No. 16-759

In the Supreme Court of the United States

RICHARD RUTGERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence sufficiently proved that petitioner attempted to persuade, induce, or entice a minor into engaging in prostitution or unlawful sexual activity, in violation of 18 U.S.C. 2422(b).

2. Whether the court of appeals reversibly erred in concluding that exclusion of evidence tending to support petitioner's theory that he was not predisposed to commit the charged crime was harmless in light of the overwhelming evidence of his predisposition.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 822 F.3d 1223.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2016. A petition for rehearing was denied on September 13, 2016 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on December 12, 2016. 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 Southern District of Florida, petitioner was convicted of attempting to persuade, induce, entice, or coerce a minor into engaging in prostitution or unlawful sexual activity, in violation of 18 U.S.C. 2422(b). He was sentenced to 120 months of impris-

onment, to be followed by five years of supervised release. Pet. App. 36a-38a. The court of appeals affirmed. *Id.* at 1a-35a.

1. Petitioner used an internet site frequented by prostitutes and their clients to arrange a meeting with "Amberly." Pet. App. 1a-2a. Amberly had posted an advertisement on the website, describing herself as a "sweet petite young lady" from Ft. Lauderdale, Florida, and listing her age as "99," which is code used to signify an underage girl. *Id.* at 1a, 3a. Amberly's advertisement included "typos, spelling errors, slang," and other words and symbols typically used by teenagers. *Id.* at 3a-4a. The advertisement was accompanied by photographs of a woman's stomach and legs and included an e-mail address. *Ibid.*

Petitioner responded to Amberly's post, and over a period of three days, he text-messaged or called her 114 times. Pet. App. 4a-5a, 10a, 14a. Petitioner asked Amberly to "tell [him] more about" herself; Amberly said she was "young." *Id.* at 5a. Petitioner said he was "looking for a playmate" and Amberly asked him, "are you good with a young playmate or no?" *Ibid.* Petitioner asked, "How young are you?" and Amberly wrote "im 15 bu ppl say i look older." *Ibid.* Petitioner said that that was "fine" as long as they were discreet. *Ibid.*

"Undeterred" by Amberly's age, petitioner "proceeded to arrange a meeting with Amberly where he expected to pay her for sex." Pet. App. 2a. Petitioner asked Amberly "what she liked to do and what her 'rules' were." *Id.* at 6a. He also asked her how she would get a hotel room; Amberly said she was working with an older friend. *Ibid.* Petitioner and Amberly then discussed price. *Ibid.* Petitioner asked Amberly

whether she was available for "GFE" (a "girlfriend experience"), "PSE" (a "porn star experience"), or "other extras" (*i.e.*, different fetishes), and Amberly gave him various prices for those services. *Id.* at 6a-7a. After negotiating price, petitioner asked Amberly if she enjoyed various sex acts and told her that he wanted her to enjoy the experience. *Id.* at 7a. In a different conversation, petitioner asked if he could have sex with Amberly without a condom, whether she was on birth control, and whether he could be her first date of the night "so he could get her 'fresh.'" *Id.* at 8a.

Petitioner asked Amberly to meet him in Miami. Pet. App. 8a. Amberly refused, explaining that she was 15 and could not drive. *Ibid.* Petitioner then said he would drive to Ft. Lauderdale; she gave him the address of a hotel and said she would meet him there. *Ibid.* During the one-hour drive to Ft. Lauderdale, petitioner "sent Amberly a series of text messages from the car"; those messages "showed no reluctance to have sex with a 15-year-old." *Ibid.*

When petitioner arrived at the hotel, he was arrested by the police. Pet. App. 8a. Two police officers had posed as Amberly as part of an operation targeting child predators on the internet. *Id.* at 3a, 8a. At the time of his arrest, petitioner had $400 and two condoms in his front pocket, large amounts of cash in his wallet and other pockets, and more condoms in his car. *Id.* at 10a.

