No. 12-10591

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY ANDREW FUGIT, PETITIONER

v.

UNITED STATES OF AMERICA

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

# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Section 2422(b) of Title 18, United States Code, makes it unlawful to use a facility or means of interstate commerce to "knowingly persuade[], induce[], entice[], or coerce[] 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 to "attempt[] to do so." The question presented is whether the term "sexual activity" requires interpersonal physical contact.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 703 F.3d 248. A prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted in 296 Fed. Appx. 311. The opinions and orders of the district court (Pet. App. 15a-63a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 31, 2012. A petition for rehearing was denied on February 26, 2013 (Pet. App. 64a). The petition for a writ of certiorari was filed

on May 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1), and one count of knowingly using a facility or means of interstate commerce to persuade, induce, entice, or coerce an individual, who had not attained the age of 18 years, to engage in any sexual activity for which any person can be charged with a criminal offense, in violation of 18 U.S.C. 2422(b). The district court sentenced petitioner to 310 months of imprisonment, to be followed by a lifetime term of supervised release. The court of appeals affirmed. See 296 Fed. Appx. 311; Judgment 1-3.

Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied petitioner's motion and declined to issue a certificate of appealability (COA). Pet. App. 15a-63a; C.A. App. 561-571. The court of appeals granted petitioner's application for a COA limited to two issues and affirmed. Pet. App. 1a-14a.

1. On November 28, 2005, while posing as a young girl named "Kimberly," petitioner entered an internet chatroom and contacted an 11-year-old girl. Petitioner asked the girl about her breast

size and genitals, about her underwear and slumber parties, and about whether she had been naked in front of men. Petitioner also obtained the girl's phone number, which he called shortly thereafter. Pretending to be Kimberly's father, petitioner asked the girl whether she had "'seen a grown man naked,' whether 'she minded if he came in to check on her while she was naked,' whether 'she would mind seeing him naked,' and whether she would 'get naked for him.'" Petitioner also asked the girl "to masturbate and take her shirt off" and repeatedly instructed the girl to "remove her pants." Pet. App. 4a, 67a; Presentence Investigation Report (PSR) ¶ 12.

On December 12, 2005, petitioner entered an internet chatroom and, again posing as "Kimberly," contacted a ten-year-old girl. Shortly after obtaining the girl's telephone number, petitioner called her, again "pretend[ing] to be Kimberly's father," and engaged in "an inappropriate sexual conversation." Petitioner "informed her of the rules he would impose" if the girl were to spend the night at his house; "instructed her to call him 'Daddy'"; and stated that they would "bathe together" and that he would perform a "finger test" by "rubbing her all over with his finger." In addition, petitioner told the girl that "'he would allow her to touch his penis' and asked her 'to take her clothes off.'" Pet. App. 4a, 65a; PSR ¶ 5.

Police officers executed a search warrant at petitioner's residence. During the search, petitioner told the police that he had "attempted to contact children on the computer and telephone" and that his internet provider had "bumped" his account several times due to "inappropriate contact with minors." Pet. App. 4a. After his wife and one-year-old son arrived, petitioner admitted that he had "a problem" and that he was "a pedophile." PSR ¶ 7.

Forensic analysis of petitioner's computers revealed 129 internet chats with individuals who appeared to be children. Police later confirmed that petitioner had contacted 12 minors between the ages of nine and 12, posing similar questions about breast size, genitalia, and masturbation. Investigators also found 289 still images and 24 videos of child pornography on petitioner's computers and 43 instances of child-pornography distribution. See Pet. App. 5a.

2. A federal grand jury in the Eastern District of Virginia returned an indictment charging petitioner with one count of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1) (Count 1); and one count of knowingly using a facility or means of interstate commerce to persuade, induce, entice, or coerce an individual, who had not attained the age of 18 years, to engage in any sexual activity for which any person can be charged with a criminal offense, in violation of 18 U.S.C. 2422(b) (Count 2). Pet. App. 3a-4a. Petitioner pleaded guilty to both

counts and agreed to a stipulated "Statement of Facts." Id. at 4a. Among other things, petitioner admitted that he "knowingly persuaded, induced, enticed or coerced" a child victim "to engage in a sexual activity," i.e., taking indecent liberties with a child in violation of Virginia law. Ibid.; see id. at 67a (citing Va. Code Ann. § 18.2-370).

