No. __

IN THE

Supreme Court of the United States

ALL PETROLEUM-PRODUCT CARGO ONBOARD THE M/T ARINA WITH INTERNATIONAL MARITIME ORGANIZATION NUMBER 9189952, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In his dissent from the denial of certiorari in *Baston v. United States*, 580 U.S. 1182, 1186 (2017) (Thomas, J. dissenting from the denial of certiorari), Justice Thomas observed 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." This language aptly describes the D.C. Circuit's decision here, in which the lower court essentially adopted this Court's "affects test" from *United States v. Lopez*, 514 U.S. 549, 559 (1995) as the governing standard under the Foreign Commerce Clause.

The question presented is precisely the one for which Justice Thomas urged a grant of certiorari in *Baston*, and one that has divided the courts of appeals: namely, whether the Foreign Commerce Clause—and, by extension, the jurisdictional provision in the criminal material-support statute (18 U.S.C. § 2339B(d)(1)(E)) on which it relies—requires a "nexus to the United States" in the form of foreign commercial act "with" the United States rather than simply an act occurring entirely abroad among foreign actors, if that commerce "affects" the United States.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners are All Petroleum-Product Cargo Onboard the M/T Arina with International Maritime Organization Number 9189952, All Petroleum-Product Cargo Onboard the M/T Nostos with International Maritime Organization Number 9258014, and Aspan Petrokimya, Co. Respondent is the United States of America.

RULE 29.6 STATEMENT

Aspan is a commodities trading company founded and incorporated in the Republic of Turkey in 2010. Aspan has no parent corporation, subsidiaries, or affiliates, nor does Aspan own, control, manage, or direct any other business entities. No publicly held corporation owns 10% or more of the stock of Aspan.

LIST OF ALL PROCEEDINGS

This case arises from the following proceedings:

- *United States of America v. All Petroleum-Product Cargo Onboard the M/T Arina with International Maritime Organization Number 9189952; All Petroleum-Product Cargo Onboard the M/T Nostos with International Maritime Organization Number 9258014, and Aspan Petrokimya Co.*, U.S. Court of Appeals for the District of Columbia Circuit, No. 24-5218. Judgment entered April 21, 2026.
- *United States of America v. All Petroleum-Product Cargo Onboard the M/T Arina with International Maritime Organization Number 9189952*, U.S. District Court for the District of Columbia, No. 1:21-cv-03234. Judgment entered September 10, 2024.
- *United States of America v. All Petroleum-Product Cargo Onboard the M/T Nostos with International Maritime Organization Number 9258014*, U.S. District Court for the District of Columbia, No. 1:21-cv-02817. Consolidated with No. 1:21-cv-03234 on April 30, 2023. Judgment entered September 10, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The April 21, 2026 opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 173 F.4th 342 (D.C. Cir. 2026) and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-16a. The opinion of the U.S. District Court for the District of Columbia is reported at *United States v. All Petroleum-Product Cargo Onboard the M/T Arina with International Maritime Organization Number 9189952*, No. 1:21-cv-03234, 2024 U.S. Dist. LEXIS 162252 (D.D.C. Sept. 10, 2024) and is reproduced at Pet. App. 17a-24a.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on April 21, 2026. Pet. App. 25a–26a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The two most relevant statutory and regulatory provisions are below. Other statutory and regulatory provisions relevant to the lower court proceedings can be found in the Addendum to the Corrected Brief of Claimant-Appellant Aspan Petrokimya Co. D.C. Cir. Doc. #2102377 (Feb. 24, 2025).

Article I, Section 8, Clause 3 of the United States Constitution:

"The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes[.]"

18 U.S.C. § 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.—

(1) Unlawful conduct.—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

* * *

(d) Extraterritorial jurisdiction.—

(1) In general.—There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction.—There is extraterritorial Federal jurisdiction over an offense under this section.

INTRODUCTION

The Constitution's Commerce Clause authorizes Congress to regulate commerce by the United States "with" foreign nations; by contrast, Congress has the power to regulate domestic commerce "among" the several states. U.S. Const. art. I, § 8, cl. 3. Relying on this language, Congress provided that one ground for exercising extraterritorial jurisdiction in cases alleging violations of the criminal material support statute in 18 U.S.C. § 2339B(d)(1)(E) is where "the offense occurs in or affects interstate or foreign commerce."

