No. 19-_____

In The
Supreme Court of the United States

YUZEF ABRAMOV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is constitutional to extend 18 U.S.C. § 2423(c) to noncommercial conduct allegedly committed by a foreign citizen and resident against other foreign citizens entirely within a foreign country.

II. Whether a defendant's exercise of his right to counsel of choice by timely requesting to substitute retained counsel may be circumscribed by the factors implicated in a request to substitute appointed counsel, or instead whether the right to retained counsel of choice must be honored in the absence of compelling justification.

STATEMENT OF RELATED CASES

- *United States of America v. Abramov*, No. 2:14-cr-00241-ODW-1, U.S. District Court for the Central District of California. Judgment Entered March 14, 2016.
- *United States of America v. Abramov*, No. 16-50104, United States Court of Appeals for the Ninth Circuit. Judgment Entered November 7, 2018. Petition for Rehearing Denied March 29, 2019.

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The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner Yuzef Abramov's ("Petitioner" or "Mr. Abramov") petition for rehearing, dated March 29, 2019, is reproduced in the Appendix at App. 25a. The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming Mr. Abramov's convictions, dated November 7, 2018, is reproduced in the Appendix at App. 1a-App. 3a. The Central District of California's Judgment and Commitment Order, dated March 14, 2016, is reproduced in the Appendix at App. 10a-App. 24a. The jury's verdict form in Mr. Abramov's trial in the Central District of California, dated October 30, 2015, is reproduced in the Appendix at App. 4a-App. 9a. These opinions are unpublished.

JURISDICTION

The Court of Appeals entered its order denying Mr. Abramov's request for panel rehearing on March 29, 2019. (App. 25a.) Justice Kagan granted an application extending the time to file until August 26, 2019. (Sup. Ct. No. 18A1350). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

- **18 U.S.C. § 2423 (2003) – Transportation of Minors**

(b) Travel With Intent To Engage in Illicit Sexual Conduct.

> A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) Engaging in Illicit Sexual Conduct in Foreign Places.

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

- **18 U.S.C. § 2423 (2013) – Transportation of Minors**

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(c) Engaging in Illicit Sexual Conduct in Foreign Places.

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

INTRODUCTION

No one pays much attention to the Foreign Commerce Clause, U.S. Const., art. I, § 8, cl. 3 (Congress has the power to "regulate Commerce with foreign nations"). While its domestic counterpart, the Interstate Commerce Clause, from which it is separated in art. I, § 8, cl. 3 by a mere comma, has been the subject of judicial scrutiny and scholarly debate since the founding of the Republic, the Foreign Commerce Clause largely languished, half-forgotten, until rapid globalization in the 21st century began to drag it into the spotlight. But because the precise scope of its few and generic terms has never been seriously scrutinized or carefully defined, it has provided cover for prosecutorial overreach into alleged conduct that would and should be within the sole jurisdiction of a foreign sovereign.

Such is the case of Petitioner Yuzef Abramov, a Russian Jewish citizen residing in Russia whose alleged criminal conduct – even assuming it occurred at all and was not a corrupt fabrication – took place exclusively in Russia and involved exclusively Russian alleged victims. Indeed, the district judge opined that no reasonable jury could have found Mr. Abramov to be anything but a resident of Russia at the time of the alleged offenses.

Mr. Abramov was nonetheless tried and convicted in Los Angeles – half a world away from his common-law wife and family, his material witnesses, and, for that matter, the alleged victims – under the pre-2013 version of 18 U.S.C. § 2423(c), a statute whose stated purpose was and is to criminalize sex tourism by Americans. Making matters worse, Mr. Abramov was denied his counsel of choice when he sought to replace one retained attorney – who had done no investigation, was unable to handle the tremendous logistical difficulties presented by a case where all material witnesses and evidence were ten time zones away, and who candidly admitted to the court that he'd had a total breakdown of communication with his client – for another set of retained attorneys who were ready and willing to face those challenges.

The Founders surely never intended the Foreign Commerce Clause to transform American federal prosecutors into a global justice league – or worse, into pawns for a corrupt foreign government that facilitated extortion and retaliation against a member of a disfavored minority. This Court has never ruled on the

constitutionally permissible scope of 18 U.S.C. § 2423(c), and the time is ripe to do so now. This Court should also grant certiorari to define the standard for substitution of retained counsel, as opposed to appointed counsel, under *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) and its progeny.

STATEMENT OF THE CASE

A. Factual History

Mr. Abramov was born in the Soviet Union in 1957. (ER 133.) He grew up, married, and had two children, Yunus "David" Abramov and Zarina Abramova ("David" and "Zarina"), all within Soviet or former-Soviet territory. (ER 17, 234-35, 249, 1136.) When politics and sovereigns changed, he became a citizen of the Russian Federation. (ER 148.)

In the mid-1990s, Mr. Abramov's wife divorced him and emigrated to the United States with their two children. (ER 235, 251-53.) Mr. Abramov stayed behind. He moved to Moscow in 1996 (ER 837), where he later became a certified jewelry appraiser (ER 194), bought property, paid taxes, had Russian health insurance, acquired part-ownership of a business, and met someone new, Ekaterina Kazakova, who would become his common-law wife (*see generally* ER 106-81, 188-94). The couple lived in an apartment in greater Moscow with Ms. Kazakova's two sons, Yuri and Mikhail, who considered Mr. Abramov their adoptive father. (ER 111-12.)

