No. 22-7855

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IN THE SUPREME COURT OF THE UNITED STATES

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EDGAR DAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

---

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner "use[d] * * * a minor * * * to engage in * * * sexually explicit conduct for the purpose of producing [a] visual depiction of such conduct," in violation of 18 U.S.C. 2251(a), when he created videos of him and his daughter while he masturbated out of her sight.

## RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Dawson, No. 20-cr-00077 (Apr. 14, 2021)

United States Court of Appeals (11th Cir.):

United States v. Dawson, No. 21-11425 (Apr. 5, 2023)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 64 F.4th 1227. The order of the district court denying petitioner's motion for judgment of acquittal is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 5, 2023. The petition for a writ of certiorari was filed on June 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Middle District of Florida, petitioner was convicted on two counts of distributing child pornography, in violation of 18 U.S.C 2252A(a)(2) and (b)(1); and five counts of sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a) and (e). Judgment 1. The district court sentenced him to 600 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-9.

1. In March 2020, an undercover Federal Bureau of Investigation (FBI) Special Agent saw petitioner posting a video in a Kik chatroom called "Daugh Fun Time" -- short for "Daughter Fun Time." Pet. App. 2 & n.2. In the video, petitioner filmed a fully clothed 11-year-old girl kneeling on an exercise mat in a yoga pose from behind, then he panned the camera down to show that his penis was exposed and erect and he was masturbating. Id. at 2.

When other members of the group asked who the girl was, petitioner responded with three additional videos. Pet. App. 2. In one, the same child, fully clothed, was sitting at a dining room table with her face visible and voice audible, and petitioner panned the camera down to show himself masturbating under the table while he talked to her. Ibid. Another video again showed the

same child, fully clothed, at the dining room table with the top of her head visible, with petitioner then panning the camera down to show himself masturbating as he stood behind her and they conversed. Ibid. And in the third video, petitioner stood behind the fully clothed child masturbating and then ejaculated onto the floor. Ibid. Petitioner informed the group chat that the child was his daughter. Ibid.

In another Kik chatroom, petitioner sent an undercover detective a video filmed in the child's bedroom. Pet. App. 2. She sat at a desk fully clothed while drawing and talking to petitioner; he stood behind her and masturbated. Ibid. As the camera panned back and forth between the girl's head and petitioner's penis, his penis brushed up against her hair. Ibid.

Pursuant to a search warrant, the FBI searched petitioner's house and interviewed him. Pet. App. 2-3. Petitioner admitted to distributing child pornography through Kik and taking videos of his daughter as he masturbated. Id. at 3. He admitted to being aroused by masturbating in the presence of his daughter and stated that the purpose of the videos was to post them and "get off" on them. Ibid.

2. A grand jury in the Middle District of Florida returned a superseding indictment charging petitioner with two counts of distributing child pornography, in violation of 18 U.S.C 2252A(a)(2) and (b)(1); and five counts of sexual exploitation of

a minor -- one count for each of the five videos -- in violation of 18 U.S.C. 2251(a) and (e). Superseding Indictment 1-4. Petitioner waived his right to a jury trial and proceeded to a bench trial. Pet. App. 3. After the parties moved to admit their evidence, petitioner moved for judgment of acquittal on the five counts of sexual exploitation of a minor. Ibid.

Under Section 2251(a), "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e)." 18 U.S.C. 2251(a). Petitioner contended that the videos that he posted in the Kik chatrooms fell outside the scope of Section 2251(a) on the theory that "the child herself must be actively engaged in sexually explicit conduct and that it is not enough that [petitioner] was engaged in sexually explicit conduct in the child's presence." D. Ct. Doc. 72, at 7 (Dec. 8, 2020). The district court rejected that argument and denied the motion. Id. at 12-13.

The district court determined that Section 2251(a) does not require the minor to be "actively engaged" in sexually explicit conduct. D. Ct. Doc. 72, at 7. The court reasoned that the word "use" in the statute should be given its ordinary meaning: "to

put into action or service: avail oneself of," or "to carry out a purpose or action by means of." Id. at 9 (quoting Merriam-Webster, http://www.merriam-webster.com/dictionary/use). And it concluded that a perpetrator can "use" a minor to engage in sexually explicit conduct without the minor's conscious or active participation. Ibid. (citing United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014)).

The district court accordingly determined that "by taking images of himself masturbating in the child's presence, even touching the child with his penis in one video, [petitioner] used the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct" in violation of Section 2251(a). D. Ct. Doc. 72, at 13-14.

The district court sentenced petitioner to 240 months of imprisonment on the Section 2252A(a)(2) counts (to be served concurrently) and 360 months of imprisonment on the Section 2251(a) counts (to be served concurrently with each other and consecutive to the 240-month sentence on the Section 2252A(a)(2) counts), for a total of 600 months of imprisonment. Judgment 3.

