U. S. Department of Justice

Civil Division

Washington, D.C. 20530

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September 22, 2003

VIA OVERNIGHT DELIVERY

Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
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Re: United States v. Marin Alliance for Medical Marijuana, No. 02-16335
United States v. Oakland Cannabis Buyers' Cooperative, No. 02-16534
United States v. Ukiah Cannabis Buyer's Club, No. 02-16715
Wo/Men's Alliance for Medical Marijuana v. United States, No. 03-15062

Dear Ms. Catterson:

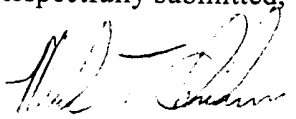
Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, enclosed please find the original and four copies of this letter and the attached decisions of this Court in United States v. Adams, — F.3d —, 2003 WL 22087570 (9th Cir. Sept. 10, 2003), and the United States Court of Appeals for the Second Circuit in United States v. Holston, — F.3d —, 2003 WL 22053060 (2d Cir. Sept. 4, 2003), which are submitted as pertinent authorities in the above-captioned appeals, which were argued on September 17, 2003.

In Adams, this Court upheld the constitutionality of 18 U.S.C. § 2252(a)(4)(B) against a facial Commerce Clause challenge, holding, *inter alia*, that "the possession of commercial child pornography substantially affects the national market for child pornography" because, "[i]n contrast to Lopez, here the statute criminalizing possession *is* part of a larger congressional scheme to eradicate the market for child pornography" and "[l]aws criminalizing the possession of a good decrease the demand for that good. This decreased demand results in a decrease of supply as production becomes less profitable and therefore less attractive." Adams, 2003 WL 22087570, at ** 6-7.

In Holston, the Second Circuit upheld the constitutionality of 18 U.S.C. § 2251(a) against a Commerce Clause challenge, holding, *inter alia*, that the activity targeted by that statute was economic in nature because, "[p]roducing child pornography, like manufacturing controlled substances -- and unlike the activities targeted in Lopez or Morrison -- concerns 'obviously economic activity,'" and reaffirmed that, in cases under the Controlled Substances Act, "'[t]he nexus to interstate commerce * * * is determined by the statute as a whole, not by the simple act for which an individual defendant is convicted.'" Holston, 2003 WL 22053060, at ** 4, 6 (quoting Proyect v. United States, 101 F.3d 11, 13 (2d Cir. 1996)).

These decisions are consistent with the United States' argument that the Controlled Substances Act is a valid exercise of Congressional authority under the Commerce Clause, which is set forth at pages 28-43 of the Brief for Appellee in Nos. 02-16335, 02-16534, and 02-16715, and pages 15-38 of the Brief for Appellee in No. 03-15062.

Respectfully submitted,



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United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Steven Michael ADAMS, Defendant-Appellant.

No. 02-50196.

Submitted Sept. 3, 2003. [FN*]
Filed Sept. 10, 2003.

Defendant was convicted in the United States District Court for the Southern District of California, Judith N. Keep, J., for possession of child pornography. Defendant appealed. The Court of Appeals, Tallman, Circuit Judge, held that: (1) statute prohibiting possession of commercial child pornography did not, on its face, violate the Commerce Clause; and (2) statute prohibiting possession of commercial child pornography was not substantially overbroad or unconstitutionally vague.

Affirmed.

[1] Criminal Law ⚿1139

110k1139

The Court of Appeals reviews de novo the district court's denial of motion to dismiss the indictment and its determination of the constitutionality of a criminal statute.

[2] Commerce ⚿82.6
83k82.6

The possession of child pornography must substantially affect interstate commerce in order for Congress to regulate it under the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] Commerce ⚿7(2)
83k7(2)

The four-factor test for determining whether a regulated activity substantially affects interstate commerce is as follows: (1) whether the regulated activity is commercial or economic in nature, (2) whether an express jurisdictional element is provided in the statute to limit its reach, (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce, and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Commerce ⚿7(2)
83k7(2)

An activity that is utterly lacking in commercial or economic character will likely have too attenuated a relationship to interstate commerce and will, accordingly, not be subject to regulation under the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Commerce ⚿7(2)
83k7(2)

Activities that do have an economic or commercial character will likely have a nexus to interstate commerce and, accordingly, are proper objects of congressional regulation under the Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[6] Commerce ⚿82.6
83k82.6

Statute prohibiting possession of commercial child pornography did not, on its face, violate the Commerce Clause; child pornography was multi-million dollar industry affecting interstate commerce, those who possess and view commercial child pornography encourage its continual production and distribution in interstate commerce, so that possession of commercial child pornography substantially affected the national market for such pornography, regardless of whether the possession resulted from interstate or intrastate sale, trade, or dissemination. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 2252(a)(4)(B).

[6] Obscenity ⚿2.5
281k2.5

Statute prohibiting possession of commercial child pornography did not, on its face, violate the Commerce Clause; child pornography was multi-million dollar industry affecting interstate commerce, those who possess and view commercial child pornography encourage its continual production and distribution in interstate commerce, so that possession of commercial child pornography substantially affected the national market for such pornography, regardless of whether the possession resulted from interstate or intrastate sale, trade, or dissemination.

U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 2252(a)(4)(B).

[7] Commerce ⚿7(2)
83k7(2)

Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce, if in the aggregate the economic activity in question would represent a general practice subject to federal control. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[8] Constitutional Law ⚿90(3)
92k90(3)

The overbreadth doctrine prohibits the government from proscribing a substantial amount of constitutionally protected speech. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚿90(3)
92k90(3)

An overbroad law suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚿90(3)
92k90(3)

A statute is not overbroad simply because some impermissible applications that improperly limit free expression are conceivable. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚿90(3)
92k90(3)

For a law to be deemed "overbroad," the law's application to protected speech must be substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚿90.4(1)
92k90.4(1)

Definition of "sexually explicit conduct," as including simulated sexual conduct and the lascivious exhibition of genitals, set forth in statute prohibiting possession of any matter containing any visual depiction of a minor engaging in sexually explicit conduct, did not render statute substantially overbroad regulation of protected speech. U.S.C.A. Const.Amend. 1.; 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(A).

[12] Obscenity ⚿2.5
281k2.5

Definition of "sexually explicit conduct," as including simulated sexual conduct and the lascivious exhibition of genitals, set forth in statute prohibiting possession of any matter containing any visual depiction of a minor engaging in sexually explicit conduct, did not render statute substantially overbroad regulation of protected speech. U.S.C.A. Const.Amend. 1.; 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(A).

[13] Criminal Law ⚿13.1(1)
110k13.1(1)

A statute is "void for vagueness" if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 5.

[14] Constitutional Law ⚿82(10)
92k82(10)

Definitional provision of statute prohibiting possession of child pornography was not unconstitutionally vague for including simulated sexual conduct or lascivious exhibition of the genitals in list of prohibited sexually explicit conduct. 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(A).

[14] Obscenity ⚿2.5
281k2.5

Definitional provision of statute prohibiting possession of child pornography was not unconstitutionally vague for including simulated sexual conduct or lascivious exhibition of the genitals in list of prohibited sexually explicit conduct. 18 U.S.C.A. §§ 2252(a)(4)(B), 2256(2)(A).

Appeal from the United States District Court for the Southern District of California; Judith N. Keep, District Judge, Presiding.

Kevin M. Bringuel, Federal Defenders of San Diego, San Diego, California, for the defendant-appellant.

