No. 21-

IN THE

Supreme Court of the United States

BYRON MONTIJO–MAYSONET,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The enticement of minors over the internet is criminalized under 18 U.S.C. § 2422(b). The First Circuit upheld the § 2422(b) conviction below based on non-sexual messages between petitioner and a minor after they first met in person. The message arranged a second in-person meeting when the two had sex. Is § 2422(b)'s internet-based enticement element satisfied when two people who already know each other have sex after exchanging non-specific, non-sexual text messages to arrange their meeting?

2. Under 18 U.S.C. § 2423(a), if an adult transports a minor for criminal sexual activity, it is not a federal crime in a U.S. state unless a state border is crossed. In contrast, within Puerto Rico and some U.S. territories, the same conduct is criminalized under § 2423(a). While this Court has applied rational basis review to civil laws discriminating against Puerto Rico residents, the standard remains at issue in *United States v. Vaello–Madero* and has not been extended to criminal laws. Does § 2423(a) violate the equal protection component of the Due Process Clause of the Fifth Amendment and the Commerce Clause?

LIST OF PARTIES

The petitioner is Byron Montijo-Maysonet.

The respondent is the United States of America.

LIST OF RELATED CASES

1. *United States v. Montijo–Maysonet*, No. 18-1640 (1st Cir.) (petition for reh'g denied Dec. 16, 2020)
2. *United States v. Montijo–Maysonet*, No. 18-1640 (1st Cir.) (judgment entered Sept. 1, 2020)
3. *United States v. Montijo–Maysonet*, Crim. No. 16-242 (June 20, 2018) (judgment in a criminal case)
4. *United States v. Montijo–Maysonet*, Crim. No. 16-242 (March 7, 2018) (verdict in a criminal case)

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Byron Montijo–Maysonet respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on September 1, 2020, and reaffirmed December 16, 2020.

The opinion of the First Circuit is reported at 950 F.3d 119. App. 1–22. Rehearing was denied December 16, 2020. The district court's judgment following trial by jury is included at App. 23.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on September 1, 2020. It was then reaffirmed on December 16, 2020, when the court of appeals denied rehearing and rehearing en banc.

Rule 13.1 of the Supreme Court allows for ninety days within which to file a petition for a writ of certiorari after entry of the judgment of the court of appeals. This Court's March 19, 2020 miscellaneous order extended the due date by 60 days. Accordingly, this petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2422(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.

18 U.S.C. § 2423(a):

Transportation With Intent To Engage in Criminal Sexual Activity.—

A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., art. IV, § 3, cl. 2.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

STATEMENT

I. Legal Background

A. In the late 1990s — before widespread wireless connectivity — Congress extended 18 U.S.C. § 2422(b) to punish computer-related sex crimes against children, including enticement.

The first version of 18 U.S.C. § 2422(b) was passed with "very little" legislative comment. *United States v. Tykarsky*, 446 F.3d 458, 467 n.4 (3d Cir. 2006).[1] Congress did not make any reference to enticement over computers or the internet.

In 1998, Congress passed the Protection of Children from Sexual Predators Act, which rewrote § 2422(b), raised the maximum penalty, "and made substantial changes to related laws," including § 2422(a). Courts have looked to its legislative history to shed light on § 2422's purpose and scope. *See* App. 9 n.7.

As the First Circuit remarked in the subject case, the 1998 Congress was expressly focused on *computer-related sex crimes against children*, noting that the House Judiciary Committee explained that "the 1998 Act responded to 'highly publicized news accounts in which [adult offenders]' *used the web* to 'seduce or persuade children to meet them to engage in sexual activities.'" App. 9 n.7 (citing H.R. Rep. 105-557, 10, 21, 1998 U.S.C.C.A.N. 678, 678–79, 690 (June 3, 1998) (emphasis

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[1] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat 56, 137.

added). Congress "confirmed its intent to enact 'a comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers . . . by providing law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our nation's children.'" *Id.*

Finally, the 1998 "bill expanded § 2422(a) to 'enable law enforcement to charge a defendant who attempts to lure individuals into illegal sexual activity' even where 'the travel did not take place.'" *Id.* (citing *United States v. Nestor*, 574 F.3d 159, 162 (3d Cir. 2009) (describing the amendments as "part of an overall policy to aggressively combat computer-related sex crimes against children").

B. Last year, in an era with ubiquitous internet connectivity, the First Circuit sustained an enticement-over-the-internet conviction where the defendant met an underage girl in-person and had sex with her after exchanging generic internet-based messages.

The First Circuit has now held that evidence of an in-person meeting, followed by a minor's recollection of non-specific, non-sexual text messaging entails sufficient evidence of internet-based enticement. App. 8–10.

