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)

REPLY BRIEF FOR THE UNITED STATES

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UNICEF United Nations Children's Fund

INTRODUCTION

In its opening brief, the government argued that the district court erred in holding § 2423(c) unconstitutional as applied to Park for three reasons. First, the court incorrectly excluded home-produced child pornography from the illicit child-pornography market and therefore held such images outside the Foreign Commerce Clause's scope. Second, the court took an unduly narrow view of the Foreign Commerce Clause as to the effect non-commercial child sexual abuse has on the markets for the prostitution of children, sex tourism, and child trafficking. And third, the court erred in finding that the 2013 and 2015 amendments to § 2423 did not rationally implement the Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.

Park's response adopts the same flawed arguments as the district court's opinion, and he supports his claims not with the law as it is but with what he wishes the law were. His brief contains more than two dozen citations to dissenting or concurring opinions that did not control the cases in which they occurred and do not bind this Court. For example, he relies heavily on Justice Thomas's dissent from denial of certiorari in *Baston v. United States*, 137 S. Ct. 850, 850 (2017), to argue that the Foreign Commerce Clause is narrowly circumscribed. *See* Park Br. 10-16. Not only did that opinion garner no other votes—let alone the three more required to grant certiorari or the four more required to make it the law—but Justice Thomas's view of the Commerce Clause's original meaning would sweep away decades of Interstate Commerce Clause

precedent. *Baston*, 137 S. Ct. at 852 (disparaging the "substantial effects" test). Needless to say, that view is not the law. Perhaps then-Justice Rehnquist put it best: "[t]he comments in the dissenting opinion … are just that: comments in a dissenting opinion." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980).

Park's arguments thus misunderstand both the legal principles involved and the factual, historical, and statutory landscape.

ARGUMENT

The district court erred in dismissing the indictment if either theory of congressional authority—the Foreign Commerce Clause or the treaty power—supports either statutory basis for liability. As in our opening brief, we address those four permutations as follows: (1) child-pornography production under the Foreign Commerce Clause; (2) child sexual abuse under the Foreign Commerce Clause; (3) & (4) both sets of conduct under the treaty power.

I. Section 2423's Regulation of Child Pornography Is a Valid Regulation of Commerce.

A. Child pornography is a commodity.

Park continues to insist that Congress may not prohibit his production of child pornography because it was "not placed in any stream of commerce, foreign or otherwise" and therefore was not "economic." Park Br. 20.[1] This argument

[1] Park also contends that the evidence does not support the inference that he produced child pornography. Park Br. 3 n.3. As he recognizes, however, at this stage of the proceedings, the question before this Court is purely a legal one, and this Court is

misapprehends both the nature of the market and the legal rule. As the government explained in its opening brief, Gov't Br. 13-15, there exists a thriving, illicit, global marketplace for digital child pornography. Park does not dispute this market's existence but claims that his alleged conduct involved "noneconomic child pornography." Park Br. 20. There is no such thing.

That is the central teaching of *Raich* and *Wickard*: once a commodity market exists, every instance of production is part of that market. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942). That the charges here are "divorced from any allegation that someone traded [the child pornography] or transferred it," Park Br. 21, make them precisely like *Raich* where the state-law scheme the Court considered was one in which the marijuana was "not intended for, nor [could] it enter, the stream of commerce." 545 U.S. at 9 (internal quotation marks omitted).

Furthermore, Park's argument proves too much. If accepted, it would invalidate not only § 2423(c) as used here but also most applications of the domestic child-pornography statutes. In prohibiting production and possession, those statutes do not require placing the images "in the stream of commerce" and instead are satisfied when the defendant produced or possessed the child pornography using an item, such as a

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bound to take the allegations as true. *Id.* at 9-10. In any event, the government identified in its response to Park's Motion for a Bill of Particulars "the actual and attempted production of child pornography" as part of the "illicit sexual conduct" alleged, ECF 22 at 2, and provided Park with a forensic report showing that some of the child pornography images found on Park's computer and iPhone were created on Park's iPhone between June 20 and August 7, 2015, Discovery, Bates Nos. Park000426, 430.

camera or computer, that has previously traveled in interstate or foreign commerce. *E.g.*, 18 U.S.C. §§ 2251(a), 2252(a)(4). Yet courts have routinely upheld convictions under these provisions absent evidence that the images were distributed across state lines. *E.g.*, *United States v. Malloy*, 568 F.3d 166, 179-180 (4th Cir. 2009) (collecting cases).

