No.

In the Supreme Court of the United States

Noel Macapagal, 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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Questions Presented

The government convicted petitioner-defendant Noel Macapagal of violating 18 U.S.C. §2422(b). As the government invoked it to convict Macapagal, this statute makes it a federal crime to use a facility or means of interstate commerce to entice a minor into illegal sexual activity. Applying §2422(b) to prosecute Macapagal—who texted, called, and messaged a fictive mother and, with her, set up a tryst with the fictive mother's three fictive daughters—presents two questions that are worthy of this Court's review.

1. The first question is whether §2422(b) picks up in-person enticement, so long as that in-person enticement is facilitated in any way by a phone or the internet or some other facility or means of commerce; or, instead, captures only remote, virtual, and online enticement that is conducted over the phone, or on the internet, or through some other means or facility of commerce. Stated differently, this question asks whether construing §2422(b) to reach in-person enticement of a real or fictive minor that is arranged over the phone or on the internet with an adult exceeds Congress's commerce clause authority, because the statute would then reach nearly all instances of modern enticement, thereby impermissibly intruding on the States' authority to police such local crime.

2. The second question this petition presents is whether §2422(b) broadly captures persuading an adult to allow access to a minor, while harboring an intent to entice the minor in person, and, thus, does not require the defendant to engage in any actual or attempted enticement of the minor, be it in person or online. Every

circuit that has reached this question has held that the statute reaches the use of, as they brand it, an 'adult intermediary' and, thus, entirely dispenses with any need to prove that the defendant interacted at all with a real or fictive minor.

Parties and Proceedings

The caption lists all parties to the proceedings in this case.

The petitioner is not a corporation.

This case arises from the following proceedings in the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit: *United States v. Macapagal*, No. 1:19-cr-00080-LEK-1 (D. Haw.), and *United States v. Macapagal*, No. 21-10262 (CA9).

Counsel is not aware of any other proceedings in any other court that are directly related to this case.

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Opinion Below

The Ninth Circuit's opinion is published as *United States v. Macapagal*, 56 F.4th 742 (CA9 2022), appended here at App-A-1–4.

Jurisdiction

The Ninth Circuit entered judgment on December 28, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

Pertinent Positive Law

1. "The Congress shall have the power … to regulate commerce with foreign nations, and among the several States[.]"[1] U.S. Const., Art. I, §8, cl. 3.

2. "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." 18 U.S.C. §2422(b).

3. "A person commits the offense of sexual assault in the first degree if the person … knowingly engages in sexual penetration with a person who is less than fourteen years old." Haw. Rev. Stat. §707-730(1)(b).

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[1] Quoted material in this petition is often silently changed in ways that do not affect sense; as here, by silently changing some capital letters to lower case ones; elsewhere, a closing period may be supplied, or brackets, a paragraph break, internal quotation marks, and the like supplied or shorn. The notion behind such silent emendation is to make it easier to read this petition.

Proceedings Below

1. In the district court, the government's indictment accused Macapagal of violating §2422(b) by using a "facility and means of interstate and foreign commerce, that is, the internet and a cellular phone, to knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years to engage in sexual activity" that would constitute statutory rape under Hawaii state law. Dist. Ct. Doc. 17, PageID 45; *accord* Haw. Rev. Stat. §707-730(1)(b). The government's theory of prosecution, however, was not so straightforward as that charging language, largely drawn from §2422(b), suggested.

Macapagal used his phone and the internet to set up a tryst with a mother and her three daughters. The mother and daughters, however, did not really exist. The mother was really two undercover FBI agents. And in setting up the tryst, Macapagal communicated only with the fictive mother. He never texted, messaged, or spoke with the fictive daughters.

