No.

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL LINDSAY,

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has well-settled that the Commerce Clause gives Congress no general police power over non-commercial, non-economic conduct. *See United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). The question before this Court is whether constitutional safeguards limiting Congress from exercising general police power apply to conduct outside the United States:

> Does 18 U.S.C. § 2423(c)'s regulation of non-commercial, non-economic conduct of American citizens outside the United States exceed Congress's Foreign Commerce Clause power?

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The Ninth Circuit's decision can be found at *United States v. Lindsay*, 931 F.3d 852 (9th Cir. 2019).

JURISDICTION

The court of appeals filed its decision on July 23, 2019, and denied rehearing and rehearing *en banc* on October 30, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. I, § 8, cl. 3 ("Commerce Clause") states:

> [Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

18 U.S.C. § 2423(c) (2012) states:

> 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(f) (2012) defines "illicit sexual conduct" as:

> (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or
>
> (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

Chapter 109A enumerates crimes of sexual abuse under 18 U.S.C. §§ 2241-48.

INTRODUCTION

This case presents a question of exceptional consequence: whether 18 U.S.C. § 2423(c), Congress's regulation of *non-commercial* acts outside the United States, exceeds Foreign Commerce Clause ("FCC") authority, *viz.*, Congress's constitutional authority "[t]o regulate Commerce with foreign Nations." U.S. Const., art. I, § 8, cl. 3. The statute itself is well-meaning: protecting children around the world from sexual exploitation. The problem is that such a statute presents an obvious exercise of general police power, which this Court has well-established exceeds Commerce Clause authority. *See United States v. Lopez,* 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). Accordingly, Congress dressed up the non-commercial, non-economic regulation as if it were part of a plan to protect children from "commercial" sex exploitation, even though the reality presents an overall scheme to protect children from *all* sex exploitation, commercial and non-commercial. The courts cannot play along and ignore the Constitution's limitations because the consequence would cede general police power to Congress over all extraterritorial conduct of American citizens.

STATEMENT OF THE CASE

A. Trial proceedings

In December 2012, a federal grand jury returned an indictment charging Michael Lindsay with engaging in extraterritorial "illicit sexual conduct," either commercial or non-commercial, in violation of 18 U.S.C. § 2423(c). The Government alleged that Lindsay, an American citizen, traveled to the Philippines in August 2012 to have sex with S.Q., a minor under age 16. Lindsay denied the allegations and sought to present evidence that the false allegations arose from the girl's father's plot to extort Lindsay. He also argued that the proscription against non-commercial sex exceeded Congress's power under the FCC.

The district court rejected Lindsay's constitutional challenge without analysis and permitted trial. With all evidence and witnesses overseas, Lindsay lost an uphill battle to secure and present testimony on his behalf. Although the district court had approved the taking of depositions in the Philippines pursuant to Federal Rule of Criminal Procedure 15, it then declined as hearsay admission of deposition testimony from three women who supported Lindsay's defense.

The five-day jury trial resulted in guilty verdicts and a 96-month sentence.

B. Appellate proceedings

On appeal, *Lindsay*, guided by the Ninth Circuit's precedent in *Clark*, addressed whether 18 U.S.C. § 2423(c) is a valid exercise of Congress's FCC

authority "under the traditional rational basis standard." *United States v. Lindsay*, 931 F.3d 852, 861 (9th Cir. 2019).

Under section 2423(c), extraterritorial "illicit sexual conduct" includes both commercial and non-commercial sex acts. 18 U.S.C. § 2423(f)(1), (f)(2). *Clark* limited its analysis to section 2423(c)'s regulation of *commercial* sex and held:

> [Section] 2423(c)'s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree.

United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006) .

Lindsay picked up where *Clark* left off and addressed the question *Clark* had not reached: the validity of section 2423(c)'s proscription of extraterritorial *non-commercial* sex (namely, sexual abuse that would be criminal under chapter 109A, such as rape and child molestation). *Lindsay* held that Congress possesses constitutional authority to criminalize such conduct abroad because non-commercial sexual abuse fairly related to foreign commerce:

> We are thus left here with the same situation we had in *Clark*: the "combination of requiring travel in foreign commerce, coupled with engagement in [non-commercial sexual activity impacting foreign commerce] while abroad, implicates foreign commerce to a constitutionally adequate degree." *See Clark*, 435 F.3d at 1114.

