

Number _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD STUART KOONTZ-PETITIONER

VS.

UNITED STATES OF AMERICA-RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

DONALD STUART KOONTZ

FEDERAL CORRECTIONS COMPLEX

POST OFFICE BOX 1000

PETERSBURG, VIRGINIA 23804-1000

PRO SE

Questions Presented

- 1) Does the government have to prove that at least one offending image actually moved across state lines in every conviction for child pornography under 18 U.S.C. § 2252A?
- 2) Can the mere receipt or possession of child pornography that is a purely local crime be prosecuted under the Commerce Clause if it is not part of a economic enterprise?
- 3) Did the district court err when it accepted a guilty plea without a factual basis of an interstate transaction?

List of Parties

All parties are listed on the cover page.

Table of Contents

	<u>Page</u>
- Questions Presented	i
- List of Parties	ii
- Table of Contents	iii
- Index of Appendices	iv
- Table of Authorities	v
- Opinions Below	1
- Jurisdiction	1
- Constitutional and Statutory Provision Involved	1
- Statement of the Case	3
- Reasons for Granting the Petition	32
- Conclusion	36

Table of Appendices

Judgment of the United States Court of Appeals for the Fourth Circuit, case number: 17-6619	A
Judgment of the United States District Court for the Middle District of North Carolina, Case number 1:13-cr-478-1	B
Full text of 18 U.S.C. § 922	C
Full text of 18 U.S.C. § 1343	D
Full text of 18 U.S.C. § 2251	E
Full text of 18 U.S.C. § 2252A	F
Full text of 18 U.S.C. § 4248	G
Full text of 21 U.S.C. § 812	H
Full text of 21 U.S.C. § 841	I
Full text of 21 U.S.C. § 844	J
Full text of North Carolina Code, § 14-190, et sequentes	K
Plea agreement of January 2014	L

Table of Authorities

<u>Case</u>	<u>Page</u>
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)	12
BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1984)	34
Bond v. United States, 134 S. Ct. 2077, 189 L. Ed.2d 1 (2014)	34
Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1857)	33
Comstock v. Unites States, 560 U.S. 126, 130 S. Ct. 1949, 176 L. Ed.2d 878, 65 A.L.R.F.2d 667 (2010)	25
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005, 83 L. Ed.2d 1016 (1985)	24-25
GDF Realty Investments, ltd. v. Norton, 323 F.3d 622 (5th Cir. 2003)	7
Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed.2d 1 (2005)	11-12, 16-18, 24-25, 33
Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed.2d 410 (1991)	34
Hodel v. Virginia Surface Mining & Reclaiming Ass'n, Inc., 454 U.S. 264, 101 S. Ct. 2352, 69 L. Ed.2d 1 (1981)	12, 23
Jimenez v. Southern Parking, Incorporated, number 07-23156, 2008 U.S. Dist. LEXIS 70147, 2008 WL 42799618 (S. D. Fl. 2008)	9
M'Culloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)	24, 33

<u>Case</u>	<u>Page</u>
McLeod v. Threkeld, 319 U.S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538 (1943)	9
Perez v. United States, 402 U.S. 146, 28 S. Ct. 1357, 28 L. Ed.2d 686 (1971)	15
Smith v. Ayres, 845 F.2d 1360 (5th Cir. 1988)	6
United States v. Ballinger, 312 F.3d 1264 (11th Cir. 2002)	34-35
United States v. Bass, 404 U.S. 336, 92 S. Ct. 515, 30 L. Ed.2d 488 (1971)	10-11, 34
United States v. Bryant, 766 F.2d 370 (8th Cir. 1985)	6
United States v. Forrest, 402 F.3d 678 (4th Cir. 2005)	26
United States v. Fox, 95 U.S. 670, 24 L. Ed. 538 (1877)	33
United States v. Holston, 343 F.3d 83 (2nd Cir. 2003)	9
United States v. Izydone, 167 F.3d 213 (5th Cir. 1999)	6
United States v. Kieffer, 681 F.3d 1143 (10th Cir. 2012)	6
United States v. Lopez, 541 U.S. 549, 115 S. Ct. 1624, 131 L. Ed.2d 626 (1995)	
	5, 7, 11-13, 15, 18, 22, 24, 26-28, 30-31, 33
United States v. Matthews, 300 F. Supp.2d 1220 (N. D. Al. 2004)	9
United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004)	14, 19-22, 33
Unites States v. McCoy, 323 F.3d 1114 (9th Cir. 2003)	9, 18

<u>Case</u>	<u>Page</u>
United States v. Morales-DeJesus, 372 F.3d 6 (1st Cir. 2004)	20-21
United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed.2d 658 (2000)	7, 11-13, 15-16, 23-24, 26-31, 35
United States v. Rodia, 194 F.3d 465 (3rd Cir. 1999)	19, 22
United States v. Smith, 402 F.3d 1303 (11th Cir. 2005)	13-14, 19, 21-22
Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942)	13-14, 19, 28

Statutes

<u>Statute</u>	<u>Page</u>
18 U.S.C. § 992	28, 31
18 U.S.C. § 1343	6
18 U.S.C. § 2251	20
18 U.S.C. § 2252A	4-6, 10-11, 14, 18, 20, 23, 26, 29-30, 37
18 U.S.C. § 4248	25
21 U.S.C. § 821	17
21 U.S.C. § 841	17
21 U.S.C. § 844	17
North Carolina Code § 14-190	24

Other Authorities

<u>Authority</u>	<u>Page</u>
Founder's Constitution, P. Kurland, and R. Lerner, 1987 edition	8
The Federalist, Number Forty Two: Madison, C. Rossites, 1961 edition	8
The Increasing Federalization of Crime, Ehrlich, 32 Ariz. St. L. J. 825 (2000)	24

Opinions Below

United States Court of Appeals for the Fourth Circuit, United States of America, Plaintiff-Appellee, v. Donald Stuart Koontz, Defendant-Appellant, Number 17-6619, 2017 U.S. App. LEXIS 16528, August 29, 2017. This opinion is unpublished and can be found in Appendix A.

United States District Court for the Middle District of North Carolina, Donald Stuart Koontz, Petitioner, v. United States of America, Respondent. Case numbers 1:15-cv-344 and 1:13-cr-478-1. This opinion is unpublished and can be found in Appendix B.

