No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

CHARLES SKAGGS, JR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED

I. Does the Fourth Amendment require that searches of electronic devices at the United States border be conducted pursuant to a warrant based on probable cause or, at the very least, pursuant to a reasonable suspicion that the devices contain evidence of a crime related to the rationale behind the border search exception?

II. Whether a defendant's conduct of filming a minor using the bathroom and taking a shower caused the minor to engage in sexually explicit conduct under 18 U.S.C. § 2251(a) where all of the minor's actions on film do not qualify under the statutory definition of "sexually explicit conduct?"

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Petitioner, CHARLES SKAGGS, JR., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Seventh Circuit, issued on February 2, 2022, affirming the Petitioner's convictions and sentences.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit dated February 2, 2022, appears in Appendix A to this Petition at page 1 and is reported at *United States v. Skaggs,* 25 F.4th 494 (7th Cir. 2022). The oral ruling of the United States District Court for the Southern District of Indiana appears in Appendix A to this Petition at page 14. The written ruling of the United States District Court for the Southern District of Indiana appears in Appendix A to this Petition at page 17. The orders denying the petitions for rehearing dated May 19, 2022, and June 7, 2022, appear in Appendix A to this Petition at pages 52 and 53.

JURISDICTION

1. The Southern District of Indiana originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

3. Petitioner seeks review in this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming his sentence pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2251 - Sexual exploitation of children

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.
>
> . . . .
>
> (e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior

convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

18 U.S.C. § 2256 - Definitions

For the purposes of this chapter [18 USCS §§ 2251 et seq.], the term—

(1) "minor" means any person under the age of eighteen years;

(2)

(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

. . . .

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

. . . .

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

STATEMENT OF THE CASE

Petitioner Charles Skaggs, Jr. was investigated in 2015 and 2016 for his alleged involvement in child sex tourism. (App. A at 2.)[1] Investigators learned that Mr. Skaggs often travelled to Ukraine, was involved in an organization called Ukrainian Angels Resource Network, had photographs on his Facebook page of teen and pre-teen girls scantily dressed or posed in a sexually suggestive way, and had a 1997 conviction for sexual misconduct with a minor. (App. A at 2-3.) Investigators received tips that Mr. Skaggs may have had minor girls living with him at an orphanage in Ukraine, had a sexual interest in minors, and traveled to Ukraine to have sex with girls. (App. A at 3.) The investigation eventually revealed that Mr. Skaggs would be returning to the United States from Ukraine on December 10, 2016, and entering the country at the Minneapolis-St. Paul International Airport. (App. A at 3.)

Mr. Skaggs was stopped in customs at the airport and questioned. (App. A at 3.) Eventually, his luggage was searched and agents located four thumb drives wrapped in underwear, an SD card, and a cell phone. (App. A at 3-4.) When agents previewed the thumb drives, they discovered what they believed to be child erotica *or* child pornography and seized the thumb drives for further

[1] Citations are abbreviated as follows: Appendix A to this Petition: "App. A at __;" Trial Transcript: "T. Tr. at __;" District Court Record: "R. at __;" and Court of Appeals Record: "Ct. App. R. at __."

analysis. (App. A at 4.) Further forensic examination of the thumb drives revealed video files and screen captures of Mr. Skaggs's daughter ("Child 1"), who, at the time the videos were taken, was between 14 and 16 years old, in the bathroom. (App. A at 4-5.) She was in and out of the shower, using the toilet, sometimes completely nude and sometimes partially clothed. (App. A at 4.) In two of the videos, the camera focused on Child 1's exposed torso and breasts and the other videos focused on her genital area. (App. A at 4-5.) The investigation revealed the images were taken by a hidden camera Mr. Skaggs placed in the bathroom. (App. A at 5.) The thumb drives also contained child pornography not involving Child 1. (App. A at 4-5.)

