

No. 17-7298

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY GOODWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

JOHN P. CRONAN
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioner was convicted of attempted transportation of a minor in interstate commerce to engage in "sexual activity for which any person can be charged with a criminal offense," in violation of 18 U.S.C. 2423(a), for soliciting a minor in North Dakota to travel to Texas to engage in sexual activity. The relevant underlying "criminal offense," ibid., was attempting to engage in a sexual act with a minor, in violation of North Dakota Century Code § 12.1-20-05(2) (Supp. 2009). The questions presented are as follows:

1. Whether the court of appeals erred in rejecting petitioner's contention that the First Amendment bars North Dakota from prohibiting his solicitation from Texas of a minor in North Dakota to engage in sexual activity, on the ground that his actions also violated Texas Penal Code Annotated § 43.25(b) (West Supp. 2010), where petitioner claims that Section 43.25(b) itself violates the First Amendment.

2. Whether the court of appeals properly considered and rejected petitioner's First Amendment overbreadth challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 869 F.3d 636. The order of the district court (Pet. App. 8a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2017. A petition for rehearing was denied on September 28, 2017 (Pet. App. 7a). The petition for a writ of certiorari was filed on December 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of attempted transportation of a minor with intent to engage in sexual activity, in violation of the Mann Act, 18 U.S.C. 2423. Petitioner was sentenced to 121 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a. The court of appeals affirmed, 719 F.3d 857, and this Court denied a petition for a writ of certiorari, 134 S. Ct. 944. Petitioner subsequently filed a motion to vacate his conviction under 28 U.S.C. 2255. Pet. App. 20a-52a. The district court denied the motion, id. at 8a-19a, and the court of appeals affirmed, id. at 1a-6a.

1. In June 2010, petitioner, who was then 45 years old, began an online relationship with J.B., who was then 16. Pet. App. 2a. Many of their messages were sexual in nature, ibid., and petitioner later told “[a] Department of Homeland Security agent” that “he had every intention of being in a relationship with J.B., to include a sexual relationship,” id. at 10a (quoting United States v. Goodwin, 719 F.3d 857, 860 (8th Cir. 2013), cert. denied, 134 S. Ct. 944 (2014)) (brackets omitted). J.B. also described to petitioner the “unhappiness and abuse she was experiencing living with her grandparents.” Id. at 9a (quoting Goodwin, 719 F.3d at 859).

On J.B.'s 17th birthday, petitioner told her that they could be together in "364.25 days." Pet. App. 9a (quoting Goodwin, 719 F.3d at 859). Petitioner soon became impatient, however, and he and J.B. began planning for J.B. to travel from North Dakota to Texas to visit petitioner. Ibid. Petitioner formulated the plan for J.B.'s travels and provided her with information about the bus schedule in Bismarck, North Dakota, so that she could travel by bus to Texas. Ibid. Petitioner instructed J.B. to buy a prepaid cell phone and to obtain a debit card that he could use to send her money. Ibid. In her journal, J.B. listed details of petitioner's plan, including the items to obtain and cities at which to transfer buses. Ibid. According to J.B., the plan was that, upon J.B.'s arrival in Texas, she and petitioner would "get a meal, then go to a hotel to engage in sexual intercourse." Id. at 10a (quoting Goodwin, 719 F.3d at 860).

On Sunday, October 17, 2010, J.B. took her grandparents' car and drove to Bismarck. Pet. App. 9a. Because most local businesses were closed until noon, she could not obtain the prepaid phone or debit card in Bismarck. Ibid. Petitioner and J.B. decided that she should go to Fargo instead, and J.B. succeeded in buying the phone and debit card there. Ibid. The phone did not work, however, and J.B. told petitioner that she was returning home. Ibid.

2. In 2011, a grand jury in the District of North Dakota returned an indictment charging petitioner with knowingly attempting to transport a minor in interstate commerce to engage in illegal sexual activity, in violation of 18 U.S.C. 2423(a) and (e). Pet. App. 2a; see Indictment 1. Section 2423(a) prohibits knowingly transporting a person under the age of 18 in interstate commerce "with intent that the individual engage * * * in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. 2423(a); see also 18 U.S.C. 2423(e) (making attempted transportation for that purpose an offense subject to the same penalties).