In the decision below, the Court of Appeals determined it was bound by its own precedents to construe the foreign commerce clause identically to the domestic power, despite the "force" of the textual distinction, and despite contrary decisions by other courts of appeals. Pet. App. 9a. In short, the D.C. Circuit held that it was bound by its own precedents to construe Congress' power to regulate foreign commerce using the same "'affects'" test that applies to domestic commerce—by looking at whether the activity "'substantially affect[s]'" global commerce. *Id.* at 9a–10a (citing *United States v. Park*, 938 F.3d 354, 371 (D.C. Cir. 2019) (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995))). As a result, the D.C. Circuit ruled that the jurisdictional provision of 18 U.S.C. § 2339B(d)(1)(E) extends to any activity that affects foreign commerce.

As the D.C. Circuit acknowledged, Pet. App. 9a–10a, other courts of appeals have disagreed, adopting a narrower construction of the foreign commerce clause based on the constitutional text and history. *See, e.g.*, *United States v. Weingarten*, 632 F.3d 60, 70 (2d Cir. 2011) ("[I]t would be anomalous to construe the general definition of 'foreign commerce' in § 10 . . . as including all forms of commerce occurring outside the United States and without nexus whatsoever to this country."); *United States v. Davila-Mendoza*, 972 F.3d 1264, 1277 (11th Cir. 2020) ("[T]he Constitution grants Congress the authority to regulate commerce 'with foreign nations' not 'among and within foreign nations.'"); *cf. United States v. Al-Maliki*, 787 F.3d 784, 792 (6th Cir. 2015) (noting that "the textualist reading" of the Foreign Commerce Clause "require[s]" "commerce '*with'* a foreign Nation"). The Court of Appeals here held that" "[i]rrespective of those arguments' force they are foreclosed by our precedent." Pet. App. 9a.

The D.C. Circuit's errant construction of the Foreign Commerce Clause warrants review. Commentators have noted for over ten years that this Court "has not yet articulated the extent of Congress's power under the Foreign Commerce Clause to enact laws with extraterritorial reach. Because of this lack of guidance . . . lower courts are at a loss for how to analyze Foreign Commerce Clause issues." Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 Fla. L. Rev. 1139, 1148–49 (2013). Justice Thomas expressed this same sentiment in a dissent from the denial of certiorari. *United States v. Batson* ("*Baston*"), 580 U.S. 1182, 1185 (2017) ("the time has come for us to clarify the scope of Congress' power under the Foreign Commerce Clause to regulate extraterritorially.")

Congress' powers under the Constitution must have some limits, and the text here limits that power to foreign activity "with" the United States. Conscripting the domestic "affects" test from *Lopez* draws the line far too broadly in the global economy, as virtually every foreign economic action can be viewed as having some effect on the U.S. economy and U.S. interests. By refusing to require some tangible or unique connection to the United States of the foreign activity at issue, the D.C. Circuit's analysis allows Congress to regulate virtually any conduct anywhere in the world—a dangerous precedent, particularly if copied by other nations attempting to reach U.S. conduct.

This case presents an ideal vehicle for addressing the issue, as it was raised and litigated in both courts below, and the D.C. Circuit's opinion acknowledges the Circuit split and the "force" of Petitioner's argument. The issue is fully preserved and ripe for this Court's review. This Court should grant the petition and, after briefing on the merits, should reverse the decision below.

STATEMENT OF THE CASE

A. Background

This is an *in rem* forfeiture action in which the government seeks forfeiture under 18 U.S.C. § 981(a)(1)(G)(i) of foreign crude oil it seized from two foreign vessels in the Mediterranean Sea, the *Motor Tanker Arina* with International Maritime Organization Number 9189952 ("*Arina*") and the *Motor Tanker Nostos* with International Maritime Organization Number 9258014 ("*Nostos*"). Its theory of the case is that the oil itself was involved in a violation of 18 U.S.C. § 2339B, a criminal provision that Congress has given extraterritorial reach, as specified in section 2339B(d)(1), which establishes six ways in which a sufficient connection to the United States can be established.

