No. 18-7613

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ACKELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2261A(2)(B), which criminalizes certain harmful "course[s] of conduct" performed "with intent to kill, injure, harass, or intimidate," is facially unconstitutional under the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 907 F.3d 67. The orders of the district court (Pet. App. 19-37, 38-45) are unreported but are available at 2016 WL 6407840 and 2017 WL 2913452.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2018. The petition for a writ of certiorari was filed on January 22, 2019. 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 District of New Hampshire, petitioner was convicted on one count of stalking, in violation of 18 U.S.C. 2261A(2)(B). Judgment 1. He was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-18.

1. Petitioner and 16-year-old R.R. first met online in 2012. Pet. App. 5. After conversing online with R.R. regularly, petitioner invited R.R. to send him personal photos in exchange for money. Id. at 6. R.R. sent partially clothed photos of herself, but petitioner never sent money. Ibid.

Approximately five months after petitioner and R.R. began communicating online, petitioner proposed that he and R.R. enter a "dominant-submissive" relationship, in which R.R. would be "the submissive." Pet. App. 6. Petitioner started referring to R.R. as a "slave" and a "caged butterfly," and he insisted that R.R. refer to him as "owner" and affirm her love for him. Ibid. Petitioner also demanded that R.R. send him sexually explicit photos. Ibid. R.R. complied. Id. at 20.

R.R. tried to end the relationship, but petitioner refused, telling R.R. that she was "caged." Pet. App. 6. Petitioner warned R.R. that, if she stopped sending photos, petitioner would distribute the photos that he had already collected to R.R.'s

friends, classmates, and family. Ibid. In late January 2014, R.R. asked petitioner to delete the photographs in his possession, expressing fear about her future, the damage to her reputation, and the possibility that she might not gain entrance into a nursing program if petitioner distributed the photographs. Id. at 20. Petitioner, however, refused to terminate the relationship. Ibid. Hoping to scare petitioner away, R.R. falsely informed him that her mother had discovered their text messages and was upset. Ibid.

Two weeks later, petitioner contacted R.R. and demanded that she send pictures of her exposed and touching herself. Pet. App. 20. When R.R. refused, petitioner threatened to "trade" her, meaning that petitioner would transmit R.R.'s information and photographs to another interested individual. Id. at 21. Petitioner then instructed R.R. to call him and "negotiate" the deletion of her photographs. Ibid.

R.R. called petitioner, stating that she felt "suicidal," "trapped," and "terrified." Pet. App. 21. Petitioner responded that he would not delete R.R.'s photographs unless she had sex with him or procured another girl who would do so. Ibid. R.R. subsequently informed her father about the relationship with petitioner. Ibid. With her father's assistance, R.R. took screenshots of her communications with petitioner and then contacted law enforcement. Ibid.

2. A federal grand jury in the District of New Hampshire charged petitioner with one count of stalking, in violation of 18 U.S.C. 2261A(2)(B). Pet. App. 38. That provision penalizes a person who,

> with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that * * * causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that] person [or an immediate family member, spouse, or intimate partner of that person].

18 U.S.C. 2261A(2)(B) (Supp. I 2013).

a. Petitioner moved to dismiss the indictment, arguing (as relevant here) that Section 2261A(2)(B) was overbroad and, therefore, facially unconstitutional under the First Amendment. Pet. App. 38. The district court denied the motion. Id. at 38-45.

The district court recognized that, in the First Amendment context, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Pet. App. 41 (quoting United States v. Stevens, 559 U.S. 460, 473 (2010) (internal quotation marks omitted)). Turning to the law at issue, the court observed that "a person may violate [Section 2261A(2)(B)] by causing substantial emotional distress to his or her intended victim, or by engaging in conduct that 'attempts to cause, or would

be reasonably expected to cause substantial emotional distress.'" Id. at 43 (quoting 18 U.S.C. 2261A(2)(B) (Supp. I 2013)). The court determined that, "[b]y requiring proof of that intent, the statute 'clearly targets conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult.'" Ibid. (quoting United States v. Sayer, 748 F.3d 425, 435 (1st Cir. 2014)). The court further observed that "[t]he statute * * * requires that the conduct have harmed the victim or his or her loved ones, or must be 'reasonably be expected to' do the same." Ibid. And it reasoned that "[t]his objective standard, coupled with the intent requirement, renders the statute unlikely to encompass" a significant amount of "constitutionally protected speech." Ibid. (emphasis omitted).

