No. 21-171

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

REPLY TO BRIEF IN OPPOSITION

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Three Courts of Appeals—including the Eighth Circuit in the decision below—have *expressly rejected* the D.C. Circuit's understanding of the operative verbs in 18 U.S.C. § 2422(b), while three other Circuits have expressly or effectively adopted the D.C. Circuit's test. This disagreement goes to the heart of what it means to violate the statute and incur its ten-year mandatory minimum penalty. Yet the Government would have this Court believe there is no dispute—all these courts agree; they just do not realize it. That is disingenuous, especially since the Government has urged the lower courts to reject the D.C. Circuit's "stricter" test.

To be sure, the Government is wise not to defend—in this Court at least—the overbroad interpretation of the Second, Eighth, and Eleventh Circuits. In those courts, a defendant violates the statute if he *causes* or *arranges* for an illicit sexual encounter, even if he does not try to convince the minor to do anything and even if the minor made clear she needed no convincing. That reading butchers the text, omits the offense's defining feature (exerting *influence* over the minor), and turns every Romeo and Juliet into a federal felon. That may be why the Government seems to abandon the minority side of the split, but abandonment does not avoid the issue. Unless this Court grants review, the conflict will persist, and defendants will face ten-year mandatory sentences even though no jury or judge even asked the question that is dispositive under the statute and in multiple other Circuits.

The Government alternatively contends that this is a poor vehicle, maintaining there was enough evidence to convict Zupnik under the proper standard. But the panel thought the standard mattered, and application of the right standard is an issue for remand anyway.

Finally, the Government tries to stave off certiorari by pointing to a half-dozen earlier petitions that this Court turned down. But as Zupnik explained (to no direct response from the Government), those petitions suffered from vehicle problems that this case does not: *e.g.*, preservation failures, disputes over the semantics of particular jury instructions, and obvious harmless-error hurdles. Pet.20-23. Moreover, those petitions came *before* the Second and Eighth Circuits weighed in on the minority side, creating a deep disagreement. At this point, certiorari should be an easy call.

I. THE CIRCUITS DISAGREE ON WHETHER SECTION 2422(B) FORBIDS MERE EFFORTS TO CAUSE OR ARRANGE THE SEXUAL OFFENSE.

The Government agrees that the Fourth, Sixth, Seventh, and D.C. Circuits all understand the common denominator of the § 2422(b) verbs—persuade, induce, entice, and coerce—as an attempt to obtain the minor's assent to engage in sexual activity. Opp.8-9, 11-12; *United States v. Hosler*, 966 F.3d 690, 692 (7th Cir. 2020) ("essence of the crime is attempting to obtain the minor's assent"); *United States v. Clarke*, 842 F.3d 288, 296 (4th Cir. 2016) ("criminaliz[es] an intentional attempt to achieve a mental state—a minor's assent"); *United States v. Roman*, 795 F.3d 511, 516-17 (6th Cir. 2015) (defendant must "seek to transform or overcome the will of a minor"); *United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014) (explaining that statutory verbs all "connote efforts to affect the mind or will of another"). As the Government acknowledges, the core prohibition in these courts is "influencing the minor's own assent," or trying "to bring about a particular mental state (*i.e.*, assent) in a minor." Opp.8-9.

On that understanding, not every illicit sexual act with a minor—or attempt to engage in one by talking to a fictional minor—is necessarily preceded by a federal § 2422(b) crime. For example, if the minor propositions the defendant, the latter does not need to try to secure assent through persuasion, inducement, enticement, or coercion. The assent already exists; the defendant knows it; any interactions merely *effectuate* that mutual assent. Likewise if the defendant has other reason to know that the minor is "willing"—*e.g.*, two teens in a relationship who text to arrange an encounter. Each of those interactions may *cause* an unlawful sexual act, and therefore constitute a state-law attempt offense. But none implicates § 2422(b), since the defendant in these scenarios is not trying to convince the minor—in the D.C. Circuit's phrasing, is not trying to "transform or overcome" the minor's will. *Hite*, 769 F.3d at 1161; *Roman*, 795 F.3d at 516-17.

