No. _____

In the

Supreme Court of the United States

WILFREDO LEE LOPEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

CUAUHTEMOC ORTEGA
Federal Public Defender
JOSHUA D. WEISS*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-3287
Facsimile: (213) 894-0081
Email: Josh_Weiss@fd.org

Attorneys for Petitioner
* Counsel of Record

Questions Presented

1. Does 18 U.S.C. § 2422(b), which criminalizes the attempted enticement of a minor to engage in "sexual activity for which any person can be charged with a criminal offense," include an *element* requiring the government to charge and prove that the object sexual activity would violate a particular predicate offense, or is the specific predicate offense merely a *means* of satisfying the § 2422(b) charge?

2. Regardless of whether the predicate offense is itself an element of § 2422(b), does a Court of Appeals constructively amend an indictment in violation of the Fifth Amendment by sustaining a § 2422(b) conviction based on a different predicate offense than the one that was in fact specified in the indictment and upon which the defendant was actually convicted at trial?

Parties to the Proceeding

Petitioner is Wilfredo Lee Lopez, defendant-appellant below. The United States of America is the respondent on review.

Statement of Related Proceedings

United States v. Wilfredo Lopez, Case No. 17-cr-0053 (D. Guam) (January 9, 2019)

United States v. Wilfredo Lopez, Case No. 19-10017 (9th Cir.) (July 6, 2021)

Table of Contents

Page(s)

Index to Appendix

Table of Authorities

Page(s)

Cases

Statutes

Constitutional Provision

Other Authorities

Petition for Writ of Certiorari

Wilfredo Lee Lopez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the Court of Appeals is available at *United States v. Lopez*, 4 F.4th 706 (9th Cir. 2021), and is included in the Appendix at App 1-78. The Court's denial of rehearing and rehearing en banc is unreported and included in the Appendix at App. 79. The judgment of the District Court is also unreported and is included in the Appendix at App. 80-86.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on July 6, 2021. App. 1-78. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on December 14, 2021. App. 79. On March 7, 2022, this Court extended the deadline to file a petition for writ of certiorari by 30 days, to April 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision 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.

Introduction

A grand jury returned an indictment charging Wilfredo Lopez with violating 18 U.S.C. § 2422(b) by 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, 87-88. Lopez proceeded to trial and was convicted of that charge. A split panel of the Court of Appeals then 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 Ninth Circuit Majority instead sustained the conviction based on a different charge of its own creation. Specifically, the Majority ignored the predicate offense identified in the indictment and evaluated the sufficiency of the evidence based on a different, uncharged predicate.

In reaching an affirmance, the Majority took two erroneous steps, each of which independently warrants this Court's review. First, the Majority deepened a longstanding circuit split by holding that the federal enticement charge, § 2422(b), does not include an element requiring the Government to charge and prove a specific predicate offense. Instead, the Majority concluded that the specific predicate offense is a *means* of satisfying an element of the charge and can therefore be omitted from an indictment charging § 2422(b). The first question presented asks this Court to resolve this circuit split and clarify the elements of § 2422(b). In doing so, this Court will also have the opportunity to clarify the distinction between the *elements* of an offense and the *means* of satisfying those elements, which lower courts and scholars have repeatedly asked this Court to do since it decided *Schad v. Arizona*, 501 U.S. 624 (1991).

Second, the Majority held that even though the indictment in this case did specify a particular predicate offense based upon which Lopez was convicted at trial, that predicate offense was mere surplusage that the Court of Appeals could excise from the charge. This maneuver led the Court to affirm the conviction based on a different predicate offense of the Court's choosing. But the Constitution does not permit a court to take such initiative. As the Ninth Circuit Dissent concluded, "[i]n contravention of the

Constitution, [the Majority] has taken on the role of the prosecutor (in its charging decision) and the grand jury (in performing its mandatory role under the Fifth Amendment)." App. 78. In doing so, the Majority also collapsed the critical distinction this Court and the Courts of Appeals have drawn between constructive amendments—unconstitutional alterations to the charges returned by a grand jury—and variances that merely amend ancillary factual allegations. After all, regardless of which side of the circuit split is correct in defining the elements of § 2422(b)—that is, whether the predicate is an element or a necessary means of satisfying an element—there is no dispute that the predicate offense is essential to proving the charge. The predicate is thus not surplusage that a Court of Appeals can excise from the indictment after trial. The second question presented asks this Court to clarify the distinction between an impermissible constructive amendment and a variance, and to safeguard the constitutional limits on a reviewing court's power to alter the charge returned by a grand jury.

The Ninth Circuit Majority's errors are thus numerous and weighty, cutting to the core of the Fifth Amendment grand jury right and to important questions in substantive criminal law that have divided the circuit courts. Each question presented is of exceptional importance. This Court should grant review.