The government identified two state-law and one federal-law criminal offenses with which petitioner could have been charged. Goodwin, 719 F.3d at 862. As relevant here, it argued that petitioner's conduct constituted an attempted violation of North Dakota Century Code § 12.1-20-05(2) (Supp. 2009), which makes it a felony for an adult who is at least 21 to engage in a sexual act with a minor who is at least 15 but under 18 years of age. Ibid.; see N.D. Cent. Code § 14-10-01 (2009) (defining "minor" as a person under 18 years of age); Pet. App. 2a. Another North Dakota statute, N.D. Cent. Code § 29-03-01.1(3) (Supp. 2009), extends that prohibition to out-of-state persons who solicit sexual contact with minors in North Dakota, providing that the persons

who are "liable to prosecution under the laws of [North Dakota]" include anyone who "[s]olicit[s], while outside th[e] state, sexual contact with a person believed to be a minor who at the time of the solicitation is located in this state." Ibid.¹

In 2012, after a jury trial, petitioner was convicted on one count of violating 18 U.S.C. 2423(a) and (e). Pet. App. 2a, 8a. The district court sentenced petitioner to 121 months of imprisonment, to be followed by five years of supervised release. Id. at 2a. Petitioner appealed, and the court of appeals affirmed. Goodwin, 719 F.3d at 859-865. It rejected petitioner's contention that, "because the conduct would have been legal in Texas," where "the legal age of consent [wa]s 17," petitioner "could not have been charged with a criminal offense." Id. at 863. The court stated that, under North Dakota Century Code § 29-03-01.1 (Supp. 2009), "[b]ecause [petitioner] solicited sexual conduct with a minor located in North Dakota, he [wa]s 'liable to prosecution under the laws' of North Dakota, including its proscription of

¹ The government also contended that petitioner could have been charged under a Texas law prohibiting possession of child pornography and a federal law, 18 U.S.C. 2251, prohibiting the production of child pornography. See Goodwin, 719 F.3d at 862-863; Gov't C.A. Br. at 30-34, Goodwin, supra (No. 12-2175). On direct appeal, the court of appeals concluded that the evidence at trial was insufficient to support petitioner's conviction under 18 U.S.C. 2423 based on those potential charges, see 719 F.3d at 862-863, and they are not at issue here.

sexual contact with a person under 18.” Goodwin, 719 F.3d at 863 (quoting N.D. Cent. Code § 29-03-01.1 (Supp. 2009)). The court also rejected petitioner’s arguments that Section 29-03-01.1(3) did not apply in these circumstances, id. at 863 n.5, and that the evidence was “insufficient to show that he attempted to ‘transport’ J.B., that the trip was for sexual activity, or that the activity could have resulted in criminal charges,” id. at 860; see id. at 860-864. Petitioner filed a petition for a writ of certiorari, which this Court denied. 134 S. Ct. 944 (2013) (No. 13-7384).

3. In 2015, petitioner filed a motion to set aside his conviction and sentence under 28 U.S.C. 2255. Pet. App. 8a. His motion challenged his conviction on three grounds. First, petitioner argued that North Dakota Century Code § 29-03-01.1(3) (Supp. 2009) -- the statute that extends criminal liability to persons outside North Dakota who solicit sexual contact with a person in North Dakota believed to be a minor -- violates the First Amendment on its face because it “subject[s] citizens of other states to criminal liability for a broad range of constitutionally protected conduct.” Pet. App. 8a. Second, petitioner contended that North Dakota Century Code §§ 12.1-20-05(2) and 29-03-01.1(3) (Supp. 2009) are unconstitutional as applied to him because they allowed him to be convicted for inviting and assisting a North Dakota citizen to travel to Texas to engage in conduct that

petitioner argued was legal in Texas. Pet. App. 8a-9a. Third, petitioner contended that he had received ineffective assistance of counsel because his attorney had failed to raise those First Amendment challenges at trial or on direct appeal. Id. at 9a; see id. at 49a-51a.²

