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Protecting Our Nation's Children in the Technological Age: Arguing For An Interpretation of "Sexual Activity" in 18 U.S.C. § 2422(b) That Does Not Require Physical Contact

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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law, B.B.A. Marketing, 2021; B.A. Political Science, University of Georgia. I would like to thank Professor John B. Meixner for his thoughtful guidance and feedback throughout my writing and editing process. Further, I would like to thank the members of the Georgia Criminal Law Review for their work in preparing this piece for publication, especially Olivia McCubbins for her support throughout the writing process.

PROTECTING OUR NATION'S CHILDREN IN THE TECHNOLOGICAL AGE: ARGUING FOR AN INTERPRETATION OF "SEXUAL ACTIVITY" IN 18 U.S.C. § 2422(b) THAT DOES NOT REQUIRE PHYSICAL CONTACT

Allison Fine[*]

Our Nation's justice system values "equal protection under the law." This represents the belief that all individuals should be treated equally under the law regardless of personal characteristics. Traditionally, we think about this in a context of things like race, gender, or ethnicity. However, this also encompasses the general idea that individuals nationwide should be accountable to and protected by the same laws. As it relates to criminal law, this notion highlights the importance of uniformity in a criminal justice system. Without consistent application and execution, a criminal justice system will never be fair or "equal."

The federal child enticement statute, 18 U.S.C. § 2422(b), criminalizes the coercion or enticement of a minor to engage in "any sexual activity for which any person can be charged with a criminal offense." The statute was initially enacted as part of the Mann Act to punish the prostitution of females, but it has since been expanded to target sexual harms against children regardless of gender and to account for the growing risk of online harms stemming from the rise in the Internet, social media, and other technology. Notably, the statute carries a 10-year mandatory minimum term of imprisonment.

When the statute was enacted, Congress did not provide a definition for the phrase "sexual activity." As a result, a circuit split is emerging among the federal jurisdictions about how the term

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"sexual activity" should be properly interpreted. The Seventh Circuit is the only circuit thus far to hold that "sexual activity" as it is used in section 2422(b) requires interpersonal physical activity between individuals. Conversely, the Fourth and Eleventh Circuits held that "sexual activity" does not require interpersonal physical contact between individuals, so sexual crimes that only occur online could constitute an offense.

This Note argues that the proper interpretation of "sexual activity" is the broader definition endorsed by the Fourth and Eleventh Circuits that does not require interpersonal physical contact between individuals. First, this Note argues that this interpretation is more appropriate because it conforms with the traditional canons of statutory interpretation unlike the reasoning underlying the narrow interpretation endorsed by the Seventh Circuit. Second, this Note argues that the broader interpretation is necessary because children have become more vulnerable due to developments in technology and because of the COVID-19 pandemic. Third, this Note argues that by adopting a broader interpretation of "sexual activity," section 2422(b) can serve as a stronger prosecutorial tool and will help fill in gaps in the justice system left by the federal trafficking statute codified in 18 U.S.C. § 1591. Lastly, this Note addresses potential problems with this interpretation and some solutions to address these.

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I. INTRODUCTION[1]

One of the central principles of American law is that it should apply equally to all. This represents the emphasis that our nation places on the ideal of every individual being treated the same under the law regardless of personal characteristics like gender, race, ethnicity, or sexual orientation. "Equal justice" also implies that individuals should receive equal treatment under the law regardless of where they are in the nation. This demonstrates the notion that a critical aspect of the federal criminal justice system is uniformity. Uniformity within the federal criminal justice system is important because it provides credibility to the public regarding the effectiveness of the justice system and promotes trust in the judicial process.

In the federal system, individuals located in different states should have engaged in the same or similar conduct to be charged with the same crime. Theoretically, a defendant charged with a federal crime in Georgia should have committed the same unlawful act as a defendant charged with that same crime in Illinois. Similarly, a victim of a federal crime in Georgia should have suffered the same or similar harm as a victim of that same crime in Illinois. If convicted, these defendants should be subject to the same sentencing process in which a federal judge considers the Federal Sentencing Guidelines, pre-sentence reports, and statutorily defined punishments. But what happens when this is not the case? In other words, how do we consider our justice system to be fair and to uphold the American ideal of "equal justice" if the government's ability to charge and convict someone of a specific crime and then deprive that person of his or her liberty is based on different standards of conduct in different places? This is the reality for defendants charged with the federal crime of child enticement or coercion under 18 U.S.C. § 2422(b).

[1] The reader is advised that this Note discusses child sexual exploitation and human trafficking. Some of the content in this Note includes factual scenarios involving these crimes. While disturbing, this topic cannot be fully addressed without providing the following details and discussion.

A. THE PROBLEM OF INCONSISTENT INTERPRETATIONS OF 18 U.S.C. § 2422(b)

The federal child enticement statute prohibits persuading, coercing, enticing, or inducing a minor to engage in "any sexual activity for which a person can be charged with a criminal offense . . . ."[2] There is not a clear definition as to what exactly amounts to a violation of the federal child enticement statute. Jurisdictions are split over what constitutes "any sexual activity" as it is used in the statute. Specifically, the Seventh Circuit has interpreted "sexual activity" in section 2422(b) narrowly, requiring that individuals engage in interpersonal physical contact to constitute "sexual activity."[3] Conversely, the Fourth and Eleventh Circuits have interpreted "sexual activity" broadly, finding that there does not need to be physical contact between individuals for conduct to be considered "sexual activity."[4] The result is irrational: some defendants receive a mandatory minimum sentence of 10 years for the very same conduct that defendants in other jurisdictions cannot even be charged for.[5]

This is a problem. For starters, it negatively affects the credibility of the justice system. Furthermore, it impedes the prosecution of egregious crimes nationwide by failing to consistently account for a prevalent form of abuse. To fix this problem, there needs to be a uniform interpretation of "sexual activity" across the federal system and it should be interpreted so as to not require physical contact between individuals.

Modern day advancements in society further emphasize the need to resolve this issue. Today, technology is significantly more advanced than it was when section 2422(b) was initially enacted[6] and since it was last amended.[7] Technology makes it easier and

[2] 18 U.S.C. § 2422(b) (2006).

[3] U.S. v. Taylor, 640 F.3d 255 (7th Cir. 2011).

[4] U.S. v. Fugit, 703 F.3d 248 (4th Cir. 2012); U.S. v. Dominguez, 997 F.3d 1121 (11th Cir. 2021).

[5] Therefore, a defendant in Georgia, which is part of the Eleventh Circuit, could be convicted under section 2422(b) for sexual activity with a minor that occurred solely online while a defendant in Illinois, which is part of the Seventh Circuit, could not be charged under this statute for the same activity. *Cf. Taylor*, 640 F.3d 255 *with Fugit*, 703 F.3d 248; *Dominguez*, 997 F.3d 1121.

[6] 18 U.S.C. § 2422(b) (1998).

[7] 18 U.S.C. § 2422(b) (2006).

cheaper to communicate with almost anyone regardless of their location. Previously simple devices like cellphones are now also high-resolution cameras and video streaming platforms.[8] These advancements make it easier for individuals to communicate with strangers anywhere in the world, while still maintaining significant anonymity.[9]

Technology itself is not the only thing that has changed—so has the world around it. Society's reliance on technology increased drastically as a result of the COVID-19 pandemic.[10] The pandemic led to an increased use of technology by children, spanning from toddlers to teenagers.[11] This created new risks for children because it made them more exposed virtually despite being physically isolated. Now, children are more vulnerable to online harms[12] particularly as developments in technology make it easier for individuals to use these tools for inappropriate purposes,[13] including criminal activity.[14] One form of criminal activity that has moved online is abuse.[15] Digital abuse has become more prevalent as technology is more frequently used as part of abusive conduct.[16] Online abuse of children can include a wide variety of conduct, but this Note will specifically address online child sexual exploitation and abuse materials.

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[8] *See* Asaf Harduf, *Rape Goes Cyber: Online Violations of Sexual Autonom*y, 50 U. BALT. L. REV. 357, 372 (describing how communication devices have evolved in purpose and use capabilities).

[9] *Id.* at 373 ("No one sees the user for who they are, which makes them uninhibited, for better or worse.").

[10] *Infra* notes 167167–193 and accompanying text.

[11] *Infra* notes 167–179 and accompanying text.

[12] *Infra* notes 167–203 and accompanying text.

[13] Harduf, *supra* note 8, at 372 ("Nowadays, one can take infinite high-resolution photos for free, observe them immediately, and later post or send them . . . . Such photographs may be related to sex, as one can take pictures of their naked bodies and send them to current or potential partners.").

[14] *See* Yury Fedotov, *In Just Two Decades, Technology Has Become a Cornerstone of Criminality*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (Oct. 23, 2017), https://www.unodc.org/unodc/en/frontpage/2017/October/in-just-two-decades--technology-has-become-a-cornerstone-of-criminality.html ("Just as the Internet has transformed every aspect of our lives, it has also become a cornerstone of criminality. . . . The Internet helps companies sell their legitimate goods, but it allows criminals to sell drugs, firearms, and endangered wildlife.").

[15] *See* Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075 (2020).

[16] *Id.* at 1076 ("People increasingly use technology to perpetrate and exacerbate abusive conduct, relying on digital tools to exert power over others.").

The prevalence of online abuse is evidenced by the trend of increasing reports that the National Center for Missing and Exploited Children (NCMEC) receive each year. In 2021, NCMEC received 29,309,106 reports to the CyberTipline®,[17] regarding instances of suspected child sexual exploitation.[18] Online enticement of children for sexual acts represented the greatest number of these reports, totaling in at over 44,000.[19] The over 29 million reports made in 2021 reflects an increase of roughly 35 percent from the reports made in 2020.[20] Similarly, in 2020, there were approximately 5 million more reports made than there were in 2019.[21] This is a notable increase considering that just a few years prior, in 2017, there were approximately 10.2 million reports of child sexual exploitation.[22]

B. A ROADMAP OF THIS NOTE

This Note argues that the proper statutory interpretation of 18 U.S.C. § 2422(b) supports interpreting "sexual activity" in a manner that does not require interpersonal physical contact. This interpretation is further supported by policy considerations. Specifically, this broader interpretation of "sexual activity" is necessary to effectively combat the growing problem of the online sexual exploitation of children, and to account for the increased vulnerability of children created by the impacts of COVID-19 and technological developments.

Below, Part Four of this Note outlines the history and development of the child enticement statute, 18 U.S.C. § 2422(b).

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[17] *See Our 2020 Impact*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (Aug. 2021), https://www.missingkids.org/content/dam/missingkids/pdfs/2020-Our-Impact.pdf ("NMEC operated the CyberTipline®, a national mechanism for the public and electronic service providers to report instances of suspected child sexual exploitation.").

[18] *See CyberTipline 2021 Report*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, https://www.missingkids.org/gethelpnow/cybertipline/cybertiplinedata (last visited Jan. 15, 2023).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *The Online Enticement of Children: An In-Depth Analysis of CyberTipline Reports*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (2017), https://www.missingkids.org/content/dam/missingkids/pdfs/ncmec-analysis/Online%20Enticement%20Pre-Travel.pdf.

This portion discusses the Congressional goals in enacting the statute and overarching legislation that it is part of as well as the amendments made to it over the years. Part Four of this Note outlines the current circuit split and the reasoning of the courts that have weighed in on the split thus far. It also addresses how other circuits have responded to arguments made by defendants in cases involving different portions of section 2422(b) and suggest that more circuits might favor the broader interpretation, if and when, those jurisdictions are faced with this question.

