No. 22 - _____

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY FLUCAS,

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

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QUESTION PRESENTED

Was the Jury Erroneously Instructed That the Government Only had to Prove That Sexual Activity Was a "Motivating Purpose" for Transportation of Persons 1-3 Across State Lines When Proof that the Dominant Intent for the Travel was Illicit Sexual Conduct is required by Precedent of this Court to Preserve the Right to Interstate Travel, Require the Prosecution to Prove its Case Beyond a Reasonable Doubt, and Maintain State Authority in in the Punishment of Purely Local Activity?

PARTIES TO THE PROCEEDINGS BELOW

Rodney Flucas, petitioner, was the defendant-appellant below.

The United States of America, respondent, was plaintiff-appellee below.

RELATED CASES

There are no related cases.

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INTRODUCTION

Flucas was convicted of violating 18 U.S.C. §§ 2421 and 2423 after moving his family from Oregon to California. The question for the jury was whether Flucas violated federal law prohibiting illicit sexual conduct as a "significant, dominant, *or* motivating purpose for transporting others across a state line." Excerpts of Record ("EOR") 0592. The divided panel of the Ninth Circuit found that the district "court did not abuse its discretion in instructing the jury concerning the intent requirements for 18 U.S.C. §§ 2421(a) and 2423(a)." Appendix A, at 38. Rehearing was denied even though, as Judge Bybee recognized in dissent, "[t]he instruction lowered the government's burden of proof, contrary to the Supreme Court's decision in *Mortensen v. United States*, 322 U.S. 309 (1944), and [this Circuit's] own Mann Act decisions; and the error in instruction is not harmless beyond a reasonable doubt." Appendix A, at 42.

Flucas crossed state lines because "there were better schools where he was going; plus, he had got a better paying job, higher paying job." EOR0024. Specifically, he accepted a job requiring relocation to increase his hourly wage from $18 to $31. EOR0250. The job provided an additional stipend of $875 per week, further increasing the compensation package. EOR0250. His wife, Evelyn Sengasi, also received a job, further increasing the family's income. EOR0339-EOR0340. There were no pending investigations of Flucas when he traveled across state lines. EOR0776.

Given these facts, the instructions are of linguistic, statutory, and constitutional importance to the question presented on appeal, which is: "Does the inclusion of 'motivating' purposes 'improperly lower[] the bar from the required intent—a dominant

or significant purpose[?]'" Appendix A, at 65. The issue is of exceptional importance because: "No court has considered whether 'a motivating purpose' is different from 'a dominant or significant purpose.'" *Id.* at 41. And "[t]here is a serious doubt that Flucas crossed the Oregon-California border with his family and moving truck as 'calculated means for effectuating sexual immorality.'" *Id.* at 66 (quoting *Mortensen*, 322 U.S. at 375).

Moreover, as Judge Bybee recognized, the decisions of the Ninth Circuit, "like those of our sister circuits, are inconsistent." Appendix A, at 57. Several decisions apply the dominant purpose test,[1] while other decisions do not.[2] The latter erroneously equate the meanings of "dominant," "significant," "compelling," and "efficient," although that combination of words has "not appeared regularly in cases, [but] ha[s] been used by some courts, usually in a casual way." Appendix A, at 48.

Honoring the dominant purpose test requires that "interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities." *Mortensen*, 322 U.S. at 374. Criminal liability based on lesser motivating purposes does not come within "federal criminal jurisdiction." Appendix A, at 69 (citing *United States v. McCauley*, 983 F.3d 690, 698 (4th Cir. 2020.) Certiorari is necessary to clear these

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[1] See *Daigle v. United States*, 181 F.2d 311 (1st Cir. 1950); *Mellor v. United States*, 160 F.2d 757 (8th Cir. 1947); *United States v. Miller*, 148 F.3d 207, 211 (2d Cir. 1998); and *United States v. Snow*, 507 F.2d 22, 23-24 (7th Cir. 1974) (opn. Stevens, J.).