At sentencing, petitioner affirmed that, with one exception not relevant here, the factual background set forth in the PSR was correct. Pet. App. 4a. The district court sentenced petitioner to 240 months of imprisonment on Count 1 and 70 months of imprisonment on Count 2, to be served consecutively, for a total of 310 months of imprisonment. Id. at 5a; Judgment 2. The prison term was to be followed by a lifetime of supervised release. Judgment 3.

3. Petitioner appealed only his sentence and the court of appeals affirmed in an unpublished per curiam decision. See 296 Fed. Appx. 311.

4. On October 1, 2009, petitioner moved to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 21a. Petitioner alleged, inter alia, that his stipulated conduct did not constitute inducement or attempted inducement of "sexual activity" within the meaning of 18 U.S.C. 2422(b) because "there was never any physical contact between him and his minor victim," and because "there was no evidence that petitioner ever intended to travel to meet his victim or performed any substantial step toward

doing so." Pet. App. 59a. Petitioner also argued that his trial counsel was constitutionally ineffective for "failing to research or investigate" that claim. Id. at 61a. The district court denied petitioner's motion and declined to issue a COA. Id. at 15a-63a; C.A. App. 561-571.

5. The court of appeals granted a COA limited to "(1) whether [petitioner's] stipulated conduct constituted attempted inducement of 'sexual activity' of a minor within the meaning of 18 U.S.C. § 2422(b), and (2) whether [petitioner's] counsel rendered ineffective assistance by advising him to stipulate to the inducement of 'sexual activity' and guilt under 18 U.S.C. § 2422(b)." Pet. App. 5a (internal quotation marks omitted). The court then affirmed in a unanimous decision. Id. at 1a-14a.

The court of appeals explained that, because petitioner had failed to raise any statutory argument during the plea proceedings or on direct appeal, he "appear[s]" to have "procedurally defaulted" the first claim. Pet. App. 6a. The court, however, recognized that a procedural default could be excused if petitioner were "actually innocent" of the offense or if he could establish cause and prejudice. Ibid. In the context of adjudicating petitioner's "actual innocence" claim, the court turned to the "underlying statutory dispute" -- namely, whether the phrase

"sexual activity" in 18 U.S.C. 2422(b) is limited to "interpersonal physical contact." Pet. App. 7a.

The court of appeals held that "interpersonal physical contact is not a requirement of [Section] 2422(b)'s 'sexual activity' element." Pet. App. 7a. The court explained that the phrase "sexual activity" is not defined in the statute and that dictionary definitions of the terms "sexual" and "activity" suggest that the phrase includes "conduct connected with the 'active pursuit of libidinal gratification.'" Id. at 7a-8a. That interpretation, the court continued, is consistent with the statutory purpose to prevent the "psychological sexualization of children." Id. at 8a. The court further rejected petitioner's suggestion that its reading would ensnare "innocent behavior" because, among other reasons, Section 2422(b) only covers conduct "that is already criminally prohibited." Ibid.

The court of appeals acknowledged that the Seventh Circuit had adopted a contrary interpretation based on the definition of "sexual act" contained in a different statutory provision. Pet. App. 8a. The court explained that the "sexual act" definition, which required more than mere interpersonal contact, was expressly applicable only to a different chapter. Id. at 8a-9a. The court therefore declined to "cut and paste this restrictive definition into [Section] 2422(b)." Id. at 9a.

The court of appeals ultimately concluded that petitioner's "actual innocence claim fails by a wide margin." Pet. App. 11a. The court found that petitioner's "conduct so surely satisfies the 'sexual activity' element that it is difficult to conceive of any reasonable juror not convicting him." Ibid. Relying on the conduct disclosed in the stipulated Statement of Facts and discussed in the PSR (which petitioner had "conceded"), the court found it "beyond question" that petitioner had engaged in the "active pursuit of libidinal gratification." Id. at 11a-12a.[1]

ARGUMENT

Petitioner contends (Pet. 5-19) that the phrase "sexual activity" in 18 U.S.C. 2422(b) is limited to interpersonal physical contact. The court of appeals correctly rejected that argument. The issue has not arisen with any frequency and the narrow and recent circuit conflict does not warrant the Court's review. In any event, this case is an inappropriate vehicle to consider the question presented because petitioner procedurally defaulted his claim. Further review is not warranted.

