

“SEXUAL ACTIVITY”: WHAT QUALIFIES UNDER 18 U.S.C. § 2422?

Abstract: On May 13, 2021, in *United States v. Dominguez*, the U.S. Court of Appeals for the Eleventh Circuit joined a pre-existing circuit split regarding the meaning of “sexual activity” under 18 U.S.C. § 2422 and whether that term requires physical contact between the defendant and the victim. The statute prohibits individuals from coercing or enticing others to participate in illegal sexual activity, including when the victim is a minor. The U.S. Court of Appeals for the Fourth and Seventh Circuits previously reached opposite interpretations of the phrase’s meaning. The court in *Dominguez* agreed with the Fourth Circuit and held that the phrase did not require the defendant to engage or attempt to engage in physical contact with another individual. This Comment argues that the Fourth and Eleventh Circuits reached the correct interpretation of “sexual activity” as not requiring physical contact.

INTRODUCTION

The Internet can be a dangerous place for minors.¹ Individuals with access have the ability to use the Internet to victimize minors through sexual requests.² In 2005, nearly fourteen percent of minors online reported getting un-

¹ See Abigail W. Balfour, Note, *Where One Marketplace Closes, (Hopefully) Another Won’t Open: In Defense of FOSTA*, 60 B.C. L. REV. 2475, 2484 (2019) (citing Amicus Brief of Nat’l Ctr. for Missing & Exploited Children at 2, *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714 (Wash. Sept. 15, 2014) (No. 4492-02-II), 2014 WL 4913544) (relaying data included in an amicus brief filed by the National Center for Missing and Exploited Children, which stated there was a significant surge in incidents of the sex trafficking of minors between 2009 and 2014, and correlating that increase to solicitations on the Internet by predators); Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 371 (2003) (explaining that the Internet provides children with the ability to view pornography that would have otherwise been unavailable to them); Julian Ansoorge, *The Internet Is Dangerous for Kids: Parents, Guard Your Children’s Exposure to Online Content*, DAILY NEWS (Aug. 22, 2019), <https://www.nydailynews.com/opinion/ny-oped-the-internet-is-dangerous-for-kids-20190822-uup4jo3i5g7bkjkj6zaw7rjq-story.html> [<https://perma.cc/9K5C-GF3D>] (providing the author’s negative encounter with online sexual content as a young child and explaining that such online viewing is common for children). An amicus brief filed by the National Center for Missing and Exploited Children stated that the vast majority of incidents of sex trafficking of minors between 2012 and 2017 occurred through online solicitations. Balfour, *supra*, at 2483 (citing Amicus Brief of Nat’l Ctr. for Missing & Exploited Children, *supra*, at 5).

² Bridget M. Boggess, *Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. § 2422(b)*, 72 MO. L. REV. 909, 909 (2007); see Tamara Markard, *Danger Behind the Screen: Protecting Your Children and Teens from Online Predators*, FORT MORGAN TIMES (Apr. 17, 2021), <https://www.fortmorgantimes.com/2021/04/17/danger-behind-the-screen-protecting-your-children-and-teens-from-online-predators/> [<https://perma.cc/T5JD-6GA4>] (explaining that sexual predators can interact with children through computers and social media because technology is an integral part of daily life, even more so since the beginning of the COVID-19 pandemic).

desired sexual requests.³ Law enforcement calculations approximate that fifty thousand sexual offenders are on the Internet at any particular time.⁴ In order to address this issue, Congress enacted 18 U.S.C. § 2422(b) to prohibit the coercion of minors to participate in illegal sexual activity.⁵ Under the provisions of that section, a defendant’s actions must be aimed at convincing the minor to “engage in prostitution or any sexual activity for which any person can be charged with a criminal offense.”⁶ The statute criminalizes both actual and attempted enticement.⁷ Notably, the statute contains no definition of the phrase “sexual activity.”⁸

This Comment analyzes federal appellate courts’ differing interpretations of “sexual activity” as it is used in the statute.⁹ Part I of this Comment gives an overview of 18 U.S.C. § 2422, its enactment history, and its involvement in *United States v. Dominguez*, which the United States Court of Appeals for the Eleventh Circuit decided in 2021.¹⁰ Part II of this Comment examines and discusses the interpretations of the U.S. Court of Appeals for the Fourth, Seventh, and Eleventh Circuits regarding whether “sexual activity” requires physical contact.¹¹ Finally, Part III of this Comment argues that the Fourth and Eleventh Circuits were correct in holding that the phrase “sexual activity” does not require physical contact between individuals and may encompass online conduct.¹²

³ Boggess, *supra* note 2, at 909. In 2005, 4% of children online received “sexual solicitations” that involved communication between them and predators off of the Internet. *Id.* These interactions included calls on the phone and in-person encounters. *Id.* Shows on television, such as *To Catch a Predator* on NBC, highlighted the extent of these encounters between minors and sexual predators. *See id.* (explaining that these shows enhanced the public’s knowledge about the dangers of minors using the Internet).

⁴ *Id.* Daily, approximately 500,000 sexual predators log onto the Internet, and minors ages twelve to fifteen are particularly vulnerable to such pedophiles. Michael Kraut, *Children and Grooming/Online Predators*, CHILD CRIME PREVENTION & SAFETY CTR., <https://childsafety.losangelescriminallawyer.pro/children-and-grooming-online-predators.html> [<https://perma.cc/BL7Y-3V48>]. Predators use online chatrooms or direct messaging to interact with children. *Id.* In more than 25% of reported cases, sexual predators request nude photographs from a child. *Id.* This problem has likely been exacerbated because a large percentage of children do not have privacy protections on their social media accounts. *See id.* (explaining that approximately 40% of minors do not make their social media accounts private because they want to increase their number of followers).