The government's opening statement (App-B) at trial starkly presents the government's theory of prosecution in this case, which contends that §2422(b) picks up downstream in-person enticement that is facilitated in any way by use of a phone or the internet:

> This case is about a grown man who was given an opportunity to have sex with three young girls and decided to take that opportunity. … This man, the defendant, Noel Macapagal, he crossed the line. He showed up at a house intending to persuade three young girls, age 6, 9, and 11, to have sex with him. That's what he's charged with doing and that's what the evidence will show he did.
>
> This all started when the defendant responded to an email message from a mother offering a sexual encounter with her three

> young daughters. In that first email contact, the mother wrote that she was looking for someone to help her daughters find their womanhood. The defendant responded that he knew what the mother was proposing and that he was very much qualified to help her out. After that, the defendant and the mother spoke on the phone and texted each other for about a day-and-a-half. ….
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> ….
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> … You'll … hear … that he wants to massage the mother and then eventually massage the girls as well. But you're also going to hear and see him say that he wants to do more than that. You're going to hear the defendant talk about crossing the line. …. You're going to hear him decide to take the opportunity that was presented to him. ….
>
> In the end, the defendant arranges to meet at the house where the mother and the children are staying. He texts with the mother as he travels there all the way up until he's right outside. Under his arm he has a milk crate and inside the milk crate are three gift baskets with flowered hair pins, chocolate bunny rabbits, candy, glitter nail polish, and children's toys. But when the door is open and he walks inside, he's not greeted by a mother and her daughters; he's arrested by the FBI. … This is all part of a law enforcement operation to catch people who show up to sexually exploit children.
>
> …. He was given an opportunity and he took it. He drove to meet them, he showed up with gift baskets for them, and he went into that house fully intending to persuade those girls to have sex with him. And he used the internet and his cell phone to arrange it all. That's what he's charged with and that's what the evidence is going to show he did.

App-B-1–4. In sum, the theory of prosecution previewed in the government's opening statement told the jury they could convict upon finding that Macapagal subjectively intended to entice and have sex with the daughters when he met them in person and, while harboring that intent, spoke to their mother in texts, calls, and online messages about such in-person conduct and to arrange a meeting for him to engage in that in-person conduct.

The government's trial evidence (mostly) confirmed what the government represented it would in its opening statement, with the exception that it was the fictive mother who first reached out to Macapagal—rather than he to her—by

responding to an entirely lawful personal ad, seeking adult companionship, that Macapagal had posted on an online legal dating site. Thereafter, the mother solicited him to have a sexual encounter with her daughters, but one that agents did not initially describe in unlawful terms. As the government successfully deployed it here, section 2422(b), which is typically described as prohibiting 'online enticement' and as targeting 'online predators,' does not require the defendant to successfully entice, or attempt to entice, a minor over the phone or on the internet. It suffices, under the government's theory, for the defendant to simply "arrange it all" with another adult over the phone or on the internet with the intent of engaging in downstream enticement and statutory rape when face-to-face with a minor.

When Macapagal moved for judgment of acquittal on the ground that the government had not proven any enticement of a minor occurred over the phone or on the internet, the government expressly asserted that §2422(b) did not require that the enticement, or attempt to entice, occur over the phone or on the internet. Macapagal argued that the statute required enticement that occurred, "online, not in person." CA9 DktEntry 11-2, Page 26 (1-ER-26). The government "just disagreed with that as a matter of law." *Id.* "All we have to prove," the government maintained, was "that he used the phone or internet in this continuing crime that ultimately would have consummated in the enticement of a minor." CA9 DktEntry 11-2, Page 30, 1-ER-30.