The district court denied petitioner's motion. Pet. App. 8a-19a. It expressly rejected petitioner's "facial and as-applied challenges to [North Dakota Century Code] §§ 12.1-20-05(2) and 29-03-01.1(3)." Id. at 17a. The court first explained that petitioner's "First Amendment claims" all were "built upon the premise [that] there is a substantive due process right to engage in sexual relations with a minor * * * so long as the minor has reached the age of consent in the state where the sexual activity is to occur." Id. at 11a-12a. The court noted that petitioner had cited Lawrence v. Texas, 539 U.S. 558 (2003), in support of that position. Pet. App. 12a; see id. at 42a (petitioner's motion citing Lawrence for the proposition that "the right to engage in non-commercial, consensual activity with a person of legal age (in

² Because petitioner did not raise his First Amendment claims on direct appeal, as he acknowledges (Pet. 12-13), those claims were procedurally defaulted. See Bousley v. United States, 523 U.S. 614, 621 (1998). The government, however, did not raise procedural default in the district court, and that court and the court of appeals accordingly addressed the merits of petitioner's claims. Pet. App. 3a, 11a; see Trest v. Cain, 522 U.S. 87, 89 (1997).

the jurisdiction where the act is to be consummated) is entitled to the same constitutional protection as the right to seek an abortion"). The court rejected petitioner's premise, stating that "[t]he substantive due process right enjoyed by adult same sex couples to engage in consensual sexual activity in the privacy of their home" at issue in Lawrence "cannot be stretched to protect the type of sexual activity proposed in this case." Id. at 12a. "[T]his case," the court observed, "involves a minor," and "[m]inors, by their nature, are generally individuals who may be injured or coerced or who are situated in relationships where consent may not be easily refused." Ibid. The court further stated that, "[b]ecause [petitioner] and other similarly situated adults do not have a constitutionally protected substantive due process right to engage in sexual activity with minors, any First Amendment protection extended to the solicitations of minors for sex is severely diminished, if not eliminated." Ibid. The court accordingly rejected petitioner's "overarching argument that interstate solicitations of North Dakota minors for sex are protected under the First Amendment." Ibid.

The district court also rejected petitioner's argument that Bigelow v. Virginia, 421 U.S. 809 (1975), required according "substantial First Amendment protection" to "the interstate solicitation of minors for sex." Pet. App. 13a; see id. at

13a-15a. In Bigelow, a Virginia newspaper editor who had run an advertisement for an organization that referred women to clinics and hospitals for low-cost abortions in New York was convicted under a Virginia statute that prohibited "encourag[ing] or prompt[ing] the procuring of abortion or miscarriage," either "by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner." 421 U.S. at 812-813 (quoting Va. Code Ann. § 18.1-63 (Michie 1960)); see id. at 811-814. This Court held that the advertisement -- which also informed readers that abortions were "now legal in New York" with "no residency requirements," id. at 812 -- merited First Amendment protection because it contained factual matter of clear public interest and involved the freedom of disseminating an opinion regarding a constitutional interest, as opposed to merely proposing a commercial transaction, id. at 822. The Court further stated that a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." Id. at 824-825.

The district court concluded that Bigelow did not support petitioner's First Amendment challenge to the North Dakota law at issue in his case. Pet. App. 13a-15a. The court reasoned that "[t]he First Amendment protections bestowed upon the advertisement

in Bigelow rested primarily upon the content of the advertisement and the public's interest in being exposed to the contents." Id. at 14a. The advertisement in Bigelow, it observed, "'contained factual matter of clear public interest,'" "'disseminat[ed] an opinion,'" and "conveyed a message of 'potential interest and value to a diverse audience'" that included not only women interested in receiving abortions "but those curious or interested in differing state laws and the potential reform of Virginia state laws." Ibid. (quoting Bigelow, 421 U.S. at 822) (brackets and other internal quotation marks omitted). In contrast, the district court found "no evidence that an adult who solicits sex from a North Dakota minor wishes to editorialize on any cultural, philosophical, or political subject matter." Id. at 14a-15a. Rather, "[t]he solicitor only wishes to persuade a North Dakota minor to travel to another state (Texas) where they can engage in legal sexual relations." Id. at 15a. The court found "simply no 'substantial individual and societal interests' in the free flow of sexual solicitations of North Dakota minors." Ibid. (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 766 (1976)); see also ibid. ("Minors in North Dakota do not have the same constitutional interest in receiving these sexual solicitations as the general public did in receiving the advertisement regarding safe and legal abortions in Bigelow").

