No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ZACHARY SPIEGEL,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Does speech alone (even obscene speech or "explicit sex talk") constitute the "substantial step" for a charge of *attempted* enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b)?

The Eleventh Circuit in this case said "yes" and sentenced the Petitioner to a mandatory ten-year prison sentence.

On essentially the same set of facts, Judge Posner of the Seventh Circuit said "no" and entered as a matter of law a judgment of acquittal in favor of the defendant who was in the same position as the Petitioner.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

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2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, ZACHARY SPIEGEL, requests that the Court issue its writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on September 5, 2023. (A-1).[1]

D. CITATION TO OPINION BELOW

The opinion below was not reported in the Federal Reporter.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

F. STATUTORY PROVISION INVOLVED

18 U.S.C. § 2422(b) provides in relevant part that "[w]hoever . . . 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." (emphasis added).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged with *attempted* enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). As set forth in the "Defendant's Motion for Post-Verdict Judgment of Acquittal," the following facts were established during

the trial:

> On January 9, 2022, after watching YouTube videos of the television show "To Catch a Predator," A.S., a sixteen-year-old boy, decided to place a post on an internet website known as Whisper. In that post he posed as a girl looking to "hang-out." The original post indicated the girl was between 18 and twenty years old.
>
> There is no dispute as to what transpired between the Defendant and this "girl." All of their discussions and texts were admitted into evidence at trial as Government Exhibit 14. The Defendant first contacted the girl at 4:19 p.m. (pg. 1, Gov. Ex. 14). Nearly two hours later, at 6:10 p.m., the girl texted that her name was Shayla. The Defendant responded with a selfie. He then asked what she liked to do for fun. Shayla responded that she liked to smoke. The Defendant followed up with, "You like to smoke and fuck?" and Shayla answered, "I do." When Defendant suggested they get together sometime, Shayla revealed for the first time that she was fourteen years old. (pg. 3, Gov. Ex. 14). The Defendant immediately said, "Well that's a problem." He then asked Shayla the age of the oldest person she had had sex with and she responded 27.

> He asked, "How? Where?" and she replied "In their car. I met them on this app." To which the Defendant responded, "I don't think I could. Sorry."

(A-6). The Petitioner and "Shayla" continued chatting, the Petitioner asked for a photograph, and "Shayla" sent him one. At 8:30 p.m., the Petitioner asked "Shayla" "How's your evening?" and she responded "Good I'm at the movies." The Petitioner replied "Nice. Should have said something. You could have met me in the back row. (Smirking emoji)." (A-240). "Shayla" then responded that she was alone at the movies and she invited the Petitioner to join her. (A-241). The Petitioner asked when the movie would start and "Shayla" responded that it had already started, and again she said "[j]ust come." (A-241-242). But instead of agreeing to join her, the Petitioner replied "Enjoy the movie." (A-242). The conversation continued, the

two engaged in "explicit sex talk," and the Petitioner sent "Shayla" a picture of his penis. Again "Shayla" prodded and said "Come pick me up its dark and I'm scared" and "The only open building is Wing Stop I went inside because I'm scared of being out here." Finally, the Petitioner played along and said that he would drive to the theater. While at the movie theater, the boy pretending to be "Shayla" approached police officers and informed them of his communications with the Petitioner.

The Petitioner, however, never showed up at the theater, and ultimately he told "Shayla" to go home and that he had been stopped by police. (A-246).

During the trial, a law enforcement officer testified that there was no evidence that the Petitioner had been stopped by any local police that night or that he had even attempted to travel to the theater. (A-193-

196, A-208).

At the conclusion of the Government's case in chief, the Petitioner moved for a judgment of acquittal, arguing that the Government's evidence – which was based solely on "communications" – failed to establish that the Petitioner took a "substantial step" towards committing the offense. The district court denied the motion, but the district court acknowledged that "[i]t's a fairly close case, and I think the defendant has some ammunition or a good argument." (A-303). The jury subsequently returned a guilty verdict.

During the sentencing hearing, the district court conceded:

> It certainly wasn't clear that Mr. Spiegel really ever meant to act out on this . . . .

(A-382). The district court sentenced the Petitioner to ten years' imprisonment (the minimum mandatary

sentence). (A-24).

On direct appeal, the Petitioner argued that the district court erred by denying his motion for a judgment of acquittal. The Eleventh Circuit Court of Appeals rejected the Petitioner's argument, concluding that the Petitioner "took a substantial step toward causing the minor's assent *through his communications*." (A-3).

H. REASONS FOR GRANTING THE WRIT

1. There is a split of authority as to whether speech alone (even obscene speech or "explicit sex talk") can serve as the "substantial step" for a charge of *attempted* enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b).

a. The charge in this case and the requirement that the Government prove that the Petitioner took a "substantial step."