The district court accordingly determined that Section 2261A(2)(B) "is not facially overbroad." Pet. App. 41. The court acknowledged that, in United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011), a district court had held that Section 2261A was unconstitutional as applied to a particular defendant who had posted critical and threatening messages directed a well-known, public figure who was the leader of a religious sect. Pet. App. 43. But the district court in this case noted that petitioner "ha[d] not raised an as-applied challenge" to Section 2261A(2)(B) and explained that "a single unconstitutional application does not suffice to facially invalidate the statute." Ibid.

Petitioner additionally posited hypothetical scenarios in which he believed that Section 2261A might unconstitutionally be applied, involving "a person [who] speaks with the intent to harass or intimidate another, and whose speech would be reasonably expected to cause substantial emotional distress, but which -- because the victim did not see it -- does not actually cause such harm." Pet. App. 43. Petitioner's hypothetical examples included online criticism of politicians or corporations, Facebook posts recounting an ex-lover's infidelity or abuse, or vigorous business negotiations. Ibid. The district court, however, expressed "skeptic[ism] that * * * statements * * * that remain entirely outside of the victim's consciousness * * * would fall even under the broader umbrella of statements that would 'reasonably be expected' to cause emotional distress to the requisite parties." Id. at 44. "Even if they did," the court added, "[petitioner's] smattering of hypotheticals does not satisfy the standard for invalidating a statute as facially overbroad." Ibid.

b. A jury found petitioner guilty of the charged offense. Pet. App. 19. Petitioner moved for a judgment of acquittal, renewing his overbreadth challenge and proffering additional examples of protected speech or activity that, in his view, Section 2261A(2)(B) purportedly criminalized. Ibid. The district court denied the motion. Id. at 29-30. The court explained that "[s]ome of the speech that [petitioner] invoke[d]" -- threats to a person's

life or safety -- "falls outside the ambit of the First Amendment." Id. at 30. The court further explained that "[o]ther examples of speech invoked by [petitioner]" -- taunting a female bodybuilder's weight, pressuring electors to change their votes, or questioning climate scientists -- "though protected, do not likely amount to a course of conduct prohibited by [Section] 2261A(2)(B)." Ibid. The court observed that the intent and "course of conduct" requirements constrain the statute's reach to encompass only "conduct performed with serious criminal intent, not just speech that happens to cause annoyance or insult." Ibid. (quoting Sayer, 748 F.3d at 435).

3. The court of appeals affirmed. Pet. App. 1-18.

The court of appeals observed that petitioner "d[id] not claim that the conduct underlying his conviction was protected by the First Amendment." Pet. App. 7. Instead, petitioner argued that "[Section] 2261A(2)(B) cannot be applied to anyone because it is overbroad under the First Amendment." Ibid. The court accordingly addressed whether "the law is facially overbroad -- that is, that it 'punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep.'" Ibid. (quoting Virginia v. Hicks, 539 U.S. 113, 118-119 (2003)).

The court of appeals observed that "[Section] 2261A(2)(B) regulates not speech, but conduct -- or, to be precise, 'courses of conduct.'" Pet. App. 8 (brackets omitted). The court

acknowledged that the statute requires the defendant to have used one of several "enumerated facilities of interstate commerce" that "commonly * * * facilitate communication," such as the mail or electronic communication services. Ibid. The court determined, however, that, "while [Section] 2261A(2)(B) could reach highly expressive conduct, it is plain from the statute's text that it covers countless amounts of unprotected conduct." Ibid. The court noted, for example, that Section 2261A(2)(B) criminalizes the mailing of an unknown white powder to the victim, sending the victim nude photographs of herself, infecting the victim's computer with viruses, or creating unwanted online dating profiles using the victim's identity. Id. at 8-9. Criminalization of those acts, the court reasoned, confirms that the statute "does not necessarily * * * target[] speech." Id. at 9. Rather, Section 2261A(2)(B) "targets conduct, specifically 'conduct performed with serious criminal intent.'" Ibid. (quoting Sayer, 748 F.3d at 435).

The court of appeals accepted that this Court "has not categorically foreclosed the possibility that a statute that does not facially regulate speech could be facially overbroad under the First Amendment." Pet. App. 9. But the court of appeals determined that "[petitioner] ha[d] not met his burden of demonstrating that factually, the statute could apply to a substantial amount of protected speech, in an absolute sense and in relation to its many legitimate applications." Id. at 9-10.

