No. 18 - _____

In the Supreme Court of the United States

JASON CRAIG MONTGOMERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HEATHER J. BARBIERI
Counsel for Petitioner
BARBIERI LAW FIRM, P.C.
7000 Preston Road, Suite 700
Plano, Texas 75024
Tel. (972) 424-1902
hbarbieri@barbierilawfirm.com

QUESTIONS PRESENTED

The Telecommunications Act of 1996, 18 U.S.C. §2422(b), prohibits using interstate communications to "persuade[], induce[], entice[], or coerce[]" a minor to engage in sexual activity. An attempt conviction requires evidence that the defendant possessed the requisite intent and took a substantial step toward completing the crime.

The Fifth Circuit affirmed the denial of Petitioner's motion(s) to dismiss the indictment, for judgment of acquittal and for new trial, concluding that evidence the Petitioner agreed or arranged to have sex with a fictitious, willing minor through an adult intermediary – without communicating with the fictitious minor, or evidence of intent to overcome the minor's will – and then traveled to meet the fictitious minor, violated 18 U.S.C. §2422(b).

The questions presented, on which the Fifth Circuit and the D.C. Circuit are in conflict, are:

I. Does a defendant attempt to persuade, induce, entice, or coerce a minor, within the meaning of 18 U.S.C. §2422(b), where the defendant communicates solely with an adult intermediary and those communications cannot be seen as an effort to overcome the minor's will?

II. Does an action that might only cause a minor to engage in sexual activity – such as travel to meet the minor in person – satisfy the substantial step requirement of a §2422(b) attempt?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

TABLE OF CONTENTS

Page

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

RULES

MISCELLANEOUS

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit affirming the denial of Petitioner's motions to dismiss indictment, for judgment of acquittal and new trial, and affirming the sentence imposed is unpublished and may be found at USCA Case No. 17-41182; *United States of America v. Jason Craig Montgomery* (August 27, 2018) (*Appendix - A1*).

The Criminal Judgment of the of the United States District Court for the Eastern District of Texas at Sherman is unpublished and may be found at USDC Case No. 4:17-cr-84-1 (November 20, 2017) (*Appendix - A17*)

STATEMENT OF JURISDICTION

The Fifth Circuit affirmed the denial of Petitioner's motions to dismiss, for judgment of acquittal and new trial and the sentence imposed on August 27, 2018.

This Court enjoys jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Telecommunications Act of 1996, 18 U.S.C. §2422(b), states:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

STATEMENT OF THE CASE

A. Relevant Facts and Proceedings in the District Court

Relevant Pre-Trial Proceedings

On April 19, 2017, a criminal complaint was filed in the Eastern District of Texas, Sherman Division, charging Petitioner Jason Craig Montgomery with attempted coercion and enticement of a minor, in violation of 18 U.S.C. §2422(b). [DE[1] #1]. On May 10, 2017, an indictment was returned in the same court, charging Petitioner with the same offense. [DE #14]. On May 17, 2017, Petitioner was arraigned on the indictment and pleaded not guilty. [DE #19].

On July 17, 2017, Petitioner filed a motion to dismiss the indictment, arguing that no trier of fact could find him guilty based on the undisputed facts of the case. [DE #60]. Petitioner's motion explained that the instant case involved neither an actual child nor an undercover officer posing as a child. *Id.* Instead, the undercover officer posed as an adult intermediary, ostensibly communicating regarding possible sexual activity between her fictitious daughter and Petitioner. *Id.*

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1. "DE" refers to docket entries on the docket for the United States District Court for the Eastern District of Texas at Sherman in Case No. 4:17-cr-84-1, which is immediately followed by the corresponding entry number, unless otherwise noted.

