

**CONFIDENTIAL SUBMISSION TO
CHILD EXPLOITATION AND OBSCENITY SECTION
RE JEFFREY EPSTEIN**

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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March 28, 2008

BY HAND DELIVERY

Honorable Sigal P. Mandelker
Deputy Assistant Attorney General
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Dear Ms. Mandelker and Mr. Oosterbaan:

Enclosed, please find our submission as discussed at the meeting. This submission includes a brief executive summary; an analysis of the relevant federal statutes and their application to the facts in this matter; a discussion of the *Petite* Policy, and an appendix, which includes significant documentary evidence including testimony by witnesses that was obtained after the Deferred Prosecution Agreement was signed. For the reasons we discuss in the submission, we do not believe this is an appropriate case for federal prosecution.

I want to call your attention to the recent statements made under oath by some of the alleged victims. As we have previously explained, the United States Attorney's Office has refused to disclose the identities of the alleged victims, and First Assistant United States Attorney [REDACTED] has made the unusual demand that Mr. Epstein's defense team make no effort to discover their identities or contact any of them. See November 5, 2007 Letter from J. [REDACTED], Exhibit 1. However, due to a procedure available under state law, and following the wave of recent lawsuits that have been filed against Mr. Epstein (ironically by Mr. [REDACTED] former law partner), we have been able to engage in discovery and take sworn statements from several of the alleged victims. These statements, which would never have been obtained under the First Assistant's directive, are extremely important for two reasons. First, because this new testimony post-dates the state investigation, all discussions regarding plea negotiations, the execution of the federal Deferred Prosecution Agreement, and the drafting of any prosecution memos, ***no federal or state prosecutor has ever reviewed this material.***¹ Second, and without

¹ However, in connection with Ms. [REDACTED] statement, which was taken by the FBI, she may have been debriefed by either the FBI or a federal prosecutor.

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exception, *the new evidence strongly supports the conclusion that this is not a case of federal concern.*

This recent testimony can be found in its entirety. See Exhibits 2-7. This evidence clearly calls into serious doubt the notion that the alleged conduct constitutes a federal crime. For example, one of the alleged victims adamantly states that she “never had sex with [Mr. Epstein]” and that she did not know him and had absolutely no contact with him—be it through Internet chatrooms, email, or phone—prior to her coming to his home. [REDACTED] (deposition) at 24, 30, Exhibit 3. The same woman stated that she was not persuaded, induced, enticed or coerced by anyone to engage in any sexual activity. Id. at 31. This woman, who was described as the “lynchpin” of the federal prosecution particularly due to her age at the time of the alleged conduct, expressly admits to lying to Mr. Epstein about her age. Id. at 37. Another alleged victim made similarly exculpatory statements to the FBI. She stated that not only did she always make sure she had a fake ID with her and lie to Mr. Epstein by telling him she was 18, but that she also had conversations with other women in which these women hoped that “[REDACTED] didn’t find out [their] age[s].” [REDACTED] Tr. at 45, Exhibit 2. When this alleged “victim” was asked if Mr. Epstein ever “pulled [her] closer to him in a sexual way,” she responded, “I wish. No, no, never, ever, ever, no, never. [REDACTED] is an awesome man, no.” Id. at 21. Yet another alleged victim stated that Mr. Epstein “never touched [her] physically” and that all she did was “massage[] his back, his chest and his thighs and that was it.” [REDACTED] Tr. at 12-13, Exhibit 4. Finally, another alleged victim stated in no unclear terms that there was never any discussion over the phone about her coming over to Mr. Epstein’s home to engage in sexual activity: “The only thing that ever occurred on any of these phone calls [with [REDACTED] or another assistant] was, ‘Are you willing to come over,’ or, ‘Would you like to come over and give a massage.’” [REDACTED] Tr. at 15, Exhibit 5A. And as each of these women confirmed, this woman stated: “[Mr. Epstein] never tried to force me to do anything.” Id. at 12.

We believe that these transcripts are of critical importance because they clearly indicate that not only did no intercourse take place with these women, but that any sexual activity that took place was unplanned and consensual. Furthermore, these women corroborate the fact that there was no pattern of luring or enticing these women to do more than give a massage, and that any activity that went beyond the massage was by no means forced upon them. We would urge you to review these particular sworn statements in their entirety both because this is new evidence that post-dates the Deferred Prosecution Agreement and because it discloses critical information about the true facts and circumstances of this case.

Importantly, at your request, we have limited the scope of the submission. Thus, this submission does not focus extensively on our concerns relating to the principles of federalism, abuse of power, prosecutorial misconduct, or many of the improper tactics used by federal

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prosecutors.² Notwithstanding that, we think it important that you be made aware of the types of actions that have caused us serious concern, and have influenced the process and distorted the facts:

- Federal involvement in a state criminal prosecution without any communication with state authorities;
- The issuance of subpoenas and letters requesting documents whose subject matter had no connection to the conduct at issue including medical records and tax returns (for example, subpoenas were issued to an agent of Mr. Epstein's counsel without following guidelines provided in the United States Attorneys' Manual which ask for: "All documents and information related to the nature of the relationship between [the agent] and Mr. [REDACTED] Epstein, including all third party contacts had on behalf of Mr. Epstein all agreements not limited to, retainer agreements; employment agreements; billing statements . . . telephone logs . . . appointment calendars/datebooks . . .");
- The use of threats of expanding the investigation to include money transmitting and money laundering, though none of the mandatory prerequisites could be described (for example, the federal prosecutors referred to the following litany of federal statutes in a letter to a potential grand jury witness as the universe of relevant federal violations: "including but not limited to, possible violations of Title 18, United States Code, Sections 2, 371, 1512, 1591, 1952, 1956, 1960, 2421, 2422, and 2423.") nor was any specific unlawful activity, which is the predicate act for a money laundering charge, ever identified;
- The nomination of an individual closely associated with one of the Assistant United States Attorneys involved in this case for the highly lucrative position of independent attorney demanded for the alleged victims;
- The insistence on a victims notification letter, which invited all alleged victims to make sworn statements at Mr. Epstein's state sentence even though there was no basis for inviting alleged victims of federal crimes to make statements in a state proceeding;

² The relevant documents for each of these propositions are available for your review upon request.

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- Clear violations of ethics rules by discussing specific details of the case and negotiations with a New York Times Reporter; and
- The relationship between the law firm representing several of the alleged victims in civil suits against Mr. Epstein and the First Assistant United States Attorney from the Southern District of Florida.

We believe these concerns are significant and that they should have bearing on the reliability and integrity of the investigation. We respectfully reserve our right to raise our concerns in the future.

Furthermore, our submission is guided by an overarching principle: Federal authority should not be stretched to override the considered judgment of a duly elected state official who, guided by a highly professional prosecutorial staff, carefully assessed the actual facts (not a sensationalized, fictionalized version of them), applicable state law, and fundamental principles of fair treatment as embodied in the practical experience of that highly respected State's Attorney's Office. A career state prosecutor looked the witnesses in the eye, evaluated the facts, and took this matter before a state grand jury, and thereafter invoked the judicial process of the State of Florida to bring about a just and fair resolution consistent with that Office's experience. The record is clear and undisputed: This matter began as a state matter in Palm Beach County; it was treated with professionalism and thoroughly investigated by the State's Attorney's Office; then, in an affront to principles of comity in our federal republic, disgruntled local police officials seeking to subvert the thoughtful judgment of state officials aired their disagreement publicly to an eager press and summoned the FBI. This should not be. But that is the undisputed genesis of a federal investigation that, in view of Congress' intent embodied in the statutes that we will closely analyze in this submission, should never have been commenced.

Federal authorities in this case have brushed aside federalism-inspired methods of professional conduct, stretched both law and facts, and emphasized the importance of financial gain -- not only to individual women but to private attorneys who stood to benefit financially from the federal authorities' involvement. The result has been that many of the witnesses who swore under oath that there was no inappropriate conduct whatever (much less a crime), have now been inspired by the beguiling prospect of financial gain and have, filed civil complaints demanding \$50 million each. This should not be. There is no justification for stretching federal law, stretching the facts, and then bringing the power of the federal government to tear apart what the State of Florida has determined is a just and fair resolution -- namely, a felony conviction under criminal statutes duly passed by the Florida legislature. That considered judgment--grounded in law and in principles of fair treatment of all persons, regardless of the wealth or station in life--should be respected in the finest traditions of federalism and comity.

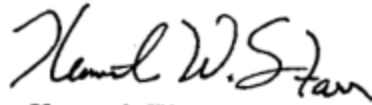
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We hope that your office and the Department will consider all of the evidence included in the submission and exhibits we put forth today, as well as the areas of concerns on which we did not focus extensively, because as we believe that all aspects of reconsideration in this case fall squarely within the overseeing responsibilities of the Department of Justice. We greatly appreciate your time and consideration of this matter.

Sincerely,



Kenneth W. Starr

SUBMISSION TO THE UNITED STATES DEPARTMENT OF JUSTICE IN THE
MATTER OF [REDACTED] E. EPSTEIN

This submission addresses (i) whether existing federal statutes, 18 U.S.C. §§ 2422(b), 1591 and 2423, apply to the conduct at issue; and (ii) whether the circumstances of this case overcome the significant hurdles established by the Department's *Petite* Policy against dual and successive prosecution. As explained below, existing statutes do not apply to Mr. Epstein's conduct, and the *Petite* Policy's bar against successive prosecution has not been surmounted.

EXECUTIVE SUMMARY

Jeffrey Epstein, a successful self-made businessman with no prior criminal history, should not be prosecuted federally for conduct that amounts to, at most, the solicitation of prostitution. To prosecute Mr. Epstein federally based upon the facts presented by this case would be an unprecedented exercise of federal power and use of federal resources. It would effectively represent the adherence to a novel legal theory never before sanctioned by federal law. As described more fully below, Mr. Epstein did not engage in any conduct covered by any of the three federal criminal statutes being considered for federal prosecution, namely 18 U.S.C. §§ 2422(b), 2423(b), and 1591. Moreover, the new evidence obtained through the use of a State discovery statute and in connection with the civil lawsuits that have been filed confirms that federal involvement in this matter is inappropriate. We highlight this evidence for you because it has never been reviewed by the federal or state prosecutors overseeing this matter. *See Exhibits 2-7.*

Mr. Epstein has had a home in Palm Beach, Florida for the past 20 years. As a routine part of Mr. Epstein's activities while at his residence in Florida, which included attending to business, socializing, visiting his elderly mother, and attending to doctors' appointments, Mr. Epstein often had masseuses come to his residence to provide him massages following his exercise. Mr. Epstein did not personally schedule the massage appointments or communicate with the women who provided massages to him, either over the telephone or otherwise, prior to the time they arrived at his residence. Rather, all these appointments were scheduled by his assistants. Often it was the masseuse who contacted Mr. Epstein's assistant inquiring about Mr. Epstein's availability rather than vice versa, the message pads reflecting incoming calls to Mr. Epstein's house, which were improperly seized during the execution of a State search warrant (actions for which the State later apologized) are replete with requests by masseuses to return to Mr. Epstein's residence to provide massages.¹ *See Message Book Entries, Exhibit 8.*

The majority of the massages were just that—massages and nothing else. Mr. Epstein would routinely be on the telephone conducting business while he received his massage. At times, the masseuses would be topless, and some sexual activity might occur, primarily self-

¹ We are including some but not all examples of this pattern of behavior but are open to sharing more examples upon request.

masturbation on the part of Mr. Epstein. On other occasions, no sexual activity would occur at all. There was no particular pattern or practice as to which masseuse would be scheduled on any particular day—if at all—or whether any sexual activity might occur. Indeed, many times Mr. Epstein would not know which masseuse his assistants had scheduled until that individual showed up. See [REDACTED] Toll Records, Exhibit 9. Mr. Epstein requested the individual be over the age of 18. The vast majority of the masseuses were in fact 18 or over, and the testimony available to us in this case demonstrates that those under the age of 18 have admitted to systematically lying to Mr. Epstein about their age. See [REDACTED] at 38-39, Exhibit 10; [REDACTED] Tr. at 9, Exhibit 4; [REDACTED] Tr. at 6, 8, 22, 45, Exhibit 2, [REDACTED] Tr. 13, Exhibit 11; [REDACTED] Tr. at 12, Exhibit 12; [REDACTED] Tr. at 5, Exhibit 13; [REDACTED] Tr. at 14-15, Exhibit 14.

In light of these facts, the case against Mr. Epstein lacks any of the hallmarks that typify federal prosecution under the identified statutes. Not only did all of the conduct take place in Mr. Epstein's home in Palm Beach, there was no commercial for-profit enterprise; no interstate component; no use by Mr. Epstein of an instrumentality of interstate commerce; no violence; no force; no alcohol; no drugs; and no child pornography.

An objective review of the facts should make clear that this is not a federal case. Indeed, Mr. Epstein's counsel have reviewed every case involving 18 U.S.C. §§ 2422(b), 2423(b), and 1591 and have not found a single case suggesting that federal prosecution can be brought under these facts. Instead, as the State Attorney's Office determined, and still believes, Mr. Epstein was a customer, a "John," for whom prosecutions are best left to the State to address. Notably, the Department of Justice has repeatedly recognized the predominant State role in such prosecutions, even as recently as November 9, 2007.²

Besides lacking the facts necessary to support a federal prosecution, the federal prosecutors responsible for this case have employed a process rife with prosecutorial misconduct, abuse and profound lack of respect for the State Attorneys of Florida. First, following the imposition of a State charge against Mr. Epstein, the local police chief, who disagreed with the decision of both the State Attorney's Office and the Grand Jury, took actions that undermined the credibility of everything that followed in the federal investigation; he referred the matter to the FBI and at the same time released the police reports containing raw allegations to the press. *Significantly, these reports, when compared to the actual transcripts of sworn taped interviews of witnesses, are demonstrably inaccurate. They contain both glaring misquotes and omissions of fact.*

² See November 9, 2007 DOJ letter to the Judiciary, Exhibit 15 ("[P]rostitution-related offenses have historically been prosecuted at the state or local level. This allocation between state and Federal enforcement authority does not imply that these crimes are less serious, but rather reflects important structural allocations of responsibility between state and Federal governments . . . the Department is not aware of any reasons why state and local authorities are not currently able to pursue prostitution-related crimes such that Federal jurisdiction is necessary.").

The intentional release of the police reports to the press not only shaped how the prosecutors in the United States Attorney's Office viewed the case, but more importantly, influenced many of the witnesses who would later be interviewed by the FBI. Indeed, multiple civil lawsuits have recently been filed against Mr. Epstein (many by the former partner of First Assistant United States Attorney [REDACTED] [REDACTED]); and those suits contain word-for-word narratives taken directly from the publicly released police report, narratives that are factually inaccurate when compared to the actual transcripts.

Many of Mr. Epstein's alleged victims and other witnesses have recently given sworn statements establishing that (i) Mr. Epstein was only interested in women over 18; (ii) they lied and told Mr. Epstein they were 18 when they were not; (iii) there was no interstate travel; (iv) there was no use of the Internet or telephone to communicate with Mr. Epstein; (v) there was no inducement over any instrumentality of interstate commerce; (vi) there was no force or coercion by anyone. See Herman Public Statement, Exhibit 16.

The facts—as opposed to the deeply flawed press reports—were carefully assessed by experienced State prosecutors who aggressively enforce State criminal laws. Following an extensive 15-month State investigation by the Florida State Attorney's Office in Palm Beach, led by the chief of the Sex Crimes Division, Mr. Epstein was indicted by a State Grand Jury on a single felony count of solicitation of prostitution. During the investigation, the State prosecutor exhaustively reviewed the evidence, met face-to-face with many of the alleged victims, considered their credibility—or lack thereof—and considered the extent of exculpatory evidence, including a psychosexual evaluation of Mr. Epstein and a polygraph examination demonstrating that Mr. Epstein genuinely believed at the time of the alleged conduct that the State's key witness was over the age of 18. Then, after months of negotiations, the State reached what it believed was an appropriate resolution of the case. Importantly, this resolution was consistent with that of cases involving other defendants who had engaged in similar conduct. Implementation of the State resolution of the case was held in abeyance, however, due to the unexpected commencement of the successive federal criminal investigation.

After many months of attempting, to no avail, to fit this case into its vision of what it initially believed (based upon the inaccurate police reports) to be a wide-spread commercial trafficking ring targeting minors, the United States Attorney's Office for the Southern District of Florida agreed to defer prosecution to the State. Notably, however, the Agreement also contained many unorthodox requirements, including requiring Mr. Epstein not only to blindly agree to pay an undisclosed list of alleged victims a minimum of \$150,000 each, but also ***to pay for an attorney to represent such unidentified victims if any chose to bring civil litigation against him.*** The United States Attorney's Office also represented at the time the Agreement was signed that it had identified, on a list, up to 40 alleged minor victims of federal crimes, and to bolster the claim that they were minors suggested that they required a guardian ad litem. This is all untrue. In fact, it was later firmly established that only one girl on the list was still a minor, and the other women on the list, after examining their testimony, could in no way qualify as "victims." There is now also a sworn statement to the effect that the FBI attempted to persuade

at least one of these women that she was in fact a “victim” of federal crimes when she herself repeatedly confirmed that she was not. *See, e.g.* [REDACTED] Tr. at 10, 19-22, 31, 57-58, Exhibit 2; [REDACTED] Tr. at 9-12, Exhibit 5A; [REDACTED] Tr. at 7, Exhibit 5B.

