No. 23-5566

IN THE

# Supreme Court of the United States

SCOTT A. ANTHONY,
*Petitioner*,
*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

This case involves a significant and recurring legal question: whether secretly recorded videos of a minor engaged in routine, daily activities can be said to depict "sexually explicit conduct" under 18 U.S.C. §§ 2251(a) and 2256(2)(A) when they do not depict the minor or anyone else engaging in conduct that is in any way sexual or sexually suggestive. As the government acknowledges (Opp. 15), the question has divided the courts of appeals. The Third Circuit, along with eight other circuits, says yes. The D.C. Circuit says no.

The circuit conflict is acknowledged. Courts and judges across the country—and indeed the government in this case—recognize this entrenched split. The split creates disuniformity in interpreting an important and highly punitive federal law and leads to disparate outcomes for criminal defendants based on the happenstance of geography. And without this Court's intervention, the discord will persist.

Resolving this conflict is critical. These cases, by the government's own telling, occur frequently. The issue presented is no mere "factbound disagreement," Opp. 13; it goes to the fundamental legal question of whether one can use a minor "to engage in … sexually explicit conduct" by secretly recording a video when the conduct depicted is not sexual at all, much less sexually explicit. Because this recurring legal question arises so regularly, nearly every circuit has now confronted the underlying issues. And there are now multiple pending certiorari petitions raising this very question before the Court.

The Third Circuit's position is also profoundly wrong. The crux of its decision here is its holding that secretly taken videos of a minor showering and getting in and

out of the shower can be found to depict "lascivious exhibition," and hence "sexually explicit conduct," 18 U.S.C. § 2256(2)(A)(v), if the prosecution puts forth evidence from which a jury could infer that the secret filmer would be sexually interested in the images he creates: "[B]ased on the content of the videos, Anthony's repeated production of them, and the steps he took to conceal the videos from his family members, *a rational juror could find that he made the videos to elicit a sexual response in himself*." Pet. App. 9 (emphasis added). But the crime at issue is defined in terms of creating depictions of minors engaging in sexually explicit conduct (here, lascivious exhibition); under the statute's plain terms, it is the conduct depicted that must be sexual and sexually explicit, and the question is *not*, instead, whether the secret filmer would have a sexual reaction to the images of the conduct, conduct which, as here, may well be entirely innocuous and non-sexual. 18 U.S.C. § 2251(a). Conduct of the kind charged here may well violate statutory prohibitions on video voyeurism or invasion of privacy, *see* 18 U.S.C. § 1801; 18 Pa. Stat. § 7507.1(a), but it does not fit within the § 2251(a) offense, which carries a 15-year mandatory minimum sentence, as Congress has chosen to define it.

This case is an excellent vehicle to take up these questions. There is no factual dispute as to the content of the videos, which depict minors showering and getting in and out of the shower, but do not show any sexual or sexually suggestive conduct of any kind. Petitioner's sufficiency objection was preserved and passed on below. The government's assertion that petitioner could have been convicted on an attempt

theory—had the jury been asked to decide that—is both hypothetical and incorrect, as well as irrelevant to the circuit split.

The petition should be granted.

## I. There Is An Entrenched Split Among The Courts Of Appeals On Whether Videos Showing No Sexual Conduct May Be Deemed To Depict "Sexually Explicit Conduct."

**A.** There is a deep and intractable circuit split on the question presented. *See* Pet. 4-7. On one side of the divide, the Third Circuit and eight other circuits conclude that surreptitious videos of minors engaging in routine, non-sexual activities can nonetheless be deemed to depict "lascivious exhibition" of genitals, and thus "sexually explicit conduct," under 18 U.S.C. §§ 2251(a) and 2256(2)(A), based on whether the videographer would have a sexual interest in the images created.[1] On the other side is the D.C. Circuit, which expressly held in *United States v. Hillie* that surreptitious videos of minors engaging in these kinds of quotidian, non-sexual activities do not, as a matter of law, depict "sexually explicit conduct" or "lascivious exhibition" under 18 U.S.C. §§ 2251(a) and 2256(2)(A). 39 F.4th 674, 685 (D.C. Cir. 2022), *aff'g on reh'g*, 14 F.4th 677 (D.C. Cir. 2021). In so holding, the D.C. Circuit in *Hillie* expressly rejected

