No. _____

In the
Supreme Court of the United States

SERGEYI BAZAR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. When Congress amended the Mann Act (18 U.S.C. § 2422) in 1986, did it overrule this Court's decisions in *United States v. Bitty*, 208 U.S. 393 (1908), and *Caminetti v. United States*, 242 U.S. 470 (1917), which defined prostitution under federal law as involving sexual intercourse?

2. Did Congress intend the term "sex act" in the sex-trafficking statute (18 U.S.C. § 1591) to cover sexual conduct beyond oral, anal, and vaginal sex?

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The memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced on pages 35 through 42 of the appendix. The court's denial of Petitioner's petition for rehearing can be found on page 43 of the appendix.

JURISDICTION

The court of appeals entered judgment on August 23, 2018. The court denied the petition for rehearing on November 14, 2018. Pet. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix contains the following statutory provisions: (1) 18 U.S.C. § 1591, Pet. App. 44a–46a; (2) 18 U.S.C. § 2246, Pet. App. 47a–48a; and (3) 18 U.S.C. § 2422, Pet. App. 49a.

STATEMENT OF THE CASE

I. Background.

Petitioner was born in the Soviet Union in 1978. He and his family immigrated to the United States in 1992. They settled in California, and Petitioner eventually became a lawful permanent resident. Petitioner ran a massage parlor in Southern California where the women who worked for him gave customers a "happy ending" massage, a massage in which the masseuse manually ejaculates male customers.

To recruit women to work for his business, Petitioner used the Russian version of Facebook, "Vkontakte"—also called "VK"—because it contained job advertisements

for Russians in the United States. When someone responded to his advertisement on VK, he would send the following form response:

> Job as masseuse, you may create your own schedule, there's work from 9 in the morning to 10 in the evening. There's a place to live too. I have 2 types of massage, sensual and exotic . . . sensual $150/hour, exotic $200/hour . . . for the sensual the girl is wearing panties, for exotic [she's] wearing panties and does a happy end[ing] with her hands, no sex, I have girls working and making $1000-2000 a day. Also girls don't overlap with each other and don't know who's doing what. Also in the complex where you live and work there's a pool, a hot tub, a laundry room and a gym . . . I will also teach you massage for free. . . All clients are Americans, I don't work with Russians. The clients pay you cash on the spot, I just take my percentage every day.

Aidana Saktabekova and Irina Manakova both responded to Petitioner's advertisement and received the above response. Saktabekova was 20, from Kazakhstan, and living in California; Manakova was 23, from Russia, and living in Florida. Both were in the United States after overstaying their student visas. Both expressed interest in the job and agreed to work for Petitioner. And both said they had no interest in having intercourse with customers.

Saktabekova worked for Petitioner for just under two weeks. During those two weeks, she gave customers happy-ending massages. She did not have intercourse with any customer. Manakova worked for Petitioner for just under a week. She too gave happy-ending massages to customers. She did have sex with one customer—but Manakova would testify at trial that she had sex with the customer because she liked him, not because she felt forced to. Indeed, she ultimately dated the customer.

Petitioner's happy-ending-massage business violated state law. *See People v. Hill*, 103 Cal.App.3d 525, 534–35 (Cal. Ct. App. 1980) (holding that touching

someone's genitals for money constituted "lewd" conduct in violation of California law). But the State of California did not prosecute Petitioner.

Instead, the federal government indicted Petitioner in a four-count indictment, three of which are now relevant.

- Count One alleged that Petitioner recruited Manakova for his massage business knowing that force, threats, coercion, or fraud would be used to cause her to engage in a "sex act" in violation of 18 U.S.C. § 1591.

- Count Two alleged that Petitioner recruited Saktabekova for his massage business knowing that force, threats, coercion, or fraud would be used to cause her to engage in a "sex act" in violation of 18 U.S.C. § 1591.

- Count Three alleged that Petitioner persuaded Manakova to cross state lines (she moved from Florida to California to take the job) to engage in "prostitution" in violation of 18 U.S.C. § 2422, a provision of the Mann Act.

The sex-trafficking charges triggered a 15-year mandatory-minimum penalty. Petitioner pled not guilty to all counts and proceeded to trial.

II. Trial.

During Petitioner's trial, Saktabekova and Manakova testified about their employment with Petitioner, including that they gave customers happy-ending massages for money. They both claimed that Petitioner hit them several times and kept their money. They also claimed that, when they agreed to work for Petitioner, they thought they choose for the client the type of massage they would give—that they could chose not to give happy-ending massages. Petitioner disputed that he ever hit either woman, kept their money, or misled them about the job.

After the close of evidence, the court and the parties discussed jury instructions and the verdict form. With respect to the Mann Act charge, the jury was asked to determine if Petitioner persuaded, enticed, or coerced Manakova to travel to "engage in prostitution[.]" Pet. App. 22a. Over Petitioner's objection, the court defined "prostitution" as "knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration," without providing a definition of "sexual act."

With respect to the sex-trafficking charge, the jury was to answer yes or no to the following question:

> Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that means of force would be used to cause [Manakova] to engage in a commercial sex act?

Pet. App. 31a. That question was then repeated four more times, but with "force" replaced with: "threats of force," "fraud," "coercion," and "any combination of such means of force, threats of force, fraud, or coercion." The same questions were then asked with respect to the count involving Saktabekova. Over Petitioner's objection, the court did not define "sex act."

The jury returned a split verdict. With respect to the sex-trafficking counts, the jury answered "no" with respect to "force," "threats of force," "coercion," and "any combination of such means of force, threats of force, fraud, or coercion." The jury answered "yes," however, with respect to "fraud." The jury also convicted Petitioner of Count Three, the Mann Act charge.

At sentencing, the court commented that it had presided over many sex-trafficking cases and that this was "the most benign of all of those cases." The court subsequently clarified why it thought that: "[W]hat strikes me about this case is that[,] if there [were] a case where we had women who were intelligent, who had the ability to do other things, and who were able to make a conscious, knowing, intelligent decision about what they were going to do, this is it." This echoed the court's earlier comments that, based on the VK messages, "Manakova did know that coming here to San Diego, she was going to have to engage in some contact with a person's, you know, sexual parts." The court also noted that "we have young ladies who knew what they were getting into, okay." These were "women who were intelligent who made the choice to do what they did." The court said it would have imposed the mandatory-minimum sentence of 15 years "if there were one victim, but there is more than one victim" and more than one count of conviction. The court thus added two years to the mandatory-minimum sentence, resulting in a 17-year sentence.

III. Appeal.

On appeal, Petitioner challenged his Mann Act conviction, contending that the district court had failed to properly instruct the jury that "prostitution" requires "intercourse." Petitioner also challenged his sex-trafficking convictions, contending (among other things) that the district court failed to properly instruct the jury that a happy-ending massage did not constitute a "sex act," as that term is used in the sex-trafficking statute.