[2] See *United States v. Vang*, 128 F.3d 1065, 1071 (7th Cir. 1997), *United States v. Hayward*, 359 F.3d 631 (3d Cir. 2004); *United States v. Campbell*, 49 F.3d 1079 (5th Cir. 1995); *United States v. Perkins*, 948 F.3d 936 (8th Cir. 2020); *United States v. Ellis*, 935 F.2d 385 (1st Cir. 1991); and *United States v. Cryar*, 232 F.3d 1318, 1319 (10th Cir. 2000).

conflicts in the law by making clear that the government's burden is to prove "the dominant motive of such interstate movement." *Mortensen*, 322 U.S. at 37; see Rules of Supreme Court, Rule 10(a).

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's published its opinion affirming the judgment in Case No. 18-15684 on January 21, 2022. Appendix A; see also *United States v. Flucas*, 22 F.4th 1149 (9th Cir. 2022). The Court of Appeal denied petitioner's additional arguments the same day. Appendix B. Rehearing was denied on May 20, 2022. Appendix C. The appeal challenged the judgment entered by the United States District Court for Eastern District of California in Case No. 17-cr-00209-KJM on February 12, 2019. *See* Appendix D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) from the judgment entered by the Ninth Circuit Court of Appeal.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner was convicted under 18 U.S.C. § 2423(a), which reads:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

He was also convicted under 18 U.S.C. § 2421(a), which reads:

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent

> that such individual engage in prostitution, or in 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 or imprisoned not more than 10 years, or both.

The issues presented implicate the Fifth and Fourteenth Amendments to the United States Constitution, which read:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Con., Amend V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Con., Amend XIV, Section 1.

STATEMENT OF THE CASE

On May 3, 2018, the government filed a third superseding indictment charging Flucas in Count 1, with transportation of Persons 1-3 across state lines with the intent to engage in criminal sexual activity between August 7-17, 2015 in violation of 18 U.S.C. § 2423(a); in Count 2, with transportation of Person 4 across state lines with the intent to engage in incest between August 7-17, 2015 in violation of 18 U.S.C. § 2421(a); in Count 3, with transportation of Persons 2-3 across state lines for the purpose of engaging in incest and child molestation between June 16-August 5, 2015 in violation of 18 U.S.C. § 2423(a);

and, in Count 4, with attempted witness tampering on November 2, 2017 in violation of 18 U.S.C. § 1512(b)(2)(B). EOR0476-0479.

As to Counts 1 and 2, the government alleged that Flucas broke California law when he moved with Persons 1-3 from Oregon to California, even though "there were better schools where he was going; plus, he had got a better paying job, higher paying job." Further Excerpts of Record ("FEOR")0773. As to Count 3, the government alleged that Flucas violated Georgia law when he went on a trip with Person 2-3 from Oregon to Reno to Georgia in June 2015. EOR0476-0479; FEOR0777. As to all counts, jury was instructed:

> Regarding Mr. Flucas's intent, as relevant to Counts 1, 2 and 3, the government must prove, beyond a reasonable doubt, that criminal sexual activity was one of the dominant purposes, not merely an incidental purpose, for the transportation from one state to another. But the government need not prove that criminal sexual activity was the sole or exclusive purpose for the transportation. A person may have more than one dominant purpose for transporting others across state lines.

FEOR0799-800; EOR0543.

The prosecution was thereby limited to arguing that Flucas's "sexual dominance" of Persons 1-3 was not "incidental." FEOR0789-790. Lesser motivating purposes could not be considered because "the question is what was his dominant purpose in transporting his victims?" FEOR0792; see also FEOR0793 ("A dominant purpose means that criminal sexual conduct was not merely incidentally to the transportation."). The defense argued that "the government has to prove beyond a reasonable doubt that the criminal sexual activity was a dominant purpose for the transportation from state to state, and that is very difficult in these cases." FEOR0796.

