No. 21-___

IN THE

Supreme Court of the United States

JOEL ZUPNIK,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title 18 U.S.C. § 2422(b) prohibits using a facility or means of interstate commerce to "persuad[e], induc[e], entic[e], or coerc[e]" a minor to engage in any sexual activity that is forbidden by state law, subject to a ten-year mandatory minimum sentence.

The question presented is whether those quoted verbs sweep in any conduct that simply attempts to cause commission of unlawful sexual activity (as the court below and some other Circuits have held), or whether the verbs also require something more—an effort by the defendant to transform the minor's will, alter the minor's mental state, or otherwise secure the minor's assent (as several other Circuits have held).

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INTRODUCTION

The Courts of Appeals have expressly divided, at least 4-3, over the meaning of the operative verbs in an important federal criminal statute. This case is a perfect vehicle for resolving the expanding circuit conflict because it presents the legal issue in a factually clean way, and because that issue was squarely decided by the Eighth Circuit in joining the minority side of the split. Heightening the need for review, the effect of the Eighth Circuit's misreading is to collapse the federal offense into its underlying state-law predicates. That error disrupts the federal-state balance and federalizes a wide swath of state criminal law, subject to the blunt instrument of a ten-year mandatory minimum prison sentence.

The statute at issue, 18 U.S.C. § 2422(b), imposes that minimum sentence (with a maximum of life in prison) on anyone who, using a facility of interstate commerce like the internet or a telephone network, "persuades, induces, entices, or coerces" someone under 18 years old to engage in sexual activity that is forbidden by state law. Giving those verbs their plain meaning, the D.C. Circuit has held that a defendant is guilty of this offense only if he endeavors to *transform or overcome* the will of the minor—using advocacy, trickery, rewards, or threats to secure the minor's assent. It is not enough, by contrast, simply to *cause* or *arrange for* the sexual activity to occur. That is a meaningful distinction and, because the jury had been misled about it, the D.C. Circuit vacated a conviction. The Fourth, Sixth, and Seventh Circuits have followed suit in adopting the same basic understanding: that the statutory focus is efforts to secure assent.

But the Eleventh Circuit has openly disagreed, insisting that the crime sweeps in anyone who *causes* the illicit sexual activity—even by simply agreeing to the advances of a minor (or, more often, an officer pretending to be a minor). Below, the Eighth Circuit embraced that expansive view, "declin[ing]" to follow the D.C. Circuit. It thus upheld petitioner's conviction notwithstanding the "apparent willingness" of the (non-existent) minor who initiated contact with him, because he "arranged to meet her" for sexual activity. Pet.App.8a–9a. More recently, the Second Circuit also approved the decision below while explicitly rejecting the D.C. Circuit's narrower construction.

This square and entrenched circuit conflict over the substantive meaning of an oft-indicted federal offense is reason enough to grant review. But review is particularly warranted because of the damage that the decision below threatens to cause to the federal-state balance. Given the modern ubiquity of phones and the internet, construing § 2422's verbs to forbid any act that *causes* illicit sexual activity turns nearly every underlying state-law offense into a federal crime. Conduct that might go unprosecuted or be subject only to minimal punishment under state law—like an 18-year-old who engages in "sexting" with her 17-year-old boyfriend—thereby triggers a ten-year federal minimum sentence. And an entire field of traditional state concern ends up displaced.

In sum, this petition is an opportunity to resolve a circuit split, correct a misreading of statutory text, and restore some semblance of balance between the federal government and states in criminal law. This Court should grant certiorari and reverse.

OPINION BELOW

The decision of the U.S. Court of Appeals for the Eighth Circuit affirming the petitioner's judgment of conviction (Pet.App.1a) is reported at 989 F.3d 649.

JURISDICTION

The Eighth Circuit issued its opinion and entered judgment on March 2, 2021, and denied a petition for rehearing on April 1, 2021. Pet.App.1a, 13a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

18 U.S.C. § 2422(b) provides as follows:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States 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, shall be fined under this title and imprisoned not less than 10 years or for life.

STATEMENT

Petitioner Joel Zupnik is a middle-aged man with no history of sexual misconduct who was caught in a sting after posting a personal advertisement seeking casual sex with a woman (not a teen or child). A South Dakota police officer responded to the ad using the pseudonym "Kelli." After flirting with Zupnik first by email and then by text message, Kelli claimed to be only 15 years old. Surprised, Zupnik immediately

warned Kelli he was "waaayyy too old for you !" Pet.App.3a. But Kelli persisted, explaining she was "tired of boys." *Id.* Zupnik again expressed reluctance, worrying Kelli was "too young" and told her "it is up to you on how you want to move forward." *Id.*; CA8 Add. 16a. But after Kelli insisted that she was "down with whatever" and "excited" for a "new experience," the two arranged to meet. Pet.App.3a; CA8 Add. 13a, 19a. Zupnik was arrested at the arranged meeting spot.

Zupnik was indicted on one count of attempting to entice a minor using the internet, in violation of 18 U.S.C. § 2422(b). A jury convicted, and the Eighth Circuit upheld his conviction by rejecting the D.C. Circuit's interpretation of the statute.

A. Statutory Background.

Section 2422(b) "traces its origin to the Mann Act of 1910." *United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011) (Brown, J., dissenting in part). The Mann Act forbade one to "persuade, induce, entice, or coerce" any woman or minor to travel from one state to another with intent to engage in prostitution or other immoral practices. White Slave Traffic (Mann) Act, ch. 395, § 4, 36 Stat. 825, 826 (1910).