Part Five of this Note addresses how the broad interpretation of "sexual activity" as it is used in section 2422(b) aligns with the traditional canons of statutory interpretation and therefore is the proper statutory interpretation. It also argues that the broader definition of "sexual activity" should be adopted for multiple policy reasons. First, it discusses how children have become more vulnerable considering developments in technology and as an effect of the COVID-19 pandemic so there is now an increased need to protect them from online harms. Next, it explains how the broader definition of "sexual activity" can make section 2422(b) a more useful tool for prosecutors to capture conduct that might not be a strong case for prosecution under similar statutes. The sex trafficking statute, 18 U.S.C. § 1591, is used as an example of this. Part Six of this Note discusses potential challenges to adopting the broader definition and possible solutions.

II. HISTORY AND DEVELOPMENT OF THE FEDERAL CHILD ENTICEMENT STATUTE

A. 18 U.S.C § 2422 AND EARLY AMENDMENTS

Over the years, Congress has undertaken many legislative efforts to specifically target the online sexual exploitation of children. In 1910, Congress passed the Mann Act,[23] consisting of federal statutes 18 U.S.C. §§ 2421–2424.[24] The Act was initially

[23] The Act is named after the original author, Congressman James R. Mann. *See Mann Act*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/mann_act (last updated July 2020).

[24] *See id.* ("The Mann Act (also known as the White-Slave Traffic Act of 1910) is a federal law . . . ."); *see also* The White-Slave Traffic Act, H.R. 12315, 61st Cong (1910) (enacted); Adam

established to target the prostitution of women.[25] Various sections of the Mann Act have undergone revisions over the years, expanding the applicable purposes of the Act.[26]

In 1948, section 2422 was amended to include a provision providing that anyone who:

> knowingly persuades, induces, entices, or coerces any woman or girl" to go from one place to another in interstate or foreign commerce . . . for the purpose of prostitution or debauchery, or for any immoral purpose . . . whether with or without her consent, and thereby knowingly causes such woman or girl to go and be carried or transported as a common passenger upon the line or route of any common carrier . . . shall be fined not more than $5000 or imprisoned not more than five years, or both.[27]

In 1978, section 2423 of the Mann Act, which previously limited its application to only women and girls, was amended to apply to children of both sexes[28] and to expand the Act's application to more activities considered to be "sexual activity for which any person can be charged with a criminal offense."[29] In 1986, the Child Sexual Abuse and Pornography Act revised the Mann Act to make all provisions gender neutral and applicable to situations even if a defendant did not seek a financial advantage for their illicit conduct.[30] Congress recognized that by limiting the statute to only

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J. Sheppard, *1910 Law Still Used As A Prosecution Tool The "Mann Act" Lives*, 31-MAR CBA REC. 40 (2017).

[25] *See* Mann Act *supra* note 23 (describing that the Mann Act criminalizes transporting a woman or girl for "prostitution, or debauchery, or for any other immoral purpose"); *see also* Thomas R. Young, LEGAL RIGHTS OF CHILDREN § 13:2 THE MANN ACT, 3d ed. (2021).

[26] *Infra* notes 27–45 and accompanying text.

[27] 18 U.S.C. § 2422 (June 25, 1948, ch., 645, § 1, 62 Stat. 812, eff. Sept. 1, 1948).

[28] *See* An Act to amend title 18 of the United States Code relating to the sexual exploitation of minors, and for other purposes, S 1585, 95th Cong., § 110 (1978) (enacted) (changing the language in § 2423 to "any person"); *see also* Young, *supra* note 25 (describing 1978 amendment).

[29] *See supra* note 25 (listing such activities as conduct like "sexual intercourse, bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals or pubic area.").

[30] 132 Cong. Rec. S14225-01 (1986) (statement of Senator William Roth Jr.) (explaining that children of both sexes are victimized and that some "prohibited sexual conduct" [is undertaken] strictly for purposes of sexual gratification, with no money changing hands.").

apply to commercial exploitation, the Act was unable to punish conduct by defendants that involved minors or depictions of minors for the purpose of pure sexual gratification and not financial advantages.[31]

In 1996, the Mann Act was updated to include § 2422(b).[32] This provision prohibited the use of telecommunications devices for the purpose of coercing or enticing a minor to engage in "prostitution or any sexual act for which any person may be criminally prosecuted . . . ." and included a maximum punishment of a fine and/or 10 years imprisonment.[33] The Senate Judiciary Committee felt that this addition was necessary to protect children from online harm.[34]

The Mann Act was updated once again in 1998. The Child Protection and Sexual Predator Punishment Act ("Child Protection Act") changed the statutory language in § 2422(b) to prohibit the coercion or enticement of a minor to engage in "prostitution or any *sexual activity* for which any person may be criminally prosecuted . . . ." and increased the maximum punishment to no more than 15 years imprisonment.[35] This provision is particularly relevant because Congress changed the statutory language from "sexual act" to "sexual activity."[36] The legislative history for the Child Protection Act identifies that in enacting this legislation, Congress sought to battle the rise of sex crimes against children[37] and the use of a computer to contact minors to engage in illegal sexual activity.[38]

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[31] 132 Cong. Rec. S14225-01 (1986) (statement of Senator William Roth Jr.) (regarding acts where money is not exchanged, "[this bill] will place these individuals within the reach of the Mann Act.")

[32] Telecommunications Act of 1996, S.652, 104th Cong. (1996) (enacted).

[33] *Id.* at § 508.

[34] H.R. Rep. No. 104-458, at 193 (1996) (Conf. Rep.).

[35] The Child Protection and Sexual Predator Punishment Act, H.R. 3494, 105th Cong. at § 103 (1998) (enacted).

[36] *C.f.* 18 U.S.C. § 2422(b) (1996) *with* 18 U.S.C. § 2422(b) (1998).

[37] *See* H.R. Rep. No. 105-557, at 9–10 (1998) (describing the purpose of The Child Protection and Sexual Predator Punishment Act); 144 Cong. Rec. E2136-01 (1998) (statement of Representative Robert E. Cramer, Jr.) (stating support for the Act and emphasizing that the bill will crack down on Internet predators); 144 Cong. Rec. E2277-03 (1998) (statement of Representative Tom Bliley) (stating that the Act is needed to "ensure our laws keep pace with technology . . . .").

[38] Press Release, House of Representatives, Child Protection, 1998 WL 213581 (Apr. 30, 1998) (explaining that the Child Protection Act is "the most comprehensive package of new crimes and increased penalties we've ever developed, in response to this problem and

The Mann Act was updated most recently in 2006 with the introduction of the Adam Walsh Child Protection and Safety Act that was aimed at protecting children from sexual exploitation and promoting Internet safety.[39] This legislation amended section 2422(b) to enhance the punishment for the coercion and enticement of a minor, changing the punishment range from a minimum sentence of 5 years and a maximum sentence of 30 years to a minimum sentence of 10 years and maximum sentence of life.[40]

B. THE MODERN STRUCTURE OF 18 U.S.C § 2422(b)

Following these many changes, the current version of 18 U.S.C. § 2422(b) reads as follows:

> Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.[41]

The statute is located in Chapter 117 of Title 18 of the U.S. Code[42] and criminalizes both the sexual enticement of children to engage

"prohibits contacting a minor over the Internet for the purpose of engaging in illegal sexual activity . . . .").

[39] *See* Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. at § 203 (2006) (enacted); *see also* Press Release, President Signs H.R. 4472, The Adam Walsh Child Protection Safety Act of 2006, 1006 WL 2076691 at 2 ("[T]he bill I sign today will increase federal penalties for crimes against children [and] increases penalties for crimes such as sex trafficking of children and child prostitution. . . . [The bill will also] make it harder for sex predators to reach our children on the Internet . . . .").

[40] Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. at § 203.

[41] 18 U.S.C. § 2422(b) (2006).

[42] Title 18 of the U.S. Code governs "Crimes and Criminal Procedure" and Chapter 117, titled "Transportation for Illegal Sexual Activity and Related Crimes", covers §§ 2421–2429. *See also* Julie A. Herward, *To Catch All Predators: Toward a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement Statute*, 63 AM. U. L. REV. 879, 888 (2014).

in sexual activity and attempted sexual enticement of children to engage in sexual activity.[43] The statute has four elements: (1) using a facility of interstate commerce, (2) to knowingly coerce or entice (or attempt to do so), (3) a minor,[44] (4) to engage in any illegal sexual activity."[45]

Courts have previously opted for broad interpretations of this statute to make it a strong prosecutorial tool. For example, prosecutions under this statute do not require that the victim is an actual minor and instead only require that a defendant attempted to entice an individual who s/he believed was a minor.[46] This expands the scope of the statute to apply in situations involving law enforcement officers acting as "adult decoys" in sting operations[47] and even adults acting as an intermediary in a transaction involving a child and a perpetrator.[48]

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[43] 18 U.S.C. § 2422(b) (2006).

[44] The use of the term "minor" encompasses anyone who is under the age of 18 years old.

[45] 18 U.S.C. § 2422(b) (2006).

[46] *See* United States v. Hicks, 457 F.3d 838, 841 (8th Cir. 2006) ("[A] defendant may be convicted of attempting to violate § 2422(b) even if the attempt is made towards someone the defendant believes is a minor but who is actually not a minor."); U.S. v. Sims, 428 F.3d 945, 960 (10th Cir. 2005) ("We agree with our sister circuits that . . . it is not a defense to an offense involving enticement and exploitation of minors that the defendant falsely believed a minor to be involved."); U.S. v. Gagliardi, 506 F.3d 140, 147 (2d Cir. 2007) ("[W]e . . . join the Third, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits in holding that the involvement of an actual minor is not a prerequisite to an attempt conviction under § 2422(b)."); U.S. v. Tykarsky, 446 F.3d 458, 469 (3d Cir. 2006) ("We therefore join the Courts of Appeals for the Fifth, Ninth, Tenth, and Eleventh Circuits in concluding that a conviction under the attempt provision of § 2422(b) does not require the involvement of an actual minor.").

[47] *See Gagliardi*, 506 F.3d at 146 ("Those who believe they are victimizing children, even if they come into contact with a law enforcement officer who poses as a child, should be punished just as if a real child were involved.") (quoting H.R. Rep. 105-557 at 19); *see also* U.S. v. Farner, 251 F.3d 510 (5th Cir. 2001) (upholding defendant's conviction based on the use of an FBI officer posing as a child online); U.S. v. Helder, 452 F.3d 751 (8th Cir. 2006) ("[W]e hold that an actual minor victim is not required for an attempt conviction under § 2422(b)."); *Sims*, 428 F.3d 945 (10th Cir. 2005) (upholding defendant's conviction based on the use of an FBI officer posing as a child online); *Tykarsy*, 446 F.3d 458 (3d Cir. 2006) (affirming conviction for defendant who communicated with an FBI officer he believed to be a child).

