No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2019

NICHOLAS HUGHES,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title 18 U.S.C. § 2251(a) requires the government to prove that the defendant engaged in sexually explicit conduct with a minor "for the purpose of" producing any visual depiction of such conduct. The question presented is:

Whether the Eleventh Circuit shall be permitted to remain an outlying jurisdiction insofar as it interprets the phrase "for the purpose of" to require proof that the production of the visual depictions was "a purpose" for engaging in sexually explicit conduct with a minor regardless of how insignificant or incidental the production of the image was to the sexual relationship or conduct; whereas, every other circuit interprets the phrase "for the purpose of" to require proof of "a purpose" rather than an incidental motive on the part of the defendant.

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Nicholas Hughes respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in Case No. 19-11403 in that court on December 26, 2019, affirming Hughes's judgment and sentence entered by the district court for the Northern District of Florida.

OPINION BELOW

An unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Nicholas Hughes*, 2019 WL 7187531 (11th Cir. Dec. 26, 2019) is attached as Appendix A to this Petition.

JURISDICTION

The Court of Appeals filed its Opinion in this matter on December 26, 2019. Petitioner did not move for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c), and Supreme Court Rule 13.1.

STATUTORY PROVISION INVOLVED

This petition involves the application of 18 U.S.C. § 2251(a):

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a).

INTRODUCTION

Title 18 U.S.C. § 2251(a) requires the government to prove that the defendant engaged in sexually explicit conduct with a minor "for the purpose of" producing any visual depiction of such conduct. The same language – "for the purpose of" – has been used for decades in similar, related federal statutes proscribing sex crimes and child sexual abuse offenses. Former offenses under the Mann Act used the same phraseology. Title 18 U.S.C. § 2421 proscribed the knowing transport in interstate commerce of any woman or girl "for the purpose of" prostitution. Similarly, 18 U.S.C. § 2432(b) formerly proscribed traveling in interstate commerce "for the purpose of" engaging in any illicit sexual conduct with another person. In each example, the circuit courts uniformly interpreted the statutory phrase "for the purpose of" to mean that prostitution, or engaging in illicit sexual conduct, need not be the defendant's sole purpose for interstate travel, but must be a dominant purpose, as opposed to an incidental one.

Today, not surprisingly, the circuit courts generally apply the same "dominant motive analysis" to the phrase "for the purpose of" under the related offense, 18 U.S.C. § 2251(a). The Eleventh Circuit Court of Appeals is the only circuit to hold the government need prove only that the production of visual depictions of sexually explicit conduct was "a purpose" for engaging in sexually explicit conduct with a minor, no matter how inconsequential or incidental the visual depictions were to the sexual relationship between the defendant and the minor victim. Here, Petitioner argues that because Congress used the same phrase – "for the purpose of" – across a

variety of related sex offense statutes, the phrase should be given a consistent meaning.

A conflict exists between the circuits as to the interpretation of the phrase "for the purpose of" under § 2251(a). Petitioner asks the Court to resolve that conflict. Specifically, Petitioner argues that Congress was aware of the judicial gloss applied by the courts under the earlier Mann Act offenses and must have intended the same construction when enacting § 2251(a). The Court should resolve the conflict by rejecting the Eleventh Circuit's expansive interpretation and approving the prior definition adopted by the circuit courts generally.

STATEMENT OF THE CASE

Petitioner, Nicholas Hughes, was tried and convicted of three counts: (1) use of a facility or means of interstate commerce to knowingly persuade, induce and entice . . . an individual who had not attainted the age of 18 years, to engage in sexual activity for which a person can be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b); (2) defendant did "knowingly and intentionally use, persuade, induce and entice a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," in violation of 18 U.S.C. §§ 2251(a) and 2251(e); and (3) knowing possession of material containing child pornography, as defined in 18 U.S.C. § 2256(8)(A), in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2). This petition concerns only the second crime – Count II.

In opening statement defense counsel explained that Mr. Hughes would present a defense based upon his motive for engaging in sexual activity, i.e., *why* did he entice C.S. to engage in sexual activity? (R84 – p55). Was it for the purpose of producing sexual images? (R84 – p55).

> If he enticed her to participate in sexual activity for some other reason, he's not guilty of the offense.

(R84 – p55). Counsel said the evidence would show that Hughes did not pursue C.S. "for the purpose of producing photos." (R84 – p57).

> I expect there will be a real question about whether he even asked for nude photos. I think the evidence will show you that it was very clear he never asked for this sort of explicit video that [C.S.] chose to send him.

(R84 – p58).

> [H]e didn't entice her to engage in sex to create those photos. He enticed her to engage in sex because it was part of the relationship and he wanted the benefits of sexual activity.

(R84 – p58). With respect to the images that C.S. sent to Hughes,

> She chose on her own to send those images to him.

(R84 – p59).

