No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

MACK DOAK, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted under 18 U.S.C. § 2241(c), which criminalizes "cross[ing] a state line with intent to engage in a sexual act with a person who has not attained the age of 12 years," and 18 U.S.C. § 2423(a), which criminalizes "knowingly transport[ing] 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." The two questions presented are:

(1) What connection must exist between the defendant's travel and the unlawful sexual act or sexual activity to support the exercise of federal jurisdiction under these statutes?

(2) What do the Constitution and Rule 7 of the Federal Rules of Criminal Procedure require the government to charge in an indictment when the statute defining the offense contains a generic phrase such as "any sexual activity for which any person can be charged with a criminal offense" that potentially encompasses a multitude of crimes?

INTERESTED PARTIES

All parties do not appear in the caption of the case on the cover page. Mack Doak's wife and co-defendant, Jaycee Doak, is an additional party to the proceeding.

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PETITION FOR WRIT OF CERTIORARI

Mack Doak respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears in the appendix and is reported at 47 F.3d 1340. The order of the United States District Court for the Southern District of Alabama denying Mr. Doak's motion to dismiss the indictment appears in the appendix and is unpublished.

STATEMENT OF JURISDICTION

The district court had original jurisdiction under 18 U.S.C. § 3231, which gives district courts original jurisdiction over all offenses against the laws of the United States. The Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291, which gives federal courts of appeal jurisdiction over all final decisions of district courts. That court issued its opinion on September 7, 2022. This petition is being filed within 90 days of that date, so it is timely under Rules 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 U.S.C. § 2241(c) (Aggravated sexual abuse with children) provides:

Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial

jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

18 U.S.C. § 2423 (Transportation of minors) provides in pertinent part:

(a) Transportation with intent to engage in criminal sexual activity. 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.

(b) Travel with intent to engage in illicit sexual conduct. A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, with a motivating purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) Engaging in illicit sexual conduct in foreign places. Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(e) Attempt and conspiracy. Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

The Fifth Amendment to the U.S. Constitution provides:

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.

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 7(c) of the Federal Rules of Criminal Procedure (Nature and Contents of the Indictment and the Information) provides:

(1) In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in

section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in that section 3282.

(2) Citation Error. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

STATEMENT OF THE CASE

In March 2019, Mack and Jaycee Doak were charged by superseding indictment in six counts alleging violations of 18 U.S.C. § 2423(a) and (e). Doc. 52.[1] Subsection (a) prohibits the knowing transport of "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." § 2423(a). Section 2423(e) prohibits conspiring or attempting to violate subsection (a). § 2423(e). Mack was singularly charged in three additional counts alleging violations of 18 U.S.C. § 2241(c), which prohibits crossing a state line "with intent to engage in a sexual act with a person who has not attained the age of 12

[1] Record references are to the district court's electronic docket sheet in the CM/ECF electronic filing system.

years." Doc. 52. The alleged victims were three of the couple's six adopted children, who were identified in the superseding indictment as Victims 1, 2, and 3. *Id.*

The superseding indictment contains tables that identify for each count of the indictment (1) the victims who were transported or traveled (Victims 1, 2, and/or 3); (2) the month that transportation or travel occurred; and (3) the location where the transportation or travel started and ended (*e.g.*, "from Butler, Alabama, to Florida."). Doc. 52. The § 2423(a) counts of the superseding indictment do not identify the "sexual activity for which any person can be charged with a criminal offense" that occurred or was intended to occur on the Doak family's trips.

Approximately two weeks before trial, the district court informed the parties of how it would instruct the jury to assess Mack's intent under § 2423(a). The court intended to instruct the jury on the Alabama offenses of rape, sodomy, and sexual abuse because it had done so in a similar case. Doc. 294 at 72-75. A week later, the government filed a pleading in which it asked the court to instead instruct the jury just on the Alabama crimes of rape and sexual abuse. Doc. 138 at 1-2. Mack objected to these instructions and also filed a motion to dismiss the indictment, arguing that the state offenses had to be submitted to the grand jury and charged in the indictment and could not be supplied by the district court. Doc. 139, 140. Two days later, which was five days before the start of trial, the government filed a response to the motion to dismiss in which it notified Mr. Doak that it intended to rely on two federal

offenses, 18 U.S.C. § 2423(b) and (c), as the "sexual activity for which any person can be charged with a criminal offense" element. Doc. 142. The district court denied the motion to dismiss but chastised the government for both "omitting the underlying criminal offenses" from the superseding indictment and "propos[ing] different underlying criminal offenses–first citing state law and now federal law–lend[ing] credence to Mack Doak's argument." Doc. 147. The court exercised its discretion to construe the motion to dismiss also as a motion for a bill of particulars and construed government's late notice of the underlying crimes as a bill of particulars. *Id.* at 5.