Five of these impose a discrete U.S. nexus—the offense involved a U.S. citizen or permanent resident, or someone present in the United States or the offense occurred here; these were plainly not applicable. Before it was seized in the Mediterranean, the crude oil had not been to the United States, was not owned by or sold to a U.S. company and was never in the possession of any U.S. entity. None of the parties to the activity had any connection with the United States and the oil had no connection to the United States. Thus, the only potentially applicable jurisdictional provision is section 2339B(d)(1)(E), which allows jurisdiction where "the offense occurs in or affects interstate or foreign commerce."

In support of its single forfeiture count, the Amended Complaint sets forth factual allegations in a section titled "Facts Giving Rise to Forfeiture." D.C. Cir. Court of Appeals Joint Appendix ("JA") at JA135–49 (D.C. Cir. Doc. #2102162 (Feb. 21, 2025)). Most of those facts do not relate to the seizure of *this* oil, but instead seek to show the worldwide effects of Iranian oil sales on the global economy.

To be sure, these allegations tell an ugly story about actions by the IRGC and IRGC-QF, both designated terrorist organizations that the government alleges to be the financial engine behind a global network of terror. JA137–38¶¶ 16–18. With regard to crude oil generally, the U.S. government alleges that the IRGC and IRGC-QF use the proceeds from the oil sales to support terror activities and human rights abuses "'at home and abroad,'" JA136 ¶ 12; *see generally* JA135–36 ¶¶ 6–13 (citation omitted), and that the IRGC and IRGC-QF "act in foreign commerce with specific aims to threaten U.S. interests and the national security of the United States, affecting U.S. commerce." JA138 ¶ 20.

The government also makes a series of allegations about the NIOC, alleging that it helps to finance the IRGC-QF, JA140–41 ¶¶ 23–27, that the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") designated the NIOC for providing support to the IRGC, JA141 ¶ 27, and that the NIOC "undertakes efforts in foreign commerce contrary to the interests of the United States," JA141 ¶ 28. The government does not allege that the NIOC has taken any actions directly against the United States, its citizens or residents, or their property, nor does it claim that the NIOC's alleged provision of material support—in the form of transporting or selling crude oil—was with the specific intent to influence, affect, or retaliate against United States government conduct. *See* JA140–44 ¶¶ 22–38. Instead, the government alleges generally that the NIOC has engaged in activities contrary to the *interests* of the United States due to its alleged connections to foreign terrorist organizations within Iran. *See* JA141–43 ¶¶ 28–29.

With respect to the seized crude oil at issue (the "Defendant Property"), the government alleges that the Defendant Property was first loaded onto an "NITC-owned and operated oil tanker" called *Stark I*. JA145 ¶ 44. The government then alleges that Stark I "met up with the Arina" and transferred the oil. JA146 ¶ 47; JA147 ¶ 55. After allegedly receiving the oil from Stark I, the "fully laden" *Arina* allegedly spent nine months sailing aimlessly around the Middle East without delivering its cargo. JA148 ¶¶ 59–60. On August 26, 2021, the *Arina* allegedly offloaded a portion of its cargo to the *Nostos*. JA103 ¶ 6; JA109 ¶ 6; JA090 ¶ 22. None of these parties had any connection to the United States.

In fact, the first connection to the United States was not until October 2021, when the U.S. Department of Justice contacted the ship managers, informed them that seizure warrants had been issued for the cargo, and directed them to sail to the United States. JA104–05 ¶¶ 8–12; JA110–11 ¶¶ 8–12. The vessels then proceeded to the United States, where the government sold the crude oil from the *Nostos* for $13,368,502.49, JA128, and from the *Arina* for $38,250,037.19. *See* JA122.

B. Procedural History

In 2021, the government brought two identical civil actions seeking the forfeiture of crude oil onboard two overseas vessels, the *Nostos* and the *Arina*. *See* JA070–80; JA084–93. The government invoked section 981(a)(1)(G)(i), which provides for the forfeiture of foreign assets "of any individual, entity, or organization engaged in planning or perpetrating any [] Federal crime of terrorism . . . against the United States, citizens or residents of the United States, or their property, and all assets, . . . affording any person a source of influence over any such entity or organization." 18 U.S.C. § 981(a)(1)(G)(i). Acting ex parte, under seal, and without notice to known claimants, the government sold the oil after it reached the United States. *See* JA122–38.

