25-6644 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DANIEL ARBAUGH - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

Has America become so great that it need not consider due process, comity among nations, follow international law, or fulfill its treaty obligations? Why are the lower courts not upholding the Constitution?

(1) Did Congress exceed the outer limits of the Foreign Commerce Clause when amending 18 U.S.C. § 2423(c) to criminalize non-commercial, illicit sexual conduct occurring entirely in a foreign sovereign territory among its residents?

(2) Can the President and two-thirds of the Senate, by the sole fact of their consent to a treaty, empower Congress to enact legislation that it otherwise could not enact by the exercise of its enumerated powers in Article I? Was a single passing statement in Missouri v. Holland, 252 U.S. 416 (1920) -- "[i]f the treaty is valid"... "there can be no dispute about the validity of the statute" -- meant to expand Congress' authority?

(3) May the United States prosecute its citizen without the consent of the foreign sovereign where the crime was committed? Does the holding in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) and its progeny -- that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," unless it expressly or impliedly consents to surrender it -- apply only in extradition proceedings where the foreign sovereign is requesting the defendant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Mr. Arbaugh is the Appellant below. The United States of America is the Appellee below.

RELATED CASES

- United States v. Arbaugh, No. 5:17-cr-00025-EKD-JCH, U.S. District Court for the Western District of Virginia. Judgment entered July 23, 2018. Updated Aug. 31, 2018 and April 30, 2021.
- United States v. Arbaugh, No. 18-4575, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Feb. 20, 2020.
- United States v. Arbaugh, No. 20-5026, Supreme Court of the United States. Judgment entered Oct. 5, 2020.
- United States v. Arbaugh, No. 5:21-cv-81482-EKD-JCH, U.S. District Court for the Western District of Virginia. Judgment entered Nov. 6, 2023 and Jan. 5, 2024.
- United States v. Arbaugh, No. 23-7186, 24-6048, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 18, 2025 and Sept. 23, 2025.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals (denial of certificate of appealability) appears at Appendix A to the petition and is

[X] reported at 2025 U.S. LEXIS 17865 (4th Cir., Va. July 18, 2025) ;
[X] is unpublished.

The opinion of the United States district court (§ 2255 motion) appears at Appendix B to the petition and is

[X] reported at 2023 U.S. Dist. LEXIS 199448, 2023 WL 7295169 (W.D. Va., Nov. 6, 2023) ;

The opinion of the United States district court (motion for reconsideration) appears at Appendix C to the petition and is

[X] reported at 2024 U.S. Dist. LEXIS 3057, 2024 WL 69824 (W.D. Va., Jan. 5, 2024) ;

The opinion of the United States court of appeals (rehearing) appears at Appendix D to the petition and is

[X] reported at 2025 U.S. App. LEXIS 24643 (4th Cir., Va., Sept. 23, 2025 ;
[X] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 18, 2025 .

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 23, 2025 , and a copy of the order denying rehearing appears at Appendix D .

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the following provisions of the Constitution of the United States, the United States Code, and the Optional Protocol treaty between the United States and Haiti.

Constitution of the United States, Article I, § 8, Cl. 3. - Power of Congress to regulate commerce
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Constitution of the United States, Article I, § 8, Cl. 18 - All necessary and proper laws
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.

Constitution of the United States, Article II, § 2, Cl. 2 -Treaties
He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...

Constitution of the United States, Fifth Amendment - Due process
No person shall be... deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 2423 - Transportation of minors
(a) **Transportation with intent to engage in criminal activity.** A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) **Travel with intent to engage in illicit sexual conduct.** A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, with a motivating purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) **Engaging in illicit sexual conduct in foreign places.** Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(e) **Attempt and conspiracy.** Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in

the same manner as a completed violation of that subsection.

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

(1) a sexual act (as defined in section 2246 [18 USCS § 2246]) with a person under 18 years of age that would be in violation of chapter 109A [18 USCS §§ 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

(2) any commercial sex (as defined in section 1591 [18 USCS § 1591]) with a person under 18 years of age; or

(3) production of child pornography (as defined in section 2256(8) [18 USCS § 2256(8)]).

18 U.S.C. § 3231 - District Courts - Jurisdiction

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...

18 U.S.C. § 3238 - Offenses not committed in any district

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

22 U.S.C. § 3927 - Chief of mission

(a) Duties. Under the direction of the President, the chief of mission to a foreign country --

(1) shall have full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country...; and

(2) shall keep fully and currently informed with respect to all activities and operations of the Government within that country, and shall insure that all Government executive branch employees in that country... comply fully with all applicable directives of the chief of mission.

(b) Duties of agencies with employees in foreign countries. Any executive branch agency having employees in a foreign country shall keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country, and shall ensure that all of its employees in that country... comply fully with all applicable directives of the chief of mission.

Treaty - United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional Protocol)

See Appendix E.

STATEMENT OF THE CASE

Mr. Arbaugh was a missionary and long-term resident of Haiti, with no plans to re-establish residence in the United States. He was not a tourist in Haiti. The United States prosecuted Mr. Arbaugh for actions occuring entirely in Haiti -- a foreign sovereign nation -- without notice, without its assistance, and without its consent in violation of a treaty, principles of comity, international law and Supreme Court precedent.

On 18-June-2002, Mr. Arbaugh moved back to Haiti, to live and work as a missionary, where he spent formative years as a child. In the years that followed, Mr. Arbaugh became more and more established as a permanent resident of Haiti. See Supplemental Memorandum (Dkt. No. 137, Appendix 2-10).

Mr. Arbaugh concedes that he traveled to the United States at least once a year. All such travel was made round-trip, from Haiti to the United States for short periods of time (e.g. holidays with family, weddings and funerals, etc.). Travel was not made with intent to engage in illicit activity, nor did Mr. Arbaugh engage in any illicit activity while on the aircraft.