C. Congress modified 18 U.S.C. § 2423(a) — which criminalizes transportation of a minor with intent engage in criminal sexual activity — such that it could be enforced within Puerto Rico and some U.S. territories but not within any U.S. states unless a state border is crossed.

The Mann Act was first passed in 1910 to target human trafficking for the purpose of sexual exploitation. Mann Act of 1910, Pub. L. No. 61-277, 36 Stat. 825. The statute then outlawed, in part, transporting minors in interstate or foreign commerce or in the District of Columbia or United States territories for the purpose of prostitution or debauchery or other immoral acts. In 1945, the power to regulate conduct occurring wholly within Puerto Rico under the Mann Act was upheld as being consistent with Congress's plenary authority to legislate under the Territorial Clause, U.S. Const. art. IV, § 3, cl. 2. *See United States v. Cotto–Flores*, 970 F.3d 17, 30 (1st Cir. 2020), cert. denied, 141 S. Ct. 1121 (Mem.) (Jan. 11, 2021).

Since that time, though, Puerto Rico's relationship with the United States has evolved, and Puerto Rico has acquired greater autonomy. *United States v. Maldonado–Burgos*, 844 F.3d 339, 341 (1st Cir. 2016). This greater autonomy has impacted the Mann Act's reach.

Over the last century, Congress has amended the Mann Act several times. It has always conserved some variation on the language "[transportation] in interstate or foreign commerce, or in any Territory or in the District of Columbia."

In 1986, this language was amended to eliminate reference to the District of Columbia and mentioned only movement of a minor "in interstate or foreign commerce, or in any Territory or Possession of the United States . . . ." 100 Stat 3511. An amendment in 1998 added the term "commonwealth" to the provision which would now cover transportation "in interstate or foreign commerce, or *in* any commonwealth, territory or possession of the United States . . . ." 18 U.S.C. § 2423(a) (emphasis added); *Maldonado–Burgos*, 844 F.3d at 350, n.10. The Committee Report made no mention of the addition of the term "commonwealth"[2] and stated only that the alteration of the language of this provision was to increase the prison sentences applicable. *See* H.R. Rep. No. 105-557, at 22 (1998).

During the 1998 amendments, Congress also amended § 2426 of the Mann Act, which defines "state" for the purposes of that section as "a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." 18 U.S.C. § 2426(b).

A plain reading of this addition to the Mann Act shows that a "state," for purposes of the Mann Act, includes common-

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[2] "Before the bill was enacted, a floor amendment proposed adding the word 'commonwealth' to the phrase 'in any territory or possession of the United States' in § 2423(a); the floor amendment passed without explanation." *Maldonado–Burgos*, 844 F.3d at 350, n.10 (highlighting the amendment from 144 Cong. Rec. S12, 262 (daily ed. Oct. 9, 1998) (statement of Senator Coats)).

wealths, territories, or possessions. Why Congress would intend for a section of the Mann Act, amended in the same year, to treat Puerto Rico and other territories differently from states, belies common sense.

D. The First Circuit only extended rational basis review to laws discriminating against Puerto Rico residents but that limited scrutiny is in question in *Vaello–Madero.*

In 1978 and 1980, the U.S. Supreme Court condoned rational basis review for non-criminal laws treating Puerto Rico residents differently. *Califano* v. *Torres*, 435 U.S. 1 (1978) (per curiam); *Harris* v. *Rosario*, 446 U.S. 651 (1980) (per curiam).

Such a limited level of scrutiny has not applied to any criminal statutes discriminating against Puerto Rico residents until the First Circuit's decision in *Cotto–Flores*, 970 F.3d at 30. The First Circuit in *Cotto–Flores* assumed, even after Puerto Rico's status change in 1952, that Congress still had plenary power over Puerto Rico under the Territorial Clause. *Id.* at 30–31.

The First Circuit therefore conceived of the question of § 2423(a)'s reach as one of mere Congressional intent to single out Puerto Rico where it would otherwise be prevented from such intrastate regulation in the fifty states. *Id.* at 31–32.

In the subject case, *Montijo–Maysonet*, the First Circuit relied on *Califano* and *Harris* to reject equal-protection claims that § 2423(a) discriminates against Puerto Rico residents.

See App. 12. The opinion then stated that, based on precedent, heightened scrutiny did not apply, and the court could not find Congress lacked a rational basis for § 2423(a)'s unequal treatment. The court reasoned that, like in a prior case, the differential treatment could be based on Congress's lack of authority to regulate the same conduct in the states. *See* App. 12.

