No._____

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER DAVIS,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The Third Circuit issued two related holdings in this case that are contrary to decisions of this Court and the other circuits; the holdings constitute a dramatic expansion of the law of attempt and an extreme contraction of the defense of entrapment. The court held, first, that the requirement of a "substantial step"—an essential element for all attempt offenses—can be satisfied by conduct occurring *after* the alleged attempt has ended and need only "in some way relate to the conduct criminalized by the statute." Second, the court held that Davis's "predisposition" to commit the offense at issue was proven by his lawful conduct and that Davis's repeated refusal to commit the offense could be disregarded on the basis of the court's speculation that it "is not necessarily evidence of his non-predisposition . . . . [r]ather it may be evidence of a misguided attempt to avoid incriminating himself."

This Court and the other circuits have long defined a "substantial step" as conduct "*toward*" the commission of a crime. That must be so because the substantial step is the *actus reus*—the overt act of the attempt—without which no attempt has occurred. Accordingly, by definition, a substantial step cannot be conduct after the alleged attempt offense has been committed. Nevertheless, while the other circuits are unanimous as to the correct definition of a substantial step, four circuits—the Second, Sixth, Eighth and Tenth—have also indicated the same confusion as the Third Circuit in cases involving the same criminal statute at issue here, 18 U.S.C. § 2422(b).

As to entrapment, the circuits are extremely divided as to how "predisposition" should be analyzed, and they have adopted several markedly different approaches. No other circuit, however, has held that a defendant's lawful conduct can establish his predisposition to commit a

crime, and that a defendant's resistance to committing an offense may be disregarded as a possible effort to avoid incrimination. This Court has held precisely the opposite.

The questions presented are:

1. Whether the requirement of a "substantial step" can be satisfied by conduct occurring *after* the alleged attempt has ended.

2. Whether a defendant's predisposition to commit a crime may be shown by his lawful conduct, and his repeated resistance to committing the offense disregarded as a possible effort to avoid incrimination.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER DAVIS,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Alexander Davis respectfully prays that a writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 12, 2021, in *United States v. Alexander Davis*, Third Circuit No. 19-1696, and as to which that court denied a petition for rehearing and rehearing *en banc* on May 12, 2021.

OPINION BELOW

The Third Circuit's precedential decision (Jordan, Matey and Roth, JJ.) was filed on January 12, 2021. The judgment is attached at Appendix ("App'x") A. The opinion of the Third Circuit is attached at App'x B and is available at 985 F.3d 298 (3d Cir. 2021). Application for *en banc* rehearing was denied by order dated May 12, 2021, a copy of which is attached at App'x C.

JURISDICTIONAL GROUNDS

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties, namely, petitioner Alexander Davis and respondent United States.

FEDERAL STATUTE INVOLVED

18 U.S.C. § 2422(b) provides:

> 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.

STATEMENT OF THE CASE

This case arose from an undercover sting operation in which a state agent, Daniel Block, posted on a Craigslist adult-only sex cite, claiming to be an eighteen-year-old adult woman "looking for fun." (A108). Davis, who has no criminal record, responded that he too was looking for "adult fun." (A122). Upon receiving Davis's response, Block now purported to be a fourteen-year-old named "Marisa," though he provided Davis with a cell-phone number that had an adult woman's voice on its voice mail message, which Davis heard when he twice called the number—a fact that Block did not dispute. (A464, 944).[1]

[1] Davis testified at trial that having heard an adult woman's voice on the voicemail he believed he was then texting with an adult who was role playing a teenager. (A465). He also testified that when communicating with people online he was never sure who the other person might actually be until meeting them in person. (A457). In returning a verdict of guilty, the jury apparently rejected Davis's testimony and determined that he believed he was communicating with a minor. For purposes of the issues raised in this Petition, this determination by the jury is not disputed.

Unable to speak with Davis lest his identity be revealed, Block instead engaged in two weeks of texting with him. At the conclusion of that two weeks, a plan to meet was made, and Davis was arrested at the meeting site. He was charged and convicted of traveling in interstate commerce for the purpose of engaging in illicit sex, in violation of 18 U.S.C. § 2423(b) (the "travel offense"), and attempting to entice a minor to engage in sex through a means of interstate commerce, in violation of 18 U.S.C. § 2422(b) (the "enticement by phone offense").[2] This petition concerns only the second of these two offenses.

As in many cases involving undercover stings, this case involves questions of whether a criminal attempt actually occurred—did Davis take a substantial step toward enticing "Marisa" by phone to engage in sex—and, to the extent that he did, was he entrapped into doing so—did he have a "predisposition" to entice a minor to engage in sex or did Block induce someone who was not so disposed into committing the crime.

As to the substantial step issue, the government did not point to any of Davis's communications with Block as constituting a substantial step toward enticement by phone. Instead, the government argued to the jury that the substantial step was Davis's subsequent travel and his possession of condoms. (A793-94). Davis objected, arguing that neither his travel nor possession of condoms could possibly have constituted substantial steps toward the attempted enticement offense which, as charged in the indictment, allegedly occurred on Davis's iPhone prior to the travel. (A830-31). The objection was overruled and on appeal the Third Circuit held that the district court was correct, that a "post-[attempt] act like travel can constitute a substantial

[2] The § 2422(b) offense specifically charged that Davis "used . . . an Apple iPhone . . . to attempt to . . . entice . . . a minor . . . . to engage in sexual activity." (A22).

step in violating § 2422(b)[,]" because a "substantial step" need only "in some way, relate to the conduct criminalized by statute." App'x B at 13.