Mr. Skaggs was ultimately charged with two counts of attempted sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) (Counts 1 and 2); seven counts of sexual exploitation of a child in violation of 18 U.S.C. § 2251(a) (Counts 3 through 9); one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 10); one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count 11); and concealment of evidence in violation of 18 U.S.C. §§ 1519 and 2 (Count 12). (R. at 88.) The nine sexual exploitation counts were based on the videos Mr. Skaggs took of Child 1 in the bathroom using the hidden camera.

Mr. Skaggs filed a motion to suppress the evidence challenging the border

search of his thumb drives. (App. A at 7.) The district court denied the suppression motion, holding, "I don't have any problem with the warrant issue. I think that is settled law that immigration has the permission, the border patrol has permission to examine whatever's coming into the United States. There is not a Fourth Amendment search issue with respect to needing a warrant. So that issue, I think has resolved by settled law." (App. A at 15-16.)

Mr. Skaggs proceeded to a bench trial *pro se* and argued that he could not be convicted under 18 U.S.C. § 2251(a) because Child 1 had not engaged in sexually explicit conduct in the videos. (T. Tr. at 563-72.) He specifically argued that because she was depicted only doing "normal bathroom activities, taking a shower and drying off and everything, that's not engaging in sexual activity. That's engaging in normal routine activity that anyone would do in the bathroom." (T. Tr. at 572.) The district court disagreed, holding the circuit courts were in agreement that the statute is fully satisfied if a child is photographed in order to create pornography. (App. A at 36-39.) The district court entered a guilty verdict on all counts. (R. at 127.) Mr. Skaggs was sentenced to life in prison on Counts 1 through 9, which the district court believed was mandatory by operation of 18 U.S.C. § 3559(e), and 120 months in prison on Counts 10, 11, and 12. (R. at 177, p. 49.) He filed a timely notice of appeal. (R. at 151.)

The Seventh Circuit Court of Appeals appointed counsel to represent Mr. Skaggs on appeal. Appointed counsel raised two issues on appeal, arguing (1) the district court erred in denying his motion to suppress the child pornography evidence uncovered by the border search and (2) the district court erred in imposing a mandatory life sentence under 18 U.S.C. § 3559(e). (App. A at 2.) The Court also allowed Mr. Skaggs to file a *pro se* brief. (Ct. App. R. at 36.) Mr. Skaggs filed a *pro se* brief and argued the evidence was insufficient to convict him of the nine § 2251(a) charges because the plain language of the statute requires that the minor engage in sexually explicit conduct. (Ct. App. R. at 40, p. 37-49.) Mr. Skaggs specifically relied on the Seventh Circuit's recent decision in *United States v. Howard,* 968 F.3d 717 (7th Cir. 2020). (Ct. App. R. at 40.)

The Seventh Circuit entered an opinion in this case on February 2, 2022, considering the two issues raised by appointed counsel and affirming Mr. Skaggs's convictions and sentences. (App. A at 1, 13.) The Court did not consider the issues raised in the *pro se* brief, stating, "Because Skaggs is represented by counsel . . . we exercise our discretion to reject his *pro se* brief without considering these additional issues." (App. A. at 8, n. 1.) Mr. Skaggs filed a *pro se* petition for rehearing, again relying on *Howard* and additionally relying on *United States v. Hillie,* 14 F.4th 677 (D.C. Cir. 2021) (finding there was insufficient evidence to support the § 2251(a) convictions in circumstances

similar to Mr. Skaggs's case). (Ct. App. R. at 74.) He also challenged the Seventh Circuit's decision on the border search issue. (Ct. App. R. at 74.)

The Seventh Circuit allowed appointed counsel to withdraw and appointed new counsel to determine whether a petition for rehearing was appropriate in this case. (Ct. App. R. at 76.) Newly appointed counsel filed a petition for rehearing on May 5, 2022, arguing the panel should reconsider its refusal to address the sufficiency of the evidence issue regarding the § 2251(a) charges. (Ct. App. R. at 80.) The Court denied counsel's petition for rehearing on May 18, 2022. (App. A at 52.) The Court denied Mr. Skagg's *pro se* petition on June 7, 2022. (App. A at 53.)

