No. 19-8669

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM M. TYSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2251(a), which criminalizes the production of child pornography, is unconstitutional under the First Amendment unless it is construed to include a mistake-of-age affirmative defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 947 F.3d 139. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2020. The petition for a writ of certiorari was filed on June 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of transporting a minor to engage in prostitution, in violation of 18 U.S.C. 2423(a), and one count of producing child pornography, in violation of 18 U.S.C. 2251(a). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A18.

1. In August 2017, petitioner contacted a 17-year-old girl on Facebook to engage her in prostitution. Pet. App. A3. Petitioner and the girl communicated for several days using Facebook and text messages, and petitioner then traveled from Pennsylvania to New York City to pick her up. Ibid. He brought her to Pennsylvania and rented several motel rooms. Ibid. Phone records show that various individuals then contacted the victim to engage her in commercial sexual activity. Ibid.

Several days after the victim arrived in Pennsylvania, law enforcement recovered her during a sting operation, interviewed her, and reviewed her phone, which contained a video of her performing oral sex on an adult male in a motel room. Pet. App. A3-A4. The victim identified the man in the video as "Real," whom law enforcement identified as petitioner. Id. at A4.

2. A federal grand jury in the Middle District of Pennsylvania charged petitioner with one count of transporting a minor to engage in prostitution, in violation of 18 U.S.C. 2423(a), and one count of producing child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. A4. Before trial, the government filed a motion in limine seeking to prohibit petitioner from eliciting evidence regarding "mistake of age" and from asserting "mistake of age" as an affirmative defense. Ibid.

The district court granted the government's motion. Pet. App. B1-B5. The court determined that evidence of mistake of age was irrelevant to the Section 2423(a) and Section 2251(a) charges because those statutes do not require proof of the individual's knowledge that the victim was a minor or authorize an affirmative mistake-of-age defense. Id. at B2-B5.

Petitioner subsequently entered into a plea agreement under which he would plead guilty to both charges, but reserve his right to appeal the district court's order granting the government's motion in limine. Pet. App. A4. The district court accepted the conditional plea and imposed concurrent 180-month sentences on each count. Ibid.

3. The court of appeals affirmed. Pet. App. A1-A18. As relevant here, the court explained that "mistake of age is not a defense" to the charge of producing child pornography in violation of Section 2251(a) because "knowledge is not an element of the

offense"; that "[t]he statute also does not contain an affirmative mistake-of-age defense"; and that "such a defense is not mandated by the Constitution." Id. at A18. The court accordingly determined that "the District Court did not err in excluding mistake-of-age evidence." Ibid.

The court of appeals cited this Court's statement in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), that "producers may be convicted under [Section] 2251(a) without proof they had knowledge of age." Pet. App. A14 (quoting X-Citement Video, 513 U.S. at 76 n.5). The court of appeals also noted "th[e] consensus" among circuit courts that "knowledge of age is not an element of [Section] 2251(a)." Id. at A15 & n.9 (collecting cases). The court further reasoned that "[t]he statute's text and history indicate that Congress did not intend to require the Government to prove knowledge of age or provide defendants with an affirmative mistake-of-age defense," noting that "Congress specifically removed 'knowingly' from [Section] 2251(a)'s age element to facilitate enforcement of laws prohibiting the production of child pornography." Ibid. Finally, the court observed that "[c]riminal statutes aimed at protecting children from sexual offenses have long been considered exempt from the general scienter presumption" that applies to criminal statutes. Id. at A16 (citing Morissette v. United States, 342 U.S. 246, 251 n.8 (1952)).

The court of appeals rejected petitioner's reliance on United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988) (Kantor), in which the Ninth Circuit allowed a defendant to raise an affirmative mistake-of-age defense, premised on the First Amendment, to a prosecution under Section 2251(a). Pet. App. A16-A17. Pointing to this Court's decision in X-Citement Video -- which was decided six years after the Ninth Circuit's decision in Kantor, see id. at A17 n.10 -- the court of appeals explained that it was "unconvinced that excluding mistake-of-age evidence poses a substantial risk to protected expression." Id. at A17. The court observed that (1) "[p]erpetrators are well positioned to know the age of a victim because they 'confront the underage victim personally,'" ibid. (quoting X-Citement Video, 513 U.S. at 72 n.2 (brackets omitted)); (2) with respect to "legitimate producers, only a small subset of pornography -- that which involves youthful-looking performers -- can conceivably be subject to criminal prosecution under [Section] 2251(a)," ibid. (citation and internal quotation marks omitted); and (3) "[m]ost prosecutions involving this subset include performers that are undoubtedly children rather than adults that appear to be young," ibid. And the court additionally reasoned that, "[e]ven if interpreting [Section] 2251(a) to preclude mistake-of-age evidence chills some protected speech, the risk is significantly outweighed by the Government's

compelling interest in protecting children from child pornography." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-16) that the First Amendment requires courts to engraft a mistake-of-age defense onto 18 U.S.C. 2251(a), which criminalizes the production of child pornography. The court of appeals correctly rejected that contention, and no conflict warranting this Court's review exists. The Court has repeatedly denied review of similar questions, see Fifer v. United States, 138 S. Ct. 1262 (2018) (No. 17-6652); Henry v. United States, 137 S. Ct. 374 (2016) (No. 16-5379); McCloud v. United States, 562 U.S. 828 (2010) (No. 09-1177); Malloy v. United States, 559 U.S. 991 (2010) (No. 09-523); Wilson v. United States, 558 U.S. 1117 (2010) (No. 09-6491), and the same result is appropriate here.

