No. 22-7061

IN THE
# SUPREME COURT OF THE UNITED STATES

LORENZO ELIAS MENDEZ

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*



**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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* Petitioner prepared this petition with help from an attorney, Owen Senders (MA Bar No. 708454), who has not been admitted to practice in the highest court of a state for a period of three years, and so may not practice in this Court pursuant to its Rules 5 and 9.

## QUESTIONS PRESENTED

18 U.S.C. § 2251(a) provides, in relevant part, that no person shall "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in ... sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]"

18 U.S.C. § 2256(2)(A)(v) defines "sexually explicit conduct," as used in § 2251(a), to include the "lascivious exhibition of the anus, genitals, or pubic area of any person[.]"

The questions presented are:

**1.** Whether the statutory term "lascivious exhibition" refers to the defendant's act of exhibiting a minor's genitals on film, or, in other words, to the visual depiction that the defendant attempted to produce, as the First through Eleventh Circuits hold; or whether it refers instead to a particular type of conduct in which the subject of the image must have engaged, as the D.C. Circuit holds; and

**2.** If the D.C. Circuit is correct, whether a defendant may be convicted of attempting to violate § 2251(a) and sentenced therefor to 20 years of imprisonment based solely on evidence that he surreptitiously filmed a minor masturbating?

## RECENT PETITION

On January 9, 2023, this Court denied certiorari in *United States v. Skaggs*, No. 22-6053, to resolve the following question: "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?'" *See also United States v. Close*, petition for cert. pending, No. 22-6847 (filed Feb. 21, 2023) (presenting similar question).

This petition differs from the petition in *Skaggs* in two important respects. First, the questions presented here can be resolved simply by reference to the statutory text; they require no parsing of this Court's precedents regarding the meaning of "sexually explicit conduct" of the kind advocated by the petitioner in *Skaggs* (and in *Close*). Second, the petitioner in *Skaggs* proceeded under the assumption that "use," in the context of § 2251(a), means "cause." Petitioner here does not; rather, he takes § 2251(a)'s prohibition on "us[ing] ... any minor to engage in ... sexually explicit conduct" to mean that no person shall engage in sexually explicit conduct by using a minor. *See United States v. Heinrich*, 57 F.4th 154, 159 (3d Cir. 2023) (Bibas, J.) ("Section 2251(a)'s actus reus starts with six active verbs. The first two verbs, 'uses' and 'employs' (as a synonym for 'uses'), require that *the defendant* engage in sexually explicit conduct, with the child as an active or passive participant.") (emphasis added).

## RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Mendez*, No. 20-30007. The Ninth Circuit's panel decision was filed June 7, 2022, and is reported at 35 F.4th 1219.

This petition is related to the following proceedings in the United States District Court for the Eastern District of Washington, *United States v. Mendez*, No. 1:18-cr-02037-SMJ-1.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Lorenzo Mendez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The panel decision of the court of appeals is reported at 35 F.4th 1219, and reprinted in Appendix A.

## JURISDICTION

The court of appeals entered judgment on June 7, 2022, *see* Appendix A, and denied Petitioner's timely petition for rehearing on November 14, 2022, *see* Appendix B. This Court extended the time to file a petition for a writ of certiorari to April 13, 2023, *see* No. 22-A-714, and has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2251(a) provides, in relevant part: "Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in ... sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e) ..."

18 U.S.C. § 2251(e) provides, in relevant part: "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 ..."

18 U.S.C. § 2256(2)(A) defines "sexually explicit conduct," as used in § 2251(a), as "actual or simulated--

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

## INTRODUCTION

Several federal criminal statutes and sentencing guidelines apply to defendants who produce, possess, and distribute visual depictions of sexually explicit conduct involving minors. Each defines "sexually explicit conduct" to include the "lascivious exhibition of the anus, genitals, or pubic area of any person." This petition presents a question concerning the meaning of the term "lascivious exhibition" over which the courts of appeals are divided, which results in the inconsistent application of all the aforementioned statutes and sentencing guidelines, and which is outcome determinative in this case—namely, whether that term refers to the defendant's act of exhibiting a minor's genitals on film, or, in other words, to the visual depiction that the defendant attempted to produce; or whether it refers instead to a particular type of conduct in which the subject of the image must have engaged.

Petitioner Lorenzo Mendez surreptitiously filmed a minor masturbating.[1] Although the government could have charged him under 18 U.S.C. § 1466A(a), which

[1] Petitioner maintains that he did not capture footage of the minor masturbating, and wishes to preserve this argument for possible habeas proceedings. For the purposes of this petition, however, the Court may assume that Petitioner did film the minor masturbating.

imposes a five-year mandatory minimum sentence on any person who attempts to produce an obscene visual depiction of a minor engaging in sexually explicit conduct, it charged him instead under 18 U.S.C. § 2251(a), (e), which imposes a 15-year mandatory minimum sentence on any person who attempts to persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct, or to engage in sexually explicit conduct himself, using a minor, in order to film that conduct.

The Ninth Circuit upheld Petitioner's conviction under the theory that he engaged in sexually explicit conduct himself, using a minor, by lasciviously exhibiting a minor's genitals on film. This theory accords with the law of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, all of which hold that a defendant's act of exhibiting a minor's genitals on film may qualify as a "lascivious exhibition," and thus sexually explicit conduct within the meaning § 2251(a). By contrast, the D.C. Circuit holds that a defendant's act of exhibiting a minor's genitals on film may *not* qualify as a "lascivious exhibition," and thus sexually explicit conduct within the meaning § 2251(a).

This petition that follows satisfies all the criteria for this Court's review. First, there is undeniably a split among the circuits as to the meaning of the statutory term "lascivious exhibition." *See United States v. Hillie*, 38 F.4th 235, 238 (D.C. Cir. 2022) (Katsas, J., concurring in denial of rehearing en banc) (acknowledging circuit split as to meaning of "lascivious exhibition"); Gov't Pet. For Rehearing En Banc at 1–2, *United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021) (No. 19-3027) (acknowledging circuit split).