The jury asked about the intent instruction. EOR0556. The district court correctly provided the same instruction. EOR0556-0557. On June 26, 2018, the jury found Flucas guilty of Count 4, but could not reach verdicts as to Counts 1-3. EOR 0709. A mistrial was declared. EOR0103. The government later moved to dismiss Count 3. EOR0703.

On September 4, 2018, retrial began as to Counts 1 and 2. EOR0725. The government modified the instructions so the jury could convict by finding, in the alternative, that Flucas had a "significant, dominant, *or* motivating purpose for transporting others across a state line." EOR0592 (emphasis added).

On September 19, 2018, the jury deliberated. EOR0729. The next day, Flucas was found guilty. EOR0730. On February 12, 2019, Flucas was sentenced to life imprisonment without the possibility of parole as to Count 1; 120 months as to Count 2; and 240 months as to Count 4 - all imposed consecutively. EOR0644.

STATEMENT OF FACTS

A. The Government's Case.

The Flucas family moved from Oregon to California for new jobs, better schools, and more Income. During the 2014-2015 school year, Flucas was a teacher for the deaf and hard of hearing in Klamath Falls, Oregon. EOR0023. At the beginning of the 2015-2016 school year, Flucas accepted a similar position in Stockton, California. EOR0024. He did so because "there were better schools where he was going; plus, he had got a better paying job, higher paying job." EOR0024. Specifically, his hourly wage increased from $18 to $31. EOR0250. He also received a stipend of $875 per week, further

increasing the compensation package. EOR0250. His wife, Evelyn Sengasi, also received a job, again increasing the family's income. EOR0339-EOR0340.

The family was extensive, consisting of approximately 25 people, including Flucas; Evelyn and her eight children; Person 4 and her three children; Person 5 and her six children; Persons 2 and 3; and additional children from Flucas' other relationships. EOR0020. Flucas held himself out as the father of Persons 2-4. EOR0026-0027, 0030, 0036-0038, 0052, 0566. He also held power of attorney for Person 1, who was pregnant and living with the family after befriending Person 2 at highschool. EOR0388.

The School District in Oregon wanted to rehire Flucas for the 2015-2016 school year. EOR0255-0256. For Flucas though, as he told the Staffing Agency, the decision had to "make sense for him financially." EOR0251. There were also more opportunities for the African-American families in California. EOR0129.

The family moved to Stockton in August 2015. EOR0019. Person 5 drove a passenger car; Flucas drove his truck; and Evelyn drove a 15-person passenger van. EOR0184. Person 4 rode with Person 5; Persons 1 and 2 rode in Flucas' truck; and the other children rode in the van with Evelyn. EOR0149, 0316.

Almost a year and a half after the move to California, Person 2 drove her car into a telephone pole on February 7, 2017. EOR0116. At the hospital, she told investigating authorities that the crash was an attempt to kill herself after sex with Flucas. EOR0116, 0289. A sexual assault and rape treatment examination revealed no injuries caused by force, but five sperm cells were later located on her cervix. EOR0283, 0289. "Y-STR testing" revealed that the major profile was likely from a male of Flucas' lineage.

EOR0297.

California Child Protective Services ("CPS") visited the Flucas home the next day. EOR0117. Flucas took more than an hour to exit. EOR0118. Nearly a dozen pieces of packed luggage were located inside. EOR0119.

Early in the morning on November 2, 2017, Special Agents with the Federal Bureau of Investigations, working with state law enforcement, arrested Flucas at his residential vehicle in Modesto, California.[3] EOR0057. The officers wore FBI insignia, or dressed as civilians and local law enforcement. EOR0068-0069. Special Agent Greg Wenning could not recall if he announced FBI. EOR0068. Flucas and Evelyn exited after four or five announcements (approximately one to two minutes). EOR0058. Flucas told her to contact some people and made a hand gesture consistent with sign language. EOR0059.

