No. 19-1084

In the Supreme Court of the United States

DAYTON MICHAEL CRAMER, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SONJA M. RALSTON
Attorney

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

QUESTION PRESENTED

Whether the court of appeals correctly determined that the evidence at trial was sufficient to enable a rational jury to find that petitioner intended to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Fla.):

United States v. *Cramer*, No. 17-cr-14 (June 20, 2018) (amended judgment)

United States Court of Appeals (11th Cir.):

United States v. *Cramer*, No. 18-12620 (Oct. 3, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A16) is not published in the Federal Reporter but is reprinted at 789 Fed. Appx. 153.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2019. On December 5, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including March 1, 2020. The petition for a writ of certiorari was filed on March 2, 2020 (Monday). 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 Northern District of Florida, petitioner was convicted on one count of using a facility or means of interstate commerce to attempt to persuade, induce,

or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Am. Judgment 1. Petitioner was sentenced to 120 months of imprisonment, to be followed by 10 years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. A3-A16.

1. "[A]fter reading a post on Craigslist" stating "that a stepmother was seeking an older man to give her 13-year-old stepdaughter some 'experience,'" petitioner sent an email to the address listed for the stepmother, expressing interest in engaging in sexual activity with "a young woman who was a virgin or inexperienced" and offering to send photographs of himself. Pet. App. A7; Trial Tr. (Tr.) 254; see Presentence Investigation Report (PSR) ¶¶ 11-12. The Craiglist post had in fact been made by a law-enforcement officer, Jacksonville Sheriff Detective Brandi Merritt, as part of an undercover operation. Tr. 232-251.

Posing as the stepmother, Detective Merritt responded to petitioner, indicating that her (fictitious) stepdaughter, named "Paisley," was 13 years old and that the stepmother was seeking "someone to teach her some things" but "who won't hurt her." Tr. 255; see PSR ¶ 13. An online conversation ensued—first with Detective Merritt, and later with another undercover officer, Tallahassee Police Department Investigator Steven Osborn—in which petitioner "asked what the stepmother wanted him to teach Paisley, whether Paisley was a virgin, and whether Paisley wanted to learn." Pet. App. A7; see Tr. 256-264, 333-336; PSR ¶¶ 13-16. Petitioner indicated that he "did not have a problem with the fact that Paisley was 13," but "said he needed to know that [she] wanted to do the things that the stepmother wanted her to learn." Pet. App. A7-A8; see Tr. 256-257, 259-260, 263; PSR ¶ 14. Petitioner also sent the

stepmother "a picture of himself for the stepmother to show Paisley and then followed up with an explicit picture of his genitalia." Pet. App. A8; see Tr. 263-266; PSR ¶ 14. And petitioner "gave a detailed and explicit account of what he intended to do with Paisley," and they made arrangements to meet. Pet. App. A8; see Tr. 337-338, 342-347; PSR ¶¶ 15-16.

Petitioner subsequently wrote to the stepmother that he had decided against meeting her and the stepdaughter. Tr. 347-348. Posing as the stepmother, Investigator Osborn replied: "Okay. No Worries. Thanks for being nice about it. Bye." Tr. 347. Petitioner then explained that he had learned of a previous law-enforcement sting operation involving Craigslist. Tr. 348. Investigator Osborn (as the stepmother) asked petitioner whether he would prefer to meet the stepmother herself at a public place "just to talk," without the stepdaughter present, so that petitioner and the stepmother would feel more comfortable. *Ibid.*; see Tr. 348-349. Petitioner agreed, and the two arranged to meet at a Walgreens store. Tr. 350-352. Petitioner traveled to the store at the appointed time, where he was arrested. Tr. 352-355.

2. A grand jury in the Northern District of Florida returned an indictment charging petitioner with one count of using a facility or means of interstate commerce to attempt to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Indictment 1. Petitioner pleaded not guilty and proceeded to trial. Am. Judgment 1.