Jurisdiction

The date on which the United States Court of Appeals for the Fourth Circuit decided this case was August 29, 2017. No petition for rehearing was filed in this case. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Constitution of the United States of America
Article I, Section 8, Clause 3; Power of Congress to Regulate
Commerce:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I, Section 8, Clause 18, All Necessary and Proper Laws:

To make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.

Article VI, Clause 2, Supreme Law:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment X, Power reserved to states or People:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code

18 U.S.C. § 922.

The full text of 18 U.S.C. § 922 can be found in Appendix C.

18 U.S.C. § 1343.

The full text of 18 U.S.C. § 1343 can be found in Appendix D.

18 U.S.C. § 2251.

The full text of 18 U.S.C. § 2251 can be found in Appendix E.

18 U.S.C. § 2252A.

The full text of 18 U.S.C. § 2252A can be found in Appendix F.

18 U.S.C. § 4248.

The full text of 18 U.S.C. § 4248 can be found in Appendix G.

21 U.S.C. § 812.

The full text of 21 U.S.C. § 812 can be found in Appendix H.

21 U.S.C. § 841.

The full text of 21 U.S.C. § 841 can be found in Appendix I.

21 U.S.C. § 844.

The full text of 21 U.S.C. § 844 can be found in Appendix J.

North Carolina Code

§14-190 et sequentes.

The full text of § 14-190 et sequentes can be found in Appendix K.

Statement of the Case

It was almost 8:00 Am on August 22, 2013, and Donald Koontz was preparing to take his mother to a doctor's appointment.

Donald walked out into the car port, where there was a freezer, to take out some meat for dinner that evening. From the carport Donald could see a small army of city, county, state and federal agents walking up his driveway with a search warrant in hand. Donald cooperated with the investigation and was arrested before he could prepare and enjoy the dinner he planned to cook for his ailing parents.

Donald was charged in the State of North Carolina for possession and distribution of child pornography and given a bond of two million dollars. For five months Donald was kept in pretrial confinement while his defense attorney worked on a plea deal with the county prosecutor's office. On January 4, 2014, the federal prosecutor ordered the county prosecutor's office they were to dismiss the state charges so the federal government could prosecute Donald. The federal government knew Donald's offense did not substantially affect interstate commerce, nor was it a commercial activity, but they relied on a broad jurisdictional hook which allows for a federal prosecution of every possible case involving child pornography if it had

...been mailed or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer. 18 U.S.C. § 2252A(a)(2)(A) and (B).

The government's removing of this case from the state court offended the parties involved, including the county prosecutor, the lead county investigator, defense counsel, and Donald. Congress has usurped traditional powers reserved for the states.

3. 4

Allowing congress to regulate noneconomic-local crime exceeds the constitutional authority to regulate commerce proscribed to Congress by the Constitution of the United States of America (the Constitution).

I. CONGRESS AND THE COMMERCE POWER

The Constitution grants Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" the Constitution, Article I., §8, clause 3.

At the time the Constitution and its Commerce Clause were drafted and ratified, "commerce consisted of selling, buying, and bartering, as well as transporting for those purposes." United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (citations omitted.)

Of course, each of these concepts constitutes interaction; consisting of activity engaged in and by individuals in the marketplace.

While Congress has the authority to pass laws affecting interstate and foreign commerce, Congress does not have authority to prescribe general criminal statutes. In Mr. Koontz's case, the government proved Mr. Koontz was only in receipt of child pornography. For the conviction under 18 U.S.C. § 2252A (§ 2252A) to be constitutional under the commerce clause, the government must prove more than Mr. Koontz possessed

a hard drive or computer impressed with images in North Carolina; the government must prove the offending images crossed state lines, or his actions were part of an economic enterprise.

The communication at issue must satisfy the interstate nexus set forth in § 2252A; it is an immutable requirement. See United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985) ("...The requirement of an interstate nexus arises from constitutional limitations on congressional power over interstate activities under the Commerce Clause....") See Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988) (explaining where relevant telephone calls were all intrastate, there was no act constituting wire fraud); United States v. Izydone, 167 F.3d 213, 219 (5th Cir. 1999) ("...the communication at issue must satisfy the interstate nexus set fourth in 18 U.S.C. § 1343; it is an immutable requirement.") (reversing wire fraud conviction based on intrastate telephone calls and noting the interstate nexus requirement is not a substantive element of wire fraud, but arises from constitutional limitations on Congressional power over interstate activities); 18 U.S.C. § 1343 (prohibiting transmission of fraudulent communication by wire "in interstate or foreign commerce").

"The use of the internet alone is insufficient to establish the required interstate nexus." United States v. Kieffer, 681 F.3d 1143, 1155 (10th Cir. 2012):

...one individual's use of the internet, "standing alone," does not establish an interstate transmission...because the origin and host servers, whether one in the same or separate, might be located

in the same state as the computer used to access the website.

Previous Commerce Clause decisions have focused on whether intrastate activities are subject to federal regulation under the Commerce Clause. As to that question, case law establishes the purely intrastate activities can be regulated under the Commerce Clause only if they are economic in nature, and if those activities have an aggregate effect on the national economy. Lopez, 514 U.S. at 585; GDF Realty Investments, LTD v. Norten, 326 F.3d 622, 630 (5th Cir. 2003) ("...the key question for purposes of aggregation is whether the nature of the regulated activity is economic."). But while this "aggregation" principle gives Congress authority even over otherwise inconsequential economic activities; Congress cannot regulate noneconomic activity, even if the activity has economic consequences in the aggregate. United States v. Morrison, 529 U.S. 598, 617-18 (2000). This principle is important because all activity has some effect on the nation's economy. To allow Congress to "aggregate" noneconomic activity, and to assert authority over that activity, would eliminate any limits on Congressional power.

In Mr. Koontz's case before this Supreme Court, Mr. Koontz's plea agreement (see Appendix I,) does not include any factual basis, offered by the government, or admitted to by Mr. Koontz; establishing his actions during these offenses were economic in nature. There is a stipulation the offense at some point

affected interstate commerce; but since every action by every individual affects interstate commerce, to allow Congress to expand its reach to every crime remotely affecting interstate commerce would remove all limits on the federal governments actions.