After being read his *Miranda* rights, petitioner admitted that he believed Amberly was 15 years old. Pet. App. 8a-9a. When asked if he thought he was going to have a sexual encounter with her, he said he did not know what was going to happen until he got

there, but that "nine times out of ten that's what happens." *Id.* at 8a.

2. A grand jury in the United States District Court for the Southern District of Florida charged petitioner with one count of attempting to persuade, induce, entice, or coerce a minor into engaging in prostitution or unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. 2a-3a. The case proceeded to trial. *Id.* at 3a.

At trial, Detective Robert Mauro of the Ft. Lauderdale Internet Crimes Against Children Task Force explained how he and a colleague had posed as Amberly and what petitioner had said to Amberly. Pet. App. 3a-6a. He explained that he had been trained in how to sound like a child online, and that Amberly's messages appeared to have been written by a teenager. *Id.* at 4a. He also testified that by calling herself "petite" and "young" and listing her age as "99," Amberly was signaling that she was a minor. See *ibid.* Another Ft. Lauderdale police officer testified about the sting operation and petitioner's arrest. *Id.* at 10a. And an FBI special agent testified that petitioner contacted Amberly 114 times, even though Amberly "indicated that she was underage many times." *Ibid.* The agent also noted that the internet history on petitioner's phone contained hundreds of searches on escort and prostitution sites, as well as adult pornography, but no child pornography. *Ibid.*

Petitioner argued at trial that the government failed to prove that he believed Amberly was a minor and failed to prove that he intended to persuade or induce Amberly to have sex. Pet. App. 12a. He also requested and received a jury instruction on entrapment. *Ibid.*; see *id.* at 19a-20a n.1.

The jury convicted petitioner, and the district court sentenced him to 120 months of imprisonment. Pet. App. 12a.

3. The court of appeals affirmed. Pet. App. 1a-35a. The court first rejected petitioner's challenge to the sufficiency of the evidence, explaining that the evidence was ample for a jury to conclude that petitioner attempted to persuade, induce, or entice Amberly to have sex with him. *Id.* at 13a-18a. The court noted that petitioner "energetically pursued Amberly over three days in an attempt to induce her to agree on a price, terms, time, and location for a sexual encounter." *Id.* at 13a-14a. He "initiated contact with Amberly after seeing her ad" and "offered to pay a sum of money to Amberly in order to induce her to agree to have sex with him." *Id.* at 16a. "So far as [petitioner] knew," the court said, "Amberly would not agree to have sex with him without receiving payment," and so "his offer of money was a clear attempt to persuade, induce, or entice her." *Ibid.* The court also observed that petitioner "engaged in active negotiations as to price and the particular sexual activities in which he wished to engage," and he "tr[ied] to persuade Amberly that she would enjoy having sex with him." *Id.* at 16a-17a. The court rejected petitioner's argument that because he believed Amberly was a prostitute, his persuasion was unnecessary; the question was whether petitioner attempted to induce Amberly to have sex with him, and "offering or agreeing to pay money in exchange for engaging in various sex acts qualifies as inducement." *Id.* at 18a.

The court of appeals then rejected petitioner's claim that he had established the affirmative defense of entrapment as a matter of law. Pet. App. 18a-23a.

The court noted that, to establish that defense, petitioner was required to show government inducement to commit the crime and his lack of predisposition. *Id.* at 18a-19a. Because the jury was instructed on entrapment and rejected the defense, and only predisposition was contested, the court asked whether the evidence was sufficient for any reasonable jury to find predisposition. *Id.* at 20a. After reviewing all of the evidence of predisposition, the court concluded that "a variety of factors" supported the jury's conclusion, including that petitioner "had accessed numerous ads for 'young' prostitutes"; he "made the initial contact with Amberly"; he "readily proceeded to attempt to arrange a sexual encounter with her" even after she said she was 15; he "persistently pursued Amberly over three days"; he "repeatedly rescheduled his date with her after his work kept interfering"; and he "did not back out of his the meeting with Amberly" and "never expressed any hesitation about having sex with a minor." *Id.* at 21a-23a. According to the court, the government "simply provided [petitioner] with the opportunity to commit a crime" by posting the advertisement and petitioner's "ready commission of" the crime "demonstrate[d] [his] predisposition. *Id.* at 23a (quoting *Jacobson* v. *United States*, 503 U.S. 540, 550 (1992)).