On March 1, 2021, this Court granted certiorari in *United States v. Vaello–Madero*, 956 F.3d 12 (1st Cir. 2020), cert. granted, 20-303, 141 S. Ct. 1462 (Mem.). This Court will assess whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income — a program that provides benefits to needy, aged, blind, and disabled individuals — in the fifty States and the District of Columbia, and in the Northern Mariana Islands under a negotiated covenant, but not extending it to Puerto Rico.

In *Vaello–Madero*, the First Circuit declared it was beyond question that it had to apply rational basis review to the equal-protection claim before it. *See Vaello–Madero*, 956 F.3d at 18. The difference between *Vaello–Madero* and this case was the First Circuit identified no rational basis for the discrimination in *Vaello–Madero* but found one here, suggesting that Congress may have treated Puerto Rico differently only because it lacked the same authority over states. *See* App. 12.

The briefing before this Court in *Vaello–Madero* now stresses that *Vaello–Madero* presents a vehicle to reconsider *Califano* and *Harris*. *See Vaello–Madero*, 20-303, Brief in Response *12–23 (Nov. 9, 2020).

II. Factual Background and Proceedings Below

Petitioner Byron Montijo–Maysonet ("Montijo") is a United States citizen who has lived his entire life in Puerto Rico. A federal jury in the United States District Court for the District of Puerto Rico found Montijo guilty of one count of using a facility of interstate commerce to entice a minor female to engage in prohibited sexual activity in violation of 18 U.S.C. § 2422(b).

The jury also found Montijo guilty of four counts of using a car to transport minor females within Puerto Rico with the intent to engage in prohibited sexual activity in violation of 18 U.S.C. § 2423(a). He was sentenced to 198-month concurrent sentences for each count with a five-year supervised release term to follow.

Montijo's convictions arose from two sexual encounters he and a co-defendant had with underage females in November 2015. Montijo was twenty-eight years old and co-defendant Luis Meléndez–Ramos ("Meléndez") was twenty-one.

Meléndez had gone to a family birthday party and met C.A.P. who was fourteen years old and attended school in Manatí, Puerto Rico.[3] The two exchanged contact information

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[3] Unless otherwise noted, the facts are from the First Circuit opinion. App. 1–22 (*United States v. Montijo–Maysonet*, 974 F.3d 34 (1st Cir. 2020)).

and Meléndez texted C.A.P. on an instant messaging application to make plans to meet again.

Meléndez also contacted C.A.P.'s thirteen-year-old friend, D.P.P., on Facebook and the three texted each other via group chat. On a Friday, Meléndez, C.A.P., and D.P.P. planned to meet the following Monday at C.A.P. and D.P.P.'s school and drive to a motel.

When they got to school on Monday, C.A.P. and D.P.P. walked to a nearby food truck, where Meléndez and Montijo were waiting.

That day was the first time Montijo met or spoke to C.A.P. and D.P.P. Meléndez introduced Montijo as his friend, and the group left together in Montijo's car, ending up in a motel that rented rooms in six-hour increments.

Once they got there, Montijo and Meléndez rented two cabanas. Meléndez and C.A.P. went into one room, and Montijo and D.P.P. went into another. Once inside, Montijo told D.P.P. she "didn't have to do anything [she] didn't want to."

They sat down on the bed, and Montijo told D.P.P. "he liked [her] hair, [her] eyes." They did not have sex. In the other room, Meléndez had sex with C.A.P. Then, C.A.P. and Meléndez called D.P.P. to tell them they had "finished," and they all met back at the car.

Montijo and Meléndez drove the girls back to the school. After that, C.A.P. never spoke to Meléndez or Montijo again. According to D.P.P., Montijo texted D.P.P. after that Monday

on the Kik instant-messaging application. D.P.P. "didn't talk about anything specific" with Montijo over text. "It was just that [Montijo] wanted to see [her] again."

D.P.P. then texted with Meléndez and Montijo through a "group chat." Meléndez asked D.P.P. to "bring in [an]other person." D.P.P. then added her thirteen-year-old friend, K.V.M., to the group chat. Meléndez, Montijo, and D.P.P. then said they "wanted to do another outing," meaning another "ride."

Referring to the ride, the group used the Spanish word "vuelta," the same word they had used before. And they planned to "meet in the same way," with Montijo and Meléndez picking the girls up at the food truck and driving them back to the motel.

Roughly a week later, Montijo and Meléndez picked up D.P.P. and K.V.M. outside the school. D.P.P. and K.V.M. met Montijo and Meléndez at the food truck, Meléndez introduced himself to K.V.M., and the group left together in Montijo's car, ending up at the same motel.

