No. 21-5858

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Enrique E. Quintana — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

United States District Court for the Eastern District of Texas - Tyler Division
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Enrique E. Quintana
(Your Name)

P.O. Box 24550
(Address)

Tucson, Arizona 85734
(City, State, Zip Code)

N/A
(Phone Number)

## QUESTION(S) PRESENTED

1. Can a defendant who claims actual innocence after entering a plea agreement be barred from raising his actual innocence claim based on a Plea Agreement Waiver?

2. Does a fatally deficient indictment overcome a Plea Agreement waiver to restrict a defendant's ability to collaterally attack his conviction?

3. Can a Commerce Clause regulation be maintained as Constitutional under the aggregate market effect of Gonzales v. Raich when it is shown that there is no National Market to effect?

## LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## RELATED CASES

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## INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

## JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 30, 2020.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 4, 2020, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutes and Rules:



Others:



Related Cases:

United States v. Hillie, 227 F.Supp.3d 57 (DC DC, 2017)
United States v. Maxwell, 546 U.S. 801, 163 L.Ed.2d 29 (2005)
United States v. Palamino-Corinado, 805 F.3d 127 (CA4, 2015)
United States v. Smith, 545 U.S. 1125, 162 L.Ed.2d 863 (2005)

## STATEMENT OF THE CASE

The Petitioner was indicted on March 2, 2011, for three counts of a violation of Sexual Exploitation of a Minor in violation of 18 U.S.C. § 2251(a), one count of Distribution of Child Pornography in violation of 18 U.S.C. § 2252(a)(2), one count of Receipt of Child Pornography in violation of 18 U.S.C. § 2252(a)(2), and one count of Possession of Child Pornography in violation of 18 U.S.C. § 2252 (a)(4)(B). On September 9, 2011, the Petitioner entered into a plea agreement and pled Guilty to the three counts of a violation of 18 U.S.C. § 2251(a).

The Petitioner was sentenced on January 26, 2012 to a total of 708 months imprisonment and lifetime Supervised Release. A Notice of Direct Appeal was given to the Petitioner's Attorney, but not filed with the Courts. The Petitioner filed a 28 U.S.C. § 2255 which the District Court granted, vacated his sentence, and then reinstated the sentence so that a proper Direct Appeal could be filed. The Appointed Counsel filed for the Petitioner to file an Anders Brief, which the Appellate Court denied.

The Petitioner then filed another 28 U.S.C. § 2255 petition to the District Court raising eight grounds for relief. The Government filed their Response. Subsequently the Court issued a Report and Recommendation. The Petitioner filed notice that neither the Government's Response, nor the Magistrate's Report and Recommendation were served to the Petitioner. The Court granted leave to file a Response to the Government's Response and objections to the Magistrate's Report and Recommendation which were both ignored by the District Court. On , the District Court dismissed the Petitioner's 28 U.S.C. § 2255 petition with prejudice and denied to issue a COA. The Petitioner filed a Notice of Appeal and sought for the Appellate Court to issue a COA. This Appeal was denied on March 30, 2020. The Petitioner filed a request for Panel Rehearing, which was denied on May 22 , 2020. The Petitioner now seeks redress from this Honorable Court.

## REASONS FOR GRANTING THE PETITION

The Petitioner has raised three questions of serious judicial concern with reverberations that extend into vast areas of Constitutional impact. Each of these questions represent errors and misapplication of legal principles that directly affect the Petitioner but also are of great import on countless individuals whose rights are being eroded just as the Petitioner has shown. The ruling, as it stands, is convoluted, conflict with rulings in the same Circuit, conflicts with rulings amongst the Circuits, and are of such a nature as merit this Court to exercise its jurisdiction to answer these questions to finally settle these matters with clarity.

The first question raised by the Petitioner merits this Court to exercise its jurisdiction because the matter in question is in dispute amongst the Circuits and this decision made by the District Court, upheld by the Fifth Circuit Court of Appeals, is in conflict with relevant holdings of this Court. The question also raises matters that go to the core of the spirit of what the Constitution was written and amended to protect, specifically the question of allowing punishment of a person who is innocent of the crime charged.

