No. 23-625

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's opposition does not contest the existence of a circuit split on this issue of "exceptional importance." Gov't Pet. for Reh'g En Banc 15, *United States v. McCoy*, No. 21-3895 (8th Cir. Jan. 30, 2023) (*McCoy* PFREB). As the government acknowledges (Opp. 14-17), the Ninth Circuit, along with eight other circuits, deems secretly recorded videos of minors showering and engaging in ordinary, non-sexual activities to depict "sexually explicit conduct." The D.C. Circuit rejects that notion as contrary to the statutory text. Opp. 14.

Having conceded the split, the government offers no meaningful argument against review. The status quo leads to grossly disparate outcomes for criminal defendants based on the happenstance of geography. By the government's own telling, these types of cases "'occur frequently.'" Pet. 3 (quoting *McCoy* PFREB 14). And without this Court's intervention, the discord will persist.

Much of the opposition is devoted to defending the Ninth Circuit's interpretation on the merits and justifying the lower courts' reliance on the *Dost* factors, but the government's position is entirely divorced from the statutory text. The government maintains that recording a minor taking a shower or grooming herself generates a depiction of that minor engaging in a "lascivious exhibition" of the genitals because the *photographer* has a lascivious response to the depiction he is producing. Opp. 9-10. But the §§ 2251(a) and 2252A offenses turn on there being a depiction of a minor engaging in "sexually explicit conduct." 18

U.S.C. §§ 2251(a), 2256(2)(A); *accord* 18 U.S.C. §§ 2252A(a)(5)(B), 2256(8). Under the statutes' plain terms, it is the conduct depicted or attempted to be depicted that must be sexual and sexually explicit. As Judges Katsas and Easterbrook have emphasized, the question is *not* whether the secret filmer would have a sexual reaction to images that depict no sexual conduct whatsoever. *See* Pet. 2, 17, 22. Nor can the judicially created *Dost* framework disregard the limits of the criminal statute Congress enacted by sweeping in conduct the statute plainly does not proscribe.

This case is an excellent vehicle to take up these questions, and again, the government offers no real argument to the contrary. The government latches onto the fact that most (though not all) of petitioner's counts of conviction were for attempt offenses, rather than a completed offense, Opp. 17-18, but the decision below made clear that it had no "need [to] differentiate" between "attempt" and "completed" counts because the distinction is wholly irrelevant here. Pet. App. 14a n.6. The government's fundamental error in statutory interpretation applies to attempt and completed offenses alike.

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."

The government does not dispute the existence of an entrenched and acknowledged circuit split on the

question presented. It acknowledges that there is "disagreement among the courts of appeals" on whether a depiction of "sexually explicit conduct" within the scope of 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A) requires a video to depict a minor engaging in sexual (including sexually suggestive) conduct. Opp. 16; *see also id.* at 14 (discussing *Hillie* and acknowledging this "circuit disagreement"); *id.* at 15 (citing examples of when "other courts of appeals have 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").

The government tries to minimize the split as unimportant because it is "nascent." Opp. 14. But over the two years since *Hillie* was decided, the split has only solidified, and it will not resolve itself without this Court's intervention. Courts of appeals have doubled down on their existing precedents permitting convictions under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A) based on surreptitious videos that all agree depict absolutely no sexual or sexually suggestive conduct of any kind, by anyone. In so doing, these circuits have expressly acknowledged the ongoing 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); *United States v. Donoho*, 76 F.4th 588, 599-600 (7th Cir. 2023), *petition for cert. filed*, No. 23-803 (U.S. Jan. 23, 2024). And in addition to the Ninth Circuit in this case, three other courts of appeals—the D.C., Third, and Seventh Circuits—have recently denied rehearing en banc petitions on this question. Pet. 16 n.2, 17.

The government cannot make the split go away by declaring *Hillie* to be an "outlier." Opp. 14. With the D.C. Circuit's having recently denied rehearing en banc in *Hillie*, there is no reasonable prospect of that court reconsidering its approach. In any event, this Court routinely grants certiorari in cases where 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 government further contends that "[t]his Court has repeatedly and recently denied petitions for certiorari raising similar issues—including most recently in *Anthony v. United States*, No. 23-5566 (Feb. 20, 2024)—and the same course is warranted here." Opp. 8. But many of those cases were pre-*Hillie*, and arose in different postures and involved different issues and questions presented. Of the nine denials cited by the government, Opp. 8 n. 1, only one—*Cohen v. United States*, 144 S. Ct. 165 (2023) (No. 22-7818)—postdates the denial of en banc review in *Hillie*. The facts and legal issue in *Cohen* are unlike those presented here and in other secret recording cases: the petitioner in *Cohen* sent graphic photographs of his own genitalia to adult women on social media, and challenged a violation of supervised release rather than a conviction under § 2251(a). *See United States*

v. Cohen, 63 F.4th 250, 253-56 (4th Cir. 2023); Petition for Writ of Certiorari 4-5, *Cohen v. United States*, No. 22-7818 (U.S. June 14, 2023).