On the way, K.V.M. asked D.P.P. what "she ha[d] to do." D.P.P. "told her that she didn't have to do anything she didn't want to do." When they arrived at the motel, the four paired off — Meléndez with K.V.M., Montijo with D.P.P. — into separate cabanas. This time, D.P.P. and Montijo had sex.

At some time in the cabana, D.P.P. took out her notebook, and Montijo "saw [her] grade" (apparently written

on the notebook). Montijo asked how old D.P.P. was, and she said she was thirteen.

Montijo was shocked. Meléndez and C.A.P. had told him she was sixteen, the legal age of consent in Puerto Rico. They had also told D.P.P. that Montijo was twenty. Montijo told D.P.P. that he was really twenty-eight, and that if he had known she was thirteen, he would not have had sex with her.

When Montijo was arrested, federal and Puerto Rico law enforcement agents searched Montijo's cell phone for evidence of messages with Montijo and any minor involved in the case. None was recovered. *See* App. 15.[4]

Montijo appealed his conviction to the Court of Appeals for the First Circuit. The First Circuit affirmed his conviction and sentence in a written opinion. *See* App. 1–22.

Though Montijo had met D.P.P. in person and had an in-person prohibited sexual relationship with her, the opinion reasoned that the jury could have adopted a chain of assumptions and inferences to conclude that Montijo had enticed her over the internet. App. 4–7. Based on its chain-of-assumptions analysis, the opinion upheld Montijo's 18 U.S.C. § 2422(b) conviction, concluding there was evidence from

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[4] The trial record involved law enforcement witnesses being questioned about a subpoena sent to Kik to determine if Montijo had a Kik account. The testifying agent did not remember if Montijo even had a Kik account.

which the jury could have inferred that the text messages were part of a campaign to induce or entice D.P.P. App. 8–11.

As to the transportation-of-a-minor charges, the opinion upheld Montijo's 18 U.S.C. § 2423(a) convictions against challenges that the statute does not apply *within* the Commonwealth of Puerto Rico, and, if it did, it would violate his Fifth Amendment equal protection rights. App. 11–12. Regarding the scope of § 2423(a), the First Circuit relied on its recently issued decision in *Cotto–Flores*, 970 F.3d. 17.

The First Circuit opinion also rejected Montijo's equal protection claim, stating first that this Court's precedent precluded applying heightened scrutiny. *See* App. 12. Montijo's equal-protection claim was raised on plain-error review as it had not been raised in trial court. The opinion then stated that, based on precedent, it could not find that Congress lacked a rational basis for § 2423(a) because, like in *Cotto–Flores*, the differential treatment could have been because Congress simply lacked the authority to regulate the same conduct in the States. *See* App. 12.

In response, Montijo filed a petition for rehearing and rehearing en banc, arguing that the court's reasoning will render 18 U.S.C. § 2422(b)'s enticement-by-means-of-interstate-commerce element unconstitutionally vague. The problem was that the jury heard evidence of mainly in-person visits, and a multi-person text-message interaction that never transcended innocuous communication. As such, the opinion would permit jury findings on the critical enticement-by-means-of-interstate-commerce element without any evidence

of enticing language and based on in-person conduct beyond the statute's scope.

Where 18 U.S.C. § 2422(b) targeted crimes in which minors were met and seduced over computers, it should not have encompassed cases in which incidental texting was involved in a mainly in-person relationship.

Montijo further argued that 18 U.S.C. § 2423(a)'s transportation-of-minor-in-a-commonwealth provision runs afoul of Puerto Rico's state-like criminal law enforcement autonomy and violates equal protection. The First Circuit denied Montijo's petition for rehearing and rehearing en banc on December 16, 2020. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. Because the smartphone era has left courts with inadequate guidance to interpret § 2422(b)'s enticement-over-the-internet element, review is exceptionally important to define the scope of federal jurisdiction and remedy the First Circuit's use of a vague and ambiguous interpretation to sustain convictions based on any passing reference to internet-based messaging.

This case presents an urgent invitation to define the boundaries of federal jurisdiction when it comes to crimes that involve an adult using the internet to entice or induce a minor to enter an unlawful sexual relationship. The statute at issue pre-dates the smartphone era in which the digital-versus-in-person divide has become profoundly blurred. *See* App. 9 n.7 (last revision to § 2422(b) in 1998). Society's evolution demands an adequate definition of enticement by "means of interstate commerce."

The First Circuit's working definition is not a solution. Only through imagining a long and winding chain of inferences did the First Circuit find sufficient evidence of internet-based enticement. App. 8–10. The federal government must not be called to step in every time a state offense involves the incidental exchange of a text message. And juries should not be assumed to cross the First Circuit's dangerous rope bridge of unspoken inferences.