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 18 U.S.C. § 2422(b)); S. REP. NO. 104-230, at 193 (1996) (Conf. Rep.); Boggess, *supra* note 2, at 910–11. Congress included this remedy in the Telecommunications Act of 1996 because it determined that action was necessary to prevent children and their families from experiencing sexual exploitation on the Internet. S. REP. NO. 104-230, at 193.

⁶ 18 U.S.C. § 2422.

⁷ *Id.*

⁸ *See id.* (failing to define the phrase “sexual activity”).

⁹ *See infra* notes 13–92 and accompanying text.

¹⁰ *See infra* notes 13–44 and accompanying text.

¹¹ *See infra* notes 45–76 and accompanying text.

¹² *See infra* notes 77–92 and accompanying text.

I. THE BACKGROUND OF *UNITED STATES V. DOMINGUEZ*

In 2021, in *United States v. Dominguez*, the U.S. Court of Appeals for the Eleventh Circuit entered a circuit split over whether “sexual activity” under 18 U.S.C. § 2422(b), which bans the manipulation of minors into participation in such conduct, necessitates physical touching.¹³ The Eleventh Circuit interpreted “sexual activity” to not require that the defendant physically interact with the victim.¹⁴ Section A of this Part discusses the statutory language interpreted by the Eleventh Circuit.¹⁵ Section B of this Part explains the facts of *Dominguez*.¹⁶

A. *The Statutory Language At Issue in United States v. Dominguez*

The statute at issue in *Dominguez*, 18 U.S.C. § 2422, prohibits individuals from compelling others to commit illegal sexual activity.¹⁷ The statute contains provisions that ban conduct targeting both adults and minors, and the section pertaining to minors prohibits individuals from convincing or manipulating those under eighteen years old to participate in illegal sexual acts.¹⁸ The statute also criminalizes incomplete efforts to elicit such acts.¹⁹ The phrase “sexual activity” is not defined in the statute, and the circuit courts that have analyzed the phrase’s meaning have reached opposite interpretations.²⁰ Some courts understand the phrase as necessitating physical touching between individuals,

¹³ See 18 U.S.C. § 2422(b) (prohibiting “coerc[ion]” or “entice[ment]” to participate in illegal sexual acts); *United States v. Dominguez*, 997 F.3d 1121, 1123 (11th Cir. 2021) (holding that “sexual activity” in 18 U.S.C. § 2422(b) does not mandate that the defendant engage or attempt to engage in physical activity with another person); see also *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) (holding that “sexual activity” in 18 U.S.C. § 2422(b) does not require a defendant to participate in physical activity with another person, instead defining “sexual activity” as activity in relation to an “active pursuit of libidinal gratification”); *United States v. Taylor*, 640 F.3d 255, 259 (7th Cir. 2011) (deciding that “sexual activity” in 18 U.S.C. § 2422(b) contemplates that defendants must make physical contact with another person).

¹⁴ *Dominguez*, 997 F.3d at 1123.

¹⁵ See *infra* notes 17–31 and accompanying text.

¹⁶ See *infra* notes 32–44 and accompanying text.

¹⁷ See 18 U.S.C. § 2422 (outlawing the manipulation of others, including minors, to participate in illegal “sexual activity”); *Dominguez*, 997 F.3d at 1123 (interpreting 18 U.S.C. § 2422(b) as prohibiting this behavior and not requiring physical interactions).

¹⁸ See 18 U.S.C. § 2422 (criminalizing the coercion of all individuals generally and minors specifically to commit illegal sexual acts).

¹⁹ *Id.*

²⁰ See *id.* (omitting a definition for the phrase “sexual activity”); *Dominguez*, 997 F.3d at 1123 (explaining that a circuit split exists over the meaning of the phrase “sexual activity” in the statute); *Fugit*, 703 F.3d at 255 (holding that “sexual activity” in 18 U.S.C. § 2422(b) does not require a defendant to physically touch another individual); *Taylor*, 640 F.3d at 259 (stating that, under 18 U.S.C. § 2422(b), “sexual activity” means that defendants must engage in physical activity between people).

whereas other courts do not interpret the phrase as imposing such a requirement.²¹

Congress amended 18 U.S.C. § 2422 numerous times, including through the Protection of Children From Sexual Predators Act of 1998.²² With that amendment, Congress sought to prevent pedophiles from stalking and communicating with minors through the Internet in pursuit of illegal sexual interactions and to ban intentionally sending minors explicit materials.²³ Congress later passed the Adam Walsh Child Protection and Safety Act of 2006 to increase minors’ protection from sexual manipulation and reduce dangers on the Internet, in part by increasing sentence ranges under 18 U.S.C. § 2422(b).²⁴

This law’s direct connection to federal sentencing emerges through the U.S. Sentencing Guidelines (“guidelines”).²⁵ When making sentencing decisions, federal judges are tasked with applying these guidelines.²⁶ In asking the

²¹ *Compare Fugit*, 703 F.3d at 255 (interpreting the phrase “sexual activity” to not require physical touching between people), *with Taylor*, 640 F.3d at 259 (understanding “sexual activity” as necessitating contact between individuals).

²² Pub. L. No. 105-314, 112 Stat. 2974, 2975–76 (1998) (amending the language of 18 U.S.C. § 2422(b)).

²³ H.R. REP. NO. 105-557, at 12 (1998). The Protection of Children From Sexual Predators Act was a reaction to sexual offenses committed against minors, especially those perpetrated online. *Id.* Sexual offenses against children on the Internet are a significant and common issue. *See* Boggett, *supra* note 2, at 909 (providing statistics showing that, in 2005, nearly 14% of children online encountered undesired sexual requests). The gravity of this issue is elucidated by the existence of the Department of Justice’s Project Safe Childhood. *See Project Safe Childhood*, U.S. DEP’T OF JUST., <https://www.justice.gov/psc> [<https://perma.cc/2SEL-H7RS>] (explaining that the program, which began in 2006, aims to catch online predators exploiting children and help those affected).