This split results in the inconsistent application of virtually all the federal child-pornography statutes and sentencing guidelines, impacting potentially more prosecutions than the split at issue in *Dubin v. United States*, cert. granted, No. 22–10 (argued Feb. 27, 2023).

It impacts prosecutions under § 2251(a) of defendants like Petitioner who have produced images of minors engaging in sexually explicit conduct, but who have not persuaded, induced, enticed, or coerced minors to engage in that conduct. If such defendants are to be convicted under § 2251(a), it can only be because they "use[d] ... minor[s] to engage in ... sexually explicit conduct," or, in other words, engaged in sexually explicit conduct themselves, using minors. *See United States v. Heinrich*, 57 F.4th 154, 159 (3d Cir. 2023) (Bibas, J.) ("Section 2251(a)'s actus reus starts with six active verbs. The first two verbs, 'uses' and 'employs' (as a synonym for 'uses'), require that the defendant engage in sexually explicit conduct, with the child as an active or passive participant."). If the First through Eleventh Circuits are correct that a defendant's act of exhibiting a minor's genitals on film may qualify as a "lascivious exhibition," and thus sexually explicit conduct, such defendants can indeed be said to have engaged in sexually explicit conduct themselves, using minors. If the D.C. Circuit's interpretation of the term "lascivious exhibition" is correct, they cannot be, and therefore cannot be convicted under § 2251(a).

This split also impacts prosecutions under § 2251(a) and several other statutes of defendants who have produced, possessed, or distributed images of minors that depict no sexually explicit conduct at all. The First through Eleventh Circuits hold

that such defendants may be properly convicted under the theory that the images they produced, possessed, or distributed were, themselves, lascivious exhibitions. The D.C. Circuit does not. Instead, it requires that the defendant produced, possessed, or distributed an image depicting a person engaged in a lascivious exhibition of genitalia or some other variety of sexually explicit conduct.

Moreover, the definition of "lascivious exhibition" adopted by the majority of the circuits has proven unworkable in practice, resulting in a "profoundly incoherent body of case law" even within those circuits. A. Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 953 (2001). And it has led those circuits to apply the federal child-pornography laws in violation of this Court's precedents and First Amendment principles.

Finally, the decision below is wrong. "A video of the child is not itself 'sexually explicit conduct,' but rather is the 'visual depiction of such conduct,' which is what cannot lawfully be produced or possessed." *Hillie*, 38 F.4th at 238 (Katsas, J., concurring in denial of rehearing en banc).

This Court should grant certiorari and reverse.

## STATEMENT OF THE CASE

Petitioner surreptitiously filmed a minor masturbating. Based on evidence of that conduct, a jury convicted him of attempting to violate a statute that forbids any person from "employ[ing], us[ing], persuad[ing], induc[ing], entic[ing], or coerc[ing] any minor to engage in ... sexually explicit conduct for the purpose of producing any

visual depiction of such conduct[.]" 18 U.S.C. § 2251(a). The district court sentenced him to 20 years of imprisonment.

Petitioner appealed, arguing that the evidence was insufficient to support his conviction. The government did "not suggest[] [on appeal] that [Petitioner] [had attempted to] employ[], persuade[], induce[], or coerce[] his victim," *United States v. Mendez*, 35 F.4th 1219, 1221 (9th Cir. 2022), leaving only the question whether he had attempted to "use[]" his victim "to engage in ... sexually explicit conduct for the purpose of producing any visual depiction of such conduct," § 2251(a).

The Ninth Circuit upheld his conviction under circuit precedent holding that the "use" element of § 2251(a) is satisfied when the defendant "'use[s] or employ[s]' his victim 'to produce sexually explicit images.'" *Mendez*, 35 F.4th at 1221 (quoting *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017)). It explained that it "read the statute as focusing on the conduct of the perpetrator—not the minor," *id.* at 1223; that "'sexually explicit conduct' includes ... 'lascivious exhibition' of intimate body parts," *id.* at 1221; and that there was "no doubt that [Petitioner's] visual depictions of the minor fall within this definition," *id.* *See also id.* at 1223 (expressly rejecting the Seventh Circuit's holding, in *United States v. Howard*, 968 F.3d 717, 721 (7th Cir. 2020), that § 2251(a) requires "*the minor* to engage in sexually explicit conduct").

## REASONS FOR GRANTING THE WRIT

### I. The Courts of Appeals are Divided as to Whether the Statutory Term "Lascivious Exhibition" Refers to the Image the Defendant Attempted to Produce, or Whether it Refers to a Particular Type of Conduct in Which the Subject of the Image Must Have Engaged.

Section 2256(2)(A) enumerates the types of sexually explicit conduct that § 2251(a) prohibits defendants from using minors to engage in. One of those types of conduct is the "lascivious exhibition of the anus, genitals, or pubic area of any person." § 2256(2)(A)(v).

In a 1987 case called *United States v. Wiegand*, the Ninth Circuit held that a defendant's act of exhibiting a minor's genitals on film may qualify as a "lascivious exhibition," and thus sexually explicit conduct within the meaning § 2251(a). *See* 812 F.2d 1239, 1244 (9th Cir. 1987) ("The offense defined by the statute is depiction of a 'lascivious exhibition of the genitals.' Plainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust.").

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have all followed the Ninth Circuit's holding in *Wiegand*. *See United States v. Goodman*, 971 F.3d 16, 18–19 (1st Cir. 2020); *United States v. Spoor*, 904 F.3d 141, 148–51 (2d Cir. 2018); *United States v. Larkin*, 629 F.3d 177, 181–85 (3d Cir. 2010); *United States v. Pratt*, 915 F.3d 266, 273–74 (4th Cir. 2019); *United States v. McCall*, 833 F.3d 560, 563–64 (5th Cir. 2016); *United States v. Daniels*, 653 F.3d 399, 407–08 (6th Cir. 2011); *United States v. Schenck*, 3 F.4th 943, 948–49 (7th Cir. 2021); *United States v. Ward*, 686 F.3d 879, 881–84 (8th Cir. 2012); *United States*

*v. Wells*, 843 F.3d 1251, 1253–57 (10th Cir. 2016); *United States v. Holmes*, 814 F.3d 1246, 1250–53 (11th Cir. 2016).