The First Circuit's interpretation flummoxes the intent of a statute aimed to catch people preying on minors using

technologies, enticing them from the virtual world into the real world. *See* App. 9 n.7. The First Circuit would syphon state cases into federal court by tagging them inescapably with a use-of-interstate-commerce label anytime someone mentions a message, as D.P.P. did here.

Rather, a line must be drawn between conduct triggering federal enforcement and conduct left to the states for regulation.

Without a clear line drawn, the First Circuit's holding risks affecting thousands of otherwise non-federal matters. The First Circuit's reading would transform a statute concerned with adults contacting and seducing minors online into a statute punishing garden-variety in-person statutory rape cases. The court's decision brings § 2422(b) into play anytime a message is exchanged by someone involved in a qualifying state offense because the message need not be sexual in nature, and it need not be produced at trial. Under the First Circuit's view, a defendant need not even be shown to have an account through the messaging service involved. Here, there was proof an in-person relationship, although Montijo was proscribed from presenting his mistake-of-age defense.[5]

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[5] Jurisdictions vary widely in statutory rape cases. In Puerto Rico state court, the jury would have been required to evaluate Montijo's mistake-of-age defense. *See* App. 10–11; *Pueblo v. Hernández*, 93 D.P.R. 435 (P.R. 1966); *Pueblo en Interés del Menor E.C.G.*, J-07-667, 2008 WL 2951966, at *3 (P.R. App. Ct. 2008).

The First Circuit's broad ruling risks grave and terrifying implications. What of text messages sent under someone else's name? How could a person defend against an allegation without an evidentiary requirement?

After all, "[t]he ubiquitous presence of the internet and the all-encompassing nature of the information it contains are too obvious to require extensive citation or discussion." *United States v. Perraza–Mercado*, 553 F.3d 65, 72 (1st Cir. 2009) (internal quotations and citation omitted). But that was not always the case and was not the case when "computers" were added to § 2422. The legislative history adding internet communications to § 2422(b) focused on reports of predators who *met and seduced minors online*, and, therefore, focused on "assaults *facilitated by computers*." App. 9 n.7 (citation omitted) (emphases added).

When Congress modified § 2422(b) in 1998, it could not have foreseen today's smartphone proliferation.[6] Protection of Children from Sexual Predators Act of 1996, Pub. L. No. 105-314, 112 Stat. 2974. The opinion below recognizes that the 1990s' amendments were "part of an overall policy to aggressively combat computer-related sex crimes against children." App. 9 n.7 (citing *Nestor*, 574 F.3d at 162) (quotation marks omitted). Since the shaping of the policy against "computer-related sex crimes," society-wide use and reliance on handheld

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[6] *See, e.g.*, Taylor, A., *The Ubiquity of Smartphones, as Captured by Photographers*, The Atlantic (Nov. 14, 2018), *available at* http://bit.ly/Atlantic11-18.

computers (i.e., smartphones, tablets, etc.) has blurred the divide between online and offline reality.

Where the accused initiates and perpetuates online contact, § 2422(b) remains straightforward, just like the 1998 Congress anticipated. But expectations are muddied where contact starts and develops in the physical world. The line between in-person and "computer-related" sex crime requires a clearer definition. By text, Montijo and the minor "'didn't talk about anything specific. It was just that he wanted to see [her] *again*'" after their first in-person meeting. App. 5 (alteration in original). The jury did not see this message, it was not recovered, and law enforcement could not even remember if Montijo had an account with the text-messaging application D.P.P. remembered using. In the six days between their in-person meetings, it was unclear who said what online and when. They met *in person*. Through an *in-person* introduction. *Not in a 1990s-era chatroom or application*, which would have been the only internet forum known to the 1990s Congress. A meeting was planned when Montijo joined a four-person group chat; D.P.P. even recalled the *group*'s discussion as "*we* wanted to do another outing." App. 5.

Puerto Rico's laws are sufficient to prosecute statutory sex offenses like Montijo's, and there is no indication in § 2422's legislative history that Congress "intended to abandon its traditional 'reluctan[ce] to define as a federal crime conduct readily denounced as criminal by the States.'" *Bond v. United States*, 572 U.S. 844, 846 (2014). And the First Circuit does not claim otherwise.

It may be true, as the First Circuit opined, that Congress "meant to cast a broad net" when it legislated "to catch predators who use the Internet to lure children into sexual encounters." App. 9 (citation omitted). But such a net could only be as broad as is "consistent with the Constitution." *Id.* And this Court has "generally declined to read federal law as intruding on" regulation of local criminal activity "unless Congress has clearly indicated that the law should have such reach." *Bond*, 572 U.S. at 848.