Beyond that, because the United States Attorney’s Office had not, and still has not, made any effort to coordinate with its State counterpart about the case. Thus, the Deferred Prosecution Agreement put Mr. Epstein in the extraordinary position of requiring him, not the federal authorities, to convince the State Attorney’s Office to impose a more severe charge and punishment than the State Attorney’s Office (and the State grand jury) had determined to be appropriate.

As a result, Mr. Epstein, and the United States Attorney’s Office—which has insisted that its prosecutorial decision in this case was mandated by policy decisions in Washington, D.C.—has now asked the Department of Justice to review whether a federal prosecution is warranted. Respectfully, a federal prosecution of this matter should be declined because (1) it is not supported by the facts; (2) it would require an unprecedented interpretation of the federal statutes in question; (3) it would unnecessarily result in an expansion of federal powers into an area properly reserved to the States; and (4) it would require an unequal application of the law.

We urge the Department of Justice to review the [REDACTED] transcript and then all of the new evidence in this case. On February 20, 2008, [REDACTED]—the alleged victim upon which this entire investigation was initially launched³—was deposed. Under oath, Ms. [REDACTED] reiterated that she “swore on her mother’s grave” that she and Mr. Epstein did not engage in sex of any kind. *See* [REDACTED] (Deposition) at 24, Exhibit 3. She also reaffirmed that she lied to Mr. Epstein about her age because it was her understanding that if she was not over 18, Mr. Epstein would not let her in his house. *See id.* at 32. Ms. [REDACTED] further repeatedly explained that prior to the time she went to Mr. Epstein’s house (she went there only once), nobody ever tried to coerce her to engage in sexual activity with Mr. Epstein, not over the Internet, not over the telephone, not at all, period. *See id.* at 31. No federal prosecution should proceed on these facts.

Among the attachments appended to this submission are several new depositions and sworn statements of persons whom the prosecutors have alleged are “victims” of Mr. Epstein’s conduct, as well as copies of recent civil lawsuits, several for \$50 million dollars, brought by the victim/witness-claimants. Each of these attachments (even the allegations in the civil complaints

³ The Police Report indicates that the originating complainants in the investigation were [REDACTED] and [REDACTED], [REDACTED] father and stepmother. *See* Police Report at 11, Exhibit 17. Notably, the Police Report (or the search warrant affidavit) omits the fact that both Mr. [REDACTED] and Mrs. [REDACTED] have prior federal felony fraud convictions.

themselves) negates the predicates for a federal prosecution.⁴ The consistent representations of witnesses such as [REDACTED], [REDACTED], [REDACTED], and [REDACTED], and the civil complainants and their attorneys, confirm the following key points: first, there was no telephonic communication that met the requirements of § 2422(b); second, the underage women who visited Mr. Epstein lied about their age in order to gain admittance into his home; third, any women who brought their underage friends to Mr. Epstein counseled them to lie about their ages in order to gain admittance into his home; fourth, there was no routine or habit suggesting an intent to transform a massage into an illegal sexual act. Finally, there was no force, coercion, fraud, violence, drugs, or even alcohol present in connection with Mr. Epstein's encounters with these women.

Mr. Epstein's counsel believe that further depositions, sworn statements, or interviews would, if permitted to occur prior to a final determination on the viability of any federal prosecution, would establish that the facts simply do not fit within any proper construction of any of the federal criminal statutes under consideration.

⁴ First Assistant United States Attorney [REDACTED] [REDACTED] sought to preclude Mr. Epstein or his agents from communicating with the alleged "victims." See November 5, 2007 Letter from J. [REDACTED], Exhibit 1. Due to established state procedures and following the initiation of the civil lawsuits, Mr. Epstein's counsel was able to take limited discovery of certain women in this matter.

I. BACKGROUND

This case involves conduct that, although prosecutable under *State* law (and indeed is being prosecuted under State law), will not support a federal conviction. *The facts simply do not meet the elements of any federal offense, and in particular not those required for a prosecution under 18 U.S.C. § 2422(b).* This case is not about using the telephone, the Internet, or any other facility of interstate commerce to lure, induce, entice, persuade or coerce unsuspecting women to Mr. Epstein's residence to engage in unlawful sexual activity. It is not about traveling in interstate commerce to engage in unlawful sexual activity. Nor does it involve a commercial sex enterprise. It is certainly not the quintessential sting case involving children.

Instead, this case is about friends who spoke to friends (in person) and brought them to Mr. Epstein's residence to perform massages on Mr. Epstein. To the extent sexual activity prohibited by State law occurred (which we deny), any inducement, enticement, and/or persuasion necessary to make out a violation of federal law took place during a face-to-face encounter and involved spur-of-the-moment decisions. It is, furthermore, a case about young women who sought to provide Mr. Epstein massages either by calling his assistants or through friends who they knew could introduce them to Mr. Epstein. It is a case where, in instance after instance, these young women have testified that they lied or otherwise concealed their ages and counseled others to do the same. It is a case in which Mr. Epstein and his assistants routinely were unaware of the identities of many of these young women before they arrived and, in fact, some visited Mr. Epstein's home only once. Finally, it is a case about purely local activity, involving local actors, and affecting local interests and thus, should be handled by local authorities.

The suggestion that calling to schedule massage appointments satisfies the elements of an offense under 18 U.S.C. § 2242 is belied by the evidence in this case, which establishes (i) that most of the masseuses were over 18, and that they were scheduled depending on their availability, and not on any instructions from Mr. Epstein either as to a particular young woman or a particular set of qualifications (e.g., underage); (ii) Mr. Epstein would not have known at the time the phone call was made that any particular masseuse was being scheduled and therefore that any underage masseuse was being scheduled; (iii) Mr. Epstein's "directive" to all the women was to refer only other young women who were at least 18 years of age; (iv) Mr. Epstein would not know the identities of the masseuses until after they were scheduled and in many instances until they arrived, and, therefore, under no circumstances would he have known their ages; (v) there were many occasions where the masseuse who was called and agreed to visit (or herself called and asked to visit) was not the young woman who actually provided the massage, but rather, a friend; (vi) decisions as to the type of conduct Mr. Epstein would request that the young women engage in during any particular massage were made in the massage room, while the massage was being conducted, in a face-to-face encounter—never in advance and never over the phone; and (vii) many appointments resulted in massages that did not involve unlawful sexual activity, where the masseuses were of age or no sexual activity was engaged in at all, or even no massages were performed. These facts are repeatedly corroborated by the actual transcripts.

Under such circumstances, it cannot be reasonably said that when Mr. Epstein purportedly caused his assistants to arrange the massage appointments (directly or indirectly), he did so with the intent to lure, induce, entice, persuade, or coerce unlawful sexual activity with minors.

Nor can it be said that the scheduling calls to "repeat" masseuses can be considered an inducement based on claims that many of the young women previously engaged in unlawful sexual activity with Mr. Epstein. Not every call, even to "repeat" masseuses, resulted in unlawful sexual activity. And as such, calling to schedule an appointment, without more, is not tantamount to luring, inducing, enticing, persuading, or coercing someone to engage in such activity. In this regard, to the extent a masseuse visited Mr. Epstein's home on more than one occasion, there is no evidence that Mr. Epstein or the masseuse knew what would occur during the next massage, let alone that they would engage in unlawful sexual activity. As many stated in sworn statements: during the course of a massage Mr. Epstein would at times request and/or offer them additional money to engage in activities in which they had never previously engaged, and some of them on some occasions would accept while others would not. *See, e.g.,* [REDACTED] Tr. at 7, Exhibit 18; [REDACTED] Tr. 1 at 6, 7, 20, 21, 24-25, Exhibit 19; [REDACTED] Tr. at 9, 18, Exhibit 20; [REDACTED] Tr. at 4, Exhibit 13. Further, no two massages with the same woman could be predicted to be the same. Thus, a call arranging a second or third visit from the same woman did not ever mean, implicitly or explicitly, "more of the same".

Further, Mr. Epstein would not ask his assistants to schedule a particular masseuse for a particular visit, let alone an underage masseuse; rather, he either asked his assistants to schedule massages while he was in Palm Beach or, more regularly, the assistants took it upon themselves to schedule the appointments. As a result, Mr. Epstein never knew who the individual would be until after the massages were scheduled. He requested that the masseuses be at least 18 years of age, and expected them to be so (and in fact most were). *See* [REDACTED] Tr. at 12, Exhibit 12; [REDACTED] Tr. at 13, Exhibit 11; [REDACTED] at 38-39, Exhibit 10; [REDACTED] Tr. at 13, 22, Exhibit 2; [REDACTED] Tr. at 9, 22, 23, Exhibit 5A; and [REDACTED] Tr. at 16-17, 18, Exhibit 4.

Specifically, there is no evidence that Mr. Epstein targeted minors as his assistants called various masseuses, *many of whom were clearly of age* (e.g., [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]), to determine who was available and wished to come to Mr. Epstein's residence and provide a massage. This fact is readily confirmed by the assistant's toll records. Mr. Epstein's assistant. The decision of whom to call was not guided by instructions from Mr. Epstein, had nothing to do with the age of the masseuse, nothing to do with the identity of the masseuse, and most particularly, nothing to do with the conduct that would occur (except, of course, a massage). *See, e.g.,* [REDACTED] Tr. at 14-16, Exhibit 5A. The identity of the individual who ultimately provided a massage was simply a matter of who expressed an interest, or was brought by a friend. In the latter circumstance, neither Mr. Epstein nor his assistants knew who the masseuse would be, other than by name (if even by name), let alone knew her age or the conduct in which she and Mr. Epstein would ultimately engage on any particular occasion. *See, e.g.,* [REDACTED] at 3, 19, Exhibit 10; [REDACTED] Tr. at 19-20, 23-24, Exhibit 2; *see also* Message Book Entries, Exhibit 8.

In many cases, the young women themselves, without any prompting by Mr. Epstein or his assistants, would leave a message seeking to visit Mr. Epstein at his home. *See, e.g.,* [REDACTED] Tr. at 6, Exhibit 21; *see also* Message Book Entries, Exhibit 8. The proactive step of calling to request to provide a massage is the antithesis of having been lured, induced, enticed, persuaded or coerced. It demonstrates that these women sought to engage in the conduct alleged, even assuming these women had been to the house before and engaged in such activities. Indeed, as word of the opportunity spread amongst groups of friends, others sought out the opportunity through friends. *See* [REDACTED] Tr. at 15, Exhibit 14; [REDACTED] Tr. at 45, 57, Exhibit 2; [REDACTED] Tr. at 22, Exhibit 19; [REDACTED] Tr. at 13, Exhibit 22; Police Report at 24, Exhibit 17.

Finally, many massages involved conduct which even if engaged in with an underage masseuse is not proscribed by federal law, either because the masseuses were of age and the calls thus resulted in conduct between two consenting adults; or because conduct with underage masseuses only involved topless massages, massages in undergarments, or naked massages.

These points are made over and over in the record before you, as the following sampling illustrates:

[REDACTED] [REDACTED] the youngest woman involved in this case, and the catalyst for and subject of the State prosecution, came to Mr. Epstein's house by way of [REDACTED]—the same [REDACTED] who swore under oath that Mr. Epstein wanted women between the ages of 18 and 20 to perform massages. It was [REDACTED] [REDACTED] who approached [REDACTED] (in person), not Mr. Epstein and not one of Mr. Epstein's assistants. And, it was [REDACTED] who spoke to Mr. Epstein's assistant to arrange an appointment for Ms. [REDACTED] to perform a massage. Neither Mr. Epstein nor his assistants were given information about [REDACTED]. Nor were details of the massage discussed over the phone. The appointment was simply scheduled for a "friend" of [REDACTED], presumably one who met the directive of being between 18 and 20 years of age, to provide Mr. Epstein with a massage. The only fact about Ms. [REDACTED] that Mr. Epstein or any assistant knew was her name (but not age), and they learned of her name only after she first visited Mr. Epstein's home. Indeed, it was not until the State investigation that it became known to Mr. Epstein that Ms. [REDACTED] was underage. Ms. [REDACTED] constructed an elaborate back story to make her claim of being 18 credible and stuck to the story. Ms. [REDACTED] provided one massage and never returned to Mr. Epstein's residence. Thus, there is no factual basis from which to claim that any federal law was broken here.

The relevant circumstances of [REDACTED] [REDACTED] encounters with Mr. Epstein are different, but they lead to the same conclusion. A review of the phone Message Book Entries obtained from Mr. Epstein's residence, as a result of a questionable seizure during the execution of a questionable search warrant, is telling. Ms. [REDACTED], like many of the other young women involved in this case, actively sought to participate in the activities in which she engaged with Mr. Epstein. She, like many others, did so by making unsolicited telephone calls to Mr. Epstein's assistants looking for a chance to provide Mr. Epstein with a massage. Ms. [REDACTED], like others, left messages to the effect: "do you have work for me." Message Book Entries,

Exhibit 8 (the following entries are also included: "was wondering if she can work. . ." and "I'd like to work for him today"). Again, these facts do not support a federal case.

The conduct of [REDACTED] is likewise illustrative of why this is not a federal case. In the same way Ms. [REDACTED] was referred to Mr. Epstein and brought to his home without having been introduced or acquainted with Mr. Epstein or his assistants in any manner, Ms. [REDACTED] too, was referred by someone else [REDACTED] who told her to lie to Mr. Epstein about her age, which she did. [REDACTED] Tr. at 8-9, Exhibit 5A. Ms. [REDACTED] too, admits that she lied to Mr. Epstein about her age. And, Ms. [REDACTED] like so many others, called Mr. Epstein's residence seeking the opportunity to provide Mr. Epstein a massage and leaving messages such as: "Please call her." See Message Book Entries, Exhibit 8. Finally, Ms. [REDACTED] confirmed that there was absolutely no element of coercion or force involved. [REDACTED] Tr. at 9-10, 13, Exhibit 5A ("And like I said, he also, you know, reassured if I wasn't comfortable with anything, then just tell him . . .").

And, there are other young women who left similar messages (see Message Book Entries, Exhibit 8); who were introduced to Mr. Epstein in a similar fashion (see [REDACTED] Tr. at 2-3, Exhibit 23; [REDACTED] Tr. at 3, Exhibit 19; [REDACTED] Tr. at 4, 6, Exhibit 20; [REDACTED] Tr. at 2, Exhibit 22; [REDACTED] Tr. 3, Exhibit 11; [REDACTED] Tr. at 2-3, Exhibit 24; [REDACTED] Tr. at 3, Exhibit 25; [REDACTED] Tr. at 3, Exhibit 13; [REDACTED] Tr. at 3, Exhibit 26); who visited the residence only once and prior to that were unknown to Mr. Epstein and his staff (see [REDACTED] Tr. at 10, Exhibit 26; [REDACTED] Tr. at 11, Exhibit 11; [REDACTED] Tr. at 5-6, Exhibit 4; [REDACTED] Tr. at 7-8, Exhibit 27); who only performed massages (see [REDACTED] Tr. at 4, 5, 6-7, 9, 11, Exhibit 13; [REDACTED] Tr. at 4, 5, 6, 10, Exhibit 24; [REDACTED] Tr. at 7, Exhibit 25); who never engaged in unlawful sexual activity or any sexual activity for that matter (*id.*; see generally, [REDACTED] Tr., Exhibit 20; [REDACTED] Tr., Exhibit 27; Police Report at 78, Exhibit 17; [REDACTED] Tr., Exhibit 24, [REDACTED] Tr., Exhibit 26; and [REDACTED] Tr., Exhibit 2); or, who lied and counseled others to lie about their ages (see [REDACTED] at 38-39, Exhibit 10; [REDACTED] Tr. at 16, Exhibit 4; [REDACTED] Tr. at 6, 8, 22, 45, Exhibit 2, [REDACTED] Tr. 13, Exhibit 11; [REDACTED] Tr. at 12, Exhibit 12; [REDACTED] Tr. at 14-15, Exhibit 14).

These facts do not support a federal conviction. There was no use of the phones to lure, induce, entice, persuade or coerce another to engage in unlawful sexual activity. There was no travel for the purpose of engaging in such activity. And, no commercial enterprise from which Mr. Epstein derived a financial benefit. To conclude that merely scheduling a massage under these circumstances, or returning an uninitiated call would support a federal prosecution under § 2242 stands in stark contrast to that which would support a conviction under the statute.

Nor do the facts of this case meet the requirements for a conviction under 18 U.S.C. § 2423(b). As discussed in greater detail below, the amount of time Mr. Epstein spent at his home in Florida, and the extensive list of his Florida-based activities clearly undermines the contention that he was a New York resident, government filing also corroborate this fact, and defeats the notion that his purpose in traveling to Florida was to engage in illicit sexual conduct. On the contrary, Mr. Epstein returned to Florida to engage in the routine activities of daily living.

Finally, as will be explained, this case does not involve the quintessential conduct present in prosecutions under the commercial sexual enterprise statute: there is no trafficking; no “force, fraud or coercion”; no threats; no sexual servitude; no financial venture; no profit from a financial venture; no forced work in the commercial sex industry; and no transporting of children from underdeveloped countries to the United States or even within the United States across state lines. Nor was there any conduct, whatsoever, which could be considered so extremely abusive or violent, that an expansion of the statutes beyond their intended purpose would be warranted.

