ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18-3017

UNITED STATES OF AMERICA, **Plaintiff-Appellant,**

v.

JOSEPH RICKY PARK,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLEE

A. J. KRAMER
FEDERAL PUBLIC DEFENDER
625 Indiana Avenue, Suite 550
Washington, D.C. 20004
(202) 208-7500

District Court
Cr. 16-0009 (TSC)

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), appellee, Mr. Joseph Ricky Park, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellant, the United States of America, and appellee, Mr. Joseph Ricky Park. There are no intervenors or *amici*.

B. Ruling Under Review: Appellant appeals from the February 28, 2018 order of the district court granting Mr. Park's motion to dismiss the indictment. The district court's ruling is reported at *United States v. Park*, 297 F. Supp. 3d 170 (D.D.C. 2018).

C. Related Cases: There are no related cases. This case has not been previously before this Court.

ISSUE PRESENTED FOR REVIEW

Whether 18 U.S.C. § 2423(c), as applied to non-commercial intra-national illicit sexual conduct, is unconstitutional under the Foreign Commerce Clause and the Treaty Power.

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COUNTER-STATEMENT OF THE CASE

I. BACKGROUND

On January 8, 2016, the government filed a complaint charging appellee Joseph Ricky Park with engaging and attempting to engage in illicit sexual conduct in a foreign place in violation of 18 U.S.C. § 2423(c) and (e). U.S.App. 7.[1] On January 13, 2016, the government filed a one-count indictment charging Mr. Park with the same offense. U.S.App. 22-23.

[1] "U.S.App." refers to the Appendix for the Appellant. "App." refers to the Appendix for the Appellee filed with this brief. "GB" refers to the government's brief.

According to the complaint affidavit, Mr. Park is a United States citizen who, before his arrest in this matter, was last physically present in the United States in 2003. U.S.App. 10. Since 2003, Mr. Park resided and traveled exclusively outside the United States in Cuba, South Korea, Philippines, Thailand, Russia, Kuwait, China, Laos, Singapore, Malaysia, Saudi Arabia, Bahrain, Lebanon, Cambodia, and Vietnam. U.S.App. 10-11; App. 24-25. Throughout his residence and travel abroad, Mr. Park maintained a valid U.S. passport. *Id.*.[2]

The complaint alleged that in early 2015, while working as a teacher in Vietnam, Mr. Park invited an 11-year-old Vietnamese boy and his two friends to his apartment for English lessons. U.S.App. 12-13; App. 25. While the three boys were playing video games, Mr. Park allegedly "placed his hand on [the victim's] genitals and then proceeded to 'pinch' and then stroke [the victim's] genitals through [the victim's] clothing." U.S.App. 13. Mr. Park allegedly "then attempted to place his hand inside [the victim's] pants, but [the victim] pushed Park's hand away." *Id.*

In October 2015, Mr. Park was asked to leave Vietnam because he impermissibly had been teaching English while on a tourist visa. App. 26. After going to Thailand, Mr. Park asked friends in Vietnam to secure belongings he had left in his apartment there. U.S.App. 13-14, 17-18. Those friends "believed that Park's

[2] Because there were no evidentiary hearings in the district court, the facts are taken from the sources cited. Mr. Park does not concede the truth of any of the allegations, but accepts them for purposes of this appeal.

landlord's nephew had moved into the apartment," but nevertheless collected what they deemed were Mr. Park's belongings. U.S.App. 16. The friends discovered digital media files that contained images of naked adolescent males, which they turned over to United States government officials. U.S.App. 17-18, 19. A forensic search of those digital media purportedly revealed "evidence of production of child pornography of unidentified victims." App. 26.

The government proffered that the illicit sexual conduct charged in the single count of the indictment involved "an actual and attempted sexual act as defined in 18 U.S.C. § 2246," in violation of 18 U.S.C. § 2423(f)(1), and "the actual and attempted production of child pornography," in violation of § 2423(f)(3). U.S.App. 25. The government noted the recovery of digital images of child pornography dated June 20, July 3, and August 7, 2015, and implied the images were possessed by Mr. Park at some point. *Id.* at 3. The government has not alleged acts constituting the *production* of these images.[3] The government states that "[n]one of the alleged conduct [in Mr. Park's case] involves a commercial transaction." *Id.* at 2.

[3] Mr. Park recognizes that the only issue in this appeal is the district court's ruling to dismiss the indictment. However, the complaint provides evidence of, at most, possession of child pornography. And, only the production of child pornography after May 30, 2015, when the statute was amended to include such, could be charged, as the government conceded below. App. 26 n.1. The sole allegation even suggesting child pornography production states only that Mr. Park's friend "DD" told investigators that he had opened a movie file on what he believed to be one of Mr. Park's flash drives, and on this video, saw a recording of what he thought was Mr. Park's computer. U.S.App. 18. DD stated that the recording captured what he believed was a Skype video, and the Skype video included what he thought was a nude

Mr. Park was arrested in January 2016, while traveling from Thailand through the Philippines on the way to Guam. U.S.App. 11. On February 10, 2016, Mr. Park first appeared in court in D.C., and was held without bond. U.S.App. 2. On February 8, 2017, Mr. Park filed a motion to dismiss the indictment on grounds that 18 U.S.C. § 2423(c) and (e) was unconstitutional both facially and as applied. App. 1. The government opposed the motion. App. 24.

II. DISTRICT COURT RULING

On February 28, 2018, the District Court issued a memorandum opinion dismissing the indictment, U.S.App. 27, holding that neither the Foreign Commerce Clause nor the treaty power authorized Congress to enact § 2423(c) as it applied to the facts of Mr. Park's case. *United States v. Park*, 297 F. Supp. 3d 170 (D.D.C. 2018).

The court applied the Interstate Commerce Clause framework of *United States v. Lopez*, 514 U.S. 549 (1995), to analyze the constitutionality of § 2324(c). The court recognized that, according to *Lopez*, Congress "may regulate three broad categories of activity: (1) 'the use of the channels of interstate commerce;' (2) 'the instrumentalities of interstate commerce, or persons or things in interstate commerce;' and (3) 'activities having a substantial relation to interstate commerce . . . i.e., activities that

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adolescent male. *Id.* The affidavit does not provide a date for this video, *see id.,* and the government does not allege that the digital images of child pornography dated June 20, July 3, and August 7, 2015 include this video, U.S.App. 26.

substantially affect interstate commerce."' *Park*, 297 F. Supp. 3d at 175 (citing *Lopez*, 514 U.S. at 558–59 (citations omitted)).

The court held that § 2423(c) did not fall under the first *Lopez* category because the "resides" element of the statute "contains no 'express connection' to foreign commerce." *Id.* at 176. The court held that under the second *Lopez* category, the statute, as applied, regulated "residing in a foreign country and engaging in illicit sexual conduct," rather than obtaining or using travel documents as "instrumentalities" of commerce. *Id.*

As to the third *Lopez* category, the court concluded that the charged activities did not have a "substantial effect" on foreign commerce, after considering the four factors identified in this Circuit's case law for determining a "substantial effect":

> (1) "whether the regulated activity has anything to do with commerce or any sort of economic enterprise, however broadly one might define those terms;" (2) "whether the statute in question contains an express jurisdictional element;" (3) "whether there are express congressional findings or legislative history regarding the effects upon interstate commerce of the regulated activity;" and (4) "whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial."

Id. at 176-77 (quoting *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003) (citing *Lopez*, 514 U.S. at 561-67) (internal quotation marks omitted)).

With regard to the first factor, the government had conceded that the conduct in this case did not involve a commercial transaction. *Id.* at 178 (citing U.S.App. 25).

The court held that under the second factor, there was no express jurisdictional element connecting § 2423(c) to foreign commerce. *Id.* With regard to the third factor, the court ruled:

> [T]he government has proffered no evidence—legislative or otherwise—demonstrating that non-commercial illicit sexual conduct committed by Americans residing abroad has an effect on foreign commerce, and the legislative history of section 2423(c) is devoid of any reference to such conduct or its effect on foreign commerce. *See United States v. Al–Maliki*, 787 F.3d 784, 793 (6th Cir. 2015) ("Congress's failure to even try to show the aggregate effect of non-commercial sexual activity on foreign commerce highlights its lack of power [to pass § 2423(c)]."

Id.

Lastly, regarding the fourth factor, the court cited *Gonzales v. Raich,* 545 U.S. 1, 36 (2005), and *United States v. Morrison*, 529 U.S. 598, 607 (2000), to conclude that the link between the non-commercial conduct at issue here and the international market in child trafficking and sex tourism was "tenuous" and "too speculative to be substantial." *Id.* at 177-78 (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, 215-16 (4th Cir. 2015)] instead of the 'substantial effect' test established in *Lopez*" given that "there simply was 'no nexus' between the alleged non-commercial illicit sexual conduct and the market for child trafficking and sex tourism" identified by the government in this case. *Id.* at 179 (internal quotation marks and citations omitted).