The district court additionally determined that “whatever First Amendment protection is arguably afforded to the interstate solicitation of minors for sex is outweighed by a State’s interest in exercising its police powers to protect minors from the sexual solicitations.” Pet. App. 16a; see id. at 12a-13a. The court reasoned that “[a] state has wide latitude under its police powers to regulate the activities of its minors,” id. at 15a-16a, and that North Dakota Century Code § 29-03-01.1 (Supp. 2009) “highlights North Dakota’s concern that its minors generally lack the maturity and understanding necessary to make decisions concerning sexual relationships,” Pet. App. 16a. The court concluded that “[i]t [wa]s within North Dakota’s police power to protect its minors from these types of sexual solicitations, for ‘a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.’” Ibid. (quoting Ginsberg v. New York, 390 U.S. 629, 649-650 (1968) (Stewart, J., concurring in the result)). The court further determined that petitioner’s counsel was not constitutionally deficient for failing to raise these First Amendment claims and that petitioner had suffered no prejudice from that failure. Id. at 17a-18a.

Although the district court was “confident” that its ruling was correct, Pet. App. 18a, it issued an order granting petitioner

a certificate of appealability (COA), certifying all three claims in petitioner's motion as issues for appeal, id. at 18a-19a.

4. Petitioner appealed and reasserted his as-applied challenge to North Dakota Century Code §§ 12.1-20-05(2) and 29-03-01.1(3) (Supp. 2009), his facial challenge to Section 29-03-01.1(3), and his ineffective-assistance-of-counsel claim. Pet. C.A. Br. 2-3. Following oral argument, the court of appeals directed the parties to file supplemental briefs addressing "the effect of Texas Penal Code § 43.25(b) on this case." Pet. App. 57a. Section 43.25(b) provides that "[a] person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance." Tex. Penal Code Ann. § 43.25(b) (West Supp. 2010). In his supplemental brief, petitioner argued (inter alia) that Section 43.25(b) did not apply and that it also violates the First Amendment to the extent that it applies to attempts to induce a 17-year-old to engage in sexual conduct in Texas. Pet. C.A. Supp. Br. 12-17. The government argued that Section 43.25(b) did prohibit petitioner's conduct and that it therefore provided an additional reason why his conduct was not constitutionally protected. Gov't C.A. Supp. Br. 4-10.

After receiving the parties' submissions, the court of appeals affirmed. Pet. App. 1a-6a. The court recognized that

petitioner was "challeng[ing] the North Dakota statutes both facially and as applied to him." Id. at 3a. The court explained that petitioner's theory -- that "the First Amendment prohibits North Dakota from punishing him for soliciting J.B. to travel to Texas to engage in sexual acts legal there," id. at 3a-4a -- necessarily "assume[d] that his proposed sexual activity with J.B. was 'activity that is legal in Texas,'" id. at 4a (brackets omitted). The court disagreed with that assumption and instead agreed with the government that petitioner's "attempted conduct violates Texas Penal Code § 43.25(b)." Ibid.; see id. at 4a-5a.