THE OPTIONAL PROTOCOL TREATY

The United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Optional Protocol) represents a non-self executing treaty between the United States and Haiti. See Appendix E. It was ratified 23-Dec-2002 and 9-Sept-2014 respectively.

The Optional Protocol specifically prohibits commercial sexual conduct; the sale of children, child prostitution, child pornography and child sex tourism. (Art. 1-3) See Appendix E at App-24.

Article 4 (App-25) provides explicit jurisdiction to Haiti:

- where all of Mr. Arbaugh's alleged offences were committed (Art. 4, para. 1)("**shall**... establish its jurisdiction... when the offences are committed in its territory")(emphasis added)
- where Mr. Arbaugh had his habitual residence (or to the U.S. because he was a national) (Art. 4, para. 2, sect. (a))("**may**... establish its jurisdiction")(emphasis added)
- where the alleged victim was a national (Art. 4, para. 2, sect. (b))

The Optional Protocol does not exclude criminal jurisdiction provided by internal law (e.g. Supreme Court precedent (Art. 4, para. 4, and Art. 11, sect. (a)) or international law (Art. 11, sect(b)). Both provide exclusive jurisdiction to punish offenses against a sovereign nation's laws committed within its borders and limiting the extraterritorial reach of their statutes.

Article 8 requires countries to "protect the rights and interests of child victims... at all stages of the criminal justice process". (Art. 8) See Appendix E at App-26. Victims were prejudiced by Mr. Arbaugh's prosecution in the United States. Consider the difficulties of communication and travel to fully participate.

The Optional Protocol requires that "States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings", and "international cooperation and coordination between their authorities". (Art. 6 & Art. 10, para. 1) See

Appendix E at App-26, App-28.

REQUIRED COORDINATION THROUGH STATE DEPARTMENT

Presidential Directive / NSC-27 (Jan. 19, 1978), ["PD-27"] requires coordination within the executive branch of the government for non-military incidents which could have an adverse impact on U.S. foreign relations. Before conducting an investigation in a foreign country or prosecuting a crime which occurred in that country, it must go through appropriate diplomatic channels. Coumou v. United States, 1997 U.S. App. LEXIS 12674 at *6 (5th Cir. 1997) ("directive was given because the Coast Guard, through the PD-27 process, had secured the Haitian government's permission to undertake an American law enforcement operation within its sovereign territory").

Similarly, 22 U.S.C. § 3927(b) requires other agencies "having employees [e.g. Department of Homeland Security forensic examiner] in a foreign country" to keep the chief of mission to that country fully and currently informed with respect to all activities and operations of its employees in that country. 22 U.S.C. § 3927(b).

Freedom of Information Act (FOIA) requests reveal that the United States neither obtained nor attempted to obtain formal or informal consent of Haiti to investigate or prosecute Mr. Arbaugh, where the alleged illicit sexual conduct occurred. There was no coordination through the United States Department of State or the chief of mission. (Dkt. No. 137, Appendix 18-20) Further, there were no exigent circumstances, or other reasons given, or evidence in the record, or in the Government's reply

briefs that explained what prevented the United States from doing so.

THE PROTECT ACT - 18 U.S.C. § 2423(c) - THE CHARGING STATUTE

On 30-April-2003, Congress enacted 18 U.S.C. § 2423(c) to criminalize illicit sexual conduct in foreign places after traveling, including commercial and non-commercial conduct. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003). On 7-March-2013, Congress amended section 2423(c) to reach U.S. citizens who temporarily or permanently reside abroad. Pub. L. 113-4, 127 Stat. 142 (2013).

THE CHARACTERISTICS OF MR. ARBAUGH'S ACTIONS

In or around 2016, Mr. Arbaugh stimulated the genitals of a minor (MV1) by touch while a guest at the minor's family home. The court concedes, "Arbaugh's acts were not directly commercial in that he did not directly give his victim money or items of value in exchange for sex." (Dkt. No. 158 at p. 18.) See Appendix B at App-11.

THE CHARACTERISTICS OF UNITED STATES' PROSECUTION

In 2017, Mr. Arbaugh, feeling a combination of guilt, regret, remorse, and the need for help traveled to the United States to seek counseling not available in Haiti. A report was made by the counselor. A prosecution under 18 U.S.C. § 2423(c) was launched, by the Department of Homeland Security / Immigration and Customs Enforcement, including an independent international investigation.

PROCEEDINGS IN THE LOWER COURTS

The Federal District Court in the Western District of Virginia claimed federal jurisdiction as the court of first instance pursuant to 18 U.S.C. § 3231. The district court considered venue proper because Mr. Arbaugh was arrested within the district, pursuant to 18 U.S.C. § 3238.

On or about 23-August-2021, Mr. Arbaugh submitted a motion seeking post-conviction relief pursuant to 28 U.S.C. § 2255, claiming counsel was ineffective for failing to discover and raise various issues and Mr. Arbaugh is factually innocent because of the issues. (Dkt. No. 132). The relevant grounds were 1) Mr. Arbaugh's Conduct was not within the scope of the statute, 2) Congress Lacks the Constitutional Power to Enact the Statute, and 4) U.S. Prosecution of Arbaugh Denied Haiti of their Treaty Rights (the United States failed to obtain jurisdiction from Haiti where the conduct occurred). Id.

On 7-Sept-2021, Mr. Arbaugh was granted an extension of time to file a supplemental memorandum in support of his motion. (Dkt. No. 134). The United States was required to reply to Mr. Arbaugh's motion within sixty day of the docketing of Petitioners's supplemental memorandum. Id. Mr. Arbuagh's supplemental memorandum was docketed on 26-Nov-2021. (Dkt. No. 137).

The government failed to reply on time which precipitated Mr. Arbaugh filing a Motion for Judgement on the Merits and the appeal of its denial which was made separate to the appeal of his § 2255 motion and later merged. (Case No. 23-7186)

On 6-Nov-2025, the district court issued its opinion denying relief on Mr. Arbaugh's § 2255 motion and denied a certificate of appealability. (Dkt. No. 159). See Appendix B at App-3.