There is no evidence, the framers of the Constitution intended the Commerce Clause to allow the federal government to criminalize local-noneconomic activity. It was drafted to give Congress "...a superintending authority over the reciprocal trade of the ... States." Federalist Papers, number forty two (C. Rossites, edition 1961, page 268). Taking away from the states their often conflicting regulatory power as exercised under the Articles of the Confederation. See, The Letters From James Madison to Joseph Cabell, February 13, 1829 (Founder's Constitution, P. Kurland, and R. Lerner, 1987 edition, page 521) (Commerce power "was intended as a negative and preventative provision against injustice among the states themselves, rather than a power to be used for the positive purposes of the general government.")

Under the Federal Labor Standards Act (F.L.S.A.), which Congress also regulates under the authority of the Commerce Clause, Congress uses a more restrictive and realistic definition of the commerce; which is "trade, commerce, transportation, transmission, or communication among the several states, or between any state and any other place outside thereof. Congress's definition under the F.L.S.A. does not

include consumption (or as applied to Mr. Koontz's actions, receipt or possession) as an element of commerce.

In Jimenez v. Southern Parking, Incorporated, number 07-23156 (S. D. Fl. September 16, 2008) The plaintiff's duties included washing and cleaning vehicles at a condominium complex. The plaintiff argued that the cars and the materials used to wash the cars moved through interstate commerce prior to and/or subsequent to his work with them. The District Court for the Southern District of Florida, attempting to determine if Jimenez's actions met the requirement for interstate commerce, found the plaintiff was not engaged in interstate commerce, stating: "Ultimate consumers of products are not 'engaged in commerce' just because they purchase products that have moved in interstate commerce."

In a similar case, McLeod v. Threkeld, 319 U.S. 491 (1943), the Supreme Court distinguished between merchants who bring commerce across state lines for sale and the ultimate consumer, who merely purchases goods having moved through interstate commerce for intrastate use. Therefore, a customer who purchases an item from Home Depot is not engaged in interstate commerce even if Home Depot purchased it from out-of-state wholesalers.

In United States v. Matthews, 300 F. Supp.2d 1220, 1235 (N. D. Al. 2004), the District Court for the Northern District of Alabama stated:

[United States v.] McCoy [323 F.3d 1114 (9th Cir. 2003)] illustrates the principle that just because

some of the elements that go together to compose an object have moved in interstate commerce at some time or another -- e.g., the camera used to record a visual image, the film, tape, diskette, or other medium on which the image is recorded, and the photographic paper, television screen, or computer monitor which the image is subsequently replicated -- it does not follow ipso facto that Congress can constitutionally regulate the object produced through incorporation of such constituents when the production [receipt, or] possession of the object occur solely within a single state. Instead, the intra-state object itself must move in the United States Mail, or through the channels and instrumentalities of interstate or foreign commerce, or be shown to have a "substantial" effect on interstate commercial activities that unquestionably are subject to congressional regulation. (Emphasis in original, alterations added.)

In United States v. Bass, 404 U.S. 336 (1971), the Supreme Court interpreted a statute that prohibited any convicted felon from "receiving, possessing or transporting in commerce or affecting commerce...any firearm." *Idem* at 337. The government argued that the statute barred felons from possessing all firearms and that it was not necessary to demonstrate a connection to interstate commerce. The Supreme Court rejected that reading. Such a reading would:

render traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal resources.

The Supreme Court instead read the statute more narrowly to require proof of a connection to interstate commerce in every case, thereby "preserving as an element of all offenses a requirement suited to federal criminal jurisdiction alone."

Under § 2252A, the government must only prove the

pornography was "shipped or transported in or affecting interstate or foreign commerce by any means, including by computer." (Emphasis added.) The language of § 2252A does not require the government to prove the act "substantially affects interstate commerce" as required by Lopez, but only but only affects "interstate or foreign commerce by any means, including by computer." (Emphasis added.) This language is not narrowly tailored as is Bass, but overly broad to allow federal prosecution in every imaginable case.

In Lopez, justice Thomas, in his concurring opinion, expressed the view that the Supreme Court, in as appropriate case, should reconsider the "substantial affects: test, is far removed from both the Constitution and the Supreme Court's earlier case law, and the Constitution does not support the proposition the Congress has the authority over all activities substantially affecting interstate commerce.

Justice Thomas also stated in his dissenting opinion in Raich, 545 U.S. at 68-69:

The substantial affects test is easily manipulated for another reason. This Court has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce. Morrison, 529 U.S. at 613, 146 L. Ed. 2d 658, 120 S. Ct. 1740 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of interstate activity only when that activity is economic in nature" (emphasis added)); Lopez, supra at 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624.

In Lopez and Morrison, the Supreme Court, conscious of potential of the "substantially affects" test to obliterate the distinction between what is national and what is local. Lopez, supra at 566-567 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 544 (1935)); see also Morrison, supra at 615-18 (rejecting the argument the Congress may regulate noneconomic activity based solely on the affect it may have on interstate commerce through a remote chain on inference. Citing Lopez, supra at 575-579, and 568.) In Raich, 545 U.S. at 36:

"[I]f we were to accept such arguments" the court reasoned in Lopez; "we are hard pressed to posit any activity by the individual that Congress is without power to regulate." 514 U.S. at 564, 1131 L. Ed. 2d 626, 115 S. Ct. 1624; see also Morrison, supra at 615-616, 146 L. Ed. 2d 658, 120 S. Ct. 1740. (Alteration in original.)

They amount to nothing more than a legislative insistence the regulation of child pornography must be absolute. They asserted without any supportive evidence - descriptive, statistical, or otherwise. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Hodel v. Virginia Surface Mining & Reclaiming Assn., Inc., 452 U.S. 311 (1982) (Rehnquist, J., Concurring in judgment.) Indeed, if declarations by Congress suffice to justify federal regulation, then the Supreme Court's decision in Morrison, should have gone the other way. In Morrison, Congress has supplied numerous finding regarding the impact gender motivated had on the national economy.

Morrison, 529 U.S. at 614 (Souter, J. dissenting, chronicling findings). But recognizing that

"[w]hether particular operations affect interstate commerce to sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, we found Congress' detailed findings inadequate." 514 US at 577, n2, 131 L. Ed 2d 626 115 S Ct 1624. (Alteration in original, internal citation omitted.)

