

App. No. \_\_\_\_\_

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In the  
Supreme Court of the United States of America

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Matthew R. Osuba,  
Petitioner,

v.

United States of America,  
Respondent.

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ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND  
CIRCUIT

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PETITIONER’S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT  
OF CERTIORARI

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

Petitioner Matthew Osuba respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for sixty days: from July 16, 2023 to and including September 14, 2023.

In his anticipated certiorari petition, Osuba will ask this Court to review a Second Circuit decision finding that he could be convicted of the production of child pornography when a 17-year-old did not participate in the sexually explicit conduct, as she was fully clothed, untouched and asleep while he filmed himself masturbating. As Osuba will explain in his petition to this Court, to “use” a minor, the minor must take part in the sexually explicit conduct— the minor must “engage in” it, as that is what Congress sought to accomplish by enacting Section 2251(a): to punish those who film the sexual abuse of minors. The crime of Sexual Exploitation of a Child, 18 U.S.C. § 2251(a), punishes those who use or persuade a child

to produce child pornography. But that law requires proof of a minor’s engagement in sexually explicit conduct, not merely that she was the subject of the defendant’s attention.

The Second Circuit’s opinion is, we will argue, contrary to decisions from other Circuit Courts. Our view, and the law (we suggest) aligns with decisions in *United States v. Howard*, 968 F.3d 717 (7th Cir. 2020), *United States v. Hillie*, 14 F.4th 677, 687 (D.C. Cir. 2021), and *United States v. Mendez*, 35 F.4th 1219 (9th Cir. 2022). Yet, the Second Circuit adheres to the contrary view espoused by the Eleventh Circuit in *United States v. Dawson* 64 F.4th 1227 (11th Cir. 2023).

Osuba requests additional time to file his certiorari petition because of undersigned counsel’s case schedule, personal travel, and the intervening holidays.

#### **PROCEDURAL HISTORY**

On September 18, 2018 Matthew Osuba was arrested on September 18, 2018, and on October 17, 2018, an Indictment was filed. A superseding indictment, filed July 17, 2019. On May 5, 2019, Osuba moved to dismiss Count One, sexual exploitation of a child, on the ground that the alleged conduct – the production of a video of himself masturbating in the same room as a then 17-year-old who had her back turned, was “fast asleep,” and fully clothed – did not constitute a crime cognizable under 18 U.S.C. §§ 2251(a) and (e). The motion was denied. During and after trial, Rule 29 motions were filed, but denied by order on May 15, 2020.

On September 16, 2020, Osuba was sentenced to serve 70 years’ imprisonment, thirty years of which was for the count we will challenge in our petition. On February 17, 2022, Osuba timely filed his opening brief. The matter was argued on February 27, 2023 and the decision to affirm was published on April 17, 2023 and an Amended Opinion was filed on May 4, 2023.

On May 12, 2023, the Second Circuit granted Osuba’s motion for appellate counsel’s

appointment to prepare and file the petition for a writ of *certiorari* pursuant to the Criminal Justice Act.

A copy of the May 5, 2023 Amended Opinion of the Second Circuit is attached.

Absent an extension of time, Osuba's petition for a writ of *certiorari* would be due on July 16, 2023 (90 days from the date of the April 17, 2023 decision). Petitioner is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over judgment under 28 U.S.C. § 1254(1).

#### **STATUS OF MATTHEW OSUBA**

Matthew Osuba was sentenced to 70 years in prison. He is serving the sentence of imprisonment.

## REASONS FOR GRANTING AN EXTENSION OF TIME

Osuba's petition to this Court will concern the limited issue whether a person commits the crime of sexual exploitation of a child when the child is not an active participant or actor in the visual depiction.

Osuba's counsel is preparing a complex appeal before the Second Circuit, *United States v. Navarro (Seth Fishman)*, 22-1600(L); 22-2063 (con). Oral arguments are expected soon in other pending appeals in that court, *United States v. Delaney*, 22-1095 and *United States v. Pratt*, 22-1637. He is preparing for sentencing matters pending in the Eastern District of New York and is representing clients in connection with a variety of assigned cases in the Southern District of New York. Those matters, coupled with counsel's personal travel schedule and the intervening holidays, will make it difficult to prepare an effective petition for *certiorari*.

There will be no prejudice to the government by the delay because Osuba is serving his sentence.

## CONCLUSION

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended sixty days to and including September 14, 2023.

Respectfully submitted,

/s/ Richard D. Willstatter  
Richard D. Willstatter  
*Attorney for Matthew R. Osuba*

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PROOF OF SERVICE

Richard D. Willstatter hereby declares under penalty of perjury under the laws of the United States that he emailed a copy of this motion to Respondent by at the address below:

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Washington, D. C. 20530-0001

Executed on May 26, 2023

/s/ Richard D. Willstatter  
Richard D. Willstatter