DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

What the majority omits to mention is more revealing than what it says. The majority identifies three supposed errors in the jury instructions on entrapment. Of these, none were adequately preserved and two are sufficiently obscure as to go largely or even wholly unremarked by the appellant before this Court. Indeed, the principal language on which the majority focuses – and the *only* supposed error from the charge itself, as opposed to the supplemental charge in response to jury questions – was unsurprisingly complained of neither below nor even here, given that the supposedly misleading language was *specifically requested* by the defense at trial and, furthermore, comes nearly verbatim from Judge Leonard Sand's Modern Federal Jury Instructions. The language of this instruction is not error, either standing alone or, as the majority would have it, in conjunction with the minor misstatements in the supplemental charge on which the majority so avidly latches. The stringent requirements for plain error, *see United States v. Marcus*, 560 U.S. 258, 262 (2010), have not been approached, much less satisfied.

Simply put, this is a vacatur in search of a justification. The majority seizes on trifling misstatements in a supplemental instruction to conclude that a properly instructed jury – a jury whose note revealed scrupulous attention to the written

instructions sent with it into the jury room and deemed "[o]bviously . . . correct" by the defense – was somehow hopelessly confused on the issue of entrapment. The majority deems these trifles prejudicial, moreover, in the face of overwhelming evidence that appellant Scott D. Kopstein ("Kopstein"), convicted in the United States District Court for the Eastern District of New York on three counts of transporting and shipping child pornography in violation of 18 U.S.C. § 2252(a)(2), was not entrapped, but utterly predisposed.

In short, vacatur here is both unwarranted on the facts and inconsistent with our cases. The majority's attempt to explain its determination otherwise, moreover, only confuses precedent that is otherwise clear and easily applied. Indeed, if this conclusion were not evident from the arguments the majority makes – and it is – it could also be inferred from another buried detail: namely, that the majority, in laying out its argument for vacatur, relies on nearly as many lines of transcript from a colloquy between the judge and counsel *outside* of the presence of the jury, as lines of instruction given to the jury. This colloquy – albeit heavily relied upon by the majority – is irrelevant to its conclusion that instructional error requires the jury's verdict to be set aside. *See United States v. Sabhnani*, 599 F.3d 215, 240 (2d Cir. 2010) ("[O]ur concern on appeal is the *effect* of jury instructions"; thus, we consider "only"

instructions the "jury . . . heard."). For the reasons set forth herein, I respectfully dissent.

I

At the start, the majority's austere presentation of the facts shown at trial obscures evidence relevant to the strength of Kopstein's entrapment defense, and thus the question whether supposed instructional error prejudiced his trial. *See Marcus*, 560 U.S. at 262 (noting that vacatur on plain error review requires that error affect substantial rights). The following facts are drawn from the trial record.

According to his own signed statement, made after his arrest, Kopstein, for a period of three years, chatted online with "younger girls." The youngest of the girls was "probably 9." During these chats, Kopstein would "trade[] pictures of [himself] for pictures of [the underage girls]." Kopstein collected "an estimated 1000 pictures [and] videos" from these chats. Kopstein also admitted to using a file-sharing service to download pornographic videos and pictures, including child pornography. He saved "everything" from these chats in an untitled folder on his hard drive. At the time of his arrest, DHS agents searched Kopstein's hard drive and, despite Kopstein's attempt to delete them, agents recovered almost 200 images that appeared to contain child pornography.

Kopstein's conviction on three counts of transporting child pornography stems from the events of June 12, 2009. On that date, Kopstein entered an Internet chatroom looking for underage girls. Using the screen name "mikehrny," Kopstein began a conversation with Hopeinsac (actually Special Agent David Lombardi, of the Department of Homeland Security) by asking for her age, sex, and location.[1] Hopeinsac responded that she was female, twelve years of age, and lived in California. Kopstein thereafter turned the conversation to sex, inquiring of Hopeinsac whether she liked sex, whether she had "ever seen a dick?," had "suck[ed] it," and whether she wanted to see his. J.A. 22-23.

Less than nine minutes after commencing this conversation, Kopstein sent a picture of his penis to Hopeinsac. Kopstein in turn asked Hopeinsac if she would send him "pics." Before she could do so, Kopstein sent another pornographic picture to Hopeinsac, this time showing his penis in his hand. Again Kopstein asked to see a picture of Hopeinsac. Agent Lombardi transmitted to Kopstein a school picture of a twelve-year-old girl.

---

[1] I adopt the appellant's use of the feminine pronoun to refer to Hopeinsac, as portrayed by Agent Lombardi, because Kopstein perceived the person with whom he was "chatting" to be female. All chat exchanges are presented with the original spelling and grammar, except as edited for clarity.

Kopstein told Hopeinsac that this picture was "very sexy," but that he wanted more. Kopstein requested that she send him child pornography, imploring that "id love to see more naughty pics[.] [S]how me where to put my cock." J.A. 23. It was thus Kopstein – not Agent Lombardi – who first raised the prospect of transporting child pornography. Hopeinsac declined, stating that she did not "hav[e] any of thos[e]." J.A. 24. Kopstein, not deterred, asked Hopeinsac to *create* child pornography for him by photographing herself: "u could just take some, send them and then delete them." J.A. 24.

The conversation proceeded:

> Kopstein: do you have any other pics?
> Hopeinsac: yea...what do i get out of it????????
> Kopstein: i got more naughty pics of me for you . . . if I can see more of you
> Hopeinsac: u hav any w a girl
> Kopstein: none of me with a girl
> Hopeinsac: awwwww
> Kopstein: but i have other people with other girls
> Hopeinsac: any good ones
> Kopstein: yea . . . if you send me more pics . . . ill show u a[ ]lot

J.A. 24. Notably, once Hopeinsac inquired whether Kopstein possessed any "good" pictures of "people with . . . girls" – a request which Kopstein argues on appeal was a request for pornographic images of children – it took Kopstein only *14 seconds* to

respond, "yea . . . ill show u a[ ]lot," affirming that he would transport child pornography across state lines. J.A. 24.

