No. 21-5960

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER DAVIS,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ROBERT EPSTEIN
Assistant Federal Defender
Counsel of Record

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West - Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES (continued)

PAGE(S)

FEDERAL STATUTES

OTHER

No. 21-5960

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER DAVIS,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

ARGUMENT IN REPLY

Although the government opposes the granting of certiorari, the government's brief nevertheless assists in making the case for it. The government, having now carefully considered the questions presented, displays the same confusion regarding these issues as the Third Circuit and several of the other courts of appeals. The government's confusion, moreover, means that this will be a substantial and recurring problem. As the cases cited in the Petition and the government's response reveal, the government routinely charges defendants with violations of § 2422(b) and § 2423(b) in cases such as this one arising from undercover stings. But the government's position that a defendant's travel is a substantial step for a § 2422(b) enticement offense not only dramatically expands the law of attempt, it eliminates the distinction between these two statutory offenses; any defendant who travels across state lines to meet a putative minor for sex, thereby violating § 2423(b), may also be found guilty of the significantly more severe § 2422(b) enticement offense, simply on the basis of the travel, even where the defendant did nothing to entice the undercover agent beyond agreeing to meet. Likewise, under the government's view of predisposition, a defendant's willingness to meet the supposed minor is sufficient proof of a predisposition to entice even if the defendant strongly resisted the undercover agent's attempts to induce any communications that could possibly be viewed as

enticing. The government is plainly wrong on these points, as was the Third Circuit, which adopted a definition of "substantial step" that is contrary to decisions of this Court and every other circuit. Review by this Court is needed.

A. Travel cannot be a substantial step in a § 2422(b) case, as it occurs after the attempt has allegedly occurred.

Apparently recognizing that, by definition, a substantial step cannot occur after the attempt has allegedly been made, the government attempts to elongate the statutory offense and rewrite the Third Circuit's opinion. Neither effort is successful.

As to the statutory offense, the government argues that Davis'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." Brief in Opposition (BIO) at 10. Contrary to the government's argument, however, a § 2422(b) offense is complete before any travel occurs. The statute 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.

18 U.S.C. § 2422(b).[1]

[1] Consistent with the statutory language, the indictment here specifically charged Davis with using his iphone to attempt to entice a minor to engage in sexual activity:

> the defendant ALEXANDER DAVIS used a facility and means of interstate and foreign commerce, that is, an Apple Iphone cellular phone, to attempt to persuade, induce, entice and coerce a minor, who he believed had not attained the age of 18 years, to engage in sexual activity . . . .

(App. 22).

As the circuit courts have thus unanimously recognized, a violation of § 2422(b) does not require any travel on the defendant's part; the offense is the defendant's use of the mails or the facilities of commerce to "transform or overcome the will of a minor." *United States v. Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014); *United States v. Howard*, 766 F.3d 414, 425-26 (5th Cir. 2014) (affirming § 2422(b) conviction based on defendant's online communications with undercover agent where defendant did not travel to meet the agent); *United States v. Bailey*, 228 F.3d 637, 639-40 (6th Cir. 2000) (same); *United States v. Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (same); *United States v. Thomas*, 410 F.3d 1235, 1246 (10th Cir. 2005) (same); *United States v. Lee*, 603 F.3d 904, 915 (11th Cir. 2010) (same).

Accordingly, in the instant case, Davis's alleged violation of § 2422(b) either occurred or did not occur during his two weeks of texting with the undercover agent; he either attempted during this time period to entice "Marisa" or he did not. While Davis's subsequent travel might have followed from his communications with the agent, that travel was not part of the alleged § 2422(b) offense, and it certainly was not a substantial step toward that offense.[2]

In addition to attempting to stretch the statute, the government attempts to rewrite the Third Circuit's opinion. The Third Circuit specifically rejected Davis's contention 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. Pet. App'x B at 12 ("We do not agree with his

[2] The government, like the Third Circuit, fails to understand that while conduct occurring after an alleged attempt is often relevant, it is never a substantial step. The government is thus correct that Davis's travel is relevant to whether his earlier communications were just "hot air," but that does not make the travel a substantial step any more than a post-attempt confession or flight would be. And, if there was no attempt at enticement during the earlier communications, Davis's travel cannot alter that fact. His travel would, at most, be probative of an intent to have sex, not an intent to entice. Under such circumstances, a defendant may be properly charged with a violation of § 2423(b), not § 2422(b).

interpretation of the law of attempt."). Instead, the Third Circuit held 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.

