No. 18-651

In the Supreme Court of the United States

JASON CRAIG MONTGOMERY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial was sufficient to enable a rational jury to find that petitioner attempted to entice or coerce a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is not reported in the Federal Reporter but is available at 2018 WL 4090610. The memoranda and orders of the district court denying petitioner's motion to dismiss the indictment (Pet. App. A32-A37), denying his motion for a judgment of acquittal (Pet. App. A38-A49), and denying his motion for a new trial (Pet. App. A50-A73) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2018. The petition for a writ of certiorari was filed on November 14, 2018. 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 Eastern District of Texas, petitioner was convicted of attempting to coerce or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. A1, A17. Petitioner was sentenced to 235 months of imprisonment, to be followed by 10 years of supervised release. *Id.* at A6, A18, A20. The court of appeals affirmed. *Id.* at A1-A16.

1. In March 2017, Federal Bureau of Investigation (FBI) Special Agent Jennifer Mullican, a member of the FBI's Child Exploitation Task Force, discovered an ad posted by petitioner on Craigslist in which petitioner "identif[ied] himself as a 'daddy' seeking 'a younger girl, 17 to 25, * * * looking for a fantasy with an older man.'" Pet. App. A2; see *id.* at A58. The ad was entitled "Have You Ever Fantasized About Daddy [performing a certain sexual act]." 7/26/17 Tr. 184. Although the ad did not specifically refer to minors under 17, Special Agent Mullican identified "flags within th[e] post that led [her] to believe that [petitioner] could be seeking a minor," 7/27/17 Tr. 38—including "the use of daddy in the title, and the fact that it said younger girl," 7/26/17 Tr. 185; see Pet. App. A2-A3; Gov't C.A. Br. 3.

Posing as a single mother who had "a child with a willingness to engage in sexual activity" and an interest in "sexual relations between a mother and daughter," Special Agent Mullican answered petitioner's ad (and an identical ad he posted five days later). Pet. App. A3. Petitioner asked the age of the (fictitious) daughter, and Special Agent Mullican responded that the daughter was ten years old. *Ibid.* Petitioner subsequently inquired whether Special Agent Mullican and her daughter had

engaged in sexual activity together; Special Agent Mullican told petitioner "she was looking 'to watch somebody be engaged in sexual activity with her child.'" *Ibid.* (brackets omitted). Special Agent Mullican asked petitioner "whether he was only interested in role play or whether he sought an encounter with a child"; petitioner responded that "he had only participated in role play before because he did not have a daughter and he had no sexual experience with children." *Ibid.*; see Gov't C.A. Br. 3-4.

Petitioner and Special Agent Mullican continued to chat via an instant-messaging application for approximately two weeks. Pet. App. A3. Special Agent Mullican "sometimes disengaged and offered [petitioner] several opportunities to leave the conversation." *Ibid.* She asked petitioner "how he knew he was interested in sex with her ten-year-old if he had no experience." *Ibid.* Petitioner "responded that he 'liked younger' and knew what he wanted." *Ibid.* (brackets omitted). Special Agent Mullican also "repeatedly reminded" petitioner that "she was not planning to participate in any sexual activity," that she "was solely interested in watching someone have sex with her daughter," and that "she was interested in more than just role play." *Id.* at A3-A4. Despite those reminders, and although petitioner "expressed knowledge that his conduct was illegal," petitioner "continued to chat with [Special Agent Mullican]." *Id.* at A4. Petitioner "described how he would engage in sexual contact with the child" and discussed "drugging the child to maintain a level of secrecy." *Ibid.* He outlined his "'ideal night'" with the girl and explained that, "for the first encounter, they would need to give the child 'sleepy medicine'" so that she would sleep "while [petitioner and Special Agent Mullican] play[ed] [with] her."

Id. at A10. Petitioner "stated he would not 'force the situation,'" "offered to give the child a trophy he won," and expressed his hope that he would not "disappoint the child." *Ibid.*; see Gov't C.A. Br. 4-6.