[48] *See* U.S. v. Hite, 769 F.3d 1154, 1160 (D.C. 2014) ("[C]ommunications with an adult intermediary to persuade, induce, entice, or coerce a minor are punishable under § 2422(b), so long as the defendant's interaction with the intermediary is aimed at transforming or overcoming the minor's will in favor of engaging in illegal sexual activity."); U.S. v. Spurlock, 495 F.3d 1011, 1014 (8th Cir. 2007) (holding that § 2422(b) does not require direct communication with a minor or purported minor and affirming conviction of defendant who attempted to entice two girls through online and telephone messages with an undercover

Additionally, many circuits have held that while a defendant must have the specific intent to persuade, entice, induce, or coerce a minor into engaging in unlawful sexual activity, a defendant does not need to have the specific intent that the unlawful conduct actually occur.[49] This also applies to § 2422(b) attempt charges meaning that defendants can be convicted if they have the intent to *attempt* to persuade, induce, or entice a minor into unlawful sexual activity.[50]

III. THE CURRENT CIRCUIT SPLIT REGARDING 18 U.S.C § 2422(b)

Currently, there is a circuit split regarding the interpretation of "sexual activity" as it is used in the fourth element of § 2422(b). Congress did not define the term as it used in the statute and the circuits that have weighed in on the issue thus far have adopted interpretations that are diametrically opposed.[51] This section outlines the circuits involved in the current split and the reasoning of the courts in the cases that created this division. It also addresses how some circuits that have not officially weighed in on this issue

agent acting as their "mother"); U.S. v. Caudill, 709 F.3d 444 (5th Cir. 2013) (affirming conviction of a defendant who used an adult intermediary to attempt to entice minors); United States v. McMillan, 744 F.3d 1033, 1035–36 (7th Cir. 2014) (recognizing that six other circuits uphold § 2422(b) convictions for contact through an intermediary and then adopting this position).

[49] *See*, *e.g.*, U.S. v. Dwinells, 508 F.3d 63, 68–69 (1st Cir. 2007) (rejecting defendant's argument that the statute required proving both the intent to entice and the intent to carry out the sexual activity); U.S. v. Lee, 603 F.3d 904, 914 (11th Cir. 2010) ("With regard to intent, the government must prove the defendant intended to cause assent on the party of the minor, not that he 'acted with the specific intent to engage in sexual activity.'") (quoting U.S. v. Yost, 479 F.3d 815, 819 n. 3 (11th Cir. 2007)); U.S. v Barlow, 568 F.3d 215, 219 n.10 (5th Cir. 2009) ("To be clear, the statute does not require that the sexual contact occur, but that defendant sought to persuade the minor to engage in that contact.").

[50] *See* U.S. v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000) ("Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves . . . ."); U.S. v. Douglas, 626 F.3d 161, 164 (2d Cir. 2010) (holding that a conviction under § 2422(b) only requires an intent to attempt to entice a minor to engage in unlawful sexual activity and not the intent to actually engage in sexual conduct); U.S. 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 act itself.").

[51] *See Taylor*, 640 F.3d 255; *Fugit*, 703 F.3d 248; *Dominguez*, 997 F.3d 1121.

have interpreted 18 U.S.C. § 2422(b) in other situations and how this may impact the future of the split.

A. THE SEVENTH CIRCUIT (2011)

In *United States v. Taylor*, the Seventh Circuit interpreted 18 U.S.C. § 2422(b) and held that "sexual activity" requires physical contact between the defendant and the victim.[52] In that case, the defendant began online messaging an individual that he believed was a thirteen-year-old girl.[53] In actuality, he was messaging with a police officer.[54] He sent sexual comments to the "girl" and then masturbated in front of his webcam and encouraged her to join him.[55] The defendant was arrested and charged with violating 18 U.S.C. § 2422(b).[56] After being convicted at his jury trial, defendant filed an appeal with the Seventh Circuit arguing that section 2422(b) requires enticing a minor to "actively participat[e]" in the sexual act.[57]

Since "sexual activity" is not defined in 18 U.S.C. § 2422, or anywhere else in Title 18 Chapter 117, the court looked to the next section of the Mann Act, 18 U.S.C. § 2423, which defines "illicit sexual conduct."[58] This term is defined as "a sexual act (as defined in section 2246) with a person under 18 years of age . . . ."[59] Section 2246, which is located in Chapter 109A, defines "sexual act" as "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years."[60] The court reasoned that because it previously used definitions from Chapter 109A to interpret provisions in Title 18 involving sexual crimes, then this practice could be extended to interpret section 2422(b) as it is used in Title 18, Chapter 117.[61]

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[52] *Taylor*, 640 F.3d 255.

[53] *Id.* at 257.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 256.

[57] Reply Brief of Defendant-Appellant Jeffrey P. Taylor at 2, United States v. Taylor, 640 F.3d 255 (7th Cir. 2011), No. 10-2715, 2011 WL 859471.

[58] *Taylor*, 640 F.3d at 257.

[59] 18 U.S.C. § 2423 (2006).

[60] 18 U.S.C. § 2246 (1998).

[61] *Taylor*, 640 F.3d at 257 (applying definitions of conduct located in Title 18, Chapter 109A to conduct described in Title 18, Chapter 110).

The court then considered whether "sexual activity" includes a wider range of conduct than "sexual act."[62] Judge Posner, writing for the majority, referenced the Wikipedia definition of "sexual activity" which defines the term as "includ[ing] conduct and activities which are intended to arouse the sexual interest of another. . . ."[63] The court was hesitant to adopt this interpretation out of concern that the range of what constitutes "sexual activity" would become too broad and encompass conduct for which society would not typically impose a 10-year mandatory minimum punishment.[64]

Since "sexual activity" was not defined in the statute, the Seventh Circuit found it possible that the members of Congress considered "sexual act" and "sexual activity" to be interchangeable.[65] The court supports this contention with the fact that until 1998, Section 2422(a) used the term "sexual activity" and Section 2422(b) used the term "sexual act" despite both sections covering substantively similar conduct.[66] Although the Seventh Circuit indicated its belief that "sexual activity" and "sexual act" are synonymous, it considered the term to be ambiguous and applied the Rule of Lenity.[67] Since the Rule of Lenity requires adopting the interpretation that is more favorable to the defendant, the court ultimately concluded that "sexual activity" does require physical contact between the offender and the victim.[68]

B. THE FOURTH CIRCUIT (2012)

In *United States v. Fugit*, the Fourth Circuit considered the definition of "sexual activity" as it is used in 18 U.S.C. § 2422(b) and ultimately decided that it does not require physical contact between individuals.[69] Similar to *Taylor*, the case involved a defendant who,

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[62] *Id.*

[63] *Id.*

[64] *Id.* ("Is watching a pornographic movie, or a pole dancer, or a striptease artist, . . . a 'sexual activity'? . . . "Does the government think that the term 'sexual activity' in 18 U.S.C. §2422(b) includes flirting?").

[65] *Taylor*, 640 F.3d at 258.

[66] *Id.*

[67] *Id.* at 259–60; *see also infra* notes 158–161 and accompanying text.

[68] *Taylor*, 640 F.3d at 259–60.

[69] *Fugit*, 703 F.3d 248.

while posing as a young girl named "Kimberly" in internet chat rooms, engaged in sexual conversations with a ten-year-old and eleven-year-old girl.[70] He had a telephone conversation with the eleven-year-old girl while posing as "Kimberly's" father and asked questions such as whether she "would mind seeing him naked" or "whether she would 'get naked for him.'"[71] The defendant also had inappropriate sexual telephone conversations with the ten-year-old girl while still pretending to be the father of "Kimberly."[72] He later told law enforcement that he previously used the computer or phone to attempt to contact children and officers found child pornography on his computer.[73] The defendant was charged with one count of distributing child pornography and one count of violating 18 U.S.C. § 2422(b).[74] He pled guilty to both counts and appealed to the Fourth Circuit for post-conviction relief from his guilty plea to the 2422(b) violation.[75] The court first identified that the statute makes no mention of a requirement to engage in physical contact and commented that if Congress intended to encompass specific conduct, the term would be defined in the statute just like in other provisions governing criminal sexual conduct such as 18 U.S.C. §§ 2246(2),[76] 2246(3),[77] 2256(2),[78] or 2423(f).[79] [80] Then, the court considered the plain meaning of the phrase "sexual activity" and found it to mean "conduct connected with the 'active pursuit of libidinal gratification' on the part of any individual" and noted that this behavior does not require interpersonal physical contact.[81]

The Fourth Circuit felt this interpretation aligned best with the goal of the statute to "protect children from the act of solicitation itself."[82] The court believed that Congress sought to deter the

[70] *Id.* at 251.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Fugit*, 703 F.3d at 250.
[75] *Id.*
[76] 18 U.S.C. § 2246(2) (1998) (defining "sexual act").
[77] 18 U.S.C. § 2246(3) (1998) (defining "sexual contact").
[78] 18 U.S.C. § 2256(2) (2022) (defining "sexually explicit conduct").
[79] 18 U.S.C. § 2423(f) (2006) (defining "illicit sexual conduct").
[80] *Fugit*, 703 F.3d at 254.
[81] *Id.* at 255 (quoting United States v. Dias-Ibarra, 522 F.3d 343, 351–52 (4th Cir. 2008)).
[82] *Id.* at 255 (quoting United States v. Engle, 676 F.3d 405, 419 (4th Cir. 2012) (quoting United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011))).

"psychological sexualization of children," something that does not require interpersonal contact, by attaching the intent requirements to a minor's state of mind (agreement to engage in sexual activity) and not to the actual performance of sexual activities.[83] The court explicitly stated its disagreement with the Seventh Circuit's holding and addressed the concerns mentioned in *Taylor* over the broad interpretation of "sexual activity" potentially encompassing behaviors such as flirting.[84] The court in *Fugit* emphasized that the statute only covers the narrow category of behavior that is criminally prohibited and that involves children.[85]

C. THE ELEVENTH CIRCUIT (2021)

In *United States v. Dominguez*,[86] the Eleventh Circuit joined the split created by the Fourth and Seventh Circuits. The Eleventh Circuit endorsed the Fourth Circuit's position and held that "sexual activity" does not require "actual or attempted physical contact between two persons."[87] In this case, the defendant engaged in internet chats with a girl that he knew was nine years old.[88] He asked her for naked photos, sent her naked photos of himself, and told her that she "sexually aroused" him.[89] The defendant was indicted on three counts of child pornography and ultimately pled guilty.[90] He appealed his sentence to the Eleventh Circuit arguing that a five-level sentencing enhancement should not have been applied to him because he did not violate 18 U.S.C. § 2422(b) since he did not engage in physical contact with the minor.[91]

The Eleventh Circuit first considered the plain meaning of "sexual activity."[92] Finding no common definition of the phrase at the time it was included in the statute, the court considered the

[83] *Id.* at 255.
[84] *See Taylor*, 640 F.3d at 257–58; *see also Fugit*, 703 F.3d at 255.
[85] *Fugit*, 703 F.3d at 255.
[86] *Dominguez*, 997 F.3d 1121.
[87] *Id.* at 1123.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Brief of Appellant Gabriel Dominguez at 6, United States v. Dominguez, 997 F.3d 1121 (11th Cir. 2011), No. 19-11378-AA, 2019 WL 3491557.
[92] *Dominguez*, 997 F.3d at 1124.

definitions of "sexual"[93] and "activity"[94] separately. By combining the definitions of each term, the court determined that the ordinary definition of "sexual activity" in 1998[95] was "an action or pursuit relating to intercourse or to the desire for sex or carnal pleasure."[96]

The court stated that this interpretation of "sexual activity" is supported by the fact that Congress explicitly stated in 18 U.S.C. § 2427 that "sexual activity . . . includes the production of child pornography[.]"[97] The court reasoned that "'includes' [as it used in § 2427] is not a word of exclusion" and since child pornography can be produced without physical contact between individuals its inclusion in the definition of "sexual activity" indicates that Congress intended for other non-interpersonal physical contact to be included as well.[98]

The Eleventh Circuit also stated its disagreement with the holding of the Seventh Circuit in *Taylor*.[99] The court particularly took issue with the application of the Rule of Lenity because it did not believe "sexual activity" is ambiguous and that it was improper "to borrow the definition of 'sexual act'" from section 2246 because it is located in a different Chapter than section 2422(b).[100] The Eleventh Circuit felt that interpreting "sexual activity" to require interpersonal contact would not pose a risk that it would encompass activity like "flashing, flirting, or watching a pornographic movie" because it only applies to criminal sexual conduct.[101]

[93] *Id.* at 1125 (defining "sexual" as including both physical intercourse and other behaviors associated with sex or sexual gratification).

