No. _____

IN THE

Supreme Court of the United States

MICHAEL JOSEPH PEPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

In *Mortensen v. United States*, the Court held that an innocent round trip cannot be split into two parts as to permit an inference that interstate travel home was for an illegal purpose, even if prohibited conduct occurred there before the trip and was expected to resume after the trip. 322 U.S. 369 (1944). In the decades thereafter, this Court and the courts of appeals followed that rule. In this case, however, the Ninth Circuit—contrary to stare decisis—dismissed *Mortensen* as a narrow and fact-bound decision, so it refused to acknowledge and apply the innocent-round-trip doctrine, under which the petitioner's convictions cannot stand. The questions presented are:

1. When a statute makes it a crime to travel in commerce or across state lines with an improper purpose or intent, can the government manufacture federal jurisdiction over local criminal activity by splitting a round trip taken for a wholly innocent purpose into two parts as to permit an inference that travel home was for an illegal purpose (as the Ninth Circuit held), or is that prohibited by *Mortensen* (as other circuits have held)?
2. When a statute criminalizes travel in commerce or across state lines with an improper purpose or intent, must that be the "dominant motive" of the travel (as *Mortensen* required), or is it enough that it was "a motivating purpose" (as the Ninth Circuit held)?

Related Proceedings

United States District Court (C.D. Cal.):

United States v. Pepe, Case No. CR-07-00168-DSF (April 20, 2022).

United States Court of Appeals (9th Cir.):

United States v. Pepe, Case No. 14-50095 (July 11, 2018).

United States v. Pepe, Case No. 22-50024 (August 28, 2023).

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Petition for a Writ of Certiorari

Petitioner Michael Joseph Pepe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-33a) is published at 81 F.4th 961. The district court's order denying a motion for judgment of acquittal (App. 34a-40a) was not published.

Jurisdiction

The court of appeals entered its judgment on August 28, 2023. App. 1a. It denied a petition for panel rehearing / rehearing en banc on November 3, 2023. App. 41a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., Amend. V provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

At the time of the charged conduct in this case (2005), 18 U.S.C. § 2241(c) provided in relevant part: "Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the

age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."[1]

At the time of the charged conduct in this case (2005), 18 U.S.C. § 2423(b) provided: "*Travel with intent to engage in illicit sexual conduct*. – A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." In 2018, this provision was amended to change the phrase "for the purpose" to "with a motivating purpose." Abolish Human Trafficking Act of 2017, Pub. L. 115-392, § 14(1), 132 Stat. 5250, 5256. And in 2023, it was amended again to change the phrase "with a motivating purpose of engaging in any illicit sexual conduct with another person" to "with intent to engage in any illicit sexual conduct with another person." Preventing Child Sex Abuse Act of 2023, Pub. L. 118-31, § 5102(c)(1), 137 Stat. 934, 935.

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[1] Subsequent amendments expanded the scope of prison jurisdiction and established a mandatory-minimum sentence, but those changes are not relevant to the issues presented herein.

Introduction

Michael Pepe, a U.S. citizen, lived in Cambodia when he allegedly had sex with minors there in 2005-2006. Instead of letting the Cambodian government prosecute him, our government tried to Americanize the crime. It initially charged and successfully convicted him under a statute reaching some sex crimes committed by U.S. citizens abroad, but the Ninth Circuit reversed those convictions, holding that the statute did not apply to Pepe unless the government could prove that he did not reside in Cambodia. It could not do that, so on remand the government charged Pepe with different crimes that (like the Mann Act) required it to prove that he traveled in commerce or across state lines with the improper purpose or intent to have sex with minors in that foreign country.

To establish this jurisdictional hook, the government relied on the return legs of Pepe's two brief round trips to the United States to attend family functions in 2005. Those trips were wholly innocent—no girls accompanied him, nor was there any other conduct connected to the alleged sex acts in Cambodia. The government's theory was that Pepe returned to his Cambodian home each time for the purpose of engaging in prohibited sex acts because it was his "personal brothel." ER 766; GAB 41.[2] But in *Mortensen v. United States*, the Court reversed Mann Act convictions for

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[2] The following abbreviations refer to documents filed in the Ninth Circuit: "ER" refers to the appellant's excerpts of record (docket no. 11). "AOB" refers to the appellant's opening brief (docket no. 10). "GAB" refers to the government's

insufficient evidence where the defendants ran an *actual* brothel and took two of their prostitutes on an innocent round trip for vacation. 322 U.S. 369 (1944). Even though all understood that the women would resume their sex work at the end of the trip, the trip itself was a break in the operation of the brothel, and the round trip could not be split into two parts as to permit an inference that the interstate travel home was for that illegal purpose. *Id*. at 374-77. Subsequently, the Court summarily reversed two other convictions based on *Mortensen*, and the courts of appeals applied its innocent-round-trip doctrine for decades.

Under *Mortensen* and its progeny, Pepe's innocent round trips to the United States were breaks from whatever happened in Cambodia, so he could not have had the requisite intent when leaving the United States to return home. The jury nevertheless convicted him. The Ninth Circuit affirmed those convictions in an opinion that improperly dismissed *Mortensen* as a narrow and fact-bound decision and disregarded the subsequent precedent applying that case. App. 12a-16a. It ignored and violated stare decisis, which required it to follow the holdings and reasoning of this Court, not to mention its own prior opinions. In doing so, the Ninth Circuit created a circuit conflict. It also vastly expanded the ability of the

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answering brief (docket no. 21). "ARB" refers to the appellant's reply brief (docket no. 31). "Argument Audio" refers to the audio of the oral argument (docket no. 49). "PFR" refers to the appellant's petition for rehearing (docket no. 56).

government to federally prosecute purely-local crimes under existing statutes and Congress to enact new statutes expanding federal police power even further.

A separate but related issue involving *Mortensen* is how to define the mens rea elements of travel-for-sex crimes. Although the Court established a "dominant motive" standard in that case, the Ninth Circuit and other courts of appeals have wrongly discounted that as dicta. As a result, the standard has been watered down to the point where any improper "motivating purpose" is enough, thereby lowering the government's burden of proof, contrary to *Mortensen*.

Considering these issues will reinforce the importance of stare decisis generally and the ongoing validity of *Mortensen* in particular. The Court should therefore grant certiorari and reverse.

