No. _____

IN THE

Supreme Court of the United States

RICHARD ALAN KUCERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title 18 U.S.C. § 2251(a) makes it a crime, punishable by a mandatory minimum of 15 years' imprisonment, to use a minor to produce a visual depiction of sexually explicit conduct. The statute contains no scienter element as to the victim's age. Non-obscene sexually explicit depictions of adults are protected by the First Amendment; the victim's minority is therefore the fact that separates constitutionally protected expression from a serious felony. The courts of appeals are openly and intractably divided over whether the First Amendment permits a producer to be convicted and imprisoned on a strict-liability basis as to age, or instead requires that the producer be allowed to raise a reasonable, good-faith mistake-of-age defense. The Ninth Circuit holds that the First Amendment requires the defense. The Eighth Circuit—joined by the Fourth, Fifth, Seventh, and Eleventh Circuits—holds that it does not.

The question presented is:

> Whether the First Amendment requires that a defendant prosecuted under 18 U.S.C. § 2251(a) for the production of child pornography be permitted to raise a reasonable, good-faith mistake-of-age defense.

PARTIES TO THE PROCEEDING

Petitioner Richard Alan Kucera was the defendant-appellant below.

Respondent the United States of America was the plaintiff-appellee below.

RELATED PROCEEDINGS

- *United States v. Kucera*, No. 25-3180 (8th Cir.) (judgment entered Aug. 13, 2026).

- *United States v. Kucera*, No. 3:23-CR-30083 (D.S.D.) (judgment of conviction and sentence entered Oct. 22, 2025).

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William Clark, *The Journals of the Lewis and Clark Expedition* (Gary E. Moulton ed., 2005) 10-11

Richard Alan Kucera petitions for a writ of certiorari to review the judgment of the Eighth Circuit below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *United States v. Kucera*, 186 F.4th 1054 (8th Cir. 2026) and reproduced in the Appendix. The district court's oral rulings on the challenged jury instructions are unreported and reproduced in the Appendix.

JURISDICTION

The court of appeals entered judgment on August 13, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1), which provides that a case in a court of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party. This petition is timely filed within 90 days of the entry of judgment. U.S. Sup. Ct. R. 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]."

Title 18 U.S.C. § 2251(a) states:

> 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.

STATEMENT OF THE CASE

1. Facts and proceedings below. Ivy Rose Heron, a co-defendant, introduced petitioner Richard Kucera to two individuals, E.B. and A.W. Petitioner paid each to allow him to produce images and to engage in sexual activity. *United States v. Kucera*, 186 F.4th 1054, 1058 (8th Cir. 2026). A federal grand jury in the District of South Dakota charged petitioner with, among other counts, two counts of producing child pornography in violation of 18 U.S.C. § 2251(a) and (e). *Id.*

Throughout the case—in his post-arrest interview, at trial, and at sentencing—petitioner maintained that he believed each was an adult based on the all-but undisputed

affirmative representations made by the co-defendant and by the two minors themselves, representing that the minors were over the age of eighteen. *Id.* at 1058-1059.

At trial, there was significant evidence introduced that both alleged victims told Kucera and others they were over the age of eighteen years of age. Kucera's statement presented as evidence to the jury was that he was repeatedly told by the co-defendant and the minor victims they were over the age of eighteen. See R. Doc. 184, Ex. 41, pgs. 19, 38. One of the two minor victims, A.W., admitted she told Kucera she was over eighteen years of age. Trial Tr. 240, 253. Indeed, she further stated that she was told by Heron that Kucera only wanted to have relationships with individuals over the age of eighteen, and that she needed to act that age and tell Kucera she was 18. Trial Ex. Q. The other minor victim, E.B., publicly presented herself as a high school graduate and twenty years old. Trial Tr. 125, See R. Doc. 184, Trial Ex. A. Ivy Rose Heron, the co-defendant, a government witness and mother of E.B.'s boyfriend at the time of the alleged offense, even testified that she was under the impression E.B. was over eighteen based on what E.B. told her and that she "regularly represent[ed] to people that she was over the age of 18." Trial Tr. 42. The record is replete with evidence on this issue.

Indeed, the Government admitted that there is substantial evidence of the same in its closing, but argued it didn't matter given the district court's instructions, finishing its closing argument as follows:

> The defense here is Kooch -- Kooch is the victim. These girls all lied and said they were 18, they conspired against me with Ivy. You've probably been wondering all along, is there some instruction about that as long as someone -- the victim, Ivy Heron, or someone else says the victim was 18 or maybe someone put it on Facebook the victim is 18, then the Defendant's not guilty. Well, you've seen all instructions now. There's no instruction like that. The legal standard is not magic words are, I'm 18. Not at all.

Trial Tr. 529:23-530:5. The Government was right as the law is interpreted in the Eighth Circuit and how the jury was instructed. The district court's instructions, based on Eighth Circuit precedent and its model jury instructions, prevented the jury from even considering whether Kucera knew or recklessly disregarded that the minor victims were

minors, or whether he reasonably believed them to be adults.

This evidence at trial was compelling enough that it resulted in a special writing being filed by Eighth Circuit Judge Kelly where she opined that "the facts of this case are different from 'most circumstances,' and it could be one of the "rare instances" where a defendant acted in an objectively reasonable manner with respect to verifying the alleged victim is an adult." *Kucera*, 186 F.4th at 1064 (Kelly, J., concurring in part and concurring in the judgment).

