No. 09-523

In the Supreme Court of the United States

MICHAEL MALLOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, is unconstitutional under the First Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 568 F.3d 166.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2009. A petition for rehearing was denied on August 4, 2009 (Pet. App. 42a). The petition for a writ of certiorari was filed on October 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of using a minor to create child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. 1a-2a. The district court sentenced petitioner to 180 months of impris-

onment, to be followed by five years of supervised release. *Id.* at 32a-34a. The court of appeals affirmed. *Id.* at 6a.

1. In October 2005, petitioner's friend, Aaron Burroughs, brought a 14 year-old girl (S.G.) to petitioner's home to have sex with them, and the men videotaped the sexual encounter. At that time, petitioner was a 33 year-old United States Capitol Police Officer; Burroughs was the coach of a junior varsity high school football team; and S.G. was a sophomore in high school and manager of that football team. Later in 2005, Burroughs again brought S.G. to petitioner's home to have sex with the two men. At the time of this second encounter, petitioner was either 14-years-old or may have just turned 15. Pet. App. 2a-3a.

In the summer of 2006, Federal Bureau of Investigation (FBI) agents opened an investigation and interviewed petitioner. Pet. App. 3a. Petitioner admitted that he had sex with the girl on two occasions and that he had videotaped the first encounter with his Sony camcorder. *Ibid.* Petitioner also admitted that he thought the girl "looked young" when he first met her. *Ibid.* (quoting C.A. App. 60). During a warrant-authorized search of his residence, FBI agents recovered the camera and the videotape. *Ibid.* The tape depicted petitioner and Burroughs having sex with S.G., and "end[ed] with [petitioner] ejaculating onto the face and into the mouth of the victim." Gov't C.A. Br. 4 (quoting C.A. App. 255) (first brackets in original).

2. A federal grand jury returned an indictment charging petitioner with sexual exploitation of a minor for the purpose of producing a visual depiction, in viola-

tion of 18 U.S.C. 2251(a).[1] Pet. App. 3a. In pertinent part, Section 2251(a) punishes "[a]ny person who * * * uses * * * any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced using materials that have been * * * transported in interstate or foreign commerce." 18 U.S.C. 2251(a). Section 2256(1) defines a "minor" as "any person under the age of eighteen years." 18 U.S.C. 2256(1).

Before trial, the government filed a motion in limine to preclude petitioner from offering a reasonable-mistake-of-age defense. Pet. App. 4a. The district court granted the motion, reasoning that Section 2251(a) resembles "statutory rape" cases where most jurisdictions "simply will not allow reasonable mistake-of-fact defenses." *Ibid.* (quoting C.A. App. 111). The court nevertheless gave petitioner an opportunity to "proffer the circumstances that reflect[] high care, high standard, almost a faultless situation where there's no way that your client was able to determine that she was under 18." *Id.* at 4a n.1 (quoting C.A. App. 110). After hearing petitioner's evidence, the court held that he failed to make any "proffer that [petitioner] investigated [the victim's] age or saw any documents that she provided that showed that she was over 18" and, accordingly, the court adhered to its original ruling. *Id.* at 4a-5a n.1 (quoting C.A. App. 154).

At trial, the government established that the victim was born in November 1990, and thus was 14-years-old when the videotape was produced, and also that the

[1] Petitioner was also charged with one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), but that count was later dropped. Gov't C.A. Br. 2.

video camera and cassette had been transported in foreign commerce. Pet. App. 5a-6a. Petitioner stipulated that the videotape was "a visual depiction showing [petitioner] engaging in genital and oral sexual intercourse with [the victim]," and that it "proves beyond a reasonable doubt that [petitioner] used [the victim] to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct." *Id.* at 5a (quoting C.A. App. 185, 403). Petitioner, however, testified that he was told S.G. was 19-years-old and a sophomore at Bowie State. Gov't C.A. Br. 3, 22 n.9.

The jury was instructed that

> [t]he government does not have to prove that the defendant knew that [the victim] was less than 18 years old and it is not a defense to the charge whether or not the defendant knew or believed that [she] was a minor. What the defendant may have known or believed with respect to [her] age is irrelevant. [Her] actual age is determinative for purposes of the government meeting its burden of proof on this element.

C.A. App. 367. On September 20, 2007, the jury found petitioner guilty. Pet. App. 6a.

The advisory Sentencing Guidelines range was 324 to 360 months of imprisonment. Pet. App. 6a. The district court sentenced petitioner to the statutory mandatory minimum of 15 years. *Ibid*; see 18 U.S.C. 2251(e).