Statement of the Case

1. Legal Background.

The Due Process Clause requires the government to prove each element of each alleged crime beyond reasonable doubt at trial. *In re Winship*, 397 U.S. 358, 364 (1970). This constitutional burden of proof "plays a vital role in the American scheme of criminal procedure" because it is "a prime instrument for reducing the risk of convictions resting on factual error" and it "provides concrete substance for the presumption of innocence[.]" *Id*. at 363 (cleaned up). "To this end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the

necessity of reaching a subjective state of certitude of the facts in issue." *Id*. at 364 (cleaned up); *see also id.* (factfinder must be convinced of guilt with "utmost certainty"). A conviction "cannot constitutionally stand" if no rational trier of fact could have found that the government met its burden. *Jackson v. Virginia*, 443 U.S. 307, 317-18 (1979). The relevant question is whether, after viewing the evidence in the light most favorable to the government, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Id*. at 319. If the evidence is insufficient as to any element, the remedy is reversal of the conviction and entry of a judgment of acquittal because the Double Jeopardy Clause precludes a retrial. *Burks v. United States*, 437 U.S. 1, 18 (1978).

At issue here is whether trial evidence was sufficient to prove violations of 18 U.S.C. § 2241(c), which imposed criminal sanctions on anyone who "crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years," and 18 U.S.C. § 2423(b), which did the same for any U.S. citizen "who travels in foreign commerce[] for the purpose of engaging in any illicit sexual conduct with another person[.]" Despite the slightly-different language, the statutes' mens rea elements are equivalent. *See*, *e.g.*, *United States v. Perkins*, 948 F.3d 936, 938-39 (8th Cir. 2020); *United States v. Murphy*, 942 F.3d 73, 82 (2d Cir. 2019).

Because modern travel-for-sex statutes are rooted in the Mann Act, courts have recognized that Mann Act cases are authoritative in construing such statutes. *See*,

e.g., *Sealed Appellee v. Sealed Appellant*, 825 F.3d 247, 251-52 (5th Cir. 2016); *United States v. Schneider*, 801 F.3d 186, 192 (3d Cir. 2015); *United States v. Garcia-Lopez*, 234 F.3d 217, 220 n.3 (5th Cir. 2000); *United States v. Vang*, 128 F.3d 1065, 1069-70 (7th Cir. 1997). That makes sense given that Congress enacts such statutes using its Commerce Clause powers, which is why they have interstate and foreign travel elements. *See Mortensen*, 322 U.S. at 375 ("What Congress has outlawed by the Mann Act . . . is the use of interstate commerce as a calculated means for effectuating sexual immorality."); *United States v. Stokes*, 726 F.3d 880, 894 (7th Cir. 2013) (Congress enacted § 2423(b) under the Commerce Clause); *United States v. Tom*, 565 F.3d 497, 504 (8th Cir. 2009) (same as to § 2241(c)). It is therefore important that in *Mortensen*, the Court reversed Mann Act convictions on the grounds that an innocent round trip cannot be split into two parts as to permit an inference that interstate travel home was for an illegal purpose, even if prohibited conduct occurred there before the trip and was expected to resume after the trip. 322 U.S. at 372-77.

2. Factual Background and Proceedings Below.

Michael Pepe, a U.S. citizen, moved to Cambodia in 2003 and lived there continuously thereafter. App. 4a-5a; AOB 6-15; ARB 2. He allegedly had sex with minors at his home between June 2005 and June 2006. App. 4a-8a; AOB 16-22; ARB 2. For purposes of this case, Pepe does not dispute that the sex acts occurred.

App. 6a n.3; AOB 6; ARB 2 n.2. At issue is whether he committed an American crime.

The government initially charged Pepe under 18 U.S.C. § 2423(c), the *current* version of which purportedly reaches citizens who engage in prohibited sexual activity while residing in a foreign country. But the Ninth Circuit reversed Pepe's convictions under a *prior* version of that provision, finding it inapplicable to citizens living abroad unless they were still traveling in foreign commerce when the activities occurred. *United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018). "If, as Pepe maintains, he relocated to Cambodia in March 2003, then the statute does not apply to him." *Id.* at 691.

Implicitly recognizing that it could not prove otherwise, the government abandoned the § 2423(c) counts on remand and instead charged Pepe with four different crimes—two counts alleging that he traveled in foreign commerce for the purpose of engaging in illicit sexual conduct in violation of 18 U.S.C. § 2423(b) (2005), and two counts alleging that he crossed a state line with the intent to engage in sex with a person under 12 in violation of 18 U.S.C. § 2241(c) (2005). A jury found Pepe guilty on all four counts. App. 4a, 8a-9a; AOB 4-5.

On appeal, the relevant facts were undisputed: Pepe had long lived in Cambodia when the alleged child-sex acts occurred there; he was charged here under statutes requiring the government to prove that the purpose of his travel in foreign commerce and across state lines was to engage in such acts; the alleged travel was

the return legs of his two brief trips to the United States in May 2005 and August-September 2005; both were booked as rounds trips in advance; no girls accompanied him; and each trip was for the wholly-innocent purpose of visiting family. App. 5a-9a, 12a; AOB 4-22; ARB 2-3. Pepe argued that *Mortensen* and subsequent precedent applying it precluded finding that the return legs of his innocent round trips to the United States were made for the purpose of engaging in the sex acts at his Cambodian home, so the trial evidence is insufficient as a matter of law. AOB 30-45; ARB 2-17. Furthermore, even if the jury could disregard the innocent nature of Pepe's round trips and consider the return legs of those trips in isolation, the government still failed to prove the requisite mental states. AOB 45-60; ARB 17-28. Finally, he argued, the district erred by failing to instruct the jury on his innocent-round-trip defense and by instructing that the government only had to prove that "a dominant, significant, or motivating purpose of" Pepe's travel in foreign commerce and crossing a state line was to engage in the prohibited sex acts. AOB 60-69; ARB 28-34.

The Ninth Circuit issued a published opinion affirming Pepe's convictions. App. 1a-33a. It rejected Pepe's innocent-round-trip argument based on *Mortensen* by characterizing it as a "narrow" and "fact-bound" decision confined to the "unique circumstances of that case[.]" App. 12a-16a. Then, viewing the return legs of Pepe's trips in isolation, it found sufficient evidence of intent as to each count, although it conceded that the jury could have rationally found that he did not commit those

crimes. App. 10a, 16a-28a, 33a. The Ninth Circuit also held that the jury was properly instructed. App. 28a-33a.