II. WICKARD AND THE AGRICULTURE ADJUSTMENT ACT

In United States v. Smith, 402 F.3d 1303, 1317 (11th Cir. 2005)

the Eleventh Circuit wrote:

In Wickard, the Supreme Court upheld a federal regulatory program that restricted the amount of wheat a commercial farmer might produce not only for sale and distribution, but also for consumption on his own farm. An Ohio farmer challenged the statute on the ground that Congress lacked the power to regulate his purely local production and consumption and its minimal indirect affect on interstate commerce. See Wickard, 317 U.S. at 113-19, 63 S. Ct. at 83-86. The Supreme Court rejected his argument and explained why the statute was permissible method of regulating interstate commerce....

At 402 F.3d 1317-18:

In other words, the Wickard regulation sought to maintain national market prices by controlling supply and demand. The Supreme Court noted that "commerce among the states in wheat is large and important," that "wheat [was] raised in every state but one," that "wheat industry [had] been a problem industry for some years." and that in the absence of regulations wheat prices would have been greatly affected by the world market. Id. at 125-26, 63 S. Ct. 89-90. Because this regulation was so plainly intended to regulate commerce, the Supreme Court held that it was appropriate to consider the "far from trivial" aggregate effect on the market of all consumption of home-grown wheat rather than the

isolated effect of a single Ohio farmer. Id. at 127-28, 63 S. Ct. 90; see also idem at 127, 63 S. Ct. at 90 ("The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop.")

Whereas, the Wickard statute regulated an interstate market indirectly through regulation of purely local production, the same cannot be said of § 2252A. The statute "makes no effort to control national trade by regulating intrastate activity. Instead, they attempt to regulate primary conduct directly, even within state borders." Maxwell, 386 F.3d 1042, 1057 (11th Cir. 2004). Even if, in the aggregate, offenders like Mr. Koontz somehow impact an interstate market by producing, receiving, or possessing, child pornography for their own use, "Congress is clearly not concerned with the supply of child pornography for the purposes of avoiding surpluses and shortages or for the purpose of stimulating its trade at increased prices." Idem.

Even in Wickard, the Agricultural Adjustment Act (the A.A.A.) itself confirmed that Congress made an explicit choice not to reach small-scale-noncommercial-wheat farming. In contrast to the Child Pornography Protection Act's (C.P.P.A.) seemingly overreach of power, Congress provided an exemption with the A.A.A. for small producers. When Mr. Filburn planted the wheat at issue in Wickard, the statute exempted planting less-than two hundred bushels (about six tons), and when he harvested his wheat it exempted planting less-than six acres. Idem, at 130, note 30. Wickard, then did not extend commerce

clause authority to something as remote from commerce as possession of a disc containing images of child pornography of a noneconomic character.

III. MORRISON AND LOPEZ CONSTRAIN THE BOUNDARIES OF THE INTERSTATE COMMERCE CLAUSE

In Morrison and Lopez, the Supreme Court tightened the reins and insisted the parameters of legislation enacted under the Commerce Clause's powers square with the historically accepted contours of Article I authority delineated by the Supreme Court in Perez v. United States, 402 U.S. 146 (1971). Congress has the power to regulate activities substantially affecting interstate commerce. *Idem*, at 150.

The Supreme Court in Lopez and Morrison constrained the boundaries of the Commerce Clause's jurisdiction to activities truly economic in nature and having a demonstrable affect on interstate commerce. In Lopez, the Supreme Court found the Gun-Free School Zone Act (G.F.S.Z.A.), making it a federal offense for any individual to knowingly possess a firearm in a school zone, exceeded Congress' Commerce Clause authority. First, the Supreme Court held the statute by its terms had nothing to do with commerce or any sort of economic activity. Second, it concluded the act could not be sustained "under our cases upholding regulations of activities arising out of, or connected with a commercial transaction, viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at

561.

Later, in Morrison, the Supreme Court concluded the Commerce Clause did not provide Congress with the authority to impose civil remedies under the Violence Against Women Act (V.A.W.A.). Despite extensive factual findings regarding the serious impact gender-motivated violence has on victims and their families; the Supreme Court concluded it was insufficient by itself to sustain the constitutionality of the Commerce Clause legislation. Morrison, 529 U.S. at 614. The Supreme Court in Morrison, ultimately rejected the argument, the Congress may regulate noneconomic-violent-criminal conduct based solely on the conduct's aggregated affect on interstate commerce. *Idem* at 617.

Drawing on the logic articulated in Lopez and Morrison, limiting the boundaries of the Commerce Clause's jurisprudence to activities truly economic in nature and substantially affecting interstate commerce, the mere intrastate production, receipt, or possession of child pornography is not an economic enterprise having a demonstrable affect on interstate commerce. In Morrison, the Supreme Court noted "[e]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." Morrison, 529 U.S. at 608.

IV. RAICH INVOKES THE SUPREMACY CLAUSE

Marijuana is classified as a Schedule I substance based on

its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. See 21 U.S.C. §§ 812(b)(1) and (c)(Schedule I)(c)(10). To effectuate the statutory goals, Congress devised a closed regulatory system - making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by 21 U.S.C. §§ 841(a)(1) and 844(a). California and eight other states enacted state laws that allowed medicinal use of marijuana for seriously ill patients. Therefore, the several states were at odds with the federal government's regulatory scheme. The federal government contended that the collective enforcement (at the local level) of the states would tend to frustrate the federal interest in entirely eliminating commercial transaction in the interstate market.

Under the Necessary and Proper Clause (Article I, § 8, Clause 18) bolstered by the Supremacy Clause (Article VI, Clause 2), the Supreme Court ruled Congress can regulate intrastate activity, even if it is not economic in nature. See, Gonzalez v. Raich, 545 U.S. 1 The State's statute:

limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondent's activities beyond congressional reach. The Supremacy Clause unambiguously provides if there is any conflict between federal and state law federal law shall prevail. See Raich, 545 U.S. at 29.

In Mr. Koontz's case, there is no conflict between the collective public policy of the state as expressed by the state in its criminal statutes, and the federal policy exemplified by

§ 2252A. All fifty states criminalize production, receipt, and possession of child pornography to the same extent as the federal law, the Supremacy Clause remains dormant. This eliminates Raich as the controlling case when determining the reach of Congress.

