No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN HIGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the Court should resolve the following question for which there is a clear circuit split: can a defendant be convicted pursuant to 18 U.S.C. § 2251 if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom – and the defendant does *not* "edit" the video to create a "lascivious exhibition of the genitals or pubic area" of the minor depicted in the video?

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, JONATHAN HIGH, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on July 9, 2024. (A-3).[1]

D. CITATION TO OPINION BELOW

The opinion below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2251(a) provides, in relevant part, that:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor *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. § 2251(a) (emphasis added). Congress also provided a definition of "sexually explicit conduct," which – as relevant for the instant case – states as follows:

> "sexually 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;

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

(ii) bestiality;
(iii) masturbation;
(iv) sadistic or masochistic abuse; or
(v) *lascivious exhibition of the anus, genitals, or pubic area of any person*.

18 U.S.C. § 2256(2)(A) (emphasis added).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged in the Northern District of Florida with the following three counts: Count One: production of child pornography (relating to "Minor Male Victim 1"); Count Two: production of child pornography (relating to "Minor Male Victim 2"); and Count Three: possession of child pornography. Counts One and Two alleged that the Petitioner secretly recorded two minor boys urinating in a church bathroom.

Prior to trial, the Petitioner entered a guilty plea to Count Three. A non-jury trial on Counts One and Two was conducted on October 4, 2022. During the trial, the Petitioner moved for a judgment of acquittal, and the parties and the district court engaged in a lengthy discussion regarding the matter. (A-35-76). Ultimately, the district court denied the motion for judgment of acquittal. (A-89-99). At the conclusion of the trial, the district court returned a guilty verdict for both counts.

The Petitioner was sentenced on February 13, 2023. The district court sentenced the Petitioner to 264 months imprisonment for Counts One and Two, and 120 months' imprisonment on Count Three, with the sentences for the three counts to run concurrently. (A-25).

On appeal, the Eleventh Circuit Court of Appeals affirmed the Petitioner's convictions for Counts One and Two. (A-3).

H. REASON FOR GRANTING THE WRIT

There is a circuit split over whether a defendant can be convicted pursuant to 18 U.S.C. § 2251 if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom – and the defendant does *not* "edit" the video to create a "lascivious exhibition of the genitals or pubic area" of the minor depicted in the video.

1. The charges in this case and the relevant statutory definition.

Counts One and Two alleged that the Petitioner produced child pornography, in violation of 18 U.S.C. §§ 2251(a) and (e). Specifically – as set forth in the "Trial Stipulations Regarding Counts One and Two" (A-12) – the Government alleged that the Petitioner used his cell phone to video record two different minors urinating in a public bathroom (and Count One related to "Minor Male Victim 1" and Count Two related to "Minor Male Victim 2"). The Government further alleged that the Petitioner took screenshots of the videos – and the district court found that at least one of the screenshots was taken at the point in the video when one of the victims was holding his penis while urinating. (A-96). However, as explained by defense counsel below, the screenshots were *not* edited to create "close-up" views of the minors' genitalia:

> There is no evidence that the screenshots are any different than the video other than it's one small portion of a video. There is no lighting added. There is no cropping. There is no zooming.

(A-59).

18 U.S.C. § 2251(a) provides, in relevant part, that:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor *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. § 2251(a) (emphasis added). Congress also provided a definition of "sexually

explicit conduct," which – as relevant for the instant case – states as follows:

> "sexually 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*.

18 U.S.C. § 2256(2)(A) (emphasis added). During the proceedings below, the Government acknowledged that only part (v) of the definition is at issue in the instant case – because the videos in question do *not* depict sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. Hence, the Petitioner could be convicted in this case only if the videos in question depict conduct that could be described as a "lascivious exhibition of the anus, genitals, or pubic area of any person." Notably, as found by the district court below:

> Some of the facts, even as to this, really aren't in dispute in terms of what happened. Neither side is contending that the children were intentionally displaying themselves in a sexual manner, or that the children were behaving in any lustful way or in any way that would connote sexual activity. They were simply using the bathroom in an ordinary way. That's my finding.
>
> I think it's clear in the photos and videos.