Mr. Abramov did not enter the United States at all, for any purpose, until around 2001 (ER 195, 238), and only then began making brief but regular visits to see David and Zarina in Los Angeles. (ER 17-18, 195-201, 238.) He continued to reside in greater Moscow with Ms. Kazakova and the two boys who looked to him as a father. (*See*, *e.g.*, ER 111-12.) He maintained business ventures there, owned properties there, kept state-sponsored health insurance there, had a car and a driver's license there (ER 106-81, 188-94), and cared for his aging mother there (ER 115). By contrast, when Mr. Abramov visited the United States, he stayed in hotels, rented cars, and had no permanent address; he used the address of his ex-wife (who flatly refused to let him actually live with her at that address (ER 236)) or that of a business for processing Russian documents on forms where an address was required (ER 235-37).

In early 2009, faced with deteriorating U.S.-Russian relations that would potentially make travel more difficult, Mr. Abramov became a dual Russian-U.S. citizen so that he could easily visit David and Zarina. (ER 234.) He then returned to Russia to continue living with Ms. Kazakova and his *ersatz* adoptive sons. (ER 235-36.) He visited Los Angeles a couple of times a year to see David and Zarina on school breaks and on important religious holidays. (ER 199-201.) Between 2009 and 2011, the time of the charged conduct, U.S. Department of Homeland Security travel documents show that Mr. Abramov spent at least 85 percent of his time in Russia. (*Id*.) As before, he had a partner and

family in Russia, paid taxes in Russia, owned a business in Russia, had a Russian driver's license and Russian health insurance, and owned properties and a car in Russia. (*See generally* ER 106-81, 188-94.)

Mr. Abramov recounted that in early 2011, he refused to pay an extortionate bribe demand in order to continue doing business in Russia; in response, he was threatened by local strongmen with fabricated criminal charges for an alleged incident involving a bus driver. (ER 887.) The strongmen referred to him as "Enemy No. 1" and a "Jewish son of a bitch" because of his American citizenship and refusal to pay the requested bribe. (ER 887.) Frightened, he paid money through his Russian lawyer to have the case dismissed. (*Id*.) He then decamped to Los Angeles in the summer of 2011, confident that the United States would do a better job of protecting his rights and ensuring justice for all of its citizens. (ER 887-91.)

But it was not over. The strongman and his associates contacted Mr. Abramov again through his lawyer, warning him that the fabricated bus incident was "just the beginning" and he should "get his money ready." (ER 892.) Mr. Abramov "laughed" and pointed to his American citizenship – and now residence – as protection against such corrupt, extortionate, and racist demands. (*Id*.) The strongman replied ominously to Mr. Abramov and his Russian lawyer, "We will now fabricate a case against you that will reach you even in the U.S." (*Id*.)

B. Criminal Proceedings

Sometime in mid-2011, the Moscow Criminal Police began investigating allegations that Mr. Abramov had engaged in sexual activities with minors between October 2009 and July 2011. (ER 196.) They alerted the U.S. Homeland Security attaché in Moscow, who then referred the investigation to U.S. authorities. (*Id*.) Russian law enforcement evidently also continued their own investigation until at least January 2012 (ER 183-86), but did not follow through with any criminal prosecution against Mr. Abramov, for reasons that are not specified in the record.

On April 29, 2014, Mr. Abramov was indicted in the Central District of California on charges that during his time in Russia between 2009 and 2011, he engaged in sexual acts with three Russian girls under the age of 18, in violation of 18 U.S.C. § 2423(b)-(c). (ER 60-66.) He moved to dismiss the indictment on the basis that those statutory provisions did not apply to him because he was a resident of Russia at all relevant times. (ER 85-97.) His motion was denied. (ER 254.)

Although Mr. Abramov was initially represented by the Office of the Federal Public Defender, he swiftly retained private attorney Dmitry Gurovich. (ER 256.) As the trial date loomed, however, it became clear that Gurovich was unprepared to handle the complexities presented by trying a case half a world away from the site of the alleged conduct and all material witnesses. (ER 1213-35.) By September 2015, five weeks before the trial was scheduled to begin, Gurovich had

performed no interviews, conducted no investigation, and had not even begun the lengthy process required to bring foreign witnesses into the United States for trial. (ER 1219-20, 1242-45; *see also* ER 340). Moreover, he and Mr. Abramov were in agreement that there had been a complete breakdown in the attorney-client relationship and told the court as much in no uncertain terms. (ER 1229, 1242-45, 1246-49.)

Mr. Abramov promptly located new counsel, Anthony Solis and Leonard Levine, whom Mr. Abramov was able to pay and who both indicated that they were willing to take on the case. (ER 266-70.) He moved to substitute Levine and Solis for Gurovich on the bases discussed above (*id*.; *see also* ER 1210-41) and for a continuance for them to get up to speed on the case. The court denied his requests because it – incredibly – did not see an irretrievable breakdown in the attorney-client relationship and because of government concerns that any further continuance would jeopardize its ability to secure the victims' presence at trial, as the process for bringing them to the United States was lengthy and complicated and it did not wish to "traumatize" them further or interfere with their college schedules. (ER 32, 280, 1230-39.)