REASONS FOR GRANTING THE WRIT

I. The Fourth Amendment requires that searches of electronic devices at the United States border be conducted pursuant to a warrant based on probable cause or, at the very least, pursuant to a reasonable suspicion that the devices contain evidence of a crime related to the rationale behind the border search exception.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. Paramount in the Fourth Amendment is that governmental searches and seizures be reasonable and require a warrant based on probable cause. *See Riley v. California*, 573 U.S. 373, 382 (2014).

There are exceptions to the warrant requirement, including the exception at issue here - the border search. The Supreme Court has long recognized the federal government's substantial sovereign interests in protecting territorial integrity and national security, blocking "the entry of unwanted persons and effects," regulating the collection of duties, and preventing the "introduction of contraband" into the country. *United States v. Flores-Montano,* 541 U.S. 149, 153 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). These concerns of the sovereign are at their "zenith" at the border, whereas an

individual's "expectation of privacy is less at the border than it is in the interior." *Flores-Montano*, 541 U.S. at 152, 154. Therefore, at the border, like at an international airport, government agents may conduct routine searches and seizures of persons and property without a warrant or any individualized suspicion. *United States v. Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018).

The border search exception is broad but it is not without limitations. This Court has explained that certain highly intrusive searches may qualify as "non-routine" and require some level of individualized suspicion. *Flores-Montano*, 541 U.S. at 152 (quoting *Montoya de Hernandez*, 473 U.S. at 541 n.4). After *Riley,* some circuit courts have held that a forensic search of a digital phone should be treated as "non-routine" and requires some form of individualized suspicion. *See Kolsuz*, 890 F.3d at 145-46. The question remains to be answered by this Court what form of individualized suspicion is required at the border after *Riley*.

The scope of a warrant exception should be defined by its express justifications. *Id*. at 143 (citing *Riley*, 573 U.S. at 385-91); *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (noting that when the justifications underlying an exception to the warrant requirement are not present, a warrantless search is unreasonable). An exception to the warrant requirement will not excuse a warrantless search where applying the exception "would untether the rule from the justifications underlying [it]." *Riley*, 573 U.S. at 386 (internal quotation marks omitted). While

Riley considered the search-incident-to-arrest exception, the same analysis applies to the border search exception. The Supreme Court has not authorized a warrantless border search unrelated to the sovereign interests underpinning the exception. *United States v. Aigbekaen,* 943 F.3d 713, 721 (4th Cir. 2019).

The government may not rely on the border exception in furtherance of a "generalized interest in law enforcement and combatting crime." *Kolsuz*, 890 F.3d at 143. As with the search incident to arrest exception, the border search exception should be limited in searches of digital devices, which store vast quantities of sensitive and intimate personal information, yet do not contain many forms of contraband, like drugs or firearms, the detection of which constitutes "the strongest historic rationale for the border-search exception." *United States v. Molina-Isidoro*, 884 F.3d 287, 295 (5th Cir. 2018) (Costa, J., concurring). Accordingly, in order to conduct a search that has the potential to reveal much more private information than contraband, this Court should hold that the government must have individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband. *Aigbekaen,* 943 F.3d at 713, 721 (citing *United States v. Ramsey*, 431 U.S. 606, 620 (1977) ("The border-search exception is grounded in the recognized right of the sovereign to control, subject to

substantive limitations imposed by the Constitution, who and what may enter the country.") When a search becomes too attenuated from the historic rationales, it can no longer fall under the exception and must be accompanied by a warrant and probable cause.

In *Riley,* this Court required a warrant and probable cause for any search of a cell phone incident to arrest despite the well-established search-incident-to-arrest exception to the warrant requirement. *Riley*, 573 U.S. at 379-80. After *Riley*, courts have approached *Riley's* impact on border searches in different ways. The courts have split on what level of individualized suspicion is required for border searches of electronic defenses and whether warrantless border searches of electronic devices should be limited as to scope, type, or location. For digital devices, some courts have split the types of border searches into "manual" or "basic" and "forensic" or "advanced." In essence, the divide is between the searches typically done at the border immediately after entering the country (called basic or manual) and the searches done with the aid of experts off-site from the border entry, typically in law enforcement facilities (called forensic or advanced). What most circuit courts are missing, however, is the nexus to the foundation of the border search exception itself - a link to the interests of the sovereign.