At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal, contending that the evidence was insufficient to establish that his conduct constituted a substantial step toward enticing a minor, that petitioner believed a minor existed, and that petitioner

had acted with the intent to entice a minor at a time when he believed a minor existed. Tr. 454-468. The district court denied the motion. Tr. 469. After petitioner declined to testify, he renewed his motion, and the court again denied it. Tr. 483-486. Petitioner additionally "object[ed]" to the submission of the case to the jury because the charge of attempted enticement rested on "the use of an adult intermediary." Tr. 486. Petitioner acknowledged, however, that "[t]he Eleventh Circuit ha[d] clearly upheld the use of an adult intermediary," and the district court overruled the objection. *Ibid.*

The district court instructed the jury that the offense petitioner "[wa]s charged with attempting to commit" under 18 U.S.C. 2422(b) had four elements:

> 1. The defendant knowingly persuaded, induced, or enticed an individual who had not attained the age of 18 years to engage in sexual activity for which any person can be charged with a criminal offense.
>
> 2. The defendant used a facility and means of interstate commerce to do so.
>
> 3. When the defendant did these acts, he believed the individual to be less than 18 years old.
>
> 4. One or more of the individuals engaging in the sexual activity could have been charged with a criminal offense under the laws of Florida.

Tr. 522. The court further instructed the jury that, to find petitioner guilty of attempting to commit that offense, it had to find that the government had proved beyond a reasonable doubt both (1) "[t]hat [petitioner] knowingly intended to commit the crime of enticement of a minor to engage in sexual activity," and (2) that petitioner's "intent was strongly corroborated by his taking a substantial step towards committing the crime." Tr. 521.

The district court additionally instructed the jury that "'[i]nduce' means to stimulate the occurrence of or to cause." Tr. 522. The court adopted that definition from the Eleventh Circuit's decision in *United States* v. *Murrell*, 368 F.3d 1283, cert. denied, 543 U.S. 960 (2004). Tr. 496. Petitioner objected generally to reliance on *Murrell*'s definition of "induce" but acknowledged that the district court was "bound by the *Murrell* definition." Tr. 497; see Tr. 228-229, 496-498. Petitioner did not otherwise object to the court's definition of "induce." *Ibid.*

The jury found petitioner guilty. Tr. 608. The district court sentenced petitioner to 120 months of imprisonment. Judgment 2.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A3-A16.

On appeal, petitioner renewed his contentions that the evidence at trial was insufficient to establish that he intended to induce a minor to engage in unlawful sexual activity or that he took a substantial step toward committing that offense. Pet. C.A. Br. 11-19. He asserted that "he never had contact with the fictional minor, Paisley"; that he had "traveled to meet only Paisley's purported stepmother"; that "he did not bring any items or gifts indicating he intended to meet or have sex with Paisley"; and that he "unequivocally abandoned his plans to meet Paisley." Pet. App. A6. The court of appeals rejected those contentions. *Id.* at A6-A13. It determined that "a reasonable jury could have found that [petitioner] had the requisite intent," observing that "the record contains ample evidence that [petitioner] intended to induce Paisley's assent to sexual activity with him." *Id.* at A6-A7, A9-A10; see *id.* at A6-A10. The court also found the evidence sufficient to enable a reasonable jury to find that petitioner "took a

substantial step toward causing Paisley's assent to engage in sexual activity with him." *Id.* at A10; see *id.* at A10-A13.

Petitioner additionally contended that had had been "convicted of conduct that does not violate 18 U.S.C. § 2422(b)." Pet. C.A. Br. 20 (emphasis omitted). Petitioner argued that, in a prosecution under Section 2422(b) predicated on a defendant's "communications with an adult intermediary," the government must prove that "the defendant's interaction with the intermediary is aimed at transforming or overcoming the minor's will in favor of engaging in illegal sexual activity." *Ibid.* (quoting *United States* v. *Hite*, 769 F.3d 1154, 1160 (D.C. Cir. 2014)) (emphasis omitted); see *id.* at 11, 20-22. Petitioner asserted that, "although there were emails in this case containing 'explicit sex talk,' and although there were initial discussions between [petitioner] and the fictitious parent about [petitioner] traveling to meet 'Paisley,'" petitioner had "unequivocally abandoned those plans." *Id.* at 21 (emphasis omitted). According to petitioner, his "ultimate interaction with the intermediary was not aimed at transforming or overcoming the minor's will in favor of engaging in illegal sexual activity," and instead he had "simply traveled to meet with the fictitious parent—with no plan or expectation that the meeting would be followed by any contact or sexual activity with the alleged minor." *Id.* at 22 (emphasis omitted). Petitioner argued that, "[p]ursuant to" *United States* v. *Hite*, *supra*, "[his] conduct * * * d[id] not violate § 2422(b)" and that the charge "should therefore be dismissed." *Ibid.*

The court of appeals rejected that argument. Pet. App. A14-A16. The court observed that, in *United States* v. *Murrell*, *supra*, it had determined that "induce" in 18 U.S.C. 2422(b) means "to stimulate the

occurrence of; cause." Pet. App. A15 (quoting *Murrell*, 368 F.3d at 1287). The court noted that *Murrell* had declined to adopt an alternative definition of "induce" of "to lead or move by influence or persuasion; to prevail upon." *Ibid.* (quoting *Murrell*, 368 F.3d at 1287). The court accordingly explained that *Murrell* "forecloses a reading of the statute that would make interactions with an adult intermediary punishable only if such interactions were aimed at transforming or overcoming the minor's will in favor of sexual activity." *Id.* at A15-A16.