The court of appeals affirmed in an unpublished decision. With respect to Petitioner's Mann Act challenge, the court of appeals agreed that, over a century ago, this Court had originally defined "prostitution" for purposes of the Mann Act as involving "intercourse." Pet App. 40a–41a. But, according to the court, Congress broadened the definition of prostitution in 1986 when it amended the Mann Act. To establish that point, the court relied solely on a single line in the legislative history that said that Congress had intended "to eliminate [the Act's] anachronistic features.'" Pet. App. 41a. According to the court, that meant that Congress intended to overrule decades of precedent from this Court regarding the meaning of "prostitution." Thus, the court held that the district court had not instructed the jury improperly on the scope of the Mann Act. With respect to the sex-trafficking convictions, the court relied on two dictionaries to define "sex act" broadly to include happy-ending massages. Pet. App. 37a. The court did not address the numerous dictionaries that more narrowly defined "sex act" as involving intercourse.

Petitioner filed a petition for rehearing, challenging the panel's conclusions. In the petition, he also asked the court to issue a published decision in the case, given the importance of the issues and the novelty of the court's conclusions. The court refused to issue a published decision and denied the petition for rehearing. Pet. App. 43a.

REASONS FOR GRANTING THE PETITION

I. This Court should grant review because the lower court decision concerning the Mann Act improperly overrules a century of this Court's precedent concerning the meaning of "prostitution."

Over a century ago, this Court defined "prostitution" for purposes of federal statutory law as involving "intercourse," not lesser sexual conduct, which was left to the states to regulate, if they so choose. *United States v. Bitty*, 208 U.S. 393 (1908). Against that backdrop, Congress has repeatedly included the word "prostitution" in federal statutes without ever offering up a contrary definition. Thus, when the district court in this case refused to define the term "prostitution" for the jury as involving intercourse, it erred.

In affirming the district court, the court of appeals upended a century of case law on the meaning of the term "prostitution." Pet. App. 40a. In doing so, the court of appeals claimed that Congress itself had altered the definition of "prostitution" when it amended the Mann Act in 1986. Pet. App. 40a. The court of appeals did not point to a definition of prostitution in the text of the Mann Act itself. Nor did the court point to any definition in the Mann Act's legislative history. Instead, the court pointed to a single line in the 1986 amendment's legislative history that stated that the amendment was intended "to eliminate [the Act's] anachronistic features." Pet. App. 41a. And, according to the court of appeals, this meant that Congress intended to overrule this Court's definition of prostitution and use a definition that was broad enough to cover happy-ending massages. Pet. App. 40a–41a.

This is not a sensible, principled way to do statutory construction. Congress does not overrule the meaning of settled, statutory terms in this manner. And a lower court should not be able to overrule this Court's precedent on the meaning of a statutory term by digging through a statute's legislative history and pointing to a single, vague sentence that does not even reference the statutory term. This Court should grant review, if not summarily reverse, to correct the lower court's deeply flawed statutory analysis.

A. A century ago, this Court defined prostitution for purposes of federal statutory law as requiring "intercourse."

The genesis of the federal statutory definition of "prostitution" can be traced to *United States v. Bitty*, 208 U.S. 393 (1908). That case involved a 1907 statute that criminalized "the importation into the United States of any alien woman or girl for purposes of *prostitution*, or for any other immoral purpose[.]" *Id.* (quoting 34 Stat. 898) (emphasis added). In *Bitty*, the indictment had alleged that the defendant had imported a woman to "live with him as his concubine," which was an "immoral purpose." *Id.* at 398–99. The district court had dismissed the indictment, holding that having a concubine live with someone was not an "immoral purpose." *Id.* at 399.

This Court reversed. In determining the meaning of "immoral purpose," the Court first defined "prostitution" as "women who, for hire or without hire, offer their bodies to indiscriminate *intercourse* with men." *Id.* at 401 (emphasis added). The Court then held that it must interpret the phrase "other immoral purpose" in conjunction with its definition of "prostitution." *Id.* at 401–02. In doing so, the Court

compared a "prostitute" with a "concubine," determining that they were close enough such that having a concubine fell under the immoral-purpose portion of the statute. *Id.*

Two years after this Court decided *Bitty*, it struck down the prostitution statute at issue in that case as an unconstitutional exercise of congressional authority. *Keller v. United States*, 213 U.S. 138 (1909). The next year, in 1910, Congress responded by passing the Mann Act—the statute at issue in this case—to replace the prostitution statute that the Court struck down. *See* Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 221–223 (1984). The Mann Act was similarly worded to the struck-down statute, except that it included an interstate commerce hook that fixed the problem that *Keller* had identified. Specifically, the statute criminalized:

> . . . knowingly transport[ing] . . . in interstate or foreign commerce . . . any woman or girl for the purpose of *prostitution* or debauchery, or for any other immoral purpose[.]

See White Slave Traffic (Mann) Act, Pub. L. No. 61–277, 36 Stat. 825 (1910) (emphasis added).

Shortly thereafter, this Court—in *Caminetti v. United States*, 242 U.S. 470, 486–88 (1917)—again addressed the meaning of prostitution. There, this Court rejected the defendant's argument that the phrase "immoral purpose" in the Mann Act should have a different definition than it did in the 1907 legislation. *Id.* at 489–91. The Court reiterated that, in *Bitty*, it had defined "immoral purpose" in light of the fact that "prostitution" was defined as "'indiscriminate intercourse.'" *Id.* at

486–87 (quoting *Bitty*, 208 U.S. at 401). The Court thereafter noted that it had defined "immoral purpose . . . prior to the enactment of" the Mann Act, and thus the Court had to "presume[]" that its definition had "been known to Congress when it enacted the law here involved." *Id.* at 488; *see also Suslak v. United States*, 213 F. 913, 917 (9th Cir. 1914) (approving a jury instruction in a Mann Act case that defined prostitution as requiring "indiscriminate sexual intercourse with men"). Thus, *Caminetti* affirmed that the definition of "immoral purpose" and "prostitution" in the Mann Act were the same definitions that this Court had provided for those words in the 1907 statute, in light of Congress's failure to reject those definitions.

Accordingly, following *Bitty* and *Caminetti*, the district court erred by refusing to limit the definition of prostitution to involving intercourse.

B. The court of appeals erred when it held that "prostitution" does not have to involve intercourse.

The court of appeals in this case agreed that this Court had defined "'prostitution in [the Mann Act] narrowly"—that is, as just involving intercourse. Pet. App. 41a (citing *Caminetti*, 242 U.S. at 487)). Nevertheless, the court of appeals affirmed Petitioner's conviction by holding that Congress changed the definition of prostitution in 1986, when it amended the Mann Act. The court's decision, however, takes out of context a single line of legislative history to reach that conclusion.