In opposing review, the Government pretends all the Courts of Appeals are in accord on this. Opp.9 (denying decision below "is inconsistent with" *Hite*); Opp.15 (claiming "all of the courts of appeals ... are in agreement" that § 2422(b) requires "an intentional attempt to achieve a particular mental state—namely, a minor's assent"). That is just wishful thinking. It cannot be reconciled with what the court below, or the Second or Eleventh Circuits for that matter, have said and done. Those courts' statements and decisions leave no doubt that they reject the majority approach and read the statutory verbs as sweeping in any efforts to arrange, facilitate, or cause the sexual activity that state law forbids. Whether the statute sweeps that broadly is the question presented.

a. Start with the decision below. The court clearly *thought* it was rejecting the D.C. Circuit's rule: "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).

That was a conscious and meaningful rejection, for the court proceeded to hold that "even a seemingly 'willing' minor" can be the victim of a § 2422(b) offense, and so "Kelli's" "apparent willingness" was irrelevant. Pet.App.8a-9a. Note the words "seemingly" and "apparent." The court is not limiting itself to scenarios where, unbeknownst to the defendant, the minor *happens to be* willing; in that case, a defendant could plausibly attempt to persuade or induce the minor because he does not realize she is already on board. *Cf. Waqar v. United States*, 997 F.3d 481, 486 (2d Cir. 2021) (example of campaign worker who approaches a voter who "already planned to vote for the candidate"). In referring to those who are *seemingly* and *apparently* willing, the court went further, evidently reasoning that a defendant could intend to persuade or induce someone *he already believes to be assenting*. That cannot be reconciled with the majority approach, as even the Government seems to admit. Opp.10. If a minor is willing and the defendant knows it, there is no "will" to "transform or overcome," and no "assent" that needs to be further obtained or secured. And the defendant cannot possibly intend, in such a case, to produce the assent that already appears to exist.

Through its descriptions of prior cases, the Eighth Circuit confirmed it meant to embrace this broad construction. For example, the panel recited that the evidence sufficed in *United States v. Riepe*, 858 F.3d 552 (8th Cir. 2017), because the defendant "discussed

specific sex acts" and "arranged to meet" the minor. Pet.App.9a. Yet nothing about those facts is remotely suggestive of exerting influence over the minor to achieve assent. Indeed, "arranging" to engage in sex with a minor is exactly what *Hite* said *does not violate the statute*: The instructions were erroneous because they allowed the jury to convict simply by finding that the defendant "sought to arrange for sexual activity." 769 F.3d at 1167. In *Clarke*, too, the Fourth Circuit agreed a defendant must try "to *persuade* [the minor] to engage in sex acts, not just *arrange* sex acts." 842 F.3d at 296 (emphasis added).

Finally, the Eighth Circuit's broad interpretation is underscored by what the court did *not* say. In the entire section of the opinion on sufficiency, the court did not once use the word that all Circuits supposedly agree is the crux of the statute: "assent." But the court did take the opportunity to emphasize that Zupnik "arranged to meet" the fictitious minor, "arrived at the specified location," and "brought his car." Pet.App.8a-9a. Those facts are highly probative if the statute forbids *causing* a sexual offense, but irrelevant if it forbids using mental influence to secure assent.

Still, the Government denies the decision below is inconsistent with *Hite*. Opp.9. It points to the panel's reliance on *United States v. Patten*, 397 F.3d 1100 (8th Cir. 2005), for the proposition that a defendant "can be found to 'persuade' or 'entice' even a seemingly 'willing' minor." Pet.App.8a. That actually shows *rejection* of *Hite*. The panel's use of the statutory term "persuade" in that context—to describe interactions with a "seemingly willing" participant—confirms that the panel below was *not* reading *Patten* as requiring proof of an intent to secure the minor's assent.

Nor does *Patten* itself suggest agreement with *Hite*. *Patten* involved an attempted sexual act with a (fake) 16-year-old, which would have been unlawful in North Dakota where the "minor" lived, but not in Minnesota where the defendant lived. *See* 397 F.3d at 1103-04. The court's focus on the location of the proposed sexual activity is completely inapposite to the issue here.