If anything, the various certiorari denials the government invokes underscore the frequency with which this issue arises and the need for this Court's resolution of a legal issue that continues to generate inconsistent outcomes in the courts of appeals. The conduct in this case, for example, arose in Idaho. If petitioner had engaged in the same conduct in the District of Columbia, he would have faced a starkly different legal regime under the D.C. Circuit's interpretation of the same statutory text. Absent this Court's intervention, defendants who engage in "materially identical … behavior" will continue to face drastically different prospects for criminal liability based on where they happen to reside. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring).

II. The Ninth Circuit's Decision Is Wrong.

The government mostly focuses on the merits, but its vigorous disagreement with *Hillie* only underscores that allowing the acknowledged circuit split to fester any further is untenable. And the decision below is profoundly wrong because it is so starkly unmoored from the statutory text. As a matter of law, a video depicting absolutely no sexual or sexually suggestive conduct of any kind does not and cannot depict "sexually explicit conduct" under 18 U.S.C. §§ 2251(a), 2252A, and 2256(2)(A).

"In everyday speech, nobody would say that … tak[ing] a shower" "is sexually explicit conduct,"

United States v. Hillie, 38 F.4th 235, 237-38 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc), yet that is precisely the conduct depicted here, Pet. App. 6a-7a. And the fact "[t]hat [petitioner] may have found the images sexually exciting … can't suffice" to create criminal liability under the statutes in question where "[t]here is nothing sexually suggestive in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J.). A person, regardless of age, is not engaged in "sexually explicit conduct" or "lascivious exhibition" when taking a routine shower, and the fact that someone is secretly filming it does not transform totally ordinary and non-sexual daily activity into "sexually explicit conduct" and "lascivious exhibition" on the ground that the secret filmer may be sexually interested in the depiction he is producing.

The government does not deny that this was once its understanding of "lascivious exhibition." Opp. 11 n.2; Pet. 23. That the Solicitor General's position in *Knox* was later "denounced" and "condemn[ed]" by President Clinton and the Senate, *id.*, does not justify a reconsidered position that simply ignores the statutory text. To support its current position, the government argues that "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for … himself or like-minded pedophiles." Opp. 9-10 (quoting *United States v. Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016)). But treating the filmer's sexual response to "the videos [he] surreptitiously took" as what causes the videos to depict "lascivious exhibition," *see* Opp. 9, "cannot be reconciled with the governing statutory text," *Hillie*, 38 F.4th at 238 (Katsas, J.), which requires the defendant to "inten[d] that [the] *minor*

engage in … sexually explicit conduct" that is then depicted, 18 U.S.C. § 2251(a) (emphasis added). "[I]t is the photographed child who must [be] engage[d] in 'sexually explicit conduct' under sections 2251(a)" and 2252A, "and thus the child who must [be engaged in] a 'lascivious exhibition' under section 2256(2)(A)(v)." *Id.*

And contrary to the government's assertion, Opp. 10, adhering to the plain statutory language does not prevent these laws from encompassing circumstances where a child is "too young to express sexual desire, or perhaps even unconscious or drugged." The crucial point in any of these scenarios is that if the defendant causes or attempts to cause the minor to engage in sexual or sexually suggestive conduct or to pose in sexually suggestive positions, that would qualify for criminal liability under the statutory text, as would the defendant's possession of any such image, *see* §§ 2251(a), 2252A.

For the same reasons, the evidence here is also legally insufficient to support petitioner's convictions for *attempted* sexual exploitation of a minor. The government says that attempt requires only "proof that the defendant 'intended to and took a substantial step toward producing lascivious videos.'" Opp. 12. But under the plain language that Congress enacted, 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." *United States v. Hillie*, 39 F.4th 674, 692 (D.C. Cir. 2022). There is absolutely no

such evidence in this case, and, indeed, no one has ever argued otherwise.

The government takes issue with our assertion that it "introduced no evidence as to [petitioner's] intent." Opp. 13 (quoting Pet. 26). But the government's objection elides our critical point about the intent that matters: namely, the intent to "capture video footage of [the minor] not just in the nude, but of her engaging in sexually explicit conduct." Pet. 26 (quotation marks omitted). It is that intent that is required under the statute to support a conviction. The defendant's expectation to derive sexual satisfaction from innocuous and wholly non-sexual conduct captured in his videos is insufficient to sustain a § 2251(a) or 2252A offense, even on an attempt theory.