3. Petitioner appealed his convictions under Section 2251(a) (though not his convictions under Section 2252A(a)(2)), and the court of appeals affirmed. Pet. App. 1-9; see id. at 4.

Looking to the "plain and ordinary meaning of the statutory language as it was understood at the time the law was enacted,"

Pet. App. 6 (citation omitted), the court of appeals reasoned 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, ibid. (quoting Black's Law Dictionary 1381 (5th ed. 1979)) (brackets omitted); see id. at 6 n.6. Under its construction of Section 2251(a), "a minor must be involved in the offender's sexually explicit conduct, but * * * need not necessarily be actively engaging in his or her own sexually explicit conduct." Id. at 7.

The court of appeals observed that the neighboring statute, 18 U.S.C. 2252(a), prohibits shipping visual depictions that "involve[] the use of a minor engaging in sexually explicit conduct," whereas Section 2251(a) prohibits "us[ing]" a minor "to engage in sexually explicit conduct." Pet. App. 6 (first set of brackets in original). And it further observed that Congress defined sexually explicit conduct to cover the "'lascivious exhibition of the anus, genitals, or pubic area of any person,'" which "again indicat[es] that the minor need not be the one engaged in sexually explicit conduct." Ibid. (quoting 18 U.S.C. 2256(2)).

The court of appeals rejected the argument, which relied on the noscitur a sociis canon, that the other verbs appearing alongside "'uses'" -- "'employs,'" "'persuades,'" "'entices,'" and "'coerces'" -- demand that all five verbs be interpreted to

"require[] some direct, active engagement by the minor." Pet. App. 7. It reasoned that the five verbs in Section 2251(a) indicate that Congress intended to cover "a continuum of participation by the minor covering a broad range of criminal conduct," with "'employs'" and "'uses'" on the more passive side, and "'persuades,'" "'entices,'" and "'coerces'" on the more active side. Ibid.

The court of appeals explained that under its construction of Section 2251(a), a minor "must be involved in the offender's sexually explicit conduct," but the minor need not be actively engaging in her own sexually explicit conduct. Pet. App. 7. And it found that requirement to be satisfied here, because the presence of petitioner's daughter in the videos "is being used as the object of [petitioner's] sexual desire as he engages in sexually explicit conduct," as demonstrated by his panning the camera between the daughter and himself masturbating -- "even going so far as to touch her hair with his penis in one video." Ibid.

The court of appeals also found that even if it were required to find that the minor herself had "engaged in" sexually explicit conduct, petitioner's daughter was "unknowingly engaged in sexually explicit conduct by virtue of her presence serving as the object of [petitioner's] sexual desire." Pet. App. 7 n.7. And the court rejected petitioner's reliance on the rule of lenity

because the traditional tools of statutory interpretation provided sufficient clarity on the meaning of Section 2251. Id. at 8.

ARGUMENT

Petitioner renews his contention (Pet. 23-31) that his production and posting of videos did not violate 18 U.S.C. 2251(a). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or create a conflict with another court of appeals that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. Section 2251(a) prescribes criminal penalties for anyone who "employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. 2251(a). "Sexually explicit conduct" is defined to include any actual or simulated "sexual intercourse," "bestiality," "masturbation," "sadistic or masochistic abuse," or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A).

The plain language of the provision includes petitioner's videos of masturbation in his 11-year-old daughter's presence. As the court of appeals observed, under the ordinary dictionary definition of the verb "use," a minor is "used" if she is "made

use of" in a sexually explicit videotape or if an adult "avails himself of" the child. Pet. App. 6 (brackets omitted); United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013) (explaining that Congress's use of the word "'uses'" in Section 2251(a) "indicates that active involvement on the part of a minor is not essential for a conviction under" the statute), cert. denied, 574 U.S. 902 (2014). The phrase "to engage in," in turn, requires a minor's involvement, but not necessarily active engagement, in sexually explicit conduct. For example, if an adult recorded himself committing "sadistic or masochistic abuse" of a child, 18 U.S.C. 2256(2)(A)(iv), the adult would have caused the child to be passively "engage[d] in" the recorded sexually explicit conduct. See Pet. 28 (acknowledging that "a person can 'use' the minor without the minor's knowledge or awareness," such as "when a perpetrator drugs a minor and abuses him/her").

Here, the lower courts permissibly found that petitioner had used his 11-year-old daughter to engage in masturbation and lascivious exhibition of his genitals for the purpose of creating videos of that experience. Defendant "admitted" that "it was arousing to him to have his daughter sitting in his presence while he masturbated" and that he had recorded the videos showing her in his presence while he masturbated in order "to post them and 'get off' on them." Pet. App. 3. He made his daughter a focal point of the videos, depicting her as the object of his sexual desire by

panning the camera between his daughter and his penis as he masturbated. Id. at 2. Indeed, her presence was essential to the sexually explicit conduct shown in the videos. Id. at 7. Petitioner's use of his 11-year-old daughter in that fashion constituted "[s]exual exploitation of children" that is prohibited by Section 2251(a). 18 U.S.C. 2251 (emphasis omitted).