Finally, the Eighth Circuit has since confirmed that it meant what it said about § 2422(b). Upholding another conviction, the court once again said not a word about securing "assent," exerting "influence," or any synonyms for the same concept. *United States v. Willins*, 992 F.3d 723, 728 (8th Cir. 2021). It instead reasoned that the defendant was guilty because he "spoke multiple times with Sammi about engaging in sex with her minor daughter," "tried to call the daughter" (with no comment about *what* he was going to say), and "brought condoms, lubricant, an empty Cialis bottle, and a sex toy with him to Arkansas." *Id.* All of that goes to whether the defendant attempted to *cause sexual activity*, but says nothing about whether he tried to *influence or alter the minor's assent*.

b. The Government is equally off-track in trying to reconcile the Eleventh Circuit with the majority rule. As the Government admits (Opp.14), the governing precedent in that Circuit identified two readings of the law: Under the narrower version, the defendant must engage in "influence or persuasion," whereas the broad version criminalizes any effort "to stimulate or cause the minor to engage in sexual activity." *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004). It adopted the broader, "cause" theory. *United States v. Laureys*, 653 F.3d 27, 41 (D.C. Cir. 2011) (Brown, J., dissenting in part).

The Eleventh Circuit has reaffirmed that holding in subsequent unpublished opinions, confirming that it represents settled Circuit law. *See, e.g.*, *United States v. Matlack*, 674 F. App'x 869, 872 (11th Cir. 2016) (per curiam) ("We have held that to 'induce' means to attempt to stimulate or cause the minor to engage in sexual activity."). Further, the court has recognized that, as a result, "D.C. Circuit precedent" construing § 2422(b) is "an incorrect statement of this Court's law." *Id.*; *see also United States v. Cramer*, 789 F. App'x 153, 156 (11th Cir. 2019) (per curiam) (citing *Murrell* and explaining that "this court has already rejected [*Hite*'s] interpretation of § 2422(b)").

The Government does not try to defend the *Murrell* interpretation or to reconcile it with the majority rule. Instead, it points to a different Eleventh Circuit case—*United States v. Lee*, 603 F.3d 904 (11th Cir. 2010)—that formulated the standard differently. Opp.11-12; *see also* Opp.14 (quoting language from *Cramer* that, in turn, quoted *Lee*). *Lee* used causation language too, but altered the *object*; it said the defendant must cause "assent on the part of the minor." 603 F.3d at 914. That is very different from "caus[ing] the minor to engage in sexual activity," *Matlack*, 674 F. App'x at 872, as *Murrell* had interpreted the statutory text. Any act of facilitation causes the sexual act; whereas to cause *assent* means to convince.

It is true that the *Lee* formulation can more readily be reconciled with *Hite* and the majority test. And that intra-circuit tension may be why this Court denied certiorari in several cases when the Eleventh Circuit was alone on the minority side of the split. Opp.5-6. But it should not foreclose review now.

At the outset, with the Eighth and Second Circuits having joined the fray and openly rejected *Hite*, any inconsistency within the Eleventh Circuit is academic. Anyway, as a practical matter the Eleventh Circuit remains on the minority side of the conflict, because its pattern jury instructions follow *Murrell*, the earlier precedent: They define "induce" to mean "to stimulate the occurrence of or to cause." CA11 Pattern Jury Instrs. (Crim. Cases) O92.2 (2020). And the court even upheld those instructions against an attack based on the *Lee* formulation that the Government invokes. *See United States v. Brooks*, 723 F. App'x 671, 678 (11th Cir. 2018) (per curiam) (rejecting argument that court "should have defined 'induce' to mean 'to stimulate the occurrence of or to cause *the assent of a minor* to engage in unlawful sexual activity,'" because that is "foreclosed by" *Murrell* (emphasis added)). As a result, defendants in the Eleventh Circuit remain governed by the broad *Murrell* construction.

