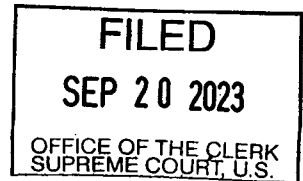


No. **23 - 5908**



IN THE
SUPREME COURT OF THE UNITED STATES

Eric A. Zevely — Petitioner

vs.

United States of America — Respondent

On Petition For A Writ of Certiorari To
The United States Court of Appeals for the Sixth Circuit

Petition For Writ of Certiorari

Eric A. Zevely, # 77764-061
Petitioner Pro Se
Federal Correctional Institution - Hazelton
P.O. Box 5000
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Questions Presented

1. In a federal criminal conviction case, whether a motion under 18 U.S.C. §3582(c) is a point in the litigation permitting a defendant to challenge subject-matter jurisdiction, where case law by this Court establishes such lack of jurisdiction in the Article III inferior court.
2. In a federal criminal conviction case, on a multiple-count indictment, whether a plea agreement offered by the prosecution to proceed on one count to avoid possible consecutive sentences if convicted in a jury trial constitutes coercion and threats for which Federal Rule of Criminal Procedure 52(b) may be used, even in this Court, to make good the wrong done to invalidate the conviction.
3. In a federal criminal case, whether this Court's construction of the Constitution that constitutional Article III courts cannot be conferred with "criminal" case jurisdiction in such courts located within a State requires the courts to protect the rights of the individual against such conviction by a court shown to lack "judicial power" over crimes when sitting within a State this Court has held Congress lacks authority to confer in such court.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ 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:

RELATED CASES

There are no other related cases.

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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

The opinion of the United States Court of Appeals appears at Appendix A to the petition, dismissing the appeal without addressing, much less reaching the jurisdictional and constitutional merits and claims.

The opinion of the United States district court appears at Appendix B to the petition and petitioner has not been able to determine whether it is published or not.

Jurisdiction

The date on which the United States Court of Appeals entered its denial order was June 22, 2023.

No rehearing was pursued in this matter in the appellate courts.

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

Constitutional and Statutory provisions Involved

United States Constitution, Article I, §8, cl. 3, relevant here provides:

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

United States Constitution, Article III, Section 2, relevant here provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;..."

United States Constitution, Article V, provides:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

United States Constitution, Amendment V, provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment VIII, provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

United States Constitution, Amendment IX, provides:

"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."

Statutory Provisions

Title 18, United States Code, Section 2251 (b), relevant to this case provides:

"Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed."

Title 18, United States Code, Section 3231, provides:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Title 18, United States Code, Section 3582, in relevant part, provides:

"(C) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—
(i) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 U.S.C. 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or ...ⁿ (emphasis added on the disjunctive word "or").

Statement of the Case

During an investigation of William Weekley by the Federal Bureau of Investigation ("FBI") for his repeated sexual abuse of a minor victim, agents discovered that petitioner was one many people Weekley had made contact with via Craigslist. The investigation revealed that petitioner had previous-

ly been investigated both by the FBI and Homeland Security Investigation's ("HSI") Internet Crimes Against Children ("ICAC") task force as a result of his conversations with undercover HSI and FBI task force officers ("TFOs") about sexually abusing the TFOs' fictitious minor children. As a result of these investigations and a search warrant eventually executed at petitioner's residence, the Grand Jury returned an Indictment charging petitioner with numerous crimes involving the sexual exploitation of minors, including production of child pornography and attempted coercion or enticement of a minor. On November 23, 2018, petitioner pled guilty to the production count of the Indictment, pursuant to a plea agreement. On May 22, 2019, the petitioner was sentenced to 250 months with 15 years of supervised release to follow. The plea agreement included waivers of direct appeal and collateral attack.

On June 13, 2022, petitioner filed a motion pursuant to 18 U.S.C. §3582(c), as such a motion constitutes a point in the litigation of the criminal case, where petitioner raised, inter alia, lack of subject-matter jurisdiction of the sentencing court, and lack of authority of the Government to charge conduct not a "precise subject-matter" not expressly enumerated in the Constitution for federal nationwide "police power" enforcements.

On July 26, 2022, the District Court denied said motion, without addressing the jurisdictional or constitutional claims that invalidate the instant conviction. A timely filed Fed. R. Civ. P. 59(e) motion was denied on August 30, 2022. On October 3, 2022, petitioner filed his notice of

appeal challenging the July 26, 2022, and August 30, 2022, orders.

