No.

IN THE

Supreme Court of the United States

SHANNON DONOHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH 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." "[S]exually explicit conduct" is defined to include "lascivious exhibition of the anus, 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 a depiction of a minor engaging in "lascivious exhibition," and thus "sexually explicit conduct" under 18 U.S.C. § 2251(a), by secretly recording a nude minor engaging in ordinary daily activities, when the videos and images depict absolutely no sexual or sexually suggestive conduct of any kind?

RELATED PROCEEDINGS

United States of America v. Shannon Donoho, No. 21-2489 (7th Cir. judgment entered Aug. 4, 2023)

United States of America v. Shannon Donoho, No. 3:19-cr-00149 (W.D. Wis. judgment entered July 30, 2021)

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INTRODUCTION

This case presents an important and recurring question about the scope of federal laws criminalizing the production of child pornography: Do surreptitiously recorded videos and images of minors in a bathroom depict those minors engaging in "sexually explicit conduct"—namely, the "lascivious exhibition" of genitals—when the videos and images depict nudity but do not show 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 Seventh Circuit, joined by at least seven other circuits, holding that images like these can indeed be deemed to depict "sexually explicit conduct," based on the lascivious intent of the person who secretly captured the minor's innocuous activities. But the D.C. Circuit has expressly rejected that reading, heeding the statutory requirement that the video or image 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 Seventh Circuit's decision below, is irreconcilable with the statutory text. As a matter of law, a surreptitious image of a minor engaged in ordinary activities like disrobing, showering, and urinating does not depict "sexually explicit conduct," including "lascivious exhibition," under 18 U.S.C. §§ 2251(a) and 2256(2)(A). The Seventh Circuit held otherwise, upholding petitioner's convictions based on an erroneous

interpretation that allows a jury to consider a defendant's motive and intent to find lascivious exhibition by a minor where none is depicted.

Although several courts of appeals have come to embrace this approach, its widespread acceptance cannot overcome its fundamental incompatibility with the statutory text. As Judge Katsas on the D.C. Circuit 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. 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.* Judge Easterbrook would have so held in the decision below, but circuit precedent precluded him from doing so. Pet. App. 28a-30a (opinion concurring in the judgment).

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, including Wisconsin (Wis. Stat. § 942.09). But here, the issue is whether the conduct is criminal under the federal child pornography laws with punishment of many decades in prison. The Seventh 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) predicated on secretly recorded images 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 a 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 as to the convictions at issue.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The Seventh Circuit's opinion is reported at 76 F.4th 588 and reproduced at Pet. App. 1a-30a. The relevant proceedings of the district court are unreported.

JURISDICTION

The Seventh Circuit issued its judgment on August 4, 2023. It denied a timely petition for rehearing on October 13, 2023. On January 2, 2024, Justice Barrett granted petitioner's application to extend the time within which to file a petition for a writ of

certiorari to and including January 25, 2024. 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. § 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 ….

STATEMENT OF THE CASE

Petitioner is charged under 18 U.S.C. § 2251(a) for secretly filming and photographing nude minors in bathrooms

Petitioner's convictions for the production of child pornography arise from secret recordings he made of minors in bathrooms. The videos and images at issue depict two minor females engaging in activities like showering, using the toilet, disrobing, and standing nude.

One of the videos in question showed a minor entering a bathroom and using the toilet, with the camera placed under the bathroom sink. The minor's "buttocks are briefly visible, but her genitals are not visible." Pet. App. 3a (describing video charged in Count 1). A second video showed a different nude minor entering a shower, with the camera apparently placed on the bathtub's faucet. Petitioner entered the bathroom while the minor was in the shower and falsely told her the camera was not recording. Pet. App. 3a (describing video charged in Count 3). A third video showed that minor entering the shower nude, with the camera apparently placed in a basket facing the toilet. Pet. App. 4a (describing video charged in Count 4). The remaining two images at issue show a minor in a bathroom partially and fully nude. Pet. App. 4a (describing images charged in Counts 5 and 7).

Law enforcement officers obtained these videos and images after executing a search warrant at a trailer home that petitioner shared with his

grandmother. The officers collected two GoPro cameras, a hard drive, and other computer devices. Pet. App. 2a. Through forensic examination of these devices, law enforcement recovered the videos and images described above. *Id.* Four of the five relevant videos and screenshots had been deleted on petitioner's devices but were later recovered by a software program. The forensic examiner determined that the images were produced by using the GoPro camera or a media player to capture screenshots from recordings. C.A. App. 88-89; C.A. U.S. Br. 2-5.

