No. 16-759

In the Supreme Court of the United States

RICHARD RUTGERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

ARGUMENT

1. The government's position that a defendant "induces" another person to engage in prostitution, within the meaning of 18 U.S.C. 2422(b), by accepting a solicitation by the prostitute highlights a circuit conflict that supports granting certiorari.

The government disputes the significance of the circuit conflict and argues for an expansive reading of the internet luring statute, so as to permit convictions where a defendant responds to online solicitation of sexual activity without any effort to induce, entice, persuade, or coerce another person. The government's interpretation of the statute conflicts with its plain meaning and the decisions of several circuits. This case presents an excellent vehicle to address the scope of this important federal criminal statute and to resolve the circuit conflict.

a. *The question presented.* The government's brief fails to acknowledge the question presented: whether the inducement element of 18 U.S.C. 2422 includes accepting an offer of illegal sexual activity made by a person who is already engaged in and soliciting such criminal conduct. In its decision on the sufficiency of the evidence of Section 2422(b)'s inducement element in Petitioner's case, the Eleventh Circuit did not rely on sexual conversations about a possible prostitution date, but on Petitioner's acceptance of the prostitute's terms for payment. App.

18a (explaining that Petitioner "correctly" argues "that [the prostitute's] agreement to have sex was dependent on the payment of money"; holding that "offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement within the meaning of the statute; it was *the necessary element* that would cause [the prostitute] to agree to have sex with" Petitioner) (emphasis added).

Despite the clarity of the Eleventh Circuit's decision, the government suggests that the court of appeals did not rest its sufficiency holding on evidence of an offer to pay money to a prostitute, but instead concluded that an individual's preliminary responses to solicitation, communicating to a soliciting prostitute a desire to set a prostitution date, violate the statute. BIO at 13 (arguing that "the court of appeals did not rely only on a causation theory," but also on the "initial overture," "negotiations," and discussion of the sexual conduct); *but see* BIO at 5 (government, quoting the decision below, concedes: "the question [in the court of appeals] was whether petitioner attempted to induce [the prostitute] to have sex with him, and 'offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement'") (quoting App. 18a).

The government's internally-inconsistent analysis of the Eleventh Circuit's decision does not diminish the significance of the question presented. Even if the government's strained interpretation of the Eleventh Circuit's decision were correct, the question

remains whether Section 2422's inducement requirement is met where a customer responds to a prostitute's solicitation.

If, as the government suggests, a defendant induces a person to engage in prostitution by discussing the matter with a prostitute who is already actively soliciting the defendant, the necessary element of an inducement to engage in prostitution would be rendered meaningless. Where a statute proscribes one party from inducing another party to take an action, the roles played by the parties to the transaction are essential to criminal liability. *See Abuelhawa v. United States*, 129 S.Ct. 2102 (2009) (rejecting government argument that defendant's using the telephone to make drug purchases for personal use "caused or facilitated" a dealer's drug "distributions"). The undercover prostitute's repeated solicitations set the framework for the question presented in Petitioner's case.

b. *The circuit conflict*. The government disputes that the more limited reading of Section 2422 inducement adopted by other circuits conflicts with the Eleventh Circuit's acceding-to-solicitation holding. BIO at 9–10. But in the cases cited by the government, the dispositive fact was the defendant's effort to persuade or coerce a minor to become willing to engage in sex, and the courts concluded that by inducing or creating such a willingness to have sexual relations the defendant violated the statute. In none of those cases was there an advertisement for prostitution, a

prostitute's demand for money, or the prostitute's pressure tactic that she was running a business and would suffer if the defendant failed to make a prostitution date. The cases cited by the government stand for interpreting the statute as addressing internet luring.