On or around 20-Nov-2023, Mr. Arbaugh filed a motion for reconsideration, because the district court failed to properly interpret, and thus failed to address, Ground 4 in his motion concerning the United States' lack of jurisdiction. (Dkt. No. 162). The government replied as ordered. (Dkt. No. 167). Mr. Arbaugh answered. (Dkt. No. 168). On 5-Jan-2024, the district court issued a memorandum opinion and order denying Mr. Arbaugh's motion for reconsideration, also denying a certificate of appealability. (Dkt. No. 169). See Appendix C at App-18.

On or around 12-Jan-2024, Mr. Arbaugh filed notice of appeal to the denial of his § 2255 motion, motion for reconsideration and denial of a certificate of appealability. (Dkt. No. 171).

On 9-Feb-2024, Mr. Arbaugh submitted his informal brief requesting a certificate of appealability from the Fourth Circuit Court of Appeals. (Case No. 24-6048). The relevant issues Mr. Arbaugh raised: 1) Mr. Arbaugh's illicit sexual conduct did not have a demonstrable affect on commerce, 2) Fourth Circuit justifying constitutionality of statute on foreign commerce clause's effect when the statute used the words of art "travels in foreign commerce", and 4) the lack of jurisdiction for the United States to prosecute. A memorandum in support of informal brief explained the issues.

On 18-July-2025, the Fourth Circuit Court of Appeals issued a memorandum opinion and judgment denying a certificate of

appealability. (Dkt. No. 184, 185). See Appendix A at App-1.

On or around 30-July-2025, Mr. Arbaugh filed a petition for rehearing and or rehearing en banc to the Fourth Circuit Court of Appeals. The relevant issues Mr. Arbaugh raised: 1) the debatability of the underlying claims was not considered, 2) no effect on foreign commerce was shown, 3) the holding in Bollinger should be revised, and 5) the United States lacked jurisdiction to prosecute. On or around 2-Sept-2025, Mr. Arbaugh filed an amended petition for rehearing and rehearing en banc.

On 23-Sept-2025, the Fourth Circuit Court of Appeals denied Mr. Arbaugh's amended motion for rehearing and rehearing en banc. (Dkt. No. 187) See Appendix D at App-22.

Mr. Arbaugh now seeks a petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for denial of a certificate of appealability (COA).

REASONS FOR GRANTING THE PETITION

QUESTION 1 - OUTER LIMITS OF THE FOREIGN COMMERCE CLAUSE

> Did Congress exceed the outer limits of the Foreign Commerce Clause when amending 18 U.S.C. § 2423(c) to criminalize non-commercial, illicit sexual conduct occurring entirely in a foreign sovereign territory among its residents?
>
> SHORT ANSWER: Yes! Congress exceeded the outer limits of the Foreign Commerce Clause. The Foreign Commerce Clause's history, text, and purpose demonstrate that the Foreign Commerce Clause as applied extraterritorially is narrower than the Interstate Commerce Clause as applied domestically. The Founders did not state or imply that Congress has the power to project U.S. law into the sovereign territories of other nations under the Foreign Commerce Clause. The text of the Commerce Clause further supports the conclusion that Congress's foreign-commerce power inside sovereign nations is narrower than its interstate-commerce power inside the several states; regulate commerce **with** foreign Nations not among them. In the historical context, commerce with foreign nations referred only to a sovereign nation's power inside its territories to regulate commerce with foreign nations; it did not refer to a legislature's power to regulate inside sovereign nations.

See this explained in United States v. Rife, 33 F.4th 838, 843-44 (6th Cir. 2022), cert. denied, 143 S. Ct. 356, 214 L. Ed. 2d 172 (2022) in Appendix F at App-31 and Judge Porter's concurrence in United States v. Clay, 128 F.4th 163, at LEXIS 35-61 (3d Cir. 2025) attached in Appendix G at App-37.

A. FOURTH CIRCUIT DECISION CONFLICTS WITH ANOTHER CIRCUIT

The Fourth Circuit Court of Appeals has entered a decision on the constitutionality of the charging statute that conflicts with other Circuits. The Fourth Circuit has held that Congress acted within its constitutional authority in enacting § 2423(c), pursuant to the Foreign Commerce Clause. As the Bollinger court explained, "Congress may ... regulate an activity when it is rational to conclude that the activity has a demonstrable effect on foreign commerce." United States v. Bollinger, 798 F.3d 201,

218 (4th Cir. 2015). "The question is admittedly difficult, having led judges across the country to reach different outcomes." See Appendix B at App-16, footnote 9, quoting United States v. Lindsay, 931 F.3d 852, 862 (9th Cir. 2019). The Sixth Circuit Court of Appeals has recently held that the Foreign Commerce Clause does not authorize § 2423(c), creating an even deeper circuit split. Rife, 33 F.4th at 845 ("Rife's conviction under 18 U.S.C. § 2423(c) for molesting his two victims in Cambodia, years after he traveled there, and without any commercial exchange, was not an exercise of Congress's power to 'regulate Commerce with foreign Nations[.]' His conviction cannot stand on that ground."). Accordingly, the Fourth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.

B. FOURTH CIRCUIT DECISION CONFLICTS WITH BASTON

The Fourth Circuit's denial of a certificate of appealability upholding its decision in Bollinger doesn't consider a relevant decision in the Supreme Court. Justice Thomas expresses concern "that language in some of this Court's precedent's has led the courts of appeals into error." Baston v. United States, 580 U.S. 1182, 137 S. Ct. 850, 197 L. Ed. 2d 478 (2017) (Thomas, J. dissenting on denial of certiorari). His concern centers around the overreach of the Foreign Commerce Clause, specifically concerning "Congress' power to regulate, or even criminalize, conduct within another nation's sovereign territory." He discusses the three Lopez categories of

interstate commerce, and how they have been improperly expanded to regulate foreign commerce. United States v. Lopez, 514 U.S. 549, 558-559, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Congress is limited to regulating three categories of interstate activity: "the use of the channels of interstate commerce", "the instrumentalities of interstate commerce", and "activities that substantially affect interstate commerce.") He specifically points out "others [that] have gone further still" -- Bollinger, holding that -- "the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect... commerce". Bollinger, 798 F.3d at 215-16.