Statement of the Case

I. The Trial

Lopez was charged in a two-count indictment based on email messages he exchanged with an undercover federal agent. App. 6-7, 87-88. This petition concerns only Count 1, which alleged that Lopez violated 18 U.S.C. § 2422(b) by 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, 87-88. 9 GCA § 25.15(a)(1) is Guam's First Degree Criminal Sexual Conduct statute, which criminalizes the completed crime of "sexual penetration" with someone "under fourteen (14) years of age." The indictment named no other predicate offense. App. 33, 87-88.

At trial, the evidence showed that Lopez worked on Anderson Air Force Base (AAFB), "a federal enclave within the special maritime and territorial jurisdiction of the United States." App. 6. A federal agent testified that he had created an online persona for a fictitious 13-year-old girl named "Brit" and posted an online advertisement to which Lopez responded via email. App. 6. Lopez and "Brit" exchanged emails about meeting at various locations on AAFB to engage in sexual activity. App. 6-7. Crucially, there was never any discussion of meeting at any off-base location. App. 6-7, 33.

The jury instructions charged the same predicate offense as the indictment. App. 90-92. The jury returned guilty verdicts on both counts.[1] App. 9, 80.

II. The Appeal

On appeal, Lopez argued, among other things, that there was insufficient evidence to sustain his conviction for the attempted enticement of a minor under § 2422(b). App. 19-20. Section 2422(b) requires evidence that the defendant attempted to entice a minor to engage in sexual activity for which a person "can be charged with a criminal offense." 18 U.S.C. § 2422(b). Here, the indictment 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, 87-88. However, it was legally impossible for the proposed sexual activity to be prosecuted under that predicate offense because the communications between Lopez and "Brit" only ever discussed meeting up on AAFB, a federal enclave where the predicate Guam statute could not apply. App. 19-20, 33, 48-49. Because the object sexual activity could not be charged under the predicate named in the indictment, there was

[1] Count 2 charged Lopez with attempting to transfer obscenity to a minor, in violation of 18 U.S.C. § 1470. App. 9. This petition challenges the judgment only as to Count 1.

insufficient evidence to sustain the Section 2422(b) conviction.
App. 33, 48-49.

The Government did not dispute that to sustain the conviction, the evidence had to show that Lopez attempted to entice a minor to engage in sexual activity that would have been prosecutable under the charged predicate offense. App. 49 n.4, 61 n.17, 68-70. Instead, it argued unconvincingly that the evidence was sufficient to sustain the conviction based on that predicate. App. 68-77.

In a split decision, the Court of Appeals affirmed the conviction. The Majority did not accept any of the Government's arguments supporting the conviction on Count 1; indeed, the Majority agreed that "Guam would have lacked jurisdiction to prosecute an offense taking place exclusively within AAFB territory," and that the predicate offense named in the indictment was "inapt." App. 33, 35.

But the Majority rested its affirmance on grounds not argued by the Government. The Majority first waded into a circuit split and stated that it was joining the Sixth and Eleventh Circuits in holding that § 2422(b) does not include an element requiring the Government to prove that the object sexual activity would have violated one specific predicate offense.
App. 29 (noting disagreement with the Seventh Circuit). The Majority then

concluded that because § 2422(b) does not include a predicate-offense element, the indictment could have omitted any reference to a predicate. App. 29. Finally, the Majority concluded that although 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."[2] 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

[2] The two predicates require proof of different elements. The predicate charged in the indictment—First Degree Criminal Sexual Conduct—is a strict-liability offense; it criminalizes sexual penetration with a victim under 14 years' old, regardless of whether the defendant knew of the victim's age. *See Guam v. Cummins*, 2010 Guam 19, ¶ 19 (Guam 2010). Conversely, the predicate relied on by the Majority—*Attempted* First Degree Criminal Sexual Conduct—requires proof of specific intent. *See* 9 G.C.A. § 13.10.

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 on Count 1. App. 48-78. 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. Moreover, consistent caselaw requires that "[w]here an indictment is constructively amended and a conviction is based on the newly amended indictment, that conviction must be reversed." App. 61.

The Dissent also addressed the Majority's contention that its holding amounted to a non-prejudicial variance and not a constructive amendment:

> The Majority tries to avoid this by wrongly holding that this case 'involves, at most, a variance in which the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.' . . . But how have the charging terms been left unaltered? As I wrote at the beginning of my dissent, the indictment returned by the grand jury charged Lopez with attempting to 'entice[] a person who the defendant believed to be under eighteen years of age[] 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).' *This is a predicate offense Lopez did not commit.*

> The indictment, as amended by the Majority, now charges a different predicate offense. And this amendment not only changes the charging terms of the indictment, but changes them materially, as Lopez did not commit the offense with which he was actually charged.