As relevant background, Congress made two primary changes to the Mann Act in 1986: it eliminated the gendered language found in its various provisions and it eliminated dated terminology. As the legislative history explains:

> The Mann Act (sections 2421–2422, and section 2424 of title 18, U.S.C.) now applies only to offenses involving the transportation of females. The problem of the sexual exploitation of young males is equally as serious. This section rewrites these sections to make them gender neutral. The section also deletes obsolete terminology (e.g. 'compel her to give herself up to the practice of prostitution, or to give herself up to debauchery,').

H.R. Rep. No. 99-910, at 7 (1986). As a result of these changes, the relevant portion of the Mann Act now makes it a crime to "knowingly persuade[]s, induces, entice[], or coerce[] any individual to travel in interstate . . . commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense[.]" 18 U.S.C. § 2422(a). Nowhere in the text of the Act, or in its legislative history, did Congress mention changing the definition of prostitution or offer up a new definition of prostitution.

Accordingly, following the 1986 amendment to the Mann Act, the word at issue—"prostitution"—remained unchanged. And, of course, when Congress re-enacts a provision with a settled meaning, courts presume Congress carried over that settled meaning. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85–86 (2006); *Ankenbrandt v. Richards*, 504 U.S. 689, 700–01 (1992); *Cottage Sav. Ass'n v. C.I.R.*, 499 U.S. 554, 562 (1991); *Sohappy v. Hodel*, 911 F.2d 1312, 1318 (9th Cir. 1990); *NLRB v. Gullet Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 146 (1920). This Court, in fact, has applied this exact principle to the Mann Act. *Caminetti,* 242 U.S. at 488. This principle flows from the fact that "[a] party contending that legislative action change settled law has the burden of showing that the legislature intended such a change." *Green v. Bock*

Laundry Mach. Co., 490 U.S. 504, 521 (1989). As a result, because Congress re-enacted § 2422 by using the identical term "prostitution," Congress presumptively intended the same interpretation of the word to carry over.

The court of appeals disagreed with this analysis. It did so by pointing to a single statement in the legislative history: that the 1986 amendment was intended "'to eliminate its anachronistic features[.]'" Pet. App. 41a (quoting H.R. Rep. No. 99-910, at 1, 8 (1986)). According to the court of appeals, this reference meant that Congress intended courts to overrule this Court's precedent on the meaning of "prostitution," to then determine the contemporary meaning of prostitution, and then use that definition. Pet. App. 40a–41a. And, according to the court of appeals, "prostitution" had a broader definition by 1986 that included "happy ending" massages.

This analysis is flawed. First, the court of appeals has taken the legislative history out of context. In context, the legislative history's reference to "elminat[ing] anachronistic features" has *nothing* to do with prostitution's definition. Instead, this was a reference to "*delet[ing]* obsolete terminology (e.g. 'compel her to give herself up to the practice of prostitution, or to give herself up to debauchery,')." H.R. Rep. No. 99-910, at 7 (1986) (emphasis added). Congress did not delete (or eliminate) the word prostitution, and thus the referenced legislative history had nothing to do with altering the term's meaning.

Apart from that, if Congress intended to overrule decades of case law on the meaning of prostitution, it surely would have done so by providing its preferred

definition of "prostitution," rather than expecting a court to grab onto a single sentence in the legislative history and then create a new definition on its own. "Congress does not 'hide elephants in mouseholes.'" *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071–72 (2018). Indeed, this is just not how statutory interpretation is supposed to work. If it did, the meaning of statutes would constantly be up for grabs.

Even assuming that Congress intended to courts to use a more contemporary definition use of prostitution when it reenacted the Mann Act, the court of appeal's analysis is still flawed. There is little indication that "prostitution" by 1986 included giving happy-ending massages for money. The court cited to two different authorities to establish that the meaning of prostitution had changed by 1986. First, the court cited to the 1979 edition of Black's Law Dictionary, which defined prostitution as involving "any unlawful sexual act." Pet. App. 37a. But that just raises the question: does an unlawful sexual act include a happy-ending massage? *Congress* doesn't think so, since (as explained in the next section) it defined "sexual act" for purposes of the federal sexual abuse of statutes in 1986 to just include oral, anal, and vaginal sex. *See* 18 U.S.C. § 2246(2). The court also cited to *Greene v. Immigration & Naturalization Service*, 313 F.2d 148, 152 n.5 (9th Cir. 1963), which noted in a footnote in dicta that the Oxford English Dictionary had defined prostitution as "[t]he offering of the body to indiscriminate lewdness for hire[.]" The court, however, did not explain how it knew that vague phrase applied to giving happy-ending massage.

On the other hand, there are contrary dictionaries contemporaneous with the ones the court of appeals cited. The 1966 version of the Random House Dictionary of the English Language defined prostitution as "the act or practice of engaging in sexual intercourse for money." And Webster's Ninth New Collegiate Dictionary (1990) defined prostitution as "the act or practice of indulging in promiscuous sexual relations esp. for money" and then defined sexual relations as "coitus."

Additionally, other provisions of federal law are inconsistent with the court's claim. Under 22 C.F.R. § 40.24, federal law to this day defines prostitution in immigration law as "engaging in promiscuous sexual intercourse for hire." *See also Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th Cir. 2006) (holding that "the mere touching of the intimate parts of another" does not qualify as "prostitution" under federal law). Moreover, the military did not broaden its definition of prostitution to include acts beyond intercourse until 2016. *See* Manual for Courts-Martial, United States, A23-25 (2016). And, at that time, it *still* did not broaden the definition to cover happy-ending massages; rather, it changed the definition to engaging in a "sexual act," as defined in 18 U.S.C. § 2246 (2)—that is, oral, anal, or vaginal sex. Manual for Courts-Martial, United States, IV-67, IV-141 (2016).

In short, the decision of the court of appeals is badly flawed. There is no meaningful basis to conclude that Congress wanted courts to use a more contemporary definition of prostitution, and there is no meaningful basis to conclude that the contemporary definition of "prostitution" by 1986 did not just include intercourse.

II. This Court should grant review because the lower court decision concerning the sex-trafficking statute defines the phrase "sex act" by arbitrarily relying on the dictionaries with the broadest definition of that phrase.

In 2000, Congress enacted 18 U.S.C. § 1591 to combat sex trafficking. The statute provides (in part) that "whoever knowingly":

> recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . ., or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished.

18 U.S.C. § 1591(a)(1). Thus, to prove a defendant violated § 1591 in a case not involving a minor, the government must prove that the defendant *knew* (or recklessly disregarded) that force, threats, coercion, or fraud "will be used to cause the person to engage in a *commercial sex act*[.]" *Id.* § 1591(a) (emphasis added). The statute defines "commercial sex act" as "any *sex act*, on account of which anything of value is given to or received by any person." *Id.* § 1591(e)(3) (emphasis added). The statute does not define "sex act." Congress punishes a violation of the statute harshly: violating § 1591 generally triggers a 15-year mandatory-minimum penalty. *Id.* § 1591(b).

