

No. 18-7489

**IN THE SUPREME COURT OF THE UNITED STATES**

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JURIJUS KADAMOVAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

(CAPITAL CASE)

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

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REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

Petitioner Jurijus Kadamovas submits this reply to the Brief for the United States in Opposition (“Opp.”). On the first question presented, the opposition does not adequately address *Bond v. United States*, 572 U.S. 844 (2014), which demonstrates that there are significant statutory construction and constitutional issues presented by this case. With respect to the second question, the D.C. Circuit’s recent opinion in *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) solidifies the lower-court conflict regarding recusal standards. This Court should review these important questions in this death penalty case.

## ARGUMENT

**I. This death penalty case is an ideal vehicle to address the meaning of the Hostage Taking Statute and the important constitutional questions that were left unresolved in *Bond*.**

**A. The statutory construction issue merits review**

The government contends in passing that this case would not be a suitable “vehicle” to review the meaning of 18 U.S.C. § 1203 because petitioner did not raise his claim in the district court. Opp. 15. The Ninth Circuit rejected the government’s contention that plain error review applied and considered the question *de novo*. See *United States v. Mikhel*, 889 F.3d 1003, 1021 (9<sup>th</sup> Cir. 2018). Plain error review does not apply because petitioner made general motions for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, thereby preserving the

question of whether his conduct violated § 1203. *See, e.g., United States v. Hammoude*, 51 F.3d 288, 291 (D.C. Cir. 1995).<sup>1</sup> Accordingly, the government’s “vehicle” complaint is without basis, and the fact that the death penalty was imposed on petitioner makes review in this particular case all the more important.

On the merits, the government acknowledges *United States v. Rodriguez*, 587 F.3d 573, 579 (2d Cir. 2009) and does not appear to dispute that the Second Circuit suggested that § 1203 is limited to the international terrorism context. *Opp.* 16-17. In response, the government cites the series of cases decided before *Rodriguez* and *Bond* that took a contrary view. *Id.* The bottom line is that the lower courts have suggested different approaches, and the decision below and in *United States v. Noel*, 893 F.3d 1294, 1299-1300 (11<sup>th</sup> Cir. 2018) demonstrate that *Bond* has not sufficiently clarified the landscape. Thus, review is warranted.

In opposing an international terrorism limitation, the government contends that the language in § 1203 is “plain,” *Opp.* 16-17, the same argument rejected in *Bond*. *See Bond*, 572 U.S. at 860-62. The government only arrives at this conclusion because it ignores many of the arguments raised by petitioner,

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<sup>1</sup> Although the government spends much time recounting the kidnappings and homicides and asserts overwhelming evidence, *Opp.* 9, it does not claim international terrorism was involved, conceding the relevant factual issue. Additionally, the only direct evidence of petitioner’s participation in the homicides came from a cooperating witness with significant credibility problems, and the government continues to incorrectly link petitioner to fingerprint and DNA evidence.

which track the analysis in *Bond*. Perhaps most notably, § 1203 cannot possibly mean that every detention to compel a third person constitutes a violation of the statute, although the government’s “plain language” argument would lead to that absurd conclusion. Under the government’s construction, parents and teachers who detain children to compel siblings or classmates are guilty of a federal felony and subject to life imprisonment. *Id.* at 862. Despite the government’s unsupported claims, § 1203 is similar to the statute involved in *Bond*, as the government concedes that it was enacted to implement an international treaty, Opp. 21, and its purported plain language is of unusual “potential breadth.” Opp. 18. There must be some unlawfulness requirement in § 1203 to justify its severe penalties. *Bond*, 572 U.S. at 857; see *Rehaif v. United States*, \_\_\_ S. Ct. \_\_\_, No. 17-9560, 2019 WL 2552487, at \*4 (June 21, 2019).

Even the definition of “hostage taking” used by the government suggests that the statute’s meaning is not so clear. The government defines “hostage taking” as “the unlawful holding of an unwilling person as security that the holder’s terms will be met by an *adversary*.” Opp. 19. The use of the term “adversary” is more consistent with international terrorism than common law kidnapping, and the fact that the statute and underlying treaty are entitled “hostage taking” rather than “kidnapping” suggests a more limited scope. This limited



approach is indicated by the “international terrorism” language in the Treaty’s preamble, and the government does not defend the Ninth Circuit’s unsupported assertion that this language is merely “illustrative.” *Mikhel*, 889 F.3d at 1022.

