

No. 20-5026

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DANIEL ARBAUGH - PETITIONER

vs.

UNITED STATES OF AMERICA, et al. - RESPONDENT(S)

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

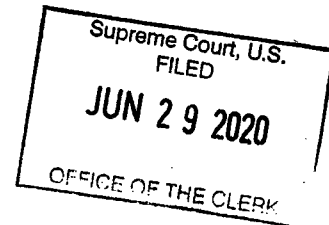
JAMES DANIEL ARBAUGH, # 21992-084

FCI Fort Dix

P.O. Box 2000

Joint Base MDL, NJ 08640

(Pro Se)



QUESTION PRESENTED

Does the "power to regulate Commerce with Foreign Nations", in accordance with the United States Constitution art 1, § 8 cl. 3, include the prosecution of a volunteer missionary who engages in non-commercial illicit sexual conduct while a permanent resident of a sovereign foreign country?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- * Laura Day Rottenborn,
OFFICE OF THE UNITED STATES ATTORNEY,
Roanoke, VA
- * Thomas T. Cullen,
United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY,
Roanoke, Virginia
- * Jeb T. Terrien, LEAD ATTORNEY
United States Attorneys Office, Western District of Virginia,
Harrisonburg, VA
- * Kaylynn N. Shoop, U.S. Department of Justice,
Criminal Division, Child Exploitation & Obscenity Section,
Washington, DC

RELATED CASES

- * United States v. Arbaugh, No. 5:17-cr-00025-EKD-1, U.S. District Court for the Western District of Virginia. Judgment entered July 23, 2018.
- * United States v. Arbaugh, No. 18-4575, U.S. Court of Appeals for the Fourth Circuit. Judgment entered February 20, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at LEXIS 5175 (951 F. 3d 167); or,
[] has been designated for publication but is not yet reported;
or,
[] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at LEXIS 122690; or,
[] has been designated for publication but is not yet reported;
or,
[] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 20, 2020.

[X] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ on in Application No. ____A____.

[X] An extension of time to file the petition for a writ of certiorari was extended to 150 days from the date of the lower court judgment, due to COVID-19. The ORDER was issued on March 19, 2020, ORDER LIST: 589 U.S.. It has been extended to July 19, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article 1, § 8, Cl 3.

Power of Congress to regulate commerce

To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;

18 U.S.C. § 10. Interstate commerce and foreign commerce defined

The term "interstate commerce", as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

The term "foreign commerce", as used in this title, includes commerce with a foreign country.

18 U.S.C. § 2423. Transportation of minors

(a) **Transportation with intent to engage in criminal activity.** A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(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, with a motivating 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 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.

(e) **Attempt and conspiracy.** Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

(f) **Definition.** As used in this section, the term "illicit sexual conduct" means--

- (1) a sexual act (as defined in section 2246 [18 USCS § 2246]) with a person under 18 years of age that would be in violation of chapter 109A [18 USCS §§ 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;
- (2) any commercial sex act (as defined in section 1591 [18 USCS § 1591]) with a person under 18 years of age; or
- (3) production of child pornography (as defined in section 2256(8) [18 USCS § 2256(8)]).

18 U.S.C. § 2246. Definition for chapter

As used in this chapter [18 USCS §§ 2241 et seq.]--

- (1) the term "prison" means a correctional, detention, or penal facility;
- (2) the term "sexual act" means--
 - (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
- (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

STATEMENT OF THE CASE

1. Petitioner's Background

James Arbaugh first lived in Haiti as a child, while his parents were missionaries there, and he returned there to work as a missionary soon after his college graduation. J.A. 954-57. He was a volunteer missionary and resident of Haiti since 2002; before Haiti or the United States ratified the Optional Protocol, and prior to the subsequent PROTECT Act [18 U.S.C. § 2423(c) and (e)], or the 2013 amendment to 18 U.S.C. 2423(c) which expanded it to include residents of foreign countries. The Optional Protocol and the PROTECT Act were designed to combat sex tourism. Arbaugh was a missionary and resident of Haiti many years prior to any alleged illicit sexual conduct.

2. Criminal Charges and Resolution

After returning to Virginia for counseling, Arbaugh was arrested on a criminal complaint alleging one count of traveling in foreign commerce and engaging in illicit sexual conduct with a minor, in violation of 18 U.S.C. § 2423(c). J.A. 8-17. The court found probable cause to proceed, and a grand jury indicted him on December 13, 2017, charging that in or about 2016, the defendant, a citizen of the United States who was arrested in the Western District of Virginia, knowingly traveled in foreign commerce, from the United States to Haiti, and engaged in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with Minor Victim 1, a person under 18 years of age, and attempted to do so. J.A. 18-19.

