No. 16-5454

IN THE SUPREME COURT OF THE UNITED STATES

DAMION ST. PATRICK BASTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 1596(a)(2) –– which expressly establishes extraterritorial jurisdiction over sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. 1591 –– is a valid exercise of Congress's power under the Constitution's Foreign Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A36) is reported at 818 F.3d 651.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2016. A petition for rehearing was denied on May 20, 2016 (Pet. App. A1). The petition for a writ of certiorari was filed on July 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 21 counts, including, inter alia, multiple counts of sex trafficking

by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1), based on his conduct "in the Southern District of Florida, Australia, the United Arab Emirates, and elsewhere"; multiple counts of transporting specific individuals in interstate or foreign commerce with the intent that the individuals engage in prostitution, in violation of 18 U.S.C. 2421; and multiple money-laundering counts based on the sex-trafficking proceeds that petitioner wired from Australia to Miami. Pet. App. A8, A37-A38. Petitioner was sentenced to 27 years of imprisonment, to be followed by a lifetime of supervised release. Id. at A10, A39-A40. The district court ordered petitioner to pay $99,270 in restitution to three of his victims. Id. at A10. The restitution award excluded $400,000 that one of the victims (K.L.) had earned for petitioner while he forced her to engage in prostitution in Australia because the district court concluded that it would violate the Constitution to order restitution based on conduct that occurred wholly overseas. Id. at A10-A11. The court of appeals affirmed petitioner's conviction and sentence. Id. at A2-A36. Addressing the government's cross-appeal, the court of appeals vacated the restitution order and remanded with instructions that the district court include in that order proceeds from K.L.'s forced prostitution in Australia. Id. at A24-A36. The petition for a writ of certiorari seeks review only of the restitution ruling. Pet. i, 6.

1. Section 1591(a), which was enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), makes it a crime for a person to "knowingly * * * in or affecting interstate or foreign commerce," recruit, entice, harbor, transport, provide, obtain, or maintain "by any means a person * * * knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, [or] coercion * * * will be used to cause the person to engage in a commercial sex act." 18 U.S.C. 1591(a). The TVPA contains a mandatory restitution provision requiring courts to "order restitution for any offense under this chapter." 18 U.S.C. 1593(a). Under Section 1593(a), a court must award as restitution "the full amount of the victim's losses," 18 U.S.C. 2259(b)(3), which includes not only medical services, transportation, lost income, or other losses suffered as a "proximate result of the offense," but also the greater of "the gross income or value to the defendant of the victim's services or labor." 18 U.S.C. 1593(b).

In 2008, Congress enacted 18 U.S.C. 1596 as part of the William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044. Section 1596 provides that, "[i]n addition to any domestic or extra-territorial jurisdiction otherwise provided by law," federal courts shall have extra-territorial jurisdiction over any offenses under 18 U.S.C. 1591, if the "alleged offender is present in the United States, irrespective of the nationality of the alleged offender." 18 U.S.C. 1596(a)(2).

2. Petitioner was an international sex trafficker who forced women to engage in prostitution through the use of violence and took all the money they earned through prostitution. Pet. App. A4-A8. Although petitioner is a Jamaican national, he lived illegally in the United States and traveled the world under an assumed identity as a U.S. citizen. Id. at A4. Petitioner lived a lavish lifestyle, which he funded by forcing multiple women to engage in prostitution and to turn over their earnings to him. Id. at A4-A7. Petitioner targeted women who were vulnerable because they had been sexually abused as children and maintained his control over them in part by using violence –– including punching the women, biting them, choking them, threatening to kill them, and threatening their families. Ibid.

The question presented in the petition for a writ of certiorari concerns the amount of restitution petitioner was ordered to pay victim K.L. Pet. i, 6; see Pet. App. A24-A36. Petitioner met K.L. while he was living in Australia. Pet. App. A5. He lured her into a romantic relationship before forcing her to engage in prostitution. See id. at A5-A6; Gov't C.A. Br. 9, 13. Petitioner then took K.L. with him when he traveled first from Australia to Dubai in the United Arab Emirates and eventually to the United States, where he continued to force K.L. to engage in prostitution. See Pet. App. A5; Gov't C.A. Br. 34-35. Throughout this time, petitioner wired proceeds from K.L.'s prostitution in Australia to his bank account in Miami,

Florida, and used this bank account to fund his forced prostitution business in Australia. Pet. App. A5; Gov't C.A. Br. 33; Superseding Indictment 8-9, D. Ct. Doc. No. 36, at 8-9.

