No.

IN THE

Supreme Court of the United States

TEL JAMES BOAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2251(a) makes it a crime to "use[] … any minor to engage in … any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2252A makes it a crime to possess "child pornography," which § 2256(8) defines as a "visual depiction" involving "the use of a minor engaging in sexually explicit conduct." "Sexually explicit conduct" in these provisions is defined, in turn, to include "lascivious exhibition of the … genitals … or pubic area of any person." 18 U.S.C. § 2256(2)(A).

The question presented, on which there is an acknowledged circuit conflict, is:

Does a defendant produce or possess a depiction involving the use of a minor engaging in "lascivious exhibition," and thus "sexually explicit conduct," under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A), by secretly recording a nude minor showering or engaging in ordinary grooming activities, when the video depicts absolutely no sexual or sexually suggestive conduct of any kind?

RELATED PROCEEDINGS

United States of America v. Tel James Boam, No. 21-30272 (9th Cir. judgment entered May 30, 2023)

United States of America v. Tel James Boam, No. 4:20-cr-00188-BLW-1 (D. Idaho judgment entered Dec. 15, 2021)

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INTRODUCTION

This case presents an important and recurring question about the scope of federal laws criminalizing the production and possession of child pornography: Do surreptitiously recorded videos of minors showering nude depict those minors engaging in "sexually explicit conduct"—namely, the "lascivious exhibition" of genitals—when the videos do not depict the minor (or anyone else) engaging in sexual or sexually suggestive activity of any kind?

The courts of appeals are intractably divided on that question, with the Ninth Circuit, joined by at least seven other circuits, holding that videos like these can indeed be deemed to depict "sexually explicit conduct," based on the lascivious intent of the person who secretly recorded the minor's innocuous activities. But the D.C. Circuit has expressly rejected that reading, heeding the statutory requirement that the videos depict a minor engaging in sexual or sexually suggestive conduct. The result is an explicit and acknowledged circuit split that will not resolve itself absent this Court's intervention.

The majority approach, exemplified by the Ninth Circuit's decision below, is irreconcilable with the statutory text. As a matter of law, a surreptitious video of a minor merely taking a shower does not depict "sexually explicit conduct," including "lascivious exhibition," under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A). The Ninth Circuit concluded otherwise only after consulting the so-called "*Dost* factors," a list of six considerations identified in a 1986 federal district court decision as relevant to whether a

photograph or video recording depicted a child engaged in sexually explicit conduct. Pet. App. 15a-16a; *see United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). Those factors include the intent of the person who created the photograph or recording. *See Dost*, 636 F. Supp. at 832 ("whether the visual depiction is intended or designed to elicit a sexual response in the viewer").

Although several courts of appeals have come to embrace the *Dost* factors, that widespread acceptance cannot overcome their fundamental incompatibility with the statutory text. As Judges Katsas and Easterbrook have explained, "'[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them.'" *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring) (quoting *United States v. Hillie*, 38 F.4th 235, 237 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc)). "[T]he statutory definition turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition." *Id.* (brackets omitted).

This does not mean that conduct like petitioner's cannot be criminalized. It can be, and is, under the federal video voyeurism statute (18 U.S.C. § 1801) and the laws of many states. But here, the issue is whether the conduct is criminal under the federal child pornography laws with punishment of many decades in prison. The Ninth Circuit and other like-minded courts of appeals are freelancing on the definition of a crime, modifying Congress's clear

limitations on the scope of the federal child pornography laws.

There can be no doubt that the question presented is significant and calls for a uniform national rule: the issue is fundamental to scores of convictions under §§ 2251(a) and 2252A for the production and possession of secretly recorded videos like the ones here. The government has acknowledged as much in seeking en banc review on this issue in multiple circuits because "surreptitious-recording cases occur frequently" and implicate questions "of surpassing importance." Gov't Pet. for Reh'g En Banc 14, *United States v. McCoy*, No. 21-3895 (8th Cir. Jan. 30, 2023) (internal quotation marks omitted). At this point, there is no benefit to further percolation. Almost every circuit has staked out its position, and there is no reason to expect the D.C. Circuit, having recently denied rehearing en banc in *Hillie*, to reconsider the position that has generated this now-entrenched split. This case is an ideal vehicle to decide the question, as the issue was both fully preserved and outcome-determinative.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is reported at 69 F.4th 601 and reproduced at Pet. App. 1a-27a. The relevant proceedings of the district court are unreported.

JURISDICTION

The Ninth Circuit issued its judgment on May 30, 2023. A timely petition for rehearing en banc was

denied on September 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251(a) provides in relevant part:

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

18 U.S.C. § 2252A(a)(5)(B) provides in relevant part:

> Any person who … knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography …shall be punished as provided in subsection (b).