In essence, the government ignores most of petitioner’s arguments based on *Bond* and instead collapses this Court’s multi-faceted analysis into only a federalism-based limiting construction, which it asserts is unnecessary in the context of § 1203 because the statute requires a single person involved to be a foreign national. Opp. 20-21. The government’s characterization of *Bond* is flawed, and if this purported distinction were valid, then any local crime could be a federal offense if a single defendant or victim is a foreign national. The government has cited no authority to support this view of federalism and the police and immigration powers. Its view is also undermined by the understanding at the time of the Founding that foreign citizens who committed crimes in this country were governed by the laws of the States, a point that the government does not dispute. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 883 (2006). At the very least, the government’s view of federalism is constitutionally doubtful, which supports petitioner’s proposed limitation on the statute. See *Bond*, 572 U.S. at 859-60. In sum, review of the statutory construction issue is warranted in this death penalty case.

**B. The Court should review the constitutional questions left unresolved in *Bond* but addressed in the *Bond* concurrences**

The Ninth Circuit also rejected the government’s undeveloped claim that plain error review should apply to the constitutional questions, *Mikhel*, 889 F.3d at 1021, consistent with lower-court authority applying *de novo* review when considering the constitutionality of a statute regardless of whether the challenge was raised in the district court. *See United States v. Slone*, 411 F.3d 643, 646 (6<sup>th</sup> Cir. 2005); *United States v. Naghani*, 361 F.3d 1255, 1259 (9<sup>th</sup> Cir. 2004); *see also Class v. United States*, 138 S. Ct. 798 (2018). Indeed, lower courts are bound by *Missouri v. Holland*, 252 U.S. 416, 432 (1920), and thus the constitutional question can only be entertained by this Court; in other words, lower-court challenges are futile. *See Henderson v. United States*, 568 U.S. 266, 285 (2013) (Scalia, J., dissenting); *United States v. Kyle*, 734 F.3d 956, 962 (9<sup>th</sup> Cir. 2013).

On the merits, the government does not challenge Justice Scalia’s dismantling of *Holland* and only contends that § 1203 does not implicate his “core” concern because the statute maintains a purported foreign “nexus.” Opp. 24-25. Justice Scalia’s “core” concern was that, under our Constitutional structure, Congress cannot enact a statute to implement a non-self-executing treaty; rather, Congress can only enact statutes pursuant to its enumerated powers in Article I, § 8. *See Bond*, 572 U.S. at 876 (Scalia, J., concurring). The

government concedes that Congress enacted § 1203 to implement the Hostage Taking Treaty, which is not self-executing. Opp. 21. Thus, this case directly implicates Justice Scalia’s “core” concern. The government contends that there may be other congressional powers that could possibly justify § 1203, Opp. 25, but it has conceded that Congress did not rely on these purported other powers, *see Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 n.7 (1999), and the Ninth Circuit explicitly disavowed reliance on any other powers. *Mikhel*, 889 F.3d at 1024 n.3. Thus, the “core” constitutional question addressed by Justice Scalia in *Bond* is squarely presented and should be reviewed.

The government maintains that § 1203 is constitutional under the view of the Treaty Power expressed by Justices Thomas and Alito in *Bond* because the Hostage Taking Treaty concerns the protection of foreign nationals. Opp. 23-24. The statute, however, does not require the *victim* to be a foreign national and therefore is not limited to the *protection* of foreign nationals. Indeed, the theory of prosecution in this case was based on *petitioner’s* nationality. Even assuming (but not conceding) that the Treaty Power authorizes an encroachment on the States’ police power by allowing the federal government to proscribe common law crimes when the victim is an alien, it does not authorize the enactment of federal criminal laws on the basis of the alienage of the defendant, *see Lee, supra*, 106 Colum. L.

