No. 19-256

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

PETITIONER'S SUPPLEMENTAL BRIEF IN LIGHT OF INTERVENING COURT DECISION

BECKY S. JAMES
Counsel of Record
JAMES & ASSOCIATES
23564 Calabasas Road
Suite 201
Calabasas, CA 91302
(310) 492-5104
bjames@jamesaa.com

Counsel of Record for Petitioner Yuzef Abramov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

REASONS FOR SUPPLEMENTAL BRIEFING

Petitioner Yuzef Abramov ("Mr. Abramov") timely filed his Petition for a Writ of Certiorari in this Court on August 23, 2019. On September 13, 2019, the U.S. Court of Appeals for the District of Columbia Circuit entered its opinion in *United States v. Park*, No. 18-3017, ___ F.3d ___, 2019 WL 4383261 (D.C. Cir. Sept. 13, 2019).

The issues decided in *Park* are intimately intertwined with those raised in Mr. Abramov's Petition, and *Park* throws into stark relief the lower courts' inability to settle on any clear legal theory for analyzing the constitutionality of 18 U.S.C. § 2423(c). This state of disarray among the circuit courts and, concomitantly, the need for this Court to step in and provide guidance, has become increasingly urgent within just the last six months, during which Mr. Abramov and the defendants in *Park* and *United States v. Lindsay*, 931 F.3d 852 (9th Cir. 2019) all received decisions from the Courts of Appeals.

For those reasons, Mr. Abramov submits this supplemental brief under Supreme Court Rule 15.8 addressing the impact of *Park* on his Petition. Mr. Abramov also hereby requests that this Court defer consideration of his Petition so that it may be analyzed together with any petition filed in *Park* and/or *Lindsay*.

ADDITIONAL REASONS FOR GRANTING THE PETITION IN LIGHT OF INTERVENING COURT DECISION

I. THE D.C. CIRCUIT'S OPINION IN *PARK* IS LIMITED TO ITS FACTS AND EXPRESSLY LEAVES OPEN THE POSSIBILITY THAT THE STATUTE MIGHT BE UNCONSTITUTIONAL IN DIFFERENT CIRCUMSTANCES

United States v. Park contains three basic holdings: firstly, and primarily, that § 2423(c) is constitutional as a "Necessary and Proper" means for Congress to implement the U.N. Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography under its treaty power, *Park*, No. 18-3017, slip op. at 2-4, 6-27; secondly, that the statute is constitutional as applied to noncommercial child pornography under the Foreign Commerce Clause, *id.* at 27-32; and finally that the statute as applied to noncommercial sexual acts with children rationally relates to foreign commerce, *id.* at 33. Each and every one of those determinations rests on the specific facts of Mr. Park's case and none readily transfers to a broader analysis of the statute's constitutionality in general. Indeed, the *Park* court expressly stated that its holding concerned only the statute's constitutionality "as applied to Park," *id.* at 3, and that even so limited, the issue of noncommercial sexual conduct with minors by a foreign resident – the main issue raised in Mr. Abramov's petition as to § 2423(c) poses a "close[]" question, *id.* at 33. Moreover, only two of the three judges on the panel joined that portion of the opinion addressing the Foreign Commerce Clause, with Judge Griffin expressly declining

to decide "the more challenging question of whether the Foreign Commerce Clause also authorizes Congress to act here." *Id.* at 37.

II. *PARK*'S PRIMARY HOLDING HAS NO SUPPORT IN THE LEGISLATIVE HISTORY OF THE PROTECT ACT OR CASE LAW INTERPRETING CONGRESS'S TREATY POWER AND IN ANY EVENT HAS NO APPLICATION HERE