[1] *See United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (secretly recorded videos depicting minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom video that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. McCall*, 833 F.3d 560, 561-63 (5th Cir. 2016) (bathroom video of a minor undressing, grooming, and showering); *United States v. Donoho*, 76 F.4th 588, 599 (7th Cir. 2023) (surreptitiously recorded bathroom videos and images of minors), *petition for cert. filed* (U.S. Jan. 23, 2024); *United States v. Ward*, 686 F.3d 879, 882-83 (8th Cir. 2012) (video of minor undressing and entering and exiting the shower); *United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023) (secretly recorded videos depicting minor engaging in ordinary grooming activities), *petition for cert. filed*, No. 23-625 (U.S. Dec. 7, 2023); *United States v. Wells*, 843 F.3d 1251, 1255-56 (10th Cir. 2016) (bathroom videos of minor showering and using toilet); *United States v. Holmes*, 814 F.3d 1246, 1247 (11th Cir. 2016) (videos of minor "performing her daily bathroom routine").

the holdings of multiple other courts of appeals. *Id.* at 689 (deeming the decisions of its "sister circuits" to be "unpersuasive"); *see also United States v. Donoho*, 76 F.4th 588, 599-600 (7th Cir. 2023) (explaining that the Court "respectfully disagree[s]" with "the reasoning of *Hillie*" and its reading of § 2256(2)(A)), *petition for cert. filed* (U.S. Jan. 23, 2024); *United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023) (observing that "there is no question that *Hillie* is incompatible with our caselaw"), *petition for cert. filed*, No. 23-625 (U.S. Dec. 7, 2023).[2]

The government concedes the existence of this split. It acknowledges in its brief in opposition that there is "disagreement among the courts of appeals" on whether a depiction of "lascivious exhibition" within the scope of 18 U.S.C. §§ 2251(a) and 2256(2)(A) requires a video to depict a minor engaging in sexual (including sexually suggestive) conduct. Opp. 13; *see also id.* at 14 (discussing *Hillie* and acknowledging this "circuit disagreement"); *id.* at 15 (citing examples of when "other courts of appeals upheld 'lascivious exhibition' convictions where a defendant secretly recorded an unsuspecting minor who was sleeping, undressing to change clothes, using the toilet, or taking a shower"). And, significantly, it has also done so in its own petitions for rehearing en banc, stressing the importance of the issue and the need for

[2] The government mischaracterizes *Hillie* to suggest the D.C. Circuit agrees with other circuits that videos of the kind at issue here are sufficient to support convictions for *attempted* sexual exploitation of a minor under 18 U.S.C. § 2251(e). Opp. 15. *Hillie* itself *reversed* an attempt conviction on sufficiency grounds, for the same reasons that it reversed the convictions on the completed-offense counts. 39 F.4th at 677 (finding "insufficient evidence" to support a conviction for "attempted sexual exploitation of a minor"); *id.* at 692 ("[T]he evidence in this case, viewed in the light most favorable to the Government, is such that no rational trier of fact could find that [the defendant] intended to use [the minor] to display her anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act."). *Hillie*, by its own terms, is in no way limited to completed offenses.

uniformity on this precise question. *See, e.g.*, Gov't Pet. for Reh'g En Banc 1-2, 9, *United States v. Hillie*, No. 19-3027 (D.C. Cir. Dec. 13, 2021) (*Hillie* "conflicts with decisions by every other court of appeals that has construed § 2256(2)(A)(v)"); Gov't Pet. for Reh'g En Banc 14, *United States v. McCoy*, No. 21-3895 (8th Cir. Jan. 30, 2023) (pointing to circuit split and also emphasizing these cases implicate questions "of surpassing importance") (internal quotation marks omitted).[3]

