No. 21-5960

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury's finding that petitioner's actions constituted a substantial step toward persuading, inducing, or enticing a minor to engage in illegal sexual activity under 18 U.S.C. 2422(b) reflects a permissible application of the law of attempt to the circumstances of this case.

2. Whether the trial evidence was sufficient for a rational jury to find that petitioner was not entrapped into committing that offense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. Davis, No. 18-cr-105 (Mar. 26, 2019)

United States Court of Appeals (3d Cir.):

United States v. Davis, No. 19-1696 (Jan. 12, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1–B21) is reported at 985 F.3d 298.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2021. A petition for rehearing was denied on May 12, 2021 (Pet. App. C1-C2). 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 October 8, 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 Eastern District of Pennsylvania, petitioner was convicted on one count of using an interstate facility to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b), and one count of traveling in interstate commerce with the intent to engage in illicit sexual conduct with a minor, in violation of 18 U.S.C. 2423(b) (2012 & Supp. IV 2017). Judgment 1. The district court sentenced petitioner to 127 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. B1-B21.

1. In December 2017, petitioner responded to an advertisement entitled "Wild child" in the "w4m" section of the Craigslist website, which is ostensibly a place where women post requests for casual sexual encounters with men. Pet. App. B3. The advertisement identified the poster as an 18-year-old who was "young n free" and was "looking for fun" with a man. Ibid. (citation omitted); C.A. App. 1026. The advertisement had been posted by Special Agent Daniel Block of the child-predator section of the Pennsylvania Office of the Attorney General. C.A. App. 101, 104. Posing as a fictional "girl named 'Marisa,'"

Special Agent Block replied to petitioner stating that "Marisa" was not 18 years old as claimed in the advertisement, but was actually 14 years old and in the eighth grade. Pet. App. B3 (citation omitted). Petitioner responded, "That's ok[.] I know how to be respectful[.] [D]o you wanna meet today?" Ibid.

Petitioner and "Marisa" continued to converse via text messages over eight days. Pet. App. B3. Petitioner told "Marisa" that he could "keep [her] warm" and that he knew she was a virgin. C.A. App. 892, 904. He also encouraged "Marisa" to sneak away or skip school and repeatedly asked her to meet with him in person. Id. at 905; Pet. App. B4. Petitioner offered "Marisa" an iPad, a new swimsuit, and entry into clubs and parties if she would meet with him. Pet. App. B4.

At one point during their correspondence, petitioner stated that he did not "wanna get in trouble." C.A. App. 959. He also asked "Marisa" if she was affiliated with law enforcement, id. at 936, and asked her to keep their relationship "a secret," id. at 959. He also explained that he could not text openly about "sex stuff," id. at 988, 990, though his messages were "permeated with innuendo and marked by attempts to sexually groom the fictitious minor," Pet. App. B4. And petitioner was willing to "talk about it" on the phone or in person. C.A. App. 992, 996.

Petitioner and "Marisa" ultimately agreed to meet in person on December 20, 2017, at a McDonald's restaurant near "Marisa's"

house in Pennsylvania, and they planned to spend the day at a nearby water park. C.A. App. 206; Pet. App. B4. After "Marisa" expressed concern about becoming pregnant, petitioner promised to bring personal lubricant and "protection" to their meeting. C.A. App. 1009–1011; Pet. App. B4.

On December 20, petitioner traveled from New York to Pennsylvania to meet "Marisa." Pet. App. B4. When he arrived at the agreed-upon meeting place, law enforcement immediately arrested him. Ibid. A search of petitioner's person revealed condoms and the phone that he had been using to communicate with "Marisa." C.A. App. 216.

2. In 2018, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with one count of using an interstate facility to attempt to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. 2422(b), and one count of traveling for the purpose of engaging in illicit sexual conduct with a minor, in violation of 18 U.S.C. 2423(b) (2012 & Supp. IV 2017). Pet. App. B5; C.A. App. 22-25. Petitioner pleaded not guilty. C.A. App. 12-13.

