No.

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW OSUBA,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Petitioner Matthew Osuba petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in *United States v. Osuba*, 65 F.4th 92 (2d Cir. April 5, 2023), amended 67 F.4th 56 (2d Cir. May 4, 2023).

JURISDICTION

The United States District Court, Northern District of New York, had jurisdiction over this criminal case under 18 U.S.C. §3231. Pursuant to 28 U.S.C. §1291, the Second 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 provides that:

> 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 * * * shall be punished as provided under subsection (e).

STATEMENT OF THE CASE

Introduction and Statutory Background

Section 2251(a) of Title 18 of 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) punishes the production of images of children engaged in sex. *See United States v. Skinner*, 70 F.4th 219, 226 (4th Cir. 2023)(Section 2251(a) prohibits the production and transmission of a depiction of a child engaging in sexually explicit conduct); *United States v. Hall*, No. 22-5179, 2023 U.S. App. LEXIS 6780, at *2-3 (6th Cir. Mar. 21, 2023) (to sustain a conviction for production of child pornography under § 2251(a), the government must prove that a defendant produced a visual depiction of a minor engaged in sexually explicit conduct); *United States v. Schopp*, 938 F.3d 1053, 1068 (9th Cir. 2019)("sexual exploitation" is limited to the production of child pornography). Even the Second Circuit has recognized that a violation of Section 2251(a) requires proof of the use of a minor in the production of child pornography. *United States v. Pattee*, 820 F.3d 496, 509 (2d Cir. 2016). 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 divided 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

Matthew Osuba contacted a woman using the app called Kik. She reached out to law enforcement when he expressed a sexual interest in children. He was later confronted by FBI agents in the Northern District of New York and consented to having his phone searched. On the phone, agents found two short videos he had made of himself masturbating near the sleeping 17-year-old daughter of his then girlfriend. The teenager was fully asleep, fully clothed, and was faced away toward the back of the couch so that her face was not visible. In the first video, Osuba masturbates while seated on a chair and, in the second one, ejaculates in the direction of, but not onto, her. Based solely on these videos, the government charged him with a violation of Section 2251(a). (App. A– 67 F.4th at 59) Osuba admitted to agents that he had made the video of himself masturbating in the presence of the sleeping 17-year-old.

B. District Court Proceedings

In July 2019, a federal grand jury indicted Matthew Osuba for sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a) 1 and (e) (Count One), distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2), 2252A(b)(1) and 2256(8)(A) (Count Two), and possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), 2252A(b)(2), and 2256(8)(A).

Defense counsel moved to dismiss the 2251(a) count pretrial. That motion was denied in a written order. (App. B) The court ruled that, "'Sexually explicit conduct' is defined as including the 'lascivious exhibition of the genitals or pubic area *of any person*.' 18 U.S.C. § 2256(2)(A)(v) (emphasis added). Under a plain reading of § 2256(2)(A)(v), it [is] not necessary that the displayed genitalia be that of the child. Here, the defendant's display of his genitals while he masturbated is sufficient evidence supporting this element of the charge." (App. B at 8) The case proceeded to trial at which Osuba was convicted. Defense counsel moved for a judgment of acquittal at the close of the government's case. The motion was denied. The prosecutor argued that, by filming himself masturbating in the presence of the sleeping girl, Osuba used her to take part in sexually explicit conduct to produce the videos. Mr. Osuba was convicted.

After trial, counsel filed a Rule 29 motion alleging that the videos could not qualify as child pornography and so the government had failed to prove the 2251(a) offense. The motion was denied. (App. B) Relying on its reasoning in denying the pretrial motion, the district court found that the question of whether the videos

constituted the production of child pornography could be and was properly determined by the jury. (NDNY Dkt. 141 at 14-15)

The district court sentenced Osuba to serve the statutory maximum sentence: 360 months on Count One consecutive to 240 months on Count Two and 240 months on Count Three, for a total of 70 years' imprisonment.

C. Appellate Court Proceedings

1. Petitioner's Argument

On appeal, Mr. Osuba argued that the district court erred in denying his motion for a judgment of acquittal because the videos at issue in count one showed only an adult engaging in solo masturbation in the presence of 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 involving an offender making a video of himself engaging in his own, solo sexual act nearby a fully clothed, sleeping minor.