The court additionally held that Congress did not have authority under the Necessary and Proper Clause to enact § 2423(c) to 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 ("Protocol"), a treaty that the United States ratified in 2002. *See* 148 Cong. Rec. S5717-01. The court noted that nothing in § 2423(c)'s legislative history indicated that Congress intended the statute to effectuate the Protocol and observed that, in fact, Congress did not even mention the Protocol in passing or amending § 2423(c). *Park*, 297 F. Supp. 3d at 180. Even if Congress intended § 2423(c)(to implement the Protocol, the court concluded that the statute as applied to Park's non-commercial conduct while residing in a foreign country was not "'reasonably' or plainly adopted to implement the Protocol's goal" of criminalizing conduct that allowed for the "*economic* exploitation" of children. *Id.* (emphasis in original). The court additionally ruled that the Protocol seeks to criminalize illicit sexual conduct occurring domestically or between the United States and another country, not conduct occurring exclusively within another country. *Id.* at 181. Thus, the court found that as applied to Mr. Park's conduct, § 2423(c) was not rationally related to the Protocol. *Id.*

Finally, the court rejected as inconsistent with the Constitution and established case law the government's argument that § 2423(c) was constitutional based on Congress's plenary power over citizens and foreign affairs. *Id.* at 182.

SUMMARY OF ARGUMENT

The district court applied the *Lopez* framework to assess the constitutionality of § 2423(c), as have other courts, in the absence of controlling authority from the Supreme Court or this Court. Because of the strong textual, structural, and historical evidence showing that Congress's power to regulate activities entirely inside a foreign nation is more limited than its power to regulate activities among the several states, this Court should hold that *Lopez*'s "substantial effect" category does not apply in the Foreign Commerce Clause context. Because the non-commercial intra-national illicit sexual conduct at issue in this case does not regulate the channels of foreign commerce or the instrumentalities of foreign commerce, § 2423(c), as applied to Mr. Park, is unconstitutional.

The government correctly acknowledges (GB 17-19) that non-commercial intra-national child sexual abuse is not properly regulated under a "substantial effect" test, because non-commercial intra-national child sexual abuse is noneconomic activity. Moreover, one non-commercial digital image of an unidentified, unclothed minor is not economic. In any event, the regulation of non-commercial child pornography occurring in another country is not an integral part of a regulatory scheme aimed at international sex tourism and child trafficking.

The Court should reject the government's request to apply a broader standard in the Foreign Commerce Clause context that would ask whether the activity has a "demonstrable effect" on commerce. This standard is incompatible with the text and

history of the Foreign Commerce Clause. However, even if a broader standard applies, non-commercial intra-national child sex abuse does not "demonstrably affect" foreign commerce in sex tourism or child trafficking, both of which depend on travel and commerce.

Finally, § 2423(c), originally and as amended, is not implementing legislation for the Optional Protocol. It does not track the Protocol's language and its legislative history is devoid of any indication that Congress intended for this section to effectuate the Protocol. And, assuming arguendo that it is implementing legislation, it is neither rationally related nor plainly adapted to the Protocol. The Protocol concerns the sale of children, child trafficking, and commercial child pornography occurring within the United States or transnationally, while § 2423(c) as applied in this case regulated non-commercial illicit sexual conduct occurring purely within a foreign nation.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law to be reviewed *de novo*. *Hodge v. Talkin*, 799 F.3d 1145, 1155 (D.C. Cir. 2015). The district court dismissed the indictment based on Mr. Park's challenge to the constitutionality of 18 U.S.C. § 2423(c) as applied to the facts of his case. This Court must therefore review whether the statute is "an unconstitutional exercise of congressional power" as applied to Mr. Park's alleged conduct., *United States v. Sullivan*, 451 F.3d 884, 887 (D.C. Cir. 2006), and may assume the truth of the factual allegations in the indictment and

the government's factual proffers, *United States v. Ballestas*, 795 F.3d 138 (D.C. Cir. 2015).

ARGUMENT

I. "OUR FEDERAL GOVERNMENT IS ONE OF LIMITED AND ENUMERATED POWERS, NOT THE WORLD'S LAWGIVER."[4]

Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. The district court applied the "well-defined Interstate Commerce Clause framework established in [*Lopez*, 514 U.S. at 558-59]" to the constitutionality under the Foreign Commerce Clause of § 2423(c) "[g]iven the historical use of the *Lopez* framework in this jurisdiction, and absent clear direction from the Supreme Court or the D.C. Circuit[.]" *Park*, 297 F. Supp. 3d at 175. However, "[t]here is 'strong textual, structural, and historical evidence that Congress has less—not more—power to impose U.S. law inside foreign nations than inside the several states under the Commerce Clause.'" *United States v. Pepe*, No. 14-50095, 2018 WL 3371364, at *8 (9th Cir. Jul. 11, 2018) (quoting Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 1003 (2010)); *see also Al-Maliki*, 787 F.3d at 791 ("doubt[ing]" that the Foreign Commerce Clause "include[s] the power to punish a citizen's noncommercial conduct while the citizen resides in a foreign nation").

[4] *Baston v. United States*, 137 S. Ct. 850, 850 (2017) (Thomas, J., dissenting from denial of certiorari).

A. Congress Has No Power to Regulate Conduct Occurring Wholly Within Another Nation.

"Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. 1, 25 (1942); *see also Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) ("Congress cannot punish felonies generally; it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers."). In the context of 18 U.S.C. § 2423(c), that power purports to come from the Foreign Commerce Clause, which gives Congress the power "to regulate Commerce with foreign Nations[.]" U.S. Const. Art. I, § 8, cl. 3. This power, however, has long been recognized as limited to regulating "commercial intercourse between the United States and foreign nations." *Gibbons v. Ogden*, 22 U.S. 1, 193 (1824). "The 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." *Perez v. Brownell*, 356 U.S. 44, 58 (1958).

Under the original meaning of "commerce," Congress does not have the power to criminalize the conduct in this case. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, 514 U.S. at 585 (Thomas, J., concurring); *see also id.* (explaining that discussions of the commerce clause during ratification "used trade (in its selling/bartering sense) and commerce interchangeably"). And indeed, in an early

case discussing both the Interstate and Foreign Commerce Clauses, Chief Justice Marshall explained that "[t]he power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations," but "it does not extend to a commerce which is completely internal." *Ogden*, 22 U.S. at 3. In other words, Congress has the power to regulate trade, and that trade cannot be completely internal to a sovereign nation. Therefore, as the Foreign Commerce Clause was originally understood, the noneconomic illicit sexual conduct occurring entirely within a foreign country at issue in this case is clearly beyond Congress' power to regulate. *Accord Al-Maliki*, 787 F.3d at 792 ("[the Foreign Commerce Clause] simply does not include the power to criminalize a citizen's noncommercial activity in a foreign country, for that is not 'Commerce' as originally understood. Nor, for that matter, is it commerce 'with' a foreign Nation, which is also required by the textualist reading.").

In the interstate context, the "interpretation of the Commerce Clause has changed as our Nation has developed," *Morrison*, 592 U.S. at 607, resulting in *Lopez*'s three-category framework. "The first two categories [the channels of interstate commerce and the instrumentalities of interstate commerce] are self-evident, since they are the ingredients of interstate commerce itself." *Raich*, 545 U.S. at 34 (Scalia, J., concurring). By contrast, the third category—activities substantially affecting interstate commerce—is not self-evident, but instead derives from Congress's ability to create what the Supreme Court has variously described as "closed regulatory system[s]" or "comprehensive regime[s]" for regulating U.S. national markets. *Raich*,

545 U.S. at 10, 12-13. From this authority to create comprehensive regulatory regimes "among" the several U.S. states, the Court found that it may be "necessary and proper" for Congress to reach activity that substantially affects interstate commerce where failure to do so would "undercut" the comprehensive regime. *Id.* at 5, 18.

Meanwhile, the Supreme Court has rarely addressed the Foreign Commerce Clause. When it has, it has been either: (1) to "address[] laws regulating conduct with a significant connection to the United States," such as the importation of goods into the country's ports; or (2) to "articulate[] limits on the power of the States to regulate commerce with foreign nations under the so-called dormant Foreign Commerce Clause," *Baston*, 137 S. Ct. at 850-51 (Thomas, J., dissenting from denial of certiorari) (citing *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 449-54 (1979)), not to outline the limits of Congress' power vis-à-vis conduct occurring entirely within a sovereign nation.

