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Enticing the Supreme Court to Hold That Physical Contact is Not Required to Violate the Child Enticement Statute

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Comments

Enticing the Supreme Court to Hold That Physical Contact is Not Required to Violate the Child Enticement Statute

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ABSTRACT

The sexual exploitation of children is a growing problem in the United States. Fifty years ago, parents feared their child getting kidnapped or approached by a predator in the park. Parents today fear their child being preyed upon through the internet. As technology continues to advance, child predators satisfy their depraved desires without ever stepping foot near their victim.

In response to the danger of the sexual exploitation of children, the federal government enacted the child enticement statute, codified at 18 U.S.C. § 2422(b). The statute criminalizes the enticement of a minor to engage in sexual activity. Because the federal code does not define "sexual activity" for purposes of § 2422(b), courts are left to decipher whether the predator must entice the minor to engage in physical contact. Three circuits have definitively spoken on this issue. The Seventh Circuit held that sexual activity requires physical contact. The Fourth and Eleventh Circuits have both held that physical contact is not required to implicate § 2422(b).

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This Comment demonstrates through methods of statutory interpretation, legislative history, and congressional intent that § 2422(b) does not require physical contact. This Comment proposes that the Supreme Court grant certiorari and hold that § 2422(b) does not require interpersonal physical contact.

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INTRODUCTION

Imagine you have an 11-year-old daughter, Lucy, who just received a laptop for Christmas. You may be one of the few parents

who monitor your child's device usage,[1] but like many other technologically savvy children, Lucy overrides the parental controls you programmed.[2] While playing an online game, Lucy receives a chat from someone with the message, "Hey, I'm Chase. How old are you? I'm twelve." After a few days of messaging through the online game, Chase asks Lucy for her cell phone number. The two form a "friendship," and the conversations take a sexual turn. Chase asks Lucy if she has ever had sex and "dares" her to FaceTime him while she puts her fingers or the handle of a hairbrush inside her vagina.[3] After being convinced to engage in the conduct, Lucy tells you about the encounter. Lucy explains that she did not see a live video of Chase, and that FaceTime only displayed his photo. Concerned, you call the police. Upon investigating the situation, detectives determine that "Chase" is actually a 45-year-old man named Robert Jones living in Wisconsin with his wife and two children. Federal prosecutors charge Robert with a myriad of state crimes and for the federal crime of enticing a minor to engage in sexual activity under 18 U.S.C. § 2422(b). Robert's pending conviction of enticing a minor to engage in sexual activity will rest upon the jurisdiction in which Robert is tried.[4] If Robert is tried in a federal court in the state of Wisconsin, the court will likely dismiss the case because Robert did not attempt to engage in physical contact with Lucy.[5] However, if Robert is tried in your home state of Florida, the charge will likely be upheld.[6]

The federal child enticement statute, codified at 18 U.S.C. § 2422(b), criminalizes the enticement of a minor to engage in sexual activity.[7] This section of the statute states:

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1. *See* Elisa Cinelli, *Study Reveals Only 14 Percent of Parents Child Kid's Devices*, MOMS (Aug. 4, 2019), https://bit.ly/3FatcvT [https://perma.cc/5ZHD-KPH8] (stating that 61 percent of parents who have children under the age of 16 have never checked their child's devices and have no intention of doing so).

2. *See* Stephen Johnson, *How Your Kids Are Outsmarting All Your Parental Controls*, LIFEHACKER (Dec. 21, 2021), https://bit.ly/3zJV1tY [https://perma.cc/56HY-93LY] (providing various examples of methods children use to bypass parental controls).

3. This scenario is partially based on the facts of *United States v. Tollefson,* 367 F. Supp 3d 865 (E.D. Wis. 2019).

4. *See* FED. R. CRIM. P. 18.

5. Wisconsin is located in the Seventh Circuit, which requires physical contact to sustain a § 2422(b) charge. *See* United States v. Taylor, 640 F.3d 255, 260 (7th Cir. 2011).

6. Florida is located in the Eleventh Circuit, which does not require physical contact to sustain a § 2422(b) charge. *See* United States v. Dominguez, 997 F.3d 1121, 1123 (11th Cir. 2021).

7. 18 U.S.C. § 2422(b) (2006).

> 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.[8]

The Federal Code does not explicitly define the term sexual activity within the relevant chapter,[9] resulting in disagreement among federal circuits in determining the applicable definition.[10] The Seventh, Fourth, and Eleventh Circuits have addressed the issue of whether sexual activity requires physical contact, giving rise to a contentious circuit split.[11]

I. BACKGROUND

A. The Evolution of § 2422(b)

The first semblance of the child enticement statute appeared in 1910 when Congress enacted the White-Slave Traffic Act ("Mann Act").[12] The Mann Act criminalized the interstate transportation of women and girls for "immoral purposes."[13] It also prohibited inducing, enticing, or compelling women to engage in prostitution.[14] The Mann Act has been amended several times, indicating Congress's cognizance of the increasing danger of sexual exploitation.[15]

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8. *Id.*

9. *See* 18 U.S.C. §§ 2421–2429.

10. *See* United States v. Taylor, 640 F.3d 255, 260 (7th Cir. 2011) (holding that physical contact is required to satisfy the sexual activity element of § 2422(b)); *see* United States v. Fugit, 703 F.3d 248, 254 (4th Cir. 2012) (holding that physical contact is not required to satisfy the sexual activity element of § 2422(b)); *see* United States v. Dominguez, 997 F.3d 1121, 1123 (11th Cir. 2021) (holding that physical contact is not required to satisfy the sexual activity element of § 2422(b)).

11. *See Taylor*, 640 F.3d at 260; *see Fugit*, 703 F.3d at 254; *see Dominguez*, 997 F.3d at 1123.

12. *See* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424).

13. *Id.* § 2.