Rev. at 883, an important distinction ignored by the government. The Treaty and implementing statute are therefore unconstitutional as applied in this case. Given the theory of prosecution in *this* case, the constitutional concerns expressed in the *Bond* concurrences are fully implicated, making this case an excellent vehicle for review. By contrast, the circumstances in *Noel v. United States*, No. 18-7485 do not cleanly present the constitutional issues, as that case involved the application of § 1203 to a United States citizen in a foreign country.

Finally, the government only briefly responds to petitioner's challenge to the 1994 amendment, Opp. 25-26, and apparently concedes that it created a new homicide offense, not a mere penalty. *See Jones v. United States*, 526 U.S. 227 (1999). Such a homicide offense can be found nowhere in the Treaty, and a subsequent Congress's decision to bootstrap a new offense onto a statute that implemented a non-self-executing treaty is precisely the constitutional problem contemplated by Justice Scalia in *Bond*. *See Bond*, 572 U.S. at 881. The government questions the applicability of the *United States v. Comstock*, 560 U.S. 126, 149 (2010) factors in the treaty context. Opp. 26 n.3. Petitioner has addressed those factors because the 1994 amendment did not implement a treaty and instead constitutes the creation of a new criminal offense inserted into a statute that had already been enacted to implement a treaty. By failing to argue

otherwise, the government apparently concedes that the 1994 amendment fails the “necessary and proper” test under *Comstock*. Even if the *Comstock* factors are inapplicable, the 1994 amendment is unconstitutional under a pure Treaty Power analysis. The government has cited no authority that allows Congress to enact a criminal offense pursuant to the Treaty Power when that offense appears nowhere in the underlying treaty. In sum, the constitutional questions addressed in the *Bond* concurrences are fully implicated, and this case is an excellent vehicle for review given the theory of prosecution and the 1994 amendment.

**II. The D.C. Circuit’s recent opinion in *In re Al-Nashiri* adds to the confusion in the lower courts, and this Court should grant review to resolve the multi-faceted conflict regarding the standards for recusal.**

**A. The opinion below conflicts with *In re Al-Nashiri***

After the petition was filed, the D.C. Circuit decided *In re Al-Nashiri*, 921 F.3d 224, which held that a military judge was required to recuse himself in a capital case because he had applied for a position as an immigration judge with the Department of Justice. The D.C. Circuit explained that “it is beyond question that judges may not adjudicate cases involving their prospective employers.” *Id.* at 235. “The risk, of course, is that an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects – to get an application noticed, to secure an interview, and ultimately to receive an offer. And

even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may *appear* to have done so remains unacceptably high.” *Id.* The court concluded that the Justice Department qualifies as an employer in this context. *Id.* at 235-36. The D.C. Circuit relied on the same authority cited by petitioner, including Opinion No. 84, Judge Posner’s opinion in *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 459-61 (7<sup>th</sup> Cir. 1985), and *Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (*en banc*). *Id.* at 235-37.

The government summarily addresses *In re Al-Nashiri* in a footnote and appears to argue that the case is distinguishable because the district judge withdrew his application to become the U.S. Attorney before it was considered “on the merits.” Opp. 29 and n.2. This purported point of distinction is flawed both factually and legally. As a factual matter, the district judge *interviewed* for the U.S. Attorney position (without previously disclosing that fact), which necessarily entails consideration on the merits. As a legal matter, Judge Posner has explained that recusal is required when a judge “is in negotiation – albeit *preliminary, tentative, indirect, unintentional, and ultimately unsuccessful* – with a lawyer or law firm or party in the case over his future employment.” *Pepsico, Inc.*, 764 F.2d at 461 (emphasis added). Likewise, Opinion No. 84 states: “After the initiation of any discussions with a law firm, *no matter how preliminary or*

*tentative the exploration may be*, the judge must recuse, subject to remittal, on any matter in which the firm appears.” Op. No. 84 (emphasis added). In other words, there is no “pre-consideration-on-the-merits” exception to the recusal rule. And, Opinion No. 84 states that, even after the termination of discussions, a judge should recuse for at least one year, a point that the government ignores in relying on the district judge’s withdrawal of his U.S. Attorney application.<sup>2</sup>

