NO.

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

The federal Hostage Taking statute, 18 U.S.C. § 1203, was enacted to implement the International Convention Against the Taking of Hostages, which treated the taking of hostages "as manifestations of international terrorism."

"Except as provided in subsection (b)," 18 U.S.C. § 1203(a) makes it a crime to "seize[] or detain[] and threaten[] 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." Subsection (b) provides, in relevant part, that "[i]t is not an offense under this section if the conduct required for the offense occurred outside the United States unless . . . the offender or the person seized or detained is a national of the United States." 18 U.S.C. § 1203(b)(1)(A).

1. When the United States prosecutes a foreign national for kidnapping a United States citizen in a foreign country, must the government prove that the defendant knew "the person seized or detained was a national of the United States"?

2. 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?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Marcus Noel respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-10529 in that court on June 26, 2018, *United States v. Noel*, 893 F.3d 1294 (11th Cir. 2018), *reh'g denied* (11th Cir. Oct. 18, 2018), which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 26, 2018. Mr. Noel filed a timely petition for rehearing *en banc*, which was denied on October 18, 2018. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3. The district court had jurisdiction pursuant to 18 U.S.C. § 3231 because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions and sentences of United States district courts.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 1203. Hostage Taking

(a) Except as provided in subsection (b) of this section, 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, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b)(1) It 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.

(2) It is not an offense under this section if the conduct required for the offense occurred inside the United States, each alleged offender and each person seized or detained are nationals of the United States, and each alleged offender is found in the United States, unless the governmental organization sought to be compelled is the Government of the United States.

(c) As used in this section, the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

18 U.S.C. § 1203.

U.S. CONST. art. I § 8, cl. 18

The Congress shall have Power . . . [t]o 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. II, § 2, cl. 2

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .

STATEMENT OF THE CASE AND THE FACTS

1. Marcus Noel, a Haitian national living in Haiti, and an accomplice kidnapped a woman in Haiti. The two men took to the woman to a local school that Mr. Noel operated. The woman was detained for three days, during which time the kidnappers made ransom demands of the woman's family. Haitian police tracked the kidnappers' phone calls to the school, where Mr. Noel and his accomplice were arrested and the victim was freed. There was no evidence that Mr. Noel knew that the woman he kidnapped was a United States citizen. She had been residing in Haiti at the time of the offense.

2. Mr. Noel was charged in the United States District Court for the Southern District of Florida with conspiracy and hostage taking under 18 U.S.C. § 1203, and using and carrying a firearm in furtherance of the crime, in violation of 18 U.S.C. § 924(c). The Hostage Taking statute, § 1203, provided the sole basis for federal jurisdiction. Mr. Noel was extradited to the United States, and pled guilty to the two hostage-taking counts. The firearm charge was dismissed pursuant to Mr. Noel's plea agreement with the United States.

3. Mr. Noel appealed his conviction to the United States Court of Appeals for the Eleventh Circuit, arguing that federal subject-matter jurisdiction was lacking because there was no evidence he knew the victim was a United States citizen. The Hostage Taking statute, like the Convention it implemented, was enacted to combat international terrorism, not to domesticate foreign violent street crime. All of the relevant conduct occurred in Haiti, and the offense did not involve any political act

or connection to international terrorism. Without proof that Mr. Noel knew his victim was a United States citizen, there was no connection between the kidnapping-for-ransom he committed and the purposes of the treaty. Nor was there any evidence that Mr. Noel had knowingly committed a crime against the United States.

4. The Eleventh Circuit rejected Mr. Noel's arguments and affirmed his conviction. *United States v. Noel*, 893 F.3d 1294 (11th Cir. 2018). The Court determined that the requirement in § 1203(b)(1)(A) that "the person seized or detained is a national of the United States" was "purely jurisdictional", and "*no mens rea* is necessary for elements that are purely jurisdictional." *Id*. at 1298. Furthermore, while the court "agree[d] that a primary focus of the statute is on acts of terrorism," it held that the plain language of the statute covered Mr. Noel's offense, without respect to whether his conduct could be described as terrorism. *Id*. at 3000. Finally, the court of appeals held that it "need not decide" whether Mr. Noel's offense could be deemed to be an offense against the Law of Nations, because "Congress had the power to enact § 1203 pursuant to the Necessary and Proper Clause and the Treaty Power." *Id.* at 1302 (citation omitted).

REASONS FOR GRANTING THE WRIT

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 that the nationality of the person seized or detained.

