No. 09-1177

In the Supreme Court of the United States

DONNELL MCCLOUD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, violates either the Free Speech Clause of the First Amendment or the Due Process Clause of the Fifth Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense.

2. Whether 18 U.S.C. 2251(a) exceeds Congress's power under the Commerce Clause as applied to the intrastate production of child pornography where the materials used to produce the pornographic images have moved in interstate or foreign commerce.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Ashcroft v. *Free Speech Coal.*, 535 U.S. 234 (2002) 9
Gilmour v. *Rogerson*, 117 F.3d 368 (8th Cir. 1997), cert. denied, 522 U.S. 1122 (1998) 10
Gonzales v. *Raich*, 545 U.S. 1 (2005) 14, 18, 19
Malloy v. *United States*, 130 S. Ct. 1736 (2010) 6
Morissette v. *United States*, 342 U.S. 246 (1952) 12, 13
Nelson v. *Moriarty*, 484 F.2d 1034 (1st Cir. 1973) 13
New York v. *Ferber*, 458 U.S. 747 (1982) 8
Rowe v. *DeBruyn*, 17 F.3d 1047 (7th Cir.), cert. denied, 513 U.S. 999 (1994) 13
United States v. *Betcher*, 534 F.3d 820 (8th Cir. 2008), cert. denied, 129 S. Ct. 962 (2009) 5
United States v. *Blum*, 534 F.3d 608 (7th Cir.), cert. denied, 129 S. Ct. 589 (2008) 14
United States v. *Brooks*, 841 F.2d 268 (9th Cir. 1988), cert. denied, 487 U.S. 1227 (1988) 8
United States v. *Deverso*, 518 F.3d 1250 (11th Cir. 2008) 10
United States v. *Forrest*, 429 F.3d 73 (4th Cir. 2005) 14

Cases—Continued: Page

United States v. *Grimmett*, 439 F.3d 1263 (10th Cir. 2006) 14, 17
United States v. *Holston*, 343 F.3d 83 (2d Cir. 2003) . 14, 18
United States v. *Johnson*, 376 F.3d 689 (7th Cir. 2004) . . . 9
United States v. *Juvenile Male*, 211 F.3d 1169 (9th Cir.), cert. denied, 531 U.S. 907 (2000) 13
United States v. *Kallestad*, 236 F.3d 225 (5th Cir. 2000) 16, 18
United States v. *Lopez*, 514 U.S. 549 (1995) 15
United States v. *Malloy*, 568 F.3d 166 (4th Cir. 2009), cert. denied, 130 S. Ct. 1736 (2010) 9
United States v. *Morales-De Jesus*, 372 F.3d 6 (1st Cir. 2004), cert. denied, 545 U.S. 1130 (2005) 14
United States v. *Morrison*, 529 U.S. 598 (2000) 15
United States v. *Mugan*, 394 F.3d 1016 (8th Cir.), vacated and remanded, 546 U.S. 1013 (2005) 14, 17
United States v. *Pliego*, 578 F.3d 938 (8th Cir. 2009), cert. denied, 130 S. Ct. 1109 (2010) 4, 5
United States v. *Ransom*, 942 F.2d 775 (10th Cir. 1991), cert. denied, 502 U.S. 1042 (1992) 8, 13
United States v. *Rodia*, 194 F.3d 465 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000) 15, 16
United States v. *Smith*:
545 U.S. 1125 (2005) 14
402 F.3d 1303 (11th Cir. 2005) 14
459 F.3d 1276 (11th Cir. 2006), cert. denied, 549 U.S. 1137 (2007) 14
United States v. *Stevens*, 130 S. Ct. 1577 (2010) 8

Cases—Continued: Page

United States v. *United States Dist. Ct.*, 858 F.2d 534 (9th Cir. 1988) 10, 11, 12
United States v. *Williams*, 553 U.S. 285 (2008) 8
United States v. *Wilson*, 565 F.3d 1059 (8th Cir. 2009), cert. denied, 130 S. Ct. 1052 (2010) 4, 5, 9, 13
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) . . . . . *passim*
Wilson v. *United States*, 130 S. Ct. 1052 (2010) 6