14. *Id.*

15. *See, e.g.*, Mann Act, Pub. L. No. 99-628, sec. 5, § 2422, 100 Stat. 3510, 3511 (1986); Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (1996) (codified as amended at 18 U.S.C. § 2422(b)); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 102, § 2422, 112 Stat. 2974, 2975 (1998); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587 (2006).

In 1986, Congress amended the Mann Act to be gender neutral.[16] In amending the statute, Congress opined that "the sexual exploitation of young males is equally as serious" as that of females.[17] Ten years later, aiming to "protect children and families from online harm," Congress again amended the Mann Act to add § 2422(b).[18] At the time of the amendment, § 2422(b) prohibited the use of a facility of interstate commerce, such as the internet, to entice a minor to engage in "any sexual act for which any person may be criminally prosecuted."[19]

In 1998—two years after § 2422(b) was added to the statute—the term sexual activity replaced sexual act.[20] In the same amendment, the minimum term of imprisonment for violation of § 2422(b) was increased from 10 years to 15 years.[21] After several more amendments, and in an effort to "promote Internet safety,"[22] violation of the statute currently imposes a term of imprisonment for "not less than ten years or for life."[23]

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16. Mann Act, Pub. L. No. 99-628, sec. 5, § 2422, 100 Stat. 3510, 3511 (1986).

17. H.R. REP. NO. 99-910, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5957.

18. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (1996) (codified as amended at 18 U.S.C. § 2422(b)); H.R. REP. NO. 104-458, at 193 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 207.

19. Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (1996) (codified as amended at 18 U.S.C. § 2422(b)); H.R. REP. NO. 104-458, at 193 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 207.

20. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 102, § 2422, 112 Stat. 2974, 2975 (1998).

21. *Id. Compare* 18 U.S.C. § 2422(b) (1996):

> Whoever . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in . . . any *sexual act* for which any person may be criminally prosecuted, or attempts to do so, shall be fined . . .or imprisoned not more than *10 years*, or both.

(emphasis added), *with* 18 U.S.C. § 2422(b) (1998):

> Whoever . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in . . . any *sexual activity* for which any person can be criminally prosecuted, or attempts to do so, shall be fined . . . or imprisoned not more than *15 years*, or both.

(emphasis added).

22. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 587 (2006).

23. 18 U.S.C. § 2422(b) (2006).

B. Circuit Courts Are Split on Whether the Sexual Activity Element of § 2422(b) Requires Physical Contact

1. The Seventh Circuit Requires Physical Contact for Sexual Activity

In *United States v. Taylor*,[24] the Seventh Circuit held that physical contact is required to satisfy the sexual activity element of 18 U.S.C. § 2422(b).[25] In *Taylor*, a police officer posing as a 13-year-old girl engaged in an online conversation with Taylor.[26] Taylor, believing he was conversing with a 13-year-old girl, masturbated in front of his webcam and asked the "girl" to masturbate.[27] A jury in the U.S. District Court for the Northern District of Indiana convicted Taylor of violating 18 U.S.C. § 2422(b), and he was sentenced to ten years in prison.[28] Taylor appealed his conviction.[29]

On appeal, the Seventh Circuit held that Taylor did not engage in sexual activity under § 2422(b) by masturbating in front of the "girl" or by asking her to masturbate because it did not involve interpersonal physical contact.[30] In so holding, the court relied on the term "sexual act," as defined in 18 U.S.C. § 2246, as an aid in interpreting sexual activity.[31] Per § 2246, a sexual act is defined as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years."[32] Masturbation and other "solitary sex acts" are not covered by the term sexual act.[33] The definition of sexual act is located in Chapter 109A of the U.S. Code, and sexual activity appears in Chapter 117. However, the court reasoned that it has previously relied on Chapter

24. United States v. Taylor, 640 F.3d 255 (7th Cir. 2011).

25. *Id.* at 260.

26. *Id.* at 257. Although the "minor" in this case was an undercover police officer, § 2422(b) is still implicated because the defendant thought he was communicating with a minor. *See, e.g.*, United States v. Blazek, 431 F.3d 1104, 1109 (8th Cir. 2005) (holding that the defendant violated § 2422(b) because he believed the intended victim was a minor, even though the intended victim was actually an undercover officer); *see, e.g.*, United States v. Farley, 607 F.3d 1294, 1325 (11th Cir. 2010) (affirming the district court's holding that an actual minor victim is not necessary since the defendant believed the undercover agent was in fact a minor).

27. *Taylor*, 640 F.3d at 257.

28. *Id.* at 256.

29. *Id.*

30. *Id.* at 260.

31. *Id.* at 257.

32. *Id.* (citing 18 U.S.C. § 2246(2)(D)).

33. *Id.* at 259 (explaining that a sexual act requires "physical contact between two people").

109A as a guide "in interpreting provisions in other chapters of Title 18 that punish sexual crimes."[34]

The court expressed concern that interpreting § 2422(b) to not require physical contact would be overly broad.[35] Further, the court deduced that Congress likely considered sexual act and sexual activity synonymous.[36] The court's inference that the terms are synonymous was based in part on committee reports in which sexual act and sexual activity were used interchangeably.[37] The court also noted that prior to a 1998 amendment, § 2422(b) used the term sexual act while § 2422(a) used the term sexual activity, notwithstanding the substantive similarities between the two subsections.[38] In 1998, § 2422(b) was amended to replace the term sexual act with sexual activity.[39] According to the Seventh Circuit, the modification stems from Congress's effort to achieve semantic uniformity within the provision.[40]

Child pornography, which does not require physical contact, constitutes sexual activity under § 2422(b).[41] The Seventh Circuit addressed this discrepancy, as it is seemingly contrary to its holding that sexual activity requires physical contact.[42] The court explained that child pornography was explicitly included as an offense because sexual activity otherwise requires physical contact.[43]

The court recognized that it cannot be certain that sexual activity and sexual act are synonymous.[44] Despite Congress using the terms interchangeably, it may be equally plausible that sexual activity does not require physical contact.[45] However, under the rule of lenity, "when there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more

34. *Id.* at 257 (citing United States v. Osborn, 551 F.3d 718, 720 (7th Cir. 2009)).