The Mann Act was amended and expanded many times since 1910, and its basic prohibitions remain in the U.S. Code, part of a web of related federal statutes that protect minors and others against sexual abuse and exploitation when federal jurisdiction is implicated. Those provisions combat this evil in a host of ways. Title 18 U.S.C. § 2421 forbids *transporting* someone in interstate or foreign commerce to engage in either prostitution or any sexual activity for which one can be criminally charged (including under state

law). Section 2422(a) prohibits *persuading, inducing, enticing, or coercing* someone to engage in interstate or foreign travel for those purposes. Section 2423 specifically forbids, *inter alia*, transporting *minors* (under 18 years old) across state lines for prostitution or unlawful sexual activity. Section 2425 prohibits using facilities of interstate commerce to transmit certain personal information about minors (under 16 years old) with the intent to "entice, encourage, offer, or solicit" unlawful sexual activity. Yet another provision imposes a 30-year mandatory minimum for crossing state lines to engage in sexual activity with minors under 12 years old. 18 U.S.C. § 2241(c). Still other provisions punish sex trafficking of minors. *Id.* §§ 1591, 2421A, 2251A.

The provision at issue here, § 2422(b), was added as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (1996). Congress has since amended the statute three times to increase the penalty: The maximum sentence ballooned from ten years to life in prison, while the minimum rose to ten years (the original *maximum*). *Laureys*, 653 F.3d at 42 & n.5 (Brown, J., dissenting in part).

Instead of interstate transportation or travel, this provision principally employs "using the mail or any facility or means of interstate or foreign commerce" as its hook for federal legislative jurisdiction. Those facilities include "the internet or the telephone system." *United States v. Young*, 613 F.3d 735, 742 (8th Cir. 2010). Courts have routinely found this jurisdictional requirement satisfied even by purely intrastate calls (or, as in this case, intrastate text messages). *United States v. Evans*, 476 F.3d 1176, 1180–81 (11th Cir. 2007); *United States v. Richeson*, 338 F.3d 653, 660

(7th Cir. 2003); *United States v. Giordano*, 442 F.3d 30, 39–40 (2d Cir. 2006) (interpreting identical language in 18 U.S.C. § 2425). The provision forbids using such means or facilities to "persuad[e], induc[e], entic[e], or coerc[e]" a minor (under the age of 18) to engage in prostitution or sexual activity that is forbidden under state law. 18 U.S.C. § 2422(b).

B. The Sting Operation.

Petitioner Joel Zupnik is a man in his 50s whose only criminal-history point is for a later-dismissed DUI from nearly a decade ago. In August 2016, he was arrested as part of a sting operation undertaken by South Dakota law enforcement officers targeting the Sturgis Motorcycle Rally. Pet.App.2a.

The episode began when Zupnik, visiting Sturgis for the biker event, "posted a personal advertisement in the Casual Encounters section of Craigslist." *Id.* The advertisement was titled "Bang a biker!! :)" and expressed interest in finding "a woman." *Id.* To use the Casual Encounters service, users must "check a box representing they are over 18 years old." *Id.* As the court below recognized, it was undisputed that "Zupnik's advertisement did not indicate or imply he was looking for a minor." *Id.*

An officer responded to the ad, pretending to be a young woman named "Kelli." *Id.* Zupnik and Kelli exchanged flirtatious emails through the Craigslist forum, with Kelli expressing "hope" that Zupnik was "okay with younger" but not identifying her age. Pet.App.2a–3a. She shared an age-regressed photo, and Zupnik shared a photo too. Pet.App.2a. Kelli gave Zupnik a cell phone number "and asked [him] to text message her." *Id.*

The two then began texting. Kelli mentioned she was "too young to really do much around here," and at that point Zupnik inquired: "How old are you?" CA8 Add. 12a. Kelli responded by claiming that she was 15. Pet.App.3a. Zupnik immediately reacted to that news with surprise: "Didn't you read my add? I think you are sexy but I am kinda waaayyy too old for you ! Lol." *Id.* Persistent, the officer purporting to be Kelli said that she was "just tired of boys." *Id.*

Zupnik then began to speculate about how they could develop a relationship in secret, but continued to express hesitation since she was "not even legal." *Id.* "Guess it is up to you on how you want to move forward," he said equivocally. *Id.*

Taking up that invitation, Kelli advised that she was "down with whatever," albeit not "experienced." *Id.* The two then discussed how and when they could meet. Again Zupnik conveyed doubt, wondering if "maybe you are too young," "[m]aybe this is a little advanced for you," and "[m]aybe we shouldn't try this … You want to have an experience with an older biker guy?" CA8 Add. 16a–17a. Kelli insisted she was "excited" for "a new experience" because younger boys "cant take care of me." *Id.* 17a–19a.

Kelli and Zupnik arranged that he would drive from Sturgis to Rapid City, both in South Dakota, to engage in oral sex. *See* Pet.App.3a; CA8 Add. 20a. But when Zupnik arrived, "law enforcement officers placed him under arrest." Pet.App.4a.

C. Proceedings Below.

Zupnik was indicted on one count of attempted persuasion of a minor using the internet, in violation of 18 U.S.C. § 2422(b). Pet.App.4a.

For an attempt offense, the government had to prove that Zupnik intended to "persuade, induce, entice or coerce" a minor. Pet.App.6a. The court denied his motion for acquittal after the government's case and at the close of the evidence. *See* Pet.App.4a. The jury found Zupnik guilty, and the court imposed the mandatory minimum sentence. *Id.*

While Zupnik's appeal was pending—and after more than a year of worsening symptoms and many requests for a proper medical examination—he was diagnosed with cancer. *See* D. Ct. Dkt. 116 at 3–5. In November 2020, the Court of Appeals granted bail so he could receive proper treatment. *Id.* at 3.

