

## A BETTER WAY TO STOP ONLINE PREDATORS: ENCOURAGING A MORE APPEALING APPROACH TO § 2422(B)

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### I. INTRODUCTION

In 1998, Congress passed the Protection of Children from Sexual Predators Act (Protection Act)<sup>1</sup> to suppress the growing wave of sexual predators using Internet chat rooms to lure minors into sexual encounters.<sup>2</sup> Congress intended the Protection Act to be “a comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers.”<sup>3</sup>

In the years since Congress passed the Protection Act, courts have resolved many of the legal challenges posed against it (and against similar laws that Congress enacted) to protect minors from online predators.<sup>4</sup> Courts, however, have yet to definitively resolve what actions constitute an attempt under 18 U.S.C. § 2422(b), which prohibits attempts to “persuade[], induce[], entice[], or coerce[]” a minor to engage in illegal sexual activity.<sup>5</sup> Although the courts have

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<sup>1</sup> Pub. L. No. 105-314, 112 Stat. 2974 (1998) (codified as amended in scattered sections of 18 U.S.C.).

<sup>2</sup> See Protection Act, pmbll., 112 Stat. at 2974.

<sup>3</sup> H.R. REP. NO. 105-557, at 10 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 678. See also *United States v. Nestor*, 574 F.3d 159, 162 (3d Cir. 2009) (noting that Congress enacted § 2422(b) as “part of an overall policy to aggressively combat computer-related sex crimes against children”).

<sup>4</sup> Courts now universally agree that even if a defendant chats not with a real minor but with a law-enforcement agent posing as one, the defendant may still be convicted for attempting to lure a minor into a sexual encounter. See *United States v. Helder*, 452 F.3d 751, 754–56 (8th Cir. 2006). Courts have also upheld many of the provisions of the Protection Act in the face of constitutional challenges. See, e.g., *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

<sup>5</sup> 18 U.S.C. § 2422(b) (2006). See Tyler Patrick Lovejoy, Comment, *A New Playground: Sexual Predators and Pedophiles Online: Criminalizing Cyber Sex Between Adults and Minors*, 20 ST. THOMAS L. REV. 311, 322 (2008) (raising unresolved questions regarding attempt liability under § 2422(b)).

consistently held that the evidence that prosecutors present in a typical sting-operation case provides overwhelming support for an attempt conviction under § 2422(b),<sup>6</sup> courts have not conclusively determined the minimal evidence necessary to uphold an attempt conviction under the statute.

A number of circuits have recently addressed the issue of when a predator advances from merely chatting with a minor online to committing a crime under § 2422(b).<sup>7</sup> In a series of 2008 cases, the U.S. Court of Appeals for the Seventh Circuit introduced a concrete-measures standard, which requires a defendant to commit some “concrete” action beyond talking with a minor online.<sup>8</sup> The contours of this standard, however, remain undefined. The Seventh Circuit applied the concrete-measures standard to uphold the conviction of a defendant who discussed the possibility of meeting a minor for a “date” on a specific day and at a certain time.<sup>9</sup> Prior to that decision, the Seventh Circuit reversed the conviction of a defendant who sent a minor online messages explicitly describing sex acts he could perform on her along with a video of himself masturbating.<sup>10</sup> Other circuits appear to have imposed lower evidentiary standards in recent § 2422(b) attempt cases<sup>11</sup> but have not established clear standards to follow in subsequent cases. Although these decisions help provide guidance, they do not define a precise test to determine the minimal

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<sup>6</sup> See *United States v. Hensley*, 574 F.3d 384, 391 (7th Cir. 2009) (holding that a typical sting-operation case provided “more than enough [evidence] for a jury to find a ‘substantial step’” under § 2422(b)); *United States v. Brand*, 467 F.3d 179, 204 (2d Cir. 2006); *infra* Part II.B (describing a typical sting-operation case).

<sup>7</sup> See *United States v. Sheridan*, 304 F. App’x 742, 745 (10th Cir. 2008) (interpreting 18 U.S.C. app. § 2G2.2(b)(3)(E) (2006), which mirrors the language of § 2422(b)); *United States v. Zawada*, 552 F.3d 531, 532 (7th Cir. 2008); *United States v. Pierson*, 544 F.3d 933, 935 (8th Cir. 2008); *United States v. Joseph*, 542 F.3d 13, 14 (2d Cir. 2008).

<sup>8</sup> *Zawada*, 552 F.3d at 534 (citing *United States v. Gladish*, 536 F.3d 646, 649–50 (7th Cir. 2008)).

<sup>9</sup> *Id.* at 535.

<sup>10</sup> *Gladish*, 536 F.3d at 651.

<sup>11</sup> See *United States v. Nestor*, 574 F.3d 159, 161 (3d Cir. 2009) (listing several actions that could individually “constitute a substantial step toward the violation of § 2422(b),” including posting an online advertisement “seeking sexual contact with children” and engaging in repeated online and telephone discussions about “having sexual contact with children”); *United States v. Sheridan*, 304 F. App’x 742, 745 (10th Cir. 2008) (holding that online conversations about “virginity, sexual experiences, and a defendant’s desire to engage in sexual activity” with a minor “are, by themselves, evidence of an attempt to persuade, induce or entice”).

evidence necessary to convict a predator for an attempt under § 2422(b).

This Comment will argue that courts should interpret § 2422(b) in a way that promotes the Protection Act's goal: to make the Internet safer for minors by prohibiting predators from using the Internet to lure children into dangerous sexual encounters.<sup>12</sup> Specifically, this Comment will propose that the key factual issue underlying current § 2422(b) precedent is whether the defendant *encouraged* or *invited* a minor to engage in illegal sexual activity. An encouragement standard provides courts with a precise test to determine whether sufficient evidence exists to convict a defendant of an attempt under § 2422(b). The standard also advances the legislative intent behind § 2422(b).

Neither the encouragement standard nor current precedent, however, supports convicting a predator under § 2422(b) for having cybersex<sup>13</sup> with a minor, which involves many of the same harms Congress intended to target and prevent under § 2422(b). To prohibit cybersex with minors, courts should break away from current precedent and broaden the interpretation of "entice" to include speech that makes illegal sexual activity more appealing to minors.

Part II of this Comment will examine the legislative history behind § 2422(b), which reflects Congress's intent to target cyberpredators interacting with minors online. It will also summarize the significant legal issues that courts have resolved regarding § 2422(b) and identify the important questions that courts have left unanswered. In Part III, this Comment will argue that a proper interpretation of § 2422(b) requires courts to distinguish an attempt to persuade a minor to engage in illegal sexual activity from an attempt to engage in sexual activity with a minor. Applying this distinction, this Comment will argue that a defendant commits an attempt under § 2422(b) when he encourages or invites a minor to take action necessary to engage in illegal sexual activity. The encouragement standard, however, is not sufficient to criminalize cybersex with minors. Instead, Part IV of this Comment will argue that courts should broaden the interpretation of "entice" to prohibit a defendant's attempt to make illegal sexual activity more appealing to minors.

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<sup>12</sup> See H.R. REP. NO. 105-557, at 10-12 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 678-81.

<sup>13</sup> Cybersex is defined as "simulating sex via sexual communication over the Internet." *United States v. Joseph*, 542 F.3d 13, 14 (2d Cir. 2008).

## II. LEGISLATIVE AND JUDICIAL HISTORY BEHIND § 2422(B)

### A. *The Legislative History Behind § 2422(b) Reflects Congress's Concerns About Cyberpredators Interacting with Minors Online*

Prior to 1996, the scope and purpose of 18 U.S.C. § 2422 focused on whether an individual was persuaded to cross state lines to engage in an illegal sexual activity.<sup>14</sup> This approach has its roots in the Mann Act of 1910.<sup>15</sup> According to § 2422's legislative history, its first version was based on 18 U.S.C. § 399 (1940), the precursor of which was § 3 of the Mann Act.<sup>16</sup> The first version of § 2422 prohibited "knowingly persuad[ing], induc[ing], entic[ing], or coerc[ing] 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 other immoral purpose."<sup>17</sup> Congress significantly revised the Mann Act in 1986 in an attempt to modernize the text of the statute.<sup>18</sup> Similar to the revisions that it made to other sections of the Mann Act, Congress made § 2422 gender neutral and eliminated the outdated "debauchery" and "immoral purpose" language.<sup>19</sup> The focus of § 2422, however, remained on whether an individual per-

<sup>14</sup> Prior to its 1996 revision, § 2422 read,

Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate [or] foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2422 (Supp. IV 1986) (current version at 18 U.S.C. § 2422 (2006)).

<sup>15</sup> White-Slave Traffic (Mann) Act, ch. 395, §§ 1–8, 36 Stat. 825, 825–27 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

<sup>16</sup> See 18 U.S.C. § 2422 (1952) (noting in the legislative history that the section was based on 18 U.S.C. § 399 (1940), the precursor of which was § 3 of the Mann Act) (current version at 18 U.S.C. § 2422 (2006)).

<sup>17</sup> *Id.* The modern version of § 2422, however, does not address persuading, inducing, enticing, or coercing minors. See 18 U.S.C. § 2422(a)–(b) (2006). Rather, the modern version of § 2422 prohibits the separate crimes of transporting minors across state lines for illegal sexual activity and traveling across state lines to engage in illegal sexual activity with minors. See *id.*

<sup>18</sup> See Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended in scattered sections of 18 U.S.C.); H.R. REP. NO. 99-910, at 3, 7–8 (1986), as reprinted in 1986 U.S.C.C.A.N. 5952, 5953, 5957–58 ("The bill rewrites the Mann Act . . . to eliminate its anachronistic features and to make it gender neutral. . . . Similarly, sections 2422 and 2423 are rewritten in modern form . . .").