3. The court of appeals affirmed. Pet. App. 1a-29a. As relevant here, the court rejected petitioner's argument that a reasonable-mistake-of-age defense is constitutionally required. *Id.* at 7a-19a.[2]

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[2] The court of appeals also rejected petitioner's other arguments, Pet. App. 19a-28a, including his claim that precluding him from raising

The court first looked to the statutory text, legislative history, and relevant judicial decisions, and concluded "that knowledge of the victim's age is neither an element of the offense nor textually available as an affirmative defense." Pet. App. 7a. The court explained that the statute contains no "knowledge" requirement on its face; the legislative history reveals that Congress "considered and explicitly rejected such a knowledge requirement"; and this Court opined that "knowledge of the age of the victim is not required to convict a defendant under § 2251(a)." *Id.* at 8a (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (*X-Citement Video*)).

Turning to the First Amendment challenge, the court rejected petitioner's argument that a reasonable-mistake-of-age defense must nevertheless be "judicially engrafted" to avoid "chilling a substantial amount of protected speech." Pet. App. 10a. Recognizing "the strong government interest identified by [this] Court in suppressing the production of child pornography," the court of appeals examined whether "§ 2251(a) as written," *i.e.*, without a reasonable-mistake-of-age defense, "poses a threat of chilling a substantial amount of protected expressive activity." *Id.* at 16a-17a.

The court held that no substantial chill would occur for several reasons. First, the court observed that, "as a practical matter," "little legitimate [*i.e.*, adult, but non-obscene] pornography would be chilled because producers of pornography are *already* required to authenticate actors' ages." Pet. App. 17a (citing 18 U.S.C. 2257(b)(1)). And producers, the court explained, have a

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a reasonable-mistake-of-age defense violated his due process rights, *id.* at 19a-21a.

"superior ability * * * to ascertain the age of the subject—through visual contact, documentary verification, direct questioning, and reputational information." *Id.* at 19a. Second, the court noted that "only a subset of adult pornography is at issue—namely, pornography made by producers who seek to use 'youthful-looking' actors or actresses." *Id.* at 17a. The court added that "because the children depicted in child pornography frequently cannot be found, the prosecutor must show that the subject is a minor solely from the pictures," which means that "most prosecutions for child pornography involve a subject that is not simply 'youthful- looking' but unmistakably a child." *Id.* at 17a-18a. Third, the court reasoned that "producers of adult pornography who wish to use youthful-looking subjects will not be deterred by § 2251(a) for profit reasons." *Id.* at 18a. The court concluded that it was therefore "unlikely that producers of such pornography will be chilled, much less substantially chilled, by the unavailability of a mistake of age defense in § 2251(a)" and, thus, "decline[d] to engraft onto it a reasonable mistake of age defense that is neither grounded in the statutory text nor mandated by the Constitution." *Id.* at 19a.

In so holding, the court of appeals aligned itself with two other courts of appeals, *United States* v. *Deverso*, 518 F.3d 1250 (11th Cir. 2008), and *Gilmour* v. *Rogerson*, 117 F.3d 368 (8th Cir. 1997), cert. denied, 522 U.S. 1122 (1998), which had already held that "no mistake of age defense is necessary in statutes prohibiting the production of child pornography." Pet. App. 12a; see *id.* at 12a-14a. The court recognized that a divided Ninth Circuit panel had held otherwise before this Court decided *X-Citement Video*, but noted that even in the Ninth Circuit the defense is "very narrow" and likely unavailable

to petitioner who "did not conduct any investigation or view any documentary evidence" about the victim's age. *Id.* at 12a n.2 (citing *United States* v. *United States Dist. Ct.*, 858 F.2d 534 (1988)).

ARGUMENT

Petitioner argues (Pet. 7-9, 10-13) that the First Amendment requires courts to engraft a reasonable-mistake-of-age defense onto 18 U.S.C. 2251(a) and that the decision below conflicts with a decision of the Ninth Circuit. The court of appeals decision is correct, and no conflict warranting this Court's review exists. The Ninth Circuit decision was issued before *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), made clear that no reasonable-mistake-of-age defense is required. Every circuit to have considered this issue since *X-Citement Video* has rejected petitioner's argument, and petitioner could not prevail even under the Ninth Circuit's narrow reasonable-mistake-of-age standard. The Court recently denied certiorari on this issue. See *Wilson* v. *United States*, cert. denied, No. 09-6491 (Jan. 11, 2010). The same result is warranted here.

