No. 18-8224

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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A. The Government's contention that because section 2251(a) does not include a knowing mens rea, it should not be interpreted to require any mens rea, is unpersuasive, and does not support denial of certiorari.

Petitioner has argued that the Court should interpret 18 U.S.C. § 2251(a) to include at least a recklessly *mens rea* element regarding the status of the minor, thereby avoiding significant constitutional questions under the First and Fifth Amendments. Pet. at 11-16 (addressing, *inter alia*, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), *Elonis v. United States*, 135 S. Ct. 2001 (2015), *Staples v. United States*, 513 U.S. 600, 605 (1994) and *Morissette v. United States*, 342 U.S. 246, 250 (1952)).[1] If such a construction is not permissible, then the Court should hold that the First Amendment requires at least a reckless mens rea as to the status of the minor in order to distinguish wrongful conduct from constitutionally protected conduct. Pet. at 16-19 (addressing, *inter alia*, *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990), and *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988)).

The Government barely addresses these arguments. Instead, it argues that the courts of appeals have uniformly held—based upon *United States v. X-*

[1] "Pet." refers to the petition for certiorari, "Opp." to the Brief for the United States in Opposition, "ER" to petitioner's Excerpts of Record filed in the court of appeals, and "CR" to the Clerk's Record of district court proceedings.

Citement Video, Inc., 513 U.S. 64 (1994)—that section 2251(a) does not require a "knowing" mens rea. Opp. at 6-8. But that observation is not particularly helpful, because petitioner does not advocate for a "knowing" mens rea. He advocates for *some* mens rea, and contends that this Court's cases support a reckless mens rea.

The Government claims that *X-Citement Video* also settles the question of a lesser mens rea because section 2251 is "an example of an offense for which poof of mens rea as to the victim's age is not required." Opp. at 9 (citing *X-Citement Video*, 513 U.S. at 72 n.2). The Government overstates *X-Citement Video* considerably. The section 2251 pornography offense is not like rape, and the jury acquitted petitioner of sex trafficking *because* it credited his reasonable mistake of age defense applicable to that charge. Moreover, the Court recognized that the opportunity to confront the victim supported the conclusion that a defendant "may reasonably be required to ascertain the victim's age[,]" which is wholly consistent with the reckless mens rea petitioner seeks. *Id*. Had that defense been provided, the jury would likely have acquitted petitioner on the pornography count as well.

So too, the Government is incorrect that *X-Citement Video* "explain[ed] that Congress's omission from Section 2251(a) of a *mens rea requirement* with respect to age was deliberate." Opp. at 10 (citing *X-Citement Video*, 513 U.S. at 76-77) (emphasis added). Rather, the Court explained that the legislative history proved

that Congress intended a knowing mens rea for section 2252, and did not intend a knowing mens rea for section 2251. 513 U.S. at 76-77 ("The Conference Committee explained that the deletion [of the word 'knowingly' from] § 2251(a) as reflecting an 'intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.'") *X-Citement Video* does not answer whether a lesser mens rea, such as recklessness, is applicable.

Elonis demonstrates how the Government's approach, like the one applied in *United States v. United States Dist. Court*, 858 F.2d 534, 537-538 (9th Cir. 1988) (*Kantor*), is flawed. *Kantor* determined that Congress's omission of scienter regarding "[t]he defendant's awareness of the subject's minority [as] an element of the offenses" sprang from its decision to exclude a "knowing" mens rea at the urging of (then) Assistant Attorney General Patricia M. Ward. *Kantor*, 858 F.2d at 538. Other legislative history confirms that Congress did not intend a knowingly mens rea for section 2251(a). *See* H.R.Rep. No. 95–811, at 5 (1977) (Conf. Rep.) ("The Senate Bill contains an express requirement in proposed section 2251(a) that the crime be committed 'knowingly.' The House amendment does not. The Conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child"). But neither Wald's concerns nor Congress's agreement

that a "knowingly" mens rea should not apply resolve the issue because the First and Fifth Amendments and the common law teach that this Court must undertake a more rigorous approach to implied mens rea, including assessing whether a reckless or criminally negligent mens rea must be required. *See Elonis*, 135 S. Ct. at 2009-12; *see also id*. at 2014-15 (Alito, S., concurring).