The court of appeals explained that Texas Penal Code Annotated § 43.25 (West Supp. 2010) prohibits inducing a minor to engage in "sexual contact, actual or simulated sexual intercourse," Pet. App. 5a (citation omitted), and that Texas courts have construed the term "induce" in that provision "to mean 'to move by persuasion or influence or to bring about by influence,'" ibid. (quoting Dornbusch v. State, 156 S.W.3d 859, 866 (Tex. Ct. App. 2005)) (other internal quotation marks omitted). The court of appeals rejected petitioner's contention that "§ 43.25(b) does not apply because other Texas statutes set the age of consent at 17," explaining that the Texas Court of Appeals had itself specifically rejected that argument in Dornbusch. Ibid. The court of appeals concluded that "§ 43.25(b) refutes [petitioner's] premise that his

'proposed sexual activity would have been legal under Texas law.'" Ibid.³

The court of appeals then addressed and rejected petitioner's contention that Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) itself violates the First Amendment. Pet. App. 5a-6a. The court explained that the First Amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute." Id. at 5a (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). The court repeated this Court's observation that "[t]he Government, of course, may punish adults who provide unsuitable materials to children, and it may enforce criminal penalties for unlawful solicitation." Id. at 6a (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 251-252 (2002)). In petitioner's case, the court of appeals concluded, "Texas has a 'compelling interest in protecting the physical and psychological well-being of minors.'" Ibid. (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). And because Section 43.25(b) validly "applie[d] to petitioner," the

³ Petitioner also argued that the government had "conceded that [petitioner's] proposed sexual activity is legal in Texas." Pet. App. 5a. The court of appeals did not address whether the government had made such a concession, explaining that it was "not bound by a party's concession of law" in any event. Ibid.

court concluded that petitioner's "argument under Bigelow and its progeny fail[ed]." Ibid.

The court of appeals also rejected petitioner's contention that he had received ineffective assistance of counsel because his attorney "fail[ed] to raise the First Amendment/Bigelow issue at trial or on appeal." Pet. App. 6a n.3. It found "no 'reasonable probability' that [his] First Amendment argument would have altered 'the result of the proceeding.'" Ibid. (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

ARGUMENT

Petitioner contends (Pet. 19-25) that the court of appeals erred by relying on Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) to reject his contention that his solicitation of a minor in North Dakota for sex was lawful in Texas without addressing his First Amendment challenge to Section 43.25(b). Petitioner additionally contends (Pet. 25-30) that the court of appeals improperly failed to address his facial First Amendment challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009), on which the district court had granted a COA. The court of appeals, however, did in fact consider both of the arguments that petitioner contends it overlooked and correctly rejected them. Its decision does not conflict with any decision of this Court or another court of appeals, and any claim of case-specific

procedural error would not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. a. Petitioner was convicted of violating a federal statute, 18 U.S.C. 2423(a) and (e), by knowingly attempting to transport a minor, J.B., in interstate commerce for the purpose of engaging in "sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. 2423(a); see Pet. App. 1a-2a. The relevant underlying criminal offense was attempting to engage in a sexual act with a minor, in violation of a North Dakota statute, N.D. Cent. Code § 12.1-20-05(2) (Supp. 2009). Pet. App. 2a. Under North Dakota law, that prohibition applies to persons outside North Dakota who knowingly solicit sexual contact with minors in North Dakota. N.D. Cent. Code § 29-03-01.1(3) (Supp. 2009). In his Section 2255 motion and in the court of appeals, petitioner did not dispute that, if North Dakota Century Code §§ 12.1-20-05(2) and 29-03-01.1(3) (Supp. 2009) were constitutionally applied to him, a violation of those provisions would constitute a sufficient predicate act to violate 18 U.S.C. 2423(a) and (e). See generally Pet. C.A. Br. 1-3, 16-34; Pet. C.A. Reply Br. 1-24; cf. United States v. Goodwin, 719 F.3d 857, 860-865 (8th Cir. 2013) (rejecting on direct appeal petitioner's arguments that the evidence was insufficient to establish a violation of 18 U.S.C. 2423(a) and (e)).

and that the jury instructions were erroneous), cert. denied, 134 S. Ct. 944 (2014).

Instead, petitioner argued below that his conviction under 18 U.S.C. 2423(a) based on conduct that violated North Dakota Century Code §§ 12.1-20-05(2) and 29-03-01.1(3) (Supp. 2009) was unconstitutional because the "First Amendment prohibits North Dakota from punishing him for soliciting J.B. to travel to Texas to engage in sexual acts legal there." Pet. App. 3a-4a; see id. at 37a-49a. The court of appeals rejected that argument because it disagreed with petitioner's premise that his conduct comported with Texas law. Id. at 4a-5a. After directing the parties to address the effect of Texas Penal Code Annotated § 43.25(b) (West Supp. 2010), the court determined that Texas law also prohibited petitioner's attempt to solicit from Texas a minor in North Dakota for sex. Pet. App. 5a.

