No. 18-7485

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent,

v.

MARCUS NOEL,
Petitioner.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

Petitioner's Reply to the Brief of the United States in Opposition

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MICHAEL CARUSO
Federal Public Defender

TRACY DREISPUL
Assistant Federal Public Defender
Counsel for Petitioner
150 West Flagler Street, Suite 1500
Miami, Florida 33130-1555
Telephone No. (305) 536-6900
E-mail: Tracy_Dreispul@fd.org

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REPLY BRIEF FOR PETITIONER

I.

The Court should grant review to determine whether 18 U.S.C. § 1203(b)(1)(A), which makes it a federal crime to seize or detain a United States national in a foreign country, requires proof that the defendant knew the nationality of the person seized or detained.

A. The statutory question in Mr. Noel's case is distinct from that in *Kadamovas and Mikhel*.

Mr. Noel's petition for certiorari asks whether 18 U.S.C. § 1203(b)(1)(A), which criminalizes the kidnapping-for-ransom of U.S. nationals while outside the United States, requires proof that the defendant knew the nationality of his victim. Unlike the petitioners in *Kadamovas v. United States*, No. 18-7489, and *Mikhel v. United States*, No. 18-7835, Mr. Noel does not insist that the statute requires an actual "nexus to international terrorism." *Contra* Brief for the United States in Opposition ("BIO") at 8 n.2. No such ruling is necessary in order for Mr. Noel to obtain relief. He simply maintains that § 1203 must be interpreted by reference to the terrorism-combatting ***purpose*** of the treaty on which it was based. Such an interpretation requires proof – at a minimum – that a defendant prosecuted under § 1203(b)(1)(A) knew the nationality of his victim.[1]

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[1] Also distinguishing Mr. Noel's case from *Kadamovas* and *Mikhel*, Mr. Noel's offense took place "outside the United States," and was prosecuted under 18 U.S.C. § 1203(b)(1)(A), rather than § 1203(b)(2). *Compare* 18 U.S.C. § 1203(b)(1) ("if the

B. The Court has never addressed whether a presumption of scienter applies with respect to extraterritorial jurisdictional facts.

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Court reaffirmed the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" 139 S. Ct. 2191, 2194 (2019) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). This presumption applies "even when Congress does not specify any scienter in the statutory text." *Id.* at 2195 (*citing Staples v. United States,* 511 U.S. 600, 606 (1994)). The Court has "interpreted statutes to include a scienter requirement even where 'the most grammatical reading of the statute' does not support one." *Id.* at 2197 (citing *X-Citement Video*, 513 U.S. at 70). The question is one of congressional intent. *See id.* at 2196.

The government argues that jurisdictional elements are not subject to the presumption of scienter. *See* BIO at 11. In *Rehaif,* the Court wrote:

> No one here claims that the word 'knowingly' modifies the statute's jurisdictional element. Jurisdictional elements do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct (normally, as here, through its Commerce Clause Power). ... Because jurisdictional elements normally have nothing to do with the wrongfulness of the defendant's conduct, such elements are not subject to the presumption in favor of scienter.

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conduct required for the offense occurred outside the United States"); *with* 18 U.S.C. § 1203 (b)(2) ("if the conduct occurred inside the United States").

Rehaif, 139 S. Ct. at 2196 (citations omitted).

This case is different. Title 18 U.S.C. § 1203 is not a typical federal statute governing domestic conduct, which affects national interests irrespective of whether it is prosecuted by State or Federal actors. *See* Petition at 8-9 (discussing *United States v. Feola*, 95 S. Ct. 1255 (1975), and *Torres v. Lynch*, 136 S. Ct. 1619, 1631 (1994)). It was enacted to implement the United States' obligations under the International Convention Against the Taking of Hostages (hereafter "the Convention"). *See United States v. Noel*, 893 F.3d 1294, 1302 (11th Cir. 2018), *reh'g denied*, (11th Cir. Oct. 18, 2018) (quoting *United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2011)). And it extends to wholly foreign conduct, committed by foreign actors, bearing no connection to the United States, ***other than*** the fact of the victim's nationality.