<sup>19</sup> 18 U.S.C. § 2422 (Supp. IV 1986) (current version at 18 U.S.C. § 2422 (2006)). See H.R. REP. NO. 99-910, at 8.

sued another individual to travel across state lines to engage in an illegal sexual activity.<sup>20</sup>

The scope and purpose of § 2422 underwent a significant shift in 1996 when Congress passed the Telecommunications Act of 1996 (Telecommunications Act).<sup>21</sup> As an attachment to the Telecommunications Act, Congress amended § 2422 by adding § 2422(b).<sup>22</sup> The new subsection specifically targeted the persuasion of minors, eliminated the prior version's requirement of "travel in interstate [or] foreign commerce," and added an attempt provision.<sup>23</sup> Significantly, Congress shifted the focus of § 2422(b) from whether a person persuaded an individual to travel across state lines to whether a person used a facility of interstate commerce to persuade, or attempt to persuade, a minor to engage in an illegal sexual activity.<sup>24</sup> The 1996 version of § 2422(b) read,

Whoever, using any facility or means of interstate or foreign commerce, including the mail, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.<sup>25</sup>

The current version of § 2422(b) reads substantially the same as the 1996 version except that Congress has raised the statutory penalty for violating the subsection.<sup>26</sup>

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<sup>20</sup> See 18 U.S.C. § 2422 (Supp. IV 1986).

<sup>21</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15 U.S.C., 18 U.S.C., and 47 U.S.C.).

<sup>22</sup> 18 U.S.C. § 2422(b) (Supp. II 1996) (current version at 18 U.S.C. § 2422(b) (2006)).

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> 18 U.S.C. § 2422(b) (2006). Congress has revised § 2422(b) three times since 1996 and each time raised the penalty for violating the statute. The maximum prison sentence under the original version of § 2422(b) was ten years. 18 U.S.C. § 2422(b) (Supp. II 1996). In 1998, Congress raised the maximum sentence for violating § 2422(b) to fifteen years. 18 U.S.C. § 2422(b) (Supp. IV 1998) (current version at 18 U.S.C. § 2422(b) (2006)). In 2003, Congress added a statutory minimum of five years imprisonment for violating § 2422(b) and a statutory maximum of thirty years imprisonment. 18 U.S.C. § 2422(b) (Supp. III 2003) (current version at 18 U.S.C. § 2422(b) (2006)). Finally, in 2006, Congress raised the statutory minimum for violating § 2422(b) to ten years imprisonment and the maximum sentence to life imprisonment. 18 U.S.C. § 2422(b) (2006).

Although enacted in 1996, the most comprehensive legislative history for § 2422(b) came in 1998 when Congress passed the Protection Act.<sup>27</sup> Its legislative history reflects Congress's concerns about cyberpredators interacting with minors online. Congress emphasized many of the dangers posed by cyberpredators developing online relationships with minors, including the possibility of cyberpredators manipulating and exploiting minors.<sup>28</sup> Congress highlighted the potential consequences of allowing cyber-relationships between predators and minors:

Recent, highly publicized news accounts in which pedophiles have used the Internet to seduce or persuade children to meet them to engage in sexual activities have sparked vigorous debate about the wonders and perils of the information superhighway. Youths who have agreed to such meetings have been kidnapped, photographed for child pornography, raped, beaten, robbed, and worse.<sup>29</sup>

Congress intended the Protection Act to counteract the growing wave of sex crimes facilitated by predators interacting with minors online.<sup>30</sup> Congressional representatives emphasized that the aim of the Protection Act was to punish "pedophiles who stalk children on the Internet."<sup>31</sup> Congresswoman Jennifer Dunn was one of many representatives who forcefully asserted that the purpose of the Protection Act was to target cyberpredators who victimize children. During debate, Dunn stated that "[b]y severely punishing those who use computers to target children for sexual acts or who knowingly send children ob-

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<sup>27</sup> Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified as amended in scattered sections of 18 U.S.C.). *See* United States v. Tykarsky, 446 F.3d 458, 467 n.4 (3d Cir. 2006) ("There is very little legislative history pertaining to the first version of § 2422(b), which was attached to the Telecommunications Act of 1996. Because the Child Protection and Sexual Predator Punishment Act of 1998 rewrote § 2422(b) and made substantial changes to related laws, we find the Congressional findings related to that act to be more relevant here."); *see also* United States v. Nestor, 574 F.3d 159, 162 (3d Cir. 2009) (discussing legislative history of the Protection Act).

<sup>28</sup> Congress noted that "cyber-predators' often 'cruise' the Internet in search of lonely, rebellious or trusting young people. The anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. Perfect strangers can reach into the home and befriend a child." H.R. REP. NO. 105-557, at 11-12 (1998), *as reprinted in* 1998 U.S.C.C.A.N. 678, 680.

<sup>29</sup> *Id.* at 12.

<sup>30</sup> Congress intended the Protection Act to be "a comprehensive response to the horrifying menace of sex crimes against children, particularly assaults facilitated by computers." *Id.* at 10.

<sup>31</sup> *Id.* at 12.

scenity over the Internet, this bill cracks down on cyber predators and pedophiles.”<sup>32</sup>

Further demonstrating Congress’s intent to criminalize the on-line interaction between sexual predators and minors, the initial draft of the Protection Act contained a provision that prohibited predators from contacting (or attempting to contact) minors “for the purpose[] of engaging in any sexual activity.”<sup>33</sup> During debate, congressional representatives discussed the importance of the provision and its underlying purpose of preventing predators from interacting with minors online. Representative Bill McCollum stated,

The key portion of this bill, and there are a lot of other things in it, is to make sure when there is contact made over the Internet for the first time by a predator like this with a child, with the intent to engage in sexual activity, whatever that contact is, as long as the intent is there to engage in that activity, he can be prosecuted for a crime.<sup>34</sup>

But both the House and Senate ultimately rejected the contact provision because it was too broad.<sup>35</sup>

Despite rejecting the proposed contact provision, Congress continued to indicate that the primary goal of § 2422(b) remained to target and punish sexual predators who interact with minors online and attempt to lure the minors into dangerous sexual encounters. After striking down the proposed contact provision, congressional representatives continued to declare their intent to “crack down” on

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<sup>32</sup> 144 CONG. REC. H4491, 4492–93 (daily ed. June 11, 1998) (statement of Rep. Dunn).

<sup>33</sup> H.R. 3494, 105th Cong. § 2422(c) (as reported by House, Mar. 23, 1998).

<sup>34</sup> 144 CONG. REC. H4497 (daily ed. June 11, 1998) (statement of Rep. McCollum). Echoing Representative Bill McCollum’s sentiments, Representative Sheila Jackson-Lee stated that the Protection Act “would be a start to effectively prevent a predator from initiating a harmful relationship with a child for illegal sexual activity and to subjecting children to damaging pornographic material that our children can currently access.” *Id.* at 4493 (statement of Rep. Jackson-Lee).

<sup>35</sup> See H.R. 3494, 105th Cong. § 2422 (as reported by House, Oct. 13, 1998) (amending previous versions of the Protection Act by erasing the proposed “contact” provision). During debate, Representative Alcee Hastings explained why the “contact” provision was rejected:

The original House bill was also too broad in that it made it a crime to contact or attempt to contact a minor. This was so broad that it would have covered a simple “hello” in an Internet chat room. Targeting attempts to make contact is like prosecuting a thought crime.

144 CONG. REC. H10566, H10572 (daily ed. Oct. 12, 1998) (statement of Rep. Hastings). See also 144 CONG. REC. S10518-02, 10521 (daily ed. Sept. 17, 1998) (statement of Sen. Leahy) (stating reasons for rejecting the proposed “contact” provision).

cyberpredators.<sup>36</sup> Senator Orrin Hatch articulated Congress's primary concerns when he stated that Congress "must also be vigilant in seeking to ensure that the Internet is not perverted into a hunting ground for pedophiles and other sexual predators, and a drive-through library and post office for purveyors of child pornography."<sup>37</sup> Representative Jerry Weller stated Congress's intent more bluntly: "[W]e need to do everything we can to ensure that the weirdos, the whackos, the slimeballs, those who would use the latest technology to prey on children and their families, are stopped."<sup>38</sup> The legislative history reflects Congress's intent to target the middle ground between "a simple 'hello' in an Internet chat room"<sup>39</sup> and arranging real-life sexual encounters with minors via online messaging.

*B. Courts Have Consistently Upheld § 2422(b) in the Face of Legal Impossibility and Constitutional Challenges*

Intended to help law enforcement catch sexual predators who use the Internet to target and lure minors into dangerous sexual encounters,<sup>40</sup> § 2422(b) is often used by prosecutors to charge and convict sexual predators caught in sting operations. The typical case arises when the predator initiates an online conversation with a law-

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<sup>36</sup> 144 CONG. REC. H10566, 10574 (daily ed. Oct. 12, 1998) (statement of Rep. Dunn). For example, during debate, Representative Alcee Hastings stated, "The legislation makes a number of important changes, principally by targeting pedophiles who stalk children on the Internet and by cracking down on pedophiles who use and distribute child pornography to lure children into sexual encounters." *Id.* at 10571-72 (statement of Rep. Hastings).