At trial, Special Agent Block testified about petitioner's e-mail and text messages. C.A. App. 100-297. In addition, law-enforcement witnesses testified that petitioner had confessed to knowing that "Marisa" was 14, Pet. App. B4; to becoming

attracted to young girls after seeing them in swimsuits at a water park, ibid.; and to "lik[ing]" 14-year-old girls' sexual genitalia, C.A. App. 241.

In its closing argument, the government urged the jury to find petitioner guilty on both counts. As to the Section 2422(b) attempt charge, the government highlighted the evidence that petitioner intended to persuade, entice, or induce "Marisa" to engage in illegal sexual activity and took substantial steps toward that goal. The government argued that petitioner's planned travel and possession of condoms at his meeting with "Marisa" both constituted qualifying "substantial step[s]" toward the commission of the crime. C.A. App. 793-794.

Petitioner objected that the government's remarks misstated the law and indicated that he would request a curative instruction. C.A. App. 793, 799-801, 830-834. The government responded that no curative instruction was necessary, id. at 831, and petitioner ultimately never requested such an instruction, id. at 873-874. The district court then instructed the jury that,

> [w]ith respect to the substantial step element, you may not find [petitioner] guilty of attempt to persuade, induce, entice, and coerce a minor to engage in sexual activity merely because he made some plans to, or some preparation for committing that crime. Instead, you must find that [petitioner] took some firm, clear, undeniable action to accomplish his intent to persuade, induce, entice, and coerce a minor to engage in sexual activity.

Id. at 856.

The district court also instructed the jury on petitioner's proffered defense of entrapment. C.A. App. 866-869. The court informed the jury that the government may not "induce an unwary innocent person into committing a criminal offense." Id. at 867. It further explained that the government bore the burden to prove beyond a reasonable doubt either that it did not "induce [petitioner] to commit the offense," or that petitioner was "predisposed, that is ready and willing to commit the offense, before he was first approached by the government." Ibid.; see also id. at 867-869.

The jury found petitioner guilty on both counts. Pet. App. B5. The district court sentenced petitioner to 127 months of imprisonment and five years of supervised release. Ibid.

3. The court of appeals affirmed. Pet. App. B1-B21. As relevant here, the court rejected petitioner's claims that the evidence was insufficient to support his convictions, and that the government had misinformed the jury during closing arguments that the substantial-step element of petitioner's Section 2422(b) charge could be satisfied by his travel to meet "Marisa" and by his possession of condoms. Id. at B7-B16; see Pet. C.A. Br. 90-104. The court noted that the purpose of requiring a "substantial step" to prove an attempt is to "corroborate criminal intent and to establish that a defendant went beyond mere planning." Pet. App. B12. Adopting the label of "post-enticement

act[s]" to describe petitioner's travel and condom possession, the court stated that such an act "can constitute a substantial step in violating § 2422(b)" if it "relate[s] to the defendant's [prior] enticing communications." Id. at B13. The court then determined that petitioner's "possession of condoms" at a meeting with "Marisa" constituted a "substantial step" because he had previously "assured Marisa" that "he would bring protection." Id. at B16. The court explained that both the travel and the condom possession demonstrated petitioner's "criminal intent" and that he had gone "beyond mere planning." Id. at B14.

The court of appeals separately rejected petitioner's contention that he was entrapped as a matter of law into enticing a minor. Pet. App. B16–B19. The court determined that "a reasonable jury could conclude beyond a reasonable doubt that [petitioner] was predisposed to entice a minor." Id. at B18. The court specifically highlighted petitioner's preexisting attraction to young girls and his "ready response" requesting a meeting after he learned that a 14-year-old had "posted a personals ad for sex." Ibid. The court also explained that a rational jury could view petitioner's professed "reluctance to engage in sexually explicit conversation" as "a misguided attempt to avoid incriminating himself." Ibid.

ARGUMENT

Petitioner renews his argument (Pet. 11-17) that traveling to a prearranged meeting place or possessing condoms at that meeting place is irrelevant to the substantial step element of a Section 2422(b) attempt charge. Petitioner also renews his argument (Pet. 17-26) that law enforcement entrapped him into enticing a minor as a matter of law. The court of appeals correctly rejected both claims, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has repeatedly denied petitions for writs of certiorari presenting issues similar to both questions that petitioner raises. See, e.g., Montgomery v. United States, 139 S. Ct. 1262 (2019) (No. 18-651) (Section 2422(b)); Rutgerson v. United States, 137 S. Ct. 2158 (2017) (No. 16-759) (entrapment); Allebban v. United States, 576 U.S. 1023 (2015) (No. 14-8793) (same); Martinez-Lopez v. United States, 531 U.S. 1080 (2001) (No. 00-5446) (same). It should follow the same course here.