²⁴ *See* Pub. L. No. 109-248, 120 Stat. 587, 613 (2006) (replacing previous sentencing guidance in 18 U.S.C. § 2422(b), which had been between five and thirty years, with an increased sentencing range of ten years to life). Adam Walsh, the namesake of Congress’s 2006 amendment, was a young boy who was abducted from a mall in Florida in 1981 and killed. Crystal Bonvillian, *Adam Walsh: Looking Back 40 Years After the Child Abduction That Changed America*, KIRO 7, <https://www.kiro7.com/news/trending/adam-walsh-looking-back-40-years-after-child-abduction-that-changed-america/DACNGXGOW5FTHITUS6XIFEDBP4/> [<https://perma.cc/EVU3-5QRK>]. His disappearance and death motivated his parents, John and Revé Walsh, to begin advocating for protecting children. *Id.* The Act specifically recognized John and Revé Walsh and the 25th anniversary of their son’s kidnapping and death. § 2, 120 Stat. at 589.

²⁵ *See Dominguez*, 997 F.3d at 1123–24 (explaining that the government argued for the application of U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) and that the district court, despite the defendant’s objection, agreed based on 18 U.S.C. § 2422). This section of the sentencing guidelines increases a defendant’s sentence for committing certain specified crimes. U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b)(5) (U.S. SENT’G COMM’N 2016).

²⁶ *See Mistretta v. United States*, 488 U.S. 361, 367 (1989) (explaining that the Sentencing Reform Act of 1981 required judges to apply the guidelines unless there was an element in the case that warranted a higher or lower sentence). In *Mistretta*, Justice Antonin Scalia noted the obligatory nature of the guidelines in his dissent by stating that if judges ignore them, their decisions will be overturned. 488 U.S. at 413 (Scalia, J., dissenting). This compulsory nature of the guidelines was overturned in a later Supreme Court case, but the Court held that judges still needed to contemplate the U.S. Sentencing Commission’s guidelines in sentencing defendants. *United States v. Booker*, 543 U.S. 220, 259–60 (2005). The Eleventh Circuit has also held that courts need to consider the recommendations of the

U.S. Sentencing Commission to draft them, Congress sought to increase sentencing “honesty” and lessen significant sentencing discrepancies.²⁷

The guidelines provide for increased sentences, known as enhancements, for certain convictions.²⁸ Enhancements can be based on a defendant’s repeat offender status or the nature of the offense.²⁹ Under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5), courts should apply an enhancement to a defendant who has committed multiple crimes related to the sexual harm or manipulation of children.³⁰ To interpret “sexual abuse or exploitation” as the phrase is used in that section, the guideline directs courts to various statutes, including 18 U.S.C. § 2422.³¹

B. *The Facts of United States v. Dominguez*

In October 2018, Gabriel Dominguez was charged in the U.S. District Court for the Southern District of Florida with multiple crimes related to having, obtaining, and disseminating child pornography under portions of 18 U.S.C. § 2252.³² The defendant admitted that he sent and received Instagram

guidelines. *See* *United States v. Henry*, 1 F.4th 1315, 1326 (11th Cir. 2021) (stating that although the court was not obligated to follow the guidelines, it needed to contemplate them properly).

²⁷ Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 4–5 (1988). “Honesty” in this context referred to the deceptiveness of the pre-existing practice of judges giving defendants longer sentences that would likely be shortened by the Parole Commission. *Id.* at 4. Congress had evidence that Second Circuit sentences for indistinguishable offenses could vary by up to seventeen years, and the Sentencing Commission’s findings revealed similar evidence of discrepancies. *Id.* at 4–5.

²⁸ *See* U.S. SENT’G GUIDELINES MANUAL § 2G2.2 (codifying sentencing enhancements for certain sexual crimes that involve children); U.S. SENT’G GUIDELINES MANUAL § 2G3.1 (U.S. SENT’G COMM’N 2016) (providing sentencing enhancements for certain crimes involving obscene materials); U.S. SENT’G GUIDELINES MANUAL § 2H3.1 (U.S. SENT’G COMM’N 2014) (establishing sentencing enhancements for crimes where defendants illegally obtained and revealed confidential information).

²⁹ *See* U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b)(5) (providing for a sentencing enhancement if there is a “pattern” of certain behavior); U.S. SENT’G GUIDELINES MANUAL § 2D1.1 (U.S. SENT’G COMM’N 2018) (providing for sentencing enhancements based on the presence of a “dangerous weapon” or other crime-specific considerations).

³⁰ U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b)(5). The guidelines define what constitutes a “pattern of activity” under the specific section of the Federal Sentencing Guidelines. *See id.* at cmt. n.1 (defining the required “pattern of activity” as the occurrence of at least two occasions “of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct”).

³¹ *See id.* at cmt. n.1 (listing federal statutes and other sources of law that should be used to interpret the phrase “sexual abuse or exploitation”). The note clarifies that obtaining, having, or opening content that relates to “sexual abuse or exploitation” of minors is not covered under the sentencing enhancement. *Id.*

³² Appellant’s Supplemental Brief at 2, *United States v. Dominguez*, 997 F.3d 1121 (11th Cir. 2021) (No. 19-11378-AA); Respondent’s Supplemental Brief at 1, *Dominguez*, 997 F.3d 1121 (No. 19-11378-AA). The defendant was accused of soliciting nude pictures from a nine-year-old girl and sending her nude pictures of himself. *Dominguez*, 997 F.3d at 1123. There was evidence that he was aware that she was only nine years old based on their Instagram messages. *Id.* His interactions with

messages of a sexual nature with a nine-year-old child, including soliciting and sending naked pictures, but he denied talking about particular sexual actions and requesting an in-person meeting.³³ The defendant only pleaded guilty to having and disseminating child pornography.³⁴