ARGUMENT

Petitioner contends (Pet. 6-11) that the trial evidence was insufficient to establish that he intended to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Specifically, he argues (Pet. 6-7) that Section 2422(b) required the government to prove that his interactions with an adult intermediary were aimed at transforming or overcoming a minor's will in favor of sexual activity, and he asserts (Pet. 10) that the evidence in this case did not establish that his interactions with the adult intermediary were aimed at that objective. 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 *Montgomery* v. *United States*, 139 S. Ct. 1262 (2019) (No. 18-651); *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 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 does not dispute that consensus. See Pet. 6-8 (endorsing *Hite*).

Petitioner was convicted of an attempted violation of Section 2422(b). Pet. App. A3-A4. 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 toward the violation. *Id.* at A5; accord, *e.g.*, *Hite*, 769 F.3d at 1162. The district court's instructions to the jury accordingly explained that the government was required to prove (*inter alia*) that petitioner "knowingly intended to commit the crime of enticement of a minor to engage in sexual activity" and that his "intent was strongly corroborated by his taking a substantial step towards committing the crime." Tr. 521. The court's instructions further explained that "the crime of enticement of a minor to engage in sexual activity" entails

"knowingly persuad[ing], induc[ing], or entic[ing] an individual," whom the defendant at the time "believed * * * to be less than 18 years old," to "engage in sexual activity for which any person can be charged with a criminal offense." Tr. 522. The instructions defined "induce" as "to stimulate the occurrence of or to cause." *Ibid.* The jury, so instructed, found petitioner guilty. Tr. 608.

2. Petitioner does not appear to challenge the district court's jury instructions on the requirements of Section 2422(b). See generally Pet. 6-11. Instead, petitioner appears to contend (*ibid.*) that the trial evidence was insufficient to establish that he engaged in conduct prohibited by Section 2422(b) and that the court of appeals applied an erroneous interpretation of the provision in determining that the evidence was sufficient. The court correctly rejected that contention, and its decision does not warrant further review.

a. The court of appeals construed Section 2422(b) not merely to require proof that the defendant "acted with the specific intent to engage in sexual activity," but instead to require proof "that the defendant intended to *cause assent* on the part of the minor." Pet. App. A7 (quoting *United States* v. *Lee*, 603 F.3d 904, 914 (11th Cir.), cert. denied, 562 U.S. 990 (2010)). And as the court explained, petitioner's communications in this case "with a person he believed to be the stepmother of a minor * * * demonstrate[] that [petitioner] intended to cause [the] assent" of her 13-year-old stepdaughter, "Paisley." *Ibid.*

Petitioner "initiated an online conversation with" the putative stepmother "after reading a post on Craigslist warning that a stepmother was seeking an older man to give her 13-year-old stepdaughter some 'experience.'" Pet. App. A7. Petitioner contacted the stepmother and,

in the online conversation that followed, he "asked what the stepmother wanted him to teach Paisley, whether Paisley was a virgin, and whether Paisley wanted to learn." *Ibid.* Petitioner also "said he needed to know that Paisley wanted to do the things that the stepmother wanted her to learn," stated that "he would not hurt Paisley and did not want to surprise her," and "gave a detailed and explicit account of what he intended to do with Paisley, claiming he would go slow, give her a massage to help her relax, gradually move to sexual activity, and stop at any point if she wanted to stop." *Id.* at A7-A8. In addition, petitioner "sent a picture of himself for the stepmother to show Paisley and then followed up with an explicit picture of his genitalia." *Id.* at A8. And he "said [that] he did not have a problem with the fact that Paisley was 13, claiming he had previously engaged in sexual activity with teens." *Ibid.*