The Petitioner was charged with attempt to commit enticement of a minor to engage in sexual activity using interstate commerce, pursuant to 18 U.S.C. § 2422(b). The Government had to prove the following essential elements for this offense:

> 1) That the defendant knowingly intended to persuade, induce, or entice an individual to engage in sexual activity as charged. 2) the defendant used a cellular telephone or the internet to do so. 3) at the time the defendant believed that such individual was less than 18 years old. 4) if the sexual activity had occurred, one or more of the individuals engaging in the sexual activity could have been charged

> with the criminal offense under the law – of the law of Florida. And finally, the defendant took a *substantial step* towards committing the offense.

(A-353) (emphasis added). *See also Braxton v. United States*, 500 U.S. 344, 349 (1991) (holding that in order for a defendant to be guilty of an attempt, the defendant must intend the completed crime and must have taken a "substantial step" toward its completion); *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980) (holding that in order to constitute a "substantial step" leading to attempt liability, an actor's behavior must be "of such a nature that a reasonable observer, viewing it in context could conclude *beyond a reasonable doubt* that it was undertaken in accordance with a design to violate the statute") (emphasis added); *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001) (explaining that for an action to constitute a

"substantial step," it must "strongly corroborate[] the firmness of defendant's criminal attempt"); 2 Kevin F. O'Malley *et al.*, *Federal Jury Practice & Instructions* § 21:04 (6th ed. 2014) (providing the following standard instruction for "substantial step": "the government must prove beyond a reasonable doubt, that the mental processes of Defendant [ ] passed from the stage of thinking about the crime of [ ] to actually intending to commit that crime and that the physical process of Defendant [ ] went beyond and passed from the stage of mere preparation to some *firm, clear, and undeniable action to accomplish that intent*") (emphasis added).

b. In the opinion below, the Eleventh Circuit Court of Appeals held that "communication" alone amounts to a "substantial step."

In the opinion below, the Eleventh Circuit Court

of Appeals stated the following:

> Zachary Spiegel, proceeding with counsel, appeals his conviction for attempted enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). On appeal, he argues that the district court erred by denying his motion for a judgment of acquittal because there was insufficient evidence to show that he intended to entice a minor to engage in sexual activity and that he took a substantial step toward committing that offense. He contends that he lacked the requisite intent under § 2422(b) because he broached the topic of sex with the fictitious minor before learning she was a minor and initially indicated that he could not engage in sexual activity with her after learning her age. He also argues that he did not take a substantial step under § 2422(b) because he only had explicit sex talk with the minor and never traveled to meet her.
>
> . . . .
>
> The statute at issue here, § 2422(b), makes it unlawful to knowingly attempt to entice a minor to engage in unlawful sexual activity. To secure a conviction under § 2422(b), the

government must prove beyond a reasonable doubt that the defendant (1) had the specific intent to entice a minor to engage in unlawful sexual activity, and (2) took a substantial step toward the commission of that offense. *See* [*United States v.*] *Lee*, 603 F.3d [904,] 913-914 [(11th Cir. 2010)].

The government must prove that the defendant intended to cause assent on the part of the minor, not that he acted with specific intent to engage in the sexual activity, and that he took a substantial step toward causing assent, not toward causing actual sexual contact. *See id.* at 914. To determine whether a defendant took a substantial step under § 2422(b), we consider the totality of the defendant's actions. *See id.* at 914, 916. *We have held that a defendant's sexually solicitous communication can constitute a substantial step under § 2422(b) because the principal, if not exclusive, means of committing the offense require oral or written communications. See United States v. Rothenberg*, 610 F.3d 621, 626-627 (11th Cir. 2010). A defendant takes a substantial step when his communication crosses the line from sexual banter to criminal enticement. *See id.* at 627. Evidence that the defendant traveled to meet the minor is not necessary to sustain an attempt

> conviction under § 2422(b). *See United States v. Yost*, 479 F.3d 815, 819-820 (11th Cir. 2007).
>
> The district court did not err by denying the motion for a judgment of acquittal. The evidence was sufficient to convict under § 2422(b) because the jury could have reasonably found that Mr. Spiegel – despite not meeting with the minor – intended to cause the minor to assent to sexual activity *and that he took a substantial step toward causing the minor's assent through his communications*. *See* § 2422(b); *Lee*, 603 F.3d at 912-914. For example, after learning the minor's age, he continued to send the minor messages describing the sex acts he wanted to perform with her, sent the minor a picture of his penis, exchanged phone numbers with the minor, and made arrangements to meet her at a movie theatre. *See Lee*, 603 F.3d at 912-914; *Rothenberg*, 610 F.3d at 626-627. Indeed, the evidence here is very similar to that which we found sufficient in *Yost*, 479 F.3d at 819-820.

