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UNITED STATES v. MALLOY: UNREASONABLY DENYING CRIMINAL DEFENDANTS A REASONABLE MISTAKE OF AGE DEFENSE IN THE FOURTH CIRCUIT

ANNE E. DI SALVO*

In United States v. Malloy,1 the United States Court of Appeals for the Fourth Circuit considered whether criminal defendants charged with producing pornographic depictions of minors in violation of 18 U.S.C. § 2251(a) should be allowed to present a reasonable mistake of age defense.2 Affirming defendant Michael Malloy’s conviction, the court held as follows: (1) the statutory text, legislative history, and prior judicial interpretation of 18 U.S.C. § 2251(a) suggest that a defendant’s knowledge of his victim’s age is “neither an element of the offense nor textually available as an affirmative defense,”3 and (2) Section 2251(a) is not unconstitutionally overbroad in limiting speech otherwise protected by the First Amendment to the United States Constitution.4 In so holding, the court correctly determined that Section 2251(a) does not enumerate knowledge of a victim’s age as an element of the offense,5 and, similarly, correctly followed recent precedent to conclude that the text of Section 2251(a) does not permit criminal defendants to present a reasonable mistake of age defense at trial.6 In interpreting the constitutionality of Section 2251(a), however, the court wrongfully neglected to engraft a narrow reasonable mistake of age defense by mischaracterizing sister circuit precedent and failing to properly balance competing social interests.7 Ultimately, the court could have upheld Malloy’s conviction and successfully protected children from the pornography industry without an

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1. 568 F.3d 166 (4th Cir. 2009), cert. denied, 130 S. Ct. 1736 (2010).
2. Id. at 169.
3. Id. at 171.
4. Id. at 176.
5. See infra Part IV.A.1.
7. See infra Part IV.B.1–2.
absolute determination that a reasonable mistake of age defense is not constitutionally necessary for Section 2251(a). Thus, in failing to carve out a narrow reasonable mistake of age defense, the Malloy court set the stage to chill future constitutionally protected speech.

I. The Case

In October 2005, Aaron Burroughs, a friend of defendant Michael Malloy, brought a fourteen-year-old girl, “S.G.,” to Malloy’s home to participate in sexual activity with both men. Burroughs and Malloy took turns videotaping each other while having sex with S.G. At the time, Malloy was a thirty-three-year-old United States Capitol Police Officer. Burroughs coached junior varsity high school football at S.G.’s school, and S.G. managed his team. On a second occasion in the fall of 2005, Burroughs again brought S.G. to Malloy’s home to have sex with the two men. The record is unclear as to whether S.G. was fourteen or had just turned fifteen at the time of the second encounter.

The Federal Bureau of Investigation (“FBI”) began investigating Malloy’s involvement in producing the videotape of himself, Burroughs, and S.G. in the summer of 2006. When FBI agents interviewed Malloy, he admitted to having sex with S.G. on two occasions and videotaping one encounter. FBI agents searched Malloy’s home and found a camcorder with a videotape of Malloy and Burroughs having sex with S.G. Malloy later admitted that he thought S.G. “‘looked young,’” but he explained that he did not investigate her age beyond simply asking her how old she was. Malloy was ultimately indicted for sexual exploitation of a minor for the purpose of producing a visual depiction in violation of 18 U.S.C. § 2251(a).

8. See infra Part IV.C.1.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. The relevant statutory language 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
Prior to his trial, Malloy filed a motion to dismiss his indictment, arguing that the indictment exceeded Congress’s Commerce Clause power.21 The United States District Court for the District of Maryland denied Malloy’s motion, finding that both the Fourth Circuit and the United States Supreme Court had previously upheld Congress’s power to prohibit the production of child pornography.22

The Government moved in limine to preclude Malloy from introducing evidence to support a reasonable mistake of age defense.23 Emphasizing the similarity between Section 2251(a) cases and statutory rape cases, the district court granted the Government’s motion to preclude Malloy from presenting a mistake of age defense.24 Nonetheless, the district court subsequently allowed Malloy’s attorney to argue that Malloy could not have possibly discovered S.G. was under eighteen.25 The court found that Malloy never saw any documentation indicating that S.G. had reached the age of majority, and, consequently, it refused to reverse its original ruling.26 Ultimately, however, the court allowed Malloy to present evidence at trial that would have supported a reasonable mistake of age defense.27

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 . . . if such person knows or has reason to know . . . that [the] 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 . . . .


21. Malloy, 568 F.3d at 169. Malloy argued that he was unaware he was producing child pornography when he filmed himself with S.G. Id. at 180. He further argued that his indictment exceeded Congress’s Commerce Clause power because his conduct made him neither a “supplier” nor “consumer” of child pornography, and that his production did not affect the pornography market on a national scale. Id.

22. Id. at 169–70. The district court further noted that the Commerce Clause enables Congress to regulate intrastate activities “so long as they are a part of an economic class of activities that have a substantial effect on interstate commerce.” Id. (citation omitted).

23. Id. at 169.

24. Id. at 170. In justifying its decision to prohibit Malloy from presenting a mistake of age defense, the district court noted that Congress specifically intended to protect minors from sexual abuse when it enacted § 2251(a). Id.

25. Id. at 170 n.1. Specifically, the court allowed Malloy’s attorney to proffer evidence that Malloy had attempted to determine S.G.’s age. Id.

26. Id.

27. See id. The court allowed Malloy’s attorney to ask S.G. at trial whether Burroughs instructed her to lie about her age, whether she ever told Malloy her true age, and whether she posted false information about her age on the Internet. Id. Additionally, the district court allowed Malloy to impeach S.G. with prior inconsistent statements about her age. Id. The court even allowed Malloy to testify that he believed S.G. to be a nineteen-year-old college student. Id. Although the court admitted this evidence, it later concluded that the evidence Malloy presented regarding S.G.’s age contained little relevance and, in retrospect, probably should not have been allowed in the first place. Id.
At trial, the prosecution established that S.G. was born in November of 1990, confirming that she was fourteen years old when Malloy made the tape of her having sex with him and Burroughs in October 2005. Malloy stipulated that the tape represented a visual depiction of himself having sexual intercourse with S.G. and also that the tape proved “beyond a reasonable doubt that the defendant used S.G. to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.”

Arguing that his indictment had been constructively amended to require that his actions be committed “knowingly,” Malloy moved for an acquittal at the close of the prosecution’s case. The district court denied Malloy’s motion, finding that the use of the word “knowingly” in Malloy’s indictment was “superfluous” language and not a constructive amendment to the indictment.

On September 20, 2007, a jury convicted Malloy of violating Section 2251(a). The district court sentenced him to the statutory minimum of fifteen years in prison. Malloy appealed his case to the Fourth Circuit, which considered, among other issues, whether the district court erred in refusing to allow Malloy to present a mistake of age defense.

II. LEGAL BACKGROUND

Because the text of 18 U.S.C. § 2251(a) does not provide for a reasonable mistake of age defense, federal appellate courts have reached different conclusions as to whether to judicially engraft this affirmative defense in response to the Supreme Court’s overbreadth

28. Id. at 170.
29. Id. (citation and internal quotation marks omitted).
30. Id. (citation and internal quotation marks omitted). On appeal, Malloy again argued that the Government’s burden of proof had been substantially lowered because despite the use of the word “knowingly” in his indictment, the Government was not required to prove that Malloy knew his victim’s true age. Id. at 177; see also infra note 34 and accompanying text (noting that Malloy’s indictment was one of four issues the Fourth Circuit considered on appeal).
31. Malloy, 568 F.3d at 170 (citation and internal quotation marks omitted).
32. Id.
33. Id. at 170–71. In sentencing Malloy, the trial court rejected Malloy’s argument that this mandatory minimum sentence violated his Eighth Amendment protection against cruel and unusual punishment by being disproportionate to the crime committed. Id. at 171.
34. Id. at 171. The Fourth Circuit additionally considered three other issues on appeal: (1) whether the indictment under which Malloy was charged was constructively amended; (2) whether § 2251(a) was a valid exercise of Congress’s Commerce Clause power as applied to Malloy; and (3) whether Malloy’s sentence violated his Eighth Amendment right against cruel and unusual punishment. Id.
doctrine. Section 2251(a) has never been textually interpreted to mean that knowledge of a victim’s age is an element of the offense,\textsuperscript{35} and, similarly, a court has never textually interpreted Section 2251(a) to include a reasonable mistake of age defense.\textsuperscript{36} In considering the constitutionality of similar criminal statutes, however, the Supreme Court has adopted an overbreadth doctrine, which allows courts to balance competing social interests in determining whether to judicially engratified affirmative defenses for statutes like Section 2251(a).\textsuperscript{37} In applying the Supreme Court’s overbreadth doctrine specifically to Section 2251(a) cases, moreover, federal circuit courts have split.\textsuperscript{38}

A. Recent Textual Interpretation of Section 2251(a) Neither Includes Knowledge of the Victim’s Age as an Element of Section 2251(a) Offenses nor Allows Criminal Defendants to Present a Reasonable Mistake of Age Defense

The text, legislative history, and recent judicial interpretations of 18 U.S.C. § 2251(a) do not require the Government to prove that the defendant knew the victim’s age and further deny criminal defendants the ability to present a reasonable mistake of age defense.\textsuperscript{39} In denying criminal defendants the ability to present this defense, courts have preferred the \textit{expressio unius est exclusio alterius} canon of statutory interpretation, which infers that all omissions in a statute should be interpreted as intentional exclusions,\textsuperscript{40} to the rule of lenity, which suggests that ambiguous criminal statutes should be construed in favor of the defendant.\textsuperscript{41}

1. Section 2251(a) Does Not Include Knowledge of the Victim’s Age as an Element of the Offense

The text, legislative history, and recent judicial interpretations of Section 2251(a) do not mandate that the Government prove that a criminal defendant knew his victim’s age before producing pornographic images to be convicted under this statute. The text of the statute provides:

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit

\textsuperscript{35} See infra Part II.A.1.
\textsuperscript{36} See infra Part II.A.2.
\textsuperscript{37} See infra Part II.B.
\textsuperscript{38} See infra Part II.C.
\textsuperscript{39} See infra Part II.A.1–2.
\textsuperscript{40} See infra text accompanying notes 71–77.
\textsuperscript{41} See infra notes 65–70 and accompanying text.
conduct for the purpose of producing any visual depiction of such conduct . . . shall be punished . . . if such person knows or has reason to know . . . that [the] 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 . . . .