In March 2021, the Eighth Circuit panel affirmed. Pet.App.1a–2a. It held, in relevant part, that there was sufficient evidence that Zupnik intended to "persuade, induce, entice, or coerce" a minor. *Id.*

In doing so, the court expressly rejected Zupnik's plea to follow the D.C. Circuit's definition of § 2422(b)'s verbs in *United States v. Hite*, 769 F.3d 1154 (D.C. Cir. 2014). *Hite* held that the "ordinary meanings" of persuade, induce, entice, and coerce "demonstrate that § 2422(b) is intended to prohibit acts that seek *to transform or overcome the will* of a minor." *Id.* at 1161 (emphasis added). The panel reasoned that *Hite* was "inapposite" because it involved communication with "an adult intermediary," rather than "directly with a minor." Pet.App.7a–8a. But the court proceeded to hold that "[t]o the extent Zupnik argues we should adopt *Hite*'s definition of the terms 'persuade, induce, entice, or coerce,' *we decline to do so*." Pet.App.8a (emphasis added). The panel quoted *Hite*'s definition, and contrasted it with "[o]ur precedent," under which

"a defendant can be found to 'persuade' or 'entice' even a seemingly 'willing' minor." *Id.* Reiterating the point, the court declared that Kelli's "apparent willingness does not change our analysis," and cited an earlier decision upholding a conviction where the defendants "arranged" to meet a minor for sex, and another where the court held that it is enough to have "conversations of a sexual nature with a minor." Pet.App.9a (citing *United States v. Riepe*, 858 F.3d 552 (8th Cir. 2017); *United States v. Shinn*, 681 F.3d 924 (8th Cir. 2012)). And the court relied on the same reasoning in finding enough evidence of "predisposition" to defeat Zupnik's entrapment defense. *See* Pet.App.11a.[1]

REASONS FOR GRANTING THE WRIT

This is an easy case for certiorari. The circuits are divided over the meaning of the operative verbs in § 2422(b), which is a serious (and, sadly, common) federal crime. The conflict has persisted for years, and the decision below cemented it by aligning with the previously isolated Eleventh Circuit. The Government has previously opposed review by suggesting intra-circuit tension within the Eleventh Circuit; that was always mistaken but is now also irrelevant. Further, this case is a clean vehicle, as it is not encumbered by the factual or legal complications that often obstruct review in criminal cases generally or § 2422(b) cases specifically. And the decision below is especially worthy of correction, as it glosses over the ordinary meaning of the text and, in doing so, federalizes the field of state-law sex offenses involving minors.

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[1] On May 5, 2021, the district court granted compassionate release, reducing Zupnik's sentence to time served and two years of home confinement within a five-year supervised release term.

I. THE CIRCUITS HAVE DIVIDED OVER WHETHER § 2422'S VERBS DO ANY WORK.

There is a square conflict, acknowledged by courts on both sides, over the scope of the verbs—persuade, induce, entice, or coerce—that form the core of the § 2422(b) offense. The Fourth, Sixth, and Seventh Circuits have followed the D.C. Circuit in identifying the common denominator of the verbs as an effort to secure the assent of the minor. The Eleventh Circuit, now joined by the Eighth Circuit and the Second, steadfastly disagrees, instead interpreting the statute to prohibit any effort to *cause*, *arrange*, *or facilitate* commission of the state-law offense, even if the minor (or, more often, as here, law enforcement pretending to be a minor) is a fully willing participant or, indeed, the initiator of the encounter.

A. The leading case on the majority side of the split is the D.C. Circuit's decision in *Hite*. But *Hite*'s reasoning was largely previewed by Judge Brown in her separate opinion in an earlier case, *Laureys*. The panel majority in *Laureys* declined to "wade into" the construction of § 2422(b) because the defendant there had forfeited the issue and any error was not "plain." *See* 653 F.3d at 32–33. Judge Brown agreed that the issue was forfeited but would have found plain error. *Id.* at 38–39 (Brown, J., dissenting in part).

Focusing on "induce," Judge Brown explained why, in context, it requires influencing the minor's will and cannot be reduced to mean, simply, "cause" the sexual activity. *Id.* at 41–42. Induce is sometimes defined as "cause," but that definition does not apply when the object of the inducement is a person. *Id.* at 41. And while the statutory verbs like "induce" and "persuade"

overlap, they are not redundant, and their similarity confirms they should be read together as requiring an "element of mental force." *Id.* at 42. Nor would this diminish the law's efficacy. Many statutes target child predators, but § 2422(b) "is unique in targeting efforts to overbear the wills of children online." *Id.*

In staking out this view, Judge Brown expressly rejected as "flawed" (*id.* at 41) the Eleventh Circuit's decision in *United States v. Murrell*, which held that to "induce" in this statute means merely to "cause" the sexual act. 368 F.3d 1283, 1287 (11th Cir. 2004).

The D.C. Circuit adopted Judge Brown's position in *Hite*, where the issue was preserved. The panel there vacated the defendant's conviction because the jury instructions reflected the government's flawed, broader interpretation. 769 F.3d at 1164, 1166–67.

The defendant in *Hite* had communicated with an undercover detective "who claimed to be an adult male with access to" minor children. *Id.* at 1158. He argued that those conversations could not violate the statute since they were not "direct communications with a minor." *Id.* To evaluate that theory, the court applied the "ordinary meanings of the verbs persuade, induce, entice, and coerce." *Id.* at 1161. It concluded, based on dictionary definitions, that those four words "prohibit acts that seek to *transform or overcome* the will of a minor." *Id.* (emphasis added).

But there is no reason why one could not seek to do exactly that using an intermediary. Accordingly, the court rejected the defendant's theory, holding instead that speaking with an adult intermediary can violate § 2422(b) "so long as 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." *Id.* at 1160; *see also id.* at 1164 (repeating that "interaction … must be aimed at transforming or overcoming the child's will").

"By the same token," the court equally "reject[ed] the Government's argument that § 2422(b) does not require the defendant to attempt to transform or overcome the minor's will." *Id.* at 1164. That is what a defendant must seek to do, whether directly or indirectly, to run afoul of this statute.

Having so construed the critical statutory terms, *Hite* rejected the sufficiency challenge, which was based on the "contention that the statute requires direct communication with a minor." *Id.* at 1166. But the court vacated and remanded for a new trial, because the instructions wrongly told the jury it could convict if the defendant had intended "to *cause* a minor to engage in unlawful sexual activity," or interacted with an adult "who could *arrange* for the child to engage in unlawful sexual activity." *Id.* (emphases in original). Those words—cause and arrange—omitted the "preeminent characteristic" of the statutory verbs, since they "d[o] not necessarily require any effort to transform or overcome the will of the minor." *Id.* at 1167. And that overbreadth was "highly prejudicial," as it allowed the jurors to convict "without necessarily finding that [the defendant] intended to transform or overcome the will" of the fictitious children, "so long as they found that he sought to arrange for sexual activity with them." *Id.*; *see also id.* (citing closing argument by prosecutor suggesting "Hite could be convicted by proof that he merely arranged to have sex with the fictitious children, rather than by proof he attempted to transform or overcome their will").