Lacking such guidance and misreading the Foreign Commerce Clause cases that do exist, "the courts of appeals have construed [Foreign Commerce Clause authority] expansively, to permit Congress to regulate economic activity abroad if it has a substantial effect on this Nation's foreign commerce." *Id.* These courts—and the government here (GB 17-19)—"have relied upon statements by [the Supreme] Court comparing the foreign commerce power to the interstate commerce power, but have removed those statements from their context." *Baston*, 137 S. Ct. at 852 (Thomas, J. dissenting from denial of certiorari); *see also United States v. Reed*, No. 15-cr-

188, 2017 WL 3208458, at *7 (D.D.C. Jul. 27, 2017). For instance, the Supreme Court described the foreign commerce power as "exclusive and plenary," *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57 (1933), and stated that Congress's commerce power "when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce[,]" *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 434 (1932). But these cases did not involve "'legislation of extraterritorial operation which purports to regulate conduct inside foreign nations." *Baston*, 137 S. Ct. at 852 (Thomas, J. dissenting from denial of certiorari) (quoting Colangelo, 96 Va. L. Rev. at 1001). Rather, the Supreme Court emphasized the broader reach of Congress's power under the Foreign Commerce Clause *only* as it relates to the power of the States to act in foreign commerce. Therefore, any such statements "are of questionable relevance" to Congress' power to legislate conduct purely within a sovereign nation. *Id.*

The "substantial effects" test applicable in Interstate Commerce Clause cases cannot apply to the Foreign Commerce Clause because the United States has no power to create comprehensive global regulatory schemes *among* the nations of the world. The text of the Foreign Commerce Clause explicitly gives Congress the power to regulate commerce "*with* foreign Nations," not *among* them. U.S. Const. Art. 1, § 8, cl. 3. "The word 'among' means intermingled with; in other words, a thing which is among others is intermingled with them." *Ogden*, 22 U.S. at 194. Thus, "[c]ommerce among the States, cannot stop at the external boundary line of each State, but may be

introduced into the interior." *Id.* By contrast, commerce "with" foreign nations requires that the commerce be "*between* the United States and foreign nations." *Id.* at 193 (emphasis added). In this context, "between" means "from one to another." Merriam-Webster's Dict., Merriam-Webster.com (accessed July 21, 2018). Accordingly, the Foreign Commerce Clause authorizes Congress to regulate commerce from the United States to a foreign nation, or vice versa, but not commerce purely within a foreign nation.

More fundamentally, foreign sovereigns, "[u]nlike the states[,] . . . have never submitted to the sovereignty of the United States government nor ceded their regulatory power to the United States." *United States v. Yunis*, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988). Thus the Indian Commerce Clause cases relied on by various courts and the government, GB 17 (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 162, 192 (1989)), are inapposite.[5] Unlike foreign nations, the Supreme Court has described Indian tribes as "domestic dependent nations" and determined that "[t]heir relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). The Supreme Court has developed "canons of construction applicable to Indian law [that] are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*,

[5] Indeed, the Indian Commerce Clause was not even included in the first draft of the Constitution. Joseph Story, *Commentaries on the Constitution*, 2: § 1092 (1833).

470 U.S. 226, 247 (1985). However, foreign nations are not wards of the United States.

Justice Thomas recently criticized the expansive view that courts of appeals have given to the Foreign Commerce Clause in a case involving sex trafficking. *Baston*, 137 S. Ct. at 850 (Thomas, J. dissenting from denial of certiorari). He explained that "[t]he facts are not sympathetic, but the principle involved is fundamental. We should grant certiorari and reaffirm that our Federal Government is one of limited and enumerated powers, not the world's lawgiver." *Id.* Justice Thomas observed that:

> Taken to the limits of its logic, the consequences of the Court of Appeals' reasoning are startling. The Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress has a rational basis to conclude that the activity has a substantial effect on commerce between this Nation and any other. Congress would be able not only to criminalize prostitution in Australia, but also to regulate working conditions in factories in China, pollution from powerplants in India, or agricultural methods on farms in France. I am confident that whatever the correct interpretation of the foreign commerce power may be, it does not confer upon Congress a virtually plenary power over global economic activity.

Id. at 853.

This Court should hold that there is no rational basis for importing the "substantial effects" category—let alone the even broader "demonstrable effect" test, *see* GB 19—into the Foreign Commerce Clause analysis. This would be faithful to the sovereignty of foreign nations and the text of the Clause, limited as it is to commerce "with" foreign nations.

B. Without A "Substantial Effect" Inquiry, § 2423(c) Is Unconstitutional As Applied to Mr. Park's Conduct.

Under the proper framework, § 2423(c), as applied to Mr. Park's non-commercial illicit sexual conduct occurring wholly within Vietnam, is unconstitutional. In the absence of a "substantial effect" on foreign commerce category, § 2423(c) would only be constitutional if it regulated either "the channels of foreign commerce" or "the instrumentalities of foreign commerce." *Lopez*, 514 U.S. at 558-59. The district court ruled that it did neither in Mr. Park's case, and the government does not challenge the court's ruling on these points. *Park*, 297 F. Supp. 3d at 175-76. Because the noneconomic illicit sexual conduct that occurred only within Vietnam does not involve the channels or instrumentalities of foreign commerce, § 2423(c), as applied to Mr. Park, is unconstitutional. The conduct reached in this case under 18 U.S.C. § 2423(c) is beyond Congress's power to regulate.

II. NON-COMMERCIAL INTRA-NATIONAL ILLICIT SEXUAL CONDUCT DOES NOT SUBSTANTIALLY AFFECT FOREIGN COMMERCE.

The government concedes that non-commercial child sexual abuse can only be regulated under the Foreign Commerce Clause *if* this clause is broader than the Interstate Commerce Clause. GB 17-19 (arguing for the "demonstrable affect" on commerce standard). But as discussed above, the Foreign Commerce Clause is not even commensurate with the Interstate Commerce Clause, let alone broader. To the extent that the *Lopez* standards apply, though, the government is correct to concede

that non-commercial child sex abuse is not properly regulated for the reasons provided by the district court. *Park*, 297 F. Supp. 3d at 176-79.

Moreover, the non-commercial possession of one digital image of an unidentified, unclothed minor in Vietnam is not economic, and the regulation of purely local non-commercial child pornography occurring in another country is not an integral part of a regulatory scheme aimed at international sex tourism and child trafficking.

A. Congress Has No Authority to Regulate Non-Commercial Intra-National Child Sexual Abuse.

Non-commercial child sexual abuse is noneconomic and thus not properly regulated under *Lopez*'s third category. Under *Lopez*, only "where *economic* activity substantially affects interstate commerce [will] legislation regulating that activity [] be sustained." 514 U.S. at 590 (emphasis added). The Supreme Court has thus "reject[ed] the argument that Congress may regulate noneconomic [] criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 509 U.S. at 617; *see also United States v. Kebodeaux*, 570 U.S. 387, 411 (2013) (Thomas, J., dissenting) (citing *Morrison* for the proposition that Congress "may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on . . . commerce").

Under the "substantial effects" category, the Court considers: (1) "whether the regulated activity has anything to do with commerce or any sort of economic

enterprise, however broadly one might define those terms"; (2) "whether the statute in question contains an express jurisdictional element"; (3) "whether there was express congressional findings or legislative history regarding the effects upon [foreign] commerce of the regulated activity"; and (4) "whether the relationship between the regulated activity and [foreign] commerce is too attenuated to be regarded as substantial." *Rancho Viejo,* 323 F.3d at 1068-69 (citing *Lopez,* 514 U.S. at 561-67) (internal quotation marks omitted). The district court correctly concluded that "[n]one of these factors, as applied to the facts of this case, support a finding that Congress was authorized to enact section 2423(c) to encompass the conduct charged here." *Park*, 297 F. Supp. 3d at 177.

First, however broadly one might define "commerce," it does not apply to sexual abuse that the government admits did not "involve a commercial transaction." U.S.App. 25. Second, § 2423(c), as amended and applied in this case, explicitly removed even the tenuous jurisdictional element of "traveling in foreign commerce" by applying to those who "reside" in a foreign country. Third, the government effectively concedes that it cannot show a *substantial* effect of non-commercial child sexual abuse on foreign commerce by arguing that it need only show a *demonstrable* effect. In any event, the law does not support substitution of the "demonstrable effect" standard proposed by the government. Finally, as the district court found, the relationship between the non-commercial child sex abuse in Vietnam and foreign

commerce "is too attenuated to be regarded as substantial." *Park*, 297 F. Supp. 3d at 177.

B. Congress Has No Authority to Regulate Non-Commercial Intra-National Child Pornography Production.

1. Mr. Park's Conduct Is Not "Quintessentially Economic."

The Supreme Court has repeatedly emphasized that the "substantial effects" rationale is appropriate only where the activity sought to be regulated is "economic" in nature. *Raich*, 545 U.S. at 24-27; *see also Morrison*, 509 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). The activity in this case that might amount to child pornography production is the existence of one digital image of an unidentified, unclothed minor who was "in (and presumably from) Vietnam," an image that was not placed in any stream of commerce, foreign or otherwise. U.S.App. 18; App. 82. This is not economic, and the "substantial effects" rational is therefore inappropriate.

The government relies on *Sullivan*, 451 F.3d at 891, to argue that child pornography is a commodity that, by its existence anywhere, has a substantial effect on global markets that the United States can then regulate. GB 13. The government misreads *Sullivan* and, based on this misreading, it misapplies *Raich*, arguing that noneconomic child pornography is a "quintessentially economic" activity. *Id.* (quoting *Raich*, 545 U.S. at 25).