Based on this evidence, the government charged petitioner with one count of attempted production of child pornography in violation of 18 U.S.C. § 2251(a) (Count 1), one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2) (Count 2),[1] and seven counts of production of child pornography in violation of 18 U.S.C. § 2251(a) (Counts 3-9). Pet. App. 2a-4a & n.1; C.A. U.S. Br. 16.[2]

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[1] Count 2 involved files depicting child pornography contained on hard drives collected during the search of petitioner's home. *See* Pet. App. 3a n.1. "[T]he images underlying that charge are not related to those at issue here." *Id.* Petitioner did not contest his guilt on Count 2 at trial and did not challenge his conviction on that count on appeal. *Id.*

[2] Count 6 involved an image of a partially nude minor with her leg lifted, displaying her buttocks and pubic area from behind. Counts 8 and 9 involved images depicting Petitioner with a nude minor sitting on his lap. *See* Pet. App. 4a. In the proceedings below, petitioner did not contest the sufficiency of the evidence as to whether those images depicted sexually explicit conduct. *See* C.A. App. 96-98.

The district court rejects petitioner's arguments about the meaning of "lascivious exhibition" and denies petitioner's motion for acquittal

"Because the Government's theory of the case was that [petitioner] had produced or attempted to produce visual depictions of 'sexually explicit conduct' in the form of 'lascivious exhibition[s] of the anus, genitals, or pubic area' of the minors, the parties argued at length over the correct instruction for determining what constitutes a 'lascivious exhibition.'" Pet. App. 5a. Those disputes, in turn, revolved around the so-called *Dost* factors: namely, six factors originating from *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), that purport to guide the jury's evaluation of whether images depict "lascivious exhibition" within the meaning of § 2256(2)(A)(v). In particular, the parties disagreed on the appropriateness of the sixth *Dost* factor: "Whether the visual depiction is intended or designed to elicit a sexual response in the viewer." Pet. App. 7a.[3]

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[3] The other five *Dost* factors are:

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; [and]

The initial draft jury instructions were prepared by the magistrate judge, who included the *Dost* factors. Pet. App. 5a-6a. Defense counsel thereafter objected to the inclusion of the sixth *Dost* factor, explaining that "sexually explicit conduct" must turn on "specific attributes of the image," rather than whether the image was "intended or designed to elicit a sexual response in the viewer." D. Ct. Dkt. 57 at 3-4; *see also* D. Ct. Dkt. 83 at 1-2 (objecting to instruction that "focuses more on the person viewing the image" as opposed to the image itself); D. Ct. Dkt. 94 at 1 (same); C.A. App. 85 (same). After considering the parties' positions on *Dost*, which shifted over the course of the pretrial proceedings, *see* Pet. App. 7a-11a, the district court instructed the jury as follows:

> In order to determine whether a visual depiction is a *lascivious exhibition of the anus, genitals, or pubic area*, you must consider the overall content of the visual depiction, while taking into account the age of the child depicted. Mere nudity does not make an image lascivious; instead, the image must tend to arouse sexual desire by the viewer. Accordingly, the focus of the image must be on the anus, genitals, or pubic area or the image of the anus, genitals, or pubic area must be otherwise sexually suggestive. Ultimately, whether the government has proven an image is lascivious

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> 5. Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity ….

Pet. App. 6a-7a; *see also Dost*, 636 F. Supp. at 832.

> beyond a reasonable doubt is left to you to decide on the facts before you applying common sense.

Pet. App. 10a-11a. The district court overruled petitioner's objection to the sentence stating that "the image must tend to arouse sexual desire by the viewer." Pet. App. 11a.

The parties again debated the meaning of "lascivious exhibition" after closing arguments, in which the government contended that "the relevant inquiry was whether the images were intended to arouse the viewer." Pet. App. 11a. Before the jurors retired for deliberations, the district court further instructed them that they could consider "the photographer's state of mind" in their assessment of whether the images depicted "lascivious exhibition." Pet. App. 11a. The jury returned a guilty verdict on all counts. Pet. App. 2a.

