No.

In the Supreme Court of the United States

TAYLOR J. MATSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether case agents may offer lay opinions summarizing evidence, interpreting plain language, and drawing inferences from evidence that only a jury may draw for itself. (A 3-8 split.)

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

RELATED CASES

United States v. Matson, No. 2:21-cr-23, United States District Court for the Western District of Washington. Judgment entered March 28, 2022.

United States v. Matson, No. 22-30060, United States Circuit Court of Appeals for the Ninth Circuit. Judgment entered May 17, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Taylor J. Matson, respectfully petitions for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit. There's a 3-8 circuit split whether case agents may offer lay opinions summarizing evidence, interpreting plain language, and drawing inferences from evidence that only a jury may draw for itself.

The minority rule of the First, Ninth, and Eleventh Circuits gives case agents free rein to do so. But the majority rule of virtually every other circuit forbids case agents from offering lay opinions interpreting coded language based on their training and expertise unless they've first disclosed those opinions before trial and then qualified as an expert per *Daubert*. Unlike the minority rule, the majority rule is faithful to the text of the Federal Rules of Evidence. It also ensures that expert testimony is subject to pretrial disclosure and is subject to judicial gatekeeping for reliability. That prevents junk opinions from reaching the jury and avoids the danger of trial by ambush. And this case is a good vehicle for resolving this intolerable split because the evidentiary errors made a difference. The Court should grant certiorari.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is unreported.

JURISDICTION

The court of appeals filed its opinion on May 17, 2023. Pet. App. 1a–6a. Petitioner didn't seek rehearing. On March 15, 2022, Justice Kagan granted a 60-day extension (23A110) to file this petition from August 15, 2023 until October 16, 2023. *See* Sup. Ct. R.

30.1. (October 14, 2023 was a Saturday.) Petitioners now invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 701, which provides that "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Federal Rule of Evidence 702, which provides that "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Federal Rule of Evidence 704(b), which provides that "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."

STATEMENT

1. A grand jury charged Matson with one count of child enticement in violation of 18 U.S.C. § 2422(b).

Pet. App. 1a. After a three-day trial, a jury found him guilty. *Id.* He was sentenced to a mandatory minimum term of 10 years' imprisonment and 10 years' supervised release. D.Ct. Doc. 91 at 2–3. The court of appeals affirmed his timely appeal (Pet. App. 1a–6a), and he's currently incarcerated.

2. Before trial, the government never disclosed its case agent as an expert or provided a summary of any expert testimony. Thus, at trial, the case agent and all other lay witnesses should've been limited to testifying about their own observations based on personal knowledge.

3. Matson grew up on a horse ranch. Tr. 272.[1] After high school, he served as a third-class petty officer aviation machinist mate for the Navy and was honorably discharged. *Id.* Then, he attended community college, obtained a pilot's license, and worked in the aerospace industry. *Id.* at 272–74. Before his conviction, he had no prior criminal history and had never committed any sexual offense against minors. *See* Tr. 286–87. He never possessed any child pornography. Tr. 217, 254.

Daljit Gill was a detective in a child sexual exploitation task force. Tr. 29. On December 4, 2018, she posted a personal advertisement on a website called "DoubleList" and received 20–25 responses. Tr. 38, 41. Titled "Family Love and Fun (Shoreline)," it said:

> I'm from Shoreline, WA and I live with three kiddos. I'm single and my mom watches my kids while I work. I'm looking for someone who is like minded (Man or Woman), who is into things not

[1] The trial transcripts (Tr. 1–364) were docketed at D.Ct. Docs. 96, 97, and 98.

> everyone agrees with. I love family fun and love playing with my kids. I have 3 horses and only 2 are broken in, do you ride horses?