Mr. Doak objected to the court's ruling, arguing again that the predicate offenses had to be charged in the indictment. Doc. 150. He argued that "the consideration first, of varying Alabama laws, then, of different federal laws, to satisfy a necessary element of § 2423(a), illustrates that notice of the specific charge alleged in Counts One through Six was not apparent from the superseding indictment, in violation of the Sixth Amendment" and that the newly-identified federal predicate offenses were not "put before the grand jury" in violation of the Fifth Amendment. *Id.*

The Doaks were convicted on all counts after a contested and emotional joint jury trial. The evidence established that the Doaks lived together with their eight children (two biological children and six adopted children) and various extended family members in homes in Texas, Alabama and Florida. They operated businesses, primarily restaurants and donut shops, with those extended family members in each

place they lived. During the relevant time period, the Doaks also traveled with their entire family to visit relatives in Rhode Island and traveled with one of the alleged victims to visit relatives in Cambodia. The government argued that Mack, aided and abetted by Jaycee, sexually abused one or more of the girls in each location that they lived or traveled. The Doaks denied all of the abuse allegations and argued that the allegations had been manufactured by Jaycee's brother, who was in a sexual relationship with the oldest victim, and Jaycee's sister, who had a history of stealing from the Doaks, expressed a financial interest in the children, and accused Mack of abusing her.

The Doaks disputed the government's position that they moved from state to state to facilitate the sexual abuse. They argued and presented evidence that they traveled for financial reasons (to open and run their small businesses) and for social reasons (to vacation and visit family). Mack twice moved for judgment of acquittal on grounds that he did not have "the specific intent to move these kids across state lines to engage in criminal sexual activity," but his motions were denied. Doc. 175; Doc. 206 at 127-29; Doc. 208 at 80-91. On the § 2241(c) counts, the jury was instructed that "[i]t doesn't matter whether the defendant's sole or primary purpose in crossing the state line was to engage in a sexual act with a person under the age of 12. The Government must show that the intent was at least one of the motives or purposes with the defendant's travel. In other words, the defendant [sic] must show that

defendant's criminal purpose was not merely incidental to the travel." Doc. 297 at 13. No such instruction was given with respect to the § 2423(a) counts.

The district court sentenced Mack to serve forty years in prison, 10 years on counts one-six and 30 years consecutive on the remaining counts. The court also imposed significant monetary penalties. Doc. 251.

Mack appealed his convictions. On appeal, he challenged the district court's denial of his motion to dismiss the indictment, arguing that the § 2423(a) counts of the superseding indictment were constitutionally deficient because they failed to identify, either by statutory citation or sufficient factual allegations, "any sexual activity for which any person can be charged with a criminal offense" and failed to charge an offense. 47 F.4th at 1351. He also challenged the sufficiency of the evidence, arguing that the government did not prove that his interstate and foreign travel was motivated by an intent to engage in unlawful sexual activity. He argued the government did not prove a link or relationship between the travel and the abuse. *Id.* at 1354-55.

After oral argument, the court of appeals rejected Mr. Doak's challenge to the indictment, concluding that the predicate criminal offenses were not elements of the offense and that the superseding indictment as a whole "divulged the key detail about the criminal sexual activity at issue–that Mack intended to sexually abuse the girls himself." 47 F.4th at 1353. The court noted, however, that it is "best practice to include the statutes criminalizing the sexual activity that the defendant planned to

inflict on the transported child" and that "best practice was not followed here." *Id.* On the sufficiency of the evidence issue, the court of appeals applied the following legal standard:

> To establish intent, the government had to prove that Mack's motive or purpose for traveling (the § 2241(c) offenses) and for bringing the girls along on the different trips (the § 2423(a) offenses) was to sexually abuse them. That "illicit behavior must be one of the purposes motivating the interstate transportation"; it "need not be the dominant purpose," but it "may not be merely incidental to the trip." United States v. Perkins, 948 F.3d 936, 939 (8th Cir. 2020). Further, an alternative "plausible innocent explanation" is not enough to prove that the conduct was not motivated by illicit sexual activity."