In support of his reading, Mr. Osuba first explained that in ordinary usage, the word "use" connotes action or activity. And beyond the verb "use," Mr. Osuba noted that §2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Thus, Mr. Osuba 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 further support for his reading, Mr. Osuba 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, Mr. Osuba 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, Mr. Osuba argued that if "uses" were interpreted broadly to mean employ in any sense, it would subsume the other words, rendering them surplusage.

Mr. Osuba argued that the videos couldn't qualify as child pornography, which is defined federally as a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A). He argued that the Section 2251(a) was enacted as part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 (1978) ("the PCASE Act"). That law was directed at the commercial pornography industry, including regulations for checking the age of "actors" to verify that they are adults. 18 U.S.C. § 2257(b)(1). The PCASE Act was concerned with pornographers using "actors" or "performers" who were minors. Pub.L. No. 95–225, § 2(a), 92 Stat. 7 (1978) (enacting 18 U.S.C. § 2253(3), later redesignated as 18 U.S.C. § 2255(3), which defined "producing" as "producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit "). Both the Act's findings and the Supreme Court cases referencing the Act, speak to the use of

"performers" in these films. *See United States v. X-Citement Video Inc.*, 513 US 64, 66 (1994) (proof required that a producer knowingly used a minor as a performer engaging in sexually explicit conduct). The PCASE Act criminalized the production of child pornography, particularly those who would "employ, use, persuade, entice, or coerce a minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct." 18 U.S.C. § 2251(a)(1978). Osuba argued that the reason that these sorts of images do not receive protection under the First Amendment is because they are "intrinsically related to the sexual abuse of children." *See Singer v. United States*, 380 U.S. 24, 37–38 (1965).

Mr. Osuba argued that the word "use" in § 2251(a) means to actively deploy a minor. "Although variously defined, the word use, in legislation as in conversation, ordinarily signifies 'active employment.'" *Jones v. United States*, 529 U.S. 848, 855 (2000) accord *Voisine v. United States*, 136 S. Ct. 2272, 2278, n.3 (2016) (to use means to convert to one's service or to employ).

Osuba argued that the government's position would lead to absurd results. As the *Howard* court put it, "The government's interpretation is strained and implausible. Indeed, 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 721. Mr. Osuba argued that the offense requires proof 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.

2. The Second Circuit's Decision

A Second Circuit panel affirmed the judgment, announcing its disagreement with the Seventh Circuit Court of Appeals decision in *Howard* and its agreement with the Eleventh Circuit Court of Appeals' decision in *United States v. Dawson,* 64 F.4th 1227 (11th Cir. 2023) insofar as it found that Osuba could commit the § 2251(a) offense without the minor engaging in the specified conduct.[1]

The Second Circuit agreed with the *Howard* court that Section 2251(a) requires proof that the minor must engage in the sexually explicit activity. 67 F.4th at 62 citing 968 F.3d at 721–22. Yet, the panel wrote that a rational jury could have concluded, beyond a reasonable doubt, that Osuba "used the minor to engage in sexually explicit conduct because his sexual activity was wholly directed toward her, in a way that rendered her a participant (albeit a passive one) in that activity." 67 F.4th at 63.

The panel found that by creating a video that depicted him masturbating in a manner that was "visibly directed toward a minor who was physically present," Osuba acted sexually upon her "inanimate body." *Id.* The panel agreed with the *Dawson* decision's finding that the 2251(a) offense was proven even when a child "was passively involved in [the defendant's] sexually explicit conduct by serving as the object of [his] sexual desire." *Id.* quoting 64 F.4th at 1238. In reaching its conclusion, *Dawson* expressly rejected the Seventh Circuit's interpretation of §2251(a) in *Howard*. *See id.*

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[1]Counsel for Dawson has filed a petition for certiorari; a petition raising the same issue was also filed in *United States v. Poulo*, No. 21-11425, 2023 WL 2810689, (11th Cir. April 6, 2023), that was consolidated with *Dawson* by the Circuit Court. Those petitions are pending as 22-7855 and 22-7851, respectively.

The panel relied on opinions from the Third and Eighth Circuits citing *United States v. Finley*, 726 F.3d 483, 495 (3d Cir. 2013) and *United States v. Lohse*, 797 F.3d 515, 520–21 (8th Cir. 2015) for the proposition that "a minor may be used to engage in sexually explicit conduct passively." 67 F.4th at 63-64. The panel thought that while Osuba did not have physical contact with the minor who was fully clothed and sleeping, it was enough that his conduct was "so directed toward the minor that it engaged her, albeit passively, in sexually explicit conduct." 67 F.4th at 64.