Tr. 38.[2]

Matson responded: "I'm intrigued. Can we chat more? 32 yo male, hwp, well endowed and open minded. happy to exchange pics." Tr. 42.[3] Gill replied, "Of course we can chat more. I'm 36 with three kids. What intrigues you about my post, baby? You into kinky taboo as well?" Tr. 43. Gill defined "kinky taboo" as "not your missionary-style sex," but rather "grotesque" "stuff that people don't normally find acceptable," such as "beastiality" [*sic*] or "fetishes." Tr. 43. Then, Gill began chatting about child incest:

> ive been into it my whole life...my daddy played with me. i guess it is a lifestyle.....lots of judgy people though. I remember i enjoyed my dad licking my pussy. i look every now and then and meet one or two people. trust is a huge thing in this...you know?

Tr. 45. She said sexual encounters with adults "has been positive for my girls and I like to keep it that way." Tr. 47. She told Matson that her children's father started "with the 12 and 6 [year-old] when they were about 1 year ...he'd finger...lick. let them paci-

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[2] The full email string was filed in the district court. *E.g.*, D.Ct. Doc. 27.1 at 2–10. It contains various smiling or winking emojis, which this petition doesn't reproduce. But this petition does reproduce the typographical errors in the original messages instead of how they were transcribed.

[3] Having grown up with horses, Matson didn't believe that the ad's reference to "horses" meant children or sexual activity with children. *Id.* at 280. He said he responded to the ad out of curiosity. *Id.*

fy." Tr. 47. She defined those terms as follows: "'Finger' would be vaginal penetration with a finger; 'lick' would be follacio [*sic*], oral sex; and 'pacify' would be inserting the penis in the child's mouth." Tr. 47. She said she just began sexual activity with her two-year-old, and the other two continued "the lifestyle" even after their dad died from a drug overdose. Tr. 48.[4]

Matson suggested that they meet "for a coffee date or something if you think you're up for it sometime." Tr. 49–50. But Gill was interested only in sexual encounters for her fictitious children, stating: "...but really im just lookin for people like us who want to participate....add some spice to our life haha." Tr. 50. Matson was curious, but reticent: "Well, I'm definitely interested in getting to know you, and if we hit it off you can introduce me to the family sometime too? You sound like sweet people and I'd love to see where this leads." Tr. 50.

The exchange persisted through the following day but then lapsed until Matson reinitiated after the New Year on January 4, 2019. Tr. 53. Gill said she was struggling financially and seemed frustrated that he was so tentative, stating, "i guess I just don't know what u are into??" Tr. 56.

He responded that she was looking for taboo friends, he was curious, and he thought she "wanted to meet up and talk about it a bit and introduce me to your girls at some point if we hit it off. I don't want to dive into anything head first with total strangers as I'm sure you do not either." Tr. 56.

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[4] Gill, not Matson, introduced the subject of incest with children. Tr. 285. Matson said he continued the conversation because ceasing the conversation "would have been turning a blind eye to a possible crime." Tr. 282.

She persisted: "no i don't have my girls to risk by diving into with total strangers..but at some point somthings gotta give to move forward right?" Tr. 60. She then requested photos, especially as she collected "pics of my fetish" and had received the same from others to ease the introduction. Tr. 60–61.

They then moved their communications to text rather than email beginning on January 12, 2019, at which point they discussed the weather, Matson's motorcycling hobby, and their respective hometowns. Tr. 66. Gill also expressed concerns that she might be tracked due to her "lifestyle." Tr. 68–69.

During exchanges on January 24 and 25, 2019, Gill again expressed financial concerns and sent photos of a half-full bottle of infant formula. Tr. 74–76. Gill explained that she sent the picture of infant formula because "[i]t happened to be on hand, and so I took a picture of it to make my persona believable." Tr. 74. Gill then discussed her fictitious child's formula consumption, and Matson advised he did not have kids. Tr. 74–76.

In chats on January 28 and 29, 2019, Gill complained that Matson had not disclosed any information about himself and was adamant that she needed to know he wasn't a cop. Tr. 80. Matson offered to meet with just Gill to "keep it friendly and not venture into the lifestyle stuff until we know each other," in response to which Gill snapped that this "isn't fucking role play." Tr. 80. It was around this point that the district court instructed Gill that "You can answer, based on your training and experience, what you interpret the words mean." Tr. 82.