Trial began on October 27, 2015, with Gurovich awkwardly forced to continue as Mr. Abramov's counsel despite admittedly being horribly unprepared and having no working relationship with his client, among myriad other failings. (*See* ER 990-1006; 1010-12.) Due to Gurovich's procrastination and the logistical hurdles presented by a case where the witnesses were

on the other side of the world, none of Mr. Abramov's witnesses were able to secure visas in time to testify at trial. (ER 641.) Mr. Abramov himself was left as the sole witness to his version of events, which, in part because the defense had no witnesses with which to corroborate it, elicited laughter from courtroom observers and sarcastic comments from the Court – all of which was overheard by the jury. (ER 839-42, 867, 893, 897.)

The three alleged victims, however, *were* flown in to testify, as the court and the U.S. Attorney's Office had gone to extraordinary lengths to ensure their appearance. In a scene straight out of *The Crucible*, one alleged victim, "Rihan," engaged in a histrionic outburst obviously designed to prejudice the jury and ensure Mr. Abramov's conviction. (ER 45-46.) As noted above, the defense case consisted primarily of Mr. Abramov explaining his version of events by himself without corroboration and in a foreign language to a Los Angeles judge and jury that likely had no experience with the Russian world of bribery and corruption.

Mr. Abramov proposed an instruction that would have explained, "[t]o 'travel in foreign commerce and engage in an illicit sexual act' means to be on a trip from the United States to a foreign country and to engage in an illicit sexual act while on this trip." (CR 85; ER 905.) The court refused, over vociferous defense objection, because the court "d[id]n't believe the statute requires or even considers domicile." (ER 905-06.) The jury returned guilty verdicts on all six counts of the

indictment, five under § 2423(c) and one under § 2423(b). (App. 4a-App. 9a.)

However, the trial court then *sua sponte* directed a judgment of acquittal under Federal Rule of Criminal Procedure 29 on the § 2423(b) count, opining that "[Mr. Abramov] resides in Russia[.] I don't believe a case can be made that he traveled to Russia for the purpose of engaging in [illicit sexual] activity" (ER 972), and thus no reasonable jury could have found that Mr. Abramov was "travel[ing] in foreign commerce" as required by the statute.[1] Mr. Abramov was sentenced to 150 years in prison on the remaining five counts.

Mr. Abramov appealed his convictions to the Ninth Circuit Court of Appeals on the grounds (1) that his conviction was unconstitutional because he resided in Russia and thus the operative version of 18 U.S.C. § 2423(c) could not apply to him, and (2) that the trial court erred in refusing to allow him to substitute retained counsel Solis and Levine for Gurovich. (App. 1a-App. 3a.) The Ninth Circuit affirmed his convictions on November 7, 2018. (*Id.*) Mr. Abramov timely petitioned for rehearing on the grounds stated above and based on the trial court's refusal to give the jury an instruction regarding residency, which he had not explicitly raised on direct appeal due to ineffective assistance

[1] The court sustained this ruling even after copious supplemental briefing by the prosecution arguing to the contrary, concluding, "[Mr. Abramov] was going home. And I'm never going to say that no, while he's going home, one of the predominant purposes for him going home was to have sex with [the alleged victims]." (ER 1122.)

of counsel.[2] The petition for rehearing was summarily denied on March 19, 2019. (App. 25a.)

REASONS FOR GRANTING THE PETITION

I. THIS COURT NEEDS TO RESOLVE THE IMPORTANT FEDERAL QUESTION OF WHETHER APPLICATION OF 18 U.S.C. § 2423(c) TO RESIDENTS OF FOREIGN COUNTRIES ENGAGED IN NONCOMMERCIAL CONDUCT IS AN UNCONSTITUTIONAL EXPANSION OF THE POWERS DELEGATED TO CONGRESS

Neither our Constitution nor international law conceives of the United States as the world's police force. Indeed, our federal government has limited power to pass and enforce criminal laws even within the United States. Congress must show at least as much restraint in imposing our government's laws on other nations. A well-intentioned desire to protect victims of child sexual abuse is no excuse for discarding the constitutional principles that have underpinned our republic since its founding, nor is it a valid reason for interfering in the purely intra-national affairs of other sovereigns.

[2] In an extraordinary display of candor, Mr. Abramov's appellate counsel admitted in a declaration attached to his petition for rehearing that he had been ineffective in failing to raise the issue that the jury should have been instructed to decide whether Mr. Abramov was a resident of Russia.

Nowhere is this Court's guidance more critical than on a question that implicates our country's relations with other nations. Lower courts have expressly recognized that the question presented here is a difficult one, and they have been inconsistent in both their outcomes and their analysis. It is imperative that the United States speak with one voice on this issue of global concern, and this Court therefore should grant certiorari to determine the power of the United States to regulate conduct by foreign residents occurring entirely within the borders of foreign sovereigns.

