 503 U.S. 965 (1992); see also 2 Leonard B. Sand et al., Modern Federal Jury Instructions: Criminal (Sand) ¶ 42.02, Instruction 42-9, at 42-27 (2016). The statute further provides that "[i]t is not an offense under" Section 1203 "if the conduct required for the offense occurred outside the United States" unless one of several circumstances is present, including (as relevant here) that the "person seized or detained is a national of the United States." 18 U.S.C. 1203(b)(1)(A).

As the court of appeals explained, Section 1203 does not require proof that the defendant knew that his victim was a U.S. national. See Pet. App. A1, at 5-6; Vega Molina, 407 F.3d at 528. Rather, the requirement that the victim be a U.S. national, if an element at all, see pp. 15-16, infra, is a "jurisdictional" element because "[i]ts primary purpose is to identify the factor that makes the [relevant conduct] an appropriate subject for federal concern," United States v. Yermian, 468 U.S. 63, 68 (1984). That follows from the text and structure of Section 1203, which states the three substantive elements of the crime in one subsection and then lists victim nationality in a separate subsection that describes the circumstances under which conduct "designated as punishable" in Section 1203(a), Pet. App. A1, at 6, is an offense under Section 1203 where "the conduct required for the offense occurred outside the United States," 18 U.S.C. 1203(b)(1). See Yermian, 468 U.S. at 69 & n.6 (concluding that a statutory criterion was jurisdictional where the relevant "language appears in a phrase separate from the prohibited conduct").

As this Court's decision in United States v. Feola, 420 U.S. 671 (1975), makes clear, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." Id. at 677 n.9. The usual rule that courts "interpret criminal statutes to require that a defendant possess a mens rea * * * as to every element of an offense" thus does not apply "when

it comes to jurisdictional elements." Torres v. Lynch, 136 S. Ct. 1619, 1630-1631 (2016); see Yermian, 468 U.S. at 74-75 (making false statement in any matter within jurisdiction of a federal agency, in violation of 18 U.S.C. 1001 (1976), does not require proof of defendant's knowledge of federal agency jurisdiction). This Court accordingly held in Feola that the crime of assaulting a federal officer, in violation of 18 U.S.C. 111 (1970), does not require the government to prove that the defendant knew the victim was a federal officer. 420 U.S. at 684-685.

The court of appeals thus correctly applied this Court's precedents in determining that, for purposes of Section 1203, the victim's U.S. nationality is at most a "purely jurisdictional" requirement that is not subject to a "mens rea requirement." Pet. App. A1, at 5-6. Construing Section 1203 to require no proof of mens rea as to the victim's nationality "poses no risk of unfairness to defendants," Feola, 420 U.S. at 685, because the conduct at issue "would be criminal regardless of the nationality of the victim." Pet. App. A1, at 6. As with the crime of assault on a federal officer, "[t]he situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected." Feola, 420 U.S. at 685. Even if a defendant "may be surprised to find that his intended victim is a federal officer in civilian apparel" -- or, here, a U.S. national -- "he nonetheless knows from the very outset that his planned course of conduct is wrongful." Ibid. "In a case of this kind

the offender takes his victim as he finds him," and "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum," ibid.

Imposing a mens rea requirement as to victim nationality is thus not "necessary to separate wrongful conduct from otherwise innocent conduct." Elonis v. United States, 135 S. Ct. 2001, 2010 (2015) (citation and internal quotation marks omitted); see Feola, 420 U.S. at 685. Rather, as in Feola, reading into Section 1203 a requirement that the defendant knew his victim was a U.S. national would undermine the statute's "protective effect" for U.S. nationals abroad. Pet. App. A1, at 6 & n.1 (citing Feola, 420 U.S. at 684-685); see Hostage-Taking Convention art. 5(1)(d), T.I.A.S. No. 11,081, at 6, 1983 WL 144724, at *3 (providing that a State Party may assert jurisdiction over a hostage-taking offense committed against "a hostage who is a national of that State, if that State considers it appropriate"); United States v. Yunis, 924 F.2d 1086, 1090-1091 (D.C. Cir. 1991) ("[Section 1203] reflects an unmistakable congressional intent * * * to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found.").

b. Petitioner's contrary contentions (Pet. 7-9) lack merit. Petitioner relies on this Court's recent observation that, in distinguishing between jurisdictional and substantive elements of criminal statutes, some "tough questions may lurk on the margins,"

