No. 12-10591

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY ANDREW FUGIT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Section 2422(b) does not define "sexual activity," which means the phrase should be given its ordinary meaning. The Fourth Circuit held below that the ordinary meaning of the phrase is "active pursuit of libidinal gratification," while the Seventh Circuit concluded that the phrase refers to interpersonal physical contact. The government argues that the decision below was correct, the circuit split does not yet warrant review, and this case is an inappropriate vehicle to consider the issue. (BIO 8). Petitioner disagrees with all those arguments and replies to them in the same order below.

I. THE FOURTH CIRCUIT ERRED.

The decision below was not correct. The Fourth Circuit's construction of "sexual activity" in section 2422(b) as the "active pursuit of libidinal gratification" is erroneous for the various reasons Petitioner has discussed. (Pet. 13-19). The government hardly gives a ringing endorsement of the Fourth Circuit's construction in its argument, spending a single paragraph defending the decision. (BIO 9-10).

The government first quotes the Fourth Circuit's reasoning that section 2422(b) "does not criminalize enticement of 'sexual activity,' full stop" because it is limited to conduct that is already criminally prohibited and that involves minors. (BIO 9). That reasoning, however, does nothing to support the Fourth Circuit's construction of "sexual activity." To say that "sexual activity" in section 2422(b) is limited to "sexual activity" that is criminally prohibited is circular reasoning that avoids defining what "sexual activity" means in the first place. And the involvement of minors is an element of section 2422(b), not a guide to interpreting

"sexual activity." *See* Pet. 7a (noting that one of the four elements required for a section 2422(b) offense is a person younger than 18).

The government then refers only in passing, in a parenthetical, to the Fourth Circuit's use of dictionary definitions. (BIO 10). The government does not defend the Fourth Circuit's dictionary use and has no response to the rule that phrases should be construed as a whole and not with pieced-together dictionary definitions. It does not dispute that the Fourth Circuit cobbled together definitions from a general dictionary, including definition 5a of "activity" (when an earlier definition of the word is "physical motion or exercise of force") and definition 2b of "sexual." (Pet. 10). The Fourth Circuit's method of construing "sexual activity" is erroneous and by itself merits review. *See, e.g.*, *Moskal v. United States*, 498 U.S. 103, 119-22 (1990) (Scalia, J., dissenting) (stating that combining general-usage dictionaries' definitions of separate statutory terms to ascertain a phrase's plain meaning is less reliable than relying on definitions of the entire phrase in legal dictionaries, and that the Court's opinion "will adversely affect many future cases").

The government next quibbles with the definition of "sexual activity" in *Black's Law Dictionary*, arguing *Black's* does not directly define the phrase and "does not suggest" that the phrase is limited to physical contact between two people. (BIO 10). Neither point withstands an examination of the dictionary's text. First, the term "sexual activity" is clearly defined to be synonymous with the term "sexual relations." The entry for "sexual activity" states "See SEXUAL RELATIONS," and

the second definition for "Sexual Relations" ends by stating, "Also termed *sexual activity*." *Black's Law Dictionary* 1498-99 (9th ed. 2009).

Next, *Black's* not only suggests that the phrase is limited to physical contact between two people, it compels the conclusion. The entry for "sexual relations" provides the following two definitions:

> 1. Sexual intercourse. – Also termed *carnalis copula.*
>
> 2. **Physical sexual activity** that does not necessarily culminate in intercourse. Sexual relations usu. involve the touching of another's breasts, vagina, penis or anus. **Both persons (the toucher and the person touched) are said to engage in sexual relations**. – **Also termed *sexual activity***.

Id. at 1499 (emphases added). Thus "sexual activity" is synonymous with physical sexual activity involving both a toucher and a person being touched. The definition has been consistent since the edition of *Black's* that was in the works when section 2422(b) was amended to include "sexual activity" in 1998. *See Black's Law Dictionary* xiii, 1379 (7th ed. 1999) (Editor-in-Chief Bryan A. Garner's Preface noting that editors had worked on entries for more than eighteen months; identical definition of phrase); *see also United States v. Satterlee*, 286 F. App'x 390, 394 (9th Cir. 2008) (rejecting challenge to jury instructions in section 2422(b) conviction because "[t]he instructions made clear that [the defendant] could be convicted only if he intended to seduce a minor into engaging in physical sexual contact with him").

The government also quibbles with Petitioner's reliance on the definition of "sexual act" in section 2246 to construe "sexual activity" in section 2422(b). (BIO 11-12). It remains true, however, that the Seventh Circuit relied on section 2246,

section 2246 is consistent with the legal definition of the phrase "sexual activity" in *Black's*, and courts generally refer to section 2422(b) as criminalizing physical activity, which is consistent with the definition of "sexual act" in section 2246. *See, e.g.*, *United States v. Goodwin*, 719 F.3d 857, 862 n.3 (8th Cir. 2013) ("Section 2422 . . . criminalizes the solicitation of the actual criminal sexual act"); *United States v. Pharis*, 176 F.3d 434, 436-37 (8th Cir. 1999) (prior convictions for obscene phone calls and indecent exposure did not constitute physical sexual contact with children or creation of child pornography, as all of the offenses in 18 U.S.C. §§ 2241-46 and 2251 involve). In addition, the section 2246 definition is much more in line with the ordinary meaning of "sexual activity" than the Fourth Circuit's definition.