A. The Circuit Courts of Appeal are divided on what the Fourth Amendment requires for border searches of electronic devices.

1. Advanced searches do not require a warrant or probable cause.

There are several circuit courts that join the category of interpreting the border search exception broadly. The First Circuit joined the Eleventh Circuit and held that advanced searches of electronic devices at the border do not require a warrant or probable cause. *Alasaad v. Mayorkas,* 988 F.3d 8, 13 (1st Cir. 2021); *United States v. Vergara,* 884 F.3d 1309, 1311-12 (11th Cir. 2018); *United States v. Touset,* 890 F.3d 1227, 1229 (11th Cir. 2018).

2. Some suspicion is required for advanced searches.

There are circuits that require some suspicion for advanced or forensic searches. The Fourth Circuit held that an advanced search off-site from the border requires some sort of individualized suspicion but did not resolve whether a warrant or probable cause was required. *Kolsuz,* 890 F.3d at 137. The Ninth Circuit similarly found that advanced or "forensic" searches of electronic devices requires reasonable suspicion. *United States v. Cano,* 934 F.3d 1002, 1016 (9th Cir. 2019). The Court continued that all cell phone searches must be limited in scope to a search for digital contraband and when a forensic search is conducted, the reasonable suspicion must related to digital contraband. *Id.* at 1007.

3. Basic searches do not require any level of suspicion.

Some circuits split their reasoning between advanced and basic levels of searches and hold that basic searches, primarily those done immediately upon border entry, require no level of suspicion. The First Circuit joined the Ninth and Eleventh Circuits in holding that the basic border searches of electronic devices are routine searches that may be performed without reasonable suspicion. *Alasaad,* 988 F.3d at 13; *see also Cano,* 934 F.3d at 1007; *Touset,* 890 F.3d at 1233; *United States v. Cotterman,* 709 F.3d 952, 957 (9th Cir. 2013).

4. Warrantless border searches are not authorized when outside the scope of sovereign interests.

As discussed above, the Fourth Circuit held that this Court has never authorized a warrantless border search unrelated to sovereign interests. *Aigbekaen,* 943 F.3d at 720. Advanced searches are not authorized without a nexus to historic rationales. *Id.* at 721. If a search at the border is so intrusive as to require individualized suspicion, the object of the suspicion must bear the nexus to the purposes of a border search exception. *Id.* at 723. Therefore, in the Fourth Circuit, border officers cannot rely on the border search exception and must "secure a warrant before conducting an intrusive forensic search of a traveler's digital device, solely to seek evidence of crimes with no transnational component." *Id.* at 722. The government may not rely on the border exception

on behalf of a "generalized interest in law enforcement and combatting crime." *Id.* at 721; *see also Kolsuz,* 890 F.3d at 143.

5. The Seventh Circuit, the circuit at issue here, avoids the issue.

The Seventh Circuit has twice avoided the issue. First, in *United States v. Wanjiku,* it found that agents acted in good faith when the searched devices with reasonable suspicion. *United States v. Wanjiku,* 919 F.3d 472, 480 (7th Cir. 2019) The Court held:

> In sum, the agents possessed reasonable suspicion to search Wanjiku's electronic devices, including his cell phone, portable hard drive, and laptop computer. At the time that they conducted these searches, they reasonably relied on Supreme Court precedent that required no suspicion for nondestructive border searches of property, and nothing more than reasonable suspicion for highly intrusive border searches of persons. The Court had also indicated that probable cause and a warrant had never been required for any border search. We therefore need not reach the issue of what level of suspicion is required (if any) for searches of electronic devices at the border, and reserve that question for a case in which it matters to the outcome.