After receiving notice of these proceedings, Aspan filed verified claims and asserted its interest in all petroleum-product cargo onboard both vessels, explaining that it "holds title to and an interest in the defendant property." JA108–13; JA102–07.

The district court dismissed the United States' initial forfeiture complaints without prejudice, finding that the government failed to establish a jurisdictional nexus to the United States. *See* JA014 (Mar. 17, 2023 Minute Entry); Pet. App. 4a, 18a. Following the dismissal, the cases were consolidated, *see* JA014 (Apr. 30, 2023 Minute Order), and the United States filed its Amended Complaint in May 2023. JA133–54.

The Amended Complaint, much like the original complaint, states a single forfeiture claim under section 981(a)(1)(G)(i). *Compare* JA149–52 *with* JA90–91. All rely on purported violations of 18 U.S.C. § 2339B and assert jurisdiction based solely on 18 U.S.C. § 2339B(d)(1)(E)—i.e., the catch-all provision where "the offense occurs in or affects interstate or foreign commerce."

Aspan moved to dismiss the Amended Complaint, challenging the sufficiency of the government's allegations on multiple grounds, including the absence of a nexus to the United States. Aspan Petrokimya Co.'s Mot. to Dismiss the Verified Compl. (July 31, 2023), D.D.C. ECF No. 28.

C. The Decisions Below

The district court denied Aspan's renewed motion to dismiss. *See* JA006 (Mar. 13, 2024 Minute Entry); JA058:8–JA059:3; Pet. App. 4a.

On extraterritoriality, it was agreed that most of the extraterritorial prongs of section 2339B(d)(1) did not apply. However, the district court determined that section 2339B(d)(1)(E)'s extraterritorial jurisdiction provision requiring "the offense occurs in or affects foreign commerce" was satisfied by general allegations that the property was involved in commercial activity that affects global markets, even if unrelated to the alleged material support offense and without any relation to foreign commerce with the United States.

Specifically, the district court found that the NIOC's activities "occurred in or affected foreign commerce" because "the government now pleads citing media sources and research papers that the introduction of billions of dollars of oil annually into the black market has a predictable effect on the price of petroleum and other fossil fuels in the United States as crude oil and other fossil fuels are global commodities." JA062:7-11. Second, the district court held that section 2339B(d)(1)(F) provides extraterritorial jurisdiction over the alleged section 2339B offense because—historically and without regard to any of the alleged conduct—some of the IRGC's terrorist activities have affected the United States. From this, the court concluded that because the NIOC allegedly assisted the IRGC, the NIOC itself must be subject to jurisdiction based solely on the IRGC's U.S.-targeted terrorism efforts. It was immaterial to the district court that the government did not actually plead that the NIOC aided and abetted, or conspired with, the IRGC. JA063:4–10.

Thereafter, the parties conferred and agreed to expedite final judgment while preserving Aspan's right to appellate review. *See* Joint Status Report, (May 3, 2024), D.D.C. ECF No. 35. Pursuant to these filings, the district court granted judgment on the pleadings in favor of the government. Pet. App. 17a-24a.

On April 21, 2026, the Court of Appeals affirmed. *Id.* at 1a-16a. On the foreign commerce issue, the Court of Appeals stated:

> The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Aspan argues that the Foreign Commerce Clause—and, by extension, the material-support statute—requires a "nexus to the United States" in the form of an act in "foreign commerce" with "a significant connection between that

> commerce and the United States." Appellant's Brief 20–21. More specifically, Aspan asserts that the Foreign Commerce Clause reaches only "commerce that itself involves the United States" and should be construed more narrowly than the Interstate Commerce Clause. *Id.* at 23. In support of this theory, Aspan relies on a close reading of the text of the Foreign Commerce Clause, out-of-circuit authorities, and separate writings of several Supreme Court Justices. *Id.* at 21–23.
>
> Irrespective of those arguments' force, they are foreclosed by our precedent. In *United States v. Park*, 938 F.3d 354 (D.C. Cir. 2019), we held that the Foreign Commerce Clause incorporates the same "framework" and is "at least as expansive" as the Interstate Commerce Clause. *Id.* at 371–72. The Interstate Commerce Clause, we explained, permits Congress to regulate even local activity that indirectly but "substantially affect[s]" interstate commerce. *Id.* at 371 (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)). And we held that the Foreign Commerce Clause similarly permits Congress to regulate transactions occurring entirely abroad so long as they substantially affect commerce with the United States. *Id.* at 372; *see also In re Sealed Case*, 936 F.3d 582, 591 (D.C. Cir. 2019).