Shortly before sentencing, the government advocated for the judge to apply a sentencing enhancement pursuant to U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) because the defendant had a previous conviction for actions violating 18 U.S.C. § 2422; the government also maintained that the conduct at issue violated 18 U.S.C. § 2422, which would mean that the defendant had committed multiple crimes related to the sexual harming or manipulation of children.³⁵ The government argued that 18 U.S.C. § 2422, specifically the phrase “sexual activity,” does not necessitate that the defendant make or attempt to make physical contact with the victim.³⁶ The defendant disputed the application of the sentencing enhancement by arguing that the behavior for which he pleaded guilty did not contravene 18 U.S.C. § 2422, as he never tried to obtain the girl’s permission to engage in physical contact that would constitute “sexual activity.”³⁷

The district court adopted the government’s interpretation of “sexual activity” and found that the defendant’s conduct was punishable under 18 U.S.C. § 2422.³⁸ In ruling that the statute criminalized the defendant’s conduct, the

the young girl were extensive and included numerous comments of a sexual nature. Appellant’s Supplemental Brief, *supra*, at 3–5. On several occasions, the defendant requested pictures of a sexual nature from the girl. *Id.* The defendant’s comments included the use of sexually suggestive nicknames and compliments. *Id.*

³³ Appellant’s Supplemental Brief, *supra* note 32, at 5. The defendant openly acknowledged that he engaged in conversations of a sexually explicit nature with the child. Respondent’s Supplemental Brief, *supra* note 32, at 8. Despite these admissions, the defendant contended that he never sought to secure the girl’s consent to engage in sexual activity. *Id.*

³⁴ *Dominguez*, 997 F.3d at 1123. As part of the plea bargain, the defendant did not plead guilty to receiving child pornography. Appellant’s Supplemental Brief, *supra* note 32, at 2.

³⁵ Respondent’s Supplemental Brief, *supra* note 32, at 7. The defendant noted in his brief that this argument arose within a week of sentencing. Appellant’s Supplemental Brief, *supra* note 32, at 8. The defendant admitted that his previous conviction met the criteria under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) and thus counted as one offense towards the requirement for a sentencing enhancement. Respondent’s Supplemental Brief, *supra* note 32, at 9. The defendant, however, disputed that the behavior in this case qualified under the sentencing guideline. *Id.*

³⁶ *Dominguez*, 997 F.3d at 1124.

³⁷ *Id.* at 1123–24. The defendant admitted that he made one comment that could be construed to refer to a physical sexual act. See Appellant’s Supplemental Brief, *supra* note 32, at 9 (referring to the remark as “one rather vague exception”).

³⁸ See Respondent’s Supplemental Brief, *supra* note 32, at 9 (explaining that the district court found that the defendant’s conduct was criminalized under 18 U.S.C. § 2422(b)). The district court relied on another case from the Eleventh Circuit, *United States v. Lee*, in reasoning that 18 U.S.C. § 2422(b) prohibits a defendant’s purposeful effort to form a certain “mental state.” *Id.*; see 603 F.3d 904, 914 (11th Cir. 2010) (holding that under the statute, the defendant must intend to obtain the minor’s acquiescence and take a “substantial step” in pursuit of obtaining that consent). The court re-

district court stated that the defendant made significant efforts to coerce the victim to participate in sexual conduct.³⁹ Based on this decision, the court applied a five-level sentencing enhancement under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) and sentenced the defendant to 240 months in prison.⁴⁰

The defendant appealed his sentence to the Eleventh Circuit Court of Appeals.⁴¹ The Eleventh Circuit considered whether the conversations that the defendant had with the minor on Instagram were “sexual activity” as defined in 18 U.S.C. § 2422(b), such that the enhancement under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) was properly applied.⁴² The court held that the statute did not require that the defendant engage or attempt to engage in physical activity, and that he thus participated in “sexual activity.”⁴³ The court did, however, vacate the district court’s use of the sentencing enhancement because the district court failed to decide whether the defendant committed activity “for which any person can be charged with a criminal offense.”⁴⁴

II. THE ELEVENTH CIRCUIT, JOINING A CIRCUIT SPLIT, HOLDS THAT SEXUAL ACTIVITY DOES NOT REQUIRE PHYSICAL CONTACT

Before the U.S. Court of Appeals for the Eleventh Circuit considered the meaning of “sexual activity” under 18 U.S.C. § 2422(b) in *United States v.*

viewed the defendant’s messages with the minor and their content in deciding that the sentencing enhancement was applicable. Respondent’s Supplemental Brief, *supra* note 32, at 10.

³⁹ Respondent’s Supplemental Brief, *supra* note 32, at 9.

⁴⁰ *Id.* at 10–11. Because the court ruled that the sentencing enhancement was applicable based on the circumstances, the sentencing guidelines indicated that the appropriate sentence was between 360 months and life in prison. *Id.* The defense argued for a maximum sentence of twenty years, which would be within the guidelines absent the enhancement. *Id.* The court proceeded to consider the criminal history of the defendant, the details of the defendant’s crime, and the defendant’s mental health problems. *Id.* The defendant was also sentenced to a lifetime of supervised release and ordered to pay restitution. Appellant’s Supplemental Brief, *supra* note 32, at 3. In responding to the defendant’s objection to the application of the sentencing enhancement, the court emphasized that it decided on a sentence that was significantly shorter than the suggested time in the guidelines. Respondent’s Supplemental Brief, *supra* note 32, at 11.

⁴¹ Appellant’s Supplemental Brief, *supra* note 32, at 3; Respondent’s Supplemental Brief, *supra* note 32, at 11. The defendant was in prison during the appeal process. Appellant’s Supplemental Brief, *supra* note 32, at 3.

