

No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**ROBERT RANG,**  
*Petitioner,*

-v-

**UNITED STATES OF AMERICA,**  
*Respondent.*

On petition for writ of certiorari to the  
United States Court of Appeals for the First Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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Appointed CJA Counsel of  
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### **QUESTION PRESENTED**

- 1) Does a “substantial step” under 18 U.S.C. § 2422(b) [attempted coercion and enticement of a minor] require evidence of intended “interpersonal physical contact” in order to rise to the level, and/or meet the definition of, “sexual activity”?

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Petitioner Rang asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

### **OPINION BELOW**

The March 26, 2019, opinion of the U.S. Court of Appeals for the First Circuit appears in Appendix A. *United States v. Rang*, 919 F.3d 113 (1st Cir. 2019).

### **JURISDICTION**

The First Circuit Court of Appeals rendered its decision March 26, 2019. This petition is timely filed; in June 2019, Justice Breyer granted a motion to extend the deadline to July 15, 2019. The Supreme Court has certiorari jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3771(d)(3).

### **STATUTORY PROVISIONS INVOLVED**

The federal statute criminalizing the coercion and enticement of a minor, 18 USC §2422(b), provides:

Whoever, using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage 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 and imprisoned not less than 10 years or for life.

### **STATEMENT OF THE CASE**

An Indictment filed February 26, 2015 charged Robert Rang with Attempted Coercion and Enticement of A Minor in violation of 18 U.S.C. § 2422(b). Doc. No. 10. The date range was alleged as January 1, 2014 and December 29, 2014.

Rang began *voir dire* on June 26, 2017.

Rang made his Rule 29 motion at the close of evidence:

Mr. Tennen: I will make an oral motion at this point, your Honor, for a finding based on the government's inability to prove the elements and some of the problems with that, the functional issues regarding the evidence that they've introduced, and I'll leave it at that.

THE COURT: The motion is denied.

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On appeal, Rang's primary argument was this:

Rang's situation falls short of a "substantial step" because Rang never asked RM "to meet him to engage in sexual activity": 1) the two never met and 2) masturbation is inherently unilateral; i.e., the opposite of a completed sexual act. However undesirable, the most that can be said of Rang's messages is that he asked to see RM masturbate but never tried to meet him to perform masturbation on Rang.

Rang's Appellate Brief, p. 18.

The First Circuit's opinion issued March 26, 2019. Even though Rang did not prevail, quite strikingly, the First Circuit noted the circuit-split as follows:

Implicit in Rang's position is the argument that "sexual activity" requires interpersonal physical contact, **a question that has caused division amongst the circuits.** Compare *United States v. Fugit*, 703 F.3d 248, 256 (4th Cir. 2012) (interpreting "sexual activity" as conduct connected with the "active pursuit of libidinal gratification" on the part of an individual and therefore not requiring physical contact), with *United States v. Taylor*, 640 F.3d 255, 259-60 (7th Cir. 2011) (applying the rule of lenity to interpret "sexual activity" as requiring physical contact). We find no need to join this debate, however, as the evidence shows that Rang intended and took steps towards achieving clearly illegal sexual contact with a minor: He rented a hotel room near where Minor A lived and plied Minor A's mother -- who was incarcerated at the time -- with money and assurances to secure her permission for a "sleep over" with Minor A; he told Minor A that Minor A sexually aroused him and that he wanted to masturbate with Minor A; and he asked Minor A to send him naked photographs.

Opinion, p. 15 (emphasis added).

### **STATEMENT OF FACTS**

A minor met Robert Rang while playing a multiplayer video game, Call of Duty, on PlayStation. Rang and the minor played together nearly every other day for an extended period of time and communicated orally via headsets with microphones. In March 2014, Rang and Minor A became "friends" on Facebook. Rang asked for and obtained Minor A's home phone number and home address. Rang called Minor A's home phone to talk to him and sent Minor A messages through TextNow, an online messaging application that Rang instructed Minor A

to download. Rang gifted Minor A PlayStation cards, ranging from \$20 to \$50, that could be used to buy PlayStation games or to purchase items within games. Rang also let Minor A access his “PSN” membership, which allowed Minor A to play certain games for free.

When Rang and Minor A played private games together, Rang called Minor A “babe,” and on numerous occasions said that he loved Minor A. Rang also talked to Minor A about masturbation, a term with which Minor A was previously unfamiliar. Rang explained masturbation to Minor A and told Minor A to search online for specific videos of men masturbating.

In his trial testimony, Minor A was clear that he never sent any pictures of his penis to Rang, was never going to send any pictures to Rang, and that Rang never tried to actually get Minor A to perform a sex act on him:

Q. Okay. Did you -- how did you answer him when he asked you for naked pictures of your penis?

A. I think I said no.

Q. Did you send them?

A. No.

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In summation, the Prosecutor explained her evidence as follows:



It was the defendant's statements here where he came right out and asked Ryan to do it. He asked R.M. to send him naked pictures of his penis. That's all it takes.

Here, the defendant's statements unequivocally demonstrate his intent when you consider them in the context of the entirety of his relationship with Ryan.

Over time, the defendant normalized the behavior that he was seeking from RM. Over a series of months he gained full access to every aspect of RM's life. He familiarized himself with RM's family. He familiarized himself with RM's friends, even going so far as to play with them online with and without RM. He talked about these things that he wanted casually and, more than once, slipping it into the context of his normal, what he made normal, relationship and communications with RM. He took steps to teach RM how to masturbate, sending him links or telling him what to write down, all in an overall effort to normalize the behavior so that it would be easier for him to accomplish his goals in the end.

