No. __-_____

In the Supreme Court of the United States

RIT TRAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. §2251 authorizes conviction upon proof that materials used to produce child pornography once crossed state lines at an unspecified prior occasion, when there is no evidence that the production or possession of child pornography itself caused such movement?

II. Whether Article I, Section 8 of the United States Constitution permits Congress to impose criminal sanctions for all conduct undertaken using materials that have moved in interstate commerce, however remotely, whether or not the criminal conduct caused such movement?

PARTIES TO THE PROCEEDINGS

Rit Tran is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rita Tran respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Tran*, No. 23-10865, 2024 WL 1110382 (5th Cir. March 14, 2024)(unpublished), and is reprinted in the Appendix to the Petition. [Appx. A]. The district court's judgment is also attached in the Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on March 14, 2024. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

> The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 2251(a) of the United States Code provides:

> Sexual exploitation of children
>
> (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 if 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.

Federal Rule of Criminal Procedure 11(b)(3) provides:

Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT OF THE CASE

A. Facts and Trial Proceedings

Petitioner Rit Tran pleaded guilty to a two-count Information. ROA.88. Count One alleged that he violated 18 U.S.C. §2251(a) by producing visual depictions of a minor engaged in sexually explicit conduct, and Count Two (not at issue here) alleged that he violated 18 U.S.C. § 2252A(a)(2) by receiving child pornography. ROA.61-62. With respect to Count One, the factual resume admitted that Petitioner used his Samsung cellular phone--which was manufactured in Vietnam--to produce a 21 - second child pornography video in Euless, Texas. ROA.66-67. He "therefore agree[d] that the file he created was produced using materials that had been mailed or shipped or transported in or affecting interstate or foreign commerce." ROA.67. The factual resume contained no admission that the phone had moved recently in interstate commerce, nor that its movement had any connection with the offense. See ROA.66-68. Nor did it admit that the file he created had moved in interstate commerce. See ROA.66-68.

Petitioner pleaded guilty pursuant to a plea agreement that waived his right to appeal, save for certain exceptions not relevant here. ROA.220. The court accepted the plea agreement and imposed a sentence of 360 months imprisonment as to Count One and 120 months imprisonment as to Count Two, to run consecutively for a total of 480 months. ROA.89.

B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit a constitutional offense as to Count One. Specifically, he argued: 1) that 18 U.S.C. §2251 should be construed to require either recent movement of materials from which child pornography had been generated, or movement of these materials as a result of the defendant's conduct, and 2) that if these statutes could not be so construed, they exceeded Congressional power to regulate interstate commerce under Article I, Section 8 of the Constitution. He cited *Bond v. United States*, 134 S. Ct. 2077 (2014), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)(Roberts, J., concurring), in support of these contentions. Petitioner showed that the claim was not barred by the appeal waiver under Fifth Circuit law, *United States v. Spruill*, 292 F.3d 207, 215 (5th Cir. 2002), but conceded that it was foreclosed on the merits, *see United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000).

The court below applied plain error and rejected these arguments, as foreclosed by circuit precedent. *See* [Appx. A](citing *United States v. Dickson*, 632 F.3d 186, 189-90 (5th Cir. 2011); *United States v. Kallestad*, 236 F.3d 225, 226-31 (5th Cir. 2000)). It expressly declined to apply the waiver. *See* [Appx. A].

REASONS FOR GRANTING THE WRIT

This Court should decide whether 18 U.S.C. §2251(a) and the Commerce Clause authorize criminal penalties any time a defendant uses an object that once crossed state lines to create illegal images.

Federal Rule of Criminal Procedure 11 requires that the admissions made by the defendant in connection with a plea establish a prosecutable offense. *See* Fed. R. Crim. P. 11(b)(3). In Petitioner's district, these admissions are called the "factual resume."

Petitioner's factual resume admits that that the materials used to produce the prosecutable content had moved in international commerce. It does not admit that the offense itself caused the movement of these materials, nor that the movement of the materials was recent, nor any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §2251.

Section 2251 of Title 18 authorizes conviction when the defendant produces a sexually explicit visual depiction of a minor, "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...." 18

U.S.C. §2251(a).[1] To be sure, the statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the production of child pornography with a telephone that crossed state lines years ago for entirely innocent purposes. Under this view of the statutes, Petitioner's conduct represented a federal offense. But *Bond v. United States*, 572 U.S. 844 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 852-853; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the car door, mailbox, and doorknob of a romantic rival. *See id.* at 852. This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 859-860. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.*

Notably, §229 defined the critical term "chemical weapon" broadly as "any

[1] Other portions of the same statutory Subsection authorize conviction only when the defendant's offense conduct is more closely related to interstate commerce, as when the depiction itself travels in interstate commerce, or in the channels of such commerce. Those parts of the statute are not at issue here.

chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read §2251(a) to reach the conduct admitted here: use of an object that once moved across state lines to commit a criminal act, without

proof that the crime caused the instrumentality to move across state lines, nor even proof that the instrumentality moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities.

It is plain that Congress intended the "interstate movement" requirement to bind §2251 to federal interests in interstate commerce. This prong of the statute should therefore be read in a way that accomplishes this purpose. The better reading of the phrase "produced ... using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer" therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused the materials to move in interstate commerce, or, at least, 2) proof that the relevant materials moved in interstate commerce at a time reasonably near the offense.

The court below rejected these claims, however, because it found them foreclosed by its own precedent. *See* [Appx. A]. The broad reading of the §2251 afforded by the court below, and its remarkable intrusion on areas of state criminal law, can therefore only be remedied by this Court. This Court should grant certiorari in an

appropriate case, and hold the instant Petition if this case is not the appropriate vehicle. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996).

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court issue an order granting the writ of *certiorari* to review the decision below.

Respectfully submitted this 10th day of June 2024.

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