Petitioner had argued that the district court should have allowed the admission of certain evidence about predisposition: specifically, Detective Mauro's testimony that he had not found any indication in his investigation that petitioner had visited websites dedicated to sex with minors. Pet. App. 29a-30a. The court of appeals concluded that the evidence should have been admitted, but also that the evidentiary

error was harmless. *Id.* at 30a. The court explained that it had "carefully review[ed] th[e] record" and found the error "plainly" harmless because, among other things, another detective presented essentially the same evidence, disclosing that a forensic search of petitioner's phone revealed no child pornography or related internet sites. *Id.* at 33a. The court noted that, not only had this evidence been introduced, but petitioner's counsel had "emphasized this testimony during closing arguments." *Ibid.* And, the court observed, petitioner introduced evidence from a private investigator showing the websites that the police uncovered in his phone's history. *Id.* at 34a. Finally, the court concluded that "whatever benefit [petitioner] may have received from Detective Mauro's testimony," it would have been "overwhelmed" by the "powerful evidence" of his predisposition to induce a minor into having sex with him. *Id.* at 34a-35a; see *id.* at 34a ("Far from hesitating after learning Amberly's tender age," petitioner "actively pursued a sexual encounter with her across several days, and exhaustively negotiated the price, terms, and conditions for various sexual activities.").

ARGUMENT

1. Petitioner renews his contention (Pet. 7-18) that the government failed to introduce sufficient evidence to support his conviction under 18 U.S.C. 2422(b). The court of appeals correctly rejected that argument, and its fact-bound assessment of the evidence in this case does not conflict with any decision of this Court or another court of appeals.

a. Section 2422(b) imposes criminal liability on a person who, through the mail or a means of interstate or foreign commerce, "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." 18 U.S.C. 2422(b). Petitioner contends (Pet. 7-18) that the government failed to establish that he intended to persuade, entice, induce, or coerce Amberly into engaging in sexual activity. He is mistaken. The court of appeals noted that the district court's jury instruction gave the terms persuade, induce, and entice their "ordinary meaning[s]," Pet. App. 15a, and it correctly concluded that "there was more than enough evidence to support the jury's finding that [petitioner] was guilty of attempting to persuade, induce, or entice Amberly to engage in prostitution with him," *id.* at 15a-16a. The court explained that petitioner had attempted to induce 15-year-old Amberly by offering to pay her for sex, actively negotiating price as well as various sexual "extras" he was interested in, and trying to convince Amberly that she would enjoy having sex with him. *Id.* at 16a-18a.

Petitioner's primary argument (Pet. 11-18) is that he did not persuade, induce, or entice Amberly because she was a prostitute. But as the court of appeals correctly explained, petitioner's offer to pay Amberly for sex violated the statutory prohibition against persuasion, inducement, or enticement "[b]y definition," because Amberly would not have agreed to have sex with petitioner without being paid. Pet. App. 16a-17a. The evidence contained "not the slightest suggestion," the court observed, that "Amberly held herself out as being willing to engage in sex acts with [petitioner] in the absence of being induced by the offer to pay her a substantial sum." *Id.* at 17a; see *id.*

at 18a. As the court explained, petitioner's belief that Amberly would have sex with anyone who paid her price "essentially gives away [his] argument," because it "assumes that her agreement to have sex was dependent on the payment of money." *Id.* at 18a.