In its closing argument (App-C), the government emphasized that the evidence adduced at trial—which consisted of Macapagal's texts, messages, and

calls with the fictive mother, and proof that he had driven to the tryst with sexualized gift baskets for the daughters—confirmed what it had said in its opening statement and proceeded to map its facilitation of in-person enticement theory onto the district court's jury instructions. Of note is that the government urged the jury to rely heavily on the physical evidence of the gift baskets as proof that Macapagal intended to have sex with the daughters and intended, once with them in person, to entice them into doing so. *See* App-C-10–24. And the government tied those gift baskets up to Macapagal's admission, when interrogated, that the baskets were a "comfort factor," which the government thought proved that "he meant that gift to comfort this child, to persuade this child that he's not dangerous, he's a special friend, to ease them into these sexual acts that he was going to engage in with them." App-C-12. The government also urged the jury to rely on the sexually explicit conversations Macapagal had with the mother to prove Macapagal's intent to entice the daughters, once he was inside the house, into having sex with him. *See* App-C-10–24. True enough, the line may be a bit fine; but the government relied on Macapagal's sexually-explicit communications with the mother, all of which succeeded in persuading the mother to grant him access to her daughters, to prove that he intended to commit statutory rape and in-person enticement, rather than to prove he enticed, or attempted to entice, a minor over the phone or on the internet vis-à-vis an adult intermediary. *See id.*

Because the government charged an attempted violation of §2422(b), it also had to prove that Macapagal took a substantial step toward engaging in the

enticement the statute prohibits. But the government's argument to the jury on this point vaguely pitched the level of generality quite high at "a substantial step toward committing the crime," and then proceeded to point out how its evidence of the gift baskets, and the texts, calls, and messages could be relied upon to find Macapagal had taken a substantial step toward committing "the crime" of statutory rape and in-person enticement, without explaining how such things proved "the crime" of an attempted violation of §2422(b). App-C-9–12. For example, the government highlighted one of Macapagal's texts "pushing back" the time he'd arrive at the house because he wanted "to grab a few more things for" the daughters. App-C-27. It then argued that text message was "a perfect example of the defendant saying I'm not done preparing for the crime yet. I need to go buy a couple more things before I show at your door to sexually abuse your daughters." App-C-27–28. The government, that is, argued to the jury that it could convict Macapagal of attempting to violate §2422(b) by finding that he took various substantial steps in real life towards committing statutory rape and in-person enticement.

The government's argument against acquittal on an entrapment theory similarly pitched the level of generality vaguely at "the crime" and urged the jury to reject entrapment because Macapagal was predisposed to commit statutory rape and in-person enticement. *See* App-C-28–35. In his communications to the mother, the government emphasized, "he is not wavering about the morality of the crime, and 'is it okay to abuse children? I don't really know.' He's not doing that. He's not reluctant. He's calling her, he's texting her." App-C-30 (internal quotation marks

added; "her" referring to the mother). In making that argument, moreover, the government repeatedly described Macapagal's communications to the mother as "talking about how he's *going to* persuade, induce, entice the children" once he meets them in person. App-C-30 (emphasis added); *see also* App-C-31. And, noting the various points at which the mother gave Macapagal repeated opportunities to "walk away," the government argued:

> There are many places in the conversations and texts where the defendant could have walked away. The defendant would have faced no consequence for walking away. If the defendant stopped communicating or didn't show up at the door, the evidence would be different. But he did. He continued the conversation. He got on the phone, he stayed on text, and he showed up at the door."

App-C-31. It bears saying again. The government's view at trial was that Macapagal would have "faced no consequence" under §2422(b) had he not "shown up at the door" with the intention of successfully persuading the daughters, once he met them in person, to have sex with him.

The government's closing argument also emphasized that it did not have "to prove that the defendant communicated directly with a person he believed to be a minor, but that *any* remark to an "adult intermediary," without regard to its content, could be relied upon to convict for a violation of §2422(b), "as long as the defendant" made a remark to the other adult "with the intent to persuade, induce, or entice a minor" into engaging in downstream criminal sexual activity. App-C-35. And in arguing that a minor's willingness to engage in such activity was irrelevant, the government argued: "A minor's willingness to engage in sexual activity or stated consent to sexual activity is irrelevant …. Even if he knocked on that door, entered,

and the girls were willing to consent to his sexual touches, that is not a defense." App-C-36.