In short, the facts of this case fail to support a charge under any of the statutes identified. At its worst, the conduct violates Florida State law and should be prosecuted as such—which it has been, by the State authorities.

II. STATUTORY ANALYSIS

Federal prosecutors have identified three statutes under which Mr. Epstein might be charged: 18 U.S.C. §§ 1591, 2422, and 2423. None of these statutes applies to this matter. Instead, as their plain text and history indicate, these statutes were designed to address problems that are truly national and international in scope: human trafficking in § 1591; telephone or Internet sexual predation in § 2422; and sex tourism in § 2423. Unlike the alleged conduct at issue here, those problems unquestionably present multi-jurisdictional problems that States and localities cannot confront effectively on their own. But Mr. Epstein’s conduct was purely local in nature, and the State of Florida and Palm Beach County are effectively prosecuting and punishing that conduct.

Any attempt to federalize Mr. Epstein’s case would require prosecutors to stretch these statutes far beyond prior precedent—and well beyond their text and purposes. Indeed, Mr. Epstein’s alleged conduct involves quintessentially State and local offenses that never before have been thought to fall within the purview of federal law. Mr. Epstein’s alleged conduct was non-violent—there was absolutely no force, coercion or fraud. Mr. Epstein’s alleged conduct occurred at his home—he did not travel to other locations (much less cross State lines) for surreptitious meetings with known minors. Mr. Epstein’s alleged conduct did not involve the use or reliance on the Internet, email, or on faceless chat room meetings. No drugs were involved. Mr. Epstein did not profit from any underage sex. And the young women’s own testimony confirms that their alleged meetings with Mr. Epstein lacked any semblance of violence or predation. Most of the women were 18 or over, and those minors who have testified acknowledge that they falsely represented themselves to be at least 18. Many of the young women telephoned Mr. Epstein’s residence and left messages on seized documents seeking to give massages; some even came to Mr. Epstein’s residence bringing friends or their boyfriends. None was explicitly induced or persuaded to have illegal sex during phone conversations, as federal law would require in order to convert this State-law solicitation case into a federal matter.

Finally, we have examined the hundreds of federal prosecutions under §§ 2422, 1591 and 2423. See Table of § 2422 Cases, Exhibit 28; Table of § 1591 Cases, Exhibit 29; Table of § 2423 Cases, Exhibit 30. Not one resembles this case; a federal prosecution on these alleged

facts would be entirely unprecedented. There is simply no reason for the Department to strain these statutes to achieve that result. This is a State and local matter, and State authorities have actively, competently, and thoroughly addressed it.

A. 18 U.S.C. § 2422(b)

Section 2422(b) reads as follows:

Whoever, *using the mail or any facility or means of interstate or foreign commerce ... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years*, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than [5] years or for life.

(Emphasis added.)⁵

By its plain text, the statute thus applies only to those who “use” the “means of interstate ... commerce” to “knowingly” convince a minor to engage in prohibited sexual conduct. That is not what happened here.

1. Plain Language

§ 2422(b) criminalizes the “us[e]” of a facility or means of interstate commerce in order to induce otherwise prohibited sexual conduct, but not the sexual conduct itself. In other words, the statute criminalizes communication over the phone or Internet—not sexual contact—by unambiguously requiring that the facility or means of interstate commerce be *used to induce* sexual activity that is independently unlawful. See *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004); *United States v. Davis*, 165 Fed. Appx. 586, 588 (10th Cir. 2006). That requirement is not merely a jurisdictional hook to federalize State crimes. Rather, *using the means of interstate commerce to induce (or attempt to induce) a minor to engage in otherwise prohibited sexual conduct is itself the crime*.

By its plain text, then, § 2422(b) requires the government to prove beyond a reasonable doubt that the defendant engaged in communication over an interstate facility (e.g., the Internet or phone) with four concurrent intentions: (1) to knowingly (2) persuade, induce, entice or coerce, or attempt to persuade, induce, entice, or coerce (3) a minor (4) to engage in prostitution or criminal sexual activity. Put differently, the caller must use the phone to induce a minor (or

⁵ During the events at issue, § 2422(b) carried a mandatory five-year period of incarceration. Congress raised the mandatory minimum to ten years in the Adam Walsh Child Protection and Safety Act of 2006.

one believed to be a minor if the charge is attempt) to engage in illegal sexual activities at the time of the use of the interstate facility—and the inducement must in fact occur during the use itself. If the defendant forms the intent to induce criminal sexual activity at some point *after* such use, or if the defendant does not actually induce during the use, § 2422(b) does not apply.

The Eleventh Circuit's Pattern Jury Instructions recognize as much. According to those Instructions, the Government must prove beyond a reasonable doubt:

First: That the Defendant knowingly used [the mail][a computer][describe other interstate facility as alleged in indictment] to attempt to persuade, induce, entice [or coerce] an individual under the age of eighteen (18) to engage in sexual activity, as charged;

Second: That the Defendant believed that such individual was less than eighteen (18) years of age;

Third: That if the sexual activity had occurred, the Defendant could have been charged with a criminal offense under the law of [identify the state]; and

Fourth: That the Defendant acted knowingly and willfully.

Offense Instructions 80, *Eleventh Circuit Pattern Jury Instructions-Criminal* (2003). These instructions thus make clear that the Government must prove that the defendant used the interstate facility to knowingly persuade or induce or entice or coerce a known minor to engage in illegal sexual activity; if the persuasion or inducement is not made over the phone or via Internet, the defendant cannot be convicted under § 2422(b).

In this case, phone calls allegedly made to schedule a massage for Mr. Epstein did not violate § 2422(b). While Mr. Epstein *later* may have persuaded a minor to engage in unlawful activity *during the massage*, that does not work retroactively to render the earlier phone call an offense under § 2422(b).

In that respect, § 2422(b) is distinguishable from the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, where there is no temporal link between the use of the mail or wires and the scheme to defraud. With wire fraud, for instance, the essence of the crime is the underlying fraud itself: activity that constitutes fraud under State law becomes a federal crime when the defendant takes the additional step of using the wires at any point in the course of the underlying fraud, or even after the principal fraudulent conduct has been completed. But the fraud itself need not be undertaken or executed over the phone or wires; those transmissions are incidental.

Moreover, the wire fraud statute does not tie the wire communication (i.e., the phone call) in any *temporal* way to the scheme to defraud. To the contrary, that relationship is deliberately loose in order to encompass the broader fraudulent activity. The fraud scheme can be either

already in place or even merely intended; the only requirement is that a phone call be made at any point “for the purposes of executing” the fraud. It does not matter whether the phone call is made before, during, or after the fraud itself. The use of the telephone serves only to bring the fraud—the primary criminal act—within the purview of federal law. Without the phone call that uses the interstate wires, the fraud might well be merely a State crime. That is clearly not the case under § 2422.

2. Legislative History

The legislative history of § 2422(b) confirms that it was not intended to apply to cases like this one. Congress enacted § 2422(b) as part of the Telecommunications Act of 1996 to combat sexual predators who solicit minors over the Internet. See H.R. Conf. Rep. No. 104-458, at 193 (1996) (expressing “the need for Congress to take effective action to protect children and families from online harm”); see also *United States v. Searcy*, 418 F.3d 1193, 1197 (11th Cir. 2005). Congress at that time recognized that the Internet allows anonymous predators to target children anywhere in the world, presenting unique jurisdictional problems that local law enforcement—and the existing federal statute—was ill-equipped to address.

To that end, Congress purposefully targeted *the use of interstate instrumentalities* for the first time. Indeed, prior to 1996, § 2422 made no such provision. It simply provided that:

Whoever knowingly persuades, induces, entices or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution or any [criminal] sexual activity . . . shall be fined under this title or imprisoned not more than five years, or both.

As a result, § 2422 at that time criminalized only knowing inducement to travel across interstate or international borders—which obviously did nothing to address the problem of Internet predators, whose persuasion or inducement might have nothing to do with persuading a prospective victim to engage in interstate or foreign travel, but which unquestionably corrupts an interstate instrumentality—the wires. Accordingly, when Congress added § 2422(b), it borrowed the language about knowing persuasion from the prior statute, and—given the growth of the Internet—then criminalized *the use of an interstate facility* to knowingly persuade a minor to engage in otherwise unlawful conduct, whether or not the minor crosses State lines. Congress, in short, was aiming at the *use of interstate facilities* (like the Internet) to recruit minors into unlawful sexual activity. In contrast to the mail and wire elements of the mail and wire fraud statutes, that element is central, not tangential, to Congress’s clear intent in enacting § 2422(b).

Finally, it is important to remember that § 2422(b) now carries a 10-year mandatory minimum sentence. Congress was addressing very serious crimes of substantial federal interest; it was not federalizing a broad swath of essentially local sexual misconduct whenever a minor was involved and there was some tangential use of an interstate facility. That is why § 2422(b) must be limited to situations where a person purposefully and knowingly communicates with a minor by means of an instrumentality of interstate commerce, generally beginning with an

Internet chatroom or email. Congress's target was online predators who lure unsuspecting minors into dangerous and unlawful sexual activity—a crime that is difficult to monitor or regulate. Subjecting Mr. Epstein's conduct (and apparent lack of use of the Internet, email, or phone) to § 2422(b)'s harsh mandatory minimum sentence is a far cry from what Congress intended.

3. Inability To Satisfy Elements

As discussed above, § 2422(b) makes it a crime for a defendant (1) to use an instrumentality of interstate commerce (2) to knowingly (3) induce or entice, or attempt to induce or entice (4) a minor (5) to engage in unlawful sexual activity. The Government will have great difficulty establishing that any of these elements is satisfied in this case, let alone all of them.

a. Mr. Epstein Did Not Use An Interstate Instrumentality.

As set forth above, the *actus reus* of § 2422(b) is the use of an interstate facility in order to persuade, induce, entice, or coerce a minor to engage in a proscribed sexual act—rather than the sexual act itself. See *United States v. Murrell*, 368 F.3d 1283, 1285 (11th Cir. 2004) (“The underlying criminal conduct Congress expressly proscribed in passing § 2422(b) is the persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself.”). But that element plainly is not satisfied here, because Mr. Epstein did not himself use an interstate facility to contact any of the women—let alone use an interstate facility to persuade or induce a minor to engage in unlawful sexual activity. That fact alone takes this case well outside the heartland of a § 2422(b) offense.⁶ See generally, Table of § 2422 Cases, Exhibit 28.

b. Mr. Epstein Did Not Target Minors.

§ 2422(b) further requires that the defendant specifically intended to target a minor. See, e.g., *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (“[T]o prove an attempt the government must first prove that [defendant], using the internet, acted with a *specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex.*”) (emphasis added). After all, § 2422(b) expressly requires that the crime be committed “knowingly,” and that requisite mental element for each element of the crime. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994); *United States v. Meek*, 366 F.3d 705, 718 (9th Cir. 2004); *United States v. Root*, 296 F.3d 1222, 1227 (11th Cir. 2002); *United States v. Bailey*, 228 F.3d 637, 638-639 (6th Cir. 2000).

⁶ Mr. Epstein's assistants maintain his schedule, and he often is not involved at all. See *infra* part II.A.3.d.

Moreover, it is black-letter law that the *mens rea* must exist when the *actus reus* is committed; the two must coincide in time. *Actus non facit reum, nisi mens sit rea*: the act alone does not amount to guilt; it must be accompanied by a guilty mind. In short, the Government must prove that Mr. Epstein had the specific intent to target a known minor *at the time of the call*. See Offense Instructions 80, *Eleventh Circuit Pattern Jury Instructions-Criminal*, (2003), see *supra* part II.A.1. (“The Defendant can be found guilty of that offense only if . . . the Defendant believed that such individual was less than eighteen (18) years of age . . .”)

Based on all of the evidence collected during a 15-month State investigation and a successive 15-month federal investigation, it is clear that the conduct in this case is exclusively a matter for State prosecution.⁷ That evidence conclusively demonstrates that the majority of the masseuses—such as [REDACTED] and [REDACTED]—were 18 or older. Ms. [REDACTED] Ms. [REDACTED] Ms. [REDACTED] and Ms. [REDACTED] each gave recorded interviews to the State in which each attested that they were over 18 on every occasion they went to Mr. Epstein’s residence. The dates reflected in the message pads of incoming calls to Mr. Epstein’s home as well as cellular toll records of [REDACTED] phone confirm this fact.

Other masseuses, who were actually 16 or 17 years old, have in sworn, taped interviews with both federal and State authorities admitted that they represented themselves to Mr. Epstein as 18 or older. Indeed, many of the interviewed masseuses—including [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED]—explicitly confirmed that these women either told Mr. Epstein that they were 18 or told others who they were introducing to Mr. Epstein to tell him that they were 18.

For instance, Ms. [REDACTED] introduced several 16 or 17 year-old women to Mr. Epstein, and, as confirmed in their sworn testimony and Ms. [REDACTED] own, she routinely advised each to tell Mr. Epstein that they were 18. See [REDACTED] Tr. 2 at 6, 8, 12, 22, 45, Exhibit 12 (“most of the girls lied when they go in there . . .”). Ms. [REDACTED] introduced others, many over 18, some under 18, to Mr. Epstein. She testified in a sworn interview conducted by the United States Attorney’s Office and FBI that: “these girls that I brought, I know that they were 18 or 19 or 20. And the girls that I didn’t know and I don’t know if they were lying or not, I would say make sure that you tell him you’re 18.” [REDACTED] Tr. at 22, Exhibit 2. These witnesses’ testimony that they commonly instructed their friends to deceive Mr. Epstein about their age in order to gain admittance to his house will make it exceptionally difficult to prove that Mr. Epstein intended to

⁷ The defense is in possession of both police reports and transcripts of taped interviews conducted largely by [REDACTED] of the Palm Beach police. These transcripts were not intended to generate exculpatory testimony; instead they are replete with leading and suggestive questioning designed to elicit accusations inculpatory to Epstein. Nonetheless, when examined in the light of the requisites of federal law, they are filled with facts that help demonstrate that a federal prosecution is unwarranted.

target minors (much less that he did so at the time of any telephone communication between Mr. Epstein's assistants and the young women).

Mr. Epstein also took several steps to ensure that no minors entered his home—most notably, by affirmatively asking the women whether they were actually 18. *See e.g.*, [REDACTED] Tr. at 38-39, Exhibit 10. That fact—which many of the potential witnesses have confirmed in sworn interviews—strongly indicates that Mr. Epstein specifically intended *to preclude* anyone under 18 from giving him a massage. That fact is confirmed by, among other things, Ms. [REDACTED] testified that “he likes the girls that are between the ages of like 18 and 20 . . .” [REDACTED] Tr. at 12, Exhibit 12.

Many of the young women who were aged 16 and 17 visited Mr. Epstein's residence only once or twice, and the evidence strongly shows that they lied to Mr. Epstein about their age. And while a few of those aged 16 and 17 visited Mr. Epstein's residence more frequently, and the government claims that Mr. Epstein either knew or should have known their true age, there is not a shred of evidence that Mr. Epstein (or anyone associated with Mr. Epstein) ever attempted to persuade, induce, entice, or coerce them over the telephone (or over the Internet). *See infra* part II.A.

Two girls, [REDACTED] and [REDACTED], were 14 or 15 at the time they met Mr. Epstein. Given that each has brought a civil lawsuit against Mr. Epstein, with Ms. [REDACTED] and her family seeking \$50 million from Mr. Epstein, their testimony against Mr. Epstein is per se suspect. The lawyer representing the “victims” made a public statement conceding that they had lied about their ages and then dismissed this critical fact. *See* Herman Public Statement, Exhibit 16. A copy of each lawsuit is appended as Exhibits 6 and 7. But, despite their obvious incentive to harm Mr. Epstein, their testimony actually confirms his innocence. Ms. [REDACTED], for instance, has testified that Ms. [REDACTED]—who introduced her to Mr. Epstein—expressly told her to lie to Mr. Epstein about her age:

Q: And [REDACTED] told you that if you weren't 18 Epstein wouldn't let you into his house, right?

A: That's -- yes, yes.

[REDACTED] (deposition) at 32, Exhibit 3.

* * * * *

Q: You didn't want Mr. Epstein to know that you were lying about your age, right?

A: Correct.

Q: You didn't want Mr. Epstein to know that you were not 18 yet, right?

A: Correct.

██████████. (deposition) at 36, Exhibit 3.

In fact, Ms. ██████████ told Mr. Epstein that she was 18 years old, and confirmed this fact with Palm Beach Police. Id. at 35. Ms. ██████████ age was also unknown to Mr. Epstein when she went to his home. ██████████, who was introduced to Mr. Epstein by Ms. ██████████, testified in her federal sworn interview that Ms. ██████████ told her to lie to Epstein. See ██████████ Tr. at 8, Exhibit 2 (*"she just said make sure you're 18 because Jeffrey doesn't want any underage girls"*) (emphasis added). Ms. ██████████ testimony strongly suggests that Ms. ██████████ lied to Mr. Epstein about her own age as well. Moreover, in addition to having a substantial financial interest in the outcome of any federal prosecution, Ms. ██████████ is not a credible witness. She has a documented history of addiction and criminal conduct that included being involuntarily committed by her mother for "prostituting herself for crack." Palm Beach County Probate Court Case ██████████. She also self represented that she worked at a local erotic massage parlor that presumably required a minimum age.