As this Court summarized in *Bond*:

> For nearly two centuries it has been "clear" that, lacking a police power, "Congress cannot punish felonies generally." *Cohens v. Virginia,* 6 Wheat. 264, 428, . . . (1821). A criminal act committed wholly within a State "cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." *United States v. Fox*, 95 U.S. 670, 672, . . . (1878).

Id. at 854. In situations like this, federally criminalizable conduct was woefully lacking. Two people met *in person*. They then spent hours together *in person*. And after exchanging non-descript, generic text messages, they engaged in an unlawful sexual encounter *in person*.

On this point, *Bond* provides powerful insights that should reverse the First Circuit's decision in this case. Bond had been convicted of two counts of possessing and using a chemical weapon, in violation of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229(a).

While Bond had used toxic chemicals in an attempt to harm a woman who had had an affair with her husband, this Court held that the scope of such "chemical weapon" regulation did not reach the simple assault effected by Bond. This Court did so in part by noting that, in the manner used by Bond, "the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare." *Bond*, 572 U.S. at 861.

Given the overwhelming in-person nature of Montijo and D.P.P.'s encounter, an ordinary person would not have viewed Montijo's non-descript text message as an example of internet-based enticement. And the First Circuit's view — that "people 'entice' and 'induce' each other to have sex all the time without spelling it out," App. 9 — will disrupt "'the constitutional balance between the National Government and the States.'" 572 U.S. at 862 (citation omitted).

Just like in *Bond*, the view at issue here "would ""alter sensitive federal-state relationships,"" convert an astonishing amount of "'traditionally local criminal conduct'" into "'a matter for federal enforcement,'" and "'involve a substantial extension of federal police resources.'" *Id.* at 863 (citation omitted). Further, under the First Circuit's reading, given modern internet and wireless network usage, hardly a statu-

tory rape offense "'in the land would fall outside the federal statute's domain.'" *Ibid.* (citation omitted). Montijo's sexual relations with underage D.P.P. was serious and unacceptable, and against the laws of Puerto Rico. "But the background principle that Congress does not normally intrude upon the police power of the States is critically important." *Id.*

Thus, the First Circuit's interpretation does not meaningfully incorporate the jurisdictional use-of-interstate-commerce prong or adequately reflect the requirement that Congressional legislation be assumed to not unjustifiably invade upon states' regulation of ordinary criminal conduct. Review is therefore necessary to adequately define the scope of internet-based enticement to include direct evidence of enticement to engage in sexual activity before such conduct can be a federal crime.

II. The First Circuit's holding on enticement over the internet conflicts with other circuits, which consistently require that a defendant's internet communication must actually be shown to overcome the will of the minor.

This Court has not defined what constitutes evidence of internet-based enticement. Now that the internet is everywhere, this Court must draw the line between internet communication triggering federal jurisdiction and criminal conduct left to the states. Left alone, the First Circuit's definition conflicts with other circuits and will lead to arbitrary enforcement in the First Circuit and particularly in Puerto Rico when combined with § 2423(a)'s discriminatory reach.

The First Circuit's definition of internet-based enticement is sustained through the creation of a chain of hypothetical findings the court believes the jury *could have* reached. This leaves ordinary people only to guess as to where unlawful state offenses end and federal offenses begin and where an internet-based offense exists at all. The First Circuit's sufficiency finding relieves the government from presenting any actual internet messages sent, any reference to any unlawful act or any express persuasion. Ordinary people and jurors will be left guessing as to the law's meaning and disparate application of the law will result.

The First Circuit's ruling on internet-based enticement conflicts with other circuits' requirement that persuasion requires a showing of an attempt to bend the will of the victim involved. In the Eleventh Circuit, the requirement is not met unless a reasonable jury could have found that defendant intended, through internet-based communication, to cause a minor to assent to sexual contact with him and took a substantial step to causing that assent. *United States v. Lee*, 603 F.3d 904, 914–15 (11th Cir. 2010); *see also United States v. Laureys,* 653 F.3d 27, 40 (D.C. Cir. 2011) (Brown, J., dissenting) (describing holdings of the D.C. and Eleventh Circuits).

Yet the First Circuit derived its definition by looking past other circuits' cases involving more explicit persuasion. In so doing the First Circuit concluded: "[T]hose cases didn't draw a line in the sand to insist on explicit sexual overtures." App. 9; *see United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). As the decision here put it, even First Circuit cases, before this decision was issued, had only affirmed cases where

defendants had sent lewd online messages that expressly referenced sex acts. App. 8 (citing *United States v. Dávila–Nieves*, 670 F.3d 1, 3–6, 11 (1st Cir. 2012); *United States v. Berk*, 652 F.3d 132, 134–35, 140 (1st Cir. 2011); *United States v. Dwinells*, 508 F.3d 63, 73 (1st Cir. 2007).

