No. 04-1382

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES MAXWELL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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On June 6, 2005, after the petition for a writ of certiorari and respondent's brief in opposition to the petition were filed, this Court issued its decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Court's decision in *Raich* reinforces the constitutionality of 18 U.S.C. 2252A(a)(5)(B) by reaffirming the central arguments the United States has advanced in defense of that provision. The Court therefore should grant the petition for certiorari in this case, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Raich*. Indeed, the Court has already taken that action with regard to another recent Eleventh Circuit decision, involving a related provision

of the federal child-pornography laws, that relied on the court of appeals' decision in this case.*

1. Respondent contends that the court of appeals' decision "rests on a highly fact-specific application of this Court's settled precedents concerning Congress' power under the Commerce Clause." Br. in Opp. 6; *id.* at 6-15. As the government's petition for a writ of certiorari explains (at 13-14), however, "the decision in this case is not limited to idiosyncratic factual settings; rather, this case involves the core conduct that Congress sought to prohibit in enacting Section 2252A(a)(5)(B)." Respondent possessed computer disks containing hundreds of pornographic images of minors to whom he had no evident personal connection. See Pet. 14. By eliminating the statute's application to an important class of prohibited conduct—the intrastate possession of child pornography for purported personal use—the decision below seriously undermines Congress's comprehensive scheme for eliminating the interstate market in child pornography.

The Eleventh Circuit has not treated its decision in this case as limited to a narrow set of facts. In *United States* v. *Smith*, 402 F.3d 1303 (11th Cir. 2005), vacated and remanded, No. 04-1390 (June 20, 2005), the court reversed the defendant's conviction for producing child pornography, in violation of 18 U.S.C. 2251(a). The defendant in *Smith* had paid a 14-year-old girl to pose for sexually explicit photographs. See, *e.g.*, 402 F.3d at 1310-1311. The court of appeals held that its decision in this case compelled the conclusion that Smith's conduct was beyond the power of Congress to regulate—indeed,

* The government's petition for a writ of certiorari in this case urged (at 14-16) that the petition be held pending the Court's decision in *Raich* and then disposed of as appropriate in light of that decision.

the court found that conclusion to be so plain and obvious that it reversed the conviction on plain-error review, notwithstanding Smith's failure to assert his constitutional challenge in the district court. See *id.* at 1323-1325; see also *United States* v. *Matthews*, No. 04-11052 (11th Cir. Apr. 11, 2005) (per curiam) (holding, based on the court of appeals' decisions in this case and in *Smith*, that the defendant's indictment for intrastate possession and production of child pornography was properly dismissed), petition for cert. pending, No. 05-59 (filed July 8, 2005).

2. The question presented in *Raich* was "[w]hether the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal 'medicinal' use or to the distribution of marijuana without charge for such use." 03-1454 Pet. at I. Relying substantially on *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (see 125 S. Ct. at 2206-2208), the Court in *Raich* rejected the respondents' as-applied constitutional challenge to the federal ban on possession and distribution of marijuana. The Court in *Raich* reaffirmed that the constitutional analysis must take into account the entire class of regulated activities. *Id.* at 2205-2206. The Court further explained that, under *Wickard*, "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 2206. The Court also held that, "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about di-

version into illicit channels, * * * Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act]." *Id.* at 2209 (citation and footnote omitted).

As the petition for a writ of certiorari in this case explains (at 11-13, 14-15), the same considerations support Congress's decision not to exempt the intrastate possession of child pornography for purported personal use from the prohibition contained in 18 U.S.C. 2252A(a)(5)(B). Like the ban on intrastate possession of marijuana, Section 2252A(a)(5)(B) is an integral feature of a comprehensive statutory scheme intended to attack the national market in a noxious commodity. And, as with marijuana, the reasonableness of Congress's enforcement regime is supported by the potential difficulty of proving that a particular visual depiction has previously moved in interstate commerce (or that it is possessed with the intent to sell or otherwise distribute it).

On June 20, 2005, this Court granted the government's petition for a writ of certiorari in *Smith*, vacated the judgment of the court of appeals, and remanded the case to the Eleventh Circuit for further consideration in light of the decision in *Raich*. There is no reason for a different disposition here.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005).

Respectfully submitted.

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JULY 2005