As to the entrapment/predisposition issue, Davis limited the issue on appeal to the enticement-by-phone count of the indictment. Block, having advertised "Marisa" on an adult sexsite, did not exhibit any reluctance about engaging in sex during his two weeks of texting with Davis. Instead, trying to induce Davis to text something that could possibly constitute unlawful enticement, Block repeatedly requested and encouraged Davis to "sext," *i.e.*, engage in sexual texting. Davis, although eager to meet with "Marisa," repeatedly refused Block's requests, going so far as to explicitly text Block: "I cannot text sex or things related . . . . [n]ot my thing[,]" (A988), and to terminate their communications altogether by texting "I'm not interested in having any type of sex with you, Tbh (to be honest) I'm gay." (A926). Block, however, refused to be deterred and repeatedly texted Davis over a period of several days to resume their communications. Upon reeling Davis back in, he then continued to barrage Davis with requests, more than eighty in all, for him to communicate something sexual in nature. Davis finally relented, relaying to Block a sexual relationship that he had engaged in at the age of fourteen.

Despite Block's relentless efforts to induce a clearly resistant Davis to engage in the type of communications that might conceivably be found to violate § 2422(b), the Third Circuit held that Davis had not been entrapped with respect to the enticement count. The court held that the jury could conclude that "Davis was predisposed to entice a minor" for two reasons: first, that Davis allegedly made "post-arrest statements regarding his attraction to young girls[;]" and second, "[w]hen Davis discovered he was corresponding with a fourteen-year-old who posted a

personal ad for sex, his ready response acknowledged her age and asked if she wanted to meet that day." App'x B at 18.

As discussed further below, the Third Circuit's holdings constitute an extreme break with the decisions of this Court and the other circuits. Each of these issues, moreover, have engendered considerable conflict and confusion both within and between the circuits. A decision from this Court is critically needed.

A. Proceedings Before the District Court

The facts relevant to this petition are undisputed. Davis was charged with the violations of 18 U.S.C. § 2422(b) and § 2423(b) discussed above. The case proceeded to trial with the evidence largely consisting of the two weeks of online communications between Davis and Block. It began with Block placing the following post on the adults-only Craigslist casual encounters site:

> **Wild child – w4m**
>
> Hey boyz
> :)
> :) age: 18
>
> Hmu if you are looking for fun, im young n free :)
> :)
> Please be discrete

(A108; 1026).

Davis responded the next day, expressing his desire to engage in "adult fun." (A122; 1027). When Block ultimately responded, he purported not to be eighteen, as he originally advertised, but only fourteen. (A126). In response, Davis sent a series of emails with questions, indicating his uncertainty about who he was communicating with, including whether Block was even a boy or girl:

That's ok, I know how to be respectful. do you wanna meet today?

* * *

What are you looking for How can I help you get it?

* * *

Are you a boy or a girl?

(A127); (A455) ("I'm trying to discern who they are . . . and what they're into").[3]

Block then provided Davis with a cell phone number and the two began to text, with Davis continuing to try to arrange a meeting as quickly as possible. (A469).[4] Before agreeing to meet, however, Block attempted to first engage Davis in some sort of sexual communications, sending him text after text questioning him as to what he would like to do with "her." (A909-25). Correctly understanding what Block was looking for, and unwilling to engage in communications of that nature with someone unknown to him, Davis terminated his communications with Block, texting him in no uncertain terms:

I'm not interested in having any type of sex with you.
Tbh I'm gay.

(A926).

Block, however, refused to give up. Over the next three days, he repeatedly texted Davis attempting to revive their communications. (A926-27). Finally, Davis replied that he wanted to "meet." (A927). Block replied "ok" to the idea of a meeting, but soon thereafter, he resumed his attempts to induce Davis to send a sexual text. (A930). That evening, Block sent Davis twenty-two such texts, without any success. (A953-966). Davis repeatedly declined Block's overtures,

[3] Davis testified that in his "experience on Craigslist, there [are] many males who post [as] women." (A456).

[4] Wanting to see who he was communicating with, Davis offered "Marisa" an iPad and/or an iPhone if she would send him a current photograph, a "selfie." (A148, 473). Block, in turn, offered excuses as to why his phone's camera was no longer working. (A900).

stating that at their first meeting he would like to just "talk." (A909, 921); (A980) ("I only want to do things that can be done in public.").

The next day, Block continued his efforts. He sent sixteen more texts attempting to induce Davis into texting something sexual. (A971-88). Having now received more than fifty texts from Block plainly seeking a sexual response, Davis explicitly stated that he did not want to engage in sexual communications:

Davis: I cannot text sex or things related.
Not at this point

Block: Wait why????? Do u not trust me

Davis: Idk. Not my thing. Hope that's ok
with you. I'm sure you understand

(A988-89)

As before, Block would not take no for an answer. He persisted in bombarding Davis, questioning him as to "why can't u text sex stuff then" and why "don't [you] trust me." (A990). Davis, in a clear indication that he was unsure who he was actually communicating with, responded, "I never met you. I neither trust you nor not trust you. I've never met you." (A990). Davis reiterated that he just wanted to meet and "see if we like each other." (A1002).

Refusing to give up, Block continued to push for what he wanted:

Block: Ok if u don't wanna text about idk
(4:25 PM)

Y can't u I don't get that
(4:26 PM)

Like wat wud U wanna do
(4:47 PM)

Wat u like to do then
(4:48 PM)

Like how far u wanna go w me. Jus tell me I
reli like u n jus wanna no
(4:54 PM)

Soooo tell me n I'll be honest w u bout it (4:56 PM)

Nooo silly u gotta tell me what ur thinkin (4:58 PM)

(A992-1001).

After receiving thirty more texts from Block similarly designed to induce a sexual response, Davis's resistance was finally broken and he provided, in a very limited fashion, what Block was looking for. He confided that when he was fourteen he had a girlfriend with whom he did "everything;" but that he "didn't treat her the right way" and wished that he could "redo it." (A1003-05). Block responded: "I think u can." and requested that Davis bring "protection" to their meeting, which Davis agreed to. (A1005, 1008-09). A meeting was set for the next day at a McDonalds in Bethlehem, Pennsylvania and after arriving there Davis was removed from his car and arrested. (A496). He was found to be in possession of three condoms. (A192).