In addition to Mr. Epstein's lack of knowledge that certain women were under the age of 18, there is certainly no evidence that Mr. Epstein exhibited a habit or pattern of targeting underage girls. The ██████████ toll records and seized message pads—two documentary sources examined during the State investigation (and presumably the successive federal investigation)—underscore the critical fact that there was no routine and pattern of targeting underage girls. To the contrary, Mr. Epstein's assistants called an array of potential masseuses—many of whom were over the age of 18, and some whom were not. On April 27, for instance, calls were made at 9:02 AM to ██████████ and at 9:03 AM to ██████████. Ms. ██████████ was over 18 at the time. On May 6, there were calls made one minute apart to ██████████ and then ██████████. On the afternoon of July 2, calls were made to Ms. ██████████ and ██████████ as well as others. Finally, on September 18, 5 calls were made to 5 females within 6 minutes including ██████████ and ██████████ (each over 18). See ██████████ Toll Records, Exhibit 9.

These records reflect that no one associated with Mr. Epstein deliberately targeted known minors, and further reflect the improbability that either the caller or Mr. Epstein even knew who would answer the phone, who would schedule a visit, what their age was at the time of the assistant's call, and what intention Mr. Epstein might have—other than to have his assistant try to schedule a massage for a given time on a given day. A sampling of the message pads reflects an identically haphazard course of communication that hardly suggests a targeted attempt to knowingly communicate an inducement to a known minor to engage in sexual activities with Mr. Epstein. See Message Book Entries, Exhibit 8.

Indeed, in many cases, the identity of a particular masseuse on a particular day was simply the result of which masseuse had left a message for Mr. Epstein—without any prompting by Mr. Epstein or his assistants. See e.g., ██████████ Tr. at 3, 4-5, Exhibit 25; ██████████ Tr. at 6, Exhibit

21. In other cases, the identity of a particular masseuse resulted from who had returned telephone calls and was available, or who was brought by a friend. Indeed, there were instances where neither Mr. Epstein nor his assistants knew the masseuse who was coming for a particular appointment other than by name (if even by name), let alone knew her age and the conduct in which they would engage. *See generally*, [REDACTED] at 3, 19, Exhibit 10; [REDACTED] Tr. at 19-20, 23-23-24, Exhibit 2. The key point here, however, is that the haphazard nature of the scheduling calls—and readily apparent randomness of the masseuses on any given day—prove that Mr. Epstein and his assistants did not deliberately target minors.⁸

c. Mr. Epstein Did Not Use An Interstate Instrumentality To Induce Proscribed Sexual Activity.

§ 2422(b) also requires that the interstate communication be used to “persuade[], induce[], entice[], or coerce[]” minors “to engage in prostitution or any [illegal] sexual activity.” The evidence in this case demonstrates that Mr. Epstein did not use the interstate instrumentalities to induce illegal sexual activity because (i) many of the masseuses were not contacted over the phone at all and/or have testified that they were not induced to engage in sexual contact over the phone, and (ii) Mr. Epstein did not in any event consistently engage in sexual activity with them, making it virtually impossible to prove even circumstantially that the phone was used to induce the women to engage in illicit sexual conduct.

i. The Evidence Shows That Mr. Epstein Did Not Use The Phone To Induce His Masseuses To Engage In Illicit Sexual Activity.

The facts and evidence do not show that Mr. Epstein (or his assistants) used an instrumentality of interstate commerce to induce sexual activity, because many of the masseuses were never contacted over the phone at all or have testified that they were not induced to engage in sexual activity over the phone. There was no Internet communication with anyone under 18, and there were no phone calls where anyone said anything that went beyond simply scheduling a massage. There are no emails—or tapes of phone conversations—which could directly or even circumstantially show that the content of any communication was to induce, persuade, entice, or

⁸ Even if there are claims that (a) Mr. Epstein knew a given masseuse was a minor, (b) and that Mr. Epstein had someone contact her to schedule a massage after a prior incident of sexual activity, those allegations would not make out a claim under § 2242(b) because Congress clearly required the “knowing” inducement to be communicated during the use of the interstate facility, and again, without proof that sexual activity routinely resulted from the massages, it is well-nigh impossible to prove that the calls included such an inducement. The transcript of Ms. [REDACTED] interview, for instance, claims only that there were occasional, random acts of sex, and that in some cases, she did not even provide Mr. Epstein with a massage, let alone engage in sexual activity. *See* [REDACTED] Tr. at 15, Exhibit 19. On other occasions, communications with Ms. [REDACTED] resulted only in her introducing someone new to Mr. Epstein—an event that again fails to reflect that Mr. Epstein had the requisite knowledge of the prospective masseuse’s age, much less that sexual activity was likely (or, indeed, inevitable).

coerce a minor into sexual activity. Instead, the evidence in this case demonstrates that the use of the phone was entirely incidental to the conduct at issue in this case. Consider the following examples:

██████████: Ms. ██████████ testified during her recent sworn deposition that she *never* had any Internet or telephone conversation with Mr. Epstein or any of his employees, and that she was not persuaded, induced, coerced, or enticed to go to Mr. Epstein's home as a result of any telephonic or Internet communication. See ██████████ (deposition) at 24-25, Exhibit 3. Ms. ██████████ has been described by prosecutors as the lynchpin of their case, but, according to her own testimony, she was brought to Mr. Epstein's house by ██████████ and informed that the purpose of her visit was to give a massage; did not ever discuss any sexual activity with Mr. Epstein over the Internet or phone; and was never induced or persuaded to see Mr. Epstein over the phone or Internet. Id. at 24-25. In fact, Ms. ██████████ had no contact whatsoever with Mr. Epstein or any of his employees prior to arriving at Epstein's residence. Id. at 29-30 Mr. Epstein never had any kind of conversation or communication with Ms. ██████████ before her single visit to his home, nor had he ever e-mailed Ms. ██████████ or engaged in Internet communication of any kind with her. Id. at 29.

██████████: Ms. ██████████, like Ms. ██████████, was introduced to Mr. Epstein by a third person without any prior phone communications with Mr. Epstein or any of his employees preceding the first visit. See ██████████ Tr. at 8, Exhibit 2. Afterward, it was ██████████ who gave Mr. Epstein her number and said "any time you want me to give you a massage again, I'll be more than welcome to." Id. Mr. Epstein's assistant would thereafter call her regarding appointments. Id. at 14. Seized message pads further reflect *incoming* calls from ██████████ and others seeking to return to Mr. Epstein's residence. As to this group of women, not only did Mr. Epstein not know their age, and not only was sexual activity not the predictable or routine outcome of the massages, but the phone was used at most to schedule, and never to persuade or induce or entice or coerce. See e.g., ██████████ Tr. at 21, Exhibit 2 (she testifies that Mr. Epstein never pulled her close in a sexual way)

██████████: Ms. ██████████ was introduced to Mr. Epstein by her friend ██████████. Ms. ██████████ told Ms. ██████████ that Mr. Epstein would pay for a massage and "that he was a respectful guy." ██████████ Tr. at 5, Exhibit 5A. Ms. ██████████ extended this offer to Ms. ██████████ in person, not over the phone or Internet. Id. at 6-7. Neither Mr. Epstein nor anyone on his behalf communicated with Ms. ██████████ by email, or fax, or text message prior to her going to Mr. Epstein's residence. Id. at 10. Ms. ██████████ was 17 at the time, and Ms. ██████████ told Ms. ██████████ to lie about her age. Id. at 8 ("she told me to say that I was 18 if it was asked"). On one occasion, Ms. ██████████ was asked her age and she lied. Id. at 9. Ms. ██████████ was never forced or coerced to engage in sexual activity with Mr. Epstein. Id. at 11-12. Follow-up visits were scheduled by ██████████ who would call and "ask me if I would like to come over and give a massage, because he would be in town." Id. at 14. There was never a suggestion of any sexual objective during the call. Id. at 14-15. Ms. ██████████ never spoke to Mr. Epstein over the phone, only Ms. ██████████ or another assistant. Id. at 15. And she has testified that what occurred thereafter was not planned or discussed in advance, but

was sporadic and consensual. Id. at 16 (“just random things, but not sex”); Id. at 17 (“he would never make me do anything”); Id. at 17.

Ms. [REDACTED] met Mr. Epstein through [REDACTED]. See [REDACTED] Tr. at 6, Exhibit 4. She went to Mr. Epstein’s residence on one occasion, but had no communication of any sort with Mr. Epstein before going to his house, nor with any assistant or employee of Mr. Epstein. Id. at 5-7. She was never contacted by Mr. Epstein or anyone on his behalf after the massage. Id. at 15. She was told by [REDACTED] who drove her to Mr. Epstein’s, to lie about her age—and she did, telling Mr. Epstein she was 19. Id. at 16. There was no prior phone contact between Ms. [REDACTED] and anyone associated with Mr. Epstein.

- ii. A Federal Case Cannot Proven With Circumstantial Evidence, Because Sexual Activity Did Not Invariably Follow The Scheduling Of A Massage Over The Phone.

There is overwhelming evidence that the phone was not used to induce women to engage in sexual activity. Mr. Epstein did not knowingly engage in a routine or habit of sexual activity with minors, and therefore did not understand that the use of the phones was intended knowingly to induce minors to engage in prohibited conduct. Taped interviews from the State investigation demonstrate conclusively that there was no governing pattern or practice with respect to Mr. Epstein’s massages. Sometimes the women were over 18, sometimes they were not; some visits resulted in massages, some did not; some massages were topless, some were not; sometimes Mr. Epstein masturbated during the massage, sometimes he did not; sometimes the massages would lead to other sexual activity, sometimes they did not.

There is no pattern or practice evident here. When scheduling calls were made (by people other than Mr. Epstein), there is no evidence that Mr. Epstein had any knowledge of which masseuse had been scheduled; whether she was a minor; whether any massage would be given; and whether any sexual activity would occur. What happened during any massage depended entirely on face-to-face interaction with Mr. Epstein *at the time*, not on any prior telephone call or Internet communication. Indeed, many females testified that they visited Mr. Epstein’s house and never even gave a massage; many times, they simply watched television or sat by the pool or ate food. See, e.g., [REDACTED] Tr. at 15, Exhibit 19 (“Sometimes...he would have to work and he’d be sitting at his desk or something and I’d just be naked there watching television or reading a book...sometimes he wanted to just watch TV or read...that’s it, not touch him or anything and I’d get paid three hundred dollars...sometimes he’d just invite me over for breakfast or dinner, or just to use the swimming pool, and I’d get paid for that too...I’d get paid just to hang out with him. That’s it.”).

Moreover, the evidence shows that Mr. Epstein’s assistants scheduled everything in his life, from doctor’s appointments and business meetings to haircuts, dinners, and massages. They knew no more about what would occur during a massage—or the real ages of the masseuses—than they did about a sensitive business meeting. They were simply “schedulers” or “appointment makers,” rather than knowing participants in a scheme to lure, induce, entice,

persuade, or coerce underage women to visit Mr. Epstein's home with the purpose of engaging in unlawful sexual activity.

Instead, to the extent any unlawful sexual activity ever occurred—which we deny—it was solicited during a face-to-face encounter with Mr. Epstein at his house, *after* the massage had been scheduled. The masseuses' own testimony makes this clear. As many have stated: during the course of the massage Mr. Epstein would at times offer them additional money to engage in activity in which they had never previously engaged—some would accept and others would not, with Mr. Epstein invariably respecting the decisions made “on the scene” by the masseuse in question. But the prior telephone conversations simply involved determining when and if a masseuse was available to come to Mr. Epstein's residence—for a massage, and nothing else. In short, the testimony, evidence and facts do not make out the elements of a federal crime, i.e. the necessary showing that a scheduling call itself was specifically intended to produce sexual activity with a minor at the time of the call.⁹

Nor is it possible to prove that Mr. Epstein intended the scheduling calls to induce sexual activity based on the fact that sexual contact occurred during an earlier massage. The fact that a call may have preceded a visit by a young woman who had, on one or more previous occasions, engaged in activity of a sexual nature with Mr. Epstein is not sufficient to establish that the next call included a knowing attempt to “persuade[], induce[], entice[] or coerce[].” At most, such a call might be a link in a causal chain that may or may not end in proscribed sexual activity—but it cannot be characterized as an attempt to persuade, induce, entice or coerce. Those, after all, are verbs that suggest a level of unwillingness on the part of the person at the other end of the communication, and that certainly is not the case with respect to repeat visitors (many of whom contacted Mr. Epstein themselves about the possibility of a return visit).

In any event, courts have repeatedly held (in the context of entrapment) that neither mere solicitation nor the creation of opportunities to commit an offense comprises inducement, even if it creates a risk that an offense will occur. *See, e.g., United States v. Sanchez-Berrios*, 424 F.3d 65, 76-77 (1st Cir. 2005), *cert. denied*, 546 U.S. 1125 (2006). The Eleventh Circuit has stated in entrapment cases that government inducement may be shown by a defendant's producing any evidence sufficient to raise a jury issue “that the government's conduct created a substantial risk

⁹ Section 2422(b) also requires that the objective of the interstate communication be “to engage in prostitution or any [illegal] sexual activity”. The statute looks to State law for whether sexual activity is unlawful, which defines unlawful sexual activity as: “Oral, anal, or vaginal penetration by, or union with, the sexual organ of another; anal or vaginal penetration of another by any other object; or the handling or fondling of the sexual organ of another for the purpose of masturbation; however, the term does not include acts done for bona fide medical purposes.” FL. Stat. &796.07(1)(d). “Prostitution” as defined by Florida law requires “the giving or receiving of the body for sexual activity for hire”, FL. Stat. &796.07(1)(a). The prostitution offense is predicated on the definition of “sexual activity” cited above. It bears mentioning that masturbation, by itself, is not considered illegal sexual activity under Florida law.

that the offense would be committed by a person other than one ready to commit it . . .” Nevertheless, “evidence of the government’s *mere suggestion* of a crime or *initiation of contact* is not enough . . . Instead, . . . inducement requires an element of persuasion or mild coercion. . . . [I]nducement consists of opportunity plus something like excessive pressure or manipulation” *United States v. Brown*, 43 F.3d 618, 625 (11th Cir.), *cert. denied*, 516 U.S.917 (1995). Likewise, a telephone call that merely initiates contact or sets up an opportunity for something inappropriate to occur, without pressure or manipulation, cannot amount to inducement. Nor can it amount to persuasion, enticement, or coercion, which are variations on the same theme.

The theme that money was the implied inducement or enticement would also fail to meet the communication as crime element. The variability of payments counter any sort of pattern. See Police Report at 78, Exhibit 17 (██████ received amount of \$100 per hour); ██████ Tr. at 10, Exhibit 25 (received amounts of \$100 and \$200); ██████ Tr. at 10, Exhibit 26 (received \$200); ██████ at 26, Exhibit 10, (received amounts of \$300); ██████ Tr. at 11, 20 (received amounts of \$300, \$400, \$500 and \$600). The fact that (i) the amounts given for massages were akin to set amounts for other persons (e.g., chiropractors and facialists who came to the house after receiving a similar call (“are you available”) and (ii) payments were often decoupled from even a massage, see ██████ Tr. at 15, Exhibit 19, and certainly from illegal sexual conduct, negates any notion that an enticement to have illegal sexual activity could be implied from the mere fact that Mr. Epstein and the masseuse each would expect there to be payment for a massage. Any additional agreement would occur, if at all, randomly, and only in person i.e. would not be known at the time of the communication in question. The requirement of a “knowing” inducement or enticement requires more. Neither mere solicitation nor the creation of opportunities to commit an offense comprises inducement. Rather, inducement refers to government conduct that persuades a person to turn “from a righteous path to an iniquitous one.” *United States v. Gifford*, 17 F.3d 462, 468 (1st Cir. 1994) (citations omitted). Inducement entails some semblance of “arm-twisting,” pleading, or coercive tactics. See *id.* Florida law is similar. See *Marreel v. State*, 841 So.2d 600, 603 (Fla. App. 4th Dist. 2003) (“Inducement cannot be found by prompting or creating an opportunity: Neither mere solicitation nor the creation of opportunities to commit an offense comprises inducement.”)

In this case, there was no unwillingness at all. Young women who visited Mr. Epstein’s home more than once did so willingly and of their own volition. Whatever activity these women engaged in while there was also entirely uninduced by any antecedent phone call. A compilation of messages from message pads seized by the State during a search of Mr. Epstein’s Palm Beach property clearly reflects that if there was a regular pattern it was of women calling Mr. Epstein’s home or his assistants to determine whether they could be scheduled to come to his residence to give a massage rather than providing evidence that Epstein’s assistant would knowingly use the phone to induce or entice or persuade or coerce as required by § 2422(b). See Message Pad Entries, Exhibit 8.