[94] *Id.* (concluding that "activity" was not limited "to the interpersonal physical realm").

[95] The language "sexual activity" was first included in the statute in 1998 with the enactment of the Child Protection and Sexual Predator Punishment Act. *See* The Child Protection and Sexual Predator Punishment Act, H.R. 3494, 105th Cong. at § 103 (1998) (enacted).

[96] *Dominguez*, 997 F.3d at 1125.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1126.

[100] *Id.*

[101] *Id.* (quoting United States v. Taylor, 640 F.3d 255, 257–58 (7th Cir. 2011)).

D. OTHER CIRCUITS APPEAR TO DISFAVOR THE SEVENTH CIRCUIT'S POSITION AND REASONING OUTLINED IN *TAYLOR*

Many circuits have not formally issued rulings adding to either side of the split, but several have endorsed broader interpretations of section 2422(b) in assessing other statutory interpretation questions or have commented on the interpretation of "sexual activity." For instance, in the case *U.S. v. Shill*[102] the Ninth Circuit addressed the question of what "criminal offense" means in the context of section 2422(b).[103] The court found that the phrase encompasses both felonies and misdemeanors and declined to construe the statute as narrowly as the Seventh Circuit in *Taylor*.[104] In *United States v. Hilts*, a defendant challenged his conviction under section 2422(b) arguing that the definition of "sexual activity" should mirror the definition of "sexual act" as it is used in section 2246.[105] In that case, the defendant engaged in sexual conversations with minors online and then took trips to visit them in order to engage in sexual acts.[106] The Third Circuit recognized the existing circuit split but declined to weigh in.[107] Instead, the court resolved the case by determining that "even if Hilts is correct that the Seventh Circuit accurately defined 'sexual activity' (to do so might give us some pause), and that, under that definition, the District Court erred . . . such error was harmless."[108]

In *United States v. Rang*, the defendant argued that "grooming" a minor did not support that he had "an intent to engage in sexual activity with [her]."[109] The First Circuit recognized that "[i]mplicit in [defendant's] position is the argument that 'sexual activity' requires interpersonal physical contact" and that this question is

[102] United States v. Shill, 740 F.3d 1347, 1353 (9th Cir. 2014).

[103] 18 U.S.C. § 2422(b) (2006) (". . .[A]any sexual activity for which any person can be charged with a *criminal offense*) (emphasis added).

[104] *Shill*, 740 F.3d at 1353 ("[T]he concerns of the Seventh Circuit in *Taylor* are mitigated when the phrase is read in the context of the statute as a whole . . . [and] without any basis in the text to limit § 2422(b) to felony conduct, we refuse to read the statute so narrowly.").

[105] United States v. Hilts, 632 Fed.Appx. 699, 703 (3d Cir. 2015).

[106] *Id.* at 701–03.

[107] *Id.* at 704.

[108] *Id.*

[109] United States v. Rang, 919 F.3d 113, 120 (1st Cir. 2019).

part of an existing circuit split.[110] However, the court "f[ound] no need to join this debate" and instead held that the evidence regarding defendant's actions could support the jury's decision that he intended to engage in physical sexual contact with the minors.[111]

Additionally, one of the arguments relied on by the Seventh Circuit in *Taylor*[112] to interpret "sexual activity" in section 2422(b) has been rejected by other courts in similar statutory interpretation cases involving the federal sex trafficking statute, 18 U.S.C. § 1591.[113] Specifically, the Seventh Circuit considered the definition of "sexual act" as it is stated in section 2246 to determine what "sexual activity" meant as it is used in section 2422(b).[114]

A district court in Wisconsin, within the Seventh Circuit, declined to apply *Taylor*[115] to a case involving the interpretation of "commercial sex act" in section 1591.[116] The court's decision distinguished the case from *Taylor* on the basis that it involved a different statute but rejected applying the definition of "sex act" in section 2246 to "commercial sex act" in section 1591.[117] The court explained that "it does not necessarily follow that the terms 'sex act' or 'sexual act' or 'sexual activity' all have the same meaning in each section."[118]

The Eighth and Ninth Circuits were also faced with interpreting "commercial sex act" in section 1591 too.[119] In that section, Congress defined "commercial sex act" as "any sex act, on account, of which anything of value is given or received by any person," but

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[110] *Id.*

[111] *Id.* at 120–21.

[112] *Taylor*, 640 F.3d 255 (holding that the definition of "sexual act" in section 2246 could apply to "sexual activity" in section 2422).

[113] 18 U.S.C. § 1591 (2018).

[114] *Taylor*, 640 F.3d at 257.

[115] *Id.*

[116] United States v. Tollefson, 367 F.Supp.3d 865 (E.D. Wis. 2019).

[117] *Id.* at 879.

[118] *Id.* The *Tollefson* court distinguished the case from *Taylor*, 640 F.3d 255, by reasoning that Congress chose to make section 2246 applicable to Chapter 117 by cross-referencing it in section 2423(f). However, it should be noted that in section 22423(f), Congress only chose to cross-reference section 2246 as it applies to "illicit sexual conduct" and did not include any cross-reference to it as it relates to the phrase ". . . any sexual activity for which any person can be charged with a criminal offense . . ." included in section 2423(a).

[119] United States v. Bazar, 747 Fed.Appx. 454, 456 (9th Cir. 2018); United States v. Taylor, 44 F.4th 779, 789 (8th Cir. 2022).

it did not provide a definition for the phrase "any sex act."[120] In both circuit cases, the defendants' wanted the definition of "sex act" listed in section 2246(2) to apply to the interpretation "commercial sex act" in section 1591.[121] The Eighth and Ninth Circuits both rejected this argument and stated that Congress chose to limit the definitions in section 2246 to Chapter 109A.[122] Although those cases involved a different statute, the underlying argument mirrors the arguments rejected by the Fourth and Eleventh Circuits in cases regarding section 2422(b).[123] This suggests that if faced with interpreting section 2422(b), the Eighth and Ninth circuits would be more likely to follow the holdings of the Fourth[124] and Eleventh[125] Circuits rather than that of the Seventh Circuit.[126]

The First, Third, Eighth, and Ninth circuits have not formally weighed in on the existing split. However, the decisions in these cases are indicative that other circuits have previously favored a broader interpretation of section 2422(b) or disfavor the Seventh Circuit's current position. Additionally, the rejection by other circuits of a statutory interpretation argument in section 1591 cases that mirror the argument in Taylor indicates that some circuits may disagree with the reasoning relied on by the Seventh Circuit and would decline to apply it to their own cases if faced with the same question. Most importantly these decisions indicate that questions regarding the interpretation of "sexual activity" are widespread and need to be resolved.

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[120] 18 U.S.C. § 1591(3). *See also Taylor*, 44 F.4th at 788.

[121] *Bazar*, 747 Fed.Appx. at 456; *Taylor*, 44 F.4th at 788.

[122] *Taylor*, 44 F.4th at 789 ("We, like other courts, decline [defendant's] invitation to restrict 'sex act' as used in 18 U.S.C. § 1591 (Chapter 77) by incorporating a definition set forth in 18 U.S.C. § 2246(2) which expressly limits its application to offenses in Chapter 109A."); *Bazar*, 747 Fed.Appx. at 456 ("Congress expressly limited the definitions in section 2246 to its chapter, which does not include section 1591, and chose not to cross-reference section 2246 in section 1591.").

[123] *Fugit*, 703 F.3d at 256; *Dominguez*, 997 F.3d at 1126.

[124] *Fugit*, 703 F.3d 248.

[125] *Dominguez*, 997 F.3d 1121.

[126] *Taylor*, 640 F.3d 255.

IV. THE BROADER INTERPRETATION OF "SEXUAL ACTIVITY" IS SUPPORTED BY TRADITIONAL CANONS OF STATUTORY INTERPRETATION AND PUBLIC POLICY

This Note argues that the interpretation of "sexual activity" endorsed by the Eleventh and Fourth Circuits is the correct one and should be followed by other circuits. This interpretation comports with the traditional notions of statutory interpretation[127] and is necessary to effectively protect children from exploitation and trafficking in light of the modern advancements in technology and the impacts of the COVID-19 pandemic.[128]

The broad definition of "sexual activity" is necessary because children are even more vulnerable now than they were when the statute was initially enacted. Section 2422 (and its enacting legislation)[129] was enacted to protect vulnerable populations, specifically women and children.[130] Congress has repeatedly taken action to amend this statute in furtherance of this goal in accordance with the changing world.[131] Due to the increased interconnectedness of the world and the advancements in technology that make it more accessible to people of all ages, the broader definition is better suited to help maintain protections for minors against all forms of sexualization by adults.

A. STATUTORY INTERPRETATION SUPPORTS ADOPTING THE BROAD DEFINITION OF "SEXUAL ACTIVITY"

Statutory interpretation is a method of determining what a statute means so that courts can correctly apply it.[132] The broader

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[127] *See infra* notes 132132–166166 and accompanying text.

[128] *Good Use and Abuse: The Role of Technology in Trafficking*, UNITED NATIONS (Oct. 14, 2021) https://www.unodc.org/unodc/en/human-trafficking/Webstories2021/the-role-of-technology-in-human-trafficking.html ("The COVID-19 pandemic has provided further opportunities for traffickers due to the increased use of the Internet, in particular social networks and online video gaming sites. . . . We have seen an increase in child sexual exploitation materials created and shared online during the pandemic . . . .").

[129] The enacting legislation is the Mann Act. *See supra* notes 23–24.

[130] *Supra* notes 25, 37–38 and accompanying text.

[131] *Supra* notes 24–45 and accompanying text.

[132] *Statutory Construction*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/statutory_construction (last updated Aug. 2022).

definition of "sexual activity" is supported by the traditional notions of statutory interpretation and therefore is the proper interpretation of the statute. The most fundamental canon of interpretation that courts rely on to discern the meaning of statutes is the ordinary-meaning canon.[133] This canon requires that courts consider the ordinary meaning of a word or phrase that Congress has not defined in the statute.[134] Often, courts do this by considering definitions of the word provided by multiple dictionaries, but "not all colloquial meanings appropriate to particular contexts are to be found in the dictionary."[135] Therefore, while the dictionary is a good starting place, the fact that a term or phrase is not explicitly defined in a particular way does not make that interpretation counter to the term's "ordinary meaning."[136]

Both the Fourth and the Eleventh Circuits considered the meaning of the words "sexual" and "activity" and found that the plain meaning of "sexual activity" did not require interpersonal physical contact.[137] The Fourth Circuit considered the definition of "sexual" and "activity" and found that it encompasses "conduct connected with the 'active pursuit of libidinal gratification' on the part of any individual" and that "[t]he fact that such conduct need not involve interpersonal physical contact is self-evident."[138] The Eleventh Circuit looked to the individual definitions of "sexual" and "activity" and found that the "ordinary public meaning of 'sexual activity' around 1998[139] was an action or pursuit relating to intercourse or the desire for sex or carnal pleasure."[140] The court concluded that based on the ordinary meaning of the words, interpersonal physical contact is not required for conduct to constitute "sexual activity."[141] This interpretation of the ordinary meaning of "sexual activity" has also been endorsed by legal

[133] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 69, (1st ed. 2012).

