No.

IN THE

Supreme Court of the United States

MATTHEW MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH 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 … 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 videos depicting a minor engaged in "lascivious exhibition," and thus "sexually explicit conduct" under 18 U.S.C. § 2251(a), by secretly recording a nude minor in the bathroom engaged in innocent daily activities like getting in and out of the shower?

RELATED PROCEEDINGS

United States of America v. Matthew McCoy, No. 21-3895 (8th Cir. judgment entered July 15, 2024)

United States of America v. Matthew McCoy, No. 21-3895 (8th Cir. judgment entered Dec. 15, 2022 and vacated Mar. 10, 2023 pursuant to order granting re-hearing en banc)

United States of America v. Matthew McCoy, No. 4:19-cr-00063-DPM-1 (E.D. Ark. judgment entered Dec. 17, 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 of a minor in a bathroom depict the minor engaging in "sexually explicit conduct"—namely, the "lascivious exhibition" of genitals—when the videos do not show the minor (or anyone else) engaging in anything other than innocent daily activities?

The courts of appeals are intractably divided on that question, with a sharply divided 6-5 Eighth Circuit en banc court in this case, joined by at least eight other circuits, holding that videos like these can indeed be deemed to depict "sexually explicit conduct," based on the lascivious intent of the person who secretly 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 must depict a minor engaging in sexual 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 Eighth Circuit's en banc decision below, is irreconcilable with the statutory text. As a matter of law, a surreptitious video of a minor engaged in innocuous daily bathroom activities does not depict "sexually explicit conduct," including "lascivious exhibition," under 18 U.S.C. §§ 2251(a) and 2256(2)(A). The Eighth Circuit en banc majority held otherwise, upholding Petitioner's convictions based on an erroneous interpretation

whereby even images of routine daily tasks "can be considered lascivious if they are intended" by the defendant "to be sexual." Pet. App. 12a.

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). As the five dissenting judges below likewise recognized, a surreptitious video of innocent daily bathroom activity as a matter of law depicts no "sexually explicit conduct" or "lascivious exhibition," and "the subjective intent of the defendant cannot" transform an image that is not lascivious into one that is legally "lascivious for purposes of" § 2251(a). Pet. App. 25a (Grasz, J., dissenting).

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 Arkansas (Ark. Code Ann. § 5-16-102). But here, the issue is whether the conduct is criminal under the federal child pornography laws with punishment of decades in prison. The Eighth 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 acknowledged as much in seeking en banc review on this issue below, as it had in the D.C. Circuit, because "surreptitious-recording cases occur frequently" and implicate questions "of surpassing importance." Gov't Pet. for Reh'g En Banc 14 (PFREB) (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 excellent vehicle to decide the question, as the issue was fully preserved, extensively addressed in the competing opinions below, and outcome-determinative.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The Eighth Circuit's en banc opinions are reported at 108 F.4th 639 and reproduced at Pet. App. 1a-32a. The Eighth Circuit panel's opinion is reported at 55 F.4th 658 and reproduced at Pet. App. 33a-40a. The relevant proceedings of the district court are unreported.

JURISDICTION

The Eighth Circuit en banc issued its judgment on July 15, 2024. Pet. App. 1a. 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 a nude minor getting in and out of the shower

Petitioner's convictions for production of child pornography arise from secret recordings he made of a female cousin, who was 15 years old at the time, engaged in routine bathroom activities. Specifically, Petitioner surreptitiously placed a hidden camera in his home's master bedroom and captured two videos of the minor preparing to get in and exiting the shower, drying off with a towel, and sitting on the toilet. Pet. App. 2a-3a, 34a, 38a.

Based on this evidence, a grand jury charged Petitioner with two counts of sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a). The indictment charged that Petitioner employed, used, persuaded, induced, enticed, or coerced the minor to engage in sexually explicit conduct, and that he did so for the purpose of producing a visual depiction of such conduct. Pet. App. 4a. The sexually explicit conduct alleged was the lascivious exhibition of the genitals. *Id.*

A jury convicts Petitioner after the district court rejects Petitioner's arguments about the meaning of "lascivious exhibition" and denies Petitioner's motion for acquittal

The case proceeded to trial. After the government rested its case and again at the close of evidence, Petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 4a. Petitioner argued that, as a matter of law, the videos do not show "lascivious exhibition" or "sexually explicit conduct" as required for a violation of 18 U.S.C. § 2251(a), because the videos depict only innocent daily activity, such as getting in and out of the shower. *See id.* The district court denied Petitioner's motion for acquittal, although it remarked that it viewed this case as a "close" one "on the facts." Pet. App. 35a, 50a.

