No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

THOMAS COSTANZO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a federal statute's interstate commerce "jurisdictional element" can prevent the statute's reach from exceeding its constitutional grasp by "ensur[ing], through case-by-case inquiry, that the [transaction] in question affects interstate commerce." *Id.* at 561. Does the court of appeals' opinion conflict with *Lopez* insofar as it holds that a jurisdictional element was satisfied by evidence that the transactions in question employed facilities that *can* be used to conduct interstate or international transactions, without requiring evidence that they actually *were* used to conduct such transactions?

RULE 14.1(b) STATEMENT

(i) All parties to the proceeding are listed in the caption.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings: *United States v. Costanzo*, No. 2:17-cr-00585-GMS-1 (D. Ariz.) (judgment entered Aug. 10, 2018); *United States v. Costanzo*, No. 18-10291 (9th Cir.) (judgment entered Apr. 17, 2020).

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Petitioner Thomas Costanzo respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 17, 2020. App. A.

OPINIONS BELOW

The court of appeals' opinion is published at 956 F.3d 1088. The district court's ruling on Mr. Costanzo's motion for a judgment of acquittal is unpublished.

JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over the government's federal charges against Mr. Costanzo pursuant to 18 U.S.C. § 3231. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 17, 2020. App. A at 1. The court of appeals denied Mr. Costanzo's timely petition for rehearing en banc on May 27, 2020. App. C. On March 19, 2020, in light of concerns relating to COVID-19, this Court extended the deadline for filing a petition for certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution reads, in pertinent part, as follows:

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

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[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

The Tenth Amendment to the United States Constitution reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The pertinent portions of 18 U.S.C. § 1956 read as follows:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

> **(A)(i)** with the intent to promote the carrying on of specified unlawful activity; or
>
> **(ii)** with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
>
> **(B)** knowing that the transaction is designed in whole or in part—
>
> **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> **(ii)** to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

* * * *

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction

> involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree[.]
>
> 18 U.S.C. § 1956 (West, Westlaw through Pub. L. No. 114-231)

STATEMENT OF THE CASE

Thomas Costanzo is a 56-year-old Brooklyn, New York native and Bitcoin enthusiast. From 2015 to 2017, Mr. Costanzo was the object of a "sting" operation that culminated in his being charged with several counts of money laundering in violation of 18 U.S.C. § 1956. This statute provides for the criminal punishment of individuals who engage in a "financial transaction" under specified circumstances. The pertinent portion of the statute's jurisdictional element – *i.e.*, the element designed to ensure that money laundering prosecutions represent proper exercises of the federal commerce power – defines the term "financial transaction" to include "a transaction which in any way or degree affects interstate or foreign commerce [] involving the movement of funds by wire or other means." 18 U.S.C. § 1956(c)(4).

Bitcoin is a form of virtual currency – an unregulated currency based on mathematical algorithms that is not controlled by any country, bank, or individual. Bitcoin has no tangible physical existence, but can be held electronically in a "virtual wallet" and transmitted via cell phones and other electronic devices. Just like more mainstream forms of currency, Bitcoin can be used to purchase everyday goods and services. It is perfectly legal to own, trade, and sell Bitcoin, including in "peer-to-peer" – *i.e.*, face-to-face – transactions.

In late 2014, Mr. Costanzo was making a modest living doing just that: selling Bitcoin to individuals in and around Phoenix, Arizona in peer-to-peer transactions. A pair of IRS Special Agents noticed that a lot of websites that sold illegal products requested payment in Bitcoin. They pulled up localbitcoins.com, a website that helps Bitcoin buyers and sellers find one another, and found a popular seller going by the name of "Morpheus Titania," who they determined was Mr. Costanzo. They dispatched fellow IRS Special Agent Sergei Kushner to approach Mr. Costanzo.