Additionally, any reliance on implication or routine would require a theory of criminal liability that stands in stark contrast to the heartland of the reported precedents we have

examined. See Table of § 2422 Cases, Exhibit 28. A great majority of § 2422(b) cases are brought under the attempt theory where the charged defendants believed the target of their inducement was 18 but where they were in fact communicating with a law enforcement agent conducting a “sting” operation. In such cases, the intent element is proven by repeated explicit Internet communications evidencing both the defendant’s belief of age (the norm is for the “sting” to fabricate an age significantly under the statutory limit) and the defendant’s unambiguous intent to engage in sexual intercourse, oral sex, or other conduct squarely within the heartland of “illegal sexual activities”. Importantly, in these cases, the age of the victim is typically 14 or under. Further, the give and take of express communications in these cases (generally via e-mail, instant messenger, or postings in chatrooms) provide explicit proof of a knowing inducement, persuasion, enticement or more. These communications are replete with explicit sex talk, multiple explicit sexual propositions and specific sexual requests, making clear both the perpetrator’s intention to induce as well as the illicit sexual activity intended to be induced. Most other non-sting cases feature explicit inducements, often the sending or receiving of graphic photos from which age can be readily deduced, and unambiguous references to targeted illegal sexual objectives. None of the reported decisions rest alone on communications by a third party aimed at “scheduling” or at inquiring whether someone is available to work at a specific time or on responsive messages merely communicating availability to work—i.e. give a massage—all without an express and knowing inducement, express evidence of knowledge of age, or any agreed objective of an illegal sexual activity as it is defined by Florida statute.

The bottom line here is that there is no proof that any given call arranged for (or was intended to arrange for) sexual activity, and thus no proof that the phones were used to lure, induce, entice, persuade, or coerce someone to engage in such activity. Without a predicable pattern linking illegal sexual activity to each visit, there is no viable implication that any given communication was intended to yield sexual activity. And such an implication would in any event be contrary to fact, since all of the evidence in this case demonstrates that the decision to engage (or not engage) in sexual conduct was made on the spur-of-the-moment it was “solicited” during the face-to-face encounter rather than over the phone.

d. There Is No Vicarious Liability.

There is no evidentiary basis for initiating a prosecution based on calls made by Mr. Epstein’s assistant: She did not know the women’s ages, lacked knowledge that any criminal sexual activity was intended, and never used the phone to persuade or induce anyone to visit Mr. Epstein except for the purpose of providing a massage. Without these elements, Mr. Epstein’s assistant cannot be proven to be a co-conspirator or abettor, and without evidence that Mr. Epstein specifically directed his assistant to call a specific witness who Mr. Epstein then knew to be under 18 and with whom Mr. Epstein at that time specifically intended to engage in a criminal sexual activity, Mr. Epstein cannot be held criminally liable for the phone calls made by his assistant.

While the Government apparently believes that there may be evidence that Mr. Epstein was told the ages of a small subset of the masseuses, there is no evidence that the *other* required elements of proof could be established—namely that the phone was used to induce sexual activity, rather than schedule a massage, and that at the time of the call, Mr. Epstein had the specific intent required to violate the statute (*i.e.* that he knew who the assistant was calling, that he authorized the assistant to persuade or induce or entice over the phone, that he had actual knowledge or belief that the person called was a minor, and that he was directing the call with the specific intent to have illegal sexual activities with the minor, as defined by Florida law). Again, the evidence here conclusively shows that any sexual activity that followed from a scheduled massage was in fact random, not part of a consistent pattern or practice, and resulted from the spontaneity of the post-telephone person-to-person contact that alone is subject to State prosecution.

e. There Is No Evidence Of A Conspiracy.

The requirements of § 2422 or the other two federal statutes for that matter, cannot be diluted or circumvented merely by resorting to a conspiracy charge. Conspiracies require a meeting of the minds of the essential elements of the criminal object which in this case would be a violation of §§ 2422(b), 2423(b), or 1591. Elements such as the use of the interstate facility to knowingly persuade, induce, entice, or coerce in § 2422(b), or the purpose to have illicit sex with a minor while engaged in interstate travel in 2423(b), *see infra* part II.C, are not jurisdictional hooks but instead are the essence of the federal crime. A conspiracy must include an agreement to each such element. These federalizing elements cannot be diminished or made irrelevant by resort to a conspiracy—they are the necessary object of any federal conspiratorial agreement and are unproven as to Mr. Epstein and equally unproven as anyone directly employed by him.

f. There Is No Basis For A Prosecution Under § 2422(b).

Given all of this, there is no basis for prosecuting Mr. Epstein under § 2422(b). Mr. Epstein did not place telephone calls inviting underage women to his house. The vast majority of women who came to Mr. Epstein's house were 18 or over. Those who were under 18 were told to lie about their age and did. Mr. Epstein's assistant did not know that the women she called were in fact under 18. Mr. Epstein did not direct his assistant to use the phone to induce underage women to engage in illicit sexual activity with him. And Mr. Epstein's assistant did not use the phone to induce underage women to engage in illicit sexual activity with him.

4. Clear Statement Rule

To the extent there is any ambiguity about the statutory requirements, it should be resolved against a prosecution of Mr. Epstein. Under our federal system, the "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Accordingly, as the Supreme Court has stated, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects 'a change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3

(1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411-12 (1973)). In *Enmons*, the Court refused to accept the Government's "broad concept" of the Hobbs Act, because it would have rendered all manner of minor actions subject to federal prosecution and stringent federal punishment, covering even "the worker who threw a punch on a picket line, or the striker who deflated the tires of his employer's truck." *Enmons*, 410 U.S. at 410-11 ("Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work ... such an unprecedented incursion into the criminal jurisdiction of the States.").

The same rationale applies here. The crime of engaging in underage criminal sexual activity (or underage prostitution) is traditionally considered within the State's historic police power. It is well-settled law that if Congress had wanted to federalize such crimes, it needed to say so with unmistakable clarity in § 2422(b). See, e.g., *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'") (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *id.* at 65 (Congress "should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); see also *United States v. Drury*, 344 F.3d 1089, 1101 (11th Cir. 2003) (recognizing that in the absence of "unmistakably clear" language signaling Congress's intent to alter the federal-State balance, courts should interpret the statute in the manner "that does not impute an intention upon Congress to invoke its full commerce power to regulate conduct traditionally controlled by the States").

Needless to say, Congress did not say with unmistakable clarity in § 2422(b) that it wanted to federalize historically State crimes. Quite the opposite: Congress criminalized only "using" an interstate facility to "knowingly persuade" or "induce[]" a minor to engage in unlawful sexual activity. Again, the most natural reading of that language is that § 2422(b) creates a crime of communication across an interstate facility. That is why most of the reported prosecutions under § 2422(b) involve sting operations in which the criminal sexual activity never actually took place; it was enough that a defendant knowingly attempted to induce such behavior via the telephone or Internet. In any event, there is no sign in § 2422(b)—much less an unmistakable sign—that Congress intended to federalize a host of State crimes like underage solicitation or prostitution.

The more narrow reading of § 2422(b) is consistent with the position recently articulated by the Department of Justice in a similar context. See November 9, 2007 DOJ letter to the Judiciary, at 8-9, Exhibit 15. In reviewing proposed changes to human trafficking statutes like 22 U.S.C. § 2151, the DOJ opposed removing the requirement that a defendant have knowledge of a minor's age. The DOJ argued that eliminating the knowledge-of-age requirement would "run[] counter to the criminal law goal of punishing culpable states of mind" and would create an unusual strict liability crime with a harsh mandatory minimum sentence. *Id.* at 8, ¶ 17. Likewise, the DOJ opposed expanding the Mann Act to include cases "affecting" interstate commerce. It reasoned that federal law already adequately covers crimes in which victims have

been trafficked by force or coercion, and that “pandering, pimping and **prostitution-related offenses have historically been prosecuted at the state or local level.**” *Id.* (emphasis added); see also *id.* (“Furthermore, the Department is not aware of any reasons why state and local authorities are not currently able to pursue prostitution-related crimes such that Federal jurisdiction is necessary.”) Those observations could hardly be more apt in this case. Expanding § 2422(b) to reach a prostitution-related offense is “unnecessary and a diversion from Federal law enforcement’s core anti-trafficking mission.” *Id.* at 9.

In the end, federal prosecutors attempt to argue that § 2422(b) applies wherever anyone uses an interstate facility and unlawful sexual activity ensues. However, the statute clearly aims at the conduct of Internet predators, *i.e.*, those who knowingly and intentionally target children through some means of interstate commerce. That is the natural reading of the text, and it is consistent with the statute’s purpose, the rule of lenity, and principles of federalism. See *Scheidler v. Nat’l Org. for Women, Inc.*, 547 U.S. 9, 16-21 (2006) (construing the Hobbs Act narrowly based on statutory text and history, as well as the need not to “federalize much ordinary criminal behavior”). On any broader interpretation, § 2422(b) would federalize nearly any sex-related crime if there were use of the telephone or Internet. If Congress had wanted to effect that sort of sea-change in the balance between federal and State power, it could and would have said so when it enacted § 2422.

Florida law defines a range of prostitution and prostitution related offenses, but it treats them as **misdemeanors**, making it a felony for a third violation. See Fla. Stat. 796.07(4). To ratchet up the punishment, by invoking the federal statute, to felony crime with a long mandatory minimum prison sentence attached, is not what Congress intended when it enacted this law, nor does the statute give fair warning that the statute made such conduct a federal criminal offense. It would work a major shift in the State-federal balance—at a time when the administration has eschewed, on federalism grounds, extending federal criminal law into areas that are primarily and historically of State concern. And it would do so where the federal (as opposed to the State) interest is minimal, assuming a federal interest exists at all. In addition, it would raise questions of the utmost seriousness under the Ex Post Facto and Due Process Clauses, since a prosecution of Mr. Epstein under § 2422(b) would require a construction of the statute that was unforeseeable when the conduct at issue occurred. See, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). If a judicial construction of a criminal statute is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, “it must not be given retroactive effect. *Id.* at 354, quoting Hall, *General Principles of Criminal Law* 61 (2d ed. 1960).

5. Conclusion

In sum, the facts and evidence do not fit the elements required to prove the crime. There are numerous factual and legal hurdles that must overcome to meet the key elements of this crime. Federal prosecutors will have to establish from credible evidence that Mr. Epstein used a phone to engage in the prohibited acts. To the extent others made the phone calls, there is no evidence that the phone was used to induce the young women to do anything other than provide

a massage. The facts clearly will not establish that Mr. Epstein knew that whoever made the calls was engaging in an attempt to induce anything other than a massage. The facts and evidence do not establish that parties who were spoken to, were “persuaded, induced, enticed, or coerced.” And the facts and evidence establish that Mr. Epstein did not know the ages of the women who came over when the phone was used, and did not at the time of the calls intend to solicit prostitution or any sexual activity chargeable under Florida law.

Under these circumstances, taking a statute plainly not intended to cover this alleged conduct and stretching to accomplish something Congress never intended would be to grossly overreach—especially where State law normally covers this territory. Mr. Epstein undeniably committed State offenses. He was so indicted and has agreed, subject to the resolution of the successive federal criminal investigation, to plead guilty to that which the evidence proves—State offenses.

Consistent with Congress’s focus on sexual predators, federal prosecutors have never used § 2422(b) in this way. We have identified 199 prosecutions under § 2422(b),¹⁰ and all of them have involved Internet predation, for-profit prostitution rings, sex tourism, or some other situation in which the defendant himself either abused the victim or aggressively induced minors over the mail, phone or Internet. Needless to say, Mr. Epstein is not a sexual predator, let alone an Internet predator. Evidence shows that Mr. Epstein did not target minors; that women were motivated by the opportunity to make money; that all sexual touching was entirely consensual; and that all of the conduct took place in Mr. Epstein’s home in Palm Beach County.

B. 18 U.S.C. § 1591

Section 1591 criminalizes human trafficking. It reads as follows:

18 U.S.C. § 1591. Sex trafficking of children or by force, fraud, or coercion

(a) *Whoever knowingly—*

(1) *in or affecting interstate or foreign commerce*, or within the special maritime and territorial jurisdiction of the United States, *recruits, entices, harbors, transports, provides, or obtains by any means a person*; or

(2) *benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),*

¹⁰ We identified a total of 230 prosecutions under § 2422(b), but 31 of those case opinions fail to provide any information as to the facts underlying the charges.

knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act....(emphasis added)

The text, structure, and history of this statute make clear that it was never intended to apply to a case like this one, and the Department's own policy statements and past prosecuting decisions demonstrate that applying § 1591 in this case would be unprecedented and inappropriate.

1. The Text Of The Statute Forecloses Its Application In This Case.

By its plain text, the statute requires (1) the deliberate (2) obtaining or enticing (3) in interstate commerce of (4) a person (5) while "knowing that force, fraud, or coercion ... will be used to cause the person to engage in a commercial sex act," or "knowing that" the person "has not attained the age of 18 years and" (6) "will be caused to engage in a commercial sex act." 18 U.S.C. § 1591. These elements cannot be satisfied.

To begin with, by no stretch of the imagination did Mr. Epstein use "force, fraud, or coercion" in connection with any of the women who came to his home. In fact, it was just the opposite. There is ample testimony that the women felt comfortable with Mr. Epstein. Those who came to his house were told before they chose to come that Mr. Epstein would request a massage and might possibly request that the masseuse remove her clothing. It was also made clear to those who came to his home, that if ever Mr. Epstein requested more from them, and they did not feel comfortable with his request, all they need do was tell him so and he would be fine with that. Each individual approached about Mr. Epstein was free to accept or reject any invitation, each was free to introduce or not introduce Mr. Epstein to their friends (as many did), each was free, if asked, to reject any request by Mr. Epstein for anything more than a simple massage and to end the massage at any time. In fact, some did reject his requests and end the massage, and they were still paid for their services. In a number of cases, even those who ended massages early returned, either to bring friends or to wait, talk and snack in Mr. Epstein's house. Still many others returned to Mr. Epstein's house time and time again to perform massages. See Summary of Testimony re No Coercion, Exhibit 31. To suggest that Mr. Epstein in any way used "force, fraud, or coercion" with these women is baseless. To the contrary, the young women's testimony in this case clearly reflects, there is not even the slightest whiff of coercion in this case, nor any suggestion that the young women involved were lacking in the ability to make fully informed choices. The clear record that all the conduct in question was voluntary, non-violent, and non-coercive plainly demonstrates that this would be an inappropriate case in which to presume coercion.

Furthermore, the evidence in this case conclusively establishes that the underage girls who visited Mr. Epstein's home have, without exception, either expressly admitted that they lied to Mr. Epstein about their age or instructed others to lie to Mr. Epstein about their age. See *supra* at part II.A.3.b. And the identity of the masseuses (and their ages) was purely random—

some girls were over 18, some were under, and the identity of a given masseuse on a given day depended entirely on who was available or who was brought to Mr. Epstein home, unsolicited, by a friend. There was, in short, no deliberate effort to target underage girls; to the extent any underage girls visited Mr. Epstein's home, it was pure happenstance, made possible only because the girls themselves deceived Mr. Epstein in order to gain access to his property.

Nor is there any evidence that Mr. Epstein or his assistants acted with knowledge that the minors would "be caused to engage in a commercial sex act." Again, Mr. Epstein's massages did not invariably lead to sexual contact (and often did not lead to sexual contact), *see supra* at part II.A.3.c., which makes it impossible to prove that the girls were recruited by someone "knowing" that those girls would "be caused to engage in a commercial sex act." After all, one cannot be said to have "known" that something "would" happen if it did not actually happen. Perhaps more important, the statute's use of the term "be caused to engage" demonstrates that Congress contemplated some use of undue influence or pressure to induce the minor to perform "a commercial sex act." When two people willingly and consensually engage in a sex act—even one that involves the exchange of money—it cannot be said that one has "be[en] caused" by the other to engage in the act. And if the statute were applied without requiring some element of undue influence, then it would apply to *any* act of consensual prostitution involving a willing minor, which certainly was not Congress's intent. The "knowing causation" element of the statute thus makes clear that the statute targets traditional pimps—those who recruit underage women and influence or require them to engage in sexual acts with third parties—not the third-party "Johns" who unwittingly solicit an underage prostitute acting under the influence of a pimp.

Needless to say, there is no evidence whatsoever that Mr. Epstein was pimping the young women who came to his home—and there is no evidence whatsoever that Mr. Epstein wielded any undue influence over those young women in their own interactions. To the contrary, each was free to accept or reject any invitation to his home; each was free to introduce or not introduce him to their friends; each was free, if asked, to reject any escalation of a simple massage into something more. Indeed, many of the girls visited Mr. Epstein's home unsolicited—and many left messages with Mr. Epstein's assistant seeking to visit him. *See supra* at part I. The statute cannot plausibly be read to cover these circumstances, where there is no serious question that the masseuses chose—but were not "caused to"—perform massages on Mr. Epstein, and, occasionally, more.