V. § 2252A's JURISDICTIONAL REQUIREMENTS

In order to convict under 2252A, the government relies on a statutory jurisdictional hook to establish federal jurisdiction over the offense: knowingly receives material containing child pornography using any means of interstate commerce transported (in or affecting) interstate by any means, including by computer. See, § 2252A(a)(2)(B). A jurisdictional hook is constitutionally significant only if it will "ensure, through case-by-case inquiry, that the [offense] in question affects interstate commerce." Lopez, 514 U.S. at 561 (alteration added). Where, as here, Congress seeks to regulate under the Commerce Clause the hook is only significant if it essentially affects interstate commerce. The jurisdictional element used in § 2252A, however:

...not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually every case imaginable, so long as any modern-day photographic equipment of material is being used. United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003) (emphasis in original).

A jurisdictional hook is not however, a talisman that wards

off constitutional challenges. See, United States v. Rodia, 194 F.3d 465, 472-73 (3rd Cir. 1999) (rejecting "hard and fast rules that presence of jurisdictional element automatically ensures that constitutionality of a statute."); United States v. Holston, 343 F.3d 83, 88 (2nd Cir. 2003) (finding the jurisdictional hook factor "superficially met" but not relying on "the mere existence of jurisdiction language purporting to tie criminal conduct to interstate commerce"). As the Eleventh Circuit has noted "'where a jurisdictional element is required, a meaningful one, rather than a pretextual incantation evoking the phantasm of Commerce,' must be offered." Maxwell, 386 F.3d at 1062. In Smith, 402 F.3d 1303 (11th Cir. 2005), the Eleventh Circuit stated:

...noted that the statutes jurisdictional hook "smacks of pretext," as congress clearly has no interest in reducing traffic in production materials such as cameras or film. Id., at 1058. Thus, we conclude[d] that the regulated interstate activity...[was] more similar by far to the brand of interstate criminal conduct that is a proper subject of state regulation alone than it is to the sort of economic activity addressed in Wickard. Id. (quoting Maxwell, 386 F.3d at 1058, alterations in original.)

But, also to the point:

...if the commercial import of general categories of noneconomic criminal activities could be measured in the aggregate, jurisdictional hooks would be rendered irrelevant. Because the categorical activity of interstate pornography would be invariably deemed to have substantial economic effect on interstate commerce, Congress would not be constrained to proscribe its possession to cases in which the materials used to produce it were transported in interstate commerce. Thus, the misguided aggregation approach suggests that jurisdictional elements in all of Congress' Commerce Clause enactments amount to

nothing more than superfluous hurdles to federal law enforcement. Maxwell, 386 F.3d at 1060-61.

VI. LEGISLATIVE HISTORY OF THE CHILD PORNOGRAPHY PROTECTION ACT

In Maxwell, the Eleventh Circuit reviewed the legislative history of § 2252A and some related provisions, to include 18 U.S.C. § 2251. The Eleventh Circuit found:

"...nothing to persuade us that possessing child pornography produced with material transported in interstate commerce is an activity that has a substantial effect on interstate commerce." *Id.* at 1067. "Instead, the vast majority of the findings support the broader propositions..." [which Mr. Koontz is prepared to accept] "...that child pornography (even that which is generated by computer without actual people) is bad and harmful to children." *Id.* at 1065. (Alteration added.)

A First Circuit opinion succinctly summarizes additional legislative history and congressional findings relevant to § 2252A.

When Congress originally passed the Protection of Children Against Sexual Exploitation Act of 1977...it supported the legislation with findings that "child pornography...has become [a] highly organized, multimillion dollar industry that operates on a nationwide scale...[and that] the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."

In 1984, Congress amended the act to, inter alia, eliminate the requirement that the production, receipt, transportation or distribution of child pornography be for a "pecuniary profit." Congress did so because it found that this commercial purpose requirement created an enforcement gap: "Many of the individuals who distribute materials covered [by the statute] do so by gift or exchange without any commercial motive and thus remain outside the coverage of this provision." Noting that "generally,

the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers" Congress determined that the statutory regime must be updated to ensure effective prosecution of producers and distributors.

Congress amended the Act again...finding that "child exploitation has become a multimillion dollar industry, infiltrated and operated by elements of organized crime, and by a nationwide network of individuals openly advertising their desire to exploit children."

In 1996, Congress amended the act to redefine child pornography....In passing those amendments, Congress found that "the existence of a traffic in child pornographic images...inflames the desire of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography...." The Senate Report also explained that "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping...to eliminate the market for the sexual exploitative use of children."

Finally, Congress amended the act again in 1998, establishing jurisdiction for the production of child pornography if the "visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means," which is the provision now before us. Congress offered two reasons for this amendment. First, it wanted new jurisdictional element of the production statute to mirror the existing jurisdictional element of the possession statutes. Second, Congress was concerned about federal law enforcement's current inability to prosecute "a number of cases where the defendant produced the child pornography but did not intend to transport the images in interstate commerce." United States v. Morales-DeJesus, 372 F.3d 6, 10-12 (1st Cir. 2004) (citations and footnotes omitted in original, alterations in original).

We will comment on each of these finding separately.

In United States v. Smith, 402 F.3d at 1320-21, the Eleventh Circuit stated:

We have already addressed the 1977 findings in Maxwell. These findings "remark [l]only on the

interstate child pornography and teach [nothing about the effects of intra state child pornography or noncommercial child pornography for that matter." Maxwell, 386 F.3d at 1066. The same can be said of the 1986 findings. That we are concerned with noncommercial production [and possession] for personal use rather than mere noneconomic production [and possession] is not significant. The substance of these findings is merely that a multimillion dollar interstate industry exists, not that noncommercial producer-consumers such as Smith substantially affect it. To say that such findings support federal jurisdiction in this case is the equivalent of saying that Congress can, for example, regulate backyard cookouts simply because a multibillion dollar interstate restaurant industry exists.

The 1984 findings refer to the problem of individuals who trade, lend or otherwise distribute child pornography without a commercial purpose. If Smith had been prosecuted for such noncommercial distribution of child pornography, then these findings might be relevant. They do not however, establish that noncommercial production [and possession] of child pornography for the producer's own use substantially affects interstate commerce.