(A-91). Thus, the issue to be decided in this case is whether a defendant can be convicted of a § 2251 offense if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom. Undersigned counsel submits – pursuant to (1) the plain language of § 2256(2)(A)(v) (i.e., "'sexually explicit conduct' means actual or simulated . . . lascivious exhibition of the anus,

genitals, or pubic area of any person") and (2) this Court's precedent – that a defendant can be convicted pursuant to § 2251 only if the conduct depicted in the video consists of the minor displaying/exhibiting an "anus, genitalia, or pubic area" in a "lustful manner" that connotes the commission of a sexual act. As explained below, the Petitioner's position is supported by precedent from at least one other circuit (i.e., the D.C. Circuit).

2. This Court's precedent.

a. This Court's precedent interpreting the First Amendment.

In a line of cases going back fifty years, this Court has provided guidance regarding to how to construe phrasing similar to the phrasing set forth in § 2256(2)(A)(v). The first such case is *Miller v. California*, 413 U.S. 15, 17 (1973), in which the Court considered a First Amendment challenge to a state statute prohibiting the mailing of unsolicited "obscene matter." In upholding the California statute, the Court held that it must be construed as limited to works depicting patently offensive "sexual conduct specifically defined by . . . state law," *id.* at 24, and the Court gave as examples "ultimate sexual acts, normal or perverted, actual or simulated," as well as "representation[s] or descriptions of masturbation, excretory functions, *and lewd exhibition of the genitals*." *Id.* at 25 (emphasis added). The Court described its holding as applying only to patently offensive "'hard core' sexual conduct." *Id.* at 27.

In *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 129-130 (1973) – decided the same day as *Miller* – the Court clarified that the "standards for

testing the constitutionality of state legislation regulating obscenity" announced in *Miller* "are applicable to federal legislation." The Court noted its "duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 130 n.7 (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971) (opinion of White, J.)). Explaining that "[i]f and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific *'hard core' sexual conduct* given as examples in *Miller*." *Id.* (emphasis added).

Almost a decade later, in *New York v. Ferber*, 458 U.S. 747, 750-751 (1982), the Court rejected a constitutional overbreadth challenge to a New York statute prohibiting "the use of a child in a sexual performance," defined as a performance "includ[ing] sexual conduct by a child." The statute further defined "sexual conduct" as meaning "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751 (emphasis added). The Court held that child pornography may be regulated without infringing on the First Amendment, regardless of whether it is obscene, because of the harm it causes to the children who appear in it. *Id.* at 756-758. The Court explained that "the question under the *Miller* test of whether a work, taken as

a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Id.* at 761. The Court clarified, however, that "[t]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *Id.* at 764. For example, the Court explained, "[t]he category of 'sexual conduct' proscribed must . . . be suitably limited and described." *Id.* The Court ruled that the New York law at issue was suitably limited:

> The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or *lewd exhibition of the genitals*."

Id. at 765 (emphasis added). The Court explained that "[t]he term 'lewd exhibition of the genitals,'" in particular, "is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation." *Id.* The Court reaffirmed that "the reach of the statute is directed at the *hard core* of child pornography," *id.* at 773 (emphasis added) – repeating the characterization of prohibited "sexual conduct" that was articulated in *Miller*.

Finally, in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the Court rejected a constitutional-overbreadth challenge to the possession-of-child-pornography statute (18 U.S.C. § 2252(a)). The Court noted that Congress had amended the statute in 1984 to broaden "its application to those sexually explicit materials that, while not obscene as defined by *Miller v. California*, could be restricted without violating the

First Amendment as explained by *New York v. Ferber*." *X-Citement Video*, 513 U.S. at 74 (internal citations omitted). The Court rejected vagueness and overbreadth challenges to the statutory term "lascivious exhibition of the . . . genitals" (as used in § 2256(2)(A)(v)) because – as the Ninth Circuit Court of Appeals had explained – "'[l]ascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California* and in *Ferber*." *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) (internal quotation marks and citations omitted) (alteration in original). *See also X-Citement Video*, 513 U.S. at 78-79 (adopting the reasoning of the Ninth Circuit). In reaching this conclusion, the Court expressly engrafted the "hard core" characterization of the prohibited "lascivious exhibition of the genitals" from *Miller* onto the construction of the federal child pornography statute. In dissent, Justice Scalia indicated his agreement with that aspect of the Court's holding. *See id.* at 84 (Scalia, J., dissenting) ("'[S]exually explicit conduct,' as defined in the statute, does not include mere nudity, but only *conduct* that consists of 'sexual intercourse . . . between persons of the same or opposite sex,' 'bestiality,' 'masturbation,' 'sadistic or masochistic abuse,' and 'lascivious exhibition of the genitals or pubic area.' What is involved, in other words, is not the clinical, the artistic, nor even the risqué, but *hard-core pornography*.") (second emphasis added).