While recognizing that Fifth Circuit precedent – *United States v. Caudill*, 709 F.3d 444, 446-47 (5th Cir. 2013) – embraced prosecutions under § 2422(b) where the defendant had no direct communication with a minor, either real or fictitious, but rather communicated with an intermediary, so long as the defendant's communications with that intermediary demonstrate intent to persuade, induce, or entice the minor, Petitioner's motion raised – for the purpose of preserving a potential appellate challenge to that precedent – a challenge to this interpretation of § 2422(b). [DE #60]. Petitioner's motion further referenced the statute charged – 18 U.S.C. § 2422(b) – noting that a plain reading of that statute indicates that the law guards against communications intended to transform or overcome the will of minors, not contact with law enforcement disguised as a mother interested in viewing sexual activity between her fictitious daughter and members of the public. *Id.* The motion argued that because Petitioner neither acted with intent to transform or overcome the fictitious minor's will, never took a "substantial step" corroborating his intent to engage in conduct designed to persuade, induce, entice or coerce a minor to participate in prohibited sexual activity, and never used or attempted to use a means of interstate commerce to communicate with a person purportedly under 18 to attempt to persuade, induce, entice or coerce that minor to participate in prohibited sexual activity, Petitioner's actions were not proscribed by §2422(b). *Id.*

On July 19, 2017, the United States opposed the motion to dismiss, arguing that it was untimely and presented what was essentially a pre-trial challenge to the

sufficiency of the evidence. [DE #62]. The next day the district court ruled that Petitioner's motion was timely, but denied the motion on the grounds that the indictment was sufficient on its face and there were factual disputes which warranted a jury trial. [DE #63, *App. C*].

Relevant Trial Proceedings

On July 25, 2017, Petitioner proceeded to trial before the Honorable Marcia A. Crone, United States District Judge. [DE #67]. During the trial, it was established that Petitioner posted an ad to Craigslist which sparked the interest of law enforcement. [DE #92, pp. 183-85]. Evidence was presented showing that as a result of this ad, an investigation was launched and Petitioner was contacted by Special Agent Mullican, posing as a respondent to the ad. *Id.* It became clear that over the course of roughly three weeks, the Appellant engaged in a series of communications with FBI Special Agent Mullican. [DE #92, pp. 192, 215]. During these interactions, Mullican masqueraded as a single mother seeking to gratify her sexual appetites by arranging and witnessing sexual encounters between men and her fictitious minor daughter. *Id., p. 199.*

The ad Petitioner posted and the communications he exchanged with Mullican are unquestionably disturbing, but it is undisputed that Petitioner understood at all times that he was communicating with an adult. [DE #92]. And, there is no evidence that Petitioner ever attempted to contact the fictitious minor through use of interstate means (or cause Mullican to contact the fictitious minor

through the use of interstate means). *Id.* Indeed, Mullican's testimony indicated that Petitioner specifically refused her offer to pass along a message or information before the Petitioner met the fictitious minor. *Id., p. 303.*

Mullican's testimony indicated that she set the tone and controlled much of the content of the interactions, even successfully manipulating the Petitioner into bringing the fictitious minor a small gift at the planned face-to-face rendevous. [DE #92, p. 312; DE #92, pp. 44-49]. Mullican also testified to pressuring Petitioner to bring condoms to the planned rendevous, and despite rebuffing the suggestion because it was "just a first meeting to see how we get along," Petitioner complied. [DE #92, p. 313; DE #93, pp. 59-60]. Petitioner's sexual advances toward Mullican, in her single mother persona, were immediately reoriented toward the fictitious minor by Mullican. [DE #93, pp. 57-58].

At the close of the Government's case, Petitioner moved *ore tenus* for a judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. [DE #93, p. 127]. Petitioner argued that he had "neither acted with the intent to transform or overcome the fictitious minor's will, and never took a substantial step corroborating his intent to engage in conduct designed to persuade, induce, entice, or coerce a minor to participate in prohibited sexual activity, and that he never used, or attempted to use a means of interstate commerce to communicate with a person purportedly under 18 to attempt to persuade, induce, entice, or coerce that minor to participate in prohibited sexual activity, his actions are

not proscribed by 2422(b) and we would ask for judgment of acquittal." *Id.* The Government opposed this motion, arguing that there is no requirement that Petitioner have intended to overcome the will of the child, which they note originated in a D.C. Circuit opinion and has no corresponding holding in the Fifth Circuit, or language in the statute. *Id., pp. 128-29.* The district court denied the motion in a four word ruling from the bench. *Id., p. 129.*

On July 28, 2017, the jury returned a guilty verdict on the single count of the indictment. [DE #71].