Although the Circuit Court correctly determined that a motion pursuant to §3582(c) is criminal in nature that comes within the 14-day limit to file an appeal, a layperson, such as petitioner, believed he had 60 days under Fed. R. App. P. 4(2)(B), since he was under a good-faith belief that the 14-day limit is for a direct appeal from the judgment of conviction—not under a denial of the denial of a §3582(c) motion.

Nevertheless, the District Court, being a constitutional Article III court, this Court's interpretation of the Constitution's provisions in Article III, §2, demonstrates such a court, sitting within a State, is incapable of being conferred with criminal jurisdiction, and it was an abuse of discretion for the district court to ignore the jurisdictional and constitutional claims, and a direct violation of its oath to uphold and support the Constitution of the United States this Court should protect petitioner's rights thereunder.

Reasons For Granting The Petition

I. The Constitution's limits on federal power does not permit the Government to extend its police power beyond those matters expressly enumerated in the instrument.

As this Court admonishes:

"We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, §8. As James Madison wrote: 'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' The Feder-

"In our federal system, the National Government possesses only limited powers; the states and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that 'the question respecting the extent of the powers actually granted' to the federal government 'is perpetually arising, and will probably continue to arise, as long as our system shall exist.'... In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many states and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries. 'The federal government' is acknowledged by all to be one of enumerated powers, '... That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the

admonished, and is relevant in this petition;

(Chief Justice Roberts has reiterated what the Court has continuously

Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936).

"The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution, and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment."

numerous times. For example, as this Court pointed out:

Our constitutional system of government, as this Court has made clear

The term "enumerated" plays a critical and important principle in

United States v. Lopez, 514 U.S. 549, 552 (1995) (citations omitted).

alist No 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." "Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front."

Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, § 8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated," ... The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."

Net'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533-535 (2012) (citations omitted).

Mr. Justice Story expressed it clearly, when he admonished:

"Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."

Houston v. Moore, 5 Wheat. 1, 48 (1820).

In addressing the Constitution's conferral upon Congress being limited as to its exercise of the federal police power versus the States' exercise of such power, this Court, citing an 1895 case, admonished:

"Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.'"

Keller v. United States, 213 U.S. 138, 146 (1909) (internal quotation marks and citation omitted).

Not only did sex-related offenses exist at the time the Framers were considering and drafting the Constitution, history also reflects the existence of sexual exploitation of both adults and minors in those

periods of our history, and the Framers knew this but did not decide to include that type of conduct, nor any crimes, other than those enumerated in the Constitution for national federal police power regulation or enforcement. And the principle has been made clear, with this Court pointing out:

"The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." ...

"State sovereignty is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." ... Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serve as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."

Nat'l Fed'n, supra, 567 U.S. 535-536 (citations omitted).

The federal courts have a duty to "say what the law is," with deference to be given to the paramount and supreme law—the Constitution. Marbury v. Madison, 1 Cranch 137, 177 (1803). With this in mind, it has been this Court's self-admonition:

"Our deference in matters of policy cannot, however, become abdication in matters of law. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." ... Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or

less wise, but cannot render it more or less constitutional." ... And there can be no question that it is the responsibility of this Court to enforce the limits on Federal power by striking down acts of Congress that transgress those limits."

Nat'l Fed'n, supra, 567 U.S. 538 (citations omitted).

With no enumeration of sex-related or exploitation conduct, whether of minors or otherwise as a "precise subject-matter" for national federal "police power" regulation and enforcement, this Court must strike down such acts of Congress, and order the reversal of the instant convictions and the dismissal of the indictments. United States v. Corrick, 298 U.S. 435, 440 (1936).

II. Petitioner's guilty plea was induced by threats and coercion and, therefore, invalidates the plea, the plea agreement, and the conviction for which this Court may apply Fed. R. (Crim. P. 52(b) to correct the error and make good the wrong done.

In United States v. Vonn, 535 U.S. 55 (2002), citing an earlier case opinion in this Court, it was made clear "that a defendant cannot overturn a guilty plea on collateral review absent a showing that the Rule 11 proceeding was "inconsistent with the rudimentary demands of fair procedure" or constituted a "complete miscarriage of justice," ... " Id., 535 U.S. 64 (citations omitted).

Although the term "collateral review" is not specifically defined, the term "collateral attack" is defined as: "An attack on a judgment in a proceeding other than a direct appeal. A petition for a writ of habeas corpus is one type of collateral attack." "Collateral attack," Black's Law Dictionary, Fourth Pocket Edition, 126 (West Publ. 2011).