At trial, petitioner asked the district court to instruct the jury that the Government was required to prove that he knew or recklessly disregarded that his victims were minors, or, in the alternative, to permit him to raise a reasonable mistake-of-age defense. Petitioner proposed a jury instruction consistent with Ninth Circuit Model Jury Instruction 20.24, which relies on *United States v. U.S. Dist. Ct.*, 858 F.2d 534, 540-42 (9th Cir. 1988). *See* Model Crim. Jury Instr. 9th Cir. 20.24 (2026). The district court denied the request and instructed the jury consistent with the Eighth Circuit model jury instruction, which relies on *United States v. Wilson*, 565 F.3d 1059 (8th Cir. 2009) and *United States v. Pliego*, 578 F.3d 938 (8th Cir. 2009). This

instruction not only fails to recognize a reasonable mistake-of-age defense but instructs the jury that the government "is not required to prove that the defendant knew that (minor's name) was under the age of eighteen." Model Crim. Jury Instr. 8th Cir. 6.18.2251(A) (2025).

2. Statutory background. Section 2251(a) prohibits using, employing, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. 18 U.S.C. § 2251(a). A violation carries a mandatory minimum term of 15 years' imprisonment. The statute contains two mental-state terms—an "intent" that the minor engage in sexually explicit conduct, and a requirement that the defendant "know[] or ha[ve] reason to know" that the depiction will travel in interstate commerce—but no explicit scienter requirement directed to the victim's age. 186 F.4th at 1062-1063.

The absence of an age-scienter element is consequential because it defines the boundary of the First Amendment. Non-obscene, sexually explicit depictions of adults are constitutionally protected expression; only the depiction of a *minor* removes that protection. *New York v. Ferber*, 458 U.S. 747 (1982). As this Court has explained, "the age of

the performers is the crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 73, 115 S. Ct. 464, 469, 130 L. Ed. 2d 372 (1994)). A producer's misjudgment of that single fact is therefore the line between protected speech and a felony with a mandatory minimum 15-year sentence.

3. The decision below. The Eighth Circuit affirmed Kucera's conviction. The two-member majority of the panel reaffirmed Eighth Circuit precedent that section 2251(a) contains no scienter requirement as to a minor victim's age, and it rejected petitioner's argument that a mistake-of-age defense is constitutionally required. *See generally Kucera*, 186 F.4th at 1058-1063. The court acknowledged that petitioner relied on the Ninth Circuit's decision holding "that the First Amendment requires as much," but held that argument "squarely foreclosed" by circuit precedent. *Id*. at 1063. The panel grounded its holding on the view that producers stand in the position of statutory rapists, for whom age has traditionally been a matter of strict liability, and that § 2251(a) was enacted "in the context of a longstanding, near-universal tradition of strict liability as to the victim's age in child sex crimes." *Id.* However, Judge Kelly wrote in her opinion concurring in part, and concurring in the judgment, that though the panel was bound by prior panel

precedent, if it were not, she would invite further briefing on whether the Eighth Circuit should recognize a mistake of age defense to a charge under § 2251(a), reasoning that:

> If not for this precedent, however, I would seek briefing from the parties on the legal viability of such a defense. *See United States v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 858 F.2d 534, 538–40, 542–43 (9th Cir. 1988). As our sister circuit has recognized, an affirmative defense such as this "would not seriously disrupt the effective operation of section 2251(a), or materially hamper the vital effort to protect minors from sexual abuse" because the "defense would be entirely implausible under most circumstances." *Id.* at 542. But the facts of this case are different from "most circumstances," and it could be one of the "rare instances" where a defendant acted in an objectively reasonable manner with respect to verifying the alleged victim is an adult. *Id.* at 542–43.

Id. at 1063-1064 (Kelly, J., concurring in part and concurring in the judgment).

REASONS FOR GRANTING THE PETITION

Kucera is from Winner, South Dakota, near the banks of the Missouri River where Lewis and Clark explored South Dakota in 1804. William Clark, Journal Entry (September 15, 1804), The Journals of the Lewis and Clark Expedition (Gary E. Moulton ed., 2005), *http://lewisandclarkjournals.unl.edu*. South Dakota being in the Eighth Circuit, Kucera was foreclosed from presenting a defense based on reasonable mistake-of-age, and was convicted of and sentenced to the 15-year mandatory minimum sentence for his 2251(a) convictions. Had Kucera lived a mere three hundred miles away in South Dakota's neighboring state of Montana, also on the banks of the Missouri River and visited by Lewis and Clark, being in the Ninth Circuit, Kucera would have been afforded the ability to present a reasonable mistake-of-age defense, and very likely may have been acquitted of the 2251(a) offenses, despite being charged pursuant to the exact same statute. A few hundred miles ought not determine whether someone is guilty of a federal crime carrying a fifteen-year mandatory minimum.

Review is warranted because a United States court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and "has decided an important question of federal law that has not been, but should be, settled by this Court." U.S. Sup. Ct. R. 10. Both criteria are satisfied here. The courts of appeals have divided—openly and by their own admission—over a recurring, constitutionally freighted question that determines whether producers who reasonably and in good faith misjudge a minor's age may be imprisoned for what would otherwise be protected expression under the First Amendment, in particular when the minors and a co-defendant are involved in a fraudulent scheme to hide the truth from the producer. This conflict has persisted for over three decades. Only this Court can resolve the conflict.

I. The Courts Of Appeals Are Openly Divided Over Whether The First Amendment Requires A Reasonable Mistake-Of-Age Defense To §2251(a).