At one point during his closing argument, Macapagal's counsel told the jury that the government's emphasis on all the things Macapagal did to prepare for enticing the girls in person was beside the point, because §2422(b) was a statute that criminalized "very specific criminal activity." App-D-1 (in addition to the government's rebuttal argument, Appendix D to this petition includes this portion of defense counsel's closing argument). Defense counsel argued: "Travel is not required. So anything about showing up or coming with gifts, or vibrators, or lube, or condoms—not a substantial step. All of the substantial steps to persuade, induce, or entice has to be done online." *Id.* The government objected on the ground that defense counsel had misstated the law. *Id.* And the district court sustained the government's objection and told the jury to disregard what defense counsel had said. App-D-2.

In its rebuttal argument (App-D), the government repackaged what it had said in its opening statement and affirmatively told jurors that Macapagal's remarks to the mother, over his phone and on the internet, were not what made "him guilty" of attempting to violate §2422(b):

> It's important to note that the substantial step does not have to happen online. His substantial step was in person. Imagine that a—this adult female walks up to a kid in a park and says, "Hi, little kid, do you want to come to 7-Eleven with me?" Okay? There may be an argument over whether that person persuaded, induced, or enticed that child. But if the same person shows up at the park with the kid's favorite color toy and holds it out and says, "Hi, little kid, come to 7-

> Eleven with me," that person has attempted to persuade, induce, or entice that child to go to 7-Eleven. That's an analogy, obviously.
>
> What he was intending to do was persuade, induce, entice the children into performing sexual acts with him, and the way he accomplished that crime was by going online, and in his text messages and in his emails communicating with somebody that he believed was a mother who had control over these children and who was willing to help arrange this dynamic. And they come up with what his name is going to be: special friend, Coach Calvin they talk about, right? They talk about the gifts that he was going to bring for the kids. And he, his words—he talks about his "special touches" and how he's going to "[e]ase them into being with me." Those are his words in communications on interstate commerce, and that's why he's charged with an attempt to commit this crime.
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> …. If the defendant had not traveled to the store, purchased all those items, asked for the address, traveled to the door, brought items to the door, rang the doorbell while texting, "Are you there? I'm here"—if he hadn't done all that, he wouldn't have committed a substantial step. In other words, it's not his chats alone online that makes him guilty. It's the fact that he was going to commit that crime, and that's what the evidence shows you.

App-D-3–5.

In sum, the government's theory of prosecution in the district court and at trial in this case was that Macapagal had attempted to violate §2422(b) because he and the mother colluded over the phone and on the internet on how he could, once he was with them in person, best persuade the daughters to have sex with him. Over his denied motion for judgment of acquittal, the jury found him guilty on that theory of prosecution, which was the only theory of prosecution the government submitted to them. The district court later sentenced Macapagal to 121 months of imprisonment, which he is presently serving.

2. On direct appeal to the Ninth Circuit, Macapagal pursued his claims that §2422(b) picked up only successful or attempted enticement that occurred over the phone, on the internet, or by or through some other means or facility of

interstate or foreign commerce, and did not pick up communications to another adult made with the intent of engaging in downstream, in-person enticement.

