No. _____

In the

Supreme Court of the United States

JOHN WILLIAM THOMAS FLECHS
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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Question Presented

When proving a violation of 18 U.S.C. § 2422(b) (attempted sexual enticement of a minor), must the government establish that the defendant either made or accepted a proposal for unlawful sexual activity involving the minor in order to satisfy the crime's substantial step element?

Parties to the Proceeding

Petitioner is John William Thomas Flechs.

Respondent is the United States of America.

No parties are corporations.

Related Proceedings

This case arises from the following proceedings in the U.S. District Court for the Northern District of Oklahoma and the U.S. Court of Appeals for the Tenth Circuit:

United States v. *Flechs*,
4:21-cr-00026-CVE-1 (N.D.O.K. Oct. 4, 2022)

United States v. *Flechs*,
No. 22-5088 (10th Cir. Apr. 19, 2024)

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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Opinion Below

The Tenth Circuit's opinion is reported at *United States v. Flechs*, 98 F.4th 1235 (10th Cir. 2024), and reproduced at Pet. App. A1.

Basis for Jurisdiction

The Tenth Circuit entered judgment on April 19, 2024. Pet. App. A1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provision Involved

18 U.S.C. § 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, 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.

Introduction

This case presents an important and recurring question that has split the circuits and implicates core First Amendment protections.

18 U.S.C. § 2422(b) prohibits using the internet to persuade, induce, entice, or coerce a minor to engage in any illegal sexual activity, or to attempt to do so. Because the actus reus consists merely of successful verbal persuasion, the offense can be committed (and often is committed) through speech alone. Indeed, the circuits largely agree that committing this crime doesn't require a defendant to attempt to engage in

sex with a minor, just to attempt to attain a mental state—the minor's assent to sex. And for his conduct to rise to the level of an "attempt," the defendant must take a "substantial step" towards the completed offense, *i.e.*, towards convincing the minor to agree to engage in unlawful sexual activity.

Here, the Tenth Circuit affirmed Mr. Flechs's conviction for attempted enticement even though he never once proposed or agreed to engage in sexual activity with the undercover officer posing as a minor. Other circuits have explicitly and implicitly required the substantial step element to include evidence that the defendant, at a minimum, made or accepted a sexual proposition involving the minor. Interpreting the statute in this manner prevents juries from speculating about a defendant's further designs and maintains the proper boundary between mere preparation and a firm commitment to criminality.

Resolving the question presented is also necessary to ensure that enforcement of the statute comports with the First Amendment. Since the statute's actus reus may be committed through pure speech (*e.g.*, by persuading a minor to engage in sex), it is crucial that the substantial-step line is properly drawn; miscalculating it (*i.e.*, erroneously treating a defendant's speech as a criminal attempt) will result in punishing speech that instead should have been protected by the First Amendment.

This Court should review the decision below.

Statement of the Case

1. The events underlying this case stemmed from online messages exchanged between Mr. Flechs and a police officer posing as a fourteen-year-old male

named "Mike." Mr. Flechs's messages were sexually explicit, recounting in graphic detail several sexual experiences he'd had during his childhood. However, when Mr. Flechs didn't propose that he and "Mike" engage in sexual activities together, the undercover officer did instead. But Mr. Flechs didn't accept his proposal. Several times during their four-day conversation over the internet, "Mike" propositioned Mr. Flechs for sex, and each time, Mr. Flechs declined. Indeed, every time "Mike" attempted to bait Mr. Flechs into conversing about the two of them having sex, Mr. Flechs either declined the invitation, redirected "Mike" to focus on finding someone his own age, or changed the subject.

It was also "Mike" who first suggested an in-person encounter, and each time the pair discussed meeting up—either hypothetically or concretely—Mr. Flechs made clear that he would only meet in a "very" public place, and only for innocuous activities, such as to skateboard or eat together.

After a few days of exchanging online messages, Mr. Flechs and "Mike" discussed their respective plans for the day. After Mr. Flechs mentioned that he might go get a coffee, "Mike" wasted no time and once again proposed that they engage into sex together. Once more, Mr. Flechs laughed in response and did not agree to or engage with "Mike's" proposition. A few hours later, "Mike" told Mr. Flechs that he was going to the skate park and asked if Mr. Flechs would bring him a Dr. Pepper. Mr. Flechs agreed to drop off a soda for him at the skate park but explained that he was in a rush and couldn't stay because he had to take his daughter to gymnastics class.

