

NO: 16-5454

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

DAMION ST. PATRICK BASTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

MICHAEL CARUSO
Federal Public Defender

Timothy Cone
Assistant Federal Public Defender
Counsel for Petitioner Damion St. Patrick Baston
109 North 2nd Street
Fort Pierce, Florida 34950
Tel. (772) 489-2123 x 8758
Temp: (202) 208-7528 ext. 121v

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DISCUSSION

1. This case presents an “as applied” constitutional challenge.

The government’s Brief in Opposition (“Opp.”) states: “Petitioner does not assert an as applied challenge to the constitutionality of Sections 1591 or 1596.” Opp. 12 (emphasis added). Although this claim is made just once, in passing, it bears noting at the outset that it is incorrect. It has always been clear to both parties that this case involves an “as applied” constitutional challenge.

In its cross-appeal of the district court’s denial of restitution for K.L.’s prostitution in Australia, the government treated the issue as an “as applied” constitutional argument. The government argued that Baston’s use of an Australian Paypal account, and his wiring of funds from Australia to the United States, created a “direct effect” on the United States. Gov’t Br. 69. This “direct effect,” the government claimed, supported the extraterritorial application of the restitution statute. *Id.* This argument, based on the specific facts of the case, framed the constitutional issue as an “as applied” question.¹

¹ The Eleventh Circuit did not adopt (nor address) the government’s argument that the extraterritorial restitution was valid because Baston’s specific crime had a “direct effect” on the United States – and the government has not made this argument in its Brief in Opposition to this Court. Instead, the government relies on an “economic class of activities” argument – the view that the Eleventh Circuit adopted in its decision below:

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)).

In response to the government’s cross-appeal, Baston addressed “whether, as applied in a particular case, extraterritorial jurisdiction exceeds Congress’ authority.” Baston Reply & Resp. Br. 44 (emphasis added). Baston conceded that the extraterritorial application of the sex trafficking statute “might” be valid in a case where a defendant “transport[ed] a significant number of persons into, or outside, the United States.” *Id.* at 54. Baston argued that “the present case concerns an extraterritorial crime, that is, a crime that occurred entirely overseas.” *Id.* (emphasis added). Baston’s argument then, and now, is that the extraterritorial application of the statute in his particular circumstances – to a crime that occurred exclusively overseas, involving neither an American defendant, nor an American victim – lacked constitutional authority. *See, e.g.*, Resp. and Reply Br. 55 (“where the narcotics trafficking is wholly extraterritorial [it] may therefore lie beyond the scope of even the Foreign Commerce Clause.”) (quoting Sarah H. Cleveland & William S. Dodge, Defining and Punishing Offenses under Treaties, 124 Yale L. J. 2202, 2284 (2015)).

In a footnote, the government faults Baston for making the “anomalous contention” 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.” Opp. 12-13, n. 3. This characterization of Baston’s position is incorrect.

Baston’s indictment and his subsequent jury trial did not present the question whether Congress has the constitutional authority to criminalize extraterritorial conduct. The government elected to prosecute Baston for his sex trafficking of K.L in a single count of the indictment, Count 1. Count 1 charged that Baston violated 18 U.S.C. § 1591 “in the Southern District of Florida,” that is, within the United States, and “[in] Australia, the United Arab Emirates, and elsewhere,” that is, outside the United States. *See* Pet. App. 7. Baston objected to the admission at trial of evidence of

sex trafficking in Australia, but the district court ruled that it was admissible, citing Fed. R. Evid. 404(b). Baston Resp. and Reply Br. 44 (citing DE145:14). A jury finding that Baston was guilty of sex trafficking K.L. in the Southern District of Florida sufficed to convict him of the violation of § 1591 charged in Count 1.

Then, based on Baston's conviction on Count 1, the government sought restitution for K.L.'s prostitution in Australia, independent of any conduct that involved the United States. Opp. 2. At this point, for the first time, the constitutional authority for extraterritorial application of United States law to Australian conduct presented itself as a distinct question in this case. Baston challenged the assertion of extraterritorial power at the restitution hearing; the district court agreed that the government was "overreaching." Pet. i.