35. *See id.* at 257–58 (questioning whether flirting or watching a pornographic movie or pole dancer would constitute sexual activity if the definition were more expansive than the definition for sexual act).

36. *Taylor*, 640 F.3d at 258.

37. *See id.* at 258 (citing H.R. REP. NO. 105-557, at 10, 20 (1998)).

38. *Id.*; 18 U.S.C. § 2422(b) (2006).

39. *See Taylor*, 640 F.3d at 258 (citing H.R. REP. NO. 105-557, at 10, 20 (1998)).

40. *See id.* (explaining that the purpose of the amendment was not to broaden § 2422(b) but to achieve uniformity).

41. *See* 18 U.S.C. § 2427 (1998).

42. *Taylor*, 640 F.3d at 259.

43. *Id.*

44. *Id.*

45. *Id.*

lenient one."[46] By treating sexual activity as a counterpart to sexual act, the court held that absent an overt statutory provision providing an exception, physical contact is required.[47]

2. *The Fourth Circuit Does Not Require Physical Contact for Sexual Activity*

In *United States v. Fugit*,[48] the Fourth Circuit held that interpersonal physical contact is not a requirement of the sexual activity element of 18 U.S.C. § 2422(b).[49] Here, Fugit posed as a young girl named Kimberly and held conversations with minor girls on the internet.[50] After obtaining the telephone numbers of the minor girls, he called them and posed as Kimberly's father.[51] Pretending to be Kimberly's father, Fugit engaged in "inappropriate sexual conversation[s]" with the girls, including asking the girls to remove their pants and masturbate.[52]

The U.S. Attorney for the Eastern District of Virginia charged Fugit with enticing or attempting to entice a minor to engage in illegal sexual activity under 18 U.S.C. § 2422.[53] Fugit pleaded guilty to the charge and later filed a motion for post-conviction relief.[54] Fugit's motion argued that § 2422(b) requires physical contact, and his conversations with his victims never referenced such contact.[55]

The Fourth Circuit rejected Fugit's argument, reasoning that if Congress had intended to narrow § 2422(b) to only apply to physical contact, it would have explicitly done so.[56] To provide further evidence of the broad scope of sexual activity, the court explained that Congress has overtly defined other similar terms within their corresponding chapters when the term "encompass[ed] only a specific subset of conduct."[57] For example, 18 U.S.C. § 2246(2) defines sexual act, the contours of which are overtly demarcated in the stat-

46. *Id.* at 259–60 (stating that "[t]he tie must go to the defendant" when there is ambiguity) (quoting United States v. Santos, 553 U.S. 507, 514 (2008)).

47. *Id.* at 257 (suggesting that if sexual activity encompassed a broader range of acts than sexual act, it would be defined in § 2422).

48. United States v. Fugit, 703 F.3d 248 (4th Cir. 2012).

49. *Id.* at 254.

50. *Id.* at 251.

51. *Id.*

52. *Id.*

53. *Id.* at 250.

54. *Id.*

55. *Id.* at 254.

56. *Id.* (inferring that Congress intentionally did not define the term sexual contact).

57. *Fugit*, 703 F.3d at 254 (citing various statutory terms that include the word "sexual," to demonstrate Congress's practice of explicitly defining the term if it is limited to a specific subset of conduct, including: § 2246(3), defining sexual contact;

ute.[58] Without an explicit limitation to the application of the term sexual activity, the court determined that Congress intended for it to be expansive.[59]

In interpreting sexual activity, the court looked to the plain meaning of the term.[60] The court cited dictionaries and found that sexual activity is an unambiguous term that does not require physical contact.[61] Rather, the court determined that the term signifies the "active pursuit of libidinal gratification."[62] The court explained that the congressional intent behind § 2422(b) was to protect children from the act of solicitation itself, which focuses on the minor's mental state rather than the completed sexual activity.[63] To comport with the congressional intent of § 2422(b)—the prevention of "psychological sexualization of children"—the Fourth Circuit held that interpersonal physical contact is not necessary.[64]

Fugit contended that the court's broad definition of sexual activity would lead to an influx of § 2422(b) convictions based on innocent behavior.[65] The court refuted Fugit's argument by explaining that § 2422(b) only encompasses sexual activity "for which any person can be charged with a criminal offense."[66] Fur-

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§ 2256(2), defining sexually explicit conduct; and § 2423, defining illicit sexual conduct).

58. *See* 18 U.S.C. § 2246(2) (1998).

59. *See Fugit*, 703 F.3d at 254.

60. *See id.* (stating that "[w]hen analyzing the meaning of an undefined statutory term, 'we must first determine whether the language at issue has a plain and unambiguous meaning'") (citations omitted) (internal quotations omitted).

61. *See id.*

62. *Id.* at 254–55 (explaining that Webster's dictionary defines "sexual" as "of or relating to the sphere of behavior associated with libidinal gratification") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2082 (3d ed. 1993)).

63. *See id.* at 255 (first citing United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011), then quoting United States v. Berk, 652 F.3d 132, 140 (1st Cir. 2011)) ("[B]y forbidding the knowing persuasion, inducement, enticement, or coercion of a minor, the statute 'criminalizes an intentional attempt to achieve a *mental* state—a minor's assent—regardless of the accused's intentions concerning the actual consummation of sexual activities with the minor.'") (emphasis in original).

64. *Fugit*, 703 F.3d at 255 (stating that the "primary evil that Congress meant to avert by enacting § 2422 was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact").

65. *Id.* (explaining that Fugit asserts that absent a physical contact requirement, § 2422(b) "becomes a trap capable of snaring all sorts of innocent behavior").