B. Congress has comprehensively regulated child pornography.

There can be little doubt that Congress has created "a comprehensive regime to combat the international and interstate traffic in illicit" child pornography. *Raich*, 545 U.S. at 12; *see* 18 U.S.C. §§ 2251-2252A, 2259, 2260, 2421-2423, 2425, 2427 ("the term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography"); *cf.* 18 U.S.C. § 3509(m) (regulatory regime is so comprehensive that the government may not produce copies of child pornography in discovery for criminal prosecutions). That this regime spans several sections of the United States Code is neither surprising nor material. So, too, does the controlled-substances regulatory regime at issue in *Raich*. *See* 21 U.S.C. §§ 801-904. Thus, whatever merit exists in Judge Ferguson's dissenting view in *United States v. Clark*, 435 F.3d 1100, 1117 n.1 (9th Cir. 2006), that "no comparably general regulation of foreign commerce exists" regarding § 2423(c)'s travel prong, Park Br. 22, it has no bearing on § 2423's regulation of child-pornography production.

Along the same lines, Park notes that the *Raich* plaintiffs conceded that the Controlled Substances Act was a "valid regulatory scheme" and contends that this concession is the only reason they lost. Park Br. 22 n.6 (internal quotation marks and

emphasis omitted). Again, this fails on both factual and legal grounds. First, Park does not contest that Congress's overarching scheme regulating child pornography is valid; that is, he makes no claim, for example, that child-pornography production is protected activity or that its regulation is inherently a state, not federal, power. Such an argument would be absurd. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 771 (1982). Thus, he stands in the same factual shoes as the *Raich* plaintiffs. Second, although this concession might have been sufficient to defeat plaintiffs' requested medical-marijuana exception in *Raich*, the Court's opinion makes clear that it was not necessary. The key to determining the scope of Congress's regulatory power, the Court said, was whether the regulated activity was "economic." 545 U.S. at 26. If so, Congress may prohibit every instance of production. *Id.*

C. Park misapprehends the relevant market.

Park asserts that § 2423(c) and (f)(3) cannot be valid commerce-based regulations because regulating child pornography is not rationally related to the markets for sex tourism and child prostitution. Br. 23-26. Setting aside the premise's merit (if any), the conclusion is wrong. Section 2423 addresses multiple markets. Originally, it was aimed only at the market for the prostitution of children, but over time, it has grown to include the sex-tourism and child-pornography markets. *See* Gov't Br. 22-23. There is no rule requiring a statute to regulate only one market. As applied here, § 2423(c) and (f)(3) regulate the child-pornography market directly and rationally.

II. Section 2423's Regulation of Non-commercial Child Sexual Abuse Is a Valid Regulation of Commerce.

A. Congress's foreign-commerce powers are broad, but not limitless.

Many of Park's complaints boil down to the view that the government's reading of the Foreign Commerce Clause is limitless. Park Br. 10-16. But Park's mistake—and Justice Thomas's, on whose dissents Park primarily relies—is in thinking that every limit on Congress's power must be found in Article I. In fact, four other checks exist on Congress's foreign regulatory power: Congress is presumed to legislate in accordance with international law, which limits what one nation can do about conduct occurring in another nation; the presumption against extraterritoriality limits statutes' foreign effect; the Due Process Clause may require some connection to the United States; and political realities keep Congress from overreaching.