(A-1-4) (emphasis added). Thus, in the opinion below, the Eleventh Circuit held that "communication" alone amounts to a "substantial step."

Even if stretched in favor of the prosecution, there is nothing in the record to justify the conclusion that the communications in this case, amounted to "making arrangements to meet" at the movie theater. "Shayla" invited the Petitioner to meet "her" at the movies. The Petitioner initially declined and said "Enjoy the Movie." (A-242). After repeated prodding from "Shayla," the Petitioner relented and pretended that he was going to drive to the theater – but the record is clear that the Petitioner never took any steps to drive to the theater. (A-208). It cannot be said that the Petitioner ever met "Shayla" or ever actually intended to meet "her."

c. The Seventh Circuit Court of Appeals has held that more than "explicit sex talk" is required to establish a "substantial step" in the context of a § 2422(b) prosecution.

In *United States v. Gladish*, 536 F.3d 646 (7th

Cir. 2008), the Seventh Circuit Court of Appeals held that more than "explicit sex talk" is required to establish a "substantial step" in the context of a § 2422(b) prosecution. In *Gladish*, the defendant (1) sent sexual online messages to person he thought was a minor girl and (2) sent her a video of himself masturbating. The defendant was found guilty by a jury of violating § 2422(b), but on appeal, the Seventh Circuit reversed. In an opinion authored by Judge Posner – the Seventh Circuit discussed "the purpose of punishing unsuccessful attempts to commit crimes":

> The defendant of course did not succeed in getting "Abagail" to have sex with him, and if he had, he would not have been guilty of a completed violation of section 2422(b) because the agent who called herself "Abagail" was not a minor. The question (the only one we need answer to resolve the appeal) is whether the defendant is guilty of having attempted to get an underage girl to have sex with him. To be guilty of an attempt

you must intend the completed crime and take a "substantial step" toward its completion. But the term "substantial step" cannot be applied to a concrete case without an understanding of the purpose of punishing unsuccessful attempts to commit crimes.

In tort law, unsuccessful attempts do not give rise to liability. If you plan to shoot a person but at the last minute change your mind (and you had not threatened him, which might be actionable), you have not committed a tort. The criminal law, because it aims at taking dangerous people out of circulation before they do harm, takes a different approach. A person who demonstrates by his conduct that he has the intention and capability of committing a crime is punishable even if his plan was thwarted. The "substantial step" toward completion is the demonstration of dangerousness, and has been usefully described as "some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime." *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980); *see, e.g., United States v. Vigil*, 523 F.3d 1258, 1267-1268 (10th Cir. 2008). You are not punished just for saying that you want or even intend to kill someone, because most such talk doesn't lead to

action. You have to do something that makes it reasonably clear that had you not been interrupted or made a mistake – for example, the person you thought you were shooting was actually a clothier's manikin – you would have completed the crime. That something marks you as genuinely dangerous – a doer and not just one of the "hollow men" of T.S. Eliot's poem, incapacitated from action because

> Between the conception
> And the creation
> Between the emotion
> And the response
> Falls the Shadow.

In the usual prosecution based on a sting operation for attempting to have sex with an underage girl, the defendant after obtaining the pretend girl's consent goes to meet her and is arrested upon arrival, as in *United States v. Gagliardi*, 506 F.3d 140, 150 (2d Cir. 2007); *United States v. Coté*, [] 504 F.3d [682,] 688 [(7th Cir. 2007)]; *United States v. Spurlock*, 495 F.3d 1011, 1012-1013 (8th Cir. 2007), and *United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir. 2006). It is always possible that had the intended victim been a real girl the defendant would have gotten cold feet at the last minute and not completed the crime even though he was in position

> to do so. But there is a sufficient likelihood that he would have completed it to allow a jury to deem the visit to meet the pretend girl a substantial step toward completion, and so the visit is conduct enough to make him guilty of an attempt and not merely an intent.
>
> Travel is not a sine qua non of finding a substantial step in a section 2422(b) case. The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting. It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable. "[T]he defendant's initiation of sexual conversation, writing insistent messages, and attempting to make arrangements to meet" were described as a substantial step in *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). "Child sexual abuse is often effectuated following a period of 'grooming' and the sexualization of the relationship." Sana Loue, *"Legal and Epidemiological Aspects of Child Maltreatment*," 19 J. Legal Med. 471, 479 (1998). We won't try to give an exhaustive list of the possibilities.