At the end of trial, the district court's jury instructions provided the jurors with several factors they could consider in assessing whether the videos depicted "lascivious exhibition" and thus "sexually explicit conduct":

> To decide whether a visual depiction of the genitals or pubic area constitutes a lascivious exhibition, you must consider the overall content of the material. You may consider factors like (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive—that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural

> pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture portrays the minor as a sexual object; and (8) any captions on the pictures.
>
> Pet. App. 5a-6a.[1]

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[1] These instructions built on the so-called "*Dost* factors," a list of six considerations identified in a 1986 federal district court decision as relevant to whether a photograph or video recording depicted a child engaged in sexually explicit conduct. *See United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The six *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;
>
> 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
>
> 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id.

The jury found McCoy guilty on both counts. The mandatory minimum sentence for a conviction under 18 U.S.C. § 2251(a) is 15 years, *see* 18 U.S.C. § 2251(e), and the district court sentenced Petitioner to 210 months' imprisonment. Pet. App. 35a.

A panel of the Eighth Circuit reverses the district court

A panel of the Eighth Circuit reversed Petitioner's convictions, holding that, as a matter of law, "no reasonable jury could have found McCoy guilty beyond a reasonable doubt." Pet. App. 39a. The panel explained that for a visual image to depict sexually explicit conduct, the display of the minor's genitals must be "lascivious." Pet. App. 36a. Under § 2251(a), mere nudity is insufficient, and "a visual depiction is 'lascivious' only if it is sexual in nature." *Id.* (cleaned up). Here, "[t]he videos display innocent daily tasks in a bathroom: getting in and out of the shower, drying off, and using the toilet." Pet. App. 38a.

The panel acknowledged that, in determining whether a depiction is "lascivious," courts "'frequently' consider" the factors enumerated in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). Pet. App. 37a; *see supra* 7 n.1. Applying those factors, the panel determined that although the videos showed the minor nude, i.e., the fourth factor, the factors in general weighed against a finding of lasciviousness. Pet. App. 37a-38a. For example, the minor was not in an unnatural position and the videos do not suggest any "sexual coyness or a willingness to engage in sexual activity." Pet. App. 38a. On the sixth factor, the panel found it irrelevant whether "the videos were

intended to appeal to the defendant's particular sexual interest," explaining that the relevant "inquiry is whether the videos, on their face, are of a sexual character," and not whether they happen to appeal to the individual filmmaker's own idiosyncratic sexual predilections. *Id.* The panel elaborated that, "[e]ven if [Petitioner] intended for the two videos of [the minor] to be sexual in nature, the statute does not ask whether the videos were intended to appeal to the defendant's particular sexual interest. Instead, the inquiry is whether the videos, on their face, are of a sexual character." *Id.*

In a 6-5 decision, the en banc Eighth Circuit overturns the panel and affirms the judgment of the district court

In a sharply divided 6-5 opinion, the Eighth Circuit en banc reinstated Petitioner's convictions, concluding that there was sufficient evidence to support the jury's verdict under 18 U.S.C. § 2251(a).

The en banc majority held that "[a] rational jury could have found that McCoy persuaded, induced, or enticed the minor female to engage in sexually explicit conduct when he steered her to the bathroom with the hidden camera, knowing that she was likely to disrobe, shower, and exhibit her pubic area to the camera." Pet. App. 13a. The majority concluded that it was permissible for a jury to find that Petitioner "viewed the minor female 'as a sexual object,'" and,

therefore, "composed the images in order to elicit a sexual response in a viewer—himself." Pet. App. 16a.[2]

Judge Grasz dissented, joined by Judges Smith, Kelly, Erickson, and Stras. The dissent saw the majority opinion as "ignor[ing] the plain language of 18 U.S.C. §§ 2251(a) and 2256(2)(A)(v) in order to keep an unsympathetic voyeur in prison," and thereby "expand[ing] the scope of the statute beyond its text and into areas that now call into question the constitutionality of this important statutory protection for children." Pet. App. 22a.

Judge Grasz explained that both of the videos in this case featured "mere nudity" that did not meet the statutory definition of "lascivious exhibition" because the activities displayed were neither "lewd" nor "lurid." Pet. App. 24a. The dissent noted that to find the images lascivious, the majority opinion and the government relied on the "subjective intent of the defendant," which "cannot make an image lascivious for purposes of the statute." Pet. App. 25a.