Hopeinsac next sent Kopstein another non-pornographic picture of a young girl (purportedly a picture of Hopeinsac), to which Kopstein responded: "mmmm sexy body . . . id like to get under that dress." J.A. 24. Hopeinsac told Kopstein that she thought he was going to send her "some stuff." Kopstein, for a second time, affirmed his commitment to transport child pornography: "[S]end me a few more pics . . . then ill send u a[ ]lot." J.A. 25.

Hopeinsac declined, but nonetheless, *and only seconds later*, Kopstein sent two additional pornographic images of himself, then also transmitted his first image of child pornography. This image depicted "a nude adult white male, [lying] on his back on the bed, with . . . a prepubescent nude female performing oral sex on him." J.A. 67. It took Kopstein less than eight minutes from the time Agent Lombardi purportedly requested child pornography until Kopstein transported the first image.

Kopstein then sent a second image of child pornography, this time depicting intercourse. Kopstein commented that "this is what I wanna do to you [Hopeinsac]." J.A. 25. Kopstein expressed his interest in having sex with Hopeinsac again: "any guy that gets to fuck you would be a really lucky guy." J.A. 26. After

continuing this sexually explicit conversation, and without any specific request from Hopeinsac, Kopstein sent two more images depicting child pornography that formed the basis of Count I in the indictment. According to trial evidence, the photograph entitled "daddygetsblownp[1].jpg" depicts a prepubescent nude girl, no older than nine years old, performing oral sex on an adult male. The child is a victim known to law enforcement and the image is part of what is known as the "Helen series." J.A. 74-75. The photograph entitled "15 suck a thk one.jpg" depicts a girl of approximately ten or eleven and is part of the "Vickie series." J.A. 89. Shortly thereafter, Kopstein sent another image that, according to testimony from Agent Lombardi, depicted an adult male having intercourse with a prepubescent female. J.A. 76-77.

Kopstein next told Hopeinsac that he would "love to have u with another sexy girl like you." J.A. 27. Hopeninsac inquired if Kopstein had ever gone out with a "gurl [her] age." Kopstein replied, "yes," and said that "the youngest ive had sex with was 11."[2] Kopstein continued, "so id love to meet you in person one day and

[2] In his post-arrest statement, Kopstein said that he told girls with whom he chatted "about having sex with other younger girls," but asserted that these statements were untrue. J.A. 21.

show u a good time." Hopeinsac said that would be "kewl" but she lives in "cali." This did not deter Kopstein: "one day, ill come visit and make you cum." J.A. 27.

Kopstein, without any additional urging from Hopeinsac, then sent two additional photographs, which are the basis of Counts II and III in the indictment. Both were stipulated to contain child pornography. The first of these, a photograph entitled "%3Bkmcnkms%20%28162%29[1].jpg," depicts a naked prepubescent girl, between eight and twelve years old, being digitally penetrated in her vagina by a male adult hand. The image is part of a series commonly referred to as the "marine land series." J.A. 85-86. The second is a photograph entitled "09 yo 0003hard.jpg," which depicts a prepubescent girl, between the ages of ten and eleven years old, holding an erect penis. The child is known to law enforcement and the image is also part of the "Vickie series." J.A. 88-89. Kopstein sent a handful of additional pornographic images to Hopeinsac, including pictures of his own tumescent and then flaccid penis. J.A. 91-93. Kopstein then ended the chat by commenting, "lets do it again . . . ." J.A. 29.

II

During opening statements, Kopstein, through counsel, admitted to possessing child pornography and to transporting it electronically. Kopstein rested

his defense on entrapment. His attorney, having solicited and secured a lesser included offense instruction from the court, argued in closing that while the jury should convict Kopstein for possessing child pornography, Kopstein was not guilty of transporting and shipping child pornography because he was entrapped by Agent Lombardi to commit this crime. The jury, after three jury notes and about three hours of deliberation, rejected Kopstein's entrapment defense and convicted on the three charged counts of transporting and shipping.

In the majority's view, supposed errors in the jury instructions regarding entrapment require that the jury's verdict be set aside. As for the main instruction, however, Kopstein – who had the opportunity to review the court's charge before it was given – never even suggested below that the district court's instructions were erroneous. To the contrary, as Kopstein's lawyer affirmed at the time of the jury notes, "Obviously the [original] charge as given is correct . . . ." J.A. 211. And even on appeal, Kopstein concedes that these instructions "[made] clear that, if entrapment were not disproved, the jury was required to acquit on transporting and shipping" – directly contrary to the majority's position here.

As presently relevant, the district court initially charged the jury on entrapment as follows:

> The defendant asserts as a defense to the indictment['s] three counts of transporting and shipping child pornography that he was entrapped into committing those offenses by the undercover government agent. The defendant may not be convicted of a crime if it was the Government who gave the defendant the idea to commit the crime, if it was the Government who also persuaded him to commit the crime, and if he was not ready and willing to commit the crime before the Government agent first was in communication with him.
>
> On the other hand, if the defendant was already ready and willing to commit the crime of transporting and shipping child pornography, and the Government merely presented him with an opportunity to do so, that would not constitute entrapment.
>
> Your inquiry on this issue should first be to determine if there is any evidence that the undercover agent took the first step that led to a criminal act of the defendant transporting and shipping child pornography. If you find there was no such evidence, there can be no entrapment, and your inquiry on this defense should end there.
>
> If, on the other hand, you find some evidence that the undercover government agent initiated the criminal acts charged in the indictment, then you must decide if the Government has satisfied its burden to prove beyond a reasonable doubt that prior to that the defendant was ready and willing to commit the crimes of transporting and shipping child pornography.
>
> If you find beyond a reasonable doubt that the defendant was predisposed, that is, ready and willing to commit transporting and shipping child pornography as charged, and merely was awaiting a favorable opportunity to commit those offenses, then you should find that the defendant was not entrapped.
>
> On the other hand, if you have a reasonable doubt that the defendant would have committed the offenses charged without the Government's inducements, you must acquit the defendant of the crimes of transporting and shipping child pornography.