App. 60 (citations omitted).

Reasons for Granting the Writ

I. This Court should grant review to resolve a longstanding circuit split in defining the elements of the federal enticement statute

A. There is a longstanding circuit split on the question presented

The Courts of Appeals are divided in defining the elements of the federal enticement statute, § 2422(b). The statute applies when a person "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). It is the final element—that the sexual activity would constitute "a criminal offense"—that has divided the lower courts. Specifically, the lower courts disagree over whether the "can be charged with a criminal offense" language creates a predicate offense element, or whether

the predicate offense is merely a means of satisfying the final element of § 2422(b).

i. Before delving into the circuit split, it is necessary to describe what all of the lower courts agree upon, namely that a § 2422(b) conviction requires proof that the object of the enticement—the sexual activity that a defendant discusses with a minor—would constitute a prosecutable criminal offense under the laws of the relevant jurisdiction. *E.g.*, *United States v. Saldana-Rivera*, 914 F.3d 721, 724 (1st Cir. 2019) (§ 2422(b) conviction requires evidence that the object of the enticement was "chargeable sexual activity," which "includes crimes defined by state law"); *United States v. Hart*, 635 F.3d 850, 855 (6th Cir. 2011) ("In order to convict Hart, the jury had to unanimously agree that the sexual activity that Hart attempted to persuade 'Ashley' to engage in would have been chargeable as a crime under Kentucky law"); *United States v. Dhingra*, 371 F.3d 557, 565 (9th Cir. 2004) (holding the object of the enticement must be sexual activity for "which an individual could actually be prosecuted," and this analysis "is limited to the jurisdiction and venue restrictions of state and federal law").

And there is further agreement that the only way for the Government to prove that the object sexual activity would constitute a criminal offense is by reference to a predicate criminal statute. *E.g.*, *United States v. Mannava*,

565 F.3d 412, 415–17 (7th Cir. 2009) (holding that a § 2422(b) conviction requires the Government to charge and prove a specific predicate offense that the object sexual activity would have violated); *United States v. Jockisch*, 857 F.3d 1122, 1133 (11th Cir. 2017) (holding that the jury need not unanimously agree upon which predicate offense the sexual activity would violate so long as the "jury unanimously agrees that that sexual activity to be enticed would violate one of the listed [predicate] statutes had it been successfully carried out"); *Hart*, 635 F.3d at 855-56 (same); *United States v. Berk*, 652 F.3d 132, 139 (1st Cir. 2011) (declining to address whether a § 2422(b) indictment must list the predicate offense but agreeing that the Government must, before trial, inform the defendant of the particular predicate offense it intended to proceed based upon).

There is thus no dispute that to sustain a § 2422(b) conviction, the Government must prove that the defendant's communications proposed sexual activity that would have violated a predicate criminal offense.

ii. But while the lower courts agree that § 2422(b) requires proof of a predicate offense, they disagree over whether the predicate constitutes an element of § 2422(b) or a *means* of satisfying an element. The practical implications of this disagreement are at least twofold; the disagreement determines whether a jury must unanimously agree as to the predicate

offense that the object sexual activity would violate, and whether the indictment charging § 2422(b) must name a specific predicate offense. If the predicate is an element of § 2422(b), then both questions are answered in the affirmative.

On this point, the Seventh Circuit held that the predicate offense is an element of § 2422(b) in *United States v. Mannava*, 565 F.3d 412, 415-16 (7th Cir. 2009). And because the predicate offense is an element, the Court concluded that it was "error to allow the jury to convict without a unanimous determination" as to which predicate applied. *Id.* at 415. The Seventh Circuit reasoned that a contrary holding would lead to "the absurd conclusion, which the government's lawyer embraced at argument while acknowledging its absurdity, that the government could charge a defendant with violating the federal [enticement] statute by violating 12 state statutes and that he could be properly convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty." *Id.*

The Seventh Circuit further reasoned that its conclusion is compelled by *Richardson v. United States*, 526 U.S. 813, 817 (1999), under which "in a case in which the defendant is accused of having violated several statutes incorporated by reference, the jury has to be unanimous with regard to the

violation of at least one of them." *Mannava*, 565 F.3d at 416. Finally, the Seventh Circuit reasoned, the predicate offense here cannot be compared to factual details upon which the verdict does not depend, such as the date of an offense; here, a guilty verdict is valid only if the jury finds that the object sexual activity would have violated a predicate offense. *See id.* The predicate is therefore an element of § 2422(b). *Id.*