At least three other Courts of Appeals share *Hite*'s understanding. The Sixth Circuit expressly agreed with *Hite*, both in that communications with adults can violate the statute if done to "persuade, induce, entice, or coerce" a minor, and in that those verbs refer to "acts that seek to transform or overcome the will of a minor." *United States v. Roman*, 795 F.3d 511, 516–17 (6th Cir. 2015) (quoting *Hite*, 769 F.3d at 1161). The panel emphasized that it agreed with not only *Hite* but also Judge Brown's dissent in *Laureys* that had rejected the Eleventh Circuit test and focused on whether the defendant had "aimed at obtaining the assent of the minor child." *Id.* at 519. In *Roman*, the defendant did just that by, *e.g.*, using "flower[s] and the child's favorite Butterfinger candy" to "obtain her assent to engage in sexual activity." *Id.* at 518.

The Fourth Circuit construes the statute the same way. In *United States v. Clarke*, the defendant argued that the jury instructions omitted *Hite*'s insight that merely "'arranging' or 'causing'" illicit sexual activity "was insufficient." 842 F.3d 288, 296 (4th Cir. 2016). The court agreed with the key legal proposition that causing or arranging sexual activity, standing alone, does not violate the statute—but denied relief because the instructions already "required the jury to find that Defendant made 'an effort to alter [a minor's] mental state,' rather than 'merely convey[ing] the notion of "causation."'" *Id.* at 296–97; *see also United States v. Engle*, 676 F.3d 405, 411 n.3 (4th Cir. 2012) (describing "ordinary meaning" of verbs as involving "persuasion or influence"). The Fourth Circuit thus recognized the difference between altering the minor's will and mere causation of the sexual activity, and affirmed that § 2422(b) requires the former.

Finally, the Seventh Circuit last year considered a sufficiency challenge by a defendant who argued that his communications were not intended "to gain [the minor's] assent," because she "needed no enticing" and he had merely "responded to [her] pre-existing, fully-formed sexual desires." *United States v. Hosler*, 966 F.3d 690, 693 (7th Cir. 2020). Like the Fourth Circuit in *Clarke*, the Seventh Circuit did not dispute the defendant's legal premise—that an effort to secure assent was necessary, and so the defendant's account of the facts would not trigger § 2422(b). Instead, the court held that the factfinder could have treated the evidence (including the defendant's offers to bring gifts) as sufficient under that standard. *See id.*[2]

B. The Eleventh Circuit first adopted a broader view of § 2422(b)'s verbs before these other circuits weighed in. In *Murrell*, the Eleventh Circuit laid out two alternative definitions of "induce"—either "[t]o lead or move by influence or persuasion," or simply "[t]o stimulate the occurrence of; cause." 368 F.3d at 1287. The court "disfavor[ed]" the first definition and instead adopted the second, broader one, purportedly to avoid rendering "superfluous" the other verbs in § 2422(b). *Id.* So under *Murrell*, a defendant violates § 2422(b) by taking any action to "cause" a violation of the state-law predicate offense.

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[2] Other Courts of Appeals have likewise recognized, consistent with *Hite*, that § 2422(b) "'criminalizes an intentional attempt to achieve a mental state—a minor's assent' to engage in sexual conduct." *United States v. Davis*, 985 F.3d 298, 307 (3d Cir. 2021) (quoting *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007)). That is truly the critical principle: The statute does not sweep in any attempt to commit the state-law predicate, but only efforts to use the internet to secure minors' assent.

In *Laureys*, Judge Brown refuted that reasoning, explaining that persuade "suggests the use of reason" whereas one can induce using "any force, such as trickery, that acts upon the will," and so no verb in the series is left redundant. 653 F.3d at 41 (Brown, J., dissenting in part). Plus, the broad reading of "induce" would leave *all the other verbs* with no work.

Rather than reconsider after *Laureys* and *Hite*, the Eleventh Circuit dug in. When a defendant asked the court "to endorse the [D.C. Circuit's] interpretation of § 2422(b)" that the communications must be "aimed at transforming or overcoming the minor's will," the response was blunt: "[T]his court has already rejected that interpretation of § 2422(b)." *United States v. Cramer*, 789 F. App'x 153, 156 (11th Cir. 2019). The court reiterated that "binding precedent forecloses" reading of the statute as limited to efforts "aimed at transforming or overcoming the minor's will." *Id.*

This quarrel is not semantic. Citing *Murrell*, the Eleventh Circuit has upheld jury instructions allowing conviction if the defendant "cause[d]" the sexual act. *United States v. Brooks*, 723 F. App'x 671, 678 (11th Cir. 2018) (per curiam); *see also* CA11 Pattern Jury Instrs. (Crim. Cases) O92.2 (2020) (defining "induce" as "to cause"). Yet *Hite* called that instruction "highly prejudicial," and a basis for vacatur. 769 F.3d at 1167.

C. Until the decision below, the circuit conflict was lopsided, with only the Eleventh Circuit treating bare causation of unlawful sexual activity as enough for a § 2422(b) conviction. In this case, however, the Eighth Circuit aligned with that minority position—and, if anything, pushed it even further.

The panel correctly recounted Zupnik's argument that the evidence was "insufficient" because it was "Kelli" who "responded to his advertisement" for an (adult) woman partner while Zupnik had "expressed doubt and hesitancy" after he "learned her age." Pet.App.7a. The panel also correctly noted that the legal premise for that challenge was the D.C. Circuit decision in *Hite*, and particularly its holding that to persuade, induce, entice, or coerce the minor requires an objective to "transfor[m] or overcom[e] the minor's will." Pet.App.7a–8a (quoting *Hite*, 769 F.3d at 1160).