Pepe filed a petition for panel rehearing / rehearing en banc arguing that the Ninth Circuit had violated stare decisis by not following *Mortensen* and other precedent applying its innocent-round-trip doctrine, thereby rendering an opinion with sweeping and far-reaching consequences undermining the Constitution's limits on federal police power. PFR 1-19. He also asked the court to reconsider its precedent on mens rea instructions in travel-for-sex cases. PFR 19-21. The Ninth Circuit summarily denied the petition. App. 41a.

Reasons for Granting the Writ

The Court should grant review to resolve a circuit conflict concerning the stare decisis effect of its decision in *Mortensen*. Whether *Mortensen* also requires a dominant-motive standard in travel-for-sex cases is a separate but related issue that also merits the Court's attention. This case is an excellent vehicle for addressing those questions and enforcing stare decisis.

1. The Court should resolve a circuit conflict concerning the stare decisis effect of its decision in *Mortensen v. United States*.

Mortensen established an innocent-round-trip doctrine applicable to statutes that make it a crime to travel in commerce or across state lines with an improper purpose or intent. Stare decisis required the courts of appeals to follow that rule.

For decades they did. But in this case, the Ninth Circuit created a circuit conflict by dismissing *Mortensen* as a narrow and fact-bound decision and refusing to apply the innocent-round-trip doctrine. If allowed to stand, that opinion will significantly expand the reach of federal police power to encompass purely-local crimes.

A. In *Mortensen*, the Court held that an innocent round trip cannot be split into two parts as to permit an inference that interstate travel home was for an illegal purpose, even if prohibited conduct occurred there before the trip and was expected to resume after the trip; it then applied that doctrine in two subsequent cases.

The Mortensens (husband and wife) ran a brothel in Grand Island, Nebraska. *Mortensen*, 322 U.S. at 372. When two of their employees asked to accompany them on a vacation to Yellowstone and Salt Lake City, they obliged. *Id*. During the trip, there was no prostitution, or even discussions about it. *Id*. It "was purely a vacation trip[.]" *Id*. The women were free to leave at any time but went back to Nebraska because that is where they resided. *Id*. at 372-73. All on the trip "anticipated that the two girls would resume their activities as prostitutes upon their return to" the brothel there. *Id*. at 374; *see also id*. at 378 (Stone, C.J., dissenting) ("The record is without evidence that they engaged, or intended to engage in any other activities in Nebraska, or that anything other than the practice of their profession was the object of their return). And they did so. *Id*. at 272.

"The primary issue" before the Court was "whether there was any evidence from which the jury could rightly find" that the Mortensens violated the Mann Act by transporting the women back to Nebraska "'for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice and compel [them] to become [] prostitute[s] or to give [themselves] up to debauchery, or to engage in any other immoral practice.'" 322 U.S. at 373-74 (quoting Mann Act). Recognizing that the Mann Act aimed "to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes," the Court deemed it "essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities." *Id.* at 374 (cleaned up). The intention for the women to engage in the proscribed conduct "must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement." *Id.* "Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act." *Id.* Given this interpretation, the Court found that the defendants' actions did not violate the Mann Act. *Id.* at 374-77.

The government argued in *Mortensen* that "the fact that the object of the trip from Nebraska to Utah was to enjoy a vacation does not preclude the existence, on the journey back to Nebraska, of a purpose to return the girls to their work as prostitutes in petitioners' employ." *Mortensen v. United States*, Brief for the United

States, 1944 WL 42874, *13 (Mar. 1944) ("Government's *Mortensen* Brief") (cleaned up). "The immoral purpose need not be the sole object of the journey," the government contended, because "the additional presence of a legitimate purpose is immaterial, if one of the objects of the transportation falls within the statutory bar." *Id*. at *21-22 (cleaned up). "If a person takes a vacation from an ordinary employment, one of the purposes of his return trip would normally be to go back to work; indeed that is often the main reason." *Id*. at *25. Therefore, the government claimed, "the jury could properly infer that at least one purpose of petitioners in transporting the girls back from Salt Lake City was to enable them to resume their immoral conduct, which they did." *Id*. at *24-25.

The Court rejected that argument. The expectation that the prostitutes would resume their activities upon returning home did not permit the jury to infer that "any part" of the interstate vacation trip "was undertaken by" the defendants "for the purpose of, or as a means of effecting or facilitating, such activities." 322 U.S. at 374-75. "The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls. It was a complete break or interlude in the operation of" the brothel "and was entirely disassociated therefrom." *Id*. at 375. "In ordinary speech an interstate trip undertaken for an innocent vacation purpose constitutes the use of interstate commerce for that innocent purpose." *Id*. Congress, however, required "the use of interstate commerce as a calculated means for effectuating sexual immorality." *Id*.

The women's resumption of prostitution after going home could not "operate to inject a retroactive illegal purpose into the return trip to Grand Island." 322 U.S. at 375. Nor could "it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal." *Id.* In other words, the return journey could not "be considered apart from its integral relation with the innocent round trip as a whole." *Id.* There was no "change in the purpose of the trip during its course"—it was "innocent when it began" so "it remained so until it ended." *Id.* "Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends." *Id.* The return leg of the trip was no more criminal than the outward leg, "since all intended, from the beginning, to end the journey where it began, at Grand Island." *Id.* at 375-76. The "direction of travel" was not "enough to make the first part innocent, the last part illegal." *Id.* at 376. Only an "artificial and unrealistic view of the nature and purpose of the return journey to Grand Island" could sustain the defendants' convictions. *Id.* The Court refused to allow something "so manifestly unfair." *Id.* It held that "to punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor with the language of the Act." *Id.* at 377 (cleaned up).

The Court recognized that "'people not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance.'" 322 U.S. at 376 (cleaned up). It quoted that language from *Hansen v. Haff*, 291 U.S. 559 (1934). The issue in that immigration case was whether an alien entered the United States for an immoral purpose. The woman was a citizen of Denmark who had been living and working as a domestic servant in Los Angeles for several years. *Id.* at 560. She began an affair with a married man there and he accompanied her on a trip to Denmark to visit her parents. *Id.* at 560-61. They returned to the United States with the intent to continue the affair. *Id.* at 561. But the Court held "it cannot be said that the petitioner's entry was for the purpose of having such relations." *Id.* at 562. "The fact is that she was returning to her former residence[.]" *Id.* Thus, *Hansen* and *Mortensen* establish that going home after a trip is not for the purpose of engaging in wrongdoing there, even if such activities occurred there before the trip and resumed there afterwards.

