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No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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**WILFREDO LEE LOPEZ**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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**Application for Extension of Time  
to File Petition for Writ of Certiorari**

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**Application for Extension of Time  
to File Petition for Writ of Certiorari  
[28 U.S.C. § 2101(c); Supreme Court Rules 13.5, 22, 30.3]**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Petitioner, by his counsel, respectfully makes an application pursuant to 28 U.S.C. § 2101(c), and Supreme Court Rules 13.5 and 22, to extend the time in which to file a petition for writ of certiorari from the judgment entered by the United States Court of Appeals for the Ninth Circuit from March 14, 2022, to and including April 13, 2022. The government does not oppose this application.

**Basis for Jurisdiction**

In *United States v. Lopez*, Case No. 19-10017, the Ninth Circuit affirmed the petitioner's conviction and sentence on July 6, 2021. App. 1-78.<sup>1</sup> The Ninth Circuit denied his petition for panel rehearing and/or

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<sup>1</sup> "App." refers to the attached appendix.

rehearing en banc on December 14, 2021. App. 79. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

### **Judgment Sought to be Reviewed**

A grand jury charged Wilfredo Lopez with two federal crimes based on email messages he exchanged with an undercover federal agent who was posing as a minor online. App. 6-7. This petition regards the first count, which charged Lopez with violating 18 U.S.C. § 2422(b), which criminalizes attempting to persuade a minor “to engage in . . . any sexual activity for which any person can be charged with a criminal offense.” The indictment specifically charged Lopez with attempting to entice a minor to engage in sexual activity “for which a person can be charged with a criminal offense, to wit: First Degree Criminal Sexual Conduct, in violation of 9 GCA § 25.15(a)(1).” App. 7-8. Lopez proceeded to trial and was convicted of that charge. In a published decision, a split panel of the Ninth Circuit affirmed the conviction, despite all members of the panel agreeing that Lopez could not have been convicted for the charge specified in the indictment.

The majority of the Ninth Circuit panel sustained the conviction based on a different predicate offense than the one named in the indictment. The majority agreed that the predicate offense named in the indictment was

“inapt,” App. 35, but held that “Section 2422(b) requires proof that the defendant’s persuasive communications described sexual conduct that could be charged in at least one relevant territorial jurisdiction but does not require the Government to indict a specific predicate offense or to prove a governmental entity would have had jurisdiction to prosecute the defendant for such predicate offense.” App. 22.

The majority further concluded that while the indictment here *did* name a particular predicate offense, the conviction could nonetheless be sustained because the alleged communications described sexual activity that would have been prosecutable under a different, previously unidentified predicate offense, namely an “*attempt* to engage in sexual penetration of a minor under fourteen,” under 9 GCA §§ 13.10, 13.60(a), 25.15(a)(1). App 31. The majority acknowledged that the “indictment did not specify Guam’s attempt statute, and so the only potential predicate offense in the indictment was 9 G.C.A. § 25.15(a)(1), which criminalizes the completed sexual penetration of a minor under fourteen.” App. 33. But, the Majority concluded, “[b]ecause Section 2422(b) does not contain a predicate offense requirement, [] the indictment’s citation to Guam’s First Degree Criminal Sexual Conduct statute was mere surplusage.” App. 34. Finally, the

Majority concluded, the fact that the indictment named a different predicate offense than the one it relied on to sustain the conviction merely amounted to a non-prejudicial variance. App. 40.

Dissenting, the Honorable Mark J. Bennett wrote that there was insufficient evidence to sustain the conviction. App 48-49. Because “Lopez could not have been charged with or committed First Degree Criminal Sexual Conduct in violation of 9 GCA § 25.15(a)(1) as the predicate offense for his § 2422(b) violation . . . . Lopez could not have committed and did not commit the crime with which he was charged in the indictment.” App. 48-49.

Moreover, by relying on a different predicate offense than was named in the indictment, the “Majority convicts the defendant for a different, uncharged crime.” App. 49. The dissent reasoned that the majority missed the point by focusing on whether an indictment charging Section 2422(b) can generally omit reference to a particular predicate offense; here, the indictment *did* name a predicate offense based upon which the parties proceeded to trial.

App. 60. “The right question is: Can a court amend the indictment returned by the grand jury to excise the charged predicate offense and substitute a different predicate offense. And the correct answer to that question is ‘no.’” App. 60. The dissent concluded that by “amending the

indictment, the Majority . . . takes upon itself a role that the Constitution specifically and exclusively carves out for the grand jury.” App. 54.

### **Reasons to Justify a 30-Day Extension**

Lopez seeks a 30-day extension of time to file his petition for writ of certiorari in this case, for the following reasons:

First, the Circuit decision in this case is unusually lengthy, spanning 78 pages, and it raises multiple complex and important issues. These include: (1) the majority decision’s novel interpretation of Section 2422(b)—which was not posited by the Government at any point in the litigation and so was not briefed below, App. 49 n.4, 61 n.17; (2) the distinction between a constructive amendment of an indictment, which violates the Fifth Amendment, and a non-prejudicial variance, *see United States v. Davis*, 854 F.3d 601, 605 (9th Cir. 2017) (“While the line that separates a constructive amendment from a variance is not always easy to define, drawing this distinction is nevertheless critical.” (cleaned up)); and (3) the constitutional question discussed at length in the opposing opinions below, namely whether the Fifth Amendment permits a court to “amend the indictment returned by the grand jury to excise the charged predicate offense and substitute a different predicate offense.” App. 60. Counsel requires additional time to

adequately consider, select, and prepare the appropriate issues for this Court's consideration.

Second, counsel believes that this request for a 30-day extension of time is necessary to fulfill my ethical and legal obligations to my client given the complexity of this case and my current workload. I carry a full load as a deputy federal public defender, and since the Ninth Circuit denied Lopez's petition for rehearing en banc on December 14, 2021, I have been required to devote my time to other direct appeals in the Ninth Circuit as well as two complex cases in the district court that are proceeding to trial. I have also been busy with other litigation in this Court, most recently filing a reply brief in support of a petition for certiorari in *De La Torriente v. United States*, 21-6212, on February 23, 2022. I am presently preparing a petition for rehearing en banc in the Ninth Circuit in another case where the Court of Appeals affirmed a conviction over a vigorous dissent. That petition is due by March 7, 2022, and I will be able to dedicate sufficient time to preparing Lopez's petition for certiorari only after completing that brief.

For these reasons, Petitioner respectfully requests a 30-day extension of this deadline (to and including April 13, 2022).

This motion is brought pursuant to Rule 39.1 of the Rules of the  
Supreme Court of the United States.

Respectfully submitted,

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DATED: March 3, 2022

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