No.

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), this Court recently held that a federal criminal threats statute required a knowingly *mens rea* and thereby avoided the constitutional question of whether the First Amendment required a particular level of scienter. This case presents related questions in the context of 18 U.S.C. § 2251(a), a federal child pornography statute. The questions presented are:

1. Whether the child pornography offense set forth in 18 U.S.C. § 2251(a) should be interpreted as including at least a recklessly *mens rea* element regarding the status of the minor, thereby avoiding significant constitutional questions under the First and Fifth Amendments.

2. Whether, under the First Amendment, a child pornography offense must require at least a recklessly *mens rea* as to the status of the minor in order to distinguish wrongful conduct from constitutionally-protected conduct.

3. Whether a 15-year mandatory minimum sentence for a strict liability offense violates the Fifth Amendment.

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The Ninth Circuit issued a memorandum decision relying on circuit precedent—*United States v. U.S. Dist. Court (Kantor)*, 858 F.2d 534 (9th Cir. 1988)—to rule that 18 U.S.C. § 2251(a) does not "require the government to prove scienter[.]" Pet. App'x 1-4. In so ruling, the court of appeals held that *Kantor* is consistent with *Elonis v. United States*, 135 S. Ct. 2001 (2015).

JURISDICTION

The court of appeals affirmed petitioner's convictions on August 21, 2018. The court of appeals denied rehearing and rehearing *en banc* on November 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Title 18 U.S.C. § 2251 provides:

> (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[.]
>
> (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

OVERVIEW

As the presiding jurist, the Honorable Steven V. Wilson, United States District Judge, observed, this production of child pornography case is "atypical" and presents "an unusual factual situation." ER 23, 30.[1] It arises from an April 2011 California road trip by four young people: petitioner Antonio Dickerson, aged 21, co-defendant D'Antoine Thomas, aged 21, petitioner's girlfriend, Lorna Daniels, aged 19, and Thomas's girlfriend, C. Morrison (a pseudonym), aged 16.

[1]As used herein, "ER" refers to petitioner's Appellant's Excerpts of Record filed in the court of appeals, "Gx." and "Dx." to the Government's and petitioner's trial exhibits, respectively, and "CR" to the Clerk's Record of district court proceedings.

The jury's verdict established that Thomas and petitioner traveled with Daniels and Morrison from Oakland to Costa Mesa, photographed them in the nude, and posted their pictures on an internet site known for prostitution. It also established that petitioner reasonably believed Morrison to be at least 18 because the jury acquitted him on Count One, sexual trafficking of a minor, based on that defense.[2] Judge Wilson made the same assessment:

> [F]rankly, in looking at these women, [Morrison] and Daniels, and my sense was—I'm no expert on these things—but that they looked about the same age. I mean, it would be hard to say one was 16 and one was 19.

ER 23. The April 2011 photographs entered into evidence prove the same. *See* ER 158-59.

But for Count Two, the jury instructions did not require the Government to prove scienter with respect to the production of child pornography allegation. *See* ER 55; *see also Kantor*, 858 F.2d at 536-38. But *Kantor* cannot be reconciled with this Court's recent decision in *Elonis*, and this Court should clarify that the First and Fifth Amendments require reading into section 2251 a scienter element that the Government must prove beyond a reasonable doubt.

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[2]The district court's instruction for Count One required proof that Dickerson was at least negligent about Morrison's status as a minor. ER 47-50.

At a bare minimum, the Court should grant the petition to hold that petitioner's 15-year sentence premised on a strict liability conviction violates the Fifth Amendment.

STATEMENT OF THE CASE

On October 29, 2014, a federal grand jury indicted Thomas and petitioner with sex trafficking a minor, in violation of 18 U.S.C. § 1591(a)(1) (Count One), and production of child pornography involving the same minor, in violation of 18 U.S.C. § 2251(a) (Count Two). CR 1. (For ease of reference, we refer to the minor by the pseudonym Morrison.) On February 2, 2016, a grand jury returned a superseding indictment, re-charging petitoner and omitting Thomas, who had plead out. ER 160. Petitioner proceeded to trial on February 16, and the jury returned unanimous verdicts on February 18. *See* ER 85-87; CR 120.