In sum, *Ferber* explained that this Court had previously construed the phrase "lewd exhibition of the genitals" in *Miller*, and that the phrase referred to "the hard

core of child pornography." *Ferber*, 458 U.S. at 764-765, 773. And in *X-Citement Video*, this Court found that the term "lascivious exhibition of the genitals" as currently used in § 2256(2)(A)(v), has the same meaning as "lewd exhibition of the genitals," as that phrase was construed in *Miller* and *Ferber*. *X-Citement Video*, 513 U.S. at 78-79.

b. This Court's opinion in *United States v. Williams*, 553 U.S. 285 (2008).

In *United States v. Williams*, 553 U.S. 285 (2008), the Court considered a constitutional overbreadth challenge to the promotion of child pornography statute (18 U.S.C. § 2252A(a)(3)(B)) – which uses the same definition of "sexually explicit conduct" as the offenses for which the Petitioner was convicted in Counts One and Two. The Court rejected the overbreadth challenge in *Williams* based, in part, on its finding that "sexually explicit conduct" includes only conduct akin to that defined by the New York statute upheld in *Ferber*:

> [T]he [statutory] definition of "sexually explicit conduct" . . . is very similar to the definition of "sexual conduct" in the New York statute we upheld against an overbreadth challenge in *Ferber*. Congress used essentially the same constitutionally approved definition in the present Act. If anything, the fact that the defined term here is "sexually explicit conduct," rather than (as in *Ferber*) merely "sexual conduct," renders the definition more immune from facial constitutional attack."

Williams, 553 U.S. at 296. Just as in *X-Citement Video*, the Court in *Williams* made clear that "sexually explicit conduct" as used in the federal child pornography statutes must be construed consistently with the "sexual conduct" prohibited in *Ferber*. Stated another way, in *Williams*, the Court reaffirmed that § 2256(2)(A)'s definition of "sexually explicit conduct" means essentially the same thing as the definition of

"sexual conduct" at issue in *Ferber* – except that the conduct defined by § 2256(2)(A) must be, if anything, more "hard-core" than the conduct defined by the New York law at issue in *Ferber*, given that the federal statute prohibits "sexually explicit conduct" rather than merely "sexual conduct," as in the state law.

3. The Court should resolve the following question for which there is a circuit split: whether a defendant can be convicted pursuant to § 2251 if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom – and the defendant does *not* "edit" the video to create a "lascivious exhibition of the genitals or pubic area" of the minor depicted in the video.

There is currently a circuit split regarding whether a defendant can be convicted pursuant to § 2251 if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom – and the defendant does *not* "edit" the video to create a "lascivious exhibition of the genitals or pubic area" of the minor depicted in the video. The Eleventh Circuit Court of Appeals falls on one side of the split. In its decision below, the Eleventh Circuit held:

> High argues that he did not use Minor Male 1 and Minor Male 2 for sexually explicit conduct as required by section 2251(a) because the recordings do not depict lascivious exhibitions of the genitals. In his view, because the recordings depict innocuous conduct, they cannot be lascivious. Thus, he contends the district court erred in denying his motion for judgment of acquittal. We disagree.
>
> . . . .
>
> . . . High engaged in the "lascivious exhibition of the genitals" when he recorded, edited, and stored the images of Minor Male 1 and Minor Male 2. § 2256(2)(A). High secretly positioned a camera to record videos of the minor boys as they urinated in a bathroom. He then created screenshots of the boys when their genitals were exposed. And he stored these images and videos with other child pornography, which included other images and videos of minor boys performing sex acts in bathrooms.

> Thus, the evidence, when viewed in the light most favorable to the government, was sufficient to find that High recorded the videos, and specifically made the screenshots, in order to engage in sexually explicit conduct in violation of section 2251(a).