1. a. Section 2422(b) imposes criminal liability on a person who, "using the mail or any facility or means of interstate or foreign commerce * * * knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in 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). Pet. App. B5; see Indictment 1; 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 crime's completion. Pet. App. B7; accord, e.g., United States v. Resendiz-Ponce, 549 U.S. 102, 106-107 (2007); United States v. Hite, 769 F.3d 1154, 1162 (D.C. Cir. 2014).

The court of appeals correctly determined that both petitioner's preplanned travel to meet "Marisa" and his preplanned possession of condoms at that meeting constituted substantial steps towards enticing or persuading her to engage in illegal sexual activity. Pet. App. B15–B16. As the court explained, "[t]he central purpose of the substantial step inquiry is to corroborate criminal intent and to establish that a defendant went beyond mere planning." Id. at B12; accord, e.g., Model Penal Code § 5.01(2) (1985). Petitioner's travel and possession of condoms both demonstrated that he had gone beyond mere planning and was actively satisfying the necessary preconditions that he and "Marisa" had agreed to for any sexual encounter. Pet. App. B12-B16.

b. Contrary to petitioner's contention (Pet. 11), the court of appeals did not hold that a substantial step could take place after the completion of a Section 2422(b) offense. Petitioner's

interstate travel to meet "Marisa" was part of his ongoing effort to use the means and facilities of interstate commerce to persuade, induce, or entice "Marisa" to engage in sexual activity. See Pet. App. B13-B16. "Marisa" had explicitly asked petitioner to meet her in Pennsylvania and to bring contraceptives as a precondition to having sex with him; had petitioner not satisfied those preconditions, his ongoing effort to persuade and entice "Marisa" would likely have failed. As the court of appeals explained, petitioner's willingness travel to another State to meet "Marisa" in person, and to bring contraceptives to the encounter, tended to show that his earlier communications with her were not "all hot air" but rather reflected true criminal intent -- an intent that he continued to harbor and act upon while traveling interstate to meet her. Id. at B13-B14; see, e.g., Hite, 769 F.3d at 1164 ("The 'substantial step' required to prove an attempt under § 2422(b) must * * * strongly corroborate the defendant's intent to engage in conduct that is designed to persuade, induce, entice, or coerce the minor.").

To the extent the court of appeals used the phrase "post-enticement," Pet. App. B11, context makes clear that was a shorthand for conduct occurring after the direct communication. See id. at B11-B14. But the relevant course of conduct in an attempt crime like petitioner's is not limited solely to the texts and e-mails that he sent. The court emphasized that the conduct

relevant to the substantial-step inquiry must "relate to the defendant's enticing communications," id. at B13 (emphasis added), but it is not solely defined by them. The court did not suggest that petitioner's efforts to persuade, induce, and entice "Marisa" ended when he shifted his focus from e-mail and text communications to traveling to meet her in person. See id. at B13-B15. In attempting to cut off the inquiry, petitioner tries to have it both ways, by claiming both that "the attempt ha[d] taken place" by the time of the travel and purchase (Pet. 11), and that the conduct on which the court of appeals relied did not constitute an attempt at all (e.g., Pet. 3, 15 & n.9).

Petitioner's contention (Pet. 12-17) that the court of appeals redefined federal law of criminal attempt lacks merit. As noted above, the court emphasized that a "substantial step must, in some way, relate to the conduct criminalized by the statute." Pet. App. B13. That determination comports with this Court's precedent. See, e.g., Resendiz-Ponce, 549 U.S. at 106 ("At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed some open deed tending to the execution of his intent." (citation and internal quotation marks omitted)); id. at 107 (explaining that attempt requires intent and "an overt act that constitutes a substantial step toward completing the offense" (citation and internal quotation marks omitted)); Braxton v.

