No. 21-171

In the Supreme Court of the United States

JOEL ZUPNIK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
JAVIER A. SINHA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the evidence at petitioner's trial was sufficient to enable a rational jury to find that he intended to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.S.D.):

United States v. *Zupnik*, No. 16-cr-50110 (Apr. 29, 2019)

United States Court of Appeals (8th Cir.):

United States v. *Zupnik*, No. 19-1916 (Mar. 2, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 989 F.3d 649.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2021. A petition for rehearing was denied on April 1, 2021 (Pet. App. 13a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on August 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioner was convicted on one count of using a facility or means of interstate commerce to attempt to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Judgment 1; Superseding Indictment 1. Petitioner was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-12a.

1. On August 8, 2016, petitioner posted an advertisement entitled "Bang a Biker!! :)" in the "casual encounters" section of the Craigslist website. Presentence Investigation Report (PSR) ¶ 14; Trial Tr. (Tr.) 45-46, 62; see Pet. App. 2a. Posing as a 15-year-old girl named "Kelli," Pennington County Sherriff's Investigator Brian Freeouf responded to petitioner through Craigslist-based e-mail, indicating that petitioner's posting "sound[ed] interesting." PSR ¶ 14; C.A. Add. 8a. That initial response included a photograph of an adult woman that had been digitally regressed to look like a 15-year-old girl. Tr. 63; C.A. Add. 8a, 19a. An online conversation ensued, during which petitioner asked "Kelli" if she "want[ed] to come see what an older, experienced man knows." Pet. App. 2a-3a. "Be a good girl," petitioner urged, "and this man happens to also be open for long term if you are looking for something better with no drama." *Id.* at 3a. Eventually petitioner and "Kelli" began to communicate through text messages. C.A. Add. 11a-12a; PSR ¶ 15.

As the conversation progressed, petitioner sent a text message to "Kelli" asking, "How old are you," to which "Kelli" replied, "I am 15." C.A. Add. 12a. Peti-

tioner responded, "I think you are sexy but I am kinda waaayyy to old for you! Lol," and added, "If you wanna daddy like me, you are gonna have to keep it a secret and on the dl. If it worked out I would have to tell the neighbors I rented a room out to a student or something lol." *Ibid.* (extra spaces omitted). Petitioner told "Kelli," "I can maybe swing by later this eve if you are wanting my company. *Id.* at 14a. Petitioner requested nude photos of "Kelli," stating, "Prove you are not a cop and let[']s see you naked!" and "Let me see a pic of your butt!" *Id.* at 15a, 18a.

Petitioner additionally asked "Kelli" whether she had experienced "an orgasm yet" and "[h]ow often * * * [she] ma[s]turbate[d]." C.A. Add. 16a. He also asked "Kelli" whether she had "given or gotten much oral sex." *Id.* at 18a. When "Kelli" responded "no," petitioner stated that "[m]aybe [they] could start there and see how it goes." *Ibid.* Petitioner and "Kelli" arranged to meet at a local high school in Rapid City, South Dakota. *Id.* at 17a, 20a; PSR ¶ 16. Petitioner traveled to the school at the appointed time, where he was arrested. Tr. 113-116.

2. A grand jury in the District of South Dakota returned an indictment charging petitioner with one count of using a facility or means of interstate commerce to attempt to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Superseding Indictment 1. Petitioner pleaded not guilty and proceeded to trial. Am. Judgment 1.

The district court instructed the jury that a finding of guilt on that charge required proof beyond a reasonable doubt (1) that petitioner "used a cell phone or computer attached to the Internet to attempt to knowingly

persuade, induce, entice, or coerce an individual under the age of 18 to engage in sexual activity"; (2) that petitioner "believed the individual was less than 18 years of age"; and (3) "[i]f the sexual activity had occurred, [petitioner] could have been charged with a criminal offense under South Dakota law." Tr. 5-7. The court further instructed the jury on the necessary findings for "attempt"—namely, proof beyond a reasonable doubt both (1) that petitioner "intended to persuade or entice a minor into engaging in illegal sexual activity," and (2) that petitioner "knowingly and willfully took some action that was a substantial step toward persuading, inducing, enticing, or coercing the individual into engaging in sexual activity." Tr. 6.