66. *Id.* ("[C]onduct that is innocuous, ambiguous, or merely flirtatious is not criminal and thus not subject to prosecution under § 2422(b)[,]" so Fugit's argument is futile).

ther, § 2422(b) only concerns sexual activity involving minors, significantly limiting its application.[67]

3. The Eleventh Circuit Does Not Require Physical Contact for Sexual Activity

In *United States v. Dominguez*,[68] the Eleventh Circuit agreed with the Fourth Circuit and held that the sexual activity element of § 2422(b) does not require interpersonal physical contact.[69] In this case, Dominguez engaged in sexually explicit conversations with a nine-year-old girl and sent her photos of his penis over the internet.[70] Rejecting Dominguez's argument that sexual activity requires actual or attempted interpersonal physical contact, the court held that sexual activity is conduct that is "done for the purpose of sexual gratification."[71]

The Eleventh Circuit explained that when Congress amended § 2422(b) to replace the term sexual act with sexual activity, the ordinary public meaning of sexual activity was not limited to interpersonal physical contact.[72] In contrast to the approach taken by the Fourth Circuit in defining sexual activity based on terms found in different chapters of the U.S. Code, the Eleventh Circuit looked to terms provided in Chapter 117 where § 2422(b) is located.[73] The Section is found in the same chapter as 18 U.S.C. § 2427, which provides, "[i]n this chapter, the term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography."[74] Because the production of child pornography does not require physical contact, the court articulated that "it would seem logical" that other conduct which does not involve physical contact also constitutes sexual activity.[75] The court further explained that § 2427's use of the word "includes" signifies

67. *Id.*

68. United States v. Dominguez, 997 F.3d 1121 (11th Cir. 2021).

69. *Id.* at 1123.

70. *Id.*

71. *Id.* at 1124, 1127 (holding that the defendant's conduct violated § 2422(b) because his statements to the child and the photos he sent her were for his own sexual gratification).

72. *See id.* at 1125 ("[W]e conclude that the ordinary public meaning of 'sexual activity' around 1998 was an action or pursuit relating to intercourse *or* to the desire for sex or carnal pleasure.") (emphasis in original).

73. *See id.*

74. 18 U.S.C. § 2427.

75. *See Dominguez*, 997 F.3d at 1125 (stating that the production of child pornography "can be accomplished without interpersonal physical contact between the offender and the victim, as certain images of a minor doing things to himself or herself can constitute child pornography"); *see also* United States v. Wolfenbarger, 464 F. Supp. 3d 1147, 1154 (N.D. Cal. 2020) (rejecting the defendant's argument

that nonphysical contact which constitutes sexual activity is not limited to child pornography.[76] Thus, the Fourth Circuit held that sexual activity does not require physical contact.[77]

4. Trial Courts Within the Sixth Circuit Have Issued Conflicting Holdings on Whether § 2422(b) Requires Physical Contact

Without a uniform rule on how to approach the sexual activity element of § 2422(b), courts lack clear direction on how to resolve child enticement cases. The Sixth Circuit has yet to interpret whether § 2422(b) requires physical contact, but its precedent suggests that when it does, it will concur with the Eleventh and Fourth Circuits.

In *United States v. Bailey*,[78] the Sixth Circuit rejected the defendant's argument that § 2422(b) requires the intent to engage in the sexual act with the minor upon persuasion.[79] Rather, the court found it sufficient that the defendant had "the intent to persuade or solicit the minor victim to commit sexual acts," even if there was no intention to "follow up."[80] The court held that § 2422(b) does not seek to criminalize the performance of the sexual act, but rather the attempt to persuade the minor into the sexual act.[81]

In *Van Stevenson v. United States*,[82] the defendant pleaded guilty to the enticement of a minor under § 2422(b) for coercing a minor to engage in sexually explicit conduct over the internet.[83] The defendant then moved to vacate or amend his sentence, arguing that his counsel was ineffective for failing to cite the circuit split regarding the definition of sexual activity.[84] The defendant cited the Seventh Circuit's holding that interpersonal physical contact is required to violate § 2422(b).[85] He argued that § 2422(b) was not implicated because he did not attempt to coerce the minor to engage

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that the attempted production of child pornography is not an offense covered by § 2422(b)).

76. *Dominguez*, 997 F.3d at 1125 ("[Section] 2427 uses the word 'includes,' and that is not a term of exclusion.").

77. *Id.*

78. United States v. Bailey, 228 F.3d 637 (6th Cir. 2000).

79. *Id.* at 638–39.

80. *Id.*

81. *Id.* at 639.

82. Van Stevenson v. United States, No. 1:14-CR-167, 2018 WL 38012113 (W.D. Mich. Aug. 10, 2018).

83. Van Stevenson v. United States, No. 1:14-CR-167, 2018 WL 38012113, at *1 (W.D. Mich. Aug. 10, 2018).

84. *Id.* at *5.

85. *Id.* (citing United States v. Taylor, 640 F.3d 255 (7th Cir. 2011)).

in interpersonal physical contact.[86] The district court rejected the argument, explaining that the Seventh Circuit's stance is the minority view and that the Sixth Circuit has not yet reached the issue.[87]

In *Newman v. United States*,[88] the court reached a different holding than *Van Stevenson*. The defendant in *Newman*, similar to the defendant in *Van Stevenson*, pleaded guilty to child enticement under § 2422(b) and subsequently moved to vacate or amend his sentence.[89] The charge in *Newman* was based on the defendant soliciting a minor to send him sexual and "sadistic" images.[90] The defendant cited to the Seventh Circuit's holding in *Taylor* that physical interpersonal contact is required and argued that because he did not persuade the minor to engage in person-to-person contact, § 2422(b) was not implicated.[91] The court ordered an evidentiary hearing and provided that the defendant's claim was not frivolous because "the Sixth [C]ircuit might adopt the [Seventh Circuit's] minority view."[92] The differing holdings among district courts in the Sixth Circuit exemplify the need for guidance in interpreting the sexual activity element of 18 U.S.C. § 2422(b).