18 U.S.C. § 2256 provides in relevant part:

> (2)(A) "[S]exually explicit conduct" means actual or simulated—
>
> > (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person ....
>
> ***
>
> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct ....

STATEMENT OF THE CASE

Petitioner is charged under 18 U.S.C. §§ 2251(a) and 2252A for secretly recording a minor taking a shower

This is a federal criminal case. Petitioner's convictions arise from a series of videos showing his then-14-year-old stepdaughter T.A. showering nude. Pet. App. 6a-7a. After obtaining these videos through a search of petitioner's iCloud account, the government charged him with 16 counts of attempted sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a)

and one count of possession of child pornography in violation of 18 U.S.C. § 2252A. Pet. App. 5a.

Section 2251(a) imposes a mandatory minimum sentence of 15 years on "[a]ny 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 …." 18 U.S.C. § 2251(a); *see id.* § 2251(e). Section 2252A criminalizes possession of child pornography, defined as "any visual depiction … of sexually explicit conduct … where … the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8). "Sexually explicit conduct" is defined as "(i) sexual intercourse … ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A).

The videos in this case show T.A. "in various stages of undress" or "completely nude" as she showers. Pet. App. 6a. None of the videos depicts T.A. engaging in any sexual activity, she is the only person depicted in the videos, and she did not know she was being filmed. *See, e.g.*, Pet. App. 17a-23a. The government's theory of the crime has always been simply that T.A. was "taken advantage of while she was showering[,] unbeknownst to her." Court of Appeals Excerpts of Record (C.A. E.R.) 5:643 (prosecutor's argument on motion for acquittal).

The district court denies petitioner's motion for acquittal, and the jury convicts on all counts

At trial, petitioner moved for acquittal under Federal Rule of Criminal Procedure 29 after the government's case-in-chief, and again after the close of evidence. Pet. App. 9a. He argued there was no evidence that the videos depicted any "sexually explicit conduct" as required for conviction, given that the videos merely showed T.A. showering, depicted no other person, and contained no showing or suggestion whatsoever of any sexual activity. *See* Pet. App. 8a-9a; C.A. E.R. 5:640-41, 645-46.

The government argued there was sufficient evidence to prove the videos showed a "lascivious display of the genitals," and thus sexually explicit conduct, under the so-called "*Dost* factors" on which the jury would be instructed. C.A. E.R. 5:643. The Ninth Circuit has endorsed these factors, originating from *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), as a way to allow a jury to determine whether an image depicts "a lascivious exhibition of a person's genitals or pubic area (and thus sexually explicit conduct)," based on considerations like "whether the child is fully or partially clothed, or nude" (the fourth *Dost* factor) and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer" (the sixth *Dost* factor). Pet. App. 15a-16a; *see also* C.A. E.R. 1:21-22 (jury instructions).[1]

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[1] The six *Dost* factors are:

Relying on the *Dost* factors, the district court denied petitioner's motion for acquittal, concluding that the government had presented sufficient evidence for the case to go to the jury. Pet. App. 10a; C.A. E.R. 5:648-50, 7:944. In its closing argument, the government emphasized that, in the surreptitious videos, T.A. was simply showering, she "was not engaging in sexual activity," and she "clearly" was not "suggest[ing] sexual coyness or willingness to engage in sexual activity"; indeed, "[s]he didn't know she was being filmed." C.A. E.R. 7:971-72 (prosecutor walking the jury through the *Dost* factors).

The jury found petitioner guilty on all counts. Pet. App. 9a. The district court sentenced him to a term of 45 years' imprisonment. Pet. App. 9a-10a.

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1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017) (quoting *Dost*, 636 F. Supp. at 832).

The Ninth Circuit affirms petitioner's conviction, expressly acknowledging a conflict with the D.C. Circuit

On appeal, petitioner again argued that, because the surreptitious videos of T.A. showering depict no sexual or sexually suggestive conduct of any kind, it necessarily follows that the videos depict no "sexually explicit conduct" under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A), and therefore acquittal is legally compelled, as the convictions cannot stand as a matter of law. Pet. App. 11a.

The Ninth Circuit affirmed, addressing petitioner's challenge in a precedential opinion. The Ninth Circuit concluded "that the district court did not clearly err in finding that the videos reasonably fell within the definition of sexually explicit conduct," and stated that it "reach[ed] the same result under a de novo review of the sufficiency of the evidence." Pet. App. 14a. The court of appeals rejected petitioner's argument that a surreptitious video that shows only a minor showering and depicts no sexual or sexually suggestive conduct cannot, as a matter of law, depict a "'lascivious exhibition' of a person's 'genitals' or 'pubic area'"—the only form of "sexually explicit conduct" that the government placed at issue here. Pet. App. 13a-14a; *see* 18 U.S.C. § 2256(2)(A).

