No. 23-6481

IN THE SUPREME COURT OF THE UNITED STATES

ASHLEY NICHOLE KOLHOFF, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for sexually exploiting a minor, in violation of 18 U.S.C. 2251(a) and (e), and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1).

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-6481

ASHLEY NICHOLE KOLHOFF, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2023. The petition for a writ of certiorari was filed on January 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of

sexually exploiting a minor, in violation of 18 U.S.C. 2251(a) and (e), and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1). Judgment 1. She was sentenced to 15 years of imprisonment, to be followed by 15 years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. In 2020, petitioner created an account at "Rapey.su," a website that facilitates the production and dissemination of child pornography. Pet. App. 2a. Petitioner then took photos of a nude minor girl, including close-up images of the victim's genitals and anus in which petitioner used her hand to spread apart the victim's labia and to expose the victim's anus to the camera. Ibid.; see Presentence Investigation Report (PSR) ¶ 13. Petitioner distributed the images to numerous other users on the website and offered sexual contact with herself and the minor victim. Pet. App. 2a; PSR ¶¶ 12-13.

A grand jury in the Eastern District of Virgina returned an indictment charging petitioner with sexually exploiting a minor, in violation of 18 U.S.C. 2251(a) and (e), and distributing child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1). Indictment 1-2. Section 2251 prohibits, among other things, "us[ing]" a minor to engage in "sexually explicit conduct" for the purpose of producing a visual depiction. 18 U.S.C. 2251(a). And Section 2252 prohibits, among other things, distributing a visual depiction that "involves the use of a minor engaging in sexually

explicit conduct." 18 U.S.C. 2252(a)(2)(A). For purposes of Sections 2251 and 2252, "'sexually explicit conduct' means actual or simulated" "(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).

Petitioner proceeded to a bench trial. Pet. App. 2a. At the conclusion of the evidence, petitioner moved for a judgment of acquittal on the theory that the photographs were not "lascivious" within the meaning of 18 U.S.C. 2256(2)(A)(v) because they did not depict overt sexual activity. Pet. App. 2a-3a. The district court denied the motion, stating that "there can be no question in my mind" that the images "qualify as a lascivious depiction of the child's genitals by themselves." Id. at 8a-9a. The court found petitioner guilty on both counts. Judgment 1.

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. The court explained that "lascivious exhibition" means "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Id. at 3a-4a (quoting United States v. Courtade, 929 F.3d 186, 192 (4th Cir. 2019), cert. denied, 140 S. Ct. 907 (2020)). The court further explained that while "[a] mere picture of genitals is insufficient on its own to be

lascivious," courts "may consider the context of the pictures" to determine "whether they were designed to sexually stimulate the viewer(s)." Id. at 4a. And the court of appeals agreed with the district court that petitioner's photos depicted sexually explicit conduct because they were staged to focus on the victim's genitals and anus and involved manipulating the victim's body so those parts were more visible, and because the photographs were taken and shared for the purpose of sexually stimulating other users on the "Rapey" website. Ibid.

ARGUMENT

Petitioner renews her contention (Pet. 9-27) that insufficient evidence supported her convictions on the ground that the photos she took of a the minor victim's labia and anus and posted to the "Rapey" website do not depict a "lascivious exhibition of the anus, genitals, or pubic area" of a minor under 18 U.S.C. 2256(2)(A)(v). The court of appeals correctly rejected that contention; its decision does not conflict with any decision of this Court; and any disagreement in the courts of appeals is narrow, nascent, and does not warrant this Court's review. This Court has repeatedly and recently denied petitions for writs of 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.[1]

1. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence.

a. The statutes under which petitioner was convicted criminalize the production and distribution of visual depictions of "sexually explicit conduct." 18 U.S.C. 2251(a); 18 U.S.C. 2252(a). "[S]exually explicit conduct" is defined to include, as relevant here, "actual or simulated * * * lascivious exhibition of the anus, genitals, or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v).