Following his arrest, Davis's phone was taken by the police and forensically examined with "every text, every image," produced in a report. (A319-21). That report, 6500 pages in length, did not contain any photos of teenagers, much less an iota of child pornography or evidence of any improper contact with a minor. (A329). However, while Davis's phone did not reveal any pictures or contact with teenagers, and the government provided no other such evidence, the arresting officers testified that after being taken into custody Davis spontaneously confessed his attraction to teenage girls. (A241, 307).

At trial, the government did not point to any of Davis's communications with Block as constituting enticement or a substantial step toward enticement. Instead, the government argued to the jury that the substantial step was Davis's subsequent travel and his possession of condoms. (A793-94). ("In this case we have two substantial steps . . . . he drove to the meet location . . . . [and] he shows up with condoms and they're in his pockets.") Davis objected, arguing that

neither his travel nor possession of condoms could possibly have constituted substantial steps toward the attempted enticement offense which, as charged in the indictment, allegedly occurred on Davis's iPhone prior to the travel. (A830-31). The objection was overruled and the jury returned a guilty verdict on both counts. The court thereafter imposed a 127-month sentence.

B. The Third Circuit Decision

On appeal, Davis argued that the prosecutor's substantial step argument was erroneous and deprived him of a fair trial. The Third Circuit disagreed, holding that "Davis's travel to the McDonald's parking lot constitutes a substantial step" as does his possession of condoms. App'x B at 15-16. The Court reasoned that a "post-enticement act like travel can constitute a substantial step in violating § 2422(b)[,] " so long as it "in some way, relate[s] to the conduct criminalized by the statute." *Id*. at 13.[5]

Davis also argued on appeal that to the extent he was actually guilty of the enticement offense, he had been entrapped as a matter of law. The Third Circuit rejected Davis's argument, holding that the evidence was sufficient for the jury to determine that Davis was "predisposed to

[5] The court's reference to travel being a "post-enticement act," as opposed to a "post-communications act," highlights the court's confusion. The government did not contend at trial or on appeal that Davis's communications with Block constituted enticement or a substantial step toward enticement. Instead, the government rested its argument on Davis's travel and possession of condoms. Nevertheless, the Third Circuit observed in *dicta* that some of Davis's texting with Block could be reasonably interpreted as a substantial step. *Id*. at 13 n.26. The issue on appeal, however, was not the sufficiency of the evidence, but whether the government's mistaken substantial step argument to the jury deprived Davis of a fair trial. And, in that regard, the government not only did not argue to the jury that Davis's communications constituted a substantial step, the government made no such harmless error argument to the Third Circuit. And with good reason. Had the prosecutor not made his mistaken substantial step argument, there is certainly a reasonable possibility that the jury would have looked at Block and Davis's communications and concluded that it was not Davis attempting, *i.e*., taking a substantial step, to entice Block into engaging in sexual activity, but rather Block, posing as a sexually adventurous minor on an adult sex-site, who was attempting to engage Davis in sexual communications prior to meeting.

entice a minor." *Id*. at 18. In so holding, the court observed that the government may prove predisposition in three ways:

> (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.

Id. (quotation marks and citation omitted).

The Court observed that the "government's evidence best fits in the third method of showing Davis's predisposition." *Id*. The court explained:

> Davis's post-arrest statements regarding his attraction to young girls is evidence that he was willing to entice a minor. When Davis discovered he was corresponding with a fourteen-year-old who posted a personals ad for sex, his "ready response" acknowledged her age and asked if she wanted to meet that day. Based on this evidence, a reasonable jury could conclude beyond a reasonable doubt that Davis was predisposed to entice a minor.

Id.

The court also rejected Davis's argument that his lack of predisposition was evidenced by his resistance to engage in any sort of sexual discussions with Block. The court reasoned:

> Davis's reluctance to engage in sexually explicit conversation is not necessarily evidence of his non-predisposition to violate § 2422(b). Rather, it may be evidence of a misguided attempt to avoid incriminating himself.

Id. at 18.

REASONS FOR GRANTING THE PETITION

THE THIRD CIRCUIT'S HOLDINGS REGARDING THE MEANING OF SUBSTANTIAL STEP AND PREDISPOSITION ARE CONTRARY TO THE DECISIONS OF THIS COURT AND THE OTHER CIRCUITS AND HIGHLIGHT THE CONFUSION AND DIVISION WITHIN AND BETWEEN THE CIRCUITS ON THESE ISSUES.

This case presents two extremely important issues that arise in a substantial percentage of undercover sting cases: did the defendant take a substantial step toward the crime that the undercover agent proposed, and, if so, was the defendant entrapped into doing so. The Third Circuit's holdings as to these issues conflict with decisions of this Court and the other circuits and they highlight the confusion and division within and between the circuits over these issues. Review by this Court is critically needed.[6]

I. The Third Circuit has adopted a definition of substantial step that conflicts with this Court and every other circuit.

As discussed above, the Third Circuit held here that the required "substantial step" element of an attempt offense can occur after the attempt has taken place and need only "in some way relate to the conduct criminalized by statute." App'x B at 12. In so holding, the court rejected Davis's argument that a substantial step must be conduct "toward" the offense of conviction and, as such, cannot possibly post-date the completion of the alleged attempt. *Id*. ("We do not agree with his interpretation of the law of attempt."). The Third Circuit's holding dramatically conflicts with decisions of this Court and every other circuit.[7]

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[6] Because the Third Circuit's substantial step holding so deviates from this Court's precedent, and this country's long history of attempt jurisprudence, Petitioner respectfully submits that this issue may properly be disposed of through summary reversal.

[7] The Third Circuit, however, did not disagree with the defense, and the other circuits, that a violation of 18 U.S.C. § 2422(b) is complete with the enticement or attempted enticement, which is why "neither travel nor a direct plan to travel is required to sustain a conviction under § 2422(b)." *United States v. Howard*, 766 F.3d 414, 425 (5th Cir. 2014). *United States v.*

In *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), this Court examined the elements of an attempt crime, specifically an attempt to illegally reenter the United States in violation of 8 U.S.C. § 1326(a). As this Court observed, it has long been recognized that an essential element of an attempt offense is an "'overt' act that constitutes a 'substantial step' *toward* completing the offense." 549 U.S. at 106 (emphasis added); *id*. ("The Government does not disagree with respondent's submission that he cannot be guilty of attempted reentry in violation of 8 U.S.C. § 1326(a) unless he committed an overt act qualifying as a substantial step toward completion of his goal."); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991) (observing that "[f]or Braxton to be guilty of an attempted killing under 18 U.S.C. § 1114, he must have taken a substantial step towards that crime . . . .").