The second question raised by the Petitioner is a matter of significant Constitutional concern. The District Court and Apellate Court for the District of Columbia, which is second only to this Court for jurisprudence, has held that an indictment must be considered in light of what criminal statute it charges, and if the alleged offense is based on a broadly worded statute more specificity is required in the indictment. This holding appears to directly follow the matter as has been decided in the relevant cases by this Court. The District Court disregarded this claim and the Fifth Circuit Court of Appeals did not find it a meritorious argument. The District of Columbia Circuit specifically ruled on the exact claim the Petitioner has made and if the Petitioner was in that Circuit his motion would have been granted. The Fifth Circuit, both the District and Appellate Courts, have completely dismissed this claim without ever holding any hearing which violates the Petitioner's Fifth Amendment rights. This question merits that this Court settle this question and give direction to the lower courts.

The third question raised by the Petitioner not only reaches to the very core of what and how for the authority granted by the Constitution's Commerce Clause, but also goes to question Congress' conclusion to support such a law. This Court has clearly allowed Congress' conclusions of a substantial effect on a national market to be questioned and challenged by a defendant. The Petitioner has done just that, but no lower Court has listened to this challenge nor refuted the copious amount of evidence provided to show that Congress' findings of a rational relation is in error. The clear standard that was laid out by this Court was that merely because Congress concludes that an activity is rationally related to an economic activity does not necessarily make it so. U.S. v. Comstock, 560 US @ 901 . By ignoring this challenge, the lower courts have allowed a substantial departure from the accepted standards of the judicial proceedings.

The long standing and accepted course of judicial proceedings have allowed a defendant to challenge the very law under which he was charged and for the courts to address these concerns specifically. So far, the lower courts have only given lip service to the Petitioner's challenge, referenced some cases in which a different challenge was made by a different defendant, and completely ignored the actual claim made by the Petitioner. The reach and condition of the Commerce Clause regulation has long been a matter of contention in the history

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of this Court's proceedings. This Court has established a tradition of exercising its judicial discretion to challenges, such as those presented herein, because of the compelling interest of all of society's liberty interests, rights of Due Process, and limited enumerated authority granted to the Federal Government by the United States Constitution. By the lower courts ignoring and dismissing such matters, it is only establishing a system in which the tyranny that the United States Constitution was written and enacted to prohibit are allowed to thrive, flourish and expand.

Nearly every Circuit has uniformly adopted and accepted that Gonzales v. Raich, supra, is the controlling precedent to uphold all Constitutional challenges to 18 U.S.C. § 2251, but no Circuit has actually done the analysis necessary to examine Congress' rational basis for concluding it affects a national market or whether Congress enacted a comprehensive regime as was required by Raich (see attached cases).

Question 1

The Petitioner is making a claim of Actual Innocence by continuing to aver that the conduct to which he engaged is not the same conduct that is proscribed by the statutes to which he was charged. The claim of actual innocence has been held as a means to overcome normal bars in proceedings. See Schlup v. Delo, 513 US 298 (1995); House v. Bell, 547 US 518 (2006); McQuiggin v. Perkins, 569 US ___, 185 L.Ed.2d 1019 (2013). The Petitioner was mislead by his Counsel to what conduct he was actually Pleading Guilty to and would have gone to trial if he would have been properly informed as to the context of the criminal statute 18 USC § 2251(a). See Affidavit, Appendix E, Exhibit - 1A.

The statute 18 USC § 2251(a) has elements that must be proven in order for a defendant to be found guilty of violating that law. Those elements are: 1) The defendant must employ, use, persuade, induce, entice, or coerce a minor to engage in Sexually Explicit Conduct as defined by 18 USC § 2256(2)(A); 2) That the defendant has a direct involvement in any person who has a minor engage in such conduct or has a minor assist any other person engaging in such conduct; and 3) at least one purpose of the defendant's active involvement was to create a visual depiction of the minor engaging in such conduct. See 18 USC § 2251(a); 18 USC § 2256(2)(A); and United States v. Palimino-Corinado, 805 F.3d 127 (CA4, 2015). The Petitioner's conduct does not meet these requirements and the conviction is not based on the actual facts but upheld based solely on the defendant entering in a Plea Agreement with the United States.

