No._____

IN THE SUPREME COURT OF THE UNITED STATES

RICK BENAVIDES, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

PHILIP J. LYNCH
Law Offices of Phil Lynch
17503 La Cantera Parkway
Suite 104-623
(210) 378-3114
LawOfficesofPhilLynch@satx.rr.com

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Petitioner was subjected to a pervasive inducement campaign by government agents using social media and texts to his personal phone. The question presented is whether predisposition to defeat an entrapment defense may be proved by the government using statements found on Petitioner's phone that were created well after the government's campaign was in force.

.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rule

No._____

IN THE SUPREME COURT OF THE UNITED STATES

RICK BENAVIDES, PETITIONER

V.

UNITED STATES OF AMERICA

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

Rick Benavides asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 21, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all parties to the proceedings in the courts below.

OPINION BELOW

The opinion of the court of appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on October 21, 2022. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2422(b) of Title 18 of the U.S. Code provides that "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."

STATEMENT

Petitioner Rick Benavides became ensnared in an undercover operation run by the Air Force Office of Special Investigations (AFOSI) out of Joint Base Lackland in San Antonio, Texas. During the operation, an agent over and over again chatted and texted with Benavides, reaching out repeatedly to reestablish contact and begin

conversations when Benavides had ceased conversing. Over the course of nine days, the agent pushed, mocked, and cajoled Benavides into making statements that could lead to a prosecution for attempted enticement of a "minor."[1] Benavides was then charged with attempted enticement of a "minor."

At trial, Benavides defended by arguing he had been entrapped by overzealous investigators. The evidence showed persistent and strong pressure from the investigators to push Benavides to meet up with a "minor." What the evidence failed to show, Benavides argued, was that he was in any way predisposed to commit the crime of enticing a minor before the government began its operation. The government introduced no evidence that Benavides had engaged in such conduct before it began its campaign. Even after the government's campaign began, Benavides was reluctant to go in the direction the operation was pulling him, and yielded only after eight days and repeated approaches and inducements to him by the agent.

The operation began on February 11, 2019, when AFOSI investigators sent a message on the social media app Whisper. The agents had no information about Benavides, as lead investigator Major David Drake admitted. Drake explained that his role in the operation was to make sure the elements necessary to make a case were achieved during the operation. App. B.

Agent Jason Hutchings's role was to play a female teenager on the social media app Whisper. Whisper, Major Drake explained, is an anonymous service, and one

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

cannot tell, apart from location, whether things appearing on Whisper are true or accurate. Indeed, the statements the investigators would make to Benavides over the next nine days on Whisper and by text were all untrue.

Agent Hutchings initial "whisper" was a message inviting people to "HMU," an abbreviation that means hit me up. A user with the name of Man of Solitude responded to the whisper. The two chatted for a while, with Man of Solitude eventually introducing himself as Rick. The chat involved talk about the reasons the Hutchings persona was "visiting" San Antonio–her brother's graduation from Air Force training–her family, the weather, and things a visitor might do or see while in San Antonio. Benavides mentioned that he worked on the base as contractor. The agent eventually suggested that the two switch the conversation from Whisper to texting.

Benavides texted the number Agent Hutchings provided. Twice, over the next week, Benavides stopped texting, once for over 28 hours and once for 48 hours. App. B. Each time, Hutchings restarted the text conversation, App. B, even though he admitted that, as late as the night before Benavides was arrested, after days of constant inducement, no explicit suggestion had been made by Benavides. Hutchings acknowledged he did not want his role-playing to end with him empty-handed. App. B.

After the cessations, and the agent's repeated restartings of the conversation, the agent used the persona to push for a meet-up. He sent a text that the teenager

did "not date boys my age" and had "b4" dated boys a few years older. The agent also asked, "What time do u get off." When Benavides, who in the Whisper chat the first day had said he was 45, asked whether the persona dated "like 19-25," the agent replied "What are ur plans tonight?" After that, the conversation turned toward the possibility that the two could meet, though Benavides admitted "[i]t kind of scares me hanging out with someone so young but plenty to show you."