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 14, 16, 17, 19
Amend. I (Free Speech Clause) . . . . . *passim*
Amend. V (Due Process Clause) 4, 6
Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Tit. I, § 121(1)(10), 110 Stat. 3009-26 17
Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 17
Controlled Substance Act, 21 U.S.C. 801 *et seq.* 18
Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7 17
18 U.S.C. 2241(c) 8
18 U.S.C. 2251(a) (Supp. II 2008) . . . . . *passim*
18 U.S.C. 2252 7
18 U.S.C. 2252A 4
18 U.S.C. 2256(1) 12
18 U.S.C. 2257(b)(1) 9

Miscellaneous: Page

H.R. Rep. No. 536, 98th Cong., 1st Sess. (1983) 17
S. Rep. No. 438, 95th Cong., 1st Sess. (1977) 15, 17
U.S. Dep't of Justice, *Attorney General's Commission on Pornography, Final Report* (1986) 16

In the Supreme Court of the United States

No. 09-1177

DONNELL MCCLOUD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 590 F.3d 560.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2009. The petition for a writ of certiorari was filed on March 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on three counts of producing child pornography,

in violation of 18 U.S.C. 2251(a).[1] He was sentenced to 30 years of imprisonment, to be followed by supervised release for life. The court of appeals affirmed. Pet. App. 1a-17a.

1. In February 2008, upon entering petitioner's apartment to execute a search warrant for illegal drugs and weapons, law enforcement officers observed petitioner, who was nude, dive out of the bedroom into the living room. The police then found K.G., a 15-year-old girl, hiding under the bed, also nude. During the ensuing search, the police found a memory card for a camera that contained seven videos of K.G. and petitioner, who was 28 years old, engaging in sexual activity. At the time of his arrest, petitioner told the arresting officer that he liked young teenage girls. Pet. App. 2a, 4a; Gov't C.A. Br. 3-4.

Petitioner had met K.G. on an Internet chat page in December 2007. Petitioner provided K.G. with a bus ticket so she could leave her home in Springfield, Missouri, and come to stay with him in St. Louis. When K.G., then 14 years old, arrived in St. Louis, petitioner took her to his apartment. Within a few days, petitioner engaged in oral and vaginal sexual intercourse with K.G. Petitioner then began taking pictures of himself engaging in sexual acts with K.G. Pet. App. 2a, 4a; Gov't C.A. Br. 3-4.

Law enforcement officers had previously investigated petitioner in 2004 for the statutory rape of G.D., a 14-year-old girl. A search of petitioner's residence at that time uncovered a blue bag in the basement containing hundreds of photographs of young females engaging

---

[1] All references to 18 U.S.C. 2251(a) are to the current version, which is contained in the 2008 Supplement to the United States Code.

in sexual acts. Ninety-six of the photographs depicted G.D. Ten of these showed G.D. displaying her nude genitals or performing oral sex. G.D. identified herself as the female depicted in the photographs and signed the backs of them. Pet. App. 2a; Gov't C.A. Br. 5-6.

The police reviewed the photographs in the blue bag and identified a third victim, C.W. There were over 100 photographs of C.W. clothed or partially dressed and engaging in sexual acts. C.W. identified herself in the pictures and said that she was 14 years old when they were taken. C.W. said she met petitioner while she was a freshman in high school, that she and petitioner engaged in oral and vaginal sex, and that petitioner took photographs of her while she was nude and while she was engaging in sexual acts with him. Petitioner ended his relationship with C.W. because she was turning 15. Pet. App. 3a, 5a; Gov't C.A. Br. 7-9.

At trial, petitioner acknowledged that he had taken the pictures and videos of K.G., G.D., and C.W. that were found at his residence. Pet. App. 6a; Gov't C.A. Br. 8-9.

In order to satisfy the interstate or foreign commerce requirement of 18 U.S.C. 2251(a), the government introduced evidence at trial that the memory card containing the pictures of K.G. was manufactured in Taiwan and shipped to the United States via Korea. The government also showed that the Fuji photo paper on which the pictures of G.D. and C.W. were printed was produced either in Greenwood, South Carolina, or the Netherlands. Pet. App. 4a-5a; Gov't C.A. Br. 5, 8.