2. The Foreign Commerce Clause does not give Congress the same police power as the Interstate Commerce Clause.

In his certiorari petition, Baston argued that since the Framers carefully identified in the Offences Clause of the Constitution specific Congressional powers over offenses that occur outside the United States, namely, the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," it is doubtful that they intended to grant Congress additional extraterritorial police power in the Foreign Commerce Clause, a clause that addresses "Commerce," not "Offences." Pet. 12 (citing U.S. Const. Art. I, § 8, Cl. 3 & 10). The government responds:

Just as . . . the Offences Clause . . . does not prevent Congress from using its authority under the Interstate Commerce Clause, see, e.g., Taylor v. United States, 136 S.Ct. 2074, 2079, 2080 (2016); Perez v. United States, 402 U.S. 146, 150-57 (1971), the Offences Clause does not restrict Congress's power to create extraterritorial crimes under the Foreign Commerce Clause.

Opp. 14.

There is no support for the government's claim that, because the Offences Clause appears to place no limitation on Congress' police power under the Interstate Commerce Clause, the Offences Clause has no bearing on Congress' police power under the Foreign Commerce Clause. The cases cited by the government, Taylor and Perez, do not even mention the Foreign Commerce Clause. And the argument fails to recognize that because the Offences Clause is directed at conduct outside the United States, the Foreign Commerce Clause is affected by this Clause in a way the Interstate Commerce Clause is not. The government, to attenuate this difference, claims that the Offences Clause grants authority to create criminal offenses "for some crimes that could be committed within the United States." Opp. 13 (emphasis added). Yet, the government cites no cases in which the Offences Clause has been invoked to create criminal offenses for conduct "within the United States," and, typically, this Clause is viewed as one of the constitutional provisions that addresses matters "affecting foreign relations." Zivotofsky ex. rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2087 (2015).

The government correctly notes that this Court has stated that even though the same clause of the Constitution, Art. I, § 8, Cl. 3, grants Congress the power to regulate commerce "among the several states" as well as the additional power to regulate commerce "with the Indian Tribes," these two grants "have very different applications." Opp. 11 (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) and Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904)). Yet, the government fails to recognize the import of this observation for this case: although Art. I, § 8, Cl. 3, embodies both the Foreign Commerce Clause and the Interstate Commerce Clause, the two might also "have very different applications."

The government dismisses as mere “dicta” the Eleventh Circuit’s reliance on this Court’s observation that Congress’ power to regulate foreign commerce under the Foreign Commerce Clause is “greater” than its power to regulate interstate commerce under the Interstate Commerce Clause. Opp. 14. But this mistaken “dicta” evidently carries persuasive force with the courts, since the same reasoning underlies like decisions in other circuits. See United States v. Bollinger, 798 F.3d 201, 211 (4th Cir. 2015), United States v. Clark, 435 F.3d 1100, 1111 (9th Cir. 2006) (2-1), and United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003). These decisions, like the Eleventh Circuit’s decision here, find support for their expansive view of Congress’ power to create extraterritorial criminal offenses under the Foreign Commerce Clause in its broad power to regulate foreign commerce. Pet. 16. This gives rise to the mistaken view, espoused by the government here, that Congress has the power to criminalize conduct that occurs exclusively overseas, involving a non-U.S. defendant and non-U.S. victim, so long as this conduct “is part of an economic class of activities that have a substantial effect on . . . commerce between the United States and other countries.” Pet. 15 (citing Pet. App. at A31). This importation of the Interstate Commerce test into the Foreign Commerce context fails to recognize that the extraterritorial application of United States criminal law implicates foreign Nations in a way that the application of federal law to “interstate commerce” does not. Pet. 18 (Congress “does not have the authority to reach across the seas into foreign sovereign nations and eliminate activities there ‘in their entirety.’”). Since each country is responsible for the enforcement of its own criminal laws, Congress’ authority to create criminal laws under the Interstate Commerce Clause is not the same as its authority under the Foreign Commerce power. Pet. 18.