On its face, the language of Section 2251(a) does not suggest that the defendant’s knowledge of his victim’s age is an element of the offense. Since the Supreme Court’s landmark decision in Morissette v. United States, however, federal courts have been careful not to follow the most obvious reading of a criminal statute in interpreting its elements.

Accordingly, federal courts have frequently looked to the legislative history of Section 2251(a) to further determine its meaning. In United States v. United States District Court for the Central District of California (District Court), the Ninth Circuit determined that the drafters of this statute did not intend to require the United States Government, in prosecuting criminal defendants, to prove that the defendant knew that his victim had not achieved the age of majority; rather, the court determined that the drafters merely intended for the Government to prove that the victim was a minor. The Ninth Circuit described Congress’s omission of a defendant’s knowledge of his victim’s age as “quite clearly deliberate.” In fact, the House Conference Report considering this issue explicitly states: “The conference substitute accepts the House provision with the intent that it is not a necessary

43. United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal. (District Court), 858 F.2d 534, 556 (9th Cir. 1988). The statute itself does not allow for a defendant to present an affirmative defense of reasonable mistake of age. See id. at 537–38 (explaining that the most plain meaning of § 2251(a) “requires only that a defendant arrange for a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction, and that there be a nexus to interstate commerce,” and failing to note any affirmative defense present in the statute).
44. 342 U.S. 246 (1952). In Morissette, the Supreme Court held that knowledge of the nature of the defendant’s act was an essential element of a federal embezzlement statute even though this was not the most natural reading of the statute. Id. at 263.
45. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994) (noting that the Court is reluctant to follow the “most grammatical reading of the statute” because of the Morissette precedent).
46. 858 F.3d 534.
48. Id. The Court specifically noted that both the Senate and the House of Representatives originally considered making knowledge of the victim’s age an element of the § 2251(a) offense but ultimately decided not to do so. Id.
element of a prosecution that the defendant knew the actual age of the child.\textsuperscript{49}

Recent Section 2251 jurisprudence supports the District Court analysis of the statute’s legislative history. Noting that a defendant’s knowledge of his victim’s age is not an essential element for the Government to prove when prosecuting someone under Section 2251, the Supreme Court differentiated the mens rea requirement of Section 2251 from that of Section 2252 in \textit{United States v. X-Citement Video, Inc.}\textsuperscript{50} In \textit{X-Citement Video}, defendant Rubin Gottesman was convicted under 18 U.S.C. § 2252 for selling and shipping pornographic videotapes featuring a minor.\textsuperscript{51} On appeal, Gottesman argued that Section 2251(a) was facially unconstitutional because it did not contain a knowledge requirement.\textsuperscript{52} The Ninth Circuit agreed with Gottesman and held that Section 2251(a) was facially unconstitutional.\textsuperscript{53} The Supreme Court reversed, however, concluding that knowledge is a requirement of Section 2252 despite the fact that it is not required by Section 2251(a).\textsuperscript{54}

More recently, in \textit{United States v. Deverso},\textsuperscript{55} the Eleventh Circuit agreed with the \textit{X-Citement Video} Court, unanimously holding that a defendant’s knowledge of the victim’s age is not an element of a Section 2251 offense.\textsuperscript{56} In \textit{Deverso}, the Department of Homeland Security obtained information regarding defendant Deverso’s foreign travel and possession of child pornography, and discovered that Deverso possessed pornographic images featuring young girls.\textsuperscript{57} Deverso was convicted under 18 U.S.C. § 2251(c)(2)(B) and (e) for “using a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct and transporting that visual depiction into the United States.”\textsuperscript{58}


\textsuperscript{50} 513 U.S. at 77–78. The \textit{X-Citement Video} Court further noted that the main reason behind the lack of an intent requirement in § 2251 is that “[pornography] producers are more conveniently able to ascertain the age of performers.” \textit{Id.} at 76 n.5.

\textsuperscript{51} \textit{Id.} at 65–66. Section 2252, part of the Protection of Children Against Sexual Exploitation Act of 1977, prohibits the interstate transportation of any visual depiction of a minor engaged in sexually explicit conduct. \textit{Id.} (citation omitted).

\textsuperscript{52} \textit{Id.} at 66–67. Gottesman further argued that § 2252 was unconstitutional as applied to his case because the tapes in question in his case were not child pornography. \textit{Id.}

\textsuperscript{53} \textit{Id.} at 67.

\textsuperscript{54} \textit{Id.} at 77–78.

\textsuperscript{55} 518 F.3d 1250 (11th Cir. 2008).

\textsuperscript{56} \textit{Id.} at 1257.

\textsuperscript{57} \textit{Id.} at 1253.

\textsuperscript{58} \textit{Id.} at 1292. Deverso was simultaneously charged and convicted for “possessing materials involving a depiction of a minor engaged in sexually explicit activity, in violation
ing the statutory language of Section 2251(a), the Eleventh Circuit merely noted that it “disagree[d]” with Deverso’s reading of the statute and cited a number of other cases, including X-Citement Video and District Court, concluding that knowledge of the victim’s age is not an element of the Section 2251(a) offense.

2. Textual Interpretation of Section 2251(a) Denies Criminal Defendants the Ability to Present a Reasonable Mistake of Age Defense

When interpreting ambiguous criminal statutes, courts often utilize the rule of lenity to avoid punishing criminal defendants who lack mens rea. In its analysis of the text of Section 2251(a), however, the Eleventh Circuit in Deverso utilized the expressio unius est exclusio alterius canon of statutory interpretation, rather than the rule of lenity, to deny criminal defendants charged with Section 2251 crimes the ability to present a reasonable mistake of age defense. Because the text of Section 2251(a) does not enumerate reasonable mistake of age as an affirmative defense to the statute, the Deverso court utilized expressio unius reasoning in reaching its conclusion.

Many courts have utilized the rule of lenity to interpret ambiguous criminal statutes. The rule of lenity requires courts to interpret ambiguous statutes in favor of the criminal defendant. In Boyce Motor Lines, Inc. v. United States, the Supreme Court utilized the rule of lenity in interpreting a regulation of the Interstate Commerce Commission requiring drivers of vehicles transporting dangerous materials of 18 U.S.C. § 2252(a)(4)(B) and (b)(2)” and “transporting materials involving a depiction of a minor engaged in sexually explicit activity, in violation of 18 U.S.C. § 2252(a)(1) and (b)(1).” Id.

59. See id. at 1257 (holding that a defendant does not have to know his victim’s age to commit a § 2251(a) offense, but failing to further explain its reasoning).

60. Id.

61. See infra notes 65–70 and accompanying text.

62. See Deverso, 518 F.3d at 1257 (holding that knowledge of the victim’s age is not an element of a § 2251 offense). Since the central issue in X-Citement Video concerned § 2252, the Court did not consider whether the text of § 2251(a) allowed criminal defendants to present a reasonable mistake of age defense in its opinion. See United States v. X-Citement Video, Inc., 513 U.S. 64, 75–78 (1994) (failing to consider whether § 2251(a) textually enables criminal defendants to present a reasonable mistake of age defense in its consideration of that statute).

63. See supra notes 20, 42 and accompanying text (quoting the text of § 2251(a) and noting that it does not enumerate a reasonable mistake of age defense).

64. See infra text accompanying notes 75–77.


66. 342 U.S. 337 (1932).
to avoid, whenever possible, driving into certain areas.\textsuperscript{67} Writing for the majority, Justice Clark offered one justification for utilizing the rule of lenity to interpret an ambiguous criminal statute: “A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.”\textsuperscript{68} Because one of the purposes of criminal punishment in our criminal justice system is to punish those with culpable intent, reasoned the Boyce Motor Lines Court, the Interstate Commerce Commission regulation should be interpreted in favor of the defendant, and the court system should only punish him if he knowingly violated the regulation.\textsuperscript{69} The rule of lenity has yet to be applied in Section 2251(a) interpretation, however.\textsuperscript{70}

The statutory interpretation canon \textit{expressio unius est exclusio alterius} assumes that where a statute speaks to certain matters, other omissions were deliberately excluded.\textsuperscript{71} In \textit{Chan v. Korean Air Lines, Ltd.},\textsuperscript{72} the Supreme Court famously utilized \textit{expressio unius} reasoning to interpret the Warsaw Convention, determining whether the respondent air carrier had lost the benefit of a damage limitation by failing to comply with the Montreal Agreement, which required carriers to provide notice of the limitation.\textsuperscript{73} Writing for the majority, which ruled in favor of respondent Korean Air Lines, Justice Scalia pronounced, “\textit{W}here the text is clear . . . we have no power to insert an amendment.”\textsuperscript{74}

The Eleventh Circuit similarly utilized \textit{expressio unius} reasoning to deny the defendant’s ability to present a reasonable mistake of age defense in \textit{Deverso}. On appeal in the Eleventh Circuit, Deverso argued that the trial court should have presented the jury with a reasonable mistake of age defense instruction with regard to his Section 2251

\footnotesize{\textsuperscript{67} Id. at 338–40.  
\textsuperscript{68} Id. at 340 (citing Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939)).  
\textsuperscript{69} Id. at 342–43; cf. Morissette v. United States, 342 U.S. 246, 251 n.8, 263 (1952) (noting that sex offenses are an exception to the general mens rea requirement of criminal statutes, but holding that although a federal statute criminalizing the taking of government property does not textually include intent as one of its elements, intent is, nonetheless, a requisite element of the offense).  
\textsuperscript{70} See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 77–78 (1994) (failing to mention the rule of lenity in its interpretation of § 2251(a)); United States v. Deverso, 518 F.3d 1250, 1257 (11th Cir. 2008) (holding, without discussing the rule of lenity, that defendant Deverso was not entitled to present a reasonable mistake of age defense because knowledge is not an element of a § 2251(a) offense).  
\textsuperscript{71} 2A S\textsuperscript{IN}GER & S\textsuperscript{IN}GER, supra note 65, § 47:23.  
\textsuperscript{72} 490 U.S. 122 (1989).  
\textsuperscript{73} Id. at 123–35.  
\textsuperscript{74} Id. at 134.
Using expressio unius reasoning, the Eleventh Circuit declined to allow Deverso to present such a defense. Because the text of Section 2251(c)(1) does not enumerate a knowledge requirement, reasoned the Deverso court, criminal defendants are not permitted to raise a reasonable mistake of age defense under this statute.