Justice Thomas concludes that "the courts of appeals have taken this Court's modern interstate commerce doctrine and assumed that the foreign commerce power is at least as broad. The result is a doctrine justified neither by our precedents nor by the original understanding." Baston, 540 U.S. at 1186. The Fourth Circuit denied a certificate of appealability to correct its error in light of Baston. The proper scope of Congress' Foreign Commerce Clause power is a question of national importance that should be addressed by this Court.

C. SCHOLARLY DEBATE SHOWS THE FOREIGN COMMERCE CLAUSE IS OF NATIONAL IMPORTANCE

The Foreign Commerce Clause has spawned differing opinions in the lower courts, many in error. Likewise, scholarly debate is abundant. Consider:

- Anthony J. Colangelo, The Foreign Commerce Clause, 96 Va. L. Rev. 949, 977 (2010) (The Founders did not state or imply that Congress has the power to "project[] U.S. law into the sovereign territories of other nations under the Foreign Commerce Clause.")

- Christopher R. Green, Tribes, Nations, States: Our Three Commerce Powers, 127 Penn St. L. Rev. 643, 655 (2023) (Nowhere did Edmund Randolph -- who drafted the initial version of the commerce clause -- mention that the Foreign Commerce Clause may apply extraterritorially.)

- Naomi Harlin Goodno, When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause, 65 Fla. L. Rev. 1139, 1191-92 (2013) ("[I]n discussing the scope of the Indian Commerce Clause, the [Supreme] Court has not relied on or analyzed the Foreign Commerce Clause. Thus, the Indian Commerce Clause legal framework should not be, and has not been, superimposed onto the Foreign Commerce Clause.")

- Jessica E. Notebaert, The Search for A Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c), 103 J. Crim. L. & Criminology 949, 955 (2013) ("The Supreme Court should consent to review United States v. Pendleton, [658 F.3d 299 (3d Cir. 2011)] or a similar case, [such as this one] in order to provide definitive guidance to lower courts considering the extent of Congress's power under the Foreign Commerce Clause.")

- Joanna Doerfel, Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause, 39 U. Miami Inter-Am. L. Rev. 331, 344 (2008) ("[B]y removing th[e] intent requirement, Congress removed its own authority to legislate the Act under its Foreign Commerce Clause powers because the individual no longer was traveling in commerce connected with the prohibited activity; and it created an unjustified and unconstitutional intrusion into other sovereign territories.")

As demonstrated by scholarly debate, the Foreign Commerce Clause, especially as applied to non-commercial conduct is of national interest.

QUESTION 2 - HOLLAND - POWER TO IMPLEMENT TREATIES

Can the President and two-thirds of the Senate, by the sole fact of their consent to a treaty, empower Congress to enact legislation that it otherwise could not enact by the exercise of its enumerated powers in Article I? Was a single passing statement in Missouri v. Holland, 252 U.S. 416 (1920) -- "[i]f the treaty is valid"... "there can be no dispute about the validity of the statute" -- meant to expand Congress' authority?

SHORT ANSWER: The phrase in Holland is unreasoned and citation-less ipse dixit, contrary to the Constitution's text and structure. A power to help the President make

treaties is not a power to implement treaties already made.

The Fourth Circuit has held that "the necessary and proper" clause, which permits Congress to effectuate treaties and other such agreements may be a potential source of authority for § 2423(c) but declined to address it. Bollinger, 798 F.3d 201, 208 & n.3. See Appendix B at App-10. The courts that have upheld § 2423(c) as constitutional based on the "necessary and proper clause" have reluctantly done so based on Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920). Holland is in "deep tension" with the Constitution. Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867, 1868 (2005).

Justices Scalia, Thomas and Alito explain this contention in their concurrence in Bond v. United States, 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014):

> An unreasoned and citation-less sentence from our opinion in Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 18 Ohio L. Rep. 61 (1920), purported to furnish the answer: "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." Id., at 432, 40 S. Ct.382, 64 L. Ed. 641. Petitioner and her amici press us to consider whether there is anything to this ipse dixit. The Constitution's text and structure show that there is not.
>
> Under Article I, § 8, cl. 18, Congress has the power "[t]o 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." One such "other Powe[r]" appears in Article II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Read together, the two Clauses empower Congress to pass laws "necessary and proper for carrying into Execution... [the] Power... to make Treaties."
>
> It is obvious what the Clauses, read together, do not say. They do not authorize Congress to enact laws for carrying into execution "Treaties," even treaties that do not execute

themselves, such as the Chemical Weapons Convention [and the Optional Protocol]. Surely it makes sense, the Government contends, that Congress would have the power to carry out the obligations to which the President and the Senate have committed the Nation. The power to "carry into Execution" the "Power... to make Treaties," it insists, has to mean the power to execute the treaties themselves.

That argument, which makes no pretense of resting on text, unsurprisingly misconstrues it. Start with the phrase "to make Treaties." A treaty is a contract with a foreign nation made, the Constitution states, by the President with the concurrence of "two thirds of the Senators present." That is true of self-executing and non-self-executing treaties alike; the Constitution does not distinguish between the two. So, because the President and the Senate can enter into a non-self-executing compact with a foreign nation but can never by themselves (without the House) give that compact domestic effect through legislation, the power of the President and the Senate "to make" a treaty cannot possibly mean to "enter into a compact with a foreign nation and then give that compact domestic legal effect." We have said in another context that a right "to make contracts" (a treaty, of course, is a contract) does not "extend... to conduct... after the contract relation has been established.... Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations." Patterson v. McLean Credit Union, 491 U.S. 164, 177, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (emphasis added). Upon the President's agreement and the Senate's ratification, a treaty-no matter what kind-has been made and is not susceptible of any more making.