The conflict is not latent or inferential. The courts on both sides have expressly recognized it. The Ninth Circuit requires the defense. In *United States v. U.S. District Court* (*Kantor*), the Ninth Circuit held that although "[t]he

defendant's awareness of the subject's minority is not an element of the offense" under § 2251(a), the First Amendment nonetheless compels reading a reasonable mistake-of-age defense into the statute. 858 F.2d 534 (9th Cir. 1988). Drawing on *Smith v. California* and *Ferber*, the Court reasoned that because the age of the subject defines the boundary between speech that is constitutionally protected and speech that is not, the First Amendment "does not permit the imposition of criminal sanctions on the basis of strict liability where doing so would seriously chill protected speech." *Id.* at 540. The Court concluded that "imposition of major criminal sanctions on these defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech." *Id.* at 541. To avoid that constitutional infirmity, the Court engrafted a narrow defense: a defendant may avoid conviction only by showing, by clear and convincing evidence, that he did not know, and could not reasonably have learned, that the performer was under eighteen. *Id.* at 543. As noted above, this has led to the Circuit adopting and using of a model jury instruction regarding the defense. *See* Model Crim. Jury Instr. 9th Cir. 20.24 (2026).

The Eighth Circuit, and at least four other circuits, reject the defense. In the decision below, the Eighth Circuit held that the First

Amendment does not require a mistake-of-age defense and that petitioner's contrary argument was "squarely foreclosed" by *United States v. Wilson*. *Kucera*, 186 F.4th at 1063. *Wilson* itself squarely confronted—and rejected—the Ninth Circuit's holding, concluding that the First Amendment does not require a reasonable-mistake-of-age defense to charges of producing child pornography in violation of section 2251(a). *United States v. Wilson*, 565 F.3d 1059, (8th Cir. 2009). Critically, *Wilson* did not disguise the division. It expressly stated that "[o]ther circuits have split as to whether the First Amendment requires reading a reasonable-mistake-of-age defense into the statute," contrasting the Ninth Circuit's decision "that imposition of major criminal sanctions on these defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech" with the Eleventh Circuit's holding that the Constitution does not mandate a mistake of age defense under § 2251 and the Fifth Circuit's holding "that nothing requires reading [a] scienter requirement into section 2251(a)." *United States v. Wilson,* 565 F.3d 1059, 1068 (8th Cir. 2009).

The First Circuit has likewise catalogued the divide, observing that "the majority of courts that have addressed the issue have held that knowledge of the age of the victim is not

required to convict a principal under the statute"—citing the Seventh, Eighth, Fourth, Eleventh, and Second Circuits—while identifying the Ninth Circuit as the lone contrary authority holding "that . . . the First Amendment requires reading a reasonable mistake of age affirmative defense into the statute." *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015).

The conflict is entrenched and will not resolve itself. The Ninth Circuit's decision has stood for almost four decades. The decision below reaffirmed the opposing rule with full awareness of the split and the majority declined to follow the Ninth Circuit, and, given Judge Kelly's special writing, indicates that judicial opinions within the Eighth Circuit even differ on the correct answer to the question. A federal producer's constitutional entitlement to defend on the basis of a reasonable, good-faith mistake of age thus turns entirely on the circuit in which the prosecution is brought. That is precisely the geographic disuniformity in the application of federal criminal and constitutional law that this Court's certiorari jurisdiction exists to correct. U.S. Sup. Ct. R. 10.

II. The Question Is Important, Recurring, And Implicates This Court's Reasoning In X-Citement Video.

The question implicates core First Amendment principles. Because non-obscene depictions of adults are protected expression, the age element is "the crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). This Court has already recognized that a child-pornography statute "completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts," and it construed 18 U.S.C. § 2252 to require knowledge of age precisely to avoid those doubts. *Id.* at 78. The circuits rejecting a mistake-of-age defense rest almost entirely on a single footnote in *X-Citement Video*, which observed in dicta that "producers are more conveniently able to ascertain the age of performers" and that it therefore "makes sense to impose the risk of error on producers." *Id.* at 76 n.5. Whether that footnote—addressed to a distribution statute and to the distinct question of statutory construction—also resolves the *constitutional* question whether a producer may be imprisoned on a strict-liability theory for protected speech is a matter this Court has never decided. The division below reflects

genuine uncertainty about the reach of this Court's own precedent.

The question is important and recurring. Section 2251(a) is among the most frequently charged federal child-exploitation offenses and carries a 15-year mandatory minimum. The mistake-of-age question arises whenever a defendant contends he reasonably believed a youthful-looking performer was an adult—a recurring scenario in both the adult-content industry and in cases such as the one at hand for personal use, like this one and like *Wilson*, involving deception about age. The unresolved conflict leaves producers, prosecutors, and district courts across the country without a uniform rule on a question of constitutional dimension.

Developments in this Court's scienter jurisprudence sharpen the need for review. In *Rehaif v. United States*, 588 U.S. 225 (2019), this Court reaffirmed the strong presumption in favor of scienter for the elements that separate innocent from wrongful conduct. The court below distinguished *Rehaif* on the ground that § 2251(a) rests on a "longstanding, near-universal tradition of strict liability as to the victim's age in child sex crimes." *Kucera*, 186 F.4th at 1063. Whether the analogy to statutory rape can bear that weight in the First Amendment setting—where the regulated

conduct is presumptively protected expression—is a question that has divided the lower courts and warrants this Court's resolution, now that the issue has percolated for over three decades.