In contrast to the Fourth Circuit in *Clarke*, the Sixth Circuit in *Roman*, and the Seventh Circuit in *Hosler*, the Eighth Circuit rejected the *legal premise*. Indeed, the panel was direct: "To the extent Zupnik argues we should adopt *Hite*'s definition of the terms 'persuade, induce, entice, or coerce,' *we decline to do so*." Pet.App.8a (emphasis added). As the panel read Eighth Circuit precedent, even a "willing" minor can be "persuade[d]" within the statutory meaning. *Id.* As an example, the panel cited *Riepe*, describing it as upholding a conviction where the defendant "arranged to meet" a minor. Pet.App.9a (quoting *Riepe*, 858 F.3d at 559). "[A]rrange" is the very verb that *Hite* held was "highly prejudicial" to include in a jury instruction, since one can arrange for sexual activity without any effort to secure the minor's assent. 769 F.3d at 1167.

Rejecting *Hite* meant rejecting Zupnik's sufficiency challenge. Since a defendant need not try to influence the minor's will, the court reasoned, "'Kelli's' apparent willingness does not change our analysis." Pet.App.9a. Indeed, the court observed that even "consensual" sex with a 15-year-old is unlawful under South Dakota law—so even arranging a voluntary sexual interaction

with "Kelli" would violate § 2422(b) in its view. *See id.* Of course, that is not true under *Hite*: If a defendant knows that the minor is willing, then the defendant is not trying to change or overcome the minor's will; assent already exists and need not be secured. To be sure, there would still be a state attempt offense—just not a federal crime. But none of that matters on the Eighth Circuit's broader view.

Beyond rejecting *Hite*'s definition of the statutory verbs, the panel also called that decision "inapposite" because "Zupnik believed he was communicating directly with a minor, not an adult intermediary." Pet.App.7a–8a. That is a factual distinction, but has no bearing on the meaning of "persuade, induce, entice, or coerce." *Hite* began its analysis by defining those verbs. 769 F.3d at 1160–61. The court then reasoned that since one can seek to transform or overcome a minor's will by communicating with an intermediary, the statute does not immunize those communications. *See id.* at 1161–64. "By the same token," whether the efforts are direct or indirect, the defendant must "attempt to transform or overcome the minor's will." *Id.* at 1164. *Hite*'s core holding was thus that the "preeminent characteristic" of § 2422(b)'s verbs "is transforming or overcoming the minor's will" in one way or another. *Id.* at 1167. The Eighth Circuit flatly disagreed with that interpretation.

In other words, while Zupnik spoke directly with the "minor" and Hite communicated through an adult intermediary, the common legal question is whether the government must prove that the communications were designed to transform or overcome a minor's will. *Hite* and several other circuits say yes; but the decision below, like the Eleventh Circuit, says no.

D. The split has only deepened since the decision below. The Second Circuit weighed in less than two months ago, approvingly quoting the Eighth Circuit's decision in this case while expressly declining to follow *Hite*. *United States v. Waqar*, 997 F.3d 481 (2d Cir. 2021). This new decision confirms that the conflict is persistent, that the legal issue continues to arise with regularity, and that this Court's review is needed.

The facts in *Waqar* were clearly sufficient to show guilt under any standard. The defendant initiated the contact with the undercover agent, whose profile had identified herself as a 12-year-old girl. He steered the discussion in a "markedly sexual" direction, "offered to give her donuts and buy her ice cream," and used other "financial rewards and emotional appeals" to influence her into sexual activity. *Id.* at 483–84, 487. The issue on appeal was not evidentiary sufficiency, but whether the district court had erred by refusing to give a jury instruction based on *Hite*. *Id.* at 483. It had instead instructed using the statutory terms, which it claimed were "words of common usage." *Id.* at 484.

The Second Circuit ruled that the district court had not erred because the D.C. Circuit's decision in *Hite* is "unpersuasive and [we] decline to follow it." *Id.* at 485. The court observed, in a footnote, that the D.C. Circuit had not vacated a conviction on this ground since *Hite* itself (*id.* at 485 n.1)—but that is hardly surprising, since *Hite* made perfectly clear how to instruct juries going forward. The Second Circuit defended its ruling as consistent with the Eleventh and Eighth Circuits, quoting the decision below in particular as "rejecting a sufficiency challenge premised on *Hite*." *Id.* at 488. "Accordingly, we hold that [§ 2422(b)] imposes no requirement that an individual endeavor to 'transform

or overcome' the will of his intended victim," and thus "reject Waqar's contention that the district court erred in refusing to so instruct the jury." *Id.*

* * *

As the discussion above shows, there is a simple and real disagreement over the scope of § 2422(b)'s verbs. Simply put, it reduces to whether a defendant violates the statute through any communications designed to lead to unlawful sexual activity, or whether there must be something more—an effort to exert influence over the minor and to secure her assent, whether by reason ("persuades"), threats ("coerces"), rewards ("entices"), or trickery ("induces"). To be sure, determining if conduct crosses the line under the latter standard will always require a judgment call, and there is room for debate over which language best conveys this concept to the jury—but juries in some Circuits *need not even ask the question*.

The Courts of Appeals recognize the conflict. Judge Brown in *Laureys* said that *Murrell* was "flawed," 653 F.3d at 41 (Brown, J., dissenting in part); her court later agreed. Meanwhile, the Eleventh Circuit admits that *Hite*'s rule is "foreclose[d]" by its precedent, *Cramer*, 789 F. App'x at 156, and has upheld model jury instructions using the very word that *Hite* (769 F.3d at 1167) called "highly prejudicial" and grounds for a new trial, *see Brooks*, 723 F. App'x at 678. The decision below openly "decline[d]" to follow *Hite* and held that "arrang[ing]" sexual activity is enough to convict (Pet.App.8a–9a), again breaking from *Hite*, 769 F.3d at 1167. And the Second Circuit was just as direct in rejecting the D.C. Circuit. *Waqar*, 997 F.3d at 488. The conflict is ripe for resolution.

II. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE CIRCUIT CONFLICT.

This Court has denied a handful of earlier petitions presenting related questions. But all were before any other court joined the previously isolated Eleventh Circuit, which the Government painted as internally inconsistent. Each of those petitions also suffered from vehicle flaws. For a number of reasons, this is an ideal vehicle to answer the legal question.