How might Congress have helped "carr[y]" the power to make the treaty - here, the Chemical Weapons Convention - "into Execution"? In any number of ways. It could have appropriated money for hiring treaty negotiators, empowered the Department of State to appoint those negotiators, formed a commission to study the benefits and risks of entering into the agreement, or paid for a bevy of spies to monitor the treaty-related deliberations of other potential signatories. See G. Lawson & G. Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 63 (2004). The Necessary and Proper Clause interacts similarly with other Article II powers: "[W]ith respect to the executive branch, the Clause would allow Congress to institute an agency to help the President wisely employ his pardoning power... Most important, the Clause allows Congress to establish officers to assist the President in exercising his 'executive Power.'" Calabresi & Prakash, the President's Power to Execute the Laws, 104 Yale L. J. 541, 591 (1994).

> But a power to help the President make treaties is not a power to implement treaties already made. See generally Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005). Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate compliance with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8 powers.
>
> "[T]he Constitutio[n] confer[s] upon Congress... not all governmental powers, but only discrete, enumerated ones." Printz v. United States, 521 U.S. 898, 919 117 S. Ct. 2365, 138 L. Ed 2d 914 (1997). And, of course, "enumeration presupposes something not enumerated." Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 195, 6 L. Ed. 23 (1824). But in Holland, the proponents of unlimited congressional power found a loophole: "By negotiating a treaty and obtaining the requisite consent of the Senate, the President... may endow Congress with a source of legislative authority independent of the powers enumerated in Article I." L. Tribe, American Constitutional Law § 4-4, pp. 645-646 (3d ed. 2000). Though Holland's change to the Constitution's text appears minor (the power to carry into execution the power to make treaties becomes the power to carry into execution treaties), the change to its structure is seismic.

Bond, 572 U.S. at 873-77.

The Sixth Circuit upheld § 2423(c) because it was bound by Holland. Rife, 33 F.4th at 838 ("[B]ased on Supreme Court precedent alone... § 2423(c) as applied here was within Congress's power to enact legislation implementing treaties.") (emphasis added). The Circuit goes to great length to explain the historical understanding that one organ of government cannot expand the powers of another because the object of fundamental law constrains them both. "In light of this history, the idea that the Founding generation would have included in the Constitution-as part of an ancillary power of Article I, no less-a hidden power to 'overleap the bounds' of all other powers in that Article, and to legislate 'in all cases whatsoever,' is

simply implausible." Id. The Sixth Circuit upheld Rife's conviction, because they were bound by Holland alone. See its reasoning in Appendix F at App-34 to App-36.

A. JUDGES ACROSS THE COUNTRY ARE REQUESTING THE SUPREME COURT TO EXPLAIN HOLLAND

Judges across the country are requesting the Supreme Court to explain Holland's troubling misinterpretation of congressional power.

- Judge Porter, Clay, 128 F.4th 163 at *60 (Porter concurring) ("Treating the Article II treaty power as a source of unbounded legislative power independent of the Constitution's overall structure of carefully enumerated powers is anomalous, at best. As other judges have, I respectfully urge the Supreme Court to clarify the scope of Holland and its place in our constitutional design.")

- Judge Ambro, Clay, 128 F.4th 163 at *61 (Ambro concurring) ("I also join Judge Porter in continuing to 'urge the Supreme Court to clarify the scope of Holland and its place in our constitutional design.'"); United States v. Bond, 681 F.3d 149, 169 (3d Cir. 2012) (Ambro, J., concurring)("I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in Missouri v. Holland".), rev'd sub nom. Bond v. United States, 572 U.S. 844, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014).

- Judge Kethledge, Rife, 33 F.4th at 845-48 ("Based on Holland alone, therefore, we uphold Rife's conviction.).

- Judge Griffith, United States v. Park, 938 F.3d 354, 375 (D.C. Cir. 2019) (Griffith, J., concurring) ("Holland's premise -- that Congress can do by legislation pursuant to a treaty what it cannot do by ordinary legislation that reaches beyond its enumerated powers -- has come in for some criticism").

B. SCHOLARLY DEBATE SHOWS HOLLAND IS OF NATIONAL IMPORTANCE

The scope and persuasiveness of Holland has generated significant scholarly debate over whether the Supreme Court correctly decided Holland. Compare:

- Peter J. Spiro, Resurrecting Missouri v. Holland, 73 Mo. L. Rev. 1029 (2008) (Since Holland, Congress has largely resisted testing the outer bounds of its treaty-implementing authority.);

- Gary Lawson & Guy Seidman, The Jeffersonian Treaty Clause, 2006 U. Ill. L. Rev. 1, 56 (2006) ("The treaty power is simply a "power to 'make Treaties' that are consistent with provisions of the Constitution allocating federal governmental power and that do not violate prohibitory provisions of the Constitution framed broadly enough to apply to the treaty-making authority.");

- Nicholas Quinn Rosenkranz, Executing the Treaty Power, 118 Harv. L. Rev. 1867 (2005) (arguing that Holland "is wrong and... should be overruled" because constitutional text, history, and structure, along with practical considerations, weigh against it)

with:

- David M. Golove, Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075 (2000) (asserting that constitutional history and "the fundamental principle of national supremacy" support Holland's recognition of broad congressional authority to enact treaty-enforcing legislation).

This debate suggests mounting interest for reconsideration of the rationale for Holland's holding.

