No. 10-522

In the Supreme Court of the United States

ANTHONY MARK BIANCHI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2423(c), which prohibits an American citizen or permanent resident alien from traveling in foreign commerce and engaging in illicit sexual conduct, exceeds Congress's power under the Foreign Commerce Clause.

2. Whether the court of appeals correctly denied, on harmless-error grounds, petitioner's claim that the government deprived him of due process and compulsory process by preventing a defense witness from testifying.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes: Page

In the Supreme Court of the United States

No. 10-522

ANTHONY MARK BIANCHI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is unreported. The opinion of the district court denying petitioner's motion for judgment of acquittal or for a new trial (Pet. App. 37-67) is reported at 594 F. Supp. 2d 532. The opinion of the district court denying petitioner's motion to dismiss the second superseding indictment (Pet. App. 68-81) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2010. A petition for rehearing was denied on August 4, 2010. Pet. App. 82-83. The petition for a writ of certiorari was filed on October 19, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to engage in illicit sexual conduct in foreign places, in violation of 18 U.S.C. 2423(e); four counts of traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. 2423(b); two counts of using a facility in foreign commerce to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); and three counts of traveling in foreign commerce and engaging in illicit sexual conduct, in violation of 18 U.S.C. 2423(c). Pet. App. 24-26. Petitioner was sentenced to 300 months of imprisonment, to be followed by a lifetime of supervised release. *Id.* at 26, 28. The court of appeals affirmed. *Id.* at 1-23.

1. Between December 2003 and March 2005, petitioner traveled twice to the impoverished village of Trejubeni, Moldova, and twice to Romania. Pet. App. 5; Gov't C.A. Br. 7. On those trips, petitioner molested or attempted to molest several boys between the ages of 12 and 15—engaging in acts including oral sex and anal rape—and began the process of grooming other boys for molestation. Pet. App. 5-6; Gov't C.A. Br. 7-15. Ion Gusin, an unindicted Moldovan co-conspirator who is currently serving a 20-year sentence in Moldova for sex trafficking, served as petitioner's translator, and helped petitioner meet and arrange sexual encounters with the boys. Pet. App. 5 & n.1. In order to ingratiate himself with his victims and their families, petitioner gave them money and gifts, and took them on outings. *Id.* at 5; Gov't C.A. Br. 7-15.

In March 2005, when petitioner was returning from a trip to Romania, customs agents searched his luggage. Pet. App. 6; Gov't C.A. Br. 7. The agents found a chil-

dren's board game, sexual lubricants, a piece of paper with the name and telephone number of a Romanian boy (A.C.N.), a handwritten letter addressed to a child, and a notebook containing (among other things) the names and numbers of many of his victims. Pet. App. 6; Gov't C.A. Br. 16, 18-19. Petitioner's telephone records showed almost 70 calls to A.C.N. in 2005. Pet. App. 6. A January 2006 search of petitioner's home uncovered reservations for petitioner to take Gusin and a Moldovan victim to Thailand; the trip had been canceled in September 2005, shortly after Moldovan police had interviewed Gusin and the victim. *Ibid.*; Gov't C.A. Br. 16-17.

2. a. Petitioner was charged in a second superseding indictment with one count of conspiring to engage in illicit sexual conduct in foreign places, in violation of 18 U.S.C. 2423(e); five counts of traveling with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. 2423(b); two counts of using a facility in foreign commerce to entice a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b); and four counts of traveling in foreign commerce and engaging in illicit sexual conduct, in violation of 18 U.S.C. 2423(c). 06-19 Docket entry No. 70 (E.D. Pa. Feb. 1, 2007).