Relevant Post-Verdict Motions for Judgment of Acquittal and New Trial

On August 10, 2017, Petitioner filed a motion for judgment of acquittal, pursuant to Rule 29, of the Federal Rules of Criminal Procedure. [DE #80]. Petitioner's motion argued that the evidence at trial was insufficient to sustain his conviction under 18 U.S.C. §2422(b) because there was no evidence presented which would allow a rational juror to find that Petitioner acted with the requisite intent -- to transform or overcome the fictitious minor's will --, took what could be properly viewed as a substantial step corroborating such intent, or used a means of interstate commerce to communicate with a person under 18 to attempt to persuade, induce, entice, or coerce that minor to participate in prohibited sexual activity. *Id.* In addition to preserving a potential challenge to *Caudill*, Petitioner's motion specifically advanced that no rational juror could have found him guilty beyond a reasonable doubt because: 1) he communicated solely with

an adult intermediary and there was no evidence of indirect persuasion, where the trial evidence failed to establish Petitioner's intent to transform or overcome the fictitious minor's will or that Petitioner took a "substantial step" corroborating his intent to engage in conduct designed to persuade, induce, entice, or coerce the fictitious minor by way of the intermediary; 2) §2422(b) does not prohibit agreeing or arranging to have sex with a minor through an adult intermediary; and 3) §2422(b) does not prohibit intending to attempt to entice a minor at a future face-to-face meeting. *Id.*

The Government opposed Petitioner's motion, arguing: 1) that it was not required to establish intent to transform or overcome the will of the child to satisfy the *mens rea* element of §2422(b), and the trial evidence established the requisite intent under Fifth Circuit law; and 2) that Petitioner's travel to the location of the rendezvous, with various items he and Mullican had discussed using during their prior communications constituted a "substantial step." [DE #86].

The district court denied Petitioner's motion, agreeing with the Government that: 1) the intent to transform or overcome the will of the minor is not required for conviction under §2422(b) in the Fifth Circuit; and 2) that traveling to the rendezvous and bringing items to win the favor of the fictitious minor constituted a "substantial step." [DE #94, *App. D*].

After seeking and obtaining an extension of time to file a motion for new trial under Rule 33(b)(2), on

September 12, 2017, Petitioner filed such motion. [DE #82, #87, #95]. Relevant to the instant petition, Petitioner sought a new trial on grounds that the Government failed to prove each element of 18 U.S.C. § 2422(b), in that the evidence presented did not establish that Petitioner acted with the requisite intent -- to transform or overcome the fictitious minor's will --, took what could be properly viewed as a substantial step corroborating such intent, or used a means of interstate commerce to communicate with a person under 18 to attempt to persuade, induce, entice, or coerce that minor to participate in prohibited sexual activity. [DE #95]. In addition to again preserving a potential challenge to *Caudill*, Petitioner's motion specifically argued that the district court should vacate the jury's verdict and order a new trial due to the insufficiency of the trial evidence to establish Petitioner's guilt beyond a reasonable doubt, because that evidence: 1) failed to establish that Petitioner had the intent to transform or overcome the fictitious minor's will; 2) failed to establish that Petitioner took a "substantial step" corroborating his intent to engage in conduct designed to persuade, induce, entice, or coerce the fictitious minor by way of the intermediary; 3) showed, at most, that Petitioner may have agreed or arranged to have sex with a minor through an adult intermediary – conduct which cannot support conviction under § 2422(b); and 4) showed, at most, that Petitioner may have intended to attempt to entice a minor at a future face-to-face meeting – conduct which cannot support conviction under § 2422(b). *Id.*

On September 25, 2017, the Government responded in opposition to the motion for new trial. [DE #96]. The

Government argued that the district court should reject Petitioner's arguments concerning the insufficiency of the evidence, which it characterized as being "at odds with the Fifth Circuit's controlling decision in *Caudill*," based on what it considered sufficient evidence in the record to support Petitioner's conviction. *Id.*