This Court has never addressed how the presumption of scienter should apply with respect to extraterritorial crimes, let alone with respect to crimes bearing so limited a connection to the United States. Hence, Congress cannot be presumed to have intended that § 1203(b)(1) would apply to a foreign defendant who unknowingly kidnapped a U.S. national. *See Rehaif*, 139 S.Ct. at 2199 ("Prior to 1986 ... there was no definitive judicial consensus that knowledge of status was not needed. The Court had not considered the matter.").

C. Knowledge of the victim's nationality is required bring the statute within the core purposes of the Convention.

Just as the defendant's status in *Rehaif* was the "'crucial element' separating innocent from wrongful conduct," here, the victim's nationality is the "crucial element" separating conduct falling within the scope of the Convention, from that which does not. *See Rehaif,* 139 S. Ct. at 2197 (citing *X-Citement Video*, 513 U.S. at 73). This is precisely the sort of fact that Congress would expect a jury to decide.

The Eleventh Circuit's refusal to consider the core purpose of the Convention when interpreting § 1203(b) was contrary *Bond v. United States*, 134 S. Ct. 2077 (2014). *See* Petition for Writ of Certiorari at 10-11; *Bond*, 134 S. Ct. at 2093 ("In sum, the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon."). The government responds that *Bond* was a "curious" and "unusual" case, decided on an "exceptional convergence of factors." BIO at 19 (citations omitted). While the analysis may have been "limited," however, the *Bond* opinion does not proclaim itself to be exempt from precedential value. *See Bond*, 572 U.S. at 885. The Court's reasoning makes clear that the Eleventh Circuit erred by refusing to consider the purpose of the Convention when interpreting § 1203(b)(1)(A). *See Noel*, 893 F.3d at 1300.

D. Canons of statutory construction overwhelmingly support Mr. Noel's interpretation.

Numerous tools of statutory construction compel the conclusion that the knowledge of the victim's nationality is required under § 1203(b)(1)(A).

1. "It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016) (citation omitted). In addition to reflecting the "commonsense notion that Congress generally legislates with domestic concerns in mind," a presumption against extraterritoriality "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *Id.* (citations omitted). Thus, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Id.* (citation omitted).

There is no doubt that Congress gave 18 U.S.C. § 1203(b) express extraterritorial effect. But the presumption that Congress "generally legislates with domestic concerns in mind," counsels that Congress did not seek simply to extend its domestic law abroad and criminalize every foreign kidnaping that, by happenstance, involved a U.S. citizen. One can only imagine the "international discord" that might arise should Congress seek to extend the jurisdiction granted it by a carefully negotiated treaty, with such brazen indifference to its purposes and intended effect. *See RJR Nabisco,* 136 S.Ct. at 2100. Instead, Congress would have legislated with the terrorism-related purpose of the Convention in mind and intended that the foreign actor know his actions affected the United States.

2. The canon of avoiding difficult constitutional questions also counsels against the government's position. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the avoidance canon as a "tool for choosing between competing plausible

interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.") (citations omitted). It is well-established that allowing foreign defendants to be unforeseeably haled into United States Courts violates due process. *See, e.g., World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *International Shoe Co. v. Washington*, 66 S. Ct. 154 (1945). This Court has yet to address whether the familiar "minimum contacts" analysis applies in criminal cases – let alone whether an unknown circumstance of a foreign actor's crime would satisfy the test. Requiring the defendant's knowledge of the facts subjecting him to the United States' laws avoids this quagmire.

3. Finally, the rule of lenity compels a result in Mr. Noel's favor. *See United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) ("ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor").

