ORAL ARGUMENT NOT YET SCHEDULED

No. 18-3017

In the United States Court of Appeals for the District of Columbia Circuit

UNITED STATES OF AMERICA,
Appellant

v.

JOSEPH RICKY PARK, A/K/A JOSEPH DEMASI,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, D. CT. NO. 16-CR-9 (HON. TANYA S. CHUTKAN)

OPENING BRIEF AND ADDENDUM FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

The parties appearing in the district court were the United States of America as plaintiff and Joseph Ricky Park as defendant. The parties appearing in this Court on appeal are the United States as appellant and Park as appellee. There are no amici or intervenors.

B. Rulings Under Review

The United States appeals the district court's order dismissing the indictment, dated February 28, 2018. ECF 35.

C. Related Cases

The government is not aware of any related cases.

s/Sonja M. Ralston

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The relevant statute and treaty are included in an addendum to this brief.

GLOSSARY

CSA	Controlled Substances Act
SORNA	Sex Offender Registration and Notification Act

JURISDICTIONAL STATEMENT

The government appeals the district court's order dismissing the indictment against defendant-appellee Joseph Park. The district court (Chutkan, J.) had jurisdiction under 18 U.S.C. § 3231. The court entered judgment on February 28, 2018, and the government filed a timely notice of appeal the next day. ECF 36, 38.[1] This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3731.

STATEMENT OF THE ISSUE

Park, a United States citizen, sexually abused minors while teaching English in Vietnam and produced child pornography. Section 2423(c) of Title 18 prohibits a U.S. citizen residing abroad from engaging in child sexual abuse and producing child pornography. The question here is whether applying § 2423(c) to Park's conduct is within Congress's constitutional authority.

STATEMENT OF THE CASE

I. Park Sexually Abused a Boy in Vietnam and Produced Child Pornography.[2]

Park is a United States citizen and convicted child sex offender. ECF 1 ¶ 9. He last left the United States in 2003, and since that time, he has traveled to or resided in Cuba (where he was arrested and incarcerated for "attempted corruption of a minor"),

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[1] ECF refers to an entry on the district court docket, 1:16-cr-9 (D.D.C.).

[2] These facts come from the criminal complaint (ECF 1), the indictment (ECF 2), the government's response to Park's motion for a bill of particulars (ECF 22), and discovery provided to Park. In reviewing the district court's dismissal of an indictment, this Court presumes these facts to be true. *See United States v. Ballestas*, 795 F.3d 138, 149 (D.C. Cir. 2015).

South Korea (where his visa was revoked and he was ordered to leave based on his prior conviction and indecent behavior while working as a teacher), the Philippines, Thailand, Russia, Kuwait, China, Laos, Singapore, Malaysia, Saudi Arabia (where he was asked to leave because of his "pedophile" behavior), Bahrain, Lebanon, Cambodia, and Vietnam (where the charged conduct took place). ECF 23 at 1-2; ECF 1 ¶ 12. Throughout this time, Park maintained a valid U.S. passport. *See* ECF 1 ¶ 12(g); ECF 23-1.

In early 2015, while working as a teacher in Vietnam, Park invited an 11-year-old Vietnamese boy and his two friends to his apartment for English lessons. ECF 22 at 2; ECF 1 ¶¶ 13-16. While the three boys were playing video games, Park placed his hand on the victim's genitals and then "pinch[ed]" and stroked the victim's genitals through the victim's clothing. ECF 1 ¶ 16. Park then attempted to place his hand inside the victim's pants, but the victim pushed Park's hand away. *Id.*

In the summer of 2015, also while living in Vietnam, Park produced child pornography of unidentified minor victims. ECF 22 at 2-3. After Park was deported from Vietnam, he asked some friends to clean out his apartment. ECF 1 ¶¶ 17-19. Those friends discovered the child pornography on Park's computer and thumb drives and turned them over to investigators. ECF 1 ¶¶ 19-24.

II. The Statutory Scheme and Park's Indictment.

Section 2423 prohibits three categories of behavior relating to foreign, international, or interstate sexual activity with minors: (a) transporting minors in

interstate or foreign commerce for the purpose of prostitution or criminal sexual activity; (b) traveling in interstate or foreign commerce with the intent to engage in illicit sexual conduct; and (c) traveling in foreign commerce or residing abroad and engaging in illicit sexual conduct. Subsection (c) applies only to U.S. citizens and permanent residents. Subsection (f) defines "illicit sexual conduct" to include three categories of acts: (1) child sexual abuse, which would violate other provisions of Title 18 if the act occurred in areas under federal jurisdiction; (2) commercial sex acts; and (3) child-pornography production. Subsection (e) provides for attempt and conspiracy liability.[3]

In January 2016, a federal grand jury in the District of Columbia charged that between January and December 2015, Park was a U.S. citizen residing in Vietnam and "engage[d] and attempt[ed] to engage in illicit sexual conduct, as defined in [§ 2423 (f)], with another person under 18 years of age," in violation of 18 U.S.C. §§ 2423(c) and (e). ECF 2. In response to Park's motion for a bill of particulars, ECF 16, the government identified the illicit sexual conduct as involving "an actual and attempted sexual act as defined in 18 U.S.C. § 2246," in violation of subsection (f)(1), and "the actual and attempted production of child pornography," in violation of subsection (f)(3). ECF 22 at 2. This is one of the first prosecutions brought under the new "resides" language in § 2423(c), added in 2013, and the child-pornography prohibition in § 2423(f)(3), added in 2015.

[3] Subsection (d) provides for a specific variety of aiding and abetting liability; subsection (g) provides a limited affirmative defense. Neither is relevant here.

III. The District Court Granted Park's Motion to Dismiss the Indictment.

Park moved to dismiss the indictment on the ground that § 2423(c) exceeded Congress's constitutional authority. ECF 18. The district court agreed, finding that neither the Foreign Commerce Clause nor the treaty power authorized the statute, and granted the motion. ECF 35. Although Park challenged § 2423(c) as unconstitutional both facially and as applied, the district court addressed only his as-applied challenge. *Id.* at 1.

First, the court considered the Foreign Commerce Clause. The court declined to find that the Foreign Commerce Clause was any broader than the Interstate Commerce Clause and applied the analysis from the Supreme Court's interstate commerce cases, specifically, *United States v. Lopez*, 514 U.S. 549 (1995). ECF 35 at 6. The court concluded that the statute did not fall under the first *Lopez* factor—"'the use of the channels of [foreign] commerce'"—because the "resides" prong "does not require [Park] to have had any connection with or movement in foreign commerce at all." *Id.* at 7-8. The court also rejected the government's argument that Park's U.S. passports and visas were "instrumentalities" of commerce—the second *Lopez* factor—because the statute, as applied here, regulated "residing in a foreign country and engaging in illicit sexual conduct" rather than the use of the documents to travel to Vietnam. *Id.* at 8-9.