First, Zupnik preserved the legal issue by pressing it to the Eighth Circuit as the basis of his sufficiency challenge, and the Eighth Circuit passed on it. The court did not offer any alternative holding or suggest that the evidence would be sufficient even under the D.C. Circuit's standard. That means the legal issue is cleanly teed up for this Court's review.

That has not been true of prior petitions. One of the earliest denials involved a case in plain-error posture. *Reddy v. United States*, 574 U.S. 1062 (2014) (No. 14-5191). In others, the issue arose in the context of jury instructions, leading to fact-bound disagreements over whether particular language had sufficiently conveyed the legal rule, and whether minor linguistic variations implicated the conflict. *E.g.*, *Grafton v. United States*, 138 S. Ct. 2651 (2018) (No. 17-7773) (instructions required a jury finding that defendant tried to obtain "assent" (Pet. 13); Government argued that "precise manner in which the [concept] was presented" did not merit review (BIO 9)); *Brooks v. United States*, 139 S. Ct. 323 (2018) (No. 18-5164) (Government said that "fact-dependent, case-specific" question of whether defendant's proposed instruction was "confus[ing]," as lower court held, did not warrant review (BIO 14)); *see*

also Waqar, 997 F.3d at 487 (reasoning that it suffices to instruct the jury using the statutory terms, because a jury "would not need a dictionary" to determine that defendant's conduct toward minor was "intended to induce, persuade, and/or entice her to have sex with him," regardless of her predispositions).

Here, given the sufficiency posture and the panel's direct rejection of the *Hite* definition in favor of a far broader understanding, the Court is well situated to confront the pure legal question on its merits.

Second, although the Court's typical practice is to remand cases for application of the legal standards it announces, it is worth observing that the facts here are such that the legal rule matters. There is a reason the Eighth Circuit did not say Zupnik's challenge would fail even under *Hite*. His ad "did not indicate or imply he was looking for a minor"; it was "Kelli" who initiated contact without first identifying her age; and, once she claimed to be 15, Zupnik conveyed hesitation, told her he was "waaayyy too old" for her and she was "too young," and wondered if they "shouldn't try this"; but Kelli persisted and told him she wanted the "new experience" of being with an older man. *See supra* at 6–7. On those facts, the court treated Kelli's "apparent willingness" as legally irrelevant. Pet.App.9a. At minimum, there is thus a serious question whether this conviction could survive under *Hite*.

Again, this is worlds apart from the prior petitions this Court denied, where the defendants had posted or responded to ads contemplating sex with underage children. In those cases, the Government could (and did) maintain that the convictions would easily pass muster under *any* standard. *See, e.g.*, *Montgomery v.*

United States, 139 S. Ct. 1262 (2019) (No. 18-651) (where defendant discussed drugging a ten-year-old, Government argued that legal issue "would not affect the outcome" (BIO 19)); *Rutgerson v. United States*, 137 S. Ct. 2158 (2017) (No. 16-759) (defendant offered to pay for sexual activity). That is not true here.

Third, many § 2422(b) cases—including virtually every petition cited above, *see also Cramer v. United States*, 141 S. Ct. 87 (2020) (No. 19-1084)—involved defendants who interacted with adult intermediaries rather than minors directly. Although those cases do present the same legal issue, *supra* at 17, applying the legal rule to the facts tends to be more complex where the communication was with an intermediary. In that context, the pure legal question is one step removed, because the inquiry must focus on what the defendant was trying to accomplish with respect to the *minor's* will while interacting with a *third party*. It is factually cleaner to address § 2422(b)'s meaning in a case where a defendant communicated directly with the putative minor. This is such a case.

Finally, this case arises from the Eighth Circuit, new to the fray, not the Eleventh. In opposing prior petitions from the latter, the government has claimed intra-circuit confusion. Pointing to stray language about "assent" in other Eleventh Circuit decisions, *e.g.*, *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (per curiam), it has insinuated that the Court of Appeals' position is not really contrary to *Hite*. That is wrong; as noted above, the Eleventh Circuit has admitted the conflict and its model jury instructions use the same term that led *Hite* to vacate. *Supra* at 15. But there is certainly no room to doubt the Eighth Circuit's position: The panel (i) expressly "decline[d]"

to follow the D.C. Circuit, Pet.App.8a; (ii) did not use the word "assent," except when quoting Zupnik's argument, Pet.App.11a; and (iii) reasoned that even "consensual" contact with a 15-year-old would violate South Dakota law and thus § 2422(b), Pet.App.9a. Plus, the Second Circuit has also since jumped aboard.

In sum, any doubt over the materiality or persistence of the split has now been lifted, while the facts and procedural history of this case offer a cleaner vehicle than this Court has confronted before.

III. THE DECISION BELOW DISRESPECTS THE TEXT AND DISRUPTS THE FEDERAL-STATE BALANCE.

The errors of the court below are especially worthy of this Court's attention and correction because they flout important principles this Court has articulated for construing federal criminal statutes. For one, the Court of Appeals neglected to seriously engage with the statutory text, its ordinary meaning, or canons of construction like *noscitur a sociis*. For another, the court ignored the federalism implications of its rule, effectively turning all state-law predicate offenses into federal crimes and thereby subjecting a host of state offenses to a severe and in some cases disproportionate mandatory minimum penalty.

A. The opinion below is straightforwardly wrong as a textual matter. As the D.C. Circuit explained in *Hite* by reference to leading dictionaries, the "ordinary meanings of the verbs persuade, induce, entice, and coerce demonstrate that § 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor." 769 F.3d at 1161. This becomes even clearer when the verbs are considered next to each other, as they must be under the *noscitur a sociis*

canon, *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961): Each "convey[s] the idea 'of one person leading or moving another by persuasion or influence." *Clarke*, 842 F.3d at 296. *Cf. Yates v. United States*, 574 U.S. 528, 543–45 (2015) (plurality) (applying this canon to narrow scope of criminal statute). And if any doubt remains over the statutory scope, it must be resolved by applying the rule of lenity. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

Even setting aside formal canons of construction, the Eighth Circuit's error is apparent as a matter of ordinary English usage. Imagine that one proposes, to two friends, resuming a weekly poker night that had been suspended during the pandemic. Each of the friends agrees. Has any of these players persuaded, induced, enticed, or coerced anyone else to gamble? Surely not, in ordinary parlance; but the Eighth and Eleventh Circuits would have to answer "yes," that *each* of them did, because both the original proposal and the assenting responses *caused* the poker game to occur. *See* Pet.App.9a (treating corresponding with minor and arranging for sexual episode as enough).