On the latter "adult intermediary" issue, the Ninth Circuit held "that so long as the government proves the defendant's intent was to obtain sex with a minor, it does not matter that the phone or internet communications occurred only between the defendant and an adult." App-A-3. As the Ninth Circuit noted, "most of our sister circuits have considered" this issue and similarly hold that the statute allows for conviction on proof that the defendant spoke only with an adult about having sex with a minor while harboring an intent to have sex with that minor. *See* App-A-2–3 (collecting cases: *United States v. Vinton*, 946 F.3d 847, 853 (CA6 2020); *United States v. Caudill*, 709 F.3d 444 (CA5 2013); *United States v. Berk*, 652 F.3d 132, 140 (CA1 2011); *United States v. Douglas*, 626 F.3d 161, 164–165 (CA2 2010) (per curiam); *United States v. Nestor*, 574 F.3d 159, 160–162 (CA3 2009); *United States v. Spurlock*, 495 F.3d 1011, 1013–1014 (CA8 2007); *United States v. Murrell*, 368 F.3d 1283, 1287 (CA11 2004)); *see also United States v. Laureys*, 653 F.3d 27, 33 (CADC 2011). The only dissenting judicial voice speaking against that entrenched view is that of Circuit Judge Brown, who dissented in *Laureys* on the ground that the statute's text plainly requires the defendant to entice a minor, rather than merely persuade an adult to allow access to a minor. *See Laureys*, 653 F.3d at 38–39 (dissenting opinion).

As to Macapagal's claim that the government's theory of prosecution was an invalid one, the Ninth Circuit rejected it on a basis that is not easily reconciled with

the government's opening statement, opposition to Macapagal's motion for judgment of acquittal, and closing and rebuttal arguments. The Ninth Circuit, apparently affected by the disturbing communications Macapagal had with the fictive mother describing to her what he would do with the daughters *once with them*, insisted that Macapagal was simply pointing "to isolated statements that the government made" and asserted that, "considering the record as a whole, the government did not convey an improper theory to the jury." App-A-3. As the appendix to this petition evinces, however, the Ninth Circuit's parsing of the theory of prosecution that the government submitted to the jury is not accurate.

Reasons to Grant the Writ of Certiorari

1. This case presents an unusually stark vehicle for deciding whether 18 U.S.C. §2422(b), a federal statute enacted under Congress' commerce clause authority and typically characterized as targeting online sexual predation of minors, picks up local instances of in-person sexual predation that are arranged with another adult over the phone or on the internet.

Congress does not have a general police power that allows it to federally proscribe purely local criminal conduct. Instead, the Constitution reserves general policing of criminal activity to the States. Congress may enact criminal laws that apply within federal territorial or maritime jurisdiction. Congress may also enact a criminal law when necessary and proper to further a power the Constitution otherwise vests in Congress, such as its commerce clause authority. But Congress lacks the authority to generally criminalize local conduct. That power is reserved to

the States. This Court has consistently enforced this federal-state balance by narrowly construing federal criminal laws enacted in furtherance of Congress's commerce clause authority and, when that does not suffice to preserve the balance, striking down the federal law entirely on the ground that it encroaches upon the general police power reserved to the States and exceeds Congress's commerce clause authority. *See*, *e.g.*, *United States v. Lopez*, 514 U.S. 549, 566 (1995) (the "Constitution … withhold[s] from Congress a plenary police power"); *Cohens v. Virginia*, 6 Wheat. 264, 428, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("Congress cannot punish felonies generally").

Bond v. United States, 572 U.S. 844 (2014), for example, held that the prohibition in 18 U.S.C. §229 against "us[ing] … any chemical weapon" did not "reach local criminal conduct," which, in that case, consisted of a jilted lover dusting a doorknob with a poison. *Id.* at 860. This Court emphasized that construing the statute broadly to capture such local conduct "would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do." *Id.* at 857. In *Jones v. United States*, 529 U.S. 848, 850 (2000), this Court rejected the government's attempt to stretch a federal arson statute to reach burning any "building in the land," such as an owner-occupied private residence, and, instead, narrowly construed it to prohibit burning "only buildings used in active employment for commercial purposes." *Id.* at 850–857. Driving that holding was the thought that "arson is a paradigmatic common-law state crime" and reading the federal arson

statute as broadly as the government urged "would significantly change the federal-state balance, … making virtually every arson in the country a federal offense." When Congress means for a statute "to reach purely local crimes," it must do so by using "clear" language in that statute indicating that the statute indeed has such an expansive reach. *Bond*, 529 U.S. at 860.