This Court's opinion in *Leocal* confirms a reckless mens rea applies, and the Government's treatment of *Leocal* is confusing. There, the Court addressed the text of 18 U.S.C. § 16(a), which defined a crime of violence as an offense that has "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 543 U.S. at 8-9. Like

here, Opp. at 9-10, the Government argued that "the 'use' of force does not incorporate any *mens rea* component[.]" 543 U.S. at 9. The Court declined the Government's invitation to read the term in isolation, and instead addressed its context: "the 'use of physical force *against the person or property of another*.'" *Id*. (original emphasis; ellipses omitted). *Id.* As established by *Bailey v. United States*, 516 U.S. 137, 145 (1995), "'use' requires active employment[,]" and the most natural reading of using force against another "suggests a higher degree of intent than negligent or merely accidental conduct."

So too here. As the Government recognizes, Opp. at 9-10, section 2251 addresses a person who "uses ... any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" Like *Leocal*, the most natural reading of the statute suggests "active employment" of a minor, and read naturally, does not reach negligent or accidental conduct. The Government's contrary read—that "the word 'uses' thus may impose a mens rea requirement with respect to the defendant's *actions*, but it does not indicate the existence of a mental-state requirement with respect to the minor's age[,]"—is *ipse dixit*, and ignores *Leocal*. *Leocal* teaches the opposite: to actively employ a minor requires some mens rea about that person's status.

The Government also argues past petitioner's First Amendment argument. While it is true that depictions of sexually explicit conduct of minors are not protected by the First Amendment, *see* Opp. at 10 (citing *New York v. Ferber*, 458 U.S. 747, 764 (1982), that is not the issue. As petitioner has shown, Pet. at 16-19, this Court's case law establishes that the First Amendment requires scienter when proscribing child pornography offenses. *See Ferber*, 458 U.S. at 765 (under the First Amendment, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant") (citing *Smith v. California*, 361 U.S. 147, (1959); *Hamling v. United States*, 418 U.S. 87 (1974)). *Osborne v.*

Ohio, 495 U.S. 103, 115 (1990) (upholding child pornography statute because it required recklessness mens rea). And under the First Amendment, even a civil defendant cannot be held liable without a finding of at least recklessness. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (plaintiff has the burden of proof on scienter issue). On these points, the Government offers no counter.

These cases also refute the Ninth Circuit's approach: the creation of an affirmative defense, with the burden of proof by clear and convincing evidence placed on the defendant. For the reasons shown, *see* Pet. at 18-19, the Ninth Circuit's rule established in *Kantor* is wrong and conflicts with all the other courts of appeals. Thus, at the very least, there is confusion in the lower courts warranting this Court's review.

To avoid certiorari, the Government relies primarily on plain error review. Pet. at 4-8. Plain error does not apply based on the futility doctrine. As the court of appeals recognized in this case, settled Ninth Circuit precedent resolved that question at bar—the existence of a scienter element in section 2251(a)—against petitioner. Pet. App. at 3 ("Dickerson argues that the government should have been required to affirmatively prove a scienter element in order to convict him of violation 18 U.S.C. § 2251(a). However, *Kantor squarely rejected the argument*

that § 2251(a) 'should be interpreted to require the government to prove scienter as to age in its prima facie case.'" 858 F.2d at 536-38) (emphasis added)). In other words, any district court objection would have been futile because settled Ninth Circuit law (incorrectly) mandated (and still mandates) that the Government need not prove *any scienter* in section 2251(a) prosecutions. *See Henderson v. United States*, 568 U.S. 266, 285 (2013) (Scalia, J., dissenting) ("[w]here the circuit law clearly contradicted the later Supreme Court opinion, again the trial court should have known that law, and counsel's raising the point would be futile and wasteful rather than sparing of judicial resources"); *see also United States v. Kyle*, 734 F.3d 956, 962 (9th Cir. 2013) (noting inapplicability of plain error review where objection would be futile).