Park based its outcome primarily – or as the concurrence argued, entirely – on its view that § 2423(c) was a "Necessary and Proper" means for Congress to implement the U.N. Optional Protocol on the Sale of Children, Child Prostitution, or Child Pornography ("Optional Protocol") under its treaty power. *Park*, No. 18-3017, slip op. at 2-4, 6-11. That analysis leaves the *Park* court standing alone among federal courts that have ruled on the constitutionality of § 2423(c), which have – with this sole exception – either expressly declined to reach the question of whether the statute might be saved by the treaty power, *see, e.g.*, *Lindsay*, 931 F.3d at 863, or rejected it, *see, e.g. U.S. v. Pepe*, 895 F.3d 679, 689-90 & n.6 (9th Cir. 2018) (expressing deep skepticism that government's theory that § 2423(c) implemented the Optional Protocol and noting that that theory relied on a single 1920 case of dubious continued validity).

Moreover, this view of § 2423(c) is utterly without support in the legislative history of the statute or the ratification of the Optional Protocol. Federal law

prohibited child prostitution and travel in foreign commerce with the intent to engage in a sexual act with a child as early as 1994, eight long years before the United States ratified the Optional Protocol in 2002. *See* Violent Crime Control & Enforcement Act of 1994, Pub. L. No. 103-322, Title XVI § 1600001(g) (1994) (now codified at 18 U.S.C. § 2423(a)-(b). Consequently, the analysis included with the Protocol's submittal to the Senate recognized that the specific criminal acts identified in the Protocol were already "fully covered" by United States law. *See* S. Treaty Doc. No. 106-37 (July 5, 2000), 2000 WL 33366017, at *14-15. In sum, not only did Congress never say that it intended § 2423(c) to implement the Optional Protocol or any other treaty, but it explicitly said that the statute rested on its Foreign Commerce powers. The D.C. Circuit's opinion in *Park* regarding the treaty power is thus unsupported by legislative history or case law.

Even setting that aside, the reasoning the D.C. Circuit applied to Mr. Park does not apply to Mr. Abramov. Mr. Park was already a convicted sex offender in Connecticut before he ever moved abroad and proceeded to continue offending in one country after another, often being expelled from whatever nation he had temporarily chosen to reside in *because* that nation had discovered his desire to have sex with children. *See Park*, 18-3017, slip op. at 2-3. The *Park* court could have thought, albeit misguidedly, that protecting other countries from Mr. Park's known proclivities was somehow part of the United States' duties under the Optional Protocol.

Mr. Abramov, by contrast, had no such history. He had never even lived permanently in the United States until after the alleged conduct, nor had he been convicted of any sexual offenses of any sort in any jurisdiction. The alleged offense conduct – even if it had occurred at all – took place entirely within Russia, most of it allegedly at Mr. Abramov's home in Moscow. Thus, if anyone was derelict in its duties under the Optional Protocol, it was *Russia*, not the United States.

Thus, not only is *Park*'s theory that § 2423(c) is a Necessary and Proper exercise of Congress's treaty power unsubstantiated by case law or legislative intent, it also fails on the facts of Mr. Abramov's case, and for all those reasons, it should be rejected.

III. *PARK*'S VIEW OF THE SCOPE OF THE FOREIGN COMMERCE CLAUSE HAS NO BASIS IN WELL ESTABLISHED PRINCIPLES OF STATUTORY INTERPRETATION OR IN CONVENTIONS OF INTERNATIONAL RELATIONS

The *Park* majority opinion's entire brief and cursory analysis of § 2423(c) under the Foreign Commerce Clause[1] is based on that court's faulty finding that Congress's power under the Foreign Commerce Clause is broader than that under its interstate counterpart. *See Park*, No. 18-3017, slip op. at 29-30. It cites to *Japan*

[1] Indeed, it is so brief in comparison to the opinion's discussion of the treaty power, and so unnecessary to the case's outcome, that Justice Griffith's concurrence lambasts the other two judges on the panel for bothering to engage in a Foreign Commerce Clause analysis at all. *Park*, No. 18-3017, slip op. at 37.

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].") and its progeny in support of that proposition.