As to the final *Lopez* factor, the court concluded that the charged activities did not have "a substantial effect on foreign commerce." It rejected the government's argument that child pornography is "quintessentially economic activity" because the

child pornography here "occurred exclusively in Vietnam," ECF 35 at 10; "there [was] no indication that Park engaged in the *trade* of child pornography or that the pornography 'traversed … over the Internet,'" *id.* (quoting *United States v. Sullivan*, 451 F.3d 884, 885 (D.C. Cir. 2006)); and there were no allegations that Park used any materials that were transported in foreign commerce, *id.* The court also noted that the "resides" prong of § 2423(c) does not contain an express jurisdictional element and that the government did not proffer any evidence, "legislative or otherwise," to demonstrate that "non-commercial illicit sexual conduct committed by Americans residing abroad has an effect on foreign commerce." *Id.* Finally, the court rejected the link between the noncommercial conduct at issue here and the international market in child trafficking and sex tourism as "tenuous" and "too speculative to be substantial." *Id.* at 11 (internal quotation marks omitted). It further stated that it would reach the same conclusion even if it were to apply the "'demonstrable effect' test established in [*United States v. Bollinger*, 798 F.3d 201, 215-216 (4th Cir. 2015)] instead of the 'substantial effect' test established in *Lopez*." *Id.* at 14.

The court also concluded that Congress did not have authority under the Necessary and Proper Clause to enact the statute as implementing the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography ("Optional Protocol"), a treaty that the United States ratified in 2002. *See* 148 Cong. Rec. S5717-01. The court noted that § 2423(c)'s legislative history is "devoid" of any indication that Congress intended

that provision to effectuate the Optional Protocol. ECF 35 at 16. Even accepting that Congress did intend to do so, the court nonetheless concluded that the statute as applied to Park's non-commercial conduct was not "rationally related to the single goal of the Optional Protocol, which was to address the States Parties' grave concerns regarding the '*international traffic* of children.'" *Id.* (quoting Optional Protocol, preamble). The court rejected the government's argument that the Optional Protocol was explicitly aimed at targeting non-commercial child pornography, reasoning that the provisions of the Protocol only require criminalizing the production of child pornography domestically or between the United States and another country. *Id.*

The government appeals the dismissal of the indictment.

SUMMARY OF ARGUMENT

Section 2423(c) is constitutional under both the Foreign Commerce Clause and the treaty power. The Foreign Commerce Clause encompasses all the same powers as the Interstate Commerce Clause, including the power to regulate commodities, but is also broader because it is not constrained by federalism. Even under the Interstate Commerce Clause, Congress may regulate and prohibit the production and possession of any commodity for which there is an interstate market, even if the prohibition sweeps up purely local instances of production and possession. The Supreme Court has applied this principle to uphold, most recently, the Controlled Substances Act's total prohibition on the growing and possession of marijuana. *Gonzales v. Raich*, 545 U.S. 1 (2005). Child pornography is no different: a vast global market exists for the

commodity, and Congress has enacted a comprehensive set of laws prohibiting its production and possession, including §§ 2423(c) and (f)(3). Under *Raich*, it matters not whether the child pornography Park produced entered—or even was intended to enter—that market, and the district court erred in holding otherwise.

The district court also erred in concluding that the Foreign Commerce Clause sweeps no more broadly than the Interstate Commerce Clause. Because the former is not constrained by federalism, it gives Congress even more power to regulate the global marketplace. Considered under the proper framework, the foreign commerce power permits Congress to regulate non-economic activities that nonetheless have a "demonstrable effect" on foreign commerce. *United States v. Bollinger*, 798 F.3d 201, 216 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 2448 (2016). Sections 2423(c) and (f)(1) have such an effect on the global black market for child prostitution, sex tourism, and sex trafficking. Furthermore, the enforcement difficulties inherent in distinguishing the commercial from the non-commercial permit Congress to regulate both in order to make the commercial regulation effective.

Congress also has the power to implement treaties to which the United States is a party, including the Optional Protocol. An implementing statute need only be rationally related to the treaty's goal to be within Congress's power. The Optional Protocol seeks an end to child sex trafficking, child prostitution, and child pornography and contemplates that each state party may police its nationals, whether or not the crimes are committed domestically. As noted above, those activities are intertwined

with child sex tourism and sexual abuse. Therefore, §§ 2423(c), (f)(1), and (f)(3) are rationally related to the Optional Protocol and within Congress's authority.

ARGUMENT

The district court erred in dismissing Park's indictment for two reasons. First, it misconstrued and misapplied the Foreign Commerce Clause. Properly understood, that Clause permits Congress to regulate Park's conduct—producing child pornography, a commodity, and sexually abusing a child in a foreign country. Second, the court read the Optional Protocol too narrowly and inappropriately declined to defer to Congress's foreign-policy judgments about the best way to implement that treaty. Correcting either error suffices to reverse the court's judgment.

I. Standard of Review and Legal Framework

This Court reviews the dismissal of an indictment, as well as constitutional questions, de novo. *See United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001). In evaluating a statute's constitutionality, a court owes "[d]ue respect for the decisions of a coordinate branch of Government [and will] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *Heller v. Doe*, 509 U.S. 312, 319 (1993) (statutes presumed constitutional). In evaluating whether Congress possessed constitutional authority to pass a statute, the task before the court is "a modest one." *Raich*, 545 U.S. at 22. This Court "need not determine" whether the factual predicate for exercising an enumerated power—say, a link between the legislation and a treaty or

an effect on commerce—actually exists, "but only whether a 'rational basis' exists for so concluding." *Id.*

In the district court, Park challenged § 2423(c) as unconstitutional both facially and as applied; the district court granted his motion to dismiss only on the as-applied challenge. ECF 18; ECF 35 at 1. In evaluating an as-applied challenge, this Court examines the case's specific facts and is not concerned with broader categorizations. *See, e.g.*, *United States v. Slatten*, 865 F.3d 767, 811 (D.C. Cir. 2017) (contrasting defendants' as-applied Eighth Amendment challenge with their categorical challenge to mandatory-minimum sentences for "all defendants who have discharged government-issued weapons in a war zone"), *petition for cert. filed*, No. 17-1110 (Feb. 5, 2018); *John Doe Co. v. Consumer Fin. Protection Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (per curiam) (declining to invalidate a statute as beyond Congress's authority where the plaintiff could not show "*its own* alleged constitutional injury").[4]

II. The Foreign Commerce Clause Authorizes § 2423(c).

The district court's foreign-commerce analysis suffers two flaws: it used the wrong framework and it misapplied the framework it used. The Constitution gives

[4] "A facial challenge to a legislative Act is … most difficult [because] the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). If "the acts charged against [Park] himself [a]re well within the limits of legitimate congressional concern," the fact that it might not "be enforce[able] against someone else whose behavior would be outside the scope of Congress's Article I authority" is irrelevant. *Sabri v. United States*, 541 U.S. 600, 609 (2004). Such "overbreadth" challenges are only cognizable in the First Amendment context. *Id.* at 609-610.

Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, Sect. 8, Cl. 3. This clause's three parts are known as the Foreign Commerce Clause (at issue here), the Interstate Commerce Clause, and the Indian Commerce Clause. The district court's first error was in concluding that the Foreign Commerce Clause is no broader than the Interstate Commerce Clause. *See* ECF 35 at 6. The Interstate Commerce Clause's federalism-based restrictions are, however, "unduly demanding in the foreign context." *United States v. Bollinger*, 798 F.3d 201, 215 (4th Cir. 2015); *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006). Both types of illicit sexual conduct charged here—child sexual abuse and production of child pornography—meet the appropriate foreign-commerce standard.