Id. at 488-89. In Mr. Skaggs's case, the Court relied on *Wanjiku* without making further analysis of the issue:

> The border search of Skaggs's thumb drives occurred about a year and a half after the searches in *Wanjiku*, and Skaggs does not point to any intervening precedent on border searches. Therefore, the officials had a good faith belief that the search did not violate the Fourth Amendment because, as the district court correctly concluded, the search was supported by reasonable suspicion.
>
> . . . .

> These facts, taken together, give rise to reasonable suspicion of criminal activity. *See, e.g., Wanjiku,* 919 F.3d at 487–88 (finding reasonable suspicion for border search of defendant's electronic devices because he was returning from an international destination known for child sex tourism, had been arrested for a crime involving a minor victim, displayed pictures of himself with "multiple friends who seemed very young" on his Facebook profile, and had been evasive during questioning at customs); *United States v. Cotterman*, 709 F.3d 952, 969 (9th Cir. 2013) (finding reasonable suspicion for border search of defendant's electronic devices based in part on defendant's "prior child-related conviction, frequent travels, [and] crossing from a country known for sex tourism").
>
> No court has ever required more than reasonable suspicion for a border search. Because reasonable suspicion existed here, the district court correctly denied Skaggs's motion to suppress, given the good faith exception.

(App. A at 10-11.)

B. This Court should grant this petition to address the variable standards used in application of the Fourth Amendment at the border.

As illustrated above, the courts of appeals are divided as to the level of suspicion required for searching digital devices at the border. The Fourth and the Ninth Circuits require individualized suspicion for forensic or advanced searches. *Cano,* 934 F.3d at 1007; *Kolsuz,* 890 F.3d at 137. On the other hand, the Eleventh Circuit requires no individualized suspicion for *any* search of digital devices at the border, *Touset,* 890 F.3d at 1229, and the First Circuit has held that no individualized suspicion is required for basic or manual searches. *Alasaad,* 988 F.3d at 13. The Seventh Circuit has remained steadfast in refusing to address

the issue substantively. The Fourth Circuit requires advanced searches have a nexus to historic rationales. *Aigbekaen,* 943 F.3d at 721.

Some of these distinctions have no basis in the Fourth Amendment but, more importantly, the standards used at the border for digital searches differs significantly depending on which circuit the border is in. The difference between advanced or forensic and basic or manual is one of method. However, the scope of personal information potential exposed remains the same, which is the concern paramount to the decision here. In *Riley,* this Court required a warrant and probable cause for any search of a cell phone incident to arrest. *Riley,* 573 U.S. at 379-80. Only basic or manual searches were conducted in *Riley* and this Court made no distinction between those searches and forensic searches. Both types of searches have the potential to reach the amount of information this Court was concerned about in *Riley.* Furthermore, digital devices are unlikely to contain items that can immediately harm officers or others, like weapons, or items that be easily disposed of, like controlled substances. Different standards should not apply.

"As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter v. United States,* 138 S. Ct. 2206,

2214 (2018); *Kyllo v. United States,* 533 U.S. 27, 34 (2001). The expectation of privacy exists within the practical limitations on the government's ability to invade personal privacy and when technical advances have made the government's ability to invade privacy easier, the protections of the Fourth Amendment are enforced to maintain that privacy. *See Katz v. United States,* 389 U.S. 347, 362 (1967) (addressing advancing wiretap technology).

Any exception to the Fourth Amendment's warrant requirement must be closely related to the underlying justifications for the exception. *See Riley,* 576 U.S. at 386; *Florida v. Royer,* 460 U.S. 491, 500 (1983) (holding that warrantless searches must be limited in scope to what is justified by the particular purposes served by the exception). This case provides the Court with the opportunity to clarify the proper standards to be used at the border in light of *Riley* and rapidly advancing technology.

II. A defendant's conduct of filming a minor using the bathroom and taking a shower did not cause the minor to engage in sexually explicit conduct under 18 U.S.C. § 2251(a) where all of the minor's actions on film do not qualify under the statutory definition of "sexually explicit conduct."