⁴² *Dominguez*, 997 F.3d at 1124. Such a decision was crucial to determining whether the sentencing enhancement under U.S. Sentencing Guidelines Manual § 2G2.2(b)(5) applied. *See id.* (noting that if the conduct was criminalized under 18 U.S.C. § 2422, this conviction would be the defendant’s second that qualified under the sentencing enhancement). The Eleventh Circuit, in considering the appropriate sentence, reviewed the lower court’s ruling de novo. Appellant’s Supplemental Brief, *supra* note 32, at 5; Respondent’s Supplemental Brief, *supra* note 32, at 11; *see De Novo*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining de novo as “anew”).

⁴³ *Dominguez*, 997 F.3d at 1127.

⁴⁴ *See* 18 U.S.C. § 2422 (requiring the court to determine if the defendant committed sexual acts that are illegal for any person to commit); *Dominguez*, 997 F.3d at 1127 (overturning the defendant’s sentence because the district court failed to decide if his actions were sexual acts that are illegal for any person to commit, which is required under 18 U.S.C. § 2422(b)).

Dominguez, the U.S. Court of Appeals for the Fourth and Seventh Circuits interpreted the phrase.⁴⁵ The Eleventh Circuit agreed with the Fourth Circuit’s interpretation of the phrase as not mandating physical touching between the defendant and the victim.⁴⁶ Section A of this Part provides the differing interpretations and rationales of the Fourth and Seventh Circuits.⁴⁷ Section B of this Part explains how the Eleventh Circuit concluded that “sexual activity” does not require interpersonal contact.⁴⁸

A. Pre-Existing Circuit Split on the Meaning of “Sexual Activity” Under 18 U.S.C. § 2422(b)

Prior to the Eleventh Circuit’s decision in *Dominguez*, two other circuits had interpreted the meaning of the phrase “sexual activity” as it is used in 18 U.S.C. § 2422(b).⁴⁹ The Fourth and Seventh Circuits reached opposite understandings of this statutory phrase.⁵⁰

In 2012, in *United States v. Fugit*, the United States Court of Appeals for the Fourth Circuit interpreted “sexual activity” under 18 U.S.C. § 2422(b) to not require physical contact between people.⁵¹ The court began by considering whether the disputed phrase had an “unambiguous” definition.⁵² The court ex-

⁴⁵ See *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) (considering whether the phrase “sexual activity” requires physical interaction between two individuals under 18 U.S.C. § 2422(b)); *United States v. Taylor*, 640 F.3d 255, 259 (7th Cir. 2011) (same).

⁴⁶ See *United States v. Dominguez*, 997 F.3d 1121, 1123 (11th Cir. 2021) (holding that no physical contact is necessary to qualify as “sexual activity” under the statute); *Fugit*, 703 F.3d at 255 (same).

⁴⁷ See *infra* notes 49–64 and accompanying text.

⁴⁸ See *infra* notes 65–76 and accompanying text.

⁴⁹ See *Fugit*, 703 F.3d at 255 (interpreting the phrase “sexual activity” to not require physical interaction between two individuals); *Taylor*, 640 F.3d at 259 (deciding that to engage in “sexual activity” under 18 U.S.C. § 2422(b), defendants must physically touch another individual).

⁵⁰ See *Fugit*, 703 F.3d at 255 (finding that “sexual activity” did not require physical contact); *Taylor*, 640 F.3d at 259 (holding that “sexual activity” did mandate physical contact).

⁵¹ *Fugit*, 703 F.3d at 251, 255. *Fugit* involved sexual online and telephone interactions between an adult and a minor. *Id.* The defendant pleaded guilty to two counts: one charge was for disseminating child pornography, and the second charge was for manipulating a child into committing illicit sexual acts or attempting to do so. *Id.* at 250–51. The parties, at the time of the plea, both assented to a set of facts, and the defendant confirmed those facts as well as others contained in a more extensive pre-sentence report. *Id.* at 251.

⁵² See *id.* at 254 (quoting *Chris v. Tenet*, 221 F.3d 648, 651 (4th Cir. 2000)) (explaining that when it interprets an undefined word or phrase in a statute, the court’s initial step is to find out if the term has a clear and ordinary meaning). There is a method of statutory interpretation, championed by Justice Scalia, that always begins with the text of the statute and posits that “unambiguous” language should not be subject to further interpretation. See *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 108 (2007) (Scalia, J., dissenting) (explaining that statutory interpretation must start with the text and criticizing the majority for placing its interpretation of Congress’s intent over clear, “unambiguous” language). The Supreme Court previously held that the initial inquiry when trying to determine a statute’s meaning is to decide whether it has a definitive meaning. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

plained that its practice is to look to various dictionaries to find a disputed phrase's "plain meaning," and it stated that "sexual" means that which pertains to actions related to carnal gratification, according to Webster's Dictionary.⁵³ The court defined "activity" as an active job, quest, or amusement.⁵⁴ Based on these definitions, the court found the plain meaning of the statute to not require interpersonal contact.⁵⁵ The court further cited to the legislative intent of 18 U.S.C. § 2422(b) to support its interpretation.⁵⁶

On the contrary, in 2011, in *United States v. Taylor*, the Seventh Circuit concluded that "sexual activity" does require physical contact with another person.⁵⁷ The court employed many different approaches to interpret the statute's language.⁵⁸ For example, the court compared the phrase "sexual activity" to "sexual act," which is used in the following section of Title 18 of the federal criminal code.⁵⁹ The court found that the term "sexual act" required interpersonal contact between two individuals and explained that it had previously employed this practice of using other provisions to help understand a separate phrase.⁶⁰ The court in *Taylor* also emphasized the negative social consequences of an expansive interpretation of "sexual activity"; if this activity was punishable under 18 U.S.C. § 2422(b), the court wondered where it should draw the

⁵³ *Fugit*, 703 F.3d at 254 (quoting *Sexual*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 2082 (3d ed. 1993)); see *Plain Meaning*, BLACK'S LAW DICTIONARY, *supra* note 42 (defining plain meaning as "the meaning attributed to a document (usu. by a court) by giving the words their ordinary sense, without referring to extrinsic indications of the author's intent").