In addition to applying an inappropriately narrow foreign-commerce framework, the district court misapplied the interstate-commerce framework to the child-pornography production conduct. All courts agree that the Foreign Commerce Clause encompasses at least as much power as the Interstate Commerce Clause. *See, e.g.*, *United States v. al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015); *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011); *United States v. Bredimus*, 352 F.3d 200, 204-208 (5th Cir. 2003). Therefore, any conduct Congress could regulate under the Interstate Commerce Clause it could *a fortiori* regulate under the Foreign Commerce Clause. Accordingly, we begin here.

A. Congress may regulate child pornography as a commodity.

At the very least, the Foreign Commerce Clause, like its interstate counterpart, permits Congress to regulate the market for a commodity, including purely local instances of production. Under the Interstate Commerce Clause, Congress may regulate (1) the channels of commerce (like highways, ports, and wires); (2) the instrumentalities of commerce (such as the Internet, trucks, ships, and bank accounts); and (3) activities that "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Only the third category is at issue here.

Under this framework, Congress may not regulate wholly intrastate, non-economic activity, such as possessing firearms in a local school or violent crime. *Lopez*, 514 U.S. at 551 (striking down the former Gun Free School Zone Act, 18 U.S.C. § 922(q)(1)(A)); *see also Morrison*, 529 U.S. at 617-619 (invalidating parts of the Violence Against Women Act). But when an activity is economic in nature, a court considers the aggregate effect on commerce of the entire class of activities to which the defendant's act belongs, not the defendant's act standing alone. *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1942); *cf. Morrison*, 529 U.S. at 613 (declining to aggregate the effects of noneconomic activity). All this is so even if the entire market is illicit. *Raich*, 545 U.S. at 18-19.

Under this rule, Congress may regulate—or prohibit altogether—the production of any commodity. *See Raich*, 545 U.S. at 19. For example, the Supreme Court has applied these principles to the purely local production, for personal consumption, of

wheat and marijuana. In *Wickard*, the Court upheld an agricultural price support program that limited farmers to a quota for wheat production. Filburn, a farmer, challenged a penalty levied under the program on 12 acres of wheat he produced over his allotted quota; he used the wheat to feed his chickens and dairy cows and to make flour for his family. 317 U.S. at 114-115. The Court concluded that such home-grown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market," and therefore "Congress may properly have considered" that such wheat must be regulated if the overall price-support program were to be effective. *Id.* at 128-129.

In *Raich*, the Court went further in rebuffing a challenge to the Controlled Substances Act (CSA) by individuals wishing to grow small amounts of marijuana for personal medical use, as permitted by California law. 545 U.S. at 7-8. It did so even though marijuana grown in compliance with California law "is not intended for, nor does it enter, the stream of commerce." *Id.* at 9. The Court distinguished *Lopez* and *Morrison*, which struck down, respectively, laws regulating guns in schools and violence against women, on the grounds that "the activities regulated by the CSA are quintessentially economic"—a term that "refers to 'the production, distribution, and consumption of commodities.'" *Id.* at 25-26 (quoting Webster's Third New International Dictionary 720 (1966)). Permitting exemptions from the CSA's comprehensive prohibition "can only increase the supply of marijuana" and create "enforcement difficulties [in] distinguishing between marijuana cultivated locally and

marijuana grown elsewhere." *Id.* at 22, 31. Such an exemption "would leave a gaping hole in the CSA" that Congress could rationally choose to close. *Id.* at 22.

As this Court has already recognized, "child pornography is 'a fungible commodity for which there is an established, albeit illegal, interstate market.'" *United States v. Sullivan*, 451 F.3d 884, 891 (D.C. Cir. 2006) (quoting *Raich*, 545 U.S. at 18). That market is, in fact, global, largely due to the Internet. *Paroline v. United States*, 134 S. Ct. 1710, 1741 (2014) (Sotomayor, J., dissenting) (child pornography is trafficked in "a global network"); U.S. Sent. Comm'n, Report to Congress: Federal Child Pornography Offenses 85 (2012) ("Sentencing Commission Report"); *see also* WeProtect Global Alliance, Global Threat Assessment 2018, at 5;[5] Testimony of John Shehan, U.S. H. Rep. Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, "Preventing Crimes Against Children: Assessing the Legal Landscape," at 2-3 (Mar. 16, 2017) (In 2016, 94% of the 8.2 million reports to the National Center for Missing and Exploited Children's CyberTipline involved foreign individuals uploading child pornography to a U.S.-based electronic service.).[6] In regulating child pornography, Congress has repeatedly expressed its concern over the Internet's effect on the child-

[5] Available at: https://static1.squarespace.com/static/5630f48de4b00a75476ecf0a/t/5a85acf2f9619a497ceef04f/1518710003669/6.4159_WeProtect+GA+report+%281%29.pdf. The United States is a member of the WeProtect Global Alliance.

[6] Available at: https://judiciary.house.gov/wp-content/uploads/2017/03/John-Shehan-Testimony-Crimes-Against-Children-House-Judiciary-Committee-final.pdf

pornography market. *E.g.*, Pub. L. No. 109-248, Title V, § 501(1)(C), 120 Stat. 587, 623 (July 27, 2006) (congressional findings: "The advent of the Internet has greatly increased the ease of transporting, distributing, receiving, and advertising child pornography in interstate commerce."); *id.* (identifying the Internet as an instrumentality of foreign commerce). It is not irrational for Congress to conclude that foreign-produced child pornography can affect the U.S. market.

Indeed, every court of appeals to consider an Interstate or Foreign Commerce Clause challenge to a child-pornography statute—whether prohibiting production, distribution, or possession—has upheld the statute under *Raich*. *United States v. Malloy*, 568 F.3d 166, 179-180 (4th Cir. 2009) (collecting cases); *United States v. McCalla*, 545 F.3d 750, 756 (9th Cir. 2008) (recognizing that *Raich* overruled circuit precedent invalidating child-pornography statute as applied to local possession).[7] Like the CSA at issue in *Raich*, Congress has enacted a comprehensive regulatory regime "to regulate (more accurately, exterminate) the entire child pornography market," including foreign-produced child pornography. *McCalla*, 545 F.3d at 755; *see* 18 U.S.C. §§ 2251(c), 2260(a).

[7] When a statute includes an explicit jurisdictional hook, such as a requirement that a person or thing traveled in or "otherwise affects" interstate commerce, it complies with *Lopez* regardless of whether the activity is economic. *See, e.g.*, *United States v. Danks,* 221 F.3d 1037, 1039 (8th Cir. 1999) (per curiam) (upholding revised Gun Free School Zone Act, which includes a jurisdictional hook). The government recognizes that these other child-pornography statutes have such a hook. But although a jurisdictional hook is a sufficient condition for complying with the Interstate Commerce Clause, it is not necessary. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003); *see also Raich*, 545 U.S. at 14 (upholding the Controlled Substances Act, *inter alia* 21 U.S.C. § 841, which has no jurisdictional hook, as regulating economic activity).