III. This Case Is An Ideal Vehicle To Resolve The Conflict.

This case cleanly presents the question. Petitioner preserved the issue by requesting both an age-scienter instruction and a mistake-of-age defense, and the district court denied both while acknowledging the circuit split. The court of appeals squarely decided the constitutional question, holding the defense foreclosed, despite reservation from at least one judge in doing so. *Kucera*, 186 F.4th at 1063. The question was outcome-determinative: petitioner consistently maintained a good-faith belief that the minors were adults based on their own affirmative representations, so a properly instructed jury permitted to consider a reasonable mistake-of-age defense could have reached a different verdict on the production counts, as explicitly recognized in Judge Kelly's concurring opinion, where she recognized that "the facts of this case are different from 'most circumstances,' and it could be one of the 'rare instances' where a defendant acted in an objectively reasonable manner with respect to verifying the alleged victim is an adult." *Id.* at

1064. There are no antecedent or alternative grounds that would prevent this Court from reaching the question. And because the Eighth Circuit's opinion expressly declined to follow the Ninth Circuit, the case squarely pits the two lines of authority against one another.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 5, 2026.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED AUGUST 13, 2026

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 25-3180

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD ALAN KUCERA,

Defendant-Appellant.

Submitted: June 10, 2026
Filed: August 13, 2026

Appeal from United States District Court for the
District of South Dakota - Central

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

GRUENDER, Circuit Judge.

A jury found Richard Kucera guilty of two counts of sex trafficking and aiding and abetting the sex trafficking of a child, *see* 18 U.S.C. §§ 1591(a)(1), (a)(2), 2, and two

counts of production of child pornography, *see* 18 U.S.C. § 2251(a), (e). Kucera challenges the denial of his motion to suppress and certain jury instructions. We affirm.

I. Background

A co-defendant introduced Richard Kucera to two minor girls, E.B. and A.W. Kucera paid each girl money to let him produce pornographic images of her and to engage in sexual activity with him. After being indicted by a federal grand jury, Kucera was arrested and taken to the Tripp County Sheriff's Office, where he was interviewed by Special Agents Adam Topping and Dave Keith of the Federal Bureau of Investigation (FBI). The beginning of the interview included the following conversation:

> **Kucera:** Only thing, I guess, should I have a lawyer?
>
> **Topping:** Yeah, we'll get to that once . . .
>
> **Kucera:** I mean . . .
>
> **Topping:** What's that?
>
> **Kucera:** Even starting right now? I guess I'm not under . . . I . . .
>
> **Topping:** That's what we're going to go over right now.
>
> **Kucera:** I got too many damn TV shows.
>
> **Topping:** That's what we're going to go over right now.
>
> **Keith:** He'll read it right from the sheet for you.

Shortly thereafter, Special Agent Topping read Kucera his *Miranda* rights, *see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), from the FBI's standard Advice of Rights form. When asked, Kucera indicated that he had no questions about his rights and that he was willing to talk to the agents. He then signed the Advice of Rights form, which states that the suspect understands his rights and is "willing to answer questions without a lawyer present." He spoke with the agents for almost an hour and made various incriminating statements, including that he had paid various women and girls to engage in sexual activity with him and to allow him to take pornographic photos and videos of them. In that interview, as well as at trial and sentencing, Kucera maintained that he believed each girl was an adult because of affirmative representations from his co-defendant and the girls.

A grand jury later returned a superseding indictment charging Kucera with three counts of sex trafficking and aiding and abetting the sex trafficking of a child and three counts of production of child pornography. Kucera moved to suppress his post-arrest statements to the agents, but the district court[1] denied the motion. It held that he had made a voluntary, knowing, and intelligent waiver of his *Miranda* rights and that his question "should I have a lawyer?" was not an unequivocal invocation of his right to counsel.

---

1. The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota, adopting the Report and Recommendation of the Honorable Mark A. Moreno, United States Magistrate Judge for the District of South Dakota.

At trial, Kucera challenged the Government's proposed jury instructions on two grounds that are relevant to this appeal. First, Kucera challenged the Government's proposed jury instructions that, even if Kucera did not know or recklessly disregard the fact that his victims were minors, he could still be convicted of sex trafficking under 18 U.S.C. § 1591, if he "had a reasonable opportunity to observe" the victims. *See* 18 U.S.C. § 1591(c) (providing that the Government need not prove defendant knew or recklessly disregarded a minor's age if "the defendant had a reasonable opportunity to observe" the minor). Kucera argued that this instruction was a constructive amendment of the indictment and that the statutory phrase "reasonable opportunity to observe" was unconstitutionally vague. Second, Kucera challenged the Government's proposed jury instructions that the prosecution was not required to prove that Kucera knew his victims were minors for the child pornography charges under 18 U.S.C. § 2251(a). Kucera argued that this was erroneous because § 2251 requires the Government to prove that he acted with a *mens rea* of knowledge or reckless disregard as to his victims' ages or, in the alternative, permits an affirmative mistake-of-age defense. The district court[2] denied both motions and gave, effectively, the challenged instructions.

The jury convicted Kucera of two of the sex trafficking counts and two of the child pornography counts. It acquitted him of the two remaining counts. The district court sentenced Kucera to 300 months' imprisonment, and he appeals.

---

2. The Honorable Eric C. Schulte, United States District Judge for the District of South Dakota, to whom this case was reassigned.

II. Discussion

Kucera contends that the district court erred (1) in denying his motion to suppress, (2) when instructing the jury on the sex trafficking counts, and (3) when instructing the jury on the child pornography counts. We address each argument in turn.

A. Motion to Suppress

Kucera argues that his post-arrest statements should have been suppressed because he unambiguously invoked his right to counsel and did not knowingly, intelligently, and voluntarily waive his *Miranda* rights.