The testimony showed that C.S. attended Coast Charter School where Hughes was a teacher. (R84 – p71). C.S. played soccer and began to take guitar lessons from Hughes. (R84 – p72). She also enjoyed riding her bike on the St. Marks Trail. (R84 – p72,75). Her mother permitted C.S. to ride the trail with Hughes on a number of occasions. (R84 – p75).

On one occasion, C.S. was to ride her bike to a friend's house to spend the night. (R84 – p76). The next day, her mother learned that C.S. had not arrived at the friend's house when she was supposed to. She arrived much later. (R84 – p77). When questioned, C.S. admitted that she had ridden her bike to the school where she met Hughes. (R84 – p77). Her mother was alarmed and discontinued C.S.'s guitar lessons and bike riding privileges. (R84 – pp77-78). The mother also installed an app on C.S.'s phone and downloaded all of her text messages. (R84 – p78). This all occurred between November 2016 and January 2017. (R84 – pp78-79).

A few months later, on a school trip to the magnet lab, Hughes pointed a "very large professional camera" at C.S. (R84 – pp81,82). Her mother described this as "very creepy" after what had transpired a few months earlier. (R84 – p82).

At some point in 2017, C.S. confided that she had engaged in sexual activity

with Hughes. (R84 – p83). C.S. agreed to report the matter to the Wakulla County Sheriff's Office. (R84 – p87).

Alyssa Higgins was the principal of the charter school from 2011-2018. (R84 – p89). Hughes was employed as a teacher of music and social studies. (R84 – p89). He also coached soccer. (R84 – pp90,113). The school is located very near the St. Marks biking trail. (R84 – p91).

Higgins described Hughes as a "very good teacher," passionate about his work. (R84 – pp92-93). In 2016-2017, however, he appeared to have frustration and anger issues. (R84 – p93). Hughes started spending an unusual amount of time with C.S. (R84 – pp93-95). On one occasion, Higgins found Hughes in his classroom alone with C.S. They were sitting across the room from each other but the lights were out. (R84 – pp95-96). This occurred in early May of 2017. (R84 – p96).

Higgins had to fire Hughes when she discovered communications that "crossed the line of appropriate teacher-student communication." (R84 – p98). The communication took place on a "school-issued tablet." (R84 – p99). Only two weeks remained in the school year. Higgins told Hughes his contract would not be renewed. (R84 – p100).

A fellow teacher, Jeffrey Lachapelle, testified that Hughes began to show signs of irritation and anger after the Christmas holiday. (R84 – p117). Hughes would frequently pull C.S. out of class and take her to his classroom. (R84 – p118). On a field trip to Universal Studios, Hughes spent most of his time with C.S. (R84 – p123). And on the way back, Hughes sat next to C.S. on the bus despite instructions not to

do so. (R84 – pp121-23).

A review of school security systems showed that Hughes was in the school on the Friday after Thanksgiving. (R84 – p139). Hughes took a lot of photos for school functions. (R84 – pp141,142). Hughes's school computer showed a lot of close-up and facial shots of C.S., including some from her time in fifth grade. (R84 – p141). On cross-examination, Lachapelle conceded that Hughes had five or six photos of C.S., but there were pictures of other students as well. (R84 – p143).

C.S. testified that Hughes was her music teacher and her soccer coach. (R84 – p147). She played soccer while in eighth grade, during the 2016-2017 school year. (R84 – pp147-48). She also took guitar and voice lessons at his house. (R84 – p148). Their relationship began to get "more friendly" with text messages and phone calls. (R84 – p149). They exchanged numbers and began communicating about the scheduling of music lessons. (R84 – p149). Hughes complimented her. He told her she was pretty and smart. He complimented her musical ability and her writing. (R84 – p150). The two began texting each other all day long. (R84 – pp150-51).

Hughes first kissed C.S. one day at the school, after they had gone for a bike ride. (R84 – p152). Their relationship graduated from kissing one day at the school. They were in Hughes's classroom on the couch. Hughes picked up her skirt and, at some point, took his pants off. (R84 – pp153-54). They then had sexual intercourse. (R84 – p154). They did this more than 20 times, always at the school. (R84 – p155). Their relationship became sexual sometime around the end of 2016, and continued for six or seven months. (R84 – p156). They would sometimes have sex after Hughes

pulled her out of another class and took her to his classroom. (R84 – p157).

At some point, Hughes sent pictures of himself naked to C.S., as well as videos of himself masturbating. (R84 – p159). C.S. also sent videos of herself masturbating to Hughes. (R84 – p160). This started when Hughes asked if C.S. would send pictures, "or is it cool if he sends me pictures?" (R84 – p160). At some point, Hughes took video of the two having sex in the classroom. (R84 – pp160-61). This included pictures and video of C.S. giving Hughes oral sex. (R84 – p161). C.S. said that Hughes came up with the idea of taking pictures and video. (R84 – p161). She did not remember how that conversation started, but said it made her feel "uncomfortable." (R84 – p161). During the time this was going on, C.S. was using marijuana and alcohol. (R84 – p163). At some point in time, C.S. asked Hughes to leave her alone. (R84 – p170).