The government argues that, because the statute lists "three substantive elements of the crime in one subsection then lists victim nationality in a separate subsection," it follows that no scienter is required with respect to the latter. BIO at 10. But the government made a similar argument in *Rehaif*, which was necessarily, rejected by the Court. *See Brief for the United States*, *Rehaif v. United States*, No. 17-9560, 2019 WL 138019 at *17 (March. 25, 2019). The mere placement of the jurisdictional fact in a separate paragraph of the statute holds little – if any – weight. A review of this particular statute reveals that the drafters were merely

distinguishing between the circumstances where the statute applies outside and inside the United States, respectively. *See* 18 U.S.C. §§ 1203(b)(1) & (b)(2).

Moreover, a defendant prosecuted under § 1203(b)(1) would inescapably know the facts rendering his conduct prosecutable under subsections (b)(1)(B) and (b)(1)(C). In 18 U.S.C. § 1203(b)(1)(B), jurisdiction is established where "the offender is found in the United States." It would be a very unusual case, indeed, where an offender is "found in the United States," without knowledge of that jurisdictional fact. And, in § 1203(b)(1)(C), jurisdiction may be found where "the governmental organization sought to be compelled is the United States," – a fact for which the defendant's specific intent to coerce the United States is required. There is no reason to believe that Congress intended for a scienter to apply with respect to the material facts in §§ (b)(1)(B) and (b)(1)(C), but not (b)(1)(A).

To the contrary, when Congress wishes to exclude crucial facts such as these from the presumption of scienter, it does so unambiguously. The federal witness tampering statute, for example, provides that: "no state of mind need be proved with respect to the circumstance[s]" that bring the matter within the statute's reach, (*i.e.*, the federal nature of the proceeding or individual involved). *See* 18 U.S.C. § 1512(g). Other statutes render the matter "open and shut" by placing a *mens rea* element *after* the jurisdictional facts. *See Rehaif,* 139 S.Ct. at 2206 (Alito, J., dissenting) (citing 18 U.S.C. § 2251(b); 18 U.S.C. § 1294(a); and 21 U.S.C. § 861(a)). *See also United States v. Yermian*, 468 U.S. 63, 68 (1984) (cited in BIO at 10) (finding the language of 18 U.S.C. § 1001 – "Whoever, in any matter within the jurisdiction of any department or

agency of the United States knowingly and willfully ... makes any false, fictitious or fraudulent representations, ... shall be fined ..." – to unambiguously omit scienter with respect to jurisdiction).

The statutory language of 18 U.S.C. § 1203(b)(1)(A) is at best ambiguous with respect to whether knowledge is required of the victim's status. Hence, the rule of lenity should apply. *See Davis*, 139 S. Ct. at 2333.

E. There are no vehicle problems.

The government notes that Mr. Noel raised this issue for the first time on appeal. But the government conceded that the error should be reviewed *de novo* in the court of appeals and thus waived the opportunity to argue that plain error review should apply. BIO at 14-15. The same is true with respect to the government's newfound argument that the Eleventh Circuit should *sua sponte* have considered "the antecedent question of whether the government bears the burden of proving victim nationality at all." BIO at 15 (citing *United States v. Santos-Riviera*, 183 F,3d 367 (5th Cir. 1999)).[4]

The Eleventh Circuit issued a precedential decision on the merits, under a *de novo* standard of review. The issue is fully and fairly before the Court, and will not

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4 In any event, *Santos-Riviera* has not been followed and is likely wrong. *See United States v. Vuitch*, 402 U.S. 62, 70 (1971) ("It is a general guide to the interpretation of criminal statutes that when an exception is incorporated into the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception"); *United States v. Corporan-Cuevas*, 244 F.3d 199 (1st Cir. 2001) ("Given *Viutch*, it is arguable that the Fifth Circuit's reasoning in *Santos-Riviera* was incorrect").

be limited in any way should the case be remanded. Hence, this case presents an excellent vehicle to review the important question presented herein.

II.

The Court should resolve whether Congress may exceed its independently enumerated powers when acting pursuant to a treaty.