The government contends that “even if some tension existed” between the Ninth Circuit’s decision and Opinion No. 84, the latter is not binding on the federal courts. Opp. 28. But this Court has never decided what effect the Committee’s opinions have on the lower federal courts, and, even if the opinions are not binding, the cases cited by the government demonstrate that they should at least be given “considerable weight.” *Ragozzine v. Youngstown State Univ.*, 783 F.3d 1077, 1080 (6<sup>th</sup> Cir. 2015); *see also Draper v. Reynolds*, 369 F.3d 1270, 1280 n.16 (11<sup>th</sup> Cir. 2004) (“we are bound to give some weight to the view of the

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<sup>2</sup> The government’s citation to *Mistretta v. United States*, 488 U.S. 361, 410 (1989) is off-base. Opp. 27. *Mistretta* makes the uncontroversial point that the judiciary is not tainted just because there may be Executive Branch positions, like private sector positions, that hypothetically interest federal judges. A recusal problem is only triggered when a judge applies for such employment. The government also mentions that the U.S. Attorney position requires Senate confirmation, Opp. 29, but does not explain why that matters. Even if the appointment here was not an interim one that would avoid the need for Senate approval, confirmations for U.S. Attorney positions are usually not contested, and whatever political implications are triggered by the Senate’s participation arguably make the recusal problem more pronounced.

committee”). The problem here is that the Ninth Circuit gave absolutely no weight to Opinion No. 84, simply ignoring the opinion despite petitioner’s heavy reliance on it, thereby creating a conflict with cases like *Ragozzine*.

In any event, even if Opinion No. 84 is entitled to no weight, the Ninth Circuit’s opinion also conflicts with *Pepsico, Inc.* and *Al-Nashiri*. Accordingly, this Court should grant review to address the split between the Ninth Circuit and the Seventh and D.C. Circuits (and the state courts). Review is particularly appropriate in this capital case because in “no proceeding is the need for an impartial judge more acute than one that may end in death.” *Al-Nashiri*, 921 F.3d at 239; *see also Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). This Court’s opinion in *Williams* demonstrates that recusal was required under both 28 U.S.C. § 455 and the Due Process Clause, and the government ignores the heightened need for an appearance of impartiality in the death penalty context.

**B. Review is also warranted to address the procedural conflicts**

The government does not withdraw its concession below that plain error review does *not* apply to petitioner’s request for sentencing relief because he requested recusal during the penalty phase. The government even contends that conflicts regarding the timeliness requirement are not implicated because the Ninth Circuit addressed the merits of the recusal claim and did not find an abuse



of discretion. Opp. 31. This Court should accept the apparent concession that timeliness does not obstruct petitioner's recusal claim as to the penalty phase, but timeliness is still in play as to the guilt phase, and the government's response actually further demonstrates the confusion and conflict in the lower courts.<sup>3</sup>

Although the majority of courts apply a timeliness requirement, the government recognizes that the Seventh Circuit does not, Opp. 33-34, but asserts that the Seventh Circuit recently eliminated its writ of mandamus requirement in *Fowler v. Butts*, 829 F.3d 788 (7<sup>th</sup> Cir. 2016), which may affect its timeliness precedent. Nothing in *Fowler* suggests that the Seventh Circuit will retreat from its rule; far from it, as *Fowler* held that a defendant did not waive or even forfeit a recusal claim even though he did not raise one in the district court. Judge Easterbrook explained that the recusal "statute does not permit an otherwise-disqualified judge to serve just because the litigant fails to make the appropriate motion." *Id.* at 794. He also reasoned that the "Supreme Court has allowed litigants to seek disqualification despite the absence of a protest in the court where the disqualified judge sat[,]" and "the participation of a disqualified judge [is] a

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<sup>3</sup> The government repeats the Ninth Circuit's speculation that petitioner strategically did not seek a mistrial as to the guilt phase because his attorney likely recognized that the evidence of his guilt was overwhelming. Opp. 14. Petitioner's attorney simultaneously sought a mistrial as to the guilt phase on other grounds and argued that the evidence was far from overwhelming at the time of sentencing, refuting this speculation.

form of structural error, which may be noticed at any time.” *Id.* (citing *Nguyen v. United States*, 539 U.S. 69 (2003)).