In any case, the plainness of the error is evaluated at the time of appellate consideration. *Henderson*, 568 U.S. at 268; *see also Johnson v. United States*, 520 U.S. 461, 469 (1997) ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that the error be 'plain' at the time of appellate consideration"). This Court's decision in *Elonis* and the additional Supreme Court authorities presented in the petition establish that section 2251(a) includes a scienter requirement of recklessness. Thus, the error was plain.

The Government correctly states that "[e]very court of appeals to consider the question has recognized that the government is not required to prove that the defendant knew the victim's age." Opp. at 6-7 (citing *United States v. Henry*, 827 F.3d 16, 22-25 (1st Cir.), *cert. denied*, 137 S. Ct. 374 (2016); *United States v. Griffith*, 284 F.3d 338, 348-349 (2d Cir.), *cert. denied*, 537 U.S. 986 (2002); *United States v. Malloy*, 568 F.3d 166, 171-172 (4th Cir. 2009), *cert. denied*, 559 U.S. 991 (2010); *United States v. Crow*, 164 F.3d 229, 236 (5th Cir.), *cert. denied*, 526 U.S. 1160 (1999); *United States v. Humphrey*, 608 F.3d 955, 962 (6th Cir. 2010); *United States v. Fletcher*, 634 F.3d 395, 400-401 (7th Cir.), *cert. denied*, 565 U.S. 942 (2011); *United States v. Pliego*, 578 F.3d 938, 942-943 (8th Cir. 2009), *cert. denied*, 558 U.S. 1133 (2010); *United States v. United States Dist. Court*, 858 F.2d 534, 537-538 (9th Cir. 1988) (Kantor); *United States v. Deverso*, 518 F.3d 1250, 1257 (11th Cir. 2008); *see also United States v. Smith*, 662 Fed. Appx. 132, 136 (3d Cir. 2016). In short, those opinions are plainly wrong.

The pre-*Elonis* cases that address the issue of scienter in full—*Griffith*, *Malloy*, *Fletcher*, and *Deverso*—rely on the *X-Citement* dicta (and sometimes the other circuits) to find that Congress's intent not to require a knowing mens rea means no mens rea at all. *See Griffith*, 284 F.3d at 349 ("We therefore reject the Griffiths' argument that the district court's charge to the jury omitting scienter of

age under § 2251(a) was erroneous" because *X-Citement Video* (in dicta) and *Kantor* and *Crow* found that section 2251(a) does not include a knowing mens rea); *Malloy*, 568 F.3d at 171-72; *Humphrey*, 608 F.3d at 958-62; *Fletcher*, 634 F.3d at 399-404;[2] *Deverso*, 518 F.3d at 1257-58.[3]

Elonis teaches the opposite. 135 S. Ct. at 2009-11 (even where knowledge is not the mens rea, courts must determine which lesser mens rea applies to separate wrongful conduct from otherwise permitted conduct). And the only post-*Elonis* case the Government cites, *Henry*, relied on the legislative history to conclude that section 2251(a) does not include a knowing mens rea, and then followed *Fletcher*, *Humphrey*, *Pilego*, *Malloy*, and *Derverso* without addressing *Elonis* and its teachings at all.[4]

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[2]While *Fletcher* looked to *Ferber* when addressing the need for a scienter under First Amendment principles, 634 F.3d at 402, it failed to note this Court's command that under the First Amendment, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765.

[3]The other pre-*Elonis* cases cited by the Government—*Crow* and *Pilego*—address a knowingly mens rea element, and do not address a lesser mens rea element, the issue presented here.

[4]The unpublished post-*Elonis* case *Smith* rejected the defendant's argument in favor of a reckless mens rea by citing the *X-Citement Video* dicta and ignoring *Elonis*. *Smith*, 662 Fed. Appx at *136.

