No. _____

24-5446

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JEREMY NICHOLAS MYNES — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jeremy Nicholas Mynes
(Your Name)

P.O. Box 33
(Address)

Terre Haute, IN 47808
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

1. 18 U.S.C. §2256(2)(A)(v) DEFINES THE TERM "LASCIVIOUS" AS PART OF 18 U.S.C. §2251(a)'S "SEXUALLY EXPLICIT CONDUCT" ELEMENT AND IS A DEFINITION AND NOT AN ELEMENT ITSELF. THERE IS AN ACKNOWLEDGED AND REOCCURRING CIRCUIT CONFLICT ON THE QUESTION OF: WHETHER CONGRESS ALLOWS FOR A CONVICTION UNDER 18 U.S.C. §2251(a) THAT IS BASED ON A DEFINITION AND NOT ON THE STATUTES ELEMENTS WHICH REQUIRE SEXUAL CONDUCT OF ANY KIND, AND THE IMAGES DEPICT ABSOLUTLY NO SEXUAL OR SEXUALLY SUGGESTIVE CONDUCT OF ANY KIND.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

U.S. Court of Appeals For The Fourth Circuit, Case No. 21-4668

U.S. District Court For The Fourth Citcuit, Middle Division, Case No. 1:20-cr-00468-CCE-1

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 1/25/2024.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 4/5/2024, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1801. Video Voyeurism

(a)"Whoever, in the special maritime and territorial jurisdiction of the United States, 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, shall be fined under this title or imprisoned not more that one year, or both.

18 U.S.C. §2251. Production Of Child Pornography

(a)"Any person who employs, uses, pursuades, induces, entices, or coerces any minor to engage in...any sexually explicit conduct for the purpose of producing any visual depiction of such conduct..."
(e)"Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years..."

18 U.S.C. §2256. Definitions of Child Pronography Stat's.

(2)(A)"Except as provided in sub paragraph (B), "sexually explicit conduct" means actual or simulated——"
(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 surreptitiously photographing a fully clothed minor sitting on a couch and petting a dog. The images in question depict no sex or simulated sex nor do they suggest that any sexual conduct has or will take place. The minor is unaware that photos were taken and is not engaged in anything but petting a dog. The minors vagina is marginally visible up her pant leg and shows only mere nudity.

On June 12, 2020, Dropbox Inc. alerted the NCMEC of suspected child pornography on one of it's accounts. The NCMEC alerted local authorities in Concord, NC who executed a search warrant on the Petitioner's home, all based solely on the information provided by Dropbox Inc. The forensic examiner determined that the images were captured with Petitioner's phone and had never been either uploaded or transferred from Petitioners phone.

Petitioner entered into a non-binding plea agreement with the government. He was sentenced on November 10th, 2021 to One Count of Production of Child Pornography (Count 2), and One Count of Possession of Child Pornography (Count 4), and received the maximum penatly on both, 30 years and 10 years respectively, despite it being his first felony charge.

In the proceedings below, Petitioner contested the sufficiency of the evidence on Count 2, stating that the evidence was insufficient to prove that he had the specific intent to produce child pornography. The Court of Appeals for the Fourth Circuit denied the argument without addressing it's merits, and with no citation of authority the Circuit Court erroniously stated that zooming in satisfies the specific intent requirement of the statute. The Circuit Court, sua sponte, had the Petitioner's lawyer brief the issue of lasciviousness. The Fourth Circuit upheld Petitioners conviction and regected his argument about the meaning of lascivious exhibition. It stated that it's reason for doing so was because the use of the Dost factors were mandatory in conducting it's analysis in finding the images lascivious under the 2251(a) statute, relying on the singular use of the Dost factors in United States v. Courtade, 929 F.3d 186 (4th Cir. 2019).

The Court conceeded that just one of the deffinitions applied here, -"The lascivious exhibition of the anus, genitals or pubic area of any person": It also conceeded that no federal statute defines "lascivious exhibition" and proceeds to rely on Courtade. Courtade, inter alia, reasoned that the Dost factors define "lasciviousness" in a manner consistant with the child pornography statute. Courtade and other courts decisions effectively have turned 18 U.S.C. §2251(a) into an all encompassing voyerism statute, despite the fact that all courts are in agreement that mere nudity is not enough and that the Dost factors are not needed because lasciviousness is defined with the use of the noscitur a sociis doctrine.