By contrast, the D.C. Circuit holds that a defendant's act of exhibiting a minor's genitals on film may *not* qualify as a "lascivious exhibition," and thus sexually explicit conduct within the meaning § 2251(a), and that, instead, the term "lascivious exhibition," in the context of the child-pornography statutes, refers to a kind of conduct in which the subject of an image must engage. *See United States v. Hillie*, 39 F.4th 674, 685–86 (D.C. Cir. 2022) (finding insufficient evidence to convict defendant under § 2251(a), (e) where defendant surreptitiously filmed naked minor grooming herself, using the toilet, and dancing; construing the term "lascivious exhibition" to mean "that the minor displayed his or her anus, genitalia, or pubic area in a manner connoting ... sexual desire"); *id.* at 688 ("[T]he statutory terms 'visual depiction'—in § 2251(a) and § 2252(a)(4)(B)—and 'lascivious exhibition'—in § 2256(2)(A)(v)—refer to different things. Sections 2251(a) and 2252(a)(4)(B) require the defendant to have produced or possessed a visual depiction of 'a minor ... engaging in sexually explicit conduct,' with sexually explicit conduct defined as, among other things, a 'lascivious exhibition of the ... genitals.' The statutory term 'lascivious exhibition' therefore refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself.") (internal citation omitted).

## II. The Question Presented is Important and Frequently Recurring.

### A. The split between the D.C. Circuit and every other circuit over the meaning of the term "lascivious exhibition" results in the inconsistent application of virtually all the federal child-pornography statutes and sentencing guidelines, impacting potentially more prosecutions than the split at issue in *Dubin v. United States.*

The split between the D.C. Circuit and every other circuit over the meaning of the term "lascivious exhibition" results in the inconsistent application of § 2251(a) to defendants like Petitioner who have filmed minors engaging in sexually explicit conduct, but who have not "persuade[d], induce[d], entice[d], or coerce[d]" minors to engage in that conduct. In the majority of the circuits, such defendants may be convicted of violating § 2251(a) under the theory that they engaged in sexually explicit conduct themselves, using minors, by lasciviously exhibiting minors' genitals on film.[2] Such defendants cannot be convicted of violating § 2251(a) under that theory in the D.C. Circuit, where a defendant's act of exhibiting a minor's genitals on film does not qualify as a "lascivious exhibition," and thus sexually explicit conduct. Instead, in the D.C. Circuit, such defendants cannot be said to have engaged in

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[2] As explained above, this was the Ninth Circuit's reasoning in this case—it expressly rejected the Seventh Circuit's holding, in *Howard*, 968 F.3d at 721, that § 2251(a) requires "*the minor* to engage in sexually explicit conduct," explaining that it read "the statute as focusing on the conduct of the perpetrator—not the minor," *Mendez*, 35 F.4th at 1223. It further explained that "'sexually explicit conduct' includes ... 'lascivious exhibition' of intimate body parts," *id.* at 1221; and that there was "no doubt that [Petitioner's] visual depictions of the minor fall within this definition," *id. See also United States v. Sirois*, 87 F.3d 34, 42 (2d Cir. 1996) (holding that the "use" element of § 2251(a) is "fully satisfied ... if a child is photographed in order to create pornography"); *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007) (same); *United States v. Wright*, 774 F.3d 1085, 1090 (6th Cir. 2014) (same).

sexually explicit conduct at all, or to have persuaded, induced, enticed, or coerced minors to engage in sexually explicit conduct, and so cannot be convicted of violating § 2251(a).[3] (Defendants like Petitioner, however, may be convicted in the D.C. Circuit of violating § 1466A(a).)

It also results in the inconsistent application of § 2251(a) to defendants who have produced images of minors engaging in no sexual conduct at all. Again, in the majority of the circuits, such defendants may be convicted of violating § 2251(a) under the theory that they engaged in sexually explicit conduct themselves, using minors,

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[3] The D.C. Circuit has yet to consider the application of § 2251(a) to defendants who have produced images of minors engaging in sexually explicit conduct, but who have not engaged in sexually explicit conduct themselves, or persuaded, induced, enticed, or coerced minors to engage in sexually explicit conduct. As the Ninth Circuit noted in this case, the D.C. Circuit has indicated, in the following sentence, that § 2251(a) might apply to such defendants:

> "[I]f a defendant, knowing that a minor masturbates in her bedroom, surreptitiously hides a video camera in the bedroom and films her doing so, then he uses or employs, i.e., avails himself of, a minor to engage in sexually explicit conduct (with herself) with the intent that she engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct."

*Hillie*, 39 F.4th at 691.

This sentence, however, is dicta, and will not bind the D.C. Circuit when such a case is before it. It is also grammatically incorrect. What the D.C. Circuit seems to have done is confuse the sentence "no person shall use a minor *to engage* in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," with the sentence, "no person shall use a minor *engaging* in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." Those sentences have different meanings, and § 2251(a) does not contain the latter sentence.

by lasciviously exhibiting minors' genitals on film.[4] In the D.C. Circuit, they cannot be.[5]

And it results in the inconsistent application of several other federal statutes and sentencing guidelines that apply to defendants who produce, transport, receive, distribute, sell, and possess images of minors engaging in sexually explicit conduct, with sexually explicit conduct defined to include the lascivious exhibition of the