II. ANALYSIS

The U.S. Supreme Court should grant certiorari to resolve the question of whether the sexual activity element of 18 U.S.C. § 2422(b) requires physical contact. Further, the Court should

86. *Id.* at *3.

87. *Id.* at *5 ("The Sixth Circuit has not reached the issue, but has held that the two different terms 'sexual contact' and 'sexual act' in the statute have different meanings.") (citing United States v. Shafer, 573 F.3d 267, 273 (6th Cir. 2009)). In *Shafer*, the court differentiated the terms sexual contact and sexual act in the context of 18 U.S.C. § 2251(a). *See Shafer*, 573 F.3d at 269, 273. The court held that sexual act is defined to require the touching "of another person," while sexual contact involves the touching of "any person," including oneself. *Id.* at 273. Because Congress used different language, the court reasoned that sexual contact is not limited to the same degree as sexual act. *Id.* Although § 2251(a) and § 2422(b) are located in different chapters of the U.S. Code, it appears that the court in *Van Stevenson* analogized *Shafer*'s comparison of sexual act and sexual contact to assist in defining sexual activity. *See generally* Van Stevenson v. United States, No. 1:14-CR-167, 2018 WL 38012113 (W.D. Mich. Aug. 10, 2018).

88. Newman v. United States, No. 3:15-CR-00083-DJH-LLK-1, 2018 WL 6503500 (W.D. Ky. Dec. 11, 2018).

89. *Id.* at *1.

90. *Id.* at *2 (explaining that the defendant persuaded the minor to penetrate his anus with the handle of a toilet plunger).

91. *Id.*

92. *Id.* at *2, *4. Ultimately, Newman filed a motion to dismiss his motion to vacate, and his § 2422(b) conviction was upheld. Motion to Dismiss Amended Petition by Patrick Newman at 1, United States v. Newman, No. 3:15-CR-00083-DJH-LLK-1 (W.D. Ky. July 31, 2019), ECF No. 74.

adopt the approach of the Fourth and Eleventh Circuits and hold that § 2422(b) does not require physical contact. Doing so would comport with the plain meaning of the statute and uphold the legislative intent to protect children from sexual predators. The statutory interpretation of § 2422(b) reinforces the proposition that physical contact is not necessary. Considering the growing number of minors who have access to the internet and use it as a primary source of daily communication, the Supreme Court must set parameters for all jurisdictions to follow.

A. The Current Societal and Technology-Driven Climate Necessitates Safeguards for Children

In 2020, the National Center for Missing & Exploited Children received 37,872 reports of online child enticement, an increase of 97.5 percent from 2019.[93] Through the internet, predators have direct access to prey on naïve minors by using them to fulfill their perverse desires. With the convenience of phone calls, FaceTime, text messages, Snapchats, and the like, predators can target children with ease.[94] The goal of the majority of offenders is to obtain sexually explicit content from their child victims, rather than meeting the child in person for sexual purposes.[95]

The television show *To Catch a Predator*, which aired its final episode in 2007, gave viewers a disturbing glimpse of child predators lurking on the internet.[96] In the show, actors would pose as minors on the internet and agree to meet suspected child predators in person for sexual contact.[97] When the predator would arrive at the sting house, he would be arrested.[98] Similarly, *Undercover Underage*, a 2021 Discovery+ docuseries, seeks to raise

93. *Online Enticement*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., https://bit.ly/3wTbrPS [https://perma.cc/4DFL-ZSK5] (last visited Dec. 22, 2021) (providing that in 2019, there were 19,174 reports of online enticement of children).

94. *See* Monica Anderson & Jingjing Jiang, *Teens, Social Media and Technology 2018*, PEW RSCH. CTR. (May 31, 2018), https://pewrsr.ch/3FNUVnz [https://perma.cc/NT5Q-9CHE] (reporting that 95 percent of children between the ages of 13 and 17 have a smartphone or access to one).

95. *The Online Enticement of Children: An In-Depth Analysis of CyberTipline Reports*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., 4 (2017), https://bit.ly/3Ftj0Qc [https://perma.cc/NU2W-SNXZ] (stating that the goal of 60 percent of offenders is to have the child victim send sexually explicit images, while 32 percent seek to meet the child in person to engage in sexual contact).

96. *See To Catch a Predator*, IMDB, https://imdb.to/3tmQv3i [https://perma.cc/7XD2-WPJP] (last visited Jan. 13, 2022). The show aired on Dateline NBC from 2004 through 2007. *Id.*

97. *Id.*

98. *Id.*

awareness of and combat the sexual exploitation of children.[99] The showrunner imitates underage individuals on the internet and engages in sexually explicit conversations with adult predators.[100] The mission of *Undercover Underage* is to "educate people about the dangers of communicating with strangers online" and to encourage parents to talk with their children about online safety.[101] The executives of *Undercover Underage* provide police with the information they obtain about suspected predators, but unlike *To Catch a Predator*, in-person sting operations are not the norm.[102]

The contrasting outcomes from *To Catch a Predator* and *Undercover Underage* reveal how society's perception of child exploitation has evolved. The purpose of *To Catch a Predator* was to lure the predator to meet the "child" in person.[103] The show focused on the predator taking steps to complete the act of sexual abuse.[104] Conversely, *Undercover Underage* focuses on abuse that takes place without the predator ever meeting his minor victim, including grooming and engaging in sexually explicit conversations.[105] As technology becomes part of the everyday lives of children, society has recognized that sexual enticement and abuse come in many forms,[106] and that physical contact is not a necessary component of such abuse.

The U.S. Supreme Court must hold that physical contact is not required to satisfy the sexual activity element of 18 U.S.C. § 2422(b). This precedent could effectively eradicate the dilemma that courts currently face when interpreting this statute. More importantly, the precedent would promote the safety of children as

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99. Stephanie Nolasco, *Connecticut Mom Who Poses as a Teen Girl To Catch Sexual Predators Speaks Out In Doc: 'I Have No Choice*,' FOXNEWS (Nov. 13, 2021), https://fxn.ws/3qv4jXr [https://perma.cc/ZN77-WA47] (explaining that the COVID-19 pandemic resulted in more children using the internet and more predators preying on them).