Finally, the statute's express requirement that there be a nexus between the inducement of a minor and interstate commerce is not satisfied in this case. That requirement makes clear that Congress intended to target commercial prostitution operations with a substantial impact on the interstate economy—i.e., those involving the coercive "trafficking" of minors across State or national boundaries as part of a commercial enterprise—rather than purely local prostitution. But that's all that was involved here. Mr. Epstein did not entice anyone located in another State or country. He did not entice anyone to cross State or national lines. None of the women in this case ever did cross State lines. Any sexual contact that occurred took place between Palm Beach

residents in Palm Beach. And any impact that the private, consensual activities at issue in this case could have had on interstate commerce was far too attenuated to sustain the application of this statute to Mr. Epstein's alleged conduct—not least of all because there is no evidence whatsoever that Congress intended § 1591 to target the sort of purely local conduct at issue here (as opposed to the interstate or transnational trafficking of minors). Needless to say, application of the statute under these circumstances would raise grave constitutional concerns, *see, e.g., United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995), and given the absence of any basis in the text, structure, or history of the statute for thinking that Congress intended to reach such purely local conduct, it should not be stretched to apply here.

2. The Structure Of The Statute Forecloses Its Application In This Case.

The broader structure of the statute likewise makes clear that § 1591 was never intended to apply to the sort of conduct at issue in this case. § 1591 was enacted in 2000 as part of the Trafficking Victims Protection Act (TVPA), which is a comprehensive legislative scheme aimed at the problem of human trafficking. That statute created four new offenses, each of which unquestionably is directed at coercive human trafficking, rather than simple solicitation of prostitution: Section 1589 addresses forced labor; section 1590 addresses trafficking with respect to peonage, slavery, involuntary servitude or forced labor; § 1591 addresses trafficking of children or by force, fraud, or coercion; and section 1592 addresses the concealment or confiscation of another person's passport or identification in the course of violating the preceding trafficking provisions. And the TVPA goes on to provide for the civil and criminal forfeiture of trafficking proceeds.

In every respect, then, the TVPA is directed at interstate and international human trafficking, particularly of women and children (and involving forced labor and sex). Each section of the statute plainly targets the operators of trafficking regimes, not their "Johns." Reading the statute to apply to simple prostitution, which is all this case involves, would wrench § 1591 from its surrounding context, and strain it to apply here—where there is not even a whiff of coercion, and no evidence whatsoever that the young women involved in this case were incapable of making their own choices.

3. The History Of The Statute Forecloses Its Application In This Case.

The legislative history of § 1591 and the TVPA further makes clear that Congress intended the statute only to cover human trafficking offenses, not mere solicitation. *See* 114 Stat. 1464 § 102 (Oct. 2000) (purpose of § 1591 is "to combat trafficking in persons, a contemporary manifestation of slavery"); *id.* ("Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.").

None of the stated goals of the TVPA in general, and of § 1591 in particular, apply to acts of solicitation of prostitution. Nothing in the legislative history states or any way suggests

that Congress was addressing the evils of human trafficking by targeting Johns. Instead, the clear Congressional focus was on traffickers—that is, those who participate and engage in a modern day form of slavery, by using force, fraud, or coercion to exploit the unwitting. *See, e.g., Legal Options To Stop Human Trafficking: Hearing Before The Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 15 (Mar. 26, 2007) (statement of Deputy Assistant Attorney General Grace Chung Becker) (“Human trafficking is really about force, fraud or coercion, and that is the key element that describes human trafficking.”); *Report on Activities to Combat Human Trafficking*, U.S. Department of Justice, Civil Rights Division (Feb. 24, 2006), available at http://149.101.1.32/crt/crim/trafficking_report_2006.pdf (“[T]rafficking is the modern-day form of slavery. It requires the use of force, fraud or coercion by a trafficker to compel a person, or hold someone in an employment situation in which he or she will be criminally exploited.”).

Again, there is no evidence that Mr. Epstein’s conduct or that of his associates resembles the kind of conduct at which this statute was aimed. To the contrary, the evidence shows again and again that the young women involved in this case were willing participants: they lied about their age because they knew Mr. Epstein was not interested in minors; they called the home seeking to make their own appointments with Mr. Epstein; many returned to the home on multiple occasions; and they were free to stay or leave on whatever terms they desired. Congress plainly did not intend § 1591 to cover these circumstances.

4. The Department’s Own Policy Statements Regarding The TVPA Foreclose The Application Of § 1591 In This Case.

The Department’s own policy statements on prostitution-based cases underscores that § 1591 cannot and should not be distorted to include the conduct at issue in this case. As the Department has explained, “Federal law prioritizes crimes in which victims have been trafficked as a result of force, fraud, or coercion, including the sex trafficking of children in which coercion is presumed i.e. crimes that fall under the Thirteenth Amendment’s prohibition on slavery and involuntary servitude, and commercial sex involving transportation in interstate commerce.” *See* November 9, 2007 DOJ letter to the Judiciary, at 8, Exhibit 15. The Department’s position further opposes the federalization of “prostitution-related offenses” as an unnecessary “diversion from Federal law enforcement’s core anti-trafficking mission,” and expresses the view that State and local authorities are more than capable of addressing such offenses. *Id.* at 8-9.

Needless to say, Mr. Epstein is not a “trafficker” of children. He derived no profit from any prostitution business. And the testimony of the women is clear and uncontroverted: Mr. Epstein did not exercise force, fraud, or coercion over any female—in fact, quite the opposite. *See* Summary of Testimony re No Coercion, Exhibit 31. Therefore, there is no basis for presuming coercion here, given the clear record that the conduct in question was voluntary, non-violent, and non-coercive.

5. The Department’s Prosecution History and Existing Case Law Foreclose The Application Of § 1591 In This Case.

Federal prosecutors have never used § 1591 in a case involving facts like these. We have identified 21 prosecutions under § 1591,¹¹ and all of them have involved international sex trafficking; for-profit prostitution rings, usually involving minors and forcible coercion; or forcible rape or physical abuse and intimidation. *See, e.g., United States v. Norris*, 188 Fed. Appx. 822, 2006 WL 1889654 (11th Cir. 2006) (prosecution of several men for conspiracy to hold young women in peonage, and to traffic them for commercial sex acts, involving force and threats); *United States v. Sims*, 161 Fed. Appx. 849, 2006 WL 14581 (11th Cir. 2006) (defendant picked up young woman, transported her over State lines, ordered her to prostitute herself, and took money from her).

Moreover, in the cases enforcing the statute, the victim is typically 14 and under. See Table of § 1591 Cases, Exhibit 29. Therefore, witnesses under 18 years old in this case are not the “children” in respect of whom trafficking cases have historically been enforced. With two exceptions, all such witnesses were 16 years old or over. Of the two exceptions, one, [REDACTED], has given multiple sworn statements that no commercial sex act occurred (and that she lied to Mr. Epstein about her age). The other, [REDACTED], who has a history of criminal misconduct and drug addiction, has sought to collect monetary remuneration from Mr. Epstein in a civil suit and her credibility is strained beyond any reasonable reliance. Importantly, other girls have testified that Ms. [REDACTED] told them to lie about their ages because Mr. Epstein did not want underage girls in his home. This strongly suggests that Ms. [REDACTED] herself lied to Mr. Epstein about her own age.

It is little wonder, then, that the courts have made clear that § 1591 simply is not intended to cover the kind of alleged conduct at issue here. Thus, as the Eleventh Circuit has explained, “Section 1591 does not criminalize all acts of prostitution (a vice traditionally governed by state regulation).” Rather, its reach is limited to sex trafficking that involves children or is accomplished by force, fraud, or coercion.” *United States v. Evans*, 476 F.3d 1176, 1179 n.1 (2007); *see also United States v. Sims*, 161 Fed. Appx. 849, 2006 WL 14581 at *3 (11th Cir. 2006) (to “establish Sims’s guilt on the sex trafficking of a minor count, the government had to show that Sims *benefited financially* from Owen’s sexual activity and that Sims knew that (a) force or coercion would be used to cause Owens to engage in a criminal sex act or (b) that Owens was under the age of 18.” (emphasis added)). The Eleventh Circuit’s interpretation of the statute makes perfect sense: were § 1591 not limited in that fashion, it would threaten to criminalize a host of localized behavior that has nothing to do with human trafficking.

In these respects, Mr. Epstein’s case hardly could differ more from the typical § 1591 case, like *Evans*—where a stereotypical pimp enticed an AIDS-inflicted 14 year-old into prostitution for commercial purposes and essentially held her in bondage. 476 F.3d at 1176-78.

¹¹ We identified a total of 25 prosecutions under § 1591, but 4 of those case opinions fail to provide any information as to the facts underlying the charges.

Conversely, Mr. Epstein was not involved in any kind of human trafficking, enslavement or commercial prostitution enterprise. We have attached sworn testimony that shows that Mr. Epstein solicited, received, and paid for massages which included, on some occasions, consensual sexual touching from local women in his Palm Beach home. Some of these women were under 18 at the time of the conduct, but they systematically lied to Mr. Epstein about their age. These facts are nothing like any of the prior cases in which the Department has initiated a § 1591 prosecution.

At bottom, Mr. Epstein's conduct was purely local; it did not involve "trafficking of women or children in the sex industry" and was not part of a phenomenon that, in the aggregate, had an economic impact on interstate or foreign commerce. Extending the statute to local customers who seek prostitution services, even on a regular basis, would collide with the limits imposed by *Evans*, by the history of a statute that is premised on the Thirteenth Amendment, by the statute's placement in Chapter 77 of the Title 18 (titled "Peonage, Slavery, and Trafficking in Persons"), and by the Department's own representations that prostitution is properly reserved for State and local prosecution absent its featuring commercial sex trafficking of children. Mr. Epstein simply is not a "trafficker" by any stretch of language, policy or imagination. Therefore, prosecution under § 1591 should not be authorized. It has never before been approved on facts like this, and no reported precedent encompasses Epstein's conduct within the ambit of a viable § 1591 prosecution. See Table of § 1591 Cases, Exhibit 29.

C. 18 U.S.C. § 2423(b)

Section 2423(b) criminalizes domestic and international sex tourism. It reads as follows:

18 U.S.C. § 2423. Transportation of minors

(b) 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.

(Emphasis added.) Section 2423(b) thus provides up to 30 years of imprisonment for anyone who travels across State lines (i) for the purpose of engaging in (ii) illicit sexual conduct with a minor. Neither of those elements is satisfied here. Mr. Epstein did not travel to Palm Beach for the purpose of engaging in sexual activity with a minor, and whatever sexual activity did occur was not "illicit sexual conduct" within the meaning of the statute.

First, Mr. Epstein's trips to Palm Beach were not undertaken "for the purpose of engaging" in sexual activity, much less for the purpose of engaging in "illicit sexual conduct." To the contrary, the prospect that Mr. Epstein might engage in sexual activity in Florida was not the dominant motive—or even a significant motive—for his travel. See *Mortensen v. United*

States, 322 U.S. 369, 374 (1944) (intention to engage in proscribed conduct must “exist before the conclusion of the interstate journey and must be the **dominant motive** of such interstate movement.”) (emphasis added); *United States v. Hoschouer*, 224 Fed. Appx. 923, 924 (11th Cir. 2007) (affirming jury instruction that “the Government must show that the Defendant’s criminal purpose was not merely incidental to the travel”); *id.* at 927 (“By requiring that the jury find that Defendant’s illicit sexual conduct was more than ‘merely incidental’ to his purpose in traveling..., the district court effectively required that Defendant’s illicit purpose be an **important purpose** of the travel.”) (emphasis added); *United States v. Tykarsky*, 446 F.3d 458, 471 (3d Cir. 2006) (“[T]he relationship between the mens rea and the actus reus required by § 2423(b) is neither incidental nor tangential. § 2423(b) does not simply prohibit traveling with an immoral thought, or even with an amorphous intent to engage in sexual activity with a minor in another state.”).

Instead, Mr. Epstein spent at least 100 days a year in Palm Beach for family purposes, business purposes, and social purposes, and to maintain a home that he has owned in Palm Beach since 1991—more than a decade before the incidents giving rise to this investigation. In fact, Mr. Epstein’s longstanding ties to the Palm Beach community led him to establish a residence there nearly 20 years ago. While in Palm Beach, he routinely visits family members and close friends, has seen his primary care physician for checkups and prescribed tests in the Palm Beach area, and until her death in May of 2004, regularly saw his mother who was hospitalized and then convalesced in south Florida. Any massages he may have received in Palm Beach were entirely incidental to these regular trips home.

Flight records previously provided to the United States Attorney’s Office show that in 2003, Mr. Epstein traveled to and from his Palm Beach home on 31 occasions, and spent 29 multi-day weekends at the residence. In 2004, Mr. Epstein traveled to and from his Palm Beach home on 37 occasions, 36 of which included a multi-day weekend stay. In the first 9 months of 2005 the pattern continued: 24 multi-day trips to Palm Beach including 21 multi-day stays over weekends. From 2003 through 2005 there was no month when Mr. Epstein did not spend at least one weekend in Palm Beach. In fact, the Palm Beach area is the home base for his flight operations, for maintenance of his aircraft, and for periodic FAA inspections. Additionally, Mr. Epstein’s pilots and engineers all resided in Florida. Mr. Epstein’s gun license, until recently, was a Florida license. He has given generously to charities in Florida. He has met business associates at his Palm Beach residence.

In short, the evidence is indisputable that Palm Beach was where Mr. Epstein spent most of his discretionary time, and that his travels to Palm Beach were trips returning to his home—not the escapades of a sex tourist off to some destination inextricably intertwined with the significant or dominant purpose of having “illicit sexual conduct.” Epstein’s trips to Palm Beach were simply those of a business person traveling home for weekends or stopping over on his way to or from New York and St. Thomas.

As with § 2422(b), § 2423 requires that there be a concurrence of (a) interstate travel for (b) the purpose of having illicit sexual conduct, as defined in 18 U.S.C. § 2246, with a minor. Mr. Epstein's routine of traveling to and from Palm Beach—to or from *his home*—for purposes other than illicit sex take this case outside of the paradigm of prior 2423(b) prosecutions, *see* the Table of § 2423 Cases, Exhibit 30, and make this case more like *Hansen v. Haff*, 291 U.S. 559 (1934), and *Mortensen v. United States*, 322 U.S. 369 (1944). In *Hansen*, the Supreme Court rejected charges against a woman traveling back to her home in the United States to “continue her irregular and improper conduct,” concluding that “her entry [into the United States] cannot be said to be with the purpose ‘only that she might live in a state of concubinage.’” 291 U.S. at 562. And in *Mortensen*, the Court likewise held that two women who took a trip from their home, returned home, and then resumed their illegal prostitution business did not violate federal law—explaining that “[t]he return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course.” 322 U.S. at 375.

As in *Mortensen*, Mr. Epstein would fly from Palm Beach with the intention, documented by his regular practice as reflected in flight logs provided to the United States Attorney's Office, to return home. Those regular trips were motivated by a myriad of ordinary motives: family, medical, social, business, and a common love of the area and his long-owned home. To the extent that upon arriving home he “resumed [his] immoral practices,” like *Mortensen* defendants, *id.* at 375, this resumption “does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to [Palm Beach].” *Id.* Mr. Epstein's commission of State offenses at his residence in Palm Beach is indistinguishable from the facts in *Mortensen* and well outside the demands of federal law that an interstate trip be significantly motivated or have as its “important purpose,” *United States v. Hoschouer*, 2007 WL 979931 (11th Cir. 2007), an illegal sex act with a person known to be a minor.

Second, there was no intent to engage in “illicit sexual conduct” under the statute. Section 2423(f) defines “illicit sexual conduct” as any sexual act set forth in 18 U.S.C. § 2246 that would be in violation of Chapter 109A of the United States Code.¹² Section 2246 sets forth vaginal, oral, and anal intercourse; genital or anal penetration; and genital touching of a minor that does not occur through clothing, while Chapter 109A defines a minor as a person under the age of 16. Here, there was no intent to engage in “illicit sexual conduct” *at the time Mr. Epstein was traveling to Florida*. Thus, even if, once in Florida, Mr. Epstein purposefully engaged in a proscribed act under the statute, which he did not, that purpose arose long after his travel to Florida was complete, while a particular massage with a particular masseuse was in progress. Indeed, there is no evidence that Mr. Epstein had knowledge that he would see anyone at all once he arrived in Palm Beach, let alone knowledge that he would see any person for the specific

¹² Section 2423(f) also defines “illicit sexual conduct” with reference to 18 U.S.C. § 1591, but that statute in turn refers to 18 U.S.C. § 2246.

purpose of engaging in intercourse, penetration, or skin-to-skin touching with someone under the age of 16. Moreover, Section 2423(g) makes it an affirmative defense if Mr. Epstein reasonably believed, based on a preponderance of the evidence, that the women involved were at least 16 years old. As discussed earlier, sworn testimony shows that Mr. Epstein reasonably believed the women involved were at least 18 years old.

The inapplicability of Section 2423(b) is confirmed by its legislative history and prosecutorial practice. Section 2423(b) is part of the Mann Act, which was originally enacted in 1910 to prevent the transportation of women and girls across State lines for immoral purposes. *See* 36 Stat. 825 (1910). That portion of the Mann Act is now codified at Section 2423(a). In 1994, Congress added Section 2423(b) to address the increasing problem of international sex tourism. *See* Pub. L. 103-322, § 160001(g)(2). Thus, Sections 2423(a) and (b) together address those persons who transport minors across State lines, or who themselves travel across State lines, in order to engage in unlawful sexual activity. Again, Mr. Epstein traveled to Palm Beach because he had a residence there; any sexual activity was merely incidental.