Flucas called Evelyn from the Sacramento County Jail, asking about the cellular telephones in the R.V. EOR0067. Flucas asked: "You cleared it?" and "remember what I asked you this morning?" EOR0664. Evelyn responded: "I didn't get to do it." EOR0664.

DNA swabs were taken from Flucas and Persons 1-5. EOR0121. Flucas was the confirmed father of Persons 2-4. EOR0166. Flucas also fathered Person 4's three children; Person 5's six children; and Person 1's child. EOR0166.

B. The Defense's Case.

At most, Flucas made $42,000 in Georgia. EOR0369. The salary was too little to

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[3] This paragraph cites to the record of Flucas' first trial, which resulted in the conviction for attempted witness tampering (Count 4) challenged below.

provide for his family. EOR0369-0370. So, he moved to Oregon for a better paying job. EOR0369-0370.

Flucas decided to look for jobs outside Oregon after it became apparent that he would lose his $10,000 mileage income. EOR0383. He located a job in Stockton that did not require as much travel, but provided the same mileage income. EOR0384. His hourly wage would also increase by $13. EOR0386. The added rent was only $400, so the move made financial sense for the family. EOR0383-0385.

Flucas' wife, Evelyn, was also offered a teaching position in Stockton. EOR00339. The job provided an additional $36,000 for the family. EOR0365. Moreover, Stockton had more African-American persons, which was also important to the family. EOR0380.

According to Flucas, Person 3 moved to Oregon because her mother wanted her closer to Reno, Nevada, where she lived. EOR0371. Person 5, who shared the same mother, also wanted to move closer to Reno. EOR0371. Person 4 moved because she didn't want to live with her mother. EOR0371. Persons 1-5 all wanted to move to California. EOR0382, 0389.

Flucas admitted to sexual relationships with Persons 4 and 5, but not in California or for the entirety of their lives. EOR0399, 0401, 0406. He denied sex with Persons 2 and 3. EOR0372-0373, 0401. He admitted engaging in a sexual relationship with Person 1 in Oregon and California. EOR0387. He did not know why he had sex with Persons 1, 4, and 5. EOR0408. He was sorry for doing so. EOR0398.

Flucas thought state - not federal - law enforcement was outside his RV before he was arrested in November 2017. EOR0393, 0395. He was not aware of any federal

investigation. EOR0427. He asked Evelyn to clear the phones because he was concerned that text messages with her, Person 4, and Person 5 would prevent them from reuniting with their children. EOR0390, 0392.

REASONS FOR GRANTING CERTIORARI

I. CERTIORARI IS NECESSARY TO SETTLE CONFLICTS IN THE LAW IN LINE WITH PRECEDENT OF THIS COURT REQUIRING PROOF OF THE DOMINANT MOTIVE FOR CROSSING STATE LINES IS ILLICIT SEXUAL ACTIVITY BEFORE INTERSTATE TRAVEL IS CRIMINALIZED.

A. The Instructions Failed to Ensure That Flucas Was Convicted Based on Dominant Intent to Cross State Lines to Commit Sex Offenses.

Congress has not included "motivating purposes" in 18 U.S.C. §§ 2421 and 2423(a). Reading "motivating purposes" into the statute, when this Court has required proof of "dominant" intent, reduces the government's burden to prove "every fact necessary to constitute the crime with which [Flucas wa]s charged." *In re Winship*, 397 U.S. 358, 364 (1970). Nor can Congress define "crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." *Richardson v. United States*, 526 U.S. 813, 820 (1999).

As Judge Bybee recognized, when instructed on "motivating," "dominant," and "significant," the jury would only need to find one "of those needed be true to convict because the instruction was phrased in the disjunctive." Appendix A, at 66. Nor would any reasonable juror believe that the distinct adjectives "dominant, significant, and motivating" are equivalent when the lexicon does not even share the same meaning in the Tax Code. See *Id.* at 60-61 (discussing *United States v. Generes*, 405 U.S. 93, 94-95

(1972)). "The instruction thus improperly lowered the bar from the required intent—a *dominant or significant* purpose." Appendix A, at 66 (emphasis in original).