Anne Kristina Perry, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

Before DONALD P. LAY, [FN**] MICHAEL DALY HAWKINS, and RICHARD C. TALLMAN, Circuit Judges.

OPINION

TALLMAN, Circuit Judge.

***1** In *United States v. McCoy,* 323 F.3d 1114 (9th Cir.2003), we entertained an "as applied" constitutional challenge to 18 U.S.C. § 2252(a)(4)(B) and held that Congress lacks the power under the Commerce Clause to criminalize the"simple intrastate possession of home-grown child pornography not intended for distribution or exchange." 323 F.3d at 1122-23. Now we must answer the question left undecided in *McCoy:* whether 18 U.S.C. § 2252(a)(4)(B), on its face, is an unconstitutional exercise of congressional power. We hold that it is not.

We also hold that the definition of "sexually explicit conduct" found at 18 U.S.C. § 2256(2)(A), on its face, is not substantially overbroad under the First Amendment. Nor is the statute void for vagueness. We affirm the conviction that underlies these challenges.

I

In October 1999, San Diego County sheriffs deputies searched the home of Defendant-Appellant Steven Adams after receiving a report that Adams had been fraternizing with children. At the time, Adams was a sex-offender on state probation and was required to submit to such searches. In the course of the search, deputies seized a billyclub, pornographic pictures of adults, non- pornographic pictures of Adams with children, Adams's computer, and several computer diskettes.

Forensic analysis of Adams's computer and diskettes revealed previously deleted images of naked, prepubescent children engaged in various sexual acts. In June 2001, approximately nineteen months after the search of his home and the seizure of the computer and computer diskettes, a federal grand jury indicted Adams for receiving and possessing child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(a)(4)(B). The indictment specifically referenced the computer and diskettes seized by the State of California.

The federal charges against Adams stemmed from an investigation into the activities of Janice and Thomas Reedy. The Reedys operated a pornographic Internet website in Texas known as Landslide. Landslide provided subscribing members access to child pornography websites. Adams subscribed to Landslide and admits that he viewed and possessed "prohibited images" downloaded from the Internet.

The district court denied Adams's motion in limine to dismiss the indictment. Adams then conditionally pled guilty to one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), and reserved his right to challenge the constitutionality of the statute. [FN1] *See* Fed. R.Crim. Pro. 11(a)(2). As part of a plea agreement, Adams admitted the following facts:

> 1. On October 22, 1999, a search was conducted at the home of defendant STEVEN ADAMS. At the time of the search, ADAMS was in possession of a computer and a number of computer diskettes.
> 2. The computer diskettes and computer contained components that were not manufactured in the State of California.
> 3. The computer diskettes and computer contained visual depictions of minors engaged in sexually explicit conduct.
> ***2** 4. The production of the visual depictions involved the use of minors engaging in sexually explicit conduct.
> 5. The images include depictions of actual children.

[1] Adams now appeals. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's denial of Adams's motion to dismiss the indictment and its determination of the constitutionality of the statute. *United States v. Cortes,* 299 F.3d 1030, 1032 (9th Cir.2002).

II

A

Adams first argues that Congress is powerless to enact a statute criminalizing intrastate possession of child pornography. To decide whether 18 U.S.C. § 2252(a)(4)(B) is a valid exercise of congressional power under the Commerce Clause, we examine the recent Supreme Court decisions of *United States v.*

Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), which set forth the relevant analytical framework.

[2] [1] ***Lopez*** "identified three broad categories of activity that Congress may regulate under its commerce power": (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) "those activities that substantially affect interstate commerce." 514 U.S. at 558- 59. Of course, the possession of child pornography concerns neither the channels nor the instrumentalities of interstate commerce. It follows that the possession of child pornography must "substantially affect interstate commerce" in order for Congress to regulate it under the Commerce Clause.

[3][4][5] In *Morrison,* the Court "established what is now the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *McCoy,* 323 F.3d at 1119. These considerations are: (1) whether the regulated activity is commercial/economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. *Morrison,* 529 U.S. at 610-12. The "most important" factors for a court to consider are the first and the fourth. *McCoy,* 323 F.3d at 1119. "An activity that is utterly lacking in commercial or economic character would likely have too attenuated a relationship to interstate commerce and would, accordingly, not be subject to regulation under the Commerce Clause." *Id.* In contrast, activities that do have an economic or commercial character will likely have a nexus to interstate commerce and, accordingly, would be proper objects of congressional regulation under the Commerce Clause.

B

In *McCoy,* we considered whether the federal government may criminalize the intrastate possession of child pornography. *Id.* at 1115. But the *McCoy* panel declined to address whether the statute criminalizing mere possession is unconstitutional on its face--the issue in this appeal. Instead it only held that, as applied to Rhonda McCoy, 18 U.S.C. § 2252(a)(4)(B) was an unconstitutional exercise of congressional power. We recount the facts and reasoning of *McCoy* in some detail.

***3** Jonathan McCoy decided to take a photograph of his intoxicated wife, Rhonda, and their ten-year-old daughter. Rhonda and her daughter posed for the picture, standing side by side, partially unclothed with their genitals exposed. A photo processor saw the picture and reported the McCoys to the authorities. *Id.* at 1115.

Rhonda and Jonathan were charged with manufacturing and transporting child pornography. *Id.* at 1116. Jonathan elected to stand trial and was acquitted. *Id.* Rhonda entered into plea negotiations with the government and conditionally pled guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), preserving for appeal whether "[the statute], on its face and as applied, constitutes an unconstitutional exercise of Congress's Commerce Clause power." *Id.* at 1116-17.

The panel considered only Rhonda McCoy's "as applied" challenge to the statute: "whether a statute enacted pursuant to the Commerce Clause may constitutionally reach non-commercial, non-economic individual conduct that is purely intrastate in nature, when there is no reasonable basis for concluding that the conduct had or was intended to have any significant interstate connection or any substantive effect on interstate commerce." *Id.* at 1117. The court then applied the *Morrison* "four-part mode of inquiry." *Id.* at 1117-29.

Applying the first *Morrison* factor--whether the regulated activity is commercial or economic in nature--*McCoy* concluded "that simple intrastate possession of home-grown child pornography not intended for distribution or exchange is 'not, in any sense of the phrase, economic activity.' " *Id.* at 1122-23 (quoting *Morrison,* 529 U.S. at 613). The court determined that home- grown child pornography intended for personal use did not influence, in any way, the national market for child pornography.

The court expressly noted its disagreement with the Third Circuit's decision in *United States v. Rodia,* 194 F.3d 465 (3d Cir.1999). *Rodia* posited that "the possession of 'home grown' pornography may well stimulate a further interest in pornography that immediately or eventually animates demand for interstate pornography." *Id.* at 477. This "addiction" theory, *McCoy* reasoned, rested on "highly questionable premises" for several reasons. *McCoy,*

323 F.3d at 1121. First, *Rodia's* "common sense understanding of the demand side forces" was based on speculation and not explicit congressional findings. *Id.* Second, *Rodia's* "labeling of persons who possess a 'home- grown' picture of a child as 'child pornographers' and addicts-in-futuro" was highly debatable in that it piled "presumption on presumption." *Id.* at 1122. Finally, *Rodia's* conclusion that home-grown pornography is a fungible good was incorrect because home-grown pornography often is intended for personal use and not for exchange, as was the case with Rhonda McCoy's photograph. *Id.*

*4 *McCoy* explained that the *Wickard v. Filburn* "aggregation principle" did not apply to render McCoy's activity economic in nature. *Id.* at 1120-23; *see also Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942). In *Wickard,* the Supreme Court held that Congress did not exceed its Commerce Clause power in restricting the bushels of wheat a farmer could grow for personal use. [FN2]

McCoy reasoned that unlike Filburn's home-grown wheat, McCoy's home-grown photograph

> had no connection with or effect on any national or international commercial child pornography market, substantial or otherwise. The picture of McCoy and her daughter which McCoy possessed for her own personal use did not "compete" with other depictions exchanged, bought, or sold in the illicit market for child pornography and did not affect their availability or price. Nor are pictures of the type McCoy possessed connected in any respect with commercial or economic enterprises.