On the other side of the ledger, the Sixth, Eleventh and (now) Ninth Circuits have held that the predicate offense is not an element of § 2422(b) but is instead a means of satisfying an element. *See United States v. Jockisch*, 857 F.3d 1122, 1126-33 (11th Cir. 2017); *United States v. Hart*, 635 F.3d 850, 854-56 (6th Cir. 2011); App. 22-34 (Ninth Circuit Majority). In *Jockisch* and *Hart*, the indictments listed multiple predicate offenses that the enticed sexual activity would have violated, and the defendants argued on appeal that the jurors should have been required to agree on at least one predicate offense unanimously. The courts disagreed, and held, as the Eleventh Circuit put it, "that the jury does not have to unanimously guess at the one statute that a defendant's successful persuasion would have violated so long as the jury unanimously agrees that that sexual activity to be enticed would violate one of the listed statutes had it been successfully carried out." *Jockisch*, 857 F.3d at 1133; *see also Hart*, 635 F.3d at 855-56. The courts

reached this conclusion because they determined that the "the underlying [predicate] criminal offenses are not elements of the federal offense," and are instead "means of violating 18 U.S.C. § 2422(b)." *Hart*, 635 F.3d at 856; *see also Jockisch*, 857 F.3d at 1131.

With its decision in this case, the Ninth Circuit deepened the circuit split by taking the more extreme position that because the predicate is not an element of § 2422(b), the indictment does not need to list any predicate offense at all. The Ninth Circuit first explicitly joined the Sixth and Eleventh Circuits in holding that the predicate offense is a means of satisfying § 2422(b), but not an element in itself. App. 29, 34. But the Ninth Circuit then went further, concluding 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[.]" App. 22. Based on this position, the Majority concluded that although 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. App. 31-41.

The Courts of Appeals are thus divided on the question of whether § 2422(b) includes a predicate offense element or whether the predicate is merely a necessary means of satisfying the federal charge. *See United States v. Vickers*, 708 F. App'x 732, 736 n.1 (2d Cir. 2017) (noting circuit split but declining to reach the issue); *United States v. Berk*, 652 F.3d 132, 139 n.7 (1st Cir. 2011) (same).

B. The Ninth Circuit's decision is incorrect: § 2442(b) includes an element requiring proof of a specific predicate offense

This Court should adopt the Seventh Circuit's position and hold that an element of § 2442(b) requires the Government to prove that the enticed sexual activity would violate a specific predicate offense. As addressed above, there is no dispute that the only way to satisfy § 2422(b)'s requirement that the object sexual activity "can be charged with a criminal offense" is to prove that it would violate a predicate statute. *E.g.*, *Jockisch*, 857 F.3d at 1133 (holding that predicate offense is not element of § 2442(b) but is a necessary means of proving the final element). And under this Court's decision in *Richardson*, when federal criminal liability depends on satisfying an underlying criminal statute, that underlying statute must be an element of the federal charge. The Sixth, Ninth and Eleventh Circuits' decisions to the contrary are unpersuasive.

In *Richardson*, this Court addressed the means-elements distinction in the context of the federal criminal statute forbidding "any 'person' from 'engaging in a continuing criminal enterprise.'" *Richardson*, 526 U.S. at 815 (quoting 21 U.S.C. § 848(a)) (alteration omitted). The statute defined "continuing criminal enterprise" (CCE) as "involving a 'violation' of the drug statutes where 'such violation is a part of a continuing series of violations.'" *Id.* (quoting 21 U.S.C. § 848(c)) (alteration omitted). The issue in the case was whether each violation of underlying drug laws was itself an element of the CCE offense, such that a jury needed to agree on the specific violations unanimously, or whether the violations were a mere means, such that the jury only needed to agree that such violations occurred but not on which specific drug laws were violated. *Id.* at 817-18.

This Court held that the specific underlying laws being violated were elements of CCE. *Id.* at 818-19. It reached that conclusion because the statute's use of the word "violation" does not connote a mere factual means of committing an offense; a "'violation' is not simply an act or conduct; it is an act or conduct that is contrary to law." *Id.* at 818. "That circumstance is significant because the criminal law ordinarily entrusts a jury with determining whether alleged conduct 'violates' the law, and, as noted above, a federal criminal jury must act unanimously when doing so." *Id.* (citation

omitted). The Court concluded that its holding "that each 'violation' here amounts to a separate element is consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not." *Id.* at 818-19.

So too, here. Section 2442(b) asks the jury to determine whether the defendant attempted to entice a minor to engage in "sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(b). The question for the jury is if the defendant attempted to entice a minor to engage in "an act or conduct that is contrary to law." *Richardson*, 526 U.S. at 818. Just as *Richardson* held, it is the jury's province to determine whether the defendant attempted to violate the law, and holding that the predicate offense is an element of § 2442(b) is therefore "consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law. To hold the contrary is not." *Id.* at 818-19.