Pet. 8 (citation omitted), such as in a statute "where an element that makes evident Congress's regulatory power also might play a role in defining the behavior Congress thought harmful." Torres, 136 S. Ct. at 1632. But Congress's use of a victim's identity to designate "an appropriate subject for federal concern," Yermian, 468 U.S. at 68, does not present any such circumstance. Congress has commonly used "the identity of [the] victim" as a basis for federal criminal jurisdiction without requiring proof that the defendant knew the victim's identity, Feola, 420 U.S. at 682 (assault on a federal officer under 18 U.S.C. 111 (1970)), including in kidnapping statutes codified in the same chapter of the federal criminal code as Section 1203, see United States v. Murillo, 826 F.3d 152, 160 (4th Cir. 2016) (determining that kidnapping victim's status as an internationally protected person is a jurisdictional element in 18 U.S.C. 1201(a)(4)), cert. denied, 137 S. Ct. 812 (2017). Courts have had "no real trouble," Torres, 136 S. Ct. at 1632, identifying those elements as jurisdictional ones that are not subject to a mens rea requirement. See, e.g., Murillo, 826 F.3d at 160.

Petitioner also errs in suggesting (Pet. 7, 13-14) that this case "shares a common thread" with Rehaif, supra, No. 17-9560, and that his petition should therefore be held pending the Court's disposition of Rehaif. The question in Rehaif is whether, in a prosecution for unlawful possession of a firearm or ammunition under 18 U.S.C. 922(g) and 924(a)(2), the government must prove a

defendant's knowledge of his legal status or personal circumstances (e.g., that he is a felon or an alien illegally or unlawfully in the United States). The parties in Rehaif agree, however, that the criminal offense defined by Sections 922(g) and 924(a)(2) does not require any showing of mens rea as to the jurisdictional element of the offense, namely, the requirement of a connection to interstate or foreign commerce, see 18 U.S.C. 922(g). See Pet. Br. at 30-32, Rehaif, supra (No. 17-9560); U.S. Br. at 21, Rehaif, supra (No. 17-9560). And the Court's decision in Rehaif will not consider, or cast any doubt upon, the court of appeals' determination that "the requirement of [Section] 1203 that the victim be an American is purely jurisdictional." Pet. App. A1, at 5. Accordingly, no substantial likelihood exists that Rehaif would affect the outcome here, and the petition need not be held pending the Court's disposition of Rehaif.

c. In any event, two aspects of this case make it an unsuitable vehicle for plenary review (and also further illustrate why a hold for Rehaif is unnecessary).

First, during the district court proceedings, petitioner did not argue that Section 1203 required the government to prove that he knew S.S. was a U.S. national. Although the government agreed below that petitioner's claim was subject to de novo review, see Gov't C.A. Br. 4,[3] the court of appeals should have reviewed it

[3] In the court of appeals, the government based its statement of the standard of review on circuit precedent providing for de novo review of challenges to subject-matter jurisdiction,

only for plain error in light of petitioner's failure to raise it in district court. See Fed. R. Crim. P. 52(b); Puckett v. United States, 556 U.S. 129, 135 (2009). Petitioner's claim fails under that standard because petitioner cannot show "clear or obvious" error, Puckett, 556 U.S. at 135, and the potential need for this Court to address application of the plain-error rule could impede this Court's consideration of whether Section 1203 requires proof that the defendant knew the victim's nationality.

Second, when petitioner argued for the first time on appeal that Section 1203 required the government to allege and prove that petitioner knew S.S. was a U.S. national, the court of appeals found the victim's nationality to be a jurisdictional requirement of the hostage-taking offense without considering the antecedent question of whether the government bears the burden of proving victim nationality at all. See Pet. App. A1, at 5-6. The Fifth Circuit has determined that the nationality of a victim (or the offender) is not in fact "an essential element of an offense under [Section] 1203 for which the government bears the burden of proof," but is instead an affirmative defense that the defendant must prove. United States v. Santos-Riviera, 183 F.3d 367, 370, cert. denied, 528 U.S. 1054 (1999); see Sand ¶ 42.02, Instructions 42-

---

even when first raised on appeal. Gov't C.A. Br. 4 (quoting United States v. Iguaran, 821 F.3d 1335, 1336 (11th Cir. 2016) (per curiam)). Properly understood, however, petitioner's argument that the government failed to allege and prove a supposedly required element of the offense was not a challenge to the district court's exercise of subject-matter jurisdiction. See United States v. Cotton, 535 U.S. 625, 629-631 (2002).

14, 42-15, at 42-35 to 42-39 (providing model jury instructions that, in light of Santos-Riviera, treat victim nationality as an affirmative defense). Unless petitioner prevails on that threshold question, which the court below did not address, he cannot prevail on his claim that the government must prove that the defendant knew the victim was a U.S. national.

