No. _____

IN THE
Supreme Court of the United States

ROBERTO L. LLERENAS, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1591 is unconstitutionally vague.

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

Petitioner, Roberto L. Llerenas, Jr., respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, entered on July 20, 2018. (App. 1-6).

OPINIONS AND ORDERS BELOW

On September 9, 2015, the grand jury returned a second superseding indictment charging four counts of Sex Trafficking of Children pursuant to 18 U.S.C. § 1591(a)(1), (b)(1)&(2).

Trial commenced on June 20, 2016. The jury returned a verdict of guilty on all counts. A sentencing hearing was held on September 2, 2016. The District Court sentenced Mr. Llerenas to 360 months each on Counts 1-4, to run concurrently, followed by a life term of supervised release.

A timely notice of appeal was filed on September 15, 2016. The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction over appeals from final judgments under 28 U.S.C. § 1291, 28 U.S.C. § 1294(1), and 18 U.S.C. § 3742 (unlawful sentence). The judgment and sentence was a final decision subject to appeal under 28 U.S.C. § 1291.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's denial of Mr. Llerenas's appeal. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 1591 - Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.
(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.
(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.
(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.
(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.
(5) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

STATEMENT OF THE CASE

On December 9, 2014, Mr. Llerenas was charged by indictment with two counts of Sex Trafficking of Children pursuant to 18 U.S.C. § 1591(a)(1), (b)(1)&(2). On June 9, 2015, the grand jury returned a superseding indictment with the same two

offenses, but containing additional language regarding the use of force and/or fraud. On September 9, 2015, the grand jury returned a second superseding indictment charging four counts of Sex Trafficking of Children pursuant to 18 U.S.C. § 1591(a)(1), (b)(1)&(2).

On September 15, 2015, Mr. Llerenas filed a motion to dismiss the case on the grounds that 18 U.S.C. § 1591 is unconstitutionally vague. The government responded on September 21, 2015. At the conclusion of a February 29, 2016 hearing, the District Court denied Mr. Llerenas's motion to dismiss on the ground that 18 U.S.C. § 1591 is unconstitutionally vague.

Trial commenced on June 20, 2016. The jury returned a verdict of guilty on all counts. A sentencing hearing was held on September 2, 2016. The District Court sentenced Mr. Llerenas to 360 months each on Counts 1-4, to run concurrently, followed by a life term of supervised release.

A timely notice of appeal was filed on September 15, 2016. The district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction over appeals from final judgments under 28 U.S.C. § 1291, 28 U.S.C. § 1294(1), and 18 U.S.C. § 3742 (unlawful sentence). The judgment and sentence was a final decision subject to appeal under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. Title 18, U.S. Code § 1591 is unconstitutionally vague

Title 18, U.S. Code § 1591, the statute of conviction in this case, is unconstitutionally vague. It fails to define the prohibited conduct with sufficient definiteness and fails to establish minimal guidelines to govern law enforcement. First, under the statute it is incredibly difficult to determine whether the reasonable-opportunity-to-observe standard has been met, but it is also unclear what a "reasonable opportunity to observe" actually is. The statute does not define the term or give any explanation, despite doing so for other terms. Cf. 18 U.S.C. § 1591(e) (setting forth various definitions). Second, the term "coercion" is subject to significantly different interpretations which render it vague and uncertain.

A. The "reasonable opportunity to observe" language is unconstitutionally vague

Title 18, U.S. Code § 1591(c) provides that where "the defendant had a reasonable opportunity to observe the person [ ] recruited, enticed, harbored, transported, provided, obtained, or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years." 18 U.S.C. § 1591(c) (2013). In other words, where the defendant "had a reasonable opportunity to observe" the alleged victim, the statute appears to alleviate wholly the requirement that the Government prove that a defendant knew or recklessly disregarded the fact

of the alleged victim's age. *See United States v. Robinson*, 702 F.3d 22, 32 (2d Cir. 2012) (concluding that the provision provides "the government with three distinct options—prove beyond a reasonable doubt that: (1) the defendant had knowledge of the victim's underage status; (2) that the defendant recklessly disregarded that fact; or (3) that the defendant had a reasonable opportunity to observe the victim").