Following that verdict, petitioner renewed his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a), which he had made at the close of the government's case and after the close of trial. Pet. App. 13a-14a; C.A. App. 82, 84. As relevant to the "lascivious exhibition" issue, petitioner argued there was insufficient evidence that the videos and images depicted any "sexually explicit conduct" as required for conviction on Counts 1, 3, 4, 5, and 7, given that these videos and images merely showed minors engaging in routine bathroom activities and contained no showing or suggestion whatsoever of any sexual activity. *See* D. Ct. Dkt. 2, 21-24.

The district court denied petitioner's motion in its entirety. As relevant, the court held that "the jury had a reasonable basis to conclude that the images were intended to elicit a sexual response by the viewer and others like him, thus amounting to a lascivious exhibition of the genitals, anus or pubic region." C.A. App. 98.

The district court sentenced petitioner to a term of 210 months' imprisonment per count on counts 1 and 3-9 (the production charges), to run concurrently with one another, with a 120-month sentence on Count 2 (the possession charge), to run concurrently with the sentence for the other charges. Pet. App. 14a.

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

On appeal, petitioner argued that "lascivious exhibition" under § 2251(a) requires the video or image to depict a minor engaged in sexual or sexually suggestive conduct. The statutory definition, petitioner maintained, is not satisfied by "pictures of nude or partially nude girls performing ordinary, non-sexual acts in bathrooms," regardless of what the "subjective intent of the photographer" may have been. Pet'r C.A. Br. 30, 37. Petitioner thus urged the Seventh Circuit to reverse his convictions on Counts 1, 3, 4, 5, and 7 because the evidence was not sufficient to support a finding of lascivious exhibition for those videos and images, and at a minimum, to vacate his convictions on all counts brought under § 2251(a) (including Counts 6, 8, and 9) because the jury was improperly

instructed with respect to the term "lascivious exhibition." Pet. App. 14a, 25a.

The Seventh Circuit affirmed in a precedential opinion. The Seventh Circuit concluded that the jury "could consider [petitioner's] intent in determining whether the images were lascivious," citing circuit precedent holding that "'a lascivious display is one that calls attention to the genitals or pubic area *for the purpose of eliciting a sexual response in the viewer*.'" Pet. App. 17a-18a. It reasoned that "lasciviousness" must be "an objective quality," but "innocent conduct may in fact constitute a 'lascivious exhibition of the genitals or pubic area'" depending on the creator's "motive and intent" or "*his* peculiar *lust*." Pet. App. 19a-20a (internal quotation marks omitted).

The Seventh Circuit also rejected petitioner's argument that § 2251(a) requires an image or video to depict a minor engaging in sexual or sexually suggestive conduct. In that regard, the Seventh Circuit expressly "disagree[d]" with the reasoning of *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), on which petitioner's view depended. Pet. App. 23a; *see also* Pet. App. 21a-23a. In the Seventh Circuit's view, petitioner's (and *Hillie*'s) construction was unduly "narrow[]." Pet. App. 24a.

Having rejected petitioner's interpretation of the applicable legal standards, the Seventh Circuit concluded there was no error in the jury instructions, and that sufficient evidence supported the jury's "lascivious exhibition" findings on Counts 1, 3, 4, 5, and 7. Pet. App. 25a-27a. On the latter issue, the court

concluded that because the videos and images captured or attempted to capture "the minors nude" and depicted each one's "genitals or pubic area," and because petitioner "possessed a large number of child pornography images unrelated to the images he himself had produced," "these facts allowed a jury to conclude that [petitioner] created these images and videos for the purpose of satisfying his sexual desires." Pet. App. 26a-27a.

Judge Easterbrook concurred in the judgment based on circuit precedent "affirm[ing] a conviction based on hidden-camera movies of young girls taking showers." Pet. App. 28a (citing *United States v. Miller*, 829 F.3d 519 (7th Cir. 2016)). However, he criticized *Miller*'s reliance on "the photographer's intent and personal reactions" as contributing to a "hopelessly vague" standard of "lascivious exhibition." *Id.* In Judge Easterbrook's view, "[t]hat Donoho may have found the images sexually exciting … can't suffice." Pet. App. 28a-29a. Instead, "liability [must] depend on a 'lascivious exhibition' of the genitals"—"which is to say, depicting the genitals in a sexually suggestive way." Pet. App. 29a. Judge Easterbrook aligned himself with the views Judge Katsas expressed in *Hillie*: "[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." Pet. App. 30a (quoting 38 F.4th at 237 (Katsas, J., concurring in the denial of rehearing en banc)). Judge Easterbrook observed that the law in the D.C. Circuit and "some other circuits … is more favorable to Donoho" than that in the Seventh Circuit. Pet. App. 29a.