Richardson also warned that construing predicate offenses as mere means, as opposed to elements, risks depriving a defendant of his right to a unanimous jury verdict. As the Court warned, where criminal liability can be based on a wide range of predicate offenses, there is an increased risk that "treating violations simply as alternative means, by permitting a jury to

avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do." *Id.* at 819. The Seventh Circuit aptly warned about the same exact problem with treating § 2422(b)'s predicate offense as a means, as opposed to an element. *Mannava*, 565 F.3d at 415-16. Specifically, the Seventh Circuit reasoned that failing to read a predicate offense element into § 2422(b) would lead to the "the absurd conclusion . . . that the government could charge a defendant with violating the federal [enticement] statute by violating 12 state statutes and that he could be properly convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty." *Id.* That is, if jurors are not required to agree upon the predicate offense that a defendant's proposed sexual activity would violate, then a jury might reach a guilty verdict while maintaining "wide disagreement among the jurors about just what the defendant did, or did not, do." *Richardson*, 526 U.S. at 819.

Section 2422(b) must therefore include an element requiring proof that the enticed sexual activity would violate a specific predicate offense. The contrary decisions of the Sixth and Eleventh Circuits attempt to limit *Richardson* to its facts, and the Ninth Circuit's decision in this case does not even mention *Richardson*. All of those decisions are unpersuasive. In *Hart*,

the Sixth Circuit flatly stated that *Richardson* was inapplicable because the "structure of 18 U.S.C. § 2422(b) is materially different from the continuing-criminal-enterprise statute analyzed in *Richardson*." *Hart*, 635 F.3d at 856. And in *Jockisch*, the Eleventh Circuit reasoned that the CCE statute at issue in *Richardson* requires the jury to find that a defendant committed *prior* violations of different underlying offenses, whereas § 2422(b) requires a jury to determine whether the defendant proposed sexual activity that *would* violate a predicate offense. *See Jockisch*, 857 F.3d at 1128. These superficial differences between the statutes do not change the fact that § 2422(b)—just like the CCE statute in *Richardson*—requires a jury to assess whether a defendant's conduct would violate another criminal law, nor do they alleviate the fairness concerns articulated in *Richardson*. Under *Richardson*, the predicate offense is an element of § 2422(b).

Finally, to the extent there is any ambiguity in the statute, the "rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). Stated otherwise, "[u]nder a long line of our decisions, the tie must go to the defendant." *Id.* To the extent the "traditional tools of statutory interpretation yield no clear answer" in this case, then the "next step is to lenity." *Wooden v. United States*, 142 S. Ct. 1063, 1086 (2022) (Gorusch, J.,

concurring). The decisions of the Sixth, Ninth, and Eleventh Circuits provide no persuasive basis to read the predicate offense requirement as a means rather than an element of § 2422(b). This Court should adopt the rule articulated by the Seventh Circuit.

C. This case presents an ideal vehicle to resolve the circuit split and, more broadly, to clarify the essential distinction between an element of an offense and a means of satisfying an element

This case presents an ideal vehicle for this Court to resolve the circuit split and, more broadly, to clarify the means-elements distinction it first articulated in *Schad v. Arizona*, 501 U.S. 624 (1991). As to the circuit split, there can be no dispute that it is outcome-determinative in this case. The Ninth Circuit Majority sustained Lopez's conviction on Count 1 based entirely on its conclusion that the predicate offense was not an element of § 2422(b). App. 21-41. Indeed, both the Majority and the Dissent agreed that Lopez could not have been convicted based on the predicate named in the indictment. *See* App. 33-40 (Majority); App. 48-78 (Dissent). But the Majority affirmed the conviction because it concluded that the predicate was not an element of § 2422(b) and so could have been omitted from the indictment. App. 29, 31. This reasoning would fail, and the conviction on Count 1 would have to be reversed, if the predicate offense is an element of § 2422(b). *See United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (it

is well established that "an indictment must set forth each element of the crime that it charges" (alteration and citation omitted)).

And while resolving a circuit split about the elements of a federal criminal statute is reason enough for this Court to grant review, it is further warranted here to clarify the oft-confused means-elements distinction. This Court first described the distinction in *Schad*. But that case involved a State statute, and so this Court's review was limited to assessing the constitutionality of the State Supreme Court's decision that a jury need not unanimously agree on alternate means of committing a certain offense. Schad, 501 U.S. at 636–37. *Schad* thus did not provide significant guidance for lower courts deciding whether a federal statute describes alternate means or distinct elements. *See id.* However, *Schad* did note that deriving a "single test" to evaluate "what facts are necessary to constitute the crime" and "what facts are mere means" would prove difficult since the decision often involves "value choices." *Id.* at 637-38.