Petitioner and Special Agent Mullican made plans to meet in person with Special Agent Mullican's daughter. Pet. App. A4. They arranged a date and location to meet and discussed particular items that petitioner would bring to the encounter—"including sleeping pills and allergy medicine to drug the daughter," as well as alcohol, a trophy petitioner had won, condoms, and flash drives for saving pornographic images. *Ibid.*

On the appointed date, petitioner arrived at the designated location, which was supposedly Special Agent Mullican's apartment complex. Pet. App. A4. Petitioner was arrested. *Ibid.* In his pockets police found sleeping and allergy pills, and in his vehicle they found condoms, beer, two flash drives, and a trophy. *Ibid.*

2. A grand jury in the Eastern District of Texas returned an indictment charging petitioner with one count of using a facility of interstate commerce to attempt to coerce or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). See Pet. App. A32; Indictment 1.

Before trial, petitioner moved to dismiss the indictment, contending (as relevant here) that "the undisputed facts showed he did not act with the" requisite intent and "never took a substantial step corroborating his intent." Pet. App. A2 (citation and internal quotation marks omitted). The district court denied the motion, finding that "the indictment [wa]s sufficient on its face." *Id.* at A35; see *id.* at A32-A37. The court observed that petitioner "d[id] not challenge the facial validity of the indictment" and instead "contend[ed] that the undisputed

facts" were insufficient to establish the elements of the offense. *Id.* at A35. The court explained that the relevant facts were disputed and that those factual disputes should be resolved by the jury. *Ibid.*

At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal, again contending (as relevant) that the trial evidence did not establish the intent or substantial-step elements. Pet. App. A4. The district court denied the motion, and following the trial, the jury found petitioner guilty. *Id.* at A4-A5.

3. After the verdict, petitioner renewed his motion for a judgment of acquittal, and he also moved for a new trial. Pet. App. A5. Both motions (as relevant here) "raised the same grounds as those in the pre-verdict motion," contesting the sufficiency of the evidence on the intent and substantial-step elements. *Ibid.* The district court denied each motion. *Id.* at A38-A73.

Petitioner "contend[ed] that the evidence establishe[d] that he did not act with intent to transform or overcome the fictitious minor's will," on the ground that "all of his communications were with an individual who represented herself as being an adult." Pet. App. A41. The district court rejected that argument. *Id.* at A41-A43; see *id.* at A55-A59. The court observed that, "as [petitioner] concede[d], it [was] well-established" under circuit precedent "that an individual may be convicted of violating § 2422(b) by communicating with an adult intermediary." *Id.* at A41. The court reasoned that "all that is required is that the defendant take 'actions directed toward obtaining the *child's* assent through an intermediary,'" as opposed to "'the assent of the fictitious parent,'" and "a defendant can attempt to persuade, induce, entice, or coerce a minor to engage in

sexual activity by relying on a parent's influence or control over the child." *Id.* at A42 (quoting *United States* v. *Olvera*, 687 F.3d 645, 648 (5th Cir. 2012) (per curiam)) (brackets omitted). The court additionally observed that petitioner's own proposed jury instructions had not included language requiring the jury to find that petitioner had transformed or overcome the will of the minor. Pet. App. A42 n.1; see Gov't C.A. Br. 22 n.2.

The district court also rejected petitioner's contention that he could not have had the requisite intent because the intermediary (Special Agent Mullican) "presented the fictitious minor as both sexually active and willing." Pet. App. A41. The court explained that "[j]ust because a person, including a child, is sexually active and 'willing' to engage in sexual activity *generally* does not mean that such person is willing to engage in sexual acts with a *specific person*." *Id.* at A42. The court found that the "evidence admitted at trial was enough to permit a rational juror to find that [petitioner] did, in fact, intend to persuade, entice, or coerce the fictitious minor to engage in sexual activities with *him* through his communications with the intermediary." *Id.* at A42-A43. The court explained that "[t]he record is replete with communications in which [petitioner] asked the intermediary whether her fictitious minor would be interested in him and acknowledged the need to meet the minor to see if he might be 'suitable' for her," and that "the evidence established that [petitioner] was willing and planning to drug the fictitious child with 'sleepy medicine' to induce or coerce sexual activity between the two." *Id.* at A43.