100. *Id.*

101. Risa Sarachan, *'Undercover Underage' Roo Powell Poses as a Teen to Track Down Child Predators*, FORBES (Nov. 18, 2021, 4:25 PM), https://bit.ly/3A3ylVp [https://perma.cc/MHL8-4M9F] (interviewing Roo Powell, the series creator and decoy).

102. *Id.*

103. *See* Brian Montopoli, *Does "Dateline" Go Too Far "To Catch A Predator?"*, CBSNEWS (Feb. 7, 2006, 11:20 AM), https://cbsn.ws/3p4udAx [https://perma.cc/NC7N-WT6L].

104. *Id.*

105. Sarachan, *supra* note 101.

106. *See The Role of Technology in Sexual Exploitation*, EQUAL. NOW, https://bit.ly/3h1JVI3 [https://perma.cc/3WDD-52E3] (last visited Feb. 3, 2023) (explaining how the internet has made sexual abuse more prevalent).

virtual connections continue to be a fundamental aspect of their lives.

B. Two Principal Theories of Statutory Interpretation: Textualism and Purposivism

Statutory interpretation relies on numerous tools and theories, but the two most predominant paradigms are textualism and purposivism.[107] The overarching goal of both methods is to uphold the meaning of a statute as prescribed by Congress.[108] Regardless of the approach relied on to interpret a statute, judges are to act as "faithful agents of Congress."[109] Although the two theories have differing approaches to statutory interpretation, both would reach the conclusion that § 2422(b) does not require physical contact.

1. Under the Textualism Theory, § 2422(b) Would Not Require Physical Contact

Textualism "focus[es] on the words of a statute, emphasizing text over any unstated purpose."[110] This theory aligns with the widely used plain meaning rule of statutory interpretation.[111] Textualists refrain from considering legislative history[112] but are more inclined to rely on canons of construction.[113]

a. Plain Meaning

If the plain meaning of a statutory term is "clear and unambiguous," the court need not go any further to gather additional clarifi-

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107. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 10 (2018).

108. *See id.* at 11 ("The goal is grounded in the belief that the Constitution makes the legislature the supreme lawmaker and that statutory interpretation should respect this legislative supremacy.").

109. Texas v. United States, 945 F.3d 355, 394 (5th Cir. 2019).

110. BRANNON, *supra* note 107, at 14.

111. *See In re* Scheierl, 176 B.R. 498, 503 (Bankr. D. Minn. 1995) (stating that textualism takes the plain meaning approach to statutory interpretation).

112. *See* BRANNON, *supra* note 107, at 15 ("Textualists have argued that focusing on 'genuine but unexpressed legislative intent' invites the danger that judges 'will in fact pursue their own objectives and desires' and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law.") (internal citations omitted); United States *ex rel.* Felten v. William Beaumont Hosp., 993 F.3d 428, 431 (6th Cir. 2021) ("We usually interpret a statute according to its plain meaning, without inquiry into its purpose.").

113. *See* Arangure v. Whitaker, 911 F.3d 333, 336 (6th Cir. 2018) (using canons of statutory interpretation to analyze the Immigration and Nationality Act). "[W]hen the text standing alone does not supply an answer, courts must consider canons of interpretation." *Id.*

cation.[114] The plain meaning of a statutory term can be deduced from the ordinary meaning of the text, a reasonable person's understanding of the term, the dictionary definition of the term, or the common law definition of the term.[115]

Sexual activity is arguably not an ambiguous term that is subject to multiple interpretations, and as such, the rule of lenity does not apply.[116] Section 2422(b) was amended in 1998 to replace the term sexual act with sexual activity.[117] In *United States v. Dominguez*, the Eleventh Circuit looked to the ordinary meaning of "sexual activity" at the time § 2422(b) was amended and determined that it was not limited to interpersonal physical contact.[118] Although it does not appear that there was a dictionary definition of the term "sexual activity" at the time of the 1998 amendment, the individual meanings of "sexual" and "activity" indicate that the words coupled together would not require physical contact.[119] The term "sexual" encompassed definitions including "of or relating to the sphere of behavior associated with libidinal gratification"[120] and "deriving from or relating to desire for sex or for carnal plea-

114. *A Guide to Reading, Interpreting and Applying Statutes*, THE WRITING CTR. AT GEO. UNIV. L. CTR., 3, https://bit.ly/3tMOLOR [https://perma.cc/D448-LSCJ] (last visited Oct. 24, 2021); *see also* BRANNON, *supra* note 107, at Summary ("First, judges often begin by looking to the ordinary meaning of the statutory text."); Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)) ("[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.' ") (omission in original).

115. *See* Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1739 (2020) (defining "sex" under Title VII by analyzing its ordinary public meaning and dictionary definitions); Pennsylvania, Dep't of Pub. Welfare v. U.S. Dep't. of Health & Hum. Servs., 647 F.3d 506, 511 (3d Cir. 2011) (utilizing the dictionary definitions of "room and board" to show the term extends beyond eating and sleeping); THE WRITING CTR. AT GEO. UNIV. L. CTR., *supra* note 114.

116. *See* United States v. Shill, No. 3:10-CR-493-BR, 2012 WL 529964, at *9 (D. Oreg. Feb. 17, 2012) (stating that the rule of lenity does not apply in interpreting § 2422(b) because the statute is not "grievously ambiguous"), *aff'd*, 740 F.3d 1347 (9th Cir. 2014).

117. *See* Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 102, § 2422, 112 Stat. 2934.

118. United States v. Dominguez, 997 F.3d 1121, 1127 (11th Cir. 2021) (evaluating the meaning of sexual activity by looking at dictionaries from around the time the statute was amended).