As to those latter four counts, Section 2423(c) provides that:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

For purposes of that section, "illicit sexual conduct" is defined as

> (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or
>
> (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

18 U.S.C. 2423(f). The "sexual act[s]" prohibited by the first provision include, among other things, a knowing sexual act, or attempt to commit a sexual act, with someone between the ages of 12 and 16 and at least four years younger than the defendant. 18 U.S.C. 2243(a); see 18 U.S.C. 2246(2) (defining "sexual act" to include the conduct at issue here). A "commercial sex act" under the second provision is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. 1591(e)(3).

b. Petitioner moved to dismiss the indictment on various grounds, including, as relevant here, that Section 2423(c) exceeds Congress's power under the Foreign Commerce Clause "[t]o regulate Commerce with foreign Nations." U.S. Const. Art. I, § 8, Cl. 3. The district court denied the motion. Pet. App. 81. The court recognized that Congress's authority over foreign commerce is broader even than its authority over interstate commerce. *Id.* at 77-78 (citing, *inter alia*, *Japan Line Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979), and *Board of Trs. of Univ. of Ill.* v. *United States*, 289 U.S. 48, 57 (1933)). The court concluded that petitioner had not shown that Congress had exceeded that authority in enacting Section 2423(c), which "applies only to American citizens or permanent residents who travel in foreign commerce." *Id.* at 79. The court furthermore ob-

served that petitioner was "charged with engaging in illicit sex acts that allegedly occurred on trips where he flew on international commercial flights * * * and then flew back to the United States," a type of conduct that has been "uniformly condemned by the international community" in a multilateral agreement. *Ibid.*

3. a. Shortly before trial, four Moldovan victim-witnesses told United States officials that they had been approached at their homes by Gusin's brother and Victor Levintsa, a Moldovan lawyer providing assistance to petitioner's defense team. Pet. App. 7. The victim-witnesses reported that the two men had tried to discourage them from traveling to the United States to testify, telling them such things as "Aren't you afraid to go be a witness against [petitioner] and Gusin?"; "The judge is black and has a face like a monkey, like King Kong and will scare you"; "America is a very poor country, maybe you won't come back"; and "If you go there, you won't come back to your parents." *Ibid.*; Gov't C. A. Br. 23. Two days before trial, the government notified the district court and defense counsel that it was seeking an arrest warrant for Levintsa for witness intimidation. Pet. App. 7. A magistrate judge issued the warrant later that day. *Ibid.*

Petitioner complained to the district court that the arrest warrant "completely scuttles the defense," because Levintsa was a critical defense witness. Pet. App. 7. The government informed the court that it had been unaware of any intent by petitioner to call Levintsa as a witness until three hours after it told petitioner about the arrest warrant. *Id.* at 7-8. Only a few weeks earlier, the district court had ordered the defense to provide the government with the statements of any defense wit-

nesses; no statements by Levintsa had been provided. *Id.* at 54 & n.12.

Although the government disputed petitioner's claim about Levintsa's importance to the trial defense, it nevertheless agreed, in response to concerns voiced by the district court, to withdraw the warrant and to permit Levintsa to come to the United States to testify without any threat of arrest. Pet. App. 8. The district court assured the defense that it would enforce the government's promise. *Ibid.*

Despite these assurances, Levintsa refused to come to the United States. Pet. App. 8. Petitioner arranged for him to testify by video from Moldova. *Ibid.* On the day of Levintsa's scheduled video testimony, a Moldovan police officer contacted Levintsa for questioning. *Ibid.* Levintsa then refused to testify even by video, stating in a declaration that he was "no longer willing to cooperate with the defense of [petitioner] due to the intimidation of both the United States Attorney General and the Moldovan Police." *Ibid.*

The government presented to the district court a letter from the United States Ambassador to Moldova explaining that the U.S. Embassy had played no role in the interview requested by the Moldovan police. Pet. App. 40. The ambassador's letter went on to explain that the Moldovan government had informed the embassy that Levintsa was not the target of a criminal investigation and that Levintsa was free to depart Moldova at any time and to testify in petitioner's case. *Ibid.* The ambassador additionally offered that "[i]n the interests of ensuring a fair trial, the Embassy is at the disposal of the Court to provide any assistance which may be required to permit Mr. Levintsa to participate fully." *Id.* at 40-41. A separate letter from Moldovan authori-

ties similarly assured the court and the parties that Levintsa was not under criminal investigation. *Id.* at 41.

