No. 05-877

In the Supreme Court of the United States

VIRGILIO JERONIMO-BAUTISTA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2251(a) is unconstitutional, as exceeding Congress's powers under the Commerce Clause, as applied to petitioner's alleged intrastate sexual exploitation of a child for the production of child pornography, where the materials used to produce that child pornography have moved in interstate or foreign commerce, but the pornographic images themselves have neither moved in nor been shown to have been intended for sale or distribution in interstate or foreign commerce.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-40) is reported at 425 F.3d 1266. The opinion of the district court (Pet. App. 41-62) is reported at 319 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2005. The petition for a writ of certiorari was filed on January 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Utah on one count of inducing a minor "to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct,

which visual depictions were produced using materials that had been * * * transported in interstate and foreign commerce," in violation of 18 U.S.C. 2251(a). 02/11/04 Indictment 1-2 (Count 1). Before trial, the district court dismissed the indictment on the ground that Section 2251(a), as applied to petitioner, exceeded Congress's authority under the Commerce Clause. See Pet. App. 25. The court of appeals reversed the district court's dismissal of the indictment and remanded the case for further proceedings. *Id.* at 24-40.

1. The government alleged in the district court that on January 29, 2004, petitioner and two other men entered a vacant residence in Magna, Utah, accompanied by a 13-year-old girl. At some point during the evening, the girl became unconscious, apparently after ingesting an intoxicating substance. After the girl lost consciousness, the men took off her clothes. They subsequently photographed the victim as she was being sexually assaulted by each of the men. The camera and film used to take the photographs were manufactured outside of Utah. Pet. App. 26, 45, 47.

One of the men took the film to a one-hour photo laboratory for processing. In the course of developing the film, the laboratory staff noticed that some of the photographs depicted the sexual assault of a minor. The manager called the police, and petitioner and the other two men were subsequently arrested. Pet. App. 26.

2. On February 11, 2004, a federal grand jury returned an indictment charging petitioner and the other two men with inducing a minor "to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct, which visual depictions were produced using materials that had been * * * transported in interstate and foreign commerce," in violation

of 18 U.S.C. 2251(a). 02/11/04 Indictment 1-2 (Count 1). The government alleged that the camera and film had traveled in interstate or foreign commerce. Pet. App. 47. The government did not contend that the defendants or the victim had crossed state lines in connection with the offense. Nor did the government contend that the sexually explicit photographs of the victim were, or were intended to be, sold or distributed through interstate or foreign commerce. *Id.* at 26, 45, 47.

Before trial, petitioner moved to dismiss the indictment, arguing that Congress lacks the authority under the Commerce Clause to prohibit the conduct with which he is charged. Pet. App. 25. The district court granted the motion, holding that Section 2251(a) is unconstitutional as applied to petitioner's alleged offense. *Id.* at 41-62. The court concluded that the intrastate production of child pornography for personal consumption is not economic activity, *id.* at 54-55; that Section 2251(a)'s jurisdictional element fails to ensure that the proscribed conduct bore a constitutionally sufficient nexus to interstate commerce, *id.* at 55-56; that Congress's findings about the sizeable interstate market in child pornography did not justify application of the statute to petitioner's own conduct, *id.* at 56-57; and that the link between petitioner's conduct and interstate commerce was too tenuous to support the exercise of Commerce Clause authority, *id.* at 57-60.

3. During the pendency of the government's appeal from the dismissal of petitioner's indictment, this Court issued its decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005). The Court in *Raich* considered and rejected the plaintiffs' claim that the Controlled Substances Act (CSA), 21U.S.C. 801 *et seq.*, "as applied to the intrastate manufacture and possession of marijuana for medical

purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." 125 S. Ct. at 2205. The Court explained that "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 concluded that "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" applicable federal scheme. *Id.* at 2209.

4. The court of appeals reversed the dismissal of petitioner's indictment and remanded the case for further proceedings. Pet. App. 24-40. The court noted that this Court in *Raich* had "rejected an as applied challenge to the [CSA]" and had "held that Congress could regulate the purely local production, possession, and use of marijuana for personal medical purposes." *Id.* at 30. The *Raich* Court's analysis, the court explained, is equally applicable to the local production of child pornography for personal consumption. *Id.* at 33-40. Like the CSA, the federal child-pornography statutes "regulate the 'production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.' Congress' prohibition against the intrastate possession or manufacture of child pornography 'is a rational (and commonly utilized) means of regulating commerce in that product.'" *Id.* at 34 (quoting *Raich*, 125 S. Ct. at 2211). The court of appeals further observed that "Congress' explicit findings regarding the extensive national market in child pornography and the need to diminish that national market support the contention that prohibiting the production of child pornog-

raphy at the local level helps to further the Congressional goal." *Id.* at 33 (citation and internal quotation marks omitted).

