No. 24-6826

IN THE

Supreme Court of the United States

TIMOTHY W. WRIGHT, *Petitioner,*

v.

UNITED STATES OF AMERICA *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

March 18, 2025

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QUESTIONS PRESENTED

Title 18 U.S.C. § 2251(a) provides 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 [this section]."

The question presented is: In accordance with the method of statutory interpretation set forth in *Dubin v. United States*, 599 U.S. 110 (2023), should the term "uses" be interpreted in the context of the statute and the other *actus reus* verbs listed in it requiring an active interaction with a minor.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished. See, *United States v.* Wright, Case No. 23-3008 (6th Cir. 2024), and is reproduced in the Appendix A to this Petition. A petition for rehearing and rehearing *en banc* was denied by an order dated January 27, 2025, which is reproduced at Appendix B to the petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on October 11, 2024. See. Appendix A. Petitioner's request for rehearing and rehearing *en banc* was denied by the Sixth Circuit on January 27, 2025. Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provision is 18 U.S.C. § 2251(a), which provides in pertinent part:.

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).

A violation of §2251(a) is punishable under 18 U.S.C. §2251(e) by significant penalties of a

mandatory minimum sentence of 15 years and a maximum sentence of 30 years.

I. INTRODUCTION

This Petition raises the issue of statutory construction. This Court has recently instructed on the process courts should follow to determine the meaning of common terms like "uses" in a statute. *See Dubin v. United States*, 599 U.S. 110 (2023). In *Dubin*, this Court, in interpreting the Aggravated Identity Theft Statute (18 U.S.C. § 1028A(a)(1)), held that, because "'use' takes on different meanings depending on context, and because it draws meaning from its context," courts should "look not only to the word itself, but also to the statute and [surrounding] scheme, to determine the meaning Congress intended." *See id.* at 118. This Court further instructed that where "uses" appears in a list of *actus reus* verbs, courts should "assume[] that Congress used [multiple] terms because it intended each term to have a particular, non-superfluous meaning." *See id.* at 126.

Section 2251(a) of Title 18 of the U.S. Code, entitled "Sexual Exploitation of Children," often called production of child pornography, makes it a crime for any person to employ, use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Congress intended §2251(a) to be part of a "comprehensive regulatory scheme" aimed at "criminalizing the receipt, distribution, sale, production, possession, solicitation and advertisement of child pornography." United States v. Parton, 749 F.3d 1329, 1330 (11th Cir. 2014) (internal quotation marks omitted)(addressing §2251(a)).

Section 2251(a) punishes the production of images of children engaged in sex. See United States v. Skinner, 70 F.4th 219, 226 (4th Cir. 2023)(Section 2251(a) prohibits the production and transmission of a depiction of a child engaging in sexually explicit conduct); United States v. Hall, No. 22-5179, 2023 U.S. App. LEXIS 6780, at *2-3 (6th Cir. Mar. 21, 2023) (to sustain a conviction for production of child pornography under § 2251(a), the government must prove that a defendant produced a visual depiction of a minor engaged in sexually explicit conduct);United States v. Schopp, 938 F.3d 1053, 1068 (9th Cir. 2019)("sexual exploitation" is limited to the production of child pornography).

This petition raises a question of statutory interpretation that has divided the lower courts about the reach of §2251(a)—whether to "use" a minor "to engage in" sexually explicit conduct, and thus produce child pornography, requires showing that an offender took an action upon a minor to cause the minor's engagement in the sexually explicit conduct depicted in an image or video.

II. BACKGROUND OF THE CASE

Following a bitter divorce in July 2020 with his wife of fourteen years, Petitioner was granted a split custody of his 13-year old daughter (Jane Doe #3), who liked to spend weekends with Petitioner. In November of 2020, Petitioner started getting suspicious after he found, on few occasions, his daughter and her friend (Jane Doe # 4) sleeping right next to each other on her bedroom floor, when he would wake her up in the mornings. Petitioner found this very odd because while his daughter's friend would stay

over with her every weekend, his daughter would always sleep in her own bed, while her friend slept on the floor.

Around same time in late November, Petitioner's daughter and her friend started to spend hours together in the bathroom, whenever his daughter's friend stayed over. At that point, Petitioner was concerned (as he was himself abused as a child by a older person) about his daughter being abused or taken advantage of by Jane Doe #4, who was a few years older and more mature than his daughter. As Petitioner could not discuss this with his divorced wife, he made a poor and stupid decision to investigate his daughter's activities in the bathroom by installing a surveillance camera in the bathroom. In December 2020, Petitioner purchased and installed a type of camera (mounted on the ceiling pointing downwards) to purposely try and avoid graphic visuals of their privates in case there was nudity. Petitioner also positioned the camera so it wouldn't view the toilet or the shower with the shower curtain closed in case they were actually taking a shower.

Following the installation of the camera, Petitioner used the camera to watch his daughter after she told him that she was going to take a shower with her friend. But once they started to undress, Petitioner felt uncomfortable and only took intermittent screenshots, without zooming in or editing any images. Petitioner didn't want to record the videos because it would be more uncomfortable to review the videos than the images. But once he could not figure out what they were doing for hours in the bathroom together, on the next occasion he used the camera to record the visuals in video.

Petitioner would watch live until they started to undress, but would stop watching and start recording, so he could later review the excerpts of what they were doing.