United States, 500 U.S. 344, 349 (1991) ("[T]o be guilty of an attempted killing under 18 U.S.C. § 1114, [the defendant] must have taken a substantial step towards that crime, and must also have had the requisite mens rea.").

The court of appeals correctly rejected petitioner's contention that "a substantial step must be necessary to the consummation of the crime." Pet. App. B11 (emphasis added). Although petitioner's planned travel to meet "Marisa" and his possession of condoms may not have been a "sine qua non of finding a substantial step in [this] section 2422(b) case[,]" it could "make him guilty of an attempt and not merely an intent." United States v. Gladish, 536 F.3d 646, 649 (7th Cir. 2008). Again, petitioner tries to have it both ways by simultaneously arguing that he did not commit the crime but that the conduct on which the court of appeals relied was unnecessary to the offense.

c. Other courts of appeals agree that actions like petitioner's are relevant to the substantial-step element of a Section 2422(b) attempt offense. See, e.g., United States v. Strubberg, 929 F.3d 969, 975 (8th Cir. 2019), cert. denied, 140 S. Ct. 874 (2020) (travel to meeting place, buying condoms, and driving to motel); United States v. Brand, 467 F.3d 179, 204 (2d Cir. 2006) (travel to meeting place and possession of condoms), cert. denied, 550 U.S. 926 (2007), abrogated on other grounds by United States v. Cabrera, 13 F.4th 140 (2d Cir. 2021); United

States v. Murrell, 368 F.3d 1283, 1288 (11th Cir. 2004) (travel to meeting place and possession of condoms, teddy bear, and $300), cert. denied, 543 U.S. 960 (2004). Indeed, they have recognized that traveling to an agreed-upon meeting place can, by itself, constitute the necessary substantial step. See, e.g., United States v. Vinton, 946 F.3d 847, 852 (6th Cir. 2020); United States v. Howard, 766 F.3d 414, 421 (5th Cir. 2014), cert. denied, 574 U.S. 1103 (2015); United States v. Knope, 655 F.3d 647, 660 (7th Cir. 2011), cert. denied, 565 U.S. 1135 (2012); United States v. Hofus, 598 F.3d 1171, 1175 (9th Cir.), cert. denied, 562 U.S. 943 (2010); United States v. Munro, 394 F.3d 865, 870 (10th Cir.), cert. denied, 544 U.S. 1009 (2005).

Petitioner cites no court of appeals decision to the contrary. Instead, petitioner relies on United States v. Nitschke, 843 F. Supp. 2d 4 (D.D.C. 2011), in which a district court determined that travel was not sufficient to constitute a substantial step. As an initial matter, any inconsistency between the district-court decision in Nitschke and the court of appeals' decision in this case would not warrant this Court's review. Cf. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (citation omitted)). And in any event, the circumstances of Nitschke differ

from the circumstances of this case in multiple respects. For example, the defendant there, unlike petitioner here, did not make "promises to the minor," "offer any money or anything else of value," or invite the minor anywhere, all of which are acts in furtherance of an enticement offense. Nitschke, 843 F. Supp. 2d at 13; see id. at 15.

d. Moreover, this case would be an unsuitable vehicle for reviewing petitioner's first question presented because any error had no effect on petitioner's trial.

Petitioner does not contend that the district court's instructions addressing the substantial-step element were erroneous. Indeed, petitioner's counsel proposed the substantial-step instruction that the district court delivered. C.A. App. 727. And after the court read that instruction to the jury, petitioner agreed that the court had given "all the requested instructions of the defense" and did not "request[] any additional instructions." Id. at 873-874.

Petitioner points (Pet. 8, 26) to the government's statement during closing arguments that petitioner's travel and possession of condoms were each substantial steps. But the district court's post-closing jury instructions accurately explained what constitutes a substantial step toward a Section 2422(b) offense. C.A. App. 856. The court also repeatedly told the jury that it must apply the facts "to the laws I alone give[] to you," id. at

837, 838, 870, and that any arguments made by counsel were not evidence, id. at 842, 844. Accordingly, even if the prosecutor had misstated the law, that misstatement was "subject to objection and to correction by the court." Boyde v. California, 494 U.S. 370, 384 (1990). Although petitioner initially objected to the government's statement and indicated an intention to seek a curative instruction, petitioner ultimately did not request a curative instruction. C.A. App. 873-874; cf. Johnson v. United States, 318 U.S. 189, 201 (1943) ("Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial.").