Consistent with the decisions of this Court, and the long history of attempt jurisprudence in this country, every other circuit has defined a substantial step as conduct "towards" completing the object offense. *United States v. Berk*, 652 F.3d 132, 140 (1st Cir. 2011) ("The crime of 'attempt' requires an intention to commit the substantive offense—here, critically, to 'persuade, induce, entice and coerce'—and a substantial step toward its commission."); *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003) ("In order to establish that a defendant is guilty of an attempt to commit a crime, the government must prove that the defendant . . . engaged in conduct amounting to a 'substantial step' toward the commission of the crime."); *United States v. Engle*, 676 F.3d 405, 419-20 (4th Cir. 2012) ("[I]n order to convict a defendant of attempt, the government must prove . . . he took a substantial step towards completion of the crime that strongly corroborates that intent."); *United States v. Redd*, 355 F.3d 866, 872-73 (5th Cir. 2003)

Goetzke, 494 F.3d 1231, 1236 (9th Cir. 2007) (same); *United States v. Gladish*, 536 F.3d 646, 649 (7th Cir. 2008) (same).

("In order to convict Redd of the attempt charge under 21 U.S.C. § 846, the jury was required to find that Redd . . . engaged in conduct which constitutes a substantial step toward commission of the crime."); *United States v. Shelton*, 30 F.3d 702, 706 (1994) (6th Cir. 1994) ("To prove an attempt, the government must show a defendant's . . . commission of an act that "constitutes a substantial step towards commission of the proscribed criminal activity."); *United States v. Sanchez*, 615 F.3d 836, 844 (7th Cir. 2010) ("To obtain a conviction for an attempt crime, the government must prove that the defendant . . . t[ook] a substantial step toward its completion."); *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007) ("The elements of attempt are (1) intent to commit the predicate offense, and (2) conduct that is a substantial step toward its commission."); *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1243 (9th Cir. 2014) ("We have defined "attempt" as requiring . . . an overt act constituting a substantial step towards the commission of the offense."); *United States v. Washington*, 653 F.3d 1251, 1264 (10th Cir. 2011) ("An attempt requires . . . the "commission of an act which constitutes a substantial step towards the commission of the substantive offense."); *Ovalles v. United States*, 905 F.3d 1300, 1305 (11th Cir. 2018) ("To be convicted of an 'attempt' of a federal offense, a defendant must . . . have taken a substantial step toward the commission of the offense that strongly corroborates her criminal intent"); *United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014) ("At the time of the enactment of § 2422(b) in 1996, the general meaning of attempt in federal criminal law was an action constituting a 'substantial step' towards commission of a crime . . . .").

II. Four circuits have indicated similar confusion as the Third Circuit as to whether a substantial step can occur after a § 2422(b) attempt offense has allegedly occurred.

While no other circuit has held, as the Third Circuit did in this case, that a substantial step can occur after an alleged attempt has ended, four of the circuits have indicated similar confusion

in the context of § 2422(b) prosecutions by describing travel as a substantial step. *See United States v. Brand*, 467 F.3d 179, 204 (2d Cir. 2008) ("Finally, Brand took a 'substantial step' toward the completion of the crime because Brand actually went to the . . . meeting place that he had established with 'Julie.'"); *United States v. Vinton*, 946 F.3d 847, 852 (6th Cir. 2020) (describing defendant's travel as a "substantial step"); *United States v. Young*, 613 F.3d 735, 743 (8th Cir. 2010) (same); *United States v. Root*, 296 F.3d 1222, 1228 (11th Cir. 2002) (same).

None of these cases, however, presented the substantial step issue raised here—whether a substantial step can be conduct *after* the alleged attempt—and in none of the cases did the courts address the apparent contradiction between the definition of a substantial step—conduct "toward" the commission of an offense—and the fact that the travel in these cases post-dated the charged attempt. Each of these cases instead involved sufficiency challenges in which the defendant's online communications themselves were found to be substantial steps and a sufficient basis upon which the defendants could be convicted.[8]

Thus, none of these cases holds, as the Third Circuit has here, that post-communication conduct such as travel or possession of condoms can constitute the requisite substantial step necessary to sustain a § 2422(b) enticement conviction, regardless of whether the communications themselves were substantial steps toward enticement. And, because the

[8] *Brand*, 467 F.3d at 204 (affirming where defendant "immediately proceeded to tell 'Julie' the sexual acts he was going to engage in with her . . . and holding that "[t]hese sexually explicit conversations with 'Julie' provided overwhelming evidence to support the jury's finding that Brand attempted to entice a minor."); *Vinton*, 946 F.3d at 852 (defendant's graphic sexual conversations held a substantial step); *Young*, 613 F.3d at 743 (defendant engaged in extremely sexual communications with putative minor and made plans to meet her); *Root*, 296 F.3d at 1228 (same).

communications in each of the cases were substantial steps, and the evidence sufficient without any travel, the courts' discussion of travel was minimal and largely superfluous.