The Seventh Circuit denied rehearing en banc without comment. Pet. App. 47a-48a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are expressly and intractably divided over whether surreptitious images 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. §§ 2251(a) and 2256(2)(A). This case squarely presents this consequential and recurring question and is an excellent vehicle for answering it. The Seventh Circuit's position is also profoundly wrong: As a matter of law, an image depicting absolutely no sexual or sexually suggestive conduct does not and cannot depict "sexually explicit conduct" regardless of the creator's intent. This Court should grant certiorari to resolve the conflict in the circuits and to reverse the Seventh Circuit's misguided and legally incorrect ruling.

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

A. The circuits have split on the question presented.

1. The Seventh Circuit in this case recognized that its decision conflicted with the D.C. Circuit's decision in *Hillie*, a case involving similar facts. Pet. App. 22a-23a. In *Hillie*, as here, the defendant took

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. 3a-4a. And as in this case, a jury found the defendant guilty of producing child pornography under 18 U.S.C. § 2251(a) when the videos in question depicted no sexual or sexually suggestive conduct of any kind. *Hillie*, 39 F.4th at 678. On appeal, Hillie argued there was insufficient evidence for conviction because none of the recordings depicted conduct that could be described as a lascivious exhibition of the anus, genitals, or pubic area, *id.* at 680—like here, the only category of "sexually explicit conduct" at issue, *compare id.* at 681, 691, *with* Pet. App. 15a.

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 courts that have invoked *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 omitted)). The D.C. Circuit further observed that such an 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." *Hillie*, 38 F.4th at 236-37 (Katsas, J.).

In this case, the Seventh Circuit came to the exact opposite conclusion on materially identical facts, expressly and unequivocally rejecting the D.C. Circuit's ruling and analysis in *Hillie*. The Seventh Circuit held that a jury could conclude that petitioner's

surreptitious videos and images of a minor engaging in routine bathroom activities met the statutory requirement of "sexually explicit conduct," in the form of a "lascivious exhibition," even where the relevant videos and images depict no sexual conduct of any kind and likewise depict no sexually suggestive conduct. Pet. App. 18a-23a. The crux of the Seventh Circuit's decision here is its holding that the prosecution put on sufficient evidence at trial to "allow[] a jury to conclude that Mr. Donoho created these images and videos for the purpose of satisfying his sexual desires." Pet. App. 26a-27a.

The Seventh Circuit did not expressly adopt or endorse the *Dost* factors in the opinion below, but the influence of these factors and the methodology rejected by *Hillie* permeate this case: They informed the jury instructions, Pet. App. 6a; *see also* Pet. App. 10a (final instructions stating that "the image must tend to arouse sexual desire by the viewer"), and were argued in "substance" to the jury, Pet. App. 10a. Indeed, the Seventh Circuit has previously held that "it is not plain error to instruct a jury on the *Dost* factors," *United States v. Russell*, 662 F.3d 831, 843 (7th Cir. 2011), allowing for outcomes like the one here.

2. At least seven other circuits are aligned with the Seventh Circuit on this issue, concluding that surreptitious content of minors engaging in routine, non-sexual activities can depict "lascivious exhibition" and thus "sexually explicit conduct" based not on the content of the videos and images themselves but rather on the subjective sensibilities of their creator. *See United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (secretly recorded videos depicting minor

undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom video that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. McCall*, 833 F.3d 560, 561-63 (5th Cir. 2016) (bathroom video of a minor undressing, grooming, and showering); *United States v. Ward*, 686 F.3d 879, 882-83 (8th Cir. 2012) (video of minor undressing and entering and exiting the shower); *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023) (bathroom videos of a minor showering nude), *petition for cert. filed*, No. 23-625 (U.S. Dec. 7, 2023); *United States v. Wells*, 843 F.3d 1251, 1255-56 (10th Cir. 2016) (bathroom videos of minor showering and using toilet); *United States v. Holmes*, 814 F.3d 1246, 1247 (11th Cir. 2016) (videos of minor "performing her daily bathroom routine").[4]