2. A grand jury in the Eastern District of Missouri returned a superseding indictment charging petitioner with three counts of producing child pornography, in violation of 18 U.S.C. 2251(a), and three counts of pos-

sessing child pornography, in violation of 18 U.S.C. 2252A. Before trial, the government dismissed the three possession counts. Pet. App. 3a & n.2.

Petitioner moved to dismiss the indictment on the ground that Section 2251(a) is unconstitutional as applied to the intrastate production of child pornography, where the materials used to produce the pornographic images have moved in interstate or foreign commerce. The district court denied that motion. Pet. App. 3a.

The government then filed a motion in limine to exclude any evidence, argument, or affirmative defense that petitioner was reasonably mistaken about his victims' ages. The district court granted the motion. Pet. App. 4a. Petitioner sought a jury instruction stating that there is an affirmative defense for a reasonable mistake about the victims' ages. The district court declined to give that instruction. *Id.* at 6a.

The jury found petitioner guilty on all counts. He was sentenced to 30 years of imprisonment, to be followed by a supervised release for life. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 1a-17a. As relevant here, the court rejected petitioner's argument that Section 2251(a) violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment because it does not require knowledge of the victim's age and does not include a reasonable-mistake-of-age affirmative defense. *Id.* at 9a-12a. The court noted that it had already rejected the First Amendment challenge in *United States* v. *Wilson*, 565 F.3d 1059, 1066-1069 (8th Cir. 2009), cert. denied, 130 S. Ct. 1052 (2010), and *United States* v. *Pliego*, 578 F.3d 938, 943-944 (8th Cir. 2009), cert. denied, 130 S. Ct. 1109 (2010).

Relying on this Court's decision in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), the *Wilson* court drew a distinction between distributors and downstream consumers of child pornography, on the one hand, and producers of child pornography, on the other, explaining that the latter are akin to statutory rapists who are not entitled to any *mens rea* safeguards. 565 F.3d at 1067. The court further explained that given the opportunity that producers have to verify the ages of the actors they employ, their speech is "less apt to be inhibited by the fear of mistake or deception." *Id.* at 1068-1069. The court concluded that these two factors, combined with the "strong interest * * * in protecting children from sexual exploitation," defeated the First Amendment challenge. *Ibid.*

The court of appeals then rejected petitioner's due process challenge to Section 2251(a), stating that it had rejected a similar argument in *Wilson*. Pet. App. 10a-11a. The court noted that Section 2251(a) does not include a *mens rea* element or a reasonable-mistake-of-age defense on its face, and it concluded that the district court did not abuse its discretion in failing to give the requested jury instruction. *Id.* at 10a-12a & n.3.

Finally, the court rejected petitioner's Commerce Clause challenge to Section 2251(a). Pet. App. 13a-17a. Relying on its earlier decisions in *Pliego*, 578 F.3d at 944, and *United States* v. *Betcher*, 534 F.3d 820, 823-824 (8th Cir. 2008), cert. denied, 129 S. Ct. 962 (2009), the court held that Congress may criminalize child pornography production using materials that have traveled in interstate or foreign commerce, and it found that the government had proved interstate and foreign transportation of such materials in this case. Pet. App. 13a-17a.

ARGUMENT

1. Petitioner renews his arguments (Pet. 8-22) that 18 U.S.C. 2251(a) violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment unless it is construed to include a reasonable-mistake-of-age affirmative defense. The court of appeals correctly rejected those claims. Petitioner contends (Pet. 9-11) that the decision below conflicts with a decision of the Ninth Circuit. But the Ninth Circuit's decision was issued before this Court's decision in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994), which distinguished between producers of child pornography and distributors and explained that the former may be held responsible for their actions without regard to their knowledge of the victim's age. Since *X-Citement Video*, the circuits have not disagreed on that issue, and there is therefore no reason for this Court to intervene at this time. In any event, review is unwarranted because petitioner could not prevail even under the Ninth Circuit's pre-*X-Citement Video* standard. The Court has recently denied certiorari on the First Amendment issue. See *Malloy* v. *United States*, 130 S. Ct. 1736 (2010) (No. 09-523); *Wilson* v. *United States*, 130 S. Ct. 1052 (2010) (No. 09-6491). The same result is warranted here.