In *Richardson*, this Court did, for the first time, address the statutory interpretation questions that arise in delineating the means-elements distinction in the context of a federal criminal statute. *See Richardson*, 526 U.S. at 815-19. Nonetheless, as lower courts and scholars have pointed out, further clarification is needed. As one commentator put it, "*Schad* has been

criticized by commentators and by courts for, among other things, failing to provide clear guidance for future cases." Jessica A. Roth, *Alternative Elements*, 59 UCLA L. REV. 170, 190 (2011). Indeed, the D.C. Circuit has held that a district court's error in failing to correctly decide a means-elements question cannot amount to plain error given "the difficulty inherent in deciding what may fit under the umbrella of a single crime, and given the division among the Justices as to how to resolve that question." *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008).

This Court should grant review to resolve the circuit split as to § 2422(b), and to shed more light on the means-elements distinction.

II. Review is further warranted to clarify that a court cannot amend an essential detail in an indictment after trial

Review is also warranted to clarify that, under the Fifth Amendment, a Court of Appeals cannot amend a crucial detail in the indictment after trial, regardless of whether that amendment concerns an element of the charged offense or a necessary means of satisfying an element. Here, the Ninth Circuit Majority affirmed the conviction based on a different predicate offense than the one named in the indictment because of its conclusion that the predicate actually named in the indictment was mere surplusage. But regardless of whether the predicate is an element of § 2422(b) or a necessary means of satisfying an element, the predicate is not a superfluous detail that is "unnecessary to and independent of the allegations of the offense proved." *United States v. Miller*, 471 U.S. 130, 136 (1985).

By affirming the conviction based on a different predicate offense than the one in the indictment, the Court of Appeals has unconstitutionally "taken on the role of the prosecutor (in its charging decision) and the grand jury (in performing its mandatory role under the Fifth Amendment)." App. 78 (Bennett, J., dissenting). The Majority has also undermined extensive caselaw drawing a fine but critical distinction between permissible variances and unconstitutional amendments to the indictment. Review is necessary to

safeguard the Fifth Amendment and address these issues of exceptional importance.

A. The Ninth Circuit Majority constructively amended the indictment in violation of the Fifth Amendment

"Ever since *Ex parte Bain*, 121 U.S. 1, 7, was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 215-16 (1960); *see also United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *United States v. Ward*, 747 F.3d 1184, 1189 (9th Cir. 2014) (emphasis and citation omitted). Such an amendment "destroy[s] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Howard v. Dagget*, 526 F.2d 1388, 1390 (9th Cir. 1975) (quotation marks and citation omitted).

The Ninth Circuit Majority substantially altered the charging terms from those named in the indictment. The indictment 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. 87-88. But the Majority

sustained the conviction based on a different predicate offense not named in the indictment, specifically *Attempted* First Degree Criminal Sexual Conduct, under 9 G.C.A. §§ 13.10, 13.60(a), 25.15(1)(1). App. 31 ("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."). And since the Majority's chosen predicate includes distinct elements from the predicate listed in the indictment, *supra* note 2, the Majority's amendment broadened the indictment. *See Miller*, 471 U.S. at 136.

The Majority has thus constructively amended the indictment in the most fundamental way. As the Dissent put it, "this amendment not only changes the charging terms of the indictment, but changes them materially, as Lopez did not commit the offense with which he was actually charged." App. 60. Under the Fifth Amendment, a court may not "change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Stirone*, 361 U.S. at 216 (quoting *Ex parte Bain*, 121 U.S. 1, 10 (1887)). Instead, the Court must accept the charges in the indictment and "decide whether they are sufficient in law to support a conviction." *Russell v. United States*, 369 U.S. 749, 768 (1962). The

Majority subverted the Constitution's mandate by agreeing that the charge in the indictment could not support a conviction but then convicting Lopez based on an amended charge of its own creation.

B. The Ninth Circuit Majority muddled the crucial distinction between a constructive amendment and a variance

The Majority affirmed the conviction based on a different predicate offense than the one named in the indictment, concluding that this change "involves, at most, a variance.'" App. 40. The Majority reasoned that because a Section 2422(b) conviction does not require the Government to name a specific predicate offense in the indictment, the predicate the indictment did name amounts to "superfluously specific language describing alleged conduct irrelevant to the defendant's culpability under the applicable statute." App. 38 (citation omitted).