On January 31, 2019, the following exchange took place:

Matson: Sigh. Romi, I'm trying my best to give you what you want and all I'm getting is the runaround. You asked me where I'm from. I told you. You asked what I do. I told you. You asked for a pic. I sent one. Whatever you want me to do to make you feel more comfortable, I'm trying to do it, but you haven't given me much reassurance in return. What am I supposed to think about that?

Gill: Um, let's be real. I obliged you to even meet even though you haven't told me anything about your fetishes. Incest, your interest in kids.

Matson: I'll meet up with you on a blind date if I have to, but I'd like to at least see that I'm talking to a real person.

Gill: You responded to my ad which was about family fun. Yeah, I'm a real person.

Matson: It was your interest in kids and my curiosity about you wanting to add more nonjudgmental friends into your family.

Gill: Haha. Okay. Vigil anti [*sic*].

Matson: But I have to get to know you before any of that becomes a remote possibility, right? Right now we're still technically strangers to each other, I want to fix that. Hence why I figured meeting up for coffee or drinks was a good idea.

Gill: I was looking for like minded people and not interested in teaching.

Matson: Ugh. Romi, if you're so paranoid about people, then why bother talking to me in the first place?

Gill: You ain't even into my lifestyle.

> Matson: I already said I don't need to be taught anything.
>
> Gill: I told you I ain't into grown men love. My fetishes is real young.
>
> Matson: I didn't say I wanted to date you. I want to get to know you so we're not friggin paranoid of each other anymore and can just hang out whenever, like the rest of your friends.
>
> Gill: Oh, love bug, I ain't looking for hang-out friends either. I'm looking for real legit people who want to participate in lifestyle events and fetishes.

Tr. 92–95. Even though nearly two months that had passed since the initial contact, Gill admitted that Matson "never told" her "what his fetishes were" and appeared to be "fresh," meaning he lacked experience with sexual activity with children. Tr. 95–96.

Gill suggested a time to meet when her fictitious kids would be at school and proposed that Matson meet her at a bar on February 5, 2019. Tr. 84–86.

According to Gill, during that meeting, she and Matson discussed the weather until she asked "So why are we here? Let's cut to the chase." Tr. 120. According to Gill, Matson then said "he was always curious about the lifestyle that I was engaged in, and that because of his like for smaller, petite ladies, he was interested in my twelve-year-old and that my twelve-year-old met his sexual wants." Tr. 120. The two then discussed sexually transmitted diseases and using condoms to prevent pregnancy in the event of vaginal intercourse with Gill's fictitious 12-year-

old daughter. Tr. 120. That meeting wasn't audio or video recorded. Tr. 203.[5]

After they met, Gill thanked Matson for lunch and asked, "[a]nything you want Carly to wear?" Tr. 131. Matson didn't respond to that question, despite her asking it two or three times. Tr. 202–03. Instead, Matson thanked Gill:

> for putting the effort into getting to know each other first. I just want to make sure I'm getting involved with good people who aren't out to harm anyone or tear lives apart ... I know it's the same for you....Well, you've got me at your disposal if you'd like to bring me into the family... And PS, you are freaking adorable. No wonder you have such cute girls.

D.Ct. Doc. 27.2 at 28. Gill responded:

> Thank you. But you being sweet won't get me to participate with you and Carly lol ...don't know if you're trying to get me in on it too...I want to take pics for now that is. Hey I didn't ask you.. ugh how big you are ... Did I make you mad?

Tr. 132. The two expressed mutual concern about law enforcement, and Matson repeated he was in "no rush and looking for long-term friendship." Tr. 134.