In petitioner's en banc petition, he cites United States v. Palomino-Coronado because they both clearly define lasciviousness in a manner consistant with the rest of the definitions found in the "sexually explicit" sub-definitions, codified in 18 U.S.C. §2256(2)(A)(v). Each definition is sexual in nature, therefore, "lascivious exhibition" cannot depict mere nudity and must show some sexual or sexually suggestive conduct of any kind, whereas here they do not. 805 F.3d 127 (4th Cir. 2015)

The Appellate Court denied Petitioners Rehearing and Rehearing En Banc without stating any reason or facts of law or conclusions as to why. Petitioner's counsel filed a motion to withdraw, which was granted. This instant petition follows.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

This petition presents an important national issue on the interpretation of a definition and it's place in the federal production of child pornography statute. The petition delves into whether congress allowed the lower courts to disregard it's mandate that the word "lascivious" found in 18 U.S.C. §2256(2)(A)(v) be sexually lascivious, like the other four terms listed with it, and allow them to go outside of the statutes definition(s) and use the factors found in United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986), when those factors focus on the victims circumstances and not the "specific intent" of the producer, especially when the victim did not exhibit any of those factors, and when the Courts rely on the picture takers subjective arousal and finally when the photos are of innocent conduct, taking into consideration that Congress was clear that lascivious means sexually explicit lasciviousness and not mere nudity.

1. There Is An Acknowledged Circuit Split In The Courts Of Appeals On Whether Images Depicting No Sexual Lasciviousness May Be Deemed To Be "Sexually Explicit Conduct".

A. The Circuits Have Split On The Question Presented.

The Court in United States v. Hillie agreed with the Petitioner that the words "lascivious exhibition" under 18 U.S.C. §2256(2)(A)(v) requires displaying private parts "in a manner cannotating that the minor or any person or thing appearing with the minor in the image, exhibit 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 minors nude body, the 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 factcould find [the minors] conduct depicted in the videos to be a 'lascivious exhibition of the genitals' as defined by §2256(2)(A)" and so aquittal was compelled as a

matter of law. id. In this case, the Fourth Circuit came to the exact opposite conclusion on materially identical facts, rejecting the D.C. Circuit's ruling in Hillie. The Fourth Circuit held that "the district court did not commit plain error in finding that the images depict a "lascivious exhibition" of CV1's genitals and pubic area." Unpublished Op. Pet. App. 21-4668 (Doc. 74), is at 8-9.

The Court adopted and endorced the ruling and analysis in United States v. Courtade, 929 F.3d 186 (4th Cir. 2019) and stated that it did not rely on or endorse the six-factor test set out in United States v. Dost, 636 F.3d F.Supp. 828 (S.D. Cal. 1986) in it's opinion below, however, the influence of these factors and the methodology rejected by Hillie premeate the reason in Courtade, using them in whole in it's reasoning. It also cited United states v. Spoor, 904 F.3d 141, 149, (2d. Cir. 2018), a case that differs greatly from Petitioners and contains no analysis like Hillie's.

The Court in Spoor stated that it found the elements were satisfied "[b]ased on features in the images suggesting they '[s]erved no obvious purpose other than to present the child as a sexual object.'" This analysis is incorrect and contradicts the analysis and holding in Hillie.

At least seven other circuits are aligned with the Fourth Circuit's on this issue, incorrectly concluding that secretly recording minors engaged 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 on the subjective sensibilities of their creators. See United States v. Goodman, 971 F.3d 16, 19 (1st Cir. 2020)(secretly recorded 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 video 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 a minor showering and using the toilet); United States v. Holmes, 814 F.3d 1246, 1247 (11th Cir. 2016)(videos

of a minor "performing her daily bathroom routine").

All of these cases, like the Petitioner's, would have been decided differently if adjudicated in the D.C. Circuit, insofar as they uphold convictions for depictions of "sexually explicit conduct" where the videos or images in question consisted of secretly recorded depictions of non-sexual or sexually suggestive activity. In it's opinion in Hillie, the D.C. Circuit rejected the approaches of multiple circuits. The Court in United States v. McCoy, No. 21-3895 (8th Cir. Jan 30, 2023)(McCoy PFREB) agree with Hillie's approach and rejected the government's approach. There, the Defendant successfully petitioned an en banc review. Furthermore, the goverment acknolwedged the Circuit conflict in it's unsuccessful petition for rehearing en banc in Hillie. See 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).