On February 6, 2018, Arbaugh pled guilty to the charge without the benefit of a plea agreement. J.A. 4, 936.

Arbaugh objected to a number of the enhancements initially applied in his presentence report. The district court conducted a sentencing hearing on June 13, at which both parties offered evidence, and the judge continued the sentencing hearing until July 23 in order to rule on the applicable guidelines before addressing the remaining required sentencing factors under 18 U.S.C. § 3553(a). On July 20, the district court entered a written ruling on the guidelines objections, applying inter alia the contested undue influence enhancement. J.A. 181-82, 253. Arbaugh's guidelines were revised to an adjusted offense level of 38, placing his recommended sentence in the 235-293 month range. J.A. 181-82.

The remainder of the sentencing hearing was conducted on July 23. Arbaugh requested a variance downward to account for his fulsome disclosure to law enforcement and the substantial positive work he had done in Haiti. J.A. 214. He also requested a 5 year term of supervised release, J.A. 225.

The district court sentenced Arbaugh to a guidelines sentence of 276 months, with a lifetime term of supervised release. J.A. 242, 258-60. The court also imposed special conditions of supervised release, including the requirements that he allow the probation officer or his designee to conduct random inspections, including reviewing and copying data from his computer, phone, or other personal computing device; allowing temporary removal of his computer, phone or other personal computing device for a more thorough inspection; not use or possess any data encryption technique or software; and purchase and use hardware and software systems that monitor his computer usage,

if so directed by probation. J.A. 262-959. A notice of appeal followed on August 10, 2018. J.A. 265.

3. Appellate Review

Arbaugh appealed to the United States Court of Appeals for the Fourth Circuit. Oral arguments were held on December 10, 2019. The case was decided on February 20, 2020. The Appeals Court affirmed Arbaugh's sentence of 276 months' imprisonment and to lifetime supervised release. They vacated his sentence with respect to the four challenged computer restrictions while on supervised release, and remanded them for resentencing. A hearing is scheduled on July 30, 2020 to address the computer restrictions while on supervised release.

4. Basis for Federal Jurisdiction

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The appeal is from a final judgment of the district court entered on August 3, 2018. The appeals' court had jurisdiction over the appeal under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE PETITION

1. History of the Statute

Building on the United Nations Convention on the Rights of the Child, one hundred and seventy-six nations have agreed to the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, adopted May 25, 2000, T.I.A.S. 13,095 2171 U.N.T.S. 227 (Optional Protocol). Its signatories jointly committed to take many common steps to protect children, including criminalizing various child sex offenses. Optional Protocol, art. 3. The Protocol also empowers its signatories to police their own nationals' sexual exploitation of children wherever it takes place. Id. art. 4. The United States Senate ratified the Optional Protocol on December 23, 2002. Haiti ratified the Optional Protocol on September 9, 2014. The Optional Protocol is a non self-executing treaty. That means that each country must create their own laws in fulfillment of the treaty.

Among the laws that fulfill the United States' duties under the Optional Protocol is the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, 18 U.S.C. § 2423 (PROTECT Act). 18 U.S.C. § 2423(c) provides that "[a]ny 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."

A different section of the statute, 18 U.S.C. § 2423(f), defines illicit sexual conduct as either (1) a non-commercial sexual act, as defined in 18 U.S.C. § 2246, with a person under 18 years of age that would be a violation of a separate part of the code proscribing sexual abuse, or (2) any commercial sex act, as defined in 18 U.S.C. § 1591, with a person under 18 years of age. Authorities did not explicitly specify if Arbaugh's alleged illicit conduct was commercial or non-commercial, but per the descriptions, it was non-commercial. During the sentencing hearing on July 23, 2018 (Page 37), it was stated "in Mr. Arbaugh's case, this is not a situation where he's accused of commercial conduct, commercial sexual conduct."

Congress first proposed the law as part of the Sex Tourism Prohibition Improvement Act of (2015 U.S. App. LEXIS 13) 2002. See H.R. Rep. No. 107-525 (2002), 2002 WL 1376220 at *1. The accompanying "Constitutional Authority Statement" identified the Commerce Clause as permitting the legislation. Id. at *5. The provision's purpose, according to the House Report, was "to make it a crime for a U.S. citizen to travel to another country and engage in illicit sexual conduct with minors." Id. Regarding the need for such legislation, the House Report noted that "ineffective law enforcement, lack of resources, corruption, and generally immature legal systems" of many countries are barriers to effective prosecution. Id. at *3. To that end, Congress wanted to eliminate the existing requirement under 18 U.S.C. § 2423(b) that a U.S. citizen had to travel with the intent to

engage in illicit sexual conduct before he/she could be criminally liable. Id. at *3, *5.