2. The court of appeals correctly rejected petitioner's contention (Pet. 9-11) that conviction under Section 1203 requires proof that the hostage-taking had a connection to "international terrorism." The court of appeals' determination accords with the decisions of every other court of appeals to address the issue and does not warrant this Court's review.

a. As relevant here, Section 1203 applies broadly to "whoever * * * seizes or detains and threatens to kill, to injure, or to continue to detain" a U.S. national "in order to compel [either] a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained." 18 U.S.C. 1203(a); see 18 U.S.C. 1203(b)(1)(A). As the court of appeals recognized, that plain statutory language "encompasses not only kidnapping and ransom demands seeking to compel action of a 'governmental organization,'" a category of conduct that terrorist organizations might employ in pressuring governments, "but also kidnapping and ransom demands 'to compel a third person.'" Pet. App. A1, at 7. At the same time, the statutory text "makes no

mention of international terrorism." United States v. Mikhel, 889 F.3d 1003, 1022 (9th Cir. 2018), petitions for cert. pending, Nos. 18-7489 (filed Jan. 14, 2019) and 18-7835 (filed Feb. 4, 2019). Section 1203 thus reaches "acts of hostage taking for ransom between private parties" that bear no connection to "governmental organizations" at all, let alone to "terrorism," however that nonstatutory term might be defined. Pet. App. A1, at 7 (citing 18 U.S.C. 1203(a)). The court of appeals therefore correctly determined that Section 1203's plain language "unambiguously" encompasses the acts for which petitioner was convicted, "without regard to whether his crime meets some definition of terrorism." Id. at 7 & n.4.

The other courts of appeals to consider the question have likewise found no ambiguity in the statutory language and have declined to "limit[]" Section 1203 "to conduct related to international terrorism." United States v. Rodriguez, 587 F.3d 573, 579-580 (2d Cir. 2009) (citing cases); see Lin, 101 F.3d at 765-766; Lopez-Flores, 63 F.3d at 1476; Carrion-Caliz, 944 F.2d at 223.

b. In urging a contrary result, petitioner attempts (Pet. 9) to find support in President Reagan's statement transmitting to Congress proposed legislation in accordance with the Hostage-Taking Convention and the fact that the chapter of the public law that included Section 1203 was titled "[t]errorism." But this Court has repeatedly emphasized that where, as here, "the statute

is clear and unambiguous, that is the end of the matter." Sullivan v. Stroop, 496 U.S. 478, 482 (1990) (citation and internal quotation marks omitted); see also, e.g., Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992). Because the plain text of Section 1203 clearly and unambiguously covers "acts of hostage taking for ransom between private parties," Pet. App. A1, at 7, without any requirement of a nexus to "terrorism" (or definition of that term), petitioner cannot impose such an atextual limitation by invoking considerations outside the statutory text. Petitioner errs in suggesting that the court of appeals should have relied on Congress's alleged "purpose" in enacting Section 1203, rather than treating the statute's "'plain language'" as dispositive. Pet. 9-10 (citation omitted). Even accepting "that a primary focus of the statute is on acts of terrorism," Pet. App. A1, at 7, "[t]he Congress that wrote" Section 1203 "enacted a provision which goes well beyond that," Whitfield v. United States, 135 S. Ct. 785, 789 (2015) (addressing 18 U.S.C. 2113(e)).

Contrary to petitioner's contention (Pet. 10-11), the Court's decision in Bond v. United States, 572 U.S. 844 (2014), does not support engrafting a terrorism limitation onto Section 1203 that is found nowhere in the statute's operative text. Bond was, as this Court repeatedly stressed, a "curious" and "unusual" case. Id. at 860, 863, 865. The Court in Bond considered whether 18 U.S.C. 229(a), a federal statute that prohibits possessing or using a "chemical weapon," reaches conduct that the Court described as

"a purely local crime" -- namely, the defendant's use of chemicals to poison her romantic rival in a lovers' quarrel. 572 U.S. at 848, 856-857. Congress had enacted Section 229(a) "[t]o fulfill the United States' obligations" under an international convention on chemical weapons, id. at 848, and the Court determined that the statute was ambiguous based on the confluence of several factors: the "dissonance" between the limited "ordinary meaning" of "chemical weapon" and the statute's potential breadth if its more technical definition applied to purely local conduct; "the context from which the statute arose," which the Court found "demonstrate[d] a much more limited prohibition was intended"; and the fact that "the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power." Id. at 861, 866; see id. at 860. That "exceptional convergence of factors," the Court reasoned, "call[ed] for [it] to interpret the statute more narrowly," id. at 866, in accordance with the "natural meaning of 'chemical weapon,'" which "takes account of both the particular chemicals that the defendant used and the circumstances in which she used them," id. at 861. The Court thus found Bond's conduct, which involved chemicals that were "not of the sort that an ordinary person would associate with instruments of chemical warfare," to be outside the statute's scope. Ibid.

