No. 22-5306

IN THE SUPREME COURT OF THE UNITED STATES

MICKY RIFE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2423(c) -- which prohibits a U.S. citizen from engaging in illicit sexual conduct with a minor following foreign travel or residence -- exceeds Congress's enumerated powers.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Ky.):

United States v. Rife, No. 20-cr-2 (June 24, 2020)

United States Court of Appeals (6th Cir.):

United States v. Rife, No. 20-5688 (May 5, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 33 F.4th 838.* The opinion and order of the district court (Pet. App. B1-B11) is reported at 429 F. Supp. 3d 363.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2022. The petition for a writ of certiorari was filed on August

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* The appendix to the petition for a writ of certiorari is not separately paginated. This brief uses "Pet. App. A1-A30" to refer to the court of appeals' opinion and "Pet. App. B1-B11" to refer to the district court's opinion.

2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of engaging in illicit sexual conduct with a minor following foreign travel or residence, in violation of 18 U.S.C. 2423(c) and (e). Judgment 1. He was sentenced to 252 months of imprisonment, to be followed by 20 years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A30.

1. In 2012, petitioner moved from Kentucky to Phnom Penh, Cambodia, to work as a teacher in an elementary school. Pet. App. A2. While he was employed there, petitioner sexually assaulted young female students. Ibid. On multiple occasions, he threw one student, then four or five years old, up in the air, touched her vaginal area, and digitally penetrated her. Ibid. Petitioner also put his hand underneath the clothing of another student, then seven or eight years old, and touched her vagina. Ibid. That "happened many times." Ibid. In 2018, based on the information that he had sexually abused its students, the school fired petitioner. Ibid. He then returned to Kentucky. Ibid.

A federal grand jury charged petitioner with two counts of violating 18 U.S.C. 2423(c), which prohibits a U.S. citizen or lawful permanent resident "who travels in foreign commerce or

resides, either temporarily or permanently, in a foreign country, [from] engag[ing] in any illicit sexual conduct with another person." 18 U.S.C. 2423(c). Section 2423(f) defines "illicit sexual conduct" to include, among other things, an unlawful "sexual act" with a minor. 18 U.S.C. 2423(f); see 18 U.S.C. 2246(2) (defining "sexual act").

The district court denied petitioner's motion to dismiss, rejecting his contention that Congress lacked the power to regulate his foreign-employment-related conduct. See Pet. App. B1-B11. The court observed that the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol), May 25, 2000, T.I.A.S. No. 13,095 (entered into force Jan. 23, 2003), "requires each signatory nation to ensure that certain sexual offenses against children are 'fully covered under its criminal or penal law, whether these[] offen[s]es are committed domestically or transnationally.'" Pet. App. B2-B3 (citation omitted). And the court explained that, because Section 2423(c) is "rationally related to the implementation of the Optional Protocol," Congress had the authority to enact it under the Necessary and Proper Clause. Id. at B6; see id. at B5-B8. The court also noted that because the provision was constitutional for that reason, it was "not necessary" to consider whether Section 2423(c) is likewise constitutional under the Foreign Commerce Clause. Id. at B8.

Petitioner pleaded guilty to one of the two Section 2423(c) counts. See Pet. App. A3. The court sentenced petitioner to 252 months of imprisonment, to be followed by 20 years of supervised release. Judgment 2-3.

2. The court of appeals affirmed. Pet. App. A1-A30.

While agreeing with the district court that Congress has the authority to prohibit petitioner's conduct, a majority of the panel expressed the view that the conduct fell outside the scope of the Foreign Commerce Clause. Pet. App. A4-A9. The majority deemed the types of conduct that Congress may regulate under the Foreign Commerce Clause to be narrower than the types that it may regulate under the Interstate Commerce Clause. Id. at A5-A7. In its view, Congress's power under the Foreign Commerce Clause is limited to regulating "navigation and the streams (figuratively speaking) of foreign * * * commerce" and to punishing "acts that interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations." Id. at A5 (citations omitted). Proceeding from that premise, it concluded that, because petitioner's "molestation of his two victims was undisputedly noncommercial," and "was not itself trade or commerce of any kind," the Foreign Commerce Clause did not provide a basis for affirmance. Id. at A7.

The court of appeals instead affirmed based on its unanimous recognition that Section 2423(c) is necessary and proper for the

implementation of the Optional Protocol. Pet. App. A9-A13. The court observed that, under this Court's decision in Missouri v. Holland, 252 U.S. 416 (1920), the Necessary and Proper Clause empowers Congress to implement valid treaties. Pet. App. A13. And the court found that the "Optional Protocol is undisputedly a valid treaty," rejecting the contention that "§ 2423(c) as applied to noncommercial sex offenses against children is so unrelated to the treaty's provisions as to put this case beyond the Court's holding in Holland." Ibid.