Mr. Flechs also went out of his way to make it clear to "Mike" that he was not agreeing to meet up for sexual activity of any kind.

Meanwhile, police arranged for a young officer to pose as "Mike," and when Mr. Flechs drove up to the skatepark with a soda in hand, police officers boxed in his vehicle and placed him under arrest.

2. The government charged Mr. Flechs with one count of attempted enticement in violation of 18 U.S.C. § 2422(b), alleging that he had attempted to persuade, induce, entice, or coerce the fake minor to engage in unlawful sexual activity.

Because Mr. Flechs never sent a single message to the purported minor proposing or agreeing to unlawful sexual activity, the government's case at trial relied solely on its theory that Mr. Flechs was "grooming" the fictional minor to someday assent to sexual activity. After the close of evidence, Mr. Flechs moved for a judgment of acquittal, which the trial court denied. The jury found Mr. Flechs guilty.

3. Mr. Flechs appealed, challenging the sufficiency of the government's substantial step evidence. A divided panel of the Tenth Circuit affirmed. The majority agreed with the government, holding that Mr. Flechs's sexually graphic messages were "enticing communications," and that he crossed the substantial-step line when he went to an in-person meeting at the skatepark. *United States v. Flechs*, 98 F.4th 1235, 1249 (10th Cir. 2024).

Judge Bacharach dissented. The dissent posited that "§ 2422(b) isn't violated by graphic messages or an arrangement to meet; the defendant must take a substan-

tial step to persuade, induce, entice, or coerce the minor to assent to a sexual activity[,]" and though the evidence showed that "Mr. Flechs might have hoped for the relationship to escalate," "a substantial step involves more than hope. Mr. Flechs not only didn't say anything to suggest a sexual encounter, but also declined to accept any of [the fake minor's] multiple proposals for sex." *Id.* at 1259.

In the dissent's view, the statute "require[s] conduct manifesting a firm commitment to persuade, induce, entice, or coerce a minor to engage in sexual activity; and that requirement necessarily entails a sexual proposal of some sort." *Id.* at 1263. For support, the dissent pointed out that no other circuit has upheld a conviction under § 2422(b) without a sexual proposal; in all of the decisions relied upon by the majority, which found the substantial step element satisfied based on "grooming" behavior and/or arrangements to meet, the defendant had also at least proposed or agreed to engage in sexual activity involving the minor. *Id.* at 1260-62. The dissent also explained the danger of the majority's position: "without requiring a sexual proposal, we are inviting future juries to speculate from 'perfectly legal behavior' about the firmness of a defendant's intent to commit a criminal act. . . . Without a sexual proposal, how will we safeguard against speculation from sex talk alone?" *Id.* at 1262.

Judge Bacharach would have reversed the conviction and retained the line between "explicit sex talk"—which is legal—and a substantial step toward committing illegal enticement—which is not—by "requir[ing] a firm commitment to persuade, induce, entice, or coerce a minor through a proposal for sexual activity." *Id.* at 1263.

Reasons for Granting the Petition

I. The Tenth Circuit's approach conflicts with that of other circuits

1. The Tenth Circuit is an outlier. As Judge Bacharach's dissent carefully catalogued, no other circuit has upheld an attempted enticement conviction without evidence that the defendant used the internet to make or accept a proposal involving sexual activity with the minor. *Flechs*, 98 F.4th at 1260-62; *see also, e.g.*, *United States v. Soler-Montalvo*, 44 F.4th 1, 9-10 (1st Cir. 2022) (defendant discussed sexual acts he wanted to perform on minor, locations to meet for sex, and using condoms together); *United States v. Brand*, 467 F.3d 179, 203 (2d Cir. 2006) (same); *United States v. Davis*, 985 F.3d 298, 309 (3d Cir. 2021) (defendant made plans with minor to meet that day to have sex); *United States v. Bailey*, 228 F.3d 637, 640 (6th Cir. 2000) (defendant proposed meeting minors to perform oral sex).

