

24-6557
No. _____

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

Steve Rosado,
Petitioner,

vs.

United States of America,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR DENYING THE MOTTON TO DISMISS THE INDICTMENT DUE TO LACK OF PERSUASION FOR THE ATTEMPTED ENTICEMENT?

WHETHER THE GOVERNMENT OVEREXTENDED THE REACH OF THE STATUTE OF 18 U.S.C. §2422(b) WHEN IT CRIMINALIZED THE DEFENDANT'S CONDUCT?

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United States v. Rosado, 109 F.4th 120 (2d Cir. 2024)

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[/] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is 2024 U.S. App. LEXIS 18791, reported at and 109 F.4th 120 (2d Cir. 2024); or, has been designated for publication but is not yet reported; or, is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at 2021 U.S. Dist. LEXIS 105522; or, has been designated for publication but is not yet reported; or, is unpublished.

[] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or, has been designated for publication but is not yet reported; or, is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or, has been designated for publication but is not yet reported; or, is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7/30/24.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/14/24, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Due Process.

18 U.S.C. § 2422(b)

STATEMENT OF THE CASE

The appellant moved pro se for permission to file a pro se supplemental brief, and appellate counsel supplanted the requested relief before the U.S. Court of Appeals for the Second Circuit. The Circuit Court granted permission on October 19, 2022. Federal Defenders raised one claim regarding unpronounced added special conditions to the defendant's supervision. The pro se appellant raised three claims, including an appeal of the denial of his motion to dismiss the indictment (filed by counsel, Marisa Cabrera) on July 30, 2024.

The Circuit Court granted the motion in part, vacating and remanding the judgment to remove the unpronounced conditions, while affirming the conviction and sentence in both a Summary Order and a separate published decision. See *U.S. v. Rosado*, 2024 U.S. App. LEXIS 18781; *U.S. v. Rosado*, 109 F.4th 120 (2d Cir. 2024).

On October 28, 2024, Federal Defenders was granted leave to withdraw as counsel, and the appellant filed his own pro se motion for rehearing or rehearing *en banc*, raising two questions of law that would later be presented in a writ of certiorari petition. The Circuit Court denied the pro se motion on November 14, 2024.

REASONS FOR GRANTING THE WRIT

I. THE TRIAL COURT COMMITTED CLEAR ERROR IN DENYING THE MOTION TO DISMISS THE INDICTMENT DUE TO LACK OF PERSUASION FOR THE ATTEMPTED ENTICEMENT

The Petitioner argues that the lower court's decision to deny relief from a Motion to Dismiss the Indictment, pursuant to Fed. R. Crim. P. Rule 12, is contrary to U.S. Supreme Court precedent, such as *Hoke v. United States*, 227 U.S. 308 (1913). The precedent established in *Hoke* specifically defines what constitutes attempted enticement, which has been

misconstrued over a century later in *United States v. Rosado*, 109 F.4th 120 (2d Cir. 2024); see also *United States v. Rosado*, 2021 U.S. Dist. LEXIS 105572 (denying a Fed. R. Crim. P. Rule 12 motion) (21-cr-03-JSR).

In *Hoke v. United States*, the Supreme Court reviewed the charge of enticement, finding it constitutional as it criminalized knowingly persuading, inducing, and enticing any woman or girl to travel in interstate commerce for the purpose of prostitution or an illegal sexual act. See 227 U.S. at 308. In *Rosado*, the stipulated record shows that both the defendant and the undercover agent (UA) resided in New York City at the time of the arrest. Prior to meeting the UA in a bar in Lower Manhattan, the defendant had never conveyed a message or specific solicitation—directly or indirectly—to the fictional minor(s). See *United States v. Rosado*, 2021 U.S. Dist. LEXIS 10557. The U.S. District Court in *Rosado* held that merely meeting the UA in a bar in New York City was a sufficient step toward attempted enticement. See *id.*

In contrast, *Hoke v. United States* illustrated attempted enticement through Florence Baden persuading her sister Gertrude to travel to Beaumont for "prostitution work." See 227 U.S. at 325-326. Florence explicitly conveyed a specific message on behalf of Effie Hoke for prostitution work. See *id.* In *Rosado*, however, the stipulated facts lack any message indicating that the fictional minors were to perform sexual acts with the defendant for the UA's financial and/or romantic benefit. See *United States v. Rosado*, *supra*.

The U.S. District Court for the District of Columbia has held that travel alone—whether domestically or interstate—to meet an intermediary adult (or UA) is not a sufficient requisite step toward attempted enticement. See *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011) (citing Fed. R. Crim. P. Rule 12).