In any event, even if petitioner's travel and possession of condoms would not be substantial steps in furtherance of his attempted commission of a crime, the government amply proved that petitioner took other, additional substantial steps during his communications with "Marisa." Petitioner's e-mails and text messages to "Marisa" "were * * * permeated with innuendo and marked by attempts to sexually groom [her]." Pet. App. B4. The court of appeals specifically noted that those communications, including petitioner's "offer of gifts[,]" "could be reasonably interpreted as a substantial step to entice a minor." Id. at B13 n.26 (citation omitted); accord, e.g., United States v. Lopez, 4 F.4th 706, 724 (9th Cir. 2021) ("It is well established that communications intended to groom a victim to engage in sexual

activity in the future constitute substantial steps."); Howard, 766 F.3d at 425 ("[G]rooming behavior plus * * * detailed discussions to arrange a meeting with the minor victim * * * can suffice to establish a substantial step.").

2. Petitioner separately contends (Pet. 17-26) that he was entrapped as a matter of law into attempting to entice a minor and that the trial evidence was insufficient for a rational jury to find him predisposed to commit that offense. That factbound claim lacks merit and does not warrant review. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In any event, petitioner's contention lacks merit.

a. The affirmative defense of entrapment has two related elements: "government inducement of the crime, and a lack of predisposition on the part of the defendant." Mathews v. United States, 485 U.S. 58, 62-63 (1988). When a defendant alleges entrapment and the first element is satisfied, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." Jacobson v. United States, 503 U.S. 540, 548-549 (1992). The predisposition element "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity

to perpetrate the crime." Mathews, 485 U.S. at 63 (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)).

The court of appeals correctly determined that a rational jury could have found petitioner predisposed to entice a minor. Pet. App. B18-B19. Petitioner responded to a suggestive Craigslist advertisement captioned "[w]ild child" that indicated that a "young n free" 18-year-old woman was "looking for fun" with a man. Id. at B3 (citation omitted); C.A. App. 1026. Petitioner quickly learned that the poster, "Marisa," was in fact 14 years old. Pet. App. B3. Rather than backing away in light of "Marisa's" age, petitioner told her "[t]hat's ok I know how to be respectful"; asked whether she wanted to meet; made unprompted use of sexual innuendo less than a day later; and groomed her with compliments and offers of gifts. Id. at B3-B4. Petitioner also later confessed that he was attracted to minors before communicating with "Marisa" and made graphic statements about his sexual interest in young teenage girls. Id. at B4.

As the court of appeals recognized, the evidence of petitioner's willingness and ready response to the government's solicitation permitted the jury to find him predisposed to entice a minor. Pet. App. B18. Other courts of appeals agree that evidence of a defendant's ready response to a solicitation, as well as evidence of independent motivations for his behavior, can demonstrate that the defendant was predisposed to commit a given

offense. See, e.g., United States v. Rutgerson, 822 F.3d 1223, 1235-1236 (11th Cir. 2016), cert. denied, 137 S. Ct 2158 (2017); United States v. Myers, 575 F.3d 801, 808 (8th Cir. 2009); Brand, 467 F.3d at 194-195; United States v. Squillacote, 221 F.3d 542, 565-566 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001); United States v. Garcia, 182 F.3d 1165, 1169 (10th Cir.), cert. denied, 528 U.S. 987 (1999); United States v. Thickstun, 110 F.3d 1394, 1396-1397 (9th Cir.), cert. denied, 522 U.S. 917 (1997); United States v. Byrd, 31 F.3d 1329, 1336 (5th Cir. 1994), cert. denied, 514 U.S. 1052 (1995); United States v. Jones, 976 F.2d 176, 179-180 (4th Cir. 1992), cert. denied, 508 U.S. 914 (1993).

b. Petitioner errs in asserting (Pet. 17-19) that the ruling below conflicts with this Court's decision in Jacobson v. United States, supra. In Jacobson, this Court reaffirmed that a defendant's ready commission of an offense will often be sufficient to establish predisposition. 503 U.S. at 549-550. But on the facts of that particular case, the Court rejected the government's contention that Jacobson's "ready" commission of the offense established his predisposition in the circumstances of that case, because "[t]he evidence that [Jacobson] was ready and willing to commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." Id. at 553. Here, in contrast, petitioner responded positively and rapidly to a

sexualized Craigslist ad and learning that the poster was a minor. That response, coupled with petitioner's post-arrest statements, sets this case apart from Jacobson and permitted the jury to find petitioner predisposed to entice a minor.

