No.

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE POULO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2251(a) of Title 18 to the U.S. Code, known as the production of child pornography statute, makes it a crime punishable by at least fifteen years and up to thirty years in prison for:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * *.

The question presented, which has divided the lower courts, is whether a person "uses" a minor "to engage in" sexually explicit conduct, and thereby produces child pornography, when he creates a visual image of himself, not the minor, engaged in sexually explicit conduct in the presence of a minor, which he found sexually arousing.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner George Poulo petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Poulo*, No. 21-11425, 2023 WL 2810689 (11th Cir. April 6, 2023) (Op.). The Panel applied *United States v. Dawson*, 64 F.3d 1227 (11th Cir. April 5, 2023), holding that *Dawson* foreclosed Poulo's statutory argument. *See* Op. 9.[1]

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case under 18 U.S.C. §3231. Pursuant to 28 U.S.C. §1291, the Eleventh Circuit Court of Appeals had jurisdiction to review the final order of the district court. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISION

Section 2251(a) of Title 18 to the U.S. Code makes it illegal for:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct * * *.

[1] Counsel of record here is also counsel of record in *Dawson*. While the Panel issued separate opinions in *Poulo* and *Dawson*, publishing *Dawson* first and applying its holding to *Poulo* days later in the unpublished opinion, both cases present the same legal issue turn on the interpretation of §2251(a). Thus, contemporaneous with filing this petition, counsel files a separate petition for writ of certiorari in *Dawson*. Certiorari would be appropriate in either or both cases.

STATEMENT OF THE CASE

Introduction and Statutory Background

Section 2251(a) of Title 18 to the U.S. Code, entitled "Sexual Exploitation of Children," often called production of child pornography, makes it a crime for any person to employ, use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Congress intended §2251(a) to be part of a "comprehensive regulatory scheme" aimed at "criminalizing the receipt, distribution, sale, production, possession, solicitation and advertisement of child pornography." *United States v. Parton*, 749 F.3d 1329, 1330 (11th Cir. 2014) (internal quotation marks omitted) (addressing §2251(a)). Section 2251(a) is placed within the chapter of offenses prohibiting the "Sexual Exploitation and Other Abuse of Children." *See* 18 U.S.C. Ch.110, *et. seq*. The offenses criminalized by this section involve sexually explicit visual depictions of a minor — i.e., child pornography. *Compare* §2251(a), *with* 18 U.S.C. §2251(b) (imposing liability on parent or guardian who knowingly permits a minor to engage in same); *id.* §2251(d)(1) (criminalizing advertising over same). A violation of §2251(a) is punishable under 18 U.S.C. §2251(e) by significant penalties of a mandatory minimum sentence of 15 years and a maximum sentence of 30 years.

This petition raises a question of statutory interpretation that has openly fractured the lower courts about the reach of §2251(a)—whether to "use" a minor "to engage in" sexually explicit conduct, and thus produce child pornography, requires

showing that an offender took an action upon a minor to cause the minor's engagement in the sexually explicit conduct depicted in an image or video; or whether it is enough to show that an offender was sexually aroused by a minor while the offender records himself—not the minor—engaging in his own sexually explicit act.

A. Statement of Facts

This case arises from an undercover investigation conducted by Sheriff Investigator Michael Sewall (Inv. Sewall) who participated in a group chat on KiK entitled "breeding no age limits." Doc. 40 (Stipulated Facts) at 3. Poulo also took part in this group chat, telling Inv. Sewall he had access to a five-year-old girl who touched his penis while he pretended to be asleep. *Id.*

During the conversation, Poulo sent Inv. Sewall an image of his erect penis with what appeared to be ejaculatory fluid on it. *Id.* at 4. The image showed the five-year-old girl "fully clothed, standing in the doorway of the room and [she] appears to be looking at the defendant who is laying naked on a bed with an erect penis." *Id.*

Poulo sent Inv. Sewall "three more images of himself masturbating while an approximately five-year-old, fully clothed child watched from the doorway of the room." *Id.* at 5. In one of the images, the child is seen in an adjoining room facing a counter and not looking at Poulo. In another, the child is in the adjoining room, just outside Poulo's bedroom, and is looking generally in Poulo's direction. And in a third,

the child is in the adjoining room but farther away, and she is not looking in Poulo's direction.

During the investigation, Inv. Sewall invited an undercover FBI Special Agent posing as a father abusing his nine-year-old son and daughter into a private KiK chat room. *Id.* at 5. Poulo told the undercover officer that the child had "grabbed [his penis] and squeezed and rubbed it," but no images were taken of this conduct. *Id.* at 7.