Recognizing that this is plainly wrong—that a substantial step cannot post-date the attempted enticement offense—the government submits that "context makes clear that [the use of the phrase 'post-enticement'] was a shorthand for conduct occurring after the direct communication." BIO at 10. Context, however, reveals exactly the opposite. The Third Circuit specifically used the phrase post-enticement twice, both times in rejecting Davis's argument that conduct after the alleged attempt cannot be a substantial step, and the Court stated in a footnote that it believed Davis's communications could be "reasonably interpreted" as enticement. Pet. App'x B at 12-13 and 26.[3]

Accordingly, notwithstanding the government's attempted rewrite, the Third Circuit here clearly held that a substantial step can post-date the charged attempt, contrary to this Court's decisions, and those of every other circuit, holding that a substantial step must be conduct "toward completing the offense." *United States v. Resindez-Ponce*, 549 U.S. 102, 106 (2007); Pet. at 12-13.

[3] In making this statement, the Court failed to recognize that the issue on appeal was not the sufficiency of the evidence—whether Davis's communications could be reasonably interpreted as enticement—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 enticement or a substantial step toward enticement, 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.

The government contends that other courts of appeals agree with the Third Circuit. But the cases cited by the government, like those discussed in the Petition, were all cases where the defendant's online communications themselves were plainly attempts at enticement and any travel was therefore unnecessary. *See United States v. Strubberg*, 929 F.3d 969, 973-74 (8th Cir 2019) (defendant discussed the sexual acts he wished to perform with the undercover agent's fourteen-year old daughter); *United States v. Murrell*, 368 F.3d 1283, 1285 (11th Cir. 2004) (same); *United States v. Knope*, 655 F.3d 647, 650 (7th Cir. 2011) (defendant discussed the sexual acts that he wanted to engage in with the putative minor); *United States v. Hofus*, 598 F.3d 1171, 1173 (9th Cir. 2010) (same); *United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2005) ("[I]t is apparent that Munro initiated the sexual conversations and otherwise attempted to entice Chantelle to engage in sexual activity.").[4]

Thus, like the cases discussed in the Petition, none of the cases cited by the government holds, as the Third Circuit did 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 communications in each of these cases constituted attempted enticement, the courts' discussion of travel was minimal and largely superfluous. Accordingly, as with the cases cited in the Petition, the statements in these 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

[4] The other cases cited by the government are all similar and were all discussed in the Petition. Pet. at 14.

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.[5]

The problem, though, is that this imprecision of language has now metastasized through the circuits to the point where the Third Circuit has adopted a definition of substantial step that is in conflict not only with this Court, but more than a hundred years of attempt jurisprudence, and the government, in endorsing that decision, has all but guaranteed that this error will be repeated in cases to come.

B. The Third Circuit's error is not harmless.

The lack of full briefing and record review has led the government to mistakenly contend that the Third Circuit's error is harmless here. Although the Court should not reach the issue at this stage, the government is incorrect. While the government now contends that it "amply proved that petitioner took other, additional substantial steps during his communications with 'Marisa[,]'" BIO at 15, the government made no such argument to the jury or to the Third Circuit. There is good reason for this. As noted above, an examination of the communications

[5] That this is so can be seen by the fact that several of these circuits have correctly recognized that a substantial step "'must be necessary to the consummation of the crime[,]'" *United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000) (quoting *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980)), and these same circuits have recognized that travel is not necessary for a § 2422(b) offense. *See supra* at 3. Accordingly, by definition, travel cannot be a substantial step. The government, though, contends that the Third Circuit "correctly rejected petitioner's contention that 'a substantial step must be necessary to the consummation of the crime.'" BIO at 12. But that holding is not only contrary to the other circuits, it is plainly wrong. If an act is not even necessary to the consummation of the crime than it cannot possibly be strongly corroborative of the defendant's intent to commit that crime, as is required for an act to constitute a "substantial step." *See e.g.*, *United States v. Engle*, 676 F.3d 405, 419-20 (4th Cir. 2021) ("[I] 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."); *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.").

between Davis and Block reveals that, but for the government's erroneous substantial step argument, the jury could well have determined that Davis's communications to Block did not constitute an attempt at enticement, and that it was instead Block, posing as a sexually adventurous minor, who was aggressively attempting to induce an extremely resistant Davis into engaging in a sexual discussion. Indeed, as the government acknowledges, it was "'Marisa' [who] had explicitly asked [Davis] to meet her in Pennsylvania and to bring contraceptives . . . ." BIO at 10.[6]

C. A defendant's willingness to commit one offense is not evidence of his predisposition to commit a more serious offense, especially where the defendant repeatedly resists the government's inducements to commit the more serious crime.