<sup>37</sup> 144 CONG. REC. S12257, 12262 (daily ed. Oct. 9, 1998) (statement of Sen. Hatch).

<sup>38</sup> 144 CONG. REC. H10566, 10572 (daily ed. Oct. 12, 1998) (statement of Rep. Weller).

<sup>39</sup> *Id.* (statement of Rep. Hastings).

<sup>40</sup> See H.R. REP. NO. 105-557, at 10 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 678. The House Report stated,

As we usher in the computer age, law enforcement will be confronted with even newer challenges. The "Child Protection and Sexual Predator Punishment Act" seeks to address those challenges by providing law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our nation's children.

*Id.* Representative Scott Hutchinson reiterated those sentiments during debate: "H.R. 3494 provides law enforcement with the tools it needs to investigate and bring to justice those individuals who prey on our Nation's children and sends a message to those individuals who commit these heinous crimes that they will be punished swiftly and severely." 144 CONG. REC. H10566, 10571 (daily ed. Oct. 12, 1998) (statement of Rep. Hutchinson).

enforcement agent posing as a minor.<sup>41</sup> The predator proceeds to discuss performing sex acts with the purported minor and suggests meeting the purported minor in person.<sup>42</sup> After the predator and purported minor arrange to meet in person, the predator travels to the meeting place where he is arrested by awaiting law enforcement.<sup>43</sup>

One of the recurring issues that courts initially confronted when adjudicating typical sting-operation cases was whether the accused predators could raise a successful legal impossibility defense.<sup>44</sup> A predator caught in a sting operation would often claim that he could not be convicted of an attempt under § 2422(b) because he attempted to persuade an undercover officer who was an adult—not a minor—to engage in sexual activity.<sup>45</sup> The predator argued that if he successfully persuaded the undercover officer to have sex with him, he would not be guilty of a crime because consensual sex between two adults is legal.<sup>46</sup>

Courts, however, have consistently rejected legal impossibility as a valid defense to an attempt charge under § 2422(b).<sup>47</sup> Some courts reject the defense by recharacterizing it as a factual impossibility de-

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<sup>41</sup> See, e.g., *United States v. Cochran*, 534 F.3d 631, 634 (7th Cir. 2008).

<sup>42</sup> See *id.*

<sup>43</sup> See *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008). Many other cases follow this typical fact pattern. See, e.g., *United States v. Myers*, 575 F.3d 801 (8th Cir. 2009); *United States v. Chaudhry*, 321 F. App'x 119 (3d Cir. 2009); *United States v. Cherer*, 513 F.3d 1150 (9th Cir. 2008); *United States v. Gagliardi*, 506 F.3d 140 (2d Cir. 2007); *United States v. Cote*, 504 F.3d 682 (7th Cir. 2007); *United States v. Yost*, 479 F.3d 815 (11th Cir. 2007); *United States v. Brand*, 467 F.3d 179 (2d Cir. 2006); *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006); *United States v. Blazek*, 431 F.3d 1104 (8th Cir. 2005); *United States v. Sims*, 428 F.3d 945 (10th Cir. 2005); *United States v. Naiden*, 424 F.3d 718 (8th Cir. 2005); *United States v. Thomas*, 410 F.3d 1235 (10th Cir. 2005); *United States v. Patten*, 397 F.3d 1100 (8th Cir. 2005); *United States v. Munro*, 394 F.3d 865 (10th Cir. 2005); *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004); *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003); *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002); *United States v. Farner*, 251 F.3d 510 (5th Cir. 2001).

<sup>44</sup> Legal impossibility occurs when “the intended acts, even if completed, would not amount to a crime.” *United States v. Hsu*, 155 F.3d 189, 199 (3d Cir. 1998) (quoting *United States v. Berrigan*, 482 F.2d 171, 188 (3d Cir. 1973)) (internal quotation marks omitted).

<sup>45</sup> See, e.g., *United States v. Helder*, 452 F.3d 751, 753 (8th Cir. 2006).

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* at 755 (joining other circuits in holding that “an actual minor victim is not required for an attempt conviction under § 2422(b)”).

fense,<sup>48</sup> which courts generally consider an invalid defense to criminal-attempt charges.<sup>49</sup> Other courts reluctantly accept the predator's legal impossibility defense for the sake of argument and then reject it on the basis of legislative intent by holding that Congress did not intend for legal impossibility to constitute a defense to an attempt charge under § 2422(b).<sup>50</sup> Although courts differ about the reasons for rejecting the defense, legal impossibility clearly is not an effective defense to an attempt under § 2422(b).<sup>51</sup> In general, to obtain an attempt conviction under § 2422(b), courts only require prosecutors to show that the defendant believed that he was communicating with a minor.<sup>52</sup>

In adjudicating attempt charges under § 2422(b), courts have also confronted federal constitutional challenges under the First Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>53</sup> Courts have roundly rejected these challenges and have held that the statute does not infringe on protected speech and is not unconstitutionally vague or overbroad.<sup>54</sup> Courts consistently hold that

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<sup>48</sup> Factual impossibility “occur[s] when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime.” *Hsu*, 155 F.3d at 199 (quoting *Berrigan*, 482 F.2d at 188).

<sup>49</sup> See *United States v. Sims*, 428 F.3d 945, 959–60 (10th Cir. 2005) (“[F]actual impossibility is generally not a defense to criminal attempt because success is not an essential element of attempt crimes. . . . [I]t is not a defense to an offense involving enticement and exploitation of minors that the defendant falsely believed a minor to be involved.” (quoting *United States v. Hankins*, 127 F.3d 932, 934 (10th Cir. 1997))) (internal quotation marks and citation omitted).

<sup>50</sup> See *United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006). After noting “that the distinction between factual and legal impossibility is essentially a matter of semantics,” the U.S. Court of Appeals for the Third Circuit stated that “[e]ven assuming that this is a case of legal impossibility, it is well established in this Court that the availability of legal impossibility as a defense to a crime is a matter of legislative intent.” *Id.* at 465–66. The Third Circuit went on to “conclude that Congress did not intend to allow the use of an adult decoy, rather than an actual minor, to be asserted as a defense to § 2422(b).” *Id.* See also *United States v. Meek*, 366 F.3d 705, 719 (9th Cir. 2004) (finding that a legal impossibility defense to § 2422(b) would frustrate the statute’s purpose of allowing law enforcement “to police effectively the illegal inducement of minors for sex”).

<sup>51</sup> See *United States v. Brand*, 467 F.3d 179, 202 n.20 (2d Cir. 2006) (summarizing circuit court decisions rejecting the legal impossibility defense in § 2422(b) cases).

<sup>52</sup> See *United States v. Root*, 296 F.3d 1222, 1227 (11th Cir. 2002) (“[The defendant’s] belief that a minor was involved is sufficient to sustain an attempt conviction under 18 U.S.C. § 2422(b).”).

<sup>53</sup> See, e.g., *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

<sup>54</sup> See *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) (“Because no protected speech would be chilled by § 2422(b), and because the statute’s terms are sufficiently unambiguous, we conclude that § 2422(b) is not unconstitutionally vague

the First Amendment does not provide a right to attempt to persuade a minor to engage in illegal sexual activity; thus, § 2422(b) does not risk criminalizing legitimate speech and is not unconstitutionally broad.<sup>55</sup> Furthermore, in the context of § 2422(b), courts routinely define the terms “persuade,” “entice,” “coerce,” and “induce” according to their plain meanings, which are not unconstitutionally vague.<sup>56</sup>

*C. Courts Have Not Yet Resolved What Constitutes an Attempt Under § 2422(b)*

Although courts have seemingly resolved the constitutional and legal impossibility challenges to § 2422(b), they have not established a clear standard to determine the threshold level of evidence needed to convict a defendant for an attempt under the statute. Often presented with more than enough evidence in the typical sting-operation case to convict the defendant for an attempt under § 2422(b),<sup>57</sup> courts decline to entertain arguments that the defendant committed an attempt before he arranged a meeting place with a minor or traveled to the meeting place.<sup>58</sup> Courts often mark a defendant’s “substantial step” toward attempting a crime under § 2422(b) as the moment he arranges to meet the minor in person.<sup>59</sup> These same courts, however, leave open the possibility that the defendant’s online interaction with the minor would have supported an attempt conviction

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or overbroad.”); *Bailey*, 228 F.3d at 639 (“No . . . overbreadth or ambiguity problems exist with 18 U.S.C. § 2422(b).”).

<sup>55</sup> See *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006) (“There is no First Amendment right to persuade minors to engage in illegal sex acts.”); *United States v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004) (“The inducement of minors to engage in illegal sexual activity enjoys no First Amendment protection.”); *Bailey*, 228 F.3d at 639 (“Put another way, the Defendant simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sexual acts.”).

<sup>56</sup> *Gagliardi*, 506 F.3d at 147–48; *Tykarsky*, 446 F.3d at 473.

<sup>57</sup> See, e.g., *United States v. Brand*, 467 F.3d 179, 204 (2d Cir. 2006).

<sup>58</sup> See, e.g., *Gagliardi*, 506 F.3d at 150–51 (declining, because of the overwhelming evidence presented in the case, to reach the government’s argument that the defendant committed an attempt under § 2422(b) before he appeared at an arranged meeting place).