The jury acquitted petitioner on Count One based upon the district court's instruction requiring the Government to prove that petitioner was negligent, *viz*., whether he knew, or recklessly disregarded, or had sufficient occasion to observe, that Morrison was a minor. *See* ER 47, 85-87. In contrast, the jury convicted on Count Two, where the district court's instructions required conviction even had petitioner reasonably believed Morrison to be 18, and without *any* scienter element for the Government to prove beyond a reasonable doubt.

On May 2, the district court sentenced Dickerson to the mandatory-minimum term of 15 years imprisonment. *See* ER 1, 31; CR 162.

STATEMENT OF FACTS

A. The Government's case.

Morrison testified that she was age 16 during the April 2011 trip to Costa Mesa. CR 181 at 23. Morrison began prostituting for Thomas one year earlier, in June 2010. CR 181 at 26-29. Morrison loved Thomas, and had his name tattooed on her wrist. CR 181 at 90-91.[3] At the outset of her prostitution for Thomas, Morrison was arrested in Reno, incarcerated at juvenile hall, and reported her arrest to Thomas. CR 181 at 29-30. Morrison then falsely told Thomas she was 17 years old, because that age "didn't seem as bad[.]" CR 181 at 31.

Morrison was released in August, and claimed she started prostituting for petitioner in December 2010, before returning to work for Thomas in April 2011. CR 181 at 34-37, 48.[4]

Later in April 2011, petitioner, Thomas, Morrison, and Daniels traveled from Oakland to Costa Mesa, California. CR 181 at 47-48, 58, 80-81. Morrison testified that the trip's purpose was to make money from her and Daniels's

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[3]Morrison also bore an array of stars tattoo on her chest. *See* ER 159.

[4]Petitioner denied that Morrison ever prostituted for him. CR 183 at 51.

prostitution. CR 181 at 59. After they checked into a Costa Mesa motel, Morrison claimed that petitioner took nude photographs of her and Daniels, and then posted them on Redbook, a (now defunct) website hosting advertisements for prostitution. CR 181 at 64-69. The next day, while Thomas and petitioner were in Los Angeles, *see* CR 183 at 35-37, Morrison and Daniels were arrested while streetwalking. CR 181 at 70-71.

Morrison's account was impeached severely. Both the Government and petitioner established that Morrison repeatedly lied to law enforcement and to the federal prosecutors, including by falsely implicating men other than Thomas as her pimp, falsely denying Thomas's involvement, and falsely implicating petitioner for conduct undertaken by her boyfriend Thomas. CR 181 at 42-45, 75-78, 80-88. As Judge Wilson observed, Morrison's account "was all over the place." ER 25-26.

Sacramento County Sheriff's Detective John Sydow testified about a search warrant he executed at Petitioner's Sacramento residence on April 28, 2011. CR 181 at 119.[5] The officers recovered a cell phone and laptop containing evidence of the Costa Mesa trip, including nude photographs of Daniels and Morrison, and

[5]Law enforcement never searched Thomas's residence. CR 183 at 8.

video recordings taken in the Costa Mesa hotel room. CR 181 at 14-15, 144-47.[6] Some of the nude photographs were posted in Redbook ads for with "Armani Cash," Daniels's alias. CR 181 at 35, 145. None of the ads containing nude photographs were ads associated with Morrison. CR 181 at 149.

B. Petitioner's defense.

Petitioner testified and denied the allegations. He defended against the charges with three main points: (1) he was unaware of Morrison's minority status, and reasonably believed she was 19 or 20; (2) Morrison testified untruthfully because she was in love with and trying to protect Thomas; and (3) the four traveled to Costa Mesa merely as a fun trip to Southern California. *See* CR 183 at 22-27, 42, 108; *see also* ER 122-23, 30.[7]

Petitioner testified that the only reason Morrison came was because she was Thomas's girlfriend. CR 183 at 54. Before the trip, petitioner had never met Morrison, and he denied her claim that they knew each other previously. CR 183 at 27. Petitioner did not know Morrison was a minor, and based on her appearance,

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[6]The video recordings supported the allegation that Thomas and petitioner were posting ads to prostitute Daniels and Morrison. *See* Gx. 88. A GPS device recorded the rental car's movements. *See* CR 181 at 16; Gx. 12-16.