⁵⁴ *Fugit*, 703 F.3d at 255 (quoting *Activity*, WEBSTER'S NEW INTERNATIONAL DICTIONARY, *supra* note 53, at 22).

⁵⁵ *Id.* The Supreme Court indicated in *Robinson* that if there is a clear meaning of the statute's language, then its process of discerning the meaning of the statute must end. *Robinson*, 519 U.S. at 340.

⁵⁶ See *Fugit*, 703 F.3d at 255 (reasoning that its precedent has shown that the statute "was designed to protect children from the act of solicitation itself" (quoting *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012)). The court explained that the wrongdoing that Congress wanted to curtail, the sexualizing of minors through psychological means, could occur in the absence of physical contact. *Id.*

⁵⁷ See *United States v. Taylor*, 640 F.3d 255, 257, 259 (7th Cir. 2011) (interpreting "sexual activity" under 18 U.S.C. § 2422(b) to mandate that defendants make contact with another person). *Taylor* involved online sexual interaction between an adult and a police officer posing as a minor. *Id.*

⁵⁸ See *id.* at 257–60 (comparing the language to phrases used elsewhere in the federal criminal code, reviewing the legislative intent, making a social consequences argument, and distinguishing precedent cases). Unlike the court in *Fugit*, the Seventh Circuit did not look first to dictionaries or like sources to discover the phrase's plain meaning. See *Fugit*, 703 F.3d at 254 (looking first to dictionary definitions to interpret the phrase in question); *Taylor*, 640 F.3d at 257 (employing other interpretative techniques first rather than immediately looking for dictionary definitions).

⁵⁹ *Taylor*, 640 F.3d at 257; see 18 U.S.C. § 2246 (providing a definition for "sexual act"). Looking at the language of other statutes to interpret another statute's language is a common tool of statutory interpretation employed by courts. See *United States v. Simms*, 914 F.3d 229, 241 (4th Cir. 2019) (pointing to the language in other statutes to exhibit that if Congress wanted a certain type of analysis under the statute at issue, it would have indicated so in the statute's provisions).

⁶⁰ *Taylor*, 640 F.3d at 257.

line.⁶¹ The court next investigated the legislative intent of the statute and found that the statute’s wording and revisions exhibited Congress’s understanding of “sexual activity” and “sexual act” as synonyms.⁶² Based on these and other techniques, the court found two possible meanings of the statute that were equally likely.⁶³ It thus applied the rule of lenity, which provides that a statute with two likely meanings should be decided in favor of the criminal defendant.⁶⁴

B. The Eleventh Circuit Sides with the Fourth Circuit’s Interpretation of “Sexual Activity”

In *Dominguez*, the court reached the same conclusion as the Fourth Circuit and decided that “sexual activity” under 18 U.S.C. § 2422(b) can occur without physical contact between individuals.⁶⁵ The court began by trying to find the meaning that the public would have given the statute’s language when it was amended.⁶⁶ The court could not find a definition of “sexual activity” from that time, so it moved to the meanings of each individual word.⁶⁷ “Sexual,” at the time the statute was amended, included behavior beyond physical sexual activity; the word also referred to other kinds of sex-related behavior.⁶⁸ The court also found a non-physical meaning of “activity” from that time by

⁶¹ See *id.* at 257–58 (providing a range of hypotheticals to display the difficulty in limiting the statute’s scope if physical contact was not required). The court mentioned multiple scenarios where line-drawing would become difficult, such as viewing sexual paintings, flirting with somebody, or flashing another person. *Id.*

⁶² *Id.* at 258. Within the original statute, one subsection originally included the phrase “sexual act” and the other included the phrase “sexual activity.” *Id.* The use of “sexual act” was revised to “sexual activity” in 1998, and the Seventh Circuit interpreted the purpose of the change as establishing uniformity between provisions that were the same substantively. *Id.*

⁶³ *Id.* at 259–60.

⁶⁴ *Id.*; see *Rule of Lenity*, BLACK’S LAW DICTIONARY, *supra* note 42 (defining rule of lenity as “the judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment”). The court gave a policy argument for the rule of lenity by explaining that it gives initiative to the government, which is the party in the best position to convince Congress to be clearer when writing statutes. *Taylor*, 640 F.3d at 260. The United States Supreme Court previously affirmed this purpose as a justification for the rule of lenity. See *United States v. Santos*, 553 U.S. 507, 514 (2008) (explaining that the rule of lenity incentivizes the government to prompt Congress to write unambiguous statutes).

⁶⁵ *Dominguez*, 997 F.3d at 1123.