<sup>59</sup> *United States v. Thomas*, 410 F.3d 1235, 1246 (10th Cir. 2005) (“Thomas crossed the line from ‘harmless banter’ to inducement the moment he began making arrangements to meet angelgirl12yo, notwithstanding the lack of evidence that he traveled to the supposed meeting place.”).

on its own even if the defendant never arranged a meeting with the minor.<sup>60</sup>

Without establishing a clear standard to determine the threshold level of evidence necessary to convict a defendant for an attempt under § 2422(b), courts have left unresolved significant issues regarding the statute. Primarily, courts have not determined whether a predator's online interaction with a minor is alone sufficient to implicate the predator under § 2422(b) or whether additional acts, such as arranging a meeting place with the minor or traveling to the meeting place, are necessary to do so.<sup>61</sup>

Recent circuit court decisions provide some guidance in forming a clear standard to determine the threshold level of evidence needed to establish an attempt under § 2422(b). In *United States v. Bailey*, the U.S. Court of Appeals for the Sixth Circuit upheld a conviction under the statute even though the defendant never arranged to meet the minors whom he contacted online.<sup>62</sup> The evidence presented in the case demonstrated that the defendant contacted the minors online, "urged [them] to meet him, and used graphic language to describe how he wanted to perform oral sex on [them]."<sup>63</sup> The Sixth Circuit concluded that the defendant's conduct constituted an attempt under § 2422(b),<sup>64</sup> which "require[d] a finding that the defendant had an intent to persuade or to attempt to persuade."<sup>65</sup> The Sixth Circuit upheld the defendant's conviction for an attempt based solely on evidence of the defendant's online interaction with the minors.<sup>66</sup>

Although confronted with a fact pattern similar to *Bailey*, the Seventh Circuit in *United States v. Gladish* overturned a defendant's conviction under § 2422(b) based on the defendant's online interaction with a purported minor.<sup>67</sup> The defendant in *Gladish* solicited for sex an undercover government agent posing as a minor in an Internet

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<sup>60</sup> See *id.* ("Thomas took a substantial step in an attempt to induce, entice, and persuade by writing and sending his insistent messages.").

<sup>61</sup> Most courts appear to agree that a defendant does not have to travel to an arranged meeting place to sustain a conviction under § 2422(b). See *United States v. Yost*, 479 F.3d 815, 820 (11th Cir. 2007) (per curiam); *Thomas*, 410 F.3d at 1246; *United States v. Bailey*, 228 F.3d 637, 639–40 (6th Cir. 2000).

<sup>62</sup> See 228 F.3d at 639–40.

<sup>63</sup> *Id.* at 639.

<sup>64</sup> See *id.* at 640.

<sup>65</sup> *Id.* at 639.

<sup>66</sup> See *id.* at 639–40.

<sup>67</sup> See 536 F.3d 646, 651 (7th Cir. 2008).

chat room.<sup>68</sup> The defendant discussed the possibility of traveling to meet the purported minor; however, law enforcement arrested the defendant before the defendant and the minor made arrangements to meet.<sup>69</sup> The Seventh Circuit overturned the defendant's conviction because

the fact that the defendant in the present case said to a stranger whom he thought a young girl things like "ill suck your titties" and "ill kiss your inner thighs" and "ill let ya suck me and learn about how to do that," while not "harmless banter," did not indicate that he would travel to northern Indiana to do these things to her in person; nor did he invite her to meet him in southern Indiana or elsewhere.<sup>70</sup>

Following its *Gladish* decision, the Seventh Circuit in *United States v. Zawada* introduced the concrete-measures standard to determine when a predator moves beyond "mere talk in an Internet chat room" and commits an attempt under § 2422(b).<sup>71</sup> The Seventh Circuit applied this standard in *Zawada* to uphold the conviction of a defendant who, with a purported minor, "had a relatively concrete conversation about making a 'date'" during which the defendant spoke about "a specific date and time of day that . . . would work."<sup>72</sup> Although the defendant never arranged a specific meeting place or time, the Seventh Circuit concluded that the action that the defendant took "[was] somewhat closer to a substantial step than the 'hot air' and nebulous comments about meeting 'sometime' that took place in *Gladish*."<sup>73</sup>

Although the *Bailey* and Seventh Circuit decisions may appear contradictory, a common factual issue underlies the courts' rulings. In *Bailey*, the Sixth Circuit relied on evidence that the defendant "urged" the minors to meet him and engage in illegal sexual activity.<sup>74</sup> The Seventh Circuit based its *Zawada* decision on similar evidence that the defendant essentially invited the purported minor to meet him for a sexual encounter.<sup>75</sup> Conversely, the Seventh Circuit reversed a defendant's conviction in *Gladish* because he did not ex-

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<sup>68</sup> See *id.* at 648.

<sup>69</sup> See *id.*

<sup>70</sup> *Id.* at 650.

<sup>71</sup> 552 F.3d 531, 534 (7th Cir. 2008).

<sup>72</sup> *Id.* at 535.

<sup>73</sup> *Id.*

<sup>74</sup> See *United States v. Bailey*, 228 F.3d 637, 639–40 (6th Cir. 2000).

<sup>75</sup> See *Zawada*, 552 F.3d at 535.

tend a similar invitation.<sup>76</sup> The common issue underlying these cases was whether the defendant encouraged or invited the minor to engage in illegal sexual activity. As the following analysis will demonstrate, current precedent supports the application of the encouragement standard to determine whether a defendant's actions constitute an attempt under § 2422(b).

### III. THE ENCOURAGEMENT STANDARD

To conduct a proper § 2422(b) analysis, courts must first recognize that § 2422(b) does not require a defendant to demonstrate an intent to actually engage in illegal sexual activity with a minor. Rather, a defendant violates § 2422(b) by merely attempting to *persuade* a minor to engage in illegal sexual activity. When courts properly recognize this distinction, the key factual issue that emerges in § 2422(b) attempt cases is whether the defendant encouraged or invited the minor to take action that is necessary to participate in illegal sexual activity. This encouragement standard not only finds support in current precedent, but it also satisfies the requirements of the substantial-step test that federal courts apply.

#### A. *Section 2422(b) Does Not Require Proof that the Defendant Attempted to Engage in Illegal Sexual Activity with a Minor*

Section 2422(b) prohibits attempts to “persuade[], induce[], entice[], or coerce[]” a minor to engage in illegal sexual activity,<sup>77</sup> a crime that most courts have carefully distinguished from an attempt to actually participate in illegal sexual activity with a minor.<sup>78</sup> Rather than prohibiting an attempt to engage in illegal sexual activity with a minor, “[§] 2422(b) criminalizes an intentional attempt to achieve a *mental* state—a minor’s assent—regardless of the accused’s intentions vis-à-vis the actual consummation of sexual activities with the mi-

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<sup>76</sup> See *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

<sup>77</sup> 18 U.S.C. § 2422(b) (2006).

<sup>78</sup> See *United States v. Goetzke*, 494 F.3d 1231, 1236 (9th Cir. 2007) (noting that the defendant “was charged with attempting to *persuade, induce, entice, or coerce* [the minor] to engage in sexual activity with him—not with attempting to *engage* in sexual activity with [the minor]”); *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006) (“A conviction under § 2422(b) requires a finding only of an attempt to entice or an intent to entice, and not an intent to perform the sexual act following the persuasion.”); *United States v. Thomas*, 410 F.3d 1235, 1244 (10th Cir. 2005) (“Section 2422(b) requires only that the defendant intend to entice a minor, not that the defendant intend to commit the underlying sexual act.”).

nor.”<sup>79</sup> In other words, § 2422(b) does not criminalize a predator’s attempt to have sex with a child; it criminalizes the predator’s attempt to talk a child into it. Section 2422(b) targets the predator’s attempt at persuasion—at convincing a minor to engage in illegal sexual activity—not the predator’s attempt to perform illegal sex acts with a minor.

Courts have recognized that Congress, in passing § 2422(b), identified an attempt to persuade a minor to engage in illegal sexual activity as a separate crime from an attempt to actually engage in illegal sexual activity with a minor.<sup>80</sup> The legislative history reflects Congress’s concerns about predators using the Internet to persuade minors to participate in illegal sexual activity. For example, during debate on the Protection Act, Representative Scott Hutchinson stated,

We are seeing numerous accounts in which pedophiles have used the Internet to seduce or persuade children to meet them to engage in sexual activities. Children who have been persuaded to meet their new online friend face-to-face have been kidnapped, raped, photographed for child pornography,<sup>81</sup> or worse. Some children have never been heard from again.

Representative Kay Granger recounted an incident in Houston, Texas that demonstrates the risks involved in predators communicating with minors online to attempt to persuade the minors to engage in illegal sexual activity:

Even scarier still, many of these predators use cyberspace to meet children and ask them out.

Earlier this year a South Houston teenager ran away to see someone she never met before. That night Edward Dub Watson sexually assaulted her. And why did she leave home to see this person? Because she talked to him on the Internet, and she thought he sounded like a nice person.

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<sup>79</sup> *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008); *see also Goetzke*, 494 F.3d at 1236 (describing an attempt to persuade under § 2422(b) as “an attempt to achieve the mental act of assent”).

<sup>80</sup> *See United States 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.”).

<sup>81</sup> 144 CONG. REC. H10571 (daily ed. Oct. 12, 1998) (statement of Rep. Hutchinson). Reiterating those sentiments, Representative Benjamin Gilman stated, “The Internet, although a remarkable source of information and knowledge, makes it all too easy for pedophiles to illegally contact our children and engage in inappropriate communication and contact with them.” *Id.* at 10574 (statement of Rep. Gilman).