Lindsay, 931 F.3d at 863. *Lindsay*'s bracketed language substituting "commercial transaction" for "non-commercial sexual activity impacting foreign commerce,"

signified that the Ninth Circuit interpreted "commercial transaction" the same as "non-commercial sexual activity impacting foreign commerce"—an interpretation that cannot be squared with this Court's decisions in *Lopez* and *Morrison*.

ARGUMENT

A. The Court should grant this petition to address whether 18 U.S.C. § 2423(c) is an unconstitutional expansion of FCC power delegated to Congress.

1. Lower courts are divided and need guidance.

As the Ninth Circuit recognized in *Lindsay*:

> 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, 308 (3rd 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 United States v. Park*, 297 F. Supp. 3d 170, 178 (D.D.C. 2018), *rev'd*, 938 F.3d 354, 370-72 (D.C. Cir. 2019) (showing further disagreement among courts following *Lindsay*).

The question is particularly relevant in this global day and age: whether, as some lower courts have reasoned, Congress has plenary or "greater authority to regulate activity outside the United States than it does within its borders"—an interpretation this Court has *not* held. *Pendleton*, 658 F.3d at 308. "Despite rich case law interpreting the Interstate Commerce Clause, the Supreme Court has yet to examine the Foreign Commerce Clause in similar depth, and has yet to articulate the constitutional boundaries beyond which Congress may not pass in regulating the conduct of citizens abroad." *Bollinger*, 798 F.3d at 209.

The time to articulate those boundaries has come. Clear pronouncement on the constitutionality of 18 U.S.C. § 2423(c) will provide much needed guidance for defining the permissible scope of Congress's extraterritorial lawmaking over non-commercial conduct under the FCC.

2. *Lindsay*, and the controlling decisions from the Fourth and Tenth Circuits conflict with this Court's reasoning in *Lopez* and *Morrison*, the Sixth Circuit's reasoning in *United States v. Al-Maliki*, 787 F.3d 784 (6th Cir. 2015), and the Ninth Circuit's own reasoning in *Clark*.

Lindsay gave two reasons why Congress may regulate non-commercial conduct abroad, both of which depart from *Lopez* and *Morrison*.

First, *Lindsay* called the regulation of non-commercial sexual abuse by Americans abroad an "essential component" of Congress's overall scheme to

combat commercial sex tourism. But it is far from evident how the non-commercial part rationally relates to the commercial sex industry. *Lindsay* contended that non-commercial child sex abuse boosts the market for commercial sex.

> For example, non-commercial sexual abuse of minors can drive commercial demand for sex with minors by reinforcing the idea that such conduct is acceptable, or by allowing traffickers to use non-commercial arrangements to entice patrons into engaging in subsequent commercial behavior. By serving as a "gateway," non-commercial conduct can fuel commercial demand.

Lindsay, 931 F.3d at 863. Therein lies the first disconnect: it is not evident why the rape and molestation of children abroad (which are never acceptable) would reinforce the idea that commercial sex with minors is acceptable. Nor does it make sense that arrangements made by traffickers to entice patrons to engage in commercial sex would be considered "non-commercial."

Judge Hartz highlighted the statute's infirmity in his dissent in *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018):

> the government has not offered any reason to believe that control of noneconomic sex abuse will affect the market in commercial sex trafficking. When dealing with fungible commodities the connection is clear. *See Raich*,

> 545 U.S. at 19, 125 S.Ct. 2195 [1] ("In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.") But here there is no apparent connection.

902 F.3d at 1259. Regulating non-economic sexual abuse by Americans abroad cannot be called an "essential component" of Congress's overall scheme to combat commercial sex tourism, because there is no apparent connection between the two. The Sixth Circuit recognized this insufficiency too, calling out the absence of Congressional findings: "Congress's failure to even try to show the aggregate effect of noncommercial sexual activity on foreign commerce highlights its lack of power here." *United States v. Al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015) (citing H.R. Rep. No. 108-66 (2003)). Rather, regulating non-economic sexual abuse by Americans abroad would be an essential (and evident) component of an overall scheme to combat—not *commercial* sex exploitation—but *all* sex exploitation, commercial and non-commercial. But that's not what Congress says it's doing, because that would require a general police power that Congress lacks. *Lopez*, 514 U.S. at 566 ("Congress' authority is limited to those powers enumerated in the

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[1] *Gonzalez v. Raich*, 545 U.S. 1 (2005).