119. *See id.* at 1125 ("When § 2422(b) was amended, the term 'sexual' did not just refer to the act of physical intercourse with another. It also covered other types of behavior associated with sex."). Around the time that § 2422(b) was amended to change 1998 to sexual activity, "activity" went beyond "the interpersonal physical realm." *Id.*

120. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2082 (2002).

sure."[121] The term "activity" was defined as a "[b]risk or vigorous action" or "a pursuit"[122] and an "energetic action."[123] By combining the definitions of "sexual" and "activity," the Eleventh Circuit concluded that the ordinary meaning of sexual activity in 1998 included a pursuit relating "to the desire for sex or carnal pleasure," which does not require physical contact.[124] Therefore, the plain meaning of sexual activity within the context of § 2422(b) does not require physical contact.

b. The Word "Includes" Signifies That the List is Not Exhaustive

Looking beyond the plain meaning of sexual activity, additional canons of statutory construction reinforce that sexual activity does not require physical contact. While interpreting statutes, courts employ a presumption that when an example is introduced by the word "includes" or "including," the listed example(s) is not an exhaustive list.[125]

It is undisputed that § 2422(b) includes the production of child pornography.[126] 18 U.S.C. § 2427 states: "In this chapter, the term 'sexual activity for which any person can be charged with a criminal offense' *includes* the production of child pornography."[127] 18 U.S.C. § 2427 is found in Chapter 117 of the U.S. Code.[128] Section 2422(b) is also located in Chapter 117 of the U.S. Code and uses the language "sexual activity for which any person can be charged with a criminal offense."[129] As such, § 2422(b) includes the production of child pornography. Child pornography does not require interper-

121. 2 SHORTER OXFORD ENGLISH DICTIONARY 2780 (5th ed. 2002).

122. 1 SHORTER OXFORD ENGLISH DICTIONARY 23 (5th ed. 2002).

123. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 14 (4th ed. 2004).

124. *Dominguez*, 997 F.3d at 1125.

125. *See, e.g.*, United States v. Herrera, 974 F.3d 1040, 1048 (9th Cir. 2020) (using this presumption to determine that a list providing examples of "victims" was nonexclusive because the list was introduced by the word "includes"); ANTONIN SCALIA & BRYAN A GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 132 (2012) ("[T]he word include does not ordinarily introduce an exhaustive list."); United States v. Lange, 862 F.3d 1290, 1294 (11th Cir. 2017) (applying this tool of statutory construction to determine if the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses").

126. *See* 18 U.S.C. § 2427 (1998); 18 U.S.C. § 2422(b) (2006).

127. 18 U.S.C. § 2427 (1998) (emphasis added).

128. *Id.*

129. 18 U.S.C. § 2422(b) (2006).

sonal contact, as the statute provides that a visual depiction of a minor masturbating would constitute child pornography.[130]

Section 2422(b) unequivocally includes at least one offense—child pornography—that does not require physical contact, but the language of § 2427 indicates that § 2422(b) covers additional contactless offenses. Because § 2427 uses the term "includes," it expands the breadth of contactless offenses that would implicate § 2422(b).[131] With such an expansion, physical contact is not required to satisfy the sexual activity element of § 2422(b).

2. *Under the Purposivism Theory, § 2422(b) Would Not Require Physical Contact*

Purposivism evaluates the congressional intent behind a statute by examining legislative history.[132] Under this theory, the court will evaluate the statute "by viewing not only the language at issue, but by its context"[133] and the policy of the legislation.[134]

a. Legislative History

The evolution of the child enticement statute indicates that Congress continues to recognize the societal changes that prompt the need for additional protection of children from predators. A significant revision to § 2422(b) occurred in 1996 when Congress amended the statute to prohibit the coercion and enticement of children through the use of telecommunication devices.[135] Legislative reports reveal that Congress made the amendment to protect children from online harm.[136]

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130. 18 U.S.C. § 2427. *See* 18 U.S.C. § 2256 (2)(A), (8); United States v. Johnson, 784 F.3d 1070, 1072 (7th Cir. 2015) (holding that the defendant produced child pornography when he instructed a minor to take explicit photos of herself).

131. *See* United States v. Dominguez, 997 F.3d 1121, 1125 (11th Cir. 2021) ("[I]f the production of child pornography constitutes 'sexual activity' within the meaning of § 2422(b), it would seem logical that so too can other conduct not involving interpersonal physical contact. After all, § 2427 uses the word 'includes,' and that is not a term of exclusion.").

132. *See* Grand Trunk W. R.R. Co. v. U.S. Dep't of Lab., 875 F.3d 821, 829 (6th Cir. 2017) (explaining that the court was engaging in purposivism by looking at the legislative history of the Federal Railroad Safety Act).

133. State v. Courchesne, 816 A.2d 562, 579 (Conn. 2003).

134. *See* Bond v. United States, 572 U.S. 844, 856 (2014) (focusing on the congressional policy of preventing war crimes to determine that the defendant's common law assault was a local crime that did not constitute a chemical weapon or invoke the Chemical Weapons Convention Implementation Act of 1998).

135. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (1996) (codified as amended at 18 U.S.C. § 2422(b)).

136. *See* H.R. REP. NO. 104-458, at 193 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 207.