This is the issue we are trying to deal with. It is sick, and it has simply got to stop.<sup>82</sup>

Other representatives highlighted additional dangers and risks associated with predators interacting with minors online, such as the anonymity with which predators can communicate with minors.<sup>83</sup> This legislative history indicates Congress's goal of not only preventing a predator's attempt to have sexual relations with a minor but also of targeting and criminalizing the online interaction through which predators persuade minors to engage in illegal sexual activity. Congress intended to treat the attempt to persuade as a wholly separate crime.

Adhering to the plain language of § 2422(b) and the legislative intent behind it, courts have recognized that the statute does not additionally require the defendant's intent for the illegal sexual activity to actually take place.<sup>84</sup> As the U.S. Court of Appeals for the First Circuit stated in *United States v. Dwinells*, "Congress fully intended to treat acts like those attributed to the appellant with the utmost gravity, whether or not the accused intended that the enticed sex acts be consummated."<sup>85</sup> The First Circuit noted that while some courts "have mentioned the defendant's intent to engage in sexual acts, . . . such a finding was not necessary."<sup>86</sup> The Sixth Circuit in *Bailey* likewise differentiated between an intent to persuade from an intent to engage:

While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and

<sup>82</sup> 144 CONG. REC. H4497 (daily ed. June 11, 1998) (statement of Rep. Granger).

<sup>83</sup> See 144 CONG. REC. H10574 (daily ed. Oct. 12, 1998) (statement of Rep. Dunn). Representative Jennifer Dunn stated,

But what about cyber-predators? They may live anywhere; in our neighborhood, in another state, across the country, and yet they still have access to our children. These predators think that they can hide behind the faceless, voiceless world of the Internet. Make no mistake, they are wrong.

. . . .  
[The Protection Act] will ensure that cyber-predators become real live prisoners by providing law enforcement with the tools it needs to bring to justice those who would prey on our children.

*Id.*

<sup>84</sup> *United States v. Dwinells*, 508 F.3d 63, 69 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008). See also *United States v. Yost*, 479 F.3d 815, 819 n.3 (11th Cir. 2007) (stating that a defendant does not need to act "with the specific intent to engage in sexual activity" to be guilty of an attempt under § 2422(b)).

<sup>85</sup> 508 F.3d at 69.

<sup>86</sup> *Id.* at 70.

the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.<sup>87</sup>

The *Bailey* and *Dwinells* decisions demonstrate that an intent to persuade a minor under § 2422(b) does not require an additional intent to engage in illegal sexual activity.

Despite Congress's purpose to distinguish an attempt to persuade a minor to engage in sexual activity from an attempt to actually engage in illegal sexual activity, some courts misinterpret § 2422(b) and mistakenly blend the two crimes. For example, in upholding an attempt conviction under § 2422(b) in *United States v. Farner*, the U.S. Court of Appeals for the Fifth Circuit stated that the defendant "intended to engage in sexual acts with a 14-year-old girl and that he took substantial steps toward committing the crime."<sup>88</sup> The U.S. Court of Appeals for the Eleventh Circuit similarly upheld a defendant's conviction under § 2422(b) in *United States v. Muentes* because the defendant "attempted to stimulate or cause a minor to *engage* in sex with him."<sup>89</sup> By framing the issue in terms of whether the defendant attempted to engage in sexual activity with a minor, the Fifth and Eleventh Circuits misinterpreted the purpose of § 2422(b), which is to criminalize the predator's attempt to *persuade* a minor rather than the predator's intent to *engage* in illegal sexual relations with a minor.<sup>90</sup> Section 2422(b) does not require a defendant to demonstrate his intent to engage in illegal sexual activity with a minor.

After its *Gladish* decision, the Seventh Circuit introduced its concrete-measures standard to determine whether a defendant made an attempt under § 2422(b).<sup>91</sup> The Seventh Circuit had left a significant middle ground between the conduct that it dismissed as "hot air" in *Gladish*, which it held did not constitute an attempt under § 2422(b),<sup>92</sup> and the "arranged meeting place" scenarios, which it held did constitute an attempt under § 2422(b).<sup>93</sup> The Seventh Circuit began to define the contours of that middle ground in *Zawada*

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<sup>87</sup> *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

<sup>88</sup> 251 F. 3d 510, 513 (5th Cir. 2001).

<sup>89</sup> 316 F. App'x 921, 924 (11th Cir. 2009) (emphasis added).

<sup>90</sup> See 18 U.S.C. § 2422(b) (2006).

<sup>91</sup> *United States v. Zawada*, 552 F.3d 531, 534 (7th Cir. 2008).

<sup>92</sup> *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

<sup>93</sup> See *id.* at 649.

and its companion case, *United States v. Davey*.<sup>94</sup> Referring to and building on its holding in *Gladish* that “mere talk in an Internet chat room is not enough to support a conviction for an attempt” under § 2422(b),<sup>95</sup> the Seventh Circuit held that “more concrete measures . . . are necessary.”<sup>96</sup> These measures include “making arrangements for meeting the (supposed) girl, agreeing on a time and place for a meeting, making a hotel reservation, purchasing a gift, or traveling to a rendezvous point.”<sup>97</sup> The Seventh Circuit applied the concrete-measures standard to affirm the conviction of a defendant who chatted with a purported minor online and discussed the possibility of meeting her for a sexual encounter but never arranged a specific meeting place and time.<sup>98</sup>

The Seventh Circuit’s concrete-measures standard, however, reflects a misinterpretation of § 2422(b). Although the factors the court highlighted pertain to whether a predator intended to actually have sex with a minor, they do not necessarily indicate a defendant’s attempt to persuade. A predator who reserves a hotel room or arranges a specific meeting place may indicate his intent to have a sexual encounter with a minor, but § 2422(b) does not target a predator’s attempt to have sex with a minor. Rather, § 2422(b) criminalizes a predator’s attempt to convince a minor to have sex, which may be accomplished solely through online interaction and without any of the concrete steps that the Seventh Circuit listed.

By treating an attempt to persuade similarly to an attempt to engage, courts impose unnecessarily high evidentiary standards to convict a predator of attempting to persuade a minor under § 2422(b). If courts frame the issue in terms of whether the predator intended to engage in illegal sexual activity with a minor, then courts require evidence that the defendant attempted to actually have sex with a minor. For example, in *United States v. Hicks*, the U.S. Court of Appeals for the Eighth Circuit reversed a district court’s decision to dismiss an indictment that charged the defendant with an attempt under § 2422(b).<sup>99</sup> In remanding the case back to the district court, the Eighth Circuit stated that a “defendant may be convicted of an attempt to violate § 2422(b) if he or she attempts, by use of the In-

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<sup>94</sup> 550 F.3d 653 (7th Cir. 2008).

<sup>95</sup> *Zawada*, 552 F.3d at 534.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citing *Gladish*, 536 F.3d at 649).

<sup>98</sup> *See id.* at 535.

<sup>99</sup> *See* 457 F.3d 838, 841 (8th Cir. 2006).

ternet, to engage in criminal sexual activity with a person under the age of eighteen.”<sup>100</sup> Thus, rather than instruct the district court to analyze whether the allegations sufficiently showed that the defendant attempted to *persuade* a minor to engage in illegal sexual activity, the Eighth Circuit improperly instructed the court to analyze whether the allegations sufficiently demonstrated that the defendant attempted to *engage* in illegal sexual activity with a minor. Section 2422(b), however, does not target a predator’s attempt to have sex with a minor; it only targets his attempt to persuade.

*B. A Predator Attempts to Persuade a Minor in Violation of § 2422(b) When He Encourages or Invites the Minor to Engage in Illegal Sexual Activity*

Federal courts apply the substantial-step test to determine whether a defendant committed a criminal attempt.<sup>101</sup> Under this test, a defendant “must intend the completed crime and take a ‘substantial step’ toward its completion.”<sup>102</sup> In *United States v. Manley*, the U.S. Court of Appeals for the Second Circuit explained that a “substantial step” is

something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate the statute.<sup>103</sup>

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<sup>100</sup> *Id.* at 840.

<sup>101</sup> *See, e.g., Gladish*, 536 F.3d at 648; *United States v. Brand*, 467 F.3d 179, 202 (2d Cir. 2006); *United States v. Thomas*, 410 F.3d 1235, 1245 (10th Cir. 2005).

<sup>102</sup> *Gladish*, 536 F.3d at 648. *See also* *United States v. Muentes*, 316 F. App’x 921, 923–24 (11th Cir. 2009) (“To sustain a conviction for the crime of attempt, the Government need only prove (1) the defendant had the specific intent to engage in the criminal conduct for which he is charged and (2) he took a substantial step toward commission of the offense.”); *Brand*, 467 F.3d at 202 (“[T]he government must prove that the defendant had the intent to commit the crime and engaged in conduct amounting to a ‘substantial step’ toward the commission of the crime.”).

<sup>103</sup> 632 F.2d 978, 987–88 (2d Cir. 1980) (citation omitted). Other circuits have frequently cited the Second Circuit’s definition of a substantial step. *See, e.g., Gladish*, 536 F.3d at 648 (quoting *Manley*, 632 F.2d at 988); *Brand*, 467 F.3d at 202 (quoting *Manley*, 632 F.2d at 987–88).