(798 F.3d 208) The proposed legislation passed the House but failed the Senate. Shortly thereafter, the same language was incorporated into different legislation - the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the "PROTECT Act"). See H.R. Conf. Rep. No. 108-66 (2003), reprinted in 2003 U.S.C.C.A.N. 683, 683, 2003 WL 1862082 at *5. The Report accompanying that legislation, however, does not include the prior reference to constitutional authority. See id. See United States v. Bollinger, 798 F.3d 201 (4th Cir. 2015).

2. Congress's Constitutional Authority to Enact Section 2423(c)

Congress's power to enact any law, including section 2423(c), must derive from the Constitution. United States v. Morrison, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); see also United States v. Carvajal, 924 F. Supp. 2d 219, 249 (D.D.C. 2013) ("Because the powers of the legislature are defined and limited, every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.") (citation and internal quotation marks omitted). As proposed in this writ, as applied to the facts of this case, Congress did not have constitutional authority to enact section 2423(c).

When Congress lacks constitutional authority to pass a

law, it acts ultra vires. And when litigants properly challenge laws passed beyond Congress's power, courts have a duty to void those laws as repugnant with the People's Law: the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 2 L. Ed. 60 (1803). Arbaugh argues that Congress exceeded its Foreign Commerce Clause authority when passing § 2423(c) for non-commercial illicit sexual conduct as alleged in this case.

For the following reasons, it is believed that § 2423(c) draws its constitutional authority from the Foreign Commerce Clause. First, the first element of the statute includes the phrase "travels in foreign commerce" which "unequivocally establishes that Congress specifically invoked the Foreign Commerce Clause." United States v. Clark, 435 F.3d 1100 (9th Cir. 2006). Second, the majority of circuits to have considered the constitutionality of the PROTECT Act have done so in the context of the Foreign Commerce Clause. Lastly, Congress chose not to expressly invoke its treaty-implementing powers in enacting Section 2423(c). Instead, the forerunner to the legislation only mentioned the Commerce Clause as its constitutional authority.

The Fourth Circuit, where this case originated, claims the Foreign Commerce Clause is the constitutional authority for enacting § 2423(c), even for non-commercial illicit sexual conduct, because of the "demonstrable effect" it may have on foreign commerce.

3. Abuse of the Foreign Commerce Clause

The Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations." U.S. Const. art. 1, § 8, cl. 3. Does that include the power to punish a citizen's non-commercial conduct while the citizen resides in a foreign nation? That is the question asked in this certiorari petition.

Under the original meaning of the Constitution, the Foreign Commerce Clause did not give Congress the power to punish the conduct at issue here. "Commerce" originally 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." United States v. Lopez, 514 U.S. 549, 585-86, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Thomas, J., dissenting); see Randy Barnett, The Original Meaning (2015 U.S. App. LEXIS 9) 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. Simple enough, And it simply does not include the power to criminalize a citizen's non-commercial 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.

In the interstate context, we have long since moved away from the original meaning of "regulate Commerce," so we turn to the case law's modern definition of the term. The Constitution as now interpreted gives Congress the power to regulate (1) "the

use of the channels of" commerce; (2) "the instrumentalities of...or persons or things in" commerce; and (3) economic activities that "substantially affect" commerce. Lopez, 514 U.S. at 558-59.

Part of § 2423 tracks the first two Lopez categories. Subpart (b), for example, criminalizes traveling in the channels of commerce for the purpose of engaging in illicit sexual conduct with a minor. Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964). And subpart (a) criminalizes moving a minor in or through commerce for an illicit sexual purpose. Cf. Lottery Case, Champion v. Ames, 188 U.S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (1903) and Caminetti v. United States, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917) (women for immoral purposes). But the United States neither charged nor alleged that Arbaugh used the channels of commerce for an illegal purpose or was "in [foreign] commerce" when he committed his crime. Lopez, 514 U.S. at 559. It charged under subpart (c).