McCoy, 323 F.3d at 1122. In other words, "Filburn's home-grown wheat may not have been meant for sale, but its very existence had an economic effect.... McCoy's photo does not have any plausible economic impact on the child pornography industry." *Id.* at 1120 n. 11.

Applying the fourth *Morrison* factor, attenuation, *McCoy* explained that the link between the possession of home-grown child pornography and interstate commerce was too remote to support the exercise of congressional power under the Commerce Clause. In fact, the court held that there was no relationship whatsoever between McCoy's possession of her personal photograph and the interstate market for child pornography. *Id.* at 1123-24.

McCoy then addressed the second *Morrison* factor--whether an express jurisdictional element is provided in the statute to limit its reach. Here it noted that " § 2252(a)(4)(B) contains an express jurisdictional element that is intended to satisfy Commerce Clause concerns." *Id.* This "jurisdictional hook" limits prosecutions under § 2252(a)(4)(B) to instances where the pornographic matter has been mailed, transported, or shipped in interstate commerce *or* where the matter "was produced using materials which have been mailed or so shipped or transported." 18 U.S.C. § 2252(a)(4)(B). Because "all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce," *McCoy,* 323 F.3d at 1125 (quoting *Rodia,* 194 F.3d at 473), *McCoy* concluded that the "jurisdictional hook" of § 2252(a)(4)(B) is "useless" and that it "provides no support for the government's assertion of federal jurisdiction." *Id.* at 1126; *see also United States v. Angle,* 234 F.3d 326, 337 (7th Cir.2000).

Finally, applying the third *Morrison* factor--whether Congress made express findings about the effects of the possession of child pornography on interstate commerce--*McCoy* held that "the findings in the statute and the legislative history do not support the conclusion that purely intrastate'home-grown' possession has a substantial connection to interstate trafficking in commercial child pornography." *McCoy,* 323 F.3d at 1130. The court noted that the legislative history "speak[s] only to the general phenomenon of commercial child pornography; [it does] not speak to the relationship between intrastate non-commercial conduct like McCoy's and the interstate commercial child pornography market." *Id.* at 1127. "At most," *McCoy* held, "the legislative history here tells us that Congress intended to eliminate the interstate commercial child pornography market, and nothing more." *Id.*

*5 **[2] *McCoy*** thus concluded that simple intrastate possession of home- grown child pornography did not substantially affect interstate commerce and therefore 18 U.S.C. § 2252(a)(4)(B) was unconstitutional as applied to McCoy. *Id.* at 1132. Expressly left unanswered in *McCoy* was whether the statute is facially constitutional. *Id.* We answer that question today.

C

Unlike Rhonda McCoy, Adams does not challenge the constitutionality of 18 U.S.C. § 2252(a)(4)(B) "as applied" to his conduct. Nor could he. Adams was

prosecuted for possessing commercial, not home-grown, child pornography. [FN3] If constitutional at all, 18 U.S.C. § 2252(a)(4)(B) must reach the possession of commercial child pornography.

The *Morrison* four-part mode of inquiry must guide our analysis. *McCoy,* 323 F.3d at 1119. There is no effective limit on federal jurisdiction under the express terms of the statute. *Id* . at 1124 (noting that the "jurisdictional hook" in § 2252(a)(4)(B) "not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually every case imaginable, so long as any modern-day photographic equipment or material has been used"). So we focus here on the remaining three *Morrison* factors: (1) whether the mere possession of commercial child pornography may be considered commercial/economic in nature; (2) whether the link between such possession and the effect on interstate commerce is too attenuated to support the congressional exercise of power; and (3) whether Congress made express findings about the effects of possession of child pornography on interstate commerce.

We begin with the legislative history of 18 U.S.C. § 2252, for the approach taken by Congress in regulating child pornography is instructive in discerning how the possession of child pornography has a nexus to economic activity. [FN4] The first incarnation of 18 U.S.C. § 2252 came with passage of the Protection of Children Against Sexual Exploitation Act in 1978. This legislation criminalized both the sale and distribution for sale of child pornography. Pub.L. No. 95-225, § 2(a), 92 Stat. 7, 7-8 (1978). Congress concluded such legislation was necessary because "child pornography and child prostitution [had] become highly organized, multimillion dollar industries that operate[d] on a nationwide scale ." S. Rep. 95-438 at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42.

Various amendments to § 2252 followed. [FN5] These amendments responded to a growing--and increasingly underground--child pornography industry. [FN6]

The Child Protection Restoration and Penalties Act of 1990 first criminalized the mere possession of child pornography. [FN7] Pub.L. No. 101-647, Title III, § 323, 104 Stat. 4789 (1990). Senator Strom Thurmond introduced the legislation. According to Senator Thurmond, greater federal involvement and more stringent laws, including laws criminalizing the possession of child pornography, were needed to destroy the market for child pornography:

> ***6** We must continue to strengthen our Nation's criminal laws in order to stamp out this vice at all levels in the distribution chain. Since the child pornography market has, in large part, been driven underground, we cannot solve the problem by only attacking the production or distribution of child pornography.
>
> This bill meets this challenge by expanding the scope of prohibited activities relating to child pornography. Under current law, it is a crime to knowingly transport, distribute, receive or reproduce any child pornography which has traveled in interstate or foreign commerce. Unfortunately, those who simply possess or view this material are not covered by current law. This bill addresses this insufficiency because *those who possess and view child pornography encourage its continual production and distribution.*

136 Cong. Rec. S4728, S4729-30 (April 20, 1990) (statement of Sen. Thurmond) (emphasis added). Subsequent legislative history confirms that the views of Senator Thurmond were shared by Congress as a whole. For example, a 1996 Senate report explains that "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography and to *eliminate the market for the sexual exploitative use of children.*" S. Rep. 104-358 at 3 (1996), 1996 WL 506545 (emphasis added); *see also* id. at 26 (statement of Sen. Grassley). [FN8]

This legislative history leads us to three observations: (1) Congress determined that child pornography is a multi-million dollar industry in which sexually explicit depictions of children are bought, sold, and traded interstate; (2) Congress decided to "stamp out" the market for child pornography by criminalizing the production, distribution, receipt, *and possession* of child pornography; and (3) Congress thought it could strike a blow to the industry by proscribing possession of child pornography "because those who possess and view child pornography encourage its continual production and distribution." 136 Cong. Rec. at S4730.

[6] Congress criminalized possession of child pornography as "part of a larger regulation of

economic activity." *Lopez,* 514 U.S. at 561. We therefore conclude that the possession of commercial child pornography has at least some nexus to economic activity [FN9]; we explain in more detail below precisely why this is so. For now we note that the first *Morrison* factor, whether the activity regulated is economic or commercial in nature, and the third *Morrison* factor, legislative history, support the exercise of congressional power.