A. The Broad Application of 18 U.S.C. § 2423(c) to Purely Foreign Conduct Exceeds Congress's Enumerated Powers

1. The Foreign Commerce Clause Does Not Extend to Prosecution of Noneconomic[3] Criminal Conduct Allegedly Committed Solely Among Foreign Residents Within a Foreign Country

Our federal government is one of enumerated powers, and thus Congress's power to enact any law must derive from the Constitution. *See United States v. Morrison*, 529 U.S. 598, 607 (2000). As Justice Thomas has aptly observed, "our Federal Government is one of limited and enumerated powers, not the

[3] Some testimony suggested Mr. Abramov had allegedly offered money to his alleged victims, but the evidence was equivocal and the general jury verdict form did not specify that Mr. Abramov's alleged conduct was commercial. (*See*, *e.g.*, ER 342-43, 560, 624; App. 4a-9a.)

world's lawgiver." *Baston v. United States*, 137 S. Ct. 850, 850 (2017) (Thomas, J., dissenting from denial of certiorari)). Thus, as one federal court has recently concluded, contrary to the Ninth Circuit's conclusion here, "Congress cannot regulate wholly intra-national non-commercial illicit sexual conduct abroad [under the Foreign Commerce Clause], just as it cannot regulate such conduct when it is wholly intrastate within the United States." *United States v. Park*, 297 F. Supp. 3d 170, 178 (D.D.C. 2018) (citing *United States v. Kebodeaux*, 570 U.S. 387, 411 (2013) (Thomas, J., dissenting)), *appeal filed*, No. 18-3017 (D.C. Cir. Mar. 6, 2018).

The permissible scope of the Foreign Commerce Clause is sometimes said to be broader than that of its more famous sibling, the Interstate Commerce Clause. *See*, *e.g.*, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979) ("[T]he Founders intended the scope of the foreign commerce power to be the greater [of the enumerated commerce powers]."). The rationale behind that view is that the Foreign Commerce Clause does not implicate the federalism and U.S. state sovereignty concerns that the Interstate Commerce Clause does, *see United States v. Lindsay*, 931 F.3d 852, 862 (9th Cir. July 23, 2019) (citation omitted), and that the federal government has a legitimate interest in ensuring national uniformity in U.S. commercial dealings with other countries, *see Japan Line, Ltd.*, 441 U.S. at 448.

But this interpretation is misleading in the context of projecting of U.S. law extraterritorially onto noncommercial conduct in foreign countries. Indeed, as

the leading scholar on the Foreign Commerce Clause explains, the textual difference between the two Commerce Clauses suggests the Foreign Commerce power is more limited than the Interstate Commerce power:

> The Foreign Commerce Clause contains no equivalent, globally-encompassing authority to regulate "among" foreign nations, only the power to regulate commerce "with" them. The difference between the power to regulate among members of the domestic system, but only with members of the international system, suggests that Congress has no more power to regulate inside foreign nations than it has inside the several states. Indeed, . . . contrary to leading lower-court decisions – this textual difference actually deprives Congress of some of the more sweeping regulatory powers abroad that it enjoys at home.

Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 973-74 (2010) (footnotes omitted). As Professor Colangelo concludes, there is "strong textual, structural, and historical evidence that Congress has less – not more – power to impose U.S. law inside foreign nations than inside the several states under the Commerce Clause." *Id.* at 1003.

In any event, an analysis of the factors used to assess whether particular conduct may permissibly be related under either Commerce Clause shows why § 2423(c) is constitutionally problematic in the context of foreign residents. The factors set forth in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States*

v. Morrison, 529 U.S. 598, 609 (2000) to analyze the Interstate Commerce Clause have been extended, and, where appropriate, adapted, to analyses of the Foreign Commerce Clause, *see, e.g.*, *Lindsay*, 931 F.3d at 862-63; *United States v. Bollinger*, 798 F.3d 201, 215-16, 218-19 (4th Cir. 2015); *Park*, 297 F. Supp. 3d at 179.

In *Lopez*, this Court held that Congress's regulatory power over commerce encompassed three broad categories of activity: (1) "the use of the channels" of commerce; (2) "the instrumentalities of . . . or persons or things" in commerce; and (3) "activities that substantially affect" commerce. *Lopez*, 514 U.S. at 558-59. The Fourth Circuit in *Bollinger* slightly modified the third prong to require only a "demonstrable effect" on commerce, *see* 798 F.3d at 216, but that holding has not been universally adopted by the circuit courts, much less this Court, and it relies on an incorrect understanding of how the Foreign Commerce Clause was originally intended and how it operates outside the commercial context. *See*, *e.g.*, *Lopez*, 514 U.S. at 585 (Thomas, J. concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling buying, and bartering as well as transporting for these purposes."); *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824) ("The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations" but "it does not extend to a commerce which is completely internal.").

As to the first prong, use of the channels of commerce, illicit noncommercial sexual acts between foreigners in a foreign country do not use such channels

in any obvious way. *See Park*, 297 F. Supp. 3d at 175-76.

As to the second prong, "Congress regulates the 'instrumentalities of commerce' when it passes legislation that directs or inhibits the vehicles of economic activity – e.g., airplanes, steamships, automobiles, trains – or interstate means of communication – e.g., mail and wires." *United States v. Reed*, 2017 WL 3208458, at *8 (D.D.C. July 27, 2017) (citing *Hous. E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 353-54 (1914)). In *Park*, the court flatly rejected the government's contention this prong was satisfied in the context of 18 U.S.C. § 2423(c) because the defendant's U.S. passports and temporary visas were "instrumentalities of commerce," and that the defendant had used "interstate means of communication to obtain them." *See* 297 F. Supp. 3d at 176 (noting, correctly, that § 2423(c), even in its post-2013 form, did not reference passports, visas, or "means of travel or communication at all"). By contrast, in *United States v. Durham*, 902 F.3d 1180, 1212 (10th Cir. 2018), the Tenth Circuit found that the second prong was satisfied by § 2423(c)'s travel requirement, without regard to whether there was any connection, temporal, intentional, or otherwise, between the travel and the illicit conduct, although it expressly distinguished cases where the defendant resided in the foreign nation, suggesting that residence did not adequately provide the required "jurisdictional hook." *See id.* at 1212, 1216.