The Mortensens would have also been convicted, and those convictions affirmed, if motivating purposes were considered by the Supreme Court. The defendants (husband and wife) ran a brothel in Nebraska and took an out-of-state vacation trip with two of their prostitutes. 322 U.S. at 372. When the four travelers returned home, the women resumed their work, leading to charges under the *Mann* act. *Ibid.*

"The primary issue" before this Court was "whether there was any evidence from which the jury could rightly find" that the Mortensens violated the Mann Act by transporting the women back to Nebraska "'for the purpose of prostitution or debauchery . . . or with the intent and purpose to induce, entice and compel [them] . . . to give [themselves] up to debauchery, or to engage in any other immoral practice.'" *Id.* at 373-74 (quoting Mann Act). The Court held:

> To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

322 U.S. at 374.

Without the dominant purpose test, the Mortensens would have been convicted because they "made no plans to abandon such activities" upon return to their brothel in Nebraska. *Mortensen*, 322 U.S. at 372. At each of the intermediary state lines, the

Mortensens did not stop their employees from giving "themselves up to debauchery and to engage in immoral practices." *Id.* at 373. Nevertheless, by focusing on their dominant intent, the jury could have held a reasonable doubt that the Mortensens transported the women home to Nebraska for the purpose of prostitution, even though they presumably "anticipated that the two girls would resume their activities as prostitutes upon their return to" the brothel. *Id.* at 374-76.

Mortensen controls because we can "ascertain from the opinion itself the reach of the ruling." *Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008). The elements of the offenses require illicit conduct "before the conclusion of the interstate journey [that] must be the dominant motive of such interstate movement." *Mortensen*, 322 U.S. at 374. Inclusion of motivating purposes fatally flaws the instruction because "dominant" alone means "[e]xercising chief authority or rule: ruling, governing, [or] commanding; most influential" and "[o]ccupying a commanding position." Dominant, Oxford English Dictionary (2d ed. 1989). Certiorari is necessary because equating dominant intent with "any 'motivation' [is an] even lower bar than either qualifier that the Court considered." *Id.* at 60.

B. The Government's Burden of Proof Was Diminished Without Statutory Support in Violation of this Court's Precedent Requiring Proof That Interstate Transportation was for the Dominant Purpose of the Commission of Illegal Acts.

The divided panel below concluded that "the district court did not abuse its discretion in instructing the jury, consistent with [their] precedent, that the government was required to prove beyond a reasonable doubt that a dominant, significant, or

motivating purpose of the transportation of Flucas' victims was to engage in criminal sexual activity." Appendix A, at 5 (footnote omitted). Unaddressed went the cases requiring proof of dominant intent to commit illicit conduct.[4] These cases demonstrate that "Flucas could not be convicted if the sexual activity was 'any motivating purpose' for his travel from Oregon to California." Appendix A, at 65.

No Circuit consensus supports modification of the jury instructions to include "motivating purposes." Indeed, just counting the number of references to "dominant," "significant," "motivating," but not "incidental," proves that Ninth Circuit precedent aligns more generally with *Mortensen*.[5] And, not until *Lukashov* and *Lindsay* does the case law turn "motive" into "motivating." See *United States v. Lukashov*, 694 F.3d 1107, 1110 (9th Cir. 2012); and *United States v. Lindsay*, 931 F.3d 852, 864 (9th Cir. 2019)

The concurring opinion by Judge Schroeder found no "perceptible difference between 'dominant,' 'significant,' and 'motivating.'" Appendix A, at 40. But both the concurring and majority opinions failed to define "motivating." Appendix A, at 1-38. As Judge Bybee recognized in dissent, "motivating," as derived from the noun "motive,"

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[4] *See Twitchell v. United States*, 330 F.2d 759 (9th Cir. 1964), on remand from, sub nom., *Rogers v. United States*, 376 U.S. 188 (1964), vacating in part *Twitchell v. United States*, 313 F.3d 425 (9th Cir. 1963); see also *Womble v. United States*, 324 U.S. 830, 830 (1945) (per curiam).