The 1996 finding relate solely to the "addiction theory" -- i.e., the theory that a person possessing the intrastate child pornography could develop an increasing appetite for more such materials that eventually affects the interstate market substantially -- adopted by the Third Circuit in *United States v. Rodia*, 194 F.3d at 478-79.... The theory simply "provides too attenuated a link to interstate commerce and would require us to "pile inference upon inference in a matter that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." Maxwell, 386 F.3d at 1061 (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634).

Finally, Congress's rationale for amending the statute in 1998 to add the jurisdictional provision at issue does nothing to explain how producer-consumers such as Smith substantially affect interstate commerce. Indeed, in 1998 Congress merely explained that under the old version of the statute it had been unable to reach some conduct that it wished to proscribe. That Congress wanted to prosecute more child pornographers is understandable, but it has little to do with interstate commerce.

In sum, the relevant congressional findings do little to persuade us that activity such as that at

issue in this case substantially affects interstate commerce. "The existence of Congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Morrison, 529 U.S. at 614, 120 S. Ct. at 1752. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not make it so." Hodel v. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 311, 101 S. Ct. 2352, 2391, 69 L. Ed. 2d (1981) (Rehnquist, J., Concurring in the judgment). The findings above support the proposition that intrastate commercial producers of child pornography affect interstate commerce. They even suggest that persons who distribute child pornography noncommercially affect the interstate market. They do not, however, support the proposition that purely intrastate production, [receipt,] and possession for personal use have a similar effect. (First and second alterations in the original, all others added. Emphasis in original.)

VII. CRIMINALIZING THE POSSESSION OF CHILD PORNOGRAPHY CLEARLY
FALLS TO THE STATE UNDER THE TENTH AMENDMENT

Congress has the authority under the Commerce Clause to regulate commerce between the states. However, Congress does not have authority to regulate at the expense of the states, particularly in the case of a criminal statute. North Carolina criminalizes the production, receipt, and possession of child pornography; and for this analysis, no state in the union allows the production, receipt or possession of child pornography. There is simply no conflict between the collective public policy of the several states as expressed by each of the state statutes, and the federal policy exemplified by § 2252A (see Appendix F).

Because § 2252A is a criminal statute, and because North Carolina Code § 14-190 (see Appendix K) criminalizes the exact same conduct § 2252A proscribes, the case of Congress exercising its Commerce Clause power to criminalize the intra state receipt of child pornography in North Carolina falls within the cases presented by Lopez and Morrison. In those cases, the Supreme Court struck down Congress' overreach under the Commerce Clause in these two cases, the Supreme Court should hold Congress exceeded its power under the Commerce Clause by enacting § 2252A.

In Mr. Koontz' case, Congress has encroached on the states traditional police powers: to define the criminal law, and to protect the health, safety, and welfare of their citizens. Further, the government's rational: the regulation of any commodity for which there is an interstate market; threatens to remove the remaining vestiges of the state's traditional police powers. Ehrlich, The Increasing Federalization of Crime, 32 Arizona State Law Journal 825, 825, 841 (2000) (describing both the relevant recency of a large percentage of federal crimes and the lack of a relationship between some of those crimes and interstate commerce). This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a pretext...for the accomplishment of objectives not entrusted to the government. M'Culloch, 4 Wheat. at 423.

As stated in Raich:

Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent

with the basic constitutional principles. Garcia, 469 U.S. at 585, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (O'Connor, J. Dissenting) (It is not enough that the 'end be legitimate'; the means to that end chosen by Congress must not contravene the spirit of the Constitution.) As Justice Scalia recognized, see ante, at 39, 162 L. Ed. 2d at 33) (opinion concurring in judgment), Congress cannot use its authority under the clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated power - a structural principle that is as much a part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an interstate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a backdoor for unconstitutional regulation.... Raich, 545 U.S. at 52 (O'Connor, J. dissenting).

In Comstock v. United States, 130 S. Ct. 1949, 1964 (2010); The Supreme Court enumerated five "considerations that supported 18 U.S.C. § 4248 (§ 4248) as constitutionally valid under the Necessary and Proper Clause. The Supreme Court recognized the statutes "narrow scope" as essential in allowing the government to further its interest under the clause without endowing Congress with a general police power citing evidence that "105 individuals have been subject to § 4248 out of 188,000 federal inmates," 130 S. Ct. at 1964. In contrast, § 2252A is not a narrowly tailored means of pursuing the government's interest, but is so overbroad that it allows unconstitutional prosecution of every case imaginable as long as it utilizes any items, including by computer, that have at some point moved across state lines.

The language in the V.A.W.A. which the Supreme Court ruled

exceeded Congressional power under the Necessary and Proper Clause, closely resembles the language found in the legislative history of the C.P.P.A. The same legislative history that added § 2252A to federal law speaks of the "clear and present danger to children" and the "deleterious effect on minors," but makes no mention of how mere intrastate production, receipt or possession of child pornography affects interstate commerce. The intrastate production, receipt, or possession of child pornography is a state crime because its connection to commerce or any economic activity is attenuated.

Section I of this petition argued that Congress exceeded its constitutional authority in enacting § 2252A because § 2252A clearly falls within the Lopez and Morrison cases under the proposed analytical methodology set forth above; i.e., in § 2252A, Congress criminalized an act (receipt of Child pornography) that is illegal in the state where the receipt of child pornography occurred in Mr. Koontz's case. However, this petition will also show that § 2252A is unconstitutional under existing precedent. In other words, United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) was wrongly decided.

Lopez and Morrison identified four factors that a court should weigh in determining whether or not a Congressional statute could withstand a Constitutional Challenge based on the Commerce Clause: (1) Is the statute a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise?; (2) Does the statute contain an express

jurisdictional element that might limit its reach to a discreet set of possessions that additionally, have an explicit connection with or effect on interstate commerce?; (3) Does the Statute or its legislative history contain express congressional findings regarding the effects upon interstate commerce of possessing child pornography?; (4) Is the connection between child pornography and a substantial effect on interstate commerce attenuated? Morrison, 529 U.S. at 610-12 (explaining the factors that Lopez identified as relevant to test for Congress' exercise of its interstate commercial power). In passing § 2252A, Congress failed all four tests.