On October 11, 2017, the district court denied Petitioner's motion for new trial. [DE #100, *App. E*]. In its order, the district court reiterated its previous decision that conviction under §2422(b) does not require proof of intent to transform or overcome the fictitious minor's will. *Id.* The order cataloged evidence which it found sufficiently established the requisite intent and that Petitioner took the necessary substantial step corroborating that intent. *Id.* Finally, the court rejected Petitioner's argument that agreeing or arranging to have sex with a minor through an adult intermediary is not prohibited by § 2422(b) because the court's interpretation of Fifth Circuit precedent indicated that relying on a parent's influence or control over a child is sufficient to satisfy the statute. *Id.*

Sentencing

On November 15, 2017, Petitioner was sentenced to 235 months' imprisonment to be followed by 10 years' supervised release. [DE #113, *App. B*].

B. Relevant Facts and Proceedings in the Appellate Court

Petitioner challenged the district court's denial(s) of his motion(s) to dismiss, for judgment of acquittal and for new trial on direct appeal. [*App. A, A1*]. In his initial brief, Petitioner argued that the district court utterly disregarded the requirements of Section 2422(b) which prohibits attempts to persuade, induce, entice, or coerce a minor into sexual activity using a means of interstate commerce. By its terms, the statute – which "targets pedophiles who stalk children on the Internet," H.R. Rep. No. 105-557, at 10 (1998) – proscribes attempts to: a) communicate with a minor, b) using the Internet or another means, c) in order to persuade the minor to engage in sexual activity, which the trial evidence did not establish in this case.

Specifically, Petitioner argued that the district court erred in denying the motion to dismiss as the undisputed facts of the case did not state a violation of §2422(b). [*App. A, A5-7*]. This was true as the evidence showed that Petitioner communicated only with an adult intermediary, lacked the requisite intent to transform or overcome the fictitious minor's will, and took no action which could properly be considered a "substantial step" corroborating an intent to persuade, induce, entice or coerce the fictitious minor, by way of the adult intermediary. Petitioner further argued that the district court erred in denying the motion(s) for judgment of acquittal and new trial because the evidence presented at trial was insufficient to allow a rational juror to find Petitioner guilty of the offense because he communicated solely with an adult intermediary and there was no evidence of indirect persuasion. [*App. A, A7-10*]. This rendered the

evidence at trial insufficient to sustain Petitioner's conviction, warranting a judgment of acquittal and showed that the district court abused it discretion in failing to grant a new trial. *Id.*

Petitioner relied on *United States v. Hite*, 769 F.3d 1154 (D.C. Cir. 2015) to support an attempt to distinguish the Fifth Circuit's holding in *Caudill*, arguing that "the undisputed facts were insufficient to state a violation of § 2422(b) because it requires 'defendant's interactions with the intermediary . . . be aimed at transforming or overcoming the child's will.'" [*App. A, A7*]. The Fifth Circuit rejected this argument.

> Our circuit requires only that defendant take "actions directed toward obtaining the child's assent through an intermediary." Defendant can attempt to persuade, induce, entice or coerce a minor to engage in sexual activity by relying on the parent's influence or control over the child. [*App. A, A7-8*] (internal citations omitted).

With respect to Petitioner's motion(s) for judgment of acquittal and for new trial the Fifth Circuit again rejected his claims based on circuit specific precedent. Specifically, the Fifth Circuit rejected Petitioner's claim that

> § 2422(b) "does not criminalize intent to persuade at a future face-to-face meeting, or agreeing or arranging to have sex with

> a minor through an adult intermediary" and "the adult must direct some of the inducements to the minor . . . or seek confirmation that the minor will engage in sexual activity." [*App. A, A9*].
>
> The appellate panel stated
>
> Our court has specifically held "defendant's act must target a child", but "the terms 'persuade,' 'induce,' 'entice,' or 'coerce' do not require that there be communication between the perpetrator and the child or that the perpetrator must request an intermediary to convey the perpetrator's communications to a minor." [*App. A, A9-10*]. *(citing Caudill).*

As it relates to Petitioner's claim that the evidence did not show that he took a substantial step toward a violation of § 2422(b), the appellate panel noted, "[o]ur court has routinely held that conduct like [Petitioner's] constitutes a substantial step toward committing a violation of § 2422(b)." [*App. A, A11*].