1. Section 2251(a) criminalizes the production of child pornography in interstate commerce. It applies to "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced using materials that have been * * * transported in interstate or foreign commerce." 18 U.S.C. 2251(a). As petitioner concedes (Pet. 12), the statute does not contain an express affirmative defense for a reasonable mistake as to the victim's age. And, as this Court observed, Congress intended to hold produc-

ers of child pornography criminally liable even in the absence of evidence that they knew the age of their victims, so long as the victims were actually children. See *X-Citement Video*, 513 U.S. at 74-77.

Petitioner nevertheless contends (Pet. 7, 10-13) that the First Amendment requires that a defense of reasonable mistake of age be made available to defendants under Section 2251(a). He is mistaken.

As the court of appeals explained (Pet. App. 8a-9a), *X-Citement Video* distinguished between distribution and production of child pornography, explaining that "producers may be convicted under § 2251(a) without proof they had knowledge of age." 513 U.S. at 76 n.5; see *id.* at 72 n.2. The Court compared a Section 2251 offense to statutory rape, observing that with both offenses "the victim's actual age [i]s determinative despite defendant's reasonable belief that the girl had reached age of consent." *Ibid.* (citation omitted). The Court also explained that it "makes sense to impose the risk of error on producers" because, as compared to distributors or mere possessors of child pornography, they "are more conveniently able to ascertain the age of performers." *Id.* at 76 n.5.

Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, which lack First Amendment protection. See 18 U.S.C. 2251(a); *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). The statute does not apply to pornographic material with youthful-looking adult actors or to virtual child pornography. Cf. *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 250-251 (2002) (invalidating statute criminalizing production of virtual child pornography). Indeed, petitioner has not identified *any* application of Section 2251(a) that would reach constitutionally protected expression. Be-

cause Section 2251(a) reaches only unprotected speech, it is not overbroad. See, *e.g.*, *United States* v. *Johnson*, 376 F.3d 689, 695-696 (7th Cir. 2004) (rejecting overbreadth challenge to Section 2251 because the statute reaches only unprotected speech).

But even if a statute reaching only unprotected speech could be subject to challenge because of its chilling effect on protected speech, which appears to be the crux of petitioner's argument (Pet. 10-13), he is mistaken in contending that Section 2251(a) substantially chills producers of adult pornography. As the court of appeals explained (Pet. App. 17a), the only material potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. And, within that already limited scope, most prosecutions "involve a subject that is not simply 'youthful-looking' but unmistakably a child." *Id.* at 17a-18a. That is so because prosecutors need to prove that the actor is a minor and, often, the children depicted cannot be found. *Ibid.*

The relative ease with which pornography producers can verify their subjects' ages, see *X-Citement Video*, 513 U.S. at 76 n.5, suggests that Section 2251(a) will not deter production of otherwise-lawful pornography involving youthful-looking adults so much as encourage producers of such material to verify their subjects' age, as they are already required to do by a separate criminal statute. See Pet. App. 17a (quoting 18 U.S.C. 2257(b)(1), which requires producers to "ascertain, by examination of an identification document containing such information, the performer's name and date of birth"). The First Amendment therefore does not require engrafting a reasonable-mistake-of-age affirmative defense onto 18 U.S.C. 2251(a).

2. Petitioner contends (Pet. 7-9) that there is a conflict among the courts of appeals "as to whether to recognize a reasonable mistake of age defense to a charge under 18 U.S.C. 2251(a)," Pet. 7.[3] On January 11, 2010, this Court denied the petition for a writ of certiorari in *United States* v. *Wilson*, No. 09-6491, which raised the same issue and relied on the same purported conflict. For the same reasons, this Court's review is not warranted here.

Every court of appeals that has addressed the issue since this Court's decision in *X-Citement Video* has held that the First Amendment does not require a reasonable-mistake-of-age defense in Section 2251(a) cases. See *United States* v. *Wilson*, 565 F.3d 1059, 1067-1069 (8th Cir. 2009), cert. denied, No. 09-6491 (Jan. 11, 2010); *United States* v. *Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008); see also *Gilmour* v. *Rogerson*, 117 F.3d 368, 372-373 (8th Cir. 1997) (reaching same conclusion with respect to state statute criminalizing production of child pornography), cert. denied, 522 U.S. 1122 (1998).