Petitioner additionally contended that "there [was] no evidence that he took a substantial step corroborating his criminal intent." Pet. App. A43. The district

court rejected that argument as well. *Id.* at A43-A45, A60-A61. The court found that "the trial evidence demonstrated that [petitioner] was arrested at the apartment complex where he had arranged to meet with the intermediary and fictitious child," a location that "was nowhere near his home or place of employment." *Id.* at A43-A44; see *id.* at A36 (noting that petitioner had "concede[d]" in his motion to dismiss that "traveling to the location of a meeting scheduled for sexual activity with a fictitious minor constitutes the requisite 'substantial step'" (quoting *United States* v. *Howard*, 766 F.3d 414, 421 (5th Cir. 2014), cert. denied, 135 S. Ct. 1015 (2015)). The court further observed that petitioner "walked around the complex" to "inspect[] the premises," was carrying a sleeping pill and an allergy pill in his pockets, and had various other "items discussed in the chats" with Special Agent Mullican in his vehicle. *Id.* at A44.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A16.

The court of appeals first determined that the district court had not erred in denying petitioner's motion to dismiss. Pet. App. A6-A8. The court explained that Section 2422(b) requires proof that the defendant

> used a facility of interstate commerce to commit the offense; was aware the victim was younger than 18; by engaging in sexual activity with the victim, could have been charged with a criminal offense under state law; and knowingly persuaded, induced, enticed, or coerced the victim to engage in criminal sexual activity.

Id. at A6. The court further explained that, "[t]o sustain a conviction for attempt, the evidence must show that the defendant (1) acted with the culpability required to commit the underlying substantive offense, and (2) took

a substantial step toward its commission." *Id.* at A6 (quoting *Olvera*, 687 F.3d at 647).

The court of appeals rejected petitioner's contention that "the undisputed facts were insufficient to state a violation of § 2422(b) because it requires 'defendant's interaction with the intermediary . . . be aimed at transforming or overcoming the child's will,'" or were insufficient because petitioner had communicated only with an adult intermediary and declined Special Agent Mullican's offer to convey a message to her fictitious daughter. Pet. App. A7 (citation omitted). The court explained that a "defendant can violate the statute solely through communications with an adult where [the] defendant directs his inducements to a child, or communications with an undercover agent posing as a person with access to a child." *Ibid.* (citation omitted). The court reasoned that Section 2422(b) "require[s] only that [a] defendant take 'actions directed toward obtaining the child's assent through an intermediary'" and that a "[d]efendant can attempt to persuade, induce, entice or coerce a minor to engage in sexual activity by relying on a parent's influence or control over the child." *Id.* at A7-A8 (quoting *Olvera*, 687 F.3d at 648). The court found that "[t]he indictment alleged [petitioner's] inducements were directed at obtaining a ten-year-old child's consent to sexual activity through a Government agent he believed to be the child's mother." *Id.* at A8.

The court of appeals additionally determined that the district court did not err in denying petitioner's motions for a judgment of acquittal and for a new trial. Pet. App. A8-A11. The court of appeals rejected petitioner's contention that the trial evidence of his "intent to violate § 2422(b)" was insufficient, which was premised on the assertion that no evidence existed that petitioner had

"'direct[ed] some of his inducements to the minor'" or had "'s[ought] confirmation that the minor would engage in sexual activity.'" *Id.* at A8-A9 (citation omitted). The court explained that, to violate Section 2422(b), the "defendant's acts must target a child," but need not include direct "communication between a perpetrator and a child" or a request by the defendant to an intermediary "to convey the perpetrator's communications to a minor." *Id.* at A9 (citation omitted). The court also found that petitioner had "sought confirmation that [Special Agent Mullican's] daughter would be interested in having sex with him." *Id.* at A10. The court further determined that petitioner's "communications with the Agent evinced an intent to persuade, induce, entice, or coerce her child into sexual activity," including (*inter alia*) petitioner's statement to Special Agent Mullican "that, for the first encounter, they would need to give the child 'sleepy medicine so she will tape [sic] a nap while [they] play[ed] w [sic] her.'" *Id.* at A10 (first and last sets of brackets in original).