The year after *Mortensen*, the Court summarily reversed *United States v. Oriolo*, where the defendant and a woman who worked for him as a prostitute in Philadelphia went to Atlantic City for the day. 146 F.2d 152, 153 (3d Cir. 1944), *reversed*, 324 U.S. 824 (1945). The Mann Act conviction was based on the return trip to Philadelphia. *Id.* The Third Circuit had distinguished *Mortensen* based on

the defendant's statement during that trip informing the woman that she would have to resume the business of prostitution to pay off a fine he had incurred in Atlantic City, supposedly reflecting "a change in the purpose of the trip during its course." *Id*. at 153-54. This Court nevertheless reversed the conviction under *Mortensen*. 324 U.S. at 824.

Several years later, the Court also summarily reversed *Becker v. United States*, 217 F.2d 555 (8th Cir. 1954), *reversed*, 348 U.S. 957 (1955). In that case, the defendant was convicted of violating the Mann Act when the woman who worked for him as an exotic dancer in Wisconsin returned from a brief trip to visit her family in Minnesota for Thanksgiving. *Id*. at 555-56. The Eighth Circuit had distinguished *Mortensen* because the woman (who did not purchase a round trip ticket) was somewhat uncertain about whether she would return to Wisconsin, and the defendant had called her while she was in Minnesota and encouraged her to do so. *Id*. at 556-57. Once again, however, the Court reversed under *Mortensen*. 348 U.S. at 957.

B. As required by stare decisis, courts of appeals applied the innocent-round-trip doctrine in the decades after *Mortensen*.

"Stare decisis—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015) (cleaned up). The Framers understood the importance of this doctrine. *See Ramos v. Louisiana*, 590 U.S. __,

140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part). Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kisor v. Wilkie*, 588 U.S. __, 139 S. Ct. 2400, 2422 (2019) (cleaned up). Favoring precedent over "the proclivities of individuals" ensures that "the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). "Respecting stare decisis means sticking to some wrong decisions" because "it is usually more important that the applicable rule of law be settled than that it be settled right." *Kimble*, 576 U.S. at 455 (cleaned up). Thus, precedent "serves an indispensable institutional role within the Federal Judiciary." *Hubbard v. United States*, 514 U.S. 695, 711 (1995).

Vertical stare decisis—the deference owed to this Court by lower courts—is "absolute, as it must be in a hierarchical system with one supreme Court." *Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part) (cleaned up). The alternative would be "anarchy." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Stare decisis requires that when the Court issues an opinion "it is not only the result but also those portions of the opinion necessary to that result by which [courts] are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996); *see also id.* (stare decisis requires adherence "not only to the holdings of" the Court's "prior cases, but also to their explications of the governing rules of law.") (cleaned

up). The entire "rationale upon which the Court based the results of its" decision is precedent. *Id*. at 66-67.

As required by vertical stare decisis, the courts of appeals (including the Ninth Circuit) applied *Mortensen* to invalidate convictions based on innocent round trips. *See*, *e.g.*, *Twitchell v. United States*, 330 F.2d 759, 760-61 (9th Cir. 1964) (woman who worked at defendant's hotel used by prostitutes took trip to visit her hometown in another state); *United States v. Hon*, 306 F.2d 52, 54-55 (7th Cir. 1962) (defendant and prostitute went on trip to visit prostitute's family in another state); *United States v. Ross*, 257 F.2d 292, 292-93 (2d Cir. 1958) (defendant and prostitute went on weekend trips out of state for recreation only); *Smart v. United States*, 202 F.2d 874, 875 (5th Cir. 1953) (defendant transported prostitutes to another state for sole purpose of taking care of pending legal matters there).

In other cases, however, those courts rightfully affirmed convictions under *Mortensen* in cases that did not involve innocent round trips. *See*, *e.g.*, *Sealed Appellee*, 825 F.3d at 252-54 (defendant took daughter to Mexico and had sex with her there); *Schneider*, 801 F.3d at 192-95 (defendant traveled with minor victim and trip was critical component of defendant's calculated plan to manipulate and abuse minor); *United States v. McGuire*, 627 F.3d 622, 623-26 (7th Cir. 2010) (defendant took minor abroad and molested him there); *United States v. Hoffman*, 626 F.3d 993, 997-98 (8th Cir. 2010) (no purpose for girls to be on trip except to sexually service defendant); *Forrest v. United States*, 363 F.2d 348, 349-52 (5th Cir. 1966)

(women engaged in prostitution during trip); *United States v. Nichol*, 323 F.2d 633, 634 (7th Cir. 1963) (no evidence establishing innocent purpose of trip); *Langford v. United States*, 178 F.2d 48, 49-52, 56 (9th Cir. 1949) (defendant took woman who worked as his prostitute on trip to Mexico to further his control over her and had her engage in prostitution during trip).

Thus, until the Ninth Circuit's opinion in this case, the courts of appeals did not question that *Mortensen* created a generally-applicable rule for innocent round trips. For example, in 1958, the Second Circuit considered itself "bound by precedent to hold the evidence insufficient" because "the Supreme Court in an unbroken line of decisions on the precise point has held that the trip to and fro must be taken as a unit. It cannot be split up into two trips. If appellant and [a prostitute] went to Newark for a weekend of recreation, the return trip cannot be separated from but remains an integral part of a single unitary undertaking." *Ross*, 257 F.2d at 292-93 (citing *Mortensen* and *Oriolo*).

C. In violation of stare decisis, the Ninth Circuit dismissed *Mortensen* as a narrow and fact-bound decision, thereby neutering the innocent-round-trip doctrine within its borders and creating a circuit conflict.

As in *Mortensen*, *Oriolo*, and *Becker*, Pepe's alleged sex acts occurred only at the starting point and ending point of his round trips—his home in Cambodia—and it was undisputed that he made those trips for the wholly innocent purpose of visiting

his family in the United States. App. 4a-8a, 12a; AOB 6-22; ARB 2-3. Thus, each trip was a "complete break or interlude" in any sexual activity. *See Mortensen*, 322 U.S. at 375. Mortensen's reasoning therefore directly applies here. Only an "artificial and unrealistic view of the nature and purpose of" Pepe's "return journey[s]" to Cambodia can sustain his convictions. *See id*. at 376. Each return journey "cannot be considered apart from its integral relation with the innocent round trip as a whole." *See id*. at 375. Each trip was "innocent when it began," so "it remained so until it ended" because "guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends." *See id*. (cleaned up).