In *United States v. Thomas*, 410 F.3d 1235, 1246 (10th Cir. 2005), the defendant initiated a sexual conversation with a minor and used coercive persuasion to induce assent. In *United States v. Caudill*, 709 F.3d 444, 446 (5th Cir. 2013), the defendant engaged another person to persuade and coerce minors to engage in sex. In *United States v. Dhingra*, 371 F.3d 557, 559 (9th Cir. 2004), the victim's perspective was irrelevant because there was clear evidence of enticement and persuasion initiated by the defendant. The court stated: "So long as a defendant's actions constitute the act of persuading, inducing, enticing, or coercing a minor to engage in criminal sexual activity, § 2422(b) applies." *Id.* at 568. In *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007), likewise, the defendant initiated a carefully-crafted and manipulative sexual conversation, "cross[ing] the line" in doing so. The government claims there is no distinction between an advertising prostitute and "an apparently receptive minor," BIO at 9, but no other case agrees with that inapt comparison.

The government does not distinguish *United States v. Joseph*, 542 F.3d 13, 19 (2d Cir. 2008)

("making a possibility more appealing can be evidence of enticement, but [cannot] be a basis for conviction under either subsection of section 2422 in the absence of enticement"), or *United States v. Gagliardi*, 506 F.3d 140, 147–48 (2d Cir. 2007) (holding that "'persuading,' ... is criminalized, [but] 'asking,' ... is not"; "and because the statute's terms are sufficiently unambiguous, we conclude that § 2422(b) is not unconstitutionally vague or overbroad"). Contrary to the government, BIO at 15, the overbreadth analysis of *Gagliardi* is relevant to the statutory interpretation question where Section 2422 would become impermissibly overbroad if the inducement element were stripped of its plain meaning.

c. *Causation analysis of inducement element.* In Petitioner's case, the court of appeals accepted that the undercover officer was soliciting for prostitution and concluded that all Petitioner had to do to violate the statute was say that he accepted the prostitute's offer. App. 18a. But that reliance on accepting the financial demand of a prostitute as a causative inducement conflicts with the holdings of other circuits that it is not the defendant's statement of willingness that is at issue, but rather the defendant's use of persuasion or coercion to cause the *minor* to become willing. *United States v. Berg*, 640 F.3d 239, 252 (7th Cir. 2011) ("statute's focus is on the intended effect on the minor"); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) ("Congress has made a clear choice to criminalize persuasion and the attempt to persuade," not sexual activity); *United States v. Dwinells*, 508

F.3d 63, 71 (1st Cir. 2007) ("Section 2422(b) criminalizes an intentional attempt to achieve a mental state—a minor's assent—regardless of the accused's intentions" as to having sex).

The government's brief ignores that a prostitute's soliciting for prostitution constitutes engaging in prostitution— independent of and prior to any action taken by the customer to accept the solicitation. The customer's acceptance of an offer does not cause the solicitation. This critical component of inducement analysis was explained by Second Circuit in relation to a related statute barring inducing a minor to produce sexually explicit images, 18 U.S.C. 2251(a). *See United States v. Broxmeyer*, 616 F.3d 120, 125 (2d Cir. 2010) ("These are words of causation; the statute punishes the cause when it brings about the effect. *Sequence is therefore critical*. The facts of this case require us to belabor the obvious: Broxmeyer could only persuade, induce, or entice A.W. to take Photos 1 and 2 if his persuasion, inducement, or enticement came before she took them.") (emphasis added). Thus, as the Second Circuit held, absent enticement that alters the minor's assent, there is no inducement. *See United States v. Gagliardi*, 506 F.3d 140, 147–48 (2d Cir. 2007) ("The words 'attempt,' 'persuade,' 'induce,' 'entice,' or 'coerce' ... are words of common usage that have plain and ordinary meanings. ... Although ... there may be some uncertainty as to the precise demarcation between 'persuading,' which is criminalized, and 'asking,' which is not, this uncertainty is not cause for constitutional concern

because the statute's terms are sufficiently definite that ordinary people using common sense could grasp the nature of the prohibited conduct.").