[134] *Id.* (citing Joseph Story, *Commentaries on the Constitution of the United States* 157–58 (1833)).

[135] *Id.* at 70.

[136] *Id.*

[137] *Fugit*, 703 F.3d at 256; *Dominguez*, 997 F.3d at 1127.

[138] *Fugit*, 703 F.3d at 255.

[139] This is the year that "sexual activity" was added to section 2422(b). *See supra* note 35 and accompanying text.

[140] *Dominguez*, 997 F.3d at 1125.

[141] *Id.*

commentators and some argue that because there is an ordinary and unambiguous meaning of the term then courts do not need to consider other canons of interpretation.[142]

The whole-text canon instructs courts to "consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[143] Context is critical to this canon because legal documents contain many parts so understanding the interaction between sections is necessary for understanding the document as a whole.[144] In section 2246, Congress defined relevant terms for offenses in Title 18, Chapter 109A.[145] In section 2246(2), the term "sexual act" is defined in a manner that requires touching.[146] The Seventh Circuit considered this as indicative that the term "sexual activity" in section 2422(b) also require physical contact.[147]

However, when considering the whole context of section 2422(b), this logic is flawed. Section 2422(b) is in Chapter 117 of Title 18 while section 2246(2) is found in Chapter 109A. These chapters are distinct from one another so the material contained in one cannot be imputed to another without Congress explicitly intending to do so. For example, in section 2427, which is part of Chapter 117, Congress explicitly stated that "sexual activity" includes the production of child pornography "as defined in section 2256(8)," which is in Chapter 110.[148] Section 2422(b) does not include any reference to another chapter to define its terms.[149] Without evidence of a clear intent from Congress to apply definitions across chapters, it would be improper to interpret "sexual activity" as it is

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[142] *See* Julie A. Herwerd, *To Catch All Predators: Towards a Uniform Interpretation of "Sexual Activity" in the Federal Child Enticement Statute*, 63 AM. U. L. REV. 879, 899–903 (arguing that the definition of "sexual activity" when the statute was enacted did not require physical contact and that while the Black's Law Dictionary definition of "sexual activity" references "sexual relations" that "*usually* involving touching of another", *usually* does not mean *always*); *see also* Max Doherty, *"Sexual Activity": What Qualifies Under 18 U.S.C. § 2422?*, 63 B.C.L. REV. E-SUPPLEMENT II.-130, 141 (2022) (arguing that "sexual activity" does not require physical contact and that because there is one clear meaning of "sexual activity" then courts "should stop here in interpreting the statute.").

[143] SCALIA & GARNER, *supra* note 133133, at 167.

[144] *Id.*

[145] *See* 18 U.S.C. § 2246 (1998).

[146] *Id.*

[147] *Taylor*, 640 F.3d at 257.

[148] 18 U.S.C. § 2427 (1998).

[149] 18 U.S.C § 2422(b).

used in section 2422(b) (Chapter 117) by applying the definition of "sexual act" included in Chapter 109A.[150]

Courts may also consider the interpretative-definition canon.[151] This canon recognizes that drafters of legislation will often provide the definitions of terms used and the phrasing of the provided definition is indicative of its application.[152] Specifically, when "a definition section says that a word 'means' something, the clear import is that this is its *only* meaning."[153] Therefore, because section 2246(2) says, "the term 'sexual act' *means* . . . ." it is clear that Congress intended to limit the interpretation of the term to the four definitions stated in this subsection that require physical contact to constitute a sexual act.[154] Conversely, section 2427, part of Chapter 117 of Title 18 just like section 2422(b), states that "[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, as defined in section 2256(8)."[155] Under the interpretative-definition canon, "[w]hen a definition section says that a word 'includes' certain things, that is usually taken to mean that it may include other things as well."[156] Thus, by stating that "sexual activity" as it is used in section 2422(b) *includes* child pornography, an offense that does not require physical contact between individuals, it is indicative of the fact that Congress also intended for "sexual activity" to encompass other non-contact offenses as well.

The interaction of the whole-context canon and the interpretative-definition canon provides further support that the definition of "sexual act" in section 2246(2) should not be imported to define "sexual activity" in section 2422(b). The interpretative-definition canon limits the definition of "sexual act" in section 2246(2) to apply only to the acts included in that specific section, and the whole-context canon applies that definition only to the other sections within Title 18, Chapter 109A. Conversely, the

[150] Herwerd, *supra* note 142, at 912 ("Congress explicitly stated that the definitions in § 2246 apply '[a]s it is used in this chapter' – that is, as used in Chapter 109A of Title 18.").

[151] SCALIA & GARNER, *supra* note 133, at 225.

[152] *Id.*

[153] *Id.* at 226.

[154] 18 U.S.C. § 2246(2) (1998).

[155] 18 U.S.C. § 2427 (1998) (emphasis added).

[156] SCALIA & GARNER, *supra* note 133, at 226.

interpretative-definition canon indicates that "sexual activity" as it is used in section 2422(b) is meant to include a broad range of conduct, *including* non-contact offenses. Additionally, the phrase, "[i]n this chapter . . . ." precedes the definition of "sexual activity," so the whole-context canon supports applying section 2427 to section 2422(b) since both provisions are located within Chapter 117.[157] Together these canons of interpretation indicate that Congress meant for "sexual activity" and "sexual act" to be distinct from one another and support adopting the definition of "sexual activity" that does not require physical contact.

Lastly, the Rule of Lenity requires that courts interpret an ambiguity in a criminal statute in favor of the defendant.[158] This is rooted in the idea that if Congress intended to punish an individual then it would be clear about what the punishment is and what it is seeking to punish.[159] The Rule of Lenity should not apply to section 2422(b) because after considering other canons of interpretation the term "sexual activity" is not ambiguous.[160] The plain language of the statute indicates that it is properly interpreted to not require physical contact between parties.[161]

The Seventh Circuit applied the Rule of Lenity in *Taylor*,[162] but the Fourth and Eleventh Circuits did not.[163] The Seventh Circuit applied the rule because it felt there were "two equally plausible interpretations" of section 2422(b).[164] However, one of these "plausible interpretations," specifically that "sexual activity" is encompassed in the definition of "sexual act" in section 2246, is based on improper statutory interpretation because the court did

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[157] 18 U.S.C. § 2427 (1998).

[158] SCALIA & GARNER, *supra* note 133, at 296.

[159] *Id.*

[160] *Id.; see also* Herwerd, supra note 142, at 915–16 ("The plain meaning of the statute . . . do[es] not leave 'reasonable doubt' about whether sexual activity requires interpersonal physical contact. . . . [T]he Seventh Circuit erred when it determined it 'must' interpret the statute in favor of the defendant [and] applied the rule of lenity. . . .").

[161] *See supra* notes 133–142 and accompanying text.

[162] *Taylor*, 640 F.3d at 259–60 ("But when there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one.").

[163] *Fugit*, 703 F.3d at 255 ("[W]e believe that the Seventh Circuit's decision in *United States v. Taylor*, upon which [defendant] places great weight, was mistaken.") (internal citations omitted); *Dominguez*, 997 F.3d at 1126 ("The Seventh Circuit . . . [a]ppl[ied] the rule of lenity . . . but like the Fourth Circuit, we choose not to follow it.").

[164] *Taylor*, 640 F.3d at 259–60.

not adhere to the "whole text canon."[165] Since that interpretation cannot be supported by proper statutory interpretation methods, it cannot be relied on. As a result, there are not "two equally plausible interpretations" so the Rule of Lenity does not apply.[166]

Overall, adopting the broader definition of "sexual activity" comports with the traditional notions of statutory interpretation while the reasoning endorsed by the Seventh Circuit does not. Therefore, the broader interpretation of "sexual activity," that does not require interpersonal physical contact is the more appropriate interpretation. This interpretation is also supported by multiple policy considerations, further indicating that the broader definition of "sexual activity" is necessary to help achieve desirable legal and policy outcomes in the field of child exploitation.

B. TECHNOLOGICAL DEVELOPMENTS AND THE EFFECTS OF THE COVID-19 PANDEMIC HAVE MADE CHILDREN MORE VULNERABLE THAN BEFORE

Children have more exposure and access to technology now than ever before. Data collected by the Pew Research Center in March 2020 (prior to the full onset of the pandemic) found that 80 percent of parents indicated that their child(ren) ages 5 to 11 used a tablet computer and 63 percent used smartphones.[167] Forty-eight percent of parents with children under the age of 5 stated that their child used a tablet and 55 percent stated their child used smartphones.[168] These data sets suggest that roughly half, if not more, of U.S.

[165] *See supra* notes 143–150 and accompanying text.

[166] *Taylor*, 640 F.3d at 259–60.

[167] *See* Brooke Auxier, et. al., *Parenting Children in the Age of Screens Methodology*, PEW RESEARCH CENTER (July 28, 2020), https://www.pewresearch.org/internet/2020/07/28/kids-and-screens-methodology.

[168] *Id.*; s*ee also Technology and Young Children in the Digital Age*, ERICKSON INSTITUTE (Oct. 2016), https://www.erikson.edu/wp-content/uploads/2018/07/Erikson-Institute-Technology-and-Young-Children-Survey.pdf (finding that over 50 percent of parents with children under age 6 allow their child to use tables and e-readers, 42 percent allow the use of smartphones, and 32 percent allow the use of computers).

children both under and over the age of 5 actively utilize technology and are exposed to the dangers that come with it.[169]

Of course, computers and the Internet are not new, and neither are concerns about misuse.[170] What *is* new is that unlike in the early 2000's when the Mann Act was last amended, technology is increasingly more accessible, even to society's youngest children and has become exponentially more advanced.[171] Mobile technology like smartphones or tablets allow both children and adults to have constant access to the Internet and other online platforms no matter where they are. The changes in technology platforms and social media platforms used by children[172] contribute to an even greater potential for misuse and harm in the modern world than ever before.[173]

In March 2020, the onset of the COVID-19 pandemic sparked an even greater dependence on technology by society. The pandemic caused increased technology usage amongst all age groups due to worldwide lockdowns pushing in-person activities, like school, work, and social activities, to fully online environments.[174] This increased reliance on technology and the changes in socialization also made children more vulnerable to online harms.[175]

Following the lockdowns, internet services saw increased usage from 40 percent to 100 percent relative to levels of pre-lockdown

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[169] *See Technology and Young Children in the Digital Age*, *supra* note 168 (reporting that 69 percent of parents were concerned about inappropriate content with respect to technology use for kids under age 6, which serves as an example of online dangers for children).

[170] *See supra* notes 32–4040 and accompanying text.

[171] *See supra* note 39.

[172] *Infra* notes 167–179 and accompanying text.

[173] *Internet/Broadband Fact Sheet*, PEW RESEARCH CENTER (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/, (reporting that in 2021, 93 percent of adults use the Internet while in 2000 (2-4 years AFTER amendments were made to the Mann Act to reflect advancements in technology) approximately 52 percent of adults used the Internet).

[174] Rahul De et al., *Impact of digital surge during Covid-19 pandemic: A viewpoint on research and practice*, NATIONAL LIBRARY OF MEDICINE (June 9, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7280123/ ("The Covid-19 pandemic has led to an inevitable surge in the use of digital technologies due to the social distances norms and nationwide lockdowns.").