Judge Stras also filed a separate dissent for himself. Judge Stras emphasized that "[t]here is nothing 'lascivious' about someone just 'us[ing] the toilet … or bath[ing],' … which is all we have here," citing and

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[2] Applying a plain-error standard of review because Petitioner had not objected to the district court's jury instructions at trial, the majority further held that there was no reversible error in the instructions, which drew on the *Dost* factors and the Eighth Circuit's Model Criminal Jury Instructions. Pet. App. 6a.

quoting Judge Katsas's opinion concurring in the denial of rehearing en banc in *Hillie*. Pet. App. 32a.[3]

REASONS FOR GRANTING THE WRIT

The courts of appeals are expressly and intractably divided over whether surreptitious images of minors depicting innocent daily activity 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 Eighth Circuit's position is also profoundly wrong: As a matter of law, an image depicting innocuous and quotidian tasks like getting in and out of the shower does not and cannot depict "sexually explicit conduct" regardless of whether the photographer happens to have his own peculiar, sexual interest in the image he creates. This Court should grant certiorari to resolve the conflict in the circuits and to reverse the Eighth Circuit's misguided and legally incorrect ruling.

[3] Judge Kelly also filed a separate dissent, joined by Judges Erickson and Grasz, elaborating primarily on the lack of "usefulness of the outdated *Dost* factors." Pet. App. 19a.

I. There Is An Acknowledged Split In The Courts Of Appeals On Whether Images Of Innocuous Daily Activity May Be Deemed To Depict "Sexually Explicit Conduct."

A. The circuits have split on the question presented.

1. The Eighth Circuit in this case recognized that its decision conflicted with the D.C. Circuit's decision in *Hillie*, a case involving similar facts. *See* Pet. App. 9a; *see also* Pet. App. 32a (Stras, J., dissenting).

In *Hillie*, as here, the defendant took surreptitious videos of a minor engaging in routine bathroom activity. *Compare United States v. Hillie*, 39 F.4th 674, 678, 686 (D.C. Cir. 2022), *with* Pet. App. 2a-3a. And as in this case, a jury found the defendant guilty of producing child pornography under 18 U.S.C. § 2251(a) even though the videos in question depicted innocent daily conduct. *Hillie*, 39 F.4th at 678-79. 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 genitals or pubic area, *id.* at 680-81—like here, the only category of "sexually explicit conduct" at issue, *compare id.* at 681, 691, *with* Pet. App. 11a.

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.*[4]

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 conduct, and "[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe

[4] The D.C. Circuit in *Hillie* also rejected the government's argument that it should approach the "lascivious exhibition" question "in accordance with the so-called *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 (internal quotation marks omitted) (quoting *Wiegand*, 812 F.2d at 1244). The D.C. Circuit 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)).

does not *lasciviously* exhibit them." *Hillie*, 38 F.4th at 236-37 (Katsas, J.).

In this case, a bare majority of the en banc Eighth Circuit came to the opposite conclusion on analogous facts, rejecting the D.C. Circuit's ruling and analysis in *Hillie*. The Eighth Circuit held that a jury could conclude that Petitioner's surreptitious videos of a minor met the statutory requirement of "sexually explicit conduct," in the form of a "lascivious exhibition," even where the relevant videos depict only routine bathroom activities. Pet. App. 2a-5a, 9a-16a. The crux of the Eighth Circuit's decision here is its holding that, as to both videos, "a reasonable jury could find that the defendant viewed the minor female 'as a sexual object,'" and, therefore, "composed the images in order to elicit a sexual response in a viewer—himself." Pet. App. 16a.

2. At least eight other circuits are aligned with the Eighth Circuit on this issue, concluding that surreptitious recordings of minors engaging in innocuous and quotidian bathroom 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 videos that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitiously filmed videos of minors showering); *United*

States v. McCall, 833 F.3d 560, 561-64 (5th Cir. 2016) (bathroom video of a minor undressing, grooming, and showering); *United States v. Donoho*, 76 F.4th 588, 591, 600-01 (7th Cir. 2023) (bathroom videos and images of minors showering and using the toilet); *United States v. Boam*, 69 F.4th 601, 609-12 (9th Cir. 2023) (bathroom videos of a minor showering nude); *United States v. Wells*, 843 F.3d 1251, 1255-57 (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").

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 routine daily activity. Indeed, in its opinion in *Hillie*, the D.C. Circuit expressly rejected the approaches of multiple circuits. 39 F.4th at 689.

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 predilections.

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. *See, e.g.*, PFREB 11 (the government in this case arguing that "[s]ubjective intent is, of course, a relevant lasciviousness

consideration"); Pet. App. 25a, 26a (Grasz, J., dissenting) ("the majority opinion retreats from th[e] principle" articulated in circuit caselaw "that the subjective intent of the defendant cannot make an image lascivious for purposes of the statute").