B. The Supreme Court Employs an Overbreadth Doctrine to Balance Competing Social Interests in First Amendment Jurisprudence

Although every significant Supreme Court decision relating to child pornography statutes emphasizes the importance of protecting the well-being of children, the Court has recognized some instances in which denying a reasonable mistake of age defense could have a chilling effect on constitutionally protected pornography. The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances.” In determining whether a federal statute impinges on First Amendment rights, the Supreme Court uses the overbreadth doctrine to balance individual rights protected by the First Amendment against the necessity of protecting social welfare. The overbreadth doctrine, therefore, empowers courts to judicially engraft affirmative defenses to criminal statutes when such statutes could potentially chill constitutionally protected speech.

In FCC v. Pacifica Foundation, the Supreme Court considered whether the Federal Communications Commission ("FCC") could censor an indecent but non-obscene radio broadcast. In a portion of the Court’s opinion in which Justice Burger and Justice Rehnquist joined, Justice Stevens questioned whether the FCC’s regulation of

75. Deverso, 518 F.3d at 1257.
76. Id.
77. Id.
78. U.S. CONST. amend. I.
79. See infra notes 81–97 and accompanying text. Significantly, the Supreme Court’s overbreadth doctrine applies when the statute chills the speech of others; the statute does not necessarily have to chill the speech of the convicted defendant. See, e.g., N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963) (noting 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”).
80. See, e.g., United States v. Williams, 553 U.S. 285, 292 (2008) (explaining that the First Amendment overbreadth doctrine attempts to balance “deter[ring] people from engaging in constitutionally protected speech, [and] inhibiting the free exchange of ideas” against “invalidating a law . . . directed at conduct so antisocial that it has been made criminal”).
82. Id. at 729.
this broadcast violated the First Amendment.\textsuperscript{83} Justice Stevens concluded that the regulation of indecency must occur in a factually specific context and "cannot be adequately judged in the abstract."\textsuperscript{84} Finding that the FCC’s regulation of the broadcast in question occurred in the proper context, the Supreme Court held that the FCC’s regulation did not violate the First Amendment.\textsuperscript{85}

The Court revisited the relationship between the federal regulation of speech and the First Amendment four years later in \textit{New York v. Ferber}.\textsuperscript{86} Here, in considering the constitutionality of a New York statute prohibiting individuals from "knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances,"\textsuperscript{87} the Court noted that society has a “‘compelling’” interest in protecting the well-being of minors.\textsuperscript{88} Noting that “a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications,"\textsuperscript{89} the Court concluded that the New York statute was constitutional.\textsuperscript{90}

More recently, in \textit{Sabri v. United States},\textsuperscript{91} the Supreme Court further commented that facial challenges based on the overbreadth doctrine should not be frequently made.\textsuperscript{92} The \textit{Sabri} Court observed that overbreadth challenges frequently seek to lower the usual standing requirements, as these challenges invite courts to declare statutes unconstitutional when applied to theoretical parties or circumstances not before the court.\textsuperscript{93} Nevertheless, the \textit{Sabri} Court enumerated free speech as a state interest "weighty" enough to overcome its skepticism of overbreadth challenges.\textsuperscript{94}

\textsuperscript{83.} \textit{Id.} at 742, 744. \\
\textsuperscript{84.} \textit{Id.} at 742. \\
\textsuperscript{85.} \textit{Id.} at 730–34. Justice Stevens additionally noted that the Commission’s regulation may lead some broadcasters to self-censor borderline indecent commentary, but that “[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern.” \textit{Id.} at 743. \\
\textsuperscript{86.} 458 U.S. 747 (1982). \\
\textsuperscript{87.} \textit{Id.} at 749. \\
\textsuperscript{88.} \textit{Id.} at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)). The Court further noted that its interest in protecting the well-being of minors validated its decision in \textit{Pacifica}. \textit{Id.} at 757. \\
\textsuperscript{89.} \textit{Id.} at 771. \\
\textsuperscript{90.} \textit{Id.} at 774. \\
\textsuperscript{91.} 541 U.S. 600 (2004). \\
\textsuperscript{92.} \textit{Id.} at 608–09. \\
\textsuperscript{93.} \textit{Id.} at 609. \\
\textsuperscript{94.} \textit{Id.} at 609–10 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973)).
The Court reached a similar conclusion in United States v. Williams.95 In Williams, the Court considered whether 18 U.S.C. § 2252A(a)(3)(B), which prohibits the pandering or solicitation of child pornography, was unconstitutionally overbroad under the First Amendment.96 In its opinion, the Court confirmed that statutes prohibiting “a substantial amount of protected speech” are facially invalid under the overbreadth doctrine.97 Therefore, although the Court has seriously limited the circumstances under which the overbreadth doctrine may be raised in pornography cases, it acknowledges there may be some circumstances in which the use of the doctrine may be appropriate to protect speech.

C. Federal Circuit Courts Have Split in Determining Whether to Judicially Engraft a Reasonable Mistake of Age Defense to Section 2251(a)

The three federal circuit courts that have considered judicially engrafting a reasonable mistake of age defense to Section 2251(a) have split in deciding whether the Constitution requires such engrafting. Although the Ninth Circuit has determined that the First Amendment requires courts to judicially engraft a reasonable mistake of age defense for Section 2251(a),98 the Eighth and Eleventh Circuits have found that the Constitution does not mandate any affirmative defense.99 In adopting its position on whether Section 2251(a) constitutionally requires a reasonable mistake of age defense, the Eleventh Circuit expressly adopted the Eighth Circuit’s position.100

In United States v. United States District Court for the Central District of California (District Court), the Ninth Circuit explained that although the defendant’s knowledge of the minor’s age is not a textual element of a Section 2251(a) offense,101 “the [F]irst [A]mendment does not permit the imposition of criminal sanctions on the basis of strict liabil-

95. 553 U.S. 285 (2008). The Williams Court described the purpose of the First Amendment overbreadth doctrine as balancing opposing social costs. Id. at 292 (citing Virginia v. Hicks, 539 U.S. 113, 119–20 (2003)).
96. Id. at 288. The Court ultimately held that this statute was not unconstitutionally overbroad. Id. at 307.
In a dissenting opinion, Justice Souter argued that exceptions to child pornography statutes should be based on the “need to foil the exploitation of child subjects.” Id. at 310 (Souter, J., dissenting). Consequently, Justice Souter argued that the First Amendment protects pornographic depictions of fake children. Id. at 311.
97. Id. at 292 (majority opinion).
98. See infra notes 101–08 and accompanying text.
99. See infra notes 109–19 and accompanying text.
100. See infra notes 118–19 and accompanying text.
101. 858 F.2d 534, 538 (9th Cir. 1988).
ity where doing so would seriously chill protected speech." In District Court, defendant James Marvin Souter, Jr., and two co-defendants employed a sixteen-year-old girl to appear in a film entitled *Those Young Girls*, in which they exhibited her participating in sexually explicit acts. While Souter and his co-defendants stipulated to the fact that the girl appearing in their film was a minor, they argued that they were greatly deceived as to her true age.

The Ninth Circuit reasoned that although Section 2251 regulates speech that is not protected by the First Amendment—pornography featuring minors—a “dim and uncertain line” separates protected and unprotected speech. Noting that the First Amendment would protect *Those Young Girls* if it did not depict a minor, the court proclaimed that a pornography producer has no way of being absolutely certain of an actor’s true age. Consequently, the court held that in the rare circumstance where a defendant, despite his best effort to obtain an actor’s true age, pornographically depicts a minor on film, he may present his “reasonable, good-faith belief as to the age of an actor” in defense of a Section 2251(a) charge.

In contrast, the Eighth and Eleventh Circuits have held that Section 2251(a) does not require judicial engraftment of a reasonable mistake of age defense. First, in *Gilmour v. Rogerson*, the Eighth Circuit held that a criminal defendant convicted under Iowa Code Section 728.12(1)—a state statute analogous to Section 2251(a)—was not entitled to present a reasonable mistake of age defense. The *Gilmour* Court reasoned: (1) the State of Iowa has a strong interest in

102. Id. at 540. In so holding, the Court noted that social aversion to the content protected does not supersede the Court’s “duty as guardians of the Constitution.” Id. at 541.

In a dissenting opinion, Judge Beezer argued that the Government’s interest in protecting the well-being of children outweighed any threat to freedom of expression. Id. at 546–47 (Beezer, J., dissenting). Furthermore, he reasoned that judicially engrafting such a defense would offer “little benefit at great cost.” Id.

103. Id. at 536 (majority opinion).

104. Id.

105. Id. at 538 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963)).

106. Id.

107. Id. at 540. The Court further noted a pornographer does not always know the true name of his actors. Id. at 540 n.2. Acknowledging that document forgery is a big industry, the Court suggested that forged documents may prohibit some pornographers from ascertaining the true age of their actors. Id.