The instant petition is timely submitted, within 90 days of the Fifth Circuit's August 27, 2018, opinion affirming the district court's denial of Petitioner's motion(s) to dismiss, for judgment of acquittal and new trial. [*App. A*].

REASONS FOR GRANTING THE WRIT

I. The Court should resolve the split in the circuits on whether, in order to violate 18 U.S.C. § 2422(b), a defendant must engage in conduct that is luring or coercive in nature, so as to affect the willingness or disposition of the minor to engage in sexual activity.

The courts of appeals are divided on the reach of 18 U.S.C. § 2422(b). Several Circuits have sought to limit the scope of the statutory terms, persuade, entice, induce and coerce, to their plain meaning of obtaining the assent of another person by means of reason, luring, trickery, incitement, or threat. *See United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000)("Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."); *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007)("Section 2422(b) criminalizes an intentional attempt to achieve a *mental* state—a minor's assent.")(emphasis in original).

In *United States v. Hite*, 769 F.3d 1154, 1167 (D.C. Cir. 2014), the District of Columbia Circuit explained that "the preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will, whether through 'inducement,' 'persuasion,' 'enticement,' or 'coercion.'" The court rejected the diluted *mens rea* accepted by the Fifth Circuit in this case, holding that in prosecutions where the defendant communicated solely with an adult intermediary, "the

defendant's interactions with the intermediary must be aimed at transforming or overcoming the child's will to violate § 2422(b)." *Id.*, 769 F.3d at 1164. *See United States v. Zagorski*, 807 F.3d 291, 293 (D.C. Cir. 2015) (recognizing *Hite*'s insistence that there be evidence that the defendant sought to "transform or overcome the will of a minor"); *see also United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (noting that § 2422(b) "'criminalizes an intentional attempt to achieve a mental state – a minor's assent – regardless of the accused's intentions [concerning] the actual consummation of sexual activities with the minor'") (*quoting United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011)); *United States v. Douglas*, 626 F.3d 161, 164 (2d Cir. 2010) ("[T]he statute criminalizes obtaining or attempting to obtain a minor's assent to unlawful sexual activity."); *United States v. Nestor*, 574 F.3d 159, 162 n. 4 (3d Cir. 2009) (defining the term "persuade," for example, means "(1) to move by argument, entreaty, or expostulation to a belief, position, or course of action; (2) to plead with."); *United States v. Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) ("Section 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act."); *see also United States v. Nitschke*, 843 F. Supp. 2d 4, 14 (D.D.C. 2011) ("The Court agrees that Defendant's communications demonstrate a 'willingness and desire to meet,' but, once again, a willingness and desire to have sex does not demonstrate an intent to persuade a minor via the internet."; granting defendant's motion to dismiss).

The Fifth Circuit, however, requires only that the defendant take "actions directed at obtaining the child's assent through an intermediary [and may violate the statute] by relying on a parent's influence or control over the child." [*App. A, A7-8*]. The problem with the Fifth Circuit's diluted *mens rea* is illustrated by the facts of this case. The trial evidence showed that the adult intermediary presented the fictitious minor as both sexually active and willing, and conveyed a desire on the part of the adult intermediary to witness the fictitious minor engage in sexual activities with the Petitioner. This evidence shows that Petitioner lacked the requisite intent to transform or overcome the fictitious minor's will. Petitioner was presented with a minor whose will he need not transform or overcome. In the context of communication with an adult intermediary who presents a willing minor, there is nothing about agreeing to possible future sex activities with that minor which alters the level of willingness already expressed.