a. 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 or for the purpose of transmitting a live visual depiction of such conduct * * * if that visual depiction was produced or transmitted using materials" transported in interstate or foreign

commerce. 18 U.S.C. 2251(a). The statute does not require that the defendant know that the victim is a minor, nor does it contain an express affirmative defense for a reasonable mistake about the victim's age. See *X-Citement Video*, 513 U.S. at 76 & n.5. As this Court has observed, Congress intended to hold producers of child pornography criminally liable even in the absence of evidence that they knew the age of their victims, so long as the victims actually were children. See *id.* at 74-77.

In *X-Citement Video*, the Court held that 18 U.S.C. 2252, which makes it a crime "knowingly" to transport, receive or distribute child pornography, requires that the defendant know that at least one of the performers depicted pornographically was a minor. 513 U.S. at 78. In so holding, the Court distinguished between distributers and producers of child pornography, explaining that "producers may be convicted under § 2251(a) without proof they had knowledge of age." 513 U.S. at 72 n.2, 76-77 & n.5. 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." *Id.* at 72 n.2 (citation omitted). The Court explained that it "makes sense to impose the risk of error on producers," because, as compared with distributors or possessors of child pornography, they "are more conveniently able to ascertain the age of performers." *Id.* at 76 n.5.[2]

---

[2] Petitioner asserts (Pet. 16-17) that while "commercial manufacturers" of child pornography may easily verify the victim's age, amateur pornographers like himself may not. But in either event, the producer of the child pornography deals directly with his victim, and is therefore in a position to ascertain the victim's age, much like statutory rapists who have traditionally been denied a mistake-of-age defense. See *X-*

Petitioner is mistaken in contending that Section 2251 violates the First Amendment on its face. As this Court explained in *United States* v. *Williams*, 553 U.S. 285 (2008), under the "First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech." *Id.* at 292. See also *United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010). The doctrine "strike[s] a balance between competing social costs," balancing "the threat of enforcement of an overbroad law," which "deters people from engaging in constitutionally protected speech," against the "obvious harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional." *Williams*, 553 U.S. at 292.

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

---

Citement Video, 513 U.S. at 72 n.2, 76 n.5 ("producers are more conveniently able to ascertain the age of performers"; "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age").

Petitioner suggests (Pet. 12) that some States allow a mistake-of-age affirmative defense to statutory rape. That is beside the point. The federal statutory rape statute, 18 U.S.C. 2241(c), does not require that the defendant know his victim's age, see, *e.g.*, *United States* v. *Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), cert. denied, 502 U.S. 1042 (1992). And the question here is not whether Congress could allow such a defense, but whether the statute is unconstitutional without such a defense, which it is not. In any event, the "majority" of American courts "that have considered this issue have rejected the reasonable mistake of age defense to statutory rape, absent express legislative directive." *United States* v. *Brooks*, 841 F.2d 268, 270 (9th Cir.), cert. denied, 487 U.S. 1227 (1988).

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). Petitioner has not identified *any* application of Section 2251(a) that would reach constitutionally protected expression. Because Section 2251(a) reaches only unprotected speech, it is not overbroad. See, *e.g.*, *United States* v. *Johnson*, 376 F.3d 689, 694-696 (7th Cir. 2004).