Gladish, 536 F.3d at 648-649 (some citations omitted).

Ultimately, the Seventh Circuit reversed the defendant's § 2422(b) conviction because the court concluded that the "substantial step" element required more than just "explicit sex talk":

> But we disagree with the government's suggestion that the line runs between "harmless banter" and a conversation in which the defendant unmistakably proposes sex. *In all the cases cited to us by the government or found by our independent research there was more than the explicit sex talk that the government quotes from the defendant's chats with "Abagail."* The *Goetzke* decision, from which we quoted, goes the furthest in the direction of the government's position, but is distinguishable. The court noted (494 F.3d at 1235, 1237; footnote omitted) that
>
> > Goetzke made advances of a sexual nature – telling W that he was a "cute young man," suggesting an exchange of pictures, describing how he liked giving W a backrub and wanted to rub his "nice butt," advising W how to

> stimulate himself, and expressing the desire to see W naked and to "put your peter in my mouth." Redolent of the fun they had together riding horses, fishing, and being massaged, the letters were crafted to appeal to W, flatter him, impress him, and encourage him to come back to Montana "maybe this summer" when school was out, by promising the same kind of fun and a motorcycle of W's own. The letters essentially began to "groom" W for a sexual encounter in the event he returned to Montana. . . . Because of the allure of the recreational activities and the prospect of a motorcycle, the letters fit neatly within the common understanding of persuade, induce, or entice. . . . [Goetzke] sent W letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana, and

> proposed that W return during the upcoming summer. In short, Goetzke made his move. Indeed, given their prior relationship and what Goetzke knew of W and their circumstances, the most substantial steps he realistically could take were to communicate his affections and carefully-crafted incentives to W by telephone and mail, which he did.

Because Goetzke and his intended victim had a prior relationship, his effort to lure the victim back to Montana for sex could not be thought idle chatter. But the fact that the defendant in the present case said to a stranger whom he thought a young girl things like "ill suck your titties" and "ill kiss your inner thighs" and "ill let ya suck me and learn about how to do that," while not "harmless banter," did not indicate that he would travel to northern Indiana to do these things to her in person; *nor did he invite her to meet him in southern Indiana or elsewhere*. His talk and his sending her a video of himself masturbating (the basis of his unchallenged conviction for

> violating 18 U.S.C. § 1470) are equally consistent with his having intended to obtain sexual satisfaction vicariously. There is no indication that he has ever had sex with an underage girl. Indeed, since she furnished no proof of her age, he could not have been sure and may indeed have doubted that she was a girl, or even a woman. He may have thought (this is common in Internet relationships) that they were both enacting a fantasy.
>
> We are surprised that the government prosecuted him under section 2422(b). *Treating speech (even obscene speech) as the "substantial step" would abolish any requirement of a substantial step*. It would imply that if X says to Y, "I'm planning to rob a bank," X has committed the crime of attempted bank robbery, even though X says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows. So he is entitled to an acquittal on the section 2422(b) count, the effect of which will be to reduce his sentence from 13 years to 10 years.

Id. at 649-650 (emphasis added). Notably, the facts of *Gladish* are a mirror image of the facts of the

Petitioner's case.

d. The Court should resolve the following question for which the Eleventh Circuit and the Seventh Circuit are split: whether speech alone (even obscene speech or "explicit sex talk") can serve as the "substantial step" for a § 2422(b) charge.

As established above, the Eleventh Circuit and the Seventh Circuit have issued conflicting decisions regarding what quantum of evidence is required to establish the "substantial step" element of a § 2422(b) prosecution. The Eleventh Circuit in the opinion below held that the Petitioner "took a substantial step toward causing the minor's assent *through his communications*." In contrast, in an erudite, well-crafted, and persuasive opinion, the Seventh Circuit in *Gladish* held that "[t]reating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step." As explained

by the Seventh Circuit, "[t]he requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air" (i.e., "if X says to Y, 'I'm planning to rob a bank,' X has committed the crime of attempted bank robbery, *even though X says such things often and never acts*"). And as in *Gladish*, in the instant case, "hot air is all the record shows" – the Petitioner *never acted.* Ultimately, the interpretation of § 2422(b) in the Seventh Circuit resulted in an acquittal of the defendant as a matter of law – and the interpretation of the same statute on identical facts in the Eleventh Circuit resulted in a mandatory sentence of ten years' imprisonment.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to resolve the split in authority cited above. The split of authority is clear and in present need of resolution

before the split widens even more. Therefore, the Petitioner prays the Court to exercise its discretion to consider the question presented in this case. The issue in this case has the potential to impact numerous criminal cases nationwide.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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