J.A. 187-88.

As already noted, Kopstein raised no objection to this entrapment instruction. He did request, however, that the jury be charged as to possession of child pornography, which Kopstein urged was a lesser included offense to the transportation of such material. Over the government's objection, the district court charged:

> In some cases, the law which a defendant is charged with breaking actually covers two separate crimes. One is more serious than the second, and the second is generally called a lesser included offense.
>
> The indictment in this case charges the defendant with three counts of transporting and shipping child pornography, and I have explained to you the elements which the Government must prove beyond a reasonable doubt before you may convict him of that crime.
>
> If you find that the Government has not satisfied its burden of proof on any of those elements, then before you may render a verdict of not guilty as to transporting and shipping child pornography, you must proceed to determine whether the defendant has committed the lesser crime of possession of child pornography.
>
> On the other hand, if you find that the Government has proven the defendant's guilt beyond a reasonable doubt as to each of the three counts of transporting and shipping child pornography, you should stop deliberating and inform the Court before you consider the lesser included offense.
>
> If you cannot reach a unanimous decision as to each of the three counts of transporting and shipping child pornography, you should likewise stop deliberating and inform the Court before you consider the lesser included offense.

J.A. 188-89.

The majority contends that the phrase "before you may render a verdict" in the instruction's third paragraph, by requesting that the jurors go on to consider the lesser included offense before returning a not guilty verdict on the more serious charge, could have misled the jury to "return a verdict of guilty on [the transporting and shipping counts] even if the prosecution had failed to prove a necessary part of its case." Maj. Op. at 14. But Kopstein's counsel not only raised no objection to this language – he specifically requested it (language derived directly from the Sand model charge):

> [Kopstein's counsel]: [T]he actual language from Sand says: ["]If you find that the government has not satisfied the burden of proof on any of the elements or if you cannot unanimously agree the defendant is guilty, then *before you may render a verdict* of [not] guilty you must proceed to determine whether the defendant has committed the lesser crime.["] . . . [W]e are asking for that language[,] if they can't agree[,] that they consider the lesser crime.

Trial Tr. 392 (emphasis added).[3]

Defense counsel did have one request in the wake of the lesser included charge – that it be amended to refer specifically to Kopstein's entrapment defense.

[3] The majority erroneously characterizes this Sand instruction as only "blessed . . . by the acquiescence of Kopstein's counsel during the reading of the initial instructions," Maj. Op. 33, when in fact the instruction was specifically requested by Kopstein's counsel who during this request, read this very instruction to the court.

Thereafter, as defense counsel requested, the district court instructed the jury that the original instruction (the text of which was provided to the jurors in the jury room) should be amended as follows:

> It should read on 44 and again on 59: If you find that the Government has not satisfied its burden of proof on any of those elements [concerning transportation and/or shipping], *or if you find that the Government has not disproved the defendant's defense of entrapment*, then you must go on to consider the lesser included offense of child – possession of child pornography.

J.A. 203 (emphasis added). The court reiterated: "All right. Ladies and gentlemen, that will appear again on page 59, and I instruct you that the same rules apply."

About one hour after deliberations began, the jury sent out two notes. The first note requested the transcript of the chat between Kopstein and Hopeinsac, as well as the images Kopstein transmitted to Hopeinsac. The second alerted the court that the jury "need[ed] clarifications on the Judge's instructions on page 44." J.A. 206. The court brought the jury back into the courtroom and asked for more detail regarding what was confusing to the jury. After returning to the jury room, the jury provided an explanatory third note:

> Please clarify[:]
>
> p[.]42 "If you find there was no such evidence there can be no entrapment and your inquiry on this defense should end there"

> p[.]44 "or if the government has not disproved the defense of entrapment beyond a reasonable doubt, then before you may render a verdict of not guilty"
>
> If we find in favor of the page 42 instruction do we consider the instruction on page 44 and if so what does it mean to "disprove the defense of entrapment"?

J.A. 225.

Read in context, the meaning of this note is clear. Page 42 of the instructions addressed the requirement that a defendant, to make out an entrapment defense, present credible evidence of inducement. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) ("[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct."). Specifically, the jury was instructed on page 42 that its inquiry as to entrapment "should first be to determine if there is any evidence that the undercover agent took the first step that led to the criminal act of the defendant transporting and shipping child pornography." J.A. 187. The jury was then advised that "[i]f you find there was no such evidence, there can be no entrapment, and *your inquiry on this defense should end there*." J.A. 187 (emphasis added).

The jury note thus obviously concerned the relationship between this instruction (that the jury should wholly discontinue consideration of the entrapment defense in the absence of evidence of government inducement) and the later instruction, on page 44, that it should consider the lesser included offense of possession of child pornography *if* the government failed to disprove entrapment. Given that the instruction on page 42, correctly read, advised jurors that absent evidence of inducement, they were never to reach the question whether entrapment had been disproved, the jurors' question as to the relationship between this instruction and the instruction on page 44 (to consider the lesser included offense if entrapment *was* disproved) makes perfect sense. Indeed, it suggests that the jurors closely scrutinized and understood the written instructions.

After discussion with the lawyers, the district court provided supplemental oral instructions to address the issue identified by the jury – oral instructions that concededly contain the minor misstatements onto which the majority latches. At the same time, however, these instructions address with clarity the issue about which the jurors actually requested assistance. The court answered the first question posed by the jurors in its explanatory note as follows:

> So look at page 42. Initially, make a determination whether there is some evidence of inducement, that is, that the Government agent

took the first step to have defendant transport and/or ship child pornography.

Now, with regard to the instructions here, if you decide there is no inducement, disregard the instructions on entrapment, and then you go on to the next step, which is to decide whether or not the Government has proven each and every element of the transporting and shipping of child pornography beyond a reasonable doubt.

