No. 22-7855

IN THE

SUPREME COURT OF THE UNITED STATES

EDGAR DAWSON,

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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REPLY BRIEF FOR PETITIONER

A. Fitzgerald Hall, Esq.
Federal Defender
Middle District of Florida

Adeel Bashir, Esq.*
Assistant Federal Public Defender
Senior Appellate Attorney
Sup. Ct. Bar. No. 291258
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
E-mail: adeel_bashir@fd.org
*Counsel of Record for Petitioner

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REPLY BRIEF FOR PETITIONER[1]

This Petition presents an important and recurring question of statutory interpretation about whether "uses" a minor "to engage in" sexually explicit conduct under 18 U.S.C. § 2251(a) requires an offender's action to cause a *minor*'s engagement in an image produced. *See generally* Pet. i, *see also id.* at 11–29. The question presented has openly divided the circuit courts about the reach of this widely invoked federal statute. *See id.* at 11–17. Furthermore, this Court often grants Petitions raising similar questions about the meaning of "uses" in federal criminal statutes, including most recently in *Dubin v. United States*, 143 S. Ct. 1557 (2023). *See id.* at 18–19.[2] Because this Petition raises a similar question in clean vehicle on undisputed facts, *see id.* at 18–28, this Court's review is warranted.

The government says very little in opposing the Petition, and its silence speaks volumes. It does not dispute that the Petition raises an important and recurring federal statutory interpretation question, nor does it deny that this is a suitable vehicle to address the scope of § 2251(a). Instead, the government raises only two points to dissuade the Court from granting the Petition: (1) it asserts that the circuit conflict does not warrant the Court's attention; and (2) it defends the outcome of the

[1] When counsel filed this petition, he simultaneously filed a petition in *Poulo v. United States*, No. 22-7855, as he is counsel of record in both cases, and both cases present the same legal issue about the interpretation of 18 U.S.C. § 2251(a). *See* Pet. 1 n.1. As noted in both petitions, although there are slight differences in the facts, granting a writ of certiorari would be appropriate in either or both cases. *See id*; *see also id.* 20–21.

[2] Similar to the comprehensive phrase here, *Dubin* addressed the meaning of the terms "uses" and "in relation to" in the aggravated identity theft statute, 18 U.S.C. § 1028(a)(1). *See id.* at 1563.

decision below. *See* Dawson BIO 8. But the government's assertion about the circuit split is belied by its admission that Dawson's conviction would have been overturned in another circuit. Furthermore, its focus on the outcome, rather than the correctness of the Eleventh Circuit's statutory interpretation, only highlights the need for this Court's intervention to tell lower courts which of the competing interpretations of § 2251(a) is the law. Consequently, the Court should grant the petition.

A. The government acknowledges a circuit split.

The government recognizes that the circuits are at odds over the meaning of "uses" a minor "to engage in" sexually explicit conduct under § 2251(a). *See* Dawson BIO 14. But it contends that the conflict is "overstated" and therefore does not warrant this Court's review. *Id.*; *see also id.* at 8. Contrary to the government's contention, the conflict is clearly defined, irreconcilable, and requires this Court's intervention.

1. Take *United States v. Howard*, 968 F.3d 717 (2020). *Howard* holds that "uses" a minor "to engage in" sexually explicit conduct under § 2251(a) requires some action by the offender "to cause *the minor* to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct." 968 F.3d at 721. Thus, in the Seventh Circuit, a person like Dawson does not violate § 2251(a) "by 'using' . . . [a] clothed and sleeping child as an object of sexual interest to produce a visual depiction of *himself* engaged in solo sexually explicit conduct." *Id.* at 718.

In conflict with *Howard*, the Eleventh Circuit holds that "[a]n 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." *United States v. Dawson,* 64 F.4th 1227, 1236 (11th Cir. 2023) (cleaned up). Consequently, in the Eleventh Circuit a person like Dawson is guilty of "using" a child when he "uses" a minor as "the object of sexual desire while he records himself engaging in sexually explicit conduct." *Id.* There is no textual limit that even requires a minor's presence in the image or video produced. *See id.*

The government concedes that Dawson's § 2251(a) convictions would have been reversed in the Seventh Circuit under *Howard*. *See* Dawson BIO 15. Yet the government appears content to let geography dictate whether Dawson should serve an extra thirty-years in prison based on its assertion that the "precise scope of *Howard* . . . is unclear." *Id.* at 16.