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[4] *See, e.g.*, *United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minors changing and urinating); *United States v. Anthony*, 2022 WL 17336206 at *3 (3d Cir., Nov. 30, 2022) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minors showering); *United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minor undressing, grooming her pubic area, and showering); *United States v. Vanderwal*, 533 Fed. Appx. 498, 502 (6th Cir. 2013) (finding sufficient evidence to convict under § 2251(a), (e) where defendant aligned hidden video camera in bathroom "to focus on the genital area of someone standing at the sink" and to capture footage of shower); *United States v. Miller*, 829 F.3d 519, 525–26 (7th Cir. 2016) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minors showering); *United States v. Petroske*, 928 F.3d 767, 773–74 (8th Cir. 2019) (finding sufficient evidence to convict under § 2251(a), (e) where defendant surreptitiously filmed minors showering); *United States v. Wells*, 843 F.3d 1251, 1257 (10th Cir. 2016) (finding sufficient evidence to convict under § 2251(a) where defendant surreptitiously filmed minor showering and using bathroom); *United States v. Holmes*, 814 F.3d 1246, 1252 (11th Cir. 2016) (finding sufficient evidence to convict under § 2251(a), (e) where defendant surreptitiously filmed naked minor grooming herself and performing other bathroom routines); *cf. United States v. Courtade*, 929 F.3d 186, 193 (4th Cir. 2019) (finding sufficient evidence to convict under § 2252(a)(4) where defendant filmed minor showering, and repeatedly referring to the resulting video as the relevant "lascivious exhibition"; but noting that defendant directed the minor to shower and handed her the video camera once she was in the shower so that she could film herself, under the pretense that he was testing the camera's water resistance).

[5] *See Hillie*, 39 F.4th at 685–86, 692.

genitals. *See* Appendix C (listing statutes and sentencing guidelines). In the majority of the circuits, where the statutory term "lascivious exhibition" is held to refer to the exhibition of a minor's genitals on film, defendants may be convicted under these statutes and given increased sentences under these sentencing guidelines based solely on evidence that they produced, transported, received, distributed, sold, or possessed images that were, themselves, lascivious exhibitions.[6] In the D.C. Circuit, such evidence is insufficient to sustain the application of these statutes and sentencing guidelines. Instead, the subject of the image must be engaged in a lascivious exhibition of genitalia, or some other variety of sexually explicit conduct.[7]

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[6] *See, e.g.*, *United States v. Horn*, 187 F.3d 781, 789–90 (8th Cir. 1999) (finding sufficient evidence to convict under 18 U.S.C. § 2252(a)(4)(B) where defendant possessed videos that were themselves lascivious exhibitions of minors' genitals, but whose minor subjects were engaged in solely non-sexual activities—playing on a jungle gym and doing cartwheels); *United States v. Spoor*, 904 F.3d 141, 146, 149 (2d Cir. 2018) (finding sufficient evidence to convict under 18 U.S.C. § 2252A(a)(5)(B) where defendant possessed videos that were themselves lascivious exhibitions of minors' genitals, but whose minor subjects were engaged in solely non-sexual activities—sleeping, playing on a bed, changing, and urinating); *United States v. Stewart*, 729 F.3d 517, 526–28 (6th Cir. 2013) finding sufficient evidence to convict under § 2252A(a)(1) where defendant transported images that were themselves lascivious exhibitions of minors' genitals, but whose minor subjects were engaged in solely non-sexual activities—playing on a beach); *United States v. Brown*, 579 F.3d 672, 681–85 (6th Cir. 2009) (finding sufficient evidence to sustain a sentencing increase under U.S.S.G. § 2G2.1(d)(1) where defendant possessed images of more than one minor that were themselves lascivious exhibitions of minors' genitals, but whose minor subjects were engaged in solely non-sexual activities—standing in the bathtub, sitting on the toilet, and lying on the floor and on a bed); *United States v. Kain*, 589 F.3d 945, 951–52 (8th Cir. 2009) (finding sufficient evidence to sustain a sentencing increase under U.S.S.G. § 2G2.2(b)(7)(A) where defendant possessed more than ten images that "depicted nude or partially clothed prepubescent girls and focus[ed] on the child's genitals or pubic area," but noting no evidence that defendant possessed more than ten images whose subjects were engaged in sexual activity).

[7] *See Hillie*, 39 F.4th at 685–86, 692.

Prosecutions under these statutes are common. In 2021, the government charged approximately 2,000 defendants under statutes incorporating the term "lascivious exhibition," including 603 defendants under § 2251 alone. *See* Appendix C. By contrast, the government charged only 437 defendants in 2021 under the federal aggravated identity theft statute, 18 U.S.C. § 1028A, the scope of which this Court recently granted certiorari to review. *See Dubin v. United States*, cert. granted, No. 22–10 (argued Feb. 27, 2023); Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, http://www.bjs.gov/fjsrc/tsec.cfm (last visited Mar. 2, 2023).

The resulting sentences are not light. In the majority of the country, defendants are routinely sentenced to decades in prison based on convictions that would not stand in the D.C. Circuit. *See, e.g.*, *United States v. Skaggs*, 25 F.4th 494, 500–01 (7th Cir. 2022) (affirming life sentence for nine counts of violating § 2251(a), (e) where defendant had prior sex conviction involving a minor); Gov't Br. at 46–51, 54, *United States v. Skaggs*, 25 F.4th 494 (7th Cir. 2022) (No. 20-1229) (explaining that each of the counts supporting defendant's life sentence was based solely on evidence that he surreptitiously filmed a minor in a bathroom); *Goodman*, 971 F.3d at 18 (affirming 260-year sentence for eight counts of violating § 2251(a) and one count of violating § 2252(a)(4)(B)); Gov't Br. at 36–38, *United States v. Goodman*, 971 F.3d 16 (1st Cir. 2020) (No. 19-1313) (explaining that two of the § 2251(a) counts, which resulted in 30-year consecutive sentences, were based solely on evidence that defendant surreptitiously filmed a minor showering); *United States v. Walker*, No. 21-13403, 2022 WL 3221905, at *1, *3 (11th Cir. Aug. 10, 2022) (affirming 60-year

sentence for two counts of violating § 2251(a), (e), each of which was based solely on evidence that defendant surreptitiously filmed minors in a bathroom); *United States v. Close*, No. 21-1962-cr, 2022 WL 17086495, at *1 (2d Cir. Nov. 21, 2022) (affirming 50-year sentence for 61 counts of violating § 2251(a) and 13 counts of violating § 2252A(a)(5)(B), "[m]ost of [which] were based on recordings Close made of children's genitalia while the unsuspecting victims used the bathroom at his music school").