Mortensen also cannot be meaningfully distinguished on its facts. During its closing argument at trial and on appeal, the government claimed that Pepe's home was his "personal brothel." ER 766; GAB 41. The Mortensens ran a literal brothel. 322 U.S. at 372. They took an innocent vacation trip out of state with two women who worked with them as prostitutes. *Id*. at 372-73. Pepe's trips to the United States were also undisputedly innocent. App. 12a; AOB 15-16, 19; ARB 2. He purportedly intended to resume child-sex activities in his Cambodian home after his trips. App. 16a-22a; GAB 38-48. But all those on the Mortensens' trip similarly anticipated that the women would resume prostitution upon their return to the brothel. 322 U.S. at 374; *see also id.* at 378 (Stone, C.J., dissenting). The government argued that the jury could properly infer that sex with children must

have been at least one of Pepe's purposes in returning home. GAB 37-48. And that is the same basic argument that the government made, and the Court rejected, in *Mortensen*. *See* 322 U.S. at 374-77; Government's *Mortensen* Brief at *13, 21-29.

The Ninth Circuit nevertheless brushed off *Mortensen* as a "narrow" and "fact-bound" decision where the Court "went out of its way to confine its reasoning" to the particular circumstances of that case and did not "depart[] from the bedrock principle that courts defer to the rational findings of the jury when reviewing the sufficiency of the evidence." App. 12a-16a. Therefore, the Ninth Circuit believed that *Mortensen* "does not remove from the jury's province its ability to rationally find that a person embarked on a trip with an innocent purpose but returned home with a motivating purpose of illicit conduct." App. 15a.

The Ninth Circuit also tried to distinguish *Mortensen* on the grounds that those defendants "had been charged with transporting *other people* with illicit intent" whereas "Pepe was convicted of traveling—or transporting *himself*—with illicit intent," so "the facts that gave rise to the 'integral relation' between the outbound and return journeys in *Mortensen* are thus not present in Pepe's case." App. 13a-14a (cleaned up) (emphasis in original); *see also* App. 15a-16a n.5. It ignored that *Mortensen* rested on the inherent nature of innocent round trips in the context of Congress outlawing "the use of interstate commerce as a calculated means for effectuating sexual immorality." 322 U.S. at 374-77. That analysis is not statute-specific; it applies equally to modern travel-for-sex statutes that do the same thing.

See supra Statement of the Case, Part 1 (explaining that Mann Act cases are authoritative in interpreting such modern statutes). Furthermore, that Pepe traveled alone makes *Mortensen*'s reasoning even more compelling as applied here because he was further "disassociated" from the alleged sexual activity during his trips, thereby buttressing (not undermining) the return trip's "integral relation with the innocent round trip as a whole." 322 U.S. at 375.

The Ninth Circuit failed to give this Court's precedent the respect that stare decisis demands.[3] This is how the author of the Ninth Circuit's opinion described *Mortensen* during oral argument: "What it reads to me like is a sufficiency-of-the-evidence case done by the Supreme Court which is not very good at doing that because they don't normally do that. I don't know why they took this case. And so they felt like they had to try to add some law to it. . . . It is a weird case." Argument Audio at 14:50–15:20; PFR 12-13 n.13. Another judge on the panel apparently recognized that was not the case, saying: "*Mortensen* doesn't seem like it's a pure sufficiency-of-the-evidence case. You don't see the Court really parsing through the record. I know it says words like 'under these circumstances' or 'in this case,' but those are kind of generic words we use often in court opinions. It used much broader language that seemed like it was establishing some kind of doctrine or rule." Argument Audio at 14:20–14:45; PFR 11 n.12. But that judge still joined the

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[3] Pepe's briefs repeatedly invoked stare decisis. AOB 31-33; ARB 6-9; PFR 1-3, 15-16, 18-19. But the Ninth Circuit never addressed it. App. 1a-33a, 41a.

Ninth Circuit's opinion to the contrary, without dissent. App. 1a-33a. That opinion reflects the Ninth Circuit's misunderstandings about insufficient-evidence claims and Supreme Court practice.

Although some insufficient-evidence claims are fact-bound, appellate courts—including this Court—are often called upon to rule on whether a particular theory, even if proved by the government, can support a conviction under a statute as a matter of law. *See*, *e.g.*, *Ciminelli v. United States*, 598 U.S. 306, 308-09 (2023) (wire-fraud conviction caannot be based on right-to-control theory). *Mortensen* was that kind of case. The issue was whether the jury could properly infer the requisite intent from the undisputed facts. 322 U.S. at 373-74. The Court held that it could not because, as a matter of law, the round trip could not be split into two parts. *Id*. at 374-77. In short, the Court adopted the "ordinary" concept of an innocent round trip and rejected the "artificial and unrealistic view" proffered by the government. *Id*. at 375-76. This is a generally-applicable doctrine, not just a case-specific finding.

That conclusion is confirmed by long-established practice. *See Dick v. New York Life Insurance Co.*, 359 U.S. 437, 448-55 (1959) (Frankfurter, J., dissenting) (recounting history of discretionary certiorari jurisdiction). "'The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should

be authoritatively declared by the final court.' Questions of fact have traditionally been deemed to be the kind of questions which ought not to be recanvassed [t]here unless they are entangled in the proper determination of constitutional or other important legal issues." *Id*. at 453-54 (quoting Chief Justice Taft about 1925 Judiciary Act). Accordingly, the Mortensens asked this Court to exercise its jurisdiction because their case involved "the scope, intent and meaning of" the Mann Act and there was "a direct conflict" between their case and other federal cases. *Mortensen v. United States*, Brief on Behalf of Appellants, 1943 WL 54708, *2-4 (Feb. 21, 1943) (invoking 1925 Act); *see also* Government's *Mortensen* Brief at *1 (Supreme Court jurisdiction rested on 1925 Act). Dismissing the resulting opinion as "narrow" and "fact-bound" disrespected this Court's role and supremacy. App. 12a-15a.