Finally, it would be particularly perverse to allow the Government to cite *Lee* as a basis to evade review of the prosecution-friendly Eleventh Circuit standard, because the Government has argued to the Eleventh Circuit that the correct, assent-focused *Hite* rule is "an incorrect statement of the law of this Circuit and should not be applied." Br. for United States at 30, *Cramer*, 789 F. App'x 153 (No. 18-12620), 2019 WL 1168034. And the Government has repeatedly invoked Eleventh Circuit law in urging *other* courts to reject *Hite*. *See* Br. for United States at 38-39, *Clarke*, 842 F.3d 288 (No. 15-4299), 2015 WL 5896160 (urging rejection of *Hite*'s "stricter standard" because "other courts," such as *Murrell*, "have not found such language ['cause' or 'arrange'] to be problematic"); Br.

for United States at 20-23, *United States v. Montgomery*, 746 F. App'x 381 (5th Cir. 2018) (No. 17-41182), 2018 WL 2165507 (citing Eleventh Circuit for "cause" standard and calling *Hite* neither "persuasive" nor "consistent" with Circuit law because its "focus" on minor's mental state is "misplaced").

The Government cannot have it both ways—urging the lower courts to reject the "stricter standard" of *Hite* in favor of the Eleventh Circuit's broad "causation" test—but then opposing review by this Court on the basis that all courts supposedly agree and there is no meaningful difference between their formulations.

c. As the Government notes in understated fashion, the Second Circuit also "declined to embrace" the D.C. Circuit's standard. Opp.13. Indeed, that court held that a proposed instruction using *Hite*'s language "did not accurately represent the law" and "decline[d] to follow" that decision. *Waqar*, 997 F.3d at 484-85.

That court appeared to be concerned that the D.C. Circuit's rule shifted the focus of the offense from the defendant to the minor. Opp.13. As Zupnik explained, that is mistaken. Pet.26-27. Regardless, by rejecting *Hite*, approving the decision below, and citing caselaw from the Eleventh Circuit, *Waqar* confirmed that this issue needs resolution. *See* 997 F.3d at 485, 488.

d. The Government also fails to grapple with how the decision below throws off the federal-state balance. True, the Eighth Circuit agrees with other courts that § 2422(b) does not prohibit the sexual act itself. Opp.9. But that misses the point: The broad reading elevates to a federal crime, with a ten-year minimum sentence, every attempt to bring about a sexual act that state law forbids—*i.e.*, every state-law attempt offense.

If an intent to "induce" means nothing more than an intent to "cause" or "arrange" the sexual activity, then intent for a § 2422(b) attempt offense collapses into an intent to bring about the sexual acts prohibited by state law. That turns every attempt to commit a state-law predicate—even with an assenting partner, and regardless of the age differential between them—into a severe violation of federal law. That is contrary not only to the statutory text but also to the interpretation the Government itself presses here. And it offends federalism by displacing state decisions about how to prosecute and punish garden-variety crimes. This Court should reject that overreaching construction.

II. UNLIKE THE PRIOR PETITIONS, THIS CASE HAS NO VEHICLE PROBLEMS.

Apart from denying the existence of the conflict, the Government offers only one other argument against review: that this is an "unsuitable vehicle" because the evidence was supposedly sufficient even under *Hite*'s definition of the statutory verbs. Opp. 15-16. That claim is both overstated and beside the point.

Reflecting its need to stretch, the Government cites statements Zupnik made through Craigslist's adults-only platform *before* "Kelli" shocked him by claiming to be only 15. Opp.2, 16 (citing Pet.App.2a-3a). That cannot establish intent to persuade a *minor* to engage in sexual activity. And the Government ignores that, after "Kelli's" revelation, Zupnik repeatedly expressed reluctance and made clear he was no longer trying to convince her: It is "up to you on how you want to move forward." Pet.App.3a. Yet "Kelli" kept insisting she was excited to proceed. Pet.7. Even the Eighth Circuit noted her "apparent willingness." Pet.App.9a.

That narrative makes this case utterly unlike the prior petitions this Court has seen, which involved men who specifically sought out children for sex. Pet.21-22. It also explains why the Eighth Circuit did not hold in the alternative that Zupnik's conviction would survive even under the standard he invoked. *Compare Hosler*, 966 F.3d at 693 (so holding).

And there's the rub. The court below premised its sufficiency holding on its rejection of the D.C. Circuit's interpretation and its adoption of a simple causation test. *See* Pet.App.8a-9a; *supra* at 5. That tees up the question of which construction of the statute is legally correct—a question the Government does not deny is important and recurring, controlling the breadth of this federal crime and its severe ten-year mandatory minimum. The Court should grant certiorari, answer that question, and leave the application of the correct standard for remand—as usual.

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Respectfully submitted,

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