The question presented implicates state criminal proceedings, too. Many states and the District of Columbia criminalize the production, transportation, receipt, distribution, sale, and possession of images of minors engaging in sexually explicit conduct, with sexually explicit conduct defined to include the lascivious or lewd exhibition of the genitals. Eighteen of these jurisdictions, including California, Texas, Florida, and New York, have relied on *Wiegand* or the district court case it affirmed to hold that the statutory term "lascivious exhibition," or "lewd exhibition," refers to the visual depiction that the defendant transported, received, distributed, sold, or possessed. *See* Appendix D (listing relevant statutes and decisions). If *Wiegand* is wrong, so too are these state court decisions.

### B. The definition of "lascivious exhibition" adopted by the majority of the circuits has proven unworkable in practice, resulting in an incoherent body of caselaw even within those circuits.

The circuits that define the term "lascivious exhibition" to refer to the defendant's act of exhibiting a minor's genitals on film, or to the image that the defendant has produced, do not agree on what the term means in practice, causing them to apply the federal child-pornography statutes and sentencing guidelines

inconsistently with each other. All allow district courts to use the following "*Dost*" factors (promulgated by the district court decision upheld on appeal in *Wiegand*) to determine whether an image is a lascivious exhibition:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

*United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).[8] But different circuits, and even different panels within certain circuits, apply these factors differently.

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[8] *See United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999) (finding that "the *Dost* factors are generally relevant and provide some guidance in evaluating whether the display in question is lascivious"); *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008) ("Although the *Dost* factors are not definitional, they are useful for assessing the sufficiency of evidence, and pose questions that are (at least) germane to the issue of lasciviousness."); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989) ("We adopt the *Dost* factors as a means of determining whether a genital exhibition is 'lascivious.'"); *Sims v. Labowitz*, 877 F.3d 171, 182 (4th Cir. 2017) ("We likewise conclude that the *Dost* factors offer helpful guidance in determining whether conduct is lascivious."); *United States v. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) ("[W]e have applied the six factors from [*Dost*] to aid in determining whether a particular depiction is lascivious"); *United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015) ("We have adopted the '*Dost* factors' as a rubric for analyzing whether a particular image is lascivious"); *United States v. Price*, 775 F.3d 828, 839–40 (7th Cir. 2014) (noting that it is not plain error to instruct the jury using the *Dost* factors, but discouraging their routine use); *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019) ("We have considered the [*Dost*] factors to determine whether or not images meet the lasciviousness requirement ... In addition to these six '*Dost* factors,' we have suggested analyzing (7) whether the image portrays the minor as a sexual object; and (8) any captions on the images.") (internal quotation marks omitted); *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017) ("The typical starting point for

Some require more than one factor to be present; others do not.[9] Some hold that showers and bathrooms are sexually suggestive settings; others do not.[10] Some allow the jury to consider evidence of the defendant's subjective intent in creating the

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determining whether a particular image is lascivious, and therefore pornographic, is the six-factor test articulated in *Dost*."); *United States v. Wolf*, 890 F.2d 241, 247 (10th Cir. 1989) ("The trial court did not err in applying the *Dost* factors."); *United States v. Williams*, 444 F.3d 1286, 1299 n.62 (11th Cir. 2006) (noting that the *Dost* factors "are relevant to the determination of whether a picture constitutes a 'lascivious exhibition of the genitals or pubic area' under child pornography law") (overruled on other grounds); *see also United States v. Roderick*, 62 M.J. 425, 429–30 (C.A.A.F. 2006) (approving use of the *Dost* factors in the courts for the armed forces).

[9] ***Compare*** *Villard*, 885 F.2d at 122 ("Although more than one factor must be present in order to establish 'lasciviousness,' all six factors need not be present."), ***with*** *United States v. Spoor*, 904 F.3d 141, 151 n.9 (2d Cir. 2018) ("In the District Court, Spoor requested that the jury be charged that 'more than one [*Dost*] factor must be present.' That is not a correct statement of the law, and it was properly rejected by the District Court.") (internal citations omitted) (alteration in original); *Wolf*, 890 F.2d at 245 n.6 ("We do not hold that more than one *Dost* factor must be present[.]").

[10] ***Compare*** *Spoor*, 904 F.3d at 149 ("Although most typically used as a place to serve biological functions, ... bathrooms also can be the subject of sexual fantasy."); *United States v. Wells*, 843 F.3d 1251, 1256 (10th Cir. 2016) ("Under the second *Dost* factor, the jury also reasonably could have concluded that [the minor's] bathroom was a sexually suggestive setting."); *United States v. Larkin*, 629 F.3d 177, 183 (3d Cir. 2010) ("[S]howers and bathtubs are frequent hosts to fantasy sexual encounters as portrayed on television and in film. It is potentially as much of a setting for fantasy sexual activity as is an adult's bedroom."); ***with*** *United States v. McCoy*, 55 F.4th 658, 661 (8th Cir. 2022), *reh'g granted en banc*, 2023 WL 2440852 ("Nor is the setting sexually suggestive under these circumstances. The videos display innocent daily tasks in a bathroom: getting in and out of the shower, drying off, and using the toilet."); *United States v. Brown*, 579 F.3d 672, 681–82 (6th Cir. 2009) ("The setting of most of the photographs—the bathtub, the toilet, and the floor—is not sexually suggestive[.]"); *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) ("[T]he district court [properly] found that ... [a]n open shower near a beach was not a place associated with sexual activity. It was natural to be nude when washing off from the sand.").

image; others do not.[11] Some hold that the jury may look outside the four corners of an image, to the defendant's conduct prior to taking the image, to determine the image's intended effect on the viewer (whether under a subjective standard or not); others do not.[12]