The Majority's holding collapses the distinction between a permissible variance and an unconstitutional constructive amendment by incorrectly assuming that any allegation that could have been omitted from the indictment is surplusage. On the contrary, it is well-established that the Government can bind itself to specific allegations made in an indictment even if the indictment could have been written in more general terms. Here, the predicate offense is far from surplusage; regardless of whether it is an

element or a *means* or proving an element, the predicate offense is "necessary to satisfy an element of" Section 2422(b). *Ward*, 747 F.3d at 1191.

i. A variance between the indictment and the proof offered at trial is permissible if the variance involves a "part of the indictment unnecessary to and independent of the allegations of the offense proved." *Miller*, 471 U.S. at 136. That is, unnecessary details in an indictment that are nothing but "a useless averment . . . may be ignored." *Id.* (quotation marks omitted). Following this guidance, the Courts of Appeals have concluded that the surplusage rule allows a court to amend ancillary details in an indictment, such as the date of the offense, or to correct typographical or clerical errors. *See, e.g.*, *United States v. Leichtnam*, 948 F.2d 370, 376 (7th Cir. 1991).

But allegations in an indictment are not surplusage if they are "relevant and material to the charge." *United States v. Terrigno*, 838 F.2d 371, 373-74 (9th Cir. 1988). And an unconstitutional constructive amendment occurs when a court broadens an indictment to include new allegations that are relevant and material to the charge. *See Stirone*, 361 U.S. at 218-19; *Miller*, 471 U.S. at 145; *see also Ward*, 747 F.3d at 1191 (a constructive amendment occurs when a court alters an allegation in the indictment that is "necessary to satisfy an element of the offense"); *Leichtnam*, 948 F.2d at 379 (constructive amendment where indictment listed

a single, specific gun, but trial proceedings allowed for conviction based on additional guns since "[b]y the way the government chose to frame Leichtnam's indictment, it made the [specific gun] an essential part of the charge").

ii. The Majority's analysis focused on its (incorrect) holding that an indictment charging a § 2422(b) offense does not need to name a specific predicate offense since the predicate is not itself an element of § 2422(b). App. 34-38. Based on that conclusion, the Majority assumed that the predicate actually named in Lopez's indictment was mere surplusage that a court can independently strike from the indictment. App. 38. This ruling distorts the concept of surplusage, with potentially far-reaching consequences.

The Majority flatly misstates the law by asserting that whenever an allegation could have been omitted from the indictment, it is surplusage. Indeed, this Court and the Courts of Appeals have repeatedly found impermissible constructive amendments where the amended allegation could have been omitted from the indictment in the first place. For example, in *Stirone*, this Court reversed a conviction based on a constructive amendment. 361 U.S. at 215–19. The indictment charged defendant-Stirone with interfering with the interstate importation of sand, but the trial proceedings

permitted a conviction based on interfering with steel transports. *Id.* at 217. Even though the indictment could have been "drawn in general terms" such that "a conviction might rest upon a showing that commerce of one kind or another had been burdened," the indictment as written limited the permissible basis of prosecution. *Id.* at 218-19. That is, even though the indictment could have been written more broadly, a conviction could rest only on the more specific theory alleged in the indictment. *See id.*

Similarly, in *Howard v. Dagget*, 526 F.2d 1388 (9th Cir. 1975), the defendant was charged with inducing two specific women to engage in prostitution. *Id.* at 1389. At trial, the jury instructions allowed for a conviction based on additional women as well as the two women named in the indictment. *Id.* The identity of the alleged prostitutes was not an element of the offense, and so the "grand jury might have indicted appellant in a general allegation, without specifying the women[.]" *Id.* at 1390. But given that the indictment *did* name two specific women, "[t]o allow the jury to consider the evidence respecting the other alleged prostitutes was to allow the jury to convict of a charge not brought by the grand jury." *Id.* The Court therefore reversed the conviction. *Id.*

It is thus immaterial to the constructive amendment analysis whether the indictment *could have* been written more generally. *See also United*

States v. Wozniak, 126 F.3d 105, 109–10 (2d Cir. 1997) (constructive amendment where indictment specifically named cocaine and methamphetamine but jury instructions allowed for conviction for marijuana, even though "the indictment could have charged Wozniak generally with offenses involving controlled substances . . . without mention of any specific drug"); *Leichtnam*, 948 F.2d at 379 (constructive amendment where indictment listed a specific gun and trial evidence included additional guns, even though "the government could easily have drawn up Leichtnam's indictment to charge him simply with having used or carried 'a firearm'").