The statute at issue here, 18 U.S.C. §2422(b), does not contain such a clear indication that Congress intended to reach local instances of in-person enticement and attempted enticement, so long as the defendant used a phone or the internet to arrange with an adult the meeting at which such activity would occur. Or, to crib from *Jones*, there is no clear indication here that Congress intended this statute to displace state enticement laws by federalizing nearly every instance of modern enticement. Section 2422(b) provides:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entice, 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 10 years or for life.

18 U.S.C. §2422(b). Immediately apparent is that this statute defines two crimes.

One is an enclave offense that prohibits enticement that occurs within federal territorial and maritime jurisdiction. That offense is not at issue here. The other offense this statute defines consists of "using" a means or facility of interstate or foreign commerce, such as a phone or the internet, to successfully entice a minor (e.g., the minor texts back, "sure"), or attempt to entice the minor (e.g., the minor texts back, "no way"). As the circuit courts have readily characterized it, this second

offense targets online grooming and online predators, who—through texts, chatrooms, and the like—remotely groom minors for illegal sexual activity. *See*, *e.g.*, *United States v. Hite*, 769 F.3d 1154, 1163 (CADC 2014) (discussing the statute's legislative history and concluding that "the purpose of §2422(b) was to protect minors from sexual exploitation by online predators").

The most natural understanding of what it means to use a phone or the internet to entice, or attempt to entice, a minor is that the enticement or attempted enticement occurs during a phone call, or in texts, or within an online chatroom, or on a social media app, and so on. Online enticement of minor is not what is happening when, as was the case here, the defendant messages, texts, and calls an adult and successfully persuades the adult that he is the man she is looking for to have sex with her daughters.[2] Nor does online enticement of a minor occur when

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[2] In addition to misconstruing §2422(b)'s legitimate sweep, the government further over-reached by so readily applying the statute in the wake of a sting operation that sought, not to curtail online predation, but to apprehend statutory rapists. *See* CA9 DktEntry 11-3, Page 101, 2-ER-184 (agent testifies that the sting operation "was a multiagency task force involving federal, state, local, and military law enforcement components, and we were using the internet to identify, communicate, and intercept people here in Hawaii that wanted to have sex with kids"). Agents, moreover, extensively conveyed to Macapagal a backstory that consisted of the mother having already fully groomed her daughters for illegal sexual activity, along with a detailed account of how one of the mother's male friends had already engaged in sexual activity with them. The elaborate backstory agents spun to Macapagal did not call upon Macapagal to entice the daughters at all because, as the mother made a point of saying to him, due to *her* successful grooming of them, "they crave a man's attention, again, and they, they've asked me for it." CA9 DktEntry 11-3, Page 64, 2-ER-147. The messages, texts, and calls Macapagal had with the mother thus capture Macapagal's successful attempt to persuade *the mother* that he was the right man for her to choose for her daughters. Such a record, in addition to making this case an excellent vehicle for addressing the extent to which conviction under §2422(b) may rest on adult-to-adult

the defendant, as here, describes to the other adult the acts of enticement he will engage in when he meets with a minor in person. However salutary the goal of apprehending those "who prey on our nation's children" writ large may be, section 2422(b) does not contain a clear indication that it picks up instances of in-person enticement and attempted in-person enticement, whenever the meeting at which such in-person conduct would occur was arranged, between two adults, over the phone or on the internet.