The statute does not define "lascivious exhibition," which accordingly should take its ordinary meaning. See, e.g., Delaware v. Pennsylvania, 598 U.S. 115, 128 (2023). The word "lascivious" means "[i]nciting to lust or wantonness." 8 The Oxford English Dictionary 667 (2d ed. 1989). And "exhibition" means a "visible show or display." 5 The Oxford English Dictionary 537 (2d ed.

---

[1] See, e.g., Cohen v. United States, 144 S. Ct. 165 (2023) (No. 22-7818); Gace v. United States, 142 S. Ct. 2877 (2022) (No. 21-7259); Barnes v. United States, 142 S. Ct. 2754 (2022) (No. 21-6934); Fernandez v. United States, 141 S. Ct. 2865 (2021) (No. 20-7460); Courtade v. United States, 140 S. Ct. 907 (2020) (No. 19-428); Rockett v. United States, 140 S. Ct. 484 (2019) (No. 18-9411); Wells v. United States, 583 U.S. 830 (2017) (No. 16-8379); Miller v. United States, 582 U.S. 933 (2017) (No. 16-6925); Holmes v. United States, 580 U.S. 917 (2016) (No. 15-9571). Other pending petitions for writs of certiorari present similar questions. See, e.g., Boam v. United States, No. 23-625 (filed Dec. 7, 2023); Donoho v. United States, No. 23-803 (filed Jan. 23, 2024).

1989). Here, a rational factfinder could determine that the photos petitioner sent to other users on the "Rapey" website where she manipulated the victim's body to show the victim's labia and anus constituted a visible display designed to incite lust in the viewers. Pet. App. 4a.

Petitioner contends that for an image to depict a lascivious exhibition of the genitals or anus, the exhibition "must be performed in a manner that connotes the commission of some sexual act, either actual or simulated." Pet. 15; see Pet. 12-17. She further contends that the photos here do not "depict the minor's anus, genitalia, or pubic area in a lustful manner that connotes the commission of any sexual conduct." Pet. 23. Those contentions lack merit.

Petitioner's focus on the minor's conduct is misplaced. Although Section 2251 refers to depictions in which a minor "engage[s] in * * * any sexually explicit conduct," the focus of the statutory prohibition is on the defendant's behavior: the defendant must not "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in" such conduct. 18 U.S.C. 2251(a). Thus, "a perpetrator can 'use' a minor to engage in sexually explicit conduct without the minor's conscious or active participation." United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014).

Indeed, because "lascivious" modifies "exhibition," "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for * * * himself or like-minded pedophiles." United States v. Wells, 843 F.3d 1251, 1255 (10th Cir. 2016) (brackets, citation, and emphasis omitted), cert. denied, 138 S. Ct. 61 (2017). Petitioner's contrary reading would implausibly narrow the statute by requiring a child victim to display a lustful manner even if she is unaware that she is being filmed, or too young to express sexual desire -- as undoubtedly was the case with the minor victim here -- or perhaps even unconscious or drugged. See Finley, 726 F.3d at 495.

Petitioner's reliance (Pet. 12-17, 21-23) on United States v. Williams, 553 U.S. 285 (2008), is misplaced. There, the Court addressed a federal law that made it unlawful to "advertise[], promote[], present[], distribute[], or solicit[]" child pornography. Id. at 294 (citation omitted). In rejecting a facial overbreadth challenge to the statute, the Court stated that the lower court had been mistaken in deeming the statute applicable "to someone who subjectively believes that an innocuous picture of a child is 'lascivious.'" Id. at 301. But that passage from Williams did not address the factual difference between "innocuous" and "lascivious" depictions, which is controlled by the statutory definition of the latter term. Although Williams elsewhere described "'[s]exually explicit conduct'" as that

"connot[ing] actual depiction of the sex act rather than merely the suggestion that it is occurring," id. at 297 (emphasis omitted), the Court also recognized that the statutory definition of "sexually explicit conduct" includes "lascivious exhibition of the genitals," id. at 301 (citation omitted), making such exhibition in itself a "sex act." Nor does Williams's reference to "a harmless picture of a child in a bathtub," ibid., foreclose application of the statutory definition to images like the ones here, which are not "harmless."