The government also misreads the importance of Judge Brown's dissenting opinion in *United States v. Laureys*, 653 F.3d 27, 40 (D.C. Cir. 2011) (Brown, J., dissenting), which recognized that all of the circuits, except the Eleventh, "agree § 2422(b) requires an attempt to bend the child-victim's will." Judge Brown's opinion, on which Petitioner relies, clearly sets forth the circuit split that is confirmed also by *United States v. Hite*, 769 F.3d 1154, 1166 (D.C. Cir. 2014), where the court explained that "transforming or overcoming the minor's will ... through 'inducement,' 'persuasion,' 'enticement,' or 'coercion'" is required for a Section 2422(b) conviction.

The government disputes the extent of the Eleventh Circuit's conflict with *Hite*, in which the District of Columbia Circuit concluded that "the preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will, whether through 'inducement,' 'persuasion,' 'enticement,' or 'coercion.'" 769 F.3d at 1166. The *Hite* court explained: "Although the word 'cause' is contained within some definitions of 'induce,' cause encompasses more conduct; simply 'to cause' sexual activity with a minor does not necessarily require any effort to transform or overcome the will of the minor." *Id.* at 1166–67 (reversing based on cause standard's inclusion in jury instructions). *See United*

States v. Zagorski, 807 F.3d 291, 293 (D.C. Cir. 2015) (recognizing *Hite*'s insistence that there be evidence that the defendant sought to "transform or overcome the will of a minor").

Similarly, Section 2422(a) (the Mann Act) addresses inducing a person to be transported across state lines to engage in prostitution, not merely accepting a request by a prostitute to provide transportation. *See*, *e.g.*, *United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002). The government's dismissive reference, *see* BIO at 15, to the Mann Act—subsection (a) of the same statute Petitioner was prosecuted under—which uses the exact same language of inducement, persuasion, enticement, or coercion, is contrary to ordinary statutory interpretation canons. *Cf. Yates v. United States*, 135 S.Ct. 1074, 1081-82 (2015) (review for ambiguity includes examining "the statute as a whole"). Congress' decision to adopt the Mann Act's inducement element in Section 2422(b) helps to explain its meaning.

In discussing causation, the government asserts that an offer (really an acceptance of the prostitute's solicitation) "was a 'but-for cause' ... of her willingness to have sex with him." BIO at 14 n. 1 (quoting *Burrage v. United States*, 134 S.Ct. 881, 891–92 (2014). But the prostitute's willingness to exchange sex for money was the very premise of her backpage.com advertisement, an acknowledged fact, not something to be induced.

Wrongly disputing the extent of Petitioner's challenge to sufficiency of the evidence, the government ignores his argument that the Eleventh Circuit created a concept of causation divorced from the internet luring barred by the statute. BIO at 11. And the government errs in suggesting any part of the sufficiency argument was not preserved, where the Eleventh Circuit broke new ground in its theory that responding to a prostitution or other explicit sex solicitation constitutes luring. BIO at 12.

The government claims there was no relevant instructional error raised on appeal by Petitioner, BIO at 10, but that is both inapposite and inaccurate. First, jury instructions are independent of the sufficiency analysis. Second, Petitioner appealed the denial of his theory-of-defense instruction request that the jury be advised that one does not induce the willingness of someone who is already willingly soliciting sex by responding to the solicitation. *See* App. 28a (affirming denial of defense instruction; holding that "whether [the prostitute] was 'ready and willing' to engage in sexual activity with [Petitioner] misses the essential statutory requirement- whether [Petitioner] attempted to induce [the prostitute] by offering her a substantial sum of money to do so").[1]

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[1] The government does not address the fact that it held its target out as a prostitute who *ridiculed* Petitioner as 'all talk and no action,' which also distinguishes Petitioner's case from true luring cases.

As a matter of logic, precedent, fairness, language, and Mann Act history, comparing luring someone to become a prostitute with accepting a prostitute's advertised offer and solicitation is jarring, distorts statutory meaning, and merits the Court's review to clarify the scope of this important and frequently-employed statute.