Nor does the statute capture, as the government expansively argued in the district court below, *any* use of the phone or internet that is part of a "continuing crime that ultimately would have consummated in the enticement of a minor." CA9 DktEntry 11-2, Page 30, 1-ER-30. Such a broad reading of the statue arbitrarily picks up a broad array of local crime that is far afield of the online grooming that Congress narrowly intended this statute to curtail. *See*, *e.g.*, *United States v. Cote*, 504 F.3d 682, 686 n.4 (CA7 2007) (recognizing that §2422(b)'s legislative history reflects that the purpose of the statute "was to equip law enforcement with the tools necessary for combating internet child predators"); *Hite*, 769 F.3d at 1163 (collecting

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communications that do not include a real or fictive minor, also allows this Court to weigh in on whether the willingness of the minor is, as the lower courts have been saying, entirely "irrelevant" to the defendant's state of mind to entice a minor under §2422(b). App-A-3–4; *see also United States v. York*, 48 F.4th 494, 500 (CA7 2022). Unlike the questions this petition presents, it appears that this subsidiary issue, however, has not yet ceased percolating in the circuit courts and, thus, is not raised as an independent ground for granting certiorari in this case. But if this Court grants this petition, Macapagal urges it to nudge the lower courts into rethinking whether a minor's *known* willingness to engage in illegal sexual activity tends to make it less probable that the defendant engaged in enticement he had no reason to think he needed to use.

legislative history). Under the government's capacious reading, the statute makes a federal crime out of using a phone app to catch an Uber ride to a neighborhood park, where the defendant then attempts to entice minors in person; while inexplicably leaving for local prosecution an instance where the defendant uses his own, privately-owned, car to go to that park or, for that matter, simply walks there. The government's reading would also make a federal crime out of a defendant calling his neighbor and inviting the neighbor's child over for fresh-baked cookies and milk, and to play with the defendant's adorable puppy, as an opening salvo towards grooming the child in person over the months or years ahead; while inexplicably leaving for local prosecution an instance in which that initial invitation is extended while sheering a shared hedge. Simply using Google Maps to locate local schools or playgrounds would seem to be swept up in the government's broad reading of the statute, as long as the defendant intended to "ultimately" engage in enticement in person with a child he first met walking home from that school or playing at that park. Nothing in the statute's text, nor legislative history, suggests Congress intended this statute to displace local enticement laws in such an expansive, and seemingly so arbitrary, way.

Congress knows how to draft a clear facilitation statute that broadly sweeps up otherwise local criminal conduct that is facilitated by a means or facility of commerce when that is what it aims to do. In the area of drug-related crime, for instance, Congress made it a federal crime for anyone to "use any communication facility in committing or in causing or facilitating the commission of any act or acts

constituting a felony under any provision" of the federal Controlled Substances Act, affixing a capacious definition to the phrase "communication facility" that broadly sweeps up personal phones, computers, and the like. 21 U.S.C. §843(b). With such a tested model at hand, drafting a federal statute that targets facilitation of in-person enticement and illegal sexual activity with children hardly calls for a feat of legerdemain. Section 2422(b) is not, however, such a statute. Its plain language instead targets a very specific range of conduct that occurs either within federal territorial and maritime jurisdiction or, instead, online, through the mail, over the phone, or by and through some other means or facility of interstate or foreign commerce.

The sole theory of prosecution that the government pursued in its opening statement, in opposition to Macapagal's motion for judgment of acquittal, and in its closing and rebuttal arguments at trial, was that Macapagal had violated §2422(b) by intending to commit local acts of enticement and instances of statutory rape prohibited under Hawaii state law once he met with three minors in person, while previously using a phone and the internet to arrange that meeting with their mother. If that is a valid theory of prosecution under §2422(b), then this Court should grant this petition to strike down the statute on federalism grounds, for the statute would then reach nearly all instances of modern enticement (because, really, how much enticement today does not involve a tangential use of a phone or the internet?). If that is *not* a valid theory of prosecution, as Macapagal has consistently argued throughout this case that it is not, then this Court should grant this petition

to set aside his conviction and 121-month sentence, and to curb the government's over-zealous and unconstitutional application of the statute beyond the fair reach of its plain language.

2. This case also provides an excellent vehicle for correcting the entrenched and uniform, but textually mistaken, view of the circuit courts that §2422(b) picks up communications that occur between two adults and is not limited to communications between the defendant and a real or fictive minor. *See* App-A-2 (collecting circuit cases).