C.S. went to a different high school the next year, 2017-2018. (R84 – p167). She just "broke down" and told a teacher about her experience. (R84 – p168). That is how the police became involved. (R84 – p168). She then discussed her experience with her mom. (R84 – p169).

On cross-examination, C.S. testified that Hughes did not encourage her to keep their relationship secret. (R84 – p171). He told her he would support her in whatever course she chose. (R84 – p171). He treated their relationship as a "real relationship." (R84 – pp171-72). C.S. regarded it as a "real relationship," as well. (R84 – p172). When she asked Hughes, in June, to stop contacting her, he respected her wish. (R84 – p172).

In a text message (Nov. 18), C.S. said she was "very happy to be linked with you as well, Buttercup. It's honestly not as freaky as it should be." (R84 – p173). "Freaky" referred to their age difference. (R84 – pp173-74). In an exchange of texts the following day, C.S. admitted that she was feeling love for Hughes. (R84 – pp174-75). On the day after Thanksgiving, C.S. said she was feeling "happy, glowy." (R84 – p175). "I feel very giddy and happy and fuzzy." (R84 – p176). "It's all I can think about." (R84 – p176). "It's perfect." (R84 – p176). This may have been the first time Hughes kissed her. (R84 – p176).

Jumping forward to May 2017, C.S. said: "I love you." (R84 – p177). Two days later, she told Hughes: "you don't have anything to be sorry for." (R84 – p177). The next day, she said: "You are, I think – you're my only actual true friend." (R84 – p178). The next day, she said: "If I had the chance to redo everything, I wouldn't change a single thing either." (R84 – p178). Again, on May 11th, she said: "I love you." (R84 – p179). May 18th: "Love you, good night." (R84 – p179).

Hughes, likewise, expressed his love for C.S. (R84 – p180). On May 8th, he said: "You know we never ever have to get physical and I will still love you, yeah?" (R84 – p180).

Even though Hughes was older, both he and C.S. considered theirs a "real relationship." (R84 – p181). As for the masturbation videos, C.S. conceded it was "possible" that she sent the first one. (R84 – pp181-82). Hughes asked her to send pictures. But he did not specifically ask her to send pictures of her masturbating. (R84 – p183). When interviewed by the child protection team, C.S. said that Hughes

asked her to send pictures of her breast and vagina. (R84 – p183). C.S. admitted, however, that it would be hard for her to admit that she was the first one to send the videos. (R84 – p187). In fact, C.S. may have given Hughes the thumb drive on which to store the videos. (R84 – p187).

C.S. told the child protection team that she had trouble remembering some of the events. (R84 – p187). She was trying to repress some of the memories. (R84 – pp187-88). Moreover, her memory may have suffered from alcohol and drug use. (R84 – p188). She was smoking marijuana on a daily basis. (R84 – pp188-93). C.S. used marijuana up until August. (R84 – p192).

Charge Conference

The district court held a charge conference prior to the second day of trial. (R85 – p225). With respect to Count II, defense counsel requested the following instruction:

> though the Government need not show that the sole purpose of the defendant in engaging a minor in sexual activity was the production of a visual depiction of the conduct, the Government must still prove beyond a reasonable doubt that it was one of the dominant motives and not a mere incident of the sexual activity.

(R35). The proposed instruction was based on *United States v. Raplinger*, 555 F.3d 687, 693 (8th Cir. 2009). Counsel acknowledged, however, the negative authority of the Eleventh Circuit in *United States v. Miller*, 819 F.3d 1314, 1316 (11th Cir. 2016). (R35). Counsel also objected to the following instruction proposed by the government and the Court.

> While the Government must prove that a purpose of the

> sexually explicit conduct was to produce a visual depiction, it need not be the Defendant's only dominant purpose.

(R85 – p226; R37 – pp6-8; R47 – p10). The district court rejected the instruction proposed by the defense, stating the court was bound by *Miller*. (R85 – p225).

Continued Testimony

Detective McAlister testified that she received a criminal complaint from C.S's mother on September 27, 2017. (R85 – p240). C.S. was interviewed by the child protection team on October 2, 2017. (R85 – p240). McAlister collected some evidence from the school that same night, with Principal Higgins. (R85 – p242). McAlister was investigating possible violations of Fla. Stat. § 800.04, lewd and lascivious battery, and lewd and lascivious conduct. (R85 – pp245,292). McAlister also enlisted the aid of the Florida Department of Law Enforcement (FDLE) in conducting the investigation. (R85 – p284). The jury was shown a number of videos obtained as a result of the investigation. The videos were described as "Hughes naked selfie videos." (R85 – p318).

Erika Hindle-Morris is an FDLE agent who assisted in the investigation. (R85 – p324). She was able to obtain records from social media providers. (R85 – pp333-39). These included an image of digital penetration of C.S. by Hughes, and C.S. performing oral sex on Hughes. (R85 – pp339-440). Pornographic images of C.S. were also discovered. (R85 – p350). Numerous videos were published to the jury. (R85 – pp351-54).