108. Id. at 542. Although the Court allowed for a reasonable mistake of age defense in this context, the Court noted that this defense is “entirely implausible under most circumstances, particularly in cases involving children or prepubescent teenagers.” Id. Furthermore, the Court noted that a defendant will certainly face significant difficulty convincing a jury that he made his best effort to obtain the actor’s true age. Id. at 542–43.

109. 117 F.3d 368 (8th Cir. 1997).

110. Id. at 373. Iowa Code § 728.12(1) states:
preventing the sexual exploitation of children;\textsuperscript{111} (2) producers of pornography have the opportunity to independently verify the age of an actor;\textsuperscript{112} and (3) denying criminal defendants a reasonable mistake of age defense would not substantially chill constitutionally protected speech.\textsuperscript{113}

In a dissenting opinion, Judge Morris Sheppard Arnold wrote that he would have found the state statute unconstitutional because it does not allow for a criminal defendant to put forth a reasonable mistake of age defense.\textsuperscript{114} Judge Arnold disagreed with the majority’s propositions, finding the following: (1) a properly designed reasonable mistake of age defense would require defendants to investigate actors’ ages and thus maintain the State’s interest in protecting the well-being of children;\textsuperscript{115} (2) the court’s distinction between producers and distributors of pornography is legally insignificant;\textsuperscript{116} and, most importantly, (3) the statute will substantially chill constitutionally protected speech.\textsuperscript{117}

It shall be unlawful to employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor to engage in a prohibited sexual act or in the simulation of a prohibited sexual act. A person must know, or have reason to know, or intend that the act or simulated act may be photographed, filmed, or otherwise preserved in a negative, slide, book, magazine, computer, computer disk, or other print or visual medium . . . or in any other type of storage system.


\textsuperscript{111} \textit{Gilmour}, 117 F.3d at 372.

\textsuperscript{112} \textit{Id.} at 372–73.

\textsuperscript{113} \textit{Id.} at 373.

\textsuperscript{114} \textit{Id.} at 375 (Arnold, J., dissenting). Judge Arnold additionally noted that the majority’s holding failed to give pornographic media featuring adults the First Amendment protection it deserves. \textit{Id.} at 373.

\textsuperscript{115} \textit{Id.} at 374.

\textsuperscript{116} \textit{Id.} Specifically, Judge Arnold explained the majority wrongfully compared producers of pornography to statutory rapists in distinguishing them from pornography distributors. \textit{Id.} Judge Arnold stated that while there is no constitutional right to engage in consensual sexual intercourse, there is a constitutional right to capture pornographic images. \textit{Id.} Here, Judge Arnold emphasized that the First Amendment contains the most extensive rights of any amendment in the Bill of Rights. \textit{Id.}

In support of his claim that the court’s distinction between producers and distributors of pornography is legally insignificant, Judge Arnold noted that in the information age, a criminal defendant’s reasonable mistake of age defense to a § 728.12(1) charge “will hardly ever prevail.” \textit{Id.} Consequently, suggested Judge Arnold, the majority’s fear of the consequences of allowing criminal defendants to present this defense fails completely. \textit{Id.}

\textsuperscript{117} \textit{Id.} at 375. Judge Arnold emphasized that employing minors for sexual purposes causes great public anxiety. \textit{Id.} Because of this great anxiety, he reasoned, individuals accused of employing minors for sexual purposes are greatly stigmatized in society. \textit{Id.} Convictions for these crimes cause further hardships, as convicts must register as sex offenders once released from prison. \textit{Id.} According to Judge Arnold, the severe consequences of a § 2251(a) charge or conviction will inevitably cause pornography producers
Most recently, in *Deverso*, the Eleventh Circuit similarly declined to judicially engraft a constitutionally mandated reasonable mistake of age defense for criminal defendants charged with violating Section 2251(a).\(^{118}\) Swiftly rejecting the defendant’s constitutional argument for a reasonable mistake of age defense, the court cited *Gilmour* as persuasive precedent and did not further justify its ruling.\(^{119}\)

### III. The Court’s Reasoning

In *United States v. Malloy*,\(^{120}\) the Fourth Circuit affirmed the district court’s conviction and sentencing of defendant Michael Malloy pursuant to 18 U.S.C. § 2251(a) and held that Section 2251(a) does not textually incorporate or constitutionally require a reasonable mistake of age defense.\(^{121}\) Writing for a unanimous Fourth Circuit, Judge Allyson K. Duncan began the court’s analysis by examining Malloy’s claim that the Constitution requires a reasonable mistake of age defense.\(^{122}\) Examining the statutory text, legislative history, and prior judicial interpretations of Section 2251(a), Judge Duncan concluded that knowledge of the victim’s age is neither an enumerated element of the offense nor textually included as an affirmative defense.\(^{123}\) In this determination, Judge Duncan noted that it was “immediately apparent” that Section 2251(a) does not require a defendant to have known his victim was a minor to be convicted.\(^{124}\) Additionally, Judge Duncan explained that the text of Section 2251(a) does not expressly incorporate any affirmative defense.\(^{125}\)

Justifying the court’s reading of the statute, Judge Duncan cited a House Conference Report detailing that the Conference modified the Senate’s original bill “with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the

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118. United States v. Deverso, 518 F.3d 1250, 1257–58 (11th Cir. 2008).
119. Id. at 1258. The Court also cited United States v. Crow, 164 F.3d 229 (5th Cir. 1999), as precedent. *Deverso*, 518 F.3d at 1258. In *Crow*, the defendant challenged the court’s jury instruction regarding § 2251(a). 164 F.3d at 236. Specifically, the defendant claimed that the court failed to instruct the jury that he knew the girl he took obscene pictures of was a minor. *Id.* Here, the court held that knowledge is not an element of the § 2251(a) offense. *Id.*
120. 568 F.3d 166 (4th Cir. 2009), *cert. denied*, 130 S. Ct. 1736 (2010).
121. *Id.* at 171, 176.
122. *Id.* at 169, 171.
123. *Id.* at 171–72.
124. *Id.* at 171.
125. *Id.* at 172.
Further supporting her conclusion that Section 2251(a) does not textually enumerate knowledge of the victim’s age as an element of the offense, Judge Duncan cited United States v. X-Citement Video, Inc., in which the Supreme Court held that criminal defendants may be convicted under Section 2251(a) without any showing that they knew their victim’s actual age.

Despite Malloy’s contention that a reasonable mistake of age defense should be judicially engrafted into the statute to avoid chilling constitutionally protected speech, Judge Duncan cited three sister circuit decisions and the United States Supreme Court to bolster the court’s argument that a reasonable mistake of age defense is not constitutionally required. The Fourth Circuit further noted, “[A]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.” The court concluded, however, that the government interest in prohibiting child participation in pornography greatly outweighed the danger of chilling speech that would otherwise be protected by the First Amendment.

Judge Duncan similarly reasoned that refusing to allow Malloy a mistake of age defense did not violate his due process rights. Although Malloy argued that the disallowance of a reasonable mistake of age defense violated his due process right to present a defense, the Fourth Circuit determined that the district court had provided Malloy with ample opportunity to present a defense. Because the core of Malloy’s due process complaint stemmed from his inability to present a particular defense (that is, reasonable mistake of age), the court also considered Malloy’s contention as an evidentiary argument. Explaining that “a defendant’s right to present a defense is not abso-

128. Malloy, 568 F.3d at 171–72 (citing X-Citement Video, 513 U.S. at 77 n.5).
129. Id. at 172–76.
130. Id. at 174 (quoting United States v. Williams, 128 S. Ct. 1830, 1838 (2008)).
131. Id. at 176. In support of this conclusion, Judge Duncan noted that because the Government has a serious interest in protecting children, the Government has more authority to regulate child pornography than it does other industries. Id. at 174–75. Alternatively, Judge Duncan noted that little lawful pornography would be chilled by the lack of a reasonable mistake of age defense because pornography producers are legally required to confirm their actors’ ages. Id. at 175–76.
132. Id. at 176–77.
133. Id. Specifically, the court cited to the fact that the court permitted Malloy to present evidence attempting to disprove that S.G. was a minor at the time Malloy made the tape. Id.
134. Id. at 177.
and that the evidence Malloy wished to present was irrelevant to the crime with which he was charged, the Fourth Circuit rejected any such evidentiary argument Malloy might raise.\footnote{135} The Fourth Circuit subsequently determined that Malloy’s indictment, which \textit{had} included a knowledge element, was not constructively amended with his conviction.\footnote{136} Concluding that the record did not demonstrate any evidence of prejudice to Malloy’s defense, Judge Duncan asserted that Malloy was appropriately tried for the crime with which he was charged.\footnote{138} Consequently, the court held that the word “knowingly” in Malloy’s indictment had no prejudicial effect on his trial.\footnote{139}

Judge Duncan next established that the Commerce Clause empowers Congress to regulate child pornography under Section 2251(a).\footnote{140} Citing \textit{United States v. Forrest},\footnote{141} the court explained that it had previously upheld a defendant’s conviction for producing child pornography in which the product had never crossed state lines but the equipment used for its production had.\footnote{142} Although Malloy’s production of the tape in question was undoubtedly a local production of child pornography, the court reasoned, he produced the video with a foreign camera and foreign videotape.\footnote{143} Consequently, the court concluded that Malloy’s production constituted an activity having a substantial effect on interstate commerce.\footnote{144}

Finally, the Fourth Circuit determined that Malloy’s fifteen-year sentence did not violate his Eighth Amendment protection from cruel and unusual punishment.\footnote{145} Explaining that judicial review of an Eighth Amendment challenge in the Fourth Circuit is unavailable for sentences less than life imprisonment without the possibility of parole, the court held that Malloy’s sentence was constitutional.\footnote{146}