But *Sullivan* involved "child pornography images that were transported in interstate commerce via the Internet." *Sullivan*, 451 F.3d at 885. The Court applied *Raich* to this activity, finding that "[i]f, under *Raich*, Congress may criminalize purely intrastate production and use of marijuana, it follows here that it may criminalize possession of child pornography *that has been transmitted through multiple states via the Internet*." *Id.* at 888 (emphasis added). The Court concluded that Congress acted "well within" the Interstate Commerce Clause "in criminalizing possession of child pornography *transmitted through several states via the Internet*" because "the prohibition against possessing child pornography transpo*rted in interstate commerce by computer* is one important aspect of a comprehensive legislative scheme aimed at eliminating traffic in child pornography." *Id.* at 890 (emphasis added). In so holding, the Court recognized that "the *trade* in child pornography is 'quintessentially economic.'" *Id.* (quoting *Raich*, 545 U.S. at 25) (emphasis added). Where no internet usage is involved, the government's claim that "foreign-produced child pornography can affect the U.S. market" cannot stand. GB 14; *id.* at 13-14 (relying on "the *internet's* effect on the child pornography market") (emphasis added).

It is only from its misreading of *Sullivan* that the government is able to apply *Raich* to the activity in this case. As the Supreme Court cautioned in *Lopez*, "depending on the level of generality, any activity can be looked upon as commercial." 514 U.S. at 565. The existence of one digital image of an unclothed minor entirely within Vietnam, divorced from any allegation that someone traded it or transferred it

using instrumentalities of foreign commerce, is not "quintessentially economic." Instead, as the government recognizes, the Court *cannot* "aggregate the effects of noneconomic activity" to find a substantial effect on foreign commerce. GB 11 (citing *Morrison*, 529 U.S. at 613). Without aggregating the alleged effects of child pornography, the image of a naked minor in a foreign nation does not have a substantial effect on foreign commerce. In other words, "Congress [did not have] a rational basis for believing that failure to regulate the intra[national] . . . [image of a single minor by a U.S. citizen] would leave a gaping hole in the [comprehensive scheme]." *Raich*, 545 U.S. at 22.[6] Finally, the government's reliance on *Raich* is particularly misplaced given that "Congress's power to effectuate a[n existing] comprehensive regulatory scheme was central to that opinion, . . . while no comparably general regulation of foreign commerce exists in this case." *United States v. Clark*, 435 F.3d 1110, 1117 n.1 (9th Cir. 2006) (Ferguson, J., dissenting).

[6] *Raich* is also inapplicable to the present case because there the respondents "ask[ed] [the Court] to excise individual applications of a *concededly valid statutory scheme*." 545 U.S. at 23 (emphasis added). "In contrast, in both *Lopez* and *Morrison*"—as in this case—"the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety." *Id.* The Supreme Court held that "[t]his distinction is pivotal." *Id.* The regulation of noneconomic child pornography produced within a foreign nation falls entirely outside of Congress's foreign commerce power. Thus *Lopez* and *Morrison* control, not *Raich*.

2. Mr. Park's Conduct Is Not Part of The Marketplace Sought to Be Regulated by § 2423(c).

More fundamentally, even if non-commercial intra-national child pornography were economic, the prohibition against producing non-commercial child pornography within the bounds of a sovereign nation is not an "important aspect of a legislative scheme aimed at eliminating" *international sex tourism* and *child trafficking*. *Sullivan*, 451 F.3d at 890. In arguing otherwise, the government inappropriately relies on cases that found that regulating wholly intrastate possession of wheat, drugs or child pornography was rationally related to schemes aimed at regulating the trade in *wheat, drugs or child pornography*—in other words, the very commodities the comprehensive schemes sought to address. *See Wickard v. Filburn*, 317 U.S. 111, 114 (1942) (upholding application of the Agricultural Adjustment Act, which regulated wheat acreage allotments, to the planting and consumption of homegrown wheat); *Raich*, 545 U.S. at 13, 27 (upholding regulation of personal intrastate marijuana use as integral to "closed regulatory system" in Controlled Substances Act, which "designates marijuana as contraband for *any* purpose"); *Sullivan*, 451 F.3d at 890 (upholding regulation of local child pornography under § 2252A(a)(5)(B) as important aspect of Child Pornography Prevention Act's "comprehensive scheme to eliminate child pornography");[7] *United States v. Bowers*, 594 F.3d 522, 528 (6th Cir. 2010) (concluding

[7] Thus, when *Sullivan* spoke of the "'gap in Congress' comprehensive efforts to eliminate the market for sexually exploitive uses of children,'" GB 15 (quoting *Sullivan*,

that "there is no doubt that" §§ 2251(a) & 2252(a)(4)(B), also created by Child Pornography Prevention Act, "are part of a larger comprehensive scheme to regulate [the] illicit interstate market [in child pornography]"); *see also United States v. Malloy*, 568 F.3d 166, 179-80 (4th Cir. 2009) (same); *United States v. McCalla*, 545 F.3d 750, 755 (9th Cir. 2008) (same).[8]

But in this case, there is a mismatch between the legislative scheme's aims and the "commodity" it attempts to regulate. Unlike the direct relationship in the above cases, non-commercial purely intra-national child pornography is not the "commodity" being regulated in what the government recognizes is a comprehensive global regulatory scheme to eradicate "child prostitution, sex tourism, and sex trafficking." GB 17. "By definition, the marketplace Congress seeks to eliminate depends on commerce and travel," *Reed*, 2017 WL 3208458, at *13, but Mr. Park "is not charged in this case with being a child sex tourist or trafficker, nor is he alleged to have provided or received consideration for his alleged sexual acts," *Park*, 297 F. Supp. 3d at 178. Therefore convicting Mr. Park for residing in Vietnam and producing non-commercial child pornography "brings Congress no closer to

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451 F.3d at 891), it was speaking of the comprehensive efforts evidenced by the Child Pornography Prevention Act to curb child pornography nationally.

[8] As the government recognizes, GB 14 n.7, unlike the "resides" language at issue in this case, the statutes at issue in *Sullivan*, *Bowers*, *Malloy*, and *McCalla* had "language that clearly connected the statutes to foreign commerce." *Park*, 297 F. Supp. 3d at 179 n.5.

stamping out the marketplace at which Section 2423's prohibitions are directed." *Reed*, 2017 WL 3208458, at *13.

"The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring). The child pornography market may "in fact, [be] global, largely due to the Internet," foreign individuals may "upload[] child pornography to a U.S. based electronic service," and Congress may have "repeatedly expressed its concern over the Internet's effect on the child pornography market." GB 13-14 (internal citations omitted). But the government still fails to provide the Court with evidence of a link between noneconomic purely local child pornography production and *the regulation of sex tourism and child trafficking*.

In the district court, the link the government offered was "tenuous"; here it is nonexistent. The government argued below that "failing to regulate non-commercial sexual activity [including child pornography] *could* lead to a widespread belief that sex with minors is available for 'free and with less risk,' which *could* result in the lowering of the price for sexual activity in the commercial market, *possibly* resulting in an increase in demand for commercial sexual activity," and "[t]his possible increase in demand . . . *may then* impact the number of victims and sex acts that occur across the world." *Park*, 297 F. Supp. 3d at 178 (emphasis in original) (citing App. 82). The district court found this reasoning "too speculative to be substantial." *Id.* (internal quotation marks and citation omitted). Here, the government does not even attempt

to argue that child pornography production in Vietnam is within the "class of activities" regulated by a global scheme aimed at the elimination of sex tourism and child trafficking.[9] It argues instead that "[i]t is not irrational for Congress to conclude that foreign-produced child pornography can affect the U.S. market," GB 14, but it does so without any recognition that it is the U.S. market for "sex tourism" and "child trafficking" that is at issue. Because there is no basis from which to conclude that the failure to regulate non-commercial intra-national child pornography substantially affects the regulation of sex tourism and child trafficking, Congress has acted outside its enumerated powers.

Ultimately, the mismatch between the non-commercial intra-national child pornography production alleged in this case and a scheme to regulate sex tourism and child trafficking renders this statute unconstitutional both under the "substantial effect" standard and the broader "demonstrable effect" standard that the government seeks to apply to the alleged child sex abuse.

[9] The congressional findings cited by the government, GB 26, explicitly linked intrastate child pornography to the regulation of interstate child pornography. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, Title V, § 501(1).

III. SECTION 2423(C) EXCEEDS CONGRESS' AUTHORITY TO REGULATE NON-COMMERCIAL INTRA-NATIONAL CHILD SEX ABUSE REGARDLESS OF THE STANDARD USED.