Mr. Skaggs was convicted of nine counts of sexual exploitation of children under 18 U.S.C. § 2251(a). Title 18 U.S.C. § 2251(a) mandates a 15 year mandatory minimum sentence for the sexual exploitation of children for:

> 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. . . .

18 U.S.C. § 2251(a). The provisions of 18 U.S.C. § 3559(e) call for a sentence of mandatory life in prison for a defendant convicted under § 2251 who has a qualifying prior conviction. *See* 18 U.S.C. § 3559(e).

For the purposes of this case, the key portion of this statute is whether the defendant: "employs, uses, persuades, induces, entices, or coerces any minor to engage in" sexually explicit conduct. As is relevant here, "sexually explicit conduct" is defined as "actual or simulated lascivious exhibition of the anus, genitals, or public area of any person." 18 U.S.C. § 2256(2)(A)(v). If a defendant's conduct and the minor's conduct do not fall within this definition, the defendant is not guilty of an offense under § 2251(a). This Court's precedent makes clear that "sexually explicit conduct" is depictions of hard core sexual acts against children considered by an objective observer.

Several circuit courts have interpreted this provision in manners causing a split among the circuits. The majority of circuits have focused instead on the subjective purposes of the creator when creating the material rather than the nature of the material. *See United States v. Courtade,* 929 F.3d 186, 191-92 (4th Cir. 2019) (holding that the statute requires more than mere nudity to be lascivious

but considering whether the purpose of creating the images was to excite lust or arouse sexual desire); *United States v. Holmes,* 814 F.3d 1246, 1247 (11th Cir. 2016) (holding that depictions of otherwise innocent conduct by a minor constitutes a lascivious exhibition based on the actions of the individual creating the depiction); *United States v. Miller,* 829 F.3d 519, 525-26 (7th Cir. 2016) (finding that courts should consider the intent of the creator and the material is sexually explicit conduct when the purpose was to sexually excite the creator).

The District of Columbia Circuit has broken from this erroneous majority and focused not on the subjective intent of the creator but on the objective content of the material. In *Hillie,* the D.C. Circuit first held that a child does not engage in a lascivious exhibition unless she displays her genitals in a manner that connotes the commission of one of the sexual acts in the statute. *Hillie,* 14 F.4th at 687. However, after a petition for rehearing, the Court amended the holding to define lascivious exhibition covering children revealing their genitals in a manner connoting sexual desire or an inclination to engage in any type of sexual activity. *United States v. Hillie*, 39 F.4th 674, 685 (D.C. Cir. 2021). The D.C. Circuit has correctly interpreted this Court's precedent regarding "sexually explicit conduct." Because the remainder of the circuit courts are misinterpreting the term, this Court should grant this writ of certiorari to address the split.

A. This Court's definition of "sexually explicit conduct"

In 1973, this Court held that obscene material, defined as materials depicting "patently offensive 'hard core' sexual conduct," fell outside of the protections of the First Amendment. *Miller v. California,* 413 U.S. 15, 27 (1973). The Court explained that the government can regulate depictions of patently offensive sexual conduct specifically defined by law and endorsed regulations of "ultimate sexual acts, normal or perverted, actual or simulated" and "representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 24-25. In a companion case, the Court construed terms lewd and lascivious as limited to depictions of "hard core sexual conduct given as examples in *Miller*." *United States v. 12 200-Ft. Reels of 8mm. Film,* 413 U.S. 123, 129-30 (1973).

Within the focus of *Miller*, Congress was concerned with visual depictions of children involved in pornographic materials. *See* S. Rep. No. 95-438, at 42, 43 (1977). Congress was concerned that "the use of children in the production of pornographic materials" could not be eradicated by the states alone and, at the time, there were no federal laws prohibiting "the use of children in the production of materials that depict explicit sexual conduct." *Id.* at 44, 48. Thus, Congress drafted a new law to "fill the existing gap" by "attack[ing] the production of materials depicting children in sexually explicit conduct as a form

of child abuse." *Id.* at 53, 56.