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST. V amend. The Supreme Court has held repeatedly that "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Id.* at 2557. The risk of impermissible vagueness is heightened when a statute lacks a mens rea requirement. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.").

Here, 18 U.S.C. § 1591 is unconstitutionally vague because it fails to define the prohibited conduct with sufficient definiteness and fails to establish minimal guidelines to govern law enforcement. First, under the statute it is incredibly difficult

to determine whether the reasonable-opportunity-to-observe standard has been met, but it is also unclear what a "reasonable opportunity to observe" actually is. The statute does not define the term or give any explanation, despite doing so for other terms. Cf. 18 U.S.C. § 1591(e) (setting forth various definitions).

"There must be ascertainable standards of guilt. ... The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests to ascertain guilt." *Winters v. People of State of New York*, 333 U.S. 507, 515-16 (1948) (citations omitted). Where there is an ambiguity in a criminal statute, a court must "apply the rule of lenity and resolve the ambiguity in [defendant's] favor." *United States v. Granderson*, 511 U.S. 39 (1994).

Second, while the phrase "reasonable opportunity to observe" apparently imposes criminal liability based on a person's purported ability to determine the alleged victim's age based on her appearance, the statute provides no guidance as to whether the focus is properly the reasonableness of the opportunity or the reasonableness of the conclusions drawn from the observation of the alleged victim. For example, the defendant may have an opportunity to observe the alleged victim at length, but his observations may reasonably lead him to believe that the victim is at least eighteen years of age. Third, the statute is impermissibly vague as to how long a "reasonable" opportunity is; what types of interactions are deemed "reasonable" opportunities; or what types of observations are required to satisfy this element (e.g.,

observations of physical appearance, conduct, speech or writing, or interactions in particular social contexts).

The risk of impermissible vagueness is heightened when a statute such as section 1591(c) lacks a mens rea. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice that prohibited his conduct is proscribed). "What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008).

Section 1591(a) is entirely unclear what a "reasonable opportunity to observe" is. The statute does not define the phrase, nor does it provide any explanation of what it is. Pursuant to 1591(c), a defendant's criminal liability is based on their ability to determine the age of the victim based upon the victim's appearance. However 1951(c) does not inform us as to whether the focus is the reasonableness of the opportunity or the reasonableness of the conclusion drawn from observations. More significantly, 1591(c) is ambiguous and vague because it fails to give any indication whether the "reasonable opportunity to observe" is a strict liability standard or a part of the reckless disregard scienter. A defendant may have a reasonable opportunity to observe the victim but that does not make him criminally liable if based on those observations he concludes the victim was over the age of 18. Furthermore, section 1591(c) is vague

on how long a "reasonable opportunity to observe" is and the nature and type of observations that are required (i.e. visual inspection, clothing, speech, social interaction, etc.).

Professor LaFave explains, "[t]he greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose criminal liability." Wayne LeFave, Substantive Criminal Law 384 (2d ed. 2003). This principle is especially salient because § 1591 carries a maximum sentence of life in prison. *Accord United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.").

In *Morissette v. United States*, the Court explained, "[t]he purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." 342 U.S. 246, 263 (1952). But even the *Robinson* court cited the Congressional Record where Judiciary Committee Chairman John Conyers and Representative Howard Berman made floor statements indicating that the revised subsection (c) was meant to preserve the rule from *United States v. X-Citement Video*, that the defendant "be required to ascertain that victim's age." 513 U.S. 64, 70, n.2 (1994). *Robinson*, at 24 n.11 (quoting 154 Cong. Rec. H24602 (daily ed. Dec. 10, 2008)).