But, as Mr. Abramov explained in his Petition, that framework is misleading once one ventures outside the context of economic relations with foreign powers and into the murky area of projecting U.S. criminal law extraterritorially onto purely private conduct allegedly performed within foreign countries among foreign citizens.

Indeed, as Professor Anthony Colangelo, the leading scholarly authority on the Foreign Commerce Clause, has written, 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. The *Park* opinion fails to recognize the distinction and instead falls back on the canard that Congress needs to speak with "one voice" on matters of foreign commerce, even when the "commerce" at issue involved no direct exchange of money and had no empirically discernible effect on international trade.

It is a bedrock principle of international relations that each sovereign may make and enforce its own laws as to what conduct is criminalized within its territory *See* U.N. Charter, Art. 2(7) ("Nothing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ."). The interpretation of the Foreign Commerce Clause urged by the *Park* court runs roughshod over this principle in order to obtain its preferred result – keeping a known and repeat sex offender off the streets, foreign or domestic. While perhaps laudable in a sense, that result may not be obtained by stretching our Constitution beyond recognition and invading the sovereignty of other nations in the process.

The absurdity of taking this misguided analysis to its extreme is demonstrated in this case. Mr. Abramov was not a known and repeat sex offender, nor was he a U.S. citizen and resident engaging in "sex tourism" by traveling or relocating overseas. He was a foreign resident, born in and living in a foreign country, who was accused of engaging in conduct entirely within the confines of his home country. To hold that the Foreign Commerce Clause gives Congress the power to regulate his conduct would be to give the United States *carte blanche* to enforce its laws anywhere on the globe.

IV. *PARK'S* REASONING ON THE SUPPOSED RELATIONSHIP BETWEEN NONCOMMERCIAL CONDUCT AND FOREIGN COMMERCE IS SPURIOUS AND SHOULD BE REJECTED

Park gives only a cursory (and superfluous) treatment of noncommercial conduct under the Foreign Commerce Clause, finding that Mr. Park's production of child pornography "could" "affect international commerce" in such images because the "market" for them is already illicit and operates mainly online, with the line between commercial and noncommercial images, and the effect of the latter on the price of the former, difficult to discern. *Park*, No. 18-3017, slip op. at 32-33. This analysis rests on an overbroad interpretation of Congress's foreign commerce powers, as discussed above, coupled with the Court of Appeals' speculative assumptions about the price of online child pornography. That an act "could" substantially affect foreign commerce does not mean that it does.

Park's discussion of noncommercial sexual conduct abroad is even more flawed. Acknowledging that this presents a "closer" question, it goes on to find that it does affect foreign commerce because it "reinforces the idea that such conduct is acceptable," and "could allow traffickers to entice patrons into engaging in subsequent commercial behavior." *Id.* at 33 (citing *Lindsay*, 931 F.3d at 863). It then laments that international sex tourists might intentionally target countries with lax regulatory schemes and thus spend more money on travel and accommodation in the targeted country. *Id.* at 33-34. This is the same speculative and flimsy rationale – also based on an overbroad reading of the Foreign Commerce Clause – that the Ninth Circuit adopted in *Lindsay*, and that, for the reasons discussed in Mr. Abramov's Petition, should be rejected.

In any event, none of the justifications cited in *Park* or *Lindsay* apply to Mr. Abramov. As discussed in his Petition, he was not a sex tourist, but a Russian-U.S. dual citizen who had lived his entire life in Russian or former Soviet territory and had never resided permanently in the United States until after the alleged offense conduct. He did not spend any additional money on travel or accommodations in connection with the alleged conduct – he visited his children from a prior relationship in Los Angeles, then went home to Moscow where he lived with his partner and two stepsons.[2] He had no history of sexual offenses anywhere

[2] While there was a smattering of evidence that Mr. Abramov may have offered money to some of his alleged victims (*see, e.g.*, ER 342-43, 560, 624 (alleged victim Aleksandra claiming she was

and was never even accused of producing or viewing child pornography. In short, his conduct had no conceivable effect on foreign commerce.