The court explained that "[e]xceptions to the First Amendment's protection of expression exist in the case of a small number of 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'" Id. at 10 (quoting Stevens, 559 U.S. at 468-469). Among these, the court noted, are "'[t]rue threats,'" which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Ibid. (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)). The court additionally observed that another such category is "[s]peech 'integral to criminal conduct,'" which "is precisely what it sounds like, and [which] is not protected on First Amendment grounds 'merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" Ibid. (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

The court of appeals reasoned that, in light of those categories, Section 2261A(2)(B) could be validly applied to various circumstances in which a "course of conduct involved speech" but the speech "would fall outside of the First Amendment's protections." Pet. App. 10. "For example," the court observed, "one could be convicted for undertaking a course of conduct, 'with the intent to kill' that 'causes the victim substantial emotional

distress,'" and such a conviction "would not be constitutionally problematic" because the speech involved would be unprotected "as a true threat and/or speech integral to criminal conduct." Ibid. (brackets omitted).

The court of appeals acknowledged, but found to be misplaced, a hypothetical petitioner posited of "an individual who, with merely the intention to harass, twice directs speech on a matter of public concern at someone -- say, via Twitter -- that could be 'reasonably expected to cause substantial emotional distress,'" but who does not "actually" cause the targeted victim to "suffer any emotional distress." Pet. App. 10. The court explained that its earlier decision in United States v. Sayer, supra, required "read[ing] 'intent to . . . harass'" to "refer[] to criminal harassment." Pet. App. 11 (citation omitted). Such speech, the court explained, "is unprotected because it constitutes true threats or speech that is integral to proscribable criminal conduct," even in "the absence of any actual harm" to the victim. Ibid. The court reasoned that the same "logic would also apply to the term 'intimidate.'" Ibid. The court separately acknowledged the decision in United States v. Cassidy, supra, where a district court had held that Section 2261A(2)(B) could not be constitutionally applied to a defendant who anonymously harassed a public religious leader via Twitter and a blog. Pet. App. 11. But the court of appeals determined that "one District Court

precedent combined with a list of hypotheticals did not result in the defendant showing that the statute was substantially overbroad." Ibid.

Although recognizing that "[Section] 2261A(2)(B) could have an unconstitutional application," the court of appeals was "unconvinced that [it] must administer the 'strong medicine' of holding the statute facially overbroad." Pet. App. 11 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)). Because "[t]he statute does not, on its face, regulate protected speech, or conduct that is necessarily intertwined with speech or expression," the court expressed "confiden[ce] that as-applied challenges will properly safeguard the rights that the First Amendment enshrines." Ibid.

The court of appeals also rejected petitioner's contention that "[Section] 2261A(2)(B) is an impermissible content-based restriction on speech that is not sufficiently narrowly tailored to vindicate a compelling government interest." Pet. App. 12. The court explained that "a law is content-based if it 'targets speech based on its communicative content.'" Ibid. (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (brackets omitted)). The court determined that, because Section 2261A(2)(B) did not "target[] speech at all," it "cannot be * * * an impermissible content- or viewpoint-based restriction on speech." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-30) that 18 U.S.C. 2261A(2)(B) is facially unconstitutional under the First Amendment, asserting that it is a content-based speech restriction on speech that is not narrowly tailored to any government interest and that it is substantially overbroad. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner contends (Pet. 7-12) that Section 2261A(2)(B) is facially invalid under the First Amendment "on the grounds [that] it is a content based-restriction on speech that is not narrowly tailored to any governmental interest." Pet. 9. The court of appeals correctly rejected that contention.

The Free Speech Clause of the First Amendment places limits on laws that "restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (citation omitted). A content-based restriction on speech generally can stand only if "it passes strict scrutiny -- that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." Brown v. Entertainment Merchs. Ass'n, 564 U.S. 786, 799 (2011). To succeed in a "facial attack" (apart from an overbreadth challenge, see pp. 14-18, infra), petitioner "would have to

establish 'that no set of circumstances exists under which [Section 2261A(2)(B)] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 473 (2010) (citations omitted).

The court of appeals correctly determined that petitioner's facial challenge to Section 2261A(2)(B) as a content-based regulation of speech fails at the threshold because the provision does not target speech at all, much less speech based on its communicative content. Pet. App. 12. The provision criminalizes certain "course[s] of conduct," 18 U.S.C. 2261A(2)(B), not speech as such. The court highlighted myriad ways the statute can be violated by engaging in conduct using the mail or computer services with the intent to injure, kill, harass, or intimate, none of which involves expressive communication, such as sending unknown powder in an envelope or ordering threatening or harassing deliveries to the victim. Id. at 8-9.