Petitioner similarly errs in asserting that the court of appeals attempted to fill an "evidentiary void" with evidence of his wariness of law enforcement. Pet. 22 (quoting Sherman, 356 U.S. at 375). The court correctly recognized that a rational jury could have discounted petitioner's "reluctance to engage in sexually explicit conversation" as "evidence of a misguided attempt to avoid incriminating himself." Pet. App. B18.

c. Petitioner contends (Pet. 22-26) that the courts of appeals consider divergent sets of factors to a defendant's predisposition. The courts of appeals, however, broadly agree on the substance of the considerations relevant to predisposition, and differ principally in whether and how they separately label and group those considerations. See United States v. Pérez-Rodríguez, 13 F.4th 1, 18 (1st Cir. 2021) (assessing five broad factors); United States v. Hamzeh, 986 F.3d 1048, 1053 (7th Cir. 2021) (same); United States v. Mohamud, 843 F.3d 420, 432 (9th Cir. 2016) (same), cert. denied, 138 S. Ct. 636 (2018); United States v. Al-Cholan, 610 F.3d 945, 950 (6th Cir. 2010) (same); United States v. Tee, 881 F.3d 1258, 1263 (10th Cir. 2018) (looking to similar considerations but without identifying a fixed

number of relevant factors); Rutgerson, 822 F.3d at 1235 (same); United States v. Warren, 788 F.3d 805, 811 (8th Cir.) (same), cert. denied, 577 U.S. 935 (2015); United States v. Nelson, 732 F.3d 504, 514-515 (5th Cir. 2013) (same), cert. denied, 572 U.S. 1143 (2014); United States v. Ramsey, 165 F.3d 980, 985 n.6 (D.C. Cir.) (same), cert. denied, 528 U.S. 894 (1999); United States v. McLaurin, 764 F.3d 372, 381 (4th Cir. 2014) (stating that "a broad swath of evidence * * * is relevant to proving predisposition"), cert. denied, 575 U.S. 962 (2015); United States v. Cromitie, 727 F.3d 194, 205 (2d Cir. 2013) (a finding of predisposition may be based on "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; [or] his willingness to do so, as evinced by ready complaisance" (citation and emphasis omitted)), cert. denied, 574 U.S. 829 (2014); Pet. App. B18 (same).

Even if courts' linguistic formulations signified distinct approaches both in substance and in practice, the court below (along with the Second Circuit) provides the most defendant-favorable formulation, which describes only three particular avenues for establishing predisposition: "showing '(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.'" Pet. App. B18 (citation omitted). And any purported differences among the courts of appeals' approaches make no difference in the circumstances of this case. The courts of appeals have universally acknowledged that a jury may find predisposition based on a defendant's ready commission of a criminal act. See pp. 17-18, supra; see also Pet. App. B18–B19; United States v. Mayfield, 771 F.3d 417, 437 (7th Cir. 2014) (en banc); United States v. Gamache, 156 F.3d 1, 12 (1st Cir. 1998); United States v. Walls, 70 F.3d 1323, 1329 (D.C. Cir. 1995), cert. denied, 519 U.S. 827 (1996), abrogated on other grounds by United States v. Bigley, 786 F.3d 11 (D.C. Cir. 2015); United States v. Kussmaul, 987 F.2d 345, 349 (6th Cir. 1993).

Petitioner's argument (Pet. 25) that he would have prevailed in another circuit begs the question by presupposing that the evidence here was insufficient to show such readiness. To the contrary, the jury in this case could reasonably have determined from the evidence that petitioner willingly availed himself of the opportunity to entice a minor. Petitioner identifies no circuit that would find entrapment as a matter of law under those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2021