In this case, the government convicted Petitioner of two counts of sex trafficking via fraud, where the *only* alleged "sex act" at issue was a so-called "happy-ending massage." On appeal, Petitioner raised a sufficiency-of-the-evidence and jury-instruction challenge to his sex-trafficking convictions, challenging whether a happy-

ending massage constituted a "sex act" for purposes of the sex-trafficking statute. The court of appeals affirmed, but only after misapplying fundamental principles of statutory interpretation.

A. The meaning of a statute should not turn on which dictionaries a court of appeals arbitrarily decides to rely on, especially when the statute triggers a 15-year mandatory-minimum penalty.

In affirming, the court of appeals first held that it should give the phrase "sex act" its "'ordinary' and 'natural' meaning[.]" Pet. App. 37a. To do that, the court of appeals cited to two dictionaries: the Merriam Webster's Collegiate Dictionary (11th ed. 2003), which defines "sex act" as an "act performed with another for sexual gratification," and the somewhat-obscure Oxford Dictionary of English (2010), which defines "sex act" as a "sexual act" and then defined "sexual" as "relating to the instincts, physiological process, and activities connected with physical attraction or intimate physical contact between individuals." (The Oxford Dictionary of English is not the same as, and should not be confused with, the Oxford English Dictionary, a dictionary that this Court recently labeled "one of the most authoritative on the English language." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 569 (2012).)

But, as Petitioner pointed out, many contrary dictionaries more narrowly define "sex act" as "sexual intercourse." Indeed, it should come as no surprise that dictionaries define the phrase differently: people have divergent views about what constitutes sex. For example, the Oxford English Dictionary—*the very dictionary the court of appeals relied on to define prostitution*—defines "sex act" as "sexual

intercourse." Shorter Oxford English Dictionary (6th ed). The Random House Dictionary of the English Language similarly defines "sex act" as "sexual intercourse." The Random House Dictionary of the English Language (2d ed). Notably, this Court has *repeatedly* relied on these two dictionaries to define terms. *See, e.g., Encino Motorcars, LLC v. Navarro*, 128 S. Ct. 1134, 1140 (2018); *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017); *Ross v. Blake*, 136 S. Ct. 1850, 1858–59 (2016). Other dictionaries—including dictionary.com—also define "sex act" as requiring intercourse.

The court of appeals, however, just ignored contrary dictionaries in defining "sex act." But there is no principled, legal reason to select the dictionaries the court of appeals relied on over the dictionaries Petitioner relied on. It is especially inexplicable that the court of appeals relied on the Oxford English Dictionary to affirm Petitioner's Mann Act conviction and then ignored that very dictionary for purposes of the sex-trafficking conviction. In any event, when dictionaries disagree—when there are "alternative dictionary definitions"—this Court has said that this means "that the statute is open to interpretation." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). In other words, the fact that the dictionaries disagree indicates that the contested term has no agreed-upon "ordinary and natural" meaning. In that situation, the court should resolve the legal dispute by setting aside the dictionaries and looking to other principles of statutory construction. Petitioner supplied those other principles.

B. When trying to figure out what Congress meant when it used the ambiguous term "sex act," the court of appeals should have looked at how Congress defined the phase "sexual act" in another closely linked statute.

Because dictionary definitions do not resolve the question, Petitioner contended that the court of appeals should look to a similar term Congress had used in a similar statute. This is because courts should "generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter." *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) (en banc). While Congress did not define "sex act," it had defined "sexual act" for purposes of the sexual-abuse statutes in 18 U.S.C. § 2241 *et. al.* With respect to those statutes, Congress defined "sexual act" as (essentially) oral, anal, and vaginal sex. 18 U.S.C. § 2246(2). Thus, sex act in the sex-trafficking statutes should be defined similarly. And even if the Congress did not want sexual act and sex act to have the *same* definition, it would not make sense for Congress to want a *broader* definition of "sex act" than "sexual act." Sexual, by definition, is broader than sex. That strongly suggested that Congress believed sex act included just sexual intercourse.

Nonetheless, the court of appeals refused to look to the sexual-abuse statutes for guidance. The court of appeals contended that that the sexual-abuse statutes and the sex-trafficking statute are not similar *enough* because the sex-trafficking statute strictly focuses on the "trafficker's conduct," whereas the sexual-abuse statutes do not. Pet. App. 38a. But, of course, no two statutes will be identical. It's all a matter

of degree. And the sexual-abuse statutes and the sex-trafficking statute are *really* similar—they are among the few federal statutes to deal with sex offenses.

The court of appeals did not need to take Petitioner's word that Congress would think these statutes were related. Congress itself recognized the interrelatedness of these statutes—a fact the court of appeals opinion ignores entirely. Congress used the state-of-mind requirement found in 18 U.S.C. § 2241(d), a sexual-abuse statute, as "the template for § 1591(c)," the sex-trafficking statute. *United States v. Robinson*, 702 F.3d 22, 33–34 (2d Cir. 2012). And Congress repeatedly grouped the sex-trafficking statute with the sexual-abuse statutes in Title 18 of the U.S. Code, including for purposes of administrative subpoenas (§ 3486(a)(1)(D)(i)); release pending trial (§ 3142(c)(1)(B)); supervised release (§ 3583(k)); and sentencing classification (§ 3559(e)(2)(A)).

This all underscores that Congress believes these statutes are of the same kind. Thus, settled principles of statutory interpretation indicate that Congress intended that courts define "sex act" in the sex-trafficking statute in light of the definition of "sexual act" in the sexual-abuse statutes. At the least, looking to a definition of the similar phrase "sexual act" is a more sensible way to figure out what Congress meant by "sex act" than arbitrarily relying on two dictionaries and ignoring contrary dictionaries.

C. Congress's use of the word "any" to modify "sex act" does not mean it intended to define "sex act" as broadly as possible, especially when the broadest definition would categorize kissing as a "sex act" for purposes of the sex-trafficking statute.

Having ignored competing dictionary definitions and a similar term in a similar statute, the court of appeals sought support for its broad reading of the term "sex act" by pointing to the fact that the term had been modified with the word "any." Pet. App. 37a. The court of appeals stated that the term "any" can suggest a broad definition. *Id.* (citing *Boyle v. United States*, 556 U.S. 938, 944 (2009)).