This clear conflict among the Courts of Appeals will not resolve itself without this Court's swift intervention. The Fourth Circuit in this case denied a petition for rehearing en banc without comment or a conclusion of facts and reasoning. See Case No. 21-4668 (Dk. No. 86) Likewise, the D.C. circuit denied the government's rehearing en banc 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). The McCoy panel also held that secretly recording a minor showering was 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). But this does not dissolve or address the circuit conflict, if anything, it adds to it's confusion.

B. The Circuit Conflict is Contrasted More Absolutly By The Confusion Over A Defendant's Subjective Intent.

The circuit split regarding "sexually explicit conduct" and "lascivious exhibition" is further added to by broad dissagreements in the Appeals Courts when comming to a decision on a defendant's subjective intent. Whether by use of the Dost factors or by use of other cases which rely on those factors, as is seen here with the use of Courtade. Inquiry into the photographers 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 it's elevation of the sexual predilections of individual pedophiles, Amy Adler, Inverting the First Amendment, 149 U.Penn.L. Rev. 921, 953 (2001).

Courts that critique Dost have been highly critical of the sixth factor, subjective intent inquiry, analogous to the one approved here: "[c]oncluding that a 'lascivious exhibition' is 'a depiction which displays or brings forth to view in order to...excite lustfulness or sexual stimulation in the viewer.'" Pet. App. 8. Among the 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 because this case illustrates that the photos are supposed to "[e]xcite lustfulness or sexual stimulation in the viwer.", it shifts the issue from being what the images depict, to whether or not they excite lust in a particular viewer.

Although the Fourth Circuit does not overtly endorse the Dost factors, Relying on them via Courtade has given rise to similar confusion by relying on a faulty and vague subjective definition of "lascivious exhinition" that includes any "depiction which displays the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer," United States v. Knox, 32 F.3d 733, 21 745 (3d Cir. 1994), or any image "that calls attention to the genitals or pubic area for the purpose of eliciting a sexual responce in the viewer," Russel, 662 F.3d at 843) (cleaned up).

The standard for defining "lascivious exhibition" must be either subjective or objective, and the Fourth Circuit's caselaw being a confusing mix of both leaves the interpretation of §2251(a) up to the trier of fact's sensibilities in defiance of the notice principles that underlie criminal punishment. Accordingly, multiple courts os appeals have curtailed inquiry into the defendant's subjective intent. See, e.g., United States v. Spoor, 904 F.3d 141,

150 (2nd 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 altogether. The First Circuit has explained; a test that focuses on the photographers own "subjective reaction" would risk turning a "Sears catalogue into pornography" based on "a sexual deviant's quirks." Amirault, 173 F.3d at 34.

As this legal chaos illustrates, the conflict at issue between circuits demonstrates an acknowledged and fundamental inter-circuit disagreement about how circuits interpret critical terms in a federal criminal statute. It also shows an equally important inter-circuit disagreement regarding whether and how to consider the defendant's subjective predilictions and other Dost factors. See Hillie, 39 F.4th at 689. This added and enterwoven discord serves only to heighten and solidify the need for, and suitibility of, this Court's review.

C. The Fourth Circuit's Decision Is Wrong.

As a matter of law, surripticious images of a minor that depict no sexual activity or sexually suggestive conduct by anyone does not depict any "sexually explicit conduct" or "lascivious exhibition of the genitals or pubic area." And convicting someone under these erronious conclusions is itself legal error.

Section 2256(2)(A) limits "sexually explicit conduct" in order to produce "any visual depiction of such conduct." (Emphasis 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 catagories:(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 catagory, 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 concuct" 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 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. 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). Cov'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 seperate federal statute that makes "video voyerism" 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 voyerism statutes, and do not encompass mere voyerism, 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, st. 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" and not the decades of punishment under the child pornography statutes. Congress thus criminalized video voyerism only within specified federal jurisdictions and was aware that similar criminal video-voyerism prohibitions exist under state laws across the country, including in North Carolina. (N.C. Gen. Stat. §14-190.9 Video Voyerism). Courts that apply the federal child pornography statutes to the same conduct are

impermissibly aggrogating 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 language of the statute, it also obeys this Court's precedent on the meaning of "sexually explicit conduct" in §2256(2)(A) and related provisions. As Justice Scalia explained in United States v. Williams, "'[s]exually explicit conduct' connotes actual depictions of the sex act rather than merely the suggestion that it is occuring." 553 U.S. 285, 297 (2008)(construing §2252A). As a category of "sexually explicit conduct," "lascivous exhibition" must therefore involve, at a minimum, an "explicitly portrayed" sexual or sexually suggestive display of private parts.