Later, during an interview conducted in connection with the execution of a search warrant, Poulo admitted that he "took the pictures of the five-year-old appearing to watch him masturbate because it was arousing to him and it was arousing to him to send them to other people." *Id.* at p. 8–10. He also stated that he only told sexual stories about the five-year-old child because he was "stupid" and that he never touched the five-year-old or his nine-year-old niece as he stated in the KiK chats. *Id.*

Five images formed the basis for counts one through five of the superseding indictment, each of which depicted Poulo himself engaging in sexually explicit conduct and lascivious exhibition of the genitals, as defined in 18 U.S.C. §2256(2)(A), nearby a fully clothed minor who was not the focal point of any of the images and who did not otherwise participate in any sexually explicit act depicted.

B. District Court Proceedings

A federal grand jury in the Middle District of Florida returned a six-count superseding indictment charging Poulo with five counts of producing child pornography under 18 U.S.C. §§2251(a)&(e) (counts one through five); and one count of distributing child pornography under 18 U.S.C. §§2252A(a)(2)&(b)(1) (count six). Doc. 28. Counts one through five are the focus of this petition.

The parties agreed to a stipulated facts bench trial, at which Poulo moved for a judgment of acquittal on counts one through five.[2] *See* Doc. 84 (Bench Trial) at 17–18; *see also* Docs. 40 (Stipulated Facts); 45 (Gov. Trial Brief); 46 (Def. Trial Brief); 49 (Exhibits Admitted Under Seal).[3] Poulo argued that the images at issue under counts one through five did not fall within the conduct criminalized under §2251(a), because he did not "use" a minor "to engage in…any sexually explicit conduct." Docs. 46; 84. The government, however, contented that §2251(a) did criminalize the images at issue under the theory that Poulo used a minor as a muse for his masturbation. Doc. 45 at 11.

In a written order, the district court rejected Poulo's reading of §2251(a) that requires some conduct by the offender to cause a minor's direct engagement in

[2] Poulo did not contest the validity of count six in the proceedings below, and therefore count six is not at issue.

[3] Government Exhibits 1 and 2 are images of the offense conduct charged in counts one and two of the superseding indictment. Government Exhibits 3 through 5 represent counts three through five of the superseding indictment.

sexually explicit conduct; and rather agreed with the government that "use" in §2251(a) is satisfied by proof the offender relied on the minor as an object of sexual desire while the offender himself engages in sexually explicit conduct. Doc. 50. As a result, the district court found Poulo guilty of counts one through six. Doc. 50.

The district court then sentenced Poulo to 2,040 months in prison, consisting of 360-month terms as to counts one through five, and a 240-month term as to count six, all terms to run consecutively to one another. Doc. 74.

C. Appellate Proceedings

1. Petitioner's Argument

On appeal, Poulo argued that the district court erred in denying his motion for a judgment of acquittal because each of the images at issue in counts one through five showed only an adult engaging in solo masturbation nearby a fully clothed minor. He argued, consistent with the Seventh Circuit's decision in *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), that §2251(a)'s text does not extend so far as to criminalize conduct, as here, involving an offender taking pictures of himself engaging in his own, solo sexual act nearby a fully clothed minor who is not otherwise participating or engaged in the sexual conduct.

In support of his reading, Poulo first explained that in ordinary usage, the word "use" connotes action or activity. And beyond the verb "use," Poulo noted that §2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Thus, Poulo reasoned that reading "uses" (verb) together with "to engage in"

(adverbial prepositional phrase) under the ordinary rules of English grammar shows that for each charge under §2251(a), the government has to prove that an offender both (1) took an action involving a minor (use), which (2) caused the minor's participation (to engage in) in sexually explicit conduct.

As more support for his reading, Poulo pointed to the contextual canon *noscitur a sociis*, which calls for reading §2251 by interpreting "uses" consistent with its surrounding verbs: employs, persuades, induces, entices, or coerces. Each of these verbs, Poulo explained, requires the offender to take some action upon the minor victim to involve the minor in sexually explicit conduct. Applying this related meaning to "uses" therefore suggests the term should be interpreted as requiring some action upon the minor to involve the minor in sexually explicit conduct. In contrast, Poulo argued that if "uses" were interpreted broadly to mean employ in any sense, it would subsume the other words, rendering them surplusage.

Along with the immediate statutory context, Poulo contended that his reading of "uses" a minor "to engage in" sexually explicit conduct aligns with §2251(a)'s significant penalties for producing child pornography. Under his reading, §2251(a) does not capture images of adult-only pornography just because a minor is in the background of an image or inspired the adult to engage in a sexual act. A contrary reading, however, would create an anomaly of penalizing an adult for the production of child pornography when the images produced do not show child pornography as defined under §2256(2)(A).

Poulo also explained that the statutory principle of avoiding absurd results favors his reading. As *Howard* explains, a broad interpterion of "use" a minor "to engage in" would lead to the absurd result that §2251(a) applies anytime a person relies on a minor as a muse for his own sexual act, even if there is no child depicted in the image. Such a reading, which would convert any number of images depicting adult-only sexually explicit conduct into child pornography, cannot be squared with §2251(a)'s text.