But the phrase "any" doesn't *always* suggest a broad definition. *See Ali v. Federal Bureau of Prisons*, 662 U.S. 214, 244 (2008) (Breyer, J, dissenting) (listing numerous Supreme Court cases in which the word "any" was limited because of "context"). And, here, it seems implausible Congress wanted the broad definition the court of appeals suggests. According to the court of appeals, something like kissing could be deemed a "sex act," since it can "'relat[e] to the instincts, physiological process, and activities connected with physical attraction[.]'" *See* Pet. App. 37a (quoting Oxford Dictionary of English (2010)). There is no credible argument that Congress intended that "sex act" in a sex-trafficking statute include kissing. And, in any event, Congress's definition of "sexual act" indicates that it did not intend for sex act to have its broadest possible definition.

D. At a minimum, the court of appeals should have applied the rule of lenity.

In the end, the court of appeals faced a phrase that Congress used that has no plain, natural meaning. Another congressionally enacted statute indicates that the

phrase should have a narrow meaning. And even if the word "any" could suggest a broader reading, this is *exactly* the sort of situation in which the rule of lenity should apply. The rule of lenity "instruct[s] that that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of' the defendant. *Cleveland v. United States*, 531 U.S. 12, 25 (2000). And that's the only principled way to resolve the meaning of the term here, where Congress failed to define a notoriously ambiguous phrase in a statute carrying a 15-year mandatory-minimum penalty.

The court of appeals, however, refused to apply the rule. Instead, the court of appeals cherry-picked inconclusive dictionary definitions. That's not consistent with any basic notion of fair notice—especially when nearly two decades of someone's liberty is at stake.

III. This Court should grant review because this petition raises important federal questions that were resolved by the court of appeals in a non-principled way.

This Court should grant review in this case. The issues this petition raises—the meaning of statutory terms in federal criminal statutes that are not infrequently relied on—are important. Moreover, the way in which the court of appeals resolved these issues makes this case particularly worthy of this Court's attention. In defining the term "prostitution" for purposes of the Mann Act, the court of appeals overruled nearly a century of precedent from this Court by relying on a single vague piece of legislative history. And in defining the phrase "sex act" for purposes of the sex-trafficking statute, the court of appeals arbitrarily relied on two dictionaries to define

a term and just ignored contrary dictionaries, including one dictionary that the court of appeals had just relied on to define the term "prostitution."

It is true that the court of appeals issued an unpublished decision in this case, a factor that would normally weigh heavily in favor of not granting review. But the underlying issues would clearly be worthy of review if the lower court had issued a published decision. A lower court should not be able to issue a decision contrary to basic principles of statutory construction and then insulate that decision from further review by the en banc court or this Court by making the decision non-precedential. *Cf. Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J. dissenting from the denial of certiorari) (criticizing the court of appeals for issuing an unpublished, non-precedential decision in a case resolving an important issue). This case should have been published: at the least, a decision that overrules a century of precedent from this Court easily meets the requirements for publication. *See* Ninth Cir. R. 36-2 (stating that a disposition "shall" be published if it "[e]stablishes, alters, modifies or clarifies a rule of federal law"). Indeed, Petitioner in his petition for rehearing expressly asked the lower court to publish its decision, and it refused. Thus, the fact that the court of appeals "inexplicabl[y]" issued an unpublished decision should not deter this Court from granting review. *See Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (criticizing the court of appeals for issuing a short, unpublished decision on an otherwise important issue).

IV. At the least, this Court should grant, vacate, and remand this case in light of this Court's recent decision in *Helsinn Healthcare S.A.*

Even if this Court does not wish to grant review and have full briefing on the merits, this Court should grant this petition, vacate the lower court decision, and remand this case for the court of appeals to reconsider its decision in light of this Court's recent decision in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc*, No. 17-1229, Slip Op. (Jan. 22, 2019). That case, issued after the court of appeals denied the petition for rehearing below, is irreconcilable with the lower court's analysis of the Mann Act. The court of appeals should therefore have the chance to reconsider its decision in light of *Helsinn Healthcare*.

In *Helsinn Healthcare*, this Court addressed the Leahy-Smith Invents Act, which prevent a person from receiving a patent on an invention that was "'in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention.'" Slip Op. at 1 (quoting 35 U.S.C. § 102(a)(1)). At issue was what Congress meant by the phrase "on sale." *Id.* In a prior version of the Act, this Court had defined "on sale" as when the patent was "'the subject of a commercial offer for sale' and 'ready for patenting.'" *Id.* (quoting *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1998)). Congress had amended that earlier version of the Act, however, to include the "'or otherwise available to the public'" language found in the current version of the Act. *Id.* at 3 (quoting 35 U.S.C. § 102(a)(1)). This Court thus addressed whether the amendment to the statute meant its earlier definition of "on sale" had been superseded.

In holding that Congress had not altered the Court's definition of "on sale," this Court observed that, while Congress had changed the statute's text, the phrase at issue—"on sale"—had "retained the exact language used in its predecessor statute[.]" Slip Op. at 7. Thus, this Court held that it would "presume that when Congress reenacted the same language in the [Act], it adopted the earlier judicial construction of that phrase." Slip Op. at 7. The addition of the "otherwise" statutory language was "simply not enough of a change for [this Court] to conclude that Congress intended to alter the meaning of the reenacted term 'on sale.'" *Id.* at 8. Accordingly, this Court declined to depart from the "well-settled meaning" of the phrase. *Id.*

This Court's analysis in *Helsinn Healthcare* is irreconcilable with the lower court's analysis of the meaning of the phrase "prostitution" in the Mann Act. Much like the phrase "on sale" had a settled definition by the time Congress amended the Leahy-Smith Invents Act, the phrase "prostitution" had a settled definition by the time Congress amended the Mann Act. Thus, when Congress re-enacted the Mann Act with the key term "prostitution" left unaltered, the court of appeals should have presumed that Congress did not intend to alter this Court's definition. *See* Slip. Op. at 7–8. But, as explained above, that's not what the court of appeals did. Instead, it relied on a vague piece of legislative history to conclude that Congress had intended a new definition. *See* Pet. App. 40a–41a. If alterations to the words around the phrase "on sale" is insufficient to indicate a desire to alter its definition, a single vague sentence in *legislative history* cannot be enough to indicate a desire to alter the definition of "prostitution."

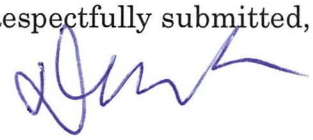
Accordingly, the court of appeals should have the chance to reconsider its decision in light of *Helsinn Healthcare*. This Court should therefore GVR this case.

CONCLUSION

This Court should grant this petition for a writ of certiorari or summarily reverse.

January 23, 2019

Respectfully submitted,



Doug Keller

Appendix

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

USA, Plaintiff, vs. SERGEYI BAZAR(1), Defendant	Case No.: 15CR0499-BEN JURY INSTRUCTIONS

Court's Instruction No. ___

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

Court's Instruction No. ___

The indictment is not evidence. The defendant has pleaded not guilty to the charges. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charges beyond a reasonable doubt.