\footnotetext[135]{135. Id. (quoting United States v. Prince-Oyibo, 320 F.3d 494, 501 (4th Cir. 2003)).} \footnotetext[136]{136. Id.} \footnotetext[137]{137. Id. at 177–79.} \footnotetext[138]{138. Id. at 178–79.} \footnotetext[139]{139. Id. at 179.} \footnotetext[140]{140. Id. at 179–80.} \footnotetext[141]{141. 429 F.3d 73 (4th Cir. 2005).} \footnotetext[142]{142. Malloy, 568 F.3d at 179 (citing Forrest, 429 F.3d at 78–79). Significantly, the \textit{Malloy} court noted that “the Commerce Clause empowers Congress to regulate purely local intra-state activities, so long as they are part of an economic class of activities that have a substantial effect on interstate commerce.” Id. (citing Forrest, 429 F.3d at 78 (internal quotation marks omitted))).} \footnotetext[143]{143. Id. at 180.} \footnotetext[144]{144. Id.} \footnotetext[145]{145. Id.} \footnotetext[146]{146. Id.}
IV. Analysis

In United States v. Malloy, the Fourth Circuit held the following: (1) knowledge of the victim’s age is not an element of a 18 U.S.C. § 2251(a) offense, nor is it textually available to criminal defendants as an affirmative defense; 147 and (2) the United States Constitution does not require judicial engraftment of a reasonable mistake of age affirmative defense. 148 In so holding, the Fourth Circuit correctly determined that Section 2251(a) does not enumerate knowledge as an element of the offense, 149 nor does its text permit a criminal defendant to raise reasonable mistake of age as an affirmative defense. 150 With its ruling, however, the Malloy court neglected to recognize the narrow instance in which a reasonable mistake of age defense could be constitutionally available to criminal defendants charged with Section 2251(a) crimes, first by mischaracterizing the circuit split on this issue 151 and subsequently by failing to properly balance competing social interests. 152 The court could have reached the same outcome and successfully protected children from exploitive abuse in the pornography industry without completely denying criminal defendants’ ability to raise a reasonable mistake of age defense in Section 2251(a) cases. 153 Furthermore, when the Malloy court neglected to carve out a narrow reasonable mistake of age defense for pornography producers, it set the stage to chill future constitutionally protected speech. 154

A. Carefully Following Child Pornography Precedent, the Malloy Court Properly Concluded that the Text, Legislative History, and Recent Judicial Interpretations of Section 2251(a) Disregard the Relevance of Knowledge of a Victim’s Age

In upholding Malloy’s conviction, the Fourth Circuit appropriately analyzed the statutory text, legislative history, and recent judicial interpretations of Section 2251(a). The court correctly concluded that knowledge of the victim’s age is not an enumerated element of the offense. 155 Similarly, the court correctly concluded that knowl-

147. Id. at 171.
148. Id. at 176.
149. See infra Part IV.A.1.
150. See infra Part IV.A.2.
151. See infra Part IV.B.1.
152. See infra Part IV.B.2.
153. See infra Part IV.C.1.
154. See infra Part IV.C.2.
155. See infra Part IV.A.1.
edge of the victim’s age is not textually available to criminal defendants as an affirmative defense.  

Although the rule of lenity would have enabled the court to interpret the text of Section 2251(a) to allow criminal defendants to present a reasonable mistake of age defense, the Malloy court appropriately interpreted the statute using expressio unius reasoning and following recent precedent.  

Because sex crimes, particularly those involving minors, are generally recognized as an exception to the rule of lenity, the Malloy court’s decision to utilize expressio unius reasoning in interpreting the text of Section 2251(a) was proper.

1. The Fourth Circuit Correctly Held that Knowledge of the Victim’s Age Is Not an Element of a Section 2251(a) Offense

The Malloy court correctly relied on the text, legislative history, and recent judicial interpretations of Section 2251(a) in determining that knowledge of the victim’s age is not an element of this statute. In doing so, the Fourth Circuit correctly found that the most grammatical reading of this statute does not include knowledge of the victim’s age as a necessary element of the offense. Specifically, the Malloy court noted that a Section 2251(a) charge of sexual exploitation of a minor for the purpose of production of a visual depiction includes only three elements, none of which requires knowledge of the victim’s age. Due to the gravity of Malloy’s constitutional challenge, moreover, the court properly determined that its statutory inquiry necessitated a more comprehensive analysis of both the legislative history and recent judicial interpretations of this statute.

156. See infra Part IV.A.2.

157. See infra notes 171–76 and accompanying text.

158. See infra notes 174–76 and accompanying text.


160. Malloy, 568 F.3d at 169. The Fourth Circuit concluded that the three elements of a § 2251(a) charge include as follows: (1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce.

Id.

161. See id. at 171 (addressing the statutory text prior to specifically addressing Malloy’s constitutional challenge); United States v. Deverso, 518 F.3d 1250, 1257–58 (11th Cir. 2008) (first considering whether knowledge of the victim’s age is an element of a § 2251(a) offense before addressing the defendant’s constitutional claim).
In support of its holding, the court properly determined that the legislative history of Section 2251(a) reveals that Congress did not intend for knowledge to be an element of this offense. The Fourth Circuit aptly noted that in enacting Section 2251(a), Congress expressly rejected the notion that the statute should include knowledge of the victim’s age as an element of the offense. Quoting the relevant portion of the House Conference Report, the Fourth Circuit detailed:

The Senate Bill contains an express requirement in proposed section 2251(a) that the crime be committed “knowingly.” The House amendment does not. The Conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

Thus, despite the inclusion of the word “knowingly” in Malloy’s indictment, the court’s use of the legislative history of Section 2251(a) demonstrates the superfluity of this language.

The Fourth Circuit’s subsequent reliance on the Supreme Court’s decision in United States v. X-Citement Video, Inc. illuminated an identical judicial understanding of the elements of the Section 2251(a) offense. Because X-Citement Video provided that producers of pornography are in an easy position to determine the age of their performers and that a Section 2251(a) offense is similar to statutory rape, the Malloy court properly relied on X-Citement Video as a recent judicial interpretation of this statute. Consequently, the court’s thorough analysis of Section 2251(a) jurisprudence supports its finding that knowledge is not an element of the Section 2251(a) offense.

162. See Malloy, 568 F.3d at 171 (analyzing the legislative intent in creating the elements of a § 2251(a) offense).
163. See id. (quoting H.R. REP. No. 95-811, at 5 (1977) (Conf. Rep.)); cf. United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal. (District Court), 858 F.2d 534, 538 (9th Cir. 1988) (determining that the drafters of § 2251(a) did not intend to require the prosecution to prove that the defendant knew the victim’s age).
164. See Malloy, 568 F.3d at 171–72 (detailing the legislative history of § 2251(a) and concluding that knowledge is not an element of the offense).
165. 513 U.S. 64 (1994).
166. Id. at 72–77.
167. See Malloy, 568 F.3d at 171–72 (bolstering its claim that § 2251(a) does not include knowledge of the victim’s age by using Supreme Court precedent). The Fourth Circuit’s reliance on X-Citement Video, however, does not specifically answer Malloy’s constitutional challenge of this statute; although the Malloy court later specifically addressed Malloy’s constitutional challenge, it did not make any mention of the constitutionality of § 2251(a) in its reliance of X-Citement Video as precedent for interpreting the text of this statute. See id. (considering the constitutional challenge subsequent to the textual analysis).
2. The Malloy Court Followed Sister Circuit Precedent in Neglecting to Interpret the Text of Section 2251(a) to Include a Reasonable Mistake of Age Defense

Including significantly less detail than it did in its analysis of whether knowledge was an element of the Section 2251(a) offense, the Fourth Circuit similarly examined the text of Section 2251(a) to find that the statute on its face does not allow a criminal defendant to present a reasonable mistake of age defense. Citing the relevant statutory language, the Malloy court properly implied that such a defense is not enumerated in the statute.168 Utilizing the statutory interpretation canon of *expressio unius*, the court determined that because Section 2251(a) does not contain such an enumerated affirmative defense, Congress did not intend for one to be present.169 To bolster its use of *expressio unius* reasoning in finding that Congress did not intend for this statute to allow defendants to present a reasonable mistake of age defense, the court analogized 18 U.S.C. §§ 2243(c) and 2252A(d), which both explicitly contain enumerated affirmative defenses, to Section 2251(a), which does not textually include any affirmative defenses.170

Moreover, in concluding that Section 2251(a) does not textually allow criminal defendants to present a reasonable mistake of age defense at trial, the court appropriately utilized *expressio unius* reasoning as opposed to the rule of lenity.171 Had the Malloy court interpreted Section 2251(a) by using the rule of lenity, it could have held that the textual ambiguity of the statute should be resolved in Malloy’s favor and thus that he should have been permitted to present a reasonable mistake of age defense.172 The court’s use of *expressio unius* reasoning

168. See id. (explicitly noting that § 2251(a) lacks an affirmative reasonable mistake of age defense).

169. Id.; see also Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (explaining that the Supreme Court “must . . . be governed by the text” and “where the text is clear . . . we have no power to insert an amendment”); 2A Singer & Singer, supra note 65, § 47:23 (explaining that *expressio unius* reasoning assumes that “all omissions . . . be understood as exclusions”).

170. See Malloy, 568 F.3d at 172 (comparing § 2251(a) to §§ 2243(c) and 2252A(d)); see also supra note 20 and accompanying text (providing the text of § 2251(a), which does not enumerate any affirmative defenses that may be raised in response to being charged under this statute).

171. See 2 Singer & Singer, supra note 65, § 44A:19 (explaining that the rule of lenity is used to interpret ambiguous criminal statutes).