In the D.C. Circuit and Eleventh Circuit, there must be evidence of an effort to directly entice the minor or cause a third person to persuade the minor. *See United States v. Hite*, 769 F.3d 1154, 1162–64 (D.C. Cir. 2014); *Lee,* 603 F.3d at 914–15. While *Hite* deals with communication through an intermediary, it held that communication to merely schedule an encounter is insufficient if it does not aim to persuade the minor to have sex. *See id.* at 1164.

The First Circuit, nevertheless, took the liberty to go where no circuit had gone before because other cases had not drawn a line in the sand. This take is inconsistent with other circuits' decisions and is wrong as a trespass upon an area of conduct left to be regulated by state — not federal — governments. *See Bond*, 572 U.S. at 846.

An enforceable reading of § 2422(b) must reject the First Circuit's elaborately speculative chain-of-inferences-based reasoning and require definitive proof that some persuasion took place over interstate commerce. In an era of constant digital connection, courts must require proof of messages that include direct evidence of enticement before a simple state offense can be a federal crime.

Otherwise, the opinion will uphold § 2422(b) convictions whenever a generic text message (or, as here, mere memory

of one) precedes an unlawful sexual encounter. Mere scheduling is a better interpretation of what happened in this case and may well have resulted in reversal or non-prosecution in a circuit with a more objective and exacting standard.

The gulf in holdings demonstrates the importance of this Court's stepping in to resolve the questions of when enticement happens to trigger a federal offense under § 2422(b), and when, due to lack of specific facilitation by the internet, it should remain a matter for state authorities. Supreme Court intervention is necessary to protect the accused and the public from a vague and ambiguous reading of § 2422(b), which, going forward, will write a blank check to juries to speculate that a defendant enticed a victim over the internet anytime the two text-messaged each other no matter how extensive their in-person relationship.

III. Enforcement of § 2423(a)'s Puerto Rico-only provision is unconstitutional and will never percolate through other circuits.

Certiorari should also issue to examine the Congressional intent behind § 2423(a) as well as its jurisdictional validity in Puerto Rico. These critical questions overlap with the concerns in *Vaello–Madero*, currently before the Court, and are exceptionally important because this statute, as interpreted, threatens both Puerto Rico's state-like law enforcement autonomy and the due process and equal protection rights of United States citizens in Puerto Rico.

A. The First Circuit's interpretation of § 2423(a) is a question of exceptional importance because the decision creates a patchwork of jurisdictional authority within a single law, and impermissibly extends federal jurisdiction.

Congress's authority does not cover § 2423(a)'s transportation prohibition entirely within Puerto Rico. Constitutional limits prevent application of § 2423(a)'s intra-Puerto Rico application. The First Circuit distinguished the treatment of Puerto Rico after the adoption of its 1952 Constitution. *See Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36 (1st Cir. 1981). Through legislation in 1950 and 1952, Congress accorded "'Puerto Rico the degree of autonomy and independence normally associated with States of the Union.'" *United States v. Maldonado–Burgos*, 844 F.3d at 341 (citing *Examining Bd. of Eng'r's, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976)). Indeed, in 1952, Congress recognized the island as a "commonwealth" and gave the Puerto Rican government greater autonomy. Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327; see also Puerto Rico Federal Relations Act ("PRFRA"), Pub. L. No. 81-600, 64 Stat. 319, 319 (1950).

The First Circuit in *Cordova* held that — following adoption of the Puerto Rico Constitution and Congress's grant of state-like autonomy — laws intervening in local affairs must reflect specific evidence or clear policy reasons for intervening more extensively in Puerto Rico's local affairs than into the local affairs of a state. *Cordova*, 649 F.2d at 42. After all, the

PRFRA provides: "The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States." 48 U.S.C. § 737.

In *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863 (2016), this Court "took pains to acknowledge the 'distinctive, indeed exceptional, status as a self-governing Commonwealth' that Puerto Rico occupies . . . ." *Maldonado–Burgos*, at 344–45 (citation omitted).

Indeed, Puerto Rico has been allowed a high degree of self-governance under its own constitution. *Sánchez Valle*, 136 S. Ct. at 1876. Montijo's argument that intrastate travel cannot violate § 2423(a) goes unanswered by the First Circuit and *Harris*, 446 U.S. 651 and *Califano*, 435 U.S. 1, do not settle the question.