But even if a statute reaching only unprotected speech could be subject to challenge because of its chilling effect on protected speech, Section 2251(a) does not substantially chill producers of adult pornography. The only material potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. *United States* v. *Malloy*, 568 F.3d 166, 175-176 (4th Cir. 2009), cert. denied, 130 S. Ct. 1736 (2010). 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' ages, as they are already required to do by a separate criminal statute, see 18 U.S.C. 2257(b)(1). The First Amendment therefore does not require engrafting a reasonable-mistake-of-age affirmative defense onto 18 U.S.C. 2251(a).

b. 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 *Malloy*, 568 F.3d at 172-176; *Wilson*, 565 F.3d at 1067-1069; *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, 543-544 (1988). That case involved unique facts: a "massive fraud" on the entire "adult entertainment industry" perpetrated by a 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 540-541. 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 permitted 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.2d at 540, 542. Review by the Court at this time would be premature.

c. Even if the disagreement in the circuits otherwise warranted this Court's review, this case would not be a suitable vehicle for resolving the issue 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.2d 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 is not that "rare" case. Here, petitioner makes no argument that he was reasonably mistaken about his victims' ages. And any such assertion would ring hollow

in light of petitioner's own statement to the police that he "like[s] young teenage girls," as well as the fact that he ended his relationship with one of his victims when she turned 15 years old. Pet. App. 2a-5a. These facts readily distinguish *United States District Court*, where the defendants claimed that the child victim provided them with fraudulent "California photographic identification" and "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." 858 F.2d at 540.[3] Because petitioner would not prevail under the Ninth Circuit's pre-*X-Citement Video* standard, further review of his First Amendment claim is unwarranted.

d. Petitioner also is mistaken in contending (Pet. 15-22) that Section 2251(a) violates due process unless construed to include a *mens rea* element or a reasonable-mistake-of-age affirmative defense. Petitioner does not identify any court that has accepted this argument or any disagreement in the circuits on this issue. Review should be denied for that reason alone.

In any event, the court of appeals correctly rejected petitioner's due process claim. Although criminal offenses typically require a "concurrence of an evil-meaning mind with an evil-doing hand," *Morissette* v. *United States*, 342 U.S. 246, 251-252 (1952), this Court has recognized that there is a long-established exception for crimes involving the sexual exploitation of children, "in which the victim's actual age [is] determinative despite

[3] Petitioner asserts (Pet. 7) that there is evidence that one victim, K.G., had shown him fake identification. But K.G. testified that her fake identification stated she was 17 years old, Pet. App. 4a, which is still below the federal age of majority, see 18 U.S.C. 2256(1).

defendant's reasonable belief that the girl had reached [the] age of consent." *Id.* at 251 n.8. In light of this exception, the courts of appeals have uniformly rejected due process challenges to the absence of a scienter requirement from statutory rape provisions. See, *e.g.*, *United States* v. *Juvenile Male*, 211 F.3d 1169, 1170-1171 (9th Cir.), cert. denied, 531 U.S. 907 (2000); *United States* v. *Ransom*, 942 F.2d 775, 777 (10th Cir. 1991), cert. denied, 502 U.S. 1042 (1992); *Nelson* v. *Moriarty*, 484 F.2d 1034, 1035-1036 (1st Cir. 1973).[4]

Child pornography statutes targeting producers are analogous to statutory rape provisions and thus fall squarely within the category of crimes for which a scienter requirement is not traditionally required. See, *e.g.*, *X-Citement Video*, 513 U.S. at 72 n.2; *Wilson*, 565 F.3d at 1067. The "long history" of the exception for sex offenses against children "undermines [the] argument that the statute in question offends principles of justice deeply rooted in our traditions and conscience." *Ransom*, 942 F.2d at 777. Moreover, Section 2251(a) "does not impinge on other protected constitutional rights," and the statute furthers the paramount government interest in protecting children from sexual exploitation. *Ibid.* As this Court explained in *X-Citement Video*, imposing "the risk of error" on producers of child pornography "makes sense," 513 U.S. at 76 n.5, and is "reason-

---

[4] Petitioner cites (Pet. 10-11, 13) cases in which the courts have adopted extra-statutory affirmative defenses for entrapment and self-defense. But such affirmative defenses are recognized only to the extent that they do not contravene the intent of Congress. See, *e.g.*, *Rowe* v. *DeBruyn*, 17 F.3d 1047, 1052 (7th Cir.), cert. denied, 513 U.S. 999 (1994). Here, Congress wanted to hold producers of child pornography responsible regardless of their knowledge of their victims' ages. See *X-Citement Video*, 513 U.S. at 76 & n.5.

abl[e]," *id.* at 72 n.2, because "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age," *ibid.* Accordingly, due process does not require that Section 2251(a) include either a knowledge-of-age element or mistake-of-age affirmative defense.