Id. at 9a-10a.

The Court of Appeals then went on to hold that the government's allegations were sufficient to satisfy the "effects" test from its prior precedents. This timely certiorari petition followed.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision resolved an issue of exceptional importance in a manner that conflicts with the text of the Foreign Commerce Clause and decisions of other United States Courts of Appeals. The case also presents an excellent procedural vehicle for resolving this issue, as the question is fully preserved. It is hard to imagine a case with less of a tangible connection to the United States than this one. This Court's corrective intervention is therefore both necessary and warranted. *See* Sup. Ct. R. 10(a).

A. The D.C. Circuit's Decision Is Not Supported by the Original Understanding of the Constitutional Text or by this Court's Precedents

The text of the Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Constitution, art. I, § 8, cl. 3. This clause is generally construed to allow Congress to regulate certain types of foreign commerce, domestic commerce and commerce with Indian tribes. The term "commerce" is the same word for all three, but this does not mean that the original understanding of Congress' power was the same with respect to all three.

In the first place, any discussion about "the comparative breadth of the Foreign Commerce Clause are of questionable relevance where the issue is Congress' power to regulate, or even criminalize, conduct within another nation's sovereign territory." *Baston*, 580 U.S. at 1186. The plain meaning of the term "foreign commerce" presupposes "[t]rade between persons in the United States and those in a foreign country." *Foreign Commerce*, Black's Law Dictionary (6th ed. 1990); *United States v. Al-Maliki,* 787 F.3d 784, 792 (6th Cir. 2015) ("the textualist reading" of the Foreign Commerce Clause "require[s]" "commerce '*with'* a foreign Nation".).

Along the same lines, there is a key textual difference in article 1, section 8, clause 3 as the Foreign Commerce Clause authorizes Congress to regulate commerce with foreign nations—not commerce occurring entirely among them. *See Haaland v. Brackeen*, 599 U.S. 255, 320–22 (2023) (Gorsuch, J., concurring) ("it is 'well established' that the individual Commerce Clauses have 'very different applications,'" "the Constitution speaks of 'Commerce . . . *among'* when discussing interstate dealings, but 'Commerce *with'* when addressing dealings with tribal and foreign sovereigns"). Put another way, the constitutional authority for the exercise over "foreign commerce" presupposes a significant connection between that commerce and the United States – a nexus for more significant than a simple "affects" test. U.S. Const. art. I, § 8, cl. 3. This sort of nexus was entirely lacking here, and the need for such a nexus is absent from the court of appeals' analysis.

While this Court's Foreign Commerce Clause precedents are limited—which is why this Court's intervention here is needed—the D.C. Circuit's analysis finds no support in them. For example, in *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 344 (2016), this Court explained that a statute's reference to "foreign commerce" does not "mean literally all commerce occurring abroad"—instead, it would construe "foreign commerce" in a federal statute as including "commerce between the United States and a foreign country." This language from *RJR* is consistent with the fact that this Court has never upheld legislation of "extraterritorial operation which purports to regulate conduct inside foreign nations." Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 1001 (2010). And for good reason: if read more broadly, as occurred below, "[t]he Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other." *Baston*, 580 U.S. 1186. Such an analysis is not authorized by the text or original understanding of the Foreign Commerce Clause.

B. This Case Presents an Important Issue on which Courts of Appeal Are Divided

The D.C. Circuit here essentially adopted the *Lopez* test as the correct one for Foreign Commerce Clause cases. As the D.C. Circuit acknowledged, Pet. App. 10a, other courts of appeals have disagreed with this analysis, adopting a narrower construction based on the constitutional text and history.