Following existing Ninth Circuit precedent, the court of appeals stated that it was consulting the *Dost* factors as "'a starting point'" in its analysis. Pet. App. 15a. The court placed substantial reliance on the sixth *Dost* factor in particular: "whether the visual depiction is intended or designed to elicit a sexual response

in the viewer." Pet. App. 16a (citing *Perkins*, 850 F.3d at 1121). "Under this factor," the court of appeals asserted, "the apparent motive of the photographer and intended response of the viewer are relevant and inform[] the meaning of lascivious." Pet. App. 19a (internal quotation marks omitted). Pointing to "other act" evidence the government had offered under Federal Rule of Evidence 404(b), the Ninth Circuit reasoned that the jury could find in this case that the videos were "designed to sexually arouse" petitioner. Pet. App. 20a; *see also, e.g.,* Pet. App. 20a ("a jury could reasonably find that the videos were intended to elicit a sexual response in Boam"); Pet. App. 21a ("The evidence … could reasonably demonstrate that Boam intentionally recorded and saved nude videos of T.A. for his sexual arousal."). This, coupled with the evidence that the camera "primarily captured T.A.'s nude body" and that "T.A. is fully nude in the videos"—facts the Ninth Circuit found relevant to the first and fourth *Dost* factors—led the court to conclude "that a rational jury could have found the videos to depict 'sexually explicit conduct,' as defined by 18 U.S.C. § 2256(2)(A)(v)." Pet. App. 18a-19a, 23a.

The Ninth Circuit expressly acknowledged that its holding and reasoning were in direct conflict with the D.C. Circuit on the specific legal question presented. While the D.C. Circuit had held in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), *aff'g on reh'g*, 14 F.4th 677 (D.C. Cir. 2021), that "similar videos" did not depict "lascivious exhibitions of a child's genitals," the Ninth Circuit rejected *Hillie* as "incompatible" with Ninth Circuit caselaw permitting convictions based on the *Dost* factors. Pet. App. 26a. The Ninth Circuit observed that "the D.C. Circuit [in turn

had] explicitly rejected use of the *Dost* factors and [the Ninth Circuit's] decision in *Wiegand*" endorsing those factors. *Id.* (citing *Hillie*, 39 F.4th at 686-90); *see also Hillie*, 39 F.4th at 689 ("declin[ing] to adopt the *Dost* factors" and "find[ing] unpersuasive those decisions of [its] sister circuits," including the Ninth Circuit, "that follow the *Dost* factors").

The Ninth Circuit denied rehearing en banc without comment. Pet. App. 40a-41a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are expressly and intractably divided over whether surreptitious videos of minors depicting no sexual or sexually suggestive conduct of any kind may nonetheless be deemed to depict "lascivious exhibition" of the genitals and thus "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A). This case squarely presents this consequential and recurring question and is an ideal vehicle for answering it. The Ninth Circuit's position is also profoundly wrong: As a matter of law, a video depicting absolutely no sexual or sexually suggestive conduct does not and cannot depict "sexually explicit conduct." This Court should grant certiorari to resolve the conflict in the circuits and to reverse the Ninth Circuit's misguided and legally incorrect ruling.

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

A. The circuits have split on the question presented.

1. The Ninth Circuit in this case expressly acknowledged that its decision was in direct conflict with the D.C. Circuit's decision in *Hillie*, a case involving materially identical facts. Pet. App. 26a. In *Hillie*, as here, the defendant captured surreptitious videos of a minor washing herself and engaging in other routine personal hygiene activities. *Compare Hillie,* 39 F.4th at 678, 686, *with* Pet. App. 7a, 17a. As in this case, the minor in *Hillie* was the only person depicted in the videos and did not know she was being recorded. 39 F.4th at 677-78, 686. And as in this case, although the minor in *Hillie* was nude, she engaged in no sexual conduct of any kind, nor did she do anything that was in any way sexually suggestive. *Id.* at 686. A jury nonetheless found the defendant guilty of sexual exploitation of a minor under 18 U.S.C. § 2251(a), among other offenses. *Hillie*, 39 F.4th at 678. On appeal, Hillie argued there was insufficient evidence for conviction because none of the videos at issue depicted conduct that could be described as a "lascivious exhibition of the … genitals[] or pubic area"—like here, the only category of "sexually explicit conduct" at issue in the case. *See id.* at 681, 691; *compare id.* at 681, 691, *with* Pet. App. 13a-14a.