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[11] ***Compare*** *Spoor*, 904 F.3d at 151 ("To be sure, the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography."); *Wells*, 843 F.3d at 1256 ("As to the sixth *Dost* factor, the jury reasonably could have considered whether the visual depictions of [the minor] naked were intended or designed to elicit a sexual response in Wells. Wells testified '[t]here was no arousal' when he reviewed the videos of [the minor]. But sufficient evidence supports the opposite conclusion, and thus his conviction."); *United States v. Miller*, 829 F.3d 519, 526 (7th Cir. 2016) ("Subjective intent—particularly of the *creator*—is a relevant, and quite probative, consideration."); *United States v. Johnson*, 639 F.3d 433, 441 (8th Cir. 2011) ("[S]tatements made by the producer about the images are relevant in determining whether the images were intended to elicit a sexual response in the viewer."); *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) ("The motive of the photographer in taking the pictures ... may be a factor which informs the meaning of 'lascivious.'"), ***with*** *McCoy*, 55 F.4th at 661 ("Even if McCoy intended for the two videos of [the minor] to be sexual in nature, the statute does not ask whether the videos were intended to appeal to the defendant's particular sexual interest. Instead, the inquiry is whether the videos, on their face, are of a sexual character."); *Amirault*, 173 F.3d at 34 ("[I]t is a mistake to look at the actual effect of the photograph on the viewer, rather than upon the intended effect. If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography.") (internal citations omitted); *Villard*, 885 F.3d at 125 ("If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand—a legal analysis of the sufficiency of the evidence of lasciviousness.").

[12] ***Compare*** *United States v. Barry*, 634 Fed. Appx. 407, 414 (5th Cir. 2015) ("[In *United States v. Steen*, 634 F.3d 822 (5th Cir. 2011)], we considered the other videos on the defendant's camera, which did not feature minors; the contents of his computer, which revealed only adult pornography; that he did not position or direct the victim to expose her genitals; that he did not upload the specific video to his computer or attempt to distribute it; and his lack of criminal history. ... Plainly, *Steen* allows for a broad[] consideration of context in analyzing the *Dost* factors.") (internal citations omitted); *United States v. Brown*, 579 F.3d 672, 683–84 (6th Cir. 2009) ("A number of factors can illuminate the context in which the photographs were taken. These include, *inter alia,* evidence about (1) where, when, and under what

The result is a "profoundly incoherent body of case law." A. Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 953 (2001). The following are just a few examples of different circuits, or different panels within the same circuit, interpreting the term "lascivious exhibition" inconsistently, such that conduct insufficient to warrant punishment in one case is sufficient in another:

**1.** In *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989), the Third Circuit found insufficient evidence to convict under § 2252(a)(1) where the defendant had transported across state lines a magazine titled "Beach Boys No. 2," purchased in a "gay bookstore," containing an image of minor, fully nude, lying on a bed with his eyes closed, with a "three quarters erection." *Id.* at 118–19. The court reasoned that the image was not a lascivious exhibition because, although the evidence "certainly could indicate to a reasonable fact-finder that the picture in fact elicited a sexual response in the viewers," *id.* at 125, the image constituted a closeup of the minor's body, as opposed to his genitals specifically, *id.* at 123; the minor was not in an unnatural position, *id.* at 124; and there was no evidence that the minor "displayed a willingness to engage in sexual activity," *id.* *See also United States v. Romero*, 558 Fed. Appx. 501, 502–03 (5th Cir. 2014) (finding that images of a sleeping minor with

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circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images."); *United States v. Frabizio*, 459 F.3d 80, 89 (1st Cir. 2006) ("The district court erred in stating that this court has adopted a general 'four corners rule.' *Amirault* did not adopt such a rule, and the text of the statute itself does not require it."), ***with*** *Amirault*, 173 F.3d at 35 ("[T]he focus should be on the objective criteria of the photograph's design."); *Villard*, 885 F.2d at 125 ("We must ... look at the photograph, rather than the viewer.").

her "dress pulled up around her waist," to which defendant had added "sexually explicit captions," were not lascivious exhibitions).

By contrast, in *United States v. Spoor*, 904 F.3d 141 (2d Cir. 2018), the Second Circuit found sufficient evidence to convict under §§ 2251(a) and 2252A(a)(5)(B) where the defendant had created and possessed a video of two sleeping minors in which, "for the briefest of moments, the genitals of one of the boys [were] visible in the center of the screen." *Id.* at 146. The court reasoned that the video was a lascivious exhibition because "[a] reasonable jury could conclude that filming a boy's genitalia, while the boy was in bed and without any other context, serves no obvious purpose other than to present the child as a sexual object," *id.* at 149; and because there was evidence indicating that the defendant's subjective intent in creating the video was to elicit a sexual response in the viewer, *see id.* *See also United States v. Nichols*, 527 Fed. Appx. 344, 347 (6th Cir. 2013) (finding that images of a sleeping, naked minor were lascivious exhibitions); *United States v. Wolf*, 890 F.2d 241, 246 (10th Cir. 1989) (finding that image of sleeping, partially clothed minor was lascivious exhibition).

**2.** In *United States v. Boudreau*, 250 F.3d 279 (5th Cir. 2001), the Fifth Circuit found no clear error in the district court's finding of insufficient evidence to sustain a sentencing increase under U.S.S.G. § 2G2.4(c)(1) where the defendant had possessed a photograph of a minor standing in a park, holding up his shorts to expose his underwear, with a sitting man resting his head on the minor's thigh, next to his pubic area, and a second, standing man pointing at the minor's genitals. *See id.* at 283.

The court reasoned that the image was not a lascivious exhibition because, although the minor's pubic area was "inescapably ... the picture's focus," the minor's "convivial facial expression intimate[d] neither sexual coyness nor a willingness to engage in sexual activity"; "the park [was] not a sexually suggestive setting"; and the minor was "not engaged in an unnatural pose by standing." *Id.*

By contrast, in *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999), the Eighth Circuit found sufficient evidence to convict under § 2252(a)(4)(B) where the defendant had "freeze-framed" videos of children playing on a beach and a jungle gym at "moments when their pubic areas [were] most exposed, as, for instance, when they [were] doing cartwheels." *Id.* at 789–90. The court reasoned that the videos were lascivious exhibitions because, although "[i]n the beach scenes, the girls [were] wearing swimsuit bottoms," the minors' pubic areas were "at the center of the image[s] and form[ed] the focus of the depiction[s]." *Id.* at 790.