Under the third prong, whether the proper test is for a substantial effect or merely a demonstrable effect

on foreign commerce, noncommercial illicit sexual conduct in a foreign country exclusively between foreign residents does not pass muster. The *Park* court – again, correctly – rejected it entirely. *See Park*, 297 F. Supp. 3d at 177 ("the government has proffered no evidence . . . demonstrating that non-commercial illicit sexual conduct committed by Americans residing abroad has an effect on foreign commerce, and the legislative history of § 2423(c) is devoid of any [such] reference. . . .").

The Ninth Circuit, which stretched to hold that "non-commercial sex with a minor abroad fairly relates to foreign commerce," found such only after a tenuous and strained analysis that linked "collateral effects" of American sex *tourism*, such as extra money paid in hotel and vacation packages, "or simply stay[ing] in the country longer spending money on other things" to foreign commerce and concluded that this hazy and convoluted reasoning was enough to make the statute constitutional, although it acknowledged that the question was "admittedly difficult." *Lindsay*, 931 F.3d at 862-63. Even if *Lindsay*'s dubious rationale is accepted in the context of tourists, *Lindsay* completely fails to address the context of foreign residents and dual citizens, such as at issue here, and cannot be used to uphold the constitutionality of the statute in general.

The Tenth Circuit in *Durham* relied on an economic analysis derived from *Japan Line Ltd.* – even though the defendant's alleged conduct was concededly noneconomic – and repeatedly pointed to the need for Congress to "speak with one voice" in the foreign

commerce context. *See Durham*, 902 F.3d at 1200-02 (quoting *Japan Line Ltd.*, 441 U.S. at 449). It is unclear why the *Durham* court felt it crucial that Congress regulate international trade and intra-national private sexual acts among foreign participants in a foreign country with "one voice." The logic of *Durham* is spurious and should also be rejected.

This is a difficult question, as even federal courts that have declined to fully address the issue have recognized. *See United States v. Pepe*, 895 F.3d 679, 688-90 (9th Cir. 2018) (interpreting pre-2013 version of § 2423(c) not to apply to foreign residents using pure statutory interpretation analysis; noting defendant's constitutional arguments were not "trivial" and that statute would require courts to "grapple with the outer limits of Congress's power to regulate the conduct of U.S. citizens residing abroad"); *United States v. Al-Maliki*, 787 F.3d 784, 793-94 (6th Cir. 2015) (expressing "skeptic[ism]" as to constitutionality of § 2423(c) as applied to foreign residents engaging in noncommercial sex, but declining to decide issue because error was not "plain").

2. The Statute is Not a Valid Exercise of Congress's Treaty Power or Necessary and Proper Clause

Nor may § 2423(c) be saved through construal as legislation "necessary and proper" to implement a treaty, more specifically the Optional Protocol to the United Nations Convention on the Rights of the

Child on the Sale of Children, Child Prostitution, and Child Pornography ("the Protocol"), which the United States ratified in 2002. *See* 148 Cong. Rec. S5717-01. Nothing in § 2423(c)'s legislative history indicated that Congress intended it to implement the Protocol, nor was the Protocol even mentioned when § 2423(c) was initially passed or later amended. *See Park*, 297 F. Supp. 3d at 180. Moreover, the Protocol's stated goal was to criminalize conduct occurring within the ratifying country (here, the United States) or between the United States and another country that allowed for the "economic exploitation" of children. In sum, non-economic conduct occurring exclusively in a foreign country has nothing to do with the Protocol, and as such § 2423(c) is not legislation implementing it. *See*, *e.g.*, Protocol, Preamble (purpose of protocol is "protection of the child from the sale of children, child prostitution and child pornography"), Art. 10 ("States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism.")

The handful of cases that have held otherwise, *see*, *e.g.*, *United States v. Martinez*, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009); *United States v. Clark*, 435 F.3d 1100, 1116-17 (9th Cir. 2006), *overruled by United States v. Pepe*, 895 F.3d 679, 691 (9th Cir. 2018), did not squarely address the issue of foreign *residents* as opposed to

American travelers, and even then conceded that the question is close, finding only no "plain" constitutional error.

The time has now come for this Court to make a clear pronouncement on the permissible constitutional reach of § 2423(c) and set a precedent for any other Congressional exercises in extraterritorial lawmaking. This Court should grant certiorari to determine to what degree and under what circumstances, if any, U.S. law may properly be projected onto conduct that is noncommercial and allegedly occurs entirely within a foreign country and involves only foreign residents.