172. See id. (clarifying that ambiguous criminal statutes should be resolved under the rule of lenity in favor of the criminal defendant); see also Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) (pronouncing that one of the primary justifications for the rule of lenity is to “give notice of the required conduct to one who would avoid its penalties”).
in its interpretation of Section 2251(a), however, follows Eleventh Circuit precedent in United States v. Deverso.\textsuperscript{173} Because sex crimes, including child rape, have previously been recognized as an exception to crimes where a knowledge requirement should be read into a criminal statute, the rule of lenity is not the most appropriate tool for interpretation of statutes criminalizing sex offenses, particularly those involving children.\textsuperscript{174} Therefore, although the Malloy court did not cite a specific precedent in its determination that Section 2251(a) does not allow for a reasonable mistake of age defense,\textsuperscript{175} it nonetheless appropriately followed the correct approach of recent precedent in refusing to apply the rule of lenity in interpreting Section 2251(a).\textsuperscript{176} Concluding that the text of Section 2251(a) does not include knowledge of the victim’s age as an element of the offense or reasonable mistake of age as an affirmative defense, the Malloy court was prepared to consider Malloy’s First Amendment challenge.\textsuperscript{177}

B. The Fourth Circuit Should Have Judicially Engrafted a Reasonable Mistake of Age Defense Pursuant to the Supreme Court’s First Amendment Overbreadth Doctrine

After correctly determining that the statutory text, legislative history, and recent jurisprudence of Section 2251(a) do not require the Government to prove the defendant’s knowledge of his victim’s age or allow for a reasonable mistake of age defense,\textsuperscript{178} the court failed to judicially engraft a reasonable mistake of age defense.\textsuperscript{179} In doing so, the Fourth Circuit wrongly characterized the Section 2251(a) circuit split, relying too heavily on the Gilmour majority’s overbreadth analysis.\textsuperscript{180} Furthermore, the Malloy court misbalanced the social in-

\textsuperscript{173} See 518 F.3d 1250, 1257 (11th Cir. 2008) (utilizing expressio unius reasoning in holding that defendant Deverso was not entitled to a reasonable mistake of age jury instruction because knowledge of age is not an element of the offense).

\textsuperscript{174} See Morissette v. United States, 342 U.S. 246, 251 n.8 (1952) (explaining that sex offenses are an exception to the general rule that a knowledge requirement should be read into an ambiguous criminal statute). But cf. Zachary Price, The Rule of Lenity as a Rule of Structure, 72 FORDHAM L. REV. 885, 909 (2004) (“If the notice theory is insufficient to justify the application of lenity across the gamut of crimes, there appears to be little authority to support selective application of the rule to some crimes but not others.”).

\textsuperscript{175} See Malloy, 568 F.3d at 172 (neglecting to cite to any specific case law in its determination of whether § 2251(a) textually enables criminal defendants to present a reasonable mistake of age defense).

\textsuperscript{176} See Deverso, 518 F.3d at 1257 (holding that § 2251(a) does not textually enable criminal defendants to present a reasonable mistake of age defense).

\textsuperscript{177} Malloy, 568 F.3d at 172.

\textsuperscript{178} See supra Part IV.A.1–2.

\textsuperscript{179} See infra Part IV.B.1–2.

\textsuperscript{180} See infra Part IV.B.1.
terests at stake in its decision not to judicially engraft a reasonable mistake of age defense. 181

1. The Court Mischaracterized the Section 2251(a) Overbreadth Circuit Split in Rejecting the Reasonable Mistake of Age Defense

The Fourth Circuit’s mischaracterization of the circuit split fostered its failure to judicially engraft a reasonable mistake of age defense. Specifically, the Fourth Circuit too easily dismissed the Ninth Circuit’s analysis of the reasonable mistake of age defense in District Court. 182 Subsequently, the Fourth Circuit improperly relied on the Eighth Circuit’s conclusion in Gilmour as its primary support to reject the reasonable mistake of age defense. 183 Additionally, the Malloy court’s reliance on the Eleventh Circuit’s reasoning offered little support for its denial of the reasonable mistake of age defense. 184

First, the Fourth Circuit wrongfully dismissed the Ninth Circuit’s reasoning in District Court in declining to engraft a reasonable mistake of age defense. The Malloy court initially attempted to discredit the Ninth Circuit’s judicial engraftment of a reasonable mistake of age defense by noting that District Court predates the Supreme Court’s opinion in X-Citement Video.185 This preliminary attempt to discredit the Ninth Circuit fails, however, because the primary issue in X-Citement Video was whether 18 U.S.C. § 2252 required knowledge of the victim’s age to be an element—not an affirmative defense—of the statute. 186 Because the central issue in District Court differs from that of X-Citement Video, the Malloy court’s dismissal of the District Court reasoning lacks merit. 187 Moreover, rather than dismissing the District Court

181. See infra Part IV.B.2.
182. See infra notes 185–92 and accompanying text.
183. See infra notes 193–202 and accompanying text.
184. See infra note 203 and accompanying text.
185. See United States v. Malloy, 568 F.3d 166, 173 & n.2 (4th Cir. 2009) (explaining that the Ninth Circuit decided District Court before the Supreme Court decided X-Citement Video, and, additionally, attempting to differentiate Malloy’s situation from the precedent set forth in District Court), cert. denied, 130 S. Ct. 1736 (2010).
186. See United States v. X-Citement Video, Inc., 513 U.S. 64, 65–67 (1994) (detailing defendant Rubin Gottesman’s claim that the Protection of Children Against Sexual Exploitation Act was unconstitutional because it does not require the Government to prove that the defendant knew his victim was a minor).
187. See id. (considering whether § 2252 was unconstitutional because it lacked a reasonable mistake of age defense); United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal. (District Court), 858 F.2d 534, 538–42 (9th Cir. 1988) (determining that § 2251(a) is unconstitutional because it does not allow criminal defendants to present a reasonable mistake of age defense); see also Gilmour v. Rogerson, 117 F.3d 368, 372 (8th Cir. 1997) (finding that after the Supreme Court’s ruling in X-Citement Video, the issue of whether § 2251(a) consti-
analysis in this way, the Fourth Circuit should have at least considered the reasons the Ninth Circuit provided for adopting a reasonable mistake of age defense in District Court.\footnote{See District Court, 858 F.2d at 540 (explaining that the First Amendment does not allow strict liability to be imposed when doing so would “seriously chill” constitutionally protected speech).}

The Malloy court also wrongfully dismissed the holding in District Court by noting that the affirmative defense the Ninth Circuit adopted was “very narrow.”\footnote{See Malloy, 568 F.3d at 173 n.2 (quoting District Court’s holding: “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 actor or actress was under 18 years of age.” (internal quotation marks omitted)).} The fact that this defense is narrow, however, is not enough to discredit it.\footnote{Cf. Gonzales v. Carhart, 550 U.S. 124, 188–89 (2007) (Ginsburg, J., dissenting) (arguing that the Partial-Birth Abortion Ban Act of 2003 may unconstitutionally pose an undue burden on a small percentage of women seeking abortions and consequently noting that “[t]he very purpose of a[n] . . . exception is to protect women in exceptional cases”). The Gonzales Court’s notion of an exception as necessary to protect women is similar to the Ninth Circuit’s attempt to protect speech with the narrow exception it set forth in District Court.} As the majority in District Court determined, Section 2251(a) would “seriously chill protected speech” without a reasonable mistake of age defense.\footnote{District Court, 858 F.2d at 540.} Therefore, the Malloy court’s assertion that the reasonable mistake of age defense that District Court adopted was “very narrow” merely shows that a broad reasonable mistake of age defense was not necessary.\footnote{See Malloy, 568 F.3d at 173 n.2 (attempting to discredit the defense set forth in District Court).} Consequently, neither of the Malloy court’s overt attempts to discredit the District Court analysis justified its ultimate conclusion that Section 2251(a) does not constitutionally require a reasonable mistake of age defense.

Second, in declining to judicially engraft an affirmative defense, the Fourth Circuit relied too heavily on the Eighth Circuit’s analysis of Section 2251(a). Explaining its decision not to allow the defense, the Malloy court pointed to the Eighth Circuit’s determination that criminal statutes protecting children often do not require a mens rea element.\footnote{See id. at 173–74 (citing Eighth Circuit precedent set in Gilmour to rule that § 2251(a) does not constitutionally require a reasonable mistake of age defense).} The Malloy court also cited Gilmour v. Rogerson\footnote{117 F.3d 368 (8th Cir. 1997).} as rejecting the approach taken in District Court.\footnote{Malloy, 568 F.3d at 174 (citing Gilmour, 117 F.3d at 372).} The Fourth Circuit’s heavy reliance on the Eighth Circuit’s assertion that criminal statutes intended...
to protect children do not require a mens rea element does not conclusively support the position that Section 2251(a) does not require a reasonable mistake of age defense.\footnote{196.}{196. Compare \textit{id.} (choosing to follow the Eighth Circuit precedent set forth in \textit{Gilmour} despite the fact that the Ninth Circuit previously ruled in \textit{District Court} that § 2251(a) constitutionally requires judicial engraftment of a reasonable mistake of age defense, \textit{with District Court}, 858 F.2d at 542–44 (explaining that "the federal courts may, in limited circumstances, recognize an affirmative defense where a statute does not expressly provide it" and holding that § 2251(a) constitutionally requires a narrow reasonable mistake of age defense).}