Accordingly, the statements in these four cases about travel being a substantial step may well have been merely a matter of imprecise language; the courts mistakenly referring to travel as a "substantial step," when the travel should have instead been characterized as additional post-attempt evidence of intent, much in the same way that a confession or flight can serve as such post-offense evidence.[9]

While this imprecision in language was relatively unimportant in these four sufficiency cases, since the defendants' online communications provided sufficient evidence of a substantial step without any travel, the case at bar illustrates the profound legal error that can result when such a mistake in terminology metastasizes from case to case, circuit to circuit, without correction. The Third Circuit, in adopting its new definition of "substantial step," relied upon the above cases as persuasive authority. App'x B at 14 ("Every other court of appeals that has addressed this issue has held that travel can constitute a substantial step.").[10] Misapprehending

[9] This distinction is important, and critical in a case such as the instant one. A substantial step, by definition, must be probative of the defendant's intent to commit the crime at issue. But, while every substantial step must be probative of intent, not every act that corroborates intent is a substantial step. An act is not a substantial step unless it *also* supplies the *actus reus* of the attempt crime—and the *actus reus* of a crime cannot come after the crime ends. Accordingly, here, Davis's travel might be some evidence of his intent, but it cannot be a substantial step toward the attempted enticement-by-phone offense, which either occurred or did not occur before the travel commenced. And if there was no attempted enticement during the two weeks of texting, Davis's travel, at best, evidences an intent to have sex, not an intent to entice by phone.

[10] The Third Circuit also mistakenly relied on several other cases where, in fact, there was no travel and the courts all agreed that travel is unnecessary for a § 2422(b) violation. App'x B at 14 n.29 (citing *Gladish*; *Goetzke*; and *Howard*). In addition, the court erroneously relied on a case where the defendant's travel was correctly referenced as additional evidence of intent and not as a substantial step. *Id*. (citing *United States v. Faust*, 795 F.3d 1243, 1250 (10th Cir. 2015)

these cases, the Third Circuit has now adopted a definition of substantial step that is in extreme conflict not only with this Court, but more than a hundred years of attempt jurisprudence.[11]

III. The Third Circuit's decision has significant constitutional implications.

The Third Circuit's new definition of a substantial step makes *mens rea* sufficient for criminal attempt, so long as the defendant performs some "related" act—whether toward a separate offense, or no offense at all—after the attempt ends.[12] The constitutional problems that raises are plain. Only Congress defines federal crimes. *Whitman v. United States*, 574 U.S. 1003, 1005 (2014); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The statutory term "attempt" signals Congress's intent to require both *mens rea* and *actus reus*, the latter consisting of a "substantial step *toward* the commission" of the object offense. *Resendiz-Ponce*, 549 U.S. at 108 & n.4 (emphasis added); *Hite*, 769 F.3d at 1162 ("Although § 2422(b) does not define attempt . . . Congress was aware of how the law of attempt would apply to the statute [;] [a]t the time of the enactment of § 2422(b) in 1996, the general meaning of 'attempt' in federal criminal law was an action constituting a 'substantial step' *toward* commission of a crime . . . ") (emphasis added). By allowing post-attempt conduct to substitute for an act "toward" the

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(holding that evidence was sufficient without defendant's travel and that the travel served to "bolster the government's proof of his intent to persuade . . . .").

[11] A federal district court has directly addressed the question of whether a defendant's travel was a substantial step in a § 2422(b) case where the defendant's online communications were not. *See United States v. Nitschke*, 843 F.Supp. 2d 4 (D. DC 2011). The court held that the travel was not a substantial step and because the government could not point to any other alleged substantial step the district court dismissed the indictment. *Id*. at 9-10 ("A § 2422(b) violation occurs, if at all, before any travel is undertaken; indeed no travel is even necessary.").

[12] The vagueness inherent in the word "related" only compounds the due process problems the decision raises.

offense attempted, the Third Circuit has made *actus reus* optional for attempt crimes—effectively criminalizing a far broader swath of conduct (and non-conduct) than Congress criminalized.[13]

Correspondingly, the ruling lowers the government's burden of proving every element of the attempt crime. As the Third Circuit's opinion reflects, the decision allows proof of intent to swallow the *actus reus* element, treating "substantial step" as if it's only "purpose . . . is to corroborate intent." App'x B at 12. Indeed, one of the cases the Third Circuit cites with approval makes that explicit: "the substantial step element collapses into the intent element in this case." *United States v. Vinton*, 946 F.3d 847, 851 (6th Cir. 2020).

IV. The Third Circuit's holding that Davis's predisposition to violate 18 U.S.C. § 2422(b) was proven by his lawful conduct and that his resistance to committing that offense should be disregarded because it might have been "a misguided attempt to avoid incriminating himself" is contrary to the decisions of this Court and every other circuit.

As discussed above, the Third Circuit held that Davis's "predisposit[ion] to entice a minor" was proven by two things: First, "his post-arrest statements regarding his attraction to young girls[;]" and, second, his "ready response" and willingness to "meet ['Marisa'] that day," after learning that she was a "fourteen-year-old." App'x B at 18. In so holding, however, the Court did not suggest that Davis's supposed attraction to teenagers, or his willingness to respond to and meet with one was unlawful.[14] Nor did the Court explain how this conduct, morally

[13] Indeed, deeming post-attempt "related" conduct a "substantial step" opens the door to using conduct toward a different offense (or no offense) to supply *both mens rea* and *actus reus* for the attempt crime. But the intent required for criminal attempt is the intent to commit the object offense—not a different one. *Resendiz-Ponce*, 549 U.S. at 107.

[14] To the extent that the court was implicitly equating Davis's willingness to "meet" with a willingness to engage in sexual activity, such conduct would of course be illegal, but, as discussed further below, it would still serve as no evidence of Davis's predisposition to violate

objectionable as it may be, evidenced Davis's predisposition to use a phone to entice a minor into engaging in sexual activity, in violation of 18 U.S.C. § 2422(b).

The Third Circuit's holding is directly contrary to this Court's decision in *Jacobson v. United States*, 503 U.S. 540 (1992). There, this Court held that the defendant had been entrapped as a matter of law into buying magazines containing child pornography in violation of the Child Protection Act of 1984. *Id*. at 554. In so holding, this Court rejected the government's arguments that the defendant's predisposition to violate the Act was evidenced by his purchase of similar magazines containing child pornography at a time when they were not illegal and by his subsequent statements indicating his interest in "[p]reteen sex" material. *Id*. at 543-44. As to the former, this Court held that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal." *Id*. at 551. And, with respect to the defendant's statements, this Court held that these communications were "at most indicative of certain personal inclinations . . . . [and] hardly support an inference that he would commit the crime of receiving child pornography through the mails." *Id*. at 551; *id*. at 551-52 ("Furthermore, a person's inclinations and 'fantasies . . . are his own and beyond the reach of government.'") (quoting *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 67 (1973)).