By focusing on efforts to alter the minor's state of mind, the *Hite* rule also vindicates § 2422(b)'s purpose: "protect[ing] children from the act of solicitation itself." *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012). And it preserves the integrity of the statutory scheme. The next section of the Code criminalizes "arrang[ing]" another person's travel for purposes of illicit sexual contact. 18 U.S.C. § 2423(d). Congress pointedly did not include the word "arrange[]" in the list of verbs in § 2422(b)—but the Court of Appeals inserted it anyway. Pet.App.9a.

The contrary arguments—most clearly stated by the Eleventh Circuit in *Murrell*—do not hold water. *Murrell's* primary contention was that "induce" had to be interpreted as "cause" because otherwise it would be "essentially synonymous with the word 'persuade.'" 368 F.3d at 1287. Judge Brown refuted this argument at length in *Laureys*. She noted, among other things, that "persuade" and "induce" are easily distinguished. While the former "suggests the use of reason," the latter "may signify any force, such as trickery, that acts upon the will." 653 F.3d at 41 (Brown, J., dissenting in part). And "Congress often uses multiple words with overlapping meaning to capture a broad swath of conduct." *Id.* As Justice Scalia put it in a similar context, the phrase "is self-evidently not a listing of differing and precisely calibrated terms, but a collection of near synonyms which describes [a general concept]." *Moskal v. United States*, 498 U.S. 103, 120–21 (1990) (Scalia, J., dissenting).

Ironically, it is actually *Murrell* that creates the real superfluity problem. Interpreting "induce" to mean "cause" would make *all* of the other statutory verbs redundant. After all, persuading, enticing and coercing are all means of *causing*. Thus, *Murrell*'s atextual interpretation of one of the four statutory terms would leave the others with no work.

Murrell also asserted, as a policy matter, that "the efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary." 368 F.3d at 1287. But this is a non-sequitur. As *Hite* explained, the statute can extend to the use of intermediaries—as long as the intermediary is used in an attempt to transform the will of the minor. 769 F.3d at 1160; *supra* at 11–12.

Murrell appeared to assume the law must prohibit any attempt to engage a minor for sexual activity. 368 F.3d at 1287. But as Judge Brown pointed out in *Laureys*, in addition to state law, there are many other federal statutes that target sex predators who do not attempt "to overbear the wills of children online." 653 F.3d at 42; *see also supra* at 4–5 (listing some of them). Thus, even if it were permissible to do so, there would be no policy reason to stretch § 2422(b) beyond what its text can bear.

More recently, the Second Circuit in *Waqar* weighed in to call *Hite* "unpersuasive." 997 F.3d at 485. But a closer examination suggests the court misunderstood the *Hite* rule, leaving its criticisms misplaced.

Waqar's principal critique was that *Hite*'s approach shifts the "locus of the offense conduct from the intent and actions of the would-be persuader to the effect of his words and deeds on his would-be victim." *Id.* at 487. The court offered the example of a campaign worker who advocates for a candidate to a voter who, unbeknownst to the worker, "already planned to vote for the candidate." *Id.* at 486. That qualifies as an attempt to persuade, the court observed, despite the pre-existing "will of the object of the persuasion." *Id.* And so, the court went on, the meaning of the verbs plainly cannot turn on the victim's predisposition.

That criticism is misguided. The Second Circuit is correct that the question in an attempt case is whether the defendant *intended* to persuade, induce, entice, or coerce. But that is equally true under *Hite*'s definition: The question is whether the defendant attempted to transform the minor's will, and the minor's attitude matters only insofar as it casts light on that inquiry.

If the defendant *knows* the minor is willing, he is not trying to persuade the minor; assent already exists. Of course, if the defendant *does not know* the minor is willing and, *e.g.*, offers the minor money to engage in sexual activity (as in *Waqar*), he has attempted to entice. That defendant, like one who offers a bribe to an official who was voting that way regardless, *United States v. Silver*, 948 F.3d 538, 562 n.14 (2d Cir. 2020), *attempted* to transform the other's will, even though it turned out that no transformation was necessary.

In *Waqar*'s hypothetical, the campaign worker tried to persuade an already-convinced voter who had not yet revealed her position. But imagine the voter approached the worker and said: "I strongly support your candidate. When is election day?" When the worker answers, she is *arranging* for the voter to cast a ballot for the candidate, but she cannot be described as trying to persuade, induce, entice, or coerce that choice. That is why the decision below is mistaken.

Waqar also took aim at a straw-man in rejecting the notion that one cannot violate § 2422(b) "until the minor being asked has said 'no.'" 997 F.3d at 485. Neither *Hite* nor any of the other Circuits following it ever suggested the minor must display opposition (say "no") before a defendant can engage in inducement. Again, the question is one of intent: Is the defendant seeking to "transform" the minor's will, regardless of whether she is reluctant, neutral, or willing to start? But if the defendant's intent is merely to arrange a liaison to which the minor assents, that may violate state law, but not the federal enticement statute.

Waqar thus fails to show that *Hite* is wrong, or that the decision below is right.

B. The broad reading of § 2422(b) is especially problematic because it leaves no room between the federal offense and an attempt to commit the state predicate crime. The result is that federal law either duplicates or displaces state law in a domain—the protection of minors from sexual activity—that is the traditional province of state police power, especially when (as here) the conduct occurs entirely within one state and there is no potential gap in enforcement. That is offensive to principles of federalism, and also threatens to create absurd (and surely unintended) consequences. In both respects, canons of construction and this Court's teachings foreclose the sweeping interpretation adopted by the court below.