The court of appeals' conclusion is consistent with decisions from other circuits holding that an offer to pay an apparently receptive minor qualifies as persuasion, inducement, or enticement under the statute. See, *e.g.*, *United States* v. *Caudill*, 709 F.3d 444, 445-447 (5th Cir.) (evidence sufficient when defendant offered to pay minor girls to have sex with him, emailed a picture of his genitalia, and drove to the designated hotel), cert. denied, 133 S. Ct. 2871 (2013); *United States* v. *Engle*, 676 F.3d 405, 422-423 (4th Cir.) (evidence of enticement sufficient where defendant initiated graphic communications with minor about their past sexual activity and unequivocally stated his intention to resume sexual relations), cert. denied, 133 S. Ct. 179 (2012); *United States* v. *Dwinells*, 508 F.3d 63, 72-74 (1st Cir. 2007) (evidence of inducement sufficient where defendant attempted to lure girls to his home with promises of payments, gifts, and sexual favors), cert. denied, 554 U.S. 922 (2008); *United States* v. *Gagliardi*, 506 F.3d 140, 143, 150 (2d Cir. 2007) (evidence sufficient where defendant contacted "Teen2HoT4u" on a website, offered to pay for sex after learning she was 13, described sexual acts he would engage in, and repeatedly attempted to set up a meeting); *United States* v. *Thomas*, 410 F.3d 1235, 1245-1246 (10th Cir. 2005) (evidence sufficient to show defendant took a substantial step toward commission of Section 2422(b) crime where he initiated sexual conversation with minors, suggested certain

sexual acts in crude terms, and made plans about a meeting place); *United States* v. *Dhingra*, 371 F.3d 557, 567-568 (9th Cir. 2004) (rejecting defendant's theory that a minor's sexual overtures "ameliorate[d] any inducement on his part"; so long as defendant attempted to persuade, induce, entice, or coerce, "[t]he victim's willingness to engage in sexual activity is irrelevant"); *United States* v. *Bailey*, 228 F.3d 637, 639-640 (6th Cir. 2000) (evidence of persuasion sufficient where defendant sent emails to minors proposing to perform sex acts on them), cert. denied, 532 U.S. 1009 (2001); see also *United States* v. *Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) ("[W]hen a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity.").

b. Petitioner also argues (Pet. 7-18) that the district court erred in defining the terms persuade, entice, and induce in Section 2422(b) as including causation.

Petitioner did not make any such argument below. The district court instructed the jury using dictionary definitions of the three statutory terms, and one of the three definitions included causation as part of the definition. Pet. App. 15a. Petitioner did not object to the instruction on the ground that it improperly referenced causation. To the contrary: his proposed instruction used a causation standard. See Def.'s Proposed Jury Instructions 12 & n.3 (S.D. Fla. Aug. 5, 2014) (Dkt. Entry No. 29-1) (stating that "[t]he government must prove that the defendant intended to

cause assent on the part of Detective Montgomery," and citing *United States* v. *Lee*, 603 F.3d 904, 914 (11th Cir.), cert. denied, 562 U.S. 990 (2010), in support). When the district court declined to use that part of petitioner's proposed instruction, petitioner's counsel agreed that the court should use the dictionary definitions of persuade, induce, and entice proposed by the government. See Trial Tr. 106, 107 (S.D. Fla. Aug. 27, 2014) (Defense counsel: "[T]he government proposed definitions for those words in their modified instruction, we are okay with using as well.... [C]oncerning the definitions of persuade, induce, entice, I would ask that the Government's definition that they propose be used and that it be inserted in this instruction."); see also *id.* at 111-112. The district court then used those definitions in the instruction. Pet. App. 15a, 26a n.2.