Over the two years since *Hillie* was decided, the split has only solidified. Courts of appeals have doubled down on their existing precedents permitting convictions under 18 U.S.C. §§ 2251(a) and 2256(2)(A) based on surreptitious videos that all agree depict absolutely no sexual or sexually suggestive conduct of any kind. In so doing, these circuits have expressly acknowledged the festering circuit split created by *Hillie*. *See, e.g., United States v. Close*, No. 21-1962, 2022 WL 17086495, at *2 n.2 (2d Cir. Nov. 21, 2022); *Vallier v. United States*, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023); *Donoho*, 76 F.4th at 599-600, *petition for cert. filed* (U.S. Jan. 23, 2024); *Boam*, 69 F.4th at 613, *petition for cert. filed*, No. 23-625 (U.S. Dec. 7, 2023). And three other courts of appeals—the D.C., Seventh, and Ninth Circuits—have recently denied rehearing en banc petitions on this question. *United States v. Hillie*, 38 F.4th 235, 236 (D.C. Cir. 2022); *Donoho*, 76 F.4th 588, *reh'g en banc denied*, No. 21-

[3] In *McCoy*, a panel of the Eighth Circuit held that surreptitiously filmed videos of a minor showering were insufficient to support a § 2251(a) conviction. 55 F.4th 658, 659-60 (8th Cir. 2022), *reh'g en banc granted, opinion vacated*, No. 21-3895, 2023 WL 2440852 (8th Cir. Mar. 10, 2023). The government petitioned for en banc review, citing to the above-described circuit split, and the Eighth Circuit earlier this year agreed to hear the case en banc, 2023 WL 2440852, at *1. By granting the government's petition for rehearing en banc, the Eighth Circuit vacated the panel decision, as the government notes (Opp. 14). The Eighth Circuit's eventual en banc decision in *McCoy* will not disturb or diminish the circuit conflict described in this case.

2489, 2023 WL 6795211 (7th Cir. Oct. 13, 2023); *Boam*, 69 F.4th 601, *reh'g en banc denied*, No. 21-30272 (9th Cir. Sept. 8, 2023); *see also* Pet. App. 1 (Third Circuit order denying rehearing en banc in this case). The circuits are thus dug in, and only this Court can resolve the disagreement.

The government tries to minimize the acknowledged split by declaring *Hillie* to be an "outlier." Opp. 14. But with the D.C. Circuit's having recently denied rehearing en banc in *Hillie*, there is no reasonable prospect of that court reconsidering its "outlier" approach. In any event, this Court routinely grants certiorari in cases in which one circuit court stakes out a position different than a clear majority of other courts of appeals. And criminal defendants on the losing side of lopsided splits also routinely convince the Court to grant certiorari and many end up winning on the merits. *See, e.g., Holguin-Hernandez v. United States,* 140 S. Ct. 762, 765 (2020) (reviewing 8-1 circuit split and ultimately ruling for the criminal defendant); *Peugh v. United States*, 569 U.S. 530, 535 & n.1 (2013) (reviewing 5-1 circuit split and ultimately ruling for the criminal defendant).

The consequences created by the split here are untenable. Defendants who engage in "materially identical … behavior" face drastically different prospects for criminal liability based on where they happen to reside. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring). As Judge Easterbrook has pointed out, geography in this context renders federal law "more favorable" to some defendants than others for no reason, let alone a good one. *Id.* Contrary to the government's claims that "the practical effect of *Hillie* remains unclear," Opp. 14, this stark disharmony in the

circuits creates disparate—indeed, opposite—regimes regarding the same federal statutory offense and the same underlying conduct. This state of affairs is intolerable, especially where the criminal statute in question requires a severe, 15-year mandatory-minimum sentence for each count of conviction, even for first offenders. 18 U.S.C. § 2251(e).