"We review the district court's factual findings concerning whether a defendant waived his *Miranda* rights under the clearly erroneous standard. We review the ultimate determination of whether waiver occurred, however, as a question of law subject to de novo review."[3] *United States v. Winn*, 969 F.2d 642, 643 (8th Cir. 1992) (citation modified). Law enforcement officers are not

3. Some of our post-*Winn* decisions have implied that we review the legal question of whether a defendant waived his Miranda rights for clear error. *See, e.g.*, *United States v. Ferrer-Montoya*, 483 F.3d 565, 569 (8th Cir. 2007). Regardless, "when faced with conflicting panel opinions, the earliest opinion must be followed as it should have controlled the subsequent panels that created the conflict." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (citation modified). For the sake of clarity, we reiterate that *Winn* reflects the proper standard for evaluating a *Miranda* waiver claim.

permitted to continue questioning a suspect who has requested counsel. *Miranda*, 384 U.S. at 474, 86 S.Ct. 1602. But officers are not required to cease questioning or "ask clarifying questions" unless a suspect has made "an unambiguous or unequivocal" request for counsel. *Davis v. United States*, 512 U.S. 452, 459, 461-62, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). To determine whether a statement is unambiguous, we ask whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459, 114 S.Ct. 2350.

Here, the relevant facts are undisputed, and we agree with the district court that Kucera did not unambiguously invoke his right to counsel when he asked "should I have a lawyer? . . . Even starting right now?" In *United States v. Havlik*, we held that the statement "I don't have a lawyer. I guess I need to get one, don't I?" was "insufficient to trigger an obligation to cease questioning." 710 F.3d 818, 821 (8th Cir. 2013). We noted that "a reasonable officer could have understood [the suspect's] response to be a request for advice about whether to seek counsel, rather than a request for counsel." *Id.* at 822. So too here. The most natural interpretation of Kucera's words is that he was asking the agents for advice about whether he should have a lawyer. Such a question does not unequivocally invoke the right to counsel under our precedent. *See id.* at 821-22; *see also United States v. Mohr*, 772 F.3d 1143, 1145-46 (8th Cir. 2014) (finding no unequivocal invocation of the right to counsel when the defendant asked "Should I get a lawyer at this time? . . . I think I should get one.").

Kucera also asserts that any waiver of his *Miranda* rights was not voluntary, knowing, and intelligent. But this argument fares no better. We review whether the accused knowingly and voluntarily waived his rights *de novo*. *United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008). Our inquiry into whether a suspect voluntarily, knowingly, and intelligently waived his *Miranda* rights has "two distinct dimensions." *United States v. Rooney*, 63 F.4th 1160, 1168 (8th Cir. 2023) (citation modified). "First, the waiver must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* "Second, the suspect must have waived his rights with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

We disagree with Kucera's assertion that he was misled by the agents and consequently did not understand his right to have a lawyer present. The agents responded to Kucera's question about whether he should have a lawyer by saying that they were "going to go over [it] right now" and would "read it right from the sheet for" him. They then read him his rights, including his right to remain silent, to consult with a lawyer before the officers asked him any questions, and to have a lawyer with him during the interview. The fact that the agents did not give Kucera advice about whether he should speak with a lawyer is far removed from the sort of "coercive" activity that makes a confession involuntary, particularly given that Kucera told the agents that he had no questions, signed a form agreeing that he understood his rights, and agreed to speak with the agents. *See United States v.*

Vinton, 631 F.3d 476, 482 (8th Cir. 2011); *see also United States v. Roberts*, 975 F.3d 709, 718 (8th Cir. 2020) ("Absent improper threats, use of physical force, or intimidation tactics, psychological pressure almost never renders a confession involuntary."). Nor do we see any error in the district court's conclusion that, under the totality of the circumstances, Kucera waived his rights knowingly and intelligently. *See Rooney*, 63 F.4th at 1168.

We therefore conclude that the district court did not err in denying Kucera's motion to suppress his statements.

B. Section 1591 Jury Instructions

We next address Kucera's challenges to the jury instructions relating to the sex trafficking counts under § 1591. To begin, Kucera argues that the district court constructively amended the indictment when it instructed the jury that the Government need not prove that Kucera knew or recklessly disregarded the minors' ages if he had a "reasonable opportunity to observe" them.

"A constructive amendment occurs when the essential elements of the offense as charged in the indictment are altered in such a manner—often through the evidence presented at trial or the jury instructions—that the jury is allowed to convict the defendant of an offense different from or in addition to the offenses charged in the indictment." *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007). "It is unclear" in this circuit whether constructive amendment claims are reviewed *de novo* or for an abuse of discretion, but we need not resolve

the question here because we would reach the same result under either standard. *See United States v. Chopra*, 67 F.4th 913, 915 (8th Cir. 2023).

The relevant counts of the superseding indictment take the following form:

> On or about [alleged time period], in the District of South Dakota and elsewhere, in and affecting interstate and foreign commerce, Richard Alan Kucera and [co-defendant], aiding and abetting each other, did knowingly and intentionally recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, and solicit, by any means, a person, to wit: [minor's name], knowing and recklessly disregarding that [minor's name] had not attained the age of 18 years, and having had a reasonable opportunity to observe [minor's name], and knowing and recklessly disregarding that means of force, threats of force, fraud, and coercion would be used to cause [minor's name] to engage in a commercial sex act, and did benefit, financially and by receiving anything of value from participation in a venture engaged in such acts, all in violation of 18 U.S.C. §§ 1591(a)(1), 1591(a)(2), and 2.