Consistent with Congress's focus on sex tourism, federal prosecutors have never used Section 2423(b) in this way. We have identified 177 prosecutions under Section 2423(b),¹³ and all of them are readily distinguishable. In 129 prosecutions, the defendant's primary purpose of travel was to engage in sexual activity with a minor. The vast bulk of those cases were sting operations in which the defendant was arrested either while traveling to or upon arriving at the hotel where he and the minor had specifically prearranged a meeting prior to travel for the sole purpose of having sexual intercourse. In 26 prosecutions, the defendant either traveled with the minor across the State lines, or intended for (and provided the means for) the minor to travel across State lines for sex. In the remaining 22 prosecutions, the defendant traveled or planned to travel internationally in order to engage in sexual activity with a minor. As with the other statutes, that is a far cry from what allegedly occurred in this case.

Third, receiving massages even topless massages is not a criminal objective. Section 2423(b) requires that the travel be for "illicit sexual conduct" i.e. conduct that was not the norm and was not expected by Epstein to be a consequence of any specific scheduled massage during any interstate travel, conduct that was not a causative factor in his regular returns to Palm Beach.

III. *PETITE* POLICY

The Department of Justice's *Petite* Policy ("*Petite*," or the "Policy") precludes federal prosecution in this matter. *Petite* establishes a baseline of a single prosecution for any given conduct, akin to the principles of double jeopardy. It is codified in the United States Attorney

¹³ We identified a total of 203 prosecutions under § 2423(b), but 26 of those case opinions fail to provide any information as to the facts underlying the charges.

Manual ("U.S.A.M."), and establishes strict prerequisites that must be met before federal prosecutors may pursue a successive federal prosecution based on conduct already addressed by a State or local prosecution. Significantly, the Policy does not merely set forth internal Executive guidance; rather, it reflects a longstanding principle under which "Congress expressly has provided" that "a state judgment of conviction, plea agreement, or acquittal on the merits shall be a *bar* to any subsequent federal prosecution for the same act or acts." U.S.A.M. § 9-2.031A (emphasis added). The purpose of this Policy is "to vindicate substantial federal interest through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s)." *Id.* To that end, *Petite* "establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transaction(s) involved in a prior state or federal proceeding." *Id.*

There is no dispute that the Policy applies here. The State of Florida and Palm Beach County already prosecuted Mr. Epstein for sexual misconduct and agreed to a plea, thereby triggering *Petite*. In drafts of the Deferred Prosecution Agreement, federal prosecutors openly acknowledged the application of the Policy. A draft of the Deferred Prosecution Agreement stated: "after an investigation of the offenses and Epstein's background, that the interest of the United States pursuant to the *Petite* policy will be served by the following procedure [contained in the Deferred Prosecution Agreement]." *See e.g.*, September 17, 2007 email from M. Villafana to J. Lefkowitz attaching draft Deferred Prosecution Agreement, Exhibit 32. The draft agreement further stated: "Epstein understands that it is his obligation to undertake discussion with the State Attorney's Office to ensure compliance with these procedures, which compliance will be necessary to satisfy the United States' interest pursuant to the *Petite* Policy." *Id.* However, after Mr. Epstein's counsel conveyed to the prosecutors the fact that they had appeared to ignore the prerequisites of *Petite* references to the Policy were inexplicably removed from the final draft of the agreement after weeks of acknowledgement that the *Petite* issue was an important consideration for federal prosecution and resolution of this case. *See Executed Deferred Prosecution Agreement*, Exhibit 33. When asked why the *Petite* references were removed, Ms. Villafana stated flatly, "it is none of your concern."

Federal prosecutors undoubtedly feared that a subsequent federal prosecution of this matter failed to clear the substantive hurdles set forth under *Petite*. The "three substantive prerequisites" are as follows:

[F]irst, the matter must involve a substantial federal interest;

second, the prior prosecution must have left that interest demonstrably unvindicated; and

third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal

offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact....

U.S.A.M. § 9-2.031A.

Even if these prerequisites are satisfied, however, the Department retains substantial discretion to decline prosecution. As the Policy explains, “[s]atisfaction of the three substantive prerequisites does not mean that a proposed prosecution must be approved or brought. Even then, the traditional elements of federal prosecutorial discretion continue to apply.” *Id.* Finally, the Policy underscores that successive State and federal prosecutions are supposed to be rare, by requiring federal prosecutors “as soon as possible” to “consult with their state counterparts to determine the most appropriate single forum in which to proceed.” *Id.*

None of *Petite*’s “three substantive prerequisites” were satisfied here, and the Department further failed to satisfy *Petite*’s requirement that it coordinate its prospective enforcement efforts with State prosecutors in order to establish a “single forum” in which to proceed. In fact, in Mr. Epstein’s case, no consultation or coordination has ever taken place.

A. There Is No Substantial Federal Interest In This Case.

The *Petite* Policy requires that the matter involve a substantial federal interest. That threshold is not met in this case. Mr. Epstein’s alleged conduct was wholly local. It was neither interstate nor international. Each alleged act took place in his Palm Beach home. All the women alleging sexual misconduct resided in Florida (indeed, in Palm Beach County) at all relevant times. By their own admissions, none traveled across State lines for the purpose or intention of engaging in illicit sexual behavior. In addition, only a deeply attenuated nexus exists between the conduct alleged and interstate instrumentalities. Mr. Epstein neither used the statutorily defined means to induce a known minor into illegal sexual activity; nor did he travel to Palm Beach for the purpose of engaging in unlawful sexual activity. *See supra* at part II.C.

A federal prosecutor’s broadly defined federal interest of protecting children from exploitation does not constitute a proper ground for discerning a substantial federal interest with the facts at hand. With two exceptions, those facts demonstrate that all of the women involved in this case were at least 16 years old at the time of the alleged conduct, and that is the effective age of consent for federal purposes.¹⁴ There is no evidence that Mr. Epstein was aware that either of the other two girls (██████████ and ██████████) was underage. Ms. ██████████ has openly acknowledged that she lied to Mr. Epstein about her age, and other girls have testified that Ms. ██████████ told them to lie about their ages because Mr. Epstein did not want underage

¹⁴ 18 U.S.C. §2243(a) (the age of consent in the federal maritime and territorial jurisdiction is 16). In 39 States and the District of Columbia, the age of consent is 16 or younger. *See* W. Eskridge & N. Hunter, *Sexuality, Gender, and the Law* 1021-1022 (1997).

girls in his home. The conduct herein was not what Congress had in mind when it broadened the relevant federal statutes to include ten year minimum sentences for federal sex-related crimes (namely, faceless predators hiding their identities in Cyberspace while preying on children). Moreover, this case does not implicate the important national prosecutorial priority in favor of protecting minors that has heretofore animated the Child Exploitation and Obscenity Section—specifically, crimes involving Internet luring; sex trafficking of minors; profiting from prostitution as a commercial enterprise with the use of some element of force or violence in connection with prostitution; international sex trafficking; transportation of minors for the purposes of prostitution; or interstate distribution of child pornography.

The conduct in question has been accurately characterized by a grand jury as solicitation of prostitution, a quintessential State law concern. *See United States v. Evans*, 476 F.3d 1176, n.1 (11th Cir. 2007) (federal law “does not criminalize all acts of prostitution (a vice traditionally governed by state regulation)”). And as the Department has recognized, in instances of prostitution where the “John” is the defendant, states are more than well equipped to handle these cases. *See* November 9, 2007 DOJ letter to the Judiciary, at 8-9, Exhibit 15.

B. The State Prosecution Has Left No Federal Interest Demonstrably Unvindicated.

Petite permits a successive federal prosecution only where the prior state prosecution leaves a substantial federal interest “**demonstrably** unvindicated,” U.S.A.M. § 9-2.031A, (emphasis added), and further compels the Department to presume that a prior State prosecution has vindicated the relevant federal interest. *Id.* § 9-2.031D (“[T]he Department will **presume** that a prior prosecution, regardless of the result, has vindicated the relevant federal interest.”) (emphasis added). That presumption controls except in certain narrow circumstances, like when the prior State prosecution was tainted by corruption or incompetence, or where the Department finds **both** that the prior state sentence is “**manifestly** inadequate in light of the federal interest,” **and** that “a **substantially** enhanced sentence—including forfeiture and restitution as well as imprisonment and fines—is available through the contemplated federal prosecution.” *Id.* (emphasis added).¹⁵ None of these conditions have been met.

¹⁵ The *Petite* Policy also provides that the presumption may be overcome “in those rare cases where three conditions are met: first, the alleged violation involves a compelling federal interest, particularly one implicating an enduring national priority; second, the alleged violation involves egregious conduct, including that which threatens or causes loss of life, severe economic or physical harm, or the impairment of the functioning of an agency of the federal government or the due administration of justice; and third, the result in the prior prosecution was manifestly inadequate in light of the federal interest involved.” U.S.A.M. § 9-2.031D. As discussed in text, this case involves local conduct that does not implicate a compelling federal interest, and the state result is not “**manifestly** inadequate.”

As a threshold matter, there is no evidence that the State's prosecution of Mr. Epstein was in any manner tainted by corruption, incompetence, or undue influence. [REDACTED] the deeply respected Palm Beach County State Attorney, has served in that office, elected, reelected, and reelected yet again, for 12 years. [REDACTED], the lead State prosecutor in this matter, is a career prosecutor who has over a decade of experience prosecuting sex-related crimes and was a founding member of the Child Abuse Protocol, which establishes operational procedures for the investigation of child abuse reports in Florida. These highly respected State prosecutors responsible for this case are seasoned professionals, and they devoted significant time and vast resources to this case. They oversaw an extensive 15-month State investigation by State authorities, and brought their case to a successful conclusion by securing a felony indictment of Mr. Epstein and reaching a strict plea agreement that included terms the State has never previously imposed on a first-time offender like Mr. Epstein.

There is no indication whatsoever that the State prosecution somehow left any federal interest *demonstrably unvindicated*. Following its own rigorous investigation into the allegations against Mr. Epstein, the State Attorney's Office carefully considered the evidence. That evidence included a psycho-sexual evaluation, lie detector test results showing that Mr. Epstein believed that [REDACTED], one of the two alleged victims, was over 18, and MySpace pages proving that Ms. [REDACTED] regularly falsely represented her age to the general public as at least 18. Ms. [REDACTED] also found the testimony of one of the main witnesses interviewed by the police incredible. Indeed, it was Mr. Epstein's counsel—not the police—that brought to the attention of the State prosecutors the key fact that one of the key witnesses had been arrested for drug possession and was in the midst of negotiating a reduction of that charge at the time she gave her statement to police regarding Mr. Epstein.

The State Attorney's Office decided to put its witnesses to the test by convening a grand jury. Subpoenas were issued and the case was presented. [REDACTED], a key witness, refused to appear. The State grand jury returned an indictment of one count of solicitation of a prostitute. After months of contentious negotiation and following the grand jury indictment, a State plea agreement was agreed to by the State Attorney's Office and Mr. Epstein. The sentence available to the State was a maximum five-year term of incarceration and a restitution fund specifically tailored to prostitution. See Fl. Stat §§ 796.07 and 775.082.

The State fully considered the facts of this case and determined that incarceration should be held in abeyance. The factors the State considered in making this determination were: (i) Mr. Epstein had no prior criminal record; (ii) each encounter with the women in question was consensual; (iii) strong evidence that the women admitted to lying about their ages; (iv) Ms. [REDACTED] who interviewed some of the witnesses herself, stated that given their lack of credibility and the fact that they clearly were seeking money from Mr. Epstein, they were "hardly victims" and she believed it would border on the unethical to use them as witnesses; and (v) this case was, according to Ms. [REDACTED] own words, a typical "sex for money case," the type for which the State historically did not require jail time.

In reaching this determination, State prosecutors took great care in abiding by the policy of "horizontal equality," a policy United States Attorney Acosta also has stated dictates his prosecutorial decisions. Under this policy, the State determined that Mr. Epstein should be charged or given a punishment of no less or no more than anyone else under the same facts. The only reason the plea agreement was not filed with the court was the unexpected initiation of the federal investigation. Nevertheless, the *Petite* Policy was triggered once the State Attorney's Office and Mr. Epstein came to an agreement on the terms of the State plea.

Despite the pending resolution between State prosecutors and Mr. Epstein, in early August 2007, after a year of conducting their own investigation with cooperation from the FBI, federal prosecutors began discussing their own proposal to defer prosecution to the State with Mr. Epstein's counsel. During these discussions, federal prosecutors represented to Mr. Epstein's counsel that they had identified up to forty alleged "victims" of federal crimes that qualified for inclusion under 18 U.S.C. § 2255, a civil remedy, and that they intended to federally prosecute Mr. Epstein unless he and his counsel, not the federal government, sought more stringent conditions to the State's proposed plea agreement, including a two-year term of incarceration and a more severe charge. Despite the awkward and unprecedented position in which this placed Mr. Epstein—namely, to be forced to have his counsel request that the State impose harsher penalties than the State itself believed were warranted—he attempted to comply with federal prosecutors' request and came to a new agreement with the State Attorney's Office. The new agreement provided for two years of supervised custody (including various other strict conditions), followed by two years of incarceration, which may have been rescinded upon successful completion of the supervised custody portion of the sentence. See August 2, 2007 letter to [REDACTED] Exhibit 34. Under this agreement, if Mr. Epstein failed to comply with the terms of the supervised custody, incarceration would commence immediately. Upon completion of his sentence, Mr. Epstein would thus serve two additional years of reporting probation (which also included mandatory and special conditions).

Indeed, if anything, the sentence provided for by the State plea agreement went too far. Proposed as a result of the federal demand, that sentence was considerably harsher than others meted out to first-time offenders convicted of similar conduct in Palm Beach County. In fact, the State Attorney's Office had never before prosecuted a case involving this type of conduct as a felony, unless the victim was exceedingly young, especially vulnerable, or in a trust relationship with the perpetrator—facts plainly not present here.

Moreover, supervised State custody (and its intrusive monitoring conditions) is not the norm for first-time offenders. And it is highly questionable whether the harsh conditions of Mr. Epstein's State plea agreement should have been proposed at all. Over the course of negotiations with federal prosecutors, counsel for Mr. Epstein learned that the United States Attorney's Office, despite trumpeting newly-learned facts resulting from the federal investigation, had included on their list of "victims," women who could in no way qualify, either as a result of their own testimony or by statute. See [REDACTED] Tr. at 21, Exhibit 2. Indeed, after numerous discussions with federal prosecutors over several months, it became evident that the federal prosecutors had

a much smaller list—a list that still has not been disclosed to either the State Attorney's Office or Mr. Epstein's counsel. The landscape was dramatically changed yet again as a result of several alleged victims on the government's list each filing a \$50 million dollar lawsuit against Mr. Epstein. Each publicly now stating they had lied about their ages, and knew nothing about any sex activity whatsoever before they arrived. See Herman Public Statement, Exhibit 16. The initial discovery precipitated by this lawsuit undeniably supported Mr. Epstein's continued assertions that the women lied to him about their ages. See [REDACTED] (Deposition) at 37, Exhibit 3. These recent facts, along with other new evidence confirms that the conduct in question was purely local and should be treated as such. These facts have been obtained under a State discovery statute and it was over vigorous objection of the federal prosecutors.

The federal prosecutors, while clearly acknowledging that this matter fell within the ambit of the *Petite* Policy, continued to assert, without substantiation, that the proposed State plea agreement failed to vindicate the federal interest. On August 3, 2007, Assistant U.S. Attorney [REDACTED] rejected the State's new proposed plea agreement. He flatly stated that "the federal interest will not be vindicated in the absence of a two year term of state imprisonment." See August 3, 2007 letter from [REDACTED] Exhibit 35.¹⁶ This letter openly acknowledged that the *Petite* Policy applied to this matter, and also highlighted the steps federal prosecutors were taking in order to circumvent its restrictions. Mr. [REDACTED] articulation of the purported federal interest misrepresents the *Petite* Policy on two grounds. First, [REDACTED] position that the federal interest could not be vindicated in the absence of a jail term for Mr. Epstein is contrary to Section 9-2.031D of the United States Attorney's Manual. This section requires the federal prosecutor to focus exclusively on the *quality or process* of the prior prosecution. The Policy expressly states that *the prosecutor should not focus on the sentencing outcome unless there are indicia of impropriety by the State prosecutors*. See *id.* ("the Department will *presume* that a prior prosecution, *regardless of the result*, has vindicated the relevant federal interest.") (emphasis added). As stated above, there are no indicia that the quality or process of the State prosecution was affected by "incompetence, corruption, intimidation, or undue influence," and thus, vindication of the federal interest must be presumed, regardless of the type of sentence.¹⁷

¹⁶ As stated above, federal prosecutors also acknowledged the application of the *Petite* Policy in drafts of the Deferred Prosecution Agreement. See *e.g.*, September 17, 2007 email from M. Villafana to J. Lefkowitz attaching draft Deferred Prosecution Agreement, Exhibit 32.