V. THE FACTS OF MR. ABRAMOV'S CASE MAKE IT A UNIQUELY APPROPRIATE VEHICLE FOR ANALYZING THE CONSTITUTIONALITY OF SECTION 2423(c)

Rapid globalization has given the question of § 2423(c)'s constitutionality a pressing urgency. In the

---

"forced" to take money lest something bad happen to her family)), the district court aptly observed that it "did not view this case as a case where the defendant was engaged in sexual activities in exchange for money." (*See* ER 342.) By the time of closing argument, the prosecution had virtually abandoned any theory based on the commerciality of Mr. Abramov's alleged conduct, devoting a mere sentence out of a twelve-page closing argument to the allegation that he had "forced" the alleged victims to take money. (*See* ER 932; ER 927-939.)

The jury was instructed that "illicit sexual conduct" under § 2423(c) encompassed three alternate bases for guilt, one of which was knowingly engaging in a commercial sex act with a person under 18 (ER 923), but because the jury verdict form ambiguously stated the three bases as "and/or," it is not at all clear that the jury unanimously found Mr. Abramov guilty of any "commercial" conduct. In any event, even if he had offered money to his purported victims – which he maintains that he did not – a Russian citizen and resident offering or "forcing" money upon another Russian citizen hardly affects the market for sex tourism, the market for lodging and restaurant meals incident to sex tourism, or, for that matter, foreign commerce at all. Thus, even if the fantastical allegations against Mr. Abramov with respect to throwing rubles at his alleged victims were true, there would be no effect on foreign commerce of sufficient significance to implicate Congress's enumerated constitutional powers.

last six months alone, Mr. Abramov and the defendants in *Park* and *Lindsay* received decisions from their respective Courts of Appeals, with an inconsistent array of results. Mr. Abramov has now petitioned this Court for certiorari, and the defendants in *Park* and *Lindsay* are likely to do the same later this term.[3] The Court should decide them together so as to provide the unity and clarity that the lower courts are so desperately lacking.

Moreover, Mr. Abramov's case has a fact pattern uniquely suited to test the outer bounds of Congress's power to project U.S. law extraterritorially. 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 – both the defendants in *Park* and *Lindsay* appear to have moved abroad at least in part out of a desire to engage in illicit sexual conduct with minors; Mr. Park was also a convicted sex offender in the United States and a child pornographer. Mr. Abramov was and is none of those things. He is a Russian Jewish man whose alleged offense conduct supposedly occurred in his home in Russia. The district judge at his trial specifically found that he was "going home" when he returned to Moscow from Los Angeles and not traveling for the purpose of illicit sexual conduct. (ER 1122.)

---

[3] Park and Lindsay may still seek rehearing in their respective courts. If those petitions are denied, the defendants will likely be petitioning this Court for certiorari within the next several months. Alternatively, if rehearing were granted and the outcome in either case reversed, it seems likely the government would petition for certiorari given the importance of the issue and the need for consistency.

Moreover, and also unlike the defendants in *Park* and *Lindsay*, Mr. Abramov vigorously asserts his actual innocence of the charged conduct, and with good reason; even at his disastrously and prejudicially run trial, there was evidence that corrupt Russian businessmen had coaxed the alleged victims into deliberately fabricating the allegations because Mr. Abramov is Jewish and refused to pay an extortionate bribe. 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 goes to the heart of why the extraterritorial application of U.S. law is deeply problematic. If Mr. Park's and Mr. Lindsay's convictions may be constitutional, it does not necessarily follow that Mr. Abramov's is.

CONCLUSION

For the foregoing reasons, Mr. Abramov requests that the Court consider this supplemental brief in support of his Petition, and that it grant his Petition, or in the alternative defer resolution of his Petition so that it may be considered together with those of the defendants in *Park* and *Lindsay*.

Respectfully submitted,

DATED: September 27, 2019

BECKY S. JAMES
JAMES & ASSOCIATES

Counsel of Record for Petitioner Yuzef Abramov