1. Section 2422(b) of Title 18, United States Code, prohibits the use of the "mail or any facility or means of interstate or foreign commerce" to "knowingly persuade[], induce[],

[1] The court of appeals also rejected petitioner's ineffective assistance of counsel claim, Pet. App. 12a-14a, and he does not renew that claim in this Court.

entice[], or coerce[] 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). Congress did not define the term "sexual activity" in Section 2422 or anywhere else in the United States Code. Cf. 18 U.S.C. 2427 ("[T]he term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography."). That term, therefore, must be given its "ordinary meaning." Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012). And it must be read in context. See Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

As the court of appeals explained, Section 2422(b) "does not criminalize enticement of 'sexual activity,' full stop." Pet. App. 8a. Rather, it is limited in two critical respects. First, it "concerns only conduct that is already criminally prohibited," i.e., sexual activity "for which any person can be charged with a criminal offense." Ibid. (quoting 18 U.S.C. 2422(b)) (emphasis omitted). Second, it "addresses only behavior involving children." Ibid. In that context, the court of appeals correctly held that the term "sexual activity" "does not incorporate an invariable requirement of interpersonal physical contact." Id. at 9a. It "comprises conduct connected with the 'active pursuit of libidinal gratification' on the part of any individual." Id. at 8a; see id.

at 7a-8a (citing dictionary definitions of "sexual" and "activity").

2. Petitioner's arguments to the contrary are without merit.

a. Petitioner contends (Pet. 13) that the term "sexual activity" in Section 2422(b) "plainly [requires] physical contact between two people." For that definition, petitioner relies on three different sources. None supports his argument.

Petitioner first points to (Pet. 8-9, 13-14) Black's Law Dictionary (Black's). That dictionary does not directly define the term "sexual activity"; it instead refers the reader to the entry for "sexual relations." Black's 1498 (9th ed. 2009). "Sexual relations," in turn, is defined as "'[s]exual intercourse' or as '[p]hysical sexual activity'" which, petitioner notes, "usually involves 'the touching of another's breast[], vagina, penis[,] or anus.'" Pet. 13-14 (quoting Black's 1499) (first and second brackets in original; emphases omitted).

That definition does not suggest that "sexual activity" is strictly limited to "physical contact between two people" (as petitioner suggests), only that it "usually" involves such contact. Masturbation, for example, may well constitute "physical sexual activity" under that definition even though it does not involve the touching of "another's" body parts. More fundamentally, the dictionary uses the statutory term at issue here (i.e., "sexual activity") as part of the definition of "sexual relations." The

modifier "physical" only serves to narrow the sort of "sexual activity" that constitutes "sexual relations." If "physical" were part of the ordinary meaning of "sexual activity," no such modifier would be necessary. Accordingly, the court of appeals properly declined to define "any sexual activity" (18 U.S.C. 2422(b) (emphasis added)) as "physical sexual activity."

Petitioner next relies on (Pet. 14, 18-19) the definition of "sexual act" set forth in 18 U.S.C. 2246. Section 2246(2) defines "sexual act" as "contact between the penis and the vulva or the penis and the anus"; "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus"; "the penetration, however slight, of the anal or genital opening" with a specified intent; or "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years" with a specified intent. 18 U.S.C. 2246(2)(A)-(D). That specialized definition of "sexual act" is limited by its terms to "this chapter [i.e., Chapter 109A]." 18 U.S.C. 2246. Congress has expressly cross-referenced that definition of "sexual act" throughout the United States Code, including in a provision neighboring Section 2422(b). See, e.g., 18 U.S.C. 2423(f); 20 U.S.C. 6777(e)(8), 9134(f)(7)(E); 28 U.S.C. 1346(b)(2); 47 U.S.C. 254(h)(7)(H). But it did not do so here. Because there is no "indication that Congress intended to import the definitions of chapter 109A" into Section 2422(b) (in Chapter 117), the "sexual

act" definition cannot be used to define the (distinct) term "sexual activity." Pet. App. 9a (citation omitted).