At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal, contending that the evidence was insufficient to establish the elements of the offense. Tr. 228. The district court denied the motion. Tr. 228-229. The jury found petitioner guilty. Tr. 315. The district court sentenced petitioner to 120 months of imprisonment. Judgment 2.*

3. The court of appeals affirmed. Pet. App. 1a-12a.

The court of appeals rejected petitioner's challenge to the sufficiency of the evidence, in which he asserted that the government had been required, but had failed, to prove that petitioner "intend[ed] to obtain the fictitious minor's assent to unlawful sexual activity by overcoming her will." Pet. C.A. Br. 17-18; see Pet. App.

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* While petitioner's appeal was pending, he moved in the district court for compassionate release under 18 U.S.C. 3582(c)(1)(a)(i), based on COVID-19 and other medical concerns. D. Ct. Docs. 115, 116 (Jan. 12, 2021). Following the court of appeals' decision, the district court granted the motion and reduced petitioner's term of imprisonment to time served. D. Ct. Doc. 129 (May 5, 2021); Am. Judgment 2.

7a-9a. The court observed that *United States* v. *Hite*, 769 F.3d 1154 (D.C. Cir. 2014), on which petitioner relied, "[wa]s not applicable" to the circumstances of this case "for multiple reasons, including the fact that [petitioner] believed he was communicating directly with a minor, not an adult intermediary." Pet. App. 8a. The court declined to adopt a construction of the statute that would require an intent to "transform or overcome the will of a minor," *ibid.* (quoting *Hite*, 769 F.3d at 1161), noting that it had previously recognized that "a defendant can be found to 'persuade' or 'entice' even a seemingly 'willing' minor," *ibid.* (citing *United States* v. *Patten*, 397 F.3d 1100, 1102 (8th Cir. 2005)). And the court determined that the evidence presented at petitioner's trial, "including testimony and conversation transcripts, was sufficient to support a reasonable jury's conclusion that [petitioner] intended to persuade or entice 'Kelli' to engage in sexual activity." *Id.* at 9a.

ARGUMENT

Petitioner renews his claim (Pet. 23-32) that the trial evidence was insufficient to support his conviction under 18 U.S.C. 2422(b). The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari raising substantially similar questions regarding the scope of Section 2422(b). See *Cramer* v. *United States*, 141 S. Ct. 87 (2020) (No. 19-1084); *Montgomery* v. *United States*, 139 S. Ct. 1262 (2019) (No. 18-651); *Brooks* v. *United States*, 139 S. Ct. 323 (2018) (No. 18-5164); *Grafton* v. *United States*, 138 S. Ct. 2651 (2018) (No. 17-7773); *Matlack* v. *United States*, 137 S. Ct. 2293 (2017) (No. 16-7986); *Rutgerson* v. *United States*, 137 S. Ct. 2158 (2017)

(No. 16-759); *Reddy* v. *United States*, 574 U.S. 1062 (2014) (No. 14-5191) (plain-error posture). It should follow the same course here.

1. Section 2422(b) imposes criminal liability on a person who, through the mail or a 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 prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. 2422(b). Petitioner was convicted of an attempted violation of Section 2422(b). Judgment 1; Am. Judgment 1.

As the court of appeals explained, and petitioner does not dispute, the key elements of a Section 2422(b) attempt offense are (1) intent to commit a violation of that provision and (2) taking a substantial step toward the violation. Pet. App. 5a; accord, *e.g.*, *United States* v. *Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014). The district court instructed the jury, without objection, that the government was required to prove beyond a reasonable doubt that, *inter alia*, (1) petitioner "intended to persuade or entice a minor into engaging in illegal sexual activity," and (2) petitioner "knowingly and willfully took some action that was a substantial step toward persuading, inducing, enticing, or coercing the individual into engaging in sexual activity." Tr. 6. The court's instructions further required proof beyond a reasonable doubt that petitioner at the time "believed the individual was less than 18 years of age" and that, "[i]f the sexual activity had occurred, [petitioner] could have been charged with a criminal offense." Tr. 6-7. The jury, so instructed, found petitioner guilty. Tr. 315.