The Ninth Circuit also effectively ignored subsequent precedent applying *Mortensen*'s innocent-round-trip-doctrine. In a footnote, it discounted this Court's reversals in *Oriolo* and *Becker* as "just as fact-bound" as *Mortensen*. App. 16a n.6. It similarly disregarded, without discussion, its own circuit precedent applying *Mortensen*. App. 16a; *see supra* Part 1.B. The Ninth Circuit failed to explain why these subsequent opinions would (or could) apply *Mortensen* at all if it was truly only a "narrow" and "fact-bound" decision confined to its particular circumstances. App. 12a-16a. As discussed above, other courts of appeals have consistently applied

Mortensen's innocent-round-trip doctrine too. *See supra* Part 1.B. The Ninth Circuit's opinion therefore created a circuit conflict on the matter.

D. The Ninth Circuit's resurrection of the travel theory rejected in *Mortensen* will have sweeping and far-reaching consequences—allowing the government to manufacture federal jurisdiction for purely-local crimes under existing statutes and Congress to enact new statutes expanding federal police power even further.

Allowing the government to prevail on the theory rejected in *Mortensen* will have "sweeping" and "far-reaching" consequences, and the Court cannot assume that government will use the theory "responsibly" because that "places great power in the hands of the prosecutor." *See Dubin v. United States*, 599 U.S. 110, 130-31 (2023) (cleaned up).

First, the theory allows existing federal criminal statutes to reach local crimes that must be dealt with by the appropriate foreign or state authorities. Consider a father living in Los Angeles who regularly molests his daughter—a horrible but purely-local crime beyond the reach of federal law enforcement. That is, until the father goes on an unrelated business trip to New York alone and then returns home. Under the theory endorsed by the Ninth Circuit, he could be convicted under the statutes charged here because one motivating purpose for going home was to resume molesting his daughter.

The theory would also apply to many other statutes that similarly make traveling with certain intents federal crimes. Consider that same Los Angeles man, but instead of molesting his daughter he beats his wife. His unrelated business trip to New York would also convert that purely-local crime to a federal offense. *See* 18 U.S.C. § 2261(a)(1) (prohibiting traveling in interstate or foreign commerce with intent to commit domestic violence); *see also* 18 U.S.C. § 2261A(1) (same for stalking); 18 U.S.C. § 2262(a)(1) (same for violation of protective order).

By sanctioning the theory rejected in *Mortensen*, the Ninth Circuit also invites Congress to similarly federalize any ongoing local criminal activity by enacting new statues with an interstate-or-foreign-travel element, allowing the government to ensnare such criminals as long as they take an innocent round trip out of state at some point. The Constitution denies such broad police power to the federal government. *See Bond v. United States*, 572 U.S. 844, 854 (2014) ("A criminal act committed wholly within a State cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.") (cleaned up); *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) ("The Constitution requires a distinction between what is truly national and what is truly local.").

2. The Court should also clarify that *Mortensen*'s dominant-motive test was not dicta and applies when a statute criminalizes travel in commerce or across state lines with an improper purpose or intent.

If (contrary to *Mortensen*) Pepe's innocent rounds trips could be split to consider the return legs in isolation, a separate but related question is how to define the mens rea elements for the charged crimes. The district court gave, and the Ninth Circuit approved, government-requested instructions telling the jury: "For [each count], the government must prove beyond a reasonable doubt that a dominant, significant, or motivating purpose of defendant's [travel in foreign commerce / crossing a state line] was to engage in [illicit sexual conduct / a sexual act with a person who was under the age of 12 years]." App. 28a-33a; AOB 62-69; ARB 28-34.[4] It did so over the objections of Pepe, who argued that the jury should instead be instructed that the government "must prove beyond a reasonable doubt that he [traveled / crossed state lines] for the sole or dominant purpose of engaging in [illicit sexual conduct with another person / a sexual act with a person under the age of

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[4] Although § 2241(c) used the word "intent" and § 2423(b) used the word "intent" in its caption and the word "purpose" in its text, the parallel instructions for all four counts reflects that those terms are synonymous. *See Voisine v. United States*, 579 U.S. 686, 691 (2016) (equating "intentionally" to "purposefully"); *Apprendi v. New Jersey*, 530 U.S. 466, 493 n.17 (2000) (Black's Law Dictionary "unsurprisingly defines 'purpose' as synonymous with intent"); *Sandstrom v. Montana*, 442 U.S. 510, 521 n.11 (1979) (""intent' and 'purpose' are roughly synonymous").

twelve]." App. 30a; AOB 63-64; ARB 29-30. Because this dispute hinges on a decades-long drift from this Court's precedent, the issue also merits review.

Once again, *Mortensen* is the key case. To consider the insufficient-evidence claim presented there, the Court first had to establish the elements of the crime, so it quoted the relevant section of the Mann Act and then made this statement:

> The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. *An intention that the women or girls shall engage in the conduct outlawed by Section 2* must be found to exist before the conclusion of the interstate journey and *must be the dominant motive of such interstate movement*. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

322 U.S. at 374 (cleaned up) (emphasis added). Again, the Court then found that no jury could properly find beyond a reasonable doubt that the Mortensens transported the women home to Nebraska for the purpose of prostitution, even though they expected them to resume those activities. *Id*. at 374-77; *see supra* Part 1.A. Thus,

the Court interpreted the Mann Act's "purpose" language to require that illicit sex be "the dominant motive" of the travel, and then it applied that legal ruling to the facts to reach the conclusion that the evidence was insufficient to support the Mortensens' convictions.

Once more stare decisis comes into play. *See supra* Part 1.B. It requires adherence not only to the holdings of this Court's cases, "but also to their explications of the governing rules of law." *Seminole Tribe*, 517 U.S. at 67 (cleaned up). That is exactly what *Mortensen*'s "dominant motive" ruling was—an explication of the governing rule of law. Alternatively, it is binding as the "rationale upon which the Court based the result[.]" *Id*. at 66-67. The relevant passage therefore satisfies the definition of precedent as "those portions of the opinion necessary to [the] result[.]" *Id.* at 67.