First, in interpreting U.S. law, U.S. courts presume that Congress acted in compliance with international law. *See United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).[2] As discussed in the government's opening brief (10, 17-18, 33), most of the limitations on both the Commerce Clause and the treaty power stem from federalism concerns, preventing Congress from usurping the states' traditional police power. The

[2] Park cites a footnote in the district court opinion in *Yunis*, stating that foreign nations "'have never submitted to the sovereignty of the United States government.'" Park Br. 15 (quoting *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988)). This footnoted statement is dicta. It relates to counts the district court dismissed on statutory construction grounds because the statute, by its own terms, did not reach as far as it could have—a problem remedied by a subsequent amendment that the court did not disparage. *Yuni*s, 681 F. Supp. at 907-908 & n.25.

Constitution, as the document by which the sovereign states ceded power to the newly formed national government, properly delineates the balance of powers between those governments. But the Constitution does not purport to be a pact between the world's sovereign nations. It therefore makes sense that the Constitution's structure does not limit Congress's enumerated powers vis-à-vis foreign sovereigns.[3] Rather, international law serves that function, providing limits on any single nation's ability to enforce its laws abroad. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (Edwards, J., concurring) (identifying international law's five jurisdictional bases: "the objective territorial, national, passive, protective and universal"). Although Congress may exceed these restrictions, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," and Congress rarely pushes that boundary. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Yunis*, 924 F.2d at 1091. Section 2423(c) accords with this presumption because it complies with international law in that it covers only U.S. nationals. *See* 1 Restatement

[3] Park cites *Perez v. Brownell*, 356 U.S. 44, 58 (1958), *overruled in part*, *Afroyim v. Rusk*, 387 U.S. 253 (1967), for the proposition that "[t]he restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations." Park Br. 11. The government agrees that rational-basis review also applies to statutes affecting foreign affairs, which is what the quoted passage addresses. *See Perez*, 356 U.S. at 58 ("Since Congress may not act arbitrarily, a rational nexus must exist" between Congress's power and the statute.). The broader point Park wishes to make—that the government is constrained abroad the same as at home—is demonstrably untrue. *E.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (Fourth Amendment does not apply abroad).

(Third) of Foreign Relations Law of the United States § 402(2) (1987) ("[A] state has jurisdiction to prescribe law with respect to … the activities, interests, status, or relations of its nationals outside as well as within its territory."). Park's apparent view that foreign nations' boundaries cannot be pierced by U.S. laws, Park Br. 14-16, 23, 33, 47, 49-50, ignores this well-established international-law principle.

Second and similarly, in accordance with the territorial principle in international law and in recognition of other nations' sovereignty, U.S. courts also employ a presumption against the extraterritorial application of U.S. statutes. *See, e.g.*, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016). Section 2423(c), which covers only conduct occurring abroad, rebuts this presumption because it "gives a clear, affirmative indication that it applies extraterritorially," but many other statutes do not. *Id.* at 2101.

Third, the Due Process Clause limits Congress's ability to legislate abroad. *Reid v. Covert*, 354 U.S. 1, 17-19 (1957) (exercise of the treaty power must still comply with the Fifth and Sixth Amendments). Many courts have held that the Fifth Amendment's due-process guarantee requires some connection between conduct abroad and a U.S. prosecution to ensure fairness. *See United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (citing cases and noting that this Court has not yet needed to "definitively resolve"

the issue). Park's prosecution complies with that limit because he is a U.S. citizen. *Blackmer v. United States*, 284 U.S. 421, 438 (1932).[4]

Fourth, practical political considerations prevent Congress from becoming "the world's lawgiver." *See Baston v. United States*, 137 S. Ct. 850, 850 (2017) (Thomas, J., dissenting from the denial of certiorari). Even under a restrictive reading of the Foreign Commerce Clause, Congress could, for example, prohibit the importation of any product manufactured abroad, or any subset manufactured in a specific way. *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 57 (1933) ("The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted."). And in sanctioning other countries, Congress may prohibit an entity doing business with that nation from using U.S. currency in the transaction or from also trading with the United States, both of which effectively shut the sanctioned persons or nations out of the international market. *E.g.*, 12 U.S.C. §§ 95a-95b; 50 U.S.C. §§ 1701-1707; 22 U.S.C. § 6021 *et seq.* (Helms-Burton Act prevents most foreign companies that trade with Cuba from trading with the United States). Yet Congress rarely uses these powers. This fact speaks to the non-constitutional though very real political and policy realities that constrain Congress on the global stage.

