No. 23-803

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

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

Having conceded a split, the government offers no persuasive 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). Without this Court's intervention, the discord will persist.

The opposition is largely devoted to defending the Seventh Circuit's interpretation on the merits, but the government's position is divorced from the statutory text. The government maintains that recording a minor taking a shower, using the toilet, disrobing, or standing nude 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 this Court in *United States v. Williams*, 553 U.S. 285 (2008), which the government ignores, already rejected the notion that § 2256's definition applies

merely because the defendant "subjectively believes that an innocuous picture of a child is 'lascivious.'" *Id.* at 301. Because the § 2251(a) offense requires a depiction of a minor engaging in "sexually explicit conduct," 18 U.S.C. § 2251(a), under the statute's plain terms it is the conduct depicted or attempted to be depicted that must be sexual and sexually explicit. As Judges Easterbrook and Katsas 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, 19, 23. Nor can a jury's "common sense" allow jurors or a court to disregard the limits of the criminal statute Congress enacted by sweeping in conduct the statute does not proscribe. *Contra* Opp. 18.

This case is an excellent vehicle to consider these questions, and again, the government offers no compelling response. The facts are straightforward and squarely present the question presented. The statutory interpretation question at the heart of this dispute is clearly preserved. And the fact that one of Mr. Donoho's counts of conviction was for an attempt offense, rather than a completed offense, or that there are distinct considerations pertinent to two other counts, in no way impedes the Court's review of the pressing legal question.

The petition should be granted.

I. There Is An Entrenched Circuit Split 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 "disagreement in the courts of appeals" on whether a depiction of "sexually explicit conduct" under 18 U.S.C. § 2251(a) requires a video or image to depict a minor engaging in sexual (including sexually suggestive) conduct. Opp. 16; *see id*. at 14 (discussing *Hillie* and acknowledging "circuit disagreement" and "disagreements among the courts of appeals" on the relevant statutory interpretation questions).

The government tries to minimize the split as unimportant because it is "narrow and nascent." Opp. 9, 14. But rather than divide over a minor legal question, the circuits have irreconcilably split regarding a very significant question of criminal liability. And over the two years since the D.C. Circuit decided *Hillie*, 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) based on surreptitious videos that all agree depict absolutely no sexual or sexually suggestive conduct. 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 State*s, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023); *United States v.*

Boam, 69 F.4th 601, 613 (9th Cir. 2023). And in addition to the Seventh Circuit in this case, three other courts of appeals—the D.C., Third, and Ninth Circuits—have recently denied rehearing en banc petitions on this question. Pet. 18 (*Hillie* and *Boam*); *see id.* at 17 n.4 (*Anthony*).[1]

The government cannot make the split go away by declaring *Hillie* to be an "outlier." Opp. 14. With the D.C. Circuit's having 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 where one circuit court stakes out a position different than a clear majority of other circuits. And criminal defendants in such cases routinely convince the Court to grant certiorari. *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 recently and repeatedly denied petitions for certiorari raising similar issues … and the same course is warranted here." Opp. 9. But many of those cases involved different issues and questions presented. For example, in *United States v. Cohen*, 63 F.4th 250, 253-56 (4th Cir. 2023), the petitioner sent

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[1] The government's attempt to minimize disagreements among the courts of appeals in applying the *Dost* factors, Opp. 16-17, is misplaced, as the petition does not turn on that issue. *See infra* 11.

graphic photographs of his own genitalia to adult women on social media and challenged revocation of supervised release rather than a conviction under § 2251. And in *Boam*, the government emphasized that certiorari was inappropriate because (unlike here) most of the counts of conviction reflected attempt offenses. Gov't Opp. 17-18, *Boam v. United States,* No. 23-625 (U.S. Mar. 11, 2024). Most of the denials the government cites, Opp. 9 & n.3, also predate the denial of en banc review in *Hillie*.

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 significant legal issue that continues to generate inconsistent outcomes in the circuits. 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. Pet. App. 29a (Easterbrook, J., concurring). These cases will continue to arise, and the acknowledged circuit split is not going away.

II. The Seventh Circuit's Decision Is Wrong.

The decision below is unmoored from the statutory text and profoundly wrong. As a matter of law, a video or image depicting no sexual or sexually suggestive conduct does not and cannot depict "sexually explicit conduct" or "lascivious exhibition" under 18 U.S.C. §§ 2251(a), 2256(2)(A). As Judge Easterbrook explained in his concurrence below, "[t]here is nothing sexually suggestive in the videos that Donoho made of girls taking showers and using the toilet." Pet. App.

29a. ""A child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them."" *Id.* (quoting *United States v. Hillie*, 38 F.4th 235, 237 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc)).

a. The government contends "a rational juror could determine that the videos and images petitioner produced" were "designed to incite petitioner's lust." Opp. 10. That is not enough under §§ 2251 and 2256(2)(A), which as this Court made clear in *United States v. Williams*, 553 U.S. 285 (2008), require that the image "in fact (and not merely in [the defendant's] estimation) must meet the statutory definition." *Id.* at 301; *see* Pet. 27-28. "'[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 or whether other viewers have a lustful motive in watching the depiction.'" Pet. App. 29a-30a (Easterbrook, J.) (quoting *Hillie*, 38 F.4th at 237 (Katsas, J.)). By approving instructions telling the jury it could find the images depicted "lascivious exhibition" if they depicted "[m]ere nudity" tending to arouse the photographer's own sexual desire, Pet. App. 10a, 18a-20a, the decision below wrongly permits convictions based on conduct outside the statute's ambit. Pet. 17, 26. The government does not attempt to reconcile this result with *Williams*.