Petitioner contends (Pet. 19-25) that the court of appeals, after having raised sua sponte the question of the effect of Texas Penal Code Annotated § 43.25(b) (West Supp. 2010), failed to consider his argument that the Texas statute itself violates the First Amendment. That is incorrect. The court of appeals considered and rejected petitioner's First Amendment challenge to Section 43.25(b). Pet. App. 5a-6a.

After determining that Section 43.25(b) applied and “refute[d] [petitioner’s] premise that his ‘proposed sexual activity would have been legal under Texas law,’” Pet. App. 5a, the court of appeals then explained why that provision comports with the First Amendment, id. at 5a-6a. The court described this Court’s precedent addressing the government’s authority to proscribe speech that is the means of committing a criminal act, including its authority to “punish adults who provide unsuitable materials to children” or who engage in “unlawful solicitation.” Id. at 6a (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 251-252 (2002)). The court of appeals then cited Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), in which this Court held that the First Amendment allows the government to “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.” Id. at 126; see Pet. App. 6a. The court of appeals concluded that Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) satisfies that test because “Texas has a ‘compelling interest in protecting the physical and psychological well-being of minors.’” Pet. App. 6a (quoting Sable Commc’ns, 492 U.S. at 126). Petitioner’s contention that the court

of appeals failed to address his constitutional challenge to Section 43.25(b) is therefore incorrect.⁴

b. To the extent petitioner challenges (Pet. 21-25) the court of appeals' conclusion that Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) does not violate the First Amendment -- an issue that is not directly encompassed within the questions presented -- that conclusion was correct. Section 43.25(b) makes it a crime to "induce[] a child younger than 18 years of age to engage in sexual conduct." Ibid. Petitioner identifies no court that has held that adults have a cognizable First Amendment interest in inducing minors to engage in sexual conduct. And as the court of appeals found, "Texas has a 'compelling interest in protecting the physical and psychological well-being of minors.'" "

⁴ Petitioner contends (Pet. 20 & n.4) that the government conceded below that the sexual contact he solicited with J.B. in Texas would have been legal under Texas law. As the government explained in the court of appeals, that is incorrect. Gov't C.A. Supp. Br. 2-3. In any event, petitioner does not contend that the court of appeals lacked discretion to consider that question and to order supplemental briefing addressing Texas Penal Code Annotated § 43.25(b) (West Supp. 2010). See United States Nat'l Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) ("[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." (citation omitted)); Pet. App. 5a. Petitioner also does not challenge in this Court the court of appeals' denial of his request to supplement the record with a declaration from a former Texas state legislator regarding Section 43.25(b). See Pet. 16-18; Pet. App. 58a-66a.

Pet. App. 6a (quoting Sable Commc'ns, 492 U.S. at 126); see New York v. Ferber, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Section 43.25(b) furthers that interest by prohibiting adults from persuading or influencing children under 18 to engage in sexual conduct.

Petitioner argues (Pet. 15, 23) that Texas Penal Code § 43.25(b) (West Supp. 2010) violates the First Amendment as applied to him because Texas has not made consensual sex with a 17-year-old itself a crime. See Tex. Penal Code Ann. § 21.11 (West Supp. 2010). But that fact does not eliminate the State's interest in preventing adults from exploiting minors for sex. Section 43.25(b) reflects a legislative determination that, even though consensual sex between an adult and a 17-year-old may not itself warrant criminal punishment, an adult's inducement of a minor into granting such consent should be proscribed. The First Amendment does not forbid Texas to seek to prevent adults from pressuring minors to engage in sexual activity by making inducement a crime merely because it chose not to criminalize consensual sexual activity itself. See Ex parte Fujisaka, 472 S.W.3d 792, 801-802

(Tex. Ct. App. 2015) (rejecting facial First Amendment challenge to Section 43.25(b)), cert. denied, 136 S. Ct. 1681 (2016).⁵