Because Section 2261A(2)(B) does not "facially regulate pure speech or highly expressive conduct," the court of appeals found that "it cannot be * * * an impermissible content- or viewpoint-based restriction on speech." Id. at 12; see also United States v. Gonzalez, 905 F.3d 165, 191 n.10 (3d Cir. 2018) ("[Section 2261A] is not targeted at speech or to conduct necessarily associated with speech, but with harassing and intimidating conduct that is unprotected by the First Amendment." (internal

quotation marks omitted)). At a minimum, because at least many of the statute's applications regulate not speech but only conduct, it has a "plainly legitimate sweep." Stevens, 559 U.S. at 473 (citation omitted); see Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-450 (2008).

2. Petitioner additionally contends (Pet. 12-30) that Section 2261A(2)(B) is facially overbroad. The court of appeals correctly rejected that contention as well.

a. A statute is impermissibly overbroad under the First Amendment only if it prohibits "a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 292 (2008). To ensure that invalidation for overbreadth is not "casually employed," Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," Williams, 553 U.S. at 292 (emphasis omitted). The Court has thus explained that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." New York v. Ferber, 458 U.S. 747, 771 (1982).

Section 2261A(2)(B) is not substantially overbroad. As the court of appeals recognized, the statute "does not necessarily * * * target[] speech," but rather "conduct." Pet. App. 9.

Moreover, Section 2261A(2)(B) prohibits only "conduct performed with serious criminal intent," ibid. (quoting United States v. Sayer, 748 F.3d 425, 435 (1st Cir. 2014)), meaning conduct intended as "criminal harassment," id. at 11. The court of appeals observed that such harassment, even if it carries an expressive component, "is unprotected" under this Court's First Amendment precedent "because it constitutes true threats or speech that is integral to proscribable criminal conduct." Ibid.; see pp. 9-11, supra. In addition, Section 2261A(2)(B) requires that the defendant's "course of conduct * * * cause[], attempt[] to cause, or * * * be reasonably expected to cause substantial emotional distress" in the person targeted for harassment. 18 U.S.C. 2261A(2)(B) (Supp. I 2013). In light of those features that cabin the statute's reach, petitioner cannot identify a "substantial number of * * * applications" where this statute would impair constitutionally protected speech. Ferber, 458 U.S. at 771.

Petitioner primarily contends (Pet. 20) that Section 2261A(2)(B) is overbroad based on two particular aspects of the provision: first, the "intent to 'intimidate'" satisfies the provision's mens rea requirement, and second, that provision covers circumstances involving attempted or reasonably expected harm, as well as actual harm. As the court of appeals explained, however, Section 2261A(2)'s "intent to . . . harass [or] intimidate" language is properly construed to "refer[] to criminal

harassment" or intimidation only. Pet. App. 11 (emphasis added). That construction restricts the statute's application to categories of speech -- e.g., "true threats" and "speech * * * integral to proscribable criminal conduct" -- that lack First Amendment protection. Ibid. At a minimum, the provision plausibly can, and therefore should, be construed in that manner, which avoids the First Amendment concern petitioner raises that the statute's intent language could be applied broadly to any perceived instances of harassment or intimidation. See Pet. 21-22; see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). And such a construction likewise eliminates petitioner's concern that the statute does not require the government to demonstrate "actual harm" to the victim, which is not required in the context of criminal harassment or intimidation. See United States v. Meeker, 527 F.2d 12, 15 (9th Cir. 1975) ("Nor is proof that the victim was in fact frightened for his own physical safety required in order to find that a defendant performed the criminal act of intimidation.").

Petitioner also errs in contending (Pet. 24) that Section 2261A(2)(B) "is not limited to 'true threats'" because "it impermissibly adopts a 'reasonable person' standard for construing whether any threat or other speech not protected by the First Amendment has even been made." To the contrary, Section

2261A(2)(B) requires an "intent to kill, injure, harass, [or] intimidate," meaning that the government must demonstrate that the defendant subjectively intended to threaten or harass the victim, thereby satisfying any constitutional requirement of subjective intent. 18 U.S.C. 2261A(2) (Supp. I 2013).

b. Petitioner additionally contends (Pet. 12-19) that the court of appeals erred by refusing to invalidate Section 2261A(2)(B) based on hypotheticals that petitioner posited as purported examples of how the provision might unconstitutionally be applied. The court, however, properly considered petitioner's hypothetical examples, and correctly determined that they did not demonstrate the statute's overbreadth. Pet. App. 10-11.