Contrary to the government's assertion, *Howard*'s scope is clear. The government overlooks that the Seventh Circuit has reaffirmed *Howard* in multiple decisions, each time citing *Howard* approvingly for its holding that "uses" a minor "to engage in" requires a minor's direct engagement in sexually explicit conduct. *See United States v. Sprenger*, 14 F.4th 785, 791 (7th Cir. 2021) (citing *Howard* to support that the defendant did not violate § 2251(a) "[b]ecause the photographs [he] took depicted himself but not Victim A engaged in sexually explicit conduct"); *United States v. Hartleroad*, 73 F.4th 493, 497 (7th Cir. 2023) (citing *Howard* to support that

§ 2251(a) requires proof of a "minor's direct engagement in sexually explicit conduct to sustain a conviction"); *see also United States v. Donoho*, 76 F.4th 588, 596 (7th Cir. 2023) (citing *Howard* as supporting that "[s]o long as the visual depiction at issue depicts a minor engaged in sexually explicit conduct, a defendant may 'use[ ]' the minor within the meaning of § 2251(a)").

So here's the split:

Section 2251(a)	"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 * * *.	
	Statutory Terms	
	"uses" a minor	"to engage in" sexually explicit conduct
Howard Seventh Circuit	reads use in context to connote an offender's action and causation	requires the minor's engagement in sexual conduct depicted in an image
Dawson Eleventh Circuit	reads use in its broadest terms to mean use in any sense, (including passive activity like availing oneself of a minor as a subjective interest of desire)	does not require the minor's engagement in sexual conduct depicted in an image (object-of-desire theory suffices and no textual limit requiring a minor to be in the image)

Despite the government's claim of uncertainty, *Howard* conflicts with *Dawson* on a straightforward question of statutory interpretation: does "uses" a minor "to engage in" sexually explicit conduct under § 2251(a) require an offender's action to cause a *minor*'s engagement in the depicted sexual act? *Howard* says, "Yes." *Dawson* says, "No."

The disagreement over the meaning of "uses" a minor "to engage in" sexually explicit conduct under § 2251(a) can only be resolved by this Court. And given how often § 2251(a) is invoked, and the significant, mandatory-minimum penalties associated with a conviction, the Court's intervention is critical.

2. The conflict between *Howard* and *Dawson* alone warrants the Court's attention. But the conflict is deeper and touches multiple circuits, heightening the need for the Court's intervention. The government's effort to downplay the conflict is unconvincing.

For example, the government contends the Second Circuit's decision in *United States v. Osuba*, 67 F.4th 56 (2d Cir. 2023), is "consistent with the result here." Dawson BIO 14. But *Osuba* expressly rejected *Dawson*'s interpretation of § 2251(a) as capturing a person who avails himself of a minor as the object of sexual desire. *See* 67 F.4th at 63. Instead, *Osuba* "agree[ed] with *Howard* that the minor must engage in the sexually explicit conduct" to constitute a "use." *Id.* The government also ignores that the Second Circuit found that a rational jury could have concluded that Osuba's conduct, on the specific facts of his case, involved engaging a minor in sexual conduct, and thus affirmed his § 2251(a) conviction. *See id.*; *see also* Pet. 15 (discussing *Osuba*).

In contrast, no factfinder found that the minor was engaged in Dawson's solo sexual act. *See* Pet. 9. Rather, it is undisputed that the visual images show Dawson engaged in his own, adult-only sexual act, nearby a fully clothed minor who is not part of his sexual conduct. *See id.* And it is undisputed that the basis for Dawson's

§ 2251(a) convictions was that he "used" a minor by availing himself of her as the object of his sexual desire—not that the minor was engaged in his sexual act, passively or actively.[3] *See Dawson*, 64 F.4th at 1236.

Thus, the government's contention that *Osuba* aligns with the result here is wrong. Because no fact finder found that the minor was engaged in Dawson's sexual act, the Second Circuit would have reversed Dawson's convictions under *Osuba*, as the government itself admits. That result further entrenches the circuit split. At a minimum, *Osuba*'s rejection of *Dawson*'s statutory construction heightens the need for the Court's guidance on the scope of "uses" a minor "to engage in" sexually explicit conduct.