The government does not deny that it once adhered to *Williams*' strictures in its understanding of "lascivious exhibition." Opp. 11 n.4; Pet. 23. That the Solicitor General's position in *Knox* was later "denounced" and "condemn[ed]" by President Clinton

and the Senate, Opp. 11 n.4, does not justify a reconsidered position ignoring 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. 11 (quoting *United States v. Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016)). But treating "the videos and images … produced" as the "exhibition" that is "lascivious," Opp. 10, "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 section[] 2251(a)," "and thus the child who must [be engaged in] a 'lascivious exhibition' under section 2256(2)(A)(v)." *Hillie*, 38 F.4th at 238 (Katsas, J.). "A video of the child is not itself 'sexually explicit conduct,' but rather it is the 'visual depiction of such conduct,' which is what cannot lawfully be produced or possessed." *Id.*

To be clear, "the defendant's behavior," Opp. 10-11, 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 capturing 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 … is a question for the factfinder, to be determined using common sense." Opp. 12. That may be so, but only as long as the factfinder has sufficient evidence that the defendant's conduct violated the statute. The question 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 a jury may view as common sense, the proof here fell conclusively and legally short of what § 2251(a) requires.

Contrary to the government's assertion, adhering to the plain statutory language does not prevent the statute from encompassing circumstances where a child is "too young to express sexual desire, or perhaps even unconscious or drugged." Opp. 11. 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, *see* § 2251(a).

b. For the same reasons, the evidence here is also legally insufficient to support Mr. Donoho's conviction on one count of *attempted* sexual exploitation of a minor (Count 1). The government says attempt requires only "proof that the defendant intended to and took a substantial step toward producing a lascivious

exhibition." Opp. 13. But under the plain language that Congress enacted, to prove attempted sexual exploitation, 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).

The government's reliance on Judge Katsas' concurrence in the *Hillie* en banc denial (at Opp. 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 below) is completely at odds with the government on the basic meaning of lascivious exhibition. *See* Pet. 12, 26-27.

The government suggests a jury could find such evidence in "the other videos and images in the record." Opp. 14. But it does not explain how images of "girls taking showers and using the toilet" that contain "nothing sexually suggestive in" them, Pet. App. 29a (Easterbrook, J.), could allow a jury to find, "without speculation," *Hillie*, 39 F.4th at 692, that Mr. Donoho intended to capture sexually suggestive conduct in Count 1. The images underlying Counts 8 and 9 do not provide the missing link. Even accepting that a jury could conclude those images contain sexually suggestive conduct, they cannot support an inference

that Mr. Donoho attempted to capture a similar image in the photo underlying Count 1, which was taken on a separate occasion and where—as the government acknowledges—Mr. Donoho surreptitiously recorded the minor "us[ing] the bathroom" and nothing more. Opp. 13.

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

There are no factual complications that would impede this Court's review of the question presented. The government does not dispute that the videos and images in counts 1, 3, 4, 5 and 7 depict minors engaged in entirely routine, non-sexual activity. Opp. 3, 18-19.

The government contends nonetheless that this case is a poor vehicle. It asserts Mr. Donoho "forfeited his contention, based on *Hillie*, that the jury instructions should have required the jury to find that the videos and images depicted conduct that connotes sex acts involving a minor." Opp. 17-18 (cleaned up). Yet there is no dispute that Mr. Donoho preserved his sufficiency challenge as to the counts based on surreptitiously obtained images that depict absolutely no sexual or sexually suggestive activity—and these counts squarely raise the question presented. To the extent there are preservation questions regarding Mr. Donoho's challenges to the jury instructions, which Mr. Donoho does not concede, they can be sorted out by the Seventh Circuit on remand.

The government further claims this is a poor vehicle because "the district court did not instruct the jury on the *Dost* factors." Opp. 18. But the petition here neither seeks review of how the courts of appeals "use … the *Dost* factors," *id.*, nor asks this Court to address the proper role of those factors (if any) in instructing a jury. Pet. i, 13. Instead, the question presented addresses the proper interpretation of the statute. *Id.*

Indeed, the heart of this case is the correct interpretation of the statutory terms "sexually explicit conduct" and "lascivious exhibition." Whether considered under the *Dost* rubric or couched in other terms as by the panel here, *see, e.g.*, Pet. App. 17a, the key point is that the Seventh Circuit fundamentally erred in holding that images and videos depicting routine and entirely non-sexual conduct are encompassed by § 2251(a) because the jury could find "that [petitioner] created these images and videos for the purpose of satisfying his sexual desires." Pet. App. 26a. Nothing about the jury instruction could correct the fundamental legal error of incorrectly interpreting the statute to permit convictions based on the secret filmer's own predilections.

As for the government's arguments about counts 6, 8, and 9, Mr. Donoho does not disagree with the government's characterizations of the images or his failure to preserve a sufficiency challenge to whether they depict a minor engaged in sexually explicit conduct. *See* Pet. 6 n.6. But there is no reason to assume that Mr. Donoho would receive the same sentence on remand if this Court were to vacate the convictions on the counts where it is undisputed that he preserved a

sufficiency argument (counts 1, 3, 4, 5 and 7). *See, e.g.*, *United States v. Bennett*, 363 F.3d 947, 955-56 (9th Cir. 2004) ("When a defendant is sentenced on multiple counts and one of them is later vacated on appeal, the sentencing package comes 'unbundled'" and the defendant "must be resentenced.").

Finally, 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. 19. 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 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 sought rehearing en banc in *Hillie* and *McCoy* on the ground that the question implicates an acknowledged circuit conflict on a recurring issue of exceptional importance. Pet. 18.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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