J.A. 218. The district court then moved on to the second question:

So let's review for a moment.

On page 42, the first inquiry you make is whether or not there is some evidence of . . . inducement . . . . If you find there is some evidence that the Government agent took the first step to have the defendant transport or ship child pornography, then you go on to consider the other elements as to whether or not the Government has proven entrapment and has disproven entrapment [sic] beyond a reasonable doubt.

First off, is there some evidence of inducement?

If you find there is some evidence of inducement, you go on to consider whether or not the Government has disproven beyond a reasonable doubt that the other elements of entrapment which I've listed here apply.

In other words, if the defendant was already ready and willing to commit the crime of transporting and shipping child pornography, and the Government merely presented him with an opportunity to do this, . . . [t]hen there's no entrapment.

J.A. 219-20. The district court then summarized its answers to both questions posed by the jury:

First, look if there is some evidence of inducement. If you find there is no evidence of inducement, that stops the inquiry on

> entrapment. If you find there is some evidence of inducement in that first step, then you go on to decide whether or not the Government has proven to you beyond a reasonable doubt that the defendant was already ready, willing and able to commit the crime of transporting child pornography, and if the Government merely presented him with an opportunity to do so, that wouldn't constitute entrapment.
>
> If you decide this issue of entrapment, you go on to decide whether or not the Government has proved beyond a reasonable doubt the three elements – or the elements that I've outlined for you for transporting and shipping child pornography. If all those elements are met beyond a reasonable doubt, then you should convict the defendant and report your verdict.

J.A. 220.

After these supplemental instructions, defense counsel asserted: (1) that the court may have misspoken at one point and indicated that even if the jury "found inducement or . . . some evidence of inducement, and then after applying the reasonable doubt standard . . . found there was entrapment," it could "still go on to consider transporting and shipping"; and (2) that the court also "may have said the Government has proven entrapment" when it meant to say "disprove." J.A. 221-22. With regard to the former point, however, as the majority states, defense counsel "backed down" when the court, after reviewing the instructions, stated that this was not the "sense" of them. Maj. Op. 26 (citing J.A. 222-23). Regarding the latter point,

defense counsel himself stated that counsel suspected the jurors realized the error, if it in fact occurred. Shortly thereafter, the jury returned its guilty verdict.

III

The majority identifies three "sources of confusion" in the entrapment instructions that, it concludes, require vacatur. To secure vacatur based on a flawed jury instruction, however, even a defendant who preserves his objection – and Kopstein did not even attempt to preserve the great bulk of the supposed instructional flaws on which the majority relies – "must demonstrate both error and ensuing prejudice." *United States v. Quinones*, 511 F.3d 289, 313-14 (2d Cir. 2007). Moreover, "[w]e emphatically do not review a jury charge 'on the basis of excerpts taken out of context,' but in its entirety to determine whether considered as a whole, 'the instructions adequately communicated the essential ideas to the jury.'" *Sabhnani*, 599 F.3d at 237 (quoting *United States v. Mitchell*, 328 F.3d 77, 82 (2d Cir. 2003); *United States v. Tran*, 519 F.3d 98, 105 (2d Cir. 2008)) (internal citations omitted); *see also Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). Judged by these standards, none of the three supposed errors identified

by the majority, either singly or in conjunction, justify its determination to set aside the jury's work.

A. Lesser Included Offense Charge

The majority first finds error in the lesser included offense instruction contained in the principal charge. The majority asserts that the district court's use of the phrase "before you may" on two occasions ("*before you may* render a verdict of not guilty") is an "instruction to put off acquittal" that "could have misled" the jury to convict on transporting and shipping even if the prosecution did not prove its case. The majority concludes that this supposed error, considered in conjunction with the other two, requires vacatur. Respectfully, I disagree.

At the start, this supposed error is not properly considered by this Court. For as already noted, Kopstein *requested* the lesser included offense instruction in its specific form: his counsel read the precise phrase onto which the majority latches, "before you may render a verdict," in his request to charge in the district court. *See* Trial Tr. 392. Kopstein then affirmed his agreement to the charge, as further amended at his own request.[4] Later, Kopstein conceded in the district court that

[4] At sidebar, after the instructions were initially read, Kopstein requested that the lesser included offense instruction be modified. Kopstein raised no objection to the "before you may render a verdict" phrase, however, having specifically asked for this

"[o]bviously, the [original] charge as given is correct . . . ." And even here he admits that "the original instruction" made "clear that if entrapment were not disproved, the jury was required to acquit on transporting and shipping . . . ." Appellant's Br. 33 & n.7. Accordingly, Kopstein has waived the opportunity to challenge the instruction on appeal. *See Quinones*, 511 F.3d at 321 ("A finding of true waiver applies with even more force when, as in this case, defendants not only failed to object to what they now describe as error, but they actively solicited it . . . ."); *United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (per curiam) ("[I]f a party invited the charge . . . , she has waived any right to appellate review of the charge."); *United States v. Young*, 745 F.2d 733, 752 (2d Cir. 1984) (holding that "not even the plain error doctrine permits reversal on the ground that the trial court granted a defendant's request to charge"); *see also United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009) ("[B]y agreeing that the [modified] instruction [proposed by the district court following an objection] was satisfactory, [defendant] waived the right to challenge the instruction on appeal.").

Even if this were not the case, however, vacatur is still wholly inappropriate,

---

language the day before. He requested *only* that the instruction be altered to "include a situation" in which the jury found the defendant not guilty of the transporting and shipping charges "by reason of the defense of entrapment." J.A. 201. This modification was made and Kopstein raised no further complaint.

pursuant to the plain error standard. *See Marcus*, 560 U.S. at 262. As already noted, the phrase identified by the majority – "before you may render a verdict" – was derived verbatim from the lesser included offense charge in Sand's Modern Federal Jury Instructions. In fact, other than specifying the particular offenses at issue and including reference to the entrapment defense at Kopstein's request, the instruction is identical, word for word, to Judge Sand's model instruction. *Compare* Sand et al., Modern Federal Jury Instructions, Criminal Instruction 9-10 ("If you find that the government has not satisfied its burden of proof on any of those elements . . . , then, before you may render a verdict of not guilty, you must proceed to determine [the lesser included offense]."), *with* J.A. 189 ("If you find that the Government has not satisfied its burden of proof on any of those elements, then before you may render a verdict of not guilty as to transporting and shipping child pornography, you must proceed to determine [the lesser included offense]."). There is nothing erroneous about this pattern provision, much less does it constitute plain error.