3. For similar reasons, the government cannot sidestep the conflict with decisions from the Third and Eighth Circuits. *See* Pet. 15–16 (discussing *United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013); *United States v. Lohse*, 797 F.3d (8th Cir. 2015)); Dawson BIO 14 (discussing same). These circuits "support an

[3] To the extent that the government subtly tries to shift this case as a dispute about whether Dawson engaged a minor in his solo, sexual activity, the government's case has always rested on the "object-of-desire" theory of prosecution. As the court below held, the minor was "used as the object of Dawson's sexual desire as he engages in sexually explicit conduct." 64 F.4th at 1238.

Even then, the ship has long sailed on the government's alternate theory of prosecution, especially since this case was presented on stipulated facts at a bench trial on the theory that Dawson "used" a minor because he availed himself of her as an object of desire while making images of himself engaged in his own solo, sexual act. *See* Pet. 4–10; *see also Ciminelli v. United States*, 598 U.S. 306, 316–17 (2023) (rejecting the government's attempt change its theory of prosecution on appeal and for the Court to "assume not only the function of a court of first view, but also of a jury."). Yet if there is still any doubt about this case, the Court should grant the petition in *Poulo v. United States*, No. 22-7851, and hold this case in abeyance; or grant the petition in both as both cases present the same legal issue about the interpretation of § 2251(a). *See supra* n.1.

interpretation of 'use' in § 2251(a) that requires showing a minor engaged in sexually explicit conduct, which aligns with *Howard* but departs from *Dawson*." Pet. 15.

The government does not dispute Dawson's reading of § 2251(a) in those circuits. For instance, it says nothing about how, unlike here, the jury instructions on the production count in *Lohse* required the government to show a minor engaged in sexually explicit activity. *See* Dawson BIO 14. Rather than discussing the elements of § 2251(a), the government claims these decisions are "consistent with the decision below" because they "affirm Section 2251(a) convictions for visual depictions in which the child was asleep." *Id.*

But the government's claim of consistency is mere wordplay. Whether § 2251(a) covers sleeping minors has never been in dispute and is not at issue. *See* Pet. 15. The government tries to recharacterize the question presented as a debate between passive and active *engagement* to muddy the waters and avoid discussing the actual conflict over whether "use," when read in conjunction with "to engage in," requires a minor's engagement in the sexually explicit conduct.

To be clear, the Third and Eighth Circuits do not read "uses" to include passive activity, like Dawson's, that involves availing oneself of a minor as the object of sexual desire; while the Eleventh Circuit does read "uses" to encompass such a passive, object-of desire theory of prosecution. And the Third and Eighth Circuits require a minor's engagement in sexually explicit conduct to support a 2251(a) conviction, while

the Eleventh Circuit does not. That's a conflict over the meaning of "uses" a minor "to engage in" sexually explicit conduct by any measure.

4. As for 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. Mendez*, 35 F.4th 1219 (9th Cir. 2022), the government claims that these cases "are inapposite" because they involve surreptitious recording of minors engaged in lascivious exhibition. Dawson BIO 15. But far from inapposite, both cases involve competing interpretations of "uses," which is the same statutory term here, and underscore the fracture among the courts of appeals over § 2251(a)'s scope. *Hillie*, for example, discusses the meaning of "uses" in § 2251, and cites *Howard* for support that "uses" a minor "to engage in" requires a minor's engagement in the sexual conduct depicted in an image or video. *See Hillie*, 39 F.4th at 391 (citing *Howard*). *Hillie* also supports that "uses" connotes action (active use) and has a causal requirement, which is consistent with Dawson's interpretation of § 2251. Pet. 22–29. *Mendez*, however, aligns more with *Dawson* on whether "uses" connotes actions or causation. *See id.* at 16–17.

Thus, *Hillie* and *Mendez* highlight the interpretative difficulties surrounding "uses" under § 2251(a) and the need for the Court's guidance on the scope of the statute. And because this Petition involves interpretating "uses" along with its grammatically linked phrase "to engage in," it presents an excellent canvas upon

which the Court can clarify the complete meaning of those statutory terms and the proper reach of § 2251(a).