[4] In light of Park's U.S. citizenship, this is not a case where "'the United States [has] go[ne] around prosecuting under the statute those with no real connection to this country.'" Park. Br. 32 (quoting *United States v. Schmidt*, 845 F.3d 153, 157 (4th Cir.), *cert. denied*, 138 S. Ct. 234 (2017) (alteration omitted)).

Similar constraints have successfully cabined Congress's actions domestically. Under Supreme Court precedent, Congress could likely regulate the home production of many commodities and craft jurisdictional hooks to cover most crimes, but Congress has not done so. And in interpreting the Interstate Commerce Clause broadly, the Supreme Court refused to be cowed by this type of slippery-slope hypothetical. *See Raich*, 545 U.S. at 49-50 (O'Connor, J., dissenting) (positing that if Congress can prohibit home-grown marijuana, it could regulate in-home child care or "windowsill gardening"). That this parade of horribles remains hypothetical demonstrates that the narrow constitutional interpretation its proponents advocated was a solution in search of a problem.

Thus, even if this Court believes it would be imprudent for Congress to "criminaliz[e] jaywalking by a United States tourist in Canada," *United States v. Al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015) (emphasis omitted), it need not invalidate § 2423(c)—especially in this as-applied challenge—based on the unfounded, speculative fear of some hypothetical statute (or hypothetical application of this statute). That § 2423(c) stems, in part, from other nations' requests for assistance is persuasive evidence that Congress is properly balancing the "delicate[and] complex" issues of foreign policy involved. *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom. Boos v. Barry*, 485 U.S. 312 (1988) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)); H.R. Rep. No. 525, 107th Cong., 2d Sess. 3 (2002).

B. This Court should join the majority view and apply the demonstrable-effect standard.

Park provides two main reasons for not using the demonstrable-effect standard, Park Br. 27-28; neither holds up. First, he asserts that it "misinterpret[s] the Supreme Court's Foreign Commerce Clause cases." *Id.* at 27. As discussed above, *see supra* pp. 1-2, that view is based entirely on concurring and dissenting opinions and a law review article, none of which is the law. The only courts to have addressed the issue have adopted the demonstrable-effect or "'nexus'" standard. *United States v. Bollinger*, 798 F.3d 201, 215 (4th Cir. 2015); *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006), *overruled on other grounds by United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018).[5] Second, he complains that the standard has no content because it lacks a multi-part test. Park Br. 28. The courts that have applied this standard disagree. *Bollinger*, 798 F.3d at 216 (standard "requires that the effect be more than merely imaginable or hypothetical"); *Clark*, 435 F.3d at 1114-1115; *United States v. Bianchi*, 386 F. App'x 156, 162 (3d Cir. 2010) (unpublished). That the standard is not as demanding as Park may like does not render it content-less.

[5] *Pepe* overruled *Clark*'s statutory construction holding that the pre-2013 version of § 2423(c) reached defendants who had settled abroad. 895 F.3d at 682. It reached this conclusion because of § 2423(c)'s 2013 amendment, not because *Clark*'s constitutional reasoning was flawed. *Id.* at 685-688. The Ninth Circuit has also held the mandate pending potential petitions for rehearing. *See* Order, No. 14-50095 (9th Cir. July 19, 2018).