ARGUMENT

Petitioner's as-applied constitutional challenge to 18 U.S.C. 2251(a) (Pet. 8-22) lacks merit and does not warrant this Court's review. Petitioner principally contends that the court of appeals' ruling in this case conflicts with the decisions in *United States* v. *Corp*, 236 F.3d 325 (6th Cir. 2001), and *United States* v. *McCoy*, 323 F.3d 1114 (9th Cir. 2003). This Court has repeatedly denied petitions for writs of certiorari in which decisions of various courts of appeals were alleged to conflict with *Corp* and *McCoy*. See, *e.g.*, *Riccardi* v. *United States*, 126 S. Ct. 299 (2005); *Sharpley* v. *United States*, 126 S. Ct. 78 (2005); *Colburn* v. *United States*, 125 S. Ct. 2934 (2005); *Morales-De Jesus* v. *United States*, 125 S. Ct. 2929 (2005); *Blackwell* v. *United States*, 541 U.S. 905 (2004). There is no reason for a different result here.

1. The court of appeals did not purport to decide whether petitioner is guilty of the charged offense, but simply reversed the district court's dismissal of petitioner's indictment and remanded the case for further proceedings. See Pet. App. 39. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari). If petitioner is acquitted following a trial on the merits, his constitutional claim will

become moot. If he is convicted, he will be entitled to reassert his current challenge to the application of 18 U.S.C. 2251(a), in addition to any other claims he may have at that time.

2. As the court of appeals correctly held, this Court's analysis of the CSA in *Raich* is equally applicable to Congress's regulation of child pornography. See Pet. App. 34-39; *United States* v. *Forrest*, 429 F.3d 73, 78-79 (4th Cir. 2005). Like the prohibition on intrastate possession of marijuana that was upheld in *Raich*, 18 U.S.C. 2251(a) is part of "comprehensive legislation to regulate the interstate market in a fungible commodity." 125 S. Ct. at 2209. Congress could rationally conclude that failure to regulate local production of child pornography would undercut its effort to eliminate that national market. See Pet. App. 39; *Forrest*, 429 F.3d at 78-79. As with the CSA, moreover, Congress's approach to the regulation of child pornography is supported by the potential difficulty of proving that particular images have previously traveled across state lines or are intended for sale or distribution in interstate or foreign commerce. See, *e.g.*, *United States* v. *Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000) ("[B]ecause it may often be impossible to determine whether a specific piece of child pornography has moved in interstate commerce[,] * * * Congress could rationally determine that banning purely local possession was a necessary adjunct to its effort to ban interstate traffic."); *United States* v. *Harris*, 358 F.3d 221, 222 (2d Cir. 2004) (explaining that regulation of intrastate possession is supported by the fact that "much of the child pornography that concerned Congress is homegrown, untraceable, and enters the national market surreptitiously") (quoting *United States* v. *Holston*, 343 F.3d 83, 89 (2d Cir. 2003)).

3. Contrary to petitioner's contention (Pet. 8-19), the court of appeals' decision in this case does not conflict with the decisions in *Corp* and *McCoy*.[1]

a. In *Corp*, the Sixth Circuit held that 18 U.S.C. 2252(a)(4)(B), which prohibits the intrastate possession of child pornography, was unconstitutional as applied to the "unusual facts" of the defendant's case. 236 F.3d at 332-333; see *United States* v. *Andrews*, 383 F.3d 374, 377 (6th Cir. 2004) (noting that the court of appeals in *Corp* "emphasized that [the] facts were unique"), cert. denied, 125 S. Ct. 1693 (2005). The 23-year-old defendant in *Corp* was convicted of possessing sexually explicit photographs of his 17-year-old girlfriend. 236 F.3d at 326. The court of appeals found that Corp's girlfriend "was not an 'exploited child' nor a victim in any real and practical sense." *Id.* at 332. Rather, the court stated, she "was merely months away from reaching majority," *id.* at 333, and she had "voluntarily posed for the photo-

