No. 14-10350-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FAWAD SHAH SYED,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Georgia, No. 1:13-cr-00061-JRH-BKE

APPELLANT'S REPLY BRIEF

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SUMMARY OF THE REPLY

This is an attempted online enticement of a minor case under 18 U.S.C. § 2422(b). In such cases, "the government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact.… The statute criminalizes an intentional attempt to achieve a mental state – a minor's assent." *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010). This Court has said so repeatedly. This reasoning is the bedrock of the "adult intermediary" line of cases, in this Circuit and around the country. Adults can be convicted for online conversations with other adults because, and only because, changing a minor's mental state, not having sex with a minor, is the conduct § 2422(b) prohibits. *See United States v. McMillan*, 744 F.3d 1033, 1036 (7th Cir. 2014) ("One particularly effective way to persuade or entice a person to do something is to enlist the help of a trusted relative, friend, or associate.").

This case is not an adult intermediary case, but affirming this conviction would greatly undermine the adult intermediary line. The Government has never argued that Fawad Syed's text messages were sufficient to constitute a § 2422(b) substantial step in themselves; they

clearly were not. (*E.g.*, Appellee's Br. 34 ("[Syed's] communications with 'Samantha' did not explicitly set out his intent to have sex with her.").) Instead, the question is whether Syed took a substantial step – "toward causing assent, not toward causing actual sexual contact," *Lee*, 603 F.3d at 914 – by arranging to meet the minor "Samantha" or by traveling to meet her. (Tr. 364:10-14 (Prosecutor: "[I]t's the Government's position that that substantial step towards committing the crime was setting up a time to meet with Samantha and, also, appearing at the location where that meeting was scheduled to take place….").) The Court cannot affirm this conviction without either (1) determining that traveling to meet a minor **in person** is a substantial step toward causing her assent **online**, which is nonsensical, or (2) dramatically breaking with *Lee* and the entire body of adult intermediary caselaw. It should do neither.

Trial counsel raised this argument below, so plain error review does not apply. Even if it did apply, acquittal would be required.

The trial court also reversibly erred in admitting prior acts evidence. Syed's conversations with his ex-wife in 2000 were too old to be probative. His non-sexual chats with a teenager in 2012 were not probative of any relevant intent. The Government does not even

contend on appeal that the prior acts showed modus operandi, which was part of the trial court's basis for admission. The trial court also erred in sentencing Syed.

Syed respectfully requests that the judgment be reversed or vacated, and that this case be remanded to the district court with direction that he be acquitted, granted a new trial, and/or resentenced.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Evidence Was Insufficient to Prove Syed Took a Substantial Step Toward Online Enticement.

A. Under any review standard, the evidence was insufficient.

The Court need not decide whether plain error or de novo review applies. Under either standard, the plain text of the statute and the overwhelming weight of the authority require reversal. Traveling to meet a minor in person, or arranging to meet in person, cannot be a substantial step toward causing a minor's assent online.

1. A wall of cases says assent, not sex, is the actus reus.

This Court has repeatedly said that affecting a minor's state of mind, not sex, is the conduct punished by § 2422(b). *See*, *e.g.*, *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) ("The underlying criminal conduct that Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself."); *United States v. Lanzon*, 639 F.3d 1293, 1298 (11th Cir. 2011) (quoting *Murrell*); *United States v. Godwin*, 399 Fed. Appx. 484, 487 (11th Cir. 2010) (quoting *Murrell*); *United States v. Rivera*, 372 Fed. Appx. 958, 964 (11th Cir. 2010) (quoting

Murrell); *United States v. Schmitz*, 322 Fed. Appx. 765, 767 (11th Cir. 2009) ("It is the persuasion, inducement, enticement, or coercion of the minor, rather than the sex act itself, that is prohibited by the statute.") (citing *Murrell*); *United States v. Muentes*, 316 Fed. Appx. 921, 924 (11th Cir. 2009) (quoting *Murrell*); *Lee*, 603 F.3d at 914 ("[T]he government must prove that the defendant took a substantial step toward causing assent, not toward causing actual sexual contact.… The statute criminalizes an intentional attempt to achieve a mental state – a minor's assent.") (citation and quotation marks omitted); *United States v. Reddy*, 562 Fed. Appx. 735, 736 (11th Cir. 2014) ("[T]he government must prove that the 'defendant intended to cause assent on the part of the minor,' not that he acted with the specific intent to engage in the sexual activity.") (quoting *Lee*). More examples could be given. There is absolutely no doubt that § 2422(b) prohibits attempts to affect a minor's mental state online, not attempts to have sex with a minor.