The D.C. Circuit agreed with the defendant. It held that "lascivious exhibition" under § 2256(2)(A) requires displaying private parts "in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in *any* type of sexual activity." *Hillie*, 39 F.4th at 685. That standard was not met by the videos in question, the *Hillie* court explained, because even though those videos showed the minor's nude body, they only depicted the minor "engaged in ordinary grooming activities, some dancing, and nothing more." *Id.* at 686. Because the minor "never engage[d] in any sexual conduct whatsoever, or any activity connoting a sex act," "no rational trier of fact could find [the minor's] conduct depicted in the videos to be a 'lascivious exhibition of the … genitals' as defined by § 2256(2)(A)" and so acquittal was compelled as a matter of law. *Id.*

The D.C. Circuit in *Hillie* also specifically rejected the government's argument that it should approach the "lascivious exhibition" question "in accordance with the *Dost* factors." *Hillie*, 39 F.4th at 686. The D.C. Circuit faulted the Ninth Circuit in particular for invoking *Dost* to hold that a "picture of a child engaged in sexually explicit conduct within the meaning of 18 U.S.C. §§ 2251 … is a picture of a child's sex organs … presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." *Id.* at 688 (quoting *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (internal quotation marks removed)). The D.C. Circuit further observed that the Ninth Circuit's approach "did not abide by" this Court's construction of almost identical language in similar statutes, and that this Court had "expressly

rejected" reliance on the photographer's "'subjective[]'" sensibilities. *Id.* at 687, 688 (quoting *United States v. Williams*, 553 U.S. 285, 301 (2008)). In an opinion concurring in the denial of the government's petition for rehearing en banc in *Hillie*, Judge Katsas carefully reiterated the panel's commonsense reading of the statute: "Sexually explicit conduct" requires that the video depict sexual or sexually suggestive conduct, and "'lascivious exhibition' means revealing private parts in a sexually suggestive way…. A child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them." *United States v. Hillie*, 38 F.4th 235, 236-37 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc).

In this case, the Ninth Circuit came to the exact opposite conclusion on materially indistinguishable facts, expressly and unequivocally rejecting the D.C. Circuit's ruling and analysis in *Hillie*. The Ninth Circuit held that a jury could conclude that petitioner's surreptitious videos of a minor showering met the statutory requirement of "sexually explicit conduct," in the form of a "lascivious exhibition," notwithstanding that the videos depict no sexual conduct of any kind and likewise depict no sexually suggestive conduct. Pet. App. 13a-14a, 20a-23a. The Ninth Circuit explicitly recognized "there is no question" that its decision was "incompatible" with the D.C. Circuit's holding and rationale in *Hillie*, which it rejected based on prior Ninth Circuit precedent. Pet. App. 26a. It further observed that "the D.C. Circuit explicitly rejected use of the *Dost* factors" and related Ninth Circuit caselaw. *Id.*

In addition to overtly rejecting *Hillie* by name, the Ninth Circuit also rejected *Hillie*'s methodological approach, which focuses on the statutory text. The Ninth Circuit, by contrast, did not begin with the language of the relevant statutes, explaining instead that the "'starting point'" of its analysis was the judicially created *Dost* factors. Pet. App. 15a. It reasoned that the first, fourth, and sixth *Dost* factors allowed a reasonable jury to find that surreptitious videos of a nude minor showering and nothing more depict "sexually explicit conduct" and "lascivious exhibition." Pet. App. 17a-23a. The Ninth Circuit placed great weight on the sixth *Dost* factor to hold that the jury could find that the videos "were intended to elicit a sexual response" in petitioner himself. Pet. App. 20a; *see also id.* at 19a-22a. The crux of the Ninth Circuit's holding is thus that a secretly taken video of a nude minor that depicts no sexual or sexually suggestive conduct of any kind can nevertheless be found (via the *Dost* factors) to depict the minor engaging in "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. §§ 2251(a), 2252A, and 2256, as long as the prosecution introduces evidence that the person making the videos would be aroused by them. *See* Pet. App. 15a-16a, 20a-22a. That holding and reasoning, as the Ninth Circuit itself squarely recognized, is directly contrary to the D.C. Circuit's holding and reasoning in *Hillie*.