We reject Adams's proposition that "simple ... possession of photographs or film is as non-commercial as the simple possession of a firearm in a school zone." In *Lopez,* the Supreme Court struck down the Gun Free School Zones Act in part because the possession of a gun in a school zone "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. But the Court was quick to note that the statutory provision at issue was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* In contrast to *Lopez,* here the statute criminalizing possession *is* part of the larger congressional scheme to eradicate the market for child pornography. *Lopez* does not stand for the proposition that Congress is powerless in all situations to criminalize the intrastate possession of a contraband good, particularly where the congressional intent is to stamp out the entire market for that good. [FN10]

*7 Having determined that the possession of commercial child pornography has some nexus to the child pornography market, and therefore economic activity, the question remains whether criminalizing the possession of commercial child pornography is so attenuated from interstate commerce that we must conclude Congress exceeded its Commerce Clause powers in enacting § 2252(a)(4)(B). We hold that the link between possession of commercial child pornography and the interstate market for commercial child pornography is sufficiently close to support the congressional exercise of power.

Laws criminalizing the possession of a good decrease the demand for that good. This decreased demand results in a decrease of supply as production becomes less profitable and therefore less attractive. Commercial child pornography is such a good susceptible to market forces, as the Supreme Court recognized in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). There the Court upheld against a First Amendment challenge Ohio's proscription of the mere possession of child pornography. 495 U.S. at 111. Ohio wanted "to destroy[the] market for the exploitative use of children," *id.* at 109, and the Court acknowledged that Ohio's law advanced this goal."It is ... surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.* at 109-110. Because "much of the child pornography market has been driven underground ... it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Id.* at 110. Ohio could reasonably criminalize the possession of child pornography "to stamp out this vice at all levels in the distribution chain." *Id.* Here, Congress likewise sought to "stamp out" the interstate market for commercial child pornography by criminalizing intrastate possession of the good.

[7] Considering *Morrison* and viewing the effects of possession of commercial child pornography in the aggregate, *see Wickard,* 317 U.S. at 128, [FN11] we think the possession of commercial child pornography substantially affects the national market for child pornography. Any possession of commercial child pornography, whether the possession resulted from inter- or intrastate sale, trade, or dissemination, can produce this effect. We therefore hold that Congress did not exceed its Commerce Clause power in enacting 18 U.S.C. § 2252(a)(4)(B). [FN12]

III

Adams asks us to invalidate 18 U.S.C. § 2256(2)(A), which defines "sexually explicit conduct." He contends the statute is facially overbroad and void for vagueness. We address each of these claims in turn.

A

[8][9][10][11] The overbreadth doctrine prohibits the government from proscribing a "substantial" amount of constitutionally protected speech. *See Virginia v. Hicks,* --- U.S. ----, ----, 123 S.Ct. 2191, 2196, 156 L.Ed.2d 148 (2003). An overbroad law "suffices to invalidate all enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.' " *Id.* (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). A statute is not invalid simply because some impermissible applications are conceivable. *New York*

v. Ferber, 458 U.S. 747, 772, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Instead, the "law's application to protected speech [must] be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks,* --- U.S. at ----, 123 S.Ct. at 2197.

***8** Adams pled guilty to 18 U.S.C. § 2252(a)(4)(B), which criminalizes the possession of any "matter which contain[s] any visual depiction" where "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." [FN13] 18 U.S.C. § 2252(a)(4)(B)(i). "Sexually explicit conduct" is defined at 18 U.S.C. § 2256(2)(A) as

> actual or simulated--
> (i) sexual intercourse, including genital-genital, oral-genital, anal- genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;
> (iii) masturbation;
> (iv) sadistic or masochistic abuse; or
> (v) lascivious exhibition of the genitals or pubic area of any person.

[12] It is this definition to which Adams objects. [FN14] According to Adams, the statute proscribes a substantial amount of protected speech because it reaches "simulated" sexual conduct and the "lascivious exhibition of the genitals or pubic area."

We hold that the Supreme Court's decision in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113, forecloses Adams's argument that 18 U.S.C. § 2256(2)(A) is substantially overbroad. *Ferber* considered an overbreadth challenge to a New York statute criminalizing child pornography. The New York statute defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Ferber,* 458 U.S. at 751. The Court reasoned that although the statute may reach some protected expression, such as medical textbooks and pictorials in artistic or educational contexts, it "seriously doubt[ed] ... that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." *Id.* at 773.

We hold that the statute at issue in *Ferber* is legally indistinguishable from 18 U.S.C. § 2256(2)(A). True, the New York statute criminalized the "lewd exhibition of the genitals" whereas the present statute criminalizes the "lascivious exhibition of the genitals." But this court has equated "lascivious" with "lewd." *United States v. Wiegand,* 812 F.2d 1239, 1243 (9th Cir .1987), *cert. denied,* 484 U.S. 856, 108 S.Ct. 164, 98 L.Ed.2d 118 (1987). The statute is not substantially overbroad.

B

[13] "A statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it invites arbitrary and discriminatory enforcement." *Schwartzmiller v. Gardner,* 752 F.2d 1341, 1345 (9th Cir.1984) (citations omitted); *see also Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Adams does not contend that 18 U.S.C. § 2256(2)(A) is vague as applied to his conduct--he concedes that the statute put him on notice that it was illegal to possess the sexually explicit depictions for which he pled guilty. Instead, he argues that the statute must be struck down as facially vague.

***9** [14] Essentially, Adams contends that the definition of "sexually explicit conduct" includes ambiguous terms that, individually or collectively, are not susceptible to a common understanding. In particular, Adams objects to the terms "simulated" and "lascivious," which he asserts are too subjective to put an ordinary person on notice as to what material is criminalized by the statute. Even if Adams has prudential standing to raise this facial vagueness claim, [FN15] an issue we do not decide, his claim is foreclosed by our precedent. *See United States v. X-Citement Video, Inc.,* 982 F.2d 1285, 1288 (9th Cir.1992) (holding that 18 U .S.C. § 2256 is not vague because it includes the terms "simulated" and "lascivious"), *overruled on other grounds by* 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Wiegand,* 812 F.2d at 1243-44 (dismissing the argument that "lascivious" is an unconstitutionally vague term).

IV

Congress acted within the bounds of its Commerce Clause power in criminalizing the intrastate possession of commercial child pornography. Adams's facial attack must fail. Commercial child pornography--unlike home-grown child pornography --is a good susceptible to market forces. Congress rationally sought to influence that market by criminalizing the possession of child pornography.

Thus, as"part of a larger regulation of economic activity," *Lopez,* 514 U.S. at 561, 18 U.S.C. § 2252(a)(4)(B) is constitutional. The definition of "sexually explicit conduct" also passes constitutional muster as it is neither substantially overbroad nor void for vagueness.

AFFIRMED.

FN* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

FN** Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

FN1. We reject the argument that Adams's indictment was constitutionally infirm because of an improper instruction when the grand jury was empaneled. The instruction given by the district court mirrored the model charge recommended by the Administrative Office of the United States Courts. In *United States v. Marcucci,* 299 F.3d 1156 (9th Cir.2002), we ruled that the model charge did not misstate the constitutional role and function of the grand jury. *Marcucci* controls here. We must decline Adams's invitation to overrule that decision. *See Hart v. Massanari,* 266 F.3d 1155, 1171 (9th Cir.2001).