The definition of "sexual act" petitioner relies on is also incomplete. He cites only one part of the Section 2246(2) definition (i.e., "the intentional touching, not through the clothing, of the genitalia of another person") (Pet. 14), but that applies only if the "child has not attained the age of 16 years." 18 U.S.C. 2246(2)(D). If the child is 16 years of age or older, the definition of "sexual act" requires more than interpersonal physical contact. And it would exclude the sorts of conduct that even petitioner concedes is covered by Section 2422(b) such as, for example, "the touching of another's breast[]" (Pet. 14) (emphasis and citation omitted), or even the touching of another's genitalia short of "oral sex or actual penetration." Pet. App. 8a-9a. Petitioner never explains why a definition of "sexual act" that is limited to children under the age of 16 would apply to a different statute's use of the term "sexual activity" in a context that reaches all children under the "age of 18 years." 18 U.S.C. 2422(b).[2]

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[2] Petitioner notes (Pet. 18-19) that Section 2422(b), as enacted, used the term "sexual act" and he argues that when Congress replaced "sexual act" with "sexual activity" in 1998 it did not intend to change the statute's meaning. That misses the point. Even before 1998, the definition of "sexual act" "as used in [Chapter 109A]" had no application to Section 2422(b), a Chapter 117 offense. And by deleting the phrase "sexual act" from Section 2422(b), Congress certainly did not (sub silentio) import a

Finally, petitioner identifies (Pet. 16-17) a few state statutes that define the term "sexual activity." As an initial matter, the state law definitions are hardly consistent with one another so it is difficult to understand what meaning should be drawn from them. For example, some define "sexual activity" narrowly to require "penetration" while others include "fondling or touching." Ibid. (quoting Fla. Stat. Ann. § 800.04(1)(a) (2008) and Ind. Code Ann. § 35-42-4-13(b) (LexisNexis 2009)). Moreover, other state statutes (including in one of the States petitioner cites) define "sexual activity" to include acts that do not require any physical contact, let alone interpersonal physical contact. See, e.g., Fla. Stat. Ann. § 393.135(b) (West 2011) ("sexual activity" includes, inter alia, "[i]ntentionally masturbating in the presence of another person" or "[i]ntentionally exposing the genitals in a lewd or lascivious manner in the presence of another person"); see id. §§ 394.4593(b), 916.1075(b) (Supp. 2013); Tenn. Code Ann. § 39-13-529(e)(4) (2010) ("sexual activity" includes, inter alia, "[m]asturbation" or "[l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person").

b. Petitioner's other arguments also fail to withstand scrutiny.

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definition of "sexual act" from a separate statutory provision that, by its terms, does not apply.

Petitioner criticizes (Pet. 9) the precise definition of "sexual activity" adopted by the court of appeals. See Pet. App. 9a (defining "sexual activity" as the "active pursuit of libidinal gratification"). Petitioner, however, offers no alternative definition of "sexual activity," short of one requiring "interpersonal physical contact," under which he could possibly prevail. Petitioner asked an 11-year-old girl to take her clothes off and masturbate. See id. at 4a, 67a; PSR ¶ 12. He asked a ten-year-old girl to take her clothes off, and he talked about having her "touch his penis," about "rubbing her all over with his finger," and about "bath[ing] together." Pet. App. 4a, 65a; PSR ¶ 5. If "sexual activity" "does not incorporate an invariable requirement of interpersonal physical contact," Pet. App. 9a (and it does not), petitioner's conduct qualifies as persuading, inducing, enticing, or coercing "sexual activity" for which he could be prosecuted under any conceivable definition of that term.

Petitioner suggests (Pet. 10, 15-16) that the court of appeals' interpretation would include "sexual activity" for which "a minor" could not be charged with a criminal offense. That is true and entirely consistent with the statute's plain text. Section 2422(b) prohibits sexual activity "for which any person can be charged with a criminal offense." 18 U.S.C. 2422(b) (emphasis added). In most cases prosecuted under the "any sexual activity" prong of Section 2422(b), the minor victim could not be charged

with a criminal offense -- and that would be true whether or not "sexual activity" were limited to interpersonal physical contact.