**3.** In *United States v. McCoy*, 55 F.4th 658 (8th Cir. 2022), *reh'g granted en banc*, 2023 WL 2440852, the Eighth Circuit found insufficient evidence to convict under § 2251(a) where the defendant had hidden a camera in a closet adjacent to a bathroom, instructed a minor to use that bathroom, and created multiple videos of the minor entering and exiting the shower, naked, which he then hid from his family. *See id.* at 660.[13] The court reasoned that the videos were not lascivious exhibitions,

[13] Although the Eighth Circuit recently vacated this ruling, *McCoy*'s analysis still illustrates the extent to which the *Dost* factors are so "malleable and subjective" as to be almost "entirely useless." *United States v. Hill*, 322 F. Supp. 2d 1081, 1085–86 (C.D. Cal. 2004) (Kozinski, J., sitting by designation).

despite evidence that the defendant had intended them to portray the minor as a sexual object, because "the focal point of the videos" was not the minor's genitalia—"rather, the videos depict[ed] [the minor] from a distance, as the hidden video camera was located inside the connecting closet"; because "the setting [was not] sexually suggestive under these circumstances"; and because the videos were not, on their face, of a sexual character, but rather depicted nothing more than "innocent daily tasks in a bathroom: getting in and out of the shower, drying off, and using the toilet." *Id.* at 661. *But see United States v. Ward*, 686 F.3d 879, 884 (8th Cir. 2012) (finding that video of minor getting in and out of the shower and drying off was lascivious exhibition; holding that "the jury could reasonably consider extrinsic evidence, such as Ward's extensive child pornography collection, to determine whether the images were intended to elicit a sexual response in the viewer.") (internal quotation marks omitted).

By contrast, in *United States v. Anthony*, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022), the Third Circuit found sufficient evidence to convict under § 2251(a) where the defendant had hidden a camera in a closet adjacent to a bathroom, instructed two minors to use that bathroom, and created multiple videos of the minors entering and exiting the shower, naked, which he then hid from his family. *See id.* at *1. The court reasoned that the videos were lascivious exhibitions, although they did not depict the minors engaging in any sexually suggestive conduct, because "a rational juror could find that, given the camera's positioning and angle of the [bathroom] mirror [at which it was pointed], the 'focal point' of the videos were

the 'child's genitalia or pubic area'"; because "a rational juror could find that a shower, especially one with a camera pointed at it, is a setting that can be associated with sexual activity"; and because, based on the defendant's "repeated production of [the videos], and the steps he took to conceal the videos from his family members, a rational juror could find that he made the videos to 'elicit a sexual response' in himself." *Id.* at *3. *See also United States v. Miller*, 829 F.3d 519, 523, 525–56 (7th Cir. 2016) (finding sufficient evidence to convict under § 2251(a) where defendant "cut a hole through the drywall from a basement utility room into the basement bathroom," instructed minors to shower in that bathroom, and filmed them through the hole while they were showering; holding that the resulting videos were lascivious exhibitions).

There are no such inconsistencies in the D.C. Circuit, where it is irrelevant whether the visual depiction at hand is a "lascivious exhibition," and what matters instead is whether the defendant has produced, possessed, or distributed an image of a minor or himself engaging in sexually explicit conduct—a relatively easy question to answer.

### C. The definition of "lascivious exhibition" adopted by the majority of the circuits has led them to apply the federal child-pornography statutes and sentencing guidelines in violation of this Court's precedents and First Amendment principles.

This court has repeatedly stated that depictions of nude minors, "without more, constitute protected expression." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982)).

Yet every circuit save the D.C. Circuit agrees that the federal child-pornography statutes and sentencing guidelines can apply to defendants who produce, possess, and distribute "images of [nude or even clothed] children acting innocently." *United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011).[14] These circuits reason that what separates a constitutionally protected image of "mere nudity" from a proscribable image of a minor acting innocently is the intent (either actual or apparent) of the image's creator. Only if the creator of the image designed it to arouse, or if it appears that the creator of the image designed it to arouse, is the image proscribable.[15]

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[14] *See also supra*, notes 4 and 6.

[15] *See United States v. Amirault*, 173 F.3d 28, 35 (1st Cir. 1999) ("[W]e cannot say with the assurance necessary to uphold an enhanced prison sentence that the photograph [of a nude minor] is designed to elicit sexual arousal."); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (distinguishing defendant's videos from mere depictions of nudity on the grounds that a jury could have found that their "purpose [was] to present the child as a sexual object," and that defendant "intended to create a video that would elicit a sexual response from the viewer") (internal quotation marks omitted); *United States v. Schuster*, 706 F.3d 800, 807 (3d Cir. 2013) ("A lascivious exhibition[, as opposed to an image of mere nudity,] is one that draws attention to the genitals or pubic area of the subject in order to excite lustfulness or sexual stimulation in the viewer.") (internal quotation marks omitted); *United States v. Courtade*, 929 F.3d 186, 191–92 (4th Cir. 2019) ("As an initial matter, we agree with Courtade that the statute by its terms requires more than mere nudity, because the phrase 'exhibition of the genitals or pubic area' is qualified by the word 'lascivious.' ... Taken together, [the dictionary definitions of 'lascivious' and 'exhibit'] indicate that 'lascivious exhibition' means a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer.") (internal quotation marks, citations, and alterations omitted); *United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011) (finding no lascivious exhibition where the images that defendant created "could not be considered to have been intended to elicit a sexual response on the viewer any more than mere nudity would"); *United States v. Brown*, 579 F.3d 672, 681–82 (6th Cir. 2009) (holding that the relevant consideration, in determining whether an image of a minor was lascivious or merely a depiction of nudity, was

This is viewpoint discrimination. Images containing certain content (children) are proscibable only if intended to convey the message that children are sexual objects.