C. AUTHORITY UNDER THE OPTIONAL PROTOCOL TREATY LACKING

Assuming § 2423(c) is in fulfillment of the Optional Protocol treaty, what actions are positive obligations and what actions are only permissible but not required? When relying on the Necessary and Proper Clause as Congress's sole grant of power, it is essential that this power not be used to implement those things that are not explicit positive obligations. "When enacting legislation under the Necessary and Proper Clause, Congress must ensure that it is not overstepping its authority under the treaty provisions." Doerfel at 370; Bond, 681 F.3d at 165 (Challenging 18 U.S.C. § 229, the Third Circuit opined that "because the [Chemical Weapons] Convention falls comfortably within the Treaty Power's traditional subject matter limitation,

["matters plainly relating to war and peace"], the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power, unless it somehow goes beyond the Convention..."](emphasis added); Sale v. Haitian Centers Council, 509 U.S. 155 (1993) ("a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent").

First, the Optional Protocol requires States parties to work together. They are explicitly required to provide assistance with investigations and international cooperation and coordination between their authorities. See Appendix E, Art. 6 & Art. 10 at App-26 and App-28. To be sure, a mutual investigation could result in prosecution in any nation with jurisdiction and the consent of the nation where the crime occurred. But, in Mr. Arbaugh's case, Haiti was not consulted, advised, or a participant. They weren't asked for consent to prosecute its nation's crime between two Haitian residents.

Second, the Optional Protocol requires governments to criminalize, "as a minimum," these commercial acts and activities: sale of children, child prostitution (for remuneration or any other form of consideration) and child pornography. See Appendix E, Art. 1 to 3 at App-24 to App-25. The Optional Protocol does not explicitly require criminalization of Mr. Arbaugh's non-commercial acts. It is beyond the limits of Congress's constitutional power to justify enactment of § 2423(c) -- to criminalize non-commercial acts -- as a treaty power.

The Fourth Circuit has drawn an unsupported conclusion that

non-commercial sex with a minor abroad has a demonstrable effect on sex tourism:

> Critically, though, the Fourth Circuit has squarely held that Congress acted within its constitutional authority in enacting § 2423(c), even as applied to non-commercial sex with a minor abroad. Bollinger, 798 F.3d at 218. As the Bollinger court explained, "Congress may. . regulate an activity when it is rational to conclude that the activity has a demonstrable effect on foreign commerce. It is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry." 798 F.3d at 218. The court went on to explain in some detail why such a conclusion was reasonable. Id. at 218-19.

See Appendix B, at App-10.

The Fourth Circuit mentions no sources to justify its assumption that sexual abuse effects sex tourism.

Judge Hartz says:

> If data show that prosecutions of noncommercial child sexual abuse reduce the incidence of commercial abuse, those data have not been presented to this court. I cannot agree with the unexplained view of the Fourth Circuit that "[i]t is eminently rational to believe that prohibiting the noncommercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry." Bollinger, 798 F.3d at 218. Contra United States v. Bianchi, 386 F. App'x 156, 163 (3d Cir. 2010) (Roth, J., dissenting) ("I find that there is no rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce."); [United States v.] Reed, 2017 U.S. Dist. LEXIS 118020, 2017 WL 3208458, at *12-13 (the connection is "too attenuated to rationally qualify as 'substantial.'"); United States v. Park, 297 F. Supp. 3d 170, 178-79 (D.D.C. 2018) (following Reed).

United States v. Durham, 902 F.3d 1180, 1259 (10th Cir. 2018) (Hartz, dissenting) ("(1) there is no evidence in this case of any commercial sexual activity, (2) I fail to see how conduct like that of Defendant [sexually assaulting boys and girls he was

supposed to be helping] has any impact on commercial sexual activity, and (3) no one has presented to this court any evidence of such a connection.").

Generally, studies show that there is no relationship between sexual abuse and child prostitution.

> [C]hild sex abuse is not a commodity that is typically purchased on the open market; there is no similar tradeoff in which if individual production is regulated, the consumer is forced to participate in a commercial market that can be controlled by the federal government. Most child sex abuse is perpetrated by children's family members and close acquaintances, not anonymous purchasers. Criminalizing the abuse of children does not encourage abusers to start engaging in market activity, such as paying providers of child prostitutes, that can be regulated as a commercial enterprise. It just prohibits private, noneconomic activity that occurs wholly outside the markets.

Notebaert, at 973-74 (internal citations omitted).

The Optional Protocol covers only commercial sex offenses against children; it says nothing about the effects of noncommercial sex offenses on foreign commerce. Durham, 902 F.3d at 1262. See Reed, 2017 U.S. Dist. LEXIS 118020, 2017 WL 3208458, at *16 ("The Optional Protocol calls on States Parties to create and enforce laws that prohibit the exploitation of children for commercial gain.") (emphasis added)).

Third, the Optional Protocol only allows, but does not require States parties to crimnalize conduct by their citizens. See Appendix E, Art. 4, at App-25. Compare "shall... establish its jurisdiction... when the offenses are committed in its territory") (Art. 4, para. 1) with "may... establish its jurisdiction... [w]hen the alleged offender is a national of that State". (Art. 4, para 2(a)). The United States may establish

its jurisdiction over its citizen, but Haiti shall establish jurisdiction over offences committed in its territory. For the United States to justify its Constitutional authority to prosecute a U.S. citizen, for conduct outside of its territory, would be beyond the Constitutional authority granted by the treaty.

QUESTION 3 - JURISDICTION WITHOUT CONSENT

> May the United States prosecute its citizen without the consent of the foreign sovereign where the crime was committed? Does the holding in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) and its progeny -- that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute," unless it expressly or impliedly consents to surrender it -- apply only in extradition proceedings where the foreign sovereign is requesting the defendant?
>
> SHORT ANSWER: No sir! The Supreme Court has consistently upheld the principal of absolute territorial jurisdiction, unless that territory surrenders it. A nation's sovereignty is not dependent upon requesting its rights to prosecute through extradition. The record clearly shows that the United States never obtained jurisdiction from Haiti - expressly or impliedly -- to prosecute Mr. Arbaugh.