B. The Lower Courts Are in Hopeless Disarray in Their Analysis of the Constitutional Reach of 18 U.S.C. § 2423(c)

The need for this Court's intervention on this important question of federal law is heightened by the lack of uniformity in the decisions of the lower courts. The Ninth Circuit itself has recognized the difficulty of the issue and the inconsistency in lower court opinions:

> The question is admittedly difficult, having led judges across the country to reach different outcomes. *Compare United States v. Durham*, 902 F.3d 1180, 1210 (10th Cir. 2018) (upholding section 2423(c) under broader power than under Interstate Commerce Clause); *United States v. Bollinger*, 798 F.3d 201, 218 (4th Cir. 2015) (same), *with United States v. Pendleton*, 658 F.3d 299, 30 (3d Cir. 2011) (upholding section 2423(c) under

> *Lopez/Morrison* framework), *and Durham*, 902 F.3d at 1241 (Hartz, J., dissenting) (concluding that section 2423(c) exceeds Foreign Commerce Clause authority); *United States v. Reed*, 2017 WL 3208458, at *14 (D.D.C. July 27, 2017) (same); *United States v. Al-Maliki*, 787 F.3d 784, 793-94 (6th Cir. 2015) (concluding that it was likely that section 2423(c) was unconstitutional, but that such error was not plain).

Lindsay, 931 F.3d at 862; *see also Park*, 297 F. Supp. 3d at 178 (holding that 18 U.S.C. § 2423(c) is unconstitutional as it exceeds Congress's powers under either the Foreign Commerce Clause or the Necessary and Proper Clause).

This Court cannot allow this lack of certainty to continue. Prosecutors and lower courts must be given uniform guidance as to the proper scope of 18 U.S.C. § 2423(c). Lower courts' differing analyses not only allow for differing outcomes in individual cases, but also fail to provide clarity to our own government or the governments of other nations as to the role of the United States in policing foreign conduct within foreign borders. With many pending prosecutions and investigations pending under this statute, the time is now for this Court to provide the much-needed clarity on this issue.

C. This Case Is an Excellent Vehicle for this Court's Review Because It Presents the Issue of the Constitutionality of Application of 18 U.S.C. § 2423(c) to a Foreign Resident

The few federal court decisions that have upheld § 2423(c) against an as-applied challenge brought by a foreign resident are distinguishable from Mr. Abramov's situation and do not present nearly as clear an example of the extraterritorial application of the statute to a truly foreign resident engaging in purely foreign, noncommercial conduct. Thus, even if the statute may sometimes constitutionally regulate the activities of foreign residents, the extension of the statute to Mr. Abramov's alleged conduct presents an excellent test case for the limits of Congress's power.

Most recently, in *Lindsay*, 931 F.3d at 862-63, the Ninth Circuit found the pre-2013 version of the statute could constitutionally be applied to noncommercial conduct because its "first element," "travel abroad," "fairly relates" to foreign commerce and its second element, illicit sexual activity, even if noncommercial, could be a "gateway" to commercial activity, such as actual commercial sex or simply spending more money on lodging and restaurants in a foreign country where an American has traveled with the belief that illicit sex is more readily available than at home, even if noncommercial in and of itself.

But even assuming the Ninth Circuit's speculative "gateway" assumption is correct, the reasoning

underpinning *Lindsay* is entirely inapposite to the situation of someone like Mr. Abramov. The district court expressly opined that he was "going home" to Russia (ER 1122; *see also* ER 972) not traveling there for illicit sex or any other purpose. Thus, not only was he *not* spending more money on lodging, restaurants, or any other tourist convenience because of any belief as to the availability of illicit sex in Russia – he already had lodging and food at his own permanent home.

The Tenth Circuit's ruling in *Durham* that the statute was constitutional because "in the aggregate, Americans who travel abroad and have noncommercial sex with minors substantially affect the international sex tourism market," *Durham*, 902 F.3d at 1215, is also inapplicable here. Again, that analysis is a poor fit for Mr. Abramov's alleged conduct; he was not a tourist, but a Russian dual citizen with his primary residence in Russia who went home (ER 1172) and was met with accusations of sex with Russian minors in Russia after he refused to pay the bribes demanded by a local strongman (or "mobster," in the words of the trial court (ER 900)). His alleged conduct, even if true, had nothing to do with the international sex tourism market, as he was not a sex tourist.

Indeed, in nearly every reported case in which a foreign resident was charged under § 2423(c) – regardless of the outcome or constitutional ruling, if any – the "foreign resident" was originally a U.S. citizen or resident who moved abroad at least in part out of a desire to engage in the charged conduct. *See Lindsay* 931 F.3d at 856; *Pepe*, 895 F.3d at 682-83; *Durham* 902 F.3d at

1189-91; *Clark*, 435 F.3d at 1103; *Park*, 297 F. Supp. 3d at 172-73; *Reed*, 2017 WL 3208458, at *2. By contrast, Mr. Abramov was born in the Soviet Union and spent his entire life residing in former-Soviet lands until he permanently resettled in Los Angeles in 2011 – *after* the time of the charged conduct.

In rejecting Mr. Abramov's constitutional challenge, the Ninth Circuit relied disingenuously on facts such as that he had a California driver's license to find "residency" in the United States, as if that were sufficient to bring his case within Congress's Foreign Commerce power. The Ninth Circuit's rationale was not only counter-factual – ignoring as it did the undisputed fact that Mr. Abramov spent 85 percent of his time in Russia – but also contrary to any accepted meaning of "residency."[4] Even more fundamentally, the Ninth Circuit lost sight of the relevant inquiry – whether Mr. Abramov's conduct had any connection to foreign commerce or applicable treaties. To apply the statute to Mr. Abramov, or anyone similarly situated, would stretch the Constitution far beyond its outer reaches. *See Pepe*, 895 F.3d at 689-90.