In 1982, this Court upheld a New York state statute prohibiting depictions of sexual activities involving children. *New York v. Ferber,* 458 U.S. 747, 753 (1982). The Court held that a statute must "suitably limit[] and describe[] the category of sexual conduct proscribed." *Id.* at 764. The New York statute meant the definition because its proscribed categories of "sexual conduct" were "directed at the hard core of child pornography," and "[t]he term 'lewd exhibition of the genitals . . . was given in *Miller* as an example of a permissible regulation." *Id*. at 765. A decade later, the Court upheld the definition of lewd from *Miller* and *Ferber* and held that "[l]ascivious is no different in its meaning than 'lewd.'" *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 78-79 (1994). As a result, the Court construed both lewd and lascivious consistent with the *Miller* definitions of "hard core sexual conduct." *See Hillie,* 39 F.4th at 685. Another decade passed and this Court reaffirmed that the constitutionality of child pornography laws hinged on whether they were connected to the sexual abuse of children. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 241 (2002).

In *Free Speech Coalition,* the Court concluded that federal law that extended the definition of child pornography to materials that appeared to, but did not actually, depict a minor engaged in sexually explicit conduct was unconstitutionally overbroad. *Id.* Those type of images "do not involve, let alone

harm, any children in the production process." *Id.* The Court came to the same conclusion in *Williams* when it upheld the pandering child pornography statute that turned on the requirement that the material contain a visual depiction of a minor engaging in "sexually explicit conduct." *United States v. Williams,* 553 U.S. 285, 293 (2008). The Court reasoned that "sexually explicit conduct" reaches only conduct similar to what was upheld in *Ferber* - hard core child pornography. *Id.* at 296-97. Importantly, the Court also stated that the law would not apply "to someone who subjectively believes that an innocuous picture of a child is lascivious" because the meaning of sexually explicit conduct does not turn on the defendant's subjective assessment of the material. *Id.* at 301.

B. The Seventh Circuit's recent interpretation of § 2251(a) leans towards *Hillie*.

The Seventh Circuit was on the majority side of the circuit split on this issue. *See Miller,* 829 F.3d at 526. However, in a 2020 case, the Court held that in cases where the defendant is charged under § 2251(a) for videos that do not depict a child engaged in sexually explicit conduct, the videos are not child pornography and the defendant cannot stand convicted of producing any visual depiction of such sexually explicit conduct. *Howard,* 968 F.3d at 721. "The most natural and contextual reading of the statutory language requires the government to prove that the offender took one of the listed actions to cause *the minor* to engage in sexually explicit conduct for the purpose of creating a visual

image of that conduct." *Id.* (emphasis in original).

In *Howard,* the government maintained that the defendant's "use" of the minor for his own sexual gratification was enough to meet the "uses" portion of § 2251(a). *Id.* This Court rejected the government's proposed interpretation of the word "uses" and held that all of the verbs on the statutory list "require some action by the offender to cause the *minor's* direct engagement in sexually explicit conduct." *Id.* at 722 (emphasis in original). The Court found support in the consistency of the statutory scheme that Congress created to combat child pornography and noted that the government's interpretation would penalize the production of material that is not child pornography. *Id.*

Shortly after *Howard,* the Court decided *United States v. Sprenger,* 14 F.4th 785 (7th Cir. 2021). The Court agreed with Sprenger and the government that his § 2251(a) conviction was invalid because the images he produced were "not child pornography since they do not show Victim A engaged in sexually explicit conduct herself, as required by § 2251(a)." *Sprenger,* 14 F.4th at 791. *Sprenger* clarified that the Court meant exactly what it said in *Howard* - images are not child pornography under § 2251(a) if the minor is not engaged in sexually explicit conduct.