No such "exceptional convergence of factors" is present in Section 1203. As an initial matter, to the extent the section's

title is taken into account, no "dissonance" exists "between th[e] ordinary meaning" of the term "hostage taking" and the elements of the offense set forth in Section 1203's operative text. Bond, 572 U.S. at 861. To the contrary, Section 1203 comports with the ordinary meaning of "hostage-taking" as "[t]he unlawful holding of an unwilling person as security that the holder's terms will be met by an adversary." Black's Law Dictionary 855 (10th ed. 2014); see also Webster's Third New International Dictionary 1094 (2002) (defining "hostage" as "the state of a person given or kept as a pledge pending the fulfillment of an agreement, demand, or treaty"). And the specific conduct at issue in this case -- abducting a stranger; blindfolding, handcuffing, and gagging her; demanding ransom from her family members with threats to kill her if the ransom is not paid; and confining her with minimal food and water in rooms that required her to sleep on dirt floors and use a bucket as a toilet -- likewise fits within the ordinary understanding of "hostage taking."

Nor does Section 1203 alter the federal-state balance in any way that supports a federalism-based limitation on the statute's reach. Cf. Bond, 572 U.S. at 856-860. Most significantly, this case involves the abduction of a U.S. national by a foreign national in a foreign country and, therefore, raises no federalism concerns at all. The "international component" of requiring that either the perpetrator or victim be foreign (or found abroad) further ensures the statute will not cover conduct of "purely

local" concern. Mikhel, 889 F.3d at 1023. Acts of hostage taking committed by or against foreign nationals (or by those who flee to foreign countries) are likely to implicate foreign-affairs and immigration concerns that the Constitution commits exclusively to the federal government. See Arizona v. United States, 567 U.S. 387, 395, 409 (2012); American Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003). And the particular provisions of Section 1203 at issue here apply to conduct -- the kidnapping of U.S. nationals abroad -- that occurs outside any State's territory and that States may have only limited authority to regulate at all. See 18 U.S.C. 1203(a) and (b)(1)(A); Restatement (Third) of The Foreign Relations Law of the United States § 402 cmt. k & note 5 (1987); cf. American Ins. Ass'n, 539 U.S. at 401 (invalidating state law that interfered with the federal government's conduct of foreign relations). It is therefore not the case here, as it was in Bond, that state laws will necessarily be "sufficient to prosecute" the criminal conduct at issue, 572 U.S. at 864, and no further review of petitioner's atextual limiting construction is warranted.

3. Petitioner next contends (Pet. 11-13) that Congress exceeded its enumerated powers in enacting the hostage-taking statute. The court of appeals correctly rejected that contention, in accord with the decisions of every other court of appeals to consider it. Its decision does not warrant this Court's review,

and this case would be an unsuitable vehicle for revisiting this Court's precedents on the scope of congressional authority.

Congress enacted Section 1203 to satisfy the United States' obligations under the Hostage-Taking Convention. See United States v. Ali, 718 F.3d 929, 943 (D.C. Cir. 2013) (observing that Section 1203 "fulfills U.S. treaty obligations" under the Convention). The Convention requires its State parties, including the United States, to punish "hostage-taking" offenses with "appropriate penalties which take into account the grave nature of those offences," Hostage-Taking Convention, arts. 1(2) and 2, T.I.A.S. No. 11,081, at 5, 1983 WL 144724, at *2, and to "take such measures as may be necessary to establish its jurisdiction over," inter alia, acts of hostage taking committed "by any of its nationals" or against "a hostage who is a national of that State, if that State considers it appropriate," id. art. 5(1)(b) and (d), T.I.A.S. No. 11,081, at 6, 1983 WL 144724, at *3. The Convention's definition of "hostage-taking" substantially corresponds to Section 1203(a), providing that a person "commits the offence of taking hostages" if he "seizes or detains and threatens to kill, to injure or to continue to detain another person (* * * the 'hostage') in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage." Id. art. 1(1), T.I.A.S. No. 11,081, at 4-5, 1983

WL 144724, at *2; see 18 U.S.C. 1203(a). The Convention's definition, similar to Section 1203, does not apply when the act of hostage taking is committed "within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State." Hostage-Taking Convention art. 13, T.I.A.S. No. 11,081, at 11, 1983 WL 144724, at *5; see 18 U.S.C. 1203(b)(2).