Federal courts adopted the substantial-step test from the Model Penal Code,<sup>104</sup> which defines a “substantial step” as conduct that “is strongly corroborative of the actor’s criminal purpose.”<sup>105</sup> The code drafters explained that the substantial-step test’s focus is on “what the actor has already done” and added that simply because “further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial.”<sup>106</sup> The code drafters intended the substantial-step test to facilitate the “apprehension of dangerous persons” and “to stop the criminal effort at an earlier stage, thereby minimizing the risk of substantive harm.”<sup>107</sup> In the context of enticement crimes, the code drafters stated that “the act of enticement is demonstrative of a relatively firm purpose to commit the crime and clearly indicates the dangerousness of the actor.”<sup>108</sup>

A predator can attempt to attain a minor’s assent to engage in illegal sexual activity through words alone.<sup>109</sup> In *Dwinells*, the First Circuit found that the defendant’s sexually explicit online conversations with purported minors, which included the defendant’s “vague promises” to visit them, constituted sufficient evidence to uphold the defendant’s attempt conviction under § 2422(b) even though the defendant never arranged a specific meeting place with the purported minors.<sup>110</sup> The Sixth Circuit also upheld an attempt conviction in *Bailey* based solely on the defendant’s online interaction with minors.<sup>111</sup> Relying exclusively on the predator’s online conversations with the minors, the Sixth Circuit concluded that the defendant “contacted [the minors], urged [them] to meet him, and used graphic language to describe how he wanted to perform oral sex on [them].”<sup>112</sup> The Sixth Circuit held that the online conversations indicated the defendant’s “intent to persuade or to attempt to persuade” and that the

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<sup>104</sup> See *Manley*, 632 F.2d at 987.

<sup>105</sup> MODEL PENAL CODE § 5.01(2) (1962).

<sup>106</sup> *Id.* § 5.01 note 6(a).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* § 5.01 note 6(b)(ii).

<sup>109</sup> See, e.g., *United States v. Nestor*, 574 F.3d 159, 161 (3d Cir. 2009) (listing repeated email and telephone conversations about “having sexual contact with children” among the activities that “[i]ndividually . . . could constitute a substantial step toward the violation of § 2442(b)”).

<sup>110</sup> *United States v. Dwinells*, 508 F.3d 63, 67, 73 (1st Cir. 2007), *cert. denied* 128 S. Ct. 2961 (2008).

<sup>111</sup> See *United States v. Bailey*, 228 F.3d 637, 639–40 (6th Cir. 2000).

<sup>112</sup> *Id.* at 639.

evidence drawn from the online conversations was sufficient to uphold the defendant's attempt conviction under § 2422(b).<sup>113</sup>

Most courts properly hold that a predator may demonstrate his specific intent to persuade a minor to engage in illegal sexual activity through online interactions.<sup>114</sup> As the *Dwinells* and *Bailey* decisions demonstrate, however, a sexual predator may indicate his intent to persuade a minor to engage in illegal sexual activity *and* take a substantial step toward committing a crime under § 2422(b) by simply chatting with a minor online even if the predator never arranges an actual meeting. A key fact the Sixth Circuit mentioned in *Bailey* was that the defendant not only engaged in sexually explicit conversations with minors, but that he also *urged* the minors to contact him to arrange a meeting.<sup>115</sup>

*Bailey* is one of a handful of cases suggesting that the key factual issue in a § 2422(b) attempt case is whether the defendant *encouraged* or *invited* the minor to take action that is necessary to engage in illegal sexual activity. In *Bailey*, the minors would have had to meet with the defendant for the defendant to perform oral sex on them.<sup>116</sup> Thus, the defendant demonstrated his intent to persuade the minors to engage in an illegal sexual activity when he encouraged them to call him to arrange a meeting.<sup>117</sup> Reflecting a proper interpretation of § 2422(b), the Sixth Circuit held that the evidence was sufficient to support a conviction for attempting to persuade a minor<sup>118</sup> even though it would most likely not support a conviction for attempting to engage in illegal sexual activity with a minor.

Similar to *Bailey*, both the *Zawada* and *Gladish* decisions turned on the issue of whether the defendant encouraged or invited the purported minor to engage in illegal sexual activity. Although the Seventh Circuit introduced the concrete-measures standard to test the sufficiency of evidence in a § 2422(b) attempt case,<sup>119</sup> the key factual determination in both *Zawada* and *Gladish* was whether the de-

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<sup>113</sup> *Id.* at 639–40.

<sup>114</sup> See *Nestor*, 574 F.3d at 161 (“Nestor evinced his intent to violate § 2422(b) in his e-mails and phone conversations.”); *United States v. Schmitz*, 322 F. App’x 765, 768 (11th Cir. 2009) (holding that the defendant demonstrated her specific intent to violate § 2422(b) by sending “messages expressing her love and desire to pursue a sexual relationship with the minor”).

<sup>115</sup> See *Bailey*, 228 F.3d at 639.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* at 640.

<sup>119</sup> See *United States v. Zawada*, 552 F.3d 531, 534 (7th Cir. 2008).

defendant encouraged or invited the purported minor to meet for a sexual encounter. In upholding the defendant's conviction in *Zawada*, the Seventh Circuit contrasted the defendant's conduct with the conduct at issue in *Gladish*.<sup>120</sup> In *Gladish*, the Seventh Circuit emphasized that the defendant neither invited the purported minor to visit him nor suggested that he visit the minor.<sup>121</sup> In *Zawada*, however, the defendant essentially invited the purported minor out for a "date" with the implication that they would have sex.<sup>122</sup> As the Seventh Circuit emphasized,<sup>123</sup> the key fact distinguishing *Zawada* from *Gladish* was the defendant's invitation.

Evidence of an invitation to engage in illegal sexual activity was also integral to the U.S. Court of Appeals for the Tenth Circuit's decision in *United States v. Sheridan*, in which the defendant "invited [a purported minor] to come to Colorado in order to perform various sex acts with him, which [the defendant] wanted to photograph."<sup>124</sup> The defendant received an increased sentence for "distribution to a minor that was intended to persuade, induce, [or] entice . . . the minor to engage in any illegal activity,"<sup>125</sup> which the Tenth Circuit affirmed.<sup>126</sup> Although the defendant never arranged a meeting with the purported minor, the Tenth Circuit concluded that "[c]onversations with a minor about virginity, sexual experiences, and a defendant's desire to engage in sexual activity with her are, *by themselves*, evidence of an attempt to persuade, induce or entice."<sup>127</sup> The *Sheridan* decision not only supports the principle that online interaction with a minor may, on its own, establish a defendant's intent to persuade, but that the key factual issue in § 2422(b) attempt cases is whether the defendant encouraged or invited the minor to engage in illegal sexual activity.

These courts are correct to question whether a defendant encouraged or invited a minor to engage in illegal sexual activity because a defendant who does so satisfies the requirements of the Mod-

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<sup>120</sup> See *id.* at 535.

<sup>121</sup> See *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

<sup>122</sup> *Zawada*, 552 F.3d at 535.

<sup>123</sup> See *id.* (noting that the defendant's "relatively concrete conversation about making a 'date'" is "somewhat closer to a substantial step than" the conduct in *Gladish*).

<sup>124</sup> 304 F. App'x 742, 745 (10th Cir. 2008).

<sup>125</sup> See *id.* at 743.

<sup>126</sup> *Id.* at 745.

<sup>127</sup> *Id.* (emphasis added).

el Penal Code's substantial-step test.<sup>128</sup> When a predator encourages or invites a minor to engage in illegal sexual activity, he places the decision of whether to accept or reject the suggestion squarely in the hands of the minor. This demonstrates both the predator's "relatively firm purpose to" persuade a minor as well as his dangerousness<sup>129</sup> because the predator indicates his willingness to accept the minor's possible acquiescence, which would complete the criminal act of persuasion under § 2422(b). The predator will have "achieve[d] a *mental* state—a minor's assent."<sup>130</sup> Furthermore, by encouraging and inviting a minor to engage in illegal sexual activity, the predator creates the impression that he *wants* the minor to agree to a sexual encounter, which augments the predator's demonstration of dangerousness. The predator not only creates the possibility that a minor will agree to a sexual encounter, but he also increases the likelihood that the minor will agree to the encounter by influencing her to say yes.

The U.S. Court of Appeals for the Ninth Circuit's decision in *United States v. Goetzke*<sup>131</sup> demonstrates how encouraging or inviting a minor to engage in illegal sexual activity can constitute a substantial step toward committing a crime under § 2422(b). In *Goetzke*, the defendant sent letters to a minor that "described the sex acts that [the defendant] wanted to perform on [the minor]."<sup>132</sup> The court found that "the letters were crafted to appeal to [the minor], flatter him, impress him, and encourage him to come back to Montana 'maybe this summer' when school was out."<sup>133</sup> The court stated that "[t]he letters essentially began to 'groom' [the minor] for a sexual encounter in the event he returned to Montana."<sup>134</sup>

Based on the letters, the Ninth Circuit upheld the defendant's conviction under § 2422(b) and concluded that "the letters fit neatly within the common understanding of persuade, induce, or entice."<sup>135</sup> The court stated that "when a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has

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<sup>128</sup> See MODEL PENAL CODE § 5.01(2) (1962).

<sup>129</sup> See *id.* § 5.01 note 6(b)(ii).

<sup>130</sup> *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008).

<sup>131</sup> 494 F.3d 1231 (9th Cir. 2007).

<sup>132</sup> *Id.* at 1236.