A. PRECEDENT CONSISTENTLY UPHOLDS ABSOLUTE TERRITORIAL JURISDICTION

This Court has a long and consistent history requiring consent of a foreign country before prosecuting a crime that occurred in its territory:

- Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136-37 (1812) (Marshall, C.J.) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty---- [Consequently] [t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign,... [is] incapable of conferring extra-territorial power...")

- The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.) ("No principle of general law is more universally

acknowledged, than the perfect equality of nations.... It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.")

- Kinsella v. Krueger, 351 U.S. 470, 479, 76 S. Ct. 886, 100 L. Ed. 1342 (1956) (Clark, J.) (nations have a "sovereign right to try and punish [American citizens] for offenses committed within their borders," unless they "have relinquished [their] jurisdiction" to do so)

- Wilson v. Girard, 354 U.S. 524, 529, 77 S. Ct. 1409, 1 L. Ed. 2d 1544 (1957) (Per Curiam) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction")

- Reid v. Covert, 354 U.S. 1, 15, n 29, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (Black, J.) ("[A] foreign nation has plenary criminal jurisdiction... over all Americans... who commit offenses against its laws within its territory")

- Munaf v. Geren, 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) (Roberts, C.J.) (The Supreme Court has "long recognized the principle that a nation state reigns sovereign within its own territory.")

B. COMMENTATORS ARGUE THAT § 2423(C) ENCROACHES OTHER SOVEREIGNS

Broad legislative powers raise the policy concern of "maintaining respect for foreign states' sovereignty within their borders." Notebaert, at 973. With respect to § 2423(c), commentators have said, "Congress encroached upon the realm of another sovereign." Id. at 970; Quoting: Doerfel, at 348. Doerfel explains:

> Unless Congress is validly utilizing its Foreign Commerce Clause or Necessary and Proper Clause powers when it regulates sex tourism, it is unconstitutionally projecting "its criminal law beyond its territorial borders." This creates a risk that the United States government will unconstitutionally interfere with separate sovereign nations in their enactment and prosecution of their domestic criminal law. However, without jurisdiction, a state has no legal authority to subject others to its own laws and legal practices. Because a state has unquestionable authority to enact laws within its own borders, and every state has "absolute power within its territory," how can a state extend this power into the realm

of a separate state sovereign's absolute power?

While the federal government retains its authority to "represent the U.S. nation as a unified and, indeed, sovereign whole on the world stage" while not infringing upon state sovereignty, the United States cannot impose a rule or condition on foreign nations. "[T]he text of the Foreign Commerce Clause, as well as the founders' notions of jurisdiction, oppose Congress disparaging the sovereignties of foreign states by purporting to legislatively 'impose a rule on' these states via a Clause that permits only the power to regulate commerce 'with' them." Any extension would be an unconstitutional infringement into another state's sovereignty and would contravene that state's authority: ["Crimes are in their nature local, and the jurisdiction of crimes is local." (quoting Huntington v. Attrill, 146 U.S. 657, 669 (1892)).] "foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States."

Not only is this overstepping of the boundaries in the Foreign Commerce Clause unconstitutional, but it is regulating among foreign sovereigns - an area in which Congress should tread lightly. Intrusions into the realm of other sovereigns must be legitimate exercises of power and must be taken with the utmost consideration towards the situs nation. Here, not only has Congress encroached upon the realm of another sovereign, but it has done so through an unconstitutional exercise of authority.

Doerfel at 347-48 (internal citations omitted).

Doerfel cautions:

In legislating extraterritorially, Congress must exercise caution to ensure that it does not significantly interfere with the regulations of other sovereign nations. Conflicts arise between U.S. laws and other nations' laws over critical issues such as how to define crimes, and who has jurisdiction over certain criminal offenders. Many Latin American countries have built into their penal code deference in their international jurisdiction to the regulated act's situs country, providing an explicit check on Latin American countries' authority. The situs country is often granted the first opportunity to prosecute the offender, and only if that country declines does the Latin American country step in to prosecute its own national. Congress arguably has similar checks (in that it has limited authority and precise parameters in which to legislate), but no country can step in to enforce the checks built into the U.S. system. Rather, the courts must intervene and strike down a statute when it exceeds the boundaries of Congress's authority. [For example, if Congress enacts a statute under its Foreign Commerce Clause that has no relation to commerce because it is a thinly veiled attempt to legislate crimes

committed abroad, the courts must strike down the statute as unconstitutionally exceeding Congress' constitutional authority.]

Doerfel at 333-34 (internal citations omitted).

In Section V, Doerfel explains the Standard Penal Code for Latin America:

> The Latin American Standard Penal Code provides its jurisdiction in the first six articles - the first, third, and fourth being relevant to this comment. Article One posits that most Latin American countries regulate only within their own territory and locations subject to their jurisdiction. While this general jurisdictional limitation is not unusual by itself, the contrast with the United States' exercise of extraterritorial legislation is stark. While Article One evinces the strong rights of sovereigns over their nations, it also reveals an implicit deference to other nations's laws.
>
> Article Three provides jurisdiction over nationals who commit crimes abroad, but only when extradition requested by another State is refused. Article Three only reaches the conduct of state officials who commit crimes abroad when they are not prosecuted at their place of commission - avoiding any double jeopardy issues with other states. Like Article One, Article Three represents a high degree of deference to other countries, allowing foreign nations to have the first option to prosecute both their own nationals (on a request for extradition) and Latin Americans who commit crimes abroad. This is in direct contrast with how the United States exercises its jurisdiction.
>
> Finally, Article Four of the standard Latin American penal code confronts the issue of international law and criminal acts which are subject to the state based on international covenants. Article Four notes that "[p]riority shall be given, however, to the foreign Nation in whose territory the criminal act was committed..." Article Four ends by stating, "[t]he laws of the foreign Nation where the criminal acts were committed will apply in cases covered by Article Three, whenever they are less severe than applicable State laws." This suggests an even stronger deference than Articles One and Three to other Nations wherein a crime might be committed. The United States law has no such deference to the other Nation's criminal law, particularly laws which are less severe (e.g., lower age of consent) than its own.
>
> The deference that the Latin American penal codes grant to other nations is commendable, and the United States would be wise to imitate it, so as not to interfere with the authority of other sovereign nations. Extraterritorial legislation by definition is going to affect another country. Before Congress enacts this legislation, it should

> ensure first that it is acting constitutionally in its own right, and second that the law of the situs country does not seriously conflict with the legislation it is passing - either or both of which could produce unjust results.