Court's Instruction No. ___

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

Court's Instruction No. ___

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the United States prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Court's Instruction No. ___

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits received in evidence; and

(3) any facts to which the parties have agreed.

Court's Instruction No. ___

In reaching your verdict you may consider only the testimony and exhibits received in evidence. The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, [will say in their] closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence. In addition, some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence in a limited way, you must do so.

3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Court's Instruction No. ___

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Court's Instruction No. ___

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the witness's opportunity and ability to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Court's Instruction No. ___

You are here only to determine whether the defendant is guilty or not guilty of the charges in the indictment. The defendant is not on trial for any conduct or offense not charged in the indictment.

Court's Instruction No. ___

A separate crime is charged against the defendant in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Court's Instruction No. ___

The indictment charges that the offense alleged in Counts 1-4 were committed "on or about" a certain date range.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in Counts 1-4 of the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged

Court's Instruction No. ___

You have heard testimony that the defendant made a statement. It is for you to decide (1) whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it.

Court's Instruction No. ___

You have heard evidence that the defendant committed other acts not charged here. You may consider this evidence only for its bearing, if any, on the question of the defendant's intent, knowledge, absence of mistake, absence of accident and for no other purpose. You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.

Court's Instruction No. ___

You have heard testimony from Irina M., Aidana S. [redacted], witnesses who received benefits from the government in connection with this case;

For this reason, in evaluating the testimony of each of these witnesses, you should consider the extent to which or whether her testimony may have been influenced by this factor. In addition, you should examine the testimony of these witnesses with greater caution than that of other witnesses.

Court's Instruction No. ___

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

(2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

(3) any inconsistent identifications made by the eyewitness;

(4) the witness's familiarity with the subject identified;

(5) the strength of earlier and later identifications;

(6) lapses of time between the event and the identification; and

(7) the totality of circumstances surrounding the eyewitness's identification.

Court's Instruction No. ___

You have heard testimony from persons who, because of education or experience, were permitted to state opinions and the reasons for their opinions.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

Court's Instruction No. ___

The defendant is charged in Counts 1-2 with Sex Trafficking by Force, Fraud or Coercion, in violation of Title 18 of the United States Code, Sections 1591(a) and (b). In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: On or about the dates alleged in the indictment, the defendant knowingly recruited, enticed, harbored, transported, provided, obtained or maintained a person, to wit: I.M. or A.S.;

Second: the defendant knowing, or in reckless disregard of the fact that means of force, threats of force, fraud, coercion or any combination of such means would be used to cause I.M. or A.S. to engage in commercial sex acts, and

Third: the defendant's actions were in or affecting interstate or foreign commerce.

Court's Instruction No. ___

The first element of the crime of sex trafficking by force, fraud or coercion requires that the government prove beyond a reasonable doubt that the defendant knowingly recruited, enticed, harbored, transported, provided, obtained or maintained a person.

In considering whether the defendant did any of these things, I instruct you to use the ordinary, everyday definitions of these terms. "Recruit" means to secure the services of a person. "Entice" means to attract by arousing hope or desire. "Harbor" means to give or afford shelter or refuge to a person. "Transport" means to transfer or convey from one place to another. "Provide" means to supply or make available. "Obtain" means to gain, acquire, or attain. "Maintain" means to cause or enable a condition to continue or keep in a certain state.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Court's Instruction No. ___

The second element of the crime of sex trafficking requires that the government prove beyond a reasonable doubt that the defendant knew, or was in reckless disregard, of the fact means of force, threats of force, fraud, or coercion would be used against the person to cause them to engage in a commercial sex act.

The term "coercion" means: (1) threats of serious harm to, or physical restraint against the person; (2) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to, or physical restraint against, any person, or (3) the abuse or threatened abuse of law or the legal process.

The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all of the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

Likewise, "force" means "force capable of causing physical pain or injury to another person." "Fraud" means "any deliberate act of deception, trickery or misrepresentation."

Court's Instruction No. ___

The third element of sex trafficking requires that the government prove beyond a reasonable doubt that the recruitment, enticement, transportation, obtaining or maintaining a person was in or affecting interstate or foreign commerce.

An act or transaction that crosses state lines is "in" interstate commerce. An act or transaction that is economic in nature and affects the flow of money in the stream of commerce to any degree, however minimal, "affects" interstate commerce. The United States has offered proof that the sex trafficking crimes involved the use of cellular telephones and the internet and national brand hotels. If you unanimously agree that any one or all of those facts have been proven beyond a reasonable doubt, then as a matter of law the crime has affected interstate commerce.

It is not necessary for the government to prove that the defendant knew or intended that his actions would affect interstate or foreign commerce.

Court's Instruction No. ___

The defendant is charged in Counts 3-4 the indictment with persuading, inducing, enticing or coercing travel to engage in prostitution in violation of Section 2422 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt:

That, the defendant knowingly persuaded, induced, enticed, or coerced an individual to travel in interstate commerce to engage in prostitution.

The word "induce" means "'to lead on to some action, prevail on as to provide 'motive or incentive.'" "Entice" means "to attract by offering hope of reward or pleasure." "Persuade" means "to cause to do something, especially by reasoning or urging, to convince." "Coerce" means "to achieve by force or threats."

To travel in interstate commerce, means to travel from one state to another.

Court's Instruction No. ___

"Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

Court's Instruction No. ___

The fact that women desired to travel to California does not preclude a finding that defendant persuaded, induced, enticed or coerced them to do so. The law does not require defendant's acts to be the only reason to travel to California, but merely requires that he have convinced or influenced them to actually undergo the journey, or made the possibility more appealing. It is the defendant's intent that forms the basis for his criminal liability, not the victims.

Court's Instruction No. ___

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Court's Instruction No. ___

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

The law requires these restrictions to ensure the parties have a fair trial based on the same evidence that each party has had an opportunity to address. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

Court's Instruction No. ___

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Court's Instruction No. ___

The punishment provided by law for this crime is for the court to decide. You may not consider punishment in deciding whether the government has proved its case against the defendant beyond a reasonable doubt.

Court's Instruction No. ___

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the Court that you are ready to return to the courtroom.

Court's Instruction No. ___

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will respond to the jury concerning the case only in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, on any question submitted to you, including the question of the guilt of the defendant, until after you have reached a unanimous verdict or have been discharged.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SERGEYI BAZAR
AKA Sergio
Defendant.

Case No.: 15-CR-0499-BEN

VERDICT

As to Count 1 of the Indictment:

We, the jury in the above entitled cause, find the defendant Sergeyi Bazar, GUILTY (not guilty/guilty), of Sex Trafficking by Force Fraud or Coercion of I.M., in violation of Title 18 United States Code, Section 1591(a).

If you find the defendant guilty on Count 1, answer the following questions below:

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that means of force would be used to cause I.M. to engage in a commercial sex act?