Benavides responded with options appropriate for a visiting teenager: He suggested that they could go downtown during the day to see the Alamo or go to the zoo or "anything you want to do here[.]" Agent Hutchings replied "Already seen the Alamo. Don't want to be a tourist." Benavides asked for time to "brainstorm." Hutchings called that "Lame but okay," before asking Benavides where he lived and how far away his house was. Hutchings said that he was "down for whatever," and Benavides, after receiving a kissy-face emoji from Hutchings, said "Tomorrow then" and told Hutchings to "message me when you're ready."

The two again discussed what they might do, with Agent Hutchings rejecting bowling and Benavides eventually mentioning drinks and "You know adult stuff," before saying "But we can't. So I didn't mention anything." The agent told Benavides not to be "like the boys at my school" by "playing games. Benavides asked, "what do you want." He expressed fear because of their age difference and mentioned laws against them being together. He asked whether Hutchings would send a naked photograph; the agent declined. Benavides said it would be his "greatest fantasy to be with such a young woman. That's the truth. I would never have thought us just

chatting would even lead to this." The agent asked, "Have you ever been with my age?" Benavides answered, "Never all above 18." App. B.

The two texted some more before Benavides signed off by saying he would take off time from work the next day to meet up. The next day around lunchtime Benavides texted saying his work had been busy. He said he was on his way to get lunch and made a reference to oral sex with the Hutchings persona. The two talked about why the meet up had failed and Benavides made two other references to oral sex. They then texted throughout the afternoon before agreeing to meet in Lion's Park on the base. When Benavides arrived at the rendezvous site, he was arrested and his cell phone was seized.

AFOSI computer forensics examiner Thomas Brandal testified that he had examined the data contained on the cell phone and SIM cards seized from Benavides. ROA.819-25. Brandal's examination found the text messages that Benavides's phone had exchanged with the agent's persona.

Brandal also found a Whisper conversation from February 20, 2019–nine days after the campaign began–between Man Of Solitude and a user named King the King. Over objection, Brandal was allowed to put into evidence the substance of that conversation. In the conversation, which occurred in the evening of February 20, Man Of Solitude asked "Did I embarrass myself with my videos?" before saying "[e]ven if I did and you don't feel the same, I like talking to you." He also referred to pictures that King had showed him the night before. Later he asked "Did I gross you out? Did

that change?" He then added, "I loved sharing it with you. I know you're in class, so just chat at me whenever." Brandal, in what he thought was the contacts section of the App, found King the King listed as 15 and female. Brandal admitted that he had no way of knowing whether that information was accurate.

Brandal was also allowed to testify over objections that, on Benavides's phone, he found 11 video files of a man masturbating and photos of female genitals. The files had been on a Western Digital cloud storage site and were pulled down from that spot beginning at 11:46 p.m. San Antonio time on February 19. Brandal was sure that neither the masturbation videos nor the photographs had been created on the phone seized from Benavides. The government played a portion of one of the masturbation videos for the jury. It also showed the jury the photographs of a female's genitals. Brandal admitted that he could not say that the photographs were sent by King the King, whoever that may have been.

The district court instructed the jury on the defense of entrapment. The jury found Benavides guilty. He appealed, arguing that the government had failed to show that he had a predisposition to the enticement offense before the government's approach and continual inducements. Because no evidence showed predisposition, the government had failed to disprove his entrapment defense and his conviction had to be reversed. He also argued that the district court had improperly admitted the video and photographs Brandal discovered.

The Fifth Circuit first addressed the Brandal evidence. It concluded the admission of it was not error, Then, seemingly relying on the Brandal evidence, the court of appeals concluded that the government had proved beyond a reasonable doubt that Benavides was predisposed to commit the offense before the government's inducements. The Fifth Circuit therefore affirmed the conviction.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHEN, IF AT ALL, EVIDENCE OF ACTIONS AFTER THE IMPLANTING OF THE CRIMINAL SCHEME BY LAW ENFORCEMENT CAN BE CONSIDERED AS EVIDENCE OF PREDISPOSITION.

.

The defense of entrapment when raised by an accused is an assertion that the government has gone too far, that it has created a crime where one did not exist and would not have existed. *Jacobson v. United States,* 503 U.S. 540, 548-49 (1992). The Court has addressed entrapment only a few times over the last century, each time clarifying the existence and parameters of the defense and the limits on law enforcement officers. The Fifth Circuit's decision in this case appears contrary to the Court's teachings and it points up a need for further guidance from the Court on two issues. First, how the advent of the internet and social media affect law enforcement efforts to persuade persons to act illegally. Second, when, if ever, the government can defeat an entrapment defense if it lacks evidence of acts showing predisposition before the government began its internet campaign against a defendant.