Finally, if any doubt remained about whether §2251(a) covers the images of an adult, not a minor, engaged in masturbation, Poulo argued that the rule of lenity supports that §2251(a) does not criminalize the images at issue in counts one through five because it was uncontested that Poulo's alleged "use" of a minor "to engage in" a sexually explicit act consisted of him creating images of himself engaged in masturbation nearby a fully clothed minor.

2. The Eleventh Circuit's Decision

An Eleventh Circuit Panel rejected Poulo's argument and affirmed his convictions under §2251(a). In so ruling, the Panel concluded that the statutory argument Poulo raised "is now foreclosed by this Court's decision in *United States v. Dawson*." Op. 9.

Dawson, a related appeal consolidated with *Poulo* for purposes of oral argument, involved the same issue of statutory interpretation—whether a defendant "uses" a minor to engage in sexually explicit conduct under §2251(a) when the

defendant makes a visual depiction of himself engaging in sexually explicit conduct nearby a fully clothed minor who is not herself actively engaging in any sexual conduct. *See United States v. Dawson*, 64 F.4th 1227, 1233 n.4 (11th Cir. 2023).

Similar to *Poulo*, the facts of *Dawson* involved an alleged "use" of a minor where Dawson engaged in his own, adult-only sexually explicit conduct by masturbating in the presence of his eleven-year-old daughter. *Id.* at 1239. *Dawson* held that "because Dawson's daughter was passively involved in Dawson's sexually explicit conduct by serving as the object of Dawson's sexual desire, Dawson's actions constituted the use of a minor to engage in sexually explicit conduct in violation of the statute." *Id.* at 1238.

In reaching its conclusion, *Dawson* expressly rejected the Seventh Circuit's interpretation of §2251(a) in *Howard*. *See id.* Rather, relying on a single definition from *Black's Law Dictionary* definition of "use," *Dawson* concluded that "an ordinary reading of § 2251(a) * * * suggests that a minor is 'used' if she is 'made use of' in a sexually explicit videotape or if an adult 'avails himself of' the child's presence as the object of his sexual desire by masturbating in her presence." *Id.* at 1236 (internal alterations omitted).

Dawson further concluded that "'the adverbial prepositional phrase 'to engage in,' which limits the word 'use,' does not require the minor to be actively engaged in sexually explicit conduct." *Id.* As support, the Panel compared the language in §2251(a), "uses ... any minor to engage in sexually explicit conduct," to the language

in the neighboring 18 U.S.C. §2252(a), "use of a minor engaging in sexually explicit conduct." *See id.* at 1237. In the Panel's view, the difference in language "suggests that Congress intended to criminalize a more passive use of a minor when it came to the production of images that sexually exploit children under § 2251(a)." *Id.*

As for the *noscitur a sociis* canon, *Dawson* found that "when read together, these verbs suggest a continuum of participation by the minor covering a broad range of criminal conduct." *Id. Dawson* presumed that "on the passive end of the spectrum are the verbs 'employs' and 'uses,' suggesting the passive involvement of the minor, rather than the active engagement of the minor, in the offender's sexually explicit conduct." *Id.* Thus, *Dawson* reasoned that §2251(a)'s "verbs do not all require the same level of either external force imposed on the minor or active engagement on the part of the minor in the sexually explicit conduct." *Id.*

"Contrary to the Seventh Circuit in *Howard*," *Dawson* found that its broad interpretation of §2251(a) does not "pose[] a slippery slope problem." *Id.* at 1238. *Dawson* recognized that the "Seventh Circuit warned that the passive interpretation of the term 'uses' may make the statute too broad: 'The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street.'" *Id.* (quoting *Howard*, 968 F.3d at 721). But *Dawson* rejected that concern because "the statute ultimately requires fact-specific determinations." *Id.*

REASONS FOR GRANTING THE PETITION

The circuit courts are openly divided over the reach of the production of child pornography statute, 18 U.S.C. §2251(a). The court below affirmed Poulo's convictions on five counts of §2251(a), resulting in 1,800 months or 150 years in prison, because he made visual depictions of himself engaging in solo, adult-only masturbation nearby a fully clothed minor. That decision directly conflicts with the Seventh Circuit's decision in *United States v. Howard*, which holds that §2251(a)'s text does not extend so far as to criminalize conduct involving an offender taking pictures of himself engaging in his own, solo sexual act nearby a fully clothed minor. *See* 968 F.3d 717, 721 (7th Cir. 2020). Other circuits, including the Second, Third, Eighth, Ninth, and D.C. Circuits have all had different takes on §2251(a)'s reach under similar facts, creating an intractable division among the lower courts on the proper scope of the statute. This case is an ideal vehicle for this Court to resolve this conflict on this important and recurring issue and resolve the meaning of "use" a minor "to engage in" sexually explicit conduct under §2251(a).