The statute's text does not reasonably bear such a construction. Jurisdictional hooks aside, section 2422(b) subjects anyone who "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years" into illegal sexual activity, or anyone who "attempts to do so," to a minimum of a decade in prison. 18 U.S.C. §2422(b). The phrase "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years" is not reasonably read to prohibit a defendant from persuading, inducing, enticing, or coercing an adult into providing access to a minor.

Likely because the factual scenarios on which these cases arise are so disturbing, the circuit courts have uniformly construed this federal penal statute broadly to embrace communications between two adults, rather than narrowly in accord with the statute's plain terms and with an eye on maintaining the federal-state balance in this niche of criminal law. The circuit courts justify their expansive reading of the statute on the ground that it is necessary to avoid "eviscerating" the

statute's "efficacy" in curbing sexual predation of children. App-A-2. And because the circuits think a capacious construction of the statute is necessary so as not to exempt from penal liability "sexual predators who attempt to harm a child by exploiting the child's natural impulse to trust and obey her parents." App-A-2. But, of course, *other* state and federal laws readily capture such sexual predation. *See*, *e.g.*, *Laureys*, 653 F.3d at 42 (dissenting opinion) (collecting federal statutes that reach sexual predators who use an adult to gain access to a child for the purpose of engaging in illegal sexual activity); Patrick Miller & Alice R. Buchalter, *Internet Crimes Against Children: A Matrix of Federal and Select State Laws* (Nov. 2009), www.ojp.gov/pdffiles1/nij/grants/228812.pdf (last visited March 13, 2023). And, in any event, despite such a laudatory goal, section 2422(b)'s text speaks far less expansively, by plainly requiring that a minor, not another adult, be the person whom the defendant persuades, induces, entices, or coerces or attempts to persuade, induce, entice, or coerce into engaging in illegal sexual activity.

As written, this statute does not police what adults say to each other. Nor does it police what adult conspirators say to each other in furtherance of their objective to engage in illegal sexual activity with minors. This statute's language narrowly polices one thing: what an adult says *to a minor*—and, even more narrowly when run on its commerce iteration, only what the adult says to that minor *online*, over the phone, in a letter, or by or through some other means or facility of interstate or foreign commerce.

In addition to ignoring what the statute plainly says, reading this statute's operative text to broadly capture instances of a defendant convincing or coercing a parent or guardian to grant sexual access to a child is contrary to this Court's consistent admonishment that federal penal statutes must, in accord with the rule of lenity, be strictly and narrowly construed against the government. *See*, *e.g.*, *Bittner v. United States*, 143 S.Ct. 713, 724–725 (2023) ("the law is settled that penal statutes are to be construed strictly, and an individual is not to be subjected to a penalty unless the words of the statute plainly impose it"); *Wooden v. United States*, 142 S.Ct. 1063, 1082–1084 (2022) (concurring opinion) (discussing the rule of lenity's history and the important safeguard the rule continues to provide); *United States v. Davis*, 139 S.Ct. 2319, 2333 (2019).

This Court, accordingly, should grant this petition to correct the entrenched but mistaken view of the circuit courts that the phrase "knowingly persuades, induces, entices, or coerces an individual who has not attained the age of 18 years" captures communications between two adults, opening them both up to federal prosecution and a minimum of a decade in a federal prison, rather than just communications between an adult defendant and a real or fictive minor.

Conclusion

This Court should grant a writ of certiorari in this case to curtail the government's use of §2422(b) to reach local crime that should be left to the States to police and to correct the circuit courts' entrenched view that this statute's prohibition against persuading, inducing, enticing, or coercing a minor to engage in

illegal sexual activity captures communications solely between a defendant and another adult, and dispenses entirely with any need for the government to prove that the defendant communicated with a real or fictive minor.

Respectfully submitted on March 21, 2023.

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