"A motion brought under §3582(c) is part of the criminal proceedings," United States v. Lathan, 2022 U.S. App. LEXIS 25632, *1 (6th Cir. 2022), and is, therefore, considered a "point in the litigation" of the original criminal case for which "challenges to subject-matter jurisdiction may be raised by the defendant," and courts must consider them *sua sponte*," Ft. Bend Cty. v. Davis, 139 S. Ct. 1843, 1849 (2019) (citation omitted), including by this Court, since the courts below failed to do.

Borrowing from this Court, especially where the claims that the district court below is constitutionally precluded from exercising its "judicial Power" in the underlying case, and the Circuit Court abused its discretion in not, first and foremost, examining the lower interior court's jurisdiction in the purported federal criminal case, thus such error is plain, this Court has reiterated:

"Rule 52(b) provides: 'A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.' Rule 52(b) is permissive, not mandatory. . . . To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. . . . First, there must be error. Second, the error must be plain. Third, the error must affect 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.' . . . If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.' . . .

"The defendant has 'the burden of establishing entitlement to relief for plain error.' . . . That means that the defendant has the burden of establishing each of the four requirements for plain-error relief. Satisfying all four prongs of the plain-error test 'is difficult.' . . .

Greer v. United States, 141 S. Ct. 2090, 2096-2097 (2021) (citations omitted).

In this case of first impression, the admonition by Mr. Justice Alito is instructive: "It is time to heed the Constitution and return the issue of [crime] to the people's elected representatives. ... That is what the Constitution and the rule of law demand." Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2243 (2022) (emphasis added).

Similarly, as in Dobbs, supra, the Constitution makes no reference to sex-related or exploitation of minors conduct, and no such right to regulate such "precise subject-matters" is implicitly, and much less expressly, provided by any constitutional provision for nationwide federal "police power" regulation, since "Constitutional analysis must begin with 'the language of the instrument,' ... which offers a 'fixed standard' for ascertaining what our founding document means, ..."
Id., 142 S.Ct. 2244-2245 (citations omitted).

And what our founding document does not mean is that the conduct proscribed in the federal criminal statutes can be enforced by the Federal Government nationally, except those for which the Framers expressly provided for in the Constitution. See, e.g., Cohens v. Virginia, 6 Wheat. 264, 428 (1821) ("It is clear, that Congress cannot punish felonies generally;"); and, e.g., Taylor v. United States, 136 S.Ct. 2074, 2082-2083 (2016) (citations omitted) (Thomas, J., dissenting).

Mr. Justice Clifford, speaking for the Court, in United States v. Hall, 98 U.S. 343 (1879), can be said to have laid the matter to rest, as to the subject-matters the circuit, now district, courts may sit in judgment of:

"Circuit courts have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the Acts of Congress otherwise provide, and concurrent with the district courts of the crimes and offenses cognizable in those courts. 1 Stat. 2 L., 79; R. S., sec. 629, p. 112.

"Such courts possess no jurisdiction over crimes and offenses committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested with any such jurisdiction beyond what the power ceded to the United States by the Constitution authorizes Congress to confer, from which it follows that before an offense can become cognizable in the circuit court, the Congress must first define or recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender. . . .

"Courts of the kind were not created by the Constitution, nor does the Constitution invest them with any criminal jurisdiction. Even the powers of an express character given to Congress upon the subject, embrace only a limited class of well known offenses. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and may pass laws to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by an Act of Congress.

"Implied power in Congress to pass laws to define and punish offenses, is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof."

Id., 98 U.S., at 345-346.

The nutshell explanation revolves around whether the United States has "standing" to pursue such a complaint as a criminal prosecution in an Article III constitutional court, when that court sits in a State, for conduct

undertaken by an individual while within a state.

As this Court has made clear:

"The question of standing is not subject to waiver, however: '[w]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.' "...

"It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely as opposed to merely speculative, that the injury will be redressed by a favorable decision."... In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power.... We have also made clear that "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' ..., 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.' "...

United States v. Hays, 515 U.S. 737, 742-743 (1995) (citations omitted).

See, also, Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 1547 (2016) (same).