Although the facts of Mr. Skaggs's case are somewhat different than the *Howard* case, the interpretation of § 2251(a) in *Howard* and *Hillie* must control

here. Like the defendant in *Howard,* Mr. Skaggs did not use or employ a minor to cause *the minor* to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct. Child 1 was simply using the bathroom, including using the toilet and taking a shower. None of the minor's actions depict her directly engaged in sexually explicit and, therefore, her actions cannot meet the statutory requirement. The fact that the videos may have been made so Mr. Skaggs could engage in sexually explicit conduct does not matter.

Any disconnect between the facts of *Howard* and the facts of the present case is dispelled by the D.C. Circuit's recent decision in *Hillie,* 14 F.4th at 677. Hillie placed hidden cameras in a minor's bedroom and in a bathroom used by the minor. *Id.* at 680-81. The videos he captured show the minor exposing her genitals while undressing, cleaning herself, applying lotion, and using the toilet. *Id.* at 681-82. Hillie was convicted of several counts pursuant to 18 U.S.C. § 2251(a) and challenged the sufficiency of the evidence for those convictions on appeal. *Id.* at 683. Like in Mr. Skaggs's case, the government relied on the definition of "sexually explicit conduct" as "lascivious exhibition of the anus, genitals, or pubic area of any person" contained in 18 U.S.C. § 2256(2)(A)(v).

The D.C. Circuit reversed the § 2251(a) convictions, holding the definition in § 2256(2)(A)(v) applies to "visual depictions in which a minor, or someone interacting with a minor, engages in conduct displaying their anus, genitalia, or

pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." *Hillie,* 14 F.4th at 687. The D.C. Circuit relied on the progression of this Court's cases interpreting similar language in similar statutes as requiring more than mere nudity. *Id.* at 684-87 (discussing *Miller,* 413 U.S. at 15 (holding applies only to "patently offensive 'hard core' sexual conduct"); *Ferber,* 458 U.S. at 747 (adopting *Miller* and reiterating that the New York statute was directed at "the hard core of child pornography"); *X-Citement Video, Inc.*, 513 U.S. at 64 (interpreting § 2256(2)(A)(v) in line with *Miller* and *Ferber*); *Williams,* 553 U.S. at 285 (relying on definition of sexually explicit conduct from *Ferber*)).

Williams is especially instructive here where it indicated that "sexually explicit conduct" must involve "actual depiction of the sexual act rather than merely the suggestion that it is occurring." *Williams,* 553 U.S. at 297. This is required by a plain reading of § 2251(a) because "lascivious exhibition of the anus, genitals, or pubic area appears in a list with sexual intercourse, bestiality, masturbation, and sadistic or masochistic abuse, its meaning is narrowed by the commonsense canon of *noscitur a sociis* - which counsels that a word is given more precise content by the neighboring words with which it is associated." *Hillie,* 14 F.4th at 688 (quoting *Williams*, 553 U.S. at 294).

The evidence to convict Mr. Skaggs of nine counts of § 2251(a) was

insufficient as a matter of law after *Howard* because none of the images charged in Counts 1 through 9 depicted Child 1 engaged in sexually explicit conduct. The D.C. Circuit's decision in *Hillie,* which involves nearly identical facts as the present case, reinforces this argument. Child 1's actions on video are using the toilet, undressing and dressing, and bathing herself in the shower. To be sure, Child 1's genitalia and pubic area are shown in these images. However, Child 1's conduct does not constitute "sexually explicit conduct" because it is not "conduct displaying their anus, genitalia, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." *See Hillie,* 14 F.4th at 694. In short, "the videos are not child pornography." *Howard,* 968 F.3d at 718.

Mr. Skaggs cannot be found guilty of any § 2251(a) offense based on these facts. He may be guilty of other offenses, and his conduct was reprehensible, but the guilty verdicts to Counts 1 through 9 were not supported by sufficient evidence. The Seventh Circuit did not reach this issue even though it was raised in Mr. Skaggs's *pro se* brief and in counsel's petition for rehearing. Based on the deepening conflict as argued above, it is clear this Court must address this issue.

CONCLUSION

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

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