¹⁷ While federal prosecutors once suggested that Mr. Epstein's retention of Jack Goldberger was intended to trigger the recusal of assistant prosecutor [REDACTED] and thereby influence the outcome of the State prosecution, that assertion is frivolous. Mr. Goldberger was retained by Gerald Lefcourt after Mr. Epstein already had been indicted by the Grand Jury. Mr. Lefcourt had never heard the name [REDACTED] when he hired Mr. Goldberger, and had no idea that Mr. Goldberger's law partner was married to a sex-crimes prosecutor—much less that that fact would trigger Ms. [REDACTED]'s recusal. And Ms. [REDACTED]—not Ms. [REDACTED] remained in charge of the State's prosecution of Mr. Epstein before, during, and after the retention of [REDACTED] (Continued...)

Moreover, although the actual sentence agreed with the State Attorney's Office was less than the maximum available to the State, the *Petite* Policy indicates that this should not be a relevant consideration. *Petite* does not ask federal prosecutors to compare the sentence achieved in a prior State prosecution (here, two years of supervised custody with a possibility of two years' imprisonment) against what they hope to achieve in a successive federal prosecution (here, eighteen months of guaranteed imprisonment). Instead, it focuses on whether federal law makes "available" certain forms of punishment that were not "available" in the prior State proceedings—like "forfeiture and restitution," rather than mere "imprisonment and fines." U.S.A.M. § 9-2.031D ("The presumption may be overcome even when a conviction was achieved in the prior prosecution . . . if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence . . . is *available* through the contemplated federal prosecution.") (emphasis added). As a result, the key inquiry under *Petite* is not whether federal prosecutors conceivably could do better; it is whether they can require the defendant to serve a sentence that was not even "available" to State prosecutors. *Id.* In this case, however, Mr. [REDACTED] has not asked for anything that State prosecutors could not have obtained. The fact that State authorities chose—for unquestionably legitimate reasons—not to seek that particular sentence does not change the fact that the sentence was available to the State and rejected in its discretion. Therefore, *Petite*'s presumption that the State of Florida's prior prosecution of Mr. Epstein has vindicated the federal interest cannot be said to have been overcome.

Second, the State's proposed plea agreement was *in no sense* "*manifestly inadequate*" under U.S.A.M. § 9-2.031D. The gap between the conditions contained in the proposed agreement and federal prosecutors' proposal was so narrow that it cannot reasonably be understood as inadequate, let alone "manifestly inadequate". That federal prosecutors apparently believed that the purported federal interest could not be vindicated by anything less than a two-year jail term fails to satisfy any objective reading of the *Petite* Policy.¹⁸ Properly interpreted, that Policy does not permit federal prosecution whenever prosecutors believe they might *better* vindicate the federal interest or whenever prosecutors consider the State sentence *merely* inadequate. Instead, the Policy requires that the federal interest be "*demonstrably* unvindicated" by the prior State prosecution; that the State sentence be "*manifestly* inadequate" to vindicate the federal interest; and that the successive federal prosecution offer a "*substantially* enhanced sentence." And *Petite* then makes clear that those words have real meaning by providing a telling example of an inadequate State process: "a state prosecution for assault and battery in a

Mr. Goldberger. In short, it is hard to imagine how the recusal of an assistant to the lead prosecutor could have resulted in any advantage to Mr. Epstein; more to the point, no such advantage was sought and none was obtained.

¹⁸ Federal prosecutors' demand for a two-year jail term was subsequently reduced to an 18 month jail term as reflected in the Deferred Prosecution Agreement. The difference between this sentence and the state plea agreement is even narrower.

case involving the murder of a federal official.” U.S.A.M. § 9-2.031D. To put it mildly, that egregious example is a far cry from the situation at hand.

Instead, the federal prosecutors’ disagreement with the State’s plea agreement boils down to a dispute over where Mr. Epstein initially would be incarcerated: The State believed that a *longer* sentence of supervised custody (which is a more onerous form of house arrest) and the potential for a *longer* sentence of imprisonment is adequate punishment for Mr. Epstein, while federal prosecutors insisted on a *shorter* period of traditional imprisonment and *no* supervised custody. There was no objective basis for believing that either of those punishments was demonstrably better or worse than the other. And the suggestion that the proposed State plea agreement was “manifestly inadequate” simply because the State Attorney’s Office and federal prosecutors disagree about the location and manner in which Mr. Epstein would be confined both undermines *Petite*’s strong presumption against successive prosecutions and is inconsistent with the Policy’s requirement that a prospective federal prosecution offer the availability of a “substantially enhanced sentence.” In short, the specific location of a defendant’s confinement—particularly one who is not an ongoing danger to the community under the conditions of the proposed State agreement—does not concern any federal interest, let alone a substantial one. As a result, it provided no basis for pursuing a successive federal prosecution.¹⁹

The remaining points of disagreement between federal prosecutors and their State counterparts likewise are too insignificant (or, indeed, irrelevant) to support a successive federal prosecution in this matter. For instance, while federal prosecutors have expressed concern that the State plea agreement does not require Mr. Epstein to register as a sex offender in Florida, that is not an appropriate consideration under *Petite*. After all, the Policy focuses on the prospect of obtaining “substantially enhanced” forms of punishment in order to vindicate *federal* interests, and given that the federal government does not itself require “Johns” to register as federal sex offenders, it is hard to see how State-law sex-offender registration can fairly be characterized as necessary to vindicate a federal interest—much less how its absence leaves the federal interest “demonstrably unvindicated.” Instead, federal prosecutors have told defense counsel that the only reason for their insistence that Mr. Epstein register as a sex offender in Florida is to “give the FBI a bone” for its work on the federal investigation. Needless to say, that is not an adequate justification for initiating a successive prosecution under *Petite*.

Moreover, State prosecutors appropriately exercised their judgment, based on years of experience, in determining that the evidence and the entire circumstances of this closely-

¹⁹ In rejecting the State’s proposal and demanding incarceration in lieu of supervised custody one federal prosecutor disparagingly noted that house arrest in Mr. Epstein’s case would amount to what would be seen by the public as “mansion arrest”. Such reasoning had no bearing on the *Petite* analysis and clearly violated Mr. Acosta’s stated policy of horizontal equality. Treating Mr. Epstein differently from any other similarly charged individual simply because of his wealth directly contravenes this policy.

examined case should not warrant sex offender registration. State prosecutors carefully assessed this case, including personally interviewing many of these witnesses, and they carefully considered Mr. Epstein's background and mitigating factors—most notably, that Mr. Epstein did not use coercion, alcohol, drugs, or violence; that Mr. Epstein held no position of authority in connection with these girls; and that Mr. Epstein passed a lie detector test and psychosexual evaluation. The State sentence thus reflected sound prosecutorial judgment, and was well-grounded in the entire circumstances of the case and the treatment of similar first-time offenders.

In short, given the local conduct at issue, and the reasoned judgment of State prosecutors that State sex-offender registration was not necessary, there was no basis for suggesting that the absence of State sex-offender registration demonstrably failed to vindicate federal interests. Not only was this articulation for the need for registration a violation of the *Petite* Policy, it was a clear violation of well-settled law mandating that registration cannot be used as a form of punishment. *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997); *Johnson v. State*, 795 So.2d 82, 87 (Fla. App. 5th Dist. 2000) (“Analogous to the cited Federal cases, the legislative intent of the Florida Sexual Offender notification and registration requirement is not intended to be punitive, but is designed to be remedial in nature...”).

Nor can federal prosecutors' concern for compensating victims justify their intent on prosecuting Mr. Epstein federally. Once federal prosecutors made clear that a primary goal of the federal investigation was a federal compensation proposal, the defense submitted one that consisted of terms harsher than Mr. Epstein's conduct warranted under prior federal precedents. In addition to the well-established state restitution statute, the defense offered a federal proposal that was similar to the resolution in the *Boehm* case, where the conduct was far more egregious. There, the defendant bought and distributed crack cocaine and cocaine to underage girls; admitted to knowing that the girls were underage; arranged for them to have sex with other members of the conspiracy in exchange for drugs; and possessed illegal firearms at the time of the alleged conduct. The defense proposal was open-ended with no monetary cap. But the federal prosecutors also ruled that out. Instead, federal prosecutors pressured Mr. Epstein to agree to provisions in the Deferred Prosecution Agreement that seem to have been designed to provide financial benefits to alleged victims who cannot qualify under Section 2255, because they testified that they did not suffer any type of harm, nor could they be victims of violations of Sections 2422(b) or 2423 (a prerequisite for recovery under Section 2255). Notably, federal prosecutors made the unprecedented demand that Mr. Epstein pay a minimum of \$150,000 to an unnamed list of women they referred to as minors—Mr. Epstein's counsel later established that all but one of these individuals were actually adults, not minors. Those same prosecutors also demanded that Mr. Epstein pay the attorneys' fees for these alleged victims should they choose to bring any further civil litigation against him. They further demanded that Mr. Epstein waive

his right to challenge any of the allegations of these alleged victims, restricting his right of discovery to a single question: "have you ever met Mr. Epstein?"²⁰

At bottom, certain federal prosecutors disagree with minor aspects of the deal made by duly-authorized State prosecutors. But federal prosecution is manifestly not appropriate whenever reasonable minds disagree about a specific punishment. Rather, the plain text of the *Petite* Policy requires that there be a **demonstrable**, **manifest**, and **substantial** difference between State and federal outcomes in order to justify a successive federal prosecution. That is, textually, a daunting standard. If Mr. Epstein's sentence is manifestly inadequate and leaves the federal interests in prosecuting solicitation demonstrably unvindicated, then so does every other sentence handed out by the State on similar facts. Indeed, the conduct here can be compared to that of Barry Kutun, a former North Miami city attorney accused of having sex with underage prostitutes and videotaping the sessions. Mr. Kutun pleaded guilty on May 18, 2007 in a Miami-Dade County courtroom as part of an agreement with State prosecutors, and he received five years probation and a withhold of adjudication with no requirement to register as a sex offender. It is unclear why federal prosecutors—who declined to federally prosecute Mr. Kutun despite the fact that his conduct is more egregious than that of Mr. Epstein—believe that State prosecutors' treatment of Mr. Epstein alone somehow leaves the federal interest substantially unvindicated. Given the number of sexual crime cases prosecuted in Palm Beach County, either the Department ought to declare the State Attorney's Office in federal receivership—or it should acknowledge that Mr. Epstein is being treated differently from other similar offenders.

C. The Conduct At Issue Does Not Constitute A Federal Offense.

The *Petite* Policy requires that the government believe that the defendant's conduct constitute a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. But a federal conviction is unlikely as a matter of both law and fact. As a matter of law, the identified federal statutes do not apply for reasons detailed above. *See supra* at part II. As a matter of fact, the sworn testimony of the witnesses in this case has definitively refuted any basis for a federal conviction.

D. Federal Prosecutors Did Not Coordinate With The State.

Quite apart from its substantive prerequisites, the *Petite* Policy also requires coordination with State authorities. *See* U.S.A.M. § 9-2.031A ("federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.") Such consultation is particularly

²⁰ This despite the fact that the state restitution statute, like the state prostitution statute, fully covers the conduct alleged and provides a well-established method for civil recovery.

important in this instance as federal prosecutors and State prosecutors clearly have a different view of the merits of this case. However, *there was no such consultation by federal prosecutors with their State counterparts.*

Federal prosecutors never contacted the State Attorney's Office, let alone attempted to coordinate efforts, despite the fact that the State prosecutors have over a decade of experience in prosecuting State matters and sex related crimes in particular.²¹ Federal prosecutors ignored Ms. [REDACTED] view of the case, despite the fact that she interviewed many of the witnesses in connection with the State investigation.

Because of a lack of communication by federal prosecutors, the State Attorney's Office was left to accept the Deferred Prosecution Agreement, which contained overreaching conditions including a mandatory period of incarceration and sex offender registration. Without a single meeting or phone call with State prosecutors and without ever sharing with them the evidence that would justify such an action, federal prosecutors insisted that the State accept that the charges be raised and the sentence enhanced.

It is telling that the failure by the federal prosecutors to coordinate with the State Attorney's Office led to confusion of the issues as well misrepresentations regarding the Deferred Prosecution Agreement. Under the agreement, which was drafted without consultation by federal prosecutors with the State Attorney's Office, Mr. Epstein was to plead guilty to an indictment charging one count of solicitation of prostitution under Florida Statute § 796.07, and to one count of procuring a minor for prostitution under Florida Statute § 796.03. Given the commercial nature of the conduct generally associated with § 796.03, a defendant convicted under this statute must register as a sexual offender under Florida's Sex Offender Registration and Notification Act (the "Florida's Sex Act").

However, Mr. Epstein's alleged conduct did not actually meet the requirements of § 796.03, a charge for which federal prosecutors had no facts to support. Since inception and at the time § 796.03 was negotiated between the parties, Ms. [REDACTED] erroneously maintained that a § 796.03 charge involved the solicitation—and not the procurement—of a minor. See July 31, 2007 Draft Deferred Prosecution Agreement, Exhibit 36 ("solicitation of minors to engage in prostitution, in violation of Fl. Stat. 796.3 . . ."). During those negotiations, Mr. Epstein's counsel repeatedly asked Ms. [REDACTED] to confirm that she possessed the requisite evidence to make out a this charge, to which she unwaveringly replied that she did in fact possess this

²¹ Federal prosecutors went to such great lengths to avoid coordinating with the State that they even asked Mr. Epstein's counsel to provide them all of the documentation provided to the State, including the transcripts of each witnesses' testimony. In addition, rather than consult with the State Attorney's Office directly, federal prosecutors effectively conscripted Mr. Epstein and his counsel to convince the State to agree to both a harsher charge and sentence in connection with its proposed plea agreement, both of which the State believes may not necessarily apply to Mr. Epstein's alleged conduct.

evidence. But Ms. [REDACTED] later informed Mr. Epstein's counsel that solicitation of minor is not a registerable offense and that § 796.03 is a procurement statute that has no application to Mr. Epstein whatsoever. See e.g., *Register v. State*, 715 So.2d 274, 278 (Fla. 1st DCA 1998) ("The Florida Legislature has designated such an act of solicitation as a less severe crime than exploiting a minor to engage in sexual activity with a third party, to the procurer's financial advantage"). It is obvious from federal prosecutors' first documented plea proposal that 'solicitation of a minor' is and always has been the appropriate charge under the facts (this is also the State's recommended charge). What is now apparent is that federal prosecutors believed that solicitation of a minor was both a felony and registerable charge under Florida law. They were wrong. Had federal prosecutors coordinated with State authorities, they would (presumably) not have fallen into this manifest legal error.²²

In addition, federal prosecutors insisted that they dictate every detail of the State sentence pursuant to the Deferred Prosecution Agreement. Once again, this was done without any coordination with the State. Federal prosecutors went so far as to demand a restriction on the judge not to be able to offer probation, community control or any other alternative that the judge might order in lieu of incarceration. See Executed Deferred Prosecution Agreement, ¶2(a), Exhibit 33. This is classic overreaching violative of the *Petite* Policy's imperatives. Not satisfied with simply dictating the terms and conditions of Mr. Epstein's incarceration, federal prosecutors then attempted to send a highly inaccurate Victim Notification Letter to their list of alleged victims of federal crimes (all except three of whom had no connection to the State prosecution) and encouraged them not only to attend the State plea and sentencing proceeding but to make public statements against Mr. Epstein before the judge. See Victim Notification Letter, Exhibit 37. Yet again, this was also done without consulting the State Attorney's Office. We understand that that Office was not given the identities of these alleged victims and had no idea that federal prosecutors intended to send such letters to these individuals.

E. Traditional Elements Of Proper Prosecutorial Discretion Do Not Favor Prosecution Here.

Even assuming that the Department could bring charges, it should decline as a matter of prosecutorial discretion. The relevant factors are set forth in Section 9-27.230 of the United States Attorney's Manual, and those factors counsel against prosecution. Mr. Epstein has no criminal history of any kind. Given the unique nature of any prosecution (which would be unprecedented as a federal matter), any general deterrent effect is likely to be minimal or

²² Furthermore, in the Victim Notification Letter that she intended to send to all the alleged federal victims, Ms. Villafana erroneously stated that under Deferred Prosecution Agreement, Mr. Epstein would have to register as "sexual predator" as opposed a "sexual offender" for the remainder of his life. See Victim Notification Letter, Exhibit 37. That is not true—under the Deferred Prosecution Agreement, Mr. Epstein need only register as a sexual offender, a classification that is far less grave than that of a sexual predator and which carries far less onerous conditions. See Executed Deferred Prosecution Agreement, Exhibit 33.

nonexistent. Moreover, federal statutes that focus on sexual activity with minors focus on truly interstate phenomena such as child pornography, human trafficking, Internet luring, and sex tourism. Here, Mr. Epstein engaged in local activity that does not implicate any broader federal concern. Mr. Epstein faces punishment for that conduct under Florida law. There is no need to add additional federal penalties grossly disproportionate to his alleged behavior.

F. The *Petite* Policy Dictates Federal Declination of This Case.

In conclusion, we believe that the *Petite* Policy clearly dictates a federal declination in this case for the following reasons: First, the *Petite* Policy (which the federal prosecutors have acknowledged is applicable here) was triggered by the initial plea agreement with the State Attorney's Office, which was not executed solely because of the pending federal investigation. Second, there is no evidence of corruption, undue influence, or incompetence by the State's Attorney's Office. Third, the presumed bar to a dual prosecution has clearly not been overcome. Fourth, there was no coordination with State prosecutors, which led to confusion of the issues and a flawed and overreaching Deferred Prosecution Agreement.

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