The majority, cherry-picking the word "may" from the instruction, argues that the lesser included charge could suggest "that the jury should not *automatically* return a verdict of not guilty as to transporting and shipping even if the government failed to sustain its burden," either as to the elements or in disproving the entrapment

defense. Maj. Op. 15. With respect, I disagree. This contention simply ignores the extensive jury instructions given *before* the lesser included offense charge, thereby failing to read this language in context and as a whole, as our precedent requires. *See United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006) (noting that instructions are reviewed as a whole "to see if the entire charge delivered a correct interpretation of the law" (internal quotation marks omitted)); *accord Sabhnani*, 599 F.3d at 237.

Although wholly ignored by the majority, the district court had previously instructed the jury numerous times that the government must prove each element of the crime and also disprove entrapment, all beyond a reasonable doubt. In fact, no fewer than seven times did the district court make clear that the defendant *must* be acquitted if: (1) the government did not prove the elements of shipping and transporting beyond a reasonable doubt;[5] or (2) if the defendant's entrapment defense

---

[5] The court's instructions requiring the government to prove the elements of shipping and transporting beyond a reasonable doubt included:

- "I will instruct you as to . . . the specific elements that the Government must prove beyond a reasonable doubt to warrant a finding of guilt . . . ." J.A. 160.
- "If you have a reasonable doubt as to the guilt of the defendant, you should not hesitate for any reason to find a verdict of acquittal for the defendant." J.A. 167.
- "The burden is always upon the Government to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, for the law

was successful.[6] Given this context, the natural way to read the term "may" – as used both by the district court and in the Sand model instruction requested by Kopstein

---

never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." J.A. 168.

- "[Y]ou must be satisfied of the guilt of the defendant beyond a reasonable doubt before you may convict." J.A. 171.

- "In order to prove the defendant guilty of transporting child pornography, the Government must prove each of the following elements beyond a reasonable doubt. . . . The first element which the Government must prove beyond a reasonable doubt is that the defendant knowingly transported or shipped . . . a visual depiction. . . . The second element which the Government must prove beyond a reasonable doubt is that the visual depiction was mailed or transported . . . . The third element which the Government must prove beyond a reasonable doubt is that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct . . . . The fourth element that the Government must prove beyond a reasonable doubt is that the defendant knew both that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct and that it portrayed a minor engaged in that conduct." J.A. 181-83, 186.

[6] The court's instructions requiring the jury to acquit if doubt remained as to whether the defendant was entrapped included:

- "The defendant may not be convicted of a crime if it was the Government who gave the defendant the idea to commit the crime . . . ." J.A. 187.

- "[I]f you have a reasonable doubt that the defendant would have committed the offenses charged without the Government's inducements, you must acquit the defendant of the crime of transporting and shipping child pornography." J.A. 188.

– is as a term of abeyance. If the jury found that the government did not prove all of the elements or did not disprove entrapment, then the jury was required to enter a verdict of not guilty, *but not until it considered the lesser included offense*. Indeed, this reading is so natural that Kopstein's counsel admitted below that it was correct and concedes in his brief on appeal that the original instructions made clear that "if entrapment were not disproved, the jury was required to acquit on transporting and shipping."

The majority seeks to avoid this result by seizing upon language, not from the main instruction, but from the supplemental one. It urges that language in the supplemental charge "compounded the problem" supposedly created by the requested model instruction by "increas[ing] the jury's already considerable confusion" with the suggestion that entrapment was not a dispositive defense. Maj. Op. 26-27. Again, I disagree.

The challenged language from the supplemental instruction is in italics:

> First, look if there is some evidence of inducement. If you find there is no evidence of inducement, that stops the inquiry on entrapment. If you find there is some evidence of inducement in that first step, then you go on to decide whether or not the Government has proven to you beyond a reasonable doubt that the defendant was already ready, willing and able to commit the crime of transporting

> child pornography, and if the Government merely presented him with an opportunity to do so, that wouldn't constitute entrapment.
>
> *If you decide this issue of entrapment*, you go on to decide whether or not the Government has proved beyond a reasonable doubt the three elements – or the elements that I've outlined for you for transporting and shipping child pornography.

J.A. 220. Granted, the district court might better have said, in the supplemental charge, that if the jury decided the entrapment issue *in favor of the Government*, it should go on to address whether each element had been shown. But for the reasons stated above, the premise of the majority's argument for vacatur – that the failure to use such language somehow "compounded" a preexisting problem in the main instruction – is simply false. The original instructions, as requested by Kopstein, did not cause, and the jury's note did not reveal, any preexisting "considerable confusion" as to entrapment that the supplemental instruction could "increase." And without any preexisting confusion, the majority is left with one phrase in the supplemental instruction that was not as precise as it could have been. Considering that the instructions previously made clear that entrapment was a complete defense to transporting and shipping, this single phrase could not have produced confusion. *Cf. Brown v. Greene*, 577 F.3d 107, 111-12 (2d Cir. 2009) (collecting cases upholding jury charges containing imprecise language regarding burden of proof, because the

charges as a whole made clear that the cases were governed by the "beyond a reasonable doubt" standard); *United States v. Locascio*, 6 F.3d 924, 941 (2d Cir. 1993) (ambiguous summary of an element of a crime did not warrant reversal where earlier discussion of the element was clear). Accordingly, it is no basis for vacatur – a point the majority implicitly concedes by conflating this supposed error in the supplemental charge with a nonexistent error in the main instruction, based on language specifically requested by the defendant himself.