And subpart (c) is different. The government need only prove that a citizen at one point "travel[ed] in foreign commerce"-with no unlawful intent whatsoever-and then committed the regulated, non-commercial act. Indeed, since 2013, the government can just prove that the citizen "resides, either temporarily or permanently, in a foreign country" before committing the act. That's not regulating the channels of, or people in, commerce; it's regulating purely intracountry conduct-

after the lawful traveling in commerce has ended. The fact that he has traveled as a free citizen unencumbered by the law, does not and cannot give rise to a later regulation of his person: as no regulation attached to his travel, Congress is not free to place one on him after he has rested. Caminetti, 242 U.S. at 491. It thus seems doubtful that Lopez categories 1 and 2 suffice to uphold § 2423(c) against Arbaugh.

But what of category 3: a substantial effect (or in the Fourth Circuit, a "demonstrable effect") on foreign commerce? It doesn't do the trick either; "Congress may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on...commerce." United States v. Kebodeaux, 133 S. Ct. 2496, 2512, 186 L. Ed. 2d 540 (2013) (Thomas, J., dissenting); see United States v. Morrison, (787 F.3d 793) 529 U.S. 598, 617-18, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). Congress's failure to even try to show the aggregate effect on non-commercial sexual activity on foreign commerce highlights its lack of power here. See H.R. Rep. (2015 U.S. App. LEXIS 11) No. 108-66 (2003). Indeed, Congress included neither a jurisdictional statement nor a constitutional authority statement in passing this subpart. Id.; see Jessica E. Notebaert, The Search for a Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c), 103 J. Crim. L. & Criminology 949, 955 (2013). Lopez category 3 fares no better than the first two categories.

Congress, it therefore appears, lacked the power under the

Foreign Commerce Clause to pass § 2423(c) as applied to non-commercial conduct, as in this case. There isn't and can't be a generalized federal crime for traveling in interstate commerce with no illicit purpose and then, after a few months, committing illicit sexual conduct with a minor. It likewise makes sense that the government couldn't articulate a limiting principle to prevent Congress from criminalizing jaywalking by a United States tourist in Canada. These are crimes in the States, e.g., Ohio Rev. Code Ann. § 2907.04 (illicit sexual conduct with a minor in Ohio), or crimes in foreign countries, e.g., Highway Traffic Act, R.S.O. 1990, c. H.8, § 144(22) (Can.) (jaywalking in Ontario), because those governments have a general police power. But (2015 U.S. App. LEXIS 12) the federal government does not. Morrison, 529 U.S. at 618-19. See United States v. Al-Maliki, 787 F.3d 784 (6th Cir. 2015).

What are the limits of the Foreign Commerce Clause? That is truly the question at issue in this petition. Whether it always seems honored or not, the Supreme Court has consistently begun the analysis of its seminal Commerce Clause rulings with this principle: the Commerce Clause has limits. See e.g., Morrison, 529 U.S. at 607; Lopez, 514 U.S. at 552, 556-57; United States v. Five Gambling Devices, 346 U.S. at 446, 98 L. Ed. 179, 74 S. Ct. 190 (1953)(plurality opinion); Shreveport Rate Case, 234 U.S. 342, 351, 34 S. Ct. 833, 836, 58 L. Ed 1341 (1914); Kidd v. Pearson, 128 U.S. 1, 15-16, 9 S. Ct. 6, 32 L. Ed. 346 (1888); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, 19 L. Ed. 999

(1870); Veazie v. Moor, 55 U.S. (14 How.) 568, 573, 14 L. Ed: 545 (1852); Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 189 (1824). In Justice Thomas' dissent in Bastion v. United States, 137 S. Ct. 850; 197 L. Ed. 2d 478 (2017), he states that the foreign commerce clause is currently being interpreted beyond the original intent of the framers of the Constitution:

The courts of appeals have relied upon statements by this Court comparing the foreign commerce power to the interstate commerce power, but have removed those statements from their context. In certain contexts, this Court has described the foreign commerce power as "exclusive and plenary," Board of Trustees, supra, at 56-57, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (citing Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 196-200, 6 L. Ed. 23 (1824)), explaining that Congress' commerce power "when exercised in respect of foreign commerce (2017 U.S. LEXIS 6) may be broader than when exercised as to interstate commerce," Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 434, 52 S. Ct. 607, 76 L. Ed. 1204 (1932); (197 L. Ed. 2d 480) see also Brolan v. United States, 236 U.S. 216, 218-220, 35 S. Ct. 285, 59 L. Ed. 544 (1915). None of these opinions, however, "involve[d] legislation of extraterritorial operation which purports to regulate conduct inside foreign nations." Colangelo, The Foreign Commerce Clause, 96 Va. L. Ref. 949, 1001 (2010). This Court's statements about the comparative breadth of the Foreign Commerce Clause are of questionable relevance where the issue is Congress' power to regulate, or even criminalize, conduct within another nation's sovereign territory.

