No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM M. TYSON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW (Rule 14.1(a))

Whether the United States Court of Appeals for the Third Circuit erred in ruling that a mistake-of-age defense need not be read into 18 U.S.C. §2251(a) in order to avoid the statute being in violation of the First Amendment?

Suggested Answer: In the Affirmative.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

1. *United States v. Tyson*, 1:17-CR-00316-001 (Middle District of Pennsylvania); judgment of sentence entered December 19, 2018.

2. *United States v. Tyson*, 947 F.3d 139 (3d Cir. 2020); direct appeal opinion entered January 14, 2020.

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Petitioner, William M. Tyson, respectfully prays that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals entered at No. 18-3804 and the United States District Court for the Middle District of Pennsylvania, issued January 14, 2020 and July 11, 2018, respectively. The instant Petition is filed within the 150-day deadline set by this Court's general Order of March 19, 2020.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, filed on January 14, 2020 was precedential and is attached as Appendix A.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Appellate and District Courts had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3231, respectively. This Petition for Writ of Certiorari is timely filed pursuant to Rule 13.1.

CONSTITUTIONAL AND STAUTORY PROVISIONS INVOLVED

First Amendment: "Congress shall make no law…abridging the freedom of speech, or of the press…"

18 U.S.C.A. § 2251(a)

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor 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, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or is such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C.A. § 2256 (Definitions for Chapter)

> For the purposes of this chapter, the term –
> (1) "minor" means any person under the age of eighteen years.

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

On October 18, 2017, Petitioner, William M. Tyson, was charged in a two (2) count Indictment with transportation of a minor to engage is prostitution and the production of child pornography, in violation of 18 U.S.C. §2423(a) and §2251(a), respectively. Pretrial, the Government filed a Motion in *Limine* to preclude mistake-of-age defense at both counts, asserting that knowledge of age is not required by either statute and therefore irrelevant. Over Tyson's opposition, the District Court granted the Motion in *Limine*. Tyson and the Government then submitted a conditional plea agreement, preserving Tyson's appeal rights as to the District Court's decision. The District Court accepted the plea agreement and imposed a 180-month sentence of imprisonment.

B. FACTUAL BACKGROUND

On August 22, 2017, the Federal Bureau of Investigation, assisted by local law enforcement, participated in an effort to target prostitution and sex trafficking in the area of Fairview Township, York County, Pennsylvania. (PSR ¶ 9). During this operation, law enforcement located a seventeen (17) year old female who was brought to the area for purposes of prostitution. (PSR ¶ 9). The female identified an individual known to her as "Real" as the person who caused her to come to Pennsylvania by transporting her from New York after exchanging Facebook

messages. (PSR ¶ 10-11). Review of the juvenile's cellular telephone uncovered a video dated August 20, 2017 of her performing oral sex on an adult male, who she identified as "Real." (PSR ¶ 15). Between August 15 and 20, 2017, the Defendant rented various rooms at the hotel where the video was made. (PSR ¶ 13). Agents compared known photographs of the defendant and voice recordings to the video and determined the adult male in the video to be the Defendant. (PSR ¶ 16).

C. DISTRICT COURT OPINION

In granting the Government's Motion in *Limine* to preclude mistake-of-age defense to either count, the district court found that "Congress removed 'knowingly' from Section 2251(a) so that a defendant's knowledge of the age of the child was not a necessary element for prosecution" and "a weighty majority of circuit courts have rejected the argument that a mistake-of-age defense to Section 2251(a) liability is mandated by the First Amendment…" Appendix B, pg. 4. Finding mistake-of-age to be a defense to neither count charged, the district court found evidence supporting such defense to be inadmissible under Fed.R.Evid. 403. *Id* at 5.

D. THIRD CIRCUIT OPINION

Timely appeal was taken to the Third Circuit. After briefing and oral argument, the Third Circuit found, *inter alia*, that it was not error for the District Court to

preclude the mistake-of-age defense as to §2251(a) finding the statute does not require knowledge of age, instead requiring only that the defendant produced a visual depiction of sexually explicit conduct and a person depicted happened to be a minor. Additionally, the Third Circuit declined to read an affirmative defense of mistake of age into the statute in order to save the statute of invalidation on First Amendment grounds, expressly splitting with the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

Review is Warranted Because the Third Circuit's Rejection of a Constitutional Defense Pursuant to the First Amendment is in Conflict with Interpretation of at Least One Other Circuit.