The Seventh Circuit is not alone, as the Sixth Circuit has also rejected a timeliness requirement. *See Roberts v. Bailar*, 625 F.2d 125, 128 n.8 (6<sup>th</sup> Cir. 1980). The government contends that the Sixth Circuit has overruled its precedent, but it relies on a series of *unpublished* opinions that constitute dicta or contain little analysis of the question and therefore could not and did not overrule its published precedent. *Opp.* 33. The government also cites *In re City of Detroit*, 828 F.2d 1160, 1167 (6<sup>th</sup> Cir. 1987), but that opinion was abrogated, and its comments about timeliness were dicta and did not address *Roberts*. The government’s suggestion that the Sixth Circuit has retreated from *Roberts* is overstated, particularly when considering that *Roberts* was vindicated by this Court’s subsequent opinion in *Nguyen*, which stated: “we have agreed to correct, at least on direct review, violations of a statutory provision that ‘embodies a strong policy concerning the proper administration of judicial business’ even though the defect was not raised in a timely manner.” *Nguyen*, 539 U.S. at 78.

Even if the Sixth Circuit’s precedent were inconsistent, that simply shows the confusion and the need for review. “Some circuits have decisions in multiple lines, sometimes using waiver doctrine, sometimes forfeiture doctrine,

and sometimes excusing the absence of a motion.” *Fowler*, 829 F.3d at 794. The bottom line is that there is significant conflict and confusion regarding whether there is a timeliness requirement. As Judge Easterbrook bluntly stated, the “circuits are all over the lot.” *Id.* at 793. Thus, review is warranted.

Additionally, the courts requiring timeliness are divided on the governing standard. The government appears to recognize as much but contends that the conflict is not implicated here because the Ninth Circuit utilized the “more permissive” standard. Opp. 34-35. Petitioner challenges the Ninth Circuit’s conclusion even as to the disputed guilt phase, and in order for this Court to determine whether a timeliness requirement was satisfied, it must determine what the standard is. Thus, the conflict over the timeliness standard is implicated.

Finally, the circuits are divided on the standard of appellate review. The government cites *Wright & Miller* to assert that the majority rule is abuse of discretion, Opp. 35, but omits that the treatise also states that “[b]ecause the disqualification statutes are mandatory and reflect a societal interest in an impartial judiciary, there is a strong argument that appellate courts should apply a *de novo* standard in reviewing recusal decisions.” 13D Charles Alan Wright et al., *Federal Practice and Procedure* § 3553, at 156 (3d ed. 2008). The government admits that the Seventh Circuit applies *de novo* review but contends there is

inconsistency in its precedent, Opp. 35-36, while ignoring that there is also disagreement in those circuits applying abuse of discretion review. *See In re United States (Franco)*, 158 F.3d 26, 36 (1<sup>st</sup> Cir. 1998) (Torruella, C.J., dissenting); *In re Drexel Lambert Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988) (Lumbard, J., dissenting). The government also fails to address this Court's precedent supporting a *de novo* standard. *See Ornelas v. United States*, 517 U.S. 690 (1996); *Thompson v. Keohane*, 516 U.S. 99 (1995). Even if plain error review were to apply as to the guilt phase, the government concedes that the recusal claim was preserved as to the penalty phase, making the standard of review important. Opp. 36-37. The government asserts that the Ninth Circuit did "not indicate that a different standard of review would affect" the outcome, Opp. 37, but its opinion does not say one way or the other, and that has not been a requirement when this Court has granted *certiorari* in other standard of review cases. *See United States v. Ornelas*, Nos. 94-3349, 94-3350, 1996 WL 508569 (7<sup>th</sup> Cir. Sep. 4, 1996) (same result after remand for application of *de novo* review). Given the subsequent opinion in *Al-Nashiri*, the Ninth Circuit may reach a different conclusion under *de novo* review.

### **CONCLUSION**

The Court should grant this petition.

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Respectfully submitted,

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