Other circuits are in accord. *See*, *e.g.*, *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) ("Section 2422(b) criminalizes an intentional attempt to achieve a *mental* state – a minor's assent –

regardless of the accused's intentions vis-a-vis the actual consummation of sexual activities with the minor."); *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (same); *United States v. McMillan*, 744 F.3d 1033, 1036 (7th Cir. 2014) ("The essence of this crime is the defendant's effect (or attempted effect) on the child's mind."); *United States v. Berg*, 640 F.3d 239, 252 (7th Cir. 2011) ("The statute's focus is on the intended effect on the minor rather than the defendant's intent to engage in sexual activity."); *United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014) ("§ 2422(b) is intended to prohibit acts that seek to transform or overcome the will of a minor"). *See also* Comment, *A Better Way to Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 Seton Hall L. Rev. 691, 708 (2010) ("A predator who reserves a hotel room or arranges a specific meeting place may indicate his intent to have a sexual encounter with a minor, but § 2422(b) does not target a predator's attempt to have sex with a minor.").

It is noteworthy, in light of this unbroken line of cases, that the Government's Brief does not contain the word "assent." It does not contain the phrase "mental state." And it does not cite *Lee*, even after Syed's Opening Brief cited it six times (at 16, 19, 22, 24, 28, and 29).

The language in the above-cited cases is not dicta. It was crucial to those decisions. The law is now clear that communications with "adult intermediaries" can violate § 2422(b). The precursor to the adult intermediary line was *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000), where the defendant "insist[ed] [§ 2422(b)] require[d] the specific intent to commit illegal sexual acts rather than just the intent to persuade or solicit the minor victim to commit sexual acts," because "to hold otherwise, would criminalize mere sexual banter on the internet." *Id.* at 638. The court rejected his argument. Reviewing the "plain language" of § 2422(b), the court held:

> While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.

Id. at 639. This Court then relied on *Bailey* in its decision in *Murrell*, the first adult intermediary case in any circuit court. 368 F.3d at 1287. The Court rejected Murrell's argument that "he could not have intended to induce a minor to engage in illegal sex acts without actually speaking to a person he believed to be a minor." *Id.* Rather, "[b]y negotiating with

the purported father of a minor … Murrell's conduct fit[] squarely within the definition of 'induce.'" *Id.*

Murrell has been followed in dozens of cases. As the Seventh Circuit recently explained, the reasoning of the adult intermediary cases is based on the statute's focus on the minor's mental state: "One particularly effective way to persuade or entice a person to do something is to enlist the help of a trusted relative, friend, or associate." *McMillan*, 744 F.3d at 1036. Or as *Murrell* put it, the intermediary's role is "negotiating." 368 F.3d at 1287.

In *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010), in affirming a sentencing enhancement triggered by a § 2422(b) violation, this Court went a step beyond *Murrell*. Rothenberg had only "coached and encouraged other adults" online about how to sexually abuse minors. *Id.* at 625. There was no suggestion in the chats at issue that Rothenberg himself would engage in any sexual activity. He argued that "mere talk or speech unaccompanied by some other form of overt conduct cannot constitute a substantial step." *Id.* at 626. The Court disagreed. Noting that whether an action constitutes a substantial step depends on "the nature of the underlying offense to which the

attempt is tied," the Court held that "the very nature of the underlying offense [under § 2422(b)] – persuading, inducing or enticing engagement in unlawful sexual activity – necessarily contemplates oral or written communications as the principal if not the exclusive means of committing the offense." *Id.* at 627. Like *Lee*, *Rothenberg* is not meaningfully addressed in Appellee's Brief, even though it was a focal point of Syed's Opening Brief.