These counts are phrased in the conjunctive; they charge that Kucera (1) knew and recklessly disregarded the minors' ages, *and* (2) had a reasonable opportunity to observe the minors, *and* (3) knew and recklessly disregarded that force, threats of force, fraud, and

coercion would be used. This contrasts with § 1591, which does not require that a defendant know or recklessly disregard a minor's age where the defendant "had a reasonable opportunity to observe" the minor. *See* 18 U.S.C. § 1591(c). The district court, following the statute, instructed the jury that it need not find that Kucera knew or recklessly disregarded the victims' ages if it found he had a reasonable opportunity to observe the victims. This instruction was not error. "An indictment may be phrased in the conjunctive, when the statute and jury instructions are phrased in the disjunctive, without creating a constructive amendment of the indictment." *United States v. Spencer*, 592 F.3d 866, 873-74 (8th Cir. 2010); *see also Griffin v. United States*, 502 U.S. 46, 56-57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

Kucera's contrary arguments are without merit. Specifically, he asserts that the indictment was unclear as to whether the phrase "having had a reasonable opportunity to observe" relieves the Government of its burden to prove he knew or had reckless disregard of a minor's age. But "[a]n indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted." *United States v. Bowie*, 618 F.3d 802, 817 (8th Cir. 2010). The indictment, reasonably construed, supports both the charged offense and the related jury instructions.

Kucera also highlights that the indictment did not cite 1591(c), the provision containing the reasonable opportunity to observe language. But this did not render the indictment misleading. "An error in, or the omission of, a statute's citation in the body of an indictment is not grounds for a conviction's reversal unless the error or omission misleads the defendant to his prejudice." *United States v. Buchanan*, 574 F.3d 554, 566 (8th Cir. 2009). The out-of-circuit cases Kucera relies on are inapposite because they addressed indictments that entirely neglected to include the "reasonable opportunity to observe" language. *See United States v. Lockhart*, 844 F.3d 501, 515 (5th Cir. 2016); *United States v. Davis*, 854 F.3d 601, 604-05 (9th Cir. 2017).

Alternatively, Kucera argues that § 1591(c) is unconstitutionally vague as applied to him. We review whether a penal statute is void for vagueness *de novo*. *United States v. Lazzaro*, 129 F.4th 514, 525 (8th Cir. 2025). We have previously rejected this precise challenge to § 1591(c). *See United States v. Koech*, 992 F.3d 686, 690 (8th Cir. 2021) ("The term reasonable opportunity to observe provides a person of ordinary intelligence fair notice of what is prohibited, is subject to common understanding, and is typical of standards that juries are asked to consider." (citation modified)). Kucera fails to meaningfully distinguish his case from *Koech*, which also involved a minor who had allegedly lied about her age during an in-person sexual encounter. *See id.* at 689. Kucera plainly "had a reasonable opportunity to observe" his victims and therefore, having "engaged in conduct that is clearly proscribed," he "cannot complain of the vagueness of the law." *See id.* at 690.

C. Section 2251(a) Jury Instructions

Finally, we address Kucera's challenges to the jury instructions related to the child pornography charges under § 2251(a). Kucera first argues that the district court erred by instructing the jury that the Government need not prove that Kucera knew his victims were minors. In relevant part, § 2251(a) criminalizes:

> entic[ing] . . . 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 . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . 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. . . .

Kucera argues that the provision requires a *mens rea* of knowledge or at least reckless disregard as to the victims' ages. "We review questions of statutory interpretation *de novo*." *United States v. Moreira-Bravo*, 56 F.4th 568, 570 (8th Cir. 2022).

We have previously recognized that "section 2251(a) contains no scienter requirement" regarding a minor victim's age. *United States v. Wilson*, 565 F.3d 1059, 1066 (8th Cir. 2009); *see also United States v. Nosley*, 62 F.4th 1120, 1129 (8th Cir. 2023). Nonetheless, Kucera

contends that in *Rehaif v. United States*, 588 U.S. 225, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019), the Supreme Court impliedly overruled *Wilson*. This argument fails; § 2251(a) bears no resemblance to the statutory scheme at issue in *Rehaif*. *Rehaif* addressed 18 U.S.C. § 924(a)(2), which made it an offense to "knowingly violate" several provisions of federal firearms law, including § 922(g)(5), which prohibited aliens illegally in the United States from possessing a firearm. *Id.* at 227, 139 S.Ct. 2191. The Court held that § 924(a)(2)'s "knowingly" element extended to § 922(g)(5), thus requiring the Government to prove that the defendant *knew* he was an alien unlawfully in the country. *Id.* Here, however, § 2251(a) has only two *mens rea* terms, neither of which are related to the age of the minor. The first requires "intent" that the minor engage in sexually explicit conduct for the purpose of producing visual depictions of that conduct. The second requires that the defendant "know[] or ha[ve] reason to know" that the visual depiction will implicate interstate commerce. Neither of these terms can plausibly be read to apply to the preceding and unconnected word "minor."

Rehaif also rested heavily on "the ordinary presumption" in favor of scienter in federal criminal statutes. *Id.* at 229, 139 S.Ct. 2191. That reasoning does not apply with equal force to statutes like § 2251(a), which were enacted "in the context of a longstanding, near-universal tradition of strict liability as to the victim's age in child sex crimes." *See Moreira-Bravo*, 56 F.4th at 572-77 (holding, post-*Rehaif*, that statute prohibiting the transportation of minors with intent to engage in criminal sexual activity does not require *mens rea* as to age). Likewise, Kucera's

argument that a *mens rea* requirement is needed to distinguish innocent from wrongful conduct fails for the same reason. *See Wilson*, 565 F.3d at 1068-69 (analogizing § 2251(a) to strict liability for statutory rape). We therefore see no serious argument that *Rehaif* impliedly overruled *Wilson*.