Petitioner did not challenge the district court's jury instructions on the requirements of Section 2422(b)

below, see, *e.g.*, 11/19/18 Tr. 58, and does not press an unpreserved claim of instructional error in this Court, see Pet. 20-21. Instead, petitioner appears solely to renew his claim (Pet. 20-22) that the trial evidence was insufficient to establish that he engaged in conduct prohibited by Section 2422(b). But the court of appeals correctly denied relief on that claim, because petitioner's communications with a person whom he believed to be a 15-year-old girl were "sufficient to support a reasonable jury's conclusion that [petitioner] intended to persuade or entice 'Kelli' to engage in sexual activity." Pet. App. 9a.

As the court of appeals observed, "although it was 'Kelli' who responded to his advertisement, the jury was presented with evidence tending to show that [petitioner] persistently sent messages to 'Kelli' with expressions of his sexual interest in her and descriptions of specific sex acts he would like to perform with her, even after learning her age." Pet. App. 8a. Petitioner "asked 'Kelli' questions about her sexual history and sexual interests," and he "used terms of endearment toward 'Kelli' and expressed a desire that she be comfortable with him before attempting any sexual conduct with her" and before she agreed to meet him at a school. *Ibid.*; see *id.* at 9a. Petitioner also sent messages that appeared to tout his particular sexual prowess and ability to provide "Kelli" with experiences that boys her age could not. See *id.* at 2a-3a.

The court of appeals correctly determined that, in view of all of the evidence of petitioner's conduct, "'Kelli's' apparent willingness d[id] not change [the] analysis." Pet. App. 9a. The critical issue is whether petitioner intended to "persuade[], induce[], entice[], or coerce[]" a minor into illegal sexual activity, 18 U.S.C.

2422(b), and took a substantial step toward doing so, not whether his words or actions actually did persuade a minor, or even whether the conversation had reached the stage where actual persuasion necessarily would have been required. As petitioner appears to recognize (Pet. 19), application of the statute inevitably requires a fact-bound determination by the jury, and a rational jury could have found—and did find—petitioner guilty here.

2. Petitioner contends (Pet. 10-19) that review is warranted to resolve a lower-court conflict regarding the proper interpretation of "persuades, induces, entices, or coerces" in Section 2422(b). 18 U.S.C. 2422(b). That contention lacks merit. Although sometimes employing different linguistic formulations, the courts of appeals broadly agree on the intent required to violate Section 2422(b).

a. Petitioner principally contends (Pet. 10-12) that the decision below conflicts with the D.C. Circuit's decision in *United States* v. *Hite*, *supra*. In *Hite*, the D.C. Circuit addressed whether communications with an adult intermediary in an effort to persuade, induce, entice, or coerce a minor are punishable under Section 2422(b). 769 F.3d at 1158. The court agreed with the other courts of appeals that such communications are punishable under Section 2422(b). *Id.* at 1160. And its conclusion that the jury instructions in that case were erroneous, *id.* at 1166-1167, does not conflict with the court of appeals' decision in this case.

The D.C. Circuit in *Hite* indicated that an instruction permitting a guilty verdict on proof that the defendant "intended to persuade an adult to cause a minor to engage in unlawful sexual activity"—an instruction that contained no reference to influencing the minor's own assent—was problematic. 769 F.3d at 1166 (citation and

emphasis omitted). The court reasoned that, "[a]lthough the word 'cause' is contained within some definitions of 'induce,' cause encompasses more conduct" and does "not necessarily require" what the court deemed "the preeminent characteristic" of conduct prohibited by Section 2422(b): an "effort to transform or overcome the will of the minor." *Id.* at 1167. But the court did not state that this particular instruction would be reversible error standing alone. Rather, the panel also focused on a separate instruction that authorized a finding of guilt upon proof that the defendant "believed that he was communicating with someone who could arrange for the child to engage in unlawful sexual activity." *Ibid.* (emphasis omitted). That language—which again did not refer to the minor's own assent—was erroneous, the D.C. Circuit reasoned, because "'arrange' means to 'put (things) in a neat, attractive, or required order' or to 'organize or make plans for (a future event),'" and thus did not require showing that the defendant attempted to bring about a particular mental state (*i.e.*, assent) in a minor. *Ibid.* (citation omitted).