Turning to the topic of international law, the government states: “Section 1591 applies extraterritorially regardless of whether such application complies with international law.” Opp. 18. This statement is unaccompanied by any citation to authority. And the point here is that the Eleventh Circuit must have been wrong when it stated that “nothing” limits Congress’ power to enact extraterritorial criminal laws. Pet. 19 (citing A26). Principles of international law, when applicable, limit Congressional power under the Foreign Commerce Clause to create remedies, like restitution, for conduct that occurs overseas (assuming that this Clause in fact delegates any power to Congress to punish criminal activity overseas). The government itself implicitly recognizes this when, in an effort to justify the extraterritorial extension of the restitution statute, it cites the Eleventh Circuit’s observation that “[c]ountries with developed legal systems recognize sex trafficking by force, fraud, or coercion as a crime.” Opp. 16 (citing A33). And when it further cites the observation that “the 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.” Opp. 16-17 (quoting A34-35) (citing 22 U.S.C. § 7101(b)(23)). These observations look like appeals to “customary international law,” appeals that seem better suited to a claim for extraterritorial application of United States law under the Offences Clause. See United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012).

Regardless, if the government is right that things like the international community’s repeat condemnation of a given crime support the extraterritorial application of United States law to this crime, then well-recognized principles of international law may also constrain the analysis. One such principle is the principle of international comity. Just as the principle of comity forestalls the application of a U.S. remedy (treble damages) to antitrust injuries overseas, see F. Hoffman-La

Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004), here this principle can forestall the remedy of restitution to an Australia prostitute for the value of her services, coerced by a Jamaican national, in Australia. Pet. 20.

Addressing “contrary dicta” in United States v. al-Maliki, 787 F.3d 784, 791-94 (6th Cir. 2015), the government claims that, unlike the “noncommercial conduct” at issue in al-Maliki, Baston’s crime here was “undoubtedly commercial conduct.” Opp. 17-18. This reliance, for Foreign Commerce Clause purposes, on a distinction between noncommercial and “undoubtedly” commercial conduct strays into uncharted territory. Moreover, it was not the commercial aspect of Baston’s conduct that made his sex trafficking of K.L. a federal crime: “Section 1591 does not criminalize all acts of prostitution (a vice traditionally governed by state regulation). Rather, its reach is limited to sex trafficking that involves children or is accomplished by force, fraud or coercion.” United States v. Evans, 476 F.3d 1176, 1179 n. 1 (11th Cir. 2007). The Sixth Circuit’s skepticism in al-Maliki regarding the application of the Foreign Commerce Clause overseas arose out of doubts about transforming a text about regulating “commerce” into a power to “criminalize”:

[T]he Foreign Commerce Clause as originally understood gave Congress the power to regulate trade or intercourse with foreign countries. Simple enough. And it 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 a textualist reading.

787 F.3d at 792.

Finally, the government states that, al-Maliki aside, Baston has not identified a conflict in the circuits regarding Congress’ extraterritorial police power under the Foreign Commerce power. Opp. 18. This is correct. But the government’s response demonstrates that this issue is recurrent. Opp.

18 (citing cases from several circuits). It is important. And the government does not contest the Eleventh Circuit's observation that this Court, to date, has provided "little guidance" on this issue. Pet. A28. Baston's certiorari petition claimed that the current state of the law "signals how far afield jurists can stray when give 'little guidance' by this Court." Pet. 20. The government's brief in opposition does not adopt this view. But it does not refute it.

CONCLUSION

Based upon the foregoing, Baston respectfully requests that this Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Timothy Cone for", written over a horizontal line.

Timothy Cone
Assistant Federal Public Defender
Counsel for Petitioner

Fort Pierce, Florida
November 17, 2016

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CERTIFICATE OF SERVICE

I certify that on this 17th day of November, 2016, in accordance with SUP. CT. R. 29, copies of the foregoing Reply Brief of Petitioner were served via FEDEX overnight delivery upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

MICHAEL CARUSO
Federal Public Defender



Timothy Cone
Assistant Federal Public Defender
Counsel for Petitioner

Fort Pierce, FL
November 17, 2016