Furthermore, the \textit{Malloy} court should not have chiefly relied on the \textit{Gilmour} majority’s reasoning in determining that Section 2251(a) does not require a reasonable mistake of age defense.\footnote{197.}{197. First, because the Supreme Court has held, in the administrative law context, that legislative inaction following interpretation of a statute evidences the legislature’s intention to adopt the interpretation,\footnote{198.}{198. See, e.g., \textit{CBS, Inc. v. FCC}, 453 U.S. 367, 383–85 (1981) (holding that because Congress had been made aware of the FCC’s interpretation of a provision of the Federal Election Campaign Act of 1973, “departure from that construction is unwarranted”); \textit{Zemel v. Rusk}, 381 U.S. 1, 11 (1965) (“Congress’ failure to repeal or revise [the statute] in the face of such administrative interpretation [is] persuasive evidence that that interpretation is the one intended by Congress.”). Because courts have sometimes considered the “legislative inaction following contemporaneous and practical interpretation” rule a “‘weak reed upon which to lean’” and a “‘poor beacon to follow,’” 2B SINGER & SINGER, supra note 65, § 49:10, application of this rule may require “the inference of conscious ratification,” \textit{Duncan v. R.R. Ret. Bd.}, 375 F.2d 915, 919 (4th Cir. 1967). Moreover, this rule is an appropriate interpretive tool to use in this circumstance for two reasons. First, Congress has revised § 2251 nine times since the Ninth Circuit’s judicial engraftment of a reasonable mistake of age defense in \textit{District Court} and has never revised the statute to prevent courts from judicially engrafting this defense. \textit{See infra} note 199 and accompanying text (enumerating the nine times Congress has revised § 2251 without ever addressing the Ninth Circuit’s ruling in \textit{District Court}). Second, because child pornography and child prostitution are serious issues that have raised great concern in Congress, it would seem that Congress would have revised § 2251 following \textit{District Court} if it did not wish to adopt this interpretation. \textit{See S. REP. NO. 95-438}, at 8–9 (1977) (detailing the need to enact § 2251 because of the importance of prohibiting child pornography and child prostitution in American society). Furthermore, the Eighth Circuit’s refusal to judicially engraft a reasonable mistake of age defense and Congress’s subsequent inaction following that decision does not constitute legislative inaction following contemporaneous and practical interpretation because the Eighth Circuit interpreted a state child pornography statute in its decision in \textit{Gilmour}. \textit{See Gilmour}, 117 F.3d at 370 (interpreting Iowa Code § 728.12(1)).}{199.} See \textit{Providing Resources, Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008} (Protect Our Children Act of 2008),
issue in *Gilmour* is analogous to Section 2251(a), the *Gilmour* court analyzed an Iowa statute—*Iowa Code Section 728.12(1)—and determined that it does not require a reasonable mistake of age defense.\(^{200}\)

Interpretation of a federal statute should only be based on a state statute when the federal statute was borrowed from the state statute.\(^{201}\) Rather than primarily basing its reasoning on *Gilmour*, therefore, the Fourth Circuit should have given more meaningful consideration to other cases, *District Court* in particular, that specifically discussed Section 2251(a).\(^{202}\)

Finally, the *Malloy* court’s reliance on the Eleventh Circuit’s holding in *Deverso* offers little support to justify its conclusion. Although the Eleventh Circuit ultimately determined that Section 2251(a) does not constitutionally require a reasonable mistake of age defense, the Eleventh Circuit only cited two cases—one of which was *Gilmour*—in reaching its conclusion.\(^{203}\) The Fourth Circuit’s use of *Deverso*, there-
fore, amounted to little more than empty precedent. Accordingly, although two of the three sister circuit precedents cited in Malloy ruled the same way, the Malloy court failed to utilize Gilmour or Deverso in a meaningful way as to justify its rejection of a reasonable mistake of age defense, and also failed to discredit the Ninth Circuit’s analysis of the issue in District Court.

2. The Malloy Court Did Not Properly Balance Competing Social Interests in Its Overbreadth Analysis

In addition to failing to properly utilize sister circuit precedent, the Fourth Circuit neglected to properly balance competing social interests in its independent overbreadth analysis. On the first side of the scale, the court properly concluded that the Government has a great interest in protecting the well-being of children.\textsuperscript{204} On the other side of the scale, however, the court wrongfully minimized the chilling effect of denying criminal defendants a reasonable mistake of age defense on their constitutional right to free speech.\textsuperscript{205} The court’s imbalanced scale wrongfully denies criminal defendants in the Fourth Circuit a reasonable mistake of age defense.

In its overbreadth analysis, the Fourth Circuit first determined that the Government has significant freedom to regulate the production of child pornography because of the great importance of protecting the well-being of children.\textsuperscript{206} Indeed, the well-being of children has always been a serious consideration in the regulation of child pornography.\textsuperscript{207} In response to an overbreadth challenge, however, a court must properly weigh the State’s social welfare interests against the potential chilling effect of constitutionally protected speech.\textsuperscript{208}

\textsuperscript{204} See infra notes 206–08 and accompanying text.
\textsuperscript{205} See infra notes 209–13 and accompanying text.
\textsuperscript{206} See Malloy, 568 F.3d at 175 (“Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy . . . . [H]owever, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.” (quoting New York v. Ferber, 458 U.S. 747, 756 (1982))).
\textsuperscript{207} See, e.g., Gilmour, 117 F.3d at 372 (noting that the State’s interest in prohibiting the sexual exploitation of minors is “very strong”); cf. GORDON HAWKINS & FRANKLIN E. ZIMRING, PORNOGRAPHY IN A FREE SOCIETY 179 (1988) (explaining that “[n]o mainstream commentary we have seen takes exception to prohibiting the use of children in the production of commercial, or for that matter private, pornography; or to the use of the criminal law to enforce that prohibition”).
\textsuperscript{208} See supra Part II.B.
The Malloy court failed to properly balance the chilling effect of constitutionally protected speech. Initially, the court minimized Section 2251(a)’s potential chilling effect, primarily basing its reasoning on a wrongful determination that little legitimate pornography would be chilled by the decision not to recognize a reasonable mistake of age defense because pornography producers are already required to authenticate their actors’ ages.\footnote{209}{See Malloy, 568 F.3d at 175 (citing 18 U.S.C. § 2257(b)(1), the statutory provision requiring pornography producers to “ascertain, by examination of an identification document containing such information, the performer’s name and date of birth”).} This argument misses the point, however, because it fails to consider the severity of the potential strict liability sanctions facing criminal defendants charged with Section 2251(a) violations.\footnote{210}{See Gilmour, 117 F.3d at 375 (Arnold, J., dissenting) (explaining that the court’s denial of criminal defendants’ ability to present a reasonable mistake of age defense will inevitably chill speech). Judge Arnold wrote: A conviction for a crime like the one charged here, moreover, will almost certainly cause significant hardship by depriving those convicted of their liberty for a considerable period of time and by creating lasting difficulties for them because of laws that require them to register with local authorities following release. These kinds of burdensome disabilities will surely cause many producers of protected erotic matter to forfeit their First Amendment rights, and this is precisely the kind of forfeiture that courts ought to be assiduous to give citizens the means to avoid. Id.} Even though pornography producers are required to determine the age of their actors prior to commencing production, there are circumstances in which pornography producers, despite their best efforts, are unable to uncover the true age of their actors.\footnote{211}{See, e.g., United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal. (District Court), 858 F.2d 534, 540 (9th Cir. 1988) (finding that “[t]here is no way of being absolutely sure that an actor or actress who is youthful in appearance is not a minor”).} The Fourth Circuit fails to note that this is precisely what happened to the defendant in District Court.\footnote{212}{See Malloy, 568 F.3d at 172–76 (failing to acknowledge that pornography producers charged with § 2251 offenses have previously been unable to determine the true age of their actors, despite their best attempts); cf. District Court, 858 F.2d at 556 (describing how defendants were “seriously misled” as to the true age of an actress that appeared in their film).} Without a reasonable mistake of age defense, therefore, pornography producers will inevitably forfeit their First Amendment rights for fear of severe strict liability sanctions being imposed.\footnote{213}{See Gilmour, 117 F.3d at 375 (arguing that failing to allow for a reasonable mistake of age defense will seriously chill future speech).}

The Malloy court’s subsequent auxiliary reasons for determining that Section 2251(a) will not chill constitutionally protected speech are equally flawed. The court’s conclusion that only pornography fea-
turing "youthful actors" will be chilled does not refute an overbreadth argument because it fails to demonstrate that a substantial amount of speech will not be chilled. Similarly, the court’s conclusion that most prosecutions involve subjects that are unmistakably children also fails to overcome an overbreadth challenge. Although the court argued that prosecution of "youthful-looking subjects who are not unmistakably children" is rare, it overlooks the fact that this was precisely what occurred in two of the three major precedents on this issue. The factual circumstance of District Court may chill constitutionally protected speech, despite the Malloy court’s assertion that such prosecutions are infrequent.

Finally, the court’s assertion that producers of pornography featuring youthful-looking actors will not be chilled because pornography is lucrative does not justify denying Malloy’s overbreadth challenge. Although pornography may be a lucrative industry, its producers nonetheless risk prosecution for utilizing a minor actor and, if

214. See Malloy, 568 F.3d at 175–76 (arguing that only a “subset” of pornography is at issue without any affirmative evidence that pornography featuring “youthful-looking” actors constitutes a small enough portion of constitutionally protected speech to trump an overbreadth challenge (internal quotation marks omitted)).

215. See Child Pornography and Sex Rings 30 (Ann Wolbert Burgess & Marianne Lindeqvist Clark eds., 1984) (clarifying that “[i]t has been difficult to obtain statistics on the use, sale, or possession of child pornography because the dynamics of child sexual exploitation include secrecy and pressure by the adult to ensure the child’s loyalty not to disclose any information about sexual activity”); Hawkins & Zimring, supra note 207, at 182 (hypothesizing that because pornography featuring children is an uncontroversial topic in our society, it has never been rigorously studied or analyzed and that consequently “a considerable number of general statements float on top of an abundance of unexamined issues relating to the possible harms involved in children’s participation in the production of pornographic material”); Porn Profits: Corporate America’s Secret, ABC News, May 27, 2004, http://abcnews.go.com/Primetime/story?id=132370&page=1 (explaining that pornography is a $10 billion business in the United States, making it bigger than the National Football League, the National Basketball Association, and Major League Baseball combined).

216. See Malloy, 568 F.3d at 176 (noting that child pornography victims frequently cannot be found, and, consequently, when prosecutors must prove their case on images alone, prosecutions only occur when the victim is “unmistakably a child”).

217. Id.; see also District Court, 858 F.2d at 546 (Beezer, J., dissenting) (arguing that prosecution in such cases does not frequently occur).