Gill then asked more about Matson's penis size, condoms, and sexually transmitted diseases, and

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[5] Matson recalled the conversation quite differently. According to him, the two discussed weather until Gill "[r]ather quickly" introduced the subject of sex with children. Tr. 285. He described her demeanor as "extremely aggressive" and he didn't know what to make of her behavior. Tr. 285. Matson didn't believe she was being truthful in their conversation. Tr. 285. Matson said he'd never had sex with children but "preferred women of smaller stature." Tr. 286.

they discussed how she intercedes to make sure her fictitious daughter is having fun. Tr. 133–35. She tried to get him to describe what he would do to her daughter, but he assured her, "[n]o expectation of anything on the first time, but we'll see how things go." Tr. 145. Gill again chastised Matson for his hesitancy, texting him:

> Haha what do you mean by no expectations on the first time... lol this isn't to hang out and watch Netflix with my daughter. You're making me nervous again... I felt better after meeting you ...but now you're acting like you want to come cuddle with her lol.

Tr. 146. Matson responded, "Just waking up.?? No, I'm not wanting to do anything weird. Relax. I just didn't want you to think anything was expected from you." Tr. 146.

On February 6, the two agreed to meet at a hotel along with "Carly," the fictitious 12-year-old. Tr. 151. Matson didn't believe there would actually be a 12-year-old girl at the hotel room and said he would've panicked if there actually were a girl in the room. Tr. 287. His intention was to contact law enforcement in the event Gill actually presented him with a 12-year-old. Tr. 287–88.

Around noon, Matson arrived at the hotel room and was arrested. Tr. 154–55. His cell phone was seized and searched, but no child pornography was found on it. Tr. 217, 254. Matson voluntarily submitted to a custodial recorded interview. Tr. 277.

The arresting officers found two condoms on Matson, although he said he always carries condoms with him and had purchased new condoms that morning because he'd planned to meet his sexual

partner after he finished work at 11:30 p.m. that night. Tr. 275–76. His work shift was from 3:00 p.m. until 11:30 p.m. Tr. 276.

3. On appeal, Matson argued the district court abused discretion when it allowed Gill to testify about his state of mind and offer lay opinions interpreting coded language based on her training and experience. C.A. Doc. 4 at 35–49. For instance, he argued the district court should've sustained objections and stricken her testimony that:

- Matson was "okay with the fact that [Gill's persona] was sexually assaulted as a child";
- Matson "agree[d] with trust being a key thing to continue this lifestyle";
- Matson was "also doing a verification [and] a verification process";
- Matson's messages were "consistent [with] looking for some sort of verification before ... taking it to the next level";
- Matson "kn[ew] what [he was] doing, in the realm of the sexual encounter [and Gill] won't have to teach anything, and this person, in my opinion, kn[ew] what he's doing in a sexual encounter";
- Matson didn't "express[] reluctance through words or actions" and "seemed comfortable."

Id. at 43. He explained those comments and others should've been stricken because they exceeded the scope of Federal Rule of Evidence 701 and invaded the province of the jury. *Id.* at 44–47. He also argued they violated Federal Rule of Evidence 704(b). *Id.* at 47–48. Lastly, he asserted the admission of Gill's improper testimony wasn't harmless. *Id.* at 48–49.

In response, the government pointed to circuit precedent that allowed a case agent to offer lay opinions that ""interpret ambiguous conversations based upon [her] direct knowledge of the investigation, including [her] direct perception of several hours of intercepted conversations … and other facts [she] learned during the investigation."" C.A. Doc. 13 at 44 (quoting *United States v. Vera*, 770 F.3d 1232, 1242–43 (9th Cir. 2014) (quoting *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007))).