[7]Petitioner also testified that he had also worked as a prostitute, and posted his own ads on Redbook; he introduced copies of those ads to corroborate his testimony. *See* CR 183 at 18-19; Dx. 1. Petitioner admitted his girlfriend Daniels was also a prostitute, but he denied acting as her pimp. CR 183 at 24-25, 74.

the way she talked, acted, and dressed, and the fact that she was Thomas's girlfriend, he thought Morrison was Daniels's age, 19 or 20. CR 183 at 27, 42. Petitioner never discovered her true age. CR 183 at 41.

ARGUMENT

I. The child pornography offense set forth in 18 U.S.C. § 2251(a) should be interpreted as including at least a recklessly *mens rea* element regarding the status of the minor, thereby avoiding significant constitutional questions under the First and Fifth Amendments.

A. There is confusion and conflict in the lower courts.

Section 2251(a) provides:

> 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)[.]

18 U.S.C. § 2251(a).

The Ninth Circuit has held that the language in section 2251 does not require a defendant to have any scienter regarding the age of an individual involved in the pornography. It also held that the First Amendment requires a "very narrow" defense which allows a defendant to "avoid conviction only by showing, by clear

and convincing evidence, that he did not know, and could not reasonably have learned, that the actor or actress was under 18 years of age." *Kantor*, 868 F.2d at 543 (footnote omitted).

Every circuit to have considered *Kantor* has rejected it, holding that the statute contains no *mens rea* element or defense whatsoever. *See United States v. Fletcher*, 634 F.3d 395 (7th Cir. 2011); *United States v. Humphrey*, 608 F.3d 955 (6th Cir. 2010); *United States v. Pliego*, 578 F.3d 938, 943-44 (8th Cir. 2009); *United States v. Malloy*, 568 F.3d 166, 171-76 (4th Cir. 2009); *United States v. Deverso*, 518 F.3d 1250, 1257-58 (11th Cir. 2008). Judge Arnold, on the other hand, has suggested that *Kantor*'s unusual allocation of the burden of proof may be constitutionally insufficient under the First Amendment. *See Gilmour v. Rogerson*, 117 F.3d 368, 375 (8th Cir. 1997) (Arnold, J., dissenting).

Petitioner contends that the confusion among the lower courts is due to the fact that they have ignored several of this Court's cases decided after *Kantor* and have also failed to consider adequately the First and Fifth Amendment concerns articulated later in this petition. This Court's decisions in *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) and *Elonis v. United States*, 135 S. Ct. 2001 (2015) establish that the plain language used in section 2251 requires at least a recklessly *mens rea* as to the age of the minor as an element of the offense. Given the conflict and confusion in the lower courts, this Court should grant review. Indeed, review is particularly

important because the standards articulated by the lower courts are wrong, as discussed below.

B. *Elonis* and *Leocal* support a recklessly *mens rea*.

The "first step" in First Amendment analysis is "to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). This Court has stated, in dicta, that section 2251 does not contain an actual knowledge requirement regarding the age of the minor. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.5 (1994).

The fact that Congress may not have intended an *actual knowledge* element, however, does not necessarily mean that section 2251 dispenses with *all mens rea* regarding the age of the minor. "Knowingly" is not the only level of scienter; lesser levels of *mens rea* exist, *e.g.*, criminal recklessness and negligence. And, the fact that a statute fails to contain a term such as "knowingly," or "recklessly," or "negligently," does not mean that no such *mens rea* element exists. *See e.g.*, *Staples v. United States*, 513 U.S. 600, 605 (1994) ("silence . . . does not necessarily suggest that Congress intended to dispense with a conventional mens rea element"). "On the contrary, [this Court] must construe the statute in light of the background rules of the common law in which the requirement of *some* mens rea for a crime is firmly embedded." *Id.* (emphasis added).

This Court's decision in *Elonis* confirms that section 2251(a) requires at least a recklessly *mens rea* element, particularly when considering First Amendment principles. In *Elonis*, 135 S. Ct. at 2004, the issue was whether 18 U.S.C. § 875(c), which proscribes sending a communication containing any threat, required the defendant to be aware of the threatening nature of the communication, and, if not, whether the First Amendment required such a showing. Although the Court could not identify "*any* indication of a particular mental state requirement in the text of section 875(c)[,]" *id*. at 2008-09 (emphasis added), the Court held that the statute nonetheless required proof of a scienter element.