Moreover, at least three federal courts have ruled that the statute's substantial step element is not satisfied based on a defendant's graphic online discussions about sex with a purported minor without a defendant's making or accepting of a concrete proposal to engage in those sexual activities in person.

In *United States v. Gladish*, the defendant was convicted of attempted enticement after sending sexually explicit messages and a video of himself masturbating to an undercover officer posing online as a fourteen-year-old girl. 536 F.3d 646 (7th Cir. 2008). The Seventh Circuit reversed for insufficient evidence. The *Gladish* court explained that although the defendant had engaged in explicit sex talk with the fake minor—during which he graphically described specific sex acts he wanted to perform on her—he never once proposed a plan to do these things to her in person. *Id.* at 650-

51. The court reasoned that "[t]reating 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." *Id.* at 650. In other words, the Seventh Circuit reversed because the defendant never made a sufficiently concrete proposal to engage in sexual activity, and thus, hadn't demonstrated a firm commitment to persuade, induce, entice, or coerce a minor into sex.

Relying on *Gladish*, the Fifth Circuit in *United States v. Howard* held that a defendant who engaged in sexually explicit conversations and sent sexually explicit photographs and videos did not sufficiently cross "the line between despicable lawful conduct and criminal attempt[.]" 766 F.3d 414, 426 (5th Cir. 2014). Instead, the *Howard* court held, the defendant had crossed the substantial-step line only at the point in which "he instructed the undercover police officer to perform sex acts on and procure birth control for the girls to get them ready for him." *Id.*

Likewise, and also relying on *Gladish*, the Court of Appeals for the Armed Forces reversed an attempted enticement conviction in *United States v. Winckelmann*, explaining that although the defendant's conversation with a purported minor on the internet was "sexually explicit," he never proposed specific sexual plans or specifically agreed to meet up for the purpose of engaging in sexual activity. 70 M.J. 403, 408 (C.A.A.F. 2011).

These decisions cannot be reconciled with the reasoning below. The Tenth Circuit upheld the conviction notwithstanding the fact that, during his online conversations with "Mike," Mr. Flechs never made or accepted a proposal—much less a concrete proposal—to engage in an illegal sexual activity with the purported minor.

2. The decision below also splits with the other courts of appeals by treating travel as a substantial step notwithstanding the lack of a sexual proposal in the pre-meeting online messages.

When courts have treated a defendant's post-communication travel to or meetings with a minor as sufficient evidence of a substantial step, they have done so only when "the travel relates to a [sexual] plan established by the interstate communication." *United States v. Davis*, 985 F.3d 298, 305 (3d Cir. 2021). Put another way, "[a] post-enticement act like travel can constitute a substantial step in violating § 2422(b)" only if the travel "relate[s] to the defendant's enticing communications." *Id.* In such cases, unlike here, courts rely on travel as a substantial step because the defendant's "enticing communications" related to his conduct in traveling to the meeting spot—*i.e.*, the internet communications expressly discussed meeting in person *for the purpose* of engaging in sexual activity with the minor. *See Flechs*, 98 F.4th at 1259-60 (Bacharach, J., dissenting (reviewing travel cases)).

Importantly, the rationale underlying these decisions is not that meeting a minor in person necessarily suffices to prove attempted enticement in all situations. Rather, the defendant's travel sufficed to prove the substantial step element only be-

cause he had specifically expressed via the internet his desire and willingness to engage in sex with the minor. Under such circumstances, traveling to meet the minor in person is "probative" of a defendant's "attempt to achieve the mental act of assent," and thus demonstrates that he would "succeed in his persuasion, inducement, enticement, or coercion, unless interrupted by the fortuitousness of a circumstance independent from him." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007).

But where, as here, a defendant has communicated no plans or desire to engage the minor in illegal sex, an in-person meeting falls short of showing that had he "not been interrupted or made a mistake," he would have successfully gained the minor's assent to unlawful sex. *United States v. Irving*, 665 F.3d 1184, 1198 n.14 (10th Cir. 2011). As the Third Circuit has explained, "[r]equiring the substantial step to relate to the enticing communications prevents criminalizing otherwise lawful behavior and permitting improper inferences against a criminal defendant." *Davis*, 985 F.3d at 306.