A warrant was obtained to search Hughes's home. (R85 – pp331-32). Authorities seized two cell phones, a Sony camera and computer equipment. The

parties stipulated that the cell phones, camera and computer equipment had been mailed, shipped or transported in interstate commerce. (R85 – p294). They also stipulated these items qualified as a means and facility of interstate commerce. (R85 – p294). The case was later presented for federal prosecution. (R85 – p369).

On cross-examination, Hindle-Morris recounted that Hughes, at the time of his arrest, stated: "I still love her and I miss her." (R85 – p375). A state prosecution of Hughes was still pending at the time of trial. (R85 – p376). The officer also testified that the C.S. masturbation videos were selfies which C.S. had sent to Hughes. (R85 – p378).

The government rested its case. Defense counsel moved for judgment of acquittal on Count I. The district court denied the motion. (R85 – p389).

The defense called Dr. Michael Herkov. (R85 – p396). Herkov is board certified in neuropsychology and clinical psychology. (R85 – p399). He has experience in evaluating and treating substance abuse problems. (R85 – p399). Herkov testified that marijuana affects the cognitive function of the brain, including memory. (R85 – p402). Daily use of marijuana for months would impair one's memory. (R85 – pp402-03). Marijuana use has adverse effects on the ability to perceive and recall. (R85 – pp404-05). And the effects are more pronounced on adolescents. (R85 – p405).

Alcohol can also impair memory function. (R85 – p406). Alcohol and marijuana when used together have a synergistic effect, meaning the effect is more pronounced than the sum of the two taken individually. (R85 – p406). On cross-examination, the doctor said marijuana would affect the decision-making of a juvenile. (R85 – p406).

On redirect, he said that months of marijuana use would, "no doubt," impact the individual. (R85 – pp411-12).

The defense rested its case. (R85 – p412). Counsel renewed his motion for judgment of acquittal. The district court again denied the motion. (R85 – p415).

Jury Instructions

With respect to Count Two, the only count at issue, the district court instructed the jury, in pertinent part, as follows:

> The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:
>
> 1. An actual minor, that is, a real person who was less than 18 years old, was depicted;
>
> 2. The defendant employed, used, persuaded, induced, enticed, or coerced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of the conduct;
>
> 3. The visual depiction was produced using materials that had been mailed, shipped, or transported in interstate commerce by any means, including by computer.
>
> While the government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it need not be defendant's only dominant purpose.

(R85 – pp425-26).

In closing argument the prosecutor argued, with respect to Count Two, that Hughes used C.S. "for the purpose of producing the visual depiction of the sex acts, the sex conduct." (R85 – p439). The defense may argue that Hughes produced the photos and videos "because he was trying to have the gratification of having sex." (R85 – p440). But, she continued:

> The law is very clear that while the government must prove that a purpose of the sexually explicit conduct was to produce a visual depiction, it doesn't have to be the only or dominant purpose.

(R85 – p440).

> [T]he law says though that the government has to prove that that doesn't have to be the only reason. It just has to be a reason that the defendant is producing this child pornography.

(R85 – p440). We know he had sexual activity to produce the depictions because he took out his camera and his cell phone. (R85 – p440).

> He might have been doing it in part to have the gratification from having sex, but, again, this element has been met regardless of that because even though that might have been some part, we know, our common sense and his own words, tell us exactly why he was producing this, had her do these things, had her as part of the sex act, so he could view it and film it and watch it, have it on multiple devices, download it from the places that he took it from, the Sony camera, and make its way through the computer to the external hard drive so he can have it, so he can watch it. That's why he produced it. That element has been met, element two.

(R85 – pp440-41).

In rebuttal, defense counsel argued that this was not a commercial effort to produce pornography for distribution on the internet. (R85 – pp452-53). It's much more difficult to prove the sexual activity was for the purpose of producing the depictions when there is a real relationship. (R85 – p453). The question is:

> Are they having sex because of their relationship or are they having sex because – for the purpose of producing these images?

(R85 – p453). Counsel further argued that they engaged in sex in pursuit of their relationship and for the obvious benefits of the sexual experience. But they did not engage in sex for the purpose of producing the pictures. It is like hiking in the mountains. You go there for the experience, the joy of hiking, and the beauty of the scenery. And while you are there you may take photos. The purpose of the photos is to remind you of the experience and help you relive the memories. But the taking of the photos is not the reason you went to the mountains in the first place. (R85 – p455).

After deliberating for more than two hours, the jury sent several questions to the judge, including:

What is the definition of persuaded, induced, enticed and coerced?

(R85 – p473; R57). Before the court could answer the questions, however, the jury announced that it had reached a verdict. (R85 – p479). When the jury returned to the courtroom, the judge inquired whether the jury would like him to answer their questions. (R85 – p482). And by a unanimous show of hands, the jurors indicated that they would prefer to return the verdict. (R85 – p482).