As *Jacobson* makes clear, the Third Circuit clearly erred in holding that Davis's alleged post-arrest statements regarding his attraction to teenagers evidenced his predisposition to entice a teenager into having sex in violation of 18 U.S.C. § 2422(b). At best, the supposed statements evidenced Davis's "personal inclinations and fantasies." *Jacobson*, 503 U.S. at 551-52.[15]

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§ 2422(b) by *enticing* a minor into having sex and it would still be contrary to this Court's entrapment jurisprudence.

[15] *See also United States v. Poehlman*, 217 F.3d 692, 705 (9th Cir. 2000) ("[T]he only indication . . . of any preexisting interest in children is Poehlman's statement . . . that he has

The Third Circuit also clearly erred in pointing to Davis's "ready response" and willingness to "meet" 'Marisa' at the outset of their communications. Meeting a teenager is not unlawful and does not support an inference that Davis would violate § 2422(b) by using a phone to attempt to entice a minor into having sex, especially given that the "minor" in question had already expressed her desire to have sex by "post[ing] a personal ad for sex" on an adult platform. App'x B at 18.

To the extent, moreover, that the Third Circuit's decision can be read as implicitly suggesting that Davis's initial communications with "Marisa" evidenced not only a ready willingness to meet, but a willingness to engage in sex at that first meeting, this still would not support an inference that Davis was predisposed to *entice* a minor into having sex and the court's decision would still be in conflict with *Jacobson*.[16] As *Jacobson* makes clear, the question when

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'always looked at little girls' . . . [b]ut this is hardly an indication that he was prone to engage in sexual relations with minors.") (citing *Jacobson*, 503 U.S. at 545).

[16] If this is what the court meant, it is also strongly against the weight of the evidence. Davis repeatedly expressed his desire to Block that at their first meeting they just "talk," and determine whether they "like each other." (A909, 1002). While the Third Circuit suggests that these statements might have just been subterfuge on Davis's part, App'x B at 19, the court fails to explain why that would be so given that Davis had encountered "Marisa" on an adult sex site and, as such, it would have been obvious to both parties that the "ultimate goal" was "to engage in sexual activity." App'x B at 18. There thus was no need or purpose for subterfuge. Davis's statements, moreover, were not made to reassure a hesitant "Marisa," she never indicated any hesitancy, but rather as responses to her repeated attempts to immediately progress to a discussion of the sexual activity that they would engage in. While Davis candidly acknowledged that his ultimate goal when on the Craigslist site was sex, he testified that his practice was not to engage in sex at an initial meeting and his texting with Block was consistent with that. (A444, 483). It was only at the conclusion of the two weeks of texting that Davis, after Block's repeated urgings, agreed to meet for a possible sexual encounter. Nevertheless, for purposes of his appeal and the instant petition, Davis does not dispute that the evidence was minimally sufficient for the jury to find a predisposition to have sex with a minor and therefore a predisposition to commit the § 2423(b) offense. The issue is whether the evidence was minimally sufficient to establish his predisposition to *entice* a minor by phone into engaging in sexual activity in violation of § 2422(b) and the Third Circuit's analysis of that issue.

it comes to predisposition is whether the defendant was predisposed to commit the offense at issue, there the Child Protection Act of 1984, here 18 U.S.C. § 2422(b). That the defendant in *Jacobson* was plainly predisposed to look at child pornography, did not mean that he was predisposed to violate the Act in order to do so. Likewise, here, assuming *arguendo* the evidence was sufficient to show Davis's predisposition to travel across state lines to have sex with a *willing* minor, this does not mean that he was also predisposed to use a phone to *entice* an *unwilling* minor to have sex in violation of § 2422(b). As Congress's statutory scheme makes clear, these are two substantially different crimes with significantly different penalties.[17] That Davis might arguably have been predisposed to violate one of them does not prove that he was predisposed to violate the other.

This point is also made clear by this Court's decision in *Sherman v. United States*, 356 U.S.369 (1958). There, this Court also found entrapment as a matter of law where a government informant induced the defendant to obtain and sell drugs to him. *Id*. at 371. In so holding, this Court found that the government's evidence of predisposition was insufficient notwithstanding the defendant's history of drug abuse and the fact that he and the informant had met at a doctor's office where the defendant was going for help with his addiction. *Id*. As this Court framed the issue of predisposition, however, the question was not whether the defendant was ready and willing to *use* narcotics, but whether he was "ready and willing to *sell* narcotics." *Id*. at 375. Just as the government proof in that regard was lacking in *Sherman*, the government presented

[17] Congress considers enticement of a minor to have sex, § 2422(b,) to be a more severe crime than traveling across state lines to have sex with a minor, § 2423(b). The former has a minimum statutory penalty of ten years and a maximum penalty of life, while the latter carries no mandatory minimum and a maximum sentence of thirty years.

no evidence here of any predisposition on Davis's part to entice a minor into engaging in sexual activity.[18]

The Third Circuit's decision is also contrary to this Court's precedent in the way that it addresses Davis's resistance to engaging in the type of sexual communications that could be found to violate § 2422(b).[19] The Third Circuit dismisses Davis's "reluctance to engage in sexually explicit conversation," suggesting that this "is not necessarily evidence of his non-predisposition to violate 2422(b)[,]" but "[r]ather it may be evidence of a misguided attempt to avoid incriminating himself." App'x B at 18. This Court, however, rejected precisely that type of speculative characterization in *Sherman.*[20]

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[18] Following *Jacobson* and *Sherman*, the circuit courts are in agreement that a defendant's willingness to commit one crime does not establish his predisposition to commit a more severe offense. *See United States v. McGill*, 754 F.3d 452, 458 (7th Cir. 2014) (rejecting the government's argument that defendant's "possession of child pornography is evidence of a predisposition to distribute" and recognizing that "[t]he government is not free to induce more-serious crimes simply because the target already committed a lesser crime."); *United States v. Ewbank*, 483 F.2d 1149, 1151 (9th Cir. 1973) ("The fact that appellant here was involved in the drug culture, according to his own admission being a user, does not establish that he was also a predisposed seller or distributor within the meaning of the crime of which he was convicted."); *accord United States v. Isnadin*, 742 F.3d 1278, 1297, 1301-02 & n.31 (11th Cir. 2014) (approving jury instructions permitting jury to find entrapment to some, but not all, charged crimes); *United States v. Mitchell,* 67 F.3d 1248, 1252-57 (6th Cir. 1995) (same).