⁶⁶ *Id.* at 1124. The court provided dictionaries from the time of the statute’s enactment as an example of materials that could be used to discern this interpretation. *Id.*

⁶⁷ *Id.* The court looked for definitions of the phrase from the end of the 1990s and the beginning of the 2000s but could not find any, and the two parties in the case did not provide any to the court. *Id.*

⁶⁸ *Id.* at 1125. The court cited to a number of dictionaries and their definitions of the word “sexual” to reach this conclusion about the non-physical dimension of the term. *Id.* (quoting *Sexual*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2082 (2002); *sexual*, 2 SHORTER OXFORD ENGLISH DICTIONARY 2780 (5th ed. 2002); *Sexual*, THE AMERICAN HERITAGE STEADMAN’S MEDICAL DICTIONARY 757 (1995)).

explaining that it included any particular act or quest.⁶⁹ Based on these two meanings, the court interpreted the phrase “sexual activity” not to require contact between two people.⁷⁰ The court found support for its interpretation from Congress’s inclusion of producing child pornography, an act that does not require contact, within “sexual activity” in the chapter of the U.S. Code where 18 U.S.C. § 2422 is placed.⁷¹

The court then addressed the Seventh Circuit’s interpretation of “sexual activity” and provided its reasons for disagreeing with the Seventh Circuit’s application of the rule of lenity.⁷² The court found no ambiguity in the phrase that would warrant an application of the rule of lenity.⁷³ The court also did not view the phrases “sexual act” and “sexual activity” as synonyms and found that it was erroneous to take the meaning of “sexual act” from a separate statute and apply it to another.⁷⁴ Finally, the court dismissed the Seventh Circuit’s concerns about the negative social consequences of a broader definition of “sexual activity” by stating that to violate 18 U.S.C. § 2422, defendants must commit “sexual activity for which any person can be charged with a criminal offense.”⁷⁵

Applying the facts of the case to this understanding of “sexual activity,” the court decided that the defendant did commit “sexual activity” as prohibited under 18 U.S.C. § 2422(b).⁷⁶

⁶⁹ *Id.* (quoting *Activity*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY 14 (4th ed. 2004)). The court also cited to other dictionaries to confirm its understanding of the word at the end of the 1990s and the beginning of the 2000s. *Id.* (quoting *Activity*, 1 SHORTER OXFORD ENGLISH DICTIONARY 23, *supra* note 68, at 23; *Activity*, BLACK’S LAW DICTIONARY 33 (6th ed. 1990)).

⁷⁰ See *Dominguez*, 997 F.3d at 1125 (providing that “sexual activity” includes an action that pertains to a want for sexual satisfaction).

⁷¹ *Id.*; see 18 U.S.C. § 2427 (providing the creation of child pornography as an example of “sexual activity”). The court reasoned that if producing child pornography, which does not necessitate physical contact in all situations, was “sexual activity,” then other non-physical contact could be classified as “sexual activity” as well. *Id.* For another example of a structuralist approach to interpretation, one may read Chief Justice John Marshall’s approach to interpreting the Necessary and Proper Clause’s meaning. See *M’Culloch v. State*, 17 U.S. (4 Wheat.) 316, 419 (1819) (explaining that one reason for the court’s interpretation of the clause was its location in the Constitution with the powers given to Congress and not with the restrictions on Congress’s powers).

⁷² See *Dominguez*, 997 F.3d at 1126 (explaining that the court decided to not adopt the Seventh Circuit’s approach and providing its reasons).

⁷³ *Id.*; see *Ambiguity*, BLACK’S LAW DICTIONARY, *supra* note 42 (defining ambiguity as “doubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, esp. by reason of doubleness of interpretation”). The court also noted that the Seventh Circuit conceded that “sexual activity” encompasses individual acts, including masturbation. *Dominguez*, 997 F.3d at 1125.

⁷⁴ *Dominguez*, 997 F.3d at 1126.

⁷⁵ *Id.* The court believed that the criminality of the alleged conduct would limit the breadth of the meaning of “sexual activity.” *Id.* Actions such as flirting, viewing pornography, or flashing someone could therefore not violate the statute as “sexual activity.” *Id.*

⁷⁶ *Id.* The court specifically cited to the fact that the defendant sent the victim nude pictures of himself and requested for her to do the same. *Id.* The defendant demonstrated through his messages on

III. THE FOURTH AND ELEVENTH CIRCUITS’ INTERPRETATION OF “SEXUAL ACTIVITY” UNDER 18 U.S.C. § 2422 IS CORRECT

The U.S. Court of Appeals for the Eleventh Circuit correctly followed the U.S. Court of Appeals for the Fourth Circuit in interpreting the phrase “sexual activity” to not mandate physical contact between the defendant and another individual.⁷⁷ There is one clear meaning of the phrase when looking at the statute.⁷⁸ Dictionary definitions discussed in both *United States v. Dominguez* and *United States v. Fugit* show that “sexual activity” does not necessarily require defendants to participate or attempt to engage in physical contact with another person.⁷⁹ Based on the phrase’s clear meaning, courts should stop here in interpreting the statute.⁸⁰

Even going beyond the statutory language, the statute’s legislative history indicates that physical contact is not required for a defendant’s actions to qualify as “sexual activity.”⁸¹ In enacting the Protection of Children From Sexual Predators Act of 1998, which modified 18 U.S.C. § 2422, Congress intended to stop pedophiles from communicating with minors online while pursuing sexual acts that are illegal and to prevent people from intentionally sending children explicit materials.⁸² Also, in the Adam Walsh Child Protection and Safety Act of 2006, which lengthened sentences under 18 U.S.C. § 2422(b), Congress

Instagram with the victim that he was trying to achieve “sexual gratification” through his actions, which the court said made its decision easy. *See id.* (indicating that, based on the defendant’s actions, it was not a difficult decision to find that the defendant committed “sexual activity”).

⁷⁷ *See United States v. Dominguez*, 997 F.3d 1123, 1123 (11th Cir. 2021) (providing an interpretation of “sexual activity” under 18 U.S.C. § 2422(b) that does not require a defendant to participate in physical contact with another individual); *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) (same).