[1] The court of appeals' decision in this case is consistent with the great weight of appellate authority upholding the constitutionality of federal child-pornography statutes. See, *e.g.*, *United States* v. *Morales-De Jesus*, 372 F.3d 6, 10-21 (1st Cir. 2004), cert. denied, 125 S. Ct. 2929 (2005); *United States* v. *Hampton*, 260 F.3d 832, 834-835 (8th Cir. 2001), cert. denied, 535 U.S. 1058 (2002); *Harris*, 358 F.3d at 222-223; *Kallestad*, 236 F.3d at 228-231; *United States* v. *Angle*, 234 F.3d 326, 337-338 (7th Cir. 2000), cert. denied, 533 U.S. 932 (2001); *United States* v. *Rodia*, 194 F.3d 465, 474-482 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000). Although the Eleventh Circuit issued three decisions holding provisions of the child-pornography statutes unconstitutional as applied to intrastate conduct, each of those decisions has been vacated and remanded by this Court for further consideration in light of *Raich*. See *United States* v. *Matthews*, 143 F. App'x 298 (11th Cir.) (Table), vacated and remanded, 126 S. Ct. 826 (2005); *United States* v. *Maxwell*, 386 F.3d 1042 (2004), vacated and remanded, 126 S. Ct. 321 (2005); *United States* v. *Smith*, 402 F.3d 1303, vacated and remanded, 125 S. Ct. 2938 (2005).

graphs and [did] not want Defendant prosecuted,'" *id.* at 326 (citation omitted). Those factors, the Sixth Circuit concluded, distinguished Corp's conduct from "the much more threatening situation where an adult was taking advantage of a much younger child or using the imagery for abusive or semi-commercial purposes." *Id.* at 332.

This case, by contrast, involves allegations of assaultive and coercive conduct directed against a 13-year-old girl—the type of conduct that the court in *Corp* stressed was not before it. The Sixth Circuit has declined to extend *Corp* to cases involving offenders who coerced and sexually exploited young minors. See *Andrews*, 383 F.3d at 377-378; see also *United States* v. *Gann*, No. 04-5840, 2005 WL 3528917, at *3-*5 (6th Cir. Dec. 21, 2005) (unpublished).

b. The facts in *McCoy* also differ substantially from the circumstances of petitioner's alleged offense. *McCoy* involved a single photograph of the defendant and her daughter, partially unclothed, posed side-by-side with their genital areas exposed. 323 F.3d at 1115, 1122, 1132. The court of appeals stressed that the visual depiction on which the prosecution was based was a "family photo (pornographic as it may have been)," *id.* at 1122, and the court attributed the incident to the defendant's consumption of large quantities of alcohol, *id.* at 1115. The court of appeals expressly limited its constitutional holding to "McCoy's circumstances and those of others similarly situated." *Id.* at 1131. In subsequent decisions, the Ninth Circuit has declined to extend its holding in *McCoy* and has rejected other defendants' Commerce Clause attacks on the federal child-pornography laws. See *United States* v. *Adams*, 343 F.3d 1024, 1027 (9th Cir. 2003), cert. denied, 542 U.S. 921 (2004);

United States v. *Tashbook*, 144 F. App'x 610 (9th Cir. 2005), cert. denied, 126 S. Ct. 777 (2005). As with *Corp*, the facts of *McCoy* are far removed from the predatory behavior alleged in this case.

c. The offense of conviction in *Corp* and *McCoy* was possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Petitioner, by contrast, was indicted for inducing a minor to engage in sexually explicit conduct for the purpose of producing child pornography, in violation of 18 U.S.C. 2251(a). Although both provisions are part of a comprehensive congressional effort to attack the "extensive national market in child pornography," *Holston*, 343 F.3d at 89, the "produced using materials" jurisdictional element has a more direct and immediate link to the offense conduct in cases where the defendant himself has used materials that moved in interstate commerce to produce the child pornography.

d. Both *Corp* and *McCoy* predate this Court's decision in *Raich*, on which the court of appeals in this case heavily relied, and *Raich* calls into serious doubt the continuing validity of those decisions. If future cases in which *Corp* and *McCoy* would otherwise be controlling arise within the Sixth and Ninth Circuits, those courts of appeals may reconsider their precedents in light of the intervening decision in *Raich*. See *Tashbook*, 144 F. App'x at 613 & n.2 (noting the potential tension between *McCoy* and *Raich*, but declining to determine *McCoy*'s continuing precedential force because the case before the court was distinguishable on its facts); *Gann*, 2005 WL 3528917, at *5-*6 (distinguishing *Corp* on its facts while rejecting, as inconsistent with *Raich*, the contention that application of Section 2251(a) is unconstitutional absent proof of an intent to sell, trade, or distribute the child pornography produced by the defendant).

The substantial uncertainty about whether *Corp* and *McCoy* remain good law within the circuits that issued those decisions provides an additional reason for this Court to deny review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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