Elonis explained that just because the statute did not specify any required mental state, that did not mean it dispensed with a scienter:

> The fact that the statute does not specify *any* required mental state, however, does not mean that none exists. We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.' This rule of construction reflects a basic principle that 'wrongdoing must be conscious to be criminal.'

Id. at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952) (emphasis added). The Court thus directed that:

> [w]hen interpreting federal criminal statutes that are silent on the required mental state, we read into the statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct.

Id. at 2010 (internal quotations and citation omitted). *Elonis* then emphasized the *requirement* that this Court read a scienter element into section 2251 when it noted:

> The 'presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct.'

Id. at 2011 (quoting *X-Citement Video*, 513 U.S. at 72.)

And because the presumption that a scienter requirement applies to each element that makes the conduct "wrongful," *Elonis* made clear that "negligence [was] not sufficient to support a conviction under [the statute] contrary to the view of nine Courts of Appeals." *Id.* at 2013.

Concurring in part, Justice Alito explained that a reckless *mens rea* was the appropriate standard under a statutory construction analysis and would suffice for purposes of the First Amendment. *Id.* at 2014-17. Justice Alito agreed that the presumption of some *mens rea* should apply to the statute. *Id.* at 2014-15. He also agreed that the presumption should apply to a form of scienter greater than negligence. *Id.* But he concluded that "when Congress does not specify a *mens rea* in a criminal statute, we have no justification for inferring that anything more than recklessness is needed." *Id.* at 2015. With respect to the First Amendment, he reasoned: "We have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their

falsity. Requiring proof of recklessness is similarly sufficient here." *Id.* at 2017 (citations omitted).

The reasoning in both the majority opinion and Justice Alito's concurring opinion in *Elonis* support petitioner's contention that section 2251(a) requires at least a recklessly *mens rea.* Section 2251(a) punishes an individual who "uses . . . any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" 18 U.S.C. § 2251. Although the statute does not specifically set forth a *mens rea* as to the minor's status, this Court should presume that some form of *mens rea* is required as an element of the offense. Indeed, what separates the proscribed conduct from legal and constitutionally protected pornography under the First Amendment is the status of the minor. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Accordingly, the statute should be construed as requiring at least a reckless *mens rea* element of the offense as to the minor's status, particularly as recklessness is the minimum scienter required under the First Amendment.

The text of section 2251(a) confirms this construction, and, of course, the starting point for any statutory interpretation is the plain language used in the statute. *See Staples*, 511 U.S. at 605. Section 2251(a) punishes an individual who "*uses* . . . any minor to engage in . . . sexually explicit conduct[.]" 18 U.S.C. § 2251(a) (emphasis added). In *Leocal*, 543 U.S. at 9, this Court explained that the

verb "uses" suggests at least a reckless *mens rea*. The word "uses" requires "active employment" and "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9 (citing *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001)).[8] Accordingly, not only does *Elonis* establish at least a reckless *mens rea* element of the offense, but the actual language in section 2251(a) confirms that *mens rea*.

While this Court need go no further than section 2251(a)'s plain language to determine that the statute includes a reckless *mens rea*, other principles of statutory construction confirm this interpretation, including the rule of lenity, *see, e.g.*, *Liparota v. United States*, 471 U.S. 419, 427 (1985) (relying on the rule of lenity in construing *mens rea*), and the doctrine of constitutional doubt. *See e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Jones v. United States*, 529 U.S. 848, 858 (2000). As this Court had recognized:

> a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress.

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[8]Section 2251(a) contains other verbs in addition to "uses," including "employs, . . . persuades, induces, entices, or coerces[.]" 18 U.S.C. § 2251(a). This Court has noted that "uses" and "employs" should be construed similarly in this context, and there is no reason to think that the other verbs—"persuades, induces, entices, or coerces"—should be treated differently. *See Leocal*, 543 U.S. at 9.

X-Citement Video, Inc., 513 U.S. at 78. Such a reading of section 2251 is not plainly contrary to the intent of Congress, and any other interpretation would run afoul of the First and Fifth Amendments. The statute should thus be construed as having at least a reckless scienter element of the offense. *See United States v. Alvarez*, 132 S. Ct. 2537, 2552-53 (2012) (Breyer, J., concurring).