B. The definition of "coercion" is unconstitutionally vague

Section 1591(e)(2)(A) and (B) defines "coercion" as either "threats of serious harm" or "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm" to any person. Section 1591(e)(4) defines "serious harm" as

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same *47 background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

The statute defines "coercion" as either actual threats of "serious harm," or as a "pattern" of conduct that would cause a person to "to believe that failure to perform an act would result in "serious harm," which includes "psychological harm." 18 U.S.C. § 1591(e)(2)(B), (4). The statute may reasonably be interpreted in one of two ways. It may be interpreted as requiring either a pattern of violence which effectively communicates similar violence if acts are not performed, even in the absence of overt threats. An alternative interpretation could include a pattern of non-violent conduct that only communicates that affection or approval may be withdrawn if acts are not performed. The first interpretation would be consistent with the normal meaning of the term "coercion," whereas the second interpretation would not. The first interpretation would also narrow the scope of the statute to conduct widely recognized as illegal, whereas the second would not. The structure and history of the

TVPA indicate that "coercion" should be given a meaning that comports with using or threatening physical or legal force to "cause" a person to engage in a commercial sex act, and not simply allowing a conviction on the threat of granting or withdrawing personal affection.

Title 22, United States Code, Section 7101(b) sets forth a number of considerations that underlie the Trafficking Victims Protection Act of 2000. One of those considerations was that:

> Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

22 U.S.C. § 7101(b)(13). This may appear, at first blush, to confirm that Congress sought to "overturn" the holding in *Kozminski* by including psychological harm in Section 1591's definition of "serious harm." However, the reason the Court limited its interpretation of "coercion" in *Kozminski* puts this interpretation in question.

Kozminski involved a prosecution of defendants for keeping two men, who were mentally disabled, on their farm and required them to work without pay for many years. The men were subjected to both physical and verbal abuse for failing to do their work and also threatened with institutionalization. The defendants failed to provide the men with adequate food, housing, clothing, or medical care. Finally, a

herdsman hired by the defendants became concerned about the welfare of the men and reported them to county officials. The government argued in *Kozminski* that the two men were " 'psychological hostages' whom the Kozminskis had 'brainwash[ed]' into serving them." 487 U.S., at 936. Although the Court affirmed the convictions based on the physical and legal coercion exercised by the defendants, the Court separately considered the argument that it should "adopt a broad construction of 'involuntary servitude,' which would prohibit the compulsion of services by any means that, from the victim's point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice." *Id.*, at 949. The Court rejected this construction as such a definition would "include compulsion through psychological coercion as well as almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work." *Id.*

The Court rejected such a broad interpretation because it "would appear to criminalize a broad range of day-to-day activity" and "would depend entirely upon the victim's state of mind." *Id.* Such a variable standard "would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law." *Id.*, at 949-950. These considerations form the standard by which a court determines when a law is void for vagueness. *See Kolender*, 361 U.S. 352. Although Congress can overturn the Supreme Court's interpretation of a statute, it cannot render the Fifth Amendment due process clause a nullity.

"The Fifth Amendment guarantees every citizen the right to due process. Stemming from this guarantee is the concept that vague statutes are void." *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002) (*citing Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). Hence, the reference to *Kozminski* in Section 7101 could refer to an interpretation of the statute which conforms to traditional notions of "coercion" as more than any psychological harm, but rather psychological harm that can result from threats of violence or legal action, not only against the victim, but also against others in the victim's presence or against others whom the victim cares about.

This limiting interpretation would satisfy the statute's efforts at targeting behavior that may be deemed "nonviolent" (such as providing a victim with addictive drugs) and yet have the "same purpose and effect" as direct violence (the physical harm that comes from withdrawal symptoms when drugs are withheld). This type of non-violent coercion involves indirect threats of physical and psychological harm that extends beyond simple name-calling that may make the recipient feel bad. Having someone "feel bad" is usually a way of getting them to not work for you, rather than the reverse. *See e.g. Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)(interpreting scope of "hostile work environment" under Title VII of the Civil Rights Act of 1964, 78 Stat. 253).