The court of appeals also rejected petitioner's contention that the evidence was insufficient to show that he had taken a substantial step corroborating his intent. Pet. App. A10 (citing *United States* v. *Broussard*, 669 F.3d 537, 547 (5th Cir. 2012)). The court observed that it had "routinely held conduct like [petitioner's]"—which included communication with an adult intermediary to plan a sexual encounter with a minor and traveling to the designated meeting place—"constitutes a substantial step toward committing a violation of § 2422(b)." *Id.* at A10-A11.

ARGUMENT

Petitioner contends (Pet. 14-22) that the trial evidence was insufficient to establish that he intended to coerce or entice a minor to engage in unlawful sexual

activity in violation of 18 U.S.C. 2422(b), or that he took a substantial step toward a violation of that provision.* The court of appeals correctly rejected those contentions, and its unpublished decision does not conflict with any decision of this Court or of another court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari raising substantially similar questions regarding the scope of Section 2422(b). See *Brooks* v. *United States*, 139 S. Ct. 323 (2018) (No. 18-5164); *Grafton* v. *United States*, 138 S. Ct. 2651 (2018) (No. 17-7773); *Matlack* v. *United States*, 137 S. Ct. 2293 (2017) (No. 16-7986); *Rutgerson* v. *United States*, 137 S. Ct. 2158 (2017) (No. 16-759); *Reddy* v. *United States*, 135 S. Ct. 869 (2014) (No. 14-5191) (plain-error posture). It should follow the same course here.

1. 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). As the courts of appeals have unanimously recognized, this provision may be violated where a defendant communicates with an adult intermediary instead of with the minor directly, so long as the defendant acts with

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* Petitioner also argued below that the indictment should have been dismissed. Pet. App. A6. The district court rejected that contention, finding that "the indictment [wa]s sufficient on its face" and explaining that petitioner "d[id] not challenge the facial validity of the indictment," but instead contended that the "undisputed facts of the case establish that he lacked" the requisite intent. *Id.* at A35; see *id.* at A35-A37. The court of appeals affirmed that determination, *id.* at A6-A8, and in this Court, his arguments concern the sufficiency of the evidence at trial, not the adequacy of the indictment.

the requisite intent. See *United States* v. *Roman*, 795 F.3d 511, 516 (6th Cir. 2015) (collecting cases); see also, *e.g.*, *United States* v. *Clarke*, 842 F.3d 288, 298 (4th Cir. 2016); *United States* v. *Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014). Petitioner acknowledged as much in the district court, see Pet. App. A41, and he does not appear to argue otherwise in this Court.

Petitioner was convicted of an attempted violation of Section 2422(b). Pet. App. A1. As the court of appeals explained, and petitioner does not dispute, the key elements of a Section 2422(b) attempt offense are (1) intent to commit a violation of that provision and (2) taking a substantial step towards the violation. *Id.* at A6; accord, *e.g.*, *Hite*, 769 F.3d at 1162. The district court's instructions to the jury, which petitioner does not challenge, instructed that the government was required to prove (*inter alia*) that petitioner "intended to persuade induce, entice, or coerce [an] individual" who he "believed * * * was less than 18 years of age * * * to engage in some form of unlawful sexual activity with [petitioner] and knowingly took some action that was a substantial step toward bringing it about." 7/27/17 Tr. 144-145. The jury, so instructed, found petitioner guilty.