The jury found Hughes guilty on all three counts. (R85 – pp483-84; R58). Under the sentencing guidelines, Hughes had a total offense level of 43, and a criminal history score of zero. (PSR ¶¶ 54, 58). An offense level of 43 and a criminal history category of I produces an advisory guidelines range of life in prison. (PSR ¶ 84). The district court sentenced Hughes to concurrent terms of 240 months in prison on all three counts followed by concurrent terms of 20 years of supervised release on each count. (R72 – pp2,3). The district court also imposed a special monetary

assessment of $300.00. (R72 – p6).

REASONS FOR GRANTING THE WRIT

This case turns upon the interpretation of the statutory phrase "for the purpose of." The Eleventh Circuit stands alone in its interpretation of the phrase. This Court should grant the writ in order to resolve the conflict among the circuits on this important question of statutory construction.

I. The question presented involves a split of authority between the Eleventh Circuit and the Second, Fourth and Eighth Circuit Courts of Appeal.

Title 18 U.S.C. § 2251(a) requires the government to prove that the defendant engaged in sexually explicit conduct with a minor "for the purpose of" producing any visual depiction of such conduct. The circuit courts disagree as to the meaning of the phrase "for the purpose of." Applying § 2251(a), the Second and Eighth Circuits hold the phrase "for the purpose of" requires the government to prove a dominant motive and not merely an incidental motive. *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996); *United States v. Raplinger*, 555 F.3d 687, 693 (8th Cir. 2009).

The Eleventh Circuit holds, in contrast, that the government must show only that the production of visual depictions of sexually explicit conduct was "a purpose" for engaging in such conduct. "[T]hat the visual depictions were incidental to a consensual romantic relationship with a minor is not a viable defense to a charge under § 2251(a)." *United States v. Hughes*, 2019 WL 7187531 *3 (11th Cir. Dec. 26, 2019) (citing *United States v. Miller*, 819 F.3d 1314, 1316 (11th Cir. 2016)).

The rule of the Eleventh Circuit conflicts with the Second and the Eighth. The Eleventh Circuit's rule diminishes the government's burden and eases its path to conviction. Furthermore, the Eleventh Circuit's rule departs from the plain text of § 2251(a), which requires the government to prove that the defendant engaged in sexually explicit conduct with a minor "for the purpose of" producing visual depictions of such conduct.

Section 2251(a) provides, in pertinent part:

> Any person who . . . 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, . . . with the intent that such minor engage in, any sexually explicit conduct *for the purpose of* producing any visual depiction of such conduct . . . shall be punished as provided in subsection (e), . . . if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce. (e.s.).

The statute may be violated three ways: (1) inducing a minor to engage in sexually explicit conduct; (2) using a minor to assist another person to engage in sexually explicit conduct; or (3) transporting any minor in or affecting interstate or foreign commerce, *each with the intent* to have the minor engage in sexually explicit conduct "for the purpose of" producing any visual depiction of such conduct. The phrase "for the purpose of" applies to each method of commission without distinction.

In *United States v. Sirois*, 87 F.3d 34 (2d Cir. 1996), Count I charged a violation of the third type, i.e., interstate transport of a minor while intending the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of

such conduct. *Id.* at 37. The defendant asked for an instruction requiring the government to prove that the sexual activity had to be the "*sole* dominant purpose for the trip." *Id.* at 39. The circuit court affirmed the denial of the instruction, holding that a conviction may be obtained

> so long as the evidence shows that illegal sexual activity was one of the dominant motives for the interstate transportation of the minors, and not merely an incident of the transportation. *Accord United States v. Ellis*, 935 F.2d 385, 390 (1st Cir.), *cert. denied*, 502 U.S. 869, 112 S. Ct. 201, 116 L. Ed.2d 160 (1991); *United States v. Drury*, 582 F.2d 1181, 1185-86 (8th Cir. 1978); *United States v. Snow*, 507 F.2d 22, 23-24 (7th Cir. 1974); *Forrest v. United States*, 363 F.2d 348, 350-51 (5th Cir. 1966), *cert. denied*, 386 U.S. 995, 87 S. Ct. 1315, 18 L.Ed.2d 343 (1967); *Dingess v. United States*, 315 F.2d 238, 240 (4th Cir.), *cert. dismissed*, 373 U.S. 947, 83 S. Ct. 1559, 10 L.Ed. 2d 703 (1963); *Dunn v. United States*, 190 F.2d 496, 497 (10th Cir. 1951).

Id.

In *United States v. Raplinger*, 555 F.3d 687 (8th Cir. 2009), the defendant was charged with a violation of the first type, i.e., inducing a minor to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct using materials (a Polaroid camera) transported in or affecting interstate commerce. *Id.* at 690. In rejecting Raplinger's challenge to the sufficiency of the evidence, the circuit court held that the "government need not prove that producing the photographs was Raplinger's sole purpose for engaging in sexual activity." *Id.* at 693. Citing *Sirois*, the circuit court held that the evidence was sufficient

> so long as the evidence showed [the illegal sexual activity] to be one of the dominant motives and not a mere incident of the transportation.

Id.