Other courts of appeals have reached the same result under similar facts. In United States v. Osuba, 67 F.4th 56, petition for cert. pending, No. 23-5381 (filed Sept. 11, 2023), for example, the Second Circuit found that the defendant had used a minor to engage in sexually explicit conduct when he videotaped himself masturbating toward her while she was asleep on a couch. Id. at 63. The court reasoned that under Section 2251(a), the minor should herself be engaged in the sexually explicit conduct, id. at 62, but it determined that the defendant had engaged her in such conduct where his conduct "was wholly directed toward her, in a way that rendered her a participant (albeit a passive one) in th[e sexually explicit] activity," id. at 63. By creating a video depicting masturbation, "the intended consummation of which was visibly directed toward a minor who was physically present," the defendant had "crossed the line" from a simple adult display of genitals around a sleeping minor to "showing his victim as 'an inanimate body' upon which he was acting sexually." Ibid. (quoting

United States v. Lohse, 797 F.3d 515, 521 (8th Cir.), cert. denied, 577 U.S. 1037 (2015)).

Similarly, in Lohse, the Eighth Circuit found that the defendant had violated Section 2251(a) by photographing himself in sexual positions next to a minor who was asleep. 797 F.3d at 521. The court explained that the defendant had violated the statute because the minor served as "an inanimate body for Lohse to act upon in exhibiting his genitals" and he "literally used [the minor] as a sexual object in orchestrating" the photographs. Ibid. (citation omitted).

2. Petitioner's contrary arguments lack merit.

Petitioner renews (Pet. 24-28) his assertion that the other verbs in Section 2251(a) imply that the verb "uses" requires more than petitioner's use of the minor here. But even if each verb in Section 2251(a) "require[s] the minor to engage in sexually explicit conduct," "[e]ngagement, of course, can be active or passive," and can include a sleeping (or otherwise unaware) child's role as the "'body'" involved in a sexual act like adult masturbation. Osuba, 67 F.4th at 62-63 (citation omitted).

Petitioner also contends (Pet. 29-30) that interpreting Section 2251(a) to exclude videos like the ones he produced is more consistent with Congress's overall statutory scheme to criminalize the possession, production, and distribution of "child pornography." That argument is misguided. Section 2251(a) does

not use the term "child pornography," which is a defined term under Section 2256(8) that explicitly requires a visual depiction to show a "minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8).

Instead, as discussed above, Section 2251(a) uses different language that encompasses the videos produced by petitioner in which his daughter, in videos revealing her face and voice, was exploited as the object of petitioner's sexual desire. The application of Section 2251(a) to conduct like petitioner's fits squarely within the provision's text and furthers the statutory objective of protecting against the "[s]exual exploitation of children." 18 U.S.C. 2251 (emphasis omitted); see Finley, 726 F.3d at 495 (interpreting Section 2251(a) to require the child to be actively engaged in sexually explicit conduct "would be absurd and against the obvious policy of the statute" to protect children, "including those who are unaware of what they are doing or what they are being subjected to").

Petitioner further asserts (Pet. 30) that the court of appeals' interpretation of Section 2251(a) leads to absurd results because it could be extended to cover visual depictions of an adult engaged in sexually explicit conduct where no child is even present in the image. That concern is unfounded. As the Second Circuit explained in Osuba, the text of the statute forecloses an interpretation that would cover a visual depiction of an adult

engaged in sexually explicit conduct with no child present because "[t]he 'visual depiction' must be 'of' the sexually explicit conduct in which the minor engaged (regardless of whether that engagement is active or passive on the part of the minor)." 67 F.4th at 64 (citation omitted); see Pet. App. 8 (similar).

Finally, petitioner's reliance on the rule of lenity (Pet. 31) is misplaced. The rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted); see Shular v. United States, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring). For the reasons described above, no such grievous ambiguity exists here. See, e.g., Shular, 140 S. Ct. at 787 (opinion for the Court) (finding "no ambiguity for the rule of lenity to resolve" after considering statutory "text and context"); see also Pet. App. 8 (rejecting petitioner's reliance on the rule of lenity).

3. Petitioner's claim (Pet. 14-16) of a circuit conflict is overstated. Petitioner errs, for example, in asserting (Pet. 16-17) that the court of appeals' decision conflicts with the Second Circuit's decision in Osuba, which noted that its interpretation of Section 2251 differed in certain respects with the

interpretation in the decision in petitioner's case, but -- consistent with the result here -- affirmed a Section 2251(a) conviction premised on images of adult masturbation involving an unaware (in that case, sleeping) minor. See 67 F.4th at 63. And as the Second Circuit observed, both courts agree that such conduct constitutes the minor's passive engagement in sexually explicit activity. Ibid. (citing Pet. App. 7 n.7).