Before *X-Citement Video*, the Ninth Circuit had held that Section 2251(a) would be unconstitutional in the absence of a reasonable-mistake-of-age defense. See *United States* v. *United States Dist. Ct.*, 858 F.2d 534,

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[3] Petitioner also contends (Pet. 8-9) that a decision of the Maryland Court of Appeals conflicts with the decision below. That is incorrect. In *Outmezguine* v. *State*, 641 A.2d 870 (Md. 1994), the court held, *as a matter of statutory construction*, that the state legislature intended to provide defendants with a mistake-of-age defense to a similarly targeted state statute. *Id.* at 883-884. But it expressly rejected the First Amendment argument urged by petitioner: "[W]e hold that the First Amendment does not require knowledge of the minor's age to be an element of the crime under § 419A(c) [prohibiting production of child pornography], nor does it require a reasonable mistake of age defense." *Id.* at 880.

543-544 (1988). That case involved unique facts: a "massive fraud" on the entire "adult entertainment industry" perpetrated by a 16 year-old minor who was an aspiring adult film actress and her agent, such that even those producers who took "the most elaborate steps to determine how old" their subject was would have been fooled. *Id.* at 536, 540. A divided panel of the court observed that the First Amendment "does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech," and it determined that not allowing a reasonable-mistake-of-age defense under the circumstances would have that effect. *Id.* at 540. The court therefore decided to "engraft" a "very narrow" affirmative defense "onto [the] statute," which would permit a defendant to escape liability if he proved, "by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Id.* at 542-543 (footnote omitted).

The Ninth Circuit's decision relied in significant part on cases involving distributors and possessors of child pornography—as opposed to producers. See *United States Dist. Ct.*, 858 F.2d at 539. Because *X-Citement Video* later explained that producers of child pornography should be treated differently from distributors of such material—specifically stating that "producers may be convicted under § 2251(a) without proof they had knowledge of age," 513 U.S. at 76 n.5—the Ninth Circuit's decision does not create a conflict warranting this Court's review. The Ninth Circuit has not had an opportunity to reassess its position in light of *X-Citement Video* and other courts' decisions that relied on *X-Citement Video* to reject First Amendment challenges to Section 2251(a). The court of appeals should be per-

mitted that opportunity, particularly because it stated that its holding was based on its "reading of the relevant Supreme Court opinions" and was valid "[u]nless and until the Supreme Court speaks otherwise." *United States Dist. Ct.*, 858 F.3d at 540, 542. Review by the Court at this time would be premature.

3. Even if the disagreement in the circuits otherwise warranted this Court's review, this case would not be a suitable vehicle for resolving the conflict because petitioner would not prevail even under the affirmative defense recognized by the Ninth Circuit. The Ninth Circuit adopted a "very narrow" affirmative defense, requiring a defendant to show, by clear and convincing evidence, not only that he "did not know" that the subject was underage, but also that he "could not reasonably have learned" his subject's true age. *United States Dist. Ct.*, 858 F.3d at 543. The court of appeals noted that "[s]uch a defense would be entirely implausible under most circumstances," and should be limited to "rare" cases, such as "where the actress allegedly engaged in a deliberate and successful effort to deceive the entire industry." *Id.* at 542-543.

This not that "rare" case. Here, petitioner was offered the opportunity to "proffer the circumstances that reflect[] high care, high standard, almost a faultless situation where there's no way that your client was able to determine that she was under 18." Pet. App. 4a n.1 (quoting C.A. App. 110). He was unable to do so. Even though petitioner admitted that the 14 year-old girl "looked young," and even though he was a *participant* in the sexual encounters (not solely a "producer"), he did not attempt to verify her age. *Id.* at 3a. When petitioner was purportedly told that the girl was 19-years-old, he did not investigate further and did not see or ask

to see "any documents" showing "she was over 18." *Id.* at 4a-5a n.1 (quoting C.A. App. 154). Petitioner does not, and could not, credibly claim that he "could not reasonably have learned" his victim's true age. *United States Dist. Ct.*, 858 F.3d at 543.

These facts readily distinguish the Ninth Circuit case, where defendants claimed that the child victim provided them with fraudulent "California photographic identification," "other official documents," and evidence that she had already been employed by "men's magazines" and other employers who, "according to industry custom and perception, reliably investigate the age of their models." *United States Dist. Ct.*, 858 F.2d at 540. Because petitioner would not prevail under the Ninth Circuit's pre-*X-Citement Video* standard, further review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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