Levintsa nevertheless continued to refuse to testify either in person or by video. Pet. App. 9. Blaming the government for this, the district court permitted defense counsel to read to the jury an eight-page declaration by Levintsa, which covered such topics as "police interrogation tactics, [Levintsa's] experiences attending Ion Gusin's trial, and [Levintsa's] interviews with several of the alleged victims, including what they told him and his impressions of their demeanor." *Ibid.* The government contended that the declaration was full of hearsay and conjecture, but the district court nevertheless allowed most of it into evidence. *Ibid.* The district court later acknowledged that, "using a very liberal interpretation of the Rules of Evidence, [it had] admitted things that probably would not have been admitted had [Levintsa] been here on the stand and testified." Gov't C.A. Br. 27 n.10 (citation omitted); see Pet. App. 9 (court of appeals characterizing the district court's statement that it had permitted "a certain amount of latitude" in the declaration to be "a remarkable understatement"). The district court instructed the jury that petitioner was not responsible for Levintsa's absence and that the jury should consider Levintsa's declaration as if Levintsa had testified in court. Pet. App. 9.

b. At the close of evidence, the government voluntarily dismissed one of the Section 2423(b) counts and one of the Section 2423(c) counts. Pet. App. 42 & n.4. The jury found petitioner guilty on the remaining counts (including the three remaining Section 2423(c) counts), though on two of the counts, the jury found petitioner guilty as to only two of the three victims alleged in the indictment. *Ibid.*

c. Petitioner filed a post-trial motion for acquittal or for a new trial in which he contended that the government's notification of its decision to obtain an arrest warrant for Levintsa had deprived petitioner of his ability to call Levintsa as a witness. The district court denied that motion. Pet. App. 37-67.

The district court stated that "as a general matter, even when actions by the prosecution appear to deprive a criminal defendant of his constitutional right to present a defense, no remedy will lie for such infringement absent a showing that the government has caused the unavailability of material evidence and has done so in bad faith." Pet. App. 51-52 (quoting *United States* v. *Santtini*, 963 F.2d 585, 596-597 (3d Cir. 1992)) (alterations omitted). Because the government had declined, on executive-privilege grounds, to reveal in court its reasons for issuing the arrest warrant, the district court "f[ound] as a fact that the decision to notify Levintsa of the arrest warrant was designed to deter him from traveling to the United States to assist with [petitioner's] trial." *Id.* at 53-54 & n.11. Petitioner, however, identified "no evidence that the Government was aware" of the specific fact "that Levintsa would be a witness at trial." *Id.* at 54.

The district court proceeded to conclude that "even assuming that the Government's decision to notify defense counsel of the arrest warrant improperly deprived [petitioner] of Levintsa's live testimony, * * * that conduct was harmless, given the extraordinary steps taken to remedy any prejudice" by permitting Levintsa to testify by declaration. Pet. App. 58. The court reasoned that petitioner "clearly was not prejudiced by the absence of" certain portions of the live testimony "that would have been impermissible hearsay or rejected as

irrelevant"; that to the extent Levintsa might have had admissible testimony impeaching the victim witnesses, it would have been cumulative of the cross-examination of those witnesses; that oral testimony would not have made Levintsa more credible, because the prosecution never contested the credibility of the declaration; and that the court had made "efforts" to render Levintsa's absence harmless by "admitting the declaration without cross-examination and by employing a 'liberal interpretation' of evidentiary rules." *Id.* at 56-58.

d. The district court sentenced petitioner to concurrent 300-month terms of imprisonment on each of the counts on which he was convicted, plus lifetime supervised release. Pet. App. 26, 28.

4. a. The court of appeals affirmed. Pet. App. 1-19. It first rejected petitioner's argument that the government had violated his Fifth Amendment right to due process and Sixth Amendment right to compulsory process by intentionally preventing Levintsa from appearing as a defense witness at trial. *Id.* at 11-14. The court of appeals "assume[d] for purposes of analysis, albeit with no great confidence," that the district court had correctly determined that the government had, in fact, intentionally prevented Levintsa from testifying. *Id.* at 12. The court of appeals agreed with the district court that, even so, petitioner still had to show that Levintsa would have presented "material and favorable" testimony. *Ibid.* (citing, *inter alia*, *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873 (1982)). And the court of appeals further agreed with the district court that petitioner had not made that showing. *Id.* at 13. The court of appeals concluded that Levintsa "primarily proffered cumulative impeachment evidence"; that the jury in fact heard that evidence in the form of a declara-

tion that included statements that would not have been admitted if Levintsa had testified in person; that the government did not attack the credibility or veracity of the declaration; and that if Levintsa had been subject to cross-examination, "the government surely would have savaged him and might well have recalled the victims on rebuttal to tell the jury how Levintsa had intimidated them." *Ibid.* "In short," the court of appeals continued, "Levintsa's live testimony would have been devastating—to the defense." *Ibid.*