An independent review of the evidence, including the original record, visual depictions and affidavits submitted by the Petitioner plainly shows that the Petitioner's conduct was not within the ambit of the Criminal Statute. The conviction violates numerous Constitutional, ethical and legal provisions, all of which was intended to prevent a Court from accepting a Guilty plea from a person in the Petitioner's situation and should not be allowed to be a claim of Actual Innocence. See United States v. Gobert, 139 f.3d 436, 439 (CA5, 1998). This claim is further supported by statements from the alleged victims that the law requires and the Government will not release for review by the Court or the Petitioner. See P.L. 99-591 Title I, § 101(b) in part, 100 Stat. 3341-75; United States Constitution Amendment VI; Brady v. Maryland, 373 US 83, 87 (1963); Jenks v. United States, 353 US 657 (1957); Giglio v. United States, 405 US 150 (1972).

The material evidence that is part of the record from the lower Courts offer no inclination that would give any reasonable person to believe that the Petitioner

was active in any fashion with the activities of the minors as is required with element 1 and 2 to constitute a violation of 18 USC § 2251(a). The Record and evidence submitted by the Petitioner in his 28 USC § 2255 petition go even further to show that not only did the Petitioner not have an active part, he was not even present when the conduct took place. United States v. Palimina-Corinado, 805 F.3d 127 (CA4, 2015); United States v. Lebowitz, 676 F.3d 1000 (CA11, 2012); United States v. Crondon, 173 F.3d 122 (CA3, 1999); United States v. Cox, 744 F.3d 305 (CA4, 2014); United States v. Morales-DeJesus, 372 F.3d 6 (CA1, 2004); United States v. Sirois, 87 F.3d 34 (CA2, 1996). Second, there is no evidence to support the conclusion that the Petitioner was proven to be purposeful in any action to coorelate his activities to the minors' actions and a creation of a visual depiction. There is no precedent for a felonious crime that contains a strict liability element that allows an individual held culpable through passive actions. Bond v. United States, 572 US ____, 189 L.Ed.2d 1 (2014); United States v. United Gypsum Co., 438 US 422 (1978).

Question 2

A fatally deficient indictment does not contain an adequate description of the place and time that the alleged offense took place, the nature or type of sexually explicit conduct, and the facts that constitute the elements of the offense. See Russell v. United States, 369 US 749 (1962). For some offense it is Constitutionally sufficient to merely track the language of the criminal statute when it is only possible to violate a statute through a single set of actions, such as a criminal statute that proscribes the arson of a federal building. The statute in this case is not such a statute and embodies over 1000 different means by which an individual could engage in conduct that would be proscribed.

A Constitutionally adequate indictment must contain not only the elements of the offense charged, but also the set of facts that, if proven, would constitute a violation of the statute. Not only must the indictment contain the elements of the offense, fairly inform a defendant of the nature and elements against which he/she must defend, but it must also be specific enough to enable him/her to Plead acquittal of the conviction in bar of future prosecutions for the same offense. See Hamling v. United States, 418 US 87, 117 (1974); Stirone v. United States, 361 US 212, 218 (1960); Puerto Rico v. Sanchez Valle, 579 US ____, 195 L.Ed.2d 179 (2016); Fleisher v. United States, 302 US 218 (1938); see also Fed.R.Crim.P. 7(c)(1); Boykin v. United States, 11 F.2d 484 (CA5, 1926).

When evaluating the sufficiency of the indictment the language used to draft the indictment is measured, not the evidence on which the charge is based; and that language must give fair notice and be expressed with sufficient specific facts to bar future prosecution. Consello v. United States, 350 US 359, 362 (1956). In all other instances the indictment is insufficient to protect against double jeopardy violations. United States v. Felix, 503 US 378 (1992); Green v. United States, 355 US 184 (1957); see also Russell v. United States, 369 US 749 (1962); Sanabria v. United States, 437 US 54 (1978). Pointedly, since a crime is made up of acts and intent, then these must be set forth in the indictment with reasonable particularity of time, place and circumstances in order for the charging document to comport with the Constitutional requirements. United States v. Cruikshank, 92 US 542 (1875). That is to say that for the accusation to be legally sufficient, the indictment must assert facts which in law amount to an offense and which if proven would establish primia facie that the accused committed the offense. United States v. Silverman, 745 F.2d 1386, 1392 (CA11, 1984). It is best said

that the "generally applicable rule is that the indictment may use the language of the statute but that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged." United States v. Condon, 628 F.2d 150 (CADC, 1980); United States v. Thomas, 444 F.2d 918 (CADC, 1971) (quoting Cruikshank, supra).