2. Petitioner renews his argument (Pet. 22-32) that a Section 2251(a) prosecution for intrastate production of child pornography, where the materials used to produce the pornographic images have moved in interstate or foreign commerce intrastate, exceeds Congress's authority under the Commerce Clause. Petitioner has not identified any disagreement in the circuits on this issue. Indeed, the courts of appeals that have addressed the issue have uniformly upheld the constitutionality of Section 2251(a) in materials-in-commerce cases. See, *e.g.*, Pet. App. 13a; *United States* v. *Blum*, 534 F.3d 608, 609-612 (7th Cir.), cert. denied, 129 S. Ct. 589 (2008); *United States* v. *Smith*, 459 F.3d 1276, 1282-1285 (11th Cir. 2006), cert. denied, 549 U.S. 1137 (2007)[5]; *United States* v. *Grimmett*, 439 F.3d 1263, 1271-1273 (10th Cir. 2006); *United States* v. *Forrest*, 429 F.3d 73, 77-79 (4th Cir. 2005); *United States* v. *Mugan*, 394 F.3d 1016, 1020-1024 (8th Cir.), vacated and remanded on other grounds, 546 U.S. 1013 (2005); *United States* v. *Morales-De Jesus*, 372 F.3d 6, 10-17 (1st Cir. 2004), cert. denied, 545 U.S. 1130 (2005); *United States* v. *Holston*, 343 F.3d 83, 84-91

[5] The Eleventh Circuit previously came to a contrary conclusion in *United States* v. *Smith*, 402 F.3d 1303, 1315-1316 (2005), but this Court vacated that decision in light of *Gonzales* v. *Raich*, 545 U.S. 1 (2005). See *United States* v. *Smith*, 545 U.S. 1125 (2005). On remand, the Eleventh Circuit "rather easily" concluded that, in light of *Raich*, the application of the statute to the defendant's purely intrastate production of child pornography was constitutional. *Smith*, 459 F.3d at 1284-1285.

(2d Cir. 2003); *United States* v. *Rodia*, 194 F.3d 465, 473-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000). Those courts are correct.

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court identified three categories of activity that Congress may regulate under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.* at 558-559. Thereafter, in *United States* v. *Morrison*, 529 U.S. 598 (2000), the Court identified four factors to be considered in determining the existence of a "substantial effect" on commerce: (1) whether the activity the statute proscribes is commercial or economic in nature; (2) whether the statute contains an express jurisdictional element involving interstate commerce that might limit its reach; (3) whether Congress has made specific findings regarding the effect of the proscribed activity on interstate commerce; and (4) whether the link between the proscribed conduct and a substantial effect on commerce is attenuated. *Id.* at 610-612.

Materials-in-commerce prosecutions under Section 2251(a) are a constitutional exercise of the Commerce Clause power because the production of child pornography substantially affects interstate commerce. The ban on production of child pornography in Section 2251(a) is an integral feature of a statutory scheme directed at large-scale commercial activity. Congress has long recognized that the production and marketing of child pornography is "a large industry * * * that operates on a nationwide scale and relies heavily on the use of the mails and other instrumentalities of interstate and foreign commerce." S. Rep. No. 438, 95th Cong., 1st Sess.

6-7 (1977) (*Senate Report*). Section 2251(a)'s ban on the intrastate production of child pornography effectuates the ban on interstate trafficking, because it reduces the demand for child pornography, thereby reducing the interstate market for such material. See *Rodia*, 194 F.3d at 477.