The court of appeals also rejected petitioner's Foreign Commerce Clause challenge to the Section 2423(c) counts. Pet. App. 14-19. The court of appeals observed, as a threshold matter, that petitioner was not challenging the sufficiency of the evidence on those counts, and that there was evidence that petitioner had given money to victims named in each of those counts. *Id.* at 14 & n.8. On the merits of petitioner's constitutional claim, the court of appeals stated that petitioner's challenge was "very generalized"; that Congress enjoys "broad" authority to regulate foreign commerce; that the statue expressly requires travel in foreign commerce; that the Ninth Circuit had upheld the "commercial sex" portion of the statute against a similar Foreign Commerce Clause challenge; and that petitioner had not tried to argue that Congress lacked a rational basis for covering even non-commercial sexual conduct as part of a broader enforcement scheme to quash child prostitution. *Id.* at 16-18 (citing, *inter alia*, *United States* v. *Clark*, 435 F.3d 1100 (9th Cir. 2006), cert. denied, 549 U.S. 1343 (2007)) (internal quotation marks omitted).

b. Judge Roth concurred in part and dissented in part. Pet. App. 19-23. She agreed with the majority that petitioner's claim regarding Levintsa's absence at

trial did not warrant relief. *Id.* at 19. But in her view, Section 2423(c) swept too broadly by criminalizing both commercial and non-commercial sexual activity in a foreign country, and "should be struck down." *Id.* at 20.

ARGUMENT

Petitioner renews (Pet. 7-21) his contentions that 18 U.S.C. 2423(c) exceeds Congress's authority under the Foreign Commerce Clause and that his constitutional rights were infringed when Levintsa did not testify at trial. The court of appeals correctly rejected both claims. Further review is unwarranted.

1. Petitioner first contends (Pet. 7-13) that Congress lacked authority under the Foreign Commerce Clause to enact Section 2423(c). That contention lacks merit, and would not, in any event, provide petitioner with any relief from his 25-year term of imprisonment.

a. To begin with, petitioner does not suggest that the court of appeals' decision conflicts with the decision of any other court of appeals concerning the constitutionality of Section 2423(c). In fact, only one other court has passed on the validity of that provision—the Ninth Circuit in *United States* v. *Clark*, 435 F.3d 1100 (2006), cert. denied, 549 U.S. 1343 (2007)—and the court there upheld the portion of the statute that criminalizes commercial sex in combination with travel in foreign commerce (the only portion that was at issue in that case). *Id.* at 1109-1117.

More broadly, petitioner does not cite any decision of another court of appeals in which a court has invalidated *any* statute on the ground that it exceeded Congress's authority under the Foreign Commerce Clause. To the contrary, courts of appeals have rejected Foreign Commerce Clause challenges to other statutes that, like Sec-

tion 2423(c), impose criminal liability for conduct that either directly or indirectly involves foreign travel. See *United States* v. *Bredimus*, 352 F.3d 200, 204-208 (5th Cir. 2003) (upholding 18 U.S.C. 2423(b), which criminalizes "travel[ing] in foreign commerce[] for the purpose of engaging in any illicit sexual conduct with another person"), cert. denied, 541 U.S. 1044 (2004); *United States* v. *Cummings*, 281 F.3d 1046, 1048-1051 (9th Cir.) (upholding 18 U.S.C. 1204(a), which criminalizes, *inter alia*, "retain[ing] a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights"), cert. denied, 537 U.S. 895 (2002). Petitioner also does not contend that the court of appeals' decision conflicts with any decision of this Court—nor could he, in light of the fact that (as the court of appeals recognized) this Court "has never struck down a law as exceeding Congress's Foreign Commerce Clause powers." Pet. App. 17.