1. 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" a "minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * * if that visual depiction was produced or transmitted using materials that have been * * * transported in or affecting interstate or foreign commerce." 18 U.S.C. 2251(a). The statute does not contain an express affirmative defense for a mistake as

to the victim's age. And as this Court observed in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), 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 were actually children. See id. at 74-77 & n.5.

2. Petitioner nevertheless contends (Pet. 13-16) that the First Amendment requires that a mistake-of-age defense be made available to defendants under Section 2251(a). That contention is incorrect.

a. Section 2251(a) reaches only depictions of real children engaging in sexually explicit conduct, and such depictions 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 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). Indeed, petitioner has not identified any application of Section 2251(a) that would reach constitutionally protected expression. And because Section 2251 reaches only unprotected speech, it necessarily does not "punish[] a 'substantial' amount of protected free speech, 'judged in relation to [its] plainly legitimate sweep,'" and thus is not vulnerable on overbreadth grounds. Virginia v. Hicks, 539 U.S.

113, 118-119 (2003) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)); see United States v. Johnson, 376 F.3d 689, 695-696 (7th Cir. 2004) (rejecting overbreadth challenge to Section 2251 because the statute reaches only unprotected speech).

Even if a statute reaching only unprotected speech could be subject to challenge because of its asserted chilling effect on protected speech, petitioner has not shown that Section 2251(a) substantially chills producers of adult pornography. The only protected speech potentially affected by Section 2251(a) is the subset of pornography involving youthful-looking adult actors. See, e.g., United States v. Malloy, 568 F.3d 166, 176 (4th Cir. 2009), cert. denied, 559 U.S. 991 (2010). As the court of appeals observed, see Pet. App. A17, the relative ease with which 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; rather, it will encourage producers of such material to verify their subjects' age in advance, as a separate statute already requires them to do. See 18 U.S.C. 2257(b)(1). No sound reason exists to believe that either commercial pornography producers or amateur pornography producers (who may be more likely to know the performers personally) would have difficulty complying with, or be chilled by, the need to verify age.

b. Every court of appeals that has addressed the issue since this Court's decision in X-Citement Video has recognized that the First Amendment does not require a mistake-of-age defense in Section 2251(a) cases. See United States v. Fifer, 863 F.3d 759, 767-768 (7th Cir. 2017), cert. denied, 138 S. Ct. 1262 (2018); United States v. Henry, 827 F.3d 16, 24 (1st Cir.), cert. denied, 137 S. Ct. 374 (2016); United States v. Fletcher, 634 F.3d 395, 404 (7th Cir.), cert. denied, 565 U.S. 942 (2011); United States v. Humphrey, 608 F.3d 955, 962 (6th Cir. 2010); Malloy, 568 F.3d at 176; United States v. Wilson, 565 F.3d 1059, 1069 (8th Cir. 2009), cert. denied, 558 U.S. 1117 (2010); United States v. Deverso, 518 F.3d 1250, 1258 (11th Cir. 2008).

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. Court, 858 F.2d 534, 543-544 (1988) (Kantor). That case involved unique facts: an asserted "massive fraud" on the entire "adult entertainment industry" perpetrated by a 16-year-old 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 Ninth Circuit reasoned 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. 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, as opposed to producers, of unprotected material. See Kantor, 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 [Section] 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 the validity of Kantor in light of X-Citement Video and the decisions of other courts that have relied on X-Citement Video to reject First Amendment challenges to Section 2251(a). See Pet. App. A17 n.10 (observing that "Kantor * * * was decided six years prior to [this] Court's X-Citement Video decision"). The Ninth Circuit

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." Kantor, 858 F.2d at 540, 542. Review by the Court at this time would be unwarranted.

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 conflict, 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. Kantor, 858 F.2d at 543. The Ninth Circuit 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 such a case. Petitioner does not claim that he ever investigated the victim's age or asked to see any documents verifying her age, nor does the record supply any basis to believe that such efforts would have failed to reveal her age. In contrast, the defendants in Kantor claimed that the child victim had provided them with fraudulent "California photographic

identification," "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. Because petitioner would not prevail even under the Ninth Circuit's pre-X-Citement Video standard, further review of petitioner's claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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