Each factor identified in *Morrison* supports the conclusion that the intrastate production of child pornography using materials that traveled in commerce substantially affects interstate or foreign commerce. First, the conduct at issue is economic in character. As the Fifth Circuit has explained, "homemade" child pornography substantially contributes to the interstate and foreign traffic in child pornography. *United States* v. *Kallestad*, 236 F.3d 225, 228 (5th Cir. 2000) (citing U.S. Dep't of Justice, *Attorney General's Commission on Pornography, Final Report* 408 (1986)). "Such pornography is exchanged through the mails, and also becomes the basis for commercial child pornography magazines, which are made not with photographs taken by the magazine producers, but rather with homemade photographs submitted by private child abusers." *Ibid.*

Second, the statute contains an express jurisdictional hook in that it requires that the visual depiction be produced using materials that have traveled in interstate commerce. See 18 U.S.C. 2251(a). This jurisdictional hook serves to limit prosecutions to "a smaller universe of provable offenses" and "reflects Congress's sensitivity to the limits upon its commerce power." *Kallestad*, 236 F.3d at 229.[6]

---

[6] Petitioner argues (Pet. 22-23) that Section 2251(a)'s materials-in-commerce element is insufficient in itself to satisfy the Commerce Clause. But even if that were true, it would not be dispositive, because petitioner's "production of intrastate pornography has a substantial

Third, Congress made explicit findings about the extensive national market in child pornography and the need to reduce it by prohibiting the production of child pornography at the local level. See, *e.g.*, Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7; *Senate Report* 5 ("[C]hild pornography * * * ha[s] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale * * * [and that is] carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; H.R. Rep. No. 536, 98th Cong., 1st Sess. 17 (1983) ("Generally, the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers."); *id.* at 16 ("Those [collectors of child pornography] who do not sell their material often loan or trade collections with others who share their interest."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Tit. I, § 121(1)(10), 110 Stat. 3009-26 ("[T]he existence of and traffic in child pornographic images * * * inflames the desires of child molesters, pedophiles, and child pornographers who prey on children,

---

impact on interstate commerce," and is thus justified under the Commerce Clause on that basis. *Grimmett*, 439 F.3d at 1272 (internal quotation marks and citation omitted).

Petitioner's argument (Pet. 25) that materials such as the memory card and photo paper in this case do not qualify as "instrumentalities" of interstate commerce is likewise beside the point, because the government does not defend the statute using an "instrumentalities" theory, and the court of appeals upheld Section 2251(a)'s application in materials-in-commerce cases on the ground that local production of child pornography substantially affects interstate or foreign commerce. *Mugan*, 394 F.3d at 1024.

thereby increasing the creation and distribution of child pornography.").

Finally, Congress rationally determined that "it must reach local, intrastate conduct in order to effectively regulate [the] national, interstate market" for child pornography. *Kallestad*, 236 F.3d at 229. As the Second Circuit has explained, "Congress understood that much of the pornographic material involving minors that feeds the market is locally produced, and this local or 'homegrown' production supports demand in the national market and is essential to its existence." *Holston*, 343 F.3d at 90. It makes no difference that an individual child pornographer may not intend to sell or distribute his depictions, because "[t]he nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted," *id.* at 90-91 (brackets in original; citation omitted).

The constitutionality of Section 2251(a) as applied to materials-in-commerce prosecutions is confirmed by this Court's recent decision in *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). There, the Court rejected a Commerce Clause challenge to the use of the federal Controlled Substance Act (CSA), 21 U.S.C. 801 *et seq.*, to criminalize the purely intrastate manufacture and possession of marijuana for medical purposes, explaining that the activity at issue substantially affects intrastate commerce. The Court emphasized Congress's power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17. The Court also made clear that the substantiality of an individual's own activities was of no moment, so long as the aggregate activity substantially affects interstate commerce. *Ibid.*

The Court determined that Congress could rationally conclude that the growers' activities substantially affected commerce because the high demand for marijuana in the interstate market created a likelihood that marijuana grown for local consumption would be drawn into the interstate market, *id.* at 19, and because the exemption of intrastate marijuana would impair the ability of Congress to enforce its interstate prohibition given the difficulty of distinguishing between marijuana grown locally and that grown elsewhere, *id.* at 22.

The same is true here: the intrastate production of child pornography using materials that have traveled in commerce contributes to the significant national and international market for such materials. Congress rationally decided to criminalize that intrastate production in order to dry up the market. Accordingly, the application of Section 2251(a) in this case comports with the Commerce Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

JUNE 2010