b. In any event, the court of appeals correctly rejected petitioner's constitutional challenge to Section 2423(c). To the extent that petitioner is arguing that the statute is unconstitutional as applied to him, that argument ignores his actual offense conduct. Petitioner concedes that Congress may criminalize "travel with the intent to commit a crime." Pet. 11 (emphasis omitted).[1] That is precisely what petitioner did when he "traveled

[1] As petitioner points out (Pet. 11), travel with the intent to commit sexual crimes against minors would violate 18 U.S.C. 2423(b), which prescribes punishment for "a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person." When the defendant actually does engage in the illicit sexual conduct that is the object of his travel, his conduct violates 18 U.S.C. 2423(c) as well.

around the world to meet and engage in sexual conduct with young boys." Pet. App. 5; see *ibid.* (petitioner "traveled twice to the impoverished village of Trejubeni, Moldova, and twice to Romania, each time seeking out boys between the approximate ages of twelve and fifteen"). Petitioner moreover appears to concede that Congress has the power to regulate commercial sexual activity by U.S. citizens in foreign countries. Pet. 10-11 & n.1. And despite petitioner's assertions to the contrary (Pet. 11), that, too, describes the offense conduct here. See Pet. App. 5 (describing how petitioner "attempted to ingratiate himself with these boys and their families by buying them gifts, giving them money, and taking them on outings"); *id.* at 14 n.8 (describing evidence that petitioner paid money to at least one of the victims in each of the Section 2423(c) counts on which he was convicted).[2]

c. If petitioner means instead to challenge the constitutionality of Section 2423(c) on its face, his argument fares no better. As just described, petitioner concedes that the statute is constitutional in at least some applications. Cf. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (plaintiff raising facial challenge "must establish that no set of circumstances exists under which the [statutory provision] would be valid"). And the argu-

[2] There can be no reasonable dispute that petitioner's three Section 2423(c) convictions all are premised upon travel with an intent to engage in illicit sexual activity, because the jury separately found petitioner guilty of travel with intent to engage in illicit sexual conduct (18 U.S.C. 2423(b)) with respect to each of the trips that formed the basis for those convictions. See 06-19 Docket entry No. 70, at 9-12, 16-17; Pet. App. 42 & n.4. Additionally, as the court of appeals noted, petitioner has not challenged the sufficiency of the evidence that his sexual activity was commercial in nature, nor would such a challenge have any merit. *Id.* at 14 n.8.

ment still would fail even if he had not made those concessions.

Petitioner's contention that Section 2423(c) exceeds Congress's authority under the Foreign Commerce Clause rests on an analogy to the Interstate Commerce Clause. Pet. 9; see U.S. Const. Art. I, § 8, Cl. 3 ("The Congress shall have Power * * * To regulate Commerce * * * among the several States"). This Court, however, has observed that "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979). The Court has explained that, while "Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty," it "has never been suggested that Congress' power to regulate foreign commerce could be so limited." *Id.* at 449 n.13. The Court therefore has applied a more exacting test in determining whether a state tax infringes on federal Foreign Commerce Clause authority than in assessing whether a state tax infringes on federal Interstate Commerce Clause authority. *Id.* at 451. And the Court has repeatedly emphasized the breadth of Congress's power to regulate foreign commerce. See, *e.g.*, *Board of Trs. of Univ. of Ill.* v. *United States*, 289 U.S. 48, 57, 59 (1933) (noting that "[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce," and that "with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power"); *Buttfield* v. *Stranahan*, 192 U.S. 470, 493 (1904) (referring to "the complete power of Congress over foreign commerce"); cf. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193-194

(1824) (explaining that "[n]o sort of trade can be carried on between this country and any other, to which [the Foreign Commerce Clause] power does not extend").