In light of the statutory text, the Fourth Circuit erroneously rejected petitioner's challenges to the sufficiency of the evidence and in accepting a plea based on that evidence. As to the sufficiency of the evidence, no reasonable trier of fact 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 a minor engaged in petting a dog while sitting on a couch and nothing more. The minor did not know she was being recorded, and the images do not in any way depict the minor (or anyone else) engaging in sexual conduct of any kind. Pet. App. 9. The Fourth Circuit conceeded to the fact that the images were of mere nudity and instead relied on errounious contextual clues that amounted to nothing more than speculative conjecture. Pet. App. 8-9.

"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 there's no evidence from which this can be based off of in the factual basis or anywhere on the record. Simply put, Petitioner did not engage in any type of conversation with any minor, let alone attempt to engage in any "sexually explicit conduct".

Both the magistrate, and the District Court Judges were erroneous in accepting the guilty plea. It failed to advise Petitioner what is needed in order for the images to be a "lascivious exhibition", instead, the Court relied on an instruction outside of the statute, and did not adequately address it's reasons for finding the Petitioner guilty. Furthermore, the Fourth Circuit similarly relied on a definition found outside the statute in upholding the Petitioners conviction. They too failed to address the factual context in which Petitioners conduct fit within §2251(a).

Again, both Courts relied on the photographers state of mind and not on the law as required. Had Petitioner been properly instructed by his counsel or the District Court, at an absolute minimum, there is a reasonable probability that he would not have plead guilty, and no reasonable juror would have found him guilty had he gone to trial.

D. In Holding Otherwise, The Fourth Circuit Seriously Misconstrued The Statutory Text.

The Fourth Circuit reasoned that the Petitioner's factual basis contained sufficient evidence to allow a conviction, because they emphasized that he created these images for the purposes of satisfying his sexual desires. This interpretation "cannot be reconciled with the governing statutory text." Hillie, 38 F.4th at 238 (Katsas J.). "[I]t is the the photograph of the child who must engagein '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 creater's "intent[t]" in making the depiction in besides the point. If the "visual depiction" does not show "a minor engaging in sexually explicit conduct," then the courts inquiry is at an end and the statutory elements are simply not satisfied, as a matter of law.

18 U.S.C. §2251(a). 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 Fourth 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 critized 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 innocent 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 Fourth Circuit erred as a matter of law by allowing the Petitioner to plead guilty to producing images depicting "sexually explicit conduct" when they depicted no such thing.

E. The Question Presented is Extremely Important And Occures All Too Frequently.

The question presented is massively consequential and the convictions for conduct that is not covered under §2251(a) are regularly occuring. Every year, federal courts sentence nearly 2,000 defendants for offenses incorporating definitions of "sexually explicit conduct" found outside the §2251(a) statute. 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 it's petition for rehearing en banc in McCoy, "surreptititious recording cases occure 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 meany criminal defendants in a similar position. The District Court sentemced Petitioner to a term of 400 months based on the charged imaged. This severe sentence is no abberation. 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 geographical circuit in which the defendant happens to be charged. The government cannot deny the importance the question presented. The government itself has repeatedly sought en banc review in cases raising this question, including 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 it's argument that surreptitious recording cases implicate questions "'of surpassing importance.'" McCoy PFREB 14 (quoting New York v. Ferber, 458 U.S. 747, 757 (1982)).

F. This Case Is An Excellent Vehicle For Review Of The Question Presented.

This case presents an excellent vehicle for review. The videos and images at issue do not depict a minor (or anyone else) engaging in conduct that is in any way sexual or sexually suggestive. The question whether the images in question could be considered to depict "sexually explicit conduct" or "lascivious exhibition" under §2251(a) were expressly raised, preserved, and ruled upon in the Circuit Court. The Fourth Circuit directly addressed the question of lasciviousness in it's opinion and the outcome of the case and the validity of the conviction that drove Petitioner's 400 month sentence turn solely on that question.

The judgment and plea in this case must be reversed and petitoners criminal convictions on the relevant count must be set aside, if, as the D.C. Circuit has ritely 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). The question is ripe for adjudication and without this Court's intervention more injustices will persist in the courts across the country. The Court should GRANT the petition and reverse the Fourth Circuit's decision on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 8/13/2024