The Fourth Circuit stands in line with the Second and the Eighth as illustrated in *United States v. Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015). There, the defendant had engaged in sexual activity with a minor child and took one explicit photo which he subsequently deleted from his cell phone. The Fourth Circuit recognized the intent to create visual depictions need not be the sole purpose for engaging in sexual activity under § 2251(a). It is sufficient that the taking of photos be "a purpose" under the statute. *Id*. at 130. But it is not sufficient that a single photo was purposefully taken during the course of a sexual encounter. In other words, it is not sufficient that the defendant engaged in sexual activity *and* took a photo. The voluntary act of taking the photo does not necessarily establish the intent required under the statute. *Id*. at 133. It must be shown that taking the photo was a purpose for engaging in sexual activity. In finding the evidence insufficient, the Fourth Circuit recognized that under some circumstances the creation of a visual depiction may be insignificant, collateral, or merely incidental to sexual conduct and inadequate to constitute "a purpose" for engaging in sexually explicit conduct under § 2251(a).

The present case stands in stark contrast to the judicial gloss employed in *Sirois*, *Raplinger* and *Palomino-Coronado*. Here, the Eleventh Circuit held the government was not required to prove that the making of photographs was the sole or primary purpose for enticing the minor to engage in sexually explicit conduct. "It is sufficient to show that it is 'a purpose.'" *Hughes*, 2019 WL 7187531 at *2, (quoting

United States v. Miller, 819 F.3d 1314, 1316 (11th Cir. 2016)). Where a defendant acts with mixed motives, the courts "'need not concern [them]selves' with whether the illegal purpose was dominant over other purposes." *Id.* at *2-3, (citing *United States v. Lebowitz*, 676 F.3d 1000,1014 (11th Cir. 2012) (quoting *Forrest v. United States*, 363 F.2d 348, 352 (5th Cir. 1966)).

In so ruling, the circuit court employed a broader legal standard and eased the government's path to conviction. The Eleventh Circuit rejected the "dominant motive analysis" articulated in *Sirois* and *Raplinger* and adopted the broader "a purpose" test. The Eleventh Circuit ruled, specifically, that the argument "that the visual depictions were incidental to a consensual romantic relationship with a minor is not a viable defense to a charge under § 2251(a)." *Hughes*, 2019 WL 7187531 at *3. This ruling conflicts with *Sirois*, *Raplinger* and *Palomino-Coronado*.

A jury will reasonably interpret the Eleventh Circuit's "a purpose" test as a directive to convict the defendant if the production of sexually explicit photos constituted "any purpose," "any minor purpose," or an "incidental motive" to engage in sexually explicit activity. The district court's instruction allowed the prosecutor to argue that the production of visual depictions need not be a dominant purpose. (R85 – p440). "It just has to be a reason that the defendant is producing this child pornography." (R85 – p440). In this manner, the legal standard employed by the Eleventh Circuit casts a wider net than that employed by the Second, Fourth and Eighth, and eases the government's path to conviction.

The Eleventh Circuit Court of Appeals is isolated in its interpretation of the phrase "for the purpose of." Only the Eleventh Circuit holds that § 2251(a) requires the government to prove that the production of visual depictions was merely "a purpose" for inducing the minor to engage in sexual conduct, *no matter how insignificant or incidental to the sexual activity*. In the interest of uniformity, this Court should grant the writ and resolve the conflict on this important question of statutory construction.

II. This case is worthy of the Court's review.

(a) The rule of the Eleventh Circuit has an unsettling effect on the law because it conflicts with the well-established interpretation of the same language, i.e., "for the purpose of," in related sexual abuse statutes.

The Court "normally presume[s] that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 139 S. Ct. 2319, 2329 (2019) (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)). And "[w]hen 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 659 (2010) (Scalia, J., concurring in part and concurring in judgment)).

Petitioner notes that the legal test employed by the Eleventh Circuit under § 2251(a) conflicts with the well-established construction of the phrase "for the purpose of" in related statutes proscribing prostitution and child exploitation offenses. In a former iteration, 18 U.S.C. § 2421 proscribed the knowing transport in interstate

commerce of any woman or girl "for the purpose of" prostitution. *See United States v. Snow*, 507 F.2d 22, 23, n.1 (7th Cir. 1974). In *Snow*, the circuit court discussed the distinction between "the purpose" and "a purpose" where the defendant had mixed motives for transporting the female across state lines. In that case, the rule of decision was well established. The intent to prostitute "need not be the sole reason for the transportation; the Act may be violated if prostitution is a dominant or a compelling and efficient purpose." *Id*. at 24 (footnote omitted). Stated alternatively,

> it is well settled that to sustain a conviction under the Mann Act it is not necessary that the sole purpose of the transportation be for immoral purposes, it being sufficient if it was a dominant or an efficient and compelling purpose.