[175] *See infra* notes 167–193 and accompanying text; s*ee also Keeping Children Safe Online*, DEPARTMENT OF JUSTICE, https://www.justice.gov/coronavirus/keeping-children-safe-online (last updated Oct. 25. 2021) ("Due to school closings, stay-at-home orders, and hybrid learning because of the COVID-19 pandemic, children's increased online presence may put them at greater risk of child exploitation.").

usage.[176] In April 2021, Pew Research Center conducted a follow-up study from their March 2020 study about children's use of technology.[177] In the more recent study, 81 percent of parents whose child was age 11 or younger during the initial study in March 2020 stated that their kid had ever used a tablet computer and 71 percent said their kid currently used a smartphone.[178] There was also a slight increase in the number of parents who stated their child (age 11 or younger) plays with gaming consoles or portable gaming devices,[179] as well as an increase in the types of activity that kids engaged in. Parents reported an increase in the usage of TikTok among their 5- to 11-year-old children and among children ages 5 or younger.[180] The number of parents who reported their child used a social media site other than TikTok, Snapchat, Facebook, or Instagram jumped from 8 percent in 2020 to 17 percent in 2021.[181]

Pandemic measures like online school and social activities protected kids from the transmission of COVID-19, but also exposed children to more danger online. These quarantine measures meant that children were spending "more time online for educational, entertainment and social purposes."[182] This normalized the concept of using online platforms, like games, messaging apps, or other social media to form interpersonal relationships.[183] Children were also more prone to being bored, which "may lead to increased risk-taking, including an increase in the taking and sharing of self-generated material."[184] In addition to increased online risks, kids became less visible to the array of guardians they previously had looking out for them. Children were seen less by doctors, teachers, childcare providers, and other mandatory reporters who

[176] De et al., *supra* note 174.

[177] Colleen McClain, *How parents' views of their kids screen time, social media use changed during COVID-19*, PEW RESEARCH CENTER (April 28, 2022), https://www.pewresearch.org/fact-tank/2022/04/28/how-parents-views-of-their-kids-screen-time-social-media-use-changed-during-covid-19/.

[178] *Id.*

[179] *Id.* ("51% of parents with a young child said their child used a game console or portable game device in 2021, up slightly from 2020.").

[180] *Id.*

[181] *Id.*

[182] *Threats and Trends Child Sexual Exploitation and Abuse COVID-19 Impact*, INTERNATIONAL CRIMINAL POLICE ORGANIZATION [INTERPOL] at 6 (Sept. 2020).

[183] *Id.*

[184] *Id.*

traditionally help identify child abuse, including child sexual exploitation.[185]

The pandemic made it harder for victimized children to be noticed and for preventative measures to be fully effective because organizations and entities that provide services for victims or assist with investigations struggled to operate at a full-scale capacity due to work-from-home measures.[186] For instance, INTERPOL reported that COVID-19 caused reductions or delays in the reporting of child sexual exploitation or abuse.[187] There were reductions in individuals investigating child sexual exploitation and abuse because of the need to divert resources to activities relating to the pandemic, and changes in the efficiency of law enforcement due to work-from-home technical constraints.[188] INTERPOL also reported a decreased use of the International Child Sexual Exploitation database by the nations belonging to the organization.[189] Many of these investigative challenges are likely to be resolved as the world continues to return to "normal," but law enforcement will still need a way to address the digital harms that arose throughout the pandemic. This will continue as use of technology increases.[190] The most effective way to achieve this is by interpreting "sexual activity" as not requiring physical contact between individuals.

Data from organizations that work to track and combat child exploitation depicts the increased occurrences of online harms to children during the peak of the COVID-19 pandemic. The National Center for Missing and Exploited Children (NCMEC) reported a 97.5 percent increase in reports of online enticement from 2019 to 2020.[191] It is possible that the increase in incidents reported is tied

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[185] *Id.*

[186] *See* Michael Salter & W.K. Tim Wong, *The Impact of COVID-19 on the Risk of Online Child Sexual Exploitation and the Implications for Child Protection and Policing* (May 2021), https://www.arts.unsw.edu.au/sites/default/files/documents/eSafety-OCSE-pandemic-report-salter-and-wong.pdf (describing changes to online child sexual exploitation prevention and monitoring efforts).

[187] *Threats and Trends Child Sexual Exploitation and Abuse COVID-19 Impact*, *supra* note 182.

[188] *Id.*

[189] *Id.*; *see also Frequently Asked Questions,* UNITED STATES DEPARTMENT OF JUSTICE (last updated Aug. 18, 2022) https://www.justice.gov/interpol-washington/frequently-asked-questions (stating the United States is part of INTERPOL).

[190] *See supra* notes 167–181 and accompanying text.

[191] *See* Brenna O'Donnell, *Rise in Online Enticement and Other Trends: NMEC Releases 2020 Exploitation Stats*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (Feb. 24,

to stay-at-home measures that allowed caregivers to better monitor their children and report harms. However, NCMEC specifically identified that one of the most significant factors is that the COVID-19 pandemic and the resulting stay-at-home measures pushed the lives of children and adults online to a greater extent than they were pre-pandemic.[192] In totality, school closures, increased time spent online, confinement at home and the lack of visibility to secondary caretakers and guardians put children more at risk for sexual exploitation, especially online exploitation.[193]

C. TECHNOLOGICAL CHANGES AND THE EFFECTS OF THE COVID-19 PANDEMIC MAKE IT EASIER FOR PREDATORS TO REACH CHILDREN

At the same time that children are becoming more vulnerable from increased access to and use of technology and the implications of the COVID-19 pandemic,[194] predators are continuing to become more technologically savvy.[195] The pandemic caused worldwide

2021), https://www.missingkids.org/blog/2021/rise-in-online-enticement-and-other-trends--ncmec-releases-2020-, ("Online enticement involves an individual communicating with someone believed to be a child via the internet with the intent to commit a sexual offense or abduction.").

[192] *Id.* ("There are multiple reasons why reports of online enticement have gone up in 2020, but one of the most evident is that safety precautions surrounding the COVID-19 pandemic have moved both children's and adults' lives online even more than they already were."); *see also* Dustin Racioppi, *'People don't want to talk about it,' but reports of kids being exploited online have spiked amid coronavirus pandemic*, USA TODAY, (Oct. 22, 2020 5:00 AM), https://www.usatoday.com/story/news/nation/2020/10/22/coronavirus-child-abuse-nj-online-child-exploitation-reports-increase/6004205002/ ("Online child abuse and exploitation, already one of the biggest and growing crime challenges nationally, has spiked as the pandemic as forced more people indoors with abusers and children spending more time on the internet.").

[193] *Threats and Trends Child Sexual Exploitation and Abuse COVID-19 Impact*, *supra* note 182.

[194] *See supra* notes 167167–192 and accompanying text.

[195] *Catching the Virus Cybercrime, disinformation, and the COVID-19 Pandemic*, EUROPOL, https://www.europol.europa.eu/publications-events/publications/catching-virus-cybercrime-disinformation-and-covid-19-pandemic (last updated Dec. 6, 2021) ("With a huge number of people teleworking from home, often with outdated security systems, cybercriminals prey on the opportunity to take advantage of this surreal situation and focus even more on cybercriminal activities.").

border closures and 'no travel' orders[196] which meant that access to minors was essentially limited to contacting them online. As such, predators had little choice but to attempt to coerce or entice minors to engage in illicit sexual activity through the Internet. Even before the pandemic it was becoming easier to recruit and entice victims this way.[197] Individuals can find a wealth of personal information about people by looking at social media platforms and utilizing online searches, including information about a person's typical habits or vulnerabilities.[198] This is enhanced by the fact that many social media platforms such as Snapchat, dating apps, and Instagram, now track and publish a user's location for their "friends" to see.[199]

By using information found online, predators can essentially develop a profile for a targeted individual before ever contacting that person. Predators can then use this information to "groom" victims and engage in online enticement.[200] "[G]rooming is a preparatory process in which a perpetrator gradually gains a person's or organization's trust with the intent to be sexually abusive" and has been considered relevant conduct in the prosecution of cases under 18 U.S.C. § 2422(b).[201] NCMEC defines

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[196] Phillip Connor, *More than nine-in-ten people worldwide live in countries with travel restrictions amid COVID-19*, PEW RESEARCH CENTER (April 1, 2020), https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/ ("The movement of people across borders has come to a standstill in much of the world as countries close their borders to visitors --- and sometimes their own citizens --- in response to the coronavirus outbreak."); *see also Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, DEPARTMENT OF HOMELAND SECURITY (Oct. 19, 2020) https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus ("In order the limit the further spread of coronavirus, the U.S. has reached agreements with both Canada and Mexico to limit all non-essential travel across borders.").

[197] *Infra* notes 198–203 and accompanying text.

[198] Working Group on Trafficking in Persons, *Successful strategies for addressing the use of technology to facilitate trafficking in persons and to prevent and investigate trafficking in persons*, pg. 4, U.N. Doc. CTOC/COP/WG.4/2021/2 (Jul. 23, 2021) ("Traffickers can find a large volume of persona information about potential victims on the Internet, in particular on social media platforms such as Facebook, TikTok, Snapchat and Instagram, with publicly accessible details related to victims' friends, family, location, work, holidays and tastes, revealing habits and vulnerabilities.").

[199] *Id.*

[200] *Id.*

[201] *See Understanding Sexual Grooming in Child Abuse Cases*, AMERICAN BAR ASSOCIATION (Nov. 1, 2015),

online enticement to include instances of "groom[ing] a child to take sexually explicit images *and/or* ultimately meet face-to-face with someone for sexual purposes, or to engage in sexual conversation online . . . ."[202] This process helps build the trust of a child and assists with enticing a minor to engage in illegal sexual activity.

"Grooming" can be carried out either in person or online, so interpersonal physical contact is not necessary for this form of sexual activity. So, while the online nature of conduct associated with the enticement and coercion of minors was not new with the onset of the pandemic, the obstacles to traveling and facilitating other in-person gatherings were. This means that conduct that might arise online but would become in-person sexual activity in a pre-pandemic world, was pushed online entirely and may continue to victimize children without there ever being physical contact between the child and the perpetrator.[203]

D. THE BROADER DEFINITION OF "SEXUAL ACTIVITY" WILL MAKE § 2422(b) A STRONGER PROSECUTORIAL TOOL

Adopting the broader definition of "sexual activity" will allow 18 U.S.C. § 2422(b) to function as a stronger prosecutorial tool. This will allow section 2422(b) to capture a form of sexual abuse and exploitation that is not encompassed by statutes addressing similar behaviors. One example of this is found in 18 U.S.C. § 1591, the federal sex trafficking statute. As discussed in detail below, employing the broader interpretation of "sexual activity" in section 2422(b) would make it easier to prosecute conduct that is either

https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/november-2015/understanding-sexual-grooming-in-child-abuse-cases/.

[202] Brittany Perna, *Grooming in the Digital Age, National Center for Missing and Exploited Children* (Feb. 4, 2020), https://www.missingkids.org/blog/2020/grooming-in-the-digital-age.