A. The Courts of Appeal Are Openly and Intractably Divided Over the Reach of the Production of Child Pornography Statute.

1. Here, the Eleventh Circuit affirmed Poulo's convictions, applying *Dawson*'s holding that "a minor does not need to be the one engaging in the sexually explicit conduct in order to be 'used' under the plain meaning of §2251(a)"; rather,

"an adult can 'use' a child as the object of sexual desire while he records himself engaging in sexually explicit conduct, like masturbating to the child while in the child's presence." Op. 9. In so concluding, the Eleventh Circuit found that "an ordinary reading of §2251(a) * * * suggests that a minor is 'used' * * * if an adult avails himself of the child's presence as the object of his sexual desire by masturbating in her presence." *Id.* (applying *Dawson*, 64 F.4th at 1236) (cleaned up).

2. The Eleventh Circuit's interpretation of §2251(a) directly conflicts with the Seventh Circuit's, which provides that §2251(a)'s text does not extend so far as to criminalize conduct, as here, involving an offender taking pictures of himself engaging in his own, solo sexual act nearby a fully clothed minor who is not otherwise participating in the sexual conduct. *See United States v. Howard*, 968 F.3d 717 (2020). There, the government charged Howard with two counts of producing child pornography in violation of §2251(a): one image shows Howard masturbating several inches above his sleeping niece's fully clothed buttocks; and another shows Howard hovering closely to her face, with his erect penis near her lips while she sleeps. *See id.* at 719.

Howard argued that his conduct, while deplorable, fell outside §2251(a)'s scope because he did not "use" his niece to "engage in" sexually explicit conduct to create a visual image of it. *See id.* at 720. Agreeing with Howard's reading, the Seventh Circuit concluded that "[t]he 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.* at 721.

Applying the doctrine of *noscitur a sociis*, a word "is known by the company it keeps," the Seventh Circuit reasoned the word "uses" in this statute must be construed in context with the other verbs that surround it. *See id.* at 721–22. Five of the six verbs "employs, persuades, induces, entices, or coerces," the Seventh Circuit explained, "require some action by the offender to cause the minor's direct engagement in sexually explicit conduct." *Id*. Thus, in interpreting the meaning of "uses," "that term should be should not be read to have a jarringly different meaning." *Id.* at 722.

The Seventh Circuit rejected the government's "radically different view," "covering someone like Howard—who made a video of his own solo sexually explicit conduct—if the offender somehow 'uses' a child as an object of sexual interest." *Id.* *Howard* explained that the "government's interpretation is strained and implausible," because "taken to its logical conclusion, it does not require the presence of a child on camera at all. The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." *Id.*

The Seventh Circuit reaffirmed *Howard* in *United States v. Sprenger*, 14 F.4th 785 (7th Cir. 2021). There, Sprenger photographed his naked, erect penis next to Victim A's face while she slept, "and his own face, with tongue sticking out, next to

Victim A's clothed groin." *Id.* at 791. "Because the photographs Sprenger took depicted himself but not Victim A engaged in sexually explicit conduct," the Seventh Circuit concluded, "Sprenger's conduct does not qualify as a violation of §2251(a)." *Id.* (citing *Howard*).

3. Other circuits have diverging takes on what it means to "use" a minor "to engage in" sexually explicit conduct under §2251(a), differing on whether the statute requires proof that a minor engages in sexually explicit conduct and whether a defendant must cause the minor to participate in the conduct.

Beginning with the Second Circuit, it seeks to find a middle ground between the Seventh and Eleventh Circuits. *See United States v. Osuba*, 67 F.4th 56 (2d Cir. 2023). The question in *Osuba* was whether the defendant "used the minor to engage in sexually explicit conduct when he filmed himself masturbating toward her." *Id.* at 62. Agreeing with the parties and the Seventh Circuit, the Second Circuit read §2251(a) as requiring the minor to engage in sexually explicit conduct. *Id.* (citing *Howard*, 968 F.3d at 721–22); *see also id.* at 63 ("We agree with Howard that the minor must engage in the sexually explicit conduct."). The *Osuba* Court reasoned that "[t]he other verbs in § 2251(a)'s list ('employs,' 'persuades,' 'induces,' 'entices,' and 'coerces') all require the minor to engage in sexually explicit conduct." *Id.* "Reading 'uses' in §2251(a) to allow the explicit conduct to be only that of the defendant or some third party, but not the minor, would give the provision 'a jarringly different meaning.'" *Id.* (quoting *Howard*, 968 F.3d at 722).