[5] See *Langford v. United States*, 178 F.2d 48, 52(9th Cir. 1949) [3 references to dominant, 0 references to motivating); *Bush v. United States*, 267 F.2d 483, 485 (9th Cir. 1959) (0 references to motivating); *Twitchell*, 330 F.2d at 761 (4 references to dominant; 0 references to motivating); *United States v. Fox*, 425 F.2d 996, 999 (9th Cir. 1970) (3 references to dominant; 0 references to motivating); *United States v. Kinslow*, 860 F.2d 963, 970 (9th Cir. 1988) (3 references to dominant; 0 references to motivating):

means in the present progressive tense to "provide or serve as a rationale for (some action, etc.); to justify." Appendix A, at 59 (quoting Oxford English Dictionary (2d ed. 1989)). The differences in words mattered because the "reduced standard could have made a difference here, one that we cannot conclude was harmless beyond a reasonable doubt." Appendix A, at 65 (citing *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Transforming the noun "motive" into the adjective "motivating" further undermines the statutory and constitutional limitations imposed by the dominant purposes test. See *Langford*, 178 F.2d at 51 ("The rule is conceded that the dominant motive for the interstate transportation of the victim must be the purpose proscribed by the statute[.]"). Indeed, "motive" is synonymous with intent or purpose, not its own adjective on par with "dominant" and "significant." *Id.* at 52 ("It is elementary that the intent, motive or purpose necessary for the establishment of a crime may rest in inference."). The decisions in *Lukashov* and *Lindsay* thereby run contrary to this Court's requirement that less than proof of the *specific dominant intent(s)* to commit "immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act." *Mortensen*, 322 U.S. at 374.

Lukashov did not authorize the jury instruction at the second trial of Flucas. Appendix A, at 55. The majority of the Ninth Circuit "did not recognize the gloss the district court had added to our prior cases by including the phrase 'motivating purpose.'" *Ibid*, citing *Lukashov*, at 1119. Thus, *Lukashov* erroneously suggested that one could be convicted if "interstate travel for illicit purposes was any motivating purpose, no

matter how insignificant." Appendix A, at 60 (footnote omitted).

Lindsay conducted plain error review of instructions pertaining to a statute not applicable to Flucas. See 18 U.S.C. § 2423(b) (2018); see Abolish Human Trafficking Act of 2017, Pub. L. 115-392, 132 Stat. 5250, § 14 (Dec. 21, 2018)). "Motivating" was referenced twice more than dominant (4 times) because the applicable statute prohibited "traveling in foreign commerce 'with a *motivating purpose* of engaging in any illicit sexual conduct with another person.'" *Lindsay*, 931 F.3d at 864 n.7 (emphasis added). Here though, this Court requires proof of *dominant intent* to violate 18 U.S.C. §§ 2421 and 2423(a). See Appendix A, at 65 ("By not amending §§2421(a) and 2423(a) at the same time, Congress left the higher burden of proof in place.").

In the context of dual purpose travel, "motivating" reasons cannot be squared with the "dominant purposes standard" for evaluating intent that "predominate[s] over other, less powerful motivations for conduct." *United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998). Allowing any number of "motivations" that lead a person to cross state lines to substitute for dominant intent unfairly reduces the standard to volitional movements lacking intent "to engage in sexual activity with underage persons that is criminal." *United States v. Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000). Certiorari is necessary to make clear that "[w]hile the intent to engage in criminal sexual activity need not be the sole purpose of the transportation, it 'must be the dominant motive' of the travel." *Sealed Appellee v. Sealed Appellant*, 825 F.3d 247, 251 (5th Cir. 2016) (citation omitted).