B. Supplemental Charge

The majority next determines that vacatur is required because the "supplemental instructions regarding inducement and the 'first step' were inconsistent and problematic given the facts of this case." Maj. Op. 27. There was no objection on this ground below, however, and the majority concedes that the plain error standard applies. It has not been satisfied.

As already noted, the district court's supplemental instruction addressed both of the questions posed in the jury's third note with precision.[7] As to the first, the jury

---

[7] Again, the third jury note reads as follows:

> Please clarify[:]
> p[.]42 "If you find there was no such evidence there can be no entrapment and your inquiry on this defense should end there"

wanted to know whether, *if* the jury found no inducement (*i.e.*, in favor of the instruction providing for no inducement), jurors then needed further to consider the entrapment defense. The district court accurately answered this question in the negative three separate times. *See* J.A. 218 (noting that if the jury found no evidence of inducement, it should "forget about entrapment and disregard any mention of entrapment").[8] The district court then answered the second question regarding disproving entrapment (although this was arguably unnecessary, given that the

---

> p[.]44 "or if the government has not disproved the defense of entrapment beyond a reasonable doubt, then before you may render a verdict of not guilty"
>
> If we find in favor of the page 42 instruction do we consider the instruction on page 44 and if so what does it mean to "disprove the defense of entrapment"?

J.A. 225.

[8] The two additional occasions where the district court answered this question correctly are set forth here:

> [I]f you decide there is no inducement, disregard the instructions on entrapment, and then you go on to the next step, which is to decide whether or not the Government has proven each and every element of the transporting and shipping of child pornography beyond a reasonable doubt.

J.A. 218.

> First, look if there is some evidence of inducement. If you find there is no evidence of inducement, that stops the inquiry on entrapment.

J.A. 220.

jurors wished to know "what . . . it mean[s] to 'disprove the defense of entrapment'" *only* if they were required to consider entrapment in the absence of inducement, which they were not). The district court answered this second question accurately and completely two separate times.[9]

As we have said, "[a] supplemental charge is not defective where it responds adequately to the jury's request for clarification." *United States v. Velez*, 652 F.2d 258, 262 (2d Cir. 1981) (citing *United States v. Viserto*, 596 F.2d 531, 539 (2d Cir. 1979)). Accordingly, because the district court did answer the jury's third note accurately and completely, the cases relied on by the majority to justify vacatur – cases

---

[9] The court correctly instructed as follows:

> If you find there is some evidence of inducement, you go on to consider whether or not the Government has disproven beyond a reasonable doubt that the other elements of entrapment which I've listed here apply.
>
> In other words, if the defendant was already ready and willing to commit the crime of transporting and shipping child pornography, and the Government merely presented him with an opportunity to do this, all right. Then there's no entrapment.

J.A. 219-20.

> [D]ecide whether or not the Government has proven to you beyond a reasonable doubt that the defendant was already ready, willing and able to commit the crime of transporting child pornography, and if the Government merely presented him with an opportunity to do so, that wouldn't constitute entrapment.

J.A. 220.

involving supplemental instructions that failed to address the issue with which the jury was concerned, or that did so poorly, further confusing it – are simply inapposite. *See* Maj. Op. 8-9 (citing *United States v. Rossomando,* 144 F.3d 197, 202-03 (2d Cir. 1998) (vacating conviction because initial charge was erroneous and supplemental charge failed to fix the problem); *United States v. Hastings*, 918 F.2d 369, 371-73 (2d Cir. 1990) (vacating conviction because the district court failed to answer the jury's question whether knowledge was required to convict the defendant of illegal firearm possession)).

The majority seizes upon a supposed problem with the inducement instruction – a problem not raised in the jury note – to avoid this conclusion. The majority asserts that the supplemental inducement instruction was inconsistent as to the evidence necessary to satisfy the inducement requirement. *United States v. Bala*, 236 F.3d 87, 94 (2d Cir. 2000) (noting that defendant bears the burden of presenting "credible evidence of government inducement"). Specifically, although the court twice noted in the supplemental instruction (consistent with its advice in the main instruction) that the inducement inquiry involved the question whether "there is some evidence that the Government agent took the first step to have the defendant transport or ship child pornography," J.A. 218-19, the majority asserts that elsewhere

in the supplemental instruction the court "took for granted that *Kopstein* took the 'first step,'" – as in the instruction that "there must be some evidence of inducement on the part of the Government agent that this inducement caused *the defendant* to take the first step," Maj. Op. 28 (quoting J.A. 217) (emphases altered).

But Kopstein, in addition to not objecting below, *admits* before this Court that his counsel "did not object when the variations referring to Kopstein's first step were delivered" because "it was clear throughout that it was the agent who had to do the inducing and that it was Kopstein who had to be induced." Appellant's Br. 37. In essence, the inconsistency *favored* Kopstein and therefore did not prejudice him. The instructions (according to the majority) should have consistently required the jury to determine, as the main instruction charged, whether "there is any evidence that the undercover agent took the first step that led to a criminal act of the defendant transporting and shipping child pornography." *E.g.*, J.A. 187. But the instructions as given allowed the jury to find inducement if either (1) "the Government agent took the first step," J.A. 218, or (2) "inducement on the part of the Government agent . . . caused the defendant to take the first step," J.A. 217 – thus permitting the jury to find inducement *in support of Kopstein's defense* even if the government did *not* take the first step, as long as the government agent induced the defendant to do so. This

instruction thus expanded Kopstein's entrapment defense, causing him no prejudice and certainly failing to affect his substantial rights, as required in plain error review. *See Marcus*, 560 U.S. at 262.