Rather, since the Commerce Clause applies to Puerto Rico, *see, e.g.*, *Sea-Land Servs., Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 546 (D.P.R. 1980), Puerto Rico's autonomy should prohibit regulation of conduct not regulatable in states. *See United States v. Morrison*, 529 U.S. 598, 607, 618 (2000) (describing limits of Commerce Clause-based regulation). Thus, certiorari is necessary to examine Congress's authority to enforce § 2423(a).

B. The issue presents an opportunity for this Court to expound upon its anachronistic *per curiam* opinions in *Harris* and *Califano* allowing Puerto-Rico-only laws to pass Constitutional muster with only rational basis review.

The First Circuit rejected an argument that the Equal Protection Clause prevents unequal treatment of Puerto Rico residents by § 2423(a) unless it passes strict scrutiny. App. 11–12. This conclusion is based on a determination that *Harris*, 446 U.S. at 651–52, mandates only rational-basis review. This determination must be reconsidered. *Harris*'s two-paragraph *per curiam* opinion upheld a federal welfare law, not a liberty-implicating criminal statute infringing on Puerto Rico's autonomy. *See id.*

Instead, § 2423(a) singles out Puerto Rico where people in all fifty states remain un-prosecutable under the law. As Justice Marshall dissented in *Harris*: "It is important to remember . . . that Puerto Ricans are United States citizens, . . . and that different treatment to Puerto Rico under [the law in question] may well affect the benefits paid to these citizens." *Id.* at 653–54 (Marshall, J., dissenting) (footnote omitted). Affirming the contrary proposition — **in a criminal statute no less** — "surely warrants the full attention of this Court before it is made part of [this Court's] jurisprudence." *Id.* at 654.

What is more, courts generally apply a "more searching judicial inquiry" in cases of "prejudice against discrete and insular minorities" whose inability to effect change through

the "political process" prevents them from protecting their interests. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that laws targeting racial or ethnic minorities are also suspect because "such discrimination is unlikely to be soon rectified by legislative means"); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (observing that "powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests" that inhibits a political solution).

As the Court stands to reexamine *Harris* and *Califano* or provide guidance as to what forms a "rational basis" for Puerto Rico-only laws, Supreme Court review is critical.

C. Even if this Court declines the invitation to address Justice Thurgood Marshall's concerns about *Harris*, no rational basis supports § 2423(a)'s Puerto Rico-only application.

No rational basis justifies § 2423(a)'s application to transportation occurring wholly within Puerto Rico where the law would violate the Commerce Clause in all states and does not reach the Commonwealth of the Northern Mariana Islands. Neither the opinion below, nor the First Circuit's opinion in *United States v. Ríos–Rivera*, 913 F.3d 38, 44 (1st Cir. 2019), express acceptable bases to discriminate. App. 12.

The First Circuit, because it receives appeals from the District of Puerto Rico tends to be the definitive voice, short

of review by this Court, on challenges to laws that single out Puerto Rico residents. Its opinion in *Ríos–Rivera* recognizes no stated basis for applying a law differently in Puerto Rico. Instead, it posits the law's justification is the very thing that must be explained: Congress's inability to regulate such conduct in the States. App. 12.

Congress's inexplicable addition of "commonwealth" to § 2423(a) left a relationship between the statute and its justification "'so attenuated as to render the distinction arbitrary or irrational.'" *Vaello–Madero*, 956 F.3d at 23 (citation omitted). Certiorari is necessary to reassess the level of scrutiny applied to laws that single out Puerto Rico, and assess whether § 2423(a)'s discriminatory Puerto Rico-only application survives any level of scrutiny.

IV. This case provides an ideal vehicle for answering both questions presented.

This case and the decision below offer an ideal vehicle for deciding on the definition of internet-based enticement within 18 U.S.C. § 2422(b) and the jurisdictional limitations of 18 U.S.C. § 2423(a). The facts are undisputed. No jurisdictional issues are implicated. The questions presented come before the Court on direct review.

V. At the very least, the Court should hold this case behind *Vaello–Madero*.

This case involves the extraordinary holding that federal laws can discriminate against United States citizens in Puerto Rico anytime rational basis review is satisfied. *See*

App. 12. Because the First Circuit relied on *Califano* and *Harris* to reject equal protection claims related to § 2423(a)'s discriminatory impact, the issue is inextricably linked to that in *Vaello–Madero*. *See* App. 12; *Vaello–Madero*, 956 F.3d 12, cert. granted, 20-303, 141 S. Ct. 1462 (Mem.).

The Court's potential revisiting of those two *per curiam* decision stands to alter the outcome of the First Circuit's § 2423(a) constitutionality determination.

CONCLUSION

Based on the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 14, 2021