As the focus of the statute is on the words of enticement and their capacity to stimulate sexual activity, allowing that focus to be blurred by equating enticement with agreement to possible future sexual activity with a willing minor is inconsistent with governing principles of statutory construction. The Court recently reaffirmed "the presumption 'that statutory language is not superfluous.'" *McDonnell v. United States*, 136 S.Ct. 2355, 2369 (2016) (*citing Arlington v. School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299 n.1 (2006)). As in *McDonnell*, "[t]here is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales . . . It is

instead with the broader legal implications of the Government's boundless interpretation of the . . . statute." *Id.*, 136 S.Ct. at 2375 (interpreting the term "official act" in 18 U.S.C. § 201(a)(3) in a way that avoids vagueness concerns and requires more than an action taken by an official); *id.* at 2373 ("where a more limited interpretation of 'official act' is supported by both text and precedent, we decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous'") (*citing McNally v. United States*, 483 U.S. 350, 360 (1987)). As the Second Circuit has held, absent enticement which alters the assent of the minor, there is no inducement within the meaning of § 2422(b). *See United States v. Gagliardi*, 506 F.3d 140, 147-48 (2d Cir. 2007) ("The words 'attempt,' 'persuade,' 'induce,' 'entice,' or 'coerce' . . . are words of common usage that have plain and ordinary meanings. . . . Although, as Gagliardi argues, there may be some uncertainty as to the precise demarcation between 'persuading,' which is criminalized, and 'asking,' which is not, this uncertainty is not cause for constitutional concern because the statute's terms are sufficiently definite that ordinary people using common sense could grasp the nature of the prohibited conduct.").

The scope of the statute is also informed by the traditional meaning of the Mann Act, 18 U.S.C. § 2422(a), which has long used the same terms of inducement at issue in § 2422(b). Because § 2422(b) uses the same terms as the more well established Mann Act, § 2422(a) (applicable to anyone who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce" to engage in unlawful sexual activity),

cases applying the Mann Act offer guidance on causation by those means. In *United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002), the Ninth Circuit recognized the distinction between conduct that is transactional and conduct that convinces someone to engage in illegal conduct. *See id.* at 1187 ("[C]onvincing someone to transport himself or herself across state lines for the purpose of prostitution completes the crime under § 2422(a). That persuasion is distinct from the actual transportation. . . . Transporting a minor with the intent that the minor engage in prostitution is not the same as persuading, enticing, inducing, or coercing someone to travel in interstate commerce to engage in prostitution."); *see also United States v. Zitlalpopoca-Hernandez,* 495 Fed. Appx. 833, 836 (9th Cir. 2012) ("Under 18 U.S.C § 2422(a) (2006), a defendant is guilty if he 'knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce ... to engage in prostitution.' The evidence at trial demonstrated that it was Florencia who persuaded Zitlalpopoca to bring her to the United States, not the other way around."); *United States v. Rashkovski*, 301 F.3d 1133 (9th Cir.2002) (sufficient evidence supported § 2422(a) conviction where defendant traveled to Russia, held recruiting meetings to promote prostitution in the United States, and arranged and paid for Russian women to travel to the United States to work as prostitutes).

Petitioner's case involves his communications with an adult intermediary only, during a law enforcement sting. It features no evidence even remotely suggesting that he possessed the intent to transform or overcome the

fictitious minor's will. To the contrary, the trial evidence showed that the intermediary presented the fictitious minor as both sexually active and willing, and conveyed that the mother desired to witness her fictitious daughter engage in sexual activities with Petitioner.

Because Petitioner did not communicate with the fictitious minor – or even convey a message through the adult intermediary – the Fifth Circuit focused on Petitioner's apparent agreement that he might have sex with the willing minor and the fact that the adult intermediary pretended to be the fictitious minor's mother. Neither of these facts alter the reality that the Petitioner lacked the required intent to affect the minor's willingness. The Fifth Circuit's expansion of the statute to encompass conduct not properly proscribed by the terms of the statute is unwarranted. There is simply no basis for application of the statute to a defendant whose actions are not intended to increase or alter the level of assent from the minor. This Court should address and resolve the conflict over the proper scope of conduct proscribed by 18 U.S.C. § 2422(b).

II. The Court should resolve the split in the circuits on whether an action which might only cause a minor to engage in sexual activity – such as travel to meet the minor in person – satisfies the substantial step requirement of 18 U.S.C. § 2422(b).