Petitioner errs in asserting (Pet. 10-12, 15-17) that the Eighth Circuit's approach reflected in the decision below is inconsistent with the D.C. Circuit's holding in *Hite*. The court of appeals here applied the interpretation of Section 2422(b) that it had previously adopted in *United States* v. *Patten*, 397 F.3d 1100 (8th Cir. 2005), where it had explained that Section 2422(b) requires proof that the defendant had the "intent *to persuade a minor* to engage in illegal sexual activity," and that "§ 2422(b) criminalizes 'the attempt *to persuade*, not the performance of the sexual acts themselves.'" *Id.* at 1103 (quoting *United States* v. *Bailey*, 228 F.3d 637, 639 (6th Cir. 2000), cert. denied, 532 U.S. 1009 (2001))

(emphases added). That interpretation accords with the D.C. Circuit's recognition in *Hite* that Section 2422(b) requires an intent to cause a minor's assent, and not merely to cause sexual conduct with the minor to occur. See 769 F.3d at 1166-1167.

Petitioner notes (Pet. 16) that the court of appeals here "decline[d]" to endorse *Hite*'s further statement that "'§ 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor,'" Pet. App. 8a (quoting *Hite*, 769 F.3d at 1161). But the context of the court of appeals' opinion makes clear that it was rejecting *Hite*'s characterization of Section 2422(b)'s scope only to the extent that *Hite*'s formulation would require the government to prove that the minor did not appear to be "'willing'" to engage in sexual conduct with the defendant. See *ibid.* ("Our precedent makes clear that a defendant can be found to 'persuade' or 'entice' even a seemingly 'willing' minor." (citing *Patten*, 397 F.3d at 1102)). And the precedent that the court of appeals cited to support its determination that an intent to "'persuade' or 'entice' even a seemingly 'willing' minor," *ibid.*, was its decision in *Patten*, which expressly requires proof of the defendant's "intent to persuade" the minor to engage in sexual conduct. 397 F.3d at 1103; see p. 9, *supra*. The decision below thus should not be read to endorse the broad "causation" theory that petitioner attributes to it.

b. Petitioner similarly errs in contending (Pet. 13-14) that the decision below conflicts with decisions in the Fourth, Sixth, and Seventh Circuits.

Petitioner cites (Pet. 13) the Fourth Circuit's decision in *United States* v. *Clarke*, 842 F.3d 288 (2016), in which the district court instructed the jury that "[t]he terms persuade, induce, and entice should be given

their ordinary meaning," and "[i]n ordinary usage, the words are effectively synonymous, and the idea conveyed is of one person leading or moving another by persuasion or influence as to some action or state of mind." *Id.* at 295 (citation omitted; first set of brackets in original). The defendant argued that the instructions were deficient because they did not inform the jury that "'arranging'" or "'causing'" sexual activity with a minor is "insufficient to support a conviction under Section 2422(b)." *Id.* at 296 (citation omitted). The Fourth Circuit rejected that argument, reasoning that the district court's instructions "accord[ed] with the statute's intent to 'criminalize an intentional attempt to achieve a mental state—a minor's assent.'" *Ibid.* (quoting *United States* v. *Engle*, 676 F.3d 405, 419 (4th Cir.), cert. denied, 568 U.S. 850 (2012)) (brackets omitted).