These cases, like the decision below, 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 images of non-sexual activity. Indeed, in its opinion in *Hillie*, the D.C. Circuit expressly rejected the approaches of multiple circuits. 39 F.4th at 689. In his concurring opinion here, Judge Easterbrook noted that *Hillie* "rejects [the Seventh] [C]ircuit's approach and reverses a conviction based on facts

[4] 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); *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'").

materially identical to Donoho's behavior." Pet. App. 29a; *see also id.* (recognizing that "[t]he law in some other circuits … is more favorable" to defendants and agreeing with those approaches). And the government itself acknowledged as much in unsuccessfully seeking en banc rehearing in *Hillie*. 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); *see also* Gov't Pet. for Reh'g En Banc 10, *United States v. McCoy*, No. 21-3895 (8th Cir. Jan. 30, 2023) (*McCoy* PFREB) (successfully petitioning for en banc review of Eighth Circuit panel opinion following *Hillie*'s approach, based on assertion of circuit split).[5]

3. This sharp and explicit conflict among the courts of appeals will not resolve itself without this Court's intervention. The Seventh Circuit in this case denied a petition for rehearing en banc without comment. *See* Pet. App. 47a-48a. Likewise, the D.C. Circuit denied the government's rehearing en banc petition in *Hillie*. *See* 38 F.4th 235. The Ninth Circuit similarly denied a petition for rehearing en banc in *United States v. Boam*, a case where a certiorari petition on this issue is currently pending (No. 23-625).

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[5] The *McCoy* panel 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). 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.

This intractable conflict has been expressly noted in judges' separate writings. 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. As these observations confirm, the circuits are now dug in on their own positions, while readily acknowledging the explicit inter-circuit disagreement.

B. The circuit conflict on "sexually explicit conduct" is exacerbated by disarray in the courts of appeals regarding the relevance of a defendant's subjective intent.

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 the relevance of the defendant's subjective intent. Whether considered under the *Dost* rubric or couched in other terms as by the panel here, *see, e.g.*, Pet. App. 17a, inquiry into the videographer's subjective sensibilities and other *Dost*-like factors "often create[s] more confusion than clarity," *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring),

and "has produced a profoundly incoherent body of case law" through its elevation of the sexual predilections of individual pedophiles, Amy Adler, *Inverting the First Amendment*, 149 U. Penn. L. Rev. 921, 953 (2001).

Courts that have critiqued *Dost* have been especially critical of its subjective-intent inquiry (factor six) analogous to the one approved here: "Whether the visual depiction is intended or designed to elicit a sexual response in the viewer." Pet. App. 7a; *see also* Pet. App. 10a-11a, 17a. 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, a focus on "the photographer's state of mind" and "*his* peculiar *lust*," Pet. App. 11a, 20a, shifts the focus away from the images themselves to whether the photographer would be aroused by them.

Although the Seventh Circuit did not overtly endorse the *Dost* factors in this case, its test has given rise to similar confusion by relying on a vague and subjective definition of "lascivious exhibition" that encompasses any "'depiction which displays … the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer,'" Pet. App. 25a (quoting *United States v. Knox*, 32 F.3d 733,

745 (3d Cir. 1994)), or any image "that calls attention to the genitals or pubic area *for the purpose of eliciting a sexual response in the viewer*," Pet. App. 17a-18a (quoting *Russell*, 662 F.3d at 843) (cleaned up). As Judge Easterbrook remarked in his concurrence, 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 § 2251(a) to "a jury's sensibilities," in defiance of the notice principles that underlie criminal punishment. Pet. App. 28a.

Accordingly, multiple courts of appeals have curtailed inquiry into the defendant's subjective intent. *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 altogether. 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.

As this cacophony illustrates, the circuit split at issue 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 whether and how to consider the defendant's subjective predilections and other *Dost* factors. *See Hillie*, 39 F.4th at 689. This additional and interconnected discord serves only to

heighten the suitability of, and the need for, this Court's review.