In short, with the United States, as plaintiff, not having alleged to have suffered any injury whatsoever, it lacked Article III standing to have invoked federal court jurisdiction, and requires reversal of the conviction, and dismissal of the bill of indictment, Corrick, supra; see also United States v. Cotton, 535 U.S. 625 (2002): "defects in subject-matter require correction regardless of whether the error was raised in district court." Id., at 630 (citation omitted).

Compare, e.g., Bond v. United States, 131 S.Ct. 2355 (2011):

"One who seeks to initiate or continue proceedings in Federal Court must demonstrate, among other requirements, both standing to obtain the relief requested, ... and, in addition, an "ongoing interest in the dispute" on the part of the opposing party that is sufficient to establish "concrete adverseness," ... When those conditions are met, Article III does not restrict the opposing party's ability to object to relief being sought at its expense. The requirement of Article III standing thus had no bearing upon Bond's capacity to assert defenses in the District Court. As for Bond's standing to appeal, it is clear Article III's prerequisites are met. Bond's challenge to her conviction and sentence "satisfies the case-or-controversy requirement, because the incarceration ... constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction." ... "

Id., 131 S.Ct., 2361-2362 (citations omitted).

Likewise, in this case, the United States lacked Article III standing to prosecute the underlying case, in a court lacking constitutional jurisdiction in a criminal case, under the totality of the circumstances, and this petitioner, like Bond, has suffered a "concrete injury, caused by the conviction and redressable by invalidation of the conviction." Id.

Paraphrasing Mr. Justice Scalia, as was quoted in Danforth v. Minnesota, 552 U.S. 264 (2008), and being apropos in this petition:

"To hold a governmental Act [as applied] to be unconstitutional is not to announce that we forbid it, but that the Constitution forbids it; and when, as in this case, the constitutionality of a [federal] statute is placed in issue [as applied], the question is not whether some decision of ours 'applies' in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute [as applied]. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue [as applied] ... was unconstitutional, or it was not; if it was, then so is enforcement of all identical [criminal] statutes in other States, whether occurring before or after our decision[.]"

Id., 552 U.S., at 268 (emphasis added, internal quotation marks and citation omitted)

ted).

The constitutional principle is clear, as Mr. Justice Harlan was quoted in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), citing Mackey v. United States, 401 U.S. 667 (1971), observing that "Justice Harlan defined substantive constitutional rules as "those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Mackey, supra, at 692," 136 S.Ct., at 729.

Because, as the Court pointed out in Carter, supra, that "the national powers of legislation were not aggregated but enumerated— with the result that what was not embraced by the enumeration remained vested in the states without change or impairment," 298 U.S. 294, since there is no enumeration, in the Constitution, of the "precise subject-matter" of sex-related or child exploitation conduct in the Constitution, that omission creates a substantive rule that this Court pointed out:

"Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the [Government's] power to impose. It follows that when a [government] enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.

Id., 136 S.Ct., at 729-730 (emphasis added).

Relying on Ex parte Siebold, 100 U.S. 371 (1880), finding that "A conviction under an unconstitutional law "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment," 136 S.Ct.

730, this Court admonished: "It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." Id., 136 S.Ct., at 731.

Again, paraphrasing this Court:

"There is no grandfather clause that permits [the Government] to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees."

Id., 136 S.Ct. 731 (emphasis added).

Many arguments arise that Congress should be able to legislate over matters "not expressly granted or essentially implied" in the Constitution, for which the Court, citing an earlier decision, in Carter, supra, reiterated:

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

Carter, supra, 298 U.S., at 293-294 (internal quotation marks and citation omitted).

Mr. Justice Brewer, speaking for the Court, in South Carolina v. United States, 199 U.S. 437 (1905), laid out, admonishingly, the principle of strict construction of our Constitution, when he wrote:

"Two propositions in our Constitutional jurisprudence are no longer debatable, one is that the national government is one of enumerated powers; and the other, that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

"The Constitution is a written instrument. As such its meaning does not alter, that which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Scott v. Sanford, 19 How. 393, 426, 15 L.ed. 691, 709:

"It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make the mere reflex of the popular opinion or passion of the day."

"To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

Id., 199 U.S., 448-449, 450.

Illustrative of the above dicta was, also, pointed out by Mr. Justice Johnson, delivering the Court's opinion, in United States v. Hudson and Goodwin, 7 Cranch 32 (1812):

"The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an act of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer."

Id., 7 Cranch, at 33.