Agreeing with that argument, the court of appeals affirmed. Pet. App. 5a. Citing *Freeman*, it held case agents "may testify as a lay witness about her interpretation of ambiguous statements based on her knowledge of or participation in an investigation." *Id.* Thus, citing another circuit precedent, it held "an agent's testimony about the meaning of sexual terms used in conversations was permissible where the agent participated in conversations." *Id.* (citing *United States v. Macapagal*, 56 F.4th 742, 747 (9th Cir. 2022)). As a backstop, it also held any error would've been harmless because the remaining evidence was "sufficient," Matson testified in his own defense, and the prosecutor didn't emphasize Gill's interpretations in closing argument. *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

I. There's a 3-8 circuit split whether case agents may offer lay opinions summarizing evidence, interpreting plain language as coded, and drawing inferences from evidence that only a jury may draw for itself

The Court should grant the petition because there's a 3-8 circuit split whether case agents may offer lay opinions summarizing evidence, interpreting plain

language as coded, and drawing inferences from evidence that only a jury may draw for itself.

1. Ordinarily, in both civil and criminal cases, the admission of expert testimony per Rule 702 is subject to pretrial disclosure, *see* Fed. R. Civ. P. 26; Fed. R. Crim. P. 16, and a district court's gatekeeping function, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999); *GE Co. v. Joiner*, 522 U.S. 136, 142 (1997). But courts have afforded the testimony of case agents unique treatment, depending on whether they've construed the case agent's testimony as offering expert opinions or lay opinions.

Partly in answer to that question, Rule 701 was amended in 2000 to add subsection (c), which now clarifies that lay opinions are limited to those that are "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). The committee notes indicate one purpose of subsection (c) was to "ensure[] that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." *Id.* cmt. (2000).

2. The minority rule, as espoused by the court of appeals' decisions in *Freeman*, *Vera*, *Macapagal*, and the case below, has given free rein to case agents and allowed them to offer lay opinions summarizing evidence, interpreting plain language as coded, and drawing inferences from evidence that only a jury may draw for itself. Two other circuits (the First and Eleventh) apparently agree with this approach. But it's contrary to the rules of evidence and out of step with the law of sister circuits. The Court should

grant certiorari to correct the minority rule's mistaken lines of precedent.[6]

Take *Macapagal*, for instance. There, as here, the defendant argued on appeal that the district court had abused discretion when it allowed the case agents to offer lay opinions "explaining sexual terms and acronyms used in the communications." 56 F.4th at 747. Without citation to any authority, *Macapagal* rejected that argument because the case agents "had personal knowledge of the communications as they were acting as Kay, and the explanation was helpful because they were able to explain what was meant by terms jurors were unlikely to know." *Id.*

The Ninth Circuit isn't alone in its view that case agents can offer lay opinions interpreting coded language based on prior experience and training. For instance, the First Circuit agrees that case agents—without being qualified as experts and notwithstanding Rule 704(b)—are "free to state" their "rationally-based perception of what [a defendant] was thinking during their face-to-face conversation." *United States v. Prange*, 771 F.3d 17, 29 (1st Cir. 2014). Similarly, the Eleventh Circuit holds that case agents can offer lay opinions interpreting coded language in Craigslist post and emails informed by "years of experience investigating child exploitation and child pornography crimes." *United States v. Stahlman*, 934 F.3d 1199, 1223–24 (11th Cir. 2019).[7]

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[6] Perhaps ironically, at one time the court of appeals had held case agents couldn't offer lay opinions to interpret code words based on their training or experience. *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997).

[7] But in a subsequent case, the Eleventh Circuit reversed as plain error the admission of a case agent's "improper testimony"

3. In contrast, the majority rule, espoused by virtually every other circuit, requires case agents to be disclosed and qualified as experts before interpreting coded language. *See, e.g.*, *United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005) (case agent's "reasoning process was not that of an average person in everyday life," but rather "was that of a law enforcement officer with considerable specialized training and experience in narcotics trafficking"); *United States v. Haynes*, 729 F.3d 178, 196 (3d Cir. 2013) (case agent's testimony that defendant "'realized' narcotics were in the rental car" was inadmissible); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010) (reversing admission of case agent's interpretation of wiretapped calls); *United States v. Haines*, 803 F.3d 713, 733 (5th Cir. 2015) (case agent violated Rule 701 by interpreting conversations); *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013) (case agent's testimony "was improper because it 'effectively spoon-fed his interpretations of the phone calls and the government's theory of the case to the jury, interpreting even ordinary English language'"); *United States v. Oriedo*, 498 F.3d 593, 603 (7th Cir. 2007) (narcotics officer had to qualify as expert per Rule 702 before offering opinions based on specialized investigatory experience); *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001) (case agent's "opinions about the recorded conversations" based on experience and training were inadmissible); *United States v. Smith*, 640 F.3d 358, 365–66 (Kavanaugh,