Whether considered under the *Dost* rubric or couched in other terms, 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), substantively identical to the one approved here: "[W]hether the picture is intended or designed to elicit a sexual response in the viewer." *See* Jury Instruction No. 12, D. Ct. ECF No. 57. 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 video recorder's state of mind shifts the focus away from the

images themselves to whether the secret photographer would be aroused by them. *See* Pet. App. 16a.

Accordingly, multiple courts of appeals have curtailed inquiry into the defendant's subjective intent. *See, e.g.*, *Spoor*, 904 F.3d at 150 (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 happenstance of the defendant's own sexual predilections. *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. *See also* Pet. App. 31a (Grasz, J., dissenting).

II. The Eighth Circuit's Decision Is Wrong.

As a matter of law, a surreptitious video of a minor that depicts innocent daily activity does not depict "sexually explicit conduct" or "lascivious exhibition of the … genitals or pubic area" under 18 U.S.C.

§§ 2251(a) and 2256(2)(A). Petitioner's convictions based on such videos reflect legal error. And the error is wholly independent of any question regarding the propriety of the district court's jury instructions or their compliance with circuit precedent. *See* Pet. App. 31a (Grasz, J., dissenting).

1. Section 2251(a) prohibits using "any minor to engage in … any *sexually explicit conduct* for the purpose of producing *any visual depiction of such conduct*." (Emphases added.) If a surreptitious video of a minor does not depict the minor engaging in "sexually explicit conduct," there is no production offense under § 2251(a).

Section 2256(2)(A) limits "sexually explicit conduct" 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 only "sexually explicit conduct alleged was the lascivious exhibition of the genitals and pubic area," Pet. App. 4a, the question whether a defendant's surreptitious recording of a minor

violates § 2251(a) "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., concurring in the denial of rehearing en banc); *see* Pet. App. 32a (Stras, J., dissenting).

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 … genitals, or pubic area in a sexually suggestive manner." *Hillie*, 38 F.4th at 237; *accord* Pet. App. 32a (Stras, J., dissenting). In other words, at an absolute minimum, the minor must "display[] his or 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." *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." 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 available 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 Arkansas, where the underlying events in this case occurred. H.R. Rep. No. 108-504, at 2-3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 3292; *see, e.g.*, Ark. Code Ann. § 5-16-102; 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 something more than just innocuous daily activity 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 specified private parts. *Id.*

2. In light of the statutory text, the Eighth Circuit erroneously rejected Petitioner's challenges to his convictions. Under "the plain language of 18 U.S.C. §§ 2251(a) and 2256(2)(A)(v)," Pet. App. 22a (Grasz, J., dissenting), Petitioner's convictions under § 2251(a) cannot stand. The videos "recorded the minor in the nude before and after she showered." Pet. App. 3a. The minor did not know she was being recorded, and in the videos she was preparing to enter and exiting the shower, drying off with a towel, and sitting on the toilet. *Id.*

Under these circumstances, as a matter of law, the videos at issue did not depict sexually explicit conduct in the form of a lascivious exhibition of the genitals or pubic area. The government, for its part, conceded that the depictions at issue here are "innocent" on their face. Pet. App. 25a (Grasz, J., dissenting). And rightly so: "There is nothing 'lascivious' about someone just … bath[ing]," "which is all [that is depicted] here." Pet. App. 32a (Stras, J., dissenting) (quoting *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." *Hillie*, 38 F.4th at 237-38 (Katsas, J.).

3. In upholding Petitioner's convictions, the Eighth Circuit en banc majority seriously misconstrued the statutory text. The government's position below was that otherwise "innocent acts of undressing and taking a shower on the videos are lascivious because of McCoy's intent for them to be sexual." Appellee's Br. 30; *see* Pet. App. 25a (Grasz, J., dissenting). The en banc majority agreed, holding that "a reasonable jury could find that the defendant … composed the images in order to elicit a sexual response in a viewer—himself." Pet. App. 16a.

The Eighth Circuit's "'what's-in-the-mind-of-the-defendant' theory of statutory construction (which allows for rampant jury speculation)," Pet. App. 25a (Grasz, J., dissenting), "cannot be reconciled with the governing statutory text." *Hillie*, 38 F.4th at 238 (Katsas, J.). The secret cameraman's idiosyncratic sexual predilections are insufficient for conviction if the "visual depiction" does not show a "minor engag[ing] in any sexually explicit conduct." 18 U.S.C. § 2251(a). As Judge Easterbrook has rightly put it in addressing this precise issue, that a defendant "may have found the images sexually exciting … can't suffice" where there is no sexually explicit conduct "in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring). 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.).