Judge Stranch concurred in the judgment. Pet. App. A14-A30. She agreed with the court of appeals that the Necessary and Proper Clause, in conjunction with the power to make treaties, empowered Congress to adopt Section 2423(c). Id. at A24-A30. She explained, however, that Section 2423(c) was also authorized by the Foreign Commerce Clause. Id. at A15-A24.

ARGUMENT

Petitioner renews his contention (Pet. 7-20) that 18 U.S.C. 2423(c) exceeds Congress's enumerated powers. The court of appeals correctly affirmed petitioner's conviction, and its judgment does not conflict with any decision of this Court or any other court of appeals. This Court has repeatedly denied petitions for writs of certiorari contending that Section 2423(c) exceeds Congress's enumerated powers. See Bollinger v. United States, 578 U.S. 1002 (2016) (No. 15-776); Pendleton v. United States, 567 U.S. 918

(2012) (No. 11-7711); Bianchi v. United States, 562 U.S. 1200 (No. 10-522); Clark v. United States, 549 U.S. 1343 (2007) (No. 06-8169). The same result is warranted here.

1. Article I of the Constitution empowers Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18. Article II, in turn, empowers the President, with the advice and consent of two-thirds of the Senate, to "make Treaties." Art. II, § 2, Cl. 2. And in Missouri v. Holland, 252 U.S. 416 (1920), this Court held that, if the Treaty Clause empowers the President to make a treaty, the Necessary and Proper Clause empowers Congress to adopt appropriate legislation to effectuate the treaty. See id. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."); see also Neely v. Henkel, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper for carrying into execution * * * the powers * * * vested in the Government of the United States * * * includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty.").

The Optional Protocol, a treaty to which the United States is a party, seeks to eliminate, among other practices, "child prostitution." Optional Protocol Art. 1. To that end, the Optional Protocol provides that each party must, "as a minimum," ensure that certain acts related to child prostitution "are fully covered under its criminal or penal law, whether [such] offences are committed domestically or transnationally." Id. Art. 3.1. The Optional Protocol requires parties to adopt "laws, administrative measures, social policies and programmes to prevent th[ose] offences." Id. Art. 9.1. Even if the Optional Protocol does not specifically require all parties to enact a measure like Section 2423(c), Section 2423(c)'s prohibition of petitioner's conduct "give[s] efficacy" to the Optional Protocol, Neely, 180 U.S. at 121, and is thus necessary and proper to the implementation of the treaty.

In particular, prohibiting "child sex abuse by U.S. residents abroad" helps effectuate the Optional Protocol's "goal of eliminating commercial child sexual exploitation, including global sex tourism." Pet. App. A27 (Stranch, J., concurring in the judgment) (citation omitted); see United States v. Comstock, 560 U.S. 126, 134 (2010) (explaining that the Necessary and Proper Clause empowers Congress to adopt legislation that is "rationally related to the implementation" of an enumerated power); Gonzales v. Raich, 545 U.S. 1, 35 (2005) (Scalia, J., concurring in the

judgment) (explaining that the Necessary and Proper Clause empowers Congress to adopt laws that are "necessary to make a regulation * * * effective"). Even when not explicitly undertaken in conjunction with an exchange of money, "sexual abuse of minors" by a U.S. citizen abroad can, among other things, "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." United States v. Lindsay, 931 F.3d 852, 863 (9th Cir. 2019), cert. denied, 140 S. Ct. 1288 (2020).

Petitioner's contrary arguments lack merit. His suggestion that the Court "overturn" Holland, Pet. 11, "fail[s] to discuss the doctrine of stare decisis or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." Randall v. Sorrell, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). "Such an incomplete presentation is reason enough to refuse [an] invitation to reexamine" controlling precedent. Ibid. And in any event, petitioners' reliance (Pet. 8-10) on Justice Scalia's and Justice Alito's separate opinions in Bond v. United States, 572 U.S. 844 (2014), is misplaced.