For similar reasons, petitioner errs in relying (Pet. 19-21) on United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973), New York v. Ferber, 458 U.S. 747 (1982), and United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). According to petitioner (Pet. 19-21), those decisions stand for the proposition that to avoid constitutional difficulty, "lascivious exhibition" must mean the sort of "hard core" depictions of sexual conduct that were described as obscene in Miller v. California, 413 U.S. 15 (1973). That is incorrect; in fact, Ferber recognizes that child pornography may constitutionally be prohibited regardless of whether it is obscene. See Ferber, 458 U.S. at 756; see also X-Citement Video, 513 U.S. at 73-78 (interpreting child-pornography law not limited to obscene material). In any event, none of the decisions on which petitioner relies addressed the interpretive question here, and therefore none forecloses a

finding that the images in this case depicted a "lascivious exhibition" under the ordinary meaning of that phrase as used in Section 2256(2)(A)(v). See pp. 5-7, supra; cf. 200-Foot Reels, 413 U.S. at 125 (addressing a federal statute prohibiting importation of obscene materials); Ferber, 458 U.S. at 773 (addressing a New York statute); X-Citement Video, 513 U.S. at 78 (addressing the mens rea requirement of Section 2252).

2. Petitioner contends (Pet. 17-23) that the decision below conflicts with a recent decision by the D.C. Circuit, and claims (Pet. 9-10, 25-26) that lower courts are divided on whether contextual evidence is permitted to establish that a visual depiction involves a lascivious exhibition of the genitals. But any disagreement in the courts of appeals is narrow, nascent, and do not warrant this Court's review.

a. In United States v. Hillie, 39 F.4th 674 (2022), a divided panel of the D.C. Circuit viewed the phrase "lascivious exhibition" in Section 2256(2)(A)(v) to require the minor victim to display her "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." Id. at 685 (emphasis omitted). But Hillie is an outlier, and any conflict with the decision below does not warrant this Court's review. And even if review of the

circuit disagreement were otherwise warranted, it would be premature, because the practical effect of Hillie remains unclear.

Both before[2] and after[3] Hillie, other courts of appeals have upheld "lascivious exhibition" convictions in situations where, for example, a defendant secretly records an unsuspecting minor who was sleeping, undressing to change clothes, using the toilet, or taking a shower. There is no reason to conclude that those courts would set aside petitioner's convictions for videos showing her manipulating the victim's genitals and anus. And even in the D.C. Circuit, conduct of the type found lascivious here and in other circuits' decisions would be sufficient to support a conviction for attempt under 18 U.S.C. 2251(e), which does not

---

[2] See, e.g., United States v. Goodman, 971 F.3d 16, 19 (1st Cir. 2020); United States v. Spoor, 904 F.3d 141, 146-150 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019); Finley, 726 F.3d at 494-495 (3d Cir.); United States v. Courtade, 929 F.3d 186, 191-193 (4th Cir. 2019), as amended (July 10, 2019), cert. denied, 140 S. Ct. 907 (2020); United States v. Vallier, 711 Fed. Appx. 786, 788 (6th Cir.) (per curiam), cert. denied, 139 S. Ct. 442 (2018); Miller, 829 F.3d at 523-526 (7th Cir.); United States v. Ward, 686 F.3d 879, 881-884 (8th Cir. 2012); Wells, 843 F.3d at 1254-1257 (10th Cir.); United States v. Holmes, 814 F.3d 1246, 1248-1252 (11th Cir.), cert. denied, 137 S. Ct. 294 (2016).