The government's reliance on Judge Katsas' concurrence in the *Hillie* en banc denial (at Opp. 13-14) gets it no further: "[T]he government … d[id] not seek en banc review on th[e]" basis of this attempt argument in *Hillie*, and Judge Katsas' analysis requires crucial evidence that is lacking here: "that [petitioner] hoped to capture sexually explicit conduct, not merely things like changing clothes or using the toilet" or taking a shower. *Hillie*, 38 F.4th at 241 n.1. And the government does not acknowledge that Judge Katsas' concurrence (like Judge Easterbrook's in *Donoho*) is completely at odds with the government on the basic meaning of lascivious exhibition under the statute. *See, e.g.*, Pet. 22, 27.

To be clear, "the defendant's own behavior," Opp. 9, is certainly relevant under another dimension of § 2251(a), as the statute requires proof that the

defendant "employ[], use[], persuade[], induce[], entice[], or coerce[]" the minor to "engage in" a lascivious exhibition "for the purpose of producing any visual depiction" of that sexually explicit conduct. But in the context of a secretly recorded video that captures only innocuous conduct, the defendant's intent cannot transform routine, non-sexual activity into something sexual, much less "sexually explicit" and "lascivious."

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. 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 of routine daily activity can depict a "lascivious exhibition" based purely on the sexual predilections of the video's creator, absent any evidence that the video itself depicted the minor (or anyone else) engaging in sexual or sexually suggestive conduct or that the defendant had some expectation that 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) and 2252A require.

While the government concedes that there is also "disagreement among the courts of appeals about the relevance and use of the *Dost* factors," it cites to their widespread acceptance as a reason to decline this Court's "consideration" of them in this case. Opp. 16, 17. But even if the government were right in its characterization regarding the uniform state of this

acceptance—and it is not, *see* Pet. 18-21—that would not justify deploying a judicially-invented, multi-factor test to displace the clear text of the United States Code. Juries cannot be permitted to find a depiction of "sexually explicit conduct" and "lascivious exhibition" when none exists, and use of the *Dost* factors to allow this result serves only to exacerbate the fundamental statutory-interpretation error in the decision below.

III. This Case Is An Ideal Vehicle To Review The Important And Recurring Question Presented.

There are no factual complications in this case. The government does not dispute that the videos here depict a minor showering nude; that no one else was in the videos; that the minor did not know she was being filmed; and that the minor, though nude, was not engaged in any sexual or sexually suggestive conduct whatsoever (and was not expected to). Pet. 29-30.

The government contends nonetheless that "[t]he inchoate nature of most of petitioner's counts" makes this case a poor vehicle to address the question presented. Opp. 17. But the Ninth Circuit did not address any distinction between attempted and completed offenses, which it found was completely irrelevant. Pet. App. 14a n.6. And the government is wrong about attempt anyway for the reasons shown above: If, as *Hillie* correctly holds, "lascivious exhibition" requires sexual or sexually suggestive conduct, then the evidence here is legally insufficient to support petitioner's attempt convictions, because it is undisputed

that there is zero evidence that petitioner attempted to secretly record any sexual or sexually suggestive conduct of any kind, by anyone. *See* Pet. 26; Opp. 13.

Moreover, the government concedes "the possession count [under 18 U.S.C. § 2252A(a)(5)(B)] does require proof" "that the recordings actually depicted a lascivious exhibition." Opp. 17. Its speculation that the district court "might well impose the same" sentence "even if petitioner were to prevail on his challenge to the possession conviction" is entirely hypothetical, and in no way impedes this Court's review of the question presented. Opp. 17-18.

The government suggests that the importance of the question presented "and the lopsided circuit conflict with respect to completed offenses likely will diminish" because "the evidence presented in a surreptitious-recording case generally will support a conviction for attempt[]." Opp. 18. As explained, that is simply incorrect, because the attempt theory suffers from the same fundamental textual infirmity as the government's position on the completed offense: ordinary non-sexual activity like daily showering is not "sexually explicit conduct" or "lascivious exhibition," and an individual who surreptitiously records such activity does not, as a matter of law, intend or attempt to produce a visual depiction encompassed by 18 U.S.C. § 2251(a). The government offers no explanation for how the question presented is any less important than when it affirmatively petitioned for rehearing en banc in both *Hillie* and *McCoy* on the ground that the question implicates an acknowledged circuit conflict on a recurring issue of exceptional importance. Pet. 28-29.

CONCLUSION

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

Respectfully submitted,

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