Moreover, as the Texas Court of Appeals has explained, the fact that Section 21.11 sets the age of legal consent in Texas at 17 does not represent a legislative judgment that soliciting a 17-year-old for sex poses no societal harm. Dornbusch v. State, 156 S.W.3d 859, 871 (2005). Section 21.11, that court observed, “does not legalize consensual sex with a seventeen-year-old; it merely does not allow such an act to be prosecuted as indecency with a child.” Ibid. “[S]ection 21.11 is in the part of the penal code that criminalizes offenses against persons, whereas [S]ection 43.25 is in the part of the code that criminalizes offenses against the public decency and order.” Ibid. Accordingly, the court explained, “[a] teenager’s consent to sex does not de-criminalize the adult’s conduct under [S]ection 43.25(b) because the adult’s

⁵ Petitioner observes (Pet. 24) that the Texas Court of Appeals in Fujisaka referred to “application of [S]ection 43.25(b) to the authorization or inducement of seventeen-year-old children to engage in sexual conduct or a sexual performance” as “the most problematic application of the statute.” 472 S.W.3d at 801. The court there did not conclude that application of Section 43.25(b) in these circumstances would in fact violate the First Amendment; instead, it observed only that in such circumstances speech “would not be categorically excluded from protection under the First Amendment.” Ibid. And the court proceeded to determine that, even with respect to inducement, “for the vast majority of its potential applications, [S]ection 43.25(b) does not raise issues of constitutional dimension” at all. Ibid.

conduct is a crime against the public, not against the teenager.”
Ibid.

Contrary to petitioner’s contention (Pet. 21-23), neither Bigelow v. Virginia, 421 U.S. 809 (1975), Carey v. Population Services, Int’l, 431 U.S. 678 (1977), nor Greater New Orleans Broadcasting Ass’n v. United States, 527 U.S. 173 (1999), suggests that Section 43.25(b) is unconstitutional (or that North Dakota cannot constitutionally apply its own overlapping prohibition on the same conduct). None of those decisions addressed speech restrictions that furthered a State’s interest in protecting children from sexual exploitation and abuse or another government objective of “surpassing importance.” Ferber, 458 U.S. at 757. In Bigelow, this Court concluded that Virginia’s asserted interest in restricting an advertisement for legal abortions in New York “was entitled to little, if any, weight.” 421 U.S. at 828. In Carey, the Court observed that the state officials’ reasons for prohibiting advertisements concerning contraceptives were “classically not justifications validating the suppression of expression protected

by the First Amendment.”⁶ 431 U.S. at 701. And in Greater New Orleans Broadcasting, the Court concluded that, although the government had “substantial interests” in regulating advertisements of private casino gambling, 527 U.S. at 187, the speech restrictions in that case did not directly and materially advance those interests in a narrowly tailored way, id. at 188. None of these cases supports petitioner’s contention that Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) is unconstitutional because it prohibits an adult from inducing a 17-year-old to have sex (or his overarching argument that North Dakota’s laws unconstitutionally criminalize conduct that Texas’s laws do not).

2. a. Petitioner contends (Pet. 3) that the court of appeals “refused to consider his facial challenge” to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009). See Pet. 25-30. That is incorrect. The court of appeals expressly acknowledged that petitioner was “challeng[ing] the North Dakota statutes both facially and as applied to him.” Pet. App. 3a. It then affirmed

⁶ In reaching that conclusion, the Court disagreed with the State’s contention that advertisements for contraceptive products “would legitimize sexual activity of young people,” finding that the advertisements in question did not “directly incite[] illicit sexual activity among the young” but instead “merely state[d] the availability of products and services that are not only entirely legal, but constitutionally protected.” Carey, 431 U.S. at 701 (citation omitted).

in full the district court's decision denying petitioner's Section 2255 motion. Id. at 6a.