In October 2014, the D.C. Circuit vacated a jury conviction based on an argument similar to the one Syed presents here. *Hite*, 769 F.3d at 1166-67. In *Hite*, the trial court instructed the jury to convict if the defendant "intended to persuade an adult to *cause* a minor to engage in unlawful sexual activity." *Id.* at 1166 (quoting instruction). This was error. "[T]he preeminent characteristic of the conduct prohibited under § 2422(b) is transforming or overcoming the minor's will," and "simply 'to cause' sexual activity with a minor does not necessarily require any effort to transform or overcome the will of the minor." *Id.* at 1167. Similarly, use of the word "arrange" in another instruction was erroneous; "the jury could have convicted the defendant without necessarily finding that he intended to transform or overcome the will

of [a] minor, so long as they found that he sought to arrange for sexual activity." *Id.* Traveling to meet a minor, while carrying condoms, alcohol, and pepper spray, may be a substantial step toward "causing" sexual activity (offline), but that does not make it a substantial step toward a § 2422(b) violation.

Although the Sixth Circuit recently rejected an argument somewhat similar to Syed's, *see United States v. Fox*, No. 14-5391, 2015 U.S. App. LEXIS 1561 (6th Cir. Jan. 28, 2015), that case is distinguishable. The Sixth Circuit rejected Fox's argument that his conviction should be reversed because, in his view, his "text messages [with a minor] never touched on sexually explicit topics," but Fox had repeatedly asked the minor in texts to do him "a great big favor," "[t]oo big maybe." *Id.* at *5 (quoting texts). And he had explained to the minor that he could not tell her what the "favor" was over the phone because he was already under investigation by the FBI for child pornography. *Id.* The jury could reasonably have determined that the defendant, by asking the minor with much nodding and winking to do him a mysterious "great big favor," was attempting to persuade the minor to have sex with him – exactly what § 2422(b) prohibits – especially in the

context of all the other texts he sent. Syed never requested any such thing from Samantha.

Also, Syed is not arguing, as the defendant did in *Fox*, that there must be online chats that use graphic language under § 2422(b). Undoubtedly, a text message asking a minor, "Will you engage in sexual activity with me?" would violate § 2422(b) without being graphic. Graphic online chats are not the only possible substantial step toward a § 2422(b) violation, but they are present and a substantial step in every affirmed conviction that counsel for either party have identified (except *Fox*).

Syed respectfully submits that the best-reasoned persuasive authority is *United States v. Nitschke*, 843 F. Supp. 2d 4 (D.D.C. 2011), which the D.C. Circuit approvingly cited in *Hite*, 769 F.3d at 1164. Relying heavily on this Court's decisions in *Murrell* and *Lee*, the court in *Nitschke* determined that § 2422(b) intent "must be an intent to persuade using a means of interstate commerce," and therefore § 2422(b) "does not criminalize an intent to persuade at some later point in person." *Nitschke*, 843 F. Supp. 2d at 11. This meant that under the facts of that case, neither intent nor a substantial step could be

established. Even if there was evidence that the defendant intended to have sex with a minor, there was "no evidence that he intended to persuade the minor via the internet to have sex." *Id.* at 13. *See also id.* at 14 ("Simple interest in prepubescent sex – or even an intent to engage in such acts – cannot be enough to establish an intent to persuade…. [A] willingness and desire to have sex does not demonstrate an intent to persuade a minor via the internet."). Arranging a face-to-face meeting could not be a substantial step: "Later face-to-face persuasion … is not criminalized under § 2422(b); accordingly, arranging to meet for such persuasion cannot be a substantial step either." *Id.* at 15. Travel also could not be a substantial step: "Travel for a face-to-face meeting … cannot be a substantial step because such face-to-face persuasion is not criminalized." *Id.* at 16. The court therefore dismissed the § 2422(b) charge.

Nitschke is distinguishable from the instant case only in that what Nitschke did was far uglier than anything Syed did. Nitschke engaged in graphic conversations about the possibility of having sex with a 12-year-old boy. Syed did nothing like that. Otherwise, *Nitschke* is exactly on point, and the Court should reach the same conclusions here.

Neither arranging a meeting nor traveling to meet can be a § 2422(b) substantial step. Nothing else Syed did was a substantial step either. He should have been acquitted.

2. The interstate component is crucial.

Syed was indicted with "Attempted Online Enticement of a Minor." (Doc. 19.) Although the phrase "online enticement" was used throughout the trial by the court, counsel for both sides, and law enforcement witnesses (Tr. 5, 30, 33, 52, 146, 149, 214, 222, 248, 253, 295, 296, 297, 299, 303, 316, 371, 386, 390), Appellee's Brief studiously avoids it. The Court should not lose sight of the fact that, for a § 2422(b) attempt conviction, the goal must have been not just to entice, but to entice online. *See McMillan*, 744 F.3d at 1036 ("[W]hat is important under this statute is the defendant's attempt (using the mails or other instrumentalities of commerce) to persuade the minor."); *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) ("Section 2422(b) essentially requires proof that the defendant attempted to communicate with the minor, and through that communication, transform the minor into his victim."); *Nitschke*, 843 F. Supp. 2d at 11.