2. At least seven other circuits are aligned with the Ninth Circuit on this issue, concluding that surreptitious videos of minors engaging in routine, ordinary, non-sexual activities can depict "lascivious exhibition" and thus "sexually explicit conduct" based on the subjective sensibilities of their creator. *See*

United States v. Goodman, 971 F.3d 16, 19 (1st Cir. 2020) (secretly recorded video depicting minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom videos 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. Miller*, 829 F.3d 519, 524-26 (7th Cir. 2016) (bathroom videos of minors undressing and showering); *United States v. Ward*, 686 F.3d 879, 882-83 (8th Cir. 2012) (video of minor undressing and showering in a recreational vehicle); *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").[2]

These cases, like the Ninth Circuit case at issue here, would come out differently in the D.C. Circuit, insofar as they uphold convictions for depictions of "sexually explicit conduct" where the recordings in question consisted of secret videos of non-sexual activity. Indeed, in its opinion in *Hillie*, the D.C. Circuit expressly rejected not only the Ninth Circuit's case

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[2] The Third Circuit has so held in an unpublished opinion. *See United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitiously filmed videos of minors showering), *petition for cert. filed*, No. 23-5566 (U.S. June 30, 2023) (response requested on Oct. 10, 2023); *cf. United States v. Larkin*, 629 F.3d 177, 184 (3d Cir. 2010) (endorsing use of the *Dost* factors, including consideration of whether "pedophile[s]" would find photographs to be "'sexually stimulating'").

law, but also the approaches of multiple other circuits. 39 F.4th at 689.

3. This sharp and explicit conflict among the courts of appeals will not resolve itself without this Court's intervention. The Ninth Circuit in this case denied a petition for rehearing en banc without comment. *See* Pet. App. 40a-41a. Likewise, the D.C. Circuit denied the government's rehearing en banc petition in *Hillie*. *See* 38 F.4th 235. Both of these rehearing petitions stressed the existence of a conflict in the circuits. Boam Pet. for Reh'g En Banc 7-14; Gov't Pet. for Reh'g En Banc 9-14, *United States v. Hillie*, No. 19-3027 (D.C. Cir. Dec. 13, 2021) (*Hillie* PFREB). And most recently, the Seventh Circuit denied a petition for rehearing en banc without comment in *United States v. Donoho*, a similar case where Judge Easterbrook had noted in a concurring opinion that *Hillie* "rejects [the Seventh] [C]ircuit's approach and reverses a conviction based on facts materially identical to Donoho's behavior." 76 F.4th 588, 602 (7th Cir. 2023), *reh'g en banc denied*, No. 21-2489, 2023 WL 6795211 (7th Cir. Oct. 13, 2023); *see also id.* (recognizing that "[t]he law in some other circuits … is more favorable" to defendants and agreeing with those approaches). For his part, Judge Katsas in *Hillie* acknowledged that "[m]any courts of appeals agree" with a broader reading of "lascivious exhibition" that "cover[s] images of a naked child created by a photographer to arouse his own lustful urges," "even if the child is engaged in no conduct related to sex." 38 F.4th at 238. In Judge Katsas's view, this broader reading simply "cannot be reconciled with the governing statutory text." *Id.* And in her panel dissent in *Hillie*, Judge Henderson plainly stated as well that

Hillie's reading of "sexually explicit conduct" and "lascivious exhibition" split with "our sister circuits' decisions." *Hillie,* 39 F.4th at 694. The circuits are thus dug in on their own positions, while readily acknowledging the explicit inter-circuit disagreement.[3]

B. The circuit conflict on "sexually explicit conduct" is exacerbated by disarray in the courts of appeals regarding whether and how to apply the *Dost* factors.

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. 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). Fundamentally, "the *Dost* test has produced a profoundly incoherent body of case law." Amy Adler, *Inverting the*

[3] In *United States v. 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, Gov't Pet. for Reh'g En Banc 10, *McCoy*, No. 21-3895 (8th Cir. Jan. 30, 2023) (*McCoy* PFREB), 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, and the en banc court held oral argument on September 19, 2023. The Eighth Circuit's eventual en banc decision in *McCoy* will not disturb or diminish the circuit conflict described in this petition.

First Amendment, 149 U. Penn. L. Rev. 921, 953 (2001).

Because the *Dost* factors "risk[] taking the ... inquiry far afield from the already clear statutory text," some courts have "discourage[d]" their "routine use." *United States v. Price*, 775 F.3d 828, 840 (7th Cir. 2014). Courts have been especially critical of the sixth *Dost* factor—the factor that the Ninth Circuit placed great weight on here—which calls for courts and juries to consider "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." Pet. App. 16a. Among the various factors, the sixth is the "most confusing and contentious." *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999). It is "[p]articularly divisive," ensnaring judges in a confusing "thicket." *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019). The sixth factor "does not make clear whether a factfinder should focus only on the content of the image at issue, or whether it may consider the images in context with other images and evidence presented at trial." *United States v. Brown*, 579 F.3d 672, 682 (6th Cir. 2009). And as this case illustrates, the sixth *Dost* factor also shifts the focus from the images themselves to whether the photographer would be aroused by them.[4]