(A-7-10) (citation omitted).

On the other side of the circuit split is *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). In *Hillie*, the D.C. Circuit considered the *exact* issue presented in the instant case and the court reversed the defendant's § 2251 convictions. The videos at issue in *Hillie* involved the following depictions:

> The first video is 29 minutes and 49 seconds long. It depicts Hillie positioning a camera underneath a bed in JAA's bedroom. Hillie walks back and forth from the camera several times, looking at it from different angles and adjusting its position. Eventually, Hillie exits the bedroom, leaving the camera behind, still recording. Later, JAA enters the bedroom. For several minutes she walks around the room, clothed, dancing and singing to herself. She proceeds to undress, standing almost directly in front of the camera. While undressing, she bends over in front of the camera, exposing her genitals to the camera for approximately nine seconds. After she has undressed, she sits slightly to the left of the camera and appears to clean her genitals and legs with a towel. While she does this, her breasts and pubic hair are visible but her genitals are not. She proceeds to apply lotion to her body for approximately 11 minutes. While she does this, her breasts are visible and her pubic hair is occasionally visible but her genitals are not. She proceeds to stand up and walk naked around the room. While she walks, her pubic area is intermittently visible for periods of approximately one or two seconds. She then dresses and exits the room. After JAA exits the room, Hillie returns and retrieves the camera.
>
> The second video is 12 minutes and 25 seconds long. It depicts Hillie positioning a camera in a bathroom ceiling vent, directly above a toilet. Hillie then leaves the bathroom. Shortly after, Jo. A enters, sits on the toilet, stands up, and leaves. JAA and another minor, whom the Government refers to as KA proceed to enter the bathroom. JAA proceeds to sit on the toilet. The upper part of JAA's buttocks is visible for approximately 20 seconds while she sits on the toilet. Because the camera is directly above the toilet, JAA's genitals are not visible. JAA

> stands up and KA proceeds to sit on the toilet. The upper part of KA's buttocks is visible for approximately 20 seconds, but her genitals are not visible. JAA proceeds to wipe KA's pubic area with a washcloth. KA's pubic area is not visible while she does this, although occasionally the upper part of KA's buttocks is visible. KA proceeds to leave the bathroom. After she has left, JAA removes her pants and underwear and proceeds to wipe her pubic area with a washcloth. JAA's pubic area is visible for approximately 16 seconds while she does this. JAA proceeds to dress and exit the bathroom. Jo. A then enters and sits on the toilet again. Jo. A then stands up, looks up at the ceiling vent, sees the camera, and removes it.
>
> The remaining four videos depict Hillie hiding a video camera in a bathroom ceiling vent and a bedroom dresser, but do not depict JAA's or JA's genitals or pubic area.

Hillie, 39 F.4th at 677-678 (internal record citations omitted). The defendant was subsequently charged with sexual exploitation of a minor (in violation of § 2251(a)) in relation to his production of the two videos in which JAA's genitals and pubic area are visible (as described above). The defendant was later convicted of these counts following a jury trial.

On appeal, the D.C. Circuit held that there was insufficient evidence to support the defendant's convictions of sexual exploitation of a minor. In reaching this conclusion, the D.C. Circuit relied on both this Court's First Amendment caselaw and this Court's holding in *Williams*:

> These constructions were necessary antecedents to determining whether the statutes at issue in *Ferber*, *X-Citement Video*, and *Williams* were overbroad, *see Williams*, 553 U.S. at 293 ("[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers"), and are therefore binding holdings, *see In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019). We are of course bound by this directly applicable Supreme Court precedent, U.S. CONST. ART. III, § 1; *Rodriguez de Quijas v. Shearson/Am. Exp.,*

Inc., 490 U.S. 477, 484 (1989), and, as the Court has explained, we must faithfully apply those precedents where the same statutory language is at issue, as it is here:

> It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A *judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.*

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 312-313 (1994) (emphasis added). Additionally, the Court's authoritative construction of statutory language must be followed in subsequent prosecutions because it is that construction which provides fair notice to citizens of what conduct is proscribed. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (unexpected or unforeseen authoritative judicial construction that broadens clear and more precise statutory language violates due process).

. . . .