By hinging its analysis on whether the indictment could have been written more generally, the Majority confuses this Court's precedents distinguishing between allegations necessary to satisfy an element of the offense—which cannot be amended without a grand jury—and surplusage that is "unnecessary to and independent of the allegations of the offense proved." *Miller*, 471 U.S. at 136.[3]

---

[3] The Majority's analysis of surplusage relies on inapposite cases. *See* App 61-68 (Bennett, J., dissenting) (distinguishing cases relied on by Majority). For example, in *United States v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002), the indictment charged that the defendant "did knowingly import and bring into the United States certain merchandise, to wit, marijuana, contrary to law." *Id.* at 1215. The defendant argued that while he knowingly imported illegal merchandise, he did not know that it was marijuana. *Id.* The Court applied a "purely textual" analysis to the indictment and concluded that the "to wit" clause did not describe the

iii. Regardless of whether a predicate offense is an element of § 2422(b) or a necessary means of satisfying an element, the predicate offense is not surplusage. Under either construction of the statute, a conviction requires proof that the defendant's communications regarded sexual activity that would be chargeable under a predicate offense, and so the predicate listed in an indictment may not be "be treated as 'a useless averment' that 'may be ignored.'" *Miller*, 471 U.S. at 136. Thus, even if the Ninth Circuit Majority was correct that a § 2422(b) indictment could be written in general terms without reference to a particular predicate, the Court constructively amended the indictment by striking the predicate that was in fact listed in the indictment and replacing it with a different predicate of its own choosing.

As addressed above, *supra* pages 12-13, regardless of whether the predicate offense is an element of § 2422(b) or a means of satisfying an element, the Courts of Appeals agree that a § 2422(b) conviction requires proof that the defendant's enticement involved sexual activity that would violate at least one predicate offense. *See United States v. Mannava*, 565 F.3d 412, 415–17 (7th Cir. 2009) (holding that a § 2422(b) conviction requires

---

defendant's knowledge but only the objective fact that he imported marijuana. *Id.* *Garcia-Paz* does not support the Majority's contention that any "to wit" clause in an indictment is surplusage if it offers more specificity than is required. *Contra* App. 34-35.

the Government to charge and prove a specific predicate offense that the object sexual activity would have violated); *United States v. Jockisch*, 857 F.3d 1122, 1133 (11th Cir. 2017) (holding that the predicate offense is not an element of § 2422(b) but a conviction requires the jury to "unanimously agree[] that that sexual activity to be enticed would violate one of the listed [predicate] statutes had it been successfully carried out"); *United States v. Hart*, 635 F.3d 850, 855–56 (6th Cir. 2011) ("In order to convict Hart, the jury had to unanimously agree that the sexual activity that Hart attempted to persuade 'Ashley' to engage in would have been chargeable as a crime under Kentucky law"); *see also* App. 31-43 (affirming Lopez's conviction because the Government offered sufficient proof that Lopez attempted to entice "Brit" to engage in sexual activity that would have violated a particular predicate offense, albeit a different one than was named in the indictment).

Thus, regardless of whether the predicate is itself an element, it is at least "necessary to satisfy an element of" Section 2422(b). *Ward*, 747 F.3d at 1191. Consequently, since the indictment here *did* name a predicate offense, replacing that predicate post-trial amounted to an unlawful constructive amendment. *See Stirone*, 361 U.S. at 218–19.

C. *The Ninth Circuit's decision has far reaching implications for reviewing courts' powers to amend jury determinations*

The Ninth Circuit's decision is startling in its willingness to alter the crime charged, not only after the grand jury returned the indictment, but even after the petit jury returned a conviction. At no time in the trial proceedings was any mention made of the predicate offense that the Ninth Circuit Majority relied upon to sustain the conviction. As the Dissent put it, there is no dispute that "Lopez could not have committed and did not commit the crime with which he was charged in the indictment." App. 49. This Court should grant review to reassert the primacy the Constitution places on grand jury proceedings and the limits on a reviewing court's power to alter the crime charged.

Moreover, review is further warranted to clarify the distinction between a permissible variance and an unconstitutional constructive amendment. "While the line that separates a constructive amendment from a variance is not always easy to define, drawing this distinction is nevertheless critical." *United States v. Davis*, 854 F.3d 601, 605 (9th Cir. 2017) (cleaned up); *see also Ward*, 747 F.3d at 1189 ("The line that separates a constructive amendment from a variance is not always easy to define."). The distinction is critical because "a constructive amendment typically mandates reversal, while a variance requires reversal only if it prejudices a

defendant's substantial rights." *Davis*, 854 F.3d at 605 (quotation marks and citation omitted). As addressed above, the Ninth Circuit Majority distorts this distinction, with potentially far-reaching implications. This is an important issue of law, warranting this Court's review.

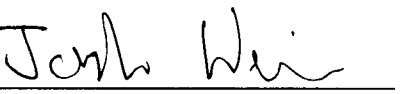
Conclusion

For the foregoing reasons, Lopez respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: April 12, 2022

By: 

JOSHUA D. WEISS*
Deputy Federal Public Defender

Attorneys for Petitioner
**Counsel of Record*