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[4] The Seventh Circuit has not adopted the *Dost* factors, but its test has given rise to similar confusion by relying on a vague and subjective definition of "lascivious exhibition." *See, e.g.*, *Donoho*, 76 F.4th at 601-02 (Easterbrook, J., concurring) (noting that the "standard" for defining "lascivious exhibition" "must be either objective or subjective" and the Seventh Circuit's caselaw going "both ways" "leaves everything" in the interpretation of

Accordingly, multiple courts of appeals have curtailed application of this factor. *See, e.g.*, *United States v. Spoor*, 904 F.3d 141, 150 (2d Cir. 2018) (allowing consideration of the sixth *Dost* factor "only to the extent that it is relevant to the jury's analysis of the five other factors and the objective elements of the image"). Others have barred a subjective-standpoint standard, thereby rendering the sixth factor largely inoperative. As the First Circuit has explained, a test focused on the filmer's own "subjective reaction" would risk turning a "Sears catalog into pornography" based on "a sexual deviant's quirks." *Amirault*, 173 F.3d at 34.

And even those courts of appeals that more broadly accept the *Dost* factors employ materially different versions of them. For example, in the Third Circuit, "more than one factor must be present to prove lasciviousness." *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002). But in the Tenth Circuit, one factor apparently is enough. *See United States v. Wolf*, 890 F.2d 241, 245 n.6 (10th Cir. 1989). And the Eighth Circuit has added two more factors for consideration. *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019).

As this cacophony illustrates, the circuit split that the question presented raises thus implicates not only an acknowledged and fundamental inter-circuit disagreement about the interpretation of critical terms in a federal criminal statute, but also, relatedly, an equally explicit inter-circuit disagreement regarding

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§ 2251(a) to "a jury's sensibilities," in defiance of the notice principles that underlie criminal punishment).

application of the *Dost* factors. *See Hillie*, 39 F.4th at 689. This additional and inter-connected discord serves only to heighten the suitability of, and the need for, this Court's review.

II. The Ninth Circuit's Decision Is Wrong.

As a matter of law, a surreptitious video of a minor that depicts no sexual or sexually suggestive conduct by anyone does not depict any "sexually explicit conduct" or "lascivious exhibition of the … genitals or pubic area." And using the *Dost* factors to allow a jury to find such a depiction where none exists is itself legal error.

1. Section 2251(a) prohibits using "any minor to engage in … any *sexually explicit conduct*" in order to produce "any *visual depiction of such conduct*." (Emphases added.) Likewise, § 2252A prohibits knowingly possessing "an image of child pornography," with § 2256(8) defining "child pornography" with the same operative language as § 2251: "any visual depiction … of sexually explicit conduct," where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." Under both the sections charged here, if the depiction does not involve a minor engaging in "sexually explicit conduct," the statutes are inapplicable.

Section 2256(2)(A) limits "sexually explicit conduct" in this context to five categories:

> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal,

> whether between persons of the same or opposite sex;
>
> (ii) bestiality;
>
> (iii) masturbation;
>
> (iv) sadistic or masochistic abuse; or
>
> (v) lascivious exhibition of the anus, genitals, or pubic area of any person ....

Where, as here, the government could not argue that the first four categories apply and therefore has only ever relied on the fifth category, the question whether surreptitious videos of a minor fall within the scope of these provisions "depends on whether the [minor] engaged in any sexually explicit conduct" as depicted in the recordings at issue, "which in turn depends on whether she made a lascivious exhibition of her genitals." *Hillie*, 38 F.4th at 236 (Katsas, J.).

As Judge Katsas explained in his opinion concurring in the denial of rehearing en banc 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; *accord Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) (defining a "'lascivious exhibition' of the genitals" as "depicting the genitals in a sexually suggestive way"). In other words, at an absolute minimum, the minor must "display[] his or her anus, genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or

an inclination to engage in *any* type of sexual activity." *Hillie*, 39 F.4th at 685. This is the same understanding of "lascivious exhibition" that the Solicitor General has previously embraced, recognizing 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. 9-10, *Knox v. United States*, No. 92-1183, 1993 WL 723366, at *9-10 (U.S. Sept. 17, 1993).

This natural limitation on the plain language of § 2256(2)(A) is especially evident when viewed in the context of a separate federal statute that makes "video voyeurism" a crime. 18 U.S.C. § 1801. Section 1801 applies only in the "special maritime and territorial jurisdiction of the United States," and encompasses anyone who "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy." *Id.* In contrast, the general federal child pornography statutes under which petitioner was charged are not voyeurism statutes, do not encompass mere voyeurism, and require that the image depict a "lascivious exhibition of the … genitals," rather than merely recording an individual's "private area." 18 U.S.C. § 2251, *et seq.*; *see Hillie*, 39 F.4th at 685, 692 n.1. Notably, violating 18 U.S.C. § 1801 carries a maximum term of imprisonment of "one year"—not the decades of punishment under the child pornography statutes. Congress thus criminalized video voyeurism only within specified federal jurisdictions and was aware that similar criminal video-voyeurism prohibitions exist under state laws across the country. H.R.