The Fifth Circuit and District of Columbia Circuit also disagree over what may constitute a "substantial step"

within the meaning of 18 U.S.C. § 2422(b). In this case, the Fifth Circuit affirmed the lower court's ruling that travel to meet the fictitious minor was a substantial step. The District of Columbia Circuit properly recognizes that because later face-to-face persuasion is not criminalized, arranging to meet for such persuasion cannot be a substantial step.

The best explanation of § 2422(b)'s text in this context is a district court opinion, *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011). The D.C. Circuit approvingly cited *Nitschke* in *Hite*, 769 F.3d at 1164. The court granted *Nitschke*'s motion to dismiss the § 2422(b) attempt count against him, finding that the undisputed facts did not show either intent or a substantial step. The court first noted the broadly-accepted principle that "the intent criminalized by § 2422(b) is the intent to persuade, induce, entice, or coerce a minor, not the intent to have sex with a minor." *Nitschke,* 843 F. Supp. 2d at 11. The court further found that "[t]he intent to persuade … must be an intent to persuade using a means of interstate commerce," and therefore § 2422(b) "does not criminalize an intent to persuade at some later point in person." *Id.* Although the facts showed Nitschke "had a sexual interest in minors, they [did] not demonstrate an intent to entice or induce the fictitious minor via the internet." *Id.* at 14. "Simple interest in prepubescent sex - or even an intent to engage in such acts - cannot be enough to establish an intent to persuade…. [A] willingness and desire to have sex does not demonstrate an intent to persuade a minor via the internet." *Id*.

Nitschke's facts also did not show a substantial step. "A substantial step towards violating § 2422(b) must necessarily be a step towards persuading, enticing, inducing, or coercing a minor via a means of interstate commerce." *Nitschke*, 843 F. Supp. 2d at 15. Arranging a face-to-face meeting could not be a substantial step: "Later face-to-face persuasion … is not criminalized under § 2422(b); accordingly, arranging to meet for such persuasion cannot be a substantial step either." *Id.* Travel also could not be a substantial step: "Travel for a face-to-face meeting … cannot be a substantial step because such face- to-face persuasion is not criminalized." *Id*. at 16. The court found cases describing travel as a substantial step in *dicta* unpersuasive, because "travel ultimately has nothing to do with this crime," *id*., and dismissed the § 2422(b) charge.

Section 2422(b) is a crime of persuasion, inherently accomplished through communications. The persuasion must take place in interstate communications, or in an attempt, the goal must have been to persuade through interstate communications. Thus, the only relevant substantial steps for a § 2422(b) attempt are those toward achieving a minor's assent to engage in sexual activity through interstate communications. Substantial steps must always be toward the particular crime being charged. *See United States v. Farhane*, 634 F.3d 127, 148 (2d Cir. 2011) ("[I]mportant to a substantial-step assessment is an understanding of the underlying conduct proscribed by the crime being attempted…. [A] substantial step to commit a robbery must be conduct planned clearly to culminate in that particular harm….");

United States v. Smith, 264 F.3d 1012, 1016 (10th Cir. 2001) ("The 'substantial step' . . . must be an act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime."). It follows that traveling to meet a minor is not a substantial step toward accomplishing a violation of § 2422(b). Having sex with a minor is not a § 2422(b) violation. The violation begins and ends with the attempt to persuade the minor to have sex through use of interstate communications.

Likewise, setting up a time and location to meet in person is not a substantial step toward persuading a person to have sex through use of interstate communications. The Fifth Circuit affirmed just such an interpretation in this case, stating: "Our court has routinely held that conduct like [Petitioner's] constitutes a substantial step toward a violation of § 2422(b). . . 'Travel to a meeting place is . . . sufficient to establish' a substantial step toward an attempt to violate § 2422(b)." [*App. A, A10*].

This Court should address whether an action which might only cause a minor to engage in sexual activity – such as travel to meet the minor in person – may constitute the requisite "substantial step" under § 2422(b).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

HEATHER J. BARBIERI
Counsel for Petitioner
BARBIERI LAW FIRM, P.C.
7000 Preston Road, Suite 700
Plano, Texas 75024
Tel. (972) 424-1902
hbarbieri@barbierilawfirm.com

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