A. The constitutional question was clearly presented in Mr. Noel's petition.

The second question presented in Mr. Noel's petition for a writ of certiorari asks:

> May Congress prosecute the foreign kidnapping-for-ransom of a United States citizen, lacking any relationship to Congress' regulatory authority under the Law of Nations Clause or any other enumerated power, as an exercise of the Necessary and Proper Clause and the Treaty Power?

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The government writes that: "Petitioner appears to argue in passing (Pet. 21) that Section 1203 is unconstitutional on the theory that the Hostage-Taking Convention falls outside the federal government's Treaty Power." BIO at 23. To be clear, it is the statute, and not the Convention itself, which Mr. Noel challenges herein.

As constitutional scholar Nicholas Quinn Rosenkraz wrote in *Executing the Treaty Power*, 118 Harv. Law. Rev 1867, 1868 (2005):

> The most important sentence in the most important case about the constitutional law of foreign affairs is this one: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I § 8, as a necessary and proper means to execute the powers of

> the Government."[] The sentence is wrong and the case should be overruled.

Id. (quoting *Missouri v. Holland*, 252 U.S. 416, 432 (1920)) (internal footnotes omitted).

The notion that Congress may legislate outside its enumerated powers when acting pursuant to a treaty "is in deep tension with the fundamental constitutional principle of enumerated legislative powers and is therefore of enormous theoretical importance." *Id*. at 1869. Yet, this momentous proposition rests exclusively on the "unreasoned and citation-less sentence" from *Holland*, quoted above. *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring in the judgment). *Holland's* famous *ipse dixit* has been followed for nearly a century, without the Court ever having carefully studied the matter. *See Executing the Treaty Power*, 118 Harv. L. Rev. at 1879 ("The striking fact is that the *Missouri v. Holland* litigation never squarely addressed this issue."). The Court should do so now.

B. Congress may assist the President's Power "to make Treaties," but has no separate power to "implement" them.

Article II, Section 2, clause 2, of the United States Constitution grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Congress' role, beyond the advice and consent *proviso*, stems from the Necessary and Proper Clause, which states:

> The Congress shall have the Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,

> and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18.

When the two Clauses are properly joined, Congress' power with respect to treaties reads as follows:

> The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution ... [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties.

Executing the Treaty Power, 118 Harv. L. Rev. at 1882 (footnote omitted).

Herein lies a widely misunderstood fact stemming from the *Holland* pronouncement: "The power granted to Congress is emphatically not the power to make laws for carrying into execution "the treaty power," let alone the power to make laws for carrying into execution 'all treaties.' Rather, on the face of the conjoined text, Congress has power 'To make all Laws which shall be necessary and proper for carrying into Execution ... [the] Power ... to make Treaties.'" *Executing the Treaty Power*, 118 Harv. L. Rev. at 1882.

The power "to make" treaties is vastly different than the power "to implement" them. *See id*. ("The 'Power' ... to make Treaties' is exhausted once a treaty is ratified; implementation is something else altogether."). Congress' powers no doubt extend to the appropriation of money for diplomacy or research into matters of geopolitical concern. But no provision of the Constitution authorizes Congress plenary power "to implement" treaties once they are made. For that, "Congress must rely upon its independent (though quite robust) Article I, § 8, powers." *Bond*, 134 S. Ct. at 2099

(Scalia, J., concurring in the judgment).

C. *Missouri v. Holland* should be overruled.

The *Holland* rule is antithetical to the concept of limited powers, and stands alone in our constitutional system. In *Marbury v. Madison*, 5 U.S. 137, 176 (1803), Chief Justice Marshall wrote: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." 5 U.S. 137, 176 (1803). But the treaty power, "as construed by Justice Holmes in *Missouri v. Holland*, may be expanded at will by political acts of political actors, unlike any other enumerated power." *Executing the Treaty Power*, 118 Harv. L. Rev. at 1901.