Alternatively, Kucera suggests that we should permit mistake of age to be raised as an affirmative defense, citing a Ninth Circuit decision holding that the First Amendment requires as much. *See United States v. U.S. Dist. Ct.*, 858 F.2d 534, 540-42 (9th Cir. 1988). But we rejected exactly this argument in *Wilson*, 565 F.3d at 1067-69, and Kucera points to nothing in *Rehaif* or any relevant, intervening Supreme Court decision to the contrary. His contention "is therefore squarely foreclosed by our precedent." *See United States v. Thurber*, 106 F.4th 814, 832 (8th Cir. 2024).

III. Conclusion

For the foregoing reasons, we affirm.

KELLY, Circuit Judge, concurring in part, and concurring in the judgment.

I concur in the court's opinion but write separately because I would affirm the § 2251(a) conviction on slightly different grounds. Our precedent establishes there is no scienter requirement with regard to an alleged victim's age to convict under this statute. *See, e.g.*, *United States v. Nosley*, 62 F.4th 1120, 1129 (8th Cir. 2023) (first citing *United States v. Wilson*, 565 F.3d 1059, 1066–69 (8th Cir.

2009); and then citing *United States v. Moreira-Bravo*, 56 F.4th 568, 573–74 (8th Cir. 2022)). This longstanding refusal to apply the "ordinary presumption" in favor of scienter differentiates our interpretation of § 2251(a), which we have characterized as a strict liability statute, from the reasoning behind *Rehaif*. *See Rehaif v. United States*, 588 U.S. 225, 229, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019); *Moreira-Bravo*, 56 F.4th at 572–77 (recognizing a "tradition of strict liability as to the victim's age in child sex crimes" like violations of § 2251(a)). I agree we are bound by this precedent. *See Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

As the court notes, we have also expressly declined to recognize a mistake of age defense to a charge under § 2251(a). *See United States v. Thurber*, 106 F.4th 814, 832 (8th Cir. 2024) (quoting *Wilson*, 565 F.3d at 1068–69). If not for this precedent, however, I would seek briefing from the parties on the legal viability of such a defense. *See United States v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 858 F.2d 534, 538–40, 542–43 (9th Cir. 1988). As our sister circuit has recognized, an affirmative defense such as this "would not seriously disrupt the effective operation of section 2251(a), or materially hamper the vital effort to protect minors from sexual abuse" because the "defense would be entirely implausible under most circumstances." *Id.* at 542. But the facts of this case are different from "most circumstances," and it could be one of the "rare instances" where a defendant acted in an objectively reasonable manner with respect to verifying the alleged victim is an adult. *Id.* at 542–43.

APPENDIX B — EXCERPTS OF TRANSCRIPT JURY TRIAL, USA VS KUCERA, VOLUME IV

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

3:23-CR-30083-ECS

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

RICHARD ALAN KUCERA,

Defendant.

Pierre, South Dakota
Courtroom 1
July 18, 2025
8:13 a.m.

Volume IV of IV
(Pages 451 - 570)

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ERIC C. SCHULTE,
UNITED STATES DISTRICT JUDGE

* * *

Appendix B

[458]THE COURT: Thank you, Mr. Albertson.

The Court spent extensive time looking at this and reviewing Document 143, which is a motion in limine to require the Government -- it's styled as a motion to require the Government to prove the Defendant knew or recklessly disregarded the age of the alleged minor victims under the 2251, production of child pornography charges relating to Counts 3, 4 and 6.

Mr. Bell, in his filing, does note to his credit, that the Eighth Circuit has taken a position contrary to what he is advocating here. And that is addressed in *United States v. Wilson*, 565 F.3d 105, an Eighth Circuit decision from 2009, which says that mistake of age on these charges is not a defense.

The Court conducted research on this and did look at the Supreme Court authority cited by Mr. Bell. At the end of day, I'm denying this motion because I believe the Eighth Circuit precedent is binding.

Second, I did reference *United States v. Bravo*, 56 F.4th 568 which is an Eighth Circuit case from 2022. Mr. Bell is correct it looks at another statute, but it does specifically talk about Wilson in a [459]positive light. So there's a reference to both 2251 and 1591 charges there and how the Eighth Circuit courts should view them.

So for that reason, I'm denying Document 143, the motion in limine, because Eighth Circuit precedent controls on this Court. It's recent, I think that's the right

ruling, and I've tailored my draft jury instructions given to you in that regard.

* * *

[470]THE COURT: Thank you, Mr. Bell. I'm not going to give this instruction for the reasons I've previously stated. We've analyzed this under the context in the motions in limine and talked about it at the pretrial.

Just in summary, I believe there's controlling Eighth Circuit case law that is contrary to what the Ninth Circuit does in handling these and that's to Mr. Bell's credit acknowledged in his briefing. I read that. I'm going to incorporate my prior discussion on this topic, and I'm not going to give this instruction.

* * *

APPENDIX C — RELEVANT DISTRICT COURT JURY INSTRUCTIONS

INSTRUCTION NO. 10

The crime of production of child pornography, as charged in Count 3 of the Superseding Indictment, has four elements, which are:

***One*, that on or about between November 1, 2020, and June 1, 2021, in the District of South Dakota and elsewhere, (name redacted) was under the age of 18 years old;**

The United States is not required to prove that the defendant knew that (name redacted) was under the age of 18 years old.