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that "summarized evidence, interpreted plain language, and drew inferences from the evidence that the jury must draw (or not draw) for itself." *United States v. Hawkins*, 934 F.3d 1251, 1264–66 (11th Cir. 2019). Thus, that circuit's precedent may be in flux.

J.) (D.C. Cir. 2011) (officer's interpretation of slang derived from "previous professional experience" was inadmissible).[8]

4. The majority rule is correct, and the minority rule is wrong. Unlike the minority rule, the majority rule is faithful to the text of Rule 701(c). It prevents expert testimony from masquerading as lay testimony. And it ensures that expert testimony is subject to pretrial disclosure and is subject to judicial gatekeeping for reliability, which prevents junk opinions from reaching the jury and avoids the danger of trial by ambush. And that's particularly important in criminal cases, given the enhanced credibility typical juries give law enforcement testimony. *See* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 248, 256 (2017) (noting "potential juror bias in favor of police officer testimony" given "popular view that police officers are more credible than civilian witnesses").

5. The harmlessness analysis of the court of appeals was deeply flawed as well, which should alleviate any vehicle concerns the Court might have.

For starters, the court of appeals said the error was harmless because the other unaffected evidence was "sufficient." Pet. App. 6a. That's not the test. Rather, the test for nonconstitutional evidentiary errors is whether the government can demonstrate by a preponderance of the evidence that it would've obtained the same verdict absent the error. *See, e.g.*, *United*

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[8] Previously, the Seventh Circuit had held case agents can offer lay opinions interpreting pronouns "used in an ambiguous manner" given their "vast experience with drug code language." *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002).

States v. Lane, 474 U.S. 438, 449 (1986) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). And the answer to that question *can't* turn solely on whether the remaining evidence was sufficient, because that would collapse the harmlessness analysis into a mere sufficiency analysis.

Second, the court of appeals said the error was harmless because Matson testified in his own defense. Pet. App. 6a. As before, of course petit juries may disbelieve a defendant's testimony and use it as substantive evidence of guilt. But that's a *sufficiency* argument, not a harmlessness argument. Indeed, it's not how other circuits handle harmlessness in similar circumstances. *E.g.*, *United States v. Ruan*, 56 F.4th 1291, 1298 (11th Cir. 2023) (jury instruction wasn't harmless as to substantive counts in part because defendants testified in their own defense).

Third, the court of appeals said the error was harmless because the prosecutor didn't emphasize Gill's interpretations during closing argument. Pet. App. 6a. But that holding misdescribed the record. Here's how the prosecutor actually began her closing argument:

> He recognized the coded language in that advertisement because he spoke that language. It wasn't foreign. It was familiar. It was his language. He wanted to ride horses. Code for children. He was not led to water unaware, confused, or curious. He drank from the well of the wicked and now here we are. He had lots of opportunity to walk away. And context does matter, even when it's inconvenient.

Tr. 331–32; *see also* Tr. 338 ("The ad was coded, and he's the one that recognized what the code was.").

Not much later, she doubled down on her coded-language argument:

> The first [area confirming Matson's intent to entice] is, of course, this very specific ad that the undercover placed on DoubleList. This is an ad that most of us would not respond to because it's clearly dark and it's about sex with children. But the response that the defendant gave indicates to you that he understood the coded language of "horses" because he gave the size of his penis. He didn't click the bottom of the e-mail link, "This ad is offensive," so that DoubleList could quickly remove it. No. Instead, he continues to talk.

Tr. 333; *see also* Tr. 333–35 (arguing what Matson's emails and texts meant and indicated what he understood, consistent with Gill's testimony).