Petitioner's argument before the court of appeals was that the evidence of persuasion, enticement, or inducement was insufficient (because Amberly was a prostitute), see Pet. C.A. Br. 16-24; Pet. C.A. Reply Br. 2-9, not that the district court used the wrong legal standard. And when petitioner described the legal standard in his appellate brief, he used the formulation that he now claims is incorrect. Petitioner argued that the appropriate question was whether "the defendant intended to cause assent on the part of the minor," Pet. C.A. Br. 17 (quoting *Lee*, 603 F.3d at 914; emphasis omitted), and that persuasion, inducement, and enticement are "words of causation," *id.* at 18 (quoting *United States* v. *Broxmeyer*, 616 F.3d 120, 125 (2d Cir. 2010)). Petitioner did not argue that the Eleventh Circuit used the wrong legal standard or that the Eleventh Circuit's standard differed from

other circuits' standards. Petitioner failed to preserve the legal argument he now makes, and this Court should not consider it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioner is mistaken in contending (Pet. 7-9) that the circuits have disagreed about the meaning of the terms persuade, entice, and induce in Section 2422(b). Petitioner relies primarily (Pet. 8) on *United States* v. *Hite*, 769 F.3d 1154 (D.C. Cir. 2014), but that decision does not conflict with the decision below. The issue in *Hite* was whether communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under Section 2422(b). *Id.* at 1158. The D.C. Circuit agreed with the other courts of appeals that such communications are criminalized by the statute. *Id.* at 1160. The court then vacated and remanded based on an instructional error. The court found the jury instructions problematic because they allowed the jury to convict on proof that the defendant "intended to persuade an adult to cause a minor to engage in unlawful sexual activity" or "believed that he was communicating with someone who could arrange for the child to engage in unlawful sexual activity." *Id.* at 1166-1167 (emphases and citation omitted). In the court's view, an intermediary's causing and arranging sexual conduct with a minor does not show the necessary persuasion, inducement, or enticement of the minor. *Ibid.*

Hite does not conflict with the decision below. This case is not one about use of an intermediary to arrange sexual conduct with a minor; petitioner was communicating directly with a person he believed to be a 15-year-old girl. The instruction that *Hite* found

erroneous—which permitted conviction when the defendant intended to persuade an adult to "cause" or "arrange for" a child to engage in unlawful sexual activity—was not given here. Instead, the jury instructions here concerned a person communicating directly with someone he believed to be a minor. Although one instruction mentioned causation, see Pet. App. 15a ("[i]nduce means to stimulate the occurrence of or to cause"), petitioner did not object to that instruction. Further, the court of appeals did not rely only on a causation theory to find the evidence sufficient under Section 2422(b). Rather, the court concluded that petitioner's initial overture, his offer to pay a substantial sum of money, his active negotiations about price and sexual services, and his attempts to convince Amberly that she would like having sex with him were all ways in which petitioner attempted to persuade, entice, or induce Amberly into having sex with him. In light of that ample evidence, no reason exists to believe that the outcome would have been different if this case had arisen in the D.C. Circuit.

Petitioner's reliance (Pet. 9-10 n.2) on *United States* v. *Laureys*, 653 F.3d 27 (D.C. Cir. 2011) (per curiam), cert. denied, 565 U.S. 1132 (2012), is likewise unavailing. Like *Hite*, *Laureys* concerned a defendant's communications with an adult intermediary to arrange a sexual encounter with a minor. *Id.* at 29-30. One issue before the court was whether a jury could convict under Section 2422(b) based on evidence that the defendant attempted to persuade the adult intermediary to arrange the sexual activity with a minor. *Id.* at 32. The court did not directly decide that question because the defendant had failed to raise it below; instead, the court found no plain error because (at the

time) the adult-intermediary issue was an open one in the circuit. *Id.* at 32-33. Judge Brown dissented from that holding, taking the view that persuasion of an adult intermediary to cause a minor to have sex could not form the basis for a conviction under Section 2422(b). *Id.* at 39-42. In the course of explaining her view, Judge Brown criticized the use of the word "cause" in defining inducement. *Id.* at 40-42. But that statement, in dissent and about an issue not decided by the court, does not provide a basis for this Court's review. That is especially true because the court of appeals here concluded that petitioner actively induced Amberly's assent to have sex with him, not that he merely caused it.[1]

No other decisions petitioner cites (Pet. 7-9) demonstrate a circuit conflict about the meaning of Section 2422(b). Two of the decisions addressed the same issue as *Hite*—whether communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under Section 2422(b); although those decisions describe Section 2422(b) generally, none of them explores the meaning of the

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[1] Petitioner contends (Pet. 9) that the Eleventh Circuit defines inducement as causation, but the decisions he cites addressed the different context of a defendant communicating with an adult intermediary, not with the purported minor herself. See *Lee*, 603 F.3d at 914-915; *United States* v. *Murrell*, 368 F.3d 1283, 1287-1288 (11th Cir.), cert. denied, 543 U.S. 960 (2004).