[3] See, e.g., United States v. Close, No. 21-1962, 2022 WL 17086495, at *1-2 & n.2 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023); United States v. Anthony, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022), cert. denied, 2024 WL 674888 (2024) (No. 23-5566); United States v. Clawson, No. 22-4141, 2023 WL 3496324, at *1-2 (4th Cir. May 17, 2023) (per curiam); 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. pending, No. 23-803 (filed Jan. 23, 2024).

turn on the actual image produced. See Hillie, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc) (observing that an attempt conviction could be supportable when a defendant "surreptitiously record[s] girls 'by hiding a video camera in the bathroom,'" because "a jury could readily infer that his interest in the girls [i]s sexual, not sartorial or urological.") (citation omitted). Accordingly, any practical effect of the decision in Hillie remains to be seen.

b. Petitioner errs in contending (Pet. 10) that the Third Circuit in United States v. Villard, 885 F.2d 117 (1989), held that contextual evidence cannot be consulted to evaluate whether a depiction of genitals is lascivious. Villard stated that, in assessing an image, the focus should be on the "intended effect on the viewer," not "the actual effect * * * on the viewer," and that the court "must, therefore, look at the photograph, rather than the viewer." Id. at 125 (emphasis omitted). But the Third Circuit later made clear in United States v. Larkin, 629 F.3d 177 (2010), cert. denied, 565 U.S. 908 (2011), that a factfinder is not prohibited from considering a creator's actions in assessing whether an exhibition of a minor victim's genitals or pubic area is lascivious. See id. at 184. Indeed, Larkin reasoned that a defendant's "design[ing] the image depicted in [a] photograph to arouse" was the factor that "tip[ped] the balance on the side of qualifying the photograph as exhibiting lascivious conduct."

Ibid.; see ibid. (noting evidence that the defendant "trafficked th[e] photograph over the internet to an interested pedophile"); see also, e.g., United States v. Anthony, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022) (secret videos of unsuspecting minors in the bathroom involved lascivious exhibition of the genitals), cert. denied, No. 23-5566 (Feb. 20, 2024).

c. As petitioner acknowledges (Pet. 25-26), courts generally permit factfinders to consider contextual evidence about the defendant's intent when determining whether an exhibition of genitals is lascivious.[4] Courts also generally have recognized 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.[5] The images in

---

[4] See, e.g., United States v. Miller, 829 F.3d 519, 526 (7th Cir. 2016) ("[w]hether the image 'arouses sexual desire' is informed by the intent of the person creating the image"), cert. denied, 137 S. Ct. 2291 (2017); United States v. Ward, 686 F.3d 879, 884 (9th Cir. 2009) (manipulation of child to film pubic area shows that defendant viewed her as a sexual object); United States v. Overton, 573 F.3d 679, 689 (9th Cir.) (evidence surrounding the staging of photographs "provides profound insight into the exhibition seen within the four corners of the photographs"), cert. denied, 558 U.S. 977 (2009); United States v. Spoor, 904 F.3d 141, 151 (2d Cir. 2018) (whether the image is intended to elicit a sexual response in the viewer should be considered to the extent it is relevant to the jury's analysis of other objective elements of the image), cert. denied, 139 S. Ct. 931 (2019); United States v. Brown, 579 F.3d 672, 683-684 (6th Cir. 2009) (applying a "limited context" test that permits consideration of the circumstances in which the images were taken), cert. denied, 558 U.S. 1133 (2010).

[5] See, e.g., Miller, 829 F.3d at 525 (leaving the question "to the factfinder to resolve, on the facts of each case, applying

this case depicting a minor's labia and anus, which were "spread/manipulated" by petitioner using her fingers or hand, Pet. App. 2a (citation omitted), and posted on the "Rapey" website with an intent to arouse users' sexual interest, ibid., would constitute a lascivious exhibition of the genitals or pubic area of the minor victim under any of the various formulations adopted by those courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

MARCH 2024

---

common sense") (citation omitted); United States v. Frabizio, 459 F.3d 80, 85 (1st Cir. 2006) ("'Lascivious' is a 'commonsensical term,' and whether a given depiction is lascivious is a question of fact for the jury.") (citation omitted); United States v. Arvin, 900 F.2d 1385, 1390 (9th Cir. 1990) (describing "'lascivious[ness]'" as a "'commonsensical term'" and "a determination that lay persons can and should make") (citation omitted), cert. denied, 498 U.S. 1024 (1991).