Another momentous change to § 2422(b) occurred in 1998 when Congress replaced the term "sexual act" with "sexual activity."[137] Courts follow the presumption that "when Congress alters the words of a statute, it must intend to change the statute's meaning."[138] Per 18 U.S.C. § 2246, a sexual act requires interpersonal physical contact.[139] Prior to Congress amending § 2422(b) to replace "sexual act" with "sexual activity," Congress may have intended § 2422(b) to only cover acts involving interpersonal physical contact. However, once Congress amended § 2422(b), the application of the statute was broadened.[140]

The Protection of Children From Sexual Predators Act of 1998 not only amended § 2422(b) to read "sexual activity" instead of "sexual act," but it also enacted 18 U.S.C. § 2427.[141] Section 2427 provides that § 2422(b) includes the production of child pornography.[142] Since child pornography does not require physical contact, and the statute uses the word "includes," Congress was cognizant that the amendment would result in § 2422(b) applying to other contactless offenses.[143]

Evidence of Congress's desire to expand the scope of § 2422(b) during the 1998 amendment is transcribed in legislative reports. Congress acknowledged the dangers of child predators on the internet and the accessibility for "[p]erfect strangers [to] reach into the home and befriend a child."[144] In recognition of the gravity of child sexualization, the legislation imposed increased penalties for "crimes against children, particularly assaults facilitated by computers."[145] The purpose of the legislation was to protect children from sexual exploitation, which can be accomplished without physical contact.[146]

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137. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 102, § 2422, 112 Stat. 2974, 2975 (1998).

138. United States v. Wilson, 503 U.S. 329, 336 (1992) (citing Russello v. United States, 464 U.S. 16, 23–24 (1983)).

139. 18 U.S.C. § 2246(2)(D) (1998) (defining a "sexual act" as "the intentional touching, not through the clothing, of the genitalia of another person").

140. *See* United States v. Quality Stores, Inc., 572 U.S. 141, 148 (2014) (citing Stone v. I.N.S., 514 U.S. 386, 397 (1995)) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

141. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, sec. 105, § 2427, 112 Stat. 2974, 2977 (1998).

142. *See* 18 U.S.C. § 2427 (1998); 18 U.S.C. § 2422(b) (2006).

143. *See supra* note 131 and accompanying text.

144. H.R. REP. NO. 105-557, at 12 (1998).

145. *Id.* at 10.

146. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974, 2974 (1998) (stating that the legislation is intended to "protect children from sexual abuse and exploitation").

b. Statutory Scheme

Evaluating the statutory scheme of the child enticement statute further clarifies that § 2422(b) does not require physical contact. Courts interpret legislation based on the overall statutory scheme rather than reading the provision in isolation.[147] This method of interpretation assists the court in determining the congressional intent of the statute while ensuring the proposed definition aligns with the legislative policy.[148] Interpretations that do not comport with the legislative policy of the statute as a whole will be precluded.[149]

A key element of § 2422(b) is that the defendant must entice an "individual *who has not attained the age of 18 years*" to engage in sexual activity.[150] To satisfy this element, one might assume that the predator needs to communicate with an actual minor. That is, someone under the age of 18. However, courts have made clear that an actual minor need not be involved to implicate § 2422(b).[151] Law enforcement often employs undercover agents to pose as minors on the internet and engage with suspected predators.[152] The fact that the "defendant falsely believed a minor to be involved" is not a viable defense to § 2422(b).[153]

147. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000) (determining "that Congress intended to exclude tobacco products from the FDA's jurisdiction" by considering the overall statutory scheme of the Food, Drug, and Cosmetic Act).

148. *In re* Wilson, 20 A.3d 1006, 1009 (N.H. 2011) (explaining that by interpreting statutes based on their statutory scheme, courts can better understand the overarching policy sought to be advanced by Congress and ensure the meaning of the statute comports with the policy); Hassell v. Bird, 420 P.3d 776, 788 (Cal. 2018) (citing City of San Jose v. Superior Ct., 389 P.3d 848, 853 (Cal. 2017)) ("[W]e consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.").

149. *See* King v. Burwell, 576 U.S. 473, 496 (2015) (rejecting the petitioner's interpretation of a provision of the Affordable Care Act because it would be contrary to the overarching policy of the Act); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014) (stating that an "interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference") (internal citations omitted).

150. 18 U.S.C. § 2422(b) (2006) (emphasis added).

151. *E.g.*, United States v. Root, 296 F.3d 1222, 1223 (11th Cir. 2002); United States v. Rajab, 23 F.4th 793, 795 (8th Cir. 2022) (rejecting the defendant's argument that his conviction could not be supported because "the object of his enticement was an adult undercover officer rather than an actual minor").

152. *See, e.g.*, United States v. Helder, 452 F.3d 751, 752 (8th Cir. 2006) (holding that the defendant violated § 2422(b) when he engaged in a sexual conversation over the internet with a detective, under the belief that he was communicating with a 14-year-old girl).

153. United States v. Sims, 428 F.3d 945, 960 (10th Cir. 2005).

By holding that an actual minor is not required to sustain a conviction under the child enticement statute, courts are reinforcing the proposition that physical contact is not required under § 2422(b). Holding that the defendant must entice a minor to engage in physical contact to violate § 2422(b) would be contrary to the statutory scheme as prescribed by Congress. Allowing undercover agents to pose as children expands the breadth of the statute and comports with the legislative intent to protect children from online predators. As the court in *United States v. Bailey* stated, "Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves."[154]

CONCLUSION

The internet provides child predators with a readily accessible medium to access their minor victims.[155] As technology is ingrained in our everyday lives, children need protection from sexual predators now more than ever. The Supreme Court could resolve the dilemma lower courts are facing by holding that 18 U.S.C. § 2422(b) does not require the offender to persuade the minor victim to engage in interpersonal physical contact. By holding that physical contact is not required, the Supreme Court would uphold the legislative intent of the statute, which is to protect children from the act of sexual persuasion and exploitation.[156] The legislative intent of § 2422(b) is apparent by the gradual evolution of the Mann Act, as each amendment has worked to further protect children. Whether the U.S. Supreme Court engages in purposivism or textualism to interpret the child enticement statute, a thorough analysis would lead them to conclude that physical contact is not required.

154. United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000).

155. *See Online Predators*, CHILD CRIME PREVENTION & SAFETY CTR., https://bit.ly/3INOjX3 [https://perma.cc/QKB6-2NTF] (last visited Jan. 29, 2022) (providing that there are around 500,000 online predators active on the internet every day).

156. *See Bailey*, 228 F.3d at 639; Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974, 2974 (1998).

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