The government fails to respond to four of the five canons of textual construction Petitioner applied. (Pet. 14-16). The government responds only to Petitioner's contention that the Fourth Circuit's definition of "sexual activity" would abolish the substantial step element of an attempt charge and thereby make the "attempts to do so" clause of section 2422(b) superfluous. (BIO 15). The government's argument is unpersuasive. It is fundamental that an attempt charge requires proof that a defendant took a "substantial step" towards completing the crime. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 349 (1991). Here, if a lewd phone call alone can satisfy section 2422(b), then the substantial step requirement is eliminated. *See United States v. Knope*, 655 F.3d 647, 660 (7th Cir. 2011) (in an attempt to entice charge under section 2422(b), "[t]he jury may not . . . convict on the basis of obscene speech or 'hot air' alone"); *United States v. Gladish*, 536 F.3d

646, 650 (7th Cir. 2008) ("Treating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step. . . .").

Indeed, each case in the government's string cite (BIO 15) involved a defendant who did much more than make single lewd phone calls and who took substantial steps towards having intercourse with a minor. *See United States v. Shinn*, 681 F.3d 924, 927-29 (8th Cir. 2012) (defendant communicated with female for two months and described how they could time their meeting to avoid her becoming pregnant; described sex acts they would perform; booked a motel room; sent her the room number, telephone number, and time he would arrive; and was arrested there in possession of condoms and cameras); *United States v. Lundy*, 676 F.3d 444, 447 (5th Cir. 2012) (defendant who agreed to meet female at Cracker Barrel near Tupelo, MS and travel to her house to have sex was arrested in parking lot); *United States v. Dwinells*, 508 F.3d 63, 65-68 (1st Cir. 2007) (defendant had numerous contacts with three females, which included sending photo of his body parts and describing what he wanted female to do with them, stating he wanted to have baby with female and marry her once she turned 18, proposing meetings and noting if he were caught he would go to jail, and offering to send travel money); *United States v. Gagliardi*, 506 F.3d 140, 143-44 (2d Cir. 2007) (defendant offered $200 for sex, arranged meeting in lower Manhattan, and was arrested there in possession of two condoms and Viagra pills); *United States v. Cote*, 504 F.3d 682, 683-84 (7th Cir. 2007) (defendant described taking away female's virginity, arranged rendezvous at a Wendy's restaurant near pretextual school in Chicago,

and was arrested there); *United States v. Tykarsky*, 446 F.3d 458, 461-62 (3d Cir. 2006) (defendant described sexual acts he hoped to perform with female in explicit detail and crossed state lines for meeting); *United States v. Meek*, 366 F.3d 705, 711 (9th Cir. 2004) (defendant arranged meeting at local school for sexual encounter).

Finally, the government does not dispute the statutory history of section 2422(b), including the proposed subsection (c). (Pet. 18-19). That proposed subsection would have reached a single "contact" over the Internet with a minor and might have supported a conviction of individuals like Petitioner who had a single Internet chat and a single phone call with minors, but the Senate rejected it.

II. THE CIRCUIT SPLIT AND THE IMPORTANCE OF THE QUESTION PRESENTED SUPPORT REVIEW.

The government concedes there is a circuit split on the question presented but argues that this Court's review would be "premature." (BIO 15-16). Fugit disagrees. The circuit split on the question presented is not going away, based on the Seventh Circuit's decisions in *United States v. Taylor*, 640 F.3d 255, 257-60 (7th Cir. 2011) and *Gladish* on the one hand, and the unanimous decision below that engaging minors in "sexual activity" means the active pursuit of one's own libidinal gratification, which the court declined to review *en banc* and the government has now apparently endorsed (though it did not propose the definition below).

In addition to the stark circuit split, that the contrasting statutory interpretations were arrived at by judges of such extraordinary intelligence as Judge Posner and Judge Wilkinson further indicates that the question presented merits review. *Cf. Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("A statute can be

impermissibly vague-. . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.").

As a result of this circuit split, in states containing ten percent of the populace (those in the Fourth Circuit), section 2422(b) makes a single lewd phone call to a minor – with no attempt at physical contact – a federal crime subject to a mandatory minimum sentence of ten years in prison; while in states containing eight per cent of the populace (those in the Seventh Circuit), the same conduct is not a federal crime. Wikipedia, *United States courts of appeals*, http://en.wikipedia.org/wiki/United_States_courts_of_appeals#Circuit_population (last visited Dec. 6, 2013) (Circuit population based on 2010 Census). Everywhere else, the law is unsettled.