The unlikelihood that the Framers intended this result is easily demonstrated. "Under *Missouri v. Holland*, some statutes are beyond Congress's power to enact absent a treaty, but within Congress' power given a treaty." *Id.* at 1892-93. And, if Congress may act outside of its enumerated powers based on the existence of a treaty, its powers are "expandable virtually without limit." *Id.* (footnote omitted). "It could begin, as some scholars have suggested, with abrogation of this Court's constitutional rulings." *Bond*, 134 S. Ct. at 2100 (Scalia, J., concurring in the judgment). "For example, the holding that a statute prohibiting the carrying of firearms near schools went beyond Congress's enumerated powers ... could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools." *Id.* (citing *United States v. Lopez*, 514 U.S. 549 (1995)). "Similarly, Congress could reenact the invalidated part of the Violence Against Women Act of

1994 that provided a civil remedy for victims of gender-motivated violence, just so long as there were a treaty on point – and some authors think there already is." *Id.* (citation omitted). "This anomalous result is inconsistent with the text, history, and structure of the Constitution, all of which suggest that constitutional amendment is the only way to increase the scope of legislative power." *Executing the Treaty Power*, 118 Harv. L. Rev. at 1901 (footnote omitted).

The government protests that "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.'" BIO at 26. But concerns for state sovereignty "flow[] from the enumerated-powers doctrine" itself. *See* John C. Eastman, *Will Mrs. Bond Topple Missouri v. Holland?*, 2011 Cato Sup. Ct. Rev. 185, 191 (2010-2011). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 222 (2011) ("*Bond I*"). And if the power to prosecute a run-of-the-mill crime on foreign soil doesn't amount to a "general police power," it is hard to imagine what does.

D. This case presents an excellent vehicle to resolve the important constitutional issue avoided in *Bond*.

The importance of this issue cannot be gainsaid. Justice Scalia would have resolved it in *Bond*, but the constitutional issue was avoided by the majority's

interpretation of the statute. Here, however, the statutory construction issue does not resolve the constitutional one.[5]

The government suggests that "Section 1203 may well be a valid exercise of other congressional powers, such as authority over immigration, foreign commerce, or the protection of U.S. nationals abroad." BIO at 26. But this case had nothing to do with immigration, and involved no commerce with the United States. Neither has the government identified what Article I power it believes authorizes the blanket "protection of U.S. nationals abroad." Rather, the statute has repeatedly been upheld under the Necessary and Proper Clause and "the Constitution's treaty power." *See Noel*, 893 at 1302 (quoting *Ferreira*, 275 F.3d at 1027-28). *See also id*. (citing *United States v. Mikel*, 889 F.3d 1003, 1023-24 (9th Cir. 2018); *United States v. Shibin*, 722 F.3d 233, 247 (4th Cir. 2013); *United States v. Lue*, 134 F.3d 79 (2d Cir. 1998)). No other Article I power justifies its enactment.

The government argues that Mr. Noel "did not timely present" this issue, by failing to raise it until his petition for rehearing. *See* BIO at 25 n.4. But the Court's "traditional rule ... precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992)**}** (citation omitted). "[T]his rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.*

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5 Should Mr. Noel prevail on his statutory claim, he would be entitled to a new trial. The government's ability to retry him, however, would remain dependent upon the resolution of the constitutional issue.

Here, the Eleventh Circuit issued a published decision, squarely addressing the constitutional issue herein (and thus prompting Mr. Noel's timely petition for rehearing *en banc*). The issue is fairly presented for the Court's review and presents a matter of unsurpassed importance. Wherefore, Mr. Noel respectfully asks the Court to issue the writ.

CONCLUSION

For the reasons stated herein and his Petition for Writ of Certiorari, Mr. Noel respectfully asks that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

By: ***s/Tracy Dreispul***
Tracy Dreispul
Assistant Federal Public Defender
Counsel for Petitioner

Miami, Florida
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