Agent Kushner contacted Mr. Costanzo and arranged to buy $2,000 worth of Bitcoin from him. The transaction took place on March 20, 2015, at a Starbucks. Agent Kushner dropped hints that his money came from an unspecified nefarious source, but he was not explicit. The two men completed a Bitcoin transaction, with Mr. Costanzo accepting $2,000 in cash from Agent Kushner in exchange for Bitcoin that he transferred to Agent Kushner's cell phone.

Two months later, Agent Kushner arranged another transaction with Mr. Costanzo. The two met at the same Starbucks on May 20, 2015. This time, Agent Kushner expressly told Mr. Costanzo that his purchase money came from "black tar heroin from Mexico" that he purchased in Arizona and sold in New York. Agent Kushner then exchanged $3,000 in cash for Bitcoin that Mr. Costanzo transmitted to his cell phone.

Five months later, IRS Special Agent Thomas Klepper, posing as Agent Kushner's business partner, contacted Mr. Costanzo to request a transaction. Mr.

Costanzo asked Agent Klepper to switch to the Telegram app, which encrypts messages while they are in transit. The two met at a Phoenix, Arizona Starbucks on October 7, 2015. During the meeting, Agent Klepper elaborated on his and Agent Kushner's purported drug-importation operation. Agent Klepper then exchanged $13,000 in cash for Bitcoin that Mr. Costanzo transferred to his cell phone.

On November 21, 2015, Agent Kushner attended a Bitcoin meetup at which Mr. Costanzo was present. At the meetup, Agent Kushner exchanged $11,700 in cash for Bitcoin that Mr. Costanzo transferred to his cell phone.

A few months later, the FBI brought Scottsdale Police Detective Chad Martin, a member of a Drug Enforcement Administration "Task Force Group," into the investigation. Detective Martin sent Mr. Costanzo a text message saying he wanted to buy Bitcoin. Mr. Costanzo met Detective Martin later that day at a McDonalds restaurant in Mesa, Arizona. Detective Martin dropped hints that his money came from a nefarious activity in Los Angeles, but he was not explicit. Detective Martin then exchanged $2,000 in cash for Bitcoin that Mr. Costanzo transferred to his cell phone.

On November 16, 2016, Detective Martin conducted another transaction with Mr. Costanzo at a Jersey Mike's restaurant in Tempe, Arizona, exchanging $12,000 in cash for Bitcoin.

On February 2, 2017, Detective Martin met Mr. Costanzo at a Starbucks with a Pei Wei bag containing $30,000 in cash, which he told Mr. Costanzo had come from "one key of coke." The money was actually "undercover funds" that Detective

Martin "obtained from the DEA." Detective Martin exchanged the cash for Bitcoin that Mr. Costanzo transferred to his cell phone.

On April 20, 2017, Detective Martin met Mr. Costanzo at a Starbucks with $107,000 in cash, which came from a "Department of Public Safety flash fund." After Mr. Costanzo used his cell phone to wire the corresponding quantity of Bitcoin to Detective Martin's cell phone, Detective Martin gave a signal, and agents arrested Mr. Costanzo.

The government charged Mr. Costanzo with (among other counts) five counts of money laundering corresponding to the transactions conducted on May 20, 2015, October 7, 2015, November 21, 2015, February 2, 2017, and April 20, 2017 – *i*.e., the transactions that took place after the respective undercover agents had clearly indicated to him that their purchase money came from the sale of unlawful drugs. The indictment alleged that Mr. Costanzo engaged in these transactions with the intent to conceal and disguise the nature, location, source, ownership, and control of property "believed to be the proceeds of specified unlawful activity" in violation of 18 U.S.C. § 1956(a)(3)(B).

At trial, the agents who conducted the charged transactions described how they set up and conducted these exchanges using Bitcoin "wallet" apps that they downloaded on their cell phones, and communicated with Mr. Costanzo using these and other apps. They, and other government witnesses, also provided general explanations of the nature of Bitcoin, and the mechanism by which Bitcoin transactions are conducted. At the close of the government's evidence, Mr. Costanzo

made a general motion for a judgment of acquittal, arguing that the evidence was insufficient to prove the charged offenses. The district court denied the motion, and Mr. Costanzo rested without putting on evidence. The jury convicted Mr. Costanzo on each count, and the district court sentenced him to 41 months of incarceration, followed by a three-year term of supervised release.

