No. 22-5306

in the

Supreme Court

of the

United States

MICKY RIFE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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This case brings to question "whether the President and two-thirds of the Senate, by the sole fact of their consent to a treaty, can empower Congress to enact legislation that it otherwise could not enact by the exercise of its enumerated powers in Article I." (Appendix 1, p.10) The Solicitor General says Congress has this authority under the Necessary and Proper clause. First, it contends *Missouri v. Holland*, 252 U.S. 416 (1920) requires a "yes" answer, without further exploration of the reasoning (or lack thereof) contained in *Holland*. Second, the Solicitor General alternatively argues 18 U.S.C. § 2423(c) can be upheld under the Foreign Commerce Clause. Each response underpins why this Court should grant certiorari review.

A. Missouri v. Holland

Without addressing the merits of the Sixth Circuit's challenge to the validity of *Missouri v. Holland*, 252 U.S. 416 (1920), the Solicitor General argues that *stare decisis* mandates rejection of this petition. However, as this Court has recently noted, *stare decisis* does not "compel unending adherence" to an abuse of judicial authority. *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2243 (2022). Rather, the words of the Constitution outweigh any blind obedience to *stare decisis*. 124 S.Ct. at 2243. As Justice Thomas noted in his concurrence in *Gamble v. United States*, 204 L. Ed. 2d 322, 139 S. Ct. 1960, 1984 (2019): "When faced with a demonstrably erroneous precedent, my rule is simple: We

should not follow it." As set forth in the initial Petition, *Holland* is demonstrably erroneous – and should not be followed.

Determining whether or not Congress has authority, pursuant to *Holland*, under the Necessary and Proper clause to enact such legislation has significant, wide reaching ramifications, and therefore is a proper consideration for certiorari review. If *Holland* is upheld, "[t]he Necessary and Proper Clause would become a portal, through which Congress would leave behind its limited powers and exercise, at last, an unlimited one. For example, a treaty addressing climate change—or an international convention for the prevention of infectious diseases—might empower Congress to regulate virtually any conduct it chose. Congress would be 'one treaty away from acquiring a general police power.'" (Appendix 1, p.10) Certainly, the Founding Fathers, in setting up the checks and balances of our form of Government, could not have intended such unchecked Congressional authority.

The Solicitor General declares this Court has steadfastly refused to grant certiorari on challenges to Congress's authority to promulgate 18 U.S.C. § 2423(c), citing to four cases in which this Court denied certiorari review. (Brief in Opposition pp.5-6) However, in each case, the only challenge raised was Congress's authority under the Foreign Commerce Clause. The Solicitor General does not cite to any instance in which the direct opportunity to address *Holland*'s erroneous interpretation of the Necessary and Proper clause was denied by this Court in relation to 18 U.S.C. § 2423(c). Indeed, this Court carefully avoided the issue in

Bond v. United States, 572 U.S. 844, 855, 134 S. Ct. 2077, 2087, 189 L. Ed. 2d 1 (2014), although certainly Justices Scalia and Thomas would have addressed the claim and invalidated *Holland*'s holding. Here, unlike in *Bond*, there is no basis to avoid the issue – the Sixth Circuit has already determined that 18 U.S.C. § 2423(c) is not a proper exercise of Congress's Foreign Commerce Clause power. The slender reed supporting the conviction is the single line in *Holland*, which is unsupported by precedent. This Court should grant certiorari review to correct the erroneous decision in *Holland*, and restore the checks and balances set forth in the Constitution.

B. Foreign Commerce Clause

The Solicitor General also alternatively argues that, even if authority for 18 U.S.C. § 2423(c) cannot be supported under the Necessary and Proper clause, Congress has the authority under the Foreign Commerce Clause to prosecute Petitioner Rife's conduct. There are two problems with the Solicitor General's alternative argument. First, the Solicitor General has not filed a cross-petition on this claim. Second, the Foreign Commerce Clause cannot be used to regulate private, non-commercial, extra-territorial conduct.

The Solicitor General did not cross-petition for certiorari on this matter, or argue in its brief in opposition "that the issues are of sufficient general importance to justify the grant of certiorari" on that alternative claim. *United States v. Nobles*, 422 U.S. 225, 241 n.16, 95 S. Ct. 2160, 2172, 45 L. Ed. 2d 141 (1975). "[W]hen a

respondent in this Court seeks to alter a lower court's judgment, he must file and we must grant a cross-petition for review." *Houston Cmty. Coll. Sys. v. Wilson*, 212 L. Ed. 2d 303, 142 S. Ct. 1253, 1258 (2022). Because the Sixth Circuit explicitly held that the Foreign Commerce Clause was not a basis for Congressional authority (Appendix 1, p.6), the Solicitor General's failure to cross-petition should prevent this Court from considering this as a basis to deny certiorari.

Petitioner Rife readily concedes that the opinion of the Sixth Circuit creates a conflict among the circuits as to whether the Foreign Commerce Clause can be utilized to uphold 18 U.S.C. § 2423(c). See, for example, *United States v. Schmidt*, 845 F.3d 153, 157 (4th Cir. 2017); *United States v. Lindsay*, 931 F.3d 852 (9th Cir. 2019), *United States v. Durham*, 902 F.3d 1180, 1200 (10th Cir. 2018). But the Solicitor General's decision to not cross-petition on this issue should preclude this Court from denying certiorari on this basis.

In any event, the Foreign Commerce Clause cannot be used by Congress to regulate private, non-commercial, extra-territorial conduct.1 Although there is little precedent from this Court addressing the Foreign Commerce Clause, Justice Thomas has opined that the Foreign Commerce Clause should not be read as

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1 The Solicitor General argues that this issue is not properly before this Court; however, to the extent that the Court would consider the opposition's Foreign Commerce Clause argument, it is a fair response. Further, the Sixth Circuit extensively relied on the non-commercial nature of Petitioner Rife's conduct in its analysis of the Foreign Commerce Clause. (Appendix 1, pp.6-8)

expansively as the domestic Commerce Clause, and that "whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity." *Baston v. United States*, 197 L. Ed. 2d 478, 137 S. Ct. 850, 853 (2017)(Thomas, dissenting from the denial of certiorari). In the criminal context, Congress has defined foreign commerce as "commerce with a foreign country," 18 U.S.C. § 10, which is not met by Petitioner Rife's conduct abroad.

Moreover, the United States conceded at the district court and at the Sixth Circuit that Rife's conduct was non-commercial in nature. And both the Solicitor General and Petitioner Rife further agree that the aim of the Optional Protocol was to eliminate child prostitution and sex tourism – neither of which describes Rife's conduct here. "The Optional Protocol covers only commercial sex offenses against children; it says nothing about the effects of noncommercial sex offenses on foreign commerce." *United States v. Durham*, 902 F.3d 1180, 1262 (10th Cir. 2018) (Hartz, dissenting). The complete non-commercial nature of Petitioner Rife's conduct takes this outside the scope of the Foreign Commerce Clause.

"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." *United States v. Al-Maliki*, 787 F.3d 784, 791 (6th Cir. 2015). This Court should so act by granting certiorari review, and declaring that the Necessary

and Proper Clause does not provide Congress with independent authority to create criminal laws to enforce treaties.

CONCLUSION

Rife requests this Court grant certiorari, reverse the Sixth Circuit's decision, and dismiss the convictions.

Respectfully submitted,

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