The Petitioner's indictment is not Constitutionally sufficient as there are no set of facts used to supplement the language of the statute that would allow him to be apprised of what conduct he is accused of engaging in to constitute a violation of the myriad of ways in which one can violate 18 U.S.C. § 2251(a). This indictment is barren of any factual averments in regard to what, where, and how the Petitioner's conduct was a violation of any statute, much less 18 U.S.C. § 2251(a). An indictment that fails to describe in any meaningful way the acts of the defendant that constitute the offense charged is insufficient to notify a defendant of the nature of the accusation against him and fatally deficient. United States v. Nance, 533 F.2d 699, 701 (CADC, 1976) (collecting Supreme Court cases); United States v. Thomas, 444 F.2d 919 (CADC, 1970). Some criminal offenses have the statute narrowly worded in such a manner that simply quoting the statutory language is sufficient to give a defendant notice. See United States v. Resendiz-Ponse, 549 US 102 (2007); United States v. Fitzpatrick, 1995 US Dist. LEXIS 11590 (DC.DC, 1995). However, there are also criminal statutes that are broadly worded that "must be charged with greater specificity" in order to pass Constitutional muster. See United States v. Resendiz-Ponse, 549 US @ 109; United States v. Thomas, 44 F.2d at 921-922. As 18 USC § 2251(a) has a minimum of 4860 ways in which an individual could violate this statute, it plainly demonstrates that 18 USC § 2251(a) is a broadly worded statute that was intended to catch a broad variety of conduct. See Congressional Findings, P.L. 108-21, Title V Subtitle A, § 501, 117 Stat. 676; P.L. 104-208, Div.A. Title I, § 101(a), 101 Stat. 3009-26.

A mere reading of the indictment against the Petitioner shows the many deficiencies contained in that charging document that render such as fatally deficient and unable to pass Constitutional muster. The fact of such fatal deficiencies contained in this indictment render grave concerns for all individuals' rights and protections guaranteed by the United States Constitution and case precedence.

Question 3

The Supreme Court has three major cases that define the scope of power granted to Congress under the United States Constitution's Article I § 8 Clause 3, otherwise known as the Commerce Clause. Those cases are United States v. Lopez, 514 US 549 (1995); United States v. Morrison, 529 US 598 (2000); and Gonzalez v. Raich, 545 US 1 (2005).

In United States v. Lopez, supra, a three prong test is applied to Commerce Clause regulations to see if a statute passes Constitutional muster. As every Circuit Court has agreed 18 USC § 2251(a) falls under the third prong of the Lopez test, that is an activity that substantially affects Commerce. See United States v. Morales-DeJesus, 372 F.3d 6 (CA1, 2004); United States v. Holston, 343 F.3d 83 (CA2, 2003); United States v. Rodia, 194 F.3d 465 (CA3, 1999); United States v. Buculei, 262 F.3d 322 (CA4, 2001); United States v. Kallestad, 236 F.3d 225 (CA5, 2000); United States v. Bowers, 594 F.3d 522 (CA6, 2006); United States v. Ray, 189 Fed.Appx. 436 (CA7, 2001); United States v. Betcher, 534 F.3d 820 (CA8, 2008); United States v. Mugen, 441 F.3d 622 (CA9,

2009); United States v. McCoy, 323 F.3d 1114 (CA10, 2006); United States v. Parton, 749 F.3d 1329 (CA11, 2014); United States v. Paige, 604 F.3d 1268 (CA11, 2010). To simply cite one case from each Circuit, there are a plethora of others that share the same conclusion.