Moreover, this Court's comparative statements about the breadth of the Foreign Commerce Clause have relied on some "evidence that the Founders intended the scope of the foreign commerce power to be greater" than Congress' power to regulate commerce among the States. Japan Line, supra, at 448, 99 S. Ct. 1813, 60 L. Ed. 2d 336. Whatever the Founders' intentions might have been in this respect, they were grounded in the original understanding of the Interstate Commerce Clause. But this Court's modern doctrine has "drifted far from the original understanding." Lopez, supra, at 584, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (Thomas, J., concurring). For one thing, the "Clause's text, structure, and history all indicate that, at the time of the founding, the term "commerce" consisted of selling, buying, and bartering, as well as transporting for these

purposes.'" Raich, 545 U.S., at 58, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (Thomas, (2017 U.S. LEXIS 7) J., dissenting) (quoting Lopez, supra, at 585, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (opinion of Thomas, J.)). For another, "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." United States v. Morrison, 529 U.S. 598, 627, 120 S. Ct. 1740, 146 L. Ed. 2d (2000)(Thomas, J., concurring).

Thus, even if the foreign commerce power were broader than the interstate commerce power as understood at the founding, it would not follow that the foreign commerce power is broader than the interstate commerce power as this Court now construes it. But rather than interpreting the Foreign Commerce Clause as it was originally understood, the courts of appeals have taken this Court's modern interstate (137 S. Ct. 853) commerce doctrine and assumed that the foreign commerce power is at least as broad. The result is a doctrine justified neither by our precedents nor by the original understanding.

4. Reasons for granting the petition

A writ for certiorari should be granted for compelling reasons in this case as well as the need for the Supreme Court to consider the Constitutional framework.

The question of the limits of the Foreign Commerce Clause is precluded by circuit splits. The Supreme Court has never "thoroughly (197 L. Ed. 2d 479) explored the scope of the Foreign Commerce Clause." 818 F.3d, at 667; accord, e.g., Goodno, When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause, 65 Fla. L. Rev. 1139, 1148-1149 (2013)("The U.S. Supreme Court has not yet articulated the extent of Congress's power under the Foreign Commerce Clause to enact laws with extraterritorial reach. Because of this lack of guidance...lower courts are at a loss for how to analyze

Foreign Commerce Clause issues"). The few decisions from the Supreme Court addressing the scope of the Clause have generally been confined to laws regulating (2017 U.S. LEXIS 4) conduct with a significant connection to the United States. See, e.g., Board of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 57, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted"); United States ex rel. Turner v. Williams, 194 U.S. 279, 290, 24 S. Ct. 719, 48 L. Ed. 979 (1904)("[T]he power to regulate commerce with foreign nations...including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States"). The Supreme Court has also articulated limits on the power of the States to regulate commerce with foreign nations under the so-called dormant Foreign Commerce Clause. See, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449-454, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979). As in the facts of this case, the Supreme Court has not, however, considered the limits of Congress' power under the Clause to regulate conduct occurring entirely within the jurisdiction of a foreign sovereign.

In the absence of specific guidance, the courts of appeals - including the Fourth Circuit - have understandably extended this Court's Interstate Commerce Clause precedents abroad. United States v. Lopez, 514 U.S. 549, 558-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), held that Congress is limited to

regulating three categories of interstate activity: "the use of the channels of interstate commerce," "the instrumentalities of interstate commerce," and "activities that substantially affect interstate commerce." Some courts of appeals "have imported the Lopez categories directly into the foreign context," (2017 U.S. LEXIS 5) some "have applied Lopez generally but recognized that Congress has greater power to regulate foreign commerce," and others have gone further still, "holding that Congress has authority to legislate under the Foreign Commerce Clause when the text of a statute has a constitutionally tenable (137 S. Ct. 852) nexus with foreign commerce." United States v. Bollinger, 798 F.3d 201, 215 (AC4 2015) (internal quotation marks omitted); see also *id.*, at 215-216 ("Instead of requiring that an activity have a substantial effect on foreign commerce, we hold that the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such commerce"). In Justice Thomas' dissent in Bastou v. United States, 137 S. Ct. 850; 197 L. Ed. 2d 478 (2017), he states "I am concerned that language in some of this Court's precedents has led the courts of appeals into error. At the very least, the time has come for us to clarify the scope of Congress' power under the Foreign Commerce Clause to regulate extraterritorially." By granting this petition for a writ of certiorari, the Supreme Court can settle the question of the limits of Congress' power to prosecute non-commercial conduct occurring entirely within the jurisdiction of a foreign sovereign.