Petitioner appears to argue in passing (Pet. 12) that Section 1203 is unconstitutional on the theory that the Hostage-Taking Convention falls outside the federal government's Treaty Power. See U.S. Const. Art. II, § 2, Cl. 2 (authorizing the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"). Petitioner failed to present his current argument -- which invokes Justice Thomas's separate concurrence in Bond, 572 U.S. at 882-896 -- in the courts below, which is in itself sufficient reason to deny review. In any event, petitioner's Treaty Power argument lacks merit.

This Court has long recognized that an "agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, * * * is within the scope of th[e treaty] power." Santovincenzo v. Egan, 284 U.S. 30, 40 (1931). In Bond, Justice Thomas expressed the view "that the Treaty Power can be used to arrange intercourse with other nations, but not to regulate

purely domestic affairs." 572 U.S. at 884 (Thomas, J., concurring in the judgment); see id. at 897 (Alito, J., concurring in the judgment) (agreeing "that the treaty power is limited to agreements that address matters of legitimate international concern"). Justice Thomas made clear, however, that such "intercourse with other nations []includ[es] their people and property[]," id. at 893, as reflected in, for example, treaties providing protection for citizens of one country resident in another or for extradition of foreign nationals. See id. at 893-894 (citing, inter alia, Asakura v. City of Seattle, 265 U.S. 332, 341 (1924), and Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840)).

The Hostage-Taking Convention falls squarely within that authority because it concerns the treatment of and the protections afforded the "people" of "other nations" in the United States, as well as the United States' ability to protect its own nationals resident in other countries. See Bond, 572 U.S. at 893 (Thomas, J., concurring in the judgment). Accordingly, every court of appeals to consider the issue has concluded that the "Convention is well within the boundaries of the Constitution's treaty power." Lue, 134 F.3d at 84; see Pet. App. A1, at 8-9; Mikhel, 889 F.3d at 1024. And like every other court of appeals to consider the question, the court below found that Congress had the authority to enact Section 1203. See Pet. App. A1, at 8-9 (reaffirming holding of United States v. Ferreira, 275 F.3d 1020, 1027-1028 (11th Cir. 2001), cert. denied, 525 U.S. 977, 525 U.S. 1028, and 537 U.S. 926

(2002)); Mikhel, 889 F.3d at 1024; United States v. Shibin, 722 F.3d 233, 247 (4th Cir. 2013), cert. denied, 572 U.S. 1089 (2014); United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998).

Petitioner also invokes (Pet. 12) Justice Scalia's concurring opinion in Bond, 572 U.S. at 873-881 (Scalia, J., concurring in the judgment), to suggest that the Court revisit its decision in Missouri v. Holland, 252 U.S. 416 (1920), in which this Court held that, "[i]f [a] treaty" entered into by the President with the advice and consent of the Senate "is valid[,] there can be no dispute about the validity of [a] statute" implementing that treaty "under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Id. at 432; see U.S. Const. Art. II, § 2, Cl. 2 (empowering the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"). But petitioner did not timely present in the courts below -- and he barely develops in this Court -- any constitutional arguments under Bond. Although Bond was decided in 2014, petitioner did not mention that decision (or Holland) in his principal briefs before the court of appeals, much less evince any reliance on the concurring opinions in that case.[4] See Pet. C.A. Br. 1-14; Pet. C.A. Reply Br. 1-8.

[4] Petitioner did cite Bond (though not Holland) in his rehearing petition, see Pet. C.A. Reh'g Pet. 7-9, but that discussion came too late to preserve the argument under this Court's "traditional practice" of "declin[ing] to review claims raised for the first time on rehearing in the court below." Wills v. Texas, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring); see also United States v. Martinez, 96 F.3d 473, 475 (11th Cir.

In any event, this case does not implicate the concerns that Justice Scalia voiced, as Section 1203 is limited to conduct with a foreign nexus, does not displace state authority, and does not afford the federal government authority amounting to "a general police power." Bond, 572 U.S. at 879 (Scalia, J., concurring in the judgment). Instead, as noted above, Section 1203 is limited to conduct involving foreign nationals in the United States and United States nationals in foreign countries. Moreover, in light of its statutory focus, Section 1203 may well be a valid exercise of other congressional powers -- such as its authority over immigration, foreign commerce, or the protection of U.S. nationals abroad -- in which case reviewing the court of appeals' specific reasoning would have no effect on petitioner's case. Cf. Mikhel, 889 F.3d at 1024 n.3 (declining to "consider whether there might be other sufficient constitutional bases for [Section 1203] as well").

1996) (per curiam) ("We do not consider issues or arguments raised for the first time on petition for rehearing.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

JUNE 2019