C. Non-commercial child sexual abuse affects the commercial market.

In its opening brief, the government cited several cases finding a rational link between non-commercial child sexual abuse and the markets for child prostitution, sex tourism, and child trafficking. Gov't Br. 21. Park contends that these cases, in particular *United States v. Martinez,* 599 F. Supp. 2d 784, 808 (W.D. Tex. 2009), "failed to identify the rational basis on which it was relying." Park Br. 30. *Martinez* did not elaborate because the basis is obvious: it is the most basic law of economics that the market-clearing price for a good or service is where supply meets demand; increased supply depresses that price or increases demand; the lower the price of the new supply (*e.g.*, free), the more pronounced the effect. *Raich*, 545 U.S. at 28 ("One need not have a degree in economics to understand why a nationwide [or global] exemption for the vast quantity of marijuana [or children made available for sexual abuse] … may have a substantial impact on the interstate [or global] market.").

Park also argues that the statute's failure to reach Park's alleged conduct does not mean it is "'permitted"' because Vietnam could prosecute him. Park Br. 31. Perhaps (although Vietnam has not done so. Gov't Response to Motion to Suppress, ECF 23 at 4-5). But that possibility does not undermine Congress's interest in condemning such conduct as part of its ongoing foreign-relations activities. *See* Gov't Br. 24-25 (discussing § 2423's evolution in the context of other nations' requests for assistance). And if such conduct has a demonstrable effect on commerce, Congress may regulate it, even if it

occurs abroad, especially when perpetrated by a U.S. citizen. *See Blackmer*, 284 U.S. at 436-438.

Park also contends that the Foreign Commerce Clause only reaches "'commercial intercourse between the United States and foreign nations.'" Park Br. 11 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 193 (1824)); *see also id.* at 14-15. *Gibbons* actually stands for the opposite proposition. The opinion's holding is that "[c]ommerce" "cannot stop at the external boundary line of each State." 22 U.S. at 194. Following its instruction to give commerce "the same meaning throughout the sentence," neither does it stop at the boundary line of a foreign country. *Id.*

D. Whether or not the statute is valid in all its applications, it is valid here.

Finally, Park contends that the facts of his case—that the alleged abuse stemmed from his conduct as a teacher, engaged in commercial activity—are "irrelevant" because § 2423(c) "does not require any proof of commercial activity." Park Br. 34. But Park made these facts relevant by raising an as-applied challenge to the statute. By painting these facts as irrelevant, Park is re-asserting a facial challenge, one that relies on the rejected notion that courts should "presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook." *Sabri v. United States*, 541 U.S. 600, 605 (2004). "Facial challenges of this sort are especially to be discouraged." *Id.* at 609. Because § 2423 does not implicate one of the "few settings" where overbreadth claims may be raised, whether the statute's full sweep exceeds constitutional limits is not before this Court. *Id.* at 609-610.

Park's attempt to evade this conclusion by asserting an elements-based approach ignores the contours of an as-applied challenge, which considers only whether Congress's power extends to this defendant's conduct. *See Sabri*, 541 U.S. at 605. Here, the government alleges that Park's presence in Vietnam, on a business visa, involved commercial activity—teaching—that he used as a pretext to lure minor children to his home where he attempted to sexually assault one of them. Because those facts are relevant to show that Park's specific conduct had a demonstrable effect on foreign commerce, his prosecution is permissible. *Compare Al-Maliki*, 787 F.3d at 792-794 (questioning, but not deciding, whether incest committed "while residing in" a foreign country satisfies the Foreign Commerce Clause).

III. Section 2423 Permissibly Implements a Treaty.

A. Congress may implement treaties.

Park initially asserts that Congress has no power to implement treaties once made and that Congress's authority under the Necessary and Proper Clause extends only to assisting the President in making treaties. Park Br. 36-37. As the proponents of this idea whom he cites acknowledge, however, this view is not the law. *See United States v. Bond*, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring); *id.* at 2109-2110 (Thomas, J., concurring). Rather, the law, as the Supreme Court explained nearly a century ago, is that when a statute implements a treaty, "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). Of course, as this Court is

well aware, when "a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); *United States v. Powell*, 483 F.3d 836, 841-842 (D.C. Cir. 2007). To the extent the district court adopted Park's view, as he contends it did, Br. 51, it violated this principle.