The Government cites *Hite*, 769 F.3d at 1165, in arguing that the "core act of persuasion" need not occur online. (Br. 28.) *Hite*, however, specifically limited its reasoning on that point to the adult intermediary context: "**Where an adult intermediary is involved**, we hold that 'using the mail or any facility or means of interstate or foreign commerce' pursuant to § 2422(b) is satisfied if the defendant knowingly and actively employs such interstate means for the essential function of communicating with the adult intermediary for the purpose of persuading, inducing, enticing, or coercing the minor." *Id.* (emphasis added). This is not an adult intermediary case, and there are no grounds for extending this reasoning beyond the adult intermediary context. Even in the adult intermediary context, the communications with the intermediary for the purpose of persuading the minor must take place online.

Syed fully agrees with the Government that offline conduct "designed to further facilitate … online persuasion" (Br. 29) could constitute a substantial step. A defendant who brings a minor a gift, with the intention of then later persuading her online to have sex, has taken a § 2422(b) substantial step. But Syed did nothing like that. The

Government has never contended that Syed traveled to Samantha's apartment for the purpose of logging onto the internet there and then using it to persuade her to have sex. That would be ridiculous.

The Government calls the interstate component of § 2422(b) "jurisdictional" (Br. 28), as if that means it is just a technicality. The interstate component is what gives Congress the power to regulate here at all. *See United States v. Mandel*, 647 F.3d 710, 716 (7th Cir. 2011) ("It is the use of a facility of interstate commerce which transforms what would otherwise be a state offense … into one that is within the federal government's authority under the Commerce Clause to proscribe and prosecute.") (discussing 18 U.S.C. § 1958(a)). There is no need for the Court to address any Commerce Clause issues in this case, because it is clear on the face of the statute that it only regulates interstate activity. (Indeed, § 2422(b) most likely extends to less than the full extent of Congress's power in this area. *See United States v. Root*, 296 F.3d 1222, 1230 (11th Cir. 2002) ("[M]ere contact … for the purposes of engaging in illegal sexual activity … is not criminalized in 18 U.S.C. § 2422(b).").) But to interpret the statute as the Government suggests would very likely mean it exceeded Congress's power. "[T]he power to

regulate commerce, though broad indeed, has limits." *United States v. Lopez*, 514 U.S. 549, 557, 115 S. Ct. 1624, 1629 (1995) (citation and quotation marks omitted). The Court should interpret § 2422(b) in a way that avoids any constitutional infirmities. *See Jones v. United States*, 529 U.S. 848, 859, 120 S. Ct. 1904, 1912 (2000) (interpreting 18 U.S.C. § 844(i) not to apply to arson of owner-occupied private residence not used in interstate commerce).

Twenty years ago, § 2422(b) did not exist in any form. It became law as part of the Telecommunications Act of 1996. It is a regulation of interstate commerce, especially internet communications, not of sex. The Court should interpret § 2422(b) consistently with that constitutional imperative.

3. Only dicta supports the Government's position.

As Syed conceded in his Opening Brief, there are cases from this Circuit and elsewhere describing travel to meet a minor or making plans to meet a minor as a § 2422(b) substantial step. None of those cases, however, requires the Court to hold here that Syed took a substantial step. The Government has not identified a single case in which the result would have been different if travel or making plans to

meet had not been described as a substantial step. On the other hand, affirming here would call the logic of the entire adult intermediary line of cases into question. Reversing the conviction is the outcome that will be much easier to reconcile with the Court's precedent.

a. Dicta does not bind the Court.

This Court is not required to follow dicta, which is "not binding on anyone for any purpose." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 762 (11th Cir. 2010) (citation and quotation marks omitted). Only holdings are binding, and "the holding of a case is … comprised both of the result of the case and 'those portions of the opinion necessary to that result by which we are bound.'" *United States v. Kaley*, 579 F.3d 1246, 1253 (11th Cir. 2009) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 66-67, 116 S. Ct. 1114, 1129 (1996)).