Congress's 2015 addition of child-pornography production to the category of acts prohibited in § 2423 is just its latest effort to close a "gap in [its] comprehensive efforts to eliminate the market for sexually exploitative uses of children." *Sullivan*, 451 F.3d at 891. Therefore, Congress's foreign commerce power may reach the purely intra-national, foreign production of child pornography by a U.S. citizen.

The district court's contrary conclusion rests on a misunderstanding of *Sullivan* and *Raich*. The court distinguished *Sullivan* on the grounds that "there [was] no indication that Park engaged in the *trade* of child pornography or that the pornography 'traversed … over the Internet.'" ECF 35 at 10 (quoting *Sullivan*, 451 F.3d at 885; omission in original). Although Sullivan possessed child pornography that he had downloaded from the Internet, the *Sullivan* court's reasoning, based on *Raich*, was not limited by that fact. Most pointedly, *Raich* defined "economic" activity to include "production" in addition to "distribution." *Raich*, 545 U.S. at 25. Moreover, *Raich*, and *Wickard* before it, dealt specifically with the "cultivat[ion], for home consumption, [of] a fungible commodity." *Id.* at 18; *see also id.* at 15 (framing plaintiffs' challenge to the CSA's prohibition on "the intrastate *manufacture* and possession of marijuana" (emphasis added)). As with marijuana, "[o]ne need not have a degree in economics to understand why a nationwide [or global] exemption for the vast quantity of marijuana [or child pornography] locally cultivated for personal use … may have a substantial impact on the interstate [or global] market." *Id.* at 28. And as with marijuana, an "exemption for [production] by [U.S. citizens living abroad] can only increase the supply of [child

pornography.]" *Id.* at 31. This is even truer for child pornography than for marijuana because the former can be instantaneously transferred worldwide and the market places a premium on new images, both facts that incentivize harming additional children. Sentencing Commission Report 95-96; *see also Raich*, 545 U.S. at 30 (California law exempting physicians from marijuana prosecution "provides them with an economic incentive" to prescribe marijuana, which would increase demand).

Furthermore, regulating the production of both marijuana and child pornography faces the same "enforcement difficulties inherent in distinguishing intrastate and interstate action." *United States v. Bowers*, 594 F.3d 522, 529 (6th Cir. 2010) (Congress may regulate "wholly intrastate production" of child pornography.). "Congress had a rational basis for believing that failure to regulate the intra[national] manufacture and possession of [child pornography by U.S. citizens] would leave a gaping hole in" its regulatory framework. *Raich*, 545 U.S. at 22. The district court's attempt to confine *Sullivan* to its facts cannot be squared with *Raich*.

Because child pornography is a commodity in a global market, under *Raich*, Congress has the power to regulate its production, and the district court thus erred in dismissing Park's indictment, at least insofar as it alleges the production of child pornography as the "illicit sexual conduct."

For these same reasons, prosecution under §§ 2423(c) and (f)(3) for producing child pornography also satisfies the broader—and correct—foreign-commerce framework outlined below. *See infra* pp. 17-19.

B. The Foreign Commerce Clause also permits Congress to prohibit a U.S. citizen from sexually abusing children abroad.

Congress's authority under the Foreign Commerce Clause also extends to regulating non-commercial child sexual abuse by U.S. citizens abroad.

i. The proper Foreign Commerce Clause framework.

The Foreign Commerce Clause has received relatively little attention from Congress and the courts, but it is a mistake to conclude that this lack of attention means the Foreign Commerce Clause is coterminous with the Interstate Commerce Clause. The "prominent theme run[ning] throughout the interstate commerce cases[is] concern for state sovereignty and federalism." *Clark*, 435 F.3d at 1111. But the Indian Commerce Clause, which is not constrained by federalism concerns, is much broader than the Interstate Commerce Clause. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The "central function" of the Indian Commerce Clause is "to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* The "structural understanding of the unique role of the States in our constitutional system"—*i.e.*, federalism—does not apply. *Id.*

Similarly, the differences between the domestic and foreign contexts demonstrate that the Foreign Commerce Clause is broader than its interstate counterpart. *Bollinger*, 798 F.3d at 210-213; *Clark*, 435 F.3d at 1110-1114. First and foremost, there are no "considerations of federalism and state sovereignty" in the foreign context. *Japan Line, Ltd. v. Los Angeles Cnty*, 441 U.S. 434, 448 n.13 (1979).

Accordingly, the primary rationale for limiting Congress's power over interstate commerce "does not touch the authority of the Congress in the regulation of foreign commerce." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933). Rather, other mechanisms, such as international law and due process constrain Congress's action vis-à-vis foreign nations. *See United States v. Ballestas*, 795 F.3d 138, 144-145, 148 (D.C. Cir. 2015).

Second, in dealing with foreign countries, it is particularly important for the United States to speak with one voice. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-316 (1936). In the realm of regulation, that voice belongs to Congress. *Bollinger*, 798 F.3d at 213; *see also Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015). Finally, the historical record contains "evidence that the Founders intended the scope of the foreign commerce power to be the greater" of the two powers. *Japan Line*, 441 U.S. at 448; *see Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932); *Buttfield v. Stranahan*, 192 U.S. 470, 492-493 (1904) (comparing Congress's "plenary power" over foreign commerce with its power over commerce with Indian Tribes, and contrasting it with "the limitations…resulting from other provisions of the Constitution, so far as interstate commerce is concerned").

Therefore, although the *Lopez* framework is "a useful starting point" for Foreign Commerce Clause analysis, *Lopez*'s third category, permitting regulation of only those "'activities that substantially affect … commerce[,]' is unduly demanding in the foreign context." *Bollinger*, 798 F.3d at 215; *Clark*, 435 F.3d at 1116 (*Lopez* "categories are a

guide, not a straightjacket" in the foreign context). Rather, the Foreign Commerce Clause requires only a "demonstrable affect" on commerce, a lower standard. *Bollinger*, 798 F.3d at 216; *see Clark*, 435 F.3d at 1114 (asking whether the statute has "a constitutionally tenable nexus with foreign commerce"); *accord United States v. Bianchi*, 386 F. App'x 156, 161-162 (3d Cir. 2010) (unpublished).

Furthermore, Congress's commerce power is augmented by the Necessary and Proper Clause, permitting Congress "[t]o make all laws … necessary and proper for carrying into Execution" its powers to regulate commerce. U.S. Const., Art. I, Sect. 8, Cl. 18. Under this provision, a statute must be upheld when it "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 560 U.S. 126, 134 (2010). That is, the provision need not be "absolutely necessary" to the enumerated power; it suffices if it is "convenient, or useful or conducive." *Id.* In the commerce arena specifically, this provision gives Congress the "'power needed to make [economic] regulation effective.'" *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-119 (1942)). Thus, when Congress has regulated a market, it may also "regulate noneconomic intrastate [or foreign, intranational] activities … [if] the failure to do so could undercut its" market regulation. *Id.* at 38 (Scalia, J., concurring in the judgment) (internal quotation marks omitted).

ii. Regulating non-commercial child sexual abuse has a demonstrable effect on the global sex-tourism market.