B. The question's importance and the vehicle's suitability are undisputed.

On top of the circuit split, the government does not dispute that the question presented involves an important and recurring question of federal statutory interpretation; nor does it dispute that this case is an excellent vehicle for resolving the conflict over § 2251(a)'s reach. Additionally, the government makes no argument about the need for further consideration or review by the lower courts. As a result, the government effectively concedes these points, all of which support granting the Petition.

It is worth emphasizing that this is an especially important case for the Court to review because it involves interpreting "uses" in a criminal statute. "As the Court has observed more than once, the word use poses some interpretational difficulties because of the different meanings attributable to it." *Dubin*, 143 S. Ct. 1565 (cleaned up). Thus, more than other statutory terms, "uses" requires particular attention from this Court to ensure its proper interpretation.

It is also worth emphasizing that § 2251(a) imposes significant mandatory penalties: at least 15 years to 30 years maximum in prison. *See* Pet. at 19. Dawson's case illustrates the significance. The district court sentenced him to an additional thirty-years in prison for his § 2251(a) convictions. And the Eleventh Circuit affirmed the sentence finding that the § 2251(a) convictions were satisfied by proof that

Dawson relied on the minor as an object of sexual desire when he produced images of himself engaged in adult-only, solo sexually activity. *See id.* at 5–6. But again, as the government concedes, Dawon's conviction and sentence would have been reversed in the Seventh Circuit under *Howard*. Dawson's case underscores the dramatic consequences of allowing a broad reading of "uses" a minor "to engage in" sexually explicit conduct.

In short, the question presented warrants the Court's attention given the interpretive difficulties involving "uses" and the significant penalties associated with a § 2251(a) conviction. Moreover, the drastic difference in Dawson's conviction and sentence in the Seventh and Eleventh Circuits punctuates the need for the Court to address the scope of § 2251(a). Accordingly, because there is no dispute that the Petition presents a clean vehicle to focus on the scope of the statute itself, the Court should take the opportunity to give § 2251(a) the attention it deserves.

C. The government's merits argument only underscores the need for review.

Finally, even if the government were correct about the merits, the Court should still grant the Petition given the circuit conflict and the importance of the question presented. But here, the government's merits defense is wrong in every way and bolsters the need to address the question presented.

To begin, the government does not defend the lower court's statutory interpretation. *See* Dawson BIO 8–13. Instead, in what appears to be a reversal from its position in the court below, the government argues that "to engage in" "requires a

minor's involvement, but not necessarily active engagement, in sexually explicit conduct." *Id.* at 9. In so arguing, the government replaces "engagement" with "involvement," and then proceeds to read its preferred term divorced from the grammatically linked phrase "uses." *See id.* With that sleight-of-hand, the government argues the result below is consistent with the statutory text and with other courts of appeals rulings because those cases involved an adult creating an image of himself committing a sexual act on a minor without the minor's awareness. *See id.* at 10–11.

But the government's argument is a classic strawman technique, and it suffers from two overarching flaws. First, on its major premise, all the government really means by "involvement" is that an adult is guilty of "using" a minor "to engage in" sexually explicit conduct when he avails himself of a minor in any sense whatsoever when he creates an image of himself engaged in a solo, adult-only sexual act. So under the government's "involvement" theory, just thinking about a minor when creating adult pornography could count as a "use" because that is also "availing" oneself of a minor as inspiration to create an image of sexually explicit conduct. But that result is more than the text of § 2251(a) can bear.

Second, on its minor premise, the government once again tries to muddy the waters by injecting the concepts of active and passive engagement into the discussion. *Id.* at 9–10. Those issues are neither in dispute nor at issue in this case. As Dawson has consistently explained, a person can passively engage a minor in a sexual act

without the minor's awareness, i.e., if the minor is sleeping, drugged, or filmed surreptitiously. *See* Pet. at 15. In these examples, a minor is engaged in a sexual act—it is the minor who is captured in a lascivious exhibition or directly participating in a sexual scene. The decision below, however, rests on the finding that Dawson created images of child pornography even though only Dawson himself—not the minor—is engaged in the sexual act depicted in the images. *See* 64 F.4th at 1236.