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## **ARGUMENT**

### **THE FIRST CIRCUIT'S OPINION RECOGNIZED THE CIRCUIT-SPLIT WHICH HAS ARISEN IN THE CONTEXT OF "ATTEMPT" AND "SEXUAL ACTS" IN THE CONTEXT OF 18 USC §2422(b)**

Implicit in Rang's position is the argument that "sexual activity" requires interpersonal physical contact, **a question that has caused division amongst the circuits**. Compare *United States v. Fugit*, 703 F.3d 248, 256 (4th Cir. 2012) (interpreting "sexual activity" as conduct connected with the "active pursuit of libidinal gratification" on the part of an individual and therefore not requiring physical contact), with *United States v. Taylor*, 640 F.3d 255, 259-60 (7th Cir. 2011) (applying the rule of lenity to interpret "sexual activity" as requiring physical contact). We find no need to join this debate, however, as the evidence shows that Rang intended and took steps

towards achieving clearly illegal sexual contact with a minor: He rented a hotel room near where Minor A lived and plied Minor A's mother -- who was incarcerated at the time -- with money and assurances to secure her permission for a "sleep over" with Minor A; he told Minor A that Minor A sexually aroused him and that he wanted to masturbate with Minor A; and he asked Minor A to send him naked photographs.

Opinion, p. 15 (emphasis added).

**THE SEVENTH CIRCUIT APPEARS TO STAND IN CONTRAST WITH  
THE FIRST AND ELEVENTH CIRCUITS**

The Seventh Circuit opinion cited by the Panel Opinion as evidence of the circuit-split, *United States v. Taylor*, 640 F.3d 255, 259-60 (7th Cir. 2011), appears to stand in conflict with the following opinions:

In *United States v. Gravenhorst*, the First Circuit found sufficient the following evidence:

A jury could reasonably conclude that, once Gravenhorst moved from sending email messages referring generally to sexual matters to asking young women to meet him to engage in sexual activity, he engaged in a substantial step toward inducing the women to engage in illegal sexual conduct.

190 Fed.Appx. 1, 2 (1st Cir. 2006).

Similarly, in *United States v. Lanzon*, the Eleventh Circuit found sufficient evidence in the following:

He conducted sexually explicit online conversations regarding a 14-year-old, and arranged to meet "Tom" and the 14-year-old to engage in sexual activity. He drove several miles to the arranged meeting place, approached

the undercover officers asking for “Tom,” and carried condoms and mint lubricant in his truck. These actions “strongly corroborate” Lanzon’s culpability and support the jury’s verdict.

639 F.3d 1293, 1299 (11th Cir. 2011).

More recently, the Eleventh Circuit found that a man trying to induce fictional 12-year old girls to perform oral sex on him was sufficient:

Wilkerson attempted to induce two fictional 12 year olds to perform oral sex on him. Had that sexual act been completed, it would have violated [relevant state statute].

*United States v. Wilkerson*, 702 Fed.Appx. 843, 851 (11th Cir. 2017).

**RANG WOULD HAVE PREVAILED HAD HIS CARE ARISEN IN THE SEVENTH CIRCUIT**

The problem is that Rang’s situation falls short of “asking” RM “to meet him to engage in sexual activity” because 1) the two never met and 2) masturbation is inherently unilateral; i.e., the opposite of a completed sexual act. However undesirable, the most that can be said of Rang’s messages is that he asked to see RM masturbate, but never tried to meet him to perform masturbation on Rang.

True, Rang gave gift cards, but there was nothing reciprocal about the gift cards and soliciting masturbation by RN:

Q: Prior to you going to jail, you were aware that at one point, maybe more than one point, Robert had sent RN gift cards so he could buy some games on PlayStation or things like that, right?

MOTHER: Yes.

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RN testified that he only used the cards to buy games he wanted to play regardless:

Q: So what you actually did with those game cards or the gift cards that he got you?

A. Yeah.

Q. What did you do?

A. I'd just buy games.


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Under the logic of *United States v. Taylor*, 640 F.3d 255, 259-60 (7th Cir. 2011), Rang's conviction would have been reversed and rendered in the Seventh Circuit. However, his conviction was sustained in the First Circuit. This wildly disparate treatment amongst the Circuit cries out for certiorari.

### **CONCLUSION**

Rang respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted this 15th day of July 2019.

By:   
\_\_\_\_\_

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Appointed CJA Counsel of Record for  
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**CERTIFICATE OF MAILING**

I hereby certify that, on the 15th day of July 2019, this pleading was served  
on the Court via mail courier.



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Seth Kretzer

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 15th day of July 2019, a true and correct copy of this petition and appendices was mailed by first-class U.S. mail to:

Solicitor General of the United States  
Department of Justice  
950 Pennsylvania Ave., N.W.; Room 5616  
Washington, DC 20530-0001

Further, I certify that I one copy of the foregoing petition was delivered to Robert Rang; 72461-067 via U.S. Mail:

Hazleton FCI  
P.O. BOX 5000  
BRUCETON MILLS, WV 26525

A handwritten signature in cursive script, appearing to read "Seth Kretzer", is written above a horizontal line.

Seth Kretzer