A. This Court Should Not Apply A "Demonstrable Effect" Standard.

Congress's power under the Foreign Commerce Clause is either narrower or commensurate with its power under the Interstate Commerce Clause. As explained in Part I, the government, and the cases that have applied a broader standard of either a "demonstrable effect" on commerce or a "constitutionally tenable nexus with foreign commerce," misinterpret the Supreme Court's Foreign Commerce Clause cases. GB 17-19 (citing *Bollinger*, 798 F.3d at 216; *Clark*, 435 F.3d at 1114; *United States v. Bianchi*, 386 F. App'x 156, 161-62 (3d Cir. 2010)). In addition, *Clark*—which, unlike here, involved foreign travel and *commercial* illicit sexual conduct—was very recently overruled. *Pepe*, 2018 WL 3371364, at *7. In *Pepe*, the Ninth Circuit acknowledged the "strong textual, structural, and historical evidence that Congress has less—not more—power to impose U.S. law inside foreign nations than inside the several states under the Commerce Clause." *Id.* at *8.

Moreover, it is not clear why a broader standard for the Foreign Commerce Clause is even needed under the government's own logic. Addressing the Necessary and Proper Clause, Art. I, § 8, cl. 18, the government cites to *Raich* and argues that "in the commerce arena specifically, this provision gives Congress the 'power needed to make [economic] regulation effective,'" such that "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." GB 19 (quoting *Raich*, 545 U.S. at 36-37, 38 (Scalia, J., concurring in the judgment)) (brackets in government brief). If Congress's authority under the Intrastate Commerce Clause, coupled with the Necessary and Proper Clause, is all Congress needs to regulate noneconomic activity that "could undercut" market regulations, then courts would have had no need to resort to a lesser standard requiring merely a "demonstrable effect" on foreign commerce.

In any event, neither the government nor the cases it cites satisfactorily define "demonstrable effect" or "constitutionally tenable nexus." Presumably these standards require something less than "substantial effects[.]" However, without the four-factor approach for the "substantial effect" standard, courts are left to imagine what a "demonstrable" effect, or a "constitutionally tenable" nexus, might be.

B. Noneconomic Intra-National Child Sex Abuse Does Not "Demonstrably Affect" Foreign Commerce.

Even if the Foreign Commerce Clause is as broad as the government alleges, "Congress must still regulate *commerce*, and it does not have exclusive or plenary power unless it does so." *Al-Maliki*, 787 F.3d at 794 (emphasis added). "Giving the word 'the same meaning throughout' the Clause so it 'remains a unit,'" Congress has not regulated commerce here, "much less commerce with a foreign country." *Id.* (quoting *Ogden*, 22 U.S. at 194). The regulation of non-commercial child sex abuse is not a valid exercise of Congressional authority because, as the district court correctly held,

there is no nexus, "demonstrably" or otherwise, between non-commercial, wholly intra-national child sex abuse and the market for sex tourism and child trafficking. *Park*, 297 F. Supp. 3d at 179.

Child sex tourists are those who "travel[] to a foreign country and engage in sexual activity with a child in that country."[10] Child trafficking involves "recruit[ing] and transfer[ring] children across international borders in order to sexually exploit them in another country."[11] The market for both "depends on commerce and travel." *Reed*, 2017 WL 3208458, at *13. Section 2423's other subsections are explicitly tied to the regulation of these markets. Section 2423(a), for instance, prohibits transporting a minor in foreign commerce for the purpose of prostitution or criminal sexual activity, and § 2423(b) prohibits traveling in foreign commerce "for the purpose of engaging in any illicit sexual conduct." And even § 2423(c), as it applies to *traveling* in foreign commerce and thereafter engaging in child sex abuse, at the very least requires foreign travel. As applied to Mr. Park, however, § 2423(c) depends neither on travel nor commerce.

The government suggests that it is difficult for authorities to prove the "commercial" element of child sex abuse, and thus the regulation of noneconomic

[10] *See* Extraterritorial Sexual Exploitation of Children, Dep't of Justice, (Jan. 25, 2016), https://www.justice.gov/criminal-ceos/extraterritorial-sexual-exploitation-children.

[11] *See* Prostitution of Children, Dep't of Justice (June 3, 2015), https://www.justice.gov/criminal-ceos/prostitution-children.

child sex abuse is necessary. GB 20. The examples the government provides—"payment of . . . tourism-related services that facilitate contact with children" and payment for "seemingly legitimate" tours that "include sexual activity with girls," GB 20—may indicate a need to expand the definition of what it means to pay for sexual activity with minors. It does not follow that regulating noneconomic child sex abuse is rationally related to the regulation of sex tourism and child trafficking.

The government nevertheless insists that case law supports its argument that the "inclusion of non-commercial child sexual abuse is 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." GB 21 (citing *Bollinger*, 798 F.3d at 218; *United States v. Martinez*, 599 F. Supp. 2d 784 (W.D. Tex. 2009); *United States v. Hardeman*, 2011 WL 12143962, at *8 (N.D. Cal. July 20, 2011)). But the reasoning in these cases is tautological. *Martinez* found that "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," but failed to identify the rational basis on which it was relying. *Id.* at 808. And *Bollinger* "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,'" GB 21 (quoting *Bollinger*, 798 F.3d at 219), but did not identify any nexus between

non-commercial sexual abuse and sex tourism or the commercial sex industry. *Hardeman* is no better, stating that, 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." *Hardeman*, 2011 WL 13143962, at *8. This conclusion begs the question of whether non-economic child sexual abuse is in fact "one particular iteration" of the "commercial, sexual exploitation of children abroad." *Id.*

The government argues that "*permitting* the non-commercial abuse of children can de-stigmatize sexual activity with children or otherwise 'contribute[] to commercial sexual exploitation.'" GB 21(emphasis added) (quoting *Bollinger*, 798 F.3d at 719. Leaving aside the speculative assumptions and inferences underlying this assertion, Congress's authority to regulate the conduct here should not turn on an assertion that non-commercial child sex abuse with no connection to foreign commerce is "permitted," when it is not. As the district court noted, child sexual abuse is against the laws of Vietnam and thus "could be handled entirely by Vietnamese law enforcement." *Park*, 297 F. Supp. 3d at 181.

Regarding the "resides" language, the government provides "some history on § 2423's expansion," GB 22, but this history is no more than a recitation of the dates on which the statute was amended. It does not demonstrate that *residing* in a foreign country and engaging in *non-commercial* child sex abuse is rationally related to the regulation of sex tourism and child trafficking. That "proving intent concurrent with

travel was so difficult that it allowed many sex tourists to escape punishment," GB 23, perhaps explains the amendment to § 2423(c) decoupling the intent requirement from foreign travel—indeed, this is what *United States v. Pendleton*, 658 F.3d 299 (3d Cir. 2011), found constitutional as a regulation of the "channels of foreign commerce," *id.* at 310—but it does not provide a demonstrable link between residing in a foreign country and engaging in non-commercial child sex abuse.

The government argues that courts questioned "whether the travel morphed into resettlement," GB 24, but it fails to explain that courts wrestled with this issue because applying the statute to illicit sexual conduct without a sufficient nexus to foreign travel would "raise constitutional or other concerns." *Clark*, 435 F.3d at 1107 n.11; *United States v. Jackson*, 480 F.3d 1014, 1017 n.6 (9th Cir. 2007) (quoting *Clark*); *United States v. Schmidt*, 845 F.3d 153, 157 (4th Cir. 2017) (explaining that "foreign commerce requires some nexus with the United States," given that "[t]he United States cannot go around prosecuting under the statute those with no real connection to this country"). And the Ninth Circuit overruled *Clark* in an opinion that explicitly questions whether the Foreign Commerce Clause is so broad as to authorize Congress to regulate residing in a foreign country and thereafter engaging in illicit sexual conduct. *Pepe*, 2018 WL 3371364, at *8.

The government further suggests that it was rational to add the "resides" language to § 2423(c) because of a concern that U.S. sex offenders were moving abroad to avoid registration under the Sex Offender Registration and Notification Act

(SORNA). GB 24. However, the "rational" response to this concern was to amend SORNA, as Congress has done, not to seek to criminalize conduct wholly within a separate sovereign. *See* International Megan's Law to Prevent Child Exploitation and Other Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, §§ 5, 6, 8 (2016) (requiring notification of foreign governments when registered American sex offenders travel abroad and a unique passport identifier for all registered American sex offenders).

That Congress's actions may "help maintain good relations with other countries" likewise is insufficient to justify acting outside of its Foreign Commerce Clause power. GB 25. Foreign "acquiescence to [U.S.] federal regulation cannot expand the bounds of the Commerce Clause." *Raich*, 545 U.S. at 29 (citing *Morrison*, 529 U.S. at 661-62 (Breyer, J., dissenting); *United States v. Darby*, 312 U.S. 100, 114 (1941)); *cf. M'Culloch v. Maryland*, 17 U.S. 316, 424 (1819) ("To impose on [Congress] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution.").