Once an activity is found to fall under the third prong of the Lopez test, a Court must analyze the challenged commerce statute under the four part test as outlined in United States v. Morrison, supra. That is to say the Courts have all found the activity is not itself commercial in nature but is rather an activity that has some effect on commerce and to determine what that effect is you go through the four part Morrison test. One aspect of the Morrison test is to ensure that the challenged statute has some form of limiting jurisdictional hook that will limit the reach of a statute that does not regulate a commercial activity to a set of conditions, limit its reach and preserving the Tenth Amendment rights. The statute in question here does not have such a limit jurisdictional condition, as the Third Circuit so aptly noted "as a practical matter, the limiting Jurisdictional factor is almost useless here", United States v. Rodia, 194 F.3d @ 473; see also United States v. Kallestad, 236 F.3d @ 227. The absence of such a limiting factor is not fatal to a statute, but the absence of a limiting jurisdictional hook means that Courts must determine independently whether a statute under the Commerce Clause arose out of or are connected with a commercial transaction, which viewed in the aggregate effect interstate commerce by way of a National Market. See Rancho Veijo, LLC. v. Norton, 323 F.3d 1062, 1068 (CADC, 2003). This analysis is based on the fourth prong of the Morrison test. See also Maxwell v. United States, 386 F.3d 1042 (CA11, 2004); United States v. Smith, 402 F.3d 1303 (CA11, 2005).

The summation of the Court's Modern Era Commerce Clause Jurisprudence is that Congress may broadly regulate an activity under the Commerce Clause if a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce. United States v. Lopez, 514 US @ 557. This is expressed further in Gonzales v. Raich, supra, when this Court stated that a general regulatory statute bears a substantial relation to Commerce. The de minimis character of individual instances arising under the statute is of no consequence. Gonzales v. Raich, 125 S.Ct. @ 2206. This Court was expressing its "Enterprise Concept" which extends Congress' Commerce Clause authority to be applied to small parts of an industry engaged in economic activity. See Wickard v. Filburn, 317 US 111 (1942). However, this Court did clarify that did not allow congress to use a "trivial impact on Commerce as an excuse for broad regulation of state or private activities". Maryland v. Wirtz, 392 US @ 197 n.d. This concept was fully clarified by the Court in that Congress can regulate purely intrastate activities that in itself are not commercial if it concludes that failure to regulate that class of activities would undercut the regulation of the interstate market in that commodity. Gonzales v. Raich, 545 US @ 17. And of course, it has been long held that the natural limit of all the enumerated powers in the Constitution are constrained to our internal affairs. United States v. Curtiss-Wright Export Co., 299 US 304 (1936).

It is important to note that there are several terms that have been given very specific meanings by the Courts and does not leave these words open to broad interpretation. The term "commerce" has been given the definition of "a commodity that must be capable of being reduced to private property and then exchanged for something of the same or similar economic value.

State ex rel. Douglas v. Sporhase, 458 US 941 (1982). By definition, "contraband" cannot be reduced to private possession of property because an individual does not have a privacy right in such an item. "Child pornography is prima facie contraband", as Congress so plainly stated. Act July 27, 2006, P.L. 109-248, Title V § 501, 120 Stat. 623(2)(E). This concise statement by Congress places all such matters outside the reach of the Commerce Clause. Predka v. Iowa, 186 F.3d 1082 (CA8, 1999). Child pornography is illegal in every state by state law and subject to seizure by the police power of the individual states, placing such materials outside of the Commerce Clause Authority, Ziffrin, Inc., v. Reeves, 308 US 132 (1932). See also Appendix D, Page 35 showing state criminal statutes for child pornography.

No Court has found that 18 USC § 2251(a) regulates an actual commercial activity, but rather have held that the regulated activities are "rationally related" to the regulation of a national market. The rational basis, or rational relation, referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration. United States v. Comstock, 560 US 126, 176 L.Ed.2d @ 901 (2010). "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Id. @ 901. The "rational basis" test has been further explored such as is applied to the Necessary and Proper Clause (Article I § 8 Clause 18) and to the Commerce Clause that not only must it be employed with care in any context but must be especially careful when applying such a test as a stand alone test. See United States v. Comstock @ 900; Williamson v. Lee Optical Co., 348 US 483 (1955). Needless to say that the Necessary and Proper Clause is not a delegation of new and independent power, but simply a provision for making effective the powers theretofore mentioned. Kansas v. Colorado, 206 US 46 (1907). Plainly showing that the Necessary and Proper Clause cannot be the means to uphold an otherwise unconstitutional statute or conviction outside of Congress Authority.