This case presents an important question of interpretation of federal law, on which the various courts of appeal are split. A strong majority of Federal Circuit Courts of Appeal have declined to read an affirmative defense of mistake-of-age into the statute to avoid invalidation, finding the statute constitutional even without such defense. By contrast, at least one circuit has read §2251(a) to require an affirmative defense of mistake of age in order to avoid invalidation on First Amendment grounds.

The interpretation of §2251(a) by the Third Circuit Court of Appeals in this case is in conflict with decisions of the Courts of Appeal for the Ninth Circuit. See *United States v. U.S. District Court (Kantor)*, 858 F.2d 534 (9th Cir. 1988). In *Kantor*, the Ninth Circuit interpreted §2251(a) to not require knowledge of a model's minority due to the deletion of the word "knowingly" by Congress at the urging of the Justice Department. *Id.* at 538. However, because §2251(a) regulates speech, albeit speech not protected by the First Amendment, and has the potential to chill protected speech, it is subject to First Amendment scrutiny because it is the age of the subject depicted which defines the boundary between protected and prohibited speech. *Id.* In *Kantor*, the Court of Appeals considered whether "Congress may subject a defendant to strict liability for misjudging the precise location of" the boundary between protect in the form of non-obscene material depicting adults and

unprotected speech in the form of illicit child pornography, ultimately finding in the negative.

Although strict liability crimes are generally constitutional, application is not permissible "in settings where [strict liability] ha[s] the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959). *Smith* concerned an ordinance providing criminal liability for booksellers who possess obscene materials. This Court stuck down the law due to concern that a bookseller would "tend to restrict the books he sells to those he has inspected…thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." *Id.*

As interpreted in *Kantor*, §2251(a) is a strict liability statute with a chilling effect on freedom of speech, and therefore invalid as contrary to the First Amendment. *Id.* at 540. The *Kantor* court proceeded to salvage the statute from invalidation by reading in a narrow mistake-of-age defense, under which a "defendant may avoid conviction only by showing, 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 543. "We have little doubt that Congress would prefer section 2251(a) with a reasonable mistake of age defense to no statute at all. Allowing defendant to prove their reasonable, good-faith belief as to the age of an actor would not seriously disrupt

the effective operation of section 2251(a), or materially hamper the vital effort to protect minors from sexual abuse." *Id.* at 542.

The practice of imputing defenses to salvage statutes from invalidation is well established. *See Sorrells v. United States*, 287 U.S. 435, 447, 53 S.Ct. 210, 214, 77 L.Ed. 413 (1932)(finding Due Process to require entrapment defense not appearing in statute because, absent clear congressional intent otherwise, "[i]t will always…be presumed that the legislature intended exceptions to its language which would avoid [injustice, oppression, or an absurd consequence]").

By contrast, the bulk of the Courts of Appeal have rejected a First Amendment defense. The First, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have found § 2251(a) does not require knowledge of age, and when the question has been considered, declined to read an affirmative defense into the statute. See *United States v. Henry*, 827 F.3d 16 (1st Cir. 2016); *United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009); *United States v. Crow*, 164 F.3d 229 (5th Cir. 1999); *United States v. Humphrey*, 608 F.3d 955 (6th Cir. 2010); United *States v. Fletcher*, 634 F.3d 395 (7th Cir. 2011); *United States v. Wilson*, 565 F.3d 1059 (8th Cir. 2009); United *States v. Pliego*, 578 F.3d 938 (8th Cir. 2009); *United States v. Deverso*, 518 F.3d 1250 (11th Cir. 2008); *United States v. Ruggiero*, 791 F.3d 1281 (11th Cir. 2015).

In cases rejecting a First Amendment defense, the Courts of Appeals have found the lack of such defense to have a limited chilling effect upon the production of protected speech (*Henry*) and any such effect to be outweighed by "the surpassing

importance of the government's interest in safeguarding the physical and psychological wellbeing of children..." (*Malloy* at 175). Such reasoning is squarely contrary to *Kantor*.

Due to the importance of determining the exact available defenses to 18 U.S.C. §2251(a), a criminal statute punishable by fifteen (15) to thirty (30) years incarceration upon violation, a question of interest of potentially thousands of defendants charged with violating the statute, this Court should resolve the circuit split and establish a uniform, national ruling regarding the imputed affirmative defense to §2251(a). This Court has not previously provided decision on the issue presented in this case.

CONCLUSION

For the foregoing reason, Petitioner, William M. Tyson, respectfully requests that this Court grant the Petition for Writ of Certiorari and review the question presented on merit.

RESPECTFULLY SUBMITTED,

BY_____

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