In response, of course, Matson attempted to challenge Gill's interpretation of her own coded language:

> [D]id you ever think, before you came into this courtroom, in this case, that "horses" mean children? That's absurd. "Horses" mean horses, particularly to somebody who was raised on a horse farm. But Detective Gill gives you her opinion as to what that means.
>
> And there are some really disgusting things here, and I have to talk about them, but they're really disgusting and they all came from Detective Gill. She gave you her opinion that "pacifying" means an adult male putting his penis in a one-year-old's mouth. That's how far we have come. That's an opinion. Father, pacifier.

Tr. 344. But by then, it was too late, and the damage had been done: the horse had long since left the barn. The evidentiary errors were anything but harmless.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 16, 2023

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TABLE OF APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-30060

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

TAYLOR J. MATSON,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
D.C. Docket No. 2:21-cr-23-JLR-1.

Before McKEOWN, BYBEE, and FORREST, Circuit Judges. (Filed May 17, 2023.)

PER CURIAM:

Defendant Taylor J. Matson appeals from his jury conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Sufficiency of the evidence. We review de novo Matson's challenge to the district court's denial of his motion to dismiss for failure to state an offense. *See United States v. Nature*, 898 F.3d 1022, 1023 (9th Cir. 2018). Matson does not challenge the district court's ruling that the indictment was sufficient on

its face, and where, as here, "a motion to dismiss an indictment … is substantially founded upon and intertwined with evidence concerning the alleged offense," a district court does not err in denying it. *See United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993) (cleaned up).

Matson also argues that there was insufficient evidence to support his conviction because the Government failed to establish that he had the requisite intent or took a substantial step toward committing the crime. Matson moved for acquittal at the close of the Government's evidence but did not renew his motion at the close of all the evidence, so we review this challenge for plain error. *United States v. Gadson*, 763 F.3d 1189, 1217 (9th Cir. 2014). Viewing the evidence in the light most favorable to the Government, *see United States v. Eller*, 57 F.4th 1117, 1119 (9th Cir. 2023), we conclude that a rational jury could have found Matson guilty of attempt under 18 U.S.C. § 2422(b).

A defendant may be found guilty even where, as here, he communicates only with an adult intermediary or undercover officer. *See id.* at 1120–21; *see also United States v. Macapagal*, 56 F.4th 742, 744–45 (9th Cir. 2022) ("[S]o 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 intermediary."). While Matson argues that the evidence showed only that the undercover officer was seeking to persuade him to engage in child sex abuse, a rational jury could find that Matson had the requisite intent where he continually reinitiated contact with the officer, tried to assuage her concerns that he might have sexually

transmitted diseases, discussed that he would be "good at communicating" what he wanted the minor to do sexually, and took the ultimate step of "travel[ing] to the anticipated meeting site" with two new condoms. *See Macapagal*, 56 F.4th at 746. We similarly conclude based on this same evidence that a rational jury could find Matson took a substantial step toward completing the violation. *See Eller*, 57 F.4th at 1120 (discussing substantial step standard).

2. Entrapment. Matson argues that the district court erred in denying his motion to dismiss for entrapment, and that the evidence proves his entrapment defense as a matter of law. We review this claim de novo. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 648 (9th Cir. 2006).

Like Matson's motion to dismiss for insufficient evidence, his motion to dismiss for entrapment was "substantially founded upon and intertwined with evidence concerning the alleged offense," *Lunstedt*, 997 F.2d at 667 (cleaned up), and the district court did not err in denying it. *See United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010) (suggesting entrapment is a question for the jury where resolving the issue requires weighing the evidence).