All the analysis of the Authority of Congress to regulate under 18 USC § 2251(a) is predicate on the concept that Congress is regulating a national market and can therefore reach private or state activities. See P.L. 110-358, Title I § 102, 122 Stat. 4001, Congressional Findings ¶-1. The Petitioner has obtained responses from several government agencies, including the Bureau of Economic Analysis which Congress specifically tasked with tracking all national markets via 15 CFR 801.1, et seq, that all plainly demonstrate that there is no national market. See Appendix D . Once again, merely because Congress stated they had a rational basis for believing a national market was affected by an activity does not necessarily make it so, and such a conclusion is not irrefutable. See United States v. Lopez, 514 US @ 617.

In addition to there being no national market to be affected by the activities proscribed in 18 USC § 2251(a), there is not a comprehensive scheme from which Congress would be able to reach the activities proscribed. In Gonzales v. Raich, this Court stated that as long as a comprehensive scheme was enacted by Congress than the de minimus effect of an individual's conduct was still within the reach of a federal criminal statute whose authority was derived from the Commerce Clause. A comprehensive scheme regulating an entire class of economic activity is one which Congress passes legislation to regulate possession, receipt, and manufacturing of a commodity. When Congress does so it chooses to fully enter into a regulation of a market in which its authority is plenary because of its choice to fully regulate the market.

Adding to the fact that child pornography cannot be a commodity, as shown above, Congress has never passed any legislation against the manufacturing of

child pornography. Title 18 USC § 2251(a) does not proscribe the creation of a visual depiction of a minor engaging in sexually explicit conduct, i.e., child pornography, but merely is a proscription on activities that make it possible to create a visual depiction of such conduct. See 18 USC § 2251(a); Smith v. United States, 2015 US Dist. LEXIS 172406 (DC7, 2015). None of the statutes that allege to regulate the market in child pornography, 18 USC § 2251 et seq., have any language that prohibits the actual creation of a visual depiction of a minor engaged in sexually explicit conduct. The proscriptions of 18 USC § 2251(a) are most similar to what this Court deemed Gender Motivated Crimes of Violence that are beyond the Authority of Congress to regulate under the guise of regulating an economic activity through the Commerce Clause. United States v. Morrison, 529 US 598 (2000).

As has been stated, the Court has the duty of federal Courts to be certain of Congress' intent before finding that federal law overrides the usual Constitutional balance of Federal and State powers. Bond v. United States, 572 US ___, 189 L.Ed.2d 1 (2014) (citing Gregory v. Ashcroft, 501 US 452, 460 (1991)). This Court's precedence is to ensure the basic principles of federalism to resolve questions of federal law that punish local activities, see United States v. Bass, 404 US 336 (1971); Jones v. United States, 529 US 848 (2000); Bond v. United States, supra. In this instance, Congress has made its intention to reach purely local criminal activity that is not itself economic in nature and invade in the individual state's sovereign police power. See Act Oct. 18 1986, P.L. 99-591, Title I, § 101(b) in part, 100 Stat. 3341-74, (2) & (3); Act Sept. 30 1996, P.L. 104-208, Div A, Title I, § 101(a), 110 Stat. 3009-26; Act April 30, 2003, P.L. 108-21, Title V, Subtitle A, § 501, 117 State. 767, (2)(3)(14) & (15); and Act July 27, 2006, P.L. 109-248, Title V § 501, 120 Stat. 623, (1).

This Court has only allowed Commerce Clause regulations to invade into Sovereign State Authority or private individual actions when Congress was enacting regulation through a comprehensive regime to regulate a national market, see Gonzales v. Raich, 545 US 1 (2005), Wickard v. Filburn, 317 US 111 (1942). As shown above a comprehensive regime is one regulating the manufacturing, distribution, and possession of a commodity of a national market. Also shown above, 18 USC § 2251, et seq., is not a comprehensive regime devised to regulate an entire class of economic activities. Title 18 USC § 2251, et seq., does not forbid the manufacturing of a visual depiction of a minor engaged in sexually explicit conduct, and such a visual depiction is not a commodity as defined by Supreme Court Jurisprudence. See United States v. Palimino-Coronado, 805 F.3d 127 (CA4, 2015); Gonzales v. Raich, 545 US 1 (2015); state ex rel. Douglas v. Sporhase, 458 US 941 (1982); Ziffrin Inc., v. Reeves, 308 US 132 (1932). Title 18 USC § 2251 et seq., makes criminal the possession and distribution of such visual depictions, as well as makes criminal certain activities that make it possible to manufacture such a visual depiction, but has no language within to proscribe the actual manufacturing of those visual depictions. See Smith v. United States, 2015 US Dist. LEXIS 172406 (D.C.7,2015), Title 18 USC § 2251(a) "was not written to prohibit the production of a visual depiction of sexually explicit conduct involving a minor." Id. Numerous Circuits have all held that the creation of a visual depiction of sexually explicit conduct involving a minor has no bearing on the criminal conduct regulated by 18 USC § 2251. For example see: US v. Buculei, 262 F.3d 322 (CA4, 2001); US v. Palamino-Coronado, 805 F.3d 127 (CA4, 2015); US v. Lebowitz, 676 F.2d 1000 (CA11, 2012); United States v. Sirois, 87 F.3d 34 (CA2, 1996); US v. McCoy, 323 F.3d 1114 (CA9, 2002), and so on.