Id. at 23, n.2 (citing *Forrest v. United States*, 363 F.2d 348, 349-351 (5th Cir. 1966) (citations omitted)). Consistent expressions of the rule are found in *Dingess v. United States*, 315 F.2d 238 (4th Cir. 1963), and *Dunn v. United States*, 190 F.2d 496 (10th Cir. 1951).

Similarly, 18 U.S.C. § 2423(b) formerly proscribed traveling in interstate commerce "for the purpose of" engaging in any illicit sexual conduct with another person. In *United States v. Vang*, 128 F.3d 1065 (7th Cir. 1997), the district court instructed the jury as follows:

> It is not necessary for the government to prove that a criminal sexual act was the sole purpose for a defendant traveling from one state to another, but the government must prove that it was a dominant purpose, *as opposed to an incidental one*. A person may have more than one dominant purpose for traveling across a state line. (e.s.).

Id. at 1068. The defendant objected to the last sentence of the instruction, contending that the government must prove that the commission of a criminal sexual act was "the" dominant purpose of the interstate travel. *Id*. The circuit court rejected the argument and affirmed the conviction based upon the "unanimous consensus of courts," i.e., the prostitution or other immoral act need not be the sole reason for the transportation; the [Mann Act] may be violated if prostitution is "a dominant or a compelling and efficient purpose." *Id*. at 1072.

Here, defense counsel conceded that the production of visual depictions need not be the sole purpose for engaging in sexually explicit conduct. But counsel requested an instruction requiring the government to prove that the production of visual depictions was "one of the dominant motives and not a mere incident of the sexual activity." (R35). The denial of this instruction foreclosed the legitimate defense that the production of visual depictions was not a dominant motive for engaging in sexually explicit conduct, but merely incidental to an ongoing sexual or romantic relationship.

Section 2251(a) proscribes three alternative means of prosecution: (1) employing, using, persuading or inducing a minor to engage in sexual activity; (2) using a minor to assist another person to engage in sexual activity, or (3) transporting a minor in or affecting foreign commerce, . . . each with the intent to have the minor engage in "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . ." 18 U.S.C. § 2251(a); Eleventh Circuit Pattern Jury Instruction 82 (2016). The Mann Act decisions represent a proper analog for the

interpretation of § 2251(a). The Mann Act, 18 U.S.C. §§ 2421-2424, proscribed generally the transportation of women in interstate commerce for the purpose of prostitution or other immoral purposes. It is well established that the Mann Act does not require proof that the female was transported for the "sole and single purpose" of engaging in prostitution or other immoral practices. *Forrest v. United States*, 363 F.2d 348 (5th Cir. 1966).

> It is enough that one of the dominant purposes was prostitution or debauchery. It suffices if one of the efficient and compelling purposes in the mind of the accused in the particular transportation was illicit conduct of that kind. The illicit purpose denounced by the Act may have coexisted with other purpose or purposes, but it must have been an efficient and compelling purpose.

Id. at 349-50 (quoting *Dunn v. United States*, 190 F.2d 496, 497 (10th Cir. 1951)); *see also United States v. Sirois*, 87 F.3d 34, 39 (2d Cir. 1996); *United States v. Drury*, 582 F.2d 1181 (8th Cir. 1978); *United States v. Snow*, 507 F.2d 22 (7th Cir. 1974).

Section 2251(a) represents an expansion, or extension, of the Mann Act. Like the Mann Act, 18 U.S.C. § 2251(a) proscribes the interstate transportation of a minor but, here, for the purpose of producing a visual depiction of sexually explicit conduct rather than for prostitution. In the alternative, § 2251(a) proscribes the employment, use, persuasion, inducement, enticement, or coercion of any minor to engage in any sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The salient point, however, is that the statute treats the production of visual depictions the same irrespective of the particular theory of prosecution. Insofar as the interstate travel theory is concerned, it stands to reason that the "dominant

motive" analysis should be the same as it is under the Mann Act cases. Furthermore, the same statutory text applicable to interstate travel – "for the purpose of producing any visual depiction" – applies equally to the other theories of prosecution, e.g., inducing the minor to engage in sexually explicit conduct, and enlisting the minor to assist any other person to engage in sexually explicit conduct. There is no principled basis to conclude that the Mann Act "dominant motive" requirement does not apply to all cases prosecuted under 18 U.S.C. § 2251(a). All such prosecutions contain the same intent element, i.e., "for the purpose of" producing visual depictions of sexually explicit conduct, which functions as a substitute, or an analog, "for the purpose of" prostitution under the Mann Act. *See United States v. Torres*, 894 F.3d 305, 319 (D.C. Cir. 2018) (Williams, J., Senior Circuit Judge, concurring in part and dissenting in part) ("Because of the similarity in language, Mann Act jurisprudence is highly relevant when interpreting § 2251.").

Section 2251 is closely related to the Mann Act.

> Congress plainly had the Mann Act in mind while enacting § 2251: it revised the former *in the same bill* that created the latter. See Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, §§ 2-3, 92 Stat. 7, 7-9 (1978) (codified as amended at 18 U.S.C. §§ 2423, 2251).