The principle, in Carter, supra, that it is up to the people, "if in the future further powers seemed necessary they should be granted by the people in the manner they had provided," 298 U.S., at 294, can be said to have been expressed by Mr. Justice Sutherland, in his dissent, pointing out, in parts relevant to this petition and case:

"Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."

"... Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances. ... But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction." The principle is reflected in many decisions of this Court. ...

"The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections."

"If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his *Constitutional Limitations*, 8th ed. p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize; but that "a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. ... what a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 403-404 (1937) (1937) (in relevant parts) (Sutherland, Jr., with whom Van Devanter, McReynolds, and Butler, JJ., join, dissenting).

Just as the abortion case, in Dobbs, *supra*, was of interest to the entire Nation, to point out "The Constitution makes no reference to abortion," 142 S.Ct. 2242, and "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives," because "that is what the Constitution and the rule of law demand," *id.*, 142 S.Ct. at 2243, this petition presents a parallel situation in the form of a federal question that requires the issue of crime, in general, should be returned "to the people's elected representatives" in the States, where the Court's dicta, in Rice v. Sioux City Cemetery, 349 U.S. 70 (1954), is *apropos*:

"A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues, nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."

Id., 349 U.S., at 74 (citations omitted).

In a case involving the power of Congress to enact its taxing power in regard to the dispensation of certain drugs within the State of Washington, and involving providing an addict such drugs, such person providing a person with such drugs "shall register with the Collector of Internal Revenue, and shall pay a special annual tax of \$1." Linder v. United States, 268 U.S. 5, 12 (1925) (internal quotation marks omitted).

Dicta in that opinion can be said to be relevant here, where such provisions not within the power of Congress to enact nationally cannot stand, the Court writing:

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid, and cannot be enforced."

Id., 268 U.S., at 17 (citations omitted).

Unlike in Linder, supra, child pornography, much less any other federal criminal statute, is not a matter that comes under the power of Congress to regulate and punish nationally, when such matters are not

"precise subject-matters" for federal "police power" enforcement nationally, and the sole reliance on the Commerce Clause for such legislation is not a reason for such legislation, and this Court's dicta, in Bond v. United States, 134 S. Ct. 2077 (2014), where this Court observed: "The Government frequently defends federal criminal legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce," 134 S. Ct., at 2087, and that is where the Government's contention would fail, because the Commerce Clause would have to be combined with another "specified power" in the Constitution in order for the Government to be able to rely on the Commerce Clause to claim the power, as the Court pointed out in Knox v. Lee and Parker v. Davis, 79 U.S. 457 (1871), writing:

"In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary, and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

"And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions."

Id., 79 U.S., at 534.

Again, with enumeration of sex-related or sexual exploitation conduct, of minors or adults, the Commerce Clause, standing alone, cannot be used for the regulation thereof, and the following case demonstrates that even

When combining the Commerce Clause with another "specified power," Constitutional Article III courts lack "criminal" jurisdiction over federal crimes, when such a court sits within a State, and the instant federal criminal conviction cannot stand.

III. Constitutional courts, when sitting within a State, cannot be conferred with criminal jurisdiction, when the offense is committed with the State.

In a case, involving the Pullman Strike, where the Commerce Clause and the protections it addresses, and the Post Office Clause was combined, the Court wrote:

"Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a postoffice system for the nation. Article I, section 8, of the Constitution provides that "the Congress shall have power, ... Third, to regulate commerce with foreign nations and among the several states, and with the Indian tribes, ... Seventh, to establish postoffices and postroads,""

In re Debs, 158 U.S. 564, 579 (1895).

Adhering to the principle that "the object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it," Lake County v. Rollins, 130 U.S. 662, 670 (1889), Mr. James Madison—the Father of the Constitution—wrote of the power Congress has under the Commerce Clause:

"A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter, were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdictions, with duties

which would fall on the makers of the latter and the consumers of the former,"

The Federalist No. 42 (J. Madison).

The Clause, therefore, provides a measure of

"preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."¹¹¹

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-180 (1995)

(citations omitted).

In adhering to the principles the Commerce Clause was included in the Constitution for, Mr. Justice Thomas has admonished:

"I write separately only to express my view that 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. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."

United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

Back to Debs, supra, one of "this Court's early Commerce Clause cases, it was pointed out:

"Obviously these powers given to the national government over

interstate commerce and in respect to the transportation of the mails were not dormant and uncused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. ...

"As under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. ...