Doerfel at 358-59 (internal citations omitted).

"Congress must not thrust its own criminal law onto the territory or the nationals of another sovereign that does not consent to the exercise of that jurisdiction." Dorfel at 370. That is exactly what has been done in this case.

C. INTERNATIONAL LAW IS SATISFIED BY SOVEREIGN CONSENT

The United States justifies Mr. Arbaugh's prosecution on his citizenship, because he is a U.S. citizen. In international law, this is referred to as "active personality jurisdiction" or "nationality jurisdiction." Restatement (Fourth) of Foreign Relations Law of the United States, § 402(1)(c), cmt. g & rep. note 7 (Am. Law Inst. 2018). Although it is permissible, it is disfavored. James Asa High, Jr., The Basis for Jurisdiction Over U.S. Sex Tourists: An examination of the Case Against Michael Lewis Clark, 11 U.C. Davis J. of Int'l L. & Pol'y. 343, 352 (Spring 2005) (Since the early 1900s, "criminal jurisdiction over U.S. nationals abroad based solely on their citizenship" has been in disfavor.)

Section 403 instructs that when a state has jurisdiction, it should not exercise it "to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) of Foreign Relations Law, § 403(1). Section 403 identifies eight non-exclusive factors to be evaluated in

determining whether the exercise of jurisdiction is unreasonable in a given case. "[A] state should defer to the other state if that state's interest is clearly greater." Id. at § 403(3). In United States v. Clark, 435 F.3d 1100, 1106-07 (9th Cir. 2006) the court considered the principles of international law:

> The Ninth Circuit concluded in Clark that, as a statutory matter, the application of U.S. law was reasonable under international law. It noted that "Cambodia consented to the United States taking jurisdiction and... Clark himself stated... that he 'wanted to return to the United States'"

Colangelo at 1037.

Because the United States failed to obtain the consent of Haiti, Mr. Arbaugh's prosecution was unreasonable, in violation of international law.

The unconstituional application of § 2423(c) to prosecute Mr. Arbaugh, without Haiti's consent or assistance encroached upon the realm of another sovereign. The Supreme Court has not overturned precedent regarding exclusive territorial jurisdiction. Thus far, the lower Courts have failed to uphold this binding precedent in this case.

IT IS JUDICIALLY EFFICIENT TO HEAR THIS CASE

This petition presents related questions of national interest. This single case should be heard to enable the Court to most efficiently address these issues, two for one! Significant judicial resources continue to be wasted as the lower courts flounder in the dark, writing drastically divergent opinions, as they attempt to define the outer limits of the Foreign Commerce Clause and the Necessary and Proper Clause. They need the direction and assistance of this Court.

OTHER JUDGES WOULD DISAGREE WITH THE OUTCOME OF THIS CASE

Other reasonable jurists would find the district court's decision and the Fourth Circuit's denial of a COA wrong:

- United States v. Reed, 2017 U.S. Dist. LEXIS 118020 (D.D.C. July 27, 2017)(Mehta, District Judge)("Section 2423(c) as applied to the conduct alleged in Count Two, is not a constitutional exercise of Congress' authority under the Foreign Commerce Clause," because there are "no facts connecting this alleged conduct to a commercial motive or a thing of value.")

- United States v. Park, 938 F.3d 354, 374 (D.C. Cir. 2019) (Pillard, Circuit Judge) (recognized "the possibility that some applications of [§ 2423(c)] may exceed Congress's authority," but determined that the defendant's actions were sufficiently market-affecting because he was alleged to have "traveled throughout the world seeking out opportunities for child sex abuse.")

- United States v. Clay, 128 F.4th 163 (3d Cir. 2024) (Porter concurring) ("Were we writing on a clean slate, I would join the Sixth Circuit and several other judges in holding that § 2423(c) exceeds Congress's power under the Foreign Commerce Clause.")

- United States v. Durham, 902 F.3d 1180, 1264 (10th Cir. 2018) (Hartz, J. dissenting) (Section "2423(c) is unconstitutional as applied in this case. Not only is it uncontroverted that Defendant was not a sex tourist, he was not even a tourist. The government does not suggest that he had any tie to commercial sex trafficking. The connection between this kind of offense and sex tourism is far too attenuated to support regulation under the Foreign Commerce Clause.")

- United States v. Clark, 435 F.3d 1100, 1121 (9th Cir. 2006) (Ferguson, J., dissenting) ("[T]he question before us is whether Congress properly invoked its power 'to regulate Commerce with foreign Nations,' id., in enacting § 2423(c) to address this problem. It did not. I therefore respectfully dissent.")

- United States v. Bianchi, 386 F. App'x 156, 163 (3d Cir. 2010) (Roth, J., dissenting) ("I find there is no rational basis to conclude that an illicit sex act with a minor undertaken on foreign soil, perhaps years after legal travel and devoid of any exchange of value, substantially affects foreign commerce.")

- United States v. Al-Maliki, 787 F.3d 784, 794 (6th Cir. 2015)(McKeague, Circuit Judge)(concluding that section 2423(c) was unconstitutional, but that such error was not

plain. "we doubt that congress has regulated commerce here")

Because reasonable jurists would find the district court's decision in this case debatable or wrong, at a minimum, the case should be remanded to the Fourth Circuit for issuance of a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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