The Court's cases have made some matters quite clear. Law enforcement does not include the manufacturing of crime. *Sorrells v. United States,* 287 U.S. 435, 442

(1932). *Sorrells* declared it contrary to the intent of Congress in creating criminal statutes for government agents to lure innocent persons into violating a statute and then to punish them for the induced violation. *Sorrells,* 287 U.S. at 447-48. That does not mean that "[a]rtifice and stratagem" may never be "employed to catch those [actually] engaged in criminal enterprises." *Id.* at 441. It does mean that "[l]aw enforcement officials go too far when they `implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.'" *Jacobson,* 503 U.S. at 552 (quoting *Sorrells,* 287 U.S. at 442). "The Government may not play on the weaknesses of an innocent party and beguil[e] him into committing crimes which he otherwise would not have attempted." *Jacobson,* 503 U.S. at 553 (brackets cleaned up) (quoting *Sherman,* 356 U.S. at 376); *cf. Casey v. United States,* 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) (the government "may not provoke or create a crime, and then punish the criminal, its creature.").

When the defense of entrapment is raised and instructed upon, the government "must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson,* 503 U.S. at 549. The crucial issue in an entrapment defense is what does predisposition mean and how can it be proved. We know from *Sherman* and *Jacobson* that lack of predisposition can be determined as a matter of law. *Sherman,* 376 U.S. at 373; *Jacobson,* 503 U.S. at 554. Both cases tell us what lack of predisposition looked like in a specific case. Neither case provides the broader guidance to assure that innocent persons are not convicted, and crucially to the issue in this case, to assure that

convictions are not upheld solely because sufficiency of the evidence review has become such a narrow and limited inquiry in the federal appellate courts. What to look for as evidence of predisposition, and where to look for it, has remained an issue that the courts of appeals have struggled with or, in this case, expanded beyond what appears authorized by precedent. This case provides an opportunity for the Court to explain how entrapment and predisposition are to be measured in an internet age, something the Court's prior entrapment cases do not do.

The Court's prior entrapment decisions were made in a pre-internet world. They involved smaller, slower, interactions. Now, the government is no longer limited to personal approaches to those who observation suggests may at least be around an unlawful environment. *See Sorrells,* 287 U.S. at (revenue agent in bootlegging area); *Sherman,* 356 U.S. at 373-74 (defendant known to be recovering drug user and thus in the drug milieu). In *Sorrells,* a revenuer used three in-person conversations and the bond of shared war service to cajole the defendant into selling him a half gallon jug of whiskey. 287 U.S. at 439. In *Sherman,* a law enforcement informant importuned a recovering addict to help him obtain drugs, telling Sherman that he was suffering from withdrawals and treatment was not helping him. 356 U.S. at 371. In *Jacobson,* postal inspectors mailed a number of solicitations and made-up political tracts to a Nebraska farmer over a 26-month period to try to entice him to order a magazine containing child pornography. 503 U.S. at 544-46.

This case shows that times have changed since *Jacobson.* The government does not now only conduct slow-motion campaigns with occasionally contacts. Instead, it

can besiege any person with contact, mockery, and inducement, 24 hours a day, wherever he is, so long as it has obtained access to his social media name or his text number. The ability of the government to cajole, badger, and induce without stop requires that the lines sketched in *Jacobson, Sherman,* and *Sorrells* be filled in to create a test for measuring entrapment in an internet age.

The Fifth Circuit's opinion in this case seems to use the immense virtual world the internet has brought into existence as an invitation to look for predisposition where *Jacobson* said not to–in things done after the agent's approach. *Jacobson*, 503 U.S. at 553. *Jacobson* stated that, even a "ready response" to government "solicitations cannot be enough to establish beyond reasonable doubt that [the defendant] was predisposed, prior to the Government acts intended to create predisposition[.]" *Id.* at 553 (citing *Sherman,* 356 U.S. at 374). The government must instead prove an "independent" predisposition existed in the defendant. *Jacobson,* 503 U.S. at 551 (citing *Sorrells,* 287 U.S. at 442; *Sherman,* 356 U.S. at 372).