We further conclude that a reasonable jury could have found that the Government disproved Matson's entrapment defense. *See Sandoval-Mendoza*, 472 F.3d at 648 (explaining that we "will not disturb the jury's finding unless, viewing the evidence in the government's favor, no reasonable jury could have concluded that the government disproved the elements of the entrapment defense" (citation omitted)). The Government may disprove entrapment by establishing that it did not induce the defendant to commit the crime. *See id.*; *see also United States v. Wil-*

liams, 547 F.3d 1187, 1197 (9th Cir. 2008). Inducement requires government pressure or coercion "more serious than mere solicitation." *United States v. McClelland*, 72 F.3d 717, 723 (9th Cir. 1995). While the Government here placed an advertisement aimed at people interested in sexually abusing children, it did not exert coercion or pressure of a type rising to the level of inducement. *Cf. United States v. Poehlman*, 217 F.3d 692, 695–702 (9th Cir. 2000) (concluding the Government entrapped the defendant where it "played on [his] obvious need for an adult relationship, for acceptance … and for a family"); *see also United States v. Mohamud*, 843 F.3d 420, 433–34 (9th Cir. 2016) (distinguishing *Poehlman* because there "the government agent aggressively pushed the idea of sexual activities with children on an uninterested defendant until eventually he gave in").

3. Outrageous Conduct. Matson argues that the district court erred by not dismissing the indictment for outrageous government conduct. Dismissal for outrageous government conduct is warranted only in the "extreme case[]" where the defendant shows "conduct that violates due process in such a way that it is 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011) (citation omitted). The Government's conduct here does not come close to meeting that standard.

4. Supervisory Powers. Matson also argues that the district court erred by not dismissing the indictment under its inherent supervisory powers. We conclude the district court did not abuse its discretion in declining to dismiss the indictment, *see United States v. Bundy*, 968 F.3d 1019, 1030 (9th Cir. 2020), because

it correctly determined that the Government did not engage in "flagrant misbehavior." *See United States v. Chapman*, 524 F.3d 1073, 1084–85 (9th Cir. 2008).

5. Undercover Officer's Testimony. Finally, Matson argues that the district court erred by allowing portions of the undercover officer's testimony about her communications with Matson as improper lay witness testimony. We review such evidentiary rulings for abuse of discretion and reverse only if any error "more likely than not affected the verdict." *See United States v. Schales*, 546 F.3d 965, 976 (9th Cir. 2008). A government agent may testify as a lay witness about her interpretation of ambiguous statements based on her knowledge of or participation in an investigation. *See United States v. Freeman*, 498 F.3d 893, 902–06 (9th Cir. 2007). The officer's testimony was based not just on her participation in the investigation, but on her perception as a direct participant in the conversations with Matson. *See United States v. Simas*, 937 F.2d 459, 464–65, (9th Cir. 1991) (explaining that an agent's testimony about statements made to her is "rationally based on" her perception for Federal Rule of Evidence 701 purposes, and that such testimony may also be helpful to the jury); *see also Macapagal*, 56 F.4th at 747 (concluding that an agent's testimony about the meaning of sexual terms used in conversations was permissible where the agent participated in conversations). The officer recounted her side of the conversation, just as Matson testified about his side. And the district court confined the officer's testimony to her own observations and understanding of the messages. *See United States v. Torralba-Mendia*, 784 F.3d 652, 660–61 (9th Cir. 2015) (explaining that a lay witness may testify based on her observations).

Even assuming the district court erred in admitting some portion of the officer's testimony, such error is harmless because the remaining evidence was sufficient to support a conviction, Matson testified to his own explanation of the interactions, and the Government did not emphasize the officer's interpretation in its closing argument. *See United States v. Perez*, 962 F.3d 420, 435 (9th Cir. 2020) ("Any error in admitting a lay witness's opinion is harmless so long as in light of the evidence as a whole, there was a fair assurance that the jury was not substantially swayed by the error." (internal quotation marks and citation omitted)); *Freeman*, 498 F.3d at 905–06 (concluding that improper admission of testimony was harmless in context of other evidence offered by the government and where "overwhelming portion" of testimony was proper); *cf. Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005) (explaining error was not harmless where the prosecutor "specifically emphasize[d]" improperly admitted evidence).

AFFIRMED.