That the "dominant motive" ruling is precedent—not dicta—is confirmed by *Mortensen*'s dissenting opinion, which reasoned that taking the prostitutes on an innocent vacation trip was not incompatible with the undisputed fact that, in bringing the woman back to Nebraska, the Mortensens "intended that they should resume there the practice of commercial vice, which in fact they did promptly resume[.]" 322 U.S. at 378 (Stone, C.J., dissenting). Whether the dissent's conclusion that the verdict was "supported by amble evidence" (*id*.) was based on the belief that that was enough to establish a "dominant motive" or, instead, that (contrary to what the majority held) something less than a "dominant motive" was

sufficient, what exactly the Mann Act required with regard to purpose was clearly the legal principle at the heart of the case. That is also confirmed by the government's brief in *Mortensen*, in which it argued that "the immoral purpose need not be the sole object of the journey" but just "one of the objects" or "one of the purposes" of the return trip home. Government's *Mortensen* Brief at *21-25. Thus, in a case where it was undisputed that all intended the prostitutes to resume working upon return to the brothel, the Court considered the government's multiple-purposes argument before concluding that what really mattered was the "dominant motive" for the travel. That legal holding was necessary to the result.

In the following years, the Court treated *Mortensen*'s dominant-motive language as a holding about the Mann Act's intent element. In *Cleveland v. United States*, it affirmed convictions of members of a Mormon sect because the "petitioners in order to cohabit with their plural wives found it necessary or convenient to transport them in interstate commerce" and that "unlawful purpose was the *dominant motive*." 329 U.S. 14, 19-20 (1946) (emphasis added). Then, in *Hawkins v. United States*, the Court cited *Mortensen* for the proposition that the Mann Act required that the defendant's "dominant purpose" in making a trip be to facilitate prostitution. 358 U.S. 74, 79 & n.6 (1958).

In light of all this, *Mortensen*'s "dominant motive" ruling is binding precedent. But the Ninth Circuit nevertheless upheld the district court's "dominant, significant, or motivating purpose" instructions (App. 30a-31a) based on its prior

opinion in *United States v. Flucas*, which barely mentioned *Mortensen*, dismissing its "dominant motive" language as "dicta." 22 F.3d 1149, 1158-59 (9th Cir.) (citing *Vang*, 128 F.3d at 1071-72), *cert. denied*, 143 S. Ct. 320 (2022).[5] That idea is based on the premise that, supposedly, "'there was in *Mortensen* a total lack of evidence of any purpose for the interstate journey other than the innocent one of giving the women a deserved vacation from their work as prostitutes in their bawdy house.'" *Id.* at 1160 (quoting *United States v. Ellis*, 935 F.2d 385, 390 (1st Cir. 1991)). Other courts have repeated the same thing about the "dominant motive" language being dicta because there was no immoral purpose at issue in *Mortensen*. *See*, *e.g.*, *McGuire*, 627 F.3d at 625.

As discussed above, *Mortensen*'s "dominant motive" ruling is precedent, not dicta. And the factual premise underlying the circuits' dicta claim—that the transportation in *Mortensen* involved no immoral purpose—is simply wrong because

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[5] The *Flucas* majority also quoted the Seventh Circuit's rejection of *Mortensen* on the grounds that "'Congress has not used the word 'dominant' in either the Mann Act or § 2423(b), and we are not prepared to read such a requirement into the statutes.'" 22 F.4th at 1159 (quoting *Vang*, 128 F.3d at 1072). That ignores that this Court was doing what courts do—interpreting a statute. "What Congress has outlawed by the Mann Act," it held, "is the use of interstate commerce as a calculated means for effectuating sexual immorality." *Mortensen*, 322 U.S. at 375. In so "construing this Act," the Court "held" that such activity "'must be the dominant motive'" of the travel. *Hawkins*, 358 U.S. at 79 n.6 (discussing *Mortensen*).

it was undisputed that the Mortensens intended that the women would resume prostitution upon their return to the brothel, so getting them back to that work was at least a purpose of transporting them home. *See* 322 U.S. at 374; *id*. at 378 (Stone, C.J., dissenting); Government's *Mortensen* Brief at *22-23; *see supra* Part 1.A. The Court's decision reversing their convictions therefore rested on the fact that it could not have been "the *dominant* motive of such interstate movement" given the innocent-round-trip doctrine. *Mortensen*, 322 U.S. at 374 (emphasis added). That conclusion is buttressed by the two Mann Act convictions summarily reversed by the Court based on *Mortensen*, where there appears to have been no dispute that a purpose of each woman's return travel was to resume her illegal work, but the Court nevertheless concluded that each conviction could not stand under *Mortensen*. *See Becker*, 217 F.2d at 555-57, *reversed*, 348 U.S. 957; *Oriolo*, 146 F.2d at 153, *reversed*, 324 U.S. 824; *see supra* Part 1.A.

Judge Bybee dissented in *Flucas*. 24 F.4th at 1165-79. He rightly concluded that the "dominant, significant, or motivating purpose" instruction "lowered the government's burden of proof, contrary to the Supreme Court's decision in *Mortensen*[.]" *Id.* at 1166; *see also id.* at 1177 ("My concerns are not mere classroom hypotheticals. When the district court added that word 'motivating' to the jury instruction, it lowered the government's burden of proof. . . . That is a clear departure from the Supreme Court's decision in *Mortensen*."). He accurately

described the decades-long drift away from *Mortensen* in a lengthy historical review that can only be partially summarized here:

> Federal courts since *Mortensen* have struggled with the Court's "dominant motive" formulation. Indeed, courts turn handsprings trying to define "dominant." For some time, the courts debated whether *Mortensen* meant that the jury must find that illicit sexual conduct was "*the* dominant motive" or "*a* dominant motive" for the interstate transportation. We were concerned that a person could have more than one dominant purpose. The courts quickly agreed, however, that people travel with mixed motives, and that so long as "a dominant motive" was to traffic in prostitution or another illegal criminal sex offense, the Mann Act was satisfied. But the courts thought that the phrase "dominant motive" was still confusing and began tinkering with alternative word formulas. . . . In the aftermath of *Mortensen*, a number courts of appeals looked to causation language borrowed from tort. They variously required the government to prove that sex trafficking was an "efficient purpose," an "efficient and compelling purpose," or a "compelling and efficient purpose." In 1997, in an influential opinion reviewing the Mann Act's history and the cases, the Seventh Circuit observed that courts have used a "dominant purpose" standard but have regarded "dominant" as synonymous with

> "compelling" or "motivating." . . . Although, prior to [then], the phrase "motivating purpose" had not appeared regularly in cases, it had been used by some courts, usually in a casual way. Around 2000, however, the phrase began to show up more frequently.