Park's suggestion that treaties may deal only with "international intercourse" and not affect any nation's internal affairs, Br. 51, suffers the same flaw. Courts have long recognized the validity of treaties that regulate purely intrastate—let alone intra-national—conduct in upholding statutes that implement them. *Holland* is a perfect example: the Migratory Bird Act that it upheld affected the purely internal affair of hunting in Missouri (and other states). 252 U.S. at 431; *see also United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010) (upholding the Torture Act, 18 U.S.C. §§ 2340-2340A, which covers acts occurring wholly within one foreign nation); *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (same regarding the Hostage Taking Act, 18 U.S.C. § 1203); *United States v. Fries*, 781 F.3d 1137, 1148-1149 (9th Cir. 2015) (same regarding the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229); *United States v. Levenderis*, 806 F.3d 390, 397-398 (6th Cir. 2015) (same regarding the Biological Weapons Anti-Terrorism Act, 18 U.S.C. § 175).

In addition to conflicting with Supreme Court precedent, Park's view of the treaty power is incorrect. "[T]he Constitution does not require that an international agreement deal only with 'matters of international concern.'" 1 Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. c. Rather, "the United States may make an agreement on any subject suggested by its national interests in relations with other nations." *Id.* Park's suggestion that a treaty may not address "purely intra-national activities" would prevent the United States from continuing to participate in a wide range of treaties that the President and Senate have found useful for advancing important U.S. interests, including preventing the proliferation of weapons of mass destruction, protecting the environment, and advancing human rights.[6]

B. Section 2423(c) implements the Optional Protocol.

i. Congress need not specify its basis of power.

The question of which power authorizes legislation is not a historical guessing game about what Congress believed it was doing when it enacted a statute. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 569-570 (2012) (upholding as a tax a statute Congress subjectively believed was a commerce regulation). It is a logical analysis asking whether the court can identify, from the statute's text, structure, and history, any

[6] Park's assertion, Br. 46, that extraterritorial laws, like all laws, must be "based on an enumerated power under the Constitution" is a red herring. *See United States v. Morrison*, 529 U.S. 598, 607 (2000). Park cites this principle in arguing that it is not enough for a valid treaty to envision a statute. Park Br. 46. But his logic is exactly backwards. The statute is "based on an enumerated power"—the treaty power—precisely because it is envisioned by the treaty.

legitimate government purpose that Congress could have been pursuing. *United States v. Moghadam*, 175 F.3d 1269, 1278 (11th Cir. 1999) (upholding a statute under the Commerce Clause despite the fact that "Congress labored under the impression that it was acting pursuant to its Copyright Clause power"). Under rational-basis review, Congress's actual motivations are "entirely irrelevant." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). There simply is no requirement that Congress "recit[e] … the power which it undertakes to exercise," *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)—"*fully*," Park Br. 39, or otherwise. Similarly, that Congress recited another provision in some of the statute's legislative history is of no moment. *NFIB*, 567 U.S. at 569 (rejecting the argument that "even if the Constitution permits Congress to do exactly what [the Court] interpret[ed] this statute to do, the law must be struck down because Congress used the wrong labels").

ii. Congress may implement a treaty over time.

Much of Park's argument centers on the Optional Protocol's ratification. Park Br. 39-41. That focus rests on the premise that a treaty may only be implemented once, at or near the time of its ratification. This premise is faulty.

In implementing a treaty, as in addressing any other legislative issue, Congress may act in a piecemeal fashion, iterating to achieve its desired result. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). It is also a principle as old as Blackstone that "one legislature cannot abridge

the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810); *see* 1 W. Blackstone, Commentaries on the Laws of England 90 (1765) ("Acts of parliament derogatory from the power of subsequent parliaments bind not."). Thus, if a treaty provides Congress the power to resolve a problem—which it does, *see supra* III.A—then one Congress's view that no further legislation is required, *see* Park Br. 40 (quoting 148 Cong. Rec. S5717, S5719 (2002)), cannot prevent a subsequent Congress from disagreeing with that assessment and legislating further.

iii. The political branches decide what is necessary to implement a treaty.