The government simply wants to ignore the central dispute here: whether "uses" connotes action and "to engage in" requires a minor's engagement in sexually explicit conduct. Instead, the government prefers to discuss whether the engagement must be active or passive. That issue is uncontested, irrelevant, and provides no basis for denying the Petition.

The rest of the government's merits arguments are equally unavailing. The government fails to address most of the statutory construction points that Dawson raises in his petition, including reading statutory text in context, utilizing the rules of grammar, and applying the ordinary canons of interpretation. *See* Pet. 22–27. Rather, the government commits the same methodological error as the court of appeals below by reading "uses" and "to engage in" based solely on dictionary definitions; divorced from context; and without accounting for the ordinary rules of English grammar. *See* Dawson BIO 8–10; Pet. at 22–29. That does not make for sound statutory construction. *See Dubin*, 143 S. Ct. 1564–1473.

The government also contends that the conduct here fits within § 2251(a)'s purpose, which it says is protecting children generally. *See* Dawson BIO 12. But that argument is just purposivism disguised as textualism.[4] It is no surprise that the government's maximalist interpretation of § 2251(a) furthers the general objective of protecting children. But while all agree that protecting minors is imperative, so is safeguarding against untenable judicial interpretations of criminal statutes that deprive individuals of liberty without a textual basis. Thus, the task here is to set the parameters for what constitutes producing child pornography under § 2251(a)'s text—not to determine if the conduct fits within what the government claims to be § 2251(a)'s policy goal.

Finally, the government tries to counter the absurd results from its nearly boundless reading of § 2251(a), which would "extend[ ] to cover visual depictions of an adult engaged in sexually explicit conduct where no child is even present in the image." Dawson BIO 12. It argues that "concern is unfounded" based on the text of the statute. *See id*. But in making that argument, the government relies on *Osuba*'s reading of § 2251(a), which, as explained, rejects *Dawson*'s reading. *See supra*, Sec. A.2; Pet. 14–15.

"Time and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Dubin*, 143 S. Ct. 1572. As

[4] *See* Tr. of Oral Argument at 87, *Pulsifer v. United States* No. 22-340 (Oct. 3, 2023), *available at* https://tinyurl.com/2s36sucf.

Justice Gorsuch explained, "[t]he Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute's meaning by rounding up to the most punitive interpretation its text and context can tolerate." *Id.* at 1575 (Gorsuch, J., concurring). And as Chief Justice Roberts has explained more than once, the problem with reading statutes too broadly goes beyond the conviction itself and extends to giving prosecutors too much leverage in plea negotiations.[5]

If the Eleventh Circuit's interpretation is left to stand, § 2251(a) could apply in every situation when a person creates an image of adult pornography inspired by a minor who was the creator's object of desire—there is no textual limit under its reading that requires a minor to be included in an image at all. Merely thinking about a child while creating adult pornography could qualify as a violation of § 2251(a). As a result, the government could leverage multiple 30-year prison sentences to coerce a plea bargain in nearly every case involving a minor, and many other cases involving the creation of adult pornography only. The government presents no argument defending the Eleventh Circuit's decision against producing this absurd result.

[5] *See* Tr. of Oral Argument at 31, *Yates v. United States*, 135 S. Ct. 1074 (Nov. 5, 2014) (No. 13-7451), *available at* http://tinyurl.com/on4285v; Tr. of Oral Argument at 42–43, *Johnson v. United States*, 135 S. Ct. 2551 (Apr. 20, 2015) (No. 13-7120), *available at* http://tinyurl.com/nw9vohp.

CONCLUSION

The Court's guidance on the meaning of § 2251(a)'s phrase "uses" a minor "to engage in" sexually explicit conduct is needed. The Court should grant the Petition to send a message that, subject matter aside, our judiciary protects the rights of all individuals equally within the bounds Congress sets in criminal statutes.

For the reasons above and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. Fitzgerald Hall, Esq.
Federal Defender
Middle District of Florida

Adeel Bashir
Adeel Bashir, Esq.
Assistant Federal Public Defender
Senior Appellate Attorney
Sup. Ct. Bar. No. 291258
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Telephone: 813-228-2715
Facsimile: 813-228-2562
E-mail: adeel_bashir@fd.org
*Counsel of Record for Petitioner