"Strictly speaking, judicial opinions do not make binding precedents; judicial decisions do." *Dantzler v. IRS*, 183 F.3d 1247, 1251 (11th Cir. 1999). Accordingly, there is "an important difference between the holding in a case and the reasoning that supports that holding." *Id.* (quoting *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 1590 (1998)). "A judicial opinion is not a statute, and not every sentence in a

judicial opinion is law." *Id.* This means that prior precedents are binding "only on cases presenting facts materially the same as those presented" in the earlier cases. *Id. See also United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Carnes, J., concurring) ("But while the prior precedent rule requires us to follow the holding of an earlier decision, it does not require us to follow the language of the accompanying opinion that is unnecessary to the decision, i.e., we are not required to follow dicta."). The fact that the Court has repeated dicta more than once does not make it any more binding. *See United States v. Maung*, 320 F.3d 1305, 1308 (11th Cir. 2003) ("[T]wice told dicta is still dicta.").

There is no case in which this Court has been presented with a fact pattern where travel to meet a minor or arranging to meet was the only alleged substantial step. The Court is not bound by cases where that fact pattern was not presented.

b. The Government relies on dicta.

In each of the substantial step cases relied upon by the Government, there were interstate chats during which the defendants sought the assent of a minor to sexual activity, usually by specifically

asking for sex or specifically discussing sex acts. For an especially pornographic example, *see United States v. Yost*, 479 F.3d 815, 817-18 (11th Cir. 2007) (Yahoo! chats). *See also United States v. Prine*, 569 Fed. Appx. 859, 861 (11th Cir. 2014) (in emails, defendant "asked if [girls] 'like[d] to touch and explore a man'" and "if he could 'touch[]/explor[e] them'"); *United States v. Deal*, 438 Fed. Appx. 807, 809 (11th Cir. 2011) (in "online conversations," defendant was "graphic in describing how he … wanted to engage in specific sexual activities with [girl]"); *United States v. Lanzon*, 639 F.3d 1293, 1296 (11th Cir. 2011) (in a "text conversation," defendant said he wanted "oral" and "hot passionate sex" with girl); *United States v. Schmitz*, 322 Fed. Appx. 765, 766, 768 (11th Cir. 2009) ("cell-phone texts and on-line instant messages" "express[ed] … desire to pursue a sexual relationship" with minor);[1] *United States v. Bolen*, 136 Fed. Appx. 325, 329 n.1 (11th Cir. 2005) ("over the phone," defendant "specifically stat[ed] that he wanted [girl] to perform oral sex on him"); *Murrell*, 368 F.3d at 1285 (in phone conversation, defendant "expressed that he wanted to have oral sex and intercourse with [girl]").

[1] More-specific texts are quoted in the District Court's opinion at *Schmitz v. United States*, Crim. No. 07-0365, 2012 U.S. Dist. LEXIS 29274, *27 (S.D. Ala. Jan. 19, 2012).

The Government has not identified any § 2422(b) conviction involving online chats as tepid as Syed's with Samantha. In their chats, Syed never expressed a desire to engage in sexual activity with Samantha, or discussed doing so.

This is not a case of "alternative holdings." *Cf. Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 484 n.3 (11th Cir. 2014). In none of the Government's cited cases did this Court make an alternative holding that travel or setting a meeting time by itself would suffice for a § 2422(b) conviction. The Government's description of *Murrell* is simply false. The Court did **not** find there "that the defendant's travel was sufficient for a 'substantial step,' even disregarding the defendant's sexually explicit communications." (Appellee's Br. 25.) Here is what the Court actually said:

> We need not reach the question whether communication via a means of interstate commerce, without more, is sufficient to sustain a conviction for attempt under § 2422(b) because Murrell engaged in objective acts in addition to his communications with Detective Spector.

368 F.3d at 1288 n.3. That is the inverse of the Government's description. *Murrell* says that objective acts **plus** communication are enough, so it does not address whether communication alone would be

enough. It says absolutely nothing about whether objective acts (like travel) alone would be enough. The other case the Government relies on, *Deal*, used language very similar to *Murrell*. 438 Fed. Appx. at 811.