As an initial matter, there can be little doubt that sex tourism is economic activity with a global market. Child sex tourism is part of the larger problem of commercial sexual exploitation of children, an annual market that the United Nations estimated had grown from $3 billion in 2006 to $20 billion in 2009. United Nations Human Rights Council, Report of the Special Rapporteur on the sale of children, child prostitutions and child pornography 9 (2012) ("2012 U.N. Report"). Sometimes the activity is commercial because perpetrators pay specifically to sexually abuse children; other times, it involves paying "travel agencies, transport, accommodation and other tourism-related services that facilitate contact with children." *Id.* at 5 (2012). And those third parties have every incentive to disguise the payments' true purpose: for example, tour operators who charge for seemingly legitimate "fishing trips" that just happen to include sexual activity with girls. *See, e.g.*, ECPAT International, Offenders on the Move, Global Study on Sexual Exploitation of Children in Travel and Tourism 61 (2016).[8] Such conduct is purposefully difficult to prosecute under a ban on solely commercial sexual activity.

Section 2423(f)'s inclusion of non-commercial child sexual abuse serves, in part, as a prophylactic gap-filling measure in support of the statute's overall crack-down on the markets for international child-sex tourism and related child trafficking. In addition

[8] Available at: http://cf.cdn.unwto.org/sites/all/files/docpdf/global-report-offenders-move-final.pdf.

to capturing expressly economic activity, "there is a rational basis for concluding that leaving non-commercial sex with minors outside of federal control could affect the price for child prostitution services and other market conditions in the child prostitution industry." *United States v. Martinez*, 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009). Moreover, permitting the non-commercial abuse of children can de-stigmatize sexual activity with children or otherwise "contribute[] to commercial sexual exploitation." *Bollinger*, 798 F.3d at 219. Although *Bollinger* considered § 2423(c)'s travel prong because the defendant occasionally returned to North Carolina, the Fourth Circuit expressly declined to rely on his travel per se in upholding the statute as constitutional. *See Bollinger*, 798 F.3d at 218 (stating that it "need not" uphold the statute on the ground that it regulates the channels and instrumentalities of foreign commerce). Instead, the court of appeals concluded that it was "eminently rational" for Congress to have believed that "prohibiting the non-commercial sexual abuse of children by Americans abroad" would have a "demonstrable effect on foreign commerce" because it would affect "sex tourism and the commercial sex industry." *Id.*; *see also United States v. Hardeman*, No. CR 10-0859 RS, 2011 WL 13143962, at *8 (N.D. Cal. July 20, 2011) (In "seek[ing] to prohibit the commercial, sexual exploitation of children abroad, … it makes sense that a failure to regulate one particular iteration—the non-economic sex crime—of this activity would undermine that effort.").[9]

[9] This is not the only example of Congress closing loopholes to shore up the prohibition on sex tourism. For example, in 2016, Congress extended the Sex Offender

Subsection (c)'s "resides" language fills additional gaps. Some history on § 2423's expansion demonstrates why. What is now subsection (a) (prohibition on transporting minors for "any sexual activity for which any person can be charged with a criminal offense") dates back to 1948, and the prohibition now found in subsection (b) (travel with intent to commit illicit sexual conduct) followed in 1994. *See* 18 U.S.C. §§ 2423(a), (b) (1996); 62 Stat. 812, c. 645 (June 25, 1948) (enacting (a)); Pub. L. No. 103-322, Title XVI, § 160001(g), 108 Stat. 2037 (Sept. 13, 1994) (adding (b)). In 2003, Congress restructured § 2423, moving the definitions of "illicit sexual conduct" to subsection (f) and adding subsection (c). PROTECT Act, Pub. L. No. 108-21, Title I, §§ 103(a)(2)(C), (b)(2)(B), 105, 117 Stat. 650, 652, 653, 654 (Apr. 30, 2003). At its enactment, subsection (c) covered only U.S. citizens or permanent residents who "travel[ed] in foreign commerce[] and engage[d] in any illicit sexual conduct." § 2423(c) (2006). In 2013, Congress amended subsection (c) to add the "resides" language under which Park was charged. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title XII, § 1211(b), 127 Stat. 54, 142 (March 7, 2013). And in May 2015, Congress once again amended § 2423, adding "production of child pornography" to the definition of

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Registration and Notification Act (SORNA)'s requirements to sex offenders traveling internationally and living abroad and required the State Department to visibly mark offenders' passports. International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119 §§ 5, 6, 8, 130 Stat. 15, 20-24 (2016); *see also id.* § 2(6), 130 Stat. 16 (defining child sex tourism without a commercial component).

illicit sexual conduct. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, Title I, § 111(a)(3), 129 Stat. 227, 240 (May 29, 2015).

The legislative history preceding the PROTECT Act is particularly instructive. That change was first proposed in 2002 in the Sex Tourism Prohibition Improvement Act. H.R. 107-4477. Congress explained that the bill was necessary because foreign countries "experiencing significant problems with sex tourism" had "requested that the United States act to deal with this growing problem" and that some countries were "blam[ing] the United States for the problem" because "many of the sex tourists are American." H.R. Rep. No. 107-525, at 3 (2002). These problems persisted despite the fact that § 2423(b) already prohibited foreign travel with the intent to engage in illicit sexual conduct with children because proving intent concurrent with travel was so difficult that it allowed many sex tourists to escape punishment. *E.g.*, 148 Cong. Rec. H3885 (remarks of Rep. Sensenbrenner, sponsor). Accordingly, "Congress enacted § 2423(c) to close 'significant loopholes in the law'" regarding sex tourism. *Pendleton*, 658 F.3d at 310 (quoting H.R. Rep. 107-525, at 3).

Over the next decade, similar questions arose over § 2423(c)'s travel prong, specifically, what, if any, temporal nexus must exist between the travel and the sexual abuse. Although every court of appeals to have considered § 2423(c)'s regulation of travel in foreign commerce has found it constitutional,[10] some courts closely examined

[10] *Bollinger*, 798 F.3d at 218-219 (holding § 2423(c) constitutional in the context of noncommercial sexual conduct); *al-Maliki*, 787 F.3d at 794 (noting that "[n]o circuit

whether the travel morphed into resettlement. *See, e.g.*, *United States v. Schmidt*, 845 F.3d 153, 156 (4th Cir.), *cert. denied*, 138 S. Ct. 234 (2017); *United States v. Jackson*, 480 F.3d 1014, 1022-1024 (9th Cir. 2007); *Clark*, 435 F.3d at 1107 n.11, 1116. Enter the 2013 amendment, dispensing with the travel requirement to cover U.S. nationals who reside abroad.