The majority resists this conclusion, asserting first that a confusing jury instruction on the defendant's sole defense *ipso facto* constitutes plain error. Maj. Op. 27 n.6. But even if the inconsistency challenged here was confusing – a doubtful proposition, given that the district court's *written* instructions were consistent in this regard – potential confusion, standing alone, does not permit vacatur on plain error review. In *United States v. Marcus*, the Supreme Court said (reversing this Court) that an appellate court:

> may, in its discretion, correct an error not raised at trial *only* where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

560 U.S. at 262 (emphasis added) (brackets and internal quotation marks omitted). And "[l]ower courts," the Supreme Court has reminded us, "must apply [the plain error rule] as this Court has interpreted it." *Id.* It is thus *not* enough to assert that a supplemental instruction is inconsistent or even confusing in some respect. Having

declined to object below, Kopstein must demonstrate that the inconsistency *matters* by satisfying each criterion required for plain error review. He has not done so – not even close.

The majority disagrees, arguing that the supplemental instruction was not merely inconsistent as to the first step (whether the government must take the first step or induce the defendant to do so). Even worse, the instruction left the "first step" undefined. But the Sand model instruction given in the main charge and deemed "[o]bviously . . . correct" by the defense leaves "first step" undefined. Sand et al., Modern Federal Jury Instructions, Criminal Instruction 8-7. Moreover, our Court has specifically endorsed the Sand instruction on inducement. In *United States v. Dunn*, Judge Feinberg, writing for a unanimous panel, noted that instructions on entrapment "should be simplified" so as to "focus the jury's attention on the central issue presented by a claim of entrapment: Was the defendant 'ready and willing to commit the offense if given an opportunity to do so?'" 779 F.2d 157, 160 (2d Cir. 1985). To reach this central issue, the Court counseled, "there need only be some evidence of government initiation of the illegal conduct." The Court further advised, "[f]or a clear and concise instruction embodying this approach, see 1 L. Sand, J. Siffert, W. Loughlin, S. Reiss, Modern Federal Jury Instructions 8-24 (1984) (§ 8.07 –

Entrapment)." *Id.* And more recently, we stated in *United States v. Brand*, "Our conclusion that the district court did not err in defining entrapment is supported by the fact that the charge mirrors the model language from Sand's Modern Federal Jury Instructions – language we have previously approved." 467 F.3d 179, 205 (2d Cir. 2006) (citing *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000)).

The majority cites no case law to support its suggestion that this instruction is deficient, for failing to specify what counts as government initiation of illegal conduct. To the contrary, it cites the same Sand instruction as "proper." Maj. Op. 28. There is thus no "clear and obvious" error here that arises from this lack of specification. *See Marcus*, 560 U.S. at 262 (noting that, among other requirements, error must be "clear or obvious" to constitute plain error). Nor is there any impact on the appellant's substantial rights. According to the majority, the district court was required to "ma[k]e clear that the critical inquiry concerned inducement of the transport and shipment, and not inducement of other conduct, however reprehensible." Maj. Op. 30. But this is precisely what the district court did – and without any need to define "first step." The court, in fact, aided the jury by making clear *four* separate times in the *supplemental instruction alone* that it was the transport and shipment of child pornography that the government must induce, not merely the

possession of child pornography or other reprehensible conduct. *See* J.A. 217 (referring to "the first step in committing the criminal act of transporting child pornography and shipping child pornography"); J.A. 218 ("the first step to have the defendant transport . . . and/or ship child pornography"); *id.* ("the first step to have defendant transport and/or ship child pornography"); J.A. 219 ("the Government agent took the first step to have the defendant transport or ship child pornography").

Finally, even if the district court *were* required to say what the first step in transporting child pornography was – although undoubtedly it was not – the failure to do so here was not prejudicial, let alone plainly erroneous. The majority lists the possible first steps about which it believes the jury was confused:"the initiation of the chat", the "sexual references", the proposal that child pornography be transported or shipped – or even possession of the images. Maj. Op. 17.[10] But choosing any one of these steps would not have changed the outcome here because it was Kopstein, not Agent Lombardi, who initiated each of them. Kopstein took up the chat and first referenced sexual matters. *See* J.A. 22. He possessed the images. And it was also Kopstein who first proposed that child pornography be transported or shipped – a

[10] The majority asserts that the agent requested Kopstein to "transmit an image of a child being raped." Maj. Op. 17. No such thing occurred.

detail the majority overlooks. After sending multiple adult pornographic photos to a person he believed to be a child, Kopstein solicited Hopeinsac to send to him a "naughty pic[ ]" that would "show me where to put my cock." J.A. 22. Thus, even if the district court had instructed the jury that one of these particular steps was *the* step the government agent had to undertake, for inducement to be found, the result would not have been different. The district court's election not to specify the first step – consistent with the case law and the better approach to entrapment – was not error, much less plain error prejudicing the defendant's substantial rights.

C. Burden Regarding Entrapment

In a single sentence, the majority contends, finally, that the supplemental instructions created a "problem" by inconsistently pronouncing "on whether the government was required to 'prove' entrapment or 'disprove' entrapment." Maj. Op. 30. The majority itself appears embarrassed to deem this error, and for good reason. The "problem" at issue relates to a single line in the supplemental instruction:

> On page 42, the first inquiry you make is whether or not there is some evidence of . . . inducement . . . . If you find there is some evidence that the Government agent took the first step to have the defendant transport or ship child pornography, then you go on to consider the other elements as to whether or not the Government *has*

> *proven entrapment and has disproved entrapment* beyond a reasonable doubt.

J.A. 219 (emphasis added). The district court here made a misstatement, which it recognized and promptly corrected – though the majority refuses to make this simple inference from the transcription of the proceedings before us. Moreover, the majority fails to mention that the supplemental instructions correctly placed the burden of disproving entrapment on the government at least five times. Indeed, even Kopstein's attorney acknowledged that any error was inconsequential: referring to this slip of the tongue, defense counsel stated just thereafter that "I think there was [a] place, also, where you may have said the Government has proven entrapment. And I think what you meant to say was disprove. But I suspect that [the jurors] realize that." J.A. 221-21. Indeed Kopstein – but not the majority – continues to maintain this position on appeal, conceding that the district judge here "immediately corrected herself." Appellant's Br. 22.