A. § 2252A is a Criminal statute that makes illegal the intrastate receipt of a noncommercial object.

§ 2252A is a penal statute. See § 2252A (imposing a maximum sentence of thirty years imprisonment). § 2252A does not attempt to regulate the production, receipt, distribution, and possession of any commodity that has any commercial characteristics. Morrison could not be clearer that criminalizing intrastate production and possession of any object with no economic nexus was the main basis on which Lopez struck down the G.F.S.Z.A. Morrison took care to point out this main theme in the following statement:

Both petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. See, e.g., [541 U.S. 549], at 551, 131 L. Ed 2d 626, 115 S Ct 1624 ("The Act [does not] regulat[e] a commercial

activity"), 560, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("Even Wickard, which is perhaps the most for reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not"), 561, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("Section 992(q) is not an essential part of a larger regulation of economic activity"), 566, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("Admittedly, a determination whether an intrastate activity is commercial or economical may in some cases result in legal uncertainty. But, so long as Congress' authority to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as have judicially enforceable outer limits, Congressional legislation under the Commerce Clause always will engender "legal uncertainty"), 567, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); see also *id.*, at 573-574, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (Kennedy, J., concurring) (stating that *Lopez* did not alter our "practical conception of commercial regulation" and that Congress may "Regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable economy"), 577, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur"), 580, 131 L. Ed. 2d 626, 115 S. Ct. 1624 ("[U]nlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design if the statute has an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far" (citation omitted)). *Lopez* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor. See *id.*, at 559-560, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (first alteration added, all other in original; emphasis added;

footnote omitted).

The G.F.S.Z.A. criminalized possession of an object (a gun within a certain distance of a school) of a noncommercial character. § 2252A criminalized receipt of an object (a disk containing child pornography of a noncommercial character. There is practically no difference between the two.

B. § 2252A's jurisdictional elements are not sufficient to limit the statute's reach to items having an explicit connection with interstate Commerce.

§ 2252A has two jurisdictional elements. Neither act to sufficiently limits the statute's reach to items with an explicit connection with interstate commerce. First, the statute does not criminalize the images of child pornography having traveled in interstate commerce. It criminalizes the possession of materials containing images or video depiction of child pornography. It is possible for the electronic image of child pornography to travel through the channels of interstate commerce. It is possible for the disc itself to travel in interstate commerce. However, it is not illegal to possess either image or the disc. It is criminal to possess the disc only after it has been imprinted with the offending images. Thus, the item whose possession § 2252A criminalizes, i.e., the hard drive with the image imprinted on it never itself travels in interstate commerce. It never leaves the possessor's computer; and unless the possessor carries the disc with the offending images or video depictions physically across state

line, the illegal possession never occurs because the image, while impressed on the hard drive, never travels outside the state. In Mr. Koontz's case, there was no factual stipulation as part of the plea agreement (Appendix L) the images traveled in interstate commerce after the images and video depictions of child pornography were impressed onto them.

Secondly, § 2252A contains a jurisdictional element of the instrumentalities in the production of the image having, at one point, traveled in interstate commerce. However, the connection shown with this element is simply too attenuated to be sufficient to show an explicit connection between the activity being regulated (production, receipt and possession of child pornography) and any affect on interstate commerce. Practically everything is manufactured by implements traveling at some point in interstate commerce. This jurisdictional element of § 2252A is so overly broad, it provides no limits to Congress' Commerce Clause reach. Morrison, 529 U.S. at 611-12, citing Lopez, 514 U.S. at 562. Limiting Congress' reach by requiring the implements producing an electronic image to have traveled in interstate commerce does not limit Congress' reach at all.

C. The legislative history of § 2252A and the history of the statute itself, make no factual findings of any nexus between interstate commerce and the receipt of child pornography. Thus, the nexus between interstate commerce and the receipt of child pornography are attenuated.

Under Lopez and Morrison, a lack of specific congressional

factual findings on the nexus between interstate commerce and child pornography, while not dispositive, argue Congress has exceeded its constitutional limits in enacting § 2252A.

...we noted neither § 922(g) nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone. While Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, the existence of such findings may enable us to evaluate the legislative judgement that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye. (Morrison, 529 U.S. at 612) (Explaining the rationale of the Lopez decision; internal quotations and citations omitted, alterations in original).

D. § 2252A does not contain such factual findings.

Public Law 104-208, added § 2252A to the United States Code as the C.P.P.A. of 1996. Subsection one of the C.P.P.A. lists thirteen separate congressional findings; none of which make any finding related to the affect of child pornography on interstate commerce. Only two of the congressional findings obliquely mention any factors relating to the classic definition of commerce: Finding number ten, discussing trafficking in child pornography; and finding number twelve, discussing eliminating the market for sexual exploitable use of children. There is no finding setting out the breadth of the market for child pornography; the amount of money involved in the market; and how the C.P.P.A., quantitatively, would affect the market. Clearly, the main factual findings underpinning the C.P.P.A. involve eliminating the inherent danger to children in child

pornography; there is not any specific finding finding related to the economic affect of the C.P.P.A. on either the availability or the price of the offending material.

The legislative history of the C.P.P.A., also reflects the absence of any focus on the interstate commerce jurisdictional nexus required for Congress' assuming jurisdiction over child pornography. Nothing in the legislative history discusses the Commerce Clause as the basis for Congress' exercising general police jurisdiction over child pornography. Additionally, the five senators who saw fit to add their specific views of the C.P.P.A. to the legislative history did not mention the Commerce Clause's jurisdictional basis for the legislation. The senators expressly states the police purpose of the statute (Senator Grassley), expressed varying degrees of concern about the First Amendment problems inherent in criminalizing non-obscene material not actually containing minors (Senators Biden and Feingold), and disapproved of the mandatory sentencing scheme the C.P.P.A. imposed (Senators Simon and Kennedy); but no senator who saw fit to add to the legislative history of the C.P.P.A. saw fit to even discuss the interstate commerce nexus required to support Congress' legislating in this area of criminal law. Congress did not make any factual findings supporting any conclusions there is a non-attenuated nexus between child pornography and interstate commerce.