Id. at 1354 (some internal citations omitted). Under that standard, the court concluded:

> Although the Doaks have offered other reasons for their travels–say, to open a new business in Florida or to visit family in Rhode Island–the jury could have readily concluded that Mack intended to bring the girls along so that he could sexually abuse them. Unsurprisingly, defendants charged with traveling to have sex with children in violation of § 2241(c) are often able to produce innocent purposes for their trips; Mack cannot elude liability by claiming that he had other reasons for traveling. The question is whether Mack's actions were motivated, at least in part, by his desire to sexually abuse the girls.

Id. at 1355 (internal citation omitted).

Mr. Doak now seeks this Court's review of these lower court rulings.

REASONS FOR GRANTING THE WRIT

This case presents important questions of law relating to the scope and application of two federal statutes that target the sexual exploitation of children, 18 U.S.C. §

2241(c) and 18 U.S.C. § 2423(a). Section 2241(c) criminalizes "cross[ing] a state line with intent to engage in a sexual act with a person who has not attained the age of 12 years[.]" Section 2423(a) criminalizes "knowingly transport[ing] 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[.]" The basis for federal jurisdiction under the statutes is the act of crossing a state line or national boundary with bad intent. The the first question presented asks what connection must exist between the defendant's travel and the unlawful sexual act or activity to support the exercise of federal jurisdiction. The Court last addressed this question in *Mortensen v. United States*, 322 U.S. 369 (1944). The second question presented asks what the Constitution and criminal rule require the government to charge in an indictment when the statute defining the offense contains a generic phrase such as "any sexual activity for which any person can be charged with a criminal offense" that potentially encompasses a multitude of crimes.

I. The Court should grant review to decide what connection must exist between a defendant's interstate or foreign travel and his unlawful sexual act or activity in order to justify the exercise of federal jurisdiction under statutes such as § 2241(c) and § 2423(a).

This case involves allegations of non-commercial, intra-familial child sexual abuse.

It also involves a family that, like any ordinary family, sometimes traveled to visit relatives, to vacation, and to seek better economic opportunities. It was not shown that sexual abuse was the sole or dominant purpose of the family's travels, and there was scant evidence of when the sexual abuse occurred relative to the travel. In contrast to cases typically prosecuted under statutes like § 2423(a) and § 2241(c), there were no admissions of bad intent by the defendants in the form of text messages, emails, or internet chats. As a result, this case is the perfect vehicle for explicating the relationship that must exist between a defendant's non-commercial sexual activity and his interstate or foreign travel and, more broadly, for assessing, in the modern era, Congress's power to regulate non-commercial sexual activity under the Commerce Clause.

The Court last visited this issue in *Mortensen*, which involved a prosecution under the original Mann Act, 18 U.S.C. § 2421.[2] 322 U.S. at 370. In that case, a husband and wife operated a house of prostitution. They traveled across state lines, from Nebraska

[2] The statutes that Mr. Doak was convicted under, § 2423(a) and § 2241(c), are close relatives of the Mann Act, both in terms of their purpose (to prohibit the crossing of state lines for immoral purposes) and their language, and of each other. *See United States v. McGuire*, 627 F.3d 622, 624 (7th Cir. 2010)("noting that 2423(a) "mirrors the Mann Act but imposes more severe penalties"); *Sealed Appellee v. Sealed Appellant*, 825 F.3d 247, 252 (5th Cir. 2016)("[T]he defendant must have the same intent to engage in sexual activity with a minor under both § 2241(c) and § 2423(a) when undertaking some action, either crossing a state line when violating § 2241(c) or transporting the minor in interstate commerce when violating § 2423(a).").

to Utah and back, with two of the women who worked for them as prostitutes. The purpose of the trip was to vacation and visit the wife's family. No prostitution or other immoral acts occurred during the trip. *Id.* at 372. The theory of prosecution was that the husband and wife transported the women from Utah back to Nebraska "for the purpose of prostitution and debauchery" because they intended for the two women to resume their jobs as prostitutes when the trip ended. *Id.* at 373. This Court rejected that theory as a basis for federal jurisdiction, stating:

> The penalties of § 2 of the [Mann] Act are directed at those who knowingly transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. 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. *Hansen v. Haff*, 291 U.S. 559, 563. An 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. 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.