2. Petitioner contends (Pet. 16-19) that the evidence was insufficient to establish that he acted with the intent to violate Section 2422(b). The court of appeals correctly rejected that contention, Pet. App. A9-A10, and its decision does not warrant further review.

a. As the court of appeals explained, petitioner's "communications with [Special Agent Mullican] evinced an intent to persuade, induce, entice, or coerce her child into sexual activity." Pet. App. A10. Petitioner expressly stated his plan to drug Special Agent Mullican's fictitious daughter to facilitate sexual contact, telling Special

Agent Mullican "that, for the first encounter, they would need to give the child 'sleepy medicine'" so that the child would "nap while [they] play[ed] w[ith] her." *Ibid.* Other statements made by petitioner reflected his intent to entice Special Agent Mullican's daughter to engage in sexual activity with him. For example, petitioner "sought confirmation that the Agent's daughter would be interested in having sex with him, and asked the Agent to explain why she thought her daughter would be interested in him." *Ibid.* Petitioner also "offered to give the child a trophy he won," having been "advised that [the minor] would be upset if he did not bring a gift." *Id.* at A10, A61. And petitioner stated that "he would not 'force the situation'" and that "he would hate to disappoint the child." *Id.* at A10. Based on that evidence, the court correctly determined that a rational jury could have found that petitioner "possessed the requisite intent to violate § 2422(b)." *Ibid.*

Petitioner contends (Pet. 16) that he "lacked the requisite intent" because Special Agent Mullican "presented the fictitious minor as both sexually active and willing" and "conveyed a desire * * * to witness the fictitious minor engage in sexual activities with" petitioner. Petitioner argues (*ibid.*) that he "was presented with a minor whose will he need not transform or overcome" and that his mere "agreement to possible future sexual activity with a willing minor" did not "alter[] the level of willingness already expressed." As the court of appeals determined, however, a rational jury could reach a contrary conclusion based on the evidence of petitioner's conduct—including his plans to drug the minor so that he could engage in sexual activity with her, and to bring her a gift to avoid upsetting her. See Pet. App. A10. That factbound assessment of the trial evidence in this

particular case does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

b. Petitioner contends (Pet. 14-16) that review is warranted to resolve a conflict among the courts of appeals concerning the intent required for a conviction of an attempted violation of Section 2422(b). That contention lacks merit.

Petitioner observes that other courts of appeals have described Section 2422(b) as requiring an intent to bring about a "'mental state'" by "obtaining the assent of" a minor to engage in sexual activity. Pet. 14 (citation and emphasis omitted); see Pet. 14-15 (citing *United States* v. *Engle*, 676 F.3d 405, 419 (4th Cir.) (describing Section 2442(b) as "criminaliz[ing] an intentional attempt to achieve a mental state—a minor's assent—regardless of the accused's intentions concerning the actual consummation of sexual activities with the minor" (brackets and citation omitted)), cert. denied, 568 U.S. 850 (2012); *United States* v. *Douglas*, 626 F.3d 161, 164 (2d Cir. 2010) (per curiam) (similar), cert. denied, 562 U.S. 1190 (2011); *United States* v. *Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) (similar), cert. denied, 554 U.S. 922 (2008); *United States* v. *Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) (similar); *United States* v. *Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (similar), cert. denied, 532 U.S. 1009 (2001); and *United States* v. *Nestor*, 574 F.3d 159, 162 n.4 (3d Cir. 2009) (defining "persuade" in context of Section 2422(b)), cert. denied, 559 U.S. 951 (2010)). The decision below, however, likewise construed Section 2422(b) to require that, where a defendant communicates only with an intermediary, his actions must have been "directed toward obtaining the child's assent." Pet. App.

A7 (quoting *United States* v. *Olvera*, 687 F.3d 645, 648 (5th Cir. 2012)).

Petitioner asserts (Pet. 14-15) that the decision below is inconsistent with the D.C. Circuit's decision in *Hite*, *supra*, which stated 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.'" Pet. 14 (quoting *Hite*, 769 F.3d at 1167). That assertion is incorrect. In *Hite*, the D.C. Circuit addressed whether communications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under Section 2422(b). 769 F.3d at 1158. The court agreed with the Fifth Circuit and other courts of appeals that such communications are punishable under Section 2422(b). *Id.* at 1160 (citing, *inter alia*, *United States* v. *Caudill*, 709 F.3d 444 (5th Cir.), cert. denied, 570 U.S. 924 (2013)). And its conclusion that the jury instructions in that case were erroneous, *id.* at 1166-1167, does not conflict with the court of appeals' decision in this case.