3. The jury convicted petitioner of, inter alia, sex trafficking K.L. by force, fraud, or coercion in Miami, Australia, the United Arab Emirates, and elsewhere, in violation of 18 U.S.C. 1591(a)(1) and (b)(1). Pet. App. A8; see 18 U.S.C. 1596(a)(2). Restitution is mandatory for violations of Section 1591, see 18 U.S.C. 1593(a), and the restitution award must require the defendant "to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses," 18 U.S.C. 1593(b)(1). Section 1593 directs that the victim's losses shall be determined as provided in 18 U.S.C. 2259(b)(3), which directs that various specific types of costs incurred by a victim shall be included, as well "any other losses suffered by the victim as a proximate result of the offense." Ibid.; see 18 U.S.C. 1593(b)(3). Section 1593 also provides that, for violations of offenses including Section 1591, a victim's losses "shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under * * * the Fair Labor Standards Act (29 U.S.C. et seq.)." 18 U.S.C. 1593(b)(3).

Based on testimony from victims, ledgers on petitioner's phone and computer, bank records, and other information, a conservative estimate of petitioner's earnings from K.L.'s forced prostitution

was $478,000: $400,000 earned in Australia, and $78,000 earned in the United States. Gov't C.A. Br. 17, 57; see Pet. App. A10-A11. The district court sustained petitioner's objection to including in K.L.'s restitution award the earnings he made from K.L.'s prostitution in Australia, agreeing with petitioner that basing an award of restitution on conduct that occurred overseas would exceed Congress's constitutional authority. See Pet. App. A11.

4. Petitioner appealed, challenging the sufficiency of the evidence to support his conviction as to K.L., a supplemental jury instruction, and the award of restitution to his victims. Pet. App. A3. The court of appeals rejected those arguments and petitioner does not challenge those holdings in his petition for a writ of certiorari. See Pet. i, 6.

The government filed a cross-appeal, challenging the district court's refusal to include in the restitution award to K.L. the $400,000 she earned for petitioner through forced prostitution in Australia. Pet. App. A3. The court of appeals vacated the restitution order and remanded to the district court with instructions "to increase the award of restitution for K.L.'s prostitution in Australia." Id. at A36. The court of appeals rejected petitioner's argument that Section 1596(a)(2)'s extension of extraterritorial jurisdiction to sex trafficking by force, fraud, or coercion exceeds Congress's constitutional authority under the Foreign Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, which grants to Congress the

power to "regulate Commerce with foreign Nations." Pet. App. A25-A31.

The court of appeals rejected petitioner's contention that Congress's authority to enact criminal laws with extraterritorial application is limited to the authority granted by the Offences Clause, which grants to Congress the authority to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," U.S. Const. Art. I, § 8, Cl. 10. Pet. App. A26-A27. The court held instead that, "[f]or purposes of" determining whether a law was validly enacted pursuant to Congress's authority under a clause in "Article I, [the court] ask[s] the same question of an extraterritorial law that [it] ask[s] of any law –– that is, whether it falls within one of Congress's enumerated powers." Id. at A27.

Turning to the government's argument that Congress's extraterritorial application of Section 1596 is authorized by the Foreign Commerce Clause, the court of appeals "assum[ed], for the sake of argument, that the Foreign Commerce Clause has the same scope as the Interstate Commerce Clause," which grants to Congress the power to "regulate Commerce * * * among the several States," U.S. Const. Art. I, § 8, Cl. 3. Pet. App. A30. The court acknowledged "evidence that the Founders intended the scope of the foreign commerce power to be greater" than that of the Interstate Commerce Clause, but declined to "demarcate the outer bounds of the Foreign Commerce Clause

in this" case. Ibid. (citation omitted); see id. at A28-A30. The court of appeals thus concluded that "Congress's power under the Foreign Commerce Clause includes at least the power to regulate the 'channels' of commerce between the United States and other countries, the 'instrumentalities' of commerce between the United States and other countries, and activities that have a 'substantial effect' on commerce between the United States and other countries." Id. at A30.