FN2. *Wickard* reasoned that, in the aggregate, home-grown wheat reduced the overall demand for the grain, which in turn reduced the price. Home-grown wheat thus affected the interstate market for the good and was an appropriate subject of congressional regulation. *Wickard,* 317 U.S. at 128. The Court stated: "if we assume that [the wheat] is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S. at 128.

FN3. By "commercial child pornography," we mean any sexually explicit depiction of a minor produced for sale, trade, or dissemination to the public. Adams admitted to possessing "prohibited images ... downloaded from a web site." (Def.'s Mot. for Downward Adjustments and Departures, No. 01 CR 1804, at 6 (S.D.Cal., March 12, 2002).) *See United States v. Bentson,* 947 F.2d 1353, 1356 (9th Cir.1991) ("A judicial admission is binding before both the trial and appellate courts."). He therefore concedes that he possessed commercial child pornography.

FN4. For a more detailed overview of the legislative history of 18 U .S.C. § 2252, see Dean C. Seman, "United States v. Corp: *Where to Draw the Interstate Line on Congress' Commerce Clause Authority to Regulate Intrastate Possession of Child Pornography,*" 9 Vill. Sports & Ent. L.J. 181, 184 86 (2002), and Bradley Scott Shannon, "*The Jurisdictional Lim its of Federal Criminal Child Pornography Law,*" 21 U. Haw. L.Rev. 73, 79- 87 (1999).

FN5. The Child Protection Act of 1984 amended § 2252 and greatly expanded the reach of federal prosecution. Among other things, the Child Protection Act excised the commercial purpose requirement of the old statute, criminalized the reproduction of child pornography, and eliminated the requirement that the depiction be obscene to be subject to federal law. Pub.L. No. 98-292, § 4, 98 Stat. 204, 204-05 (1984). A House of Representatives report justified these amendments by noting: "The creation and proliferation of child pornography is no less than a national tragedy. Each year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H.R. Rep. 98-536 at 1 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492.
A 1986 amendment added longer prison sentences for repeat offenders. Pub.L. No. 99-591, § 702, 100 Stat. 3341 (1986). A 1988 amendment criminalized the transmission of child pornography "by any means including by computer." Pub.L. No. 100-690, § 7511(b), 102 Stat. 4485 (1988).

FN6. "[E]xperience revealed that much if not most child pornography mate rial is distributed through an underground network of pedophiles who exchange the material on a non-commercial basis, and thus no sale is involved." H.R. Rep. 99-910 at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

FN7. This legislation was part of the Crime Control Act of 1990.

FN8. We are mindful that subsequent legislative history is a "hazardous basis for inferring the intent of an earlier Congress."

McCoy, 323 F.3d at 1121 (quoting *Pension Benefit Guar. Corp. v.. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990)). We choose to note the 1996 Senate report nonetheless because it supplements those views articulated by Senator Thurmond. *See Rodia*, 194 F.3d at 478 n. 6 ("Where ... Congress's subsequent factfinding supplements, rather than conflicts with, its earlier statements ... we think that subsequent fact- finding can be considered, though not given a large role, in the rational basis determination.").

FN9. *McCoy* does not preclude this conclusion. Though in *McCoy* the panel reasoned that possession of home-grown pornography "is 'not, in any sense of the phrase, economic activity,' " 323 F.3d at 1122-23 (quoting *Morrison*, 529 U.S. at 613), the panel was quick to point out that its analysis did not extend "to wholly intrastate possession of a commercial or economic character." 323 F.3d at 1132.

FN10. We think there is little doubt that if Congress had intended to eliminate the interstate market for guns (assuming, arguendo, that such a law would be constitutional), Congress could proscribe the intrastate possession of firearms. But the intent behind the Gun Free School Zones Act was to protect school children from gun violence--not to regulate a national market in firearms.

FN11. The Supreme Court recently reaffirmed the *Wickard* aggregation principle in *The Citizens Bank v. Alafabco, Inc.*, --- U.S. ----, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003). "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.' " --- U.S. at ----, 123 S.Ct. at 2040 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed. 1328 (1948)).

FN12. Other circuits are generally in accord. *See United States v.. Hampton*, 260 F.3d 832 (8th Cir.2001); *United States v. Corp*, 236 F.3d 325 (6th Cir.2001); *United States v. Kallestad*, 236 F.3d 225 (5th Cir.2000); *United States v. Angle*, 234 F.3d 326 (7th Cir.2000); *United States v. Rodia*, 194 F.3d 465 (3d Cir .1999); *United States v. Robinson*, 137 F.3d 652 (1st Cir.1998); *see also United States v. Buculei*, 262 F.3d 322 (4th Cir.2001) (recognizing the constitutionality of § 2252(a)); *United States v. Galo*, 239 F.3d 572 (3d Cir.2001) (reaffirming *Rodia*); *United States v. Bausch*, 140 F.3d 739 (8th Cir.1998). *But see Kallestad*, 236 F.3d at 231 (Jolly, J., dissenting).

FN13. Because Adams entered his guilty plea only to this subsection, he does not have standing to challenge the constitutionality of other subsections.

FN14. Adams has standing to bring an overbreadth challenge. *See, e . g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985)

FN15. In *Schwartzmiller v. Gardner*, we explained that when "no constitutional overbreadth problem exists ... a party has standing to challenge a statute facially, despite the ordinary rule against facial statutory review, if no standard of conduct is specified at all; that is, if the statute is impermissibly vague in all of its applications." 752 F.2d at 1347 (internal quotation marks and citations omitted). According to the *Schwartzmiller* court, this standing rule applies even where the First Amendment is implicated. To the extent a vague statute infringes upon First Amendment freedoms, "facial vagueness analysis becomes the functional equivalent of facial overbreadth analysis and, apparently, adds nothing new to statutory facial consideration." *Id.* Adams essentially concedes that the present statute is not "impermissibly vague in all of its applications." Thus under *Schwartzmiller*, Adams lacks standing to argue facial vagueness. Subsequent Ninth Circuit authority conflicts with the *Schwartzmiller* rule. For example, in *California Teachers Association*, we noted that "[i]n the First Amendment context, facial vagueness challenges are appropriate if the statute clearly implicates free speech rights." *Cal. Teachers Ass'n v.State Bd. of Educ.*, 271 F.3d 1141, 1149 (9th Cir.2001) (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 639 n. 10 (9th Cir.1998); *United States v.Wunsch*, 84 F.3d 1110, 1119 (9th Cir.1996)). Supreme Court authority also provides conflicting guidance. *Compare City of Chicago v. Morales*, 527 U.S. 41, 55, 119

S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality) ("When vagueness permeates the text of such a law, it is subject to facial attack."); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (holding that in the First Amendment context, a challenger may bring a facial vagueness challenge to a statute even if its meaning is plain as applied to his or her own conduct if the vague statute's deterrent effect on speech is "real and substantial") (citation omitted); *NAACP v. Button*, 371 U.S. 415, 432, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (stating that a statute "may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct"); *with Morales*, 527 U.S. at 73, 74 (Scalia, J., dissenting) ("When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit."); *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

2003 WL 22087570 (9th Cir.(Cal.)), 3 Cal. Daily Op. Serv. 8244, 2003 Daily Journal D.A.R. 10,315

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United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Eric HOLSTON, Defendant-Appellant.

Docket No. 02-1292.

Argued: April 4, 2003.
Decided: Sept. 4, 2003.