Petitioner points (Pet. 13) to the Sixth Circuit's decision in *United States* v. *Roman*, 795 F.3d 511, 516-517 (2015), which cited *Hite* for the proposition that the verbs "'persuade, induce, entice, or coerce' * * * refer to 'acts that seek to transform or overcome the will of a minor.'" Pet. 13 (quoting *Roman*, 795 F.3d at 516-517). But the Sixth Circuit in *Roman* relied on *Hite* to reject the defendant's argument "that he could not violate § 2422(b) as a matter of law because he communicated only with an adult law enforcement agent playing the role of a decoy parent." *Roman*, 795 F.3d at 515. The Sixth Circuit in *Roman* did not identify a dispute in the circuits on the issue here, let alone purport to choose sides in any such dispute. Indeed, the Sixth Circuit cited Eleventh Circuit precedent approvingly, which it presumably would not have done if it shared petitioner's view (Pet. 10-15) that the Eleventh and D.C. Circuits take relevantly different approaches. See *Roman*,

795 F.3d at 516-517 (citing *United States* v. *Lee*, 603 F.3d 904, 912-916 (11th Cir.), cert. denied, 562 U.S. 990 (2010)). And *Roman* ultimately affirmed the conviction at issue. See *id.* at 513, 515-519.

Finally, petitioner cites (Pet. 14) *United States* v. *Hosler*, 966 F.3d 690 (7th Cir. 2020), in which the Seventh Circuit determined that the district court properly rejected the defendant's motion for judgment of acquittal based on his argument that he could not be found guilty under Section 2422(b) because "he was merely a willing participant who responded to [the minor's] preexisting, fully-formed sexual desires." *Id.* at 693. The Seventh Circuit explained that the district court reasonably interpreted the defendant's "messages as trying to win [the minor's] favor." *Ibid.* In making that determination, the Seventh Circuit explained, consistent with other circuits, see pp. 8-11, *supra*, that "[t]he 'essence of the crime is attempting to obtain the minor's assent' to sexual activity." *Id.* at 692 (quoting *United States* v. *McMillan*, 744 F.3d 1033, 1036 (7th Cir.), cert. denied, 574 U.S. 913 (2014)).

c. To the extent that it might even be relevant to the question of whether to grant certiorari in a case from the Eighth Circuit, petitioner errs in contending (Pet. 13-15, 18-19) that the decision below implicates a conflict involving the Second and Eleventh Circuits. Contrary to petitioner's assertion (Pet. 14-15, 18-19), the Second and Eleventh Circuits do not "treat[] bare causation of unlawful sexual activity as enough for a § 2422(b) conviction." Pet. 15. Like other circuits, those courts recognize that § 2422(b) "criminalizes an intentional attempt to achieve a mental state—a minor's assent." *Lee*, 603 F.3d at 914 (citation and emphasis omitted).

In *United States* v. *Waqar*, 997 F.3d 481 (2d Cir. 2021), the Second Circuit determined that Section 2422(b) applied where the defendant had exchanged messages with a person he believed to be a 13-year-old girl (a detective posing as the minor) discussing sex, requesting nude photos, and offering to purchase her various things and pay her cell-phone bill. *Id.* at 483-484. In making that determination, the court reiterated its earlier recognition that Section 2422(b) requires that "the defendant must have a specific intent to persuade, induce, or entice a minor to engage in unlawful sexual conduct." *Id.* at 487 (citing *United States* v. *Joseph*, 542 F.3d 13, 18 (2d Cir. 2008)); see also *United States* v. *Douglas*, 626 F.3d 161, 164-165 (2d Cir. 2010) (Section 2422(b) "criminalizes obtaining or attempting to obtain a minor's assent to unlawful sexual activity." (citing *United States* v. *Brand*, 467 F.3d 179, 202 (2d Cir. 2006), cert. denied, 550 U.S. 926 (2007))), cert. denied, 562 U.S. 1190 (2011).