Osuba disagreed with *Dawson* that "the minor need not be the one engaging in sexually explicit conduct," explaining that it was "not convinced" that *Dawson*'s reading of §2251(a)'s "six verbs as lying on a 'spectrum'" of active to passive conduct "is the best reading of the statute." *Id.* at 63. Even so, *Osuba* said that *Dawson* supported its holding because the *Osuba* Court found "that on the facts of this case, the minor's passive involvement as the intended recipient of Osuba's actions suffices to constitute her 'engage[ment]' under § 2251(a)." *Id.* (quoting *Howard*, 968 F.3d at 722).

The Third, Eighth, and D.C. Circuits also seem to support an interpretation of "use" in §2251(a) that requires showing a minor engaged in sexually explicit conduct, which aligns with *Howard* but departs from *Dawson*. The Third Circuit, for instance, supports the view that a jury could find a defendant "'use[d]' a minor to engage in sexually explicit without the minor's conscious or active participation" if a defendant depicts the minor as a sexual object in an image while the minor is asleep. *United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013).

Similarly, the Eight Circuit, on plain-error review, found that evidence was sufficient to find images fell under §2251 because the images did not involve the "mere presence" of a minor; rather "the setting of the images was sexually suggestive; the images were intended to elicit a sexual response in the viewer; and K.S. was portrayed as a sexual object." *United States v. Lohse*, 797 F.3d 515, 521–22 (8th Cir. 2015). The definition of "child pornography" used for the production count

in *Lohse* required the minor to engage in sexually explicit activity. *See United States v. Lohse*, Case 5:13-cr-04053, Doc. 68.

Moreover, the D.C. Circuit provides that "if 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." *United States v. Hillie*, 14 F.4th 677, 693–94 (D.C. Cir. 2021), *reh'g granted,* 37 F.4th 680 (D.C. Cir. 2022), and *on reh'g,* 39 F.4th 674 (D.C. Cir. 2022). So in *Hillie*, the D.C. Circuit concluded that "the Government was required to prove that Hillie intended *to use JAA to engage in the lascivious exhibition of her genitals* by displaying her anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act." *Id.* (emphasis supplied).

Finally, the Ninth Circuit addressed the meaning of "use" in *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017). There, the Ninth Circuit "explained that the dictionary definition of 'use' is 'to put into action or service,' 'to avail oneself of,' or to 'employ.'" *Id.* (citation omitted). Emphasizing the similarities between "use" and "employ," the *Lauren* Court reasoned that although the minor in its case took the nude, pornographic selfies, Laursen "used or employed his victim to produce sexually explicit images by telling her that the two looked good together and that he wanted to take pictures." *Id.* (cleaned up).

The Ninth Circuit cited *Laursen* with approval in *United States v. Mendez*, 35 F.4th 1219 (9th Cir. 2022). There, "Mendez hid cameras in the eye of a stuffed animal, then placed the stuffed animal in the girl's bedroom." *Id.* at 1220. "Video footage recovered by police officers spanned six months in 2018 and showed the girl in various states of undress. Several videos showed her masturbating." *Id.* Affirming Mendez's §2251(a) conviction for the production of child pornography under these facts, *Mendez* explained that *Laursen* compelled its conclusion that the surreptitious photographing constituted "use" of a minor "to engage in" sexually explicit conduct. *Mendez*, however, acknowledged that "writing on a clean slate, some of us might interpret § 2251(a) differently by, for example, concluding that the statutory language requires the perpetrator to *cause* the minor to 'to engage in sexually explicit conduct.'" *Id.* at 1222–23. To that end, *Mendez* recognized that its precedent in *Laursen* foreclosed adopting *Howard*'s reading of "use," which requires proof that an offender acted to "cause the minor to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct." *Id.* at 1223 (quoting *Howard*, 968 F.3d at 721). Thus, *Mendez* appears to be at odds with *Howard*, but closer to *Dawson*, on the question of whether to "use" a minor "to engage in" sexually explicit conduct requires showing that the minor herself engages in the sexual act.

B. The Question Presented Involves an Important and Recurring Question of Statutory Interpretation.

This Court should not allow continued confusion and disagreement about what it means to "use" a minor "to engage in" sexually explicit conduct and thereby produce child pornography. To begin with, this Court routinely grants certiorari to resolve questions of statutory interpretation that determine the reach of a federal criminal statute. *See Van Buren v. United States*, 141 S. Ct. 1648 (2021); *Marinello v. United States*, 138 S. Ct. 1101 (2018); *Maslenjak v. United States*, 137 S. Ct. 1918 (2017); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *Bond v. United States*, 134 S. Ct. 2077 (2014). Indeed, this Court has addressed the meaning of "uses" many times, including as recently as last term, given that "uses" is susceptible to a broad interpretation that dramatically extends a statute's breath. *See, e.g.*, *Dubin v. United States*, No. 21-10, -- S. Ct. -- (2023); *Smith v. United States*, 508 U.S. 223, 232 (1993); *Bailey v. United States*, 516 U.S. 137, 143 (1995); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). And in most instances, the Court has cabined the reach of a statute by interpreting "uses" consistent with its statutory context and potential for prosecutorial abuse. *See Dubin*, Slip Op. 4–17; *see also id.* at 18 ("Time and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."); *id.* at 19 ("We cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (cleaned up).