Rep. No. 108-504, at 2-3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 3292; *see, e.g.,* Idaho Code § 18-6605; Fla. Stat. § 810.145; Ky. Rev. Stat. § 531.100; R.I. Gen. Laws § 11-64-2. Courts that apply the federal child pornography statutes to the same conduct are impermissibly arrogating to themselves Congress's power to decide which crimes to federalize and with what punishment.

Understanding "lascivious exhibition" to require a depiction of the minor engaged in a sexual or sexually suggestive display not only comports with the plain statutory language, it also heeds this Court's precedent on the meaning of "sexually explicit conduct" in § 2256(2)(A) and related provisions. As Justice Scalia explained for the Court in *United States v. Williams*, "'[s]exually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." 553 U.S. 285, 297 (2008) (construing § 2252A). As a category of "sexually explicit conduct," "lascivious exhibition" must therefore involve, at a minimum, an "explicitly portrayed" sexual or sexually suggestive display of private parts. *Id.*

Even before *Williams*, this Court observed that prior amendments to the child pornography statutes where the current definition of "sexually explicit conduct" first appeared, *see* Child Protection Act of 1984, Pub. L. No. 98-292, § 5, 98 Stat. 204, 205 (amending definition previously codified at 18 U.S.C. § 2253), sought "to expand the … statute to its full constitutional limits" following this Court's upholding a New York child pornography statute in *New York v. Ferber*, 458 U.S. 747 (1982). *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74 (1994) (addressing § 2252);

accord Hillie, 38 F.4th at 238 (Katsas, J.). Congress would have understood § 2256's definition of sexually explicit conduct, including lascivious exhibition, to prohibit "works that *visually* depict *sexual* conduct by children" because that is how this Court understood almost identical terms in *Ferber* in upholding their constitutionality. 458 U.S. at 764 (second emphasis added); *see also id.* at 765 (examining New York law banning performances of minors engaged in "sexual conduct," defined as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals'"); *Williams*, 553 U.S. at 296 ("Congress used essentially the same constitutionally approved definition [as *Ferber*] in" § 2256).

2. In light of the statutory text, no reasonable juror could find beyond a reasonable doubt in this case that petitioner used T.A. to produce depictions of sexually explicit conduct under §§ 2251(a) or possess such depictions under § 2252A. The materials at issue here are videos of T.A. showering. T.A did not know she was being recorded, and the videos do not depict the minor (or anyone else) engaging in any sexual conduct of any kind. Pet. App. 6a-7a. The Ninth Circuit did not suggest otherwise. Pet. App. 17a-23a.

"A child who uncovers her private parts" to "bathe does not *lasciviously* exhibit them." *Hillie*, 38 F.4th at 237 (Katsas, J.). "[N]obody would say that it is sexually explicit conduct to uncover private parts simply to … take a shower." *Id.* at 237-38. Because, as in *Hillie*, the minor as depicted in the videos here "never engages in any sexual conduct whatsoever, or any activity connoting a sex act," "no rational trier of fact

could find [her] conduct depicted in the videos … to be a 'lascivious exhibition of the ... genitals' … as defined by § 2256(2)(A)." 39 F.4th at 686. And the government likewise could not prove petitioner "attempted" to use a minor to produce such images because it "introduced no evidence from which the jury, without speculation, could reasonably infer that [petitioner] intended to capture video footage of [T.A.] not just in the nude, but of her engaging in sexually explicit conduct." *Id.* at 692.

3. In holding otherwise, the Ninth Circuit conspicuously ignored the statutory text. Instead, it "'start[ed]'" and ended its analysis of whether the videos depicted "a lascivious exhibition of a person's genitals … and thus sexually explicit conduct" by assessing the "*Dost* factors." Pet. App. 15a. The Ninth Circuit went seriously astray in elevating the *Dost* factors over the text of the United States Code. The criminal statutes that petitioner was charged with violating consist of the terms that Congress enacted into law. They do not consist of a multi-part test invented by a district court that fails to track the actual language of Congress' enactment.

The Ninth Circuit reasoned that sufficient evidence supported petitioner's conviction because, under the sixth *Dost* factor, a reasonable juror could find that the videos "were intended to elicit a sexual response in Boam." Pet. App. 20a; *see id.* ("The fact that Boam's video collection was curated in this way supports a jury finding that the videos were designed to sexually arouse Boam."); Pet. App. 22a ("[A] rational jury could find that the overall contents of the videos reflect that Boam's intent in creating and possessing

the videos was 'to arouse or satisfy' his sexual desires.").