The court of appeals noted that petitioner "ultimately backed out of meeting Paisley" in the initially planned in-person encounter, but it observed that "sufficient evidence demonstrated his decision stemmed from his fear that the stepmother was associated with law enforcement, not from a change of heart about pursuing Paisley's assent to sexual activity." Pet. App. A8-A9. That fear, he had told the stepmother, was his "only reluctance in the matter." *Id.* at A9; see Tr. 342. The court observed that petitioner "ultimately agreed to meet the stepmother so she could prove she was not associated with law enforcement," action that "corroborates his criminal intent because he would not have had reason to fear her association with law enforcement unless he intended to pursue Paisley's assent to sexual activity." Pet. App. A9. Based on that evidence, the court correctly determined that a rational jury could have found that

petitioner "intended to induce Paisley's assent to sexual activity with him." *Id.* at A10; see *id.* at A9-A10.

b. Petitioner contends (Pet. 6-11) that review is warranted to resolve a conflict between the Eleventh and D.C. Circuits concerning the proper application of Section 2422(b) in prosecutions predicated on a defendant's interactions with an adult intermediary rather than directly with a minor. That contention lacks merit.

In *United States* v. *Murrell*, 368 F.3d 1283, cert. denied, 543 U.S. 960 (2004), the Eleventh Circuit concluded that Section 2422(b) applied where the defendant had negotiated with an adult intermediary (a detective posing as the minor's father) to pay for sex with a 13-year-old girl, even though the defendant had not directly communicated with the minor. See *id.* at 1286-1288. In reaching that conclusion, which accords with the conclusions of other circuits and which petitioner does not contest, the court observed that "'[i]nduce' can be defined in two ways": either as "'to lead or move by influence or persuasion; to prevail upon,' or alternatively, 'to stimulate the occurrence of; cause.'" *Id.* at 1287 (citation and brackets omitted). The court adopted the second definition. *Ibid.*

The court of appeals in *Murrell* reasoned that the first definition would make "induce" "essentially synonymous with the word 'persuade,'" which also appears in Section 2422(b). 368 F.3d at 1287. It also "note[d] that the efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective." *Ibid.* The court accordingly applied the second definition and found that the defendant's conduct fell "squarely within the definition of 'induce'" because he "attempted to stimulate or cause the minor to engage in sexual

activity." *Ibid.* The court explained that the defendant's actions in that case, which included bringing a teddy bear with him to the negotiated rendezvous, "unequivocally" showed that he "intended to influence a young girl into engaging in unlawful sexual activity." *Id.* at 1288.

The court of appeals in this case applied *Murrell*'s interpretation of Section 2422(b). Pet. App. A10, A14-A15. The court emphasized, however, that "the government must prove that the defendant intended to *cause assent* on the part of the minor, not that he acted with the specific intent to engage in sexual activity." *Id.* at A7 (quoting *Lee*, 603 F.3d at 914). And it similarly stressed that "the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact." *Id.* at A10 (quoting *Lee*, 603 F.3d at 914).

Petitioner asserts (Pet. 6-10) that the Eleventh Circuit's approach in the unpublished decision below is inconsistent with the D.C. Circuit's decision in *United States* v. *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.'" 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). *Id.* at 1158. The court agreed with the Eleventh Circuit and other courts of appeals that such communications are punishable under Section 2422(b). *Id.* at 1160 (citing, *inter alia*, *Murrell*). 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.* 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 is consistent with the decision below. Both courts of appeals agree that Section 2422(b) "criminalizes an intentional attempt to achieve a mental state—a minor's assent." *Lee*, 603 F.3d at 914 (citation and emphasis omitted); see Pet. App. A7, A10; *Hite*, 769 F.3d at

1164 (quoting *United States* v. *Engle*, 676 F.3d 405, 419 (4th Cir.), cert. denied, 568 U.S. 850 (2012)). *Hite* stated that "simply 'to cause' *sexual activity* with a minor does not necessarily require any effort to transform or overcome the *will* of the minor." 769 F.3d at 1167 (emphases added). Similarly, in *United States* v. *Lee*, *supra*, the Eleventh Circuit explained that the government must prove that the defendant intended to "cause assent" to sexual activity "on the part of the minor"—not merely that the defendant intended to cause the minor "'to engage in sexual activity'"—and "that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact." 603 F.3d at 914 (citation omitted). The court of appeals here quoted and applied both of those prior determinations. See Pet. App. A7, A10, A14.

Both the D.C. and the Eleventh Circuits therefore require proof that the defendant intended to achieve a minor's assent to sexual activity. As the court of appeals here acknowledged, Pet. App. A14-A15, the courts have used different linguistic formulations 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 "achieve" or "cause" the minor's "assent," *Lee*, 603 F.3d at 914; see Pet. App. A7, A10, A14. It is far from clear, however, that those formulations differ in any meaningful way or produce different results in practice, or that the D.C. Circuit would find the Eleventh Circuit's formulation problematic.