The criminal conduct that is defined by a statute is Constitutional from the word Congress chose and the manner in which Congress chose to construct the statute, and these concepts are embodied in what is known as The Rules of Statutory Construction and the plain language of the statute. This Court has held that it is bound by the words that Congress chose and that Congress chose those words on purpose. This Court has held that it cannot interpret a statute to cover conduct that Congress "meant" to proscribe but instead must construe the statutory language strictly and only allow punishment for conduct that violates a statute as written. Bifulco v. United States, 447 US 381 (1980); Aaron v. SEC, 446 US 680 (1980); TVA v. Hill, 437 US 153 (1978). A badly drawn statute places strain on judges. Busic v. United States, 446 US 398 (1980); LaRocco v. United States, 446 US 398 (1980). A Court's duty is not to do justice but to apply the law as written and hope that justice is done. Bifulco v. United States, 447 US @ 402.

The fact that manufacturing child pornography is not prohibited by 18 USC § 2251(a) is further evident by the Title assigned to the statute by Congress "Sexual Exploitation of a Minor", See Almendarez-Torres v. United States, 523 US 224, 234 (1998). As shown above there is no national market for child pornography, there is no statute that prohibits the actual manufacturing of child pornography, child pornography is not something that can be defined as a commodity that is regulatable under the Commerce Clause, Congress has not chosen to enact is full authority under the Commerce Clause, and Congress did not enact a comprehensive regime that would allow it to venture into a state's sovereign authority. Some Circuits have made rulings applying the exact analysis required by this Court's Jurisprudence and concluded that 18 USC § 2251 did not have the reach as applied in this case, but were later overruled by the misapplication of Gonzales v. Raich, supra, in a misguided belief of some national market or other authority that does not exist. See United States v. Jeronimo-Bautista, 425 F.3d 1266 (CA10, 2005); United States v. Forrest, 429 F.3d 73 (CA4, 2005); United States v. Smith, 402 F.3d 1303 (CA11, 2005); United States v. Maxwell, 386 F.3d 1042 (CA11, 2004); United States v. Corp, 236 F.3d 325 (CA6, 2001).

The language of the statute applies the Jurisdictional element as materials that traveled at some point in interstate Commerce is utterly useless for limiting its jurisdictional reach. See United States v. Rhodia, 194 F.3d 465, 473 (CA3, 1999); United States v. Morales-DeJesus, 372 F.3d 36 (CA1, 2004); United States v. Holston, 343 F.3d 83 (CA2, 2003). The only reason any Circuit has upheld the Constitutionality of this statute is based on the aggregate effect on a national market, and as shown, plainly erroneous.

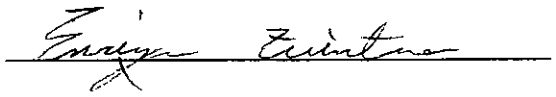
Material Facts of the Case

Congress mandates that all national markets be tracked and data collected for a variety of reasons, including safety, market share, to avoid monopolies, fair business practices, etc., all codified in 28 CFR § 801.1, et seq. The Petitioner obtained several FOIA requests and responses from those agencies whose legal obligation is to collect and maintain such market data, including the Bureau of Economic Analysis. All responses plainly stated there was no market in child pornography. The Petitioner utilized Fed.R.Civ.P. to petition those agencies and the Attorney General of the United States that resulted in the stipulation of the fact that there is no national market in child pornography.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: November 15, 2020