The decision below thus clashes with the approach of the other circuits, as the Tenth Circuit found the substantial step evidence sufficient notwithstanding that the online communications contained no sexual proposition offered or accepted by Mr. Flechs. And requiring a sexual proposal as a baseline evidentiary requirement makes good sense; it shows that the defendant is sufficiently serious about his enticement plans to justify imposing criminal penalties, and it "safeguard[s] against speculation from sex talk alone[.]" *Flechs*, 98 F.4th at 1263 (Bacharach, J., dissenting); *see also Davis*, 985 F.3d at 306.

II. The question presented is important and recurring

1. It is vitally important for this Court to decide whether the statute's substantial step element sets a minimum threshold of conduct that requires a defendant to, at the very least, make or accept a sexual proposal involving a minor.

Lower courts agree that attempted enticement can be committed entirely online through pure speech alone, without traveling to an in-person meeting, engaging in any offline conduct, or even knowing whether the person on the other side of the virtual conversation is who they purport to be. *See, e.g.*, *United States v. Dwinells*, 508 F.3d 63, 74 (1st Cir. 2007) (affirming conviction without travel); *United States v. Nestor*, 574 F.3d 159, 161 (3d Cir. 2009) (same); *Bailey*, 228 F.3d at 639 (same); *United States v. Zawada*, 552 F.3d 531, 535 (7th Cir. 2008) (same). As a result, parsing out exactly what someone must say for their words to constitute not just a step, but a *substantial* step towards convincing a minor to engage in illegal sex is a murky task, to say the least. But precisely because the offense can be (and often is) committed with words alone, miscalculating the substantial-step line (*i.e.*, erroneously treating a defendant's speech as a criminal attempt) has greater-than-usual consequences, as it results in punishing speech that instead should have been protected by the First Amendment. In other words, courts cannot merely throw up their hands and leave the substantial-step question for the jury to sort out because falling on the wrong side of the line will, in many cases, amount to the criminalization of pure speech.

Worse still, erring on the wrong side of that line, *i.e.*, improperly treating lawful speech as an unlawful attempt, is even more troubling here because it subjects a defendant to draconian criminal sanctions. *Cf. Reno v. ACLU*, 521 U.S. 844, 872

(1997) (potential First Amendment infringements are "of special concern" when the statute at issue imposes criminal penalties, as the threat of improper enforcement "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images"). Section 2422(b) in particular imposes exceptionally harsh penalties, even for a child sex offense; a violation carries a ten-year mandatory minimum sentence and a statutory maximum of life imprisonment. 18 U.S.C. § 2422(b). Even production of child pornography, for example, imposes a statutory maximum sentence of only thirty years. 18 U.S.C. § 2251(e). Because of the severe consequences that will result from lower courts getting the substantial-step line wrong, it is especially critical for this Court to step in and provide guidance as to the minimum behavior necessary to violate the statute.

As other circuits have explicitly and implicitly recognized, requiring evidence that there was a sexual proposal of some sort avoids undue speculation about a defendant's future designs, ensures that the defendant exhibits a sufficiently firm commitment to criminality, *see Flechs*, 98 F.4th at 1262-63 (Bacharach, J., dissenting), and, in turn, thereby also avoids running afoul of the First Amendment. The Tenth Circuit's decision impermissibly eliminates these critical features of the statute's substantial step element. And without intervention from this Court, the risk that future courts will interpret the statute in a similar manner, which would subject defendants to draconian penalties for engaging in protected internet speech, is intolerably high.

2. This question is also recurring. As is clear from the sheer number of attempted enticement cases across the country that have challenged the sufficiency of

the government's evidence, the question is bound to arise again. Indeed, a review of these cases confirms that federal courts have struggled to define the precise boundaries of the offense. As a result, any future attempted enticement case could raise the question presented.

III. The case is an ideal vehicle

This case is also an ideal vehicle to address the question presented. No jurisdictional issues exist. And the facts squarely present the question of whether satisfying the substantial step element of attempted enticement necessarily requires the government to prove that the defendant, at a minimum, proposed or agreed to illegal sexual activity involving the minor. If the answer to that question is yes, then the Tenth Circuit erred in finding the evidence against Mr. Flechs sufficient and the judgment below must be vacated.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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