In the face of all this, the majority fails to identify the standard of review (plain error), the prejudice to the defendant (none), the error that is plain (none), or how the plain error, assuming there was one, seriously affects the fairness, integrity, or public reputation of judicial proceedings (it would not). As we have repeatedly

said, jury charges are not to be read "on the basis of excerpts taken out of context," but in their entirety, to see whether the instructions "adequately communicated the essential ideas to the jury." *Sabhnani*, 599 F.3d at 237 (internal quotation marks omitted). By the majority's reasoning, *any* misspoken portion of a sentence by a district judge – even if "immediately corrected" and, sensibly, not objected to – could constitute a reason to grant a defendant a new trial. There was no error here, much less error justifying vacatur.

IV

Although not necessary to my conclusion, I note, finally, that the supposed errors on which the majority relies were utterly harmless – so that even assuming, contrary to the record, that these errors were properly preserved, vacatur is still inappropriate.[11] *United States v. Naiman*, 211 F.3d 40, 51 (2d Cir. 2000) (noting that a conviction will be set aside for error in jury instructions only "if the instructions, viewed as a whole, caused the defendant prejudice"); *see also United States v. Ekinci*, 101 F.3d 838, 843 (2d Cir. 1996) (noting that prejudice is examined in light of the

[11] Vacatur on plain error review is similarly barred because there was no effect on Kopstein's substantial rights. *See Marcus*, 560 U.S. at 262.

evidence and the "erroneous instruction in the context of the instructions as a whole").

To succeed on his affirmative defense of entrapment, Kopstein was first required to "present[ ] credible evidence of government inducement." *Bala*, 236 F.3d at 94. Provided this element was shown, the prosecution then was required to prove predisposition beyond a reasonable doubt, in order to disprove entrapment. *United States v. Al-Moayad*, 545 F.3d 139, 153 (2d Cir. 2008). No rational jury, applying this law, would have found that Kopstein was entrapped.

As to inducement (and as noted already), the defendant need only point to credible evidence of inducement, a burden we have properly characterized as "relatively slight." *United States v. Mayo*, 705 F.2d 62, 67 (2d Cir. 1983). But as we have also said, this obligation "should not be treated as a hollow requirement," and a defendant "cannot simply point to the government's use of an undercover agent" to satisfy it. *Brand*, 467 F.3d at 190. Here, contrary to the majority's implication that it was the *government* who initiated Kopstein's crimes by first suggesting the electronic transmission of child pornography, Kopstein first suggested this crime by requesting that a purported twelve-year-old send him a photograph showing him "where to put my cock." Thus (and by any of the definitions of "first step" to which

the majority points) the evidence overwhelmingly shows that Kopstein was not induced and that any supposed error in the inducement instructions was harmless.

Even if this were not the case, however, any rational jury would find that the government proved that Kopstein was predisposed in light of (1) his existing course of criminal conduct prior to the crime charged and (2) his ready willingness to commit the crime, as evidenced by his prompt response to Agent Lombardi's supposed inducement. *See United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995). As to his existing course of conduct, Kopstein admitted to possessing child pornography and to having numerous sexual chats with girls as young as nine over a three-year period. He admitted both to sending these girls images of himself and to requesting that they send him images. Nearly two hundred images depicting apparent child pornography were recovered from his computer.

All this is in addition, moreover, to the evidence that Kopstein (1) sought out Hopeinsac; (2) turned their conversation to sex within minutes of encountering her; (3) repeatedly sent her unsolicited images of his penis; and (4) within fifteen minutes of beginning their encounter, implored her to create and transmit to him a pornographic image of herself showing him "where to put my cock." This conduct

took place before *any* suggestion by the agent that Kopstein transmit images of underage girls.

The majority is thus reduced to claiming that a rational jury could conclude that Kopstein, who solicited the transport of child pornography in the early part of his conversation with Hopeinsac, was not predisposed to commit the offense moments thereafter. The majority is wrong. Kopstein's request that Hopeinsac engage in sexually explicit conduct and produce and transport visual depictions of such conduct – "take some, send them and then delete them," J.A. 24 – overwhelmingly establishes his predisposition to transport child pornography and, indeed, to engage in an even *more* serious crime (production of child pornography) requiring a mandatory minimum sentence of 15 years imprisonment. *See* 18 U.S.C. § 2251(a); *see also United States v. Broxmeyer*, 708 F.3d 132, 139 (2d Cir. 2013) (Jacobs, J., dissenting from denial of rehearing *en banc*) ("[U]nder 18 U.S.C. § 2251(a), by asking [the victim] (without success) to take nude photos of herself, [the defendant] became guilty of attempting to [cause a minor to] 'engage in . . . sexually explicit conduct for the purpose of producing [a] visual depiction of such conduct.'").

Kopstein also readily acceded to what he asserts was the government inducement here – namely, the agent's inquiry whether Kopstein possessed "good"

pictures of any "girls." Kopstein agreed to commit the criminal conduct of transmitting child pornography *within fourteen seconds* of the moment he asserts he was induced, and began transmitting child pornography to a purported twelve-year-old girl minutes thereafter. *See Jacobson v. United States*, 503 U.S. 540, 550 (1992) ("Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner – who must be presumed to know the law – had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction."). Thus, Kopstein's course of criminal conduct was not, as the majority would have it, consistent with the theory that Kopstein had "no predisposition or inclination" to transport child pornography. No rational jury would find otherwise.

CONCLUSION

In sum, I disagree with the majority's analysis and with its conclusion. The majority fails to read the instructions in context and as a whole. It neglects to explain how any properly preserved error prejudiced Kopstein and it wholly disregards the Supreme Court's admonition in *Marcus* that we are to apply the plain error rule "as [the Supreme Court] has interpreted it," and not as we see fit. 560 U.S. at 262. There is no basis for vacatur. Accordingly, I respectfully dissent.