Moreover, the court of appeals directly addressed the substance of petitioner's facial challenge. As petitioner explains (Pet. 27), his facial challenge asserted that North Dakota Century Code § 29-03-01.1(3) (Supp. 2009) "is unconstitutionally overbroad under Bigelow." He also relied on this Court's decision in Carey, Pet. C.A. Br. 30 (asserting that "§ 29-03-01.1(3) imposes criminal liability for a substantial number of communications that, under Bigelow and Carey, are protected by the First Amendment"), and he described those decisions and Greater New Orleans Broadcasting as the "[m]ost apposite cases" to his facial challenge, id. at 2. The court of appeals described the holdings of each of those decisions, Pet. App. 4a, and proceeded to conclude that petitioner's "argument under Bigelow and its progeny fail[ed]," id. at 6a; see also id. at 6a n.3 (rejecting ineffective-assistance-of-counsel claim because there was "no reasonable probability that [petitioner's] First Amendment argument would have altered the result of the proceeding" (citation and internal quotation marks omitted)).

Although the court of appeals' explanation of its First Amendment analysis focused primarily on Texas Penal Code Annotated § 43.25(b) (West Supp. 2010), its reasoning applies equally to

petitioner's facial challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009). The court explained that the First Amendment permits a State to impose criminal penalties on adults who induce or solicit minors to engage in sexual conduct -- even if that sexual conduct itself, when consensual, is legal in the State where it occurs. See Pet. App. 6a. The court thus squarely rejected the central argument in petitioner's facial challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009). Petitioner identifies nothing in the court's decision indicating that, despite expressly acknowledging his facial challenge to that provision, the court's First Amendment discussion concerned only petitioner's First Amendment challenge to Texas Penal Code Annotated § 43.25(b) (West Supp. 2010).

Petitioner's contention that the court of appeals failed to address his facial challenge therefore lacks merit. His related contention (Pet. 25) that its ruling conflicts with decisions of the Tenth Circuit holding that an appellate court in Section 2255 proceedings must review the merits of every issue included in a COA fails for the same reason. In any event, even if petitioner were correct in his view that the court of appeals silently omitted to address his facial First Amendment argument, that would at most reflect a case-specific error that does not warrant this Court's review. See Sup. Ct. R. 10. Furthermore, this case would be an

unsuitable vehicle for addressing the question petitioner raises about the adequacy of a court of appeals' discussion of arguments raised in this context. Even if petitioner were correct that the court of appeals did not specifically address his facial challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009), its opinion leaves no doubt that it would reject that challenge. Further review is not warranted.⁷

b. The court of appeals was correct to reject petitioner's facial challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009). A statute is impermissibly overbroad under the First Amendment only if it prohibits "a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 292 (2008). To ensure that invalidation for overbreadth is not "casually employed," Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999), this Court has "vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep," Williams, 553 U.S. at 292 (emphasis

⁷ Because petitioner's contentions that the court of appeals failed to adjudicate his challenge to Texas Penal Code Annotated § 43.25(b) (West Supp. 2010) and his facial challenge to North Dakota Century Code § 29-03-01.1(3) (Supp. 2009) each lack merit, his further contention (Pet. 30-31) that the combination of those purported failures constituted a violation of the Suspension Clause likewise fails.

omitted). The Court has thus stated that "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." Ferber, 458 U.S. at 771.

North Dakota Century Code § 29-03-01.1(3) (Supp. 2009) is not overbroad in that sense, let alone substantially so. Petitioner's argument rests on the premise that a State may not prohibit an adult from soliciting sexual contact with a minor unless that sexual contact is illegal. As discussed above, however, that premise is incorrect. See pp. 19-23, supra. The First Amendment allows States to prohibit efforts by adults to induce or solicit minors to engage in sexual activity, even if the adults cannot be prosecuted for the sexual activity itself. In any event, even if some applications of Section 29-03-01.1(3) impermissibly prohibited fully protected speech, petitioner has failed to show that such instances are "substantial" in relation to cases where adults solicit minors for illegal sexual conduct. Petitioner's facial-overbreadth challenge to the statute therefore lacks merit, and he does not identify any court of appeals that would sustain his challenge. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

JOHN P. CRONAN
Acting Assistant Attorney General

JENNY C. ELLICKSON
Attorney

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