Furthermore, Congress could rationally have been concerned that U.S. sex offenders were increasingly leaving the United States to permanently resettle abroad. In 2005, in enacting the Sex Offender Registration and Notification Act (SORNA), Congress "conservatively estimated that approximately 20 percent of [the nation's] 400,000 sex offenders are 'lost' [from then-existing] State sex offender registry programs" due to offenders moving. H.R. Rep. No. 109-218, pt. 1, at 23 (2005). One rational inference from this data is that some sex offenders seek to avoid registration requirements by moving. Although SORNA has made those requirements more ubiquitous and harder to evade domestically, in 2013, when Congress added the "resides" prong to § 2423(c), it was unclear whether SORNA required offenders to provide notice when they move abroad. *See Nichols v. United States*, 136 S. Ct. 1113, 1119

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court has declared § 2423(c) unconstitutional"); *id.* at 792-794 (acknowledging "skeptic[ism]" about the statute but rejecting, on plain-error review, constitutional challenge to § 2423(c) in the context of noncommercial sexual conduct); *Pendleton*, 658 F.3d at 305-311 (holding § 2423(c) constitutional in the context of noncommercial sexual conduct); *Clark*, 435 F.3d at 1109-1117 (holding § 2423(c) constitutional in the context of commercial sexual conduct); *see also Bianchi*, 386 F. App'x at 160-162 (holding § 2423(c) constitutional in the context of both commercial and noncommercial sexual conduct).

(2016) (holding that it did not).[11] And because law enforcement can be lax in some foreign countries, it makes sense that offenders seeking to avoid registration would move to those countries. *See* H.R. Rep. No. 107-525, at 3 (2002) (discussing other nations' enforcement difficulties and their requests for U.S. assistance). It was therefore rational for Congress to conclude that including U.S. citizens who reside abroad in § 2423(c)'s prohibition was necessary to "make [the sex tourism] regulation effective." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment) (internal quotation marks omitted).

Finally, Congress's more extensive power over foreign commerce is especially justifiable when, as here, it intersects with the federal government's other powers over foreign affairs. *See Curtiss-Wright Export Corp.*, 299 U.S. at 315-316 (discussing those powers). For the reasons already discussed, and those discussed below, Congress's steps to curtail U.S. citizens from abusing foreign children help maintain good relations with other countries and thereby further the United States's diplomatic interests.

Even if the Foreign Commerce Clause would not permit reaching every instance of foreign non-commercial child sexual abuse by a U.S. citizen, this is an as-applied challenge. On the facts alleged here, Park used his work as a foreigner teaching a foreign language to lure his child victims into his apartment. ECF 1 ¶¶ 13-16. This straightforward commercial activity was thus critical to Park's alleged offense. And to

[11] SORNA has since been amended. *See supra* n.9.

the extent the statute may not reach, for example, domestic abuse within a single household, Park may not challenge the statute based on how it might apply to others. *See Sabri v. United States*, 541 U.S. 600, 609-610 (2004) (overbreadth challenges not tenable outside First Amendment context); *United States v. Reed*, No. 15-cr-188, 2017 WL 3208458 (D.D.C. July 27, 2017) (dismissing count alleging incest by U.S. citizen residing abroad).

* * *

As applied to Park, § 2423(c) is within Congress's power to regulate foreign commerce, including the production of commodities and those activities affecting commercial markets.

III. Congress's Treaty Power and the Optional Protocol Authorize § 2423(c).

Congress's power to enact § 2423(c), as amended, is also grounded in its authority to pass legislation implementing treaties to which the United States is a party. The President has the power to make treaties with other countries, and those become binding on the United States when ratified following advice and consent of a two-thirds majority of the Senate. U.S. Const., Art. II, Sect. 2, Cl. 2; *Medellin v. Texas*, 552 U.S. 491, 504-505 (2008). Congress may implement a treaty with legislation, and "there can be no dispute about the validity of the statute … as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Comstock*, 560 U.S. at 134 (The Necessary and Proper Clause authorizes statutes that are "rationally related to the implementation of a constitutionally enumerated power."). A

law that is "convenient, or useful or conducive" to implementing a treaty's provisions is "rationally related" to it. *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010) (quoting *Comstock*, 560 U.S. at 133-134); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998). Congress's necessary-and-proper power, though always broad, "is nowhere broader and more important than in the realm of foreign relations." *Belfast*, 611 F.3d at 805.

Although courts have a role to play in interpreting treaties, just as with other laws, "a determination by the political branches concerning" the means of implementing a treaty to which the United States is a party "is also a determination about the conduct of American foreign policy [that] require[s] the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations." *Finzer v. Barry*, 798 F.2d 1450, 1458-1459 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988). In light of these foreign-policy considerations, the political branches are best suited to determining the nuances of how to implement treaties. *See Medellin*, 552 U.S. at 526-529 (Congress must decide how to enforce a non-self-executing treaty).

Accordingly, a treaty-implementing statute need not copy a treaty verbatim or limit itself to the treaty's narrow confines. *See Belfast*, 611 F.3d at 806-808; *Lue*, 134 F.3d at 84. Some treaties, including those seeking to end international ills such as torture, can be read to "create[] a floor, not a ceiling, for [their] signatories in their efforts to combat" the problem. *Belfast*, 611 F.3d at 806 (addressing the Torture Act as

implementing the Convention Against Torture). In some circumstances, implementing legislation that is broader than the treaty's minimum requirements may, in fact, be "more faithful to the [treaty]'s purpose of enhancing global efforts to combat" the problem than legislation that tracks the precise language of the treaty's provisions. *Id.* at 809.

Finally, Congress need not expressly invoke the treaty power or reference the specific treaty for the statute to be "constitutionally justified" under the treaty power. *United States v. Georgescu*, 723 F. Supp. 912, 918 (E.D.N.Y. 1989); *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 358 (3d Cir. 1997) (Congress's "failure to explain fully the constitutional justification for its enactment does not invalidate the [statute], for Congress is not required to discuss or explain explicitly the constitutional basis for laws that it enacts."). Under the rational basis standard, the question is whether this Court can identify any legitimate government purpose which Congress could have been pursuing, and Congress's actual motivations are "entirely irrelevant." *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

Under these principles, § 2423(c) plays an important role in implementing the Optional Protocol. In the midst of § 2423's expansion, *see supra* p. 22, President Clinton signed the Optional Protocol in July 2000, and the Senate provided advice and consent to ratification in 2002. *See* 148 Cong. Rec. S5717-01; Letter of Submittal from President Clinton to the Department of State, S. Treaty Doc. No. 106-37, 2000 WL 33366017, at *1 (July 13, 2000). The Optional Protocol binds the United States and 173 other

countries, many of which have been sex-tourism destinations. *See* Status of Ratification of the Protocol, available at http://indicators.ohchr.org/ (last accessed April 23, 2018). The Optional Protocol's parties share "[d]eep[] concern[] at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography." *See* Optional Protocol, preamble. To combat this problem, the Optional Protocol requires parties to ensure "as a minimum" that the acts and activities defined within are "fully covered under [each nation's] criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis." *Id.*, art. 3. These offenses include "[i]n the context of sale of children … offering, delivering or accepting … a child for the purpose of [s]exual exploitation of the child," "obtaining … a child for child prostitution," and "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing … child pornography." *Id.*[12] Article 4 further provides that each nation "may take such measures as may be necessary to establish its jurisdiction over [the specified offenses] … [w]hen the alleged offender is

[12] The Protocol defines child prostitution as "the use of a child in sexual activities for remuneration or any other form of consideration." Optional Protocol, art. 2(b). Child pornography is defined as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes." *Id.*, art. 2(c). The preamble also "recall[s] the International Conference on Combatting Child Pornography on the Internet (Vienna, 1999) and, in particular, its conclusion calling for the worldwide criminalization of" among other things, the "production" and "intentional possession" of child pornography.

a national of that State." To effectuate these provisions, the Optional Protocol recognizes the need for a "holistic approach." *Id.*, preamble.