The U.S. Supreme Court has reviewed the denial of motions to dismiss indictments in the past based on stipulated facts, even where the defendant entered a guilty plea. See, e.g.,

Reynolds v. United States, 132 S. Ct. 975, 565 U.S. 432 (2012); *United States v. Rahimi*, 2024 U.S. LEXIS 2714, 144 S. Ct. 1884 (2024).

It has been over 37 years since Congress last amended the statute's language, making this case ripe for review. Accordingly, this Petition for a Writ of Certiorari should be granted, along with such other relief as this Supreme Court deems just and proper.

II. THE GOVERNMENT OVEREXTENDED THE REACH OF 18 U.S.C. § 2422(b) WHEN IT CRIMINALIZED THE DEFENDANT'S CONDUCT

This Petition for a Writ of Certiorari addresses the nationwide interpretation and application of 18 U.S.C. § 2422(b) by FBI agents conducting sting operations. These agents pose as single potential sexual or romantic partners on adult dating websites, adult fetish websites, and various messaging apps, later luring, enticing, and/or entrapping civilian targets into discussing the possibility of committing a [future] illegal sexual act with a minor—without ever directly communicating with a [real or fictional] minor. The Circuit Courts have held that merely agreeing with an adult (i.e., the undercover agent) to commit a future sex offense is sufficient for a conviction under § 2422(b).

The statute, however, was enacted for the specific purpose of criminalizing the solicitation of a real or fictional minor. A specific act of solicitation must occur before an individual attempts to travel (through interstate commerce) to meet the minor victim or before luring the minor to travel (across state lines) to meet the perpetrator. State law governs local sex offenses that do not involve interstate travel. The FBI has improperly stretched the reach of this statute, circumventing state jurisdiction and extending beyond the original legislative intent of 18 U.S.C. § 2422(b) attempted enticement.

In *Dubin v. United States*, 599 U.S. 131, 143 S. Ct. 1557, 1573 (2023) the Supreme Court held that a court cannot construe a criminal statute on the assumption that the Government

will use it responsibly. "To rely upon prosecutorial discretion to narrow the otherwise wide-ranging abstract statutory language places great power in the hands of the prosecutor." . The stipulated facts in *Rosado* indicate that the defendant did not:

1. Directly or indirectly convey a specific message to induce, persuade, or entice any of the [fictional] victims;
2. Travel or attempt to travel out of his state of residence for the purpose of an illegal sexual act; or
3. Transport or attempt to transport the [fictional] victims out of their state of residence for the purpose of an illegal sexual act.

At sentencing, the Government argued that federal jurisdiction was justified simply by the use of a phone. However, the defendant, the fictional victims, and the undercover agent all resided in New York City. The denied *pro se* Motion for Rehearing En Banc raised a crucial issue: *Does the use of a cellphone alone establish federal jurisdiction over a sex offense case rather than state jurisdiction where no interstate travel is involved?*

The U.S. Supreme Court in *Class v. United States*, 200 L. Ed. 2d 37 (2018) held that a guilty plea does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. The petitioner does not relinquish the right to appeal the district court's constitutional determinations simply by pleading guilty. The claims in *Class* questioned the Government's authority to criminalize the petitioner's admitted conduct, and the Supreme Court held that the petitioner could pursue constitutional claims on direct appeal. See *Class*, 583 U.S. at 174.

In this Certiorari proceeding from a direct appeal, the Supreme Court can fully examine the nationwide sting operation practices used to arrest and convict defendants unaware that they were violating a federal law—without ever traveling outside of their state's jurisdiction.

Recent examples of the Government overextending its reach through misinterpretation of federal law include precedent decisions related to the January 6 riots and the Bureau of Alcohol, Tobacco, Firearms, and Explosives' (ATF) interpretation of "machine gun" in relation to bump stocks. See, e.g., *Fischer v. United States*, 219 L. Ed. 2d 911, 141 S. Ct. 2176 (2024); *Garland v. Cargill*, 144 S. Ct. 1613, 602 U.S. 406 (2024).

Since the last amendment to § 2422(b) in 1986, the statute has not been re-examined by this Court despite the growth of internet use. For these reasons, this Petition for a Writ of Certiorari should be granted, along with such other relief as this Supreme Court deems just and proper.

CONCLUSION

A petition for a writ of certiorari should be granted.

Respectfully submitted,



Steve Rosado

Date: February 7, 2025