Park does not dispute that the decision of how to implement a treaty is one in which the political branches deserve special deference; he argues only that "the government's reliance on *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), is misplaced" because that case involved a statute that "'both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty.'" Park Br. 38 (footnote omitted; quoting *Finzer*, 798 F.2d at 1459). *Finzer* is not so limited. That case might have been "an unusually strong [one] for judicial deference, over and above the traditional and general requirement of restraint in the area of foreign relations." *Finzer*, 798 F.2d at 1459. But this Court's statements about the political nature of implementing treaties and the foreign-affairs sensitivities involved were a recitation of that "traditional and general requirement," not some special solicitude good for that case only. *Ibid.*

Moreover, here, successive Congresses and successive Presidents have worked with one another and with the international community to implement the Optional Protocol, and the 2013 and 2015 amendments to § 2423 are part of that process. *See* Gov't Br. 31-32 (describing the United Nations implementation reports).

Furthermore, the government agrees that the 2013 and 2015 amendments to § 2423 were not necessary to fulfill the United States's international obligations under the Optional Protocol. This fact does not, however, carry the import Park gives it. *See* Park Br. 40-41, 50. Despite spilling much ink to establish that the "Protocol did not, by its plain terms, compel the enactment [of] § 2423(c)," Park Br. 41, Park fails to identify a single case establishing that this matters. The Optional Protocol, like many other international agreements, contains both aspirational aspects and concrete obligations. The Treaty Clause permits the President to negotiate such agreements, and the Necessary and Proper Clause permits Congress to implement them, should it so desire. *See Belfast*, 611 F.3d at 806 (finding it permissible for a treaty to set "a floor, not a ceiling").

iv. Section 2423 rationally relates to the Optional Protocol.

1. Park's argument that § 2423(c)'s "resides" language does nothing to implement the treaty, Br. 45-47, boils down to the assertion that it does nothing to aid in prosecuting the substantive offenses the treaty identifies. Thus, Park accepts that the "resides" prong is rationally related to the treaty to the extent the substantive offenses, *i.e.*, "illicit sexual conduct" as defined in § 2423(f), are likewise related. In light of Article

4(2) of the Optional Protocol, which provides that "[e]ach State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3, paragraph 1 … [w]hen the alleged offender is a national of that State," the government agrees that this is the proper analysis.

2. As to non-commercial child sexual abuse, Park contends that § 2423(f)(1) sweeps more broadly than the Optional Protocol and thus cannot be rationally related to it. Park Br. 47-50. This argument asks too much of the rational-basis standard. Park does not dispute that the examples the government provided, Gov't Br. 20-26, 34, are properly prohibited under the treaty. Park Br. 48. He claims only that those activities should be covered under "a broad definition of paying for sexual acts with a child." *Id.* But he has no answer for the points that (1) § 2423(f)(2), through its cross-reference to 18 U.S.C. § 1591(e)(3), requires proof beyond a reasonable doubt of an exchange or (2) defendants are canny enough to make such proof difficult to gather. It would therefore be *rational* for Congress to conclude that coupling § 2423(f)(1)'s broader definition of abuse (including non-commercial child sex abuse) with § 2423(c)'s resides prong more fully covers the universe of evils the Optional Protocol targets—in other words, that combination is "convenient, or useful or conducive" to implementing the treaty. *United States v. Comstock*, 560 U.S. 126, 133-134 (2010) (internal quotation marks omitted).