<sup>133</sup> *Id.* at 1235.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity.”<sup>136</sup> The Ninth Circuit further concluded that “physical proximity or travel” was not necessary to constitute a substantial step under § 2422(b).<sup>137</sup>

The defendant’s letters alone provided sufficient evidence to uphold a § 2422(b) attempt conviction because they encouraged and invited the minor to engage in illegal sexual activity.<sup>138</sup> Recognizing that § 2422(b) does not require a defendant to arrange a meeting with a minor, the Ninth Circuit found it irrelevant that the minor never agreed to return to Montana or have a sexual encounter with the defendant.<sup>139</sup> Section 2422(b) merely requires an attempt to persuade, and the letters were part of the defendant’s scheme to accomplish that goal. Designed to elicit a positive response from the minor,<sup>140</sup> the letters not only presented an opportunity for the minor to agree to a sexual encounter, but they also encouraged him to do so. The defendant’s encouragement reflected his intent to persuade the minor because it demonstrated that the defendant wanted and actively tried to convince the minor to return to Montana for a sexual encounter.<sup>141</sup> The defendant’s encouragement caused his conduct to “cross the line between preparation and attempt.”<sup>142</sup>

*Goetzke’s* reasoning applies with equal force in the context of online solicitation of minors. Just as a predator may send letters to a child encouraging him to engage in illegal sexual activity, a predator may send a child an instant message or email encouraging the same conduct. The Seventh Circuit implicitly accepted *Goetzke’s* applicability in the online context in *Gladish*, a case that involved the online solicitation of minors, by distinguishing *Goetzke* for reasons other than the different modes of communication involved in the two cases.<sup>143</sup>

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<sup>136</sup> *Id.* at 1237.

<sup>137</sup> *Goetzke*, 494 F.3d at 1236.

<sup>138</sup> *See id.* at 1235.

<sup>139</sup> *See id.* at 1236.

<sup>140</sup> As the Ninth Circuit described, “[Goetzke] sent [the minor] letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana, and proposed that [the minor] return during the upcoming summer. In short, Goetzke made his move.” *Id.* at 1237 (footnote omitted).

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)).

<sup>143</sup> *See United States v. Gladish*, 536 F.3d 646, 649–50 (7th Cir. 2008).

## IV. A “MORE APPEALING” INTERPRETATION OF “ENTICE”

Although the encouragement standard provides a clear test for courts to apply in § 2422(b) attempt cases, the standard would not protect against the full range of harms that Congress intended to target under the statute. For example, cybersex between online predators and children poses many significant risks, but it would likely fall outside the scope of the encouragement standard. In order to criminalize cybersex with minors, courts should broaden their interpretation of “entice” under § 2422(b) to encompass conduct that makes illegal sexual activity more appealing to minors.

A. *The Encouragement Standard Would Not Prohibit Cybersex with Minors, Which Poses Many of the Same Risks Congress Intended to Prevent Under § 2422(b)*

Even if courts applied the encouragement test to determine whether a predator committed an attempt under § 2422(b), cybersex with minors would most likely still fall outside the scope of § 2422(b). A predator could engage in a sexually explicit online conversation with a minor without ever encouraging or inviting the minor to engage in any illegal sexual activity. Courts also appear reluctant to interpret § 2422(b) to prohibit cybersex with minors. For example, the Second Circuit concluded in *United States v. Joseph* that the statute did not encompass cybersex with minors.<sup>144</sup> The Second Circuit reasoned that cybersex is merely conduct that makes sexual activity “more appealing” and declined to adopt a “more appealing” interpretation of “entice” under § 2422(b).<sup>145</sup>

Courts, however, should adopt an interpretation of § 2422(b) that criminalizes cybersex with minors because it poses many of the same dangers Congress intended to prevent under the statute. Among the new laws enacted under the Protection Act, Congress created 18 U.S.C. § 1470, which prohibits the transfer of obscene ma-

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<sup>144</sup> See 542 F.3d 13, 18 & n.4 (2d Cir. 2008).

<sup>145</sup> *Id.* at 18. After noting that “the offense remains ‘enticing,’ and making a sexual act ‘more appealing’ in the absence of an intent to entice is not a crime,” the Second Circuit stated,

If jurors thought that [the defendant] only wanted to make “Julie” think that sexual conduct with him would be appealing, but did not intend to entice her to engage in such conduct with him, they would have convicted him for having cybersex conversation, *which is not a crime, but not for violating section 2422(b)*.

*Id.* (emphasis added).

terial (including child pornography) to minors.<sup>146</sup> Congress enacted § 1470 to prohibit predators from sending minors child pornography to help lure the minors into sexual encounters.<sup>147</sup> During debate on the Protection Act, Congress often noted that online predators send minors child pornography to lower their inhibitions and condition them for a sexual encounter.<sup>148</sup> Predators may engage in cybersex with minors for the same reasons. Cybersex, like child pornography, serves a predator's purpose of sexualizing the relationship and "grooming" the minor for a sexual encounter, which often precedes child sexual abuse.<sup>149</sup> Courts have often recognized this danger and "have noted the government's 'interest in preventing pedophiles from "grooming" minors for future sexual encounters.'"<sup>150</sup>

In *Joseph*, the Second Circuit raised the issue of whether cybersex conversations with minors violate § 1470, but the court did not have an opportunity to formally rule on the matter.<sup>151</sup> Such conduct, however, would most likely fall outside the scope of § 1470 because the statute was intended to prohibit the transfer of child pornography and other related materials to a child.<sup>152</sup> Based on the legislative history, § 1470 does not appear to implicate the direct online interaction between a predator and a minor.

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<sup>146</sup> 18 U.S.C. § 1470 (1998); H.R. 3494, 105th Cong. § 1470 (as reported by House, Oct. 20, 1998).

<sup>147</sup> During debate on the Protection Act, Representative Alcee Hastings stated, "The legislation makes a number of important changes, principally by targeting pedophiles who stalk children on the Internet and by cracking down on pedophiles who use and distribute child pornography to lure children into sexual encounters." 144 CONG. REC. H10566, 10571-72 (daily ed. Oct. 12, 1998) (statement of Rep. Hastings).

<sup>148</sup> For example, Representative Bill McCollum noted, "Often used to break down inhibitions and introduce and validate specific sex acts as normal to a child, pedophiles frequently send pictures to young people to gauge a child's interest in a relationship." 144 CONG. REC. H4491, 4491 (daily ed. June 11, 1998) (statement of Rep. McCollum).

<sup>149</sup> *United States v. Brand*, 467 F.3d 179, 203 (2d Cir. 2006) ("Child sexual abuse is often effectuated following a period of "grooming" and the sexualization of the relationship." (quoting Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 479 (1998))).

<sup>150</sup> *Id.* (quoting *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003)).

<sup>151</sup> See *United States v. Joseph*, 542 F.3d 13, 18 n.4 (2d Cir. 2008) ("Cybersex conversation constituting the transfer of 'obscene matter' via the Internet to a person under 16 might well violate 18 U.S.C. § 1470, but [the defendant] was not charged with that offense.").

<sup>152</sup> See 144 CONG. REC. H10566, 10571-72 (daily ed. Oct. 12, 1998) (statement of Rep. Hastings).

*B. In Order to Criminalize Cybersex with Minors, Courts Should Adopt a “More Appealing” Interpretation of “Entice” Under § 2422(b)*

Under current U.S. law, the best approach for courts to take in order to criminalize cybersex with minors is to adopt the “more appealing” interpretation of “entice” that the Second Circuit rejected in *Joseph*.<sup>153</sup> Although Congress did not enact the proposed contact provision,<sup>154</sup> protecting minors from online predators remained the primary goal of the Protection Act.<sup>155</sup> A “more appealing” interpretation would advance that goal by allowing courts to convict predators for having cybersex with minors, which raises the same concerns that prompted Congress to outlaw distributing child pornography to minors: predators attempting to break down a child’s inhibitions and sexualize their relationship with a child.<sup>156</sup>

Case law from a number of circuits supports an interpretation of “entice” under § 2422(b) that includes speech intending to make more appealing to the minor the prospect of meeting the predator for a sexual encounter.<sup>157</sup> For example, in *United States v. Tykarsky*, the defendant interacted online with the purported minor on numerous occasions and “described, in explicit detail, the sexual acts that he hoped to perform with her.”<sup>158</sup> The Third Circuit stated that the predator’s interaction with the purported minor “provide[d] sufficient evidence that [the defendant] took substantial steps toward ‘persuading, inducing, enticing or coercing’ a minor to engage in sexual activity.”<sup>159</sup> Likewise, in *United States v. Brand*, the defendant chatted with

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<sup>153</sup> See *Joseph*, 542 F.3d at 18–19 (rejecting the “more appealing” interpretation of “entice” under § 2422(b)).

<sup>154</sup> See H.R. 3494, 105th Cong. § 2422 (as reported by House, Oct. 13, 1998).

<sup>155</sup> H.R. REP. NO. 105-557, at 10 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 678.

<sup>156</sup> See 144 CONG. REC. H4491, 4491 (daily ed. June 11, 1998) (statement of Rep. McCollum).

<sup>157</sup> See *United States v. Barlow*, 568 F.3d 215, 219 (5th Cir. 2009) (describing how the defendant “promised [the purported minor] a modeling career, to spoil her rotten, to make her feel good, and to treat her like a queen” as evidence of the defendant’s attempt to persuade); *United States v. Dwinells*, 508 F.3d 63, 73–74 (1st Cir. 2007) (stating the defendant’s “promise of a quarter-million-dollar life insurance policy . . . would serve as a very powerful enticement to a thirteen-year-old girl who lacked enough money even to travel to Boston”), cert. denied 128 S. Ct. 2961 (2008); *United States v. Munro*, 394 F.3d 865, 869–70 (10th Cir. 2005) (“Munro’s statements that he had money, his own place, a car, an Xbox, a Play Station 2, and a DVD player could reasonably be interpreted as attempts to impress Chantelle and give her incentives to meet and engage in sexual activities with Munro.”).