In order to succeed on an overbreadth challenge, a party must specifically demonstrate "a realistic danger that the statute * * * will significantly compromise recognized First Amendment protections" of those third parties. Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984). The court of appeals here acknowledged that petitioner had "coalesce[d] around a number of * * * hypothetical examples illustrating how [Section] 2261A(2)(B) reaches protected speech" of third parties. Pet. App. 10. But the court noted that its previous decision in "Sayer t[ook] much force out of [petitioner's] arguments." Id. at 11. In Sayer, the court held that the previous version of Section 2261A did not apply to a similar list of

hypothetical examples, 748 F.3d at 435, in light of "the statute's specific intent requirement," id. at 435 n.9. The court also found "nothing [to] suggest[]" that the new hypothetical examples advanced by petitioner "certainly would be covered" by the current version of the statute. Pet. App. 11.

3. The decision below does not implicate any conflict among the courts of appeals. Contrary to petitioner's contention (Pet. 12-19), the court's determination that his particular hypotheticals did not provide a basis for finding this particular provision to be overbroad does not conflict with the approaches of other courts of appeals. The court here did not disregard his arguments, and the results other courts have reached as to other statutes do not demonstrate that any would have invalidated Section 2261A(2)(B) on overbreadth grounds.

The Third and Fourth Circuits have rejected similar overbreadth challenges to Section 2261A. See Gonzalez, 905 F.3d at 190 n.10; United States v. Anderson, 700 Fed. Appx. 190, 192-193 (4th Cir. 2017) (per curiam). And other courts of appeals similarly rejected overbreadth challenges to the prior version of Section 2261A. See United States v. Osinger, 753 F.3d 939, 944 (9th Cir. 2014); United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012); Sayer, 748 F.3d at 435-436; United States v. Bowker, 372 F.3d 365, 378-379 (6th Cir. 2004), rev'd on other grounds, 543 U.S. 1182 (2005). Petitioner observes (Pet. 8, 12) that the

prior version required the government to show that the target of the harassment suffered actual harm. See 18 U.S.C. 2261A(2) (2006) (defendant's course of conduct must "cause[] substantial emotional distress" or "place[] th[e] person in reasonable fear of * * * death * * * or serious bodily injury."). As explained above, however, petitioner has not shown that Congress's decision to remove the actual-harm requirement from Section 2261A rendered the statute overbroad for First Amendment purposes. See pp. 15-16, supra.

Petitioner errs in contending (Pet. 8-9) that the decision below conflicts with United States v. Hobgood, 868 F.3d 744 (8th Cir. 2017), and United States v. Petrovic, supra. In Hobgood, the Eighth Circuit rejected an as-applied challenge to Section 2261A(2)(B) on the ground that the defendant's communications -- threats to broadcast statements portraying the victim as an exotic dancer and prostitute -- did not warrant First Amendment protection because they were "integral to the crime of extortion." 868 F.3d at 747. And in Petrovic, the Eighth Circuit rejected an as-applied First Amendment challenge to the previous version of Section 2261A(2)(B) for communications that "constituted the means of carrying out [the defendant's] extortionate threats." 701 F.3d at 855. Those rejections of as-applied challenges do not support an argument that the Eighth Circuit would find the provision facially overbroad.

Petitioner contends that Hobgood and Petrovic construed Section 2261A(2)(B) as a content-based restriction on speech. That is incorrect. No such claim was raised, much less addressed, in those decisions. Rather, in each case, the Eighth Circuit rejected the defendant's as-applied First Amendment challenge to his conviction because his "extortionate speech [wa]s not constitutionally protected." Hobgood, 868 F.3d at 748; see Petrovic, 701 F.3d at 854 ("determin[ing] the communications for which [the defendant] was convicted under the statute are not protected by the First Amendment"); see also Sayer, 748 F.3d at 428, 433 (rejecting similar as-applied First Amendment challenge). The application of Section 2261A(2)(B) in Hobgood and Petrovic to conduct that contained an expressive component did not transform the statute into a content-based restriction on speech. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). And petitioner does not dispute that here, as in Hobgood and Petrovic, Section 2261A(2)(B) was constitutional as applied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2019