Applying that standard, the court of appeals concluded that "section 1596(a)(2) is a constitutional exercise of Congress's authority under the Foreign Commerce Clause" "at the least as a regulation of activities that have a 'substantial effect' on foreign commerce." Pet. App. A31. In particular, the court explained that Section 1596(a)(2) gives extraterritorial effect to 18 U.S.C. 1591, which criminalizes sex trafficking through force, fraud, or coercion, and held that Congress had a "'rational basis' to conclude that such conduct -- even when it occurs exclusively overseas -- is 'part of an economic "class of activities" that have a substantial effect on . . . commerce.'" Pet. App. A31 (ellipses in original) (quoting Gonzales v. Raich, 545 U.S. 1, 17, 19 (2005)). The court relied on its previous decision in United States v. Evans, 476 F.3d 1176 (11th Cir.), cert. denied, 552 U.S. 878 (2007), which explained that Section 1591 was enacted as part of a "comprehensive regulatory scheme" and that Congress "found that trafficking of persons has an aggregate

economic impact on interstate and foreign commerce." Pet. App. A31 (quoting Evans, 476 F.3d at 1179); see 22 U.S.C. 7101(b)(12).

The court of appeals also rejected petitioner's argument that exercising extraterritorial jurisdiction over petitioner would violate international law. Pet. App. A34-A36. The court noted that, "[u]nder the 'protective principle' of international law, a country can enact extraterritorial criminal laws to punish conduct that 'threatens its security as a state or the operation of its governmental functions' and 'is generally recognized as a crime under the laws of states that have reasonably developed legal systems.'" Id. at A34 (quoting Restatement (Second) of Foreign Relations of the United States § 33(1) (1965)). Criminalizing sex trafficking by force, fraud, or coercion, satisfies that standard, the court held, because countries with developed legal systems recognize such conduct as a crime, ibid., and because such conduct "is the fastest growing source of profits for organized criminal enterprises worldwide," id. at A35 (quoting 22 U.S.C. 7101(b)(8)).[1]

Because the court of appeals held that Congress "has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another

[1] The court of appeals also rejected petitioner's arguments that Section 1596(a)(2)'s extraterritorial reach violates due process. Pet. App. A33-A34. Petitioner does not renew that argument in his petition for a writ of certiorari.

country," the court ordered the district court to include in K.L.'s restitution award petitioner's earnings from K.L.'s forced prostitution in Australia. Pet. App. A36.

ARGUMENT

Petitioner contends (Pet. 7-21) that the extraterritorial application of Section 1591, as authorized by Section 1596(a)(2), exceeds Congress's authority under the Foreign Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Review by this Court is unwarranted because the court of appeals' decision was correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly concluded that Congress's extraterritorial application of Section 1591, as authorized by Section 1596(a)(2), is a valid exercise of Congress's authority under the Foreign Commerce Clause.[2] The Foreign Commerce Clause gives Congress the authority to regulate commerce "with foreign nations." U.S. Const. Art. I, § 8, Cl. 3. Although the same clause authorizes Congress to regulate commerce "among the several States," the Court

[2] Although Section 1591 does not itself provide for extraterritorial application, Congress expressly provided for such application in Section 1596(a)(2): "In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section * * * 1591 if," as here, "an alleged offender is present in the United States, irrespective of [his or her] nationality." 18 U.S.C. 1596(a)(2). Petitioner concedes (Pet. 8) that the statute applies extraterritorially.

has remarked that the Framers "intended the scope of the foreign commerce power to be the greater." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979); see Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (noting that it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications," in part because the limitations on Congress's powers over interstate commerce are "premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause"); Buttfield v. Stranahan, 192 U.S. 470, 492-493 (1904) (comparing Congress's "plenary power" over foreign commerce with its power over commerce with Indian Tribes, and contrasting it with "the limitations * * * resulting from other provisions of the Constitution, so far as interstate commerce is concerned").

Section 1591 makes it a crime if a person, inter alia, "knowingly * * * in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, maintains, or solicits by any means a person * * * knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, [or] coercion * * * will be used to cause the person to engage in a commercial sex act." 18 U.S.C. 1591(a)(1). Section 1591 thus requires as an element of the offense that the relevant conduct take

place "in or affecting interstate or foreign commerce" –– an element that can be established with proof that, for example, a defendant used U.S. banks, communicated with persons using email accounts with U.S.-based servers, or carried out the offense through other connections to the United States. Because Section 1591 expressly requires proof of a jurisdictional link to foreign commerce as an element of the crime, it is facially within Congress's authority under the Foreign Commerce Clause. Petitioner does not assert an as-applied challenge to the constitutionality of Sections 1591 or 1596. The court of appeals thus correctly held that Section 1591 is a valid exercise of Congress's authority under the Foreign Commerce Clause and that it applies extraterritorially, as provided in Section 1596.