____YES X NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that threats of force would be used to cause I.M. to engage in a commercial sex act?

_____YES _X_NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that fraud would be used to cause I.M. to engage in a commercial sex act?

_X_YES _____NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that coercion would be used to cause I.M. to engage in a commercial sex act?

_____YES _X_NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that any combination of such means of force, threats of force, fraud or coercion would be used to cause I.M. to engage in a commercial sex act?

_____YES _X_NO

As to Count 2 of the Indictment:

We, the jury in the above entitled cause, find the defendant Sergeyi Bazar, GUILTY (not guilty/guilty), of Sex Trafficking by Force Fraud or Coercion of A.S., in violation of Title 18 United States Code, Section 1591(a).

If you find the defendant guilty on Count 2, answer the following questions below:

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that means of force would be used to cause A.S. to engage in a commercial sex act?

_____YES X NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that threats of force would be used to cause A.S. to engage in a commercial sex act?

_____YES X NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that fraud would be used to cause A.S. to engage in a commercial sex act?

X YES ____NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that coercion would be used to cause A.S. to engage in a commercial sex act?

____YES X NO

Does the jury unanimously find beyond a reasonable doubt that the defendant knew or was in reckless disregard that any combination of such means of force, threats of force, fraud or coercion would be used to cause A.S. to engage in a commercial sex act?

____YES ___X___NO

As to Count 3 of the Indictment:

We, the jury in the above entitled cause, find the defendant Sergeyi Bazar, GUILTY (not guilty/guilty), of Coercion and Enticement of I.M., in violation of Title 18 United States Code, Section 2422(a).

As to Count 4 of the Indictment:

We, the jury in the above entitled cause, find the defendant Sergeyi Bazar, NOT GUILTY (not guilty/guilty), of Coercion and Enticement of V.K. in violation of Title 18 United States Code, Section 2422(a).

DATED: 11/6, 2015
NOVEMBER 6

FOREPERSON OF THE JURY

NOT FOR PUBLICATION

FILED

AUG 23 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGEYI BAZAR, AKA Sergio Bazar, Defendant-Appellant.	No. 16-50180 D.C. No. 3:15-cr-00499-BEN-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted November 6, 2017
Pasadena, California

Before: GILMAN,** WARDLAW, and BERZON,[1] Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

[1] This case was submitted to a panel that included Judge Stephen R. Reinhardt. Following Judge Reinhardt's death, Judge Berzon was drawn by lot to replace him. Ninth Circuit General Order 3.2.h. Judge Berzon has read the briefs, reviewed the record, and listened to oral argument.

Sergeyi Bazar appeals his convictions for two counts of sex trafficking by fraud, in violation of 18 U.S.C. § 1591(a), and one count of inducement to travel in commerce for prostitution, in violation of 18 U.S.C. § 2422(a), arising from his massage business in San Diego that offered "happy ending" massages.[2] We review de novo the denial of Bazar's Fed. R. Crim. Pro. 29 motion for judgment of acquittal, as well as whether the jury instructions omitted or misstated an element of a crime. *See United States v. Niebla-Torres*, 847 F.3d 1049, 1054 (9th Cir. 2017); *United States v. Aldana*, 878 F.3d 877, 880 (9th Cir. 2017); *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016). With regard to challenges to sufficiency of the evidence, "We ask whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Niebla-Torres*, 847 F.3d at 1054 (internal quotation marks omitted). We review for abuse of discretion the district court's overruling of Bazar's objection to alleged prosecutorial misconduct. *See United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011). We affirm.

1. The district court correctly instructed the jury and properly denied Bazar's Rule 29 motion on his convictions for sex trafficking by fraud under 18

[2] The parties stipulate that the term "happy ending massage" means "the manual stimulation of an adult male's penis until ejaculation."

U.S.C. § 1591(a). Section 1591(a) criminalizes, among other things, the recruiting of an individual knowing that fraud will be used to cause that person to engage in a "commercial sex act." "Commercial sex act" is defined in section 1591(e)(3) 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).

Bazar argues that the term "commercial sex act" is limited to sexual intercourse for money. But the "ordinary" and "natural" meaning of "any sex act" includes happy-ending massages. *See Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015) (noting that the Supreme Court normally construes undefined words in a statute in accord with their ordinary and natural meaning, which can often be discerned by reference to a dictionary); *Sex Act & Sexual*, Oxford Dictionary of English (2010) (defining "sex act" as "a sexual act" and "sexual" as "relating to the instincts, physiological processes, and activities connected with physical attraction or intimate physical contact between individuals"); *Sex Act*, Merriam Webster's Collegiate Dictionary (11th ed. 2003) (defining "sex act" as "an act performed with another for sexual gratification"); *see also Boyle v. United States*, 556 U.S. 938, 944 (2009) (holding in the context of the Racketeer Influenced and Corrupt Organizations Act that "[t]he term 'any' ensures that the definition has a wide reach."). Accordingly, the district court's instruction that simply reproduced the statutory definition in section 1591(e)(3) was proper.

See United States v. Vazquez-Hernandez, 849 F.3d 1219, 1225 n.3 (9th Cir. 2017) (holding that district courts' "failure to define a term that was within the comprehension of the average juror" is not prejudicial).

We reject Bazar's argument that we should import the narrower definition of "sexual act" from 18 U.S.C. § 2246(2) into section 1591(a). Congress expressly limited the definitions in section 2246 to its chapter, which does not include section 1591, and chose not to cross reference section 2246 in section 1591. Furthermore, the "goals and objectives" of the statutes are "not completely similar." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). Section 2246's definitions apply to a chapter criminalizing sexual abuse, which is punished based on the degree of reprehensibility of the sexual abuse and the type of harm it caused to the victim. *See* 18 U.S.C. § 2241–44. Accordingly, section 2246 lays out two gradations of abusive sexual conduct, the more serious of which is a "sexual act." *Compare id.* § 2246(2) (defining "sexual act") *with id.* § 2246(3) (defining "sexual contact"). In contrast, section 1591 criminalizes sex trafficking, which is punished based on the trafficker's conduct. Accordingly, section 1591 specifies numerous reprehensible means of trafficking, *see* 18 U.S.C. § 1591(a), and a trafficker can be convicted under section 1591 even if his victim did not perform a single commercial sex act, *see, e.g.*, *United States v. Hornbuckle*, 784 F.3d 549, 554 (9th Cir. 2015).