As the Government points out, the jury deliberated for only 40 minutes. (Tr. 419-20.) But if anything this fact weighs against, not in favor, of the jury's verdict. "When brief jury deliberation is coupled with a verdict that is contrary to the great weight of the evidence … the district court has an affirmative duty to set aside the verdict." *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 182 (1st Cir. 1988). This case should never have gone to the jury. There was insufficient evidence from which they could find that Syed took a substantial step toward a § 2422(b) violation.

B. Plain error review does not apply and would not change the result.

1. The error was preserved.

Syed sought acquittal at trial on the same basis he now asserts in this appeal. During the oral motion for acquittal, his counsel argued: "This crime is a computer crime. It's online enticement. We have the texts in this case – 1006 texts between my client and Investigator Dobbins. There is not one text out of the 1000 that any witness can

point to and say that my client was enticing sexual activity…." (Tr. 297:3-7.) And then: "Again, this is a computer case. It's brought up, well, when he got arrested he had condoms in his pocket. Well, he was already under arrest at that point. According to the prosecution the crime had already been committed because, again, it's a computer crime." (Tr. 298:10-14.)

That is precisely the same argument being presented here. This is an online enticement case – "a computer crime" – so the fact that Syed carried condoms is irrelevant, and what matters is what happened in the texts. Counsel repeated these arguments in closing:

> There is a reason why I keep referring to the 1006 texts.… It's a computer sex crime. They keep saying, well, consider all the other stuff that happened later on.
>
> As soon as Fawad went down to the apartment, he was arrested.… As far as the Government was concerned, the crime had been committed because it's a computer crime.… So, when you look to see is someone guilty or not guilty of a computer crime, you look to see what's on the computer.…
>
> [N]owhere in any of the texts anywhere on the computer is he trying to induce or coerce sexual intercourse.…
>
> But again, it's not that hard because it's a computer crime – online enticement. Look at

> what's online and there is no sex discussed, much less coerced or forced or enticed.

(Tr. 386-90.) Again, this is the same argument being presented on appeal. The crime is online enticement, and the crime happened online if it happened at all. What happened when Syed "went down to the apartment" is almost irrelevant; the jury should have "[l]ook[ed] at what's online and there is no sex discussed, much less coerced or forced or enticed."

The Government argues that Syed's motion for acquittal was all about lack of intent. (*E.g.*, Br. 20 ("That was his chosen defense, lack of intent…").) But Syed's counsel did not use the word "intent" anywhere in the motion. (Tr. 296:17-299:7, 301:22-303:7.) The trial court also did not use the word "intent" anywhere in its ruling. (Tr. 303:15-307:16.) Undoubtedly, lack of intent was part of the basis for Syed's motion, but it was not the sole basis. Lack of a substantial step was also part of the basis. The fact that Syed's counsel did not use the words "substantial step" during the motion is not dispositive, any more than the fact that he did not use the word "intent" is dispositive. *See United States v. Massey*, 443 F.3d 814, 819 (11th Cir. 2006) (finding error preserved even though defense attorney "did not specifically utter the words" at

issue). Indeed, the prosecutor evidently recognized that Syed was making a substantial step argument, because she used the words "substantial step" in her response. (Tr. 299:16.)

Because Syed moved for acquittal under Rule 29, on the same grounds he now asserts on appeal, he preserved this insufficiency of evidence claim and it should be reviewed de novo. *See United States v. Bachynsky*, 415 Fed. Appx. 167, 170 (11th Cir. 2011).

2. Even under plain error review, the Court should direct Syed's acquittal.

For all the reasons discussed above, insufficiency of the evidence would be grounds for reversal even if the issue had not been preserved. The argument presented here comes straight from the language of § 2422(b) itself. *See United States v. Whitfield*, 590 F.3d 325, 347 (5th Cir. 2009) (reversing under plain error standard where "plain language" of statute did not support convictions). A miscarriage of justice would result if this conviction were not reversed.

II. By Arguing that Travel or Setting a Meeting Time Was a Substantial Step, the Prosecutor Committed Misconduct.

As the Government does not offer any argument on prosecutorial misconduct independent of its arguments on insufficiency of the evidence, Syed stands on the argument in his Opening Brief.

III. The Trial Court Erred by Allowing Prior Acts Evidence.

The prior acts evidence should not have been admitted. Neither prior act was probative of the relevant intent, the evidence from 2000 was too old to be probative, and unfair prejudice outweighed any value.