Id. at 1167-70 (cleaned up) (emphasis in original) (discussing cases). As Judge Bybee demonstrated, "the federal courts tried to capture Congress's mood by adding their own word formulas," but in doing so they "strayed from *Mortensen*'s determination that the Mann act requires engaging in illicit sexual activity play a dominant role in the decision to travel between jurisdictions." *Id*. at 1169 (cleaned up). Looking at the plain meanings of "dominant," "significant," and "motivating," Judge Bybee concluded "that 'motivating' can[not] bear the same weight as either 'dominant' or 'significant.'" *Id*. at 1174.[6] "Once the jury is told that travel must be '*a* motivating purpose,' it is a short step for the jury to think that the government satisfies its burden if it has proven that interstate travel for illicit purposes was *any* motivating purpose, no matter how insignificant." *Id*. at 1174-75 (emphasis in original).[7] Another judge on the panel dismissed that concern in a cursory opinion

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[6] Additionally, to the extent "that 'purposes' and 'motives' are the same, a 'motivating purpose' is redundant. It's like saying 'purposeful purpose' or 'motivating motive.'" *Id*. at 1170.

[7] This problem was aggravated in Pepe's case because, unlike in *Flucas* and other cases allowing the "dominant, significant, or motivating purpose" instruction, the district court refused to at least include an additional instruction that "the

asserting that "dominant," "significant," and "motivating" were "interchangeable" words with no "perceptible difference." *Id.* at 1165 (Schroeder, CJ, concurring) (cleaned up). That, of course, begs the question why anything should be added to *Mortensen*'s "dominant motive" standard given that, however judges may parse the language, lay jurors will surely think that the additional terms "significant" and "motivating" mean something different—and lesser. *See McGuire*, 627 F.3d at 625 (recognizing that adding "significant" or "motivating" to "dominant" will "define it down"). But the *Flucas* majority opinion was silent on this important issue. 22 F.4th at 1150-64.

Judge Bybee is not alone in pointing out the confusion in this area. For example, in *United States v. McGuire*, Judge Posner wrote this on behalf of the Seventh Circuit:

> The courts have had trouble dealing with cases in which the travel prosecuted under section 2423(b) may have had dual purposes, only one of which was to have sex with minors. The statute says "the" purpose must be sex rather than "a" purpose, but . . . we approved a jury instruction which said that sex didn't have to be "the sole purpose" of the travel, though it did have to be "a dominant purpose, as opposed

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government must prove that the criminal sexual activity was not merely incidental to the transportation." AOB 64-68; ARB 30-33. The Ninth Circuit endorsed that decision too. App. 31a-33a.

> to an incidental one. A person may have more than one dominant purpose for traveling across a state line." To speak of multiple dominant purposes is not idiomatic, but given the evidence in [our prior case] the precise wording of the instruction hardly mattered. Other cases, too, fasten on "dominant," but then define it down to mean "significant," "efficient and compelling," "predominating," "motivating," not "incidental," or not "an incident" to the defendant's purpose in traveling. These verbal formulas are strained; the courts turn handsprings trying to define "dominant" as if it were a statutory term, which it is not.

627 F.3d at 624-25 (cleaned up). But unlike Judge Bybee, who recognized lower courts' obligation to follow *Mortensen*, Judge Posner "place[d] the *blame* for judicial preoccupation with the word 'dominant' on the Supreme Court, which in *Mortensen*[,] a Mann Act case, said that engaging in forbidden sexual activity 'must be the dominant purpose of such interstate movement.'" *Id*. at 625 (cleaned up) (emphasis added). Judge Posner then wrongly disregarded that holding as "dictum." *Id*.

Judge Posner proposed that, instead of continuing to fiddle with strained verbal formulas using terms like "dominant," "significant, or "motivating," "it would be better to ask whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially." 627 F.3d at 625 (cleaned up).

Consistent with this opinion, Pepe argued to his jury that if his return trips home would have happened anyway, regardless of any sex acts, the sex acts could not have been a dominant, significant, or motivating purpose of the travel. ER 810-19, 836-37. In its rebuttal argument, the government responded, "That's not the standard. That's not what the judge told you." ER 840. Pepe objected that that misstated the law and renewed his request for a defense-theory instruction, particularly a version parroting *McGuire*: "One does not have the requisite purpose/intent if the travel/crossing a state line would have still taken place even had a sex motive not been present." ER 730, 851. The district court refused. ER 851-52. On appeal, Pepe argued that was an additional instructional error. AOB 68-69; ARB 33. The government complained that this was an improper "'but-for' causation standard," but it failed to explain how sex acts can be anything more than "merely incidental" to travel if the trip would have been exactly the same with or without them. GAB 71-72. The Ninth Circuit likewise ignored that when holding that "a purpose can be 'dominant, significant, or motivating' without necessarily being a 'but-for' cause of an action." App. 33a.

All this demonstrates that the Court's guidance is needed on how to define the mens rea elements of travel-for-sex crimes. It should clarify that *Mortensen*'s "dominant motive" language controls and prohibits using other terms—like "motivating purpose"—that dilute that standard and reduce the government's burden of proof.

3. This case is an excellent vehicle to address the questions presented and provides an opportunity to impress upon the lower courts the importance of stare decisis.

Both issues raised in this petition were preserved in the district court, squarely presented on appeal, and decided in a publish opinion. App. 12a-16a, 29a-36a; AOB 30-45, 62-69; ARB 2-17, 28-34; PFR 1-21. With regard to the first issue, the facts of this cases fall well within the innocent-round-trip doctrine, so the stare decisis effect of *Mortensen* on that matter is dispositive; if, contrary to what the Ninth Circuit held, that doctrine survives, then Pepe's convictions must be reversed. *See supra* Part 1. As for the second issue, the Ninth Circuit acknowledged that the jury could have rationally acquitted Pepe (App. 10a, 33a), so the correct description of the mens rea elements was of the utmost importance; any instructional error cannot be dismissed as harmless. *See supra* Part 2. This case is therefore an excellent vehicle to address both of the questions presented.

Granting review would also serve the goal of enforcing, and thereby protecting, stare decisis. *See supra* Part 1.B. As discussed above, the Ninth Circuit has failed to follow *Mortensen*'s innocent-round-trip doctrine (thereby creating a circuit conflict), and courts of appeals throughout the country have improperly disregarded *Mortensen*'s dominant-motive test as dicta. "Such defiance of vertical stare decisis, if allowed to stand, substantially erodes confidence in the functioning of the legal

system." *Andrus v. Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., joined by Breyer and Kagan, JJ., dissenting from denial of certiorari).

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

January 29, 2024

Respectfully submitted,

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