Henry also addressed *Staples*, 827 F.3d at 22-23, which signaled *Elonis* when the Court taught that "silence . . . does not necessarily suggest that Congress intended to dispense with a conventional mens rea element." *Staples*, 513 U.S. at 605. "On the contrary, [this Court] must construe the statute in light of the background rules of the common law in which the requirement of *some* mens rea for a crime is firmly embedded." *Id*. (emphasis added). Nonetheless, the *Henry* court relied on the *X-Citement Video* dicta to conclude that no knowing mens rea meant no mens rea at all. *Henry*, 827 F.3d at 23; *see also id.* at 23-25 (declining mistake of age defense despite First and Fifth Amendment concerns). Again, *Elonis* demonstrates *Henry*'s failure to conduct the correct statutory analysis of lesser mens rea elements.

In sum, the lower courts' assessments of section 2251(a) are clearly and plainly wrong under this Court's settled precedent.

Petitioner also can meet the rest of the plain error test. *See United States v. Olano*, 507 U.S. 725 (1993). The omission of a scienter element affected his substantial rights: he was convicted and sentenced to 15 years in prison without any finding of criminal intent, and the same jury acquitted him of sex trafficking a minor when the mens rea was essentially criminal negligence regarding the complainant's age. *See* ER 47-50, 85-87. Had the district court instructed on a a

reckless mens rea element, it is reasonably probable that the jury would have reached a different result. Thus, the error seriously affected the fairness, integrity and public reputation of these proceedings.

B. Petitioner raised a Fifth Amendment Due Process challenge in the Court of Appeals.

The Government asks the Court to decline the second question presented because petitioner's "only challenge to his sentence before the court of appeals was his argument that it violated the *Eighth* Amendment (not the Fifth Amendment)." Opp. at 12. But the Government cites pages 38-42 of petitioners's opening brief below, rather than pages 27-32. Opp. at 12 (citing petitioner's opening brief below ("AOB"). In that portion of his opening brief, petitioner argued that the Fifth Amendment, as interpreted by *Lambert v. California*, 355 U.S. 225 (1957) and *Staples*, requires a scienter element. He also argued that "no court has ever held that, under the Due Process clause, a criminal statute can punish a defendant by a mandatory minimum of 15 years and as many as 30 years without the Government having the burden of proving *any* level of scienter as an element of the offense." AOB at 32. And he pressed the same claim again in his petition for rehearing en banc. C.A. Dkt. 64 at 7 ("An *en banc* panel should further hold that a minimum 15-year sentence for an offense lacking a scienter

element violates the Fifth and Eighth Amendments.") In sum, petitioner adequately presented this issue to the court of appeals.

As for the merits, the Government tries to distinguish *Lambert* on the facts, and then ignores *Staples*. As petitioner has argued, *Staples*, 511 U.S. at 602, considered a federal statute prohibiting any person from possessing a machine gun that was not properly registered, and addressed whether the Government was required to prove that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." In holding that the statute did require such knowledge, this Court emphasized the "harsh penalty" of up to 10 years' imprisonment for the offense. *Id.* at 616. The Court reasoned that "the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Id*. The Court quoted Blackstone to further explain, "[i]n a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous." *Id.* at 616-17. This Court even suggested that all felonies may require a culpable *mens rea*:

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense.

Id. at 618.

Likewise, petitioner noted the difficulties the lower courts have had with identifying the limits on the legislature's authority to impose punishments for strict liability crimes, *see United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n.4 (10th Cir. 2010); *United States v. Garrett*, 984 F.2d 1402, 1409 n.15 (5th Cir. 1993); *United States v. Burwell*, 690 F.3d 500, 533 n.7 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 505 (E.D.N.Y. 1993), as well as the concerns expressed by academic commentators. *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1374 (1979)); Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999).

The Government addresses none of these authorities and essentially avoids the issue. That omission, however, supports the granting of this petition to provide much needed guidance to the lower courts on the Due Process question.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari* on both questions.

Respectfully submitted,

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