The Government does not argue on appeal that modus operandi justified introducing the prior acts evidence. Thus, intent appears to be the only arguable purpose remaining for introducing the prior acts. Further, it is not correct that "Syed does not dispute that he committed those [prior] acts." (Appellee's Br. 32.) On the contrary, Syed maintains that his ex-wife was 18 when they first had sex. But he concedes that there was evidence from which one could conclude otherwise.

Syed also fully agrees with the Government that intent was at issue. The question is whether the prior acts evidence was probative of any relevant intent. It was not. Neither the meeting with his ex-wife, nor the texts in 2012 with a teenager, tended to show any intent to persuade minors online to engage in sexual activity.

Syed's interactions with his ex-wife in 2000 were too old to be probative in 2013. Much can change in thirteen years. For example, in 1989, the Supreme Court held there was "insufficient evidence of a

national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment." *Penry v. Lynaugh*, 492 U.S. 302, 335, 109 S. Ct. 2934, 2955 (1989). Thirteen years later, the Court reversed itself, finding that a new national consensus against such executions had developed. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002). *See also Romer v. Evans*, 517 U.S. 620, 636, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago….") (citing *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986)). There was a massive transformation in the way people used the internet, and particularly in the way they used smart phones (like the iPhone Syed used for his chats with Samantha), in the thirteen years between 2000 and 2013. Section 2422(b) was in its infancy in 2000. Thirteen years is old for any kind of prior acts evidence, but it especially old in an online enticement case. Neither of the prior acts should have been admitted.

IV. The Trial Court Erroneously Sentenced Syed.

Because the two prior acts were not "prohibited sexual conduct," even reading the facts in the light most favorable to the Government, the trial court should not have applied a five-point enhancement under U.S.S.G. § 4b1.5(b). To say that Syed's first meeting with his ex-wife was not prohibited sexual conduct is not "self-serving" (Appellee's Br. 39); it is based on the ex-wife's own testimony. She said herself that she did not know they were going to have sex when they chatted online, but only after they met in person. (Tr. 205:23-24.) Similarly, there was no evidence of persuasion or an attempt at persuasion in the 2012 texts with a teenager. Thus, there was no evidence that Syed persuaded or attempted to persuade a minor online, and therefore no § 2422(b) violation on which to base an enhancement.

On appeal, the Government now argues that Syed "probably" (Br. 39) violated 18 U.S.C. § 2423(b), which prohibits crossing state lines to engage in illicit sexual conduct, when he met his ex-wife. Although there was testimony that Syed lived in Maryland and his ex-wife lived in Virginia when they met, there was no testimony as to where they allegedly had sex or who (if anyone) crossed state lines for

that particular purpose. Nothing was introduced in the trial court showing the age of consent in 2000 in Maryland, Virginia, or any other jurisdiction where they might have met while the ex-wife was 17. This is not enough to sustain the enhancement.

As for the 18 U.S.C. § 1519 records-destruction charges, four justices of the Supreme Court agreed in February that it "is a bad law – too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." *Yates v. United States*, __ U.S. __, 135 S. Ct. 1074 (2015) (Kagan, J., dissenting) (the fish-record case). Not only that, § 1519 is "an emblem of a deeper pathology in the federal criminal code," representing "overcriminalization and excessive punishment." This case well illustrates those problems. Syed was sentenced to 240 months in prison on each of the two § 1519 charges, while his ex-wife was not charged with any crime (Tr. 207:20), even after admitting she destroyed the records at issue with knowledge that Syed had been arrested and was under investigation. (Tr. 197:17.) If the § 2422(b) conviction is overturned, Syed will at the very least be resentenced (because the § 1519 sentences were adjusted upward under U.S.S.G. §§ 2J1.2(c) and

2X3.1). But he should be retried under § 1519, because the cumulative effect of the errors at trial denied him of due process.

CONCLUSION

Before the events of this case, Syed had a clean record and a good job. He has two children. He respectfully requests that the judgment be reversed or vacated, and that this case be remanded to the district court with direction that he be acquitted, granted a new trial, and/or resentenced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 5,837 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

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April 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2015, I filed and served on all parties the foregoing Appellant's Reply Brief using the Court's CM/ECF system, and by sending paper copies to counsel and the Court via third-party commercial carrier.

/s/ Andy Clark
Andy Clark