The duplication or displacement occurs because, on the view taken by the Eleventh and Eighth Circuits, the statutory verbs encompass any effort to *cause* or *facilitate* commission of illegal sexual activity, such as trying to *arrange for* or *coordinate* it. *See Murrell*, 368 F.3d at 1287; Pet.App.8a–9a; *supra* at 14–17. Any effort toward committing a state-law predicate, even by agreeing on a place to meet for sexual activity, would therefore be enough to satisfy § 2422(b)'s verbs. And neither the degree of voluntariness nor the age differential between the participants would be legally relevant, so long as the underlying sexual activity is forbidden by state law. Proving precisely that point, the decision below emphasized that South Dakota law forbids even consensual sexual activity with someone under 18, using that as a reason to reject treating the transformation of the minor's will as an element of the federal offense. *See* Pet.App.9a. Again, that makes the scope of federal law indistinguishable from the state-law predicates.

Of course, § 2422(b)'s jurisdictional hook requires use of a facility or means of interstate commerce. But that includes phones and the internet, even if (as here) all communications occurred between persons in a single state. *Supra* at 5–6; Pet.App.6a. As this Court has observed, "modern cell phones" are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). The same is true of the internet. Limiting federal jurisdiction to attempted state sex offenses that involve a cellphone or the internet is thus no limitation at all.

Accordingly, the minority approach to the statute, as a practical matter, conflates the federal crime with the underlying state offenses. That "broader reading" would thus "mark a major inroad into a domain traditionally left to the States," and should not be adopted without "clearer direction from Congress." *United States v. Bass*, 404 U.S. 336, 339 (1971); *see also id.* at 350 (refusing to "affect the federal-state balance" by reading statute to sweep in "traditionally local criminal conduct"). This Court has repeatedly construed federal crimes to avoid undue intrusion into areas of "traditional state responsibility." *Bond v. United States*, 572 U.S. 844, 856–59 (2014); *see also, e.g.*, *Jones v. United States*, 529 U.S. 848, 859 (2000) (rejecting interpretation that would cover "virtually every arson in the country"); *Bass*, 404 U.S. at 349 (rejecting broad construction of gun possession statute that would "significantly chang[e] the federal-state balance"); *Bond*, 572 U.S. at 859–61 (rejecting broad reading of chemical weapons statute that would cover "local criminal conduct").

The majority construction, by contrast, recognizes a limited federal role in preventing harm to minors from being recruited into sexual activity online, distinct from the harm (addressed by state law) that arises from that sexual activity itself. *See Engle*, 676 F.3d at 419 (explaining that § 2422(b) is focused on protecting minors from "act of solicitation itself" and punishes efforts "to achieve a *mental* state" rather than "actual consummation of sexual activities"). That narrows the scope of the federal offense to the subset of the state predicates that implicates a distinct federal interest. Contrary to *Murrell*, 368 F.3d at 1287, that is not a reason to reject this interpretation. In insisting on comprehensive coverage, the Eleventh Circuit failed to consider not only the many other federal statutes that protect minors against sexual exploitation (*see supra* at 4–5), but also the primacy of state law.

This is not merely an academic quarrel about the balance between state and federal criminal power. By broadly subjecting an entire category of state-law crimes to federal mandatory minimum sentences, the decision below threatens absurd results. Coercing, inducing, threatening, or coaxing an unwilling minor to engage in illicit sexual activity is serious abuse for which Congress understandably imposed a ten-year minimum penalty. But state law often forbids much less serious conduct that nonetheless qualifies as a § 2422(b) predicate offense.[3] Of course, state law can

[3] Notably, lower courts have held that "sexual activity" under § 2422 is not limited to "interpersonal physical contact" but can also include sexual conversations and virtual activity. *Fugit*, 703 F.3d at 255–59; *cf. United States v. Sonnenberg*, 556 F.3d 667, 670 (8th Cir. 2009) (similar, for related statute).

provide reduced sentences for such offenses; here, the *maximum* penalty for Zupnik's state-law predicate offense was below the *minimum* penalty for what is (according to the opinion below) effectively the same substantive crime. *See* S.D. Codified Laws §§ 22-4-1, 22-6-1. That is why the federalizing interpretation of this statute is not only flawed from a legal perspective but also deeply problematic at a practical level.

In particular, the minority interpretation adopted by the Eighth Circuit could ensnare teens who engage in voluntary sexual activity—including "sexting"—with other teens. This has been the subject of media attention in recent years. For example, a "sixteen-year-old girl faced multiple felony charges" in North Carolina "for 'sexting' a picture of herself to her boyfriend," which was deemed "sexual exploitation of a minor." Sarah Stillman, *The List: When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence*, THE NEW YORKER (Mar. 14, 2016). A Texas teen was indicted for sexual assault of a child based on a consensual relationship he had, as a junior in high school, with a freshman. *See id.* A 16-year-old boy in Minnesota was convicted of sexual abuse for "consensual sex" with a girl he met "at a teen club" who claimed to be 15. *Id.*; *see also, e.g.*, Amy E. Feldman, *For Teens, Sexting Can Be a Crime*, WALL ST. J. (Nov. 19, 2020) (citing examples); Zusha Elinson, *Federal Youth Case on Trial*, WALL ST. J. (Oct. 7, 2013) (citing 2009 study for statistic that "35.6% [of sex offenses against minors reported to police] were allegedly committed by other minors"); Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. OF CRIM. L. 335 (2020) (examples of absurd results with minor

defendants); Jordan J. Szymialis, *Sexting: A Response to Prosecuting Those Growing Up with a Growing Trend*, 44 IND. L. REV. 301 (2010).

Whether that conduct should be criminalized at all is not the issue—that is a decision for state law. But what should be clear, and what a majority of circuits have recognized, is that when Congress imposed a ten-year mandatory minimum for anyone who "persuades, induces, entices, or coerces" a minor to engage in sexual activity, it was not envisioning a pair of high-school seniors who share flirtatious text messages or use email to arrange a rendezvous. And while those are not the facts here, this Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016). It should instead grant certiorari and reverse.

CONCLUSION

This Court should grant the petition.

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