Park's reliance on *Pepe*'s globe-trotting Romeo-and-Juliet hypothetical, Br. 48, also misunderstands the nature of an as-applied challenge. *See supra* pp. 13-14. Park was 59 or 60 years old when, according to the allegations here, he lured young boys to his

apartment under the guise of being their teacher and attempted to sexually assault one of them. Whether the statute might have some debatable applications to other defendants says nothing about whether it may constitutionally be applied to Park. And Park's contention that permitting Congress's prohibition on non-commercial child sexual abuse by U.S. citizens abroad "would allow the United States to pass a law outlawing conduct by anyone anywhere in the world," Br. 48, ignores the other constitutional, political, and practical limits on Congress's power. *See supra* pp. 6-10.

3. Park contends that the Optional Protocol is only concerned with commercial child pornography. Park Br. 42-45, 50-51. This is both wrong and irrelevant. First, the treaty is not limited to commercial child pornography. To begin, the treaty's definitions for both the sale of children and child prostitution include "remuneration or any other form of consideration," but its definition for child pornography does not. Optional Protocol, Art. 2. "A treaty is a contract . . . between nations," which is "to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals." *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) (internal quotation marks omitted). One such principle that "has guided federal courts' interpretation of treaties for over a century" is *expressio unius est exclusio alterius*, or "'express mention of one thing excludes all others'—which is also known as the negative-implication canon." *Georges v. United Nations*, 834 F.3d 88, 93 (2d Cir. 2016) (footnote omitted). In accordance with this principle, the exclusion of an express commercial limitation on the definition of child pornography should be read as

intentional. *Cf. Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)). Thus, the treaty's differing definitions defeat Park's attempt to read a commercial limitation into the definition of child pornography.

Ignoring these definitional differences, Park focuses, Br. 43, on Article 3(1), which directs State Parties to criminalize three sets of actions: the sale of children, "[o]ffering, obtaining, procuring or providing a child for child prostitution," and "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography." As to the sale of children, the Optional Protocol specifies that this includes "offering, delivering or accepting, by whatever means, a child for the purpose of" sexual exploitation; harvesting the child's organs "for profit"; and using the child in "forced labour," as well as "[i]mproperly inducing consent" for adoption. Optional Protocol, Art. 3(1)(a). Park claims that the reference in the child-pornography crime to "the above purposes" could mean the purposes identified in the sale-of-children crime: sexual exploitation, organ harvesting, and forced labor. Park Br. 43. This interpretation makes no sense. It would be highly unusual for someone to distribute child pornography for the purpose of harvesting a child's organs or forcing her to work. Indeed, such a scenario is hard to envision.

It makes much more sense for "the above purposes" to apply only to the last verb ("possessing") within the definition of the child-pornography crime and to reference the other verbs in the list as a shorthand way of covering possession for the purpose of distribution, and the like, rather than simple possession. *See* UNICEF, Handbook on the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (2009), at 12 ("[F]or the above purposes" modifies "possessing," and references "producing, distributing, disseminating, importing, exporting, offering, [and] selling").[7] This interpretation accords with the grammatical rule of the last antecedent: "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (internal quotation marks and alteration omitted). "The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Id.* at 963. That intuition is born out here. When applied only to the last item in the list ("possessing"), the modifier ("for the above purposes") makes perfect sense—it is common for criminal statutes to distinguish between simple possession of contraband and possession with the intent to produce or distribute it. *E.g.*, 21 U.S.C. § 841. Applying the modifier to each verb in the list, on the other hand, gives rise to the two problems addressed above: (1) confusion

[7] Available at https://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf.

over which "purposes" are referenced and (2) the otherwise unusual if not absurd limitations on the criminal conduct.

Read properly, the Optional Protocol is not limited to combatting commercial child pornography. Accordingly, § 2423(f)(3) is rationally related to it. Additionally, even if the treaty itself were textually limited to commercial child pornography, given the speed and ease with which digital child pornography can become commercial, it would be rational for Congress to target all child pornography in cracking down on the commercial market. *See* Gov't Br. 32-33.

CONCLUSION

For the reasons stated here and in the government's opening brief, this Court should reverse the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

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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 and Tony Axam, counsel for appellee, by notice of electronic filing with the District of Columbia Circuit CM/ECF system.

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CERTIFICATE OF COMPLIANCE

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