1. The issue in this case relates to one currently under review. Although there was no proof Mr. Noel knew the woman he kidnapped-for-ransom in Haiti was a United States citizen, the Eleventh Circuit held that the victim's nationality under 18 U.S.C. § 1203(b)(1)(A) was a "purely jurisdictional element", which did not require proof of *mens rea*. *United States v. Noel*, 893 F.3d 1294, 1299 (11th Cir. 2018). This case thus shares a common thread *United States v. Rehaif*, 888 F.3d 1138 (11th Cir. 2018), *cert. granted*, *Rehaif v. United States* No. 17-9560, 2019 WL 166874 (U.S. Jan 11, 2019), over which the Court recently granted review. In *Rehaif*, the Court will decide whether 18 U.S.C. § 922(g)(5)(A), which criminalizes the possession of firearms or ammunition by a person unlawfully in the United States, requires the government to prove the defendant's knowledge of his own unlawful immigration status. In *Rehaif*, as in Mr. Noel's case, the Eleventh Circuit considered the unknown fact to be non-substantive, and thus outside "the traditional rule that the government must prove *mens rea* for each substantive element of the crime." *Rehaif*, 888 F.3d at 1140.

2. Unlike the statue at issue in *Rehaif*, 18 U.S.C. § 1203 does not contain an express *mens rea* element. This does not end the inquiry, however, because "[i]n such cases, courts read the statute against a 'background rule' that the defendant must know each fact making his conduct illegal." *Torres v. Lynch*, 136 S. Ct. 1619, 1631

(1994). "This rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (citation omitted). Generally, a defendant must "'know the facts that make his conduct fit the definition of the offense,' ... even if he does not know that those facts give rise to a crime." *Id.* (quoting *Staples v. United States*, 511 U. S. 600, 608 n.3 (1994)).

Although the Court has recognized exceptions to this rule for elements that are "jurisdictional", those cases involved very different situations. *Torres*, for example, involved comparing federal offenses -- which typically contain a "jurisdictional hook" tying substantive elements to an enumerated power -- with their state counterparts, which do not. *See Torres*, 136 at 1362. Even there, however, the Court recognized that "tough questions may lurk on the margins -- where an element that makes Congress' regulatory power ***also might play a role in defining the behavior Congress thought harmful***. But a standard interstate commerce element, of the kind appearing in a great many federal laws, is almost always a simple jurisdictional hook." *Id.* (emphasis added). In the case *sub judice*, the victim's nationality is neither a "standard interstate commerce element" nor a "simple jurisdictional hook." *See id*. Rather, it plays the central "role in defining the behavior Congress thought harmful." *Id*.

This fact distinguishes Mr. Noel's offense from that in *United States v. Feola*, 95 S. Ct. 1255 (1975), or the many other crimes for which the federal and state governments share regulatory interests. Certainly, in *Feola*, the federal government

had an interest in prosecuting assaults against law enforcement officers, irrespective of the jurisdiction conferred by the victim's status. Mr. Noel's offense, by contrast, occurred in Haiti and but for the victim's nationality, the United States had no interest in the crime. The victim's nationality is what brought Mr. Noel's offense within the core concern of the behavior Congress sought to proscribe.

Title 18 U.S.C. § 1203, captioned "Hostage Taking," was enacted in 1984 in Chapter XX of Public Law 98-473, which is entitled "Terrorism". The statute was "enacted to fully implement the [United Nations] International Convention Against the Taking of Hostages." H.R. 98-5689; S. Rep. 98-2624. President Reagan urged Congress to enact the statute against international terrorism to "act immediately to cope with this menace and to increase cooperation with other governments in dealing with this growing threat to our way of life." Ronald Reagan, President of the United States, Message to the Congress Transmitting Proposed Legislation to Combat International Terrorism (April 26, 1984). Clearly, the statute is directed at international terroristic hostage-takings, and not street-level kidnappings-for-ransom in foreign countries. Likewise, the statute excludes most domestic offenses committed by and against U.S. nationals, "unless the governmental organization sought to be compelled is the Government of the United States." *See* 18 U.S.C. § 1203(b)(2).

3. The Eleventh Circuit gave scant weight to this purpose in interpreting § 1203, and considered only the "plain language" of the statute. *Noel*, 893 F.3d at 1300 ("Although we agree that a primary focus of the statute is on acts of terrorism, 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."). In doing so, the court misapplied *Bond v. United States*, 572 U.S. 844 (2014), and raised significant constitutional concerns.