Constitution," and the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation"); *Morrison*, 529 U.S. at 618-19 ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power") (citing Thomas, J., concurring, internal citation omitted).

Second, *Lindsay* found that opportunities to engage in non-commercial sexual abuse, such as the rape or molestation of children abroad, stimulate tourism generally, thereby impacting foreign commerce.

> If Americans believe that traveling to a particular foreign country includes the opportunity for unregulated, non-commercial illicit sexual conduct, they may travel to that country when they otherwise would not, and they may pay more in airfare, lodging costs, vacation packages, or simply stay in the country longer spending money on other things.

Lindsay, 931 F.3d at 863. This conclusion presents a similar stretch, suggesting that "sex tourists who prey on children are indifferent to whether their victims are provided by commercial enterprises or they must seek out their victims at places like mission schools and assault the children on their own." *Durham*, 902 F.3d at 1260 (Hartz, J., dissenting). Arguing that non-commercial sexual abuse promotes tourism also smacks of the same attenuated reasoning this Court rejected in *Lopez*, 514 U.S. at 563-64 (firearm possession in a local school zone increases violent

crime, which hinders tourism to unsafe areas, among other social costs), and *Morrison*, 529 U.S. at 615 (gender-motivated crimes deter potential victims from tourism, among other social costs). Attenuated reasoning, the Court held, would lead to the danger of Congress exercising a general police power it does not possess. *See Lopez*, 514 U.S. at 563-67, and *Morrison*, 529 U.S. at 612-13.

"Non-commercial sexual activity impacting foreign commerce" does not rise to the level of "commercial transaction." It's not even close, because non-commercial sexual activity does not impact foreign commerce to a constitutionally adequate degree. *Lindsay* asserted that it does, relying on *United States v. Bollinger*, 798 F.3d 201 (4th Cir. 2015), and *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018). But the Fourth and Tenth Circuits validated the constitutionality of section 2423(c), based on a modified, overbroad version of FCC jurisprudence.

That rationale posits that while federalism constrains the scope of Congress's Interstate Commerce Clause ("ICC) power, federalism is not a check on Congress's FCC power. Therefore, in *Bollinger*, the Fourth Circuit reasoned that the third *Lopez* category's finding of "substantial" effect was "unduly demanding" in the foreign context; all that was required was a "demonstrable" effect on foreign commerce—"more than merely imaginable or hypothetical." 798

F.3d at 215-16. In *Durham*, the Tenth Circuit reasoned that in the foreign context, *non-economic* activities could be viewed *in the aggregate* in order to qualify as a "substantial effect" on foreign commerce. 902 F.3d at 1216.

Bollinger and *Durham* cannot be squared with this Court's opinions in *Lopez* or *Morrison*. The problem is that the Fourth and Tenth Circuits failed to heed the danger this Court has always recognized: however well-intentioned Congress's statute is, an overbroad application of the Commerce Clause cedes too much power to Congress. *See Lopez*, 514 U.S. at 567-68, and *Morrison*, 529 U.S. at 613. And that's where Congress's authority begins to look like a general police power to regulate any individual activity. *Id.*

> Given the reality that in modern times every activity can be said to have *some* effect on commerce, courts must set reasonable limits on the meaning of "substantial effect" or concede that the vision of a Constitution of limited powers, *see, e.g.*, U.S. Const. amend. X, is a mirage and anything can be justified under the Commerce Clause. The power under the Foreign Commerce Clause is one of the *limited* powers granted to Congress by the Constitution. Courts should not construe it in a way that would amount to ceding to Congress a general police power over Americans with respect to all conduct beyond our shores.

Durham, 902 F.3d at 1251 (Hartz, J., dissenting). "Reasonable limits" are the reason that *Morrison* explicitly rejected the argument that non-economic activities could be considered in the aggregate. 529 U.S. at 617. They are also the reason

Lopez and *Morrison* emphasized that non-economic criminal statutes that have "nothing to do with 'commerce' or any sort of economic enterprise" are outside Congress's ICC authority. *Lopez*, 514 U.S. at 561; *see also Morrison*, 529 U.S. at 613. On the other hand, an "unbounded reading" of the FCC:

> allows the federal government to intrude on the sovereignty of other nations—just as a broad reading of the Interstate commerce allows it to intrude on the sovereignty of the States. More importantly, an overbroad interpretation of the Foreign Commerce Clause allows the government to intrude on the liberty of individual citizens. And that seems as least as wrong as a reading of the Commerce Clause that allows the government to intrude on the States.