In sum, under cases like *Elonis* and *Leocal*, section 2251(a) requires at least a reckless *mens rea* element of the offense as a matter of statutory construction. If the statute maintained any lesser *mens rea*, it would violate the First and Fifth Amendments, as discussed below. This Court should grant this petition to resolve the confusion in the lower courts and to correct the flawed statutory construction adopted by most of the lower courts.

II. Under the First Amendment, a child pornography offense must require at least a recklessly *mens rea* as to the status of the minor in order to distinguish wrongful conduct from constitutionally-protected conduct.

Although the majority in *Elonis* declined to reach the First Amendment question, this Court's precedent establishes that the First Amendment requires at least a recklessly *mens rea* in this context. In 1982, this Court decided *New York v. Ferber*, 458 U.S. 747 (1982), the landmark child pornography case. At issue in *Ferber* was a New York law that prohibited the "knowing" use of a child under 16 in a sexual performance; the statute set forth a "Class D" felony with a maximum of seven years imprisonment. *Id.* at 751 and n.3. The central holding of *Ferber*

was that, under the First Amendment, a state could criminalize conduct related to child pornography, even if the pornography was not obscene. This Court also held that, under the First Amendment, "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Id.* at 765 (citing *Smith v. California*, 361 U.S. 147, (1959); *Hamling v. United States*, 418 U.S. 87 (1974)). The New York law was held constitutional because the statute "expressly include[d] a scienter requirement." *Id.*

Several years later, this Court decided *Osborne v. Ohio*, 495 U.S. 103 (1990), where the defendant was convicted under an Ohio law that proscribed the possession of child pornography. This Court concluded that, unlike obscenity, *see Stanley v. Georgia*, 394 U.S. 557 (1969), the mere possession of child pornography could be outlawed consistent with the First Amendment. This Court also addressed the defendant's challenge regarding the scienter requirement of the statute. The defendant contended that the statute was unconstitutional because, on its face, it lacked a *mens rea* requirement. This Court held:

> The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of [the statute] based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent specification. The statute on its face lacks a mens rea requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that

> prohibitions on child pornography include some element of scienter.

Osborne, 495 U.S. at 115 (citations omitted). *Osborne* thus suggests that a reckless *mens rea* is required.

In *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), this Court explained that "a rule that would impose strict liability on a publisher for unprotected speech would have an undoubted 'chilling' effect on speech that does have constitutional value." As a result, this Court emphasized that the First Amendment protects individuals from making defamatory statements about public figures unless the statement was made "with knowledge that it was false or with *reckless* disregard of whether it was false or not." *Falwell*, 485 U.S. at 52 (emphasis added). If, in the context of the First Amendment, a defendant cannot be held civilly liable unless he engaged in reckless conduct, it is hard to imagine that a defendant could be held criminally liable without reckless conduct.

Not only does this Court's First Amendment jurisprudence require a reckless *mens rea*, but it also requires the burden of proof to be placed on the government. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990), this Court emphasized that the burden of proof must be placed on the plaintiff when activity implicating the First Amendment is at issue. Once again, if, in the civil context, the First Amendment prohibits the placement of a burden of proof on the defendant in order

not to chill protected activity, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-78 (1986), it is hard to imagine that a burden could be placed on a criminal defendant under the First Amendment. Furthermore, *Ferber* stated that, under the First Amendment, "criminal responsibility may not be imposed without some *element* of scienter on the part of the defendant." *Ferber*, 458 U.S. at 765 (emphasis added). An "element" of the offense must be proved by the prosecution beyond a reasonable doubt. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Even if the Ninth Circuit standard set forth in *Kantor* were correct to treat scienter as an "affirmative defense," this Court's precedent reveals that placing a clear and convincing evidence standard on the defendant is flawed. In *Jacobson v. United States*, 503 U.S. 540, 549 (1992), this Court held, in a child pornography case, that the government had the burden of disproving the defense of entrapment beyond a reasonable doubt. Although reciting the evils of child pornography, *id.* at 548, this Court did not construct a special rule placing the burden on the defendant in such cases. Likewise, this Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996) suggests that placing an unusual *clear and convincing* evidence burden of proof on a criminal defendant is unconstitutional.

In sum, this Court should grant this petition to reach the First Amendment question avoided in *Elonis*. This Court's precedent demonstrates that the First

Amendment requires at least a recklessly *mens rea* element in this context. The contrary conclusion reached by the lower courts should be corrected.