In his appeal to the court of appeals, Mr. Costanzo's lead claim was that the evidence was insufficient to prove the money laundering statute's jurisdictional element, which required proof that the transactions underlying each charge affected "interstate or foreign commerce [] involving the movement of funds by wire or other means." 18 U.S.C. § 1956(c)(4). Mr. Costanzo acknowledged that the "sting" operation had incorporated a *fictional* interstate commerce nexus – the agents' representations that their purchase money came from drug transactions conducted across state lines – but he explained that the statute's plain language required an actual, rather than a fictional, interstate commerce nexus, and the government did not dispute this point.

After receiving briefing and hearing oral argument, the court of appeals rejected Mr. Costanzo's claim in a ten-page published opinion. App. A. The court of appeals concluded that the government had carried its burden of proving the money laundering statute's jurisdictional element by producing evidence of Mr. Costanzo's "use of global platforms," "transfer of bitcoin through a digital wallet," use of a "website based outside of the United States" to advertise, encouragement of the agents to download apps to facilitate transactions, and use of apps to engage in

encrypted communications and transfer bitcoin "from one digital wallet to another." *Id*. at 9-10. Mr. Costanzo filed a petition for en banc review, which the court denied. App. C.

REASON FOR GRANTING THE WRIT

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court made plain that an exercise of congressional authority purportedly authorized by the Commerce Clause must have an actual and tangible connection to interstate commerce. An interstate commerce nexus that is merely speculative or hypothetical, or that "pile[s] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," does not suffice. *Id*. at 567. The Court observed that some federal statutes seek to ensure their integrity under the Commerce Clause by means of "jurisdictional element[s]" – elements that "ensure, through case-by-case inquiry, that the [transaction] in question affects interstate commerce." *Id*. at 561. The money-laundering statute employed to prosecute Mr. Costanzo, 18 U.S.C. § 1956, is one such statute. As applied here, the statute required proof beyond a reasonable doubt that Mr. Costanzo engaged in transactions "which in any way or degree affect[ed] interstate or foreign commerce (i) involving the movement of funds by wire or other means." *Id*. § 1956(c)(4).

But there was no such proof. The evidence described transactions that took place face-to-face, across tables located wholly within Arizona, in which stacks of cash were exchanged for virtual currency summoned from geographically-undefined

corners of cyberspace. In order to affirm Mr. Costanzo's convictions despite this flaw, the court of appeals was compelled to reason that the statute's jurisdictional element require proof only of the use of instruments that *can* be used to conduct interstate transactions, and not proof that these instruments actually *were* so used in the transactions in question. This misinterpretation of *Lopez* and its progeny threatens to render "jurisdictional elements" ineffective at keeping Congress within its constitutional sphere. This Court should grant certiorari and correct the court of appeals' misconstruction of its precedent.

ARGUMENT

The court of appeals contravened this Court's opinion in *United States v. Lopez* by holding that a statute's interstate commerce "jurisdictional element" may be satisfied by evidence of the use of instruments that are *capable* of being used for interstate transactions, even without evidence that they *were* so used in the transactions in question.

The Constitution created "a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (*citing* U.S. Const. art. I, § 8). The Framers intended that the powers to be exercised by the federal government would be "'few and defined,'" whereas the powers retained by the state governments would be "'numerous and indefinite.'" *Id.* (*quoting* The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)). They did this to maintain "a healthy balance of power between the States and the Federal Government," and thereby to "reduce the risk of tyranny and abuse from either front." *Id.* (internal quotation marks omitted).