For example, in *United States v. Rife*, 33 F.4th 838, 844 (6th Cir. 2022), the Sixth Circuit, after engaging in an extensive review of Justice Thomas' dissent in *Baston*, ultimately rejected the notion that the *Lopez* framework should apply to the Foreign Commerce Clause, holding that the appropriate test was "whether [the] conduct fell within Congress's power to 'regulate Commerce with foreign Nations,' as that power was originally understood." The Sixth Circuit then went on to determine that the Foreign Commerce Clause did not allow Congress to criminalize the conduct of a U.S. citizen, using the following reasoning:

> [T]he bare fact that an American "travels in foreign commerce" does not empower Congress to regulate, under the Foreign Commerce Clause, everything that American does afterward. That is the plain implication of the government's argument here: that, once an American citizen travels in foreign commerce, the federal government has a police power to regulate (or proscribe) *any* conduct that citizen might engage in overseas, from marrying a foreign national to consuming *foie gras*. Congress has no such power.

Id. at 845.

Similarly, in *United States v. Davila-Mendoza,* 972 F.3d 1264, 1276–77 (11th Cir. 2020), the Eleventh Circuit, informed by Justice Thomas' dissent in *Baston*, engaged in a broad discussion of history and precedent that cast doubt on whether *Lopez* was the appropriate test in Foreign Commerce Clause cases. Although the Eleventh Circuit assumed without deciding that the *Lopez* "substantial affects" analysis could apply in this context, it refused to apply this analysis absent a "hook or nexus" beyond mere general effect of the type of conduct at issue, "to tie wholly foreign extraterritorial conduct to the United States." *Id.* at 1275.

Ultimately, the Eleventh Circuit Court of Appeals determined that the text of the Foreign Commerce Clause—and particularly the fact that the "Constitution grants Congress the authority to regulate commerce 'with foreign nations' not 'among and within foreign nations'"—meant that the analysis must be tethered to some conduct with a nexus to the United States. *Id.* at 1277. To hold otherwise, would leave nothing

> to prevent Congress from globally policing wholly foreign drug trafficking commerce, potentially intruding on the sovereignty of other Nations, and bringing foreign nationals into the United States for prosecution based solely on extra-territorial conduct when the United States was neither a party to, nor a target of, the commerce.

Id. at 1276–77.

Finally, in *United States v. Weingarten,* 632 F.3d 60, 70 (2d Cir. 2011), the Second Circuit determined, against the backdrop of a Foreign Commerce Clause challenge, that the term "travel in foreign commerce" must incorporate a territorial nexus to the United States—that is, travel between the U.S. and a foreign country. As the Court explained, "it would be anomalous to construe the general definition of 'foreign commerce' in [28 U.S.C.] § 10 . . . as including all forms of commerce occurring outside the United States and without nexus whatsoever to this country." *Id.*

To be sure, as Justice Thomas correctly observed in *Baston*, 580 U.S. at 1185, "[s]ome courts of appeals have imported the *Lopez* categories directly into the foreign context, some have applied *Lopez* generally but recognized that Congress has greater power to regulate foreign commerce, and others have gone further still, holding that Congress has authority to legislate under the Foreign Commerce Clause when the text of a statute has a constitutionally tenable nexus with foreign commerce." (quoting *United*

States v. Bollinger, 798 F.3d 201, 215 (4th Cir. 2015) (cleaned up)); *Bollinger*, 798 F.3d at 215–16 ("Instead of requiring that an activity have a substantial effect on foreign commerce, we hold that the Foreign Commerce Clause allows Congress to regulate activities that demonstrably affect such commerce.").

The division of authority on this important issue is another reason this Court's corrective intervention is warranted.

C. This Case Presents an Excellent Procedural Vehicle for Resolving This Important Issue

This case also presents an excellent vehicle for resolving the important question raised here. As the opinion below expressly acknowledges, the issues raised by Petitioner have "force" but were foreclosed by D.C. Circuit precedent. Pet. App. 9a. Petitioner raised and litigated this issue in both the district court and the court of appeals. *Id.* The issue thus comes to this Court on a record fully preserved for resolution of the issue.

It has now been almost a decade since Justice Thomas invited this Court to "grant certiorari in this case to consider the proper scope of Congress' Foreign Commerce Clause power." *Baston*, 580 U.S. 1187. The issue has had time to percolate, a clear division of authority has developed, and this case presents an ideal vehicle for doing so, and this Court should take the opportunity now.

CONCLUSION

The Court should grant the Petition for Certiorari.

Respectfully submitted,

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