Finally, the government claims that "Park used his work as a foreigner teaching a foreign language to lure his child victims into his apartment" and "[t]his straightforward commercial activity was thus critical to Park's alleged offense." GB

25. But to prove a violation of § 2423(c) as it applies to non-commercial child sex abuse does not require any proof of commercial activity, "straightforward" or otherwise, and the fact that Mr. Park was a teacher is irrelevant. In fact, if § 2423(c) required this proof, then the government would not need to resort to a "demonstrable effect" standard. After all, in the government's own words, "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." GB 11 (citing *Wickard*, 317 U.S. at 127-28). But the government itself does not believe that non-commercial child sex abuse is economic in nature, and must resort to the "demonstrable effects" test.

In the end, noneconomic child sex abuse occurring entirely within a foreign nation neither substantially nor demonstrably affects the regulation of sex tourism and child trafficking. Therefore, § 2423(c), as applied to Mr. Park, is beyond the scope of Congress's power under the Foreign Commerce Clause.

IV. SECTION 2423(c) DOES NOT IMPLEMENT THE OPTIONAL PROTOCOL AND IS NEITHER NECESSARY NOR PROPER FOR ITS IMPLEMENTATION.

While Congress has the authority to pass legislation implementing a treaty, § 2423(c) does not do so. The Protocol exists, but the statute was neither enacted nor amended to implement it. Moreover, even if it were, the district court correctly concluded that § 2423(c) is not rationally related to the Protocol's goal of stamping

out commercial sex tourism, commercial child prostitution, and commercial child pornography. *Park*, 297 F. Supp. 3d at 179-82.

A. Section 2423(c) Is Not Implementing Legislation.

Under the Necessary and Proper Clause, Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18. One such "other Power[]" appears in Article II, § 2, cl. 2: "[T]he President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." "Read together, the two Clauses empower Congress to pass laws 'necessary and proper for carrying into Execution . . . [the] Power . . . to make Treaties.'" *Bond v. United States*, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring); *cf. Reed*, 2017 WL 3208458, at *15 ("The Necessary and Proper Clause allows Congress to construct laws that are 'rationally related' to the implementation of another constitutionally enumerated power—here, the President's power to make and execute treaties.").

In an early case considering the Necessary and Proper Clause, the Supreme Court stated, "If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920). Some courts "have read *Holland* to mean that the Necessary and Proper Clause [] governs

whether a statute is in fact implementing legislation, and implementing legislation is automatically constitutional if it implements a valid treaty." *Reed*, 2017 WL 3208458, at *15 (internal quotation marks omitted) (citing, *inter alia*, the following cases relied upon by the government, GB 27-28, 34-35: *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998); *United States v. Belfast*, 611 F.3d 783, 804-06 (11th Cir. 2010); *United States v. Frank*, 486 F. Supp. 2d 1353, 1356 (S.D. Fla. 2007); *United States v. Flath*, No. 11-69, 2011 WL 6299941, at *9 (E.D. Wis. Sept. 14, 2011)). But these courts misconstrue *Holland* because there was no question in *Holland*—as there is here—that Congress intended the legislation to implement the treaty. *Holland*, 252 U.S. at 431 (explaining that the Migratory Bird Treaty Act of 1918 was "entitled an act to give effect to the convention"). And *Holland* did not conclude that because the Migratory Bird Treaty was valid, the act was valid; had it done so, the Supreme Court would have had no need to discuss whether the act was necessary or proper to remedy the harm identified by the treaty. *Id.* at 435.

The Supreme Court in *Holland* simply did not address the distinct inquiry of whether a statute in fact implements a treaty. *Holland* instructs only that, *where it is already clear that a statute is implementing a treaty*, the Court will inquire whether the means it has chosen to do so are necessary and proper. Moreover, *Holland* has been "sharply criticized in recent years." *Pepe*, 2018 WL 3371364, at *8. In *Bond*, "the Court interpreted a criminal statute narrowly to avoid reconsidering this precedent," but "[t]hree Justices would have reached the constitutional question and struck down the

statute as exceeding Congress's authority." *Id.* at *8 n.6 (citing *Bond*, 134 S. Ct. at 2085-87, 2100, 2109-10). Justice Thomas, with whom Justice Alito joined in relevant part, criticized *Holland* for taking "an improperly broad view of the Necessary and Proper Clause" given "the original understanding [of] the Treaty Power." *Bond*, 134 S. Ct. at 2109-10 (Thomas, J., concurring). And Justice Scalia noted that while the Necessary and Proper Clause "empower[s] Congress to pass laws 'necessary and proper for carrying into Execution the power to make Treaties," it does "not authorize Congress to enact laws for carrying into execution 'Treaties,' even treaties that do not execute themselves." *Bond*, 134 S. Ct. at 2098 (Scalia, J., concurring). As Justice Scalia explained,

> [A] power to help the President make treaties is not a power to implement treaties already made. . . . Once a treaty has been made, Congress's power to do what is "necessary and proper" to assist the making of treaties drops out of the picture. To legislate comp[liance] with the United States' treaty obligations, Congress must rely upon its independent (though quite robust) Article I, § 8, powers.

Id. at 2099 (citation omitted); *see also* Nicholas Quinn Rosenkranz, *Executing the Treaty Power,* 118 Harv. L. Rev. 1867, 1869 (2005) (arguing that *Holland* improperly allows treaties to "increase the legislative power virtually without limit"). Justice Scalia cautioned that "the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless and hardly farfetched." *Bond*, 134 S. Ct. at 2100 (Scalia, J., concurring).

Nevertheless, *Holland* does not sanction eliding any inquiry into whether a statute is in fact implementing legislation. In this regard, the government's reliance on *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986),[12] is misplaced. In that case, the Court was "asked to review a statute which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under both customary international law and a treaty which we have signed." *Id.* at 1459.

Similarly, in both *Belfast* and *Lue*, there was no question that the legislation implemented the treaty; the question was only whether the legislation was necessary and proper to its implementation. *See Belfast*, 611 F.3d at 801 ("Congress passed the Torture Act to implement the United States's obligations under the Convention Against Torture."); *Lue*, 134 F.3d at 81 ("The legislation was designed to implement the International Convention Against the Taking of Hostages."); *see also United States v. Georgescu*, 723 F. Supp. 912, 914-17 (E.D.N.Y. 1989) (discussing constitutionally of statute under Tokyo, Hague, and Montreal Conventions, where enactment of and amendments to statute explicitly cited to Tokyo, Hague, and Montreal Conventions and offenses therein).[13] By contrast, § 2423(c), originally and as amended, contains no indication that it is implementing the Protocol. Thus it is not "Congress's 'failure to

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[12] *Aff'd in part, rev'd in part sub nom. in Boos v. Barry*, 485 U.S. 312 (1988).

[13] *Medellin* also does not help the government, since it only addressed which branch of government, Congress or the President, enacts legislation to enforce a non-self-executing treaty. *Medellin v. Texas*, 552 U.S. 491, 526-29 (2008).

explain *fully* the constitutional justification for its enactment'" that is at issue. GB 28 (quoting *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 358 (3d Cir. 1997)) (emphasis added). Rather, it is that there is no explanation at all to support a finding that § 2423(c) implements any treaty.

The government argues that § 2423(c) "plays an important role in implementing the Optional Protocol" and "furthers the treaty's goals," but does not claim that § 2423(c) was passed in order to implement the treaty. GB 28, 30. In fact, Congress passed § 2423(c) expressly pursuant to the Foreign Commerce Clause and not to enforce any treaty obligations. *See* H.R. Rep. No. 107-525 (2002), at 2-5 (referring to travel in foreign commerce under Article I, § 8 of the Constitution as authority for the legislation and making no mention of the Protocol or treaty power); H.R. Conf. Rep. No. 106-66 (2003), at 51-52, 2003 U.S.C.C.A.N. 683, 686 (making no mention of the Protocol or treaty power but rather only the government's "problem" meeting the standard of proof); H.R. Rep. 107-525 (2002) (failing to mention any treaty power and instead explaining that eliminating the intent requirement would help "close significant loopholes in the law that persons who *travel to foreign countries seeking sex with children* are currently using to their advantage in order to avoid prosecution" (emphasis added)).

Notably, federal law prohibited child prostitution and travel in foreign commerce with the intent to engage in a sexual act with a child as early as September 1994, long before the Senate ratified the Protocol in 2002. *See* Violent Crime Control

& Enforcement Act of 1994, Pub. L. No. 103-322, Title XVI, § 160001(g) (1994) (codified at 18 U.S.C. § 2423(a)-(b)). Consequently, the analysis included with the Protocol's submittal to the Senate recognized that specific criminal acts identified in the Protocol were already "fully covered" by United States law. S. Treaty Doc. No. 106-37 (July 5, 2000), 2000 WL 33366017, at *14-*15 ("Protocol Analysis").