[19] Notably, neither the government nor the Third Circuit have identified any of Davis's texts that actually violated § 2422(b). While the court characterizes the texts as "replete with attempts to entice Marisa to meet him[,]" App'x B at 19, § 2422(b) does not criminalize enticing a minor to meet, it criminalizes enticing a minor to "engage in sexual activity." As discussed above, the only texts from Davis that arguably violate § 2422(b) came at the end of his two weeks of texting with Block, after his resistance had been overcome by Block's relentless efforts to generate a sexual discussion.

[20] The Third Circuit's characterization is not only contrary to *Sherman*, it makes little sense. The very offense at issue, enticing a minor by phone to engage in sexual activity, necessarily requires a defendant to engage in some communications, however limited, about sexual activity. If a defendant is resistant to engaging in any sexual communications whatsoever, then he is, by definition, resistant to committing the offense, and it is irrelevant whether that resistance is motivated by a fear of incrimination, a fear of violating the law, or any other reason. The issue,

The government in *Sherman* attempted to explain away the defendant's resistance to the charged crime much the same way that the Third Circuit has done so here. The government argued that the defendant's repeated attempts to deflect and avoid the informant's repeated requests for narcotics was merely "the natural wariness of the criminal." *Id*. This Court rejected that argument out of hand, holding that "the government's characterization . . . cannot fill the evidentiary void." *Id*. at 374. Instead, this Court made the defendant's resistance a critical part of the Court's analysis in determining that the government's proof of predisposition was insufficient.[21]

V. The circuit courts are divided as to how to analyze the issue of predisposition, but under none of the various approaches would the evidence in this case be deemed sufficient

Since this Court's decision in *Jacobson*, the circuit courts have been substantially divided as to how the issue of predisposition should be evaluated. *See Thickstun*, 110 F.3d at 1397-98 (Ninth Circuit rejects the approach of the Seventh Circuit); *United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995) (rejecting the Ninth Circuit's approach); *United States v. Hollingsworth*, 27 F.3d 1196, 1199 (7th Cir. 1994) (disagreeing with the First Circuit's approach). Whereas some courts view *Jacobson* as "merely applying settled entrapment law," *Thickstun*, 110 F.3d at

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for purposes of predisposition, is whether the defendant was resistant to committing the offense, not the reason for the defendant's resistance. As discussed above, moreover, Davis's resistance extended not just to attempting to limit his texting with Block, but to attempting to terminate their communications altogether.

[21] Accordingly, after *Sherman*, the circuits agree that a critical factor in determining predisposition is a defendant's resistance to committing the offense at issue. *See e.g.*, *United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997) (observing that "the defendant's reluctance is the most important" predisposition factor); *United States v. Mayfield*, 771 F.3d 417, 435 (7th Cir. 2014) (same). Counsel is unaware of any other court, besides the Third Circuit in the case at bar, that has dismissed such resistance by speculating that it "may be" . . . an attempt to avoid incrimina[tion]. App'x B at 18.

1398,[22] others believe that the decision has "changed the landscape of the entrapment defense[,]" . . . . [and] clarified the meaning of predisposition." *Hollingworth*, 27 F.3d at 1198; *United States v. Gendron*, 18 F.3d 955, 963 (1st Cir. 1994) (adopting a new approach to entrapment and observing that "*Jacobson*'s importance . . . concerns the 'predisposition part of the entrapment defense.").

Having interpreted *Jacobson* so differently, the circuits have taken very different approaches in their analysis of predisposition. At least four different modes of analysis have emerged. The First Circuit has adopted an "ordinary opportunity to commit the crime" test. *Gendron*, 18 F.3d at 962. Under that approach, a factfinder or reviewing court "should ask how the defendant likely would have reacted to an ordinary opportunity to commit the crime[,]" absent any "*government overreaching*." *Id*. (emphasis in the original).

The Seventh Circuit, by contrast, rejected the First Circuit's approach, believing that *Jacobson* "clarified" that "[p]redisposition is not a purely mental state . . . . [predisposition] has positional as well as dispositional force." *Hollingsworth*, 27 F.3d at 1200. What this means, according to the Seventh Circuit, is that the "defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so[.]" *Id*.[23]

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[22] *See also Brown*, 43 F.3d at 624 ("*Jacobson* does not constitute 'an innovation in entrapment law' . . . .") (quoting *Jacobson*, 503 U.S. at 549 n.2). This Court's quoted language in *Brown* actually referred to one discrete aspect of the Court's opinion, "the proposition that the accused must be predisposed prior to contact with law enforcement officers . . . ." 503 U.S. at 549 n.2

[23] The Seventh Circuit also understands *Jacobson* as meaning that a defendant's mere "willingness" to commit a crime does not mean that he is predisposed. *Hollingsworth*, 27 F.3d at 1199 ("[H]ad the Court in *Jacobson* believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then Jacobson was predisposed . . . . [h]e never resisted."); *see also Poehlman*, 217 F.3d at 703 ("The government argues that Poehlman was predisposed because he

Other Circuits, in turn, have rejected the Seventh Circuit's "positional" predisposition test. *Thickstun*, 110 F.3d at 1397 ("The [Seventh Circuit] believed that *Jacobson* compelled the alteration of the law. We disagree."); *United States v. Cromitie*, 727 F.3d 194, 217 (2d Cir. 2019) ("We reject the Seventh Circuit's expansion of the entrapment defense to permit an induced defendant, predisposed under existing standards to commit a crime, to establish the defense of entrapment simply, because, prior to the unfolding of a government sting, he was not in a position where it was likely that he would have figured out how to commit the offense . . . .").