2. The government's concession that there was no evidence of Petitioner's predisposition to commit the offense other than the undisputed record of his text-message responses to the government's sexual solicitations supports granting certiorari to review the circumstances under which evidence of predisposition is so overwhelming as to render harmless the exclusion of evidence of lack of any prior willingness to commit the offense.

Particularly given the fixed, written record of communications on which the government relies to show predisposition and the undisputed nature of the excluded evidence—that the government's own investigation of Petitioner's internet usage showed no indication of any interest in sex with minors—the harmless error issue is not fact-bound. Instead, the petition is an appropriate vehicle for consideration of the application of harmless error review to exclusion of crucial defense evidence of a lack of predisposition.

The government asserts that when Petitioner finally made a prostitution date, after more than 100 messages from the prostitute, his acceptance (or capitulation) proved his predisposition. But a case is not fact-bound—nor is acceptance of a solicitation on the third day, after receiving 100 soliciting messages, self-evidently a "ready" acceptance of the criminal offer—simply because the government argues government-favorable interpretations of the events and gives no weight to portions of an undisputed record that favor the defense.

Petitioner's case did not involve conduct inherently predatory in nature: the government's initial lure was adult escort services using photographs of an adult woman's features; the prostitute engaged in mature commercial discussions using clear, intelligent text-message protocols; Petitioner's attempt to redirect the discussion to non-sexual behavior or to end the communications was thwarted by responsive texts; and after three days of messaging, repeatedly reinitiated by the government, the prostitute scolded and belittled Petitioner for failing to agree to a date—i.e., failing to commit the offense.

These facts present important issues regarding entrapment under the Court's well-established precedent because of clear evidence that "'the criminal design originate[d] with the officials of the government, and they implant[ed] in the mind of [Petitioner]the disposition to commit the alleged

offense and induce its commission in order that they may prosecute.'" *Sherman v. United States*, 356 U.S. 369, 372 (1958) (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)).

Under *Sherman*, a defendant's innocence need not be complete—and he may already be disposed to a lesser type of criminal behavior—but Sherman's predisposition as to *abusing* drugs was not a predisposition to *sell* drugs. *Id*. at 376 ("[T]he Government plays on the weaknesses of an innocent party and beguiles him into committing *crimes which he otherwise would not have attempted*.") (emphasis added).

The government recites non-criminal conduct by Petitioner before he acquiesced and made a date that led to his arrest, primarily consisting of sex talk between the prostitute and Petitioner over a three-day period. BIO at 17. The significance of the virtual reality the government created to draw in the Petitioner contributes to the disputed jury questions, and understanding the resolution of those questions is not made easier by the government brief's omitting the content of the government-inducement side of the dialogue it initiated with Petitioner. As *United States v. Gladish*, 536 F.3d 646, 649–50 (7th Cir. 2008), points out, in virtual relationships, the target may be living a fantasy until pushed to take it to a criminal

level.[2]

The government unconvincingly asserts that "'essentially the same' [exculpatory] evidence was elicited from another detective," who investigated and found Petitioner had no interest in child pornography. BIO at 17 (quoting App. 33a). The admission of such evidence was a double-edged sword—leaving a jury to wonder if the absence of similar evidence regarding internet searches for sex with minors inculpated Petitioner. The carve-out nature of the exculpatory evidence on child pornography made the absence of such evidence regarding interest in sex with minors like the Sherlock Holmesian dog that did not bark, particularly in the context of the factors affecting jury deliberation of the fate of someone who might ultimately have become disposed to having sex with a teenage prostitute, "for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more." *United States v. Maynard*, 615 F.3d 544, 561–62 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S. 400 (2012); *see* A. Doyle, *Silver Blaze*, *in* The Complete Sherlock Holmes 335 (1927).

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[2] Being ridiculed by a 15-year-old might affect different adults differently, but falling prey to it is not overwhelming evidence of predisposition to accept a teenager's demand to bring money and stop wasting her time.

The Court should grant the petition in light of the fundamental importance of the right to present a defense to the government's case on predisposition.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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