Al-Maliki, 787 F.3d at 793. Even when federalism is not a check on Congress's FCC power, "there is no reason to define the terms *commerce* and *regulate* more broadly in the foreign-commerce context than in the interstate-commerce context." *Durham*, 902 F.3d at 1251 (Hartz, J., dissenting); *Al-Maliki*, 787 F.3d at 794 ("Giving [commerce] 'the same meaning throughout' the Clause so it 'remain[s] a unit' . . . we doubt that Congress has regulated commerce here, much less commerce with a foreign country") (internal citations omitted).

Perhaps more importantly, under no reasonable reading of the FCC does extraterritorial non-economic activity by Americans constitute "Commerce with foreign Nations." At the time of the founding, "Commerce" meant trade or

"[i]ntercour[s]e," 1 S. Johnson, A Dictionary of the English Language 361 (4th ed.1773), *i.e.*, "selling, buying, and bartering, [and] transporting for these purposes." *Lopez*, 514 U.S. at 585–86 (Thomas, J., dissenting); *see also* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112–125 (2001).

> So the Foreign Commerce Clause as originally understood gave Congress the power to regulate trade or intercourse with foreign countries. . . And it simply does not include the power to criminalize a citizen's noncommercial activity in a foreign country, for that is not 'Commerce' as originally understood. Nor, for that matter, is it commerce "with" a foreign Nation, which is also required by the textualist reading.

Al-Maliki, 787 F.3d at 792.

Finally, *Lindsay* is at odds with *Clark.* While *Clark* also recognized the absence of federalism as a check on Congress's FCC power, it was careful not to adopt an overbroad FCC jurisprudence. *Clark* held the statute constitutional because the prong regulated travel in foreign commerce *and* an engagement in the proscribed commercial transaction while abroad. 435 F.3d at 1116. It was this "combination" that saved the statute by "implicat[ing] foreign *commerce* to a constitutionally adequate degree." *Id.* at 1114, 1116 (emphasis added). *Clark* further emphasized the "essential *economic* character" of the commercial prong, distinguishing it from the non-economic activity in *Lopez* and *Morrison*. *Id.* at

1115 (emphasis added). On the other hand, 18 U.S.C. 2423(c)'s regulation of non-commercial, non-economic, criminal activity cannot be distinguished from the non-commercial, non-economic, criminal statutes this Court struck down in *Lopez* and *Morrison*. *Lopez*, 514 U.S. at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms."); *Morrison*, 529 U.S at 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

B. This case presents an excellent vehicle to decide this constitutional question.

This case presents an excellent vehicle to address the constitutional scope of Congress's FCC power. The issue was raised in the district court and preserved for *de novo* review. Lindsay's case also uniquely highlights the problems presented when Congress exercises general police power over all American conduct outside the United States. Section 2423(c), in particular, makes it easy to extort American citizens, because no *mens rea* need be proven, penalties are severe (up to 30 years in prison), and all evidence and witnesses are half a world away. Indeed, in Lindsay's case, the Ninth Circuit recognized that—despite the fact that the district judge excluded much of the corroborating evidence—the alleged victim's family schemed to frame Lindsay and extort money from him. *Lindsay*, 931 F.3d at 856.

But in American courts, overseas witnesses cannot be compelled to testify, nor can their testimony necessarily be obtained, whereas the Government can take special measures to ensure its witnesses have visas, are flown in, and are available at trial. Where virtually all the contacts are overseas, the prosecution of defendants offends "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945).

At bottom, it is the judiciary's responsibility to recognize and enforce the boundaries of constitutional limitations. A well-intentioned desire to protect victims of child sexual abuse is no justification for ceding general police power to the Government and undermining the founding principles of the Constitution. The Founders feared giving any branch of government too much power, because they understood: men aren't angels, and angels don't govern men. The Federalist No. 51 (James Madison).

CONCLUSION

For the reasons set forth, Lindsay respectfully asks this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

DATED: January 24, 2020

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