The Optional Protocol's goal is as broad as it is noble: "elimination of the sale of children, child prostitution, and child pornography." Optional Protocol, preamble; Letter of Submittal from President Clinton to the Department of State, S. Treaty Doc. No. 106-37, 2000 WL 33366017, at *1 (July 13, 2000) (noting the parties' "common objective: the elimination of abuses of the world's children"). To effectuate this goal, it requires parties, "as a minimum," to criminalize "offering, delivering or accepting … a child for the purpose of [s]exual exploitation of the child," "obtaining … a child for child prostitution," and "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing … child pornography." Optional Protocol, art. 3. And it requires those prohibitions to apply, again "as a minimum," "whether these offences are committed domestically or transnationally." *Id.* As President Clinton told the Senate, ratifying the Optional Protocol would "enhance the ability of the United States *to provide global leadership* in the effort to eliminate abuses against children"—a quintessential diplomatic concern entrusted to the political branches. Letter of Transmittal from President Clinton to the United States Senate, S. Treaty Doc. No. 106-37, 2000 WL 33366017, at *1 (July 25, 2000) (emphasis added).

Each of the three aspects of § 2423 at issue here—subsection (c)'s "resides" prong, subsection (f)(3)'s prohibition on child-pornography production, and subsection (f)(1)'s prohibition on non-commercial child sexual abuse—furthers the treaty's goals.

First, § 2423(c)'s "resides" prong helps implement the Optional Protocol. The Optional Protocol establishes that each state party to the treaty say "may take such measures as may be necessary to establish its jurisdiction" over offenses committed by its nationals and residents—not only those who travel in foreign commerce. Art. 4; *see also* 2012 U.N. Report, at 11 ("Extraterritorial legislation is one of the key tools in combating [child sex tourism], as it allows legal authorities to hold nationals and citizens accountable for crimes committed abroad and undertake prosecution in their country of origin."). Between the Optional Protocol's ratification and the 2013 amendment adding the "resides" prong, the United Nations Committee on the Rights of the Child twice criticized the United States for not extending its extraterritorial jurisdiction over all U.S. nationals who violate the treaty's offenses. *See* Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography ¶¶ 39-40 (July 2, 2013); Consideration of reports submitted by states parties under article 12, paragraph 1, of the Optional Protocol to the convention on the rights of the child on the sale of children, child prostitution and child pornography ¶¶ 35-36 (June 25, 2008).[13] Thus, although it is optional under the treaty to extend

[13] The 2013 report was published in July, but it reflects a proceeding that occurred in January 2013, before the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, was enacted on February 13. These reports are available at: https://www.state.gov/documents/organization/246457.pdf; http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.USA.CO.1.pdf.

jurisdiction over a party's nationals acting abroad, it would have been rational for Congress to extend § 2423(c) in light of the Optional Protocol. And in its 2016 report on the Optional Protocol, the United States cited § 2423(c), including its new "resides" language as evidence of the nation's commitment to fighting sex tourism. *See* Combined third and fourth periodic report of the United States of America on the Optional Protocols to the convention on the rights of the child on the involvement of children in armed conflict and the sale of children, child prostitution, and child pornography ¶ C-57 (Jan. 22, 2016).[14] Furthermore, under the Constitution, "the United States retain[s] its authority over" its citizens residing abroad and they are "bound by its laws made applicable to [them] in a foreign country." *Blackmer v. United States*, 284 U.S. 421, 436 (1932). Section 2423(c)'s "resides" prong is therefore a constitutionally permissible implementation of the Optional Protocol.

Second, § 2423(f)(3)'s prohibition on the production of child pornography flows directly from the Optional Protocol. In holding otherwise, the district court determined that the treaty addressed only domestic or transnational but not foreign child-pornography production. ECF 35 at 18. This holding suffers four flaws. First, ignores the treaty's express inclusion of a provision permitting each state party to address its own nationals' conduct, regardless of where committed. Optional Protocol, Art. 4(2)(a). Second, it reads "as a minimum" out of the treaty. Where a treaty "create[s] a floor, not

[14] Available at: https://www.state.gov/j/drl/rls/252299.htm.

a ceiling, for its signatories in their efforts to combat" a problem, Congress may go further. *Belfast*, 611 F.3d at 806-807. Third, it ignores the realities of digital child pornography, which rarely stays put and can become "transnational" in an instant. *See supra* pp. 13-14. It is therefore rational for Congress to conclude that child pornography produced by an American abroad could become domestic or transnational and that prohibiting child-pornography production as broadly as possible is "more faithful to the [treaty]'s purpose of enhancing global efforts to" eliminate exploitation. *Belfast*, 611 F.3d at 809. Fourth, the court's holding, premised on federalism concerns, rests on the false assumption that the treaty could not address regulation by the United States of its citizens' conduct abroad. ECF 35 at 18 (citing *United States v. Bond*, 134 S. Ct. 2077, 2109 (2014) (Thomas, J., concurring in the judgment); *Power Auth. of N.Y. v. Fed. Power Comm.*, 247 F.2d 538, 542-543 (D.C. Cir.), *judgment vacated sub nom., Am. Public Power Ass'n v. Power Authority of N.Y.*, 355 U.S. 64 (1957) (per curiam)). But whatever limits federalism might place on the federal government's power to implement treaties with regards to domestic conduct, federalism says nothing about the government's power to regulate conduct occurring abroad. *See supra* pp. 17-19. Moreover, even if some analog of federalism applied vis-à-vis foreign nations, this prosecution would not implicate it. As used here, at least, § 2423(f)(3) reaches only U.S. nationals and does not interfere with foreign law enforcement—other nations retain concurrent jurisdiction just as the states do over many domestic crimes.

Finally, criminalization of non-commercial child sexual abuse by a U.S. citizen abroad is also rationally related to implementation of the Optional Protocol. Although one of the treaty's core concerns involves commercial sex acts with minors, its scope is not so limited. Significantly, the Optional Protocol defines child prostitution to include "the use of a child in sexual activities for remuneration *or any other form of consideration.*" *Id.*, art. 2 (emphasis added). Under this broad definition, it would not be irrational to conclude that a statute that required proof of a quid-pro-quo would not fully implement the treaty because, for example, the "payment" involved could go to a third party (such as a tour operator, hotel, or other person) with the child victim unaware of the crime's commercial nature. Furthermore, as discussed above, payments for sexual acts could be disguised as payments for seemingly legitimate purposes. *See supra* pp. 20-21; 2012 U.N. Report, at 10 ("[S]ex tourism involving children is directly linked to the offences covered by the Optional Protocol."). Additionally, the demand for sexual interactions with children is equally damaging whether met in a commercial or non-commercial way—it makes little sense to proscribe prostitution but not rape—and eliminating the demand altogether is the best way to serve the treaty's goal of protecting children. *See supra* pp. 20-26. Including non-commercial sexual abuse is thus "convenient, or useful or conducive" to achieving the treaty's goals, making § 2423(c) "rationally related" implementing legislation. *See Martinez*, 599 F. Supp. 2d at 798-799; *United States v. Pendleton*, No. 08-111-GMS, 2009 WL 330965, at *4 (D. Del. Feb. 11, 2009), *aff'd on other grounds*, 658 F.3d 299 (3d Cir. 2011); *United States v. Frank*, 486 F. Supp. 2d 1353, 1358-

1359 (S.D. Fla. 2007), *aff'd on other grounds*, 599 F.3d 1221 (11th Cir. 2010); *United States v. Flath*, 845 F. Supp. 2d 951, 957 (E.D. Wis. 2012); *United States v. Pepe*, No. 07-168-DF, slip op. at 6 (C.D. Cal. Dec. 3, 2007).