The court in *Hite* indicated that an instruction permitting a guilty verdict on proof that the defendant "intended to persuade an adult to cause a minor to engage in unlawful sexual activity"—an instruction that contained no reference to influencing the minor's own assent—was problematic. 769 F.3d at 1166 (citation and emphasis omitted). The court reasoned that, "[a]lthough the word 'cause' is contained within some definitions of 'induce,' cause encompasses more conduct" and does "not necessarily require" what the court deemed "the preeminent characteristic" of conduct prohibited by Section 2422(b): an "effort to transform or overcome the will of the minor." *Id.* at 1167. But the court did not state that this particular instruction would be reversible

error standing alone. Rather, the panel also focused on a separate instruction that authorized a finding of guilt upon proof that the defendant "believed that he was communicating with someone who could *arrange* for the child to engage in unlawful sexual activity." *Ibid.* (citation omitted). That language—which again did not refer to the minor's own assent—was erroneous, the D.C. Circuit reasoned, because "'arrange' means to 'put (things) in a neat, attractive, or required order' or to 'organize or make plans for (a future event),'" and thus did not require showing that the defendant attempted to bring about a particular mental state (*i.e.*, assent) in a minor. *Ibid.* (citation omitted).

Hite does not conflict with the decision below. Unlike the defendant in *Hite*, 769 F.3d at 1160, 1166-1167, petitioner does not challenge the legal validity of the jury instructions concerning the elements of Section 2422(b). As the district court observed, petitioner's proposed instruction did not include language requiring the jury to find that petitioner intended to transform or overcome the will of the minor. Pet. App. A42 n.1. Moreover, both courts of appeals agree that Section 2422(b) requires an attempt to "obtain[ ] the child's assent." *Id.* at A7 (citation omitted); see *Hite*, 769 F.3d at 1164 (Section 2422(b) "criminalizes an intentional attempt to achieve a mental state—a minor's assent" (citation and emphasis omitted)). And although *Hite* used a different linguistic formulation to describe the requisite intent of the defendant to affect the minor's mental state—"transform or overcome the will of the minor," *Hite*, 769 F.3d at 1167, as compared to "obtaining the child's assent," Pet. App. A7 (citation omitted)—it is far from

clear that it would find the formulation here problematic or that the formulations differ in a meaningful or practical way that would warrant this Court's review.

3. Petitioner additionally argues (Pet. 19-22) that the trial evidence was insufficient to establish that he took a substantial step toward a violation of Section 2422(b). The court of appeals also correctly rejected that contention, Pet. App. A10-A11, and its determination does not warrant further review.

a. As the court of appeals explained, "[a] substantial step is defined as conduct which strongly corroborates the firmness of defendant's criminal attempt." Pet. App. A10 (quoting *United States* v. *Broussard*, 669 F.3d 537, 547 (5th Cir. 2012)). Applying that definition, the court correctly determined that the evidence was sufficient to show that petitioner took a substantial step toward enticing or coercing Special Agent Mullican's fictitious daughter to engage in unlawful sexual activity. *Id.* at A10-A11. Beyond his extensive communications with Special Agent Mullican to arrange the planned encounter, petitioner traveled to the appointed location and brought with him sleeping pills and allergy medicine, which petitioner had explained to Special Agent Mullican would be needed to drug her daughter. *Id.* at A4, A10. Petitioner also brought a gift for the daughter —which he had discussed with Special Agent Mullican, who had advised petitioner that her daughter "would be upset" if petitioner did not "bring a gift," *id.* at A44—as well as condoms, alcohol, and flash drives for saving pornographic images of the daughter, *id.* at A4.