Specifically, the analysis stated that these criminal acts—selling children "for the purpose of sexual exploitation," "offering, obtaining, procuring or providing a child for child prostitution," and "producing, distributing, disseminating, importing, exporting, offering, selling, or possessing for these purposes child pornography"—already "violate[d] criminal statutes under existing U.S. federal and state laws." *Id.* at *15 ("The Protocol does not require that the above-listed elements be crimes *per se* or that specific crimes be established under national law. Rather, the Protocol requires States Parties to ensure that acts and activities specified in Article 3(1) are covered by its criminal law."). The analysis expressly referred to § 2423, and specifically to § 2423(b), which prohibits "travel with intent to engage in any sexual act with one under age 18." *Id.* at *18. Moreover, the Senate's ratification of the Protocol declared that "current United States law . . . fulfills the obligations of the Protocol for the United States," and "accordingly, the United States does not intend to enact new legislation to fulfill its obligations under the Protocol." 148 Cong. Rec. S5717 (2002), at *S5719, 2002 WL 1332171.

The Protocol recognized that the measures taken by States Parties "to establish the liability of legal persons for [the offenses]" of the sale of children, child prostitution, and child pornography would be "[s]ubject to the provisions of its national law" and "[s]ubject to the legal principles of [each] State Party." Article 3(4).[14] Indeed, the analysis accompanying the Protocol's transmittal to the Senate identified the limits of United States law to reach offenses committed by United States citizens where the crime has no additional nexus to the United States. It cautioned that "U.S. extraterritorial jurisdiction based on nationality of the offender does not reach all offenses set forth in the Protocol." *Protocol Analysis*, 2000 WL 33366017, at *23. "Nonetheless," it explained, "since Article 4(2) is permissive rather than obligatory, U.S. law is consistent with the requirements of the provision" of the Protocol that "provides that each State Party may, but is not obligated to, establish jurisdiction when [] the alleged offender is a national of that State[.]" *Id.* at *21, *23 (citing Article 4(2)(a)). The Protocol did not, by its plain terms, compel the enactment § 2423(c), and, in ratifying the Protocol, Congress explicitly recognized the limit of its authority to assert jurisdiction over an offender based solely on U.S. citizenship.

In the end, nothing in § 2423(c) or its history either identifies or tracks the treaty. Thus, the Necessary and Proper Clause is inapplicable and provides no basis for criminalizing the conduct at issue in Mr. Park's case.

[14] The text of the Protocol is in the government's Addendum to its Brief at 3-10.

B. Even If § 2423(c) Could Be Considered Implementing Legislation For The Protocol, It Is Neither Necessary Nor Proper.

Assuming arguendo that § 2423(c) is implementing legislation, it is constitutional under the Necessary and Proper Clause only if it is "rationally related to the implementation of" the Protocol. *Comstock*, 560 U.S. at 134. A statute must be "plainly adapted" to the treaty, and the means chosen must "not [be] prohibited" but instead "consistent with the letter and spirit of the Constitution." *M'Culloch*, 17 U.S. at 421; *see also Comstock*, 560 U.S. at 134. Section 2423(c) is not plainly adapted to the Protocol and the means chosen—criminalizing noneconomic illicit sexual conduct entirely within a foreign nation—is inconsistent with both the letter and spirit of the Constitution.

The Protocol explicitly focused on the commercial, economic exploitation of children. It was expressly premised on "the right of the child to be protected from *economic exploitation*[.]" Preamble (emphasis added). The States Parties expressed "[g]rave[] concern[] at the significant and increasing *international traffic of children* for the purposes of the sale of children, child prostitution, and child pornography," and identified the need to "reduce *consumer demand* for" these activities. *Id.* (emphasis added). It called on States Parties to "prohibit the sale of children, child prostitution and child pornography," Article 1, and to ensure that their laws covered these offenses when committed "domestically or *transnationally*," Article 3 (emphasis added)

In keeping with the economic focus of the treaty, the Protocol defined "sale of children" as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration." Article 2(a). "Child prostitution" was defined as "the use of a child in sexual activities for remuneration or any other form of consideration." Article 2(b). And although "child pornography" as a single term was defined as "any representation, by whatever means, of a child engaged in real or simulated sexual activities or any representation of the sexual parts of a child for primarily sexual purposes," Article 2(c), a closer reading of the Protocol indicates that the treaty sought to cover to child pornography *for the purposes* of economic activity.

Specifically, Article 3, paragraph 1 stated that States Parties were to ensure that their laws covered:

> (a) the sale of children "for the purpose of" the "sexual exploitation of the child," the "transfer of organs of the child for profit," and the "engagement of the child in forced labor";
>
> (b) child prostitution; and
>
> (c) "[p]roducing, distributing, disseminating, importing, exporting, offering, selling, or possessing *for the above purposes* child pornography as defined in article 2."

Article 3(1)(a)-(c) (emphasis added). It is not obvious which purposes the phrase "the above purposes" refers to, but each plausible explanation suggests a primary concern with *commercial* child pornography. First, the phrase may refer to the only other "purposes" mentioned in Article 3, paragraph 1: the purposes of "sexual exploitation

of the child," "transfer of organs of the child for profit," or "engagement of the child in forced labor." Article 3(1)(a). Second, by using the term "above," the phrase may have meant child pornography for the purposes of the activities listed *above* this subsection in subsections (a) and (b), *i.e.,* the sale of children and child prostitution. Finally, the phrase may have meant to modify only the term "possessing," in which case it would have meant "possessing for the [] purposes" of the preceding terms, *i.e.*, possession for the purposes of "producing, distributing, disseminating, importing, exporting, offering, [or] selling[.]" Thus, in each plausible reading of the treaty's terms, and subject to the rule of lenity appropriate here, the Protocol concerns *commercial* child pornography. *Cf. Pepe*, 2018 WL 3371364, at *7 (explaining that "[a]pplication of the rule of lenity takes on heightened importance when an offense requires no mens rea and its potential penalty is so severe.").

Understood in this manner, § 2423(c), as applied to Mr. Park, is neither rationally related, nor plainly adapted, to the Protocol. To allow the statute to stand on the basis of the Protocol would give Congress power that it does not have under the Constitution. After all, Congress could always find a treaty that generally relates to a matter that it wishes to regulate, and thereby expand its ability to pass legislation in areas where its authority is otherwise limited. Given that the Constitution rests the power to negotiate treaties with the President, allowing Congress to enact legislation purporting to implement a treaty based on only the most general terms, would

necessarily infringe on the President's exclusive authority in this area. As one court explained,

> It would violate the structure and spirit of the Constitution for Congress to pass implementing legislation that causes a treaty to take on a shape that contradicts the Constitution, either by causing a treaty to reach a topic on which the President himself could not have negotiated or by allowing Congress to reserve for itself power to expand the treaty's scope beyond what the President negotiated on the country's behalf.

Reed, 2017 WL 3208458, at *17. Simply put, no aspect of § 2423 at issue here—the "resides" prong, the regulation of non-commercial child sex abuse, or the regulation of child pornography production—"further[s] the treaty's goals[,]" GB 30, and § 2423(c) is not a necessary and proper exercise of authority for implementing the Protocol.

1. Resides

The treaty asks States Parties to address offenses committed "domestically," *i.e.*, within the United States, or "transnationally," *i.e.*, between the United States and another nation, *see* Article 3, but Mr. Park's alleged offenses occurred only in Vietnam. Thus, as the district court properly recognized, *Park*, 297 F. Supp. 3d at 181, when applied to purely intra-national acts, § 2423(c) is not rationally related to a treaty aimed at domestic or transnational activities.

The government relies upon the Protocol's statement that each State Party "'may take such measures as may be necessary to establish its jurisdiction' over offenses committed by its nationals and residents." GB 31 (quoting Article 4); *id.*

(citing 2008, 2012, and 2013 reports by the United Nations Committee on the Rights of the Child and a Special Rapporteur about extraterritorial jurisdiction). But the offenses to which the statement and the reports refer are those in Article 3, paragraph 1, *i.e.,* the sale of children, the prostituting of children and commercial child pornography. *See* Article 4(2). The "resides" language brings the United States no further to extending its jurisdiction to *these offenses*, which is what both the Protocol and reports recommend. And while the reports also mention "child sex tourism" in the list of offenses over which it hopes the United States extends extraterritorial jurisdiction, "child sex tourism" is not itself identified in the Protocol as its aim and, as explained above in Part I, "child sex tourism" requires both travel and commerce, neither of which Mr. Park is alleged to have engaged in.

The government cites to the reports' bid for extraterritoriality, GB 31-32, but simply because these reports desire extraterritoriality does not mean that it is *constitutional* for the United States to enact such laws as to foreign acts occurring on foreign soil with no connection in foreign commerce. As the Protocol recognized, the measures taken to implement the treaty are still "[s]ubject to the provisions of [our] national law" and "[s]ubject to [our nation's] legal principles[.]" Article 3(2). Even where Congress has passed an extraterritorial criminal law, it must still do so based on an enumerated power under the Constitution. *Morrison*, 529 U.S. at 607.