⁷⁸ *See Dominguez*, 997 F.3d at 1126 (explaining that the statute is not “ambiguous”); *Fugit*, 703 F.3d at 255 (describing the definition of the statutory phrase as “plain”). The Supreme Court previously indicated that looking for a clear meaning is the initial inquiry in understanding a statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

⁷⁹ *See Dominguez*, 997 F.3d at 1125 (explaining dictionary definitions for “sexual” as extending beyond purely physical activities and for “activity” as including a “pursuit”); *Fugit*, 703 F.3d at 254–55 (finding that dictionaries defined “activity” as including “pursuit” and “sexual” as pertaining to achieving satisfaction of one’s sexual desires). These courts used multiple dictionaries instead of relying on only one dictionary. *See Dominguez*, 997 F.3d at 1125 (quoting *Sexual*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 68; *Sexual*, 2 SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 68; *Sexual*, THE AMERICAN HERITAGE STEADMAN’S MEDICAL DICTIONARY, *supra* note 68); *Fugit*, 703 F.3d at 254–55 (quoting *Sexual*, WEBSTER’S NEW INTERNATIONAL DICTIONARY, *supra* note 53).

⁸⁰ *See Robinson*, 519 U.S. at 340 (indicating that once a court finds an unambiguous meaning of statutory language, the interpretation process must end).

⁸¹ *See Adam Walsh Child Protection and Safety Act of 2006*, Pub. L. No. 109-248, 120 Stat. 587 (2006) (seeking to advance children’s safety and protection from pedophiles on the Internet); *Protection of Children From Sexual Predators Act of 1998*, Pub. L. No. 105-314, 112 Stat. 2974 (1998) (same); H.R. REP. NO. 105-557, at 12 (1998) (same).

⁸² Pub. L. No. 105-314, 112 Stat. 2974, 2975–76 (1998); H.R. REP. NO. 105-557, at 12 (1998).

sought to safeguard children from being exploited and to make the Internet a safer place for children.⁸³ In addition to the legislative history, the statute's placement in the U.S. Code reinforces this interpretation.⁸⁴ Within the same chapter of the U.S. Code where 18 U.S.C. § 2422 is codified, Congress included producing child pornography as an act that qualifies as "sexual activity."⁸⁵

Based on the proscribed activity and the legislative history, Congress would not have left such a significant void by only criminalizing conduct involving physical activity.⁸⁶ As explained by *Fugit*, Congress wanted to prevent the mental sexualization of minors, and this prohibited conduct could occur without interacting physically with these minors.⁸⁷ Additionally, similar statutes surrounding § 2422 provide evidence that Congress intended to criminalize non-physical conduct.⁸⁸ Section 2421A, the section immediately preceding § 2422, specifically addresses individuals who use computers to engage in prostitution.⁸⁹ Similarly, a nearby section, § 2425, proscribes the exchanging of minors' information and does not require physical means.⁹⁰

The U.S. Court of Appeals for the Seventh Circuit presented an argument that there would be severe social consequences if courts interpreted the statutory phrase to include non-physical conduct.⁹¹ Ultimately, however, both the Fourth and Eleventh Circuits articulated the limiting principle in the statute that prevents this slippery slope: the requirement that defendants commit "sexual activity for which any person can be charged with a criminal offense."⁹²

⁸³ See Pub. L. No. 109-248, 120 Stat. 587, 613 (2006) (replacing a previous sentencing scheme in U.S.C. § 2422(b) with an increased sentencing range).

⁸⁴ See *Dominguez*, 997 F.3d at 1125 (using the placement of 18 U.S.C. § 2422 to support its initial interpretation of the phrase "sexual activity").

⁸⁵ 18 U.S.C. § 2427; *Dominguez*, 997 F.3d at 1125. The court in *Dominguez* noted that producing child pornography does not necessarily require the defendant to make physical contact with another person. 997 F.3d at 1125.

⁸⁶ See *Fugit*, 703 F.3d at 255 (explaining that the proscribed conduct, child sexualization, can be achieved without physical interaction with the victim).

⁸⁷ *Id.*

⁸⁸ See 18 U.S.C. § 2425 (criminalizing using facilities between states to exchange information about minors for the purpose of promoting sexual activity); *id.* § 2421A (prohibiting using a computer system to encourage and support prostitution).

⁸⁹ *Id.* § 2421A.

⁹⁰ *Id.* § 2425.

⁹¹ See *United States v. Taylor*, 640 F.3d 255, 257–58 (7th Cir. 2011) (presenting various hypotheticals to demonstrate how hard it would be to limit the statute's applicability if it stretched to include non-physical conduct). Some scenarios referenced by the court were viewing sexual shows, flirting with another person, or watching a pole dancer. *Id.*

⁹² See 18 U.S.C. § 2422 (banning the manipulation of people to engage in illegal "sexual activity"); *Dominguez*, 997 F.3d at 1126 (explaining that the requirement of the criminality of the alleged conduct would limit the statute's breadth and prevent the criminalization of actions like flirting and watching pornography); *Fugit*, 703 F.3d at 255 (highlighting that the statute only affects actions that are banned by criminal laws and thus has a more limited focus than if the statute criminalized individuals who enticed others to engage in "sexual activity" without any qualifiers).

CONCLUSION

In 2021, in *United States v. Dominguez*, the U.S. Court of Appeals for the Eleventh Circuit joined a circuit split by deciding that “sexual activity” under 18 U.S.C. § 2422(b) does not require a defendant to make physical contact with another individual. The U.S. Court of Appeals for the Fourth and Seventh Circuits previously reached conflicting interpretations of the phrase; the Fourth Circuit had the same interpretation as the Eleventh Circuit in *Dominguez*. The Fourth and Eleventh Circuits correctly interpreted the phrase “sexual activity” to not require defendants to participate or attempt to engage in physical contact with another person. The courts found unambiguous meanings of the phrase to support their interpretations, and the legislative history reinforces the correctness of these courts’ conclusions. In the future, federal courts should follow the reasoning of the Fourth and Eleventh Circuits when considering 18 U.S.C. § 2422(b). Doing so will effectuate Congress’s will and promote the beneficial policies that Congress sought to advance through its enactment of 18 U.S.C. § 2422(b).

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