Relying on *Burrage* v. *United States*, 134 S. Ct. 881 (2014), a case about a drug-distribution statute, petitioner contends that he cannot be convicted under Section 2422(b) even under a causation standard. See Pet. 10-11. Even if *Burrage* were relevant, petitioner's offer to pay (the fictional) Amberly a substantial sum of money, as the court of appeals found, was a "but-for cause" (*Burrage*, 134 S. Ct. at 891-892) of her willingness to have sex with him.

terms persuade, entice, or induce in any detail. See *United States* v. *Douglas*, 626 F.3d 161, 164-165 (2d Cir. 2010) (per curiam), cert. denied, 562 U.S. 1190 (2011); *United States* v. *Nestor*, 574 F.3d 159, 161-162 (3d Cir. 2009), cert. denied, 559 U.S. 951 (2010). Two decisions are about whether the evidence was sufficient to convict under Section 2422(b) under particular facts; they also are not cases about construing the statutory terms persuade, entice, and induce. See *Engle*, 676 F.3d at 421-422; *Thomas*, 410 F.3d at 1245-1246. One decision addressed a narrow instructional error not present here, see *United States* v. *Joseph*, 542 F.3d 13, 18 (2d Cir. 2008) (instruction erroneously allowed conviction based merely on defendant "ma[king] the possibility of a sexual act with him more appealing"), abrogated on other grounds by *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam); another addressed an overbreadth argument not made here, see *Gagliardi*, 506 F.3d at 147-148; and another concerned a sentence enhancement under a provision materially different from Section 2422(b), see *United States* v. *Zagorski*, 807 F.3d 291, 292, 293 (D.C. Cir. 2015).

Petitioner's reliance (Pet. 15-17) on decisions involving a different statutory provision, 18 U.S.C. 2422(a), does not demonstrate a circuit conflict about the meaning of Section 2422(b). Two of those decisions simply address whether evidence was sufficient to support a conviction in particular cases. See *United States* v. *Rashkovski*, 301 F.3d 1133, 1136-1137 (9th Cir. 2002), cert. denied, 537 U.S. 1179 (2003); see also *United States* v. *Zitlalpopoca-Hernandez*, 495 Fed. Appx. 833, 836 (9th Cir. 2012) (unpublished). The other decision addresses a double-jeopardy issue. See

United States v. *Williams*, 291 F.3d 1180, 1187 (9th Cir. 2002) (per curiam), overruled on other grounds by *United States* v. *Gonzales*, 506 F.3d 940, 942 (9th Cir. 2007). Petitioner relies (Pet. 11-18 & n.3) on these decisions to argue that he cannot be convicted under Section 2422(b) because he did no more than capitulate to a prostitute's quoted price. But that argument is belied by the evidence, and the court of appeals' rejection of petitioner's view of the facts does not implicate any disagreement in the circuits warranting this Court's review.

2. Petitioner also challenges the court of appeals' holding that the exclusion of Detective Mauro's testimony about facts assertedly bearing on petitioner's predisposition to commit the crime, while erroneous, was harmless. Pet. 18-26. That fact-bound claim lacks merit and does not warrant this Court's review.

a. The affirmative defense of entrapment has two related elements: government inducement of the crime and a lack of predisposition on the part of the defendant. See *Mathews* v. *United States*, 485 U.S. 58, 62-63 (1988). Predisposition "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Id.* at 63 (quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)). The "prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson* v. *United States*, 503 U.S. 540, 549 (1992). The courts of appeals have concluded that evidence of a defendant's ready response to a solicitation, as well as evidence of independently motivated behavior that occurs after government

solicitation begins, can demonstrate that the defendant was predisposed to commit the offense.[2]