It follows that whenever the federal government acts, it must point to an affirmative grant of power in the Constitution that authorizes its action. Because the federal government "is entirely a creature of the Constitution," and "[i]ts power and authority have no other source," federal action taken in the absence of such a grant of authority is *ultra vires*. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion). These principles carry special force in cases like this one, which involve "the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). Indeed, all of the transactions at issue here took place within the State of Arizona, which has its own statute outlawing money laundering. Ariz. Rev. Stat. Ann. § 13-2317 (West, Westlaw through 54th Leg., 2d Reg. Sess.).

Mindful of this constitutional framework, Congress built into the money-laundering statute a "jurisdictional element" – an offense element designed to "ensure, through case-by-case inquiry," that any particular instance of alleged money laundering falls within the federal government's power to address. *Lopez*, 514 U.S. at 561.

Section 1956's jurisdictional element identifies four ways in which the government may prove the requisite interstate commerce nexus:

> [T]he term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree[.]

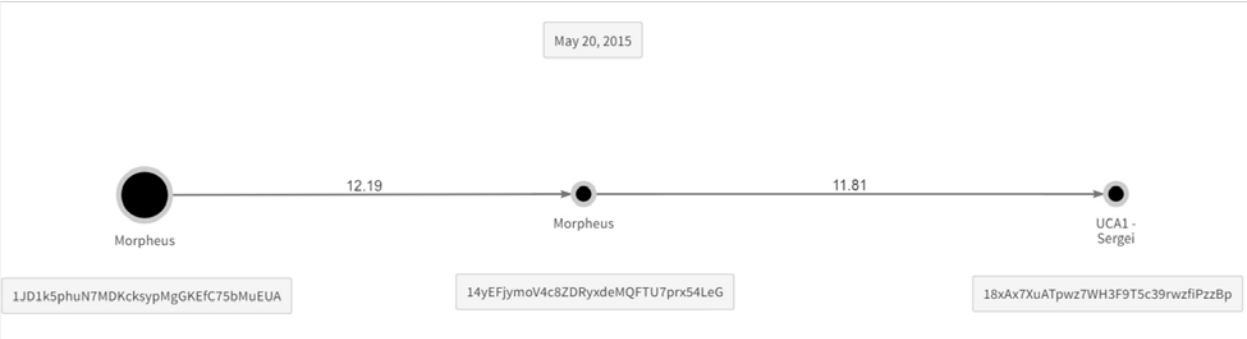
18 U.S.C. § 1956(c)(4).

The transactions underlying Mr. Costanzo's convictions did not involve a financial institution, "monetary instruments," or the transfer of title to any property, so Section 1956(c)(4)(A)(ii) and (iii) and Section 1956(c)(4)(B) are inapplicable. *See* 18 U.S.C. § 1956(c)(5) (defining "monetary instruments"). The only part of the jurisdictional element that the government could claim to have satisfied is Section 1956(c)(4)(A)(i), which requires proof that the transactions "affect[ed] interstate or foreign commerce" "involving the movement of funds by wire or other means." 18 U.S.C. § 1956(c)(4)(A)(i). But the government's evidence failed to make this showing.

Each of the five transactions underlying Mr. Costanzo's convictions was literally conducted across a table, and all of these tables were situated entirely within the state of Arizona. On one side of the tables sat government agents, who produced cash and handed it to Mr. Costanzo. The agents *pretended* that their cash came from interstate drug transactions, but there was no evidence that it actually did. The only evidence of the true provenance of the agents' cash consisted of testimony that it came from government "undercover" or "flash" funds, with no information regarding its geographic origin.

On the other side of the tables sat Mr. Costanzo, who used his cell phone to cause Bitcoin to be transferred to the agents' cell phones. The evidence established that Mr. Costanzo's side of the transactions involved "wallet" apps, the Internet, and an Internet-based system called the "Blockchain." But there was no evidence

that any of the charged transactions involved the transfer of Bitcoin across a state or national border. Nor was there evidence that computer servers or devices located outside of Arizona were involved in these transactions. The evidence regarding these transactions is represented by illustrations that an IRS Special Agent introduced at trial, depicting Bitcoin transfers running between geographically indeterminate "wallet addresses" hovering in cyberspace:



In short, the government failed to produce evidence satisfying the money laundering statute's jurisdictional element.