Several of these other circuits employ a multi-factor test to assess predisposition. *See Thickstun*, 110 F.3d at 1396 ("Five factors may be considered to show predisposition: (1) the defendant's character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement); *United States v. Khalil*, 279 F.3d 358, 365 (6th Cir. 2002) (same). The Eleventh Circuit, by contrast, rejects the Ninth Circuit's five-factor analysis, because "[a]ny list would necessarily be over and under

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jumped at the chance to cross state lines to sexually mentor Sharon's children at the first opportunity available to him[,] [b]ut if willingness alone were the test, *Jacobson* would have come out differently.").

Other circuits, however, continue to see a defendant's ready willingness to commit an offense as being dispositive evidence of predisposition. *See Brown*, 43 F.3d at 625 ("Predisposition may be demonstrated simply by a defendant's ready commission of the charged crime."); *United States v. Zupnik*, 989 F.3d 649, 656 (8th Cir. 2021) ("There was more than sufficient evidence that the jury could have relied upon in finding that Zupnik responded promptly to the opportunity to solicit a minor and was, therefore, not entrapped by the government.").

inclusive by omitting factors which might prove crucial to a predisposition inquiry in one prosecution but are totally irrelevant in another." *Brown*, 43 F.3d at 625.[24]

As the foregoing discussion makes clear, the circuits are thoroughly divided when it comes to the analysis of predisposition. What is nevertheless clear is that under any of these various approaches, the evidence of predisposition in this case was plainly insufficient. Consider, for example, the First Circuit's "ordinary opportunity" approach, which asks how Davis would have responded if presented with an ordinary opportunity to violate § 2422(b). To answer this, we thus have to imagine a teenage girl presenting Davis with an ordinary opportunity to use his phone to try to entice her into engaging in sexual activity. The answer to that hypothetical is actually clear from the evidence in this case. When Davis and Block first began texting and Block essentially asked Davis to "entice her"—to reveal the sexual activity that he would like to engage in—Davis promptly terminated the communications altogether, telling Block in no uncertain terms that he was not interested in having sex with her. (A926). And, when Block then succeeded days later in getting Davis to reengage, and again attempted to get Davis to "sext," Davis again said "no," that he was not comfortable communicating in that way. (A988-99). What was extraordinary here, and why this was no "ordinary opportunity," is that Block would not take "no" for an answer. Instead, he continued to barrage Davis with texts, more than eighty in all, until he finally got what he was after. In so doing, however, Block acted

[24] It also bears noting that the First Circuit and Seventh Circuits, in applying their own particular approaches to predisposition, sometimes utilize a list of factors, sometimes not. *Compare Gendron*, 18 F.3d at 960-64 (no analysis of factors) *with United States v. Pérez-Rodríguez*, ___ F.4th ___, 2021 WL 3928896 at *10 (1st Cir. 2021) (applying "ordinary opportunity" approach and considering five factors); *compare Hollingsworth*, 27 F.3d at 1198-1203 (no analysis of factors) *with Mayfield*, 771 F.3d at 435 (applying "positional" predisposition analysis and a "non-exclusive list of five factors").

like no ordinary minor, or any conceivable minor. Instead, he acted exactly like what he was, a law enforcement agent determined to induce a § 2422(b) offense.

Alternatively, consider the five-factor test employed by several of the circuits. First, Davis had no prior criminal record and there was no evidence, beyond the instant sting operation, that he had ever engaged, tried to engage, or would have considered engaging in sex with a minor, much less enticing one to do so. Second, it was the government that suggested the criminal activity. Third, Davis did not engage in the activity for profit. Fourth, Davis showed considerable reluctance to engaging in the conduct that § 2422(b) prohibits. Fifth, the government's inducement was extreme, the agent refused to accept Davis's "no," refused to allow him to walk away, and ultimately had to try more than eighty times before Davis finally relented.

VI. This case is an ideal vehicle for resolving the confusion and division between the circuits on these two important and recurring issues.

Three reasons make this an ideal vehicle for this Court to resolve the confusion and division between the circuits on these two important and recurring issues.

First, the issues were preserved during trial, fully briefed on appeal, and addressed by the Third Circuit. Second, the issues are each case dispositive. If the government's substantial-step argument in closing was mistaken, then Davis is entitled to a new trial on the § 2422(b) count; the government did not even attempt to make a harmless error argument before the Third Circuit. Likewise, if Davis was entrapped, the § 2422(b) conviction must be vacated and Davis resentenced on the remaining count of conviction.

Third, and finally, this case has the advantage of presenting both of these important issues, each of which regularly arises in undercover sting cases. The circuit split on the entrapment issue is longstanding, with at least four different approaches to the issue of

predisposition now existing. And, as this case illustrates, the outcome of an entrapment case can well be a function of the circuit that it is prosecuted in. A routine Westlaw search reveals that in the past twenty years alone, there have been more than 7,500 federal cases raising entrapment.

Similarly, as this case illustrates, there is widespread confusion throughout the circuits as to the meaning of "substantial step" and that confusion has now culminated in the Third Circuit adopting a definition of this essential element which is not only contrary to the decisions of this Court, but to more than 100 years of attempt jurisprudence. In the last twenty years alone there have been more than 2,500 federal attempt cases involving the substantial step element.

Through the grant of certiorari in this case, the Court can resolve the division and confusion that exists throughout the circuits on both of these critically important and recurring issues.

CONCLUSION

For the foregoing reasons, Petitioner Alexander Davis respectfully requests that this Court grant a writ of certiorari.

Respectfully submitted,

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