**B.** The division in the circuits regarding the statutory terms "sexually explicit conduct" and "lascivious exhibition" is compounded by broad disagreements among the courts of appeals regarding when and how to apply the *Dost* factors. Several circuits—including the Third Circuit—understand *Dost* as permitting convictions under 18 U.S.C. § 2251(a) based on the creator's lascivious intent even when, as here, there is no depiction of the minor or anyone else engaging in any sexual or sexually suggestive conduct at all. *See, e.g.*, Pet. App. 5-6; *United States v. Larkin*, 629 F.3d 177, 184 (3d Cir. 2010) (endorsing use of the *Dost* factors, including consideration of whether a "pedophile" would find the images "'sexually stimulating'"). *Dost* itself has only generated uncertainty as to when intent matters, and whose intent matters. As Judge Higginbotham has observed, the *Dost* factors "often create more confusion than clarity." *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (concurring opinion).

The government acknowledges that *Dost* has engendered confusion in the lower courts, but contends that "any disagreement among the courts of appeals about the relevance and use of the *Dost* factors is narrow and does not warrant this Court's review." Opp. 16. That contention misunderstands the question presented, which does not call upon the Court to endorse or disapprove the *Dost* factors in the abstract,

in all circumstances. At the same time, the sixth *Dost* factor, which necessitates an inquiry into "whether the visual depiction is intended or designed to elicit a sexual response in the viewer," *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), contributes to the fundamental legal error that warrants this Court's review: namely, the notion that a recording depicting conduct that is indisputably neither sexual nor sexually suggestive somehow becomes a "lascivious exhibition" because of the creator's own sexual predilections. Insofar as the decision below and other circuits look to *Dost* as license to depart so fundamentally from the statutory text, that just reinforces the need to grant review on this issue.

## II. The Third Circuit's Decision Is Wrong.

The decision below is fundamentally wrong on the merits. As a matter of law, a video depicting absolutely no sexual or sexually suggestive conduct does not and cannot depict "sexually explicit conduct" under 18 U.S.C. §§ 2251(a) and 2256(2)(A). As Judge Katsas explained in his opinion concurring in the denial of the government's rehearing en banc petition in *Hillie*, "[a] child engages in 'lascivious exhibition' under section 2256(2)(A)(v) if, but only if, she reveals her anus, genitals, or pubic area in a sexually suggestive manner." *Hillie*, 38 F.4th at 237 (Katsas, J.); *accord Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) ("'lascivious exhibition' of the genitals" means "depicting the genitals in a sexually suggestive way"). In Judge Katsas's words, "[i]n everyday speech, nobody would say that" conduct of the kind depicted here—including showering and getting in and out of the shower, *see* Pet. App. 5; C.A. App. 192—"is sexually explicit conduct." *Hillie*, 38 F.4th at 237. "Nor would anybody say that a girl performing such acts is engaged in sexually explicit conduct just

because *someone else* looks at her with lust." *Id.* at 238. "That [petitioner] may have found the images sexually exciting … can't suffice" where "[t]here is nothing sexually suggestive in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J.)

This understanding of "lascivious exhibition" was once the government's. In previous filings in this Court, the Solicitor General recognized that under "the plain meaning of the statute," "the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)." Gov't Br. 9, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183), 1993 WL 723366, at *9.

The government contends that the plain meaning of "lascivious exhibition" supports its current position. Opp. 8 (invoking the "ordinary meaning" of the phrase with reference to dictionary definitions). But this plain-meaning argument elides a critical feature of the statute: Congress chose to define "sexually explicit conduct" (including "lascivious exhibition") as a feature of the *minor*'s conduct, not of the defendant's own, subjective predilections. As Judge Katsas explained in discussing the plain meaning of "lascivious exhibition," "[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them," because "the definition turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition or whether other viewers have a lustful motive in watching the depiction." *Hillie*, 38 F.4th at 237. Put differently, the statute makes clear that the "lascivious exhibition" is a characteristic of the conduct that the defendant "employs, uses, persuades,

induces, entices, or coerces" the *minor* to "engage in." 18 U.S.C. § 2251(a). To be clear, the defendant's behavior and intent are certainly relevant under another dimension of § 2251(a), as the statute requires proof that the defendant *intended* to "employ[], use[], persuade[], induce[], entice[], or coerce[]" the minor to "engage in" a lascivious exhibition. But in the context of a secretly recorded video that captures only innocuous conduct, the defendant's intent cannot transform that routine, non-sexual activity into something sexual, much less "sexually explicit."