***Two*, the defendant knowingly employed, used, persuaded, induced, enticed, and coerced (name redacted) to engage in sexually explicit conduct;**

A person is "used" if they are photographed or videotaped.

The term "sexually explicit conduct" is defined in Instruction No. 11.

***Three*, the defendant acted with the purpose of producing visual depictions of such conduct; and**

The term "visual depiction" is defined in Instruction No. 12.

***Four*,**

a. the defendant knew or had reason to know that such visual depiction would be transported in interstate commerce or foreign commerce; or

b. the visual depiction was produced using materials that had been mailed, shipped, or transported in interstate commerce or foreign commerce by any means, including by computer or cellular phone.

The terms "interstate commerce," "foreign commerce," and "commerce" are defined in Instruction No. 8.

If all of these elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged; otherwise, you must find the defendant not guilty of this crime.

INSTRUCTION NO. 13

The crime of production of child pornography, as charged in Count 4 of the Superseding Indictment, has four elements, which are:

***One*, that on or about between May 1, 2021, and July 31, 2021, in the District of South Dakota and elsewhere, (name redacted) was under the age of 18 years old;**

Appendix C

The United States is not required to prove that the defendant knew that (name redacted) was under the age of 18 years old.

***Two*, the defendant knowingly employed, used, persuaded, induced, enticed, and coerced (name redacted) to engage in sexually explicit conduct;**

A person is "used" if they are photographed or videotaped.

The term "sexually explicit conduct" is defined in Instruction No. 11.

***Three*, the defendant acted with the purpose of producing visual depictions of such conduct; and**

The term "visual depiction" is defined in Instruction No. 12.

***Four*,**

a. the defendant knew or had reason to know that such visual depiction would be transported in interstate commerce or foreign commerce; or

b. the visual depiction was produced using materials that had been mailed, shipped, or transported in interstate commerce or foreign commerce by any means, including by computer or cellular phone.

Appendix C

> The terms "interstate commerce," "foreign commerce," and "commerce" are defined in Instruction No. 8.

If all of these elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged; otherwise, you must find the defendant not guilty of this crime.

APPENDIX D — EIGHTH CIRCUIT MODEL INSTRUCTION 6.18.2551(A)

6.18.2251(A) SEXUAL EXPLOITATION OF A CHILD BY A PERSON OTHER THAN PARENT OR GUARDIAN (18 U.S.C. § 2251(A))

The crime of sexual exploitation of a child, as charged in [Count _____ of] the Indictment, has four elements, which are:

One, at the time alleged, (name of minor) was under the age of eighteen years;

Two, the defendant knowingly:

a) [employed] [used] [persuaded] [induced] [enticed] [coerced] (name of minor) to engage in sexually explicit conduct; or

b) had (name of minor) assist another person or persons to engage in sexually explicit conduct; or

c) transported (name of minor) [across state lines] [in foreign commerce] [in any Territory or Possession of the United States] with the intent that (name of minor) engage in sexually explicit conduct;

Three, the defendant acted with the purpose of [producing a visual depiction of such conduct] [transmitting a live visual depiction of such conduct]; and

Appendix D

Four, a) the defendant knew or had reason to know that such visual depiction [*e.g.*, video tape] would be [mailed] [transported across state lines or in foreign commerce]; or

b) the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce by any means, including by computer or cellular phone; or

c) the visual depiction was actually [mailed or transported across state lines or in] [transported or transmitted using any means or facility of interstate or] foreign commerce.

A person is "used" if they are photographed or videotaped.

"Sexually explicit conduct" means actual or simulated sexual intercourse, including [genital-genital] [oral-genital] [anal-genital] [oral-anal], whether between persons of the same or opposite sex]; [bestiality] [masturbation] [sadistic or masochistic abuse] [lascivious exhibition of the genitals or pubic area of any person].

The term "visual depiction" includes [a] [any] [photograph] [film] [video] [picture] [or] [computer or computer-generated image or picture], whether made or produced by electronic, mechanical, or other means. [It includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image.]

Appendix D

An item is "produced" if it is produced, directed, manufactured, issued, published, advertised, created, made, or is in any other way brought into being by the involvement of an individual participating in the recording of child pornography.

The [government] [prosecution] is not required to prove that the defendant knew that (minor's name) was under the age of eighteen.

[Insert paragraph describing the [government's] [prosecution's] burden of proof. *See* Instruction 3.09, *supra*.]

APPENDIX E — NINTH CIRCUIT MODEL INSTRUCTION 20.24

20.24 Sexual Exploitation of Child—Defense of Reasonable Belief of Age

It is a defense to a charge of sexual exploitation of a child that the defendant did not know, and could not reasonably have learned, that the child was under 18 years of age.

The defendant has the burden of proving by clear and convincing evidence—that is, that it is highly probable—that the defendant did not know and could not reasonably have learned that [*name of victim*] was under 18 years of age. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

If you find by clear and convincing evidence that the defendant did not know and could not reasonably have learned that the child was under 18 years of age, you must find the defendant not guilty of the charge of sexual exploitation of a child.

APPENDIX F — RELEVANT STATUTORY PROVISION

18 U.S.C. §2251

§2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in 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, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct shall be punished as provided under subsection (d) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign

commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (d).

(2) The circumstance referred to in paragraph (1) is that—

(A) such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported in interstate or foreign commerce by any means including by computer or mailed.

(d) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both, but if such person has one prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 30 years, but if such person has 2 or more prior convictions under this chapter, chapter 109A, or chapter 117, 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 30 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 any term of years or for life.