Based on the foregoing, we construe "lascivious exhibition of the anus, genitals, or pubic area of any person" in 18 U.S.C. § 2256(2)(A)(v) to mean that the minor displayed 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. *See* Webster's Third New Int'l Dictionary (1981) (defining "lascivious" to mean, among others, "inclined to lechery: lewd, lustful"); Black's Law Dictionary (5th Ed. 1979) (defining "lascivious" as, among others, "tending to incite lust" and "lewd"). This construction is consistent with the phrase "sexually explicit conduct," of which the "lascivious exhibition of the genitals" is one form. As *Williams* explained:

> "Sexually explicit conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And "simulated" sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that

conduct on camera.

553 U.S. at 297. Further, just as *Williams* relied upon the *noscitur a sociis* canon to interpret the promotion of child pornography statute, 18 U.S.C. § 2252A(a)(3)(B), *id.* at 294-295, we believe it has relevance here. Because "lascivious exhibition of the anus, genitals, or pubic area" appears in a list with "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," its "meaning[ ] [is] narrowed by the commonsense canon of *noscitur a sociis* – which counsels that a word is given more precise content by the neighboring words with which it is associated." *Id.* at 294. Thus, the "lascivious exhibition of the anus, genitals, or pubic area" must be performed in a manner that connotes the commission of a sexual act, which is consistent with how the prosecutors construed "lewd exhibition of the genitals" when asking the Supreme Court to uphold the New York statute in *Ferber*. *See* Brief for Petitioner, *Ferber*, 458 U.S. 747, (1982) (No. 81-55), 1982 WL 608534, at *24 ("Notably, the statute, in defining sexual conduct, does not include simple nudity, although it does prohibit lewd exhibition of the genitals. Nudity is prohibited only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the prohibited acts. N.Y. Penal Law § 263.00 (3) & (6). In not prohibiting simple nudity, the statute allows producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children."). Further, this construction is consistent with the Court's repeated description of the conduct prohibited by the terms "sexual conduct" and "sexually explicit conduct" in child pornography statutes as "hard core" sexual conduct, as described above.

To be clear, this construction of the statute – although it is informed by First Amendment caselaw – is not a holding that Congress has run up against a constitutional limit on its authority to criminalize conduct like Hillie's. In fact, both federal law and the law of the District of Columbia contain prohibitions on voyeurism. *See* 18 U.S.C. § 1801; D.C. Code § 22-3531. And we see no barrier to imposition of enhanced penalties when the victim is a minor. *Cf. Ferber*, 458 U.S. at 756-757. The First Amendment cases are instructive simply in that they shed light on the meaning that Congress ascribed to the statutory term "lascivious exhibition of the anus, genitals, or pubic area of any person."

Applying this construction to the evidence introduced at trial, we conclude that no rational trier of fact could find JAA's conduct depicted in the videos related to counts 1-3 to be a "lascivious exhibition of the anus, genitals, or pubic area of any person," as defined by § 2256(2)(A). To fall within the definition of "lascivious exhibition of the . . . genitals," JAA's conduct depicted in the videos must consist of her displaying her anus, genitalia or pubic area in a lustful manner that connotes the

> commission of a sexual act. As the dissent agrees (pp. 698-699), none of the conduct in which JAA engages in the two videos at issue comes close. The videos depict JAA engaged in ordinary grooming activities, some dancing, and nothing more. While JAA disrobes and her nude body is shown, along with fleeting views of her pubic area, JAA never engages in any sexual conduct whatsoever, or any activity connoting a sex act. There is certainly nothing that could be reasonably described as "hard core," sexually explicit conduct. The depiction of JAA's conduct does not even suggest "sexual coyness or a willingness to engage in sexual activity." Dissent at 699. We agree and highlight that we view the evidence in the same way as our dissenting colleague: the evidence against Hillie showed no sexual conduct or coyness by JAA nor anyone else. Accordingly, we hold that no rational trier of fact could find JAA's conduct depicted in the videos to be a "lascivious exhibition of the . . . genitals" as defined by § 2256(2)(A). We therefore vacate Hillie's convictions on counts 1-3 and direct the District Court to enter a judgment of acquittal on those counts.

Hillie, 39 F.4th at 683-686.