Because all three aspects of § 2423 at issue here are "rationally related" to the Optional Protocol's goals, they are within Congress's legislative authority as measures necessary and proper to implement a treaty.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and remand the case for further proceedings.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief and Addendum for the United States was this day served upon Celia Goetzl, counsel for appellee, by notice of electronic filing with the District of Columbia Circuit CM/ECF system.

DATED: APRIL 30, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8,916 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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ADDENDUM

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2423

§ 2423. Transportation of minors

Effective: May 29, 2015
Currentness

(a) Transportation with intent to engage in criminal sexual 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, for the 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.

(d) Ancillary offenses.--Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, 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) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

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

(3) production of child pornography (as defined in section 2256(8)).

(g) Defense.--In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by clear and convincing evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; Pub.L. 95-225, § 3(a), Feb. 6, 1978, 92 Stat. 8; Pub.L. 99-628, § 5(b)(1), Nov. 7, 1986, 100 Stat. 3511; Pub.L. 103-322, Title XVI, § 160001(g), Sept. 13, 1994, 108 Stat. 2037; Pub.L. 104-71, § 5, Dec. 23, 1995, 109 Stat. 774; Pub.L. 104-294, Title VI, §§ 601(b)(4), 604(b)(33), Oct. 11, 1996, 110 Stat. 3499, 3508; Pub.L. 105-314, Title I, § 103, Oct. 30, 1998, 112 Stat. 2976; Pub.L. 107-273, Div. B, Title IV, § 4002(c)(1), Nov. 2, 2002, 116 Stat. 1808; Pub.L. 108-21, Title I, §§ 103(a)(2)(C), (b)(2)(B), 105, Apr. 30, 2003, 117 Stat. 652, 653, 654; Pub.L. 109-248, Title II, § 204, July 27, 2006, 120 Stat. 613; Pub.L. 113-4, Title XII, § 1211(b), Mar. 7, 2013, 127 Stat. 142; Pub.L. 114-22, Title I, § 111, May 29, 2015, 129 Stat. 240.)

18 U.S.C.A. § 2423, 18 USCA § 2423
Current through P.L. 115-140. Title 26 includes updates from P.L. 115-141, Divisions M, T, and U (Titles I through III).

End of Document

[ENGLISH TEXT — TEXTE ANGLAIS]

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

The States Parties to the present Protocol,

Considering that, in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography,

Considering also that the Convention on the Rights of the Child recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development,

Gravely concerned at the significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography,

Deeply concerned at the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,

Recognizing that a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation, and that girl children are disproportionately represented among the sexually exploited,

Concerned about the growing availability of child pornography on the Internet and other evolving technologies, and recalling the International Conference on Combating Child Pornography on the Internet (Vienna, 1999) and, in particular, its conclusion calling for the worldwide criminalization of the production, distribution, exportation, transmission, importation, intentional possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry,

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach, addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking of children,

Believing that efforts to raise public awareness are needed to reduce consumer demand for the sale of children, child prostitution and child pornography, and also believing in the importance of strengthening global partnership among all actors and of improving law enforcement at the national level,

Noting the provisions of international legal instruments relevant to the protection of children, including the Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists for the promotion and protection of the rights of the child,

Recognizing the importance of the implementation of the provisions of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action adopted at the World Congress against Commercial Sexual Exploitation of Children, held at Stockholm from 27 to 31 August 1996, and the other relevant decisions and recommendations of pertinent international bodies,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Have agreed as follows:

Article 1

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 2

For the purpose of the present Protocol:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Article 3

1 . Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in Article 2:

(i) The offering, delivering or accepting, by whatever means, a child for the purpose of:

a. Sexual exploitation of the child;

b. Transfer of organs of the child for profit;

c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.

2. Subject to the provisions of a State Party's national law, the same shall apply to an attempt to commit any of these acts and to complicity or participation in any of these acts.

3. Each State Party shall make these offences punishable by appropriate penalties that take into account their grave nature.

4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph I of the present Article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative.

5. States Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

Article 4

1 . Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State.

2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1, in the following cases:

(a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;

(b) When the victim is a national of that State.

3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the above-mentioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.

4. This Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5

1. The offences referred to in Article 3, paragraph 1, shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in those treaties.

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Protocol as a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.

3. States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 4.

5. If an extradition request is made with respect to an offence described in Article 3, paragraph 1, and if the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

Article 6

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of the present Article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 7

States Parties shall, subject to the provisions of their national law:

(a) Take measures to provide for the seizure and confiscation, as appropriate, of:

(i) Goods such as materials, assets and other instrumentalities used to commit or facilitate offences under the present Protocol;

(ii) Proceeds derived from such offences;

(b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a) (i);

(c) Take measures aimed at closing, on a temporary or definitive basis, premises used to commit such offences.

Article 8

1 . States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

(a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;

(b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;

(c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a mariner consistent with the procedural rules of national law;

(d) Providing appropriate support services to child victims throughout the legal process;

(e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;

(f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.

3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.

4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.

5. States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.

6. Nothing in the present Article shall be construed as prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

Article 9

1. States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes to prevent the offences referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to these practices.

2. States Parties shall promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offences referred to in the present Protocol. In fulfilling their obligations under this Article, States Parties shall encourage the participation of the community and, in particular, children and child victims, in such information and education and training programmes, including at the international level.

3. States Parties shall take all feasible measures with the aim of ensuring all appropriate assistance to victims of such offences, including their full social reintegration and their full physical and psychological recovery.

4. States Parties shall ensure that all child victims of the offences described in the present Protocol have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.

5. States Parties shall take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol.

Article 10

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall also promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

2. States Parties shall promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation.

3. States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the sale of children, child prostitution, child pornography and child sex tourism.

4. States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

Article 11

Nothing in the present Protocol shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

(a) The law of a State Party;

(b) International law in force for that State.

Article 12

1 . Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with Article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of this Protocol.

Article 13

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State that is a party to the Convention or has signed it. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 14

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 15

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall I take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Protocol in regard to any offence that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any

way the continued consideration of any matter that is already under consideration by the Committee prior to the date on which the denunciation becomes effective.

Article 16

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph I of the present Article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 17

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.