The question presented here is also important because the consequences of a broad reading of "uses" a minor "to engage in" sexually explicit conduct are substantial. A first-time offender convicted of producing child pornography under §2251 faces fines and a statutory minimum of 15 years to 30 years maximum in prison. Recent data from the Sentencing Commission shows that the average sentence for offenders convicted of production of child pornography was 265 months.[4] And that data reveals that the two of the top three districts involving production of child pornography are within the Seventh and Eleventh Circuits—the two circuits directly in conflict over the reach of §2251(a). *See* n.4.

If the Eleventh Circuit's interpretation is wrong, individuals like Poulo are being sentenced to life imprisonment for conduct that would not be a federal crime in other jurisdictions, like in the Seventh Circuit. And if "uses" a minor means basically use or avail in any sense, §2251(a) has no textual requirement that an image depicts a minor at all, let alone one engaged in sexually explicit conduct. That nearly limitless reading of §2251(a) would apply to a whole host of images and recordings, effectively transforming adult pornography into child pornography punishable by up to thirty years' imprisonment for each image or video produced.

Also, there can be no doubt the question here is recurring. *See* n.4 (detailing the number of production of child pornography prosecutions each year). Indeed, the

[4] *See Quick Facts on Sexual Abused Offenders*, https://rb.gy/byz0m; *see also Quick Facts on Child Pornography Offenses*, https://rb.gy/0nhmg.

circuit opinions addressed here alone show the frequency with which prosecutors are using §2251(a) under factual scenarios in which no minor is shown engaged in sexually explicit conduct. Prosecutors will continue to push the bounds of what conduct qualifies as the production of child pornography, and the threat of prosecution alone will be enough to threaten any defendant daring to challenge the government's case at trial. The statutory arguments have been thoroughly fleshed out by the lower court opinions and additional percolation among the courts is unnecessary. Now is the time for this Court's intervention to clarify the appropriate scope of §2251(a).

C. Petitioner's Case Presents an Excellent Vehicle for Resolving the Conflict over the Reach of §2251(a).

First, the issue is presented cleanly on stipulated facts. Indeed, the five images resulting in convictions for production of child pornography show Poulo himself engaging in sexually explicit conduct nearby a fully clothed minor who is not the focal point of any of the images and who otherwise is not a participant in any sexually explicit act depicted. The "use" of a minor therefore solely involves Poulo's sexual interest in the minor. Nor is there any question Poulo, not the minor, is the person "engaged in" the sexual act. As a result, these are ideal facts for the Court to address what it means to "use" a minor "to engage in" sexually explicit conduct under §2251(a) and whether the statute requires showing that a person took some

action upon a minor to cause the minor to participate in the sexually explicit conduct depicted in the visuals produced.

Second, the issue here has been thoroughly litigated and preserved at every stage of the proceedings, thereby resulting in a comprehensive decision that flushes out the statutory interpretation analysis. As a result, the Eleventh Circuit's decision squarely implicates a circuit conflict on a pure question of law. Poulo's convictions for producing child pornography are based on an interpretation of §2251(a) finding that he used a child to engage in sexually explicit conduct because he "used" a minor as the object of sexual desire while he recorded himself engaging in his own, adult-only masturbation. Op. 9. That decision conflicts with *Howard*, which reversed Howard's convictions for producing child pornography on similar facts, holding that "[t]he 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." *Howard*, 968 at 721.

Third, the Panel's decision is consequential. Poulo was sentenced to a consecutive 1,800 months' imprisonment (to his twenty-year sentence for distribution) based solely on visual depictions of himself engaging in masturbation nearby a fully clothed minor. At a minimum, Poulo would not have been convicted of production of child pornography under §2251(a) in the Second and Seventh Circuits. On top of the far-reaching consequences of the Eleventh Circuit's broad

interpretation of §2251(a), which would apply to any number of images showing adult-only pornography, allowing the Eleventh Circuit's decision to stand here is the difference between twenty years and nearly two hundred years in prison. Such a drastic difference in potential sentences warrants the Court's attention to the significant statutory interpretation issue this petition presents.

D. The Eleventh Circuit's Interpretation of "Use" a Minor "To Engage In" Sexually Explicit Conduct under §2251(a) is Wrong.