III. A 15-year mandatory minimum sentence for a strict liability offense violates the Fifth Amendment.

A. Courts need guidance on the Fifth Amendment question.

Actus non facit reum nisi mens sit rea – the act does not make a person guilty unless the mind be also guilty. Despite this long-established maxim, modern legislatures have created a variety of strict liability crimes: crimes where the prosecution does not need to prove a culpable scienter as an element of the offense. The final question presented in this petition asks this Court to clarify if and when the Fifth Amendment restrains legislatures in *punishing* such strict liability crimes.

In *Lambert v. California*, 355 U.S. 225 (1957), this Court struck down a criminal statute because its *mens rea* requirements did not satisfy the Due Process Clause. The defendant was convicted of violating a local ordinance that required convicted felons to register and had attempted to defend the charge by arguing that she did not know of the registration requirement, but that defense was refused. *Id.* at 227. This Court explained that lawmakers have latitude "to declare an offense and to exclude elements of knowledge and diligence from its definition" but warned that "due process places some limits on [their] exercise." *Id.* at 228. This Court noted that the defendant was subject to "heavy criminal penalties"—she was

fined $250 fine and placed on probation for three years, *viz.*, nothing compared to the mandatory minimum 15-year sentence in this case—and held that application of the statute violated the Due Process Clause. *Id.* at 229-30.

More recently, in *Staples*, 511 U.S. at 602, this Court considered a federal statute prohibiting any person from possessing a machinegun that was not properly registered, and addressed whether the Government was required to prove that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." In holding that the statute did require such knowledge, this Court emphasized the "harsh penalty" of up to 10 years' imprisonment for the offense. *Id.* at 616. The Court reasoned that "the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary." *Id.* at 616. The Court quoted Blackstone to further explain, "[i]n a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no mens rea would seem incongruous." *Id.* at 616-17. This Court even suggested that all felonies may require a culpable *mens rea*:

> Close adherence to the early cases . . . might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense.

Id. at 618.

The Court did not, however, explicitly set forth the constitutional limitations on strict liability penalties.

The lower courts have generally recognized that the Due Process Clause places *some* limits on the legislature's authority to impose punishments for strict liability crimes but have further suggested that the limits are unclear. The Tenth Circuit has stated that "due process suggests some constitutional limits on the penalties contained in strict liability crimes." *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n.4 (10th Cir. 2010). Likewise, the Fifth Circuit has recognized that "[t]he Supreme Court has indicated that, under some circumstances, the imposition of criminal liability without mens rea violates due process." *United States v. Garrett*, 984 F.2d 1402, 1409 n.15 (5th Cir. 1993); *accord United States v. Burwell*, 690 F.3d 500, 533 n.7 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).[9]

But in the decades since *Lambert*, the courts have struggled with the constitutional limits on strict liability penalties. Judge Weinstein has noted that "[t]he more recent [Supreme Court] opinions have not clarified the picture. This body of law has left unsettled the question of what role the mens rea principle plays in our constitutional law." *United States v. Cordoba-Hincapie*, 825 F. Supp.

[9]Courts have looked to the Due Process Clause rather than the Eighth Amendment's prohibition on cruel and unusual punishments.

485, 505 (E.D.N.Y. 1993). Likewise, "[a]cademic commentators are in general agreement that this collection of Supreme Court decisions give the mens rea principle uncertain constitutional status." *Id.* at 515 (citing John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1374 (1979)); *see also* Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828 (1999).

More recently, the unsettled nature of this important constitutional question arose in the context of litigation in Florida addressing an amendment to the State's drug statutes which relieved the prosecution from proving that a defendant knew he was possessing a controlled substance in order to convict him of a crime. Under the Florida regime, a defendant could only avoid conviction if he could prove that he did not know he was possessing a controlled substance as an affirmative defense in which he must overcome a "permissive presumption" of culpable knowledge. Florida's drug laws carry significant felony penalties, including up to 15 years for first offenders, and a minimum of 10 and up to 30 years for habitual offenders; accordingly, a federal district court granted a defendant's habeas corpus petition challenging the statute under the Due Process Clause, reasoning that "[n]o strict liability statute carrying penalties of th[is] magnitude . . . has ever been upheld under federal law." *Shelton v. Secretary, Department of Corrections*, 802 F. Supp. 2d 1289, 1300 (M.D. Fla. 2011).