In *Bond*, the Court held that a statute passed to implement the Convention Against Chemical Weapons did not reach the defendant's "unremarkable local offense." *Id.* at 848. Because the statute was passed to implement the Convention, the Court "beg[a]n with that international agreement." *See id.* at 855. The Convention Against Chemical Weapons was the "product of years of worldwide study, analysis, and multinational negotiation," which "arose in response to war crimes and acts of terrorism." *Id.* at 848. It dealt with crimes of "deadly seriousness." *Id.* The Court found "no reason to think the sovereign nations that ratified the Convention were interested in anything like Bond's common law assault," and interpreted the implementing statute accordingly. *See id.* at 856. *See also id.* at 860-861 (finding "ambiguity" deriving from the "improbably broad reach of the key statutory definition").

In Mr. Noel's case, the court of appeals disregarded this guidance entirely, and stopped its analysis at the "plain language" of § 1203 and the treaty:

> We note that the preamble to the Treaty provides that it seeks to address "all acts of taking of hostages as manifestations of international terrorism." We need not decide in this case the scope of the concept of terrorism, or whether Noel's crime is itself an act of terrorism. The plain language of § 1203 and the plain language of the Treaty encompass

> Noel's crime, without regard to whether his crime meets some definition of terrorism.

Noel, 893 F.3d at 1300. This was directly contrary to *Bond*. *See Bond*, 572 U.S. at 866 ("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.").

4. The *Bond* Court held that "nothing prevents Congress from implementing the Convention in the same manner it legislates with respect to innumerable other matters," - *i.e.*, by respecting constitutional limits. In *Bond*, the Court was addressing federalism concerns. In this case, the court of appeals' expansive interpretation of § 1203 infringed upon an equally important -- but far less settled -- area of constitutional law.

Terroristic acts may be viewed as Offences against the Law of Nations, which Congress is independently authorized to prosecute. *See* U.S. Const. ART. I, § 8, cl. 10. *See also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1393-94 (2018) (assuming that individuals "who inflicted death or injury by terrorism committed crimes in violation of well-settled, fundamental precepts of international law."). A purely local kidnapping-for-profit, however, in no way resembles an international law crime. Nor is there any other enumerated power that justifies such a prosecution. Instead, the Eleventh Circuit held that Congress may exceed its otherwise limited powers when acting pursuant to a treaty.

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

1. The court of appeals held that even if Mr. Noel's crime was not an offense against the law of nations, it fell within Congress' powers under the Necessary and Proper Clause, and its authority to implement a validly-enacted treaty. *Noel*, 893 F.3d at 1302. In doing so, the court invoked the familiar refrain from *Missouri v. Holland*, 252 U.S. 416, 432 (1920), that "if the treaty is valid, there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *See Noel,* 893 at 1302 (alteration and citations omitted).

Although this proposition is widely-accepted, Justice Scalia pointed out in his concurring opinion in *Bond* that it rests on "[a]n unreasoned and citation-less sentence" from the *Holland* opinion, and is inconsistent with the Constitution's structure and text. *See* 572 U.S. at 874 (Scalia, J., concurring in the judgment). Justice Scalia argued that: "[t]o legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers." *Id*. at 876. Otherwise, the Federal Government would be able to expand its own powers by entering into treaties with foreign nations. But "'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'" *Id.* at 879 (citation omitted).

2. In a separate concurring opinion, Justice Thomas wrote that the "preservation of limits on the Treaty Power is . . . a matter of fundamental constitutional importance, and the Court ought to address the scope of the Treaty Power when that issue is presented." *Bond*, 572 U.S. at 896 (Thomas, J., with whom Scalia, J., and Alito J., joined, concurring in the judgment). Mr. Noel asks the Court to do so in this case.

3. This case presents an excellent vehicle for certiorari. The facts of the case are clear and not in dispute. The court of appeals addressed the questions herein succinctly in a published and precedential decision. Additionally, the first issue presented overlaps in significant respects with the question already before the Court in *Rehaif*. Wherefore, he asks the Court to issue the writ.

CONCLUSION

For the reasons stated herein, Mr. Noel respectfully asks that a writ of certiorari issue to the United States Court of Appeals for the Eleventh Circuit. Alternatively, he asks the Court to hold his petition in abeyance until *Rehaif v. United States*, No. 17-9560, 2019 WL 166874 (Jan. 11, 2019), is decided.

Respectfully submitted,

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January 16, 2019