2. Petitioner contends that (Pet. 9-12) Congress has no authority under the Foreign Commerce Clause to enact criminal statutes with extraterritorial application, that (Pet. 13-21) the court of appeals erred by equating the breadth of Congress's power over foreign commerce with its power over interstate commerce, and that (Pet. 19-20) extraterritorial application of Section 1591 would be inconsistent with international law. Petitioner's arguments lack merit.[3]

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[3] Although petitioner challenges the application of Section 1591 and 1593 to his extraterritorial conduct for purposes of ordering restitution in connection with such conduct, he does not challenge the application of Section 1591 to that conduct for purposes of making

a. Petitioner contends (Pet. 9-12) that the Foreign Commerce Clause should not be interpreted to permit Congress to create a criminal offense for conduct that occurred abroad because another provision of Article II –– the Offences Clause, U.S. Const. Art. I, § 8, Cl. 10, expressly authorizes Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Pet. 10. Because the Offences Clause "specifically defines three kinds of offenses for which Congress is granted a power to 'define and punish,'" petitioner argues (ibid.) that it is "doubtful" (Pet. 12) whether the Framers intended to authorize Congress to criminalize overseas conduct under any other part of Article I (except possibly the Treaty Clause U.S. Const. Art. II, § 2, Cl. 2, see Pet. 11-12). Petitioner's argument is unavailing. Nothing in the Offences Clause (or any other part of Article I) suggests that the authority it bestows would preempt Congress's authority to create criminal offenses under any other provision of the Constitution. Just as the specific grant of authority in the Offences Clause to create criminal offenses –– including for some crimes that could be committed within the United States –– does not

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it illegal. The precise nature of this claim, therefore, as it comes to this Court, is that although Congress has constitutional authority to criminalize his extraterritorial conduct towards K.L., Congress lacks constitutional authority to order him to pay restitution for that criminal conduct. That anomalous contention makes this case a particularly poor candidate for review.

prevent Congress from using its authority under the Interstate Commerce Clause to criminalize domestic activity, see, e.g., Taylor v. United States, 136 S. Ct. 2074, 2079-2080 (2016); Perez v. United States, 402 U.S. 146, 150-157 (1971), the Offences Clause does not restrict Congress's power to create extraterritorial crimes under the Foreign Commerce Clause.

b. Petitioner also contends (Pet. 13-19) that the court of appeals erred by relying on the Interstate Commerce Clause to determine the scope of the Foreign Commerce Clause. That contention does not warrant this Court's review.

As the court of appeals noted, see Pet. App. A29-A30, this Court has remarked that the Framers "intended the scope of the foreign commerce power to be greater" than that of the Interstate Commerce Clause. Japan Line Ltd., 441 U.S. at 448; see Board of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 56-57 (1933) (characterizing Congress's foreign commerce power as "exclusive and plenary"). The court of appeals nevertheless declined to rely on that view, instead applying a stricter view of the Foreign Commerce Clause and assuming without deciding that it is limited in the same way that the Interstate Commerce Clause is limited. Because the court of appeals did not rely on the potentially broader grant of authority in the Foreign Commerce Clause –– and the outcome of this case therefore did not depend on such a reading of the Foreign Commerce Clause –– no reason exists for this Court to review the court of appeals' dicta noting that

Congress's authority under that Clause might be greater than its authority under the Interstate Commerce Clause.

The court of appeals was correct, moreover, that Section 1591 would fall within Congress's commerce powers (even absent the express jurisdictional element) because it regulates foreign conduct that has a substantial effect on commerce between the United States and other countries. Pet. App. A30. The court of appeals correctly concluded that Congress had a rational basis for concluding that sex trafficking by force, fraud, or coercion -- including such trafficking that takes place abroad -- "is 'part of an economic "class of activities" that have a substantial effect on . . . commerce' between the United States and other countries." Id. at A31 (ellipses in original) (quoting Gonzales v. Raich, 545 U.S. 1, 16-17, 19 (2005). Section 1591 is part of "a comprehensive regulatory scheme that criminalizes and attempts to prevent * * * human trafficking for commercial gain" and was enacted based on Congress's findings that human trafficking had a "substantial aggregate economic impact on interstate and foreign commerce." United States v. Walls, 784 F.3d 543, 548 (9th Cir.), cert. denied, 136 S. Ct. 226 (2015); see United States v. Evans, 476 F.3d 1176, 1179 (11th Cir.) (concluding that Congress had a rational basis for finding that sex trafficking has an economic effect on interstate and foreign commerce), cert. denied, 552 U.S. 878 (2007).

c. Petitioner's argument (Pet. 19-20) that extraterritorial application of Section 1591 would be inconsistent with international law fares no better. Because Section 1596(a)(2) expressly provides for extraterritorial application of Section 1591 (and because Section 1591 is a valid exercise of Congess's constitutional powers), Section 1591 applies extraterritorially regardless of whether such application complies with international law. But that application does comply with international law.