<sup>158</sup> 446 F.3d 458, 461 (3d Cir. 2006).

<sup>159</sup> *Id.* at 469.

two purported minors online, shared photos with them, flirted with them, and attempted to gain their affection.<sup>160</sup> Noting that the defendant's interaction with the purported minors "constituted classic 'grooming' behavior in preparation for a future sexual encounter,"<sup>161</sup> the Second Circuit concluded that "[t]hese sexually explicit conversations with 'Julie' provided overwhelming evidence to support the jury's finding that [the defendant] attempted to entice a minor."<sup>162</sup>

The Ninth Circuit's decision in *Goetzke* also supports the adoption of a "more appealing" interpretation of "entice" under § 2422(b). Relying on the letters that the defendant sent the minor, the Ninth Circuit upheld the defendant's attempt conviction.<sup>163</sup> The court emphasized that "the letters were crafted to *appeal* to [the minor], *flatter* him, *impress* him."<sup>164</sup> The letters essentially demonstrated the defendant's attempt to make a sexual encounter more appealing to the minor.

Had it adopted the "more appealing" interpretation of "entice," the Seventh Circuit could have upheld the defendant's conviction in *Gladish* for an attempt under § 2422(b). By describing in graphic detail the sex acts that he wanted to perform on the purported minor and by emphasizing his intent to teach the minor about sex,<sup>165</sup> the defendant essentially tried to make the prospect of a sexual encounter more appealing to the minor.

If courts apply the "more appealing" interpretation of "entice," § 2422(b) could still withstand First Amendment scrutiny because of its scienter and intent requirements.<sup>166</sup> As the Ninth Circuit stated in *United States v. Dhingra*, "The statute's intent provision, coupled with the requirement that the purpose of the conduct must be for criminal sexual activity, sufficiently excludes legitimate activity, including speech, from its scope."<sup>167</sup>

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<sup>160</sup> See 467 F.3d 179, 203 (2d Cir. 2006).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007).

<sup>164</sup> *Id.* at 1235 (emphasis added).

<sup>165</sup> See *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

<sup>166</sup> See, e.g., *United States v. Dhingra*, No. 03-10001, 2004 U.S. App. LEXIS 15288, at \*9-10 (9th Cir. June 8, 2004) ("[Section] 2422(b) does not chill legitimate speech because the scienter and intent requirements of the statute sufficiently limit criminal culpability to reach only conduct outside the protection of the First Amendment.").

<sup>167</sup> *Id.* at \*11.

Although courts have consistently held that speech attempting to persuade minors to engage in illegal sexual activity receives no First Amendment protection, courts have recognized a “fantasy” or “role-playing” defense in which the defendant claims that he thought he was merely engaging in a mutual fantasy with another adult.<sup>168</sup> Neither a “fantasy” nor a “role-playing” defense, however, poses a First Amendment threat to an interpretation of § 2422(b) that defines “entice” as making sexual conduct more appealing. Section 2422(b) only implicates speech that a predator “knowingly” directs toward a minor.<sup>169</sup> This requirement would insulate § 2422(b) against First Amendment challenges, even if courts apply a “more appealing” interpretation of “entice” under § 2422(b).<sup>170</sup> The knowledge requirement imposes a formidable obstacle to defendants who want to challenge their § 2422(b) charge on First Amendment grounds. As the Ninth Circuit noted in *United States v. Meek*, “The age and purpose clauses insulate from liability persons engaged in constitutionally permissible speech, such as sexually explicit conversations between two adults, because conversations of that nature would not involve the narrow category of criminal sexual activity with a minor.”<sup>171</sup>

Policy considerations also weigh in favor of adopting a “more appealing” interpretation of “entice” under § 2422(b). Such a standard would provide law enforcement with an earlier opportunity to interrupt a predator’s online interaction with a child so that law enforcement may prevent the predator from arranging a potentially dangerous meeting with the child. The current standard forces law enforcement to expend valuable time and resources devising elaborate sting operations to catch online predators.<sup>172</sup> These operations take time to develop and allow predators to continue to chat online

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<sup>168</sup> See *United States v. Dwinells*, 508 F.3d 63, 74 (1st Cir. 2007) (“The appellant’s chief defense—that he was merely role-playing and thought that the communications were mutually entertained fantasies, comfortably remote from any prospect of consummation—is plausible.”), *cert. denied*, 128 S. Ct. 2961 (2008). But see *United States v. Cherer*, 513 F.3d 1150, 1155–56 (9th Cir. 2008) (addressing defendant’s role-playing defense, but rejecting it on the merits).

<sup>169</sup> See 18 U.S.C. § 2422(b) (2006).

<sup>170</sup> See *United States v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004) (“The potential for unconstitutional chilling of legitimate speech disappears because § 2422(b) requires the prosecution to prove that a defendant actually knows or believes that the specific target of the inducement is a minor.”).

<sup>171</sup> 366 F.3d at 722.

<sup>172</sup> See cases cited *supra* note 43.

with children and to persuade them to meet for sexual encounters while law enforcement conducts undercover investigations. The quicker law enforcement may intervene, the safer vulnerable children will be while engaging in online activity.

## V. CONCLUSION

The challenge in determining when a predator takes a substantial step toward committing a crime under § 2422(b) is trying to harmonize the statute's intent requirement with its legislative goals. The legislative history behind the Protection Act reflects Congress's efforts to aggressively respond to online sex crimes targeting children and to protect minors from online predators who might lure minors into dangerous sexual encounters.<sup>173</sup> To fall under the scope of § 2422(b), however, a predator must still demonstrate his intent to persuade a minor to engage in illegal sexual activity.<sup>174</sup>

Recent case law suggests that the key factual issue in § 2422(b) attempt cases is whether the defendant encouraged or invited a minor to engage in illegal sexual activity. Circuit courts have based their decisions to uphold or overturn a § 2422(b) conviction on evidence that the defendant "urged" a minor to perform illegal sex acts,<sup>175</sup> asked a minor out for a "date,"<sup>176</sup> or sent flattering letters in an effort to tempt a minor into having a sexual encounter.<sup>177</sup> The encouragement standard provides courts with a precise test to determine whether sufficient evidence supports the conviction of a defendant for attempting to persuade a minor to engage in illegal sexual activity.

But the encouragement standard is ultimately inadequate to determine whether a predator committed an attempt under § 2422(b) because cybersex with minors would likely remain beyond the statute's reach. Posing many of the same risks that Congress intended to prevent by passing the Protection Act,<sup>178</sup> cybersex with minors must

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<sup>173</sup> See H.R. REP. NO. 105-557, at 10 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 678; 144 CONG. REC. H10566, 10571-72 (daily ed. Oct. 12, 1998) (statements of Reps. Hastings & Weller).

<sup>174</sup> See *United States v. Bailey*, 228 F.3d 637, 639-40 (6th Cir. 2000).

<sup>175</sup> *Id.* at 639.

<sup>176</sup> *United States v. Zawada*, 552 F.3d 531, 535 (7th Cir. 2008).

<sup>177</sup> See *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007).

<sup>178</sup> See *United States v. Brand*, 467 F.3d 179, 203 (2d Cir. 2006) (quoting *Loue*, supra note 59, at 479); 144 CONG. REC. H4491, 4491 (daily ed. June 11, 1998) (statement of Rep. McCollum).

be criminalized. But because engaging in cybersex with children is well beyond the scope of other statutes, cybersex will likely remain legal unless courts bring it within the reach of § 2422(b). Although Congress could revise the statute to explicitly address cybersex, Congress has already provided the courts with sufficient statutory tools to criminalize cybersex now.

To bring cybersex with minors within the scope of § 2422(b), courts should adopt an interpretation of “entice” that includes speech that makes sexual activity “more appealing” to minors. A “more appealing” interpretation of “entice” would withstand constitutional challenges under the First Amendment because of the statute’s intent requirement.<sup>179</sup> Many § 2422(b) sting-operation cases provide support for a “more appealing” interpretation of “entice” by relying on evidence that the defendant attempted to make sexual activity more appealing to a minor.<sup>180</sup>

In sum, courts should interpret § 2422(b) in a way that promotes the primary goal of the Protection Act—to make the Internet safer for minors. Throughout the 1998 debates, members of Congress reiterated their concerns about faceless cyberpredators using pornography and sexually explicit speech to lure minors into dangerous sexual encounters.<sup>181</sup> A broader interpretation of § 2422(b) will allow prosecutors to target predators who have cybersex with minors or who use other online communication to break down children’s inhibitions and bait them into participating in illegal sexual activity. Innocent children need this protection and deserve the adoption of a legal standard that will provide it.

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<sup>179</sup> See *United States v. Dhingra*, No. 03-10001, 2004 U.S. App. LEXIS 15288, at \*9–10 (9th Cir. June 8, 2004).

<sup>180</sup> See *United States v. Dwinells*, 508 F.3d 63, 73–74 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008); *United States v. Tykarsky*, 446 F.3d 458, 461 (3d Cir. 2006); *United States v. Munro*, 394 F.3d 865, 869–70 (10th Cir. 2005).

<sup>181</sup> See, e.g., 144 CONG. REC. H10566, 10571 (daily ed. Oct. 12, 1998) (statement of Rep. Hutchinson).