[4] Black's Law Dictionary defines "residence" as "[t]he act or fact of living in a given place for some time," "[t]he place where one actually lives," and "bodily presence as an inhabitant in a given place." Black's Law Dictionary (10th ed. 2014).

D. Reading the Statute to Apply to Foreign Residents Like Mr. Abramov Creates Grave Public Policy/Due Process Concerns

The unconstitutionality of § 2423(c) as applied to Mr. Abramov is further demonstrated by the cascade of constitutional problems created in its wake when he was put on trial in Los Angeles, half a world away from all percipient witnesses, most of the investigators, and the alleged victims.

Mr. Abramov had corroborating evidence of medical examinations performed in Russia that cast doubt on some of the alleged victims' more extreme claims. (ER 1065.) He had witnesses in Russia who could have testified that no girls were seen entering his apartment at relevant times (ER 185), that he was being harassed for his Jewish faith (ER 108), that he was being extorted for money and threatened with bogus criminal charges (*id.*), that two of the three alleged victims had had consensual teenage romances with Mr. Abramov's stepson, Yuri, who had been forbidden by Mr. Abramov to continue his relationship with the first because of her trouble with drinking and drugs, and who had spurned a second for someone else (ER 853-54, 859-60, 866-67),[5] and that one of the alleged victims had a history of making false abuse claims, most

[5] Mr. Abramov's testimony also suggested that Yuri had been seeing two of the alleged victims at the same time, resulting in a physical altercation between the two girls when they found out about each other. (ER 866-67.)

notably against her own mother (ER 1014-15). (*See also generally* ER 989-93.)

But the jury heard none of it, in part because of the daunting logistics of bringing such witnesses and evidence to a forum on the other side of the world, and in part because Mr. Abramov's attorney was not up to the task and the trial court refused to let Mr. Abramov replace him. (ER 989-93; *see also* discussion in Section II, *infra.*)

Moreover, by being tried in Los Angeles instead of Moscow, Mr. Abramov was arguably denied a jury of his peers. *See Uttecht v. Brown*, 551 U.S. 1, 35 n.1 (2007) (Stevens, J., dissenting) (reiterating that defendant has constitutional right to trial by jury consisting of "fair cross section of the community"); *Skilling v. U.S.*, 561 U.S. 358, 378-79 (2010) (explaining how choice of trial venue is of constitutional magnitude when local jury pool cannot consider case impartially).

The twelve American jurors who decided his fate likely had no experience with Russian corruption or the lengths to which a Russian corrupt official/strongman/"mobster" might go to retaliate against an enemy of the wrong faith or ethnic background.

Mr. Abramov's conviction makes U.S. federal prosecutors unwitting pawns in intra-Russian political and ethnic battles that have nothing whatsoever to do with our Constitution and its guarantees of due process and a fair trial or, for that matter, with preventing American sex tourism. The individual who threatened and extorted Mr. Abramov said he would find a charge that

would follow him to America and he did – he found the one area where our justice system still figuratively hunts witches in the name of "protecting children." The Constitution should not be perverted in the service of – as the trial court memorably put it – "Mr. Putin's playhouse." (ER 1239.)

II. THIS COURT SHOULD CLARIFY THAT THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE SET FORTH IN *UNITED STATES V. GONZALEZ-LOPEZ* SHOULD NOT BE "CIRCUMSCRIBED" IN THE CONTEXT OF RETAINED COUNSEL

A. The *Gonzalez-Lopez* Decision Clearly Recognizes Two Distinct Sixth Amendment Rights to Counsel – the Right to Counsel of Choice and the Right to Effective Counsel – and Does Not Call for Circumscribing the Right to Retained Counsel of Choice

In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court recognized that the right to counsel of choice is separate and distinct from the right to effective assistance of counsel, although both ultimately derive from the Sixth Amendment. *See* 548 U.S. at 146-58. In so holding, this Court noted that "it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation" when a defendant claims deprivation of his right to counsel of choice. *Id.* at 148.

Moreover, a violation of the right to counsel of choice amounts to "structural error." *Id.* at 150. This is in stark contrast to an ineffective-assistance claim, where the defendant or petitioner must show both ineffectiveness and prejudice in order to prevail. *See Strickland v. Washington*, 466 U.S. 668, 691-96 (1984). The right to counsel of choice is also more tightly circumscribed in the context of appointed counsel; a defendant has no right to a chosen attorney whom he lacks the ability to pay and who is unwilling to handle the case pro bono. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989). *Gonzalez-Lopez* left that holding untouched.

The *Gonzalez-Lopez* court did not, however, address whether or to what extent the right to counsel of choice may be "circumscribed" in the context of retained counsel whom the defendant has the ability to pay, including what other concerns could or should properly come into play, and how those concerns should be balanced against the defendant's constitutional rights. *See Gonzalez-Lopez*, 548 U.S. at 144 (quoting *Wheat v. United States*, 486 U.S. 153, 159-60 (1988) (right to counsel of choice limited to attorneys properly admitted to practice and willing to undertake representation who were without unwaivable conflict, and whom defendant could afford to pay); *see also Gonzalez-Lopez*, 548 U.S. at 152 (court has "wide latitude" to balance right to counsel of choice with needs of fairness and demands of its calendar).