Petitioner similarly errs in asserting (Pet. 17-18) that the court of appeals' decision "departs from" the Third Circuit's decision in United States v. Finley, supra, and the Eighth Circuit's decision in United States v. Lohse, supra. Petitioner suggests (Pet. 17) that those decisions support an interpretation of the word "use" in Section 2251(a) that requires "showing a minor engaged in sexually explicit conduct." But as with Osuba, both of those decisions -- consistent with the decision below -- affirm Section 2251(a) convictions for visual depictions in which the child was asleep. Lohse, 797 F.3d at 524; Finley, 726 F.3d at 496. And the court of appeals here would moreover agree with those decisions' understanding that a sleeping child can passively engage in sexual conduct for purposes of Section 2251. See Pet. App. 7 n.7; Lohse, 797 F.3d at 521; Finley, 726 F.3d at 494-495.

Petitioner also suggests (Pet. 18-19) that the court of appeals' decision conflicts with the D.C. Circuit's decision in United States v. Hillie, 39 F.4th 674 (D.C. Cir. 2022), and the Ninth Circuit's decision in United States v. Laursen, 847 F.3d

1026, cert. denied, 583 U.S. 883 (2017). Those cases are inapposite. Hillie involved a defendant hiding cameras in a bedroom and bathroom that captured minors going to the bathroom and washing their genitals, among other things. 39 F.4th at 677-678. The minors were the only subject of the videos, and the "only contested issue" was whether their actions amounted to lascivious exhibition of the genitals. Id. at 681. And Laursen did not involve a dispute about whether the 16-year-old minor had posed in sexually explicit photos with the defendant; the question was whether the defendant had "used" her within the meaning of the statute when she had willingly participated. 847 F.3d at 1032-1033.

The only circuit that petitioner identifies as vacating convictions for conduct like his is the Seventh Circuit. In United States v. Howard, 968 F.3d 717 (2020), the Seventh Circuit vacated a Section 2251(a) conviction that was based images that showed the defendant masturbating next to a fully clothed and sleeping child, where the government's sole argument was that "it does not matter whether the minor victim engaged in any sexually explicit conduct." Id. at 721. The court disagreed with that argument, reading the statute to mean 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." Ibid. And in United States v. Sprenger, 14 F.4th 785 (2021), the Seventh Circuit relied on Howard to vacate a plea to Section 2251(a)

offense involving a defendant masturbating next to a sleeping minor. Id. at 790-791.

The precise scope of Howard, however, is unclear. The Seventh Circuit stated there that because "[t]he government [had] staked its entire case for conviction on a mistaken interpretation of the statute," it would not consider whether the images at issue might nevertheless fall within the scope of Section 2251(a) if the government were to reframe its case to conform to the court's reading of the statute. 968 F.3d at 723 & n.3. The Second Circuit accordingly reasoned in Osuba that "[w]hether the Seventh Circuit would have agreed with the argument presented by the government in our case [that the defendant had engaged a sleeping minor in sexually explicit conduct], and upon which we now rely, we do not know." 67 F.4th at 64. And while Howard requires that the minor herself engage in the sexually explicit conduct, it does not impose any requirement that such conduct be active or conscious.

Indeed, in distinguishing decisions of other courts, the Seventh Circuit described multiple cases involving sleeping or unconscious minors as "involv[ing] visual images clearly depicting minors engaged in sexually explicit conduct" because the minor was made to participate in a sexual act while asleep. Howard, 968 F.3d at 723 (citing, e.g., Finley, 726 F.3d at 488-489). That is akin to the conduct at issue here.*

* Petitioner suggests (Pet. 19) that the Ninth Circuit's decision in United States v. Mendez, 35 F.4th 1219 (2022), cert. denied, 143 S. Ct. 1772 (2023), conflicts with Howard by upholding

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2023

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a Section 2251(a) conviction based on a surreptitious recording without requiring that the defendant "cause" the minor to engage in sexually explicit conduct. But the Ninth Circuit observed in Mendez that Howard "confronted a completely different question of interpretation -- namely, whether the sexually explicit conduct needs to be that of the minor." Id. at 1223. And the Seventh Circuit has recently clarified, in a case involving surreptitious recording, that a defendant can "'use'" a minor within the meaning of Section 2251(a) "without causing the minor to act in any particular way." United States v. Donoho, No. 21-2489, 2023 WL 4992866, at *6 (Aug. 4, 2023). In any event, a conflict between Mendez and Howard on any causation requirement in the statute would not be a reason to grant a writ of certiorari to consider the distinct question presented in this case.