The Eleventh Circuit, however, reversed the district court's decision, applying the highly deferential AEDPA standard of review governing habeas corpus cases arising from state courts. The Eleventh Circuit held that there was no *clearly established* Supreme Court precedent on this question and explained:

> The Supreme Court has acknowledged that its work in this area has only just begun, noting twice that no court 'has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.'

Shelton v. Secretary, Department of Corrections, 691 F.3d 1348, 1354 (11th Cir. 2012).

In sum, the lower courts and commentators have indicated that guidance is needed on the important constitutional question raised by this petition. Indeed, as set forth below, there has been a conflict in the lower courts since at least the 1980s as to the constitutional limits on strict liability penalties.

B. The lower courts are divided.

The Third and Sixth Circuits reached conflicting conclusions regarding the constitutional limits for strict liability penalties in *United States v. Wulff,* 758 F.2d 1121 (6th Cir. 1985) and *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986). In *Wulff* and *Engler*, the courts considered a federal statute proscribing the sale of migratory bird parts. The statute did not contain a scienter element and set forth

both a misdemeanor provision and a separate felony offense punishable by two-years imprisonment and a $2,000 fine.

The Sixth Circuit held that the felony provision violated the Due Process Clause. It explained: "[t]he elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125. The Sixth Circuit reasoned that the felony punishment was not relatively small and "irreparably damages one's reputation." *Id.* at 1125. It therefore concluded:

> [I]n order to be convicted of a felony . . . Congress must require the prosecution to prove the defendant acted with some degree of scienter. Otherwise, a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation. This, in our opinion, the Constitution does not allow.

Id.

In *Engler*, the Third Circuit reached a different result in a divided opinion. The lead opinion observed that the "Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be." *Engler*, 806 F.2d at 433. The majority reasoned that the differences between misdemeanor penalties, for which strict liability is allowed, and the two-year felony at issue were, "for due process purposes, *de minimis*." *Id.* The opinion explained:

> To decide cases on constitutional law, to be sure, is to draw lines and to make judgment calls. But where differences between misdemeanor and felony penalties are as close as they are here, we feel that the analysis takes place on a very slippery slope[.]

Id. at 435. The *Engler* majority noted that courts had approved of other strict liability crimes with greater penalties and concluded that the due process test should depend upon whether strict liability is being imposed "for omissions which are not 'per se blameworthy'[.]" *Id.*[10]

Judge Higginbotham concurred in the result. *Id.* at 436-41. He believed that the statute should be read as containing a scienter requirement and disagreed with the majority's due process analysis. He explained that the difference between misdemeanor and felony penalties are significant, and the latter were not justified under the Due Process Clause for a strict liability offense. *Id.* at 440-41. He also reasoned that there is a difference, for due process purposes, as to the propriety of "the penalty imposed for violation of the" statute and whether a defendant can "be penalized at all." *Id.* at 441. In other words, while the Due Process Clause may allow *conviction* without proof of scienter, it may not allow the potential *penalties* that the offense entails. Accordingly, he agreed with the majority's conclusion to

[10]The cases cited in *Engler* where strict liability offenses carried greater penalties, such as *United States v. Freed*, 401 U.S. 601 (1971), were not on point for several reasons, including the fact that they did not involve due process claims.

reverse the dismissal of the indictment but believed that the defendant should be sentenced under the misdemeanor provision. *Id.*

The conflict between *Wulff* and *Engler* offers a good example of the confusion in the lower courts concerning the question presented. The time has come to resolve the confusion. Despite criticism, legislatures continue to enact and increase mandatory minimum penalties. *See, e.g., In re Ellis*, 356 F.3d 1198, 1220 (9th Cir. 2004) (*en banc*) (Kozinski, J., concurring) ("I am aware of no respectable support for mandatory minimums . . . . In fact, our most distinguished jurists and commentators have spoken out against the Procrustean regime of mandatory minimum sentences, and in favor of sentences that reflect the informed discretion of the trial judge.").[11]

This Court should now address this important question and clarify the *mens rea* requirements for such draconian provisions.