Mr. Abramov clearly satisfied all of the *Wheat* factors, as his proposed new retained attorneys were

ready, willing, and able to undertake the representation, had no unwaivable conflicts, and Mr. Abramov was able to pay them. (ER 266-70, 1210-41.) As to the needs of fairness and the Court's calendar demands, as discussed above, the result of the denial of Mr. Abramov's request was a blatantly one-sided and unfair trial at which Mr. Abramov was forced to proceed with an attorney with whom he had no working relationship, was unable to call any witnesses to corroborate his version of events, and was hampered by his counsel's poor performance in other areas, such as cross-examination of the three alleged victims.

This Court has never said what factors should be weighed when a defendant wishes to substitute one privately retained attorney for another. However, the factors applicable to substitution of appointed counsel must provide a floor below which courts certainly may not go in denying a request for substitution of retained counsel. Where, as here, there has been a complete breakdown in the relationship between retained counsel and the client, substitution must be permitted, just as it would be with respect to appointed counsel. Moreover, while courts must be given some latitude to manage their calendars, where, as here, a request for substitution is made weeks before trial, the court's desire to manage its calendar cannot outweigh the defendant's right to retained counsel of choice. Similarly, the trial court's anger with defense counsel for his failure to timely investigate or prepare cannot justify the denial of substitution. Indeed, that was the very reason Mr. Abramov *needed* substitution of counsel.

Nor can the prosecution's desire not to inconvenience its witnesses be sufficient reason to deny a request for substitution of counsel. Indeed, here, the prosecution was given an entirely unfair advantage in being able to dictate when trial would proceed, even when it was obvious that retained counsel had failed to provide effective assistance and Mr. Abramov was deprived of his right to bring his witnesses to trial.

In short, this Court should make clear that the right to retained counsel of choice may not be circumscribed other than with compelling justification. The convenience of the court or the prosecution is no such compelling justification and cannot be used to deprive a defendant of his fundamental Sixth Amendment right.

B. Lower Courts Are in Disagreement As to the Proper Legal Standard for Requests to Substitute Retained Counsel

In the 13 years since *Gonzalez-Lopez*, and in the absence of further clarification from this Court, lower federal courts have created a patchwork of inconsistent decisions and standards that often conflate requests to substitute retained counsel with those to substitute appointed counsel, in the process infusing deficiency and prejudice analyses into the former when none is called for.

For example, in *Carlson v. Jess*, 526 F.3d 1018, 1027 (7th Cir. 2008), the court recognized that the petitioner need not show full *Strickland* prejudice in

order to prevail on his claim that he was wrongly denied substitution of retained counsel, but it nevertheless proceeded to analyze whether the denial had had an "adverse effect" on the presentation of his case, a consideration that *Gonzalez-Lopez* expressly indicated was not necessary. In the First Circuit, the court has a "duty to inquire" into the reasons for the proposed substitution that "applies with equal force whether the counsel at issue is appointed or retained." *United States v. Diaz-Rodriguez*, 745 F.3d 586, 591 (1st Cir. 2014).

Meanwhile the Eleventh Circuit has held that a defendant has the right to fire his retained counsel for any reason under *Gonzalez-Lopez*, with no showing of harm or good cause required. *See United States v. Jiminez-Antunez*, 820 F.3d 1207, 1271-72 (11th Cir. 2016). So too, apparently, has the Ninth Circuit, which in *United States v. Brown*, 785 F.3d 1337, 1347 (9th Cir. 2015), held that a defendant has the right to fire his retained attorney for any reason or for no reason, subject to the constraints of fairness and demands of the court's calendar, although the Ninth Circuit evidently departed from its own precedent in Mr. Abramov's case.

Neither *Jiminez-Antunez* nor *Brown*, however, nor the above-cited cases from the First and Seventh Circuits, deal at all with the proper factors to be balanced in the context of *hiring* new retained counsel. Mr. Abramov had licensed, competent counsel who were ready, willing, and able to take on his case, and whom he had the ability to pay, and yet was still forced to

proceed with previously retained counsel – Gurovich – who candidly admitted to a total breakdown of the attorney-client relationship, an admission with which Mr. Abramov concurred. (ER 1229, 1242-45, 1246-49.)

Incredibly, and despite Gurovich's and Mr. Abramov's clear consensus on the issue, the court concluded that there had been no breakdown and that Mr. Abramov could not substitute attorneys because Gurovich had already received several continuances (during which he had done nothing to further Mr. Abramov's case, which is one of many reasons why Mr. Abramov wished to fire him) and because it might make it more difficult for the alleged victims to make travel arrangements to the United States. (ER 32, 280, 1230-39.) The demands of the court's calendar were never discussed, and to the extent fairness came into play at all, the court blatantly denied it to Mr. Abramov so as to cater to the prosecution and the alleged victims. When the Ninth Circuit considered the case, it disregarded its own precedent and analyzed Mr. Abramov's request under the more stringent standard for appointed counsel, for reasons that have never been adequately explained.

This Court should step in and grant certiorari to make clear that the concerns of efficiency and the needs of the prosecution cannot by themselves outweigh a defendant's Sixth Amendment right to counsel of choice in the context of *hiring* new retained counsel under *Gonzalez-Lopez* and its progeny.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Abramov's petition for a writ of certiorari.

Respectfully submitted,

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