218. See United States v. Deverso, 518 F.3d 1250, 1253–54 (11th Cir. 2008) (explaining that one of the defendant’s victims, “Beverly,” was seventeen when the defendant captured pornographic images of her); Gilmour, 117 F.3d at 369–70 (majority opinion) (prosecuting a criminal defendant who took photographs of a seventeen-year-old who claimed to be twenty-two); District Court, 858 F.2d at 536 (majority opinion) (prosecuting a criminal defendant for hiring a youthful-looking actress to play in the pornography film Those Young Girls).

219. See Malloy, 568 F.3d at 176 & n.8 (justifying its conclusion that pornography is lucrative by citing two articles that explain that pornography is currently a multi-billion dollar industry in the United States).
convicted, face severe sanctions. Thus, all of the court’s justifications for denying Malloy’s overbreadth challenge fail.

C. The Malloy Court’s Holding Unnecessarily Sets the Stage to Chill Future Constitutionally Protected Speech

Because the Fourth Circuit, in declining to adopt a reasonable mistake of age defense, wrongfully utilized sister circuit precedent and failed to properly balance competing social interests and prevent overbreadth, future constitutionally protected speech will be chilled in this circuit. Moreover, the Fourth Circuit could easily have engrafted a reasonable mistake of age defense to prevent overbreadth and upheld Malloy’s conviction. Through faulty reasoning, however, the Fourth Circuit’s absolute refusal to engraft a reasonable mistake of age defense for criminal defendants charged with violating Section 2251(a) set the stage to chill constitutionally protected speech in the future.

1. The Fourth Circuit Could Have Reached the Same Outcome Without an Absolute Determination that a Reasonable Mistake of Age Defense Is Never Appropriate

If the Malloy court had elected to judicially engraft an affirmative defense to Section 2251(a), it still could have upheld Malloy’s conviction. As the court noted, the Ninth Circuit adopted a narrow affirmative defense to Section 2251(a) in District Court: “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 actor or actress was under 18 years of age.” Because the defendant in District Court could show by clear and convincing evidence that there was absolutely no way he could have learned the true age of the actress in question, the Ninth Circuit permitted him to present this affirmative defense. The Malloy court noted, though, that the af-

220. See supra note 210 and accompanying text.
221. See supra Part IV.B.1–2.
222. See infra Part IV.C.1.
223. See infra Part IV.C.2.
224. Malloy, 568 F.3d at 173 n.2 (internal quotation marks omitted) (quoting United States v. U.S. Dist. Ct. for the Cent. Dist. of Cal. (District Court), 858 F.2d 534, 543 (9th Cir. 1988)).
225. See District Court, 858 F.2d at 540, 542–44 (explaining that a reasonable mistake of age defense is necessary because in certain instances there is no way a pornography producer can be “absolutely sure” that an actor or actress is over eighteen). The court further noted, however, that this defense would be “implausible” in situations where the actor or actress was obviously a prepubescent child. Id. at 542.
firmative defense the Ninth Circuit adopted would not apply to defendant Malloy’s situation.\textsuperscript{226} Although the reasonable mistake of age defense adopted in \textit{District Court} would not be appropriate for Malloy himself to raise, future criminal defendants with factual situations similar to the defendant in \textit{District Court} would and should be able to raise such a defense.\textsuperscript{227} Noting that the \textit{District Court} rule would not help Malloy, the court refused to adopt any affirmative defense.\textsuperscript{228} Instead of rejecting an affirmative defense completely, the court could have elected to adopt the narrow affirmative defense detailed in \textit{District Court} while simultaneously upholding Malloy’s conviction.

Furthermore, in adopting \textit{District Court}’s narrowly tailored affirmative defense, the Malloy court could have maintained its primary goal of protecting the well-being of minors. Emphasizing the Government’s interest in protecting children from being sexually abused in the pornography industry, the court cited \textit{Ferber} to justify its holding.\textsuperscript{229} The Fourth Circuit failed to note, however, that equally as important as protecting the well-being of children in our society, the First Amendment mightily protects freedom of speech in our Nation and “is as close to an absolute as we have in our jurisprudence.”\textsuperscript{2230} Although judges may individually feel aversion to the speech at issue in cases such as this, such aversion does not discharge the court’s duty to protect the Constitution.\textsuperscript{231} Had the \textit{Malloy} court adopted a narrowly tailored affirmative defense, moreover, it could have properly

\begin{itemize}
  \item \textsuperscript{226} \textit{Malloy}, 568 F.3d at 173 & n.2. The Fourth Circuit reasoned that because Malloy merely asked S.G. her age and never investigated her true age further, he would be unable to meet the clear and convincing evidence standard set forth in \textit{District Court}. \textit{Id.} at 173 n.2 (internal quotation marks omitted). Although Malloy requested that the court lower the evidentiary standard to a preponderance of the evidence standard, the court refused to accept the argument that § 2251(a) constitutionally necessitates an affirmative defense. \textit{Id.} (internal quotation marks omitted).
  \item \textsuperscript{227} \textit{See District Court}, 858 F.2d at 540 (explaining that “[e]ven after taking the most elaborate steps to determine how old the subject is, as defendants claim they did here, a producer may still face up to ten years in prison and a $100,000 fine for each count” (citation omitted)).
  \item \textsuperscript{228} \textit{See Malloy}, 568 F.3d at 173 (failing to acknowledge the possibility that such a situation may arise, despite sister circuit precedent to the contrary).
  \item \textsuperscript{229} \textit{Id.} at 175 & n.5 (“[A] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” (quoting New York v. \textit{Ferber}, 458 U.S. 747, 757 (1982))).
  \item \textsuperscript{230} \textit{District Court}, 858 F.2d at 541.
  \item \textsuperscript{231} \textit{See id.} (“The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution.”).
\end{itemize}
balanced the competing interests of protecting children from sexual abuse and preserving First Amendment rights.232

2. By Following the Gilmour Majority, the Malloy Court Set the Stage to Chill Constitutionally Protected Speech in the Fourth Circuit

When it refused to judicially engraft a reasonable mistake of age defense for criminal defendants charged with Section 2251(a) crimes, the Malloy court set the stage to chill future constitutionally protected speech in the Fourth Circuit. Future pornography producers will inevitably be chilled by the Malloy court’s decision to impose criminal sanctions on a strict liability basis.233 From this point forward, pornography producers who diligently investigate the age of their actors and actresses and reasonably believe they are filming adults may wrongfully be held strictly liable despite First Amendment protection.234 As the Supreme Court noted in its landmark decision regarding libel under the First Amendment in *New York Times Co. v. Sullivan*,235 “freedoms of expression are to have . . . breathing space.”236 Such breathing space should allow a pornography producer the opportunity to defend himself against a Section 2251(a) charge when he can prove that he independently investigated the age of the actor or actress he filmed and believed in good faith that the individual he filmed had achieved the age of majority.237 With its decision in *Malloy*, however, the court has denied future criminal defendants in the Fourth Circuit any such breathing space.

When governments possess the ability to restrict speech, greater consequences may be imminent. As one court noted:

Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting

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232. See id. at 541–42 (explaining that the First Amendment mandates a reasonable mistake of age defense to be available for defendants charged with § 2251(a) offenses).

233. See id. at 540 (reading Supreme Court precedent to indicate that First Amendment jurisprudence does not allow strict liability where doing so would chill constitutionally protected speech).

234. See id. at 542 (explaining that a reasonable mistake of age defense is necessary to protect “the heartland of political, literary and scientific expression and debate”).


236. Id. at 271–72 (citation and internal quotation marks omitted).

237. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (noting that breathing space in the libel context requires the plaintiff to prove the requisite level of culpability). Here, the court stated, “[B]reathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability.” *Id.*
speech. . . . Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.238

To avoid silencing change and those seeking change in society, therefore, courts must vigilantly protect First Amendment rights.239 By failing to engraft a reasonable mistake of age defense, the Fourth Circuit has ensured that constitutionally protected speech will be chilled and voices of change may be silenced.

V. Conclusion

In United States v. Malloy, the Fourth Circuit properly held that 18 U.S.C. § 2251(a) does not include knowledge of a victim’s age as an element the Government must prove to convict a criminal defendant,240 and it also rightly determined that Section 2251(a) does not textualy offer reasonable mistake of age as an affirmative defense.241 In so holding, however, the court unreasonably failed to judicially engraft a reasonable mistake of age defense pursuant to the Supreme Court’s overbreadth doctrine.242 The Malloy court could have achieved the same outcome and successfully protected minors from sexual abuse in the pornography industry without universally denying criminal defendants charged with Section 2251(a) violations a narrowly tailored reasonable mistake of age defense.243 With its ruling,

239. See id. (insisting that any loss of the right to free speech will thwart any individual attempt for change in society and enable government stasis). In addition to protecting First Amendment rights, the protection of pornographers’ rights may help collapse the sexual repression of women wishing to participate in the pornography industry. Cf. Ronald J. Berger, Patricia Searles & Charles E. Cottle, Feminism and Pornography 40 (1991) (explaining that according to libertarian feminists, female sexual freedom involves “transgressing socially respectable categories of sexuality and refusing to draw the line on . . . politically correct sexuality” (quoting Ann Ferguson, Sex War: The Debate Between Radical and Libertarian Feminists, 10 Signs 106, 109 (1984))). Although libertarian feminists certainly do not advocate for the sexual abuse of children in the pornography industry, their advocacy for the social acceptance of pornography as a vehicle for women to reclaim sexual power promotes pornography as a “progressive cultural force.” See id. at 43 (describing libertarian feminists’ advocacy for pornography in American society). But see id. at 34–35 (explaining that radical feminists believe that pornography further represses females and female sexuality in a patriarchal society).
240. See supra Part IV.A.1.
241. See supra Part IV.A.2.
242. See supra Part IV.B.1–2.
243. See supra Part IV.C.1.
moreover, the Fourth Circuit set the stage to chill otherwise constitutionally protected speech.\textsuperscript{244}