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[11]Section 2251 is an example of this escalation. Originally, the maximum penalty was 10 years. 18 U.S.C. § 2251(c) (1977). In 1996, Congress increased the penalties to a minimum of 10 and a maximum of 20 years. 18 U.S.C. § 2251 (1996). In 2003, Congress again increased the penalties to their current status: a minimum of 15 and a maximum of 30 years. 18 U.S.C. § 2251(e). Section 2251(e) also contains recidivist provisions that increase the minimum to 25 and the maximum to 50 years if the defendant has a qualifying prior conviction; two prior qualifying convictions raise the minimum to 35 years and the maximum to life imprisonment.

C. This case is an excellent vehicle to decide the question.

This case presents an excellent vehicle to decide the constitutional question presented. As an initial matter, unlike the Florida litigation in *Shelton,* this case does not involve the highly deferential AEDPA standard of review that applies to habeas corpus cases arising from state courts. Also, the penalty set forth in section 2251(e) is severe; the mandatory minimum penalty at issue starkly presents the constitutional question. In other words, unlike perhaps the subtle distinction between a misdemeanor with a one-year maximum and a felony with a two or three-year maximum, the statute here carries a 15-year *minimum*. *See Shelton*, 802 F. Supp. 2d at 1301 ("while the Third and Sixth Circuits disagree over whether the outer bounds of due process lie at a one or two-year strict liability sentence, . . . the Court has not located any precedent applying federal law to sustain a penalty of fifteen years, thirty years, and/or life imprisonment for a strict liability offense").

Indeed, the *Shelton* court reasoned that the penalties associated with the Florida strict liability drug statutes, which were not as severe as the ones involved here, were well beyond anything that has ever been approved for strict liability offenses. *Id.* at 1300-02. The court explained that "the fifteen-year maximum sentence that the statute imposes is not 'relatively small' even when considered without regard to the enhancement Petitioner faced, and it cannot reasonably be

contended otherwise." *Id.* at 1302. Here, section 2251 sets forth a 15-year mandatory *minimum*. Similarly, the *Shelton* court reasoned:

> The label of 'convicted felon' combined with a proclamation that the defendant is so vile that he must be separated from society for fifteen to thirty years, creates irreparable damage to the defendant's reputation and standing in the community. This social stigma precludes, for example, the ability of a convicted felon to reside in any neighborhood of his choosing or to obtain certain employment.

Id. Here, the felony section 2251 conviction, with a sentencing range of 15-30 years and potential lifetime supervised release (with registration as a sex offender), *see* 18 U.S.C. § 3583(k), carry even more baggage and stigma than the drug offense involved in *Shelton*. The 15-year minimum set forth in section 2251(e) is one of the harshest mandatory penalties found in the federal criminal code, harsher than large-scale drug trafficking, discharging firearms during serious crimes, and kidnapping during a bank robbery, all of which obviously have *mens rea* elements of the offense. *See* 18 U.S.C. §§ 924(c), 2113(e); 21 U.S.C. § 841(b). Furthermore, there is no "safety-valve" provision to circumvent this extraordinary minimum sentence. *Compare* 18 U.S.C. § 3553(f).

Petitioner is not aware of any other strict liability child pornography offense covering the range of conduct proscribed by section 2251(a) and that carries penalties of the magnitude set forth in section 2251(e). In this regard, it is

important to recognize that section 2251 is not a narrowly-tailored statute. Despite the fact that Congress originally thought that only depictions involving minors under the age of 16 should be proscribed, *see* 18 U.S.C. § 2253 (1977), and despite the fact that the majority of states set the relevant age of consent at 16 or younger, *see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247 (2002), Congress has expanded section 2251's reach to depictions involving minors under the age of 18. *See* 18 U.S.C. § 2256(1).[12] Likewise, the statute's definition of "sexually explicit conduct" is quite broad and includes "simulated" sexual acts. 18 U.S.C. § 2256(2)(A). Furthermore, section 2251 even applies to someone who "induces" a minor to "assist" in the production of *adult* pornography. 18 U.S.C. § 2251(a). The breadth of conduct covered by the statute, the interpretation of which this Court can address *de novo* on direct review, as well as the extraordinary minimum penalty at issue, make this case an excellent vehicle for review.

[12]Congress amended section 2251 as part of the Child Protect Act of 1984, changing the definition of a minor from an individual under the age of 16 to an individual under the age of 18. *See* 18 U.S.C. § 2255 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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