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

Debs, supra, 158 U.S. 580-581, 586 (in relevant parts)

Interestingly, it should not be lost that the prosecution, in Debs, had a full understanding of the Constitution and the limits it places both in Congress and the federal courts, since the Government's attorney did not pursue the matter as a criminal case, being that the conduct charged was undertaken in Chicago, Illinois, and sought from the District Court the issuance of an injunction against the defendants, to cease and desist in the strike to allow the railroads to continue to transport, inter alia, the mails.

When the defendants refused to obey the injunction, "A hearing was had before the circuit court, and on December 14 these petitioners were found guilty of contempt, and sentenced to imprisonment in the county jail for terms varying from three to six months." 158 U.S., at 572-573.

Contempt of court, not a criminal offense, because such a court,

sitting within a State, is incapable of being conferred with criminal jurisdiction.

And that's where O'Donoghue v. United States, 289 U.S. 516 (1933), becomes relevant in this petition, a criminal conduct case occurring within the District of Columbia, where the Court observed:

"In the District clause, unlike the territorial clause, there is no more linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupilage may be constituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental. The District is not an "ephemeral" subdivision of the "outlying dominion of the United States," but the capital—the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of [fifty] states, and for a future immeasurably beyond the prophetic vision of those who designed and created it.

"Over this District Congress possesses "the combined powers of a general and of a State government in all cases where legislation is possible," etc."

Id., 289 U.S., at 538-539 (citation omitted).

Mr. Justice Sutherland, speaking for the Court, further elaborated, as far as to constitutional Article III courts sitting in the District of Columbia, saying:

"In the light of all that has now been said, we are unable to perceive upon what basis of reason it can be said that these courts of the District are incapable of receiving the judicial power under Art. 3. In respect of them we take the true rule to be that they are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in § 2 of Art. 3. The provision of this section of the article is that the "judicial power shall extend" to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, ipso facto, vested in such courts as inferior courts of the United

States.

"... In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. ... "In other words," this court there said, "it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts. ..."

"Since Congress, then, has the same power under Art 3 of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable."

Id., 289 U.S., at 544-545, 546.

And that's where Shively v. Bowlby, 152 U.S. 1 (1894), plays a part in this discussion, addressing the status of territories, the Court pointing out:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition."

Id., 152 U.S., at 48 (citations omitted).

Compare, e.g., Benner et al. v. Porter, 9 How. 235 (1850) (same in principle); and see Bird v. United States, 187 U.S. 118 (1902), the Court citing McNulty v. Batty, 10 How. 72 (1850), observing:

"In McNulty v. Batty, ... there was a transfer of sovereignty; a territory became a state, and it was held "the territorial government

ceased to exist and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of their judgments in this court [Supreme Court of the United States] by appeals or writs of error."

Id., 187 U.S., at 124.

In a nutshell, the principle is simple and clear:

"Upon the admission of a State into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order and the protection of persons and property throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, vested in the State, and not in the United States."

Van Brocklin v. Anderson, 117 U.S. 151, 167-168 (1886) (in relevant parts, citations omitted),

One of the cases, cited in Van Brocklin, *supra*, referring to Article I, §8, cl. 17, made it clear:

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction."

New Orleans v. United States, 10 Pet. 662, 737 (1836).

Ohio entered the Union on March 1, 1803, and, under Baldwin's Ohio Revised Code, Annotated, (1953), chapter 159, § 159.03 (1970), provides:

"The consent of the state is hereby given, in accordance with clause 17, Section 8, Article I, United States Constitution, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government."

Petitioner was nowhere, or alleged to have been located within, in such places for the Government to have jurisdiction over him when the alleged

purported federal criminal conduct occurred, and such lack of both personal and "precise subject-matter" jurisdiction requires this Court, as Mr. Justice Stevens opined:

"In my opinion, the federal courts—and particularly this Court—have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution. . . . Although some cases involving overly expansive interpretations of federally protected rights surely merit federal review, the interest in correcting such errors is necessarily secondary to the federal courts' principal role as protector of federally secured rights."

Harris v. Reed, 489 U.S. 255, 267 (1989) (citation omitted) (Stevens, J., concurring).

Since neither of the two lower courts protected petitioner's rights "embodied in the Federal Constitution" in refusing the Government's purported federal criminal case Article III, § 2, does not encompass, see, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998), finding that "criminal" cases "are not, however, the sort of cases in that Article III, § 2, refers to." Id., at 523 U.S. 102.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: September 20, 2023.

Respectfully submitted,



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