Indeed, this Court "expressly rejected this line of reasoning in *Williams*." *Hillie*, 39 F.4th at 688. *Williams* 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.*

Unlike the government, the en banc majority below sought to emphasize that, in the first video, the minor is shown briefly "jump[ing] up and down … , causing her breasts to bounce in view of the camera," and in the second video is shown briefly "ben[ding] over" to pick up a towel, Pet. App. 3a; *see* Pet. App. 24a & n.10. These observations serve only to underscore the majority's error. The minor did not know she was being recorded and Petitioner did not direct her to jump up and down, and in any event the applicable definition of "sexually explicit conduct" does not include lascivious exhibition of the breasts. 18 U.S.C. § 2256(2)(A)(v); Pet. App. 24a. Likewise, the fact that the minor happened briefly to bend down is insufficient to transform a depiction of innocent activity into a depiction of "sexually explicit conduct"; otherwise, as Judge Stras' dissent noted, incidentally capturing a minor bending down to pick up a fallen toothpaste tube could be the difference between a video of innocent conduct and a video triggering a federal criminal conviction and a statutory minimum sentence of 15 years in prison. *See* Pet. App. 32a n.15 (Stras, J., dissenting).

In sum, the Eighth Circuit erred as a matter of law by allowing a jury to convict Petitioner for producing videos depicting "sexually explicit conduct" when they depicted no such thing. And this conclusion holds true regardless of any question of the correctness of the district court's jury instructions. The district court's *Dost*-based instructions provided the jury with a number of factors it could take into account in its deliberations. *See supra* 6-7 & n.1. Regardless of the factors the jury could consider, the videos here show only innocuous daily bathroom activity and thus depict no "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. § 2251(a), as a matter of law. *See* Pet. App. 31a (Grasz, J., dissenting); Pet. App. 50a ("We're asking the Court to find as a matter of law that the videos themselves do not equate to production of child pornography because they don't show lascivious exhibition of the genitalia.").

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 told the Eighth Circuit in its petition for rehearing en banc below, "surreptitious-recording cases occur frequently." PFREB 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 Petitioner in this case and for the many criminal defendants in a similar position. The district court sentenced Petitioner to a term of 210 months' imprisonment based on the two charged videos. 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 "move[] the law decidedly away from the statute's text and into the vague and uncertain arena of subjective intent," Pet. App. 26a n.11 (Grasz, J., dissenting)—indeterminacy that is dependent on the geographic circuit in which the defendant happens to be charged. *See also* Pet. App. 21a (Kelly, J., dissenting) ("interpreting whose intent matters and how it matters in the context of this statute is a murky endeavor").

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 this case and before the D.C. Circuit in *Hillie*. Below, the government sought, and obtained, rehearing en banc based on its argument that surreptitious-recording cases implicate questions "'of surpassing importance.'" PFREB 14 (quoting *New York v. Ferber*, 458 U.S. 747, 757 (1982)). And the government's petition for rehearing en banc in the D.C. Circuit likewise emphasized the need for uniformity on this question. *See* Gov't Pet. for Reh'g En Banc 9, *United States v. Hillie*, No. 19-3027 (D.C. Cir. Dec. 13, 2021).

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

This case presents an excellent vehicle for review. The parties agree that the surreptitious videos here depict innocuous and routine bathroom activity, such as getting in and out of the shower: As noted, the government argued below that the minor's "innocent acts of undressing and taking a shower on the videos are lascivious because of McCoy's intent for them to be sexual." Appellee's Br. 30; *see* Pet. App. 25a (Grasz, J., dissenting). The question whether such recordings of routine and quotidian conduct can 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 Eighth Circuit.[5]

The Eighth Circuit directly addressed the question presented in a precedential, en banc opinion. And because the depictions here do not "contain images of sexually explicit conduct" as required under § 2251(a), the outcome of the case and the validity of the convictions that drove Petitioner's 210-month sentence turn solely on that question. *See* Pet. App. 28a (Grasz, J., dissenting). The judgment in this case must be reversed, and Petitioner's criminal

[5] And because the charges and convictions in this case were based on completed offenses, Pet. App. 2a, this case does not raise potentially separate questions about the scope of *attempted* sexual exploitation of a minor under § 2251(a), which the government has relied on to oppose review of recent petitions raising similar issues.

convictions must be set aside, if, as the D.C. Circuit has rightly held, surreptitious videos of a minor engaged in innocent daily activity cannot as a matter of law depict "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. §§ 2251(a) and 2256(2)(A). The question is squarely and directly teed up in this petition, and the Court should grant the petition and reverse the Eighth Circuit on the merits.

CONCLUSION

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

Respectfully submitted,

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October 1, 2024