Section 2423(c) does not implicate Justice Scalia's concern that a treaty-implementing statute violating "the principle of

state sovereignty" may not be "'proper'" for purposes of the Necessary and Proper Clause. Bond, 572 U.S. at 879 (Scalia, J., concurring in the judgment). The statute governs conduct of U.S. citizens in foreign countries, which is the domain of the federal government, not of any State. See Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."). Similarly, Section 2423(c) does not implicate Justice Alito's concern that the treaty power, and the authority to implement it, be "limited to agreements that address matters of legitimate international concern." Bond, 572 U.S. at 897 (Alito, J., concurring in the judgment); see id. at 882-884 (Thomas, J., concurring in the judgment). Section 2423(c) plainly addresses a matter of international concern: the activities of U.S. citizens in foreign countries.

Petitioner also errs in seeking Section 2423(c)'s invalidation based on the assertion (Pet. 17) that the provision "was not written in response to the Optional Protocol." The Judiciary Committee of the House of Representatives recommended passage of the legislation containing Section 2423(c) "just six days after the Senate consented to the ratification of the Optional Protocol." United States v. Park, 938 F.3d 354, 360 (D.C. Cir. 2019). And the Committee on the Rights of the Child, which

monitors parties' implementation of their obligations under the Protocol, has expressed concern about the involvement of American citizens in child sex tourism; in response, the Department of State has cited Section 2423(c) as evidence of the United States' efforts to act aggressively to combat child sex tourism. See id. at 367 (citing U.S. Dep't of State, Combined Third and Fourth Periodic Report of the United States of America on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography, ¶ C-57 (Jan. 22, 2016)). In any event, Congress's subjective motive for adopting Section 2423(c) is legally immaterial, because "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948).

2. Furthermore, alternative grounds for affirmance make this case an unsuitable vehicle for reviewing petitioner's contentions concerning Holland. Even putting aside Section 2423(c)'s connection to the Optional Protocol, the provision is independently constitutional because it falls within Congress's powers under the Foreign Commerce and Necessary and Proper Clauses, as well as its powers over foreign affairs. See Gov't C.A. Br. 29 (invoking "Congress's commerce power," as "augmented by the Necessary and Proper Clause"); id. at 32 (invoking "the federal

government's other powers over foreign affairs"); see also Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 38 (1989) ("Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'") (citation omitted).

The Foreign Commerce Clause empowers Congress to "regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3. And the Necessary and Proper Clause empowers Congress to regulate activity that does not itself constitute foreign commerce, if regulating that activity is "necessary to make a regulation of [foreign] commerce effective." Raich, 545 U.S. at 35 (Scalia, J., concurring in the judgment). Congress's power to regulate foreign commerce plainly includes the power to prohibit "[i]nternational sex tourism" -- "a multi-billion dollar industry." Lindsay, 931 F.3d at 862. And Section 2423(c)'s ban on child sex abuse is "an essential component of Congress's overall scheme to combat commercial sex tourism by Americans abroad." Ibid.

Congress could reasonably determine that allowing child sex abuse abroad could "encourage U.S. citizens to travel or relocate to foreign countries that do not, or cannot, successfully police child sexual abuse, thereby affecting the price for child prostitution services and other market conditions in the child

prostitution industry." Park, 938 F.3d at 373 (brackets and citation omitted). The provisions of Section 2423(c) "curb the supply and demand in the sex tourism industry," United States v. Durham, 902 F.3d 1180, 1214 (10th Cir. 2018), cert. denied, 139 S. Ct. 849 (2019), thus "mak[ing] * * * effective" the prohibition of international sex tourism, Raich, 545 U.S. at 35 (Scalia, J., concurring in the judgment).

In addition, by establishing the United States as a sovereign nation, the Constitution implicitly vests it with the "powers of external sovereignty" that are "inherently inseparable from the conception of nationality." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); see Perez v. Brownell, 356 U.S. 44, 57 (1958) ("The States that joined together to form a single Nation * * * must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations."); Burnet v. Brooks, 288 U.S. 378, 396 (1933) ("As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."); see also Zivotofsky v. Kerry, 576 U.S. 1, 48-51 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that the Constitution vests foreign-affairs powers in the President, but that Congress may enact laws that are necessary and proper for carrying those powers into

execution). The traditional "powers of external sovereignty," Curtiss-Wright, 299 U.S. at 318, include the authority to regulate the conduct of U.S. citizens overseas. See Blackmer v. United States, 284 U.S. 421, 436 (1932) ("By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country."); Joseph Story, Commentaries on the Conflict of Laws § 540, at 451 (1834) ("[N]ations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens [abroad].").