The Second Circuit panel suggested that its decision was not at odds with that of the *Howard* court. Although the Seventh Circuit found that the government had 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," 968 F.3d. at 721 (emphasis in original), the Second Circuit suggested that the *Howard* court rejected only the government's argument "that the statute required only the defendant, not the minor, to engage in the proscribed conduct." 67 F.4th at 64. In other words, because the Second Circuit thought that a minor's mere presence was enough for her passive participation, it claimed it was reaching an issue not raised by the government in the *Howard* appeal. In Osuba's case, the government argued that Osuba "used" the minor,[2] but the Circuit panel found she was used even though she did not engage in the sexually explicit conduct. In reality, the Second Circuit panel sought to

[2] In its appellate brief, the government argued, "The law does not require the restrictive understanding of the word "use" in §2251(a) that Osuba suggests." 2d Cir. Dkt. 110 at 33.

avoid a circuit spilt with the Seventh Circuit, but in the end, it adopted a rule that cannot be squared with *Howard* and instead aligns with the Eleventh Circuit's opinion in *Dawson*.

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 Osuba's conviction which resulted in thirty years in prison, because he made visual depictions of himself engaging in solo, adult-only masturbation nearby a fully clothed, sleeping 17-year-old girl. 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 Third, Eighth, Ninth, Eleventh 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" of 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.

The Second Circuit's opinion that a minor's so-called "passive participation" in the sexual activity amounts to the same conflict with the Seventh Circuit's opinion as does that of the Eleventh Circuit. The question of whether the minor must engage in

the sexual activity or performance divides the lower courts.

The Third Circuit found that a jury could find a defendant "'use[d]' a minor to engage in sexually explicit conduct 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. *Finley*, 726 F.3d at 495.

The District of Columbia Circuit Court found that Section 2251(a) requires the government to prove that a defendant filmed a victim engaging in overt sexual activity. *United States v. Hillie*, 14 F.4th 677, 687 (D.C. Cir. 2021). The *Hillie* court relied on *New York v. Ferber*, 458 U.S. 747 (1982), *United States v. X-Citement Video*, 513 U.S. 64 (1994), and *United States v. Williams*, 553 U.S. 285 (2008) to reverse the conviction, finding no rational jury could have convicted the defendant. *Id*. at 687.

The Eighth 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." *Lohse*, 797 F.3d at 521–22.

As the Seventh Circuit pointed out, however, Lohse's argument "was both unpreserved in the district court and poorly developed on appeal. Indeed, the Eighth Circuit could not tell if the defendant was challenging the jury instructions or the sufficiency of the evidence." *Howard*, 968 F.3d at 723.

The Ninth Circuit has held that a defendant "used" a minor to create child pornography when he secreted cameras to film her masturbating if the government

proves the defendant used the minor to create the child pornography, that is, "the minor engaged in 'sexually explicit conduct.'" *United States v. Mendez*, 2022 U.S. App. LEXIS 15670 at *4 (9th Cir. June 7, 2022) (mem.).

The Eleventh Circuit held 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. *See Dawson*, 64 F.4th at 1236. 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 Howard*, 968 F.3d at 721.

The Second 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. 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 Howard,* 968 F.3d 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*. Indeed, the same logical problem attends to the Second Circuit's finding that the minor can

"passively" engage in sexually explicit conduct merely by being the object of the defendant's sexual interest. *Osuba,* 67 F.4th at 64. By that logic, a rational jury could convict even if the child is not physically present at all but is merely seen on a video or an image.

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

This Court should resolve the lower courts' disagreement about what it means to "use" a minor "to engage in" sexually explicit conduct and thereby produce child pornography. This Court has not hesitated 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). On several occasions, this Court has also interpreted the meaning of the word "use" in a statute, most recently in *Dubin v. United States*, 143 S. Ct. 1557 (2023) (finding that "use" implies action and implementation but takes on different meanings depending on context so that the Court will look not only to the word itself, but also to the statute and the surrounding scheme, to determine the meaning Congress intended). *Id.* at 1565.

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. Osuba received

the full 30-year sentence. And he is not alone. The 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. The government's aggressive use of 2251(a) prosecutions to imprison people who did not create child pornography is reason enough to curtail the use of a statute where it is employed to punish those who are not within its reach.

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). But engagement in sexually explicit conduct has to mean more than that minor (or their image) was the object of the producer's sexual interest.

CONCLUSION

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

Respectfully submitted,

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