In holding to the contrary, the panel cited the following evidence:

1. evidence "regarding Costanzo's business";

2. evidence of Mr. Costanzo's "use of global platforms";

3. evidence of Mr. Costanzo's "transfer of bitcoin through a digital wallet, which by its nature invokes a wide and international network";

4. evidence that Mr. Costanzo advertised his business through "a website based outside of the United States";

5. evidence that Mr. Costanzo "encouraged the undercover agents to download applications from the Apple Store or other similar platforms to facilitate their communications and transactions";

6. evidence that Mr. Costanzo "then utilized those applications to engage in encrypted communications with the agents to arrange the transfers";

7. evidence that Mr. Costanzo "used those applications on their smartphones to transfer bitcoin from one digital wallet to another"; and

8. evidence that "[e]ach transaction was complete only after it was verified on the blockchain."

App. A at 9-10.

This evidence established that the transactions underlying Mr. Costanzo's convictions involved commerce, and that they involved facilities – "global platforms" and an "international network" – that *can* be used to conduct interstate and international transactions. But there was no evidence that these facilities actually *were* used in that fashion, in connection with any of the charged transactions. In essence, it was no different from evidence that a defendant placed a call with a landline telephone. Landline telephone service involves "global platforms" and an "international network," but it does not follow that every landline telephone call amounts to an interstate or international transaction. It can just as easily involve a person calling her next-door neighbor to tell him that he left his porch light on. *See United States v. Sutcliffe*, 505 F.3d 944, 952 (9th Cir. 2007) (characterizing the internet as "similar to – and often using – our national network of telephone lines").

Because the evidence to which the court of appeals pointed failed to show that the charged transactions actually "affect[ed] interstate or foreign commerce [] involving the movement of funds by wire or other means," as opposed to merely involving facilities that *can* be used in this fashion, that evidence was insufficient to

satisfy the money laundering statute's jurisdictional element. 18 U.S.C. § 1956(c)(4). The court of appeals' contrary holding cannot be reconciled with *Lopez* and its progeny.

In *Lopez*, this Court reviewed a constitutional challenge to the portion of the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647 (1990), that made it a federal offense "for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). Stressing that the law "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce," the Court held that it did not fall within Congress's Commerce Clause power. *Lopez*, 514 U.S. at 551. The Court elaborated on the latter observation, noting that the law contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561; *see also id.* at 562 (observing that law had no "express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce"); *accord United States v. Morrison*, 529 U.S. 598, 613 (2000) (striking down provision of statute that, like Gun-Free School Zones Act, "contain[ed] no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce").

Central to these holdings is the understanding that a statute's "jurisdictional element" can save the statute from unconstitutionality by confirming that its

application in an individual case involves an *actual*, and not merely a *hypothetical*, effect on interstate commerce. A jurisdictional element that requires merely proof that the defendant used an instrument – such as a telephone – that *can* be used to engage in interstate transactions cannot effectively ensure that the statute's application remains within constitutional limits. Indeed, given the widespread availability and ubiquitous use of such instruments, including cellular telephones, computers, tablets, and other devices, such an element could come close to authorizing Congress to exercise a general "police power, which the Founders denied the National Government and reposed in the States." *Id*. at 618.

In sum, because the court of appeals' misunderstanding of the nature and function of a Commerce Clause "jurisdictional element" conflicts with this Court's precedent with respect to an important issue of constitutional law, this Court should grant certiorari and state clearly that such elements are satisfied only by proof of an *actual* effect on interstate commerce.

CONCLUSION

For the reasons set forth above, the Court should grant a writ of certiorari.

Respectfully submitted on October 23, 2020.

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