The government makes the same mistake as the Third Circuit. It argues that Davis's supposed willingness to commit the § 2423(b) offense is evidence of his predisposition to violate § 2422(b). *See* BIO at 17 ("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."). The government fails to recognize that the agent's solicitation was an invitation to violate § 2423(b), not § 2422(b). The agent posted his solicitation on a site

[6] The government is also mistaken in relying upon the court's substantial step instruction to the jury. While that instruction was not itself erroneous, it did not address or remediate the prosecutor's mistaken substantial step argument. *See Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2016) (reversing attempt conviction because of prosecutor's erroneous substantial step argument and observing that "improper prosecutorial statements cannot be neutralized by instructions that do not in any way address the specific statements of the prosecutor.") (internal citations omitted). Similarly, the government is off base in pointing at Davis's failure to ask for a curative instruction. It is not a defendant's obligation to cure the prosecutor's mistakes, the defendant's only obligation is to object. Davis's attorney did so here and, as such, the issue was properly preserved. *See Deck*, 814 F.3d at 978 (holding that the district court's failure to give a curative instruction, notwithstanding that none was requested, was an additional reason for reversal).

"where women look for casual sex with men." Pet. App'x B at 3. This is what Davis readily responded to. And, when the agent then tried to induce a violation of § 2422(b) by repeatedly asking Davis to "sext" with him, Davis resisted, even going so far as to terminate his communications with the agent. It was only the agent's dogged efforts to overcome Davis's resistance that ultimately led Davis, near the end of the two weeks of communications, to send a text that might arguably have violated § 2422(b).[7]

As discussed in the Petition, this Court's decisions in *Jacobson v. United States*, 503 U.S. 540 (1992) and *Sherman v. United States*, 356 U.S.369 (1958) make clear that a willingness to commit one offense is not evidence of a predisposition to commit a more serious crime. Pet. at 19-21. On this point, the other courts of appeal are in unanimous agreement. *Id*. at 21 n.18. The government, however, fails to address this point.[8]

---

[7] Like the Third Circuit, the government fails to point to any specific texts that violated § 2422(b).

[8] The government does cite several cases for the proposition that "evidence of a defendant's ready response to a solicitation . . . can demonstrate that the defendant was predisposed to entice a minor." BIO at 17. But these cases help to make Davis's argument. In all of them, the government's solicitation, and the defendant's ready response, concerned the crime that the defendant was charged with. *See United States v. Rutgerson*, 822 F.3d 1223, 1235 (11th Cir. 2016), cert. denied, 137 S. Ct 2158 (2017) (defendant charged with § 2422(b) where solicitation was from a prostitute requesting money for sex and defendant readily agreed to pay her); *United States v. Myers*, 575 F.3d 801, 808 (8th Cir. 2009) (defendant charged with § 2422(b) where defendant responded to solicitation by sending a sexual video of himself); *United States v. Squillacote*, 221 F.3d 542, 565-66 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001) (defendant charged with espionage after being solicited to commit that crime); *United States v. Garcia*, 182 F.3d 1165, 1169 (10th Cir. 1999), cert. denied. 528 U.S. 987 (1999) (defendant charged with drug offenses after being solicited to commit those offenses); *United States v. Thickstun*, 110 F.3d 1394, 1396-97 (9th Cir. 1997); cert. denied, 522 U.S. 917 (1997) (defendant charged with bribery after solicitation to commit bribery); *United States v. Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994), cert. denied, 514 U.S. 1052 (1995) (defendant charged with possession of child pornography after being solicited to receive child pornography).

The government also mistakenly refers to this as a "factbound" issue. BIO at 16. That is hardly the case. The facts at issue here—the texts and email chain—are completely undisputed. The question is whether, given these undisputed facts, the government, as a matter of law, met its burden of establishing Davis's predisposition to entice a minor into engaging in sex in violation of § 2422(b).[9] The answer, under this Court's decisions in *Jacobson* and *Sherman*, is clearly "no."

Finally, the government contends that there is no real conflict between the circuits as to how to determine predisposition, "that the courts . . . broadly agree on the substance of the considerations . . . and differ principally in whether and how they separately label and group these considerations." BIO at 19. The government is mistaken. As set forth in the Petition, the courts of appeal have taken several markedly different approaches in evaluating predisposition, a conflict that the courts, and commentators, have recognized. Pet. at 22-26; James F. Ponsoldt & Stephen Marsh, *Entrapment When the Spoken Word is the Crime*, 68 Fordham L. Rev. 1199, 1216 (March, 2000) ("In the wake of the Court's decision in *Jacobson*, the circuit courts have split as to how to properly define the term predisposition.")

[9] The government continues not to dispute that Davis satisfied the inducement prong of entrapment and that the government therefore had the burden of proving Davis's predisposition to violate § 2422(b).

CONCLUSION

For all of the foregoing reasons, and for those set forth in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 12, 2021.

Respectfully submitted,

/s/ *Robert Epstein*
ROBERT EPSTEIN
Assistant Federal Defender
Counsel of Record

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

LEIGH M. SKIPPER
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 540 West
Philadelphia, PA 19106
(215) 928-1100