Defendant entered a conditional guilty plea in the United States District Court for the Western District of New York, Richard J. Arcara, Chief Judge, to producing visual depictions of sexually explicit conduct involving a minor, and defendant appealed. The Court of Appeals, B.D. Parker, Jr., Circuit Judge, held that federal statute prohibiting local production of child pornography using materials that have moved in interstate commerce was a permissible exercise of Congress's authority under the Commerce Clause.

Affirmed.

West Headnotes

[1] Criminal Law ⚿1139
110k1139

The Court of Appeals reviews a challenge to the constitutionality of a statute de novo.

[2] Commerce ⚿82.6
83k82.6

[2] Obscenity ⚿2.5
281k2.5

Federal statute prohibiting local production of child pornography using materials that have moved in interstate commerce was a permissible exercise of Congress's authority under the Commerce Clause; production of child pornography substantially affected interstate commerce, as much of the child pornography that concerned Congress was homegrown, untraceable, and entered the national market surreptitiously, and fed the national market and stimulated demand for child pornography. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 2251(a).

[3] Commerce ⚿7(2)
83k7(2)

Where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.

[4] Commerce ⚿82.6
83k82.6

[4] Obscenity ⚿2.5
281k2.5

Federal statute prohibiting local production of child pornography using materials that have moved in interstate commerce was not unconstitutional as applied to defendant, notwithstanding fact that defendant neither shipped the pornographic materials interstate nor intended to benefit commercially from his conduct. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 2251(a).

James P. Harrington, Harrington & Mahoney, Buffalo, NY, for Defendant- Appellant.

Paul J. Campana, Assistant United States Attorney, for Michael A. Battle, United States Attorney, Western District of New York, Buffalo, NY, for Appellee.

Before: OAKES, KEARSE, and B.D. PARKER, JR., Circuit Judges.

B.D. PARKER, JR., Circuit Judge.

***1** Eric Holston appeals from a judgment of conviction entered in the United States District Court for the Western District of New York (Richard Arcara, *Chief Judge*), following his conditional plea of guilty to one count of producing visual depictions of sexually explicit conduct involving a minor, in violation of 18 U.S.C. § 2251(a). Holston's plea preserved his right to appeal the denial of his motion to dismiss the indictment on the ground that § 2251(a), which prohibits the production of pornographic depictions involving a minor "using materials that have been mailed, shipped, or transported in interstate or foreign commerce," was an unconstitutional exercise of Congress's authority under the Commerce Clause. Because we find § 2251(a) to be constitutional, we affirm.

BACKGROUND

At the time of his arrest in February 2001, Eric Holston lived in the ground- floor apartment of a split-level, two-family dwelling in Buffalo, New York. A single mother with three minor daughters--aged 10, 13, and 14--lived in one of the upstairs apartments. Several days before Holston's arrest, FBI agents executed a search warrant at his apartment and seized video recording equipment and several videotapes depicting Holston engaged in sexually explicit acts with two of the girls. One tape portrayed the 10-year-old girl as Holston touched her genitals, and another tape depicted the 14-year-old girl as she undressed herself and simulated masturbation. Holston was arrested and subsequently charged with producing child pornography in violation of § 2251(a) and with possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).

Holston waived indictment and, pursuant to a plea agreement, pleaded guilty to a one-count information charging him with violating § 2251(a). As part of the factual basis for the plea, the agreement identified various items such as videotapes and video recording equipment that had been used in the production of the depictions and the out-of-state locations where each had been manufactured. Specifically, the agreement indicated that a Panasonic brand "Palmcorder" and JVC and TDK brand mini-cassettes manufactured in Japan, a JVC adapter made in Malaysia, and two videocassette recorders and a Sony brand videocassette tape manufactured outside New York State, were used to produce the depictions. The plea agreement preserved Holston's right to appeal in the event the District Court denied his anticipated motion to dismiss the information on the basis that § 2251(a) was unconstitutional. After the District Court denied the motion, Holston pleaded guilty and was sentenced principally to ten years' imprisonment and three years' supervised release. Following entry of judgment, Holston appealed.

DISCUSSION

[1] Holston raises facial and as-applied challenges to the constitutionality of § 2251(a). Citing *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), his main contention is that Congress's attempt, through § 2251(a)'s materials-in-commerce jurisdictional prong, to reach child pornography created for personal use and which does not cross state lines is an unconstitutional exercise of the Commerce Clause power because the jurisdictional prong is too attenuated from the conduct sought to be regulated. Holston further contends that, even if facially valid, the statute is unconstitutional as applied to him because his conduct was not commercial and did not implicate interstate commerce because the depictions never crossed state lines. We review a challenge to the constitutionality of a statute *de novo. United States v. Griffith,* 284 F.3d 338, 345 (2d Cir.2002); *United States v. Bianco,* 998 F.2d 1112, 1120 (2d Cir.1993).

I. The Federal Child Pornography Statutes

*2 Section 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 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, shall be punished as provided under subsection (d), [1] if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, [2] *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 [3] if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a) (2000) (emphasis added). Appellant was prosecuted on the basis of the second jurisdictional prong and the Government has not alleged that either of the other jurisdictional bases applies.

Section 2251 was enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977 (the "Act"), Pub.L. No. 95-225, § 2(a), 92 Stat. 7, 8 (1978), (codified at 18 U.S.C. §§ 2251 *et seq.*). The Act is a broad regulatory scheme that prohibits, in addition to the production of child pornography, the receipt, transmission, and possession of child pornography. *See* 18 U.S.C. §§ 2252, 2252A. As originally enacted, § 2251(a) did not contain the jurisdictional language at issue here. Instead, it criminalized the production of pornographic depictions involving minors only if the producer knew, or had reason to know, that the depiction would be transported in interstate commerce, or if it

was, in fact, transported in interstate commerce.

When passed in 1978, the Act was supported by congressional findings that "child pornography ... ha[s] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale," and that "the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce." S. Rep. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42-43, *available at* 1977 WL 9660. Congress also found that "because of the vast potential profits in child pornography"--its low production and reproduction costs and high retail prices--the industry was "growing at a very rapid rate." *Id.* at 7, 1978 U.S.C.C.A.N. at 44.

The Act was amended in 1984 to eliminate the requirement that the production, receipt, transportation, and distribution of child pornography be for a commercial purpose. *See* Child Protection Act of 1984, Pub.L. No. 98-292, 98 Stat. 204; *see also* H.R. Rep. 98-536, at 10 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 501, *available at* 1983 WL 25391. This change followed Congress's conclusion that, within the unique realities of the child pornography market, much of the production and trafficking was non-commercial. *See, e.g., id.* at 2, 1984 U.S.C.C.A.N. at 493 ("Many of the individuals who distribute materials covered by 18 U.S.C. Section 2252 do so by gift or exchange without any commercial motive ...."); *id.* at 17, 1984 U.S.C.C.A.N. at 508 ("The bulk of the child pornography traffic is non-commercial."; "Generally, the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers."); *see also id.* at 16, 1984 U.S.C.C.A.N. at 507 ("Most often, our investigations have resulted in the identification of collectors, some of whom sell their material while others do not. Those who do not sell their material often loan or trade collections with others who share their interest."). The House Report on the amendment indicated that because much of the pornographic material that concerned Congress was "homemade" and the subject of barter and informal exchanges through underground distribution networks, a statutory regime that required a commercial purpose left a significant enforcement hole that the 1984 amendment was intended to fill.