Extraterritorial jurisdiction is consistent with international laws under five general principles: territorial, national, protective, universal, and passive personality. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (citing Restatement of the Law of Foreign Relations (Revised) § 402 (Tent. Draft No. 2, 1981)), cert. denied, 470 U.S. 1003 (1985). The court of appeals correctly concluded that the protective principle supports extraterritorial application of Section 1591. Pet. App. A34. Under that principle, a country can enact a criminal law to prohibit conduct that threatens its security or government functions and "is generally recognized as a crime under the law of states that have reasonably developed legal systems." Ibid. (quoting Restatement (Second) of Foreign Relations of the United States § 33(1) (1965)). As the court of appeals correctly recognized, "[c]ountries with developed legal systems recognize sex trafficking by force, fraud, or coercion as a crime," ibid., and Congress has explained that "[t]he international

community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports," id. at A34-A35 (quoting 22 U.S.C. 7101 (b)(23)). And, the court of appeals correctly concluded, sex trafficking by force, fraud, or coercion implicates the national security of the United States. Id. at A35. Congress has determined that such conduct is the "fastest growing source of profits for organized criminal enterprises worldwide." 22 U.S.C. 7101(b)(8).

3. Finally, the court of appeals' decision does not conflict with any decision of any other court of appeals. That is reason enough to deny the petition for a writ of certiorari.

Petitioner suggests (Pet. 14) that the court of appeals' decision conflicts with the Sixth Circuit's decision in United States v. al-Maliki, 787 F.3d 784, cert. denied, 136 S. Ct. 204 (2015). Petitioner acknowledges (Pet. 14), however, that the purported conflict implicates only "contrary dicta" in the Sixth Circuit's decision. The Sixth Circuit in al-Maliki rejected a Foreign Commerce Clause challenge to 18 U.S.C. 2423(c), while expressing in dicta skepticism that the Foreign Commerce Clause authorizes Congress to "punish a citizen's noncommercial conduct while the citizen resides in a foreign nation." 787 F.3d at 791; see id. at 791-794. Even if that concern were well-grounded (which the government does not concede), it would not call into question Congress's authority to

punish petitioner's undoubtedly commercial conduct. The decision in al-Maliki thus provides no basis for further review of the court of appeals' decision in this case.

Moreover, petitioner identifies no decision that has held that either Section 1591 or Section 1596 exceeds Congress's authority under the Foreign Commerce Clause. In fact, the courts of appeals have uniformly rejected Foreign Commerce Clause challenges to other extraterritorial statutes that, like Section 1596(a)(2), impose criminal liability for conduct occurring wholly in a foreign country -- and petitioner, while acknowledging some of those holdings (Pet. 14), does not contend that they conflict with the court of appeals' holding in this case. See, e.g., United States v. Bollinger, 798 F.3d 201, 204-206, 216-219 (4th Cir. 2015) (holding 18 U.S.C. 2423(c) constitutional in the context of noncommercial sexual conduct in Haiti), cert. denied, 136 S. Ct. 2448 (2016); United States v. Pendleton, 658 F.3d 299, 305-311 (3d Cir. 2011) (holding 18 U.S.C. 2423(c) constitutional in the context of noncommercial sexual conduct in Germany), cert. denied, 132 S. Ct. 2771 (2012); United States v. Clark, 435 F.3d 1100, 1109-1117 (9th Cir. 2006) (holding 18 U.S.C. 2423(c) constitutional in the context of commercial sexual conduct in Cambodia), cert. denied, 549 U.S. 1343 (2007); see also United States v. Bianchi, 386 Fed. Appx. 156, 160-162 (3d Cir. 2010) (holding 18 U.S.C. 2423(c) constitutional in the context of both commercial and noncommercial sexual conduct), cert. denied, 562 U.S. 1200 (2011).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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