2. The district court did not err in rejecting Bazar's argument that insufficient evidence supported his sex-trafficking-by-fraud convictions. To sustain a conviction under section 1591(a), the government had to prove that Bazar was "aware of an established modus operandi" of fraud that would cause his victims to engage in commercial sex acts. *See United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010) ("When an act of Congress requires knowledge of a future action, it does not require knowledge in the sense of certainty as to a future act."). Viewing the evidence most favorably to the prosecution, *Niebla-Torres*, 847 F.3d at 1054, Bazar enticed his victims with promises of lucrative employment and told them that they could choose whether and when to perform happy-ending massages. But once they were under his control, he took all their earnings and told them that they had to perform happy-ending massages exclusively. Further, Bazar provided his victims with the same, pre-printed instruction sheet dictating their answers to potential clients, and he told one victim that he would "take all the money" and "break or ruin [her] life" if she left, and that she was "not the first one" and was "not going to be the last one" because he had had "many like" her. Considering this evidence "in the light most favorable to the prosecution," it was "sufficient to allow any rational trier of fact to find" beyond a reasonable doubt that Bazar knowingly had an established modus operandi of enticing women with promises of lucrative employment, in which the women could decide whether to perform

happy-ending massages, and then misappropriating their earnings while forcing them to perform happy-ending massages and other sexual acts. *See United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018) (quotation marks omitted).

3. The district court correctly instructed the jury and properly denied Bazar's Rule 29 motion on his conviction for violating 18 U.S.C. § 2422(a), which criminalizes knowingly persuading, inducing, enticing, or coercing "any individual" to travel in commerce "to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." Bazar argues that "prostitution" is limited to sexual intercourse for money. But as of 1986, when Congress enacted the current version of section 2422, "prostitution" encompassed performing happy-ending massages for money. *See, e.g.*, *Greene v. Immigration & Naturalization Serv.*, 313 F.2d 148, 152 n.5 (9th Cir. 1963) (defining prostitution as "offering of the body to indiscriminate lewdness for hire"); *Prostitution*, Black's Law Dictionary (5th ed. 1979) (defining "prostitution" as including "offering or agreeing to perform . . . any unlawful sexual act for hire"). Accordingly, the district court's instruction that "prostitution" is "knowingly engaging in/or offering to engage in a sexual act in exchange for money or other valuable consideration" was proper.

Pre-1986 cases interpreting "prostitution" in section 2422 narrowly, *see, e.g.*, *Caminetti v. United States*, 242 U.S. 470, 487 (1917), do not control because,

in 1986, Congress struck out the entirety of section 2422 and rewrote it "in modern form" "to eliminate its anachronistic features." § 5(b); H.R. Rep. No. 99-910, at 1, 8 (1986); Child Sexual Abuse and Pornography Act of 1986, H.R. 5560, 99th Cong., § 5(b) (1986); *see United States v. Reza-Ramos*, 816 F.3d 1110, 1129 (9th Cir. 2016) (indicating that statutory terms are defined by their meaning at the time of reenactment).

4. The district court did not abuse its discretion by concluding that the prosecutor did not engage in misconduct by arguing in rebuttal that defense counsel was "blaming the victim." The prosecutor's use of the term "victim" merely summarized the government's legitimate theory of the case, following a trial that focused heavily on whether or not women who worked for Bazar were victims of a fraudulent scheme. The prosecutor's reference to what the jury might expect from defense counsel generally simply highlighted how defense counsel's closing argument in the present case—that the women were willing and fully informed participants, not victims—aligned with the rest of the trial, and was not done to denigrate defense counsel. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (We do "not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."). Finally, a "lawyer is entitled to characterize an argument with

an epithet as well as a rebuttal," *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998). It was within the district court's discretion to determine that any inflammatory impact was blunted because the jury had already received instructions that, while the prosecutor labeled the women "victims," they would have to decide "whether they're victims or not victims" based on the evidence.

AFFIRMED.

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SERGEYI BAZAR, AKA Sergio Bazar, Defendant-Appellant.	No. 16-50180 D.C. No. 3:15-cr-00499-BEN-1 Southern District of California, San Diego ORDER

Before: GILMAN,* WARDLAW, and BERZON, Circuit Judges.

The panel has voted unanimously to deny the petition for panel rehearing. Judges Wardlaw and Berzon vote to deny the petition for rehearing en banc, and Judge Gilman so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are **DENIED**.

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

Effective: April 11, 2018
Currentness

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means--

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

CREDIT(S)

(Added Pub.L. 106-386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended Pub.L. 108-21, Title I, § 103(a)(3), Apr. 30, 2003, 117 Stat. 653; Pub.L. 108-193, § 5(a), Dec. 19, 2003, 117 Stat. 2879; Pub.L. 109-248, Title II, § 208, July 27, 2006, 120 Stat. 615; Pub.L. 110-457, Title II, § 222(b)(5), Dec. 23, 2008, 122 Stat. 5069; Pub.L. 114-22, Title I, §§ 108(a), 118(b), May 29, 2015, 129 Stat. 238, 247; Pub.L. 115-164, § 5, Apr. 11, 2018, 132 Stat. 1255.)

18 U.S.C.A. § 1591, 18 USCA § 1591

Current through P.L. 115-281. Also includes P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333. Title 26 current through P.L. 115-333.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 109A. Sexual Abuse (Refs & Annos)

18 U.S.C.A. § 2246

§ 2246. Definitions for chapter

Effective: October 30, 1998
Currentness

As used in this chapter--

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means--

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

(6) the term "State" means a State of the United States, the District of Columbia, and any commonwealth, possession, or territory of the United States.

CREDIT(S)

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622, § 2245, renumbered § 2246 and amended Pub.L. 103-322, Title IV, § 40502, Title VI, § 60010(a)(1), Sept. 13, 1994, 108 Stat. 1945, 1972; Pub.L. 105-314, Title III, § 301(c), Oct. 30, 1998, 112 Stat. 2978.)

18 U.S.C.A. § 2246, 18 USCA § 2246
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333. Title 26 current through P.L. 115-333.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes (Refs & Annos)

18 U.S.C.A. § 2422

§ 2422. Coercion and enticement

Effective: July 27, 2006
Currentness

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in 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 or imprisoned not more than 20 years, or both.

(b) 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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; Pub.L. 99-628, § 5(b)(1), Nov. 7, 1986, 100 Stat. 3511; Pub.L. 100-690, Title VII, § 7070, Nov. 18, 1988, 102 Stat. 4405; Pub.L. 104-104, Title V, § 508, Feb. 8, 1996, 110 Stat. 137; Pub.L. 105-314, Title I, § 102, Oct. 30, 1998, 112 Stat. 2975; Pub.L. 108-21, Title I, § 103(a)(2)(A), (B), (b)(2)(A), Apr. 30, 2003, 117 Stat. 652, 653; Pub.L. 109-248, Title II, § 203, July 27, 2006, 120 Stat. 613.)

18 U.S.C.A. § 2422, 18 USCA § 2422
Current through P.L. 115-281. Also includes P.L. 115-283 to 115-306, 115-308 to 115-326, and 115-330 to 115-333. Title 26 current through P.L. 115-333.

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