[203] *See* Mengqing Long, et. al., *The Short-and Long-Term Impact of COVID-19 Lockdown on Child Maltreatment*, 19 INT. J. ENVIRON. RES. PUB. HEALTH 3350 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8954178/pdf/ijerph-19-03350.pdf (describing a study of child abuse in China that showed sexual abuse increased at a statistically significant rate even after lockdown measures ended).

insufficient or too challenging to charge under section 1591 while maintaining similar punishments.[204]

Sections 1591 and 2422(b) cover similar but not identical conduct. Section 2422(b) requires that a defendant use either a facility of interstate or foreign commerce to knowingly persuade, induce, entice, or coerce a minor to engage in illegal sexual activity, or attempt to do so.[205] The statute does not explicitly define what persuade,[206] induce,[207] entice,[208] or coerce[209] mean in this context, but many courts have held that these terms are unambiguous and "are words of common usage that have plain and ordinary meanings."[210]

Section 1591 was enacted as part of the Trafficking Victims Protection Act[211] (TVPA) in 2000 and has been amended over the years to specifically target the trafficking and exploitation of

[204] *C.f.* 18 U.S.C. § 2422(b) (2006) (providing for a 10-year mandatory minimum) *with* 18 U.S.C. § 1591(b) (2018) (providing for a 15-year mandatory minimum).

[205] 18 U.S.C. § 2422(b) (2006).

[206] *Persuade*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/persuade (last visited Dec. 29, 2023) (defining persuade as "to move by argument, . . . or course of action; to plead with").

[207] *Induce*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/induce (last visited Dec. 29, 2023) (defining induce as "to move by persuasion or influence; to call forth or bring about by influence or stimulation; to cause the formation of").

[208] *Entice*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/entice (last visited Dec. 29, 2023) (defining entice as "to attract artfully or adroitly or by arousing hope or desire").

[209] *Coerce*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/coerce (last visited Dec. 29, 2023) (defining coerce as "to compel to an act or choice; to achieve by force or threat; to restrain or dominate by force").

[210] *Gagliardi*, 506 F.3d at 147 ("We reject both challenges [referring to the defendant's argument that section 2422(b) is vague and overbroad because it does not define "attempt", "persuade", "induce," "entice," or "coerce"] and now join the five other circuits that have already done so."); *see also* United States v. Thomas, 410 F.3d 1235, 1244 (10th Cir. 2005) ("Section 2422(b) requires only that the defendant intent to entice a minor, not that defendant intend to commit the underlying sexual act. . . . this interpretation does not render the statute unconstitutionally overbroad or void for vagueness."); United States v. Meek, 366 F.3d 705, 722 (9th Cir. 2004) (holding that section 2422(b) is not vague or overbroad); United States v. Panfill, 338 F.3d 1299, 1301 (11th Cir. 2003) ("The words 'entice' and 'induce' are not ambiguous . . . . Indeed the language of § 2422(b) is clear."); *Bailey*, 228 F.3d at 639 ("No such overbreadth or ambiguity problems exist with 18 U.S.C. § 2422(b)."); *Tykarsky*, 446 F.3d 458, 472 (3d Cir. 2006) ("Section 2422(b) is not overbroad.").

[211] Trafficking Victims Protection Act of 2000, H.R. 3244, 106th Cong. (2000) (enacted).

minors.[212] The statute requires that (1) the defendant "act in furtherance of or benefit from a commercial sex act", (2) that the defendant behaved "knowing[ly], or in reckless disregard of the fact" that [force, fraud, or coercion] would be used to carry out a commercial sex act, or that the victim was not yet 18 years old, and (3) that the conduct impacted interstate or foreign commerce.[213] A defendant can act in furtherance of a commercial sex act if s/he "knowingly, recruits, entices, harbors, transports, provides, obtains, or maintains, patronizes, or solicits by any means a person."[214]

One notable difference between the statutes is that the sexual activity described in section 1591 is *commercial* sex acts while section 2422(b) seems to apply to sexual activity generally (regardless of the commercial or non-commercial nature).[215] "Commercial sex act" is defined in the statute as "any sex act, on account of which anything of value is given to or received by any person."[216] While courts have held that money does not necessarily need to change hands to constitute a "commercial sex act,"[217] there

[212] *See*, *e.g.*, Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (2003) (enacted) (reauthorizing the funding provided in the TVPA and adding new programs); Trafficking Victims Reauthorization Act of 2005, H.R. 972, 109th Cong. (2005) (enacted) (adding provisions like requiring the Department of Health and Human Services to undertake studies about the prevalence of trafficking, which indicated Congress's desire to address trafficking at an international scale and better assist victims); Adam Walsh Child Protection and Safety Act, H.R. 4472, 109th Cong. (2005) (enacted) (aimed at protecting children from sexual exploitation and promoting Internet safety as well as increasing punishments for the trafficking of children);William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008) (enacted) (adding new mens rea elements to be used to establish liability under section 1591).

[213] 18 U.S.C. § 1591 (2018); *see also* Stephen C. Parker & Jonathan T, Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1031–32 (2013).

[214] Parker & Skermetti, *supra* note 213, at 1032 (explaining that some courts have defined these terms as follows: "'Recruit' means to seek the services of a person. 'Entice' means to attract or lure using hope or desire. 'Harbor' means to give or afford shelter or refuge to a person, either openly or secretly. 'Transport' means to transfer or convey from one place to another. 'Provide' means to supply or make available. And 'obtain' means to gain, acquire, or attain.").

[215] *Cf.* 18 U.S.C. § 2422(b) *with* 18 U.S.C. § 1591.

[216] 18 USC § 1591(e)(3).

[217] *See Bazar*, 747 Fed.Appx. at 456; United States v. Glenn, 839 Fed.Appx. 376, 385 (11th Cir. 2020) ("These arguments fail because the statutory definition of "commercial sex act" covers more conduct than just prostitution.").

is still *something* of value exchanged, even if not monetary.[218] Conversely, in cases involving section 2422(b), the defendant might receive something of value, such as requested images from children, but the victims might not receive anything of value in return.[219]

Given this, section 2422(b) can apply to a wider array of conduct. Adopting the broader definition of "sexual activity" would allow prosecutors to use this statute to catch conduct that might not be sufficient to charge under section 1591. Prosecutors must be able to prove the "commercial" element of a sex act that is charged under section 1591. Even though this is not limited to proving monetary transactions, it is one more obstacle for the prosecution to overcome at trial because they must gather evidence and prove that there was *something* of value exchanged. Under section 2422(b), prosecutors do not need to establish this element to obtain a conviction, which allows the statute to serve as a more flexible and powerful prosecutorial tool that can better protect minors today.

Another difference in these statutes relates to their ease of use in criminal prosecutions. Although human trafficking, and sex trafficking specifically, are issues of international[220] and domestic

[218] *See*, *e.g.,* Ardolf v. Weber, 332 F.R.D. 467, 478 (S.D.NY 2019) ("Defendant's alleged fondling of Plaintiffs' genitals was commercial in nature because he offered them valuable career advancement, including future modeling jobs, to allow it to happen."); Noble v. Weinstein, 335 F.Supp.3d 504, 521 (S.D.NY 2018) (holding that the connections Weinstein, "a world-renowned film producer", provided for Noble, "an aspiring actress," was something of value to satisfy the commercial sex act element of section 1591); Geiss v. Weinstein Company Holdings LLC, 383 F.Supp.3d 156, 169 (S.D.NY 2019) (holding that the "commercial sex act" element of section 1591 was satisfied by promises of career advancement).

[219] *See*, *e.g.*, *Fugit*, 703 F.3d at 251 (stating that Defendant engaged in inappropriate sexual phone conversations with a ten-year-old and eleven-year-old girl, but not identifying that the minor victims received anything of value that they solicited or were under the impression they would obtain); *Dominguez*, 997 F.3d at 1123 (stating that Defendant sent a photo of his penis to a nine-year-old girl and then solicited photos from her but not discussing that the girl requested the photo or was under the impression that she was gaining something in the exchange).

[220] *See The Protocol*, UNITED NATIONS, https://www.unodc.org/unodc/en/human-trafficking/protocol.html (last updated Sept. 15, 2021) (stating that the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in persons as the "world's primary legal instrument to combat human trafficking" and identifying that the Protocol has 178 member-parties, including the United States).

concern (both federally[221] and locally[222]), these crimes are difficult to investigate which thus makes them hard to prosecute.[223] First, there are challenges in identifying victims in trafficking cases.[224] This is in part due to the covert nature of the trafficking activity, but it is compounded by the fact that victims often are unable or unwilling to seek help out of fear of repercussions from law enforcement.[225] Additionally, not all law enforcement agencies prioritize trafficking cases, have the resources to investigate these cases, or have the proper training for how to effectively work with victims of trafficking when conducting interviews and investigations.[226]

There are additional challenges in prosecuting trafficking cases.[227] In sex trafficking cases, there can be questions as to whether the victim was being trafficked or was engaging in prostitution, which might present difficulty in establishing credibility of victims.[228] Victims might be pressured or threatened by their traffickers to refrain from testifying or hesitate to provide information to law enforcement due to the lack of protections available to them.[229] Furthermore, due to the techniques that

[221] *See Federal Government Efforts to Combat Human Trafficking,* OFFICE OF TRAFFICKING IN PERSONS https://www.acf.hhs.gov/otip/resource-library/federal-efforts (last updated July 8, 2020) (detailing the Department of Health and Human Services' efforts to develop programs to combat human trafficking and providing information about the efforts of other federal agencies such as the Department of Justice, Department of State, Department of Labor, the Federal Bureau of Investigation, and more); *see also Key Legislation*, DEPARTMENT OF JUSTICE https://www.justice.gov/humantrafficking/key-legislation (last updated Sept. 28, 2022) (detailing U.S. legislative efforts to combat human trafficking).

[222] *See State & Territory Profiles: Efforts to Combat Human Trafficking*, OFFICE OF TRAFFICKING IN PERSONS https://www.acf.hhs.gov/otip/training-technical-assistance/resource/profiles (last updated June 17, 2019) (detailing anti-trafficking measures in each state and U.S. territories).

[223] *Improving the Investigation and Prosecution of State and Local Human Trafficking Case*, NATIONAL INSTITUTE OF JUSTICE (Aug. 31, 2016), https://nij.ojp.gov/topics/articles/improving-investigation-and-prosecution-state-and-local-human-trafficking-cases.

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*; *see also* Jennifer Nelms, *Perceptions of Barriers in Prosecuting Human Trafficking Cases* (Nov. 11, 2020) (Ph.D. dissertation, Nova Southeastern University) (on file with NSUWorks).

[228] Nelms, *supra* note 227, at 26.

[229] *Id.* at 27–28.

traffickers often use to recruit and then exploit their victims, it can be challenging for prosecutors to explain the complex relationship between traffickers and victims.[230]

There will likely always be obstacles to prosecuting child enticement cases but employing the broader interpretation of "sexual activity" in section 2422(b) would help make it easier to prosecute conduct that could otherwise be too challenging to address under section 1591. For instance, interpreting "sexual activity" to not require physical contact means that section 2422(b) can be used to capture conduct before it escalates to sex trafficking. Section 2422(b) allows for convictions arising from attempt crimes,[231] sting operations,[232] or attempts to induce/entice a minor to engage in unlawful sexual activity through an adult intermediary.[233]

This could help ameliorate prosecutorial difficulties multiple ways. First, because a conviction can be based on sting operations or conduct with an adult intermediary, it would mean that prosecutors might not have to rely on child victims to testify or can avoid the difficulties of explaining the emotionally complicated relationship between a trafficker and a victim. Additionally, since the criminalized conduct under section 2422(b) encompasses attempts to induce or entice a minor to engage in sexual activity, this could include aspects of the "grooming" process that traffickers undertake when seeking out their victims. This would also encompass sexual conduct that occurs entirely online and does not actually culminate in interpersonal sexual activity meaning that prosecutors could intercept actions of online enticement and solicitation of children in violation of section 2422(b) before it could escalate to full-fledged trafficking.