The question presented is arising with increasing frequency. In a recent National Defender Conference paper, for example, under the heading "These Cases Are On The Rise," District of Columbia Assistant Federal Public Defenders noted:

> Since the Department of Justice began *Project Safe Childhood* in 2006, DoJ has dedicated significantly increased resources to child exploitation cases. As a result, the number of federal prosecutions for child exploitation crimes has increased dramatically. While child pornography cases are responsible for the bulk of the increase, the next largest categories are for internet enticers (18 U.S.C. § 2422) and interstate travelers (18 U.S.C. § 2423) . . . .

Jonathan S. Jeffress and Rosanna M. Taormina, *Enticers and Travelers: Law and Strategy for Fighting "Child Sex" Cases*, at 1 (National Defender Conference Atlanta, Georgia, May 29-June 1, 2012) (available at www.fd.org). In Fiscal Year 2011 alone, task forces of federal and state officers who pose online as children or adult intermediaries were involved in 5,700 arrests around the country. *Id.*

Conduct that would satisfy the Fourth Circuit's interpretation of "sexual activity" appears in the news regularly. *See* Nick Wing, *Scott Hounsell, Ex-GOP Official, Arrested for Sexting Minor after Mocking Anthony Weiner's Exploits*, Huffington Post (Aug. 6, 2013, 1:31 PM), http://www.huffingtonpost.com/2013/08/06/soctt-hounsell-arrested_n_3712596.html (former executive director of county Republican Party charged with sending sexually explicit material to 16-year-old over social media); *Ex-Teacher Melinda Dennehy Pleads GUILTY To 'Sexting' Nude Photos to Student*, Huffington Post (May 25, 2011, 6:10 PM), http://www.huffington post.com/2010/07/27/melinda-dennehy-sexting-p_n_ 660898.html; Charles Babington & Jonathan Weisman, *Rep. Foley Quits in Page Scandal*, Wash. Post. (Sept. 30, 2006), http://www.washington post.com/wp-dyn/content/article/2006/09/29/AR2006 09 2901574.html (resignation of Congressman amid reports he sent sexually explicit Internet messages to 16-year-old former page).

The government has no response to the very real concern (Pet. 11-13) that the Fourth Circuit's expansive interpretation of section 2422(b) subjects 18-year-olds sexting younger teenagers to federal prosecution. *See also* Amy Adler, *To Catch a Predator*, 21 Colum. J. Gender & L. 130, 133 (2012) (noting that "the recent epidemic of 'sexting' prosecutions began in earnest in early 2009"); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 Harv. C.R.-C.L. L. Rev. 435, 456 (2010) (noting survey's finding that 20% of teens engage in "sexting," the transmission of images that might be deemed child pornography, and that some

prosecutors have charged such teens with distributing child pornography). In sum, due to the circuit split and the importance of the issue, certiorari is appropriate.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO CONSIDER THE QUESTION PRESENTED.

The government's argument that this case is an inappropriate vehicle (BIO 16-18) is without factual support in the record or legal support. Factually, Petitioner did not avoid any additional charges by pleading guilty. He was charged with two counts and pleaded guilty to both. He pleaded guilty without a written plea agreement, and there is no record evidence that the government elected not to charge him with other counts in exchange for his plea. *See Bousley v. United States*, 523 U.S. 614, 624 (1998) (rejecting government's argument that petitioner had to show he was actually innocent of both "using" and "carrying" a firearm, because indictment charged him only with "using" a firearm, and "there is no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty").

Even if there were factual support for the government's argument that it would have added additional charges had Petitioner gone to trial, the charges would have only been more of the same. The rule from *Bousley* the government quotes refers to "more serious" charges. (BIO 17). The government could at most have charged Petitioner with additional counts of what he was already charged with, possession of child pornography and enticement of minors to engage in sexual activity. Additional counts would likely not have affected his sentencing range, because they would have been grouped for sentencing. *See United States v. Wernick*,

2012 WL 3194244, at *2 (2d Cir. Aug. 8, 2012) (noting parties' agreement that counts one through four related to defendant's possession and distribution of child pornography should be grouped); *United States v. Macaluso*, 460 F. App'x 862, 866 (11th Cir. 2012) (noting that probation officer had grouped defendant's four counts of distributing child pornography).

The government's bogeyman of additional charges makes no sense in this case, where Petitioner received twenty years for possessing child pornography and would have received that sentence with additional counts of that nature. If additional counts of enticing a minor to engage in sexual activity had been added, Petitioner would be actually innocent of them all, if the statute requires physical contact or attempted physical contact.

The government also wrongly suggests that Petitioner has abandoned his ineffective assistance of counsel claim. (BIO 8 n.1 & 17 n.4). Petitioner asks this Court to construe "sexual activity" in 18 U.S.C. § 2422(b), a question that he has clearly preserved and that affects both his claim of actual innocence and his claim of ineffective assistance. Both lower courts addressed the question presented in denying his claims. (Pet. 7a-9a, 59a-61a). If this Court were to decide the question presented in his favor, the Court's decision would affect his claim of actual innocence and his claim of ineffective assistance. The two claims are interrelated, as his Petition noted. (Pet. 4). The Court could either determine whatever relief flows from a decision on the question presented in Petitioner's favor or remand for the lower courts to reevaluate his claims under the proper statutory construction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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