"As the Court has observed more than once, the word use poses some interpretational difficulties because of the different meanings attributable to it." *Dubin*, Slip. Op. 6 (internal quotation marks omitted). At the same time, this Court has both said the word "use" necessarily "draws its meaning from context" and traditionally exercised restraint in ascribing "use" to its broadest possible meaning. *See Id.*

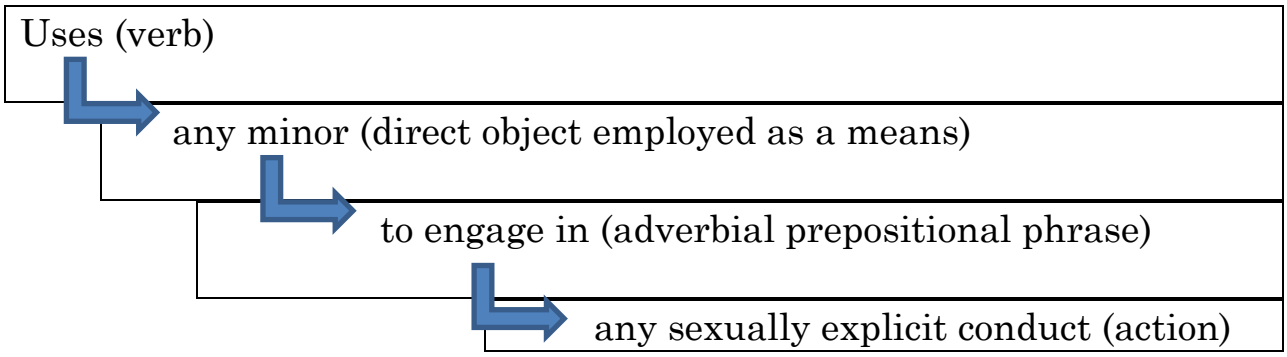
Here, the Eleventh Circuit erred in relying on a single dictionary definition to interpret "use" a minor broadly to mean avail oneself of a minor in any sense. *See* Op. 9 (citing *Dawson*). Rather, interpreting "use" a minor "to engage in" sexually explicit conduct requires a wholistic endeavor and should never turn "solely on dictionary definitions of its component words." *See Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion).

1. The starting point in all statutory construction begins with the text itself, giving the words their plain, everyday, ordinary meaning in context. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Furthermore, in deciding what a statute defines as an offense, the "verb test" is a valuable interpretive tool. *See United States v. Rodriguez-Moreno*, 526 U.S. 275, 279–80 (1999).

The verbs listed in the production of child pornography statute are *employ*, *use*, *persuade*, *induce*, *entice*, or *coerce* any minor *to engage in* any sexually explicit conduct *to produce* any visual depiction of such conduct. *See* §2251. In ordinary usage, the word "use" connotes action or activity. The ordinary and natural meaning of "use" is variously defined as "[t]o convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of." *Bailey*, 516 U.S. at 144–45 (superseded by statute). In other words, "use" is the "application or employment of something." Black's Law Dictionary 1681 (9th ed. 2009)

2. Beyond the verb "use," §2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Black's Law Dictionary defines "engage" as "to employ or involve oneself to take part in; to embark on." Black's Law Dictionary 549 (7th ed. 1999). Merriam–Webster Online defines "engage" as "to begin and carry on an enterprise or activity; to take part" and lists the word participate as a synonym. *http://www.mirriam-webster.com/dictionary/engage*. These definitions reveal that some participation on the minor's part is needed to constitute "engaging in" sexually explicit conduct.

Applying ordinary English grammar rules, reading "uses" (verb) together with "to engage in" (adverbial prepositional phrase), shows that for each charge under §2251(a), the government has to prove both an action involving a minor (uses) with some causal relationship to the minor's participation (to engage in) in sexually explicit conduct.



Consider these examples of the grammatical reading of "uses…to engage in" to illustrate the proper English reading of the phrase. Suppose John "uses" a computer "to engage in" online shopping. An ordinary English speaker would understand that John availed himself of a computer as a means to purchase some items on the internet; but not assume, for instance, that John stared at his computer while buying items through an app on his cellphone. Likewise, if a person says Jenny "uses" a fountain pen "to engage in" calligraphy, an ordinary English speaker would comprehend that Jenny is producing calligraphic art with a fountain pen. An ordinary English speaker, however, would not take from this statement that Jenny produced her calligraphy with a paintbrush while drawing inspiration from a fountain pen for her design. Similarly, a person would naturally say that an offender

produces child pornography by "using" a child "to engage in" sexually explicit conduct when the offender involves the minor in a sexual act; but not simply when the offender's sexual appetite is fueled by a minor's presence or focuses a visual depiction on a minor in a sexually suggestive way to excite a sexual desire.

3. The meaning of a statutory term, of course, should not be "determined in isolation," but "must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Tyler v. Cain*, 533 U.S. 656, 662 (2001) (emphasizing that courts should not "construe the meaning of statutory terms in a vacuum"). "Particularly when interpreting a statute that features as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9.