Petitioner also suggests (Pet. 16) that the court of appeals' definition makes the "'attempts to do so' clause" superfluous. That is incorrect. Among other things, the "attempts" clause covers instances in which the defendant attempts to entice an individual, whom he believed to be a minor, to engage in illegal sexual activity -- when the minor was, in fact, an adult (e.g., an undercover officer). See, e.g., United States v. Shinn, 681 F.3d 924, 927-929 (8th Cir. 2012); United States v. Lundy, 676 F.3d 444, 448-450 (5th Cir. 2012); United States v. Dwinells, 508 F.3d 63, 65-68 (1st Cir. 2007), cert. denied, 554 U.S. 922 (2008); United States v. Gagliardi, 506 F.3d 140, 143-144 (2d Cir. 2007); United States v. Coté, 504 F.3d 682, 683-684 (7th Cir. 2007), cert. denied, 553 U.S. 1073 (2008); United States v. Tykarsky, 446 F.3d 458, 461-463 (3d Cir. 2006); United States v. Meek, 366 F.3d 705, 710-711, 717-718 (9th Cir. 2004).[3]

3. Petitioner contends (Pet. 5-7) that the court of appeals' decision conflicts with a recent Seventh Circuit decision. In

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[3] Petitioner does not appear to argue that interpersonal physical contact must actually occur and, in any event, that argument has been rejected by several courts of appeals. See, e.g., United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) (Section 2422(b) criminalizes "persuasion and the attempt to persuade, not the performance of the sexual acts themselves"), cert. denied, 532 U.S. 1009 (2001); United States v. Broussard, 669 F.3d 537, 548 & n.6 (5th Cir. 2012) (citing cases).

United States v. Taylor, 640 F.3d 255, 257-260 (2011), the Seventh Circuit held that "sexual activity" in Section 2422(b) requires interpersonal physical contact. That case involved a defendant who "masturbated in front of his webcam" while communicating with an undercover officer he believed to be a 13-year-old girl. Id. at 257. The court acknowledged that "as a matter of ordinary usage, 'sexual activity' includes masturbation," id. at 259, but it adopted Section 2246(2)'s definition of "sexual act" under the "rule of lenity." Id. at 258, 259-260.

For all of the reasons set forth above, that decision is wrong. But the narrow (and recent) circuit conflict does not warrant the Court's review. The issue does not appear to arise in federal criminal prosecutions with any frequency. As the Seventh Circuit noted, "very little law" has addressed the meaning of the statutory term "sexual activity." Taylor, 640 F.3d at 256. The statute was amended to include the "sexual activity" language in 1998. See id. at 258. In the ensuing 15 years, only two appellate courts have interpreted the phrase "sexual activity" -- and both decisions were issued in the last two years. Further review of this rarely litigated issue would be premature.

4. In any event, this case would not be an appropriate vehicle to consider the question presented. The issue arises in the context of a collateral challenge where petitioner procedurally defaulted his claim by failing to raise any statutory argument

during his plea proceedings or on direct appeal. See Pet. App. 6a. To excuse his default, petitioner must therefore establish that he is "actual[ly] innocen[t]." Id. at 9a. "In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." Bousley v. United States, 523 U.S. 614, 624 (1998).[4]

If petitioner had raised his statutory argument during the plea proceedings and "proceeded to trial, he would have undoubtedly opened himself up to multiple additional charges relating to multiple other victims and to child pornography as well." Pet. App. 13a; ibid. (petitioner "was lucky to receive the deal that he did"); see id. at 5a (noting that the "[i]nvestigation revealed that [petitioner] had participated in [similar] internet chats [and often telephone conversations] with 129 individuals who appeared to be children, twelve of whom police confirmed were indeed minors between nine and twelve years old"); ibid. (noting that forensic analysis revealed 289 still images and 24 videos of child pornography and 43 instances of child-pornography distribution). Petitioner avoided those additional charges by pleading guilty. See Gov't C.A. Br. 25 (If petitioner "had raised this claim earlier

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[4] In the court of appeals, petitioner maintained that he could excuse his default by establishing "cause and prejudice" through an ineffective assistance of counsel claim. Pet. App. 12a. Petitioner has not renewed that argument in his petition.

and gone to trial to test his theory, the United States would have added more charges."); cf. C.A. App. 522-523.

The record does not affirmatively reflect that the government forwent those charges in plea negotiations. But the extensive and egregious nature of the criminal conduct for which petitioner was not prosecuted (because the charges underlying his plea were deemed adequate), provides an added reason for this Court to exercise its discretion to deny further review. Petitioner's collateral attack of his conviction implicates the finality concerns that Bousley raised about entertaining a forfeited legal claim where, at the time the guilty plea was entered, the defendant's conduct would have supported additional serious charges that the guilty plea made it unnecessary to pursue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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