As repulsive as it may be to suggest that children are sexual objects, this Court has never held that such a message can suffice to remove an image from the protection of the First Amendment. *See Ferber*, 458 U.S. at 775 (O'Connor, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas."); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002) (declining to decide the constitutionality of 18 U.S.C. § 2256(8)(C)'s prohibition on "alter[ing] innocent pictures of real children so that the

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whether it was "intended or designed to elicit a sexual response in the viewer"); *United States v. Russell*, 662 F.3d 831, 843–44 (7th Cir. 2011) ("[I]t is the sexually suggestive nature of a photograph of a minor which distinguishes a depiction of simple nudity from a lascivious exhibition of the genitals. ... A lascivious display is one that draws attention to the genitals or pubic area of the subject in order to excite lustfulness or sexual stimulation in the viewer.") (internal quotation marks omitted); *United States v. Petroske*, 928 F.3d 767, 772 (8th Cir. 2019) ("More than mere nudity is required before an image can qualify as 'lascivious' within the meaning of the child pornography statute. Lasciviousness may be found when an image of a nude or partially clothed child focuses on the child's genitals or pubic area and is intended to elicit a sexual response in the viewer.") (internal quotation marks, citations, and alterations omitted); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) ("The picture of a child 'engaged in sexually explicit conduct' within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by § 2255(2)(E) is a picture of a child's sex organs displayed lasciviously—that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur."); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019) ("[M]ere nudity is not sufficient to constitute child pornography; rather, the nudity must be depicted in a lascivious manner in order to be criminal.") (quoting *United States v. Soderstrand*, 412 F.3d 1146, 1151–52 (10th Cir. 2005)); *United States v. Holmes*, 814 F.3d 1246, 1251–52 (11th Cir. 2016) ("[W]e ... conclude[] that depictions of otherwise innocent conduct may in fact constitute a 'lascivious exhibition of the genitals or pubic area' of a minor based on the ... intent of the producer or editor of an image.").

children appear to be engaged in sexual activity," but noting that such images "implicate the interests of real children").

The only basis on which this Court has held that a non-obscene image of a child may be proscribed is the harm that the image causes to the child through its production and circulation. *See Free Speech Coalition*, 535 U.S. at 253–54 (striking down prohibition on virtual child-pornography produced without real children, holding that "the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct"); *id.* at 250–51 ("*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."); *see also* Carissa Byrne Hessick, *Setting Definitional Limits for the Child Pornography Exception*, *in* REFINING CHILD PORNOGRAPHY LAW 57, 59–63 (Carissa Byrne Hessick ed., 2016); *id.* at 61 ("In *Ashcroft v. Free Speech Coalition*, the Supreme Court made clear that either the harm of creation or the harm of circulation must exist in order to trigger the First Amendment exception. It also indicated that the harm of creation—that is, the sexual exploitation and abuse of children to produce child pornography—plays a principal role in its child pornography doctrine.").

Perhaps children are harmed when objectified. *See Wiegand*, 812 F.2d at 1245. Certainly their privacy is invaded when pedophiles share images of them over the internet.

But it is not obvious whether such harms are sufficient to remove an image from the protection of the First Amendment. It is surely wrong to crop or alter a legally obtained image of a child to draw attention to the child's genitals and post it on the internet. *Cf. United States v. Stewart*, 729 F.3d 517, 526–28 (6th Cir. 2013) (finding sufficient evidence to convict under § 2252A(a)(1) where defendant "crop[ed] and brighten[ed] ... non-lascivious photographs" of children playing on a beach); *Horn*, 187 F.3d at 789–90 (finding sufficient evidence to convict under § 2252(a)(4)(B) where defendant "freeze-framed" videos of children playing on a beach and a jungle gym; but noting no evidence of distribution). But is the harm caused to the child any more legally significant than the harm that would be caused to Olivia Hussey and Leonard Whiting, who appeared as teenagers in Franco Zeffirelli's "Romeo and Juliet," by posting a message in a chatroom encouraging viewers to pause the film at moments when the actors are nude? *See* Julia Jacobs, *Teen Stars of 'Romeo and Juliet' Sue Over Nudity in 1968 Film*, N. Y. TIMES, Jan. 4, 2023. Is it more legally significant than the harm that would be caused to Spencer Elden, who appeared as an infant on the cover of Nirvana's "Nevermind," by posting a message encouraging viewers to observe his naked genitals with a magnifying glass? *See* Eduardo Medina, *Judge Dismisses Suit Over Naked Baby Image on Nirvana Album Cover*, N. Y. TIMES, Sept. 4, 2022. Is it more legally significant than the harm caused to a teenage Sasha Obama by drawing attention to the length of her skirt? *See Aide to Republican Congressman Under Fire For Criticism of Obama's Daughters*, THE GUARDIAN, Nov. 30, 2014.

The definition of "lascivious exhibition" adopted by the majority of the circuits requires these questions to be answered. The definition adopted by the D.C. Circuit does not.

## III. The Decision Below is Wrong.

The Ninth Circuit's theory that Petitioner used a minor to engage in sexually explicit conduct by lasciviously exhibiting her genitals on film "cannot be reconciled with the governing statutory text." *Hillie*, 38 F.4th at 238 (Katsas, J., concurring in denial of rehearing en banc). That is because the statute requires that the sexually explicit conduct—whether it be a lascivious exhibition of the genitals or some other variety—be done "*for the purpose of producing any visual depiction of such conduct.*" § 2251(a) (emphasis added). The "visual depiction," or the defendant's act of exhibiting the minor's genitals on film, therefore cannot *be* the "sexually explicit conduct."[16]

Because there is no other basis on which a rational jury could have found that Petitioner attempted to engage in sexually explicit conduct, using a minor, or else "persuade[], induce[], entice[], or coerce[]" a minor to engage in sexually explicit conduct, Petitioner's conviction under § 2251(a), (e) cannot stand. Petitioner could, however, be prosecuted under § 1466A(a), which imposes a five-year mandatory

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[16] The Ninth Circuit's interpretation of § 2251(a) also relieves the government from ever proving, in order to convict a defendant under that section, that he "persuade[d], induce[d], entice[d], or coerce[d]" a minor to do anything. If the decision below is correct, all of those terms are surplusage.

minimum sentence on any person who attempts to produce an obscene visual depiction of a minor engaging in sexually explicit conduct.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Lorenzo Mendez

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