Petitioner contends (Pet. 20, 22) that neither "arranging to meet" with a person one believes to be a minor nor "traveling to meet a minor" is a substantial step toward a Section 2422(b) violation and that the district

court below erred by treating petitioner's "travel to meet the fictitious minor" as constituting a "substantial step." The district court determined, however, that the government had presented extensive additional evidence beyond petitioner's arranging the encounter and his travel to the apartment complex that constituted a substantial step. See Pet. App. A44. For example, as petitioner had discussed with Special Agent Mullican, he brought with him medication he intended to use to drug the minor so that he could engage in sexual activity with her. See *ibid.* Although the court of appeals observed that it had previously deemed travel to a meeting place to constitute a substantial step, *id.* at A11, it did not rest its affirmance on travel alone. It instead explained that "conduct like" petitioner's conduct in this case "constitutes a substantial step toward committing a violation of § 2422(b)," comparing it to other cases where defendants engaged in additional conduct beyond traveling to the arranged meeting place, such as online communications with intermediaries. *Id.* at A10-A11.

b. Petitioner contends (Pet. 19-21) that review is warranted to resolve a conflict between the Fifth Circuit in this case and the D.C. Circuit in *Hite*, *supra*, concerning the conduct necessary to establish a substantial step toward a violation of Section 2422(b). That contention lacks merit. Similar to the court of appeals here, Pet. App. A10, the court in *Hite* explained that "[t]he 'substantial step' required to prove an attempt under § 2422(b) must * * * strongly corroborate the defendant's intent to engage in conduct that is designed to persuade, induce, entice, or coerce the minor by way of the intermediary." 769 F.3d at 1164. It also cited approvingly decisions of other circuits that had held that a defendant had engaged

in a substantial step toward a violation of Section 2422(b) by interacting with a purported parent or other adult who had influence and control over a minor. See *id.* at 1162 (citing *United States* v. *Lee*, 603 F.3d 904, 915 (11th Cir.), cert. denied, 562 U.S. 990 (2010), and *United States* v. *Spurlock*, 495 F.3d 1011, 1014 (8th Cir.), cert. denied, 552 U.S. 1054 (2007)).

The D.C. Circuit in *Hite* declined to address whether the evidence in that case was sufficient to establish a substantial step. See 769 F.3d at 1166. As the court explained, the defendant challenged the sufficiency of the evidence of a substantial step only in connection with his contention that Section 2422(b) "requires direct communication with a minor" and does not extend to communication with an intermediary. *Ibid.* Because the court rejected that statutory argument, the defendant's contention that the evidence was insufficient because it did not establish direct communication with a minor "necessarily fail[ed]" as well. *Ibid.*

Petitioner suggests (Pet. 20-21) that the decision below is inconsistent with a district-court decision cited in *Hite*, *supra*, in which the court stated that "[t]ravel * * * is not sufficient to establish a substantial step." *United States* v. *Nitschke*, 843 F. Supp. 2d 4, 15 (D.D.C. 2011). Any inconsistency with that district-court decision would not warrant this Court's review. Cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (citation omitted)). In any event, as the court of appeals recognized, Pet. App. A10-A11, the evidence of petitioner's conduct entails much more than merely traveling to the appointed place. See pp. 6-9, 16-17, *supra*.

4. Even assuming the questions petitioner raises otherwise warranted this Court's review, this case would be an unsuitable vehicle in which to address them, because they would not affect the outcome. Even under the intent standard as articulated by petitioner—"intent to transform or overcome the fictitious minor's will," Pet. 16—the evidence of intent was sufficient. Petitioner's expressly stated intention to drug Special Agent Mullican's daughter during their first encounter to enable him to engage in sexual activity with her reflects an intention to transform or overcome the daughter's will. Similarly, even if traveling to an appointed place for a planned sexual encounter with a minor were categorically insufficient to constitute a substantial step toward a violation of Section 2422(b), see Pet. 20-21, petitioner engaged in significant conduct beyond traveling to the appointed place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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