*3 In 1998, Congress amended § 2251 by adding a new jurisdictional basis which required that the materials used to produce the depictions "have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer." Pub.L. No. 105-314, § 201(a), 112 Stat. 2974, 2977 (1998) (codified at 18 U.S.C.A. § 2251(a)). The legislative history indicates two reasons for the amendment. The first was to correct an anomaly between the analogous possession statutes, 18 U.S.C. §§ 2252(a)(4)(B), 2252A(a)(4)(B), & 2252A(a)(5)(B), which contained equivalent jurisdictional language, [FN1] and the production statute, § 2251, which, as originally enacted, did not. The second was to extend the statute to cases where proof of the interstate transportation of the depictions, or proof of the pornographer's knowledge as to the interstate transportation, was absent. *See* H.R. Rep. 105-557, at 26-27 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 695, *available at* 1998 WL 285821.

II. The Commerce Clause under *Lopez* and *Morrison*

Holston contends that the materials-in-commerce prong of § 2251(a) exceeds Congress's authority under the Commerce Clause in light of *Lopez* and *Morrison.* In these two decisions, the Supreme Court "reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 173, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). Both *Lopez* and *Morrison* involved statutes that regulated local noneconomic activity under the theory that the activity, when viewed in the aggregate, substantially affected interstate commerce.

In *Lopez,* the Supreme Court struck down the Gun-Free School Zones Act of 1990 ("GFSZA"), 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), which criminalized the knowing possession of a firearm within a school zone. 514 U.S. at 551, 115 S.Ct. 1624. The *Lopez* court identified three broad categories of activity that Congress may regulate under its commerce power: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce. *Id.* at 558-59, 115 S.Ct. 1624. The Court noted that the GFSZA would have to be sustained, if at all, as a category-three regulation, as it involved neither the channels nor the instrumentalities of interstate commerce. *See id.* at 559, 115 S.Ct. 1624.

The Court observed, first, that § 922(q) was a criminal statute that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise," *id.* at 561, 115 S.Ct. 1624, and thus could not be sustained under the Court's "cases upholding regulations of activities that ... are connected with a commercial transaction that, when viewed in the aggregate, substantially affects interstate commerce." *Id.* Next, the Court noted that the statute contained no jurisdictional element that would "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* Finally, the Court noted the absence of congressional findings, which, although not required to sustain legislation, "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye." *Id.* at 563, 115 S.Ct. 1624. On this reasoning, the Court held the statute unconstitutional. *See id.* at 567-68, 115 S.Ct. 1624.

***4** Five years later, the Court decided *Morrison* and struck down the civil remedy provision of the Violence Against Women Act of 1994 ("VAWA"), 42 U.S.C. § 13981. 529 U.S. at 616-17, 120 S.Ct. 1740. Elaborating on *Lopez,* the Court identified four factors to be considered in determining the existence of a "substantial effect" on commerce. They were whether: (1) the activity at which the statute is directed is commercial or economic in nature; (2) the statute contains an express jurisdictional element involving interstate activity that might limit its reach; (3) Congress has made specific findings regarding the effects of the prohibited activity on interstate commerce; and (4) the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated. *See Morrison,* 529 U.S. at 610-12, 120 S.Ct. 1740.

Applying these principles to § 13981, the Court noted, first, that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613, 120 S.Ct. 1740. Further, § 13981 contained no jurisdictional element "establishing that the federal cause of action is in pursuance of Congress's power to regulate interstate commerce." *Id.* The Court acknowledged that the provision was supported by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families," *id.* at 614, 120 S.Ct. 1740, but held that these findings were insufficient, especially when the methodology relied upon by Congress had been undermined by *Lopez. See id.* at 615, 115 S.Ct. 1624. Finally, the Court found that the link between gender-related violence and a substantial effect on interstate commerce was attenuated. *See id.* The Court accordingly held the provision insufficiently grounded in the Commerce Clause. *See id.* at 616-17, 115 S.Ct. 1624.

III. Constitutionality of Section 2251 Under *Lopez* and *Morrison*

[2] Although other circuits have spoken on the constitutionality of the materials-in-commerce prong of § 2251(a), we have not yet done so. [FN2] Applying *Lopez* and *Morrison* requires us to determine whether, in light of the *Morrison* factors, the statute regulates an activity that "substantially affects" interstate commerce. The first factor--whether the activity targeted by the statute is commercial or economic in nature--is satisfied here. We accept Congress's conclusions both that there is an extensive commercial market in child pornography and that much of the material that feeds this market is "homegrown," that is, produced by amateur pornographers. Producing child pornography, like manufacturing controlled substances--and unlike the activities targeted in *Lopez* or *Morrison*--concerns "obviously economic activity." *Proyect v. United States,* 101 F.3d 11 (2d Cir.1996) (internal quotation marks omitted). Accordingly, we find that the activity addressed by the statute is commercial in nature. *See, e.g., United States v. Buculei,* 262 F.3d 322, 329 (4th Cir.2001) ("[T]here can be no doubt that the production of visual depictions of minors engaging in sexually explicit conduct, i.e., child pornography, is economic in nature."); *see also United States v. Kallestad,* 236 F.3d 225, 228 (5th Cir.2000) (holding that possession of child pornography is conduct that is "commercial in character, defined broadly"; citing the "interstate attributes" of child pornography).

***5** The second *Morrison* factor, whether the statute contains a jurisdictional element that might limit its application, is at least superficially met here. The statute, as we have seen, proscribes the production of child pornography with materials that have been shipped in interstate or foreign commerce. But we question whether the mere existence of jurisdictional language purporting to tie criminal conduct to interstate commerce can satisfactorily establish the required "substantial effect," where, as here, the interstate component underpinning the jurisdictional element, for example, the shipment of a video camera, is attenuated from the criminal conduct--the production of child pornography--which occurs

entirely locally. As the Third Circuit observed, "[a]s a practical matter, the limiting jurisdictional factor is almost useless here, since all but the most self-sufficient child pornographers will rely on film, cameras, or chemicals that traveled in interstate commerce." *United States v. Rodia,* 194 F.3d 465, 473 (3d Cir.1999). Because we find, however, as discussed below with respect to the fourth *Morrison* factor, that the activity on the whole bears a significant relationship to interstate commerce, the failure of the jurisdictional element effectively to limit the reach of the statute is not determinative. *Cf. Rancho Viejo, LLC v. Norton,* 323 F.3d 1062, 1068 (D.C.Cir.2003) ("[T]he absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[ ] interstate commerce.") (internal quotation marks omitted).