Like the court of appeals here, the Second Circuit in *Waqar* declined to embrace the view that Section 2422(b) requires proof that the defendant intended to "transform[] or overcom[e] another's will." 997 F.3d at 485. But, also like the court of appeals here, the Second Circuit in *Waqar* rejected that description of Section 2422(b)'s scope to the extent that it would allow a defendant to avoid conviction through an argument "based on the intended victim's responses to [his] overtures," rather than his own "intent in making them." *Id.* at 487. That approach, the Second Circuit explained, improperly "moves the locus of the offense conduct from the intent and actions of the would-be persuader to the effect of his words and deeds on his would-be victim." *Ibid.*

Similarly, in *United States* v. *Murrell*, 368 F.3d 1283, cert. denied, 543 U.S. 960 (2004), the Eleventh Circuit determined that Section 2422(b) applied in a case where the defendant had negotiated with an adult intermediary (a detective posing as the minor's father) to pay for sex with a 13-year-old girl, even though the defendant had not directly communicated with the minor. See *id.* at 1286-1288. In making that determination, the court observed that "'[i]nduce' can be defined in two ways": either as "'to lead or move by influence or persuasion; to prevail upon,' or alternatively, 'to stimulate the occurrence of; cause.'" *Id.* at 1287 (citation and brackets omitted). The court adopted the second definition, reasoning that the first definition would make "induce" "essentially synonymous with the word 'persuade'" notwithstanding the statute's separate use of both, and found that the defendant's conduct fell "squarely within the definition of 'induce'" because he "attempted to stimulate or cause the minor to engage in sexual activity." *Ibid.*

Subsequently, the Eleventh Circuit applied *Murrell*'s interpretation of Section 2422(b) in its unpublished decision in *United States* v. *Cramer*, 789 Fed. Appx. 153 (2019) (per curiam), cert. denied, 141 S. Ct. 87 (2020). The court made clear that "the government must prove that the defendant intended to *cause assent* on the part of the minor, not that he acted with the specific intent to engage in sexual activity." *Id.* at 154 (quoting *Lee*, 603 F.3d at 914). And it similarly stressed that "the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact." *Id.* at 155 (quoting *Lee*, 603 F.3d at 914).

Petitioner asserts that, in its unpublished decision in *United States* v. *Brooks*, 723 Fed. Appx. 671, 679 (11th Cir.) (per curiam), cert. denied, 139 S. Ct. 323 (2018), the Eleventh Circuit "upheld jury instructions allowing conviction if the defendant 'caused' the sexual act." Pet. 15 (brackets and citation omitted). But the court in *Brooks* determined that the defendant's "requested * * * instruction that he could not be found guilty if he did not intend to cause a minor to assent to sexual activity" was in fact "encompassed within the jury instruction given regarding § 2422(b)." 723 Fed. Appx. at 691.

* * * * *

In sum, all of the courts of appeals that have addressed the issue are in agreement that Section 2422(b) requires an intentional attempt to achieve a particular mental state—namely, a minor's assent. And any tension in the language of other circuits' decisions that petitioner cites would not warrant review of the decision below rendered by the Eighth Circuit, which has expressly construed Section 2422(b) to "criminalize[] 'the attempt to persuade, not the performance of the sexual acts themselves.'" *Patten*, 397 F.3d at 1103 (citation omitted).

3. Even if the question petitioner raises otherwise warranted this Court's review, this case would be an unsuitable vehicle in which to address it. Even under petitioner's preferred formulation—that the jury had to find that petitioner intended "to transform the minor's will, alter the minor's mental state, or otherwise secure the minor's assent," Pet. i—the evidence at trial of petitioner's intent was sufficient. The record shows that petitioner sought to persuade, induce, and entice "Kelli" throughout the conversation. See pp. 2-3, 7, *supra*. As the court of appeals recognized, the jury heard evidence

that petitioner "persistently sent messages to 'Kelli' with expressions of his sexual interest in her and descriptions of specific sex acts he would like to perform with her, even after learning her age." Pet. App. 8a. And his communications with her—including questions about her sexual history and preferences, his use of "terms of endearment," *ibid.*, his "expressed [] desire that she be comfortable with him before attempting any sexual conduct with her," *ibid.*, and his touting of his own sexual prowess, see *id.* at 2a-3a—all evince petitioner's intent to overcome any hesitation or resistance by a person he believed to be a minor to engage in illegal sexual activity. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
JAVIER A. SINHA
Attorney

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