Mortensen, 322 U.S. at 373-74 (emphasis added). The Court further explained: "'People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel

for that purpose, is to emphasize that which is incidental and ignore what is of primary significance.'" *Mortensen*, 322 U.S. at 376 (citations omitted).

Mortensen's "dominant purpose" standard has generated confusion and legal contortions in the courts of appeals, particularly in cases involving defendants who traveled with dual purposes. *See McGuire*, 627 F.3d at 624-25 ("The courts have had trouble dealing with cases in which the travel prosecuted under section 2423(b) may have had dual purposes, only one of which was to have sex with minors."). Some courts "fasten on 'dominant,' but then define it down to mean 'significant,' 'efficient and compelling,' 'predominat[ing],' 'motivating,' not 'incidental,' or not 'an incident' to the defendant's purpose in traveling." *Id.* at 625 (collecting cases). Some courts, such as the court below, reject the word "dominant" altogether, as if it did not appear in *Mortensen* at all. *See Doak*, 47 F.4th at 1355; *United States v. Perkins*, 948 F.3d 936, 939 (8th Cir. 2020)("While the sexual activity must be more than merely incidental to the trip across state lines, it need not be the sole or even dominant purpose. A defendant has the requisite intent under § 2241(c) if engaging in sexual activity with the minor was one of the purposes motivating the defendant to cross state lines, even if the sexual activity is not the sole or dominant purpose for the trip, so long as it is more than incidental.").

Courts tend to justify these legal contortions by noting how easily defendants can produce an innocent explanation for their travel, which is just another way of saying

that it would be difficult for the government to prove that sexual abuse was "the dominant motive" for the defendant's travel. *See Doak*, 47 F.4th at 1355 ("Unsurprisingly, defendants charged with traveling to have sex with children in violation of § 2241(c) are often able to produce innocent purposes for their trips; Mack cannot elude liability by claiming that he had other reasons for traveling."). The fact that these cases involve allegations of *child* sexual abuse blots out all rational thought, even among experienced jurists. But moral outrage is no basis for federal jurisdiction, and states are more than capable of prosecuting these cases. Domestic abuse, in particular, is the quintessential state crime.

After nearly 80 years of silence, it is time to revisit the Mann Act and its statutory cousins and either embrace or reject the "dominant motive" standard. The interstate travel element of the various traveler statutes is the only thing that prevents federal law from becoming co-extensive with state laws applicable to child sexual abuse. Certiorari is necessary to clarify the scope of federal jurisdiction in this space, to preserve the right to travel freely across state lines, and to maintain the "traditional state authority [in] the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014).

II. The Court should grant review to decide what the Constitution and criminal rule require the government to charge in an indictment when the statute defining the offense contains a generic phrase such as "any sexual activity for which any person can be charged with a criminal offense" that potentially encompasses a multitude of crimes.

A § 2423(a) offense is predicated on the commission or intended commission of a separate criminal offense that is either prostitution or "any sexual activity for which any person can be charged with a criminal offense." The term "sexual activity" is not defined in the statute, and the phrase "any sexual activity for which any person can be charged with a criminal offense" encompasses a multitude of crimes. Yet the court of appeals concluded that the Constitution and Rule 7 of the Federal Rules of Criminal Procedure do not require the government to identify any "sexual activity" or "criminal offense" in the indictment. For several reasons, this case provides an excellent vehicle for the Court to assess what the Constitution and criminal rule require an indictment to allege when the charged offense is predicated on the commission or intended commission of another offense that is described in the statute by vague, generic terms such as "sexual activity" and "criminal offense."

The criminal rule governing indictments requires that indictments contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). The leading decision on challenging indictments makes clear that indictments must include enough detail to factually state a criminal act. Indictments must "fairly inform[] a defendant of the charge against which he must defend" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *Hamling v. United States*, 418 U.S. 87,

117-18 (1974). Rule 7(c)'s requirement reflects three different constitutional protections: (1) it helps protect the Sixth Amendment right to be informed of the nature and cause of the accusation; (2) it is a mechanism for preventing someone from being subject to double jeopardy under the Fifth Amendment; and (3) it reflects the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury. *United States v. McGarity*, 669 F.3d 1218, 1235 (11th Cir. 2012).