United States v. Torres, 910 F.3d 1245, 1248 (D.C. Cir. 2018) (Williams, J., Senior Circuit Judge, dissenting to denial of rehearing of 894 F.3d 305) (emphasis in original).

In the interest of uniformity, the Court should apply the Mann Act's dominant motive analysis to prosecutions under § 2251. On that basis, the jury instruction

requested by defense counsel championed a valid defense, i.e., the jury cannot convict if the production of visual depictions of sexually explicit conduct was merely an inconsequential or incidental product of an ongoing or loving (even if unlawful) sexual relationship. Such an instruction was reasonably supported by the evidence and necessary to resolve a relevant and disputed factual question.

(b) This record ensures that the Court can resolve the question presented.

This case is worthy of the Court's review because the record places the question presented squarely in focus. Petitioner specifically preserved the issue in the district court by his request for a specific jury instruction and objection to the instruction proposed by the government and adopted by the district court. Petitioner's objection was the focal point of the trial. In opening, defense counsel announced his intended defense, i.e., Hughes did not entice C.S. to engage in sexual activity "for the purpose of" producing photos of the sexual activity. (R84 – p57, 58). The production of photos was merely incidental, or inconsequential, to the ongoing sexual relationship. Petitioner's intended defense was amply supported by the evidence. The jury was presented with evidence of an ongoing sexual, loving relationship, albeit unlawful. The jury *could have* reasonably found that the production of photos was an incidental part of a sexual relationship, and not the "purpose of" the sexual activity. And even if there was evidence tugging the other way, this was ultimately a factual question to be resolved by the jury. The contested jury instructions took this factual question from the jury.

Petitioner raised the same issue on direct appeal. The circuit court's affirming decision shows that Petitioner satisfied his duty to exhaust his direct appeal remedies. And the circuit court's decision frames the conflict with the decisions of its sister courts.

No legitimate interest would be served by allowing more time for further percolation of the issue in the circuit courts. The contested language – "for the purpose of" – has been construed for decades in the context of related sexual abuse and sex crimes statutes. The judicial gloss placed on "for the purpose of" by the Eleventh Circuit is at odds with the mainstream of the law. The rule of the Eleventh Circuit has a corrosive effect on the uniformity and stability of the law. *See United States v. Torres*, 894 F.3d 305, 310-312 (D.C. Cir. 2018) (avoiding the defendant's claim that the taking of photos was merely "incidental or "collateral" to sexual intercourse; "[w]e also have no cause to decide how prominent the purpose to create an image must be among a defendant's possible motives."). The interest in uniformity of the law warrants review to maintain consistency in the interpretation of the contested language in similar, related contexts. Finally, the Court will be able to resolve the disputed question on the record preserved below.

III. The decision below is wrong.

From the viewpoint of the textualist, the jury instruction employed by the district court, and approved by the circuit court, is subject to criticism because it changed the words of the statute and, therefore, deviated from the intent of Congress. It is generally true that a jury instruction which tracks the language of a statute is

correct. *See Waddington v. Sarausad*, 555 U.S. 179, 191 (2009). Here, the statute provides criminal liability where the defendant engages in sexually explicit conduct "for the purpose of" producing any visual depiction of such conduct. 18 U.S.C. § 2251(a). But the Eleventh Circuit deviates from the statutory language for no apparent reason. The Eleventh Circuit employs a judicial gloss informing the jury that the government need prove only that "*a purpose* of the sexually explicit conduct was to produce a visual depiction, it need not be Defendant's only or dominant purpose." Eleventh Circuit Pattern Jury Instruction 82 (2016)(e.s.). And it is no defense that the creation of visual depictions of sexually explicit conduct was merely incidental to an ongoing sexual relationship. *Miller*, 819 F.3d at 1316.

The phrase "for the purpose of" is not a legal term of art. The phrase does not require a judicial gloss. Juries are capable of finding whether a defendant behaved "for the purpose of" producing sexually graphic images. The judicial gloss implemented by the Eleventh Circuit mischaracterizes the intent of Congress and eases the government's path to conviction.

Nonetheless, the phrase "for the purpose of" carries a well-established judicial gloss in the context of similar and related federal sex crimes. But the established judicial gloss is not the one employed by the Eleventh Circuit. As explained above, the phrase "for the purpose of" in the context of federal sex crimes means that the illegal sexual activity was a dominant motive, but not merely incidental to, the unlawful interstate transportation of a female or minor. *See Snow*, 507 F.2d 22 (citing former 18 U.S.C. § 2421)). In another context, "for the purpose of" means the

defendant's intent to engage in unlawful sexual activity was the dominant motive for, but not merely incidental to, the defendant's interstate travel. *See Vang*, 128 F.3d 1065 (citing former 18 U.S.C. § 2423(b)). The Eleventh Circuit's departure from this well-worn path in the context of § 2251(a), a clearly related statute, demonstrates the error of its ways. "When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 659 (2010) (Scalia, J., concurring in part and concurring in judgment)). The decision below represents a deviation from a well-trodden path.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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