The government also notes the United States' description, in a 2016 report, that § 2423(c)'s "resides" language was "evidence of the nation's commitment to fighting

sex tourism." GB 32. But the government's post hoc assertion about the "resides" language and its connection to sex tourism does not render § 2423(c) and the Protocol rationally related. If it did, then the mere claim that a statute implements a treaty would always be sufficient to make it so. Instead, as the district court correctly concluded, regulating non-commercial illicit sexual conduct by a U.S. citizen who resides abroad and whose alleged conduct occurred entirely within a foreign sovereign is not rationally related to the commercial exploitation concerns of the Protocol. *Park*, 297 F. Supp. 2d at 181-82.

Finally, the government's citation to *Blackmer* is inapposite. GB 32 (citing *Blackmer v. United States*, 284 U.S. 421 (1932)). That Congress has the general authority to enact statutes with extraterritorial effect is not at issue. The question is whether this authority was properly exercised under a power enumerated under the Constitution. *Cf. Park*, 297 F. Supp. 3d at 182 (citing, *inter alia*, to *Blackmer* and stating that "[n]one of these cases stand for the proposition that a law can be constitutionally valid based *solely* on Congress' power to apply its laws extraterritorially").

2. Non-Commercial Child Sexual Abuse

The non-commercial child sexual abuse that § 2423(c) seeks to proscribe does not appear anywhere in the Protocol. The Protocol was concerned only with commercial sexual exploitation of children and proscribes only commercial acts. Significantly, "[s]ince the Protocol aims at punishing sexual abuse in the contest of the *sale of a child*, there is no obligation [under the Protocol] to criminalize consensual

conduct involving individuals under age 18 that is legal under the laws of a State Party." *Protocol Analysis*, 2000 WL 33366017, at *15 (emphasis added). Yet § 2423(c) is *intended* to reach non-commercial, consensual sexual conduct entirely unrelated to the sale of children. *Pepe*, 2018 WL 3371364, at *7 n.5 ("the statute would apply equally to a 19-year-old who has a romantic and mutually desired sexual relationship with a 15-year-old, *see* 18 U.S.C. §§ 2243(a), 2423(f)(1), even if the relationship is legal in both the 19-year-old's home state and the foreign country, *see, e.g.*, Colo. Rev. Stat. § 18-3-402(e); Code pénal art. 227-25 (Fr.)."). This mismatch undermines the government's argument that § 2423(c) implements the Protocol.

The government suggests that the phrase "any other form of consideration" means that it is rational to include non-commercial child sex abuse within the Protocol's scope. GB 34. The government's description of "other forms of consideration," however, only suggests a broad definition of paying for sexual acts with a child, not that the statute needs to cover conduct where an individual does not pay for sexual acts with a child.

The government also claims that "eliminating the demand [for child sex abuse] is the best way to serve the treaty's goals of protecting children." *Id.* Under this reasoning, the broad "goal of protecting children" would allow the United States to pass a law outlawing conduct by anyone anywhere in the world, whether or not the person was a United States citizen. The treaty's goal was much more specific: protecting children from sale, trafficking, and commercial pornography. Articles 1,

3(1). The inclusion of non-commercial intra-national child sexual abuse is not rationally related to this goal.

Finally, the government relies on cases finding that § 2423(c), as it applies to individuals who travel in foreign commerce and engage in illicit sexual conduct, is rationally related implementing legislation. GB 34-35 (citing *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); *Frank*, 486 F. Supp. 2d at 1359; *Flath*, 845 F. Supp. 2d at 957; *United States v. Pepe*, No. 07-168-DF, slip op. at 6 (C.D. Cal. Dec. 3, 2007)). As the district court noted, "the 'travels in foreign commerce' language of section 2423(c) arguably aligns with the Optional Protocol's transnational focus," but "[h]ere there is no transnational component, as the statute criminalizes conduct that occurred exclusively in Vietnam, long after Park left the United States." *Park*, 297 F. Supp. 3d at 181.

Moreover, the district court's decision in *Pepe* has since been overruled. *Pepe*, 2018 WL 3371364, at *2. And *Frank* found that "the statute—insofar as *commercial* sex with minors is concerned—reasonably implements the [Protocol.]" 486 F. Supp. 2d at 1358 (emphasis added). *Flath*, meanwhile, "[found] it unnecessary to take [the] alternative step" of analyzing § 2423(c) under the Treaty Power since it had already held that as applied to traveling in foreign commerce it was constitutional under the Foreign Commerce Clause. *Flath*, 845 F. Supp. 2d at 957. These cases thus have no bearing on whether the criminalization of non-commercial sexual conduct with

minors occurring within a sovereign nation is plainly adapted to the treaty's goals. It is not.

3. Non-Commercial Child Pornography

The Protocol is aimed at *commercial* child pornography produced nationally or transnationally, while the government invokes § 2423(c) in this case to regulate intra-national non-commercial child pornography. As the district court correctly ruled, the Protocol "does not require the United States to criminalize the production of child pornography in *another* country, nor could it." *Park*, 297 F. Supp. 3d at 181 (citing *Reed*, 2017 WL 3208458, at *17) (emphasis in original). The government's contrary position is not supported by the treaty, the case law, or the Constitution.

First, the treaty may "permit[] each state party to address its own nationals' conduct, regardless of where committed," GB 32, but, as already explained, this permission is tied to the *commercial* sale of children, *commercial* child trafficking, and *commercial* child pornography.

Second, the "minimum" steps State Parties must take are not being "read [] out of the treaty," as the government claims. *Id.* Rather, the "minimum" steps must be understood in conjunction with the treaty's other language recognizing the limits of domestic law. Article 3(2) (expressly noting that criminalizing offenses will be "[s]ubject to the provisions of [the States Party's] national law" and "[s]ubject to the legal principles of [each] State Party."). Contrary to the government's argument, *Belfast* does not hold otherwise.

In *Belfast*, the court recognized that Congress passed the Torture Act explicitly to implement the Convention Against Torture ("CAT"), and therefore the Eleventh Circuit examined whether "the legislation 'track[ed] the language of the treaty in all *material* respects.'" 611 F.3d at 801, 806 (quoting *Lue*, 134 F.3d at 84) (emphasis in *Belfast*). The court found that it did based on the "plain language of the CAT." By contrast, the "plain language of" the Protocol does not require the criminalization of either non-commercial conduct or purely intra-national conduct.

Third, the district court was not "ignor[ing] the realities of digital child pornography," but rather recognizing the limits of the United States' power to legislate entirely inside of foreign nations. In this regard, the government's fourth claim of error misreads the district court's concern. GB 33. The concern is not federalism; it is the purported authority under the Treaty Power to reach purely intra-national acts. Specifically, the "original understanding [was] that the Treaty Power was limited to *international intercourse*[.]" *Bond*, 134 S. Ct. at 2108 (Thomas, J., concurring) (emphasis added). Because § 2423(c) applies to purely intra-national activities that do not involve international intercourse, the district court properly cautioned that regulating such activities is beyond the scope of the Treaty Power. *Park*, 297 F. Supp. 3d at 181-82. It relied upon the *Reed* decision, which explained that "[a]ccepting that there is some limitation on the President's Treaty Power, it follows that the Necessary and Proper Clause, which only grants Congress power to assist the president in his treaty-making powers, cannot provide Congress with

authority to assist the president in *exceeding* his treaty-making powers." *Reed*, 2017 WL 3208458, at *17. The question is not whether other nations retain concurrent jurisdiction. GB 33. The question is whether the Treaty Power can be read so expansively as to allow the United States to regulate non-commercial acts occurring solely within the borders of another country. It cannot.

In sum, since the purpose of the Protocol was to combat the commercial effects of the sale of children, child trafficking, and child pornography occurring either within a State Party or between States Parties, and the purpose of § 2423(c), as applied in this case, is to reach non-commercial child sex abuse and child pornography production wholly within another nation, § 2423(c) is not "legitimately predicated on" the implementation of the Protocol. *Comstock*, 560 U.S. at 148.

CONCLUSION

For the foregoing reasons, Mr. Park respectfully submits that the district court's order and memorandum opinion dismissing the indictment should be affirmed.

Respectfully submitted,

/s/

A. J. KRAMER
FEDERAL PUBLIC DEFENDER
625 Indiana Ave., N.W., Suite 550
Washington, D.C. 20004
(202) 208-7500

CERTIFICATE OF LENGTH

I hereby certify that the foregoing brief for appellee contains 12,948 words in Garamond 14-point font, pursuant to Fed. R. App. P. 32(a)(5)(B), and does not exceed the word limit of D.C. Cir. Rule 32(a) and Fed. R. App. P. 32(a)(7).

/s/
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A. J. KRAMER
FEDERAL PUBLIC DEFENDER

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), the undersigned counsel of record certifies that the foregoing Brief for the Appellee was this day served upon Sonja M. Ralston, counsel for appellant, by notice of electronic filing with the District of Columbia Circuit CM/ECF system.

/s/
_____
A. J. KRAMER
FEDERAL PUBLIC DEFENDER

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