The court of appeals correctly found strong evidence that petitioner was predisposed to commit the Section 2422(b) offense. Petitioner made the initial contact with Amberly on a website frequented by prostitutes; he "persistently pursued" her after learning that she was only 15 years old; he actively negotiated price, time, location, and rules for their sexual encounter; he said he was "okay" with her being young, so long as they were "discreet"; he tried to convince her to come to Miami, and, when Amberly declined, he drove to Ft. Lauderdale to meet her; he told authorities that, although he was not sure what would happen, "nine times out of ten" a sexual encounter occurs; and he had previously contacted "young" prostitutes online. Pet. App. 21a-23a.

Petitioner contends (Pet. 19) that the court of appeals erred in finding the error in excluding aspects of Detective Mauro's testimony harmless. But as the court explained, Detective Mauro would have testified that he had not found any indication that petitioner had visited websites dedicated to sex with minors, and "essentially the same" evidence was elicited from another detective, who testified that he had searched petitioner's phone and found no child pornography

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[2] See, *e.g.*, *United States* v. *Squillacote*, 221 F.3d 542, 565-566 (4th Cir. 2000), cert. denied, 532 U.S. 971 (2001); *United States* v. *Garcia*, 182 F.3d 1165, 1169 (10th Cir.), cert. denied, 528 U.S. 987 (1999); *United States* v. *Thickstun*, 110 F.3d 1394, 1396-1397 (9th Cir.), cert. denied, 522 U.S. 917 (1997); *United States* v. *Salerno*, 66 F.3d 544, 547-548 (2d Cir. 1995), cert. denied, 516 U.S. 1063 (1996); *United States* v. *Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994), cert. denied, 514 U.S. 1052 (1995); *United States* v. *Jones*, 976 F.2d 176, 179-180 (4th Cir. 1992), cert. denied, 508 U.S. 914 (1993).

and no evidence that petitioner had accessed child-pornography websites. Pet. App. 33a. Petitioner's counsel "emphasized this testimony during closing arguments" and buttressed it with similar testimony from a private investigator. *Id.* at 33a-34a. And "whatever benefit [petitioner] may have received from Detective Mauro's testimony would have been overwhelmed" by the evidence of his predisposition to commit the crime, including his many searches for "young" prostitutes and his active pursuit of a sexual encounter with Amberly. *Id.* at 34a-35a.

b. Petitioner suggests (Pet. 20-21) that the court of appeals used the wrong legal standard in addressing predisposition, but he did not present any such argument below. Instead, petitioner's argument was limited to the contention that the district court should have admitted Detective Mauro's testimony. Pet. C.A. Br. 31-34; Pet. C.A. Reply Br. 15-16.

Petitioner cites (Pet. 21-22) two Seventh Circuit decisions, but neither conflicts with the decision below. In *United States* v. *McGill*, 754 F.3d 452, 459-460 (7th Cir. 2014), the district court erroneously failed to give an entrapment instruction; here, the court did give such an instruction, Pet. App. 19a n.1. In *United States* v. *Gladish*, 536 F.3d 646, 650 (7th Cir. 2008), the court found the government failed to prove that a defendant took a "substantial step" toward the commission of a Section 2422(b) crime because he gave no indication that he would travel to have sex with his online correspondent, did not invite her to meet him, and did not know for sure that she was a minor. Here, petitioner took a number of steps designed to induce, and meet with, Amberly for sex, even after she repeatedly told him she was underage.

Finally, petitioner contends (Pet. 20-23) that all he did is engage in sexual "banter" online and the evidence in the record showed a "complete absence of any interest in [his having] sex with minors." The court of appeals disagreed, Pet. App. 21a-23a, 33a-34a, and petitioner's quarrel with the court of appeals' fact-bound holding does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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