While "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling*, 418 U.S. at 117 (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)). In contrast, "where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, –it must descend to the particulars.'" *Russell v. United States*, 369 U.S. 749, 765 (1962)(quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)). Because unlawful sexual activity is "the very core of criminality" and "central to every prosecution under" §§ 2241 and 2423–transporting or inducing a person to do nothing is not a crime–it must be stated with particularity. *Russell*, 369 U.S. at 759.

The statutory term "any sexual activity for which any person can be charged with a criminal offense" is like the common statutory term "contrary to law." When a statute uses that or a similar term, "it is not enough simply to cite that statute and recite in the pleading that the act was contrary to law–the pleading must show what other law was violated, either by citation to the other statute or by sufficient factual allegations." Charles Alan Wright, et. al., 1 Fed. Prac. & Proc. Crim. § 124 (4th ed. 2014); *Keck v. United States*, 172 U.S. 434, 437 (1899)(indictment charging defendant with importing diamonds "contrary to law" was deficient); *Babb v. United States*, 252 F.2d 702, 703-04 (5th Cir. 1958)("We hold that the indictment should have alleged some fact or facts showing that the cattle in question were imported or brought in contrary to some law; and that it is not enough to say that they were imported or brought in 'contrary to law.'"); *United States v. Teh*, 535 F.3d 511, 516 (6th Cir. 2008)("[T]he words 'contrary to law' . . . do not fully set forth the 'contrary to law' element."); *United States v. Miller*, 774 F.2d 883, 883-86 (8th Cir. 1985)(indictment charging defendant with running an "*illegal* gambling business" was insufficient because it failed to cite the state statute alleged to have been violated); *see also United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000)("[W]here an indictment charges a crime that depends in turn on violation of another statute, the indictment must identify the underlying offense.").

This case is a good vehicle for reviewing this issue because the constitutional concerns in Mr. Doak's case are real and concrete. Although the superseding

indictment describes the Doak family's travel, it does not suggest that the grand jury was presented with evidence of specific sexual acts that violated specific criminal laws. The case involved interstate and international travel across multiple jurisdictions, each with its own sexual abuse laws that contain material differences that are not merely academic. For example, in this case, the government's sole proof of Mr. Doak's criminal intent in count three of the indictment was that he briefly groped Victim 1, then 17 years old, through her clothes. Fondling of a person who is at least 16 years old does not satisfy the definition of "illicit sexual conduct" under § 2423(b). 18 U.S.C. § 2423(f)(defining "illicit sexual conduct," in pertinent part, as "a sexual act (as defined in section 2246) with a person under 18 years of age. . ."); 18 U.S.C. § 2246(2)(D)(defining "sexual act" to include "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years . . .").

Also, the case proves that when the government is allowed to proceed on the basis of a scant indictment, the government is afforded "factual flexibility that it can use to unfairly and unconstitutionally trap the defendant in different ways throughout the trial proceedings." James M. Burnham, *Why Don't Courts Dismiss Indictments? A Simple Suggestion for Making Federal Criminal Law a Little Less Lawless*, 18 Green Bag 2d 347, 361 (Summer 2015). Short, scant indictments "enable prosecutors to continually revise their factual theory to respond to defense arguments, new developments,

perceived juror reactions, unexpected testimony, etc." *Id.* "That forces criminal defendants to rebut ever-shifting accusations, making criminal cases much more difficult to defend than their civil counterparts, where plaintiffs must commit to a relatively specific set of factual allegations at the outset and then attempt to prove it." *Id.* That is exactly what happened in this case. When defense counsel challenged the government's reliance on various Alabama laws as predicates for the § 2423(a) offenses, the government switched tactics and identified two federal statutes, § 2423(b) and (c), as predicates for the § 2423(a) offense. Predicating the federal transport offense in § 2423(b) on two other subsections of the same traveler statute, §§ 2423(b) and (c), was a novel and questionable legal theory that arguably was not an offense at all and that would have presented a large target for a motion to dismiss had the federal statutes been charged in the indictment, instead of announced in a pleading filed a mere five days before trial.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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