Section 2422(b) can also be used as a "negotiating" charge in trafficking prosecutions. As discussed above, it can be challenging

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[230] *See Understanding Sexual Grooming in Child Abuse Cases*, *supra* note 201 ("Aspects of sexual grooming may include: targeting the victim, securing access to and isolating the victim, gaining the victim's trust, and controlling and concealing the relationship.").

[231] *See* 18 U.S.C. § 2422(b) (2006) ("Whoever . . . 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 . . . .") (emphasis added).

[232] *See supra* note 47 and accompanying text.

[233] *See Murrell*, 368 F.3d at 1289 (addressing that the defendant induced a minor through an adult intermediary in violation of § 2422(b) with the intention of convincing the girl to engage in a commercial sex act in violation of § 1591).

to effectively investigate and prosecute trafficking crimes, especially for cases going to trial, so in some instances section 2422(b) might be an easier way to obtain a conviction.[234] This is partly because under section 2422(b) the government does not have to establish that conduct involved the exchange of anything of value. It can thus reach a wider array of conduct because it allows for convictions based on interactions with adult intermediaries or "decoy" operations.[235] Therefore, a prosecutor who has a basis for charging under 1591 but is hesitant to go to trial because of concerns about having sufficient evidence to prove every element or being able to effectively present testimony could still successfully bring charges under section 2422(b).

Under section 1591, defendants are subject to a 15-year mandatory minimum for conduct involving children under age 14.[236] Under section 2422(b), defendants are subject to a 10-year mandatory minimum for conduct involving a minor.[237] In circumstances where there is proof beyond a reasonable doubt of conduct that could satisfy both crimes, prosecutors may charge a defendant under both statutes and negotiate a deal where the defendant pleads to the section 2422(b) charge.[238] This could benefit both prosecutors and defendants. Prosecutors with enough evidence to satisfy their burden on both counts might still fear what

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[234] *See supra* notes 223–230 and accompanying text.

[235] *See supra* notes 46–50 and accompanying text.

[236] 18 U.S.C. § 1591(b)(2) (2018).

[237] 18 U.S.C. § 2422(b) (2006).

[238] This is **not** intended to suggest or endorse the practice of "overcharging" in which prosecutors file charges against defendants to gain bargaining leverage to *coerce* a plea. *See* H. Mitchell Caldwell, C*oercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 83–84 (2012) ("[B]ecause most criminal convictions are secured through plea negotiations, prosecutors have an incentive to file more serious charges than those supported by the evidence with 'the hope that a defendant will be risk averse.'"). Prosecutors should not file charges for conduct unless they believe there is sufficient evidence to support the charges at trial and prove the conduct beyond a reasonable doubt; *Criminal Justice Standards Prosecution Function*, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (last visited Jan. 14, 2023) ("The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct."). Instead, this comment is intended to highlight that even in cases with sufficient evidence to ethically proceed to trial, there may be beneficial reasons for both the government and defense to negotiate a plea deal.

a jury would decide if the case went to trial. This is particularly relevant as it pertains to the section 1591 charge because as previously discussed, some of the relationships between abusers and victims are challenging to explain to a jury.[239] Similarly, defendants know that if they go to trial there is a potential that they will not be convicted on either or both of the charges. However, because the government likely has a strong case since it has proceeded to charge a defendant on both counts, defendants may be counseled to accept an offer to plead to the section 2422(b) charge. This is because the section 2422(b) charge carries a slightly lower mandatory minimum sentence than section 1591 and this eliminates the risk of serving two mandatory minimum sentences if convicted of both counts at trial.

V. POTENTIAL PROBLEMS WITH IMPLEMENTING THE BROADER DEFINITION OF "SEXUAL ACTIVITY" IN 18 U.S.C § 2422(b)

One concern with adopting the broader definition of "sexual activity" is that it will criminalize too much conduct. This was suggested as a potential problem by the Seventh Circuit when the court questioned whether pornographic-like movies, erotic painting or sketches would fall into this category.[240] The Fourth and Eleventh Circuits argue that this is not a true concern because the requirement that the sexual activity in question be activity "for which any person can be charged with a criminal offense" serves as a limitation on the range of conduct that charges can be brought for.[241] While it is unlikely the Seventh Circuit's extreme characterization of conduct that might be considered "sexual activity" would occur, it does provide a basis for the argument that possibly not all of the conduct that could be prosecuted under the broader definition of "sexual activity" warrants a 10-year mandatory minimum.

In addition to amending the statute to explicitly define "sexual activity" in line with the broader definition, Congress should

[239] *See supra* notes 221221–230 and accompanying text.

[240] *Taylor*, 640 F.3d at 257.

[241] *Fugit*, 703 F.3d at 255 ("As a general matter, conduct that is innocuous, ambiguous, or merely flirtatious is not criminal and thus not subject to prosecution under § 2422(b)."); *Dominguez*, 997 F.3d at 1126 ("[T]he term "sexual activity" is limited by the requirement that the conduct in question also be criminally proscribed.").

provide for differentiated punishment schemes. For instance, instead of a 10-year mandatory minimum for all convictions under the statute, some conduct might be effectively addressed through a shorter mandatory minimum term. It might be more appropriate to establish a safety-valve-like provision to adjust sentences for defendants who meet specific criteria. One author has proposed this concept for non-production child pornography cases because of growing discomfort with the high mandatory sentences dictated by the Guidelines in those cases.[242] By employing a "safety valve" provision in a small subset of cases that arise under section 2422(b), some conduct that is still criminalized under the broader definition of "sexual activity" but that a 10-year mandatory minimum might not be appropriate for can still be prosecuted and adequately punished.

If implemented, the safety valve provision should only apply only to a select group of defendants. For instance, it should include only individuals with a criminal history category of zero or one under the Sentencing Guidelines.[243] Other characteristics might be that the defendant did not engage in sexual activity with more than five minors,[244] that the defendant had taken no steps to make travel

[242] John T. Hughes, *Reacting to the Judicial Revolt: Applying Innovations in Narcotics Sentencing to Federal Non-Production Child Pornography Case*s, 47 COLUM. J.L. & SOC. PROBS. 31 (2013).

[243] *See* U.S. SENT'G GUIDELINES MANUAL § 5C1.2 (U.S. SENT'G COMM'N 2021) (explaining the "Limitation on Applicability of Statutory Minimum Sentences in Certain Cases" and stating that to qualify, a defendant "does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3"); *see also* U.S. SENT'G GUIDELINES MANUAL §§ 4A1.1–1.2 (U.S. SENT'G COMM'N 2021) (detailing the allocation of criminal history points and the computation of criminal history category).

[244] *See* Hughes, *supra* note 242, at 59 (proposing that a child pornography safety valve provision only apply to defendants who did not engage in "extensive distribution" defined as sending child pornography to ten or more people). This recommendation is similar to the suggestion by Hughes. It deviates by suggesting the exception only apply to defendants who were involved with fewer than five minors (compared to ten). This is because unlike child pornography distribution, which does not necessarily require contact directly with a child, a section 2422(b) requires a defendant to either engage in or intend to engage in conduct with a child.

plans to meet a minor in person,[245] and that the victims were over the age of 14.[246]

VI. CONCLUSION

The world is changing quickly, and it is imperative that the law reflect those changes. The advancements made in technology are hugely beneficial to society, but they come with significant dangers to the wellbeing and protection of our nation's children. Children today use technology more in daily life and have a larger digital footprint than ever before.[247] Additionally, the COVID-19 pandemic resulted in significant increases in the use of technology which exacerbated the vulnerability of children.[248] In order to achieve the legislative goal of protecting children from online harm and exploitation, the definition of "sexual activity" as it is used in section 2422(b) needs to be interpreted in a manner that does not require interpersonal physical contact.

This broader interpretation of "sexual activity" comports with the traditional notions of statutory interpretation and is supported by multiple policy considerations. Specifically, finding that sexual activity does not require interpersonal contact will help better protect our nation's children who have become increasingly more vulnerable to online abuse due to changes in technology and the COVID-19 pandemic.[249] Further, it would allow section 2422(b) to serve as a more effective prosecutorial tool because prosecutors can

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[245] If a defendant has made travel plans, then it indicates s/he planned to actually engage in physical sexual activity with a victim. This would move the conduct outside the possible scope of concern that the broader interpretation of "sexual activity" would criminalize conduct that society might not always deem criminal.

[246] Fourteen is the proposed age because some federal statutes differentiate between mandatory minimums when victims of this age because they are not seen as pre-pubescent. *See* 18 U.S.C. §§ 1591(b)(1) (providing a 15-year mandatory minimum for a victim under age 14) and 1591(b)(2) (providing a 10-year mandatory minimum for a victim who is at least 14 but not yet 18); *see also Puberty and Precocious Puberty*, NATIONAL INSTITUTE OF HEALTH, https://www.nichd.nih.gov/health/topics/puberty/conditioninfo#:~:text=Precocious%20(meaning%20prematurely%20developed)%20puberty,their%20growth%20halts%20too%20soon (last visited Oct. 13, 2022) ("The onset of puberty, the time in life when a person becomes sexually mature, typically occurs between ages 8 and 13 for girls, and ages 9 and 14 for boys.").

[247] *Supra* notes 167–179 and accompanying text.

[248] *Supra* notes 166166–193 and accompanying text.

[249] *Supra* notes 167–203203 and accompanying text.

punish conduct more quickly and help prevent it from evolving to full-scale human trafficking.[250] The broader definition might allow prosecutors to catch some forms of conduct that would not be easily be reached through the sex trafficking statute.[251] As a result, children can be more effectively protected and harmful conduct can be prosecuted more easily.

While only one-third of the federal circuit courts have weighed in on this existing split, it seems plausible that when faced with this question, other circuits will choose to follow the position endorsed by the Fourth and Eleventh circuits and adopt the broader definition of "sexual activity." Some of the circuits that have not yet officially weighed in on the section 2422(b) issue have rejected similar arguments made by defendants in these cases as to why "sexual activity" should be interpreted narrowly in other cases involving sexual crimes.[252] Though not dispositive as to how the split will evolve, it is indicative that some of the arguments relied on by defendants, and by the Seventh Circuit, will not be a persuasive reason to adopt a narrow definition of "sexual activity" to require physical contact between individuals.

There are some concerns with the implications of adopting the broader definition such as that it will criminalize too much conduct, such as "flirting."[253] However, these concerns are alleviated by the limitation within the statute itself requiring that the sexual activity be of the type "for which any person can be charged with a criminal offense."[254] Other safeguards could also be introduced as well such as establishing different mandatory minimum punishment schemes for varying levels of conduct or implementing a safety valve opportunity for certain offenders.[255]

Our nation promises equal justice under the law, but we are currently failing to provide that. Victims and defendants alike are not receiving equal justice when contrary interpretations of a federal criminal statute exist. It is unjust for some defendants to be subject to a 10-year mandatory minimum for the same conduct that another defendant might not be punished for. Similarly, it is unjust

[250] *Supra* notes 204–239 and accompanying text.
[251] *Supra* notes 204–219 and accompanying text.
[252] *Supra* notes 103–125 and accompanying text.
[253] *Taylor*, 640 F.3d at 257–58.
[254] 18 U.S.C. § 2422(b) (2006).
[255] *Supra* notes 242–246 and accompanying text.

that not all victims of these exploitative behaviors will be classified as a victim. It is necessary to adopt a uniform interpretation of "sexual activity" for section 2422(b), but in order to best serve the goals of protecting our children and punishing harmful conduct, the broader definition that does not require interpersonal physical contact should be adopted.