II. THE INSTRUCTIONAL ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE JURY WAS CORRECTLY INSTRUCTED DURING THE FIRST TRIAL, BUT COULD NOT REACH A VERDICT UNTIL IT WAS INCORRECTLY INSTRUCTED IN A MANNER THAT REDUCED THE GOVERNMENT'S BURDEN OF PROOF AT THE SECOND TRIAL.

The government cannot demonstrate that the instructional error was harmless beyond a reasonable doubt given the violations of Flucas' rights. *See generally*, *Chapman v. California*, 386 U.S. 18, 24 (1967). An element of the charges was misconstrued, and "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – [so the court] should not find the error harmless." *Neder v. United States*, 527 U.S. 1, 19 (1999). Indeed, the evidence of Flucas' intent was so highly contested that the first jury could not return a verdict. EOR0556, 0558. Prejudice resulted from the alterations to the instruction at the second trial. *See, e.g., Mayfield v. Woodford*, 270 F.3d 915, 938 (9th Cir. 2001).

The error went to the heart of Flucas' defense, which was premised on the right to cross state lines "for financial reasons, not to transport his daughters and the other minors for criminal sexual activity." Appendix A, at 11. Yet, the majority denied that the "district court abused its discretion in instructing the jury." *Id.* at 5. *De novo* review was required given the government's inability to prove beyond reasonable doubt that the instruction was harmless. *United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010); and *United States v. Kaplan*, 836 F.3d 1199, 1214 (9th Cir. 2016).

Notably, the concurring opinion claimed that the government dismissed to "change[] its presentation to concentrate on the defendant's activities during one time

period rather than two." Appendix A, at 40. Not so. The government dismissed Count 3 and changed the instructions to gain unlawful convictions as to Counts 1 and 2 at the second trial. But, due process prohibits the government "from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in Winship on the critical question of intent in a criminal prosecution." *Francis v. Franklin*, 471 U.S. 307, 326 (1985).

Nor did the majority and concurring panel opinions consider the entirety of the first trial before rejecting the argument that the modified instruction at the second trial was prejudicial "because the first jury did not convict and the second jury did." Appendix A, at 40. Omitted, as the district court recognized, was that the alterations went to *"a critical instruction at the heart of the matter."* EOR0346 (emphasis added). The majority and concurring opinions should have addressed harmless error because "the evidence that illicit sexual conduct with his daughters and other young women was a dominant or significant reason Flucas moved his family from Oregon to California was flimsy." Appendix A, at 67.

Deviation from the pattern instruction was significant "in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991). Indeed, the parties' arguments centered on the defective language. See EOR0438, 0443. All of which, diminished the burden of proof by substituting "motivating" purposes for proof of dominant intent. See *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977). Certiorari is necessary because, as Judge Bybee points out, the instruction was not only erroneous, but also inserted the federal

government into matters in the "traditional area of state control." Appendix A, at 68 (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

III. CERTIORARI IS NECESSARY BEFORE DISMISSAL OF THIS COURT'S PRECEDENT REQUIRING PROOF OF DOMINANT INTENT AS MERE "DICTA."

There was nothing unnecessary about this Court's finding in *Mortensen* that "Congress has outlawed by the Mann Act, . . . the use of interstate commerce as a calculated means for effectuating sexual immorality." *Mortensen*, 322 U.S. at 375 (emphasis added). The Court necessarily held the government to prove beyond a reasonable doubt by requiring evidence of "[a]n intention that the women or girls shall engage in the conduct outlawed by § 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement." *Id.* at 374. Nevertheless, the majority and concurring opinions below relegated *Mortensen* to an anachronism of history - mere dicta - despite prior and subsequent supporting case law. See Appendix A, at 25; but see *Hansen v. Haff* 291 U.S. 559, 563(1934); *Hawkins v. United States*, 358 U.S. 74, 79 (1958); and *Cleveland v. United States*, 329 U.S. 14, 20 (1946).

"Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) (cleaned up). The Courts of Appeals must follow both the Court's precedent ("vertical stare decisis".) See *Ramos*, 140 S. Ct. at 1416 n. 5 (Kavanaugh, J., concurring in part). To do so, *stare decisis* requires adherence "not only to the holdings of" this Court's "prior cases, but also to their explications of the

governing rules of law." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). *Mortensen* cannot be relegated to dicta unless we are to similarly apply circuit opinions that "confront[] an issue germane to the eventual resolution of the case, and resolve[] it after reasoned consideration in a published opinion, [so] that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir 2001) (minority opinion of Kozinski, J.); see also *United States v Tydingco*, 909 F3d 297, 303 (9th Cir 2018).

Mortensen makes plain that the Mann Act required proof that a defendant's intent for a transported women to engage in prohibited conduct "must be the dominant motive of such interstate movement." 322 U.S. at 374. *Mortensen*'s "dominant motive" ruling was an explication of the governing rule of law as binding as the "rationale upon which the Court based the result[]" (id. at 66-67), the "reasoning" of the opinion (*Langere v. Verizon Wireless*, 983 F.3d 1115, 1121 (2020)), and the "mode of analysis." *MK Hillside Partners*, 826 F.3d at 1206. The relevant passage therefore satisfies even the narrowest definition of precedent, which covers all "those portions of the opinion necessary to [the] result[.]" *Seminole Tribe*, 517 U.S. at 67.

That the "dominant motive" ruling is precedent—not dicta—is confirmed by *Mortensen*'s dissenting opinion, which reasoned that taking the employees on an innocent vacation trip wasn't incompatible with the undisputed fact that, in bringing the woman back to Nebraska, the Mortensens "intended that they should resume there the practice of commercial vice, which in fact they did promptly resume in [their] establishment." *Mortensen*, 322 U.S. at 378 (Black, J., dissenting). However, the

majority of this Court rejected that view because even if the broad statutory "language is conditioned upon the use of interstate transportation for the purpose of, or as a means of effecting or facilitating, the commission of the illegal acts." *Id.* at 377. Given the need to protect interstate travel, "[t]he fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island." *Id.* at 375.

Likewise, the binding nature of the dominant purpose test is seen in the other cases decided by this Court applying that test. (See *Cleveland,* 329 U.S. at 19-20; and *Hawkins*, 358 U.S. at 79 & n.6. "What Congress has outlawed by the Mann Act," it held, "is the use of interstate commerce as a calculated means for effectuating sexual immorality." *Mortensen,* 322 U.S. at 375. In so "construing this Act," this Court "held" that such activity "'must be the dominant motive'" of the travel. *Hawkins,* 358 U.S. at 79 n.6; see also *United States v. Oriolo,* 146 F.2d 152, 153 (3d Cir. 1944), reversed, 324 U.S. 824 (1945); and *Becker v. United States,* 217 F.2d 555, 555-57 (8th Cir. 1954), reversed, 348 U.S. 957 (1955).

Ultimately, as Judge Bybee recognized, "the interstate transportation element is the only thing that narrows the Mann Act; otherwise, federal law would be at least coextensive with state law." Appendix A, at 68. Here though, in violation of *Mortensen*, the jury was not "instructed that [Flucas] continued illicit sexual conduct was one of the dominant or significant purposes for moving his family from Oregon to California." *Id.* at 68. Certiorari is necessary to ensure that proof of dominant intent limits federal prosecutions, while preserving the right to cross state lines, and maintaining the

"traditional state authority [in] the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014).

CONCLUSION

For the foregoing reasons, Flucas respectfully submits that his convictions and sentence must be vacated and the matter remanded accordingly.

Dated: August 10, 2022

Respectfully submitted,

By: 
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CERTIFICATE OF COMPLIANCE
PURSUANT TO USSC RULE 33(h)

I certify that the foregoing petitioner's petition for writ of certiorari is proportionally spaced, has a typeface of 12 point, is in Century725BT font, is double-spaced, and has 5,807 words in less than 40 pages.

Dated: August 10, 2022

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