As explained by the D.C. Circuit in *Hillie*, to fall within the definition of "lascivious exhibition of the . . . genitals," the conduct depicted in the videos must consist of the victims displaying their anus, genitalia or pubic area in a lustful manner that connotes the commission of a sexual act. And as specifically found by the district court in the instant case, none of the conduct depicted in the videos satisfies this requirement:

> Some of the facts, even as to this, really aren't in dispute in terms of what happened. *Neither side is contending that the children were intentionally displaying themselves in a sexual manner, or that the children were behaving in any lustful way or in any way that would connote sexual activity. They were simply using the bathroom in an ordinary way. That's my finding.*
>
> I think it's clear in the photos and videos.

(A-91). There is certainly nothing in the videos that could be reasonably described as "hard core," sexually explicit conduct, and the depiction of the victims' conduct does not

even suggest "sexual coyness or a willingness to engage in sexual activity." Notably, during the Petitioner's trial, the Government conceded that if the holding in *Hillie* is applied to this case, then the Petitioner is entitled to relief:

> And I will note that that is completely at odds with *Hillie*.
>
> THE COURT: You would acknowledge – *Hillie* is a very good case for them and if that were binding here you couldn't succeed; could you?
>
> MS. WEISS [one of the prosecutors]: If *Hillie* was binding here, Judge, we would be in a different posture. I agree.
> But, *Hillie* –
>
> THE COURT: To the point where you couldn't succeed. I mean, it's a question, I guess, but maybe there is some argument. But it would seem to me you are not arguing that there is evidence that the child was doing anything?
>
> MS. WEISS: No. I think the government has been very clear from the beginning with this. We are not arguing that the videos and images at issue here are conventionally pornographic. We are not arguing that it's any of the other potential ways to prove that the images are sexually explicit, aside from the lascivious exhibition of the genitals.
>
> THE COURT: So, *Hillie* is just incorrect in your view then?
>
> MS. WEISS: Yes. Completely.

(A-62-63). The district court also agreed that if the holding in *Hillie* is applied to this case, then the Petitioner is entitled to relief

> There are cases that support that view. We talked at length about the *Hillie* case – the recent Court of Appeals decision from the DC Circuit.
> There, the Court construed the term "lascivious exhibition" to mean – and I am quoting from the case here – that the minor displayed 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.
> That's how the DC Circuit interpreted that statute.

. . . .

> I will note, again, you know, this is – I think the government acknowledges that under the DC Circuit case we have discussed, *Hillie*, which looks just from the perspective of the child in the pictures and not from the perspective of the person taking the pictures, that would be a different outcome.

(A-92, A-96).

* * * * *

Thus, the holding in *Hillie* is clearly in conflict with the Eleventh Circuit's opinion below. By granting the petition in the instant case, the Court will have the opportunity to resolve the circuit split cited above and clarify whether a defendant can be convicted pursuant to 18 U.S.C. § 2251 if the video that is the basis for the charge merely shows a minor engaging in innocuous conduct – such as going to the bathroom – and the defendant does *not* "edit" the video to create a "lascivious exhibition of the genitals or pubic area" of the minor depicted in the video. The issue in this case has the potential to impact *numerous* criminal cases nationwide. As explained above, the split of authority is clear and in present need of resolution from this Court before the split widens even more. Notably, three other circuit courts have recently disagreed with the holding in *Hillie*. *See United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023) ("Boam also points us to a recent D.C. Circuit case that held that similar videos were not lascivious exhibitions of a child's genitals. *See United States v. Hillie*, 39 F.4th 674, 692 (D.C. Cir. 2022). But there is no question that *Hillie* is incompatible with our caselaw . . . ."); *United States v. Sanders*, 107 F.4th 234, 264 (4th Cir. 2024)

(recognizing that Fourth Circuit precedent "cannot be reconciled with *Hillie*'s requirement to the contrary"); *United States v. Porter*, 114 F.4th 931, 937 (7th Cir. 2024) ("But we have recently considered *Hillie* and rejected its holding . . . .").

Accordingly, for the reasons set forth above, the Petitioner requests the Court to grant his petition and exercise its discretion to hear this important matter.

I. CONCLUSION

The Petitioner requests the Court to grant this petition for writ of certiorari.

Respectfully Submitted,

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