The government likewise misunderstands the significance of the *noscitur a sociis* canon, which counsels that a word's meaning takes on content from the neighboring words with which it is connected. Opp. 8-9. The canon suggests that the meaning of "lascivious exhibition," which appears alongside "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," 18 U.S.C. § 2256(2)(A), should be informed by common features of those terms. Because "the other four listed acts … are all 'sexually explicit conduct' in the ordinary sense of that phrase," "[i]t would be strange if lascivious exhibition of private parts, lone among them, were not." *Hillie*, 38 F.4th at 238 (Katsas, J.).

Nor does it help the government to emphasize that "whether a depiction constitutes a lascivious exhibition of the genitals or pubic area of a child is a question for the factfinder, to be determined using common sense." Opp. 10-11. That may be so, but only as long as the factfinder has sufficient evidence that the defendant's conduct violated the statute. The question here is whether a secretly recorded video can, as a matter of law, constitute a "lascivious exhibition" based purely on the sexual response

of the creator, absent any evidence that the video depicted the minor engaging in sexual conduct or that the defendant had some expectation she would do so. Regardless of what the *Dost* factors may suggest or what a jury may view as common sense, the proof here fell conclusively and legally short of what § 2251(a) requires.

## III. This Case Is An Excellent Vehicle To Review The Recurring Question Presented.

This case presents an excellent vehicle to review the recurring legal question. The question is squarely and directly teed up in the Petition. There is no factual dispute regarding the content of the surreptitious videos at issue: Each video depicts a minor showering or getting in and out of the shower; the minor did not know she was being filmed; and the minor, though nude, was not engaged in any sexual or sexually suggestive conduct whatsoever (and was not expected to). And the question presented was fully preserved and was the sole basis for the decision below.

**A.** The government misleadingly contends that this case is a "poor vehicle in which to address the broader question of what constitutes a 'lascivious exhibition.'" Opp. 18. This is so, the government says, because the "petitioner's conduct was punishable as attempted sexual exploitation of a minor under 18 U.S.C. 2251(e)," and "a defendant may be found guilty of attempting to create a visual depiction containing a lascivious exhibition whether or not the depiction ultimately contains such an exhibition." *Id.* The government concedes, however, that the jury here did not actually consider whether petitioner's conduct violated the statute under an attempt theory. Opp. 5. The government's submission that "[h]ad [the jury] needed to reach" the question of an attempt offense, "it would have found guilt on that equivalent alternative

basis," Opp. 19, is entirely hypothetical and would in no way impede this Court's review of the question presented.

In any event, the government's "attempt" argument is legally wrong on the merits for the same reasons that its position regarding the completed offense is wrong. To prove attempted sexual exploitation of a minor, the government must "introduce[] … evidence from which the jury, without speculation, could reasonably infer that [the defendant] intended to capture" images of a minor "not just in the nude, but of her engaging in sexually explicit conduct" as properly construed. *Hillie*, 39 F.4th at 692. The government introduced no such evidence in this case, and does not argue otherwise, and it is undisputed that the jury here made no finding of guilt with regard to any attempt offenses.

**B.** As noted, multiple petitions for certiorari are currently before the Court concerning the same question presented. *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023), *petition for cert. filed*, No. 23-625 (U.S. Dec. 7, 2023); *United States v. Donoho*, 76 F.4th 588 (7th Cir. 2023), *petition for cert. filed* (U.S. Jan. 23, 2024). The issue warrants the Court's review. Whether or not it is correct on its own terms, the government's claim that this Court has "repeatedly and recently" denied certiorari petitions "raising similar issues," Opp. 7 & n.2, has now been overtaken by events. The courts of appeals in *Hillie*'s aftermath have recognized and continue to point to an explicit and intractable circuit conflict, and the multiple pending certiorari petitions at this juncture, including this petition, present this Court with a much-needed opportunity to address and resolve the issue. The Court should grant review.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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