The majority of the Seventh Circuit took *Jacobson* at its word in *United States v. Hollingsworth,* 27 F.3d 1196, 1203 (7th Cir. 1994) (en banc), though a number of dissenters wished not to. Judge Posner, writing for the majority, read *Jacobson* as unequivocally stating that "a predisposition *created* by the government cannot be used to defeat a defense of entrapment." *Id.* The government is therefore bound to provide evidence that the predisposition existed in the defendant before the government approached him.

The Fifth Circuit has taken a broader view of what it may consider under *Jacobson.* It will look to evidence in a variety of forms "including `a showing of a defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity under investigation,'" *United States v. Chavez,* 119 F.3d 342, 346 (5th Cir. 1997) (quoting *United States v. Madrigal,* 43 F.3d 1367, 1370 (10th Cir. 1994)). While all of those may be sufficient if they are shown to have existed before the government approaches a defendant, in Petitioner Benavides case, the Fifth Circuit relied on evidence gathered from Benavides's phone after the government's approach and inducements. Indeed, the government admitted it had no information about Benavides before it began badgering him. App. B.

The Fifth Circuit, however, used evidence gathered from the internet and created after the government's approach to find predisposition. It accepted the government's arguments that chats, videos, and photographs from Benavides's phone created a week after the government's constant campaign began could count as evidence of predisposition. This, though the evidence was of conversations, Benavides had with another unknown person in the late hours of February 19 and early hours of February 20; that is, though the evidence was indisputably brought into existence after the government's campaign was in full swing.

These chats, and accompanying video and photographic attachments, occurred eight days after the government had begun badgering Benavides. This after-the-implanting evidence was not properly considered under *Jacobson.* It could not show a

predisposition independent of the inducements the government had been barraging Benavides with for a week. Importantly, not only was the evidence out of time, it did not show a predisposition to entice minors. The government had no evidence as to the identity of the King the King person chatting with Benavides that night. It asked the jury, and then the Fifth Circuit, to assume King the King was a minor. Both the jury and the Fifth Circuit indulged that assumption, rather than requiring evidence. See App. A (court of appeals avoids discussing timing of evidence).

Of course, internet evidence can be evidence of predisposition, if it existed before the government's approach to the defendant. In *United States v. Hopkins,* 859 Fed. Appx. 810, 813 (9th Cir. 2021), for example, the defendant had been involved in "sexually explicit" chat conversations involving interest in minors *before* the government approached him. *Id.* (emphasis added). But that is not what happened here. The Fifth Circuit instead relied on later internet chats.

The record makes that clear and thus this case is a good vehicle for considering the issues presented. Benavides elicited that the agents had not had any prior information about him. He also established that, after he began chatting and texting with the agent, it was the agent who did not want to go away empty-handed and who pushed things. App. B. And, after saying early on after the approach that he just liked to chat and chatting for a while, Benavides went away. The agent pulled him back in. Benavides again went away. The agent again reached out again to pull him back and push him to arrange a meeting. App. B. In those chats, the agent pushed Benavides,

telling him not to play games, not to act like an immature boy, and inquiring about what plans Benavides had and where he lived.

The government lamented that it is "always true" that it lacks prior information about persons who might respond to an internet public-solicitation undercover operation. Fifth Circuit Brief of United States in No. 21-51211 at 20-21. That need not be so. In fact, part of the lesson of *Sorrels, Sherman,* and *Jacobson,* is that the government runs the risk of having its case rejected if it fails to do the investigation into whether a person is predisposed to commit the offense it induces him to commit. It is no answer to the lack of evidence in this case that proof may be difficult to find if the government starts blindly and choose to implant a crime rather than first investigate if anything may be afoot. For example, here, the government, once it got Benavides's Whisper name and phone number, could have looked for information through law enforcement channels, both physical and virtual, to see if a line of investigation presenting a crime opportunity was warranted. *Jacobson,* 503 U.S. at 548-49. It did not.

The virtual world of the internet and the limitless contact it allows has increased the risk that the government will oversteps its bounds and create criminality in persons who would otherwise not engage in crime. The Court should consider this risk and should shape appropriate safeguards to ensure that entrapment remains a viable defense and a strong limit of the actions of the government.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals. Alternatively, the Court should grant certiorari, vacate the judgment below, and remand the case to the Fifth Circuit to examine the issue of predisposition without considering the computer evidence that was created after the government had implanted the crime.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: January 17, 2023.