Accordingly, the court of appeals did not err, as petitioner contends, in declining to apply "the structure for analyzing Congressional power" that this Court has employed in cases challenging statutes as exceeding the Interstate Commerce Clause. Pet. 11 (citing *United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995)). As several courts of appeals have concluded, a statute may be valid under the Foreign Commerce Clause even if an analogous statute enacted pursuant to Congress's authority under the Interstate Commerce Clause would not be. See *Clark*, 435 F.3d 1116; *Bredimus*, 352 F.3d at 207-208; *International Bancorp, LLC* v. *Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 368 (4th Cir. 2003), cert. denied, 540 U.S. 1106 (2004).

d. Petitioner's argument furthermore fails on its own terms. Section 2423(c) includes as an element that the defendant "travel[ed] in foreign commerce." Even under the Interstate Commerce Clause, courts have long upheld the constitutionality of statutes based on movement in interstate commerce that may have occurred long before the primary conduct being regulated—even where that conduct is not itself "commercial" in nature.

In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court construed the predecessor to the current felon-in-possession statute, which required that the defendant's possession of the firearm be "in commerce or affecting commerce." *Id.* at 564. The phrase "affecting commerce," the Court said, indicated that Congress intended to assert "its full Commerce Clause power." *Id.* at 571 (citation omitted). The Court accordingly inter-

preted the statute to prohibit the possession by a felon of any firearm, so long as the firearm had moved in interstate commerce "at some time" before the possession. *Id.* at 564, 575. This Court's subsequent decision in *United States* v. *Lopez*, which invalidated a particular handgun-possession statute as exceeding Congress's authority under the Interstate Commerce Clause, distinguished the invalidated statute from the statute at issue in *Scarborough*, observing that the *Lopez* statute "contain[ed] no jurisdictional element which * * * ensure[d], through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." 514 U.S. at 561.

Since this Court's decision in *Lopez*, the courts of appeals have continued to rely on *Scarborough* in upholding the constitutionality of various statutes (including the felon-in-possession statute). See, *e.g.*, *United States* v. *Ballinger*, 395 F.3d 1218, 1240-1243 (11th Cir.) (en banc), cert. denied, 546 U.S. 829 (2005); *United States* v. *Singletary*, 268 F.3d 196, 200-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); *United States* v. *Santiago*, 238 F.3d 213, 216-217 (2d Cir.) (per curiam), cert. denied, 532 U.S. 1046 (2001); *United States* v. *Dorris*, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986 (2001); *United States* v. *Bradford*, 78 F.3d 1216, 1222-1223 (7th Cir.), cert. denied, 517 U.S. 1174 (1996); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1125 (1996). As one of those courts explained, *Scarborough* "established the proposition that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession a sufficient nexus to interstate commerce." *Singletary*, 268 F.3d at 200. Petitioner does not contend, nor could

he, that the prohibition in Section 2423(c) is distinguishable simply because it regulates a person, rather than an item, that has moved in commerce. See, *e.g.*, *North Am. Co.* v. *SEC*, 327 U.S. 686, 705 (1946) (citing "the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature").

e. This case in any event presents a poor vehicle for reviewing the constitutionality of Section 2423(c). First, petitioner has not challenged all possible sources of constitutional authority for Section 2423(c). As the Ninth Circuit has noted, Congress's broad foreign-affairs authority may provide an independent basis, apart from the Foreign Commerce Clause, for its enactment of the statute. See *Clark*, 435 F.3d at 1109 n.14 (citing *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936); *United States* v. *Belmont*, 301 U.S. 324, 331 (1937)). Accordingly, petitioner's convictions might still be constitutionally valid even if petitioner's Foreign Commerce Clause argument were correct.

Second, even assuming that petitioner were able to establish that Section 2423(c) is outside any of Congress's powers, his term of imprisonment would be unaffected. Petitioner was sentenced to 300 months of imprisonment on each of his ten counts of conviction, with all ten sentences to run concurrently. Pet. App. 26. Prevailing on an argument that pertains to only three of the ten counts would therefore not reduce his prison term. For that reason, as well as the reasons previously explained, further review on this issue is unwarranted.

2. Petitioner next contends (Pet. 13-21) that the government intentionally prevented a defense witness

(Levintsa) from testifying at trial, in violation of petitioner's due process and compulsory process rights. That contention also lacks merit. Even assuming (as the court of appeals hesitantly did) that the government intentionally set in motion a chain of events that caused Levintsa's unavailability, the court of appeals correctly concluded that petitioner is not entitled to relief.

a. Petitioner's primary argument is that Levintsa's absence at trial is not subject to harmless-error analysis. But the Court has identified only "a limited class of fundamental constitutional errors that defy analysis by 'harmless error' standards." *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (citation and internal quotation marks omitted); see *United States* v. *Marcus*, 130 S. Ct. 2159, 2164-2165 (2010). The error asserted here is not one of them.