II. The Circuit Courts are interpreting 18 U.S.C. §1591 differently

Proof that section 1591(c) is vague and ambiguous is provided by contrasting interpretations of how it is applied in *United States v. Mozie*, 752 F.3d 1271 (11th Cir. May 22, 2014) and *United States v. Robinson*, 702 F.3d 22 (2d Cir. 2012). In *Mozie*, the Eleventh Circuit stated:

> The government must prove beyond a reasonable doubt all elements of the § 1591 crime, including the *mens rea*. If the government proves by that standard that the defendant had a reasonable opportunity to observe the victim, it need prove only that he recklessly disregarded the fact that she was under the age of eighteen, not that the defendant knew she was.

Mozie, 752 F.3d at 1282. Thus the Eleventh Circuit held that section 1591(c) applied to the reckless disregard scienter requirement of 1591(a).

By contrast, the Second Circuit in *Robinson* held that, "the plain reading of § 1591(c), and the only interpretation that preserves any meaning, is that the provision creates strict liability where the defendant had a reasonable opportunity to observe the victim." *Robinson*, 702 F.3d at 32. Thus, the Second Circuit found that 1591(c) created strict liability, "thus making the defendant's awareness of the victim's age irrelevant." *Id.* at 34.

These different interpretations demonstrate the vague nature of the statute. A statute is impermissibly vague where "the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries." *Connally v. General Constr. Co.*, 269 U.S. 385,

395 (1926). Where a statute fails to provide the requisite guidelines to ensure consistent enforcement "policemen, prosecutors, and juries [may be permitted] to pursue their personal predilections" resulting in arbitrary enforcement of the statute. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Moreover, where the "uncertainty as to the statute's meaning is itself not revealed until [a] court's decision," the due process "violation is that much greater." *Bouie v. Columbia*, 378 U.S. 347, 352 (1964).

Here the phrase "reasonable opportunity to observe" provides "inadequate guidance to the triers of fact." *Id.* at 353. Congress failed to specify for whom the opportunity to observe had to be reasonable. Is it a reasonable opportunity to observe given the unique facts and circumstances of the defendant? Is it a reasonable opportunity to observe by the hypothetical reasonable person? Or is it a reasonable opportunity to observe from the perspective of each individual juror?

As the Court recently noted "we have long been reluctant to infer that a negligence standard was intended in criminal statutes." *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (internal quotations omitted). Absent a clear indication from Congress "what [the defendant] thinks does matter." *Id.* (internal quotations omitted). In § 1591(c), Congress appears to be attempting some version of a negligence *mens rea.*

The bottom line, however, is that Congress failed to define through whose perspective "a reasonable opportunity to observe" is to be defined and that impermissibly "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. State of*

Pennsylvania, 382 U.S. 399, 402-03 (1966); *see, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to . . . judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

The "vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another." *Connally*, 269 U.S. at 394. "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 573-75 (1974) (observing that given "widely varying attitudes and tastes . . . what is contemptuous to one man may be a work of art to another"); *see, e.g., Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (observing that conduct that annoys some people does not annoy others resulting in "an unascertainable standard"). Congress needs to specify from whose perspective a reasonable opportunity to observe is to be defined. *See United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"); *United States v. Evans*, 333 U.S. 483, 495 (1948) ("It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.").

Because this Court can "do no more than make speculation law" as to whose perspective Congress intended to define "a reasonable opportunity to observe," Mr.

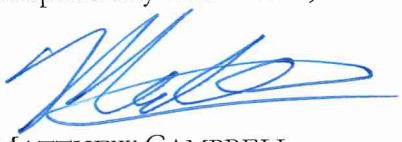
Llerenas's conviction under § 1591 violates the Fifth Amendment's prohibition against impermissibly vague statutes.

Conclusion

Based on the arguments discussed herein, it is requested that this Court grant this Petition for Writ of Certiorari, reverse the Ninth Circuit's decision affirming the District Court's denial of Mr. Mock's motion, and remand with instructions to conduct further proceedings consistent with this Court's decision.

Dated: October 11, 2018

Respectfully Submitted,



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