Indeed, since the earliest days of the Republic, the United States has exercised the power to regulate its citizens' conduct abroad. See Geoffrey R. Watson, Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction, 17 Yale J. Int'l L. 41, 49-50 (1992) (discussing federal regulation of U.S. citizens abroad in the 18th and early 19th centuries); Louis Henkin, Foreign Affairs and the United States Constitution 71 (2d ed. 1996) (justifying "various statutes governing the conduct of U.S. nationals abroad" by invoking "the theory that the right to regulate the conduct of nationals abroad is inherent in sovereignty"). Congress exercised that well-established power when it prohibited U.S. citizens from abusing children in foreign places. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 43 & n.1 (2012) (citing Section

2423(c) to illustrate the principle that a "country may, if it wishes, subject its own citizens [abroad] to its laws"). In doing so, Congress protected the foreign-relations interests of the United States. See H.R. Rep. No. 525, 107th Cong., 2d Sess. 3 (2002) (recognizing a need for a provision like Section 2423(c) because foreign countries were "experiencing significant problems with sex tourism," had "requested that the United States act," and were "blam[ing] the United States for the problem" because "many of the sex tourists are American"); Park, 938 F.3d at 367 (noting that Section 2423(c) addressed "international opprobrium" over the United States' failure to prosecute its citizens for child sex abuse overseas).

3. No circuit conflict exists on the question whether Section 2423(c) exceeds Congress's enumerated powers. Every court of appeals to consider the question has upheld the statute under the commerce power, the treaty power, or both. See United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011) (commerce power), cert. denied, 567 U.S. 918 (2012); United States v. Bollinger, 798 F.3d 201, 219 (4th Cir. 2015) (commerce power), cert. denied, 578 U.S. 1002 (2016); Pet. App. A13 (6th Cir.) (treaty power); Lindsay, 931 F.3d at 863 (9th Cir.) (commerce power); Durham, 902 F.3d at 1216 (10th Cir.) (commerce power); Park, 938 F.3d at 362-374 (D.C. Cir.) (commerce and treaty powers). And particularly because "[t]his Court 'reviews judgments, not statements in opinions,'"

that consensus outcome does not warrant this Court's review. California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted).

Petitioner also briefly suggests (Pet. 18) that the outcome in his case should be different, on the theory that Section 2423(c) does not cover "noncommercial sexual acts." But that question is not properly before this Court. Petitioner's question presented (Pet. ii) concerns only the constitutionality of Section 2423(c). This Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari." Yee v. City of Escondido, 503 U.S. 519, 535 (1992); see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Petitioner also did not raise any question of statutory interpretation in the court of appeals, and the court accordingly did not address it. See Pet. App. A3. This Court is a "court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 708, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari" as to a question that "'was not pressed or passed upon below,'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). Nor, for that matter, did petitioner raise that issue in the district court. See Pet. App. B1. At a minimum, therefore, petitioner's contention would be subject to review only for plain error. See Fed. R. Crim. P. 52(b).

Petitioner's contention in any event lacks merit. Section 2423(c) prohibits "[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, [from] engag[ing] in any illicit sexual conduct with another person." 18 U.S.C. 2423(c). Section 2423(f) then defines "illicit sexual conduct" to refer to three categories of conduct, one of which is "a sexual act (as defined in [18 U.S.C.] 2246) with a person under 18 years of age that would be in violation of [18 U.S.C. 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States." 18 U.S.C. 2423(f)(1). Petitioner's acts -- intentionally touching and digitally penetrating minor girls' genitals -- qualify as "sexual acts," see 18 U.S.C. 2246(2), and would violate federal law if they occur in the special maritime or territorial jurisdiction of the United States, see 18 U.S.C. 2241(c).

Petitioner seeks to limit Section 2423(c) to "commercial sexual exploitation," Pet. 18 (emphasis added), but the applicable statutory provision does not use the word "commercial," see 18 U.S.C. 2423(f)(1), and this Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face," Bates v. United States, 522 U.S. 23, 29 (1997). Accordingly, every other court of appeals to consider the question has recognized that 18 U.S.C. 2423(c) criminalizes acts of child sex abuse

regardless of whether they are "commercial." See Lindsay, 931 F.3d at 860 (9th Cir.); Park, 938 F.3d at 364 (D.C. Cir.); see also Bollinger, 798 F.3d at 207 (4th Cir.). Moreover, although the government conceded below that petitioner's conduct was "noncommercial," Pet. App. A7, his abuse of young female students directly related to his employment at the school -- indeed, the school fired him based on it, id. at A2. At a bare minimum, therefore, petitioner cannot show that his conviction "had a serious effect on the fairness, integrity or public reputation of judicial proceedings," Greer v. United States, 141 S. Ct. 2090, 2097 (2021), and he therefore cannot justify plain-error relief, see ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2022