But the court's rationale, and the sixth *Dost* factor, "cannot be reconciled with the governing statutory text." *Hillie*, 38 F.4th at 238 (Katsas, J.). In this setting, the creator's "inten[t]" in making the videos is beside the point. If the "visual depiction" does not show "a minor engaging in sexually explicit conduct," then the court's inquiry is at an end—the statutory elements are simply not satisfied, as a matter of law. 18 U.S.C. §§ 2251(a), 2252A, 2256(2)(A). As Judge Katsas has correctly observed, whether a surreptitious video depicts a minor engaging in "lascivious exhibition" and "sexually explicit conduct" "turns on whether" there is an exhibition depicted that "itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition." *Hillie*, 38 F.4th at 237. No one would "say that a girl performing [ordinary] acts" such as "tak[ing] a shower" "is engaged in sexually explicit conduct just because *someone else* looks at her with lust." *Id.* at 238. As Judge Easterbrook has also rightly put it, "[t]hat [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.

Indeed, this Court "expressly rejected this line of reasoning in *Williams*." *Hillie*, 39 F.4th at 688. *Williams* specifically criticized the Eleventh Circuit for suggesting that statutes criminalizing depictions of "sexually explicit conduct" as defined in § 2256(2)(A) "could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.'" 553 U.S. at 301. "[The] material in fact (and not

merely in [the defendant's] estimation) must meet the statutory definition." *Id.* For example, "[w]here the material at issue is a harmless picture of a child in a bathtub" but the defendant subjectively "believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." *Id.*

The Ninth Circuit's deployment of the *Dost* factors here simply confirms and compounds the error in its statutory construction. Using the *Dost* factors, especially the sixth factor, to allow a jury to find "sexually explicit conduct" where a surreptitious video shows only a minor showering and depicts no sexual conduct of any kind, by anyone, is legal error under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A). In such cases, a judgment of acquittal is legally required, and any conviction must be set aside as a matter of law.

III. The Question Presented Is Important And Recurring.

The question presented is hugely consequential and regularly recurs. Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the definition of "sexually explicit conduct." U.S. Sent'g Comm'n, *Federal Sentencing of Child Pornography: Production Offenses* 17 (2021). And as the government recently told the Eighth Circuit in its petition for rehearing en banc in *McCoy*, "surreptitious-recording cases occur frequently." *McCoy* PFREB at 14. At this point, these prosecutions have become so frequent that nearly every regional circuit has confronted the underlying issues. *See supra* § I.A.

The stakes are significant, both for the petitioner in this case and the many criminal defendants in a similar position. The district court sentenced petitioner to a term of 45 years' imprisonment for making the nude videos in question. This severe sentence is no aberration. A first-time offender convicted of producing even one image under 18 U.S.C. § 2251(a) faces a statutory minimum of 15 years in prison. Such severe punishment should not turn on factors that lack any grounding in the statutory text and apply differently depending on the geographic circuit in which the defendant happens to be charged.

The government cannot deny the importance of the question presented. The government itself has repeatedly sought en banc review in cases raising this very question, including in the D.C. Circuit in *Hillie* and the Eighth Circuit in *McCoy*. The government's petition for rehearing en banc in the D.C. Circuit emphasized the need for uniformity on this question. *See Hillie* PFREB 9. And before the Eighth Circuit, the government likewise sought, and obtained, rehearing en banc based on its argument that surreptitious-recording cases implicate questions "'of surpassing importance.'" *McCoy* PFREB 14 (quoting *Ferber*, 458 U.S. at 757).

IV. This Case Is An Ideal Vehicle To Review The Question Presented.

This case presents an ideal vehicle for review. There is no factual dispute regarding the content of the surreptitious videos at issue: The videos are of a nude minor showering, the videos depict only the minor and no other person, the minor did not know she

was being filmed, and the videos do not depict any sexual conduct of any kind.

The question whether such videos may nonetheless be deemed to depict "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A) was expressly raised, preserved, and ruled upon in both the district court and the Ninth Circuit.

The Ninth Circuit directly addressed the question presented in a precedential opinion. And the outcome of the case and the validity of petitioner's convictions turn solely on that question. The judgment in this case must be reversed, and petitioner's criminal convictions must be set aside, if, as the D.C. Circuit has rightly held, a surreptitious video of a minor that depicts no sexual conduct of any kind cannot as a matter of law depict "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A). The question is squarely and directly teed up in this petition, and the Court should grant the petition and reverse the Ninth Circuit on the merits.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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