As petitioner notes (Pet. 7-8), *Hite* cited a district-court decision involving a defendant who interacted with an adult intermediary rather than a minor directly, in which the indictment was dismissed for insufficiency. See *Hite*, 769 F.3d at 1164 (citing *United States* v.

Nitschke, 843 F. Supp. 2d 4, 13 (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, that district-court decision is not inconsistent with the decision below. The defendant there "never sought [the adult intermediary's] help in procuring the fictitious minor"; "did not ask [the intermediary] to pass along any communication whatsoever to the minor"; "did not make any promises to the minor through [the intermediary]"; "did not offer any money or anything else of value"; and "did not invite [the intermediary] or the minor anywhere." *Nitschke*, 843 F. Supp. 2d at 13. And in finding that evidence insufficient, the district court applied the Eleventh Circuit's formulation of the standard, asking whether a reasonable juror could find that "the defendant intended to cause the assent on the part of the minor." *Id.* at 10 (quoting *Lee*, 603 F.3d at 914); see *id.* at 13 (finding that, "[g]iven the undisputed facts here, no reasonable juror could find that Defendant intended to cause the minor to assent").

3. Even if the question petitioner raises otherwise warranted this Court's review, this case would be an unsuitable vehicle in which to address it. As the court of appeals observed, the trial evidence showed that petitioner assured the fictitious stepmother that "he would not hurt Paisley and did not want to surprise her"; he "claim[ed] [that] he had previously engaged in sexual activity with teens"; he "sent a picture of himself for the stepmother to show Paisley and then followed up with an explicit picture of his genitalia"; he asked "what

the stepmother wanted him to teach Paisley" and whether "Paisley wanted to learn" and "to do [those] things"; and he "gave a detailed and explicit account of what he intended to do with Paisley, claiming he would go slow, give her a massage to help her relax, gradually move to sexual activity, and stop at any point if she wanted to stop." Pet. App. A7-A8. The evidence therefore established that petitioner intended to transform the will of a minor to engage in illegal sexual activity.

Petitioner asserts, without elaboration, that he "would be entitled to relief" under the D.C. Circuit's formulation of the standard in *Hite* because "[t]he record in this case is clear that [his] ultimate interaction with the adult intermediary was not aimed at transforming or overcoming the minor's will in favor of engaging in illegal sexual activity." Pet. 10 (emphasis omitted). In the court of appeals, the argument that petitioner advanced in support of that conclusion was that he "unequivocally abandoned" his plans to meet the fictitious minor for sex. Pet. C.A. Br. 21 (citation omitted). Petitioner cited a message he had sent to the stepmother stating that, "[a]fter more reflection, [petitioner had] decided that [he] just [was] not comfortable meeting [the stepmother] and [her] daughter." *Id.* at 22 (quoting Tr. 347). But as further evidence showed, that message was not the end of petitioner's efforts, and a rational jury could find that he had not actually abandoned his attempt. The undercover officer posing as the stepmother responded to the message by giving petitioner the opportunity to end their interactions. See Tr. 347 (officer telling petitioner: "Okay. No Worries. Thanks for being nice about it. Bye."). Petitioner, however, ultimately agreed to meet the putative stepmother in person the following day. Tr. 348-350. And he had stated earlier that his

"only reluctance in the matter" had been his fear that the stepmother was associated with law enforcement. Tr. 342. As the court of appeals found, it was clear that petitioner's hesitation was caused not by a lack of genuine interest in persuading the minor to engage in sexual activity, but by his concern about being caught in a sting. Pet. App. A8-A9; Tr. 345-352. And that concern "corroborate[d] his criminal intent" to engage in such activity. Pet. App. A9.

The jury was instructed that it could find petitioner guilty only if the government proved beyond a reasonable doubt that petitioner "knowingly intended" to "persuade[], induce[], or entice[] an individual who had not attained the age of 18 years to engage in sexual activity," and that he took "a substantial step towards committing the crime." Tr. 521-522. In finding petitioner guilty after being so instructed, the jury necessarily rejected petitioner's premise that he "unequivocally abandoned" his plan to induce the stepdaughter to engage in sexual activity with him. Pet. C.A. Br. 21 (emphasis omitted). Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
SONJA M. RALSTON
Attorney

MAY 2020