In *United States* v. *Valenzuela-Bernal*, 458 U.S. 858 (1982), the defendant was arrested for transporting an illegal alien; before trial, the government deported two of the three alien passengers whom the defendant had been driving. *Id.* at 860-861. The defendant claimed that deporting the two passengers violated his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process. *Id.* at 861. This Court held that "[a] violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense." *Id.* at 873.

Petitioner attempts to limit the holding in *Valenzuela-Bernal* to the context of witness deportation, "where the government [i]s executing its constitutional authority to enforce immigration laws." Pet. 15. That supposed limitation cannot be squared with the opinion itself. The Court's analysis in *Valenzuela-Bernal* drew in part on the language of the Sixth Amendment, which

"does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor*.'" 458 U.S. at 867 (quoting U.S. Const. Amend. VI). And the Court also cited numerous decisions, not limited to the deportation context, in which it had required a showing of prejudice before concluding that a criminal defendant's constitutional rights have been violated. See *id.* at 867-869; see also *id.* at 872 (treating Fifth Amendment analysis as identical to Sixth Amendment analysis).

Petitioner's reliance (Pet. 14-15) on *Webb* v. *Texas*, 409 U.S. 95 (1972) (per curiam), and *United States* v. *Hammond*, 598 F.2d 1008 (5th Cir. 1979), is misplaced. In *Webb*, the Court reversed a conviction where the trial judge's threatening remarks to a potential defense witness "effectively drove that witness from the stand." *Id.* at 98. The Court did not address what standard of prejudice should apply in that circumstance, and had no occasion to address what standard of prejudice should apply in the circumstance where the witness's absence arises from law-enforcement activity, rather than judicial action. The latter issue, at least, was later resolved, adversely to petitioner's position here, in *Valenzuela-Bernal*.

Hammond was a pre-*Valenzuela-Bernal* case that declined to apply harmless-error analysis to a federal agent's threats against a defense witness during a break in the witness's testimony. 598 F.2d at 1012-1013. Even assuming *Hammond* would apply in the different circumstances of this case (which involve a potential witness who refused to testify, despite government assurances that a fear of prosecution was unfounded), it does not survive *Valenzuela-Bernal*. See, *e.g.*, *United States*

v. *Combs*, 555 F.3d 60, 64 n.3 (1st Cir.) (explaining that subsequent decisions of this Court have superseded appellate precedent, including *Hammond*, that does not require a showing of prejudice in witness-intimidation cases), cert. denied, 129 S. Ct. 2814 (2009).

b. Petitioner alternatively argues that even if a harmless-error standard applies, the court of appeals was mistaken in concluding that any error in his case was harmless. That fact-bound argument does not warrant review. As the court of appeals correctly concluded, petitioner was actually *advantaged* both by having otherwise inadmissible statements from Levintsa admitted into evidence by declaration and by the absence of an opportunity for the government to "savage" Levintsa on cross-examination. Pet. App. 11-14. On the latter point, the court went so far as to state that "Levintsa's live testimony would have been devastating—*to the defense*." *Id.* at 13 (emphasis added).

Petitioner fails to show otherwise. He cites *Hammond*, which concluded, as an alternative to its holding that no showing of prejudice was necessary, that the defendant in that case had shown prejudice from the exclusion of "two defense witnesses" whose testimony was "very important" to his defense. 598 F.2d at 1014. For reasons just explained, that is not the case here. Contrary to petitioner's assertions, neither *Hammond* nor *Old Chief* v. *United States*, 519 U.S. 172 (1997)—which did not address issues of due process or compulsory process—establishes a rule that the omission of live testimony is per se prejudicial in this circumstance. Indeed, such a rule could not be reconciled with the result in *Valenzuela-Bernal*, which upheld a conviction despite the government-caused unavailability of two potential defense witnesses. 458 U.S. at 874.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney

DECEMBER 2010