Turning to the third *Morrison* factor, we observe that § 2251(a) was well supported by legislative findings documenting both the existence of an extensive national market in child pornography and that market's reliance on the instrumentalities of interstate commerce. Although these findings were made in connection with the statute's original passage in 1978 and not at the time of the 1998 amendment, these findings apply with equal force to the amendment. *See, e.g., Maryland v. Wirtz,* 392 U.S. 183, 189 n. 13, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (noting that it was "quite irrelevant" that the legislative history of the amendments being challenged did not provide a factual basis for extending the original statute because "[t]he original Act stated Congress's findings and purposes" and "[s]ubsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered"), *overruled on other grounds, Nat'l League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

Furthermore, the House Report on the amendment emphasized that the absence of the jurisdictional language was inconsistent with the child pornography possession statutes and left a significant enforcement hole in the prosecution of child pornography production offenses. *See* H.R. Rep. 105-557, at 26 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 695, *available at* 1998 WL 285821. [FN3]

***6** We now reach the final *Morrison* factor, whether the relationship between the regulated activity and a substantial effect on interstate commerce is attenuated. As we have seen, Congress concluded that there is an extensive interstate market in child pornography and that the existence of this market depends on a distribution network that relies heavily on the mails and other instrumentalities of interstate commerce. In other words, "[t]here can be no debate that 'interstate trafficking in child pornography has an effect on interstate commerce.' " *Angle,* 234 F.3d at 337 (quoting *Rodia,* 194 F.3d at 474). Since no one would doubt Congress's ability to regulate a national market in child pornography, the question becomes "whether Congress could rationally have determined that it must reach local, intrastate conduct in order to effectively regulate a national interstate market." *United States v. Kallestad,* 236 F.3d at 229. Congress understood that much of the pornographic material involving minors that feeds the market is locally produced, and this local or "homegrown" production supports demand in the national market and is essential to its existence. *See United States v. Robinson,* 137 F.3d 652, 656 (1st Cir.1998) (affirming a conviction under § 2252(a)(4)(B) because the local possession of child pornography " 'through repetition elsewhere,' ... helps to create and sustain a market for sexually explicit materials depicting minors" and thus substantially affects the instrumentalities of interstate commerce); *United States v. Rodia,* 194 F.3d 465, 476 (3d Cir.1999) (affirming a conviction under § 2252(a)(4)(B) based on a market-theory rationale similar to *Robinson*). Because much of the child pornography that concerned Congress is homegrown, untraceable, and enters the national market surreptitiously, we conclude that Congress, in an attempt to halt interstate trafficking, can prohibit local production that feeds the national market and stimulates demand, as this production substantially affects interstate commerce. Accordingly, we conclude that insofar as § 2251(a) prohibits the production of child pornography using materials that have moved in interstate commerce, it is a permissible exercise of Congress's authority under the Commerce Clause.

[3][4] Finally, we turn to Holston's contention that § 2251(a) is unconstitutional as applied to him. He contends that the government was required--but failed--to prove an actual nexus to interstate commerce because it did not prove that he intended to sell the depictions or that they ever entered interstate commerce. This argument is essentially foreclosed by *Proyect v. United States,* 101 F.3d 11 (2d Cir.1996) (per curiam), which involved a Commerce Clause challenge to a conviction under 21 U.S.C. § 841(a)(1)

for the growing of marijuana where there was no evidence that the drug was intended for interstate distribution. We held that when Congress regulates a class of activities that substantially affect interstate commerce, "[t]he fact that certain intrastate activities within this class, such as growing marijuana solely for personal consumption, may not actually have a significant effect on interstate commerce is ... irrelevant." 101 F.3d at 14. Moreover, "[t]he nexus to interstate commerce ... is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted." *Id.* at 13. Where, as here, " 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' " *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624 (quoting *Wirtz,* 392 U.S. at 196 n.27, 88 S.Ct. 2017) (internal formatting omitted). The government need not demonstrate a nexus to interstate commerce in every prosecution. *See Proyect,* 101 F.3d at 14. As we are satisfied that § 2251(a) lies within Congress's powers under the Commerce Clause, the fact that Holston neither shipped the materials interstate nor intended to benefit commercially from his conduct is of no moment.

CONCLUSION

*7 For the foregoing reasons, the judgment is AFFIRMED.

FN1. *See* 18 U.S.C. § 2252(a)(4)(B), which applies to "[a]ny person ... who knowingly possesses ... matter which contains any visual depiction [involving the use of a minor engaging in sexually explicit conduct] that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which *was produced using materials which have been mailed or so shipped or transported* " (emphasis added); § 2252A(a)(4)(B), which applies to "[a]ny person ... who knowingly sells or possesses with the intent to sell any child pornography ... *that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce* " (emphasis added); and § 2252A(a)(5)(B), which applies to "[a]ny person ... who knowingly possesses any ... material that contains an image of child pornography ... *that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce* " (emphasis added).

FN2. Some circuits have ruled on the sufficiency of nearly identical jurisdictional language contained in the analogous possession statute, 18 U.S.C. § 2252(a)(4)(B). Because the relevant jurisdictional language is equivalent to that in § 2251(a), we find precedent based on § 2252(a)(4)(B) applicable here.

Of the seven circuits to address the issue, five have upheld convictions under this jurisdictional prong. *See United States v. Hoggard,* 254 F.3d 744, 746 (8th Cir.2001) (affirming a conviction under § 2251); *United States v. Kallestad,* 236 F.3d 225, 228-31 (5th Cir.2000) (affirming a conviction under § 2252(a)(4)(B) on the ground that the statute regulates an activity that has a "substantial effect" on interstate commerce in light of the *Morrison* factors); *United States v. Angle,* 234 F.3d 326, 338 (7th Cir.2000) (affirming a conviction under § 2252(a)(4)(B) under a market theory; statute "prohibits intrastate activity that is substantially related to the closely regulated interstate market of child pornography"); *United States v. Rodia,* 194 F.3d 465, 476 (3d Cir.1999) (affirming a conviction under § 2252(a)(4)(B) based on a market theory); *United States v. Robinson,* 137 F.3d 652, 656 (1st Cir.1998) (affirming a conviction under § 2252(a)(4)(B) because the local possession of child pornography " 'through repetition elsewhere,' ... helps to create and sustain a market for sexually explicit materials depicting minors" and thus substantially affects the instrumentalities of interstate commerce).

The only two circuits that have failed to uphold a conviction under this jurisdictional prong, the Sixth and the Ninth, did so in the context of the analogous possession statute, § 2252(a)(4)(B), and somewhat unique facts. *See United States v. McCoy,* 323 F.3d 1114 (9th Cir.2003); *United States v. Corp,* 236 F.3d 325 (6th Cir.2001). *McCoy* involved a single family photograph of a child taken by a parent with no commercial or interstate component, 323 F.3d at 1115, and *Corp* involved several photographs taken by a 23-year-old man of a 17-year-old girl who was within months of majority status, 236 F.3d at 326. Neither decision held the statute facially unconstitutional; *Corp* found it unconstitutional only as applied, *id.* at 332-33, and *McCoy,* unconstitutional only as applied to McCoy and "others similarly situated," defined as those who merely possess a visual depiction intrastate where the depiction has not been mailed, shipped, or transported interstate and "is not intended for interstate

distribution or for economic or commercial use, including the exchange of the prohibited material for other prohibited material." 323 F.3d at 1127, 1133.

FN3. As other courts have noted with respect to the amended § 2252(a)(4)(B), Congress was not "plow[ing] thoroughly new ground" in enacting the jurisdictional element, as it "has long legislated in the area of child pornography, and given the legislative history of the regulatory scheme, the addition of the clause at issue 'was not novel but incremental.' " *Angle,* 234 F.3d at 338 (quoting *United States v. Kenney,* 91 F.3d 884, 890 (7th Cir.1996)); *see also Rodia,* 194 F.3d at 482 (Roth, J., concurring) (noting that the court's decision was not "plowing new ground [by upholding the statute], as was the situation in [*Lopez*], where there were no congressional findings" concerning the effect of local gun possession on interstate commerce; noting that the statute "has been repeatedly held to cover conduct that affects interstate commerce," and this should be kept in mind when examining the jurisdictional amendment).

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