II. The Seventh Circuit's Decision Is Wrong.

As a matter of law, a surreptitious image 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 instructing a jury that it can 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.) Under the section 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 images 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* Pet. App. 29a (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, including in Wisconsin. H.R. Rep. No. 108-504, at 2-3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 3292; *see, e.g.*, Wis. Stat. § 942.09; 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.*

2. In light of the statutory text, the Seventh Circuit erroneously rejected petitioner's challenges to the sufficiency of the evidence and claims of instructional error. As to sufficiency of the evidence, no reasonable juror could find beyond a reasonable doubt in this case that petitioner used nude minors to produce depictions of sexually explicit conduct under § 2251(a) as to the images in question. The materials at issue are images of minors engaging in routine bathroom activities. The minors did not know they were being recorded, and the images do not depict the minors (or anyone else) engaging in any sexual conduct of any kind. Pet. App. 2a-4a. The Seventh Circuit did not suggest otherwise. Pet. App. 2a-4a.

"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 images 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 [the minors] not just in the nude, but of [them] engaging in sexually explicit conduct." *Id.* at 692.

The jury instructions were erroneous for the same reasons. The district court failed to advise the jury that it could find "lascivious exhibition" only if the images depicted a minor engaged in sexual or sexually suggestive conduct. Instead, the court instructed the jury that it needed to find only that the "image … tend[ed] to arouse sexual desire by the viewer" and that the jury could consider "the photographer's state of mind" and subjective reactions without regard to whether the images themselves actually depicted any sexual or sexually suggestive conduct. Pet. App. 10a-11a. Had the jury been properly instructed as to what the law required, there is, at an absolute minimum, a reasonable probability that one or more jurors would have harbored reasonable doubt as to whether the charged videos and images depicted "sexually explicit conduct" in the form of "lascivious exhibition."

3. In holding otherwise, the Seventh Circuit seriously misconstrued the statutory text. The Seventh Circuit reasoned that the prosecution put on sufficient evidence at trial to "allow[] a jury to conclude

that Mr. Donoho created these images and videos for the purpose of satisfying his sexual desires." Pet. App. 26a-27a. This interpretation "cannot be reconciled with the governing statutory text." *Hillie*, 38 F.4th at 238 (Katsas, J.). "[I]t is the photographed child who must engage in 'sexually explicit conduct' under section[] 2251(a)," "and thus the child who must make a 'lascivious exhibition' under section 2256(2)(A)(v)." *Id.* "A video of the child is not itself 'sexually explicit conduct,' but rather is the 'visual depiction of such conduct,' which is what cannot lawfully be produced or possessed." *Id.*

In this setting, the creator's "inten[t]" in making the depiction 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). As Judge Easterbrook correctly observed, "[t]hat [petitioner] may have found the images sexually exciting … can't suffice" where "[t]here is nothing sexually suggestive in the videos" themselves. Pet. App. 28a-29a. 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." *Hillie*, 38 F.4th at 238 (Katsas, J.).

Contrary to the Seventh Circuit's reading of Supreme Court precedent, 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.*

In sum, the Seventh Circuit erred as a matter of law by allowing a jury to convict petitioner for producing videos and images depicting "sexually explicit conduct" when they depicted no such thing.

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 210 months' imprisonment based on the charged videos and images. 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. 18 U.S.C. § 2251(e). 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 *New York v. Ferber*, 458 U.S. 747, 757 (1982)).

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

This case presents an excellent vehicle for review. The videos and images at issue do not depict minors (or anyone else) engaging in conduct that is in any way sexual or sexually suggestive. The question whether such images may nonetheless be deemed to depict "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. §§ 2251(a) and 2256(2)(A) was expressly raised, preserved, and ruled upon in both the district court and the Seventh Circuit.

The Seventh Circuit directly addressed the question presented in a precedential opinion. And the outcome of the case and the validity of the convictions that drove petitioner's 210-month sentence turn solely on that question. The judgment in this case must be reversed, and petitioner's criminal convictions on the relevant counts must be set aside, if, as the D.C. Circuit has rightly held, surreptitious content 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) and 2256(2)(A).[6] The question is squarely and directly teed up in this petition, and the Court should grant the petition and reverse the Seventh Circuit on the merits.

[6] Although petitioner did not raise a sufficiency challenge on the "lascivious exhibition" element of Counts 6, 8, or 9, his objections to the jury instructions encompassed those counts, and petitioner's appeal explicitly preserved the argument that his convictions on those counts should be vacated and remanded for a new trial with proper jury instructions. Pet. App. 25a-26a.

CONCLUSION

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

Respectfully submitted,

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