The contextual canon *noscitur a sociis*, which instructs that "words grouped in a list should be given related meaning," is particularly helpful in understanding the meaning of "uses" a minor "to engage in" sexually explicit conduct. *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990). The principle of *noscitur a sociis* helps to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotation marks omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (discussing *noscitur a sociis*).

"Uses" is surrounded by five companion verbs: employs, persuades, induces, entices, or coerces. As *Howard* explains, these five verbs "require some action by the offender to cause the minor's direct engagement in sexually explicit conduct." 968 F.3d at 721–22. For instance, saying that an offender "persuades" a minor to engage in sexual conduct grammatically reads as requiring the government to prove an offender *convinced* a minor to participate in some sexually explicit act. Saying that an offender "coerced" a minor to engage in sexually explicit conduct means the government must show the offender *forced* a minor to participate in some illicit conduct. And to say that an offender "induced" a minor means the offender must have *caused* the minor's assent.

Each of these verbs requires the offender to take some action upon the minor victim to cause the minor to engage in sexually explicit conduct. Applying this related meaning to "uses" suggests the term should be interpreted as requiring some action upon the minor to involve the minor in sexually explicit conduct.

To be clear, a person can "use" the minor without the minor's knowledge or awareness. For instance, when a perpetrator drugs a minor and abuses him/her, the perpetrator no doubt "uses" the minor "to engage in" sexually explicit conduct, even though the minor is unconscious. The key in this example is that the offender is taking some action that is *causing* the minor to be engaged in sexually explicit conduct, knowingly or unknowingly. That is what "use" means in §2251(a).

In contrast, if "uses" were interpreted as broadly as the Eleventh Circuit suggests, simply meaning to avail oneself of a minor in any form, it would subsume the verbs in the statute rendering them surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (providing that the surplusage canon requires courts to give each word and clause of a statute operative effect, if possible). For example, an offender unquestionably avails himself of a minor whenever he persuades, induces, entices, or coerces a minor. But those verbs have no independent meaning if "uses" is ascribed to its broadest possible interpretation, as the Eleventh Circuit holds, meaning "to make use of" or when an adult "avails" himself of a minor. *See Dawson*, 64 F.4th at 1236.

4. Along with the immediate statutory context, reading "uses" a minor "to engage in" sexually explicit conduct as excluding depictions of adult-only sexual acts nearby a fully clothed child aligns with §2251(a)'s placement in the overall statutory scheme. *See Yates*, 574 U.S. at 537; *see also Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted); *Bailey*, 516 U.S. at 145 ("We consider not only the bare meaning" of the critical word or phrase "but also its placement and purpose in the statutory scheme.").

Congress intended §2251 to be a "comprehensive regulatory scheme" aimed at "criminalizing the receipt, distribution, sale, production, possession, solicitation and

advertisement of child pornography." *Parton*, 749 F.3d at 1330 (internal quotation marks omitted) (addressing §2251(a)). As *Howard* explains, reading §2251(a) to exclude images of solo, adult-only masturbation "has the virtue of consistency with the comprehensive scheme that Congress created to combat child pornography." 986 F.3d at 722. "This statutory scheme broadly covers material depicting minors engaged in sexually explicit conduct," and the "government's interpretation of § 2251(a) creates an odd statutory mismatch, penalizing the production of material that is not child pornography." *Id*.

Section 2251(a)'s placement in the overall statutory scheme suggests that the production of child pornography statute criminalizes the production of images that depict minors in a way consistent with the understanding of what constitutes child pornography—images that depict minors in a sexually suggestive manner or as objects of sexual desire; but not images where minors are merely present and where the child's presence is not intended to elicit a sexual response.

5. Another principle of statutory construction provides against interpreting text leading to an absurd result. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 & n.3 (1993) (citing cases beginning in 1869 applying "the common mandate of statutory construction to avoid absurd results"). Again, as *Howard* explains, the "government's interpretation is strained and implausible," because "taken to its logical conclusion, it does not require the presence of a child on camera at all. The crime could be committed even

if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." 968 F.3d at 722. *Dawson* itself does not contend there is a textual limit to §2251(a)'s reaching a scenario when no minor is depicted in the image. Rather, *Dawson* contends the limits of §2251(a) depend on "fact-specific determinations." *Dawson*, 64 F.4th at 1238. But relying on the good graces of prosecutors or jury nullification to limit a statute that by the Eleventh Circuit's interpretation applies to situations in which no minor is depicted in an image is an approach this Court has rejected over and over. *See Dubin*, Slip Op. 19.

5. Finally, "when a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971) (cleaned up). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *See Liparota v. United States*, 471 U.S. 419, 427 (1985). Should the Court doubt the meaning of "uses" after exhausting all the other applicable statutory construction, the rule of lenity favors adopting Poulo's reading and concluding that his images do not come under §2251(a)'s reach.

CONCLUSION

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

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