Reason for Granting the Petition

In our federal system, the federal government possesses only limited powers; the states and the people retain the remainder. The states have broad authority to enact legislation for the public good - what the courts have often called a "police power." Lopez, 514 U.S. at 567. The federal government, by contrast, has no such authority and "...can exercise only the powers granted to it,...." M'Culloch, 4 Wheat. at 405, including the power to make "...all laws which shall be necessary and proper for carrying into execution...." the enumerated power. Constitution of the United States of America (U.S. Const.), Article I, § 8, clause 18. For nearly two centuries it has been "clear" that lacking police power, "Congress cannot punish felonies generally." Cohens v. Virginia, 6 Wheat. 264, 428 (1821).

In other words, a criminal act committed wholly within a state:

...cannot be made an offense against the United States, unless it has some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. (United States v. Fox, 95 U.S. 670, 672 (1878)).

In Maxwell, the Eleventh Circuit held that applying § 2252A to wholly intrastate possession of child pornography exceeded Congress' power under the Interstate Commerce Clause. The Supreme Court vacated the Eleventh Circuit's decision in Maxwell and remanded the case and ordered reconsideration in light of the court's then most recent "commerce clause" decision, Raich. However, the Supreme Court never explicitly found that the

commerce clause provides Congress the authority to regulate local child pornography.

Closely related to these facts is the well-established principle that "...it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law over-rides...." the "...usual constitutional balance of federal and state power." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). If the federal government were to "...radically readjust [] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit..." about it. BFP v. Resolution Trust Corporation, 511 U.S. 531, 544 (1994) (alterations in original). In Bond v. United States, 189 L. Ed.2d 1, 13. (2014):

Or as explained by Justice Marshall, when legislation "affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." Bass, supra at 349, 92 S. Ct. 515, 30 L. Ed.2d 488 (1971).

In recent years the Supreme Court has given two seemingly conflicting opinions as to the reach of Congress' regulatory power under the Interstate Commerce Clause. These conflicting opinions have allowed the federal government to prosecute with a broad brush-stroke instead of with precision.

To allow Congress a freehand to regulate local crime on a theory of its aggregate effect on the national economy would give Congress a free hand to regulate any activity, since in the modern world, virtually all crimes have at least some attenuated impact on the national economy. Furthermore, it would transfer to Congress a general police power

that the Constitution denied the federal government and reposes to the United States. United States v. Ballinger, 312 F.3d 1264, 1271 (11th Cir. 2002) (quoting United States v. Morrison, 529 U.S. 598, 615, 618).

The C.P.P.A., when originally enacted by Congress, was intended to regulate economic activity. The C.P.P.A. has been amended numerous times since it was passed and now every case imaginable falls under the federal statute, even those cases that have no connection to an interstate marketplace. The Supreme Court has never allowed Congress to regulate non-economic-local crime, and in the case of child pornography every state in the union aggressively prosecutes this class of crime. Nowhere in the United States is the receipt, production, or possession of child pornography legal. To allow Congress to regulate conduct already denounced as criminal by the states violates the principles of federalism and would confer on the federal government powers which the framers denied the federal government and reposed the States.

Mr. Koontz believes the Supreme Court should rely on the following reasons to grant the writ of certiorari:

1. The decision of the United States Court of Appeals for the Fourth Circuit (the Fourth Circuit) is in conflict with the relevant decisions of other circuits. See Rules of the Supreme Court of the United States, Rule 10 (Rule 10), subsection (a). As previously demonstrated, many of the sister circuits have recognized the Commerce Clause does not confer jurisdiction over local-noneconomic activities; contrary to the

beliefs of the Fourth Circuit. The decisions of the Fourth Circuit and the District Court cannot stand.

2. The decision of the Fourth Circuit is in conflict with the relevant decisions of the Supreme Court. See Rule 10(c). As previously demonstrated, the Supreme Court has recognized the Commerce Clause does not confer jurisdiction over local-noneconomic activities; contrary to the beliefs of the Fourth Circuit. The decisions of the Fourth Circuit and the District Court cannot stand.

3. Additionally, Mr. Koontz has demonstrated the District Court violated his rights under the Due Process Clause by trying him without jurisdiction. Mr. Koontz's resulting conviction and sentence are also violations of the Due Process Clause. The decisions of the Fourth Circuit and the District Court cannot stand.

These are the reasons the Supreme Court should rely on to grant the Writ of Certiorari.

Conclusion

The Act of receipt alone, the only act for which Mr. Koontz was convicted, entailed no commercial transactions, no consumption of goods or services, and no necessary resort to the marketplace. The statute at issue has no clear economic purpose and the legislative history provides no meaningful evidence the local production, receipt, or possession of child pornography

substantially affects interstate commerce. The affect on interstate commerce must be measured in relation to the isolated conduct at issue, rather than as a nationwide aggregate, because the intrastate production, receipt, or possession of child pornography is a noneconomic, criminal activity.

The language of § 2252A only requires the offender affected interstate or foreign commerce by any means, including by computer, to be found guilty. The Supreme Court could not be clearer, the offense must substantially affect interstate commerce or it is unconstitutionally over broad.

§ 2252A makes no effort to control national trade by regulating intrastate activity. If commercial trade was involved then congress would not need its over-broad-unconstitutional-jurisdictional hook to assert its power over a traditional state concern. Congress, by enacting § 2252A, has violated the principles of federalism by regulating criminal conduct directly, even within a state's borders. Federal moral and social legislation under the Commerce Clause is constitutional if, and only if, it is a regulation of commercial marketplace. When Congress chooses to address a moral wrong through commercial regulation, it lacks the power insisting the regulation be applied wherever the wrong is found. It is the direct affect on interstate commerce, not the moral wrong that supports federal jurisdiction.

In closing, the conduct convicting Mr. Koontz is clearly punishable. The problem is it is not a punishable-federal

crime. To allow Congress to regulate conduct already punishable by all of the states, violates the principles of federalism. The federal regulation of this conduct confers on the federal government a police power the framers of the Constitution denied the federal government and left for the several states.

Mr. Koontz asks this Supreme Court to vacate his conviction because § 2252A is unconstitutional as it was applied to him; Mr. Koontz was not involved in a commercial marketplace, or a part of an economic enterprise. Or in the alternate, vacate the judgment of the United States Court of Appeals for the Fourth Circuit, because Mr. Koontz has stated a constitutional violation.

Respectfully submitted,

November __, 2017


Donald Koontz 29961-057
Federal Corrections Complex
P.O. Box 1000
Petersburg, VA. 23804-1000
Pro se