While Petitioner was satisfied that his daughter was not being sexually abused by her older friend, his concerns were right about other inappropriate behavior of his daughter and her friend, who were apparently communicating with some third person and taking and sending nude pictures of themselves to that person. A few weeks later, Petitioner cautioned his daughter about not sending or texting any inappropriate pictures over the internet, as she may regret that later in her lifetime. At the same time, Petitioner himself forgot to delete the images and videos saved in his phone. They were simply out of sight and out of mind. Petitioner had no lascivious, sexual or criminal intent during these few weeks of surveillance. It was rather a very poor and stupid decision to use a camera and invade the privacy of those girls and Petitioner later always felt awful about it.

In unrelated circumstances, Special Agents from Homeland Security Investigations (HSI) received information in July of 2021, from the Delaware Country Juvenile Court and Columbus Division of Police Missing Persons Unit (CPD) regarding three minor females. More Specifically, law enforcement learned that in early to mid-July, Jane Doe One (15-years-old), Jane Doe Two (17-years-old), and S.S. (16-years-old) had all been reported missing. Furthermore, the agents learned that all three minors were good friends. During the investigation into the whereabouts of all three female minors, on July 27, 2021 call records revealed that between May 2021 and July 2021, Petitioner exchanged numerous phone calls and text messages with Jane Doe One and Jane Doe Two.

Further searches pursuant to additional search warrants revealed communications between Petitioner and Jane Doe One and Jane Doe Two. In addition to that evidence, agents discovered screen shot photos in Petitioner's camera roll that appeared to be from a hidden camera, the same camera installed in the bathroom ceiling by the Petitioner. The images saved to the camera roll were the ones Petitioner recorded over six-months before. On August 24, 2021, law enforcement returned to Petitioner's residence to execute a search warrant, seizing ll digital media devices. While agents were initially unable to locate any hidden camera device, further investigation revealed that on December 14, 2020, Petitioner has purchased from Amazon a smoke detector with a hidden camera inside.

Following a full forensic examination on Petitioner's iPhone X, it was noted that an app called YiEye was installed on Petitioner's phone which was directly linked to the hidden camera in the bathroom within his residence. Approximately 27 videos of the same event and 152 screenshot images were recovered from Petitioner's iPhone camera roll. The law enforcement confirmed that all of the saved images and videos were taken in January and February 2021, and depict Petitioner's daughter (Jane Doe Three) and her older friend (Jane Doe Four) were taking naked photographs of one another, filming themselves nude in a mirror, masturbating, bathing together, and overall, appearing to be involved in the "exploration" of their own bodies and each other's. Petitioner's daughter admitted to law enforcement that she had no idea there was a hidden camera in her bathroom prior to Petitioner admitting to her that he installed it.

The evidence in petitioner's case shows that he has never acted on his impulses, has no history of predatory behavior towards children, and never posed any threat to any children. On the contrary, he has a reputation of being kind and caring. While the charges should reflect greater culpability of an actual predator or abuser, Petitioner's conduct was not intended to engage in such exploitative crimes or acts of abuse.

III. BACKGROUND OF THE PROCEEDINGS

A. District Court Proceedings

Petitioner was charged in a superseding indictment of various counts involving sexual exploitation of minor, in violation of 18 U.S.C. Section 2251(a), (e); and possession of child pornography, in violation of 18 U.S.C. Section 2252(a)(4)(B). Petitioner pled guilty to Counts 3, and 4, charging that he used minors (Jane does Three and Four) to engage in sexually explicit conduct ... for the purpose of" producing such depiction, and Count 12, possession of child pornography, for the images he received from Jane Does One and Two. Petitioner was sentenced to a twenty-year imprisonment on all three counts, to run concurrently.

B. Appellate Court Proceedings

On appeal, Petitioner argued that his plea was involuntary as §2251(a)'s text does not extend so far as to criminalize conduct involving a surreptitious recording of the minor,

without any direct interaction and active participation of the minor. In support of his reading, Petitioner first explained that in ordinary usage, the word "use" connotes action or activity. And beyond the verb "use," Petitioner noted that §2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Thus, Petitioner reasoned that reading "uses" (verb) together with "to engage in" (adverbial prepositional phrase) under the ordinary rules of English grammar shows that for each charge under §2251(a), the government has to prove that an offender both (1) took an action involving a minor (use), which (2) caused the minor's participation (to engage in) in sexually explicit conduct.

Petitioner argued that the word "use" in § 2251(a) means to actively deploy a minor. "Although variously defined, the word use, in legislation as in conversation, ordinarily signifies 'active employment.'" Jones v. United States, 529 U.S. 848, 855 (2000) accord Voisine v. United States, 136 S. Ct. 2272, 2278, n.3 (2016) (to use means to convert to one's service or to employ). Petitioner argued that the government's position would lead to absurd results. As the Howard court put it, "The government's interpretation is strained and implausible. Indeed, taken to its logical conclusion, it does not require the presence of a child on camera at all. The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." 968 F.3d at 721. Petitioner argued that the offense requires proof that the offender took one of the listed actions to cause the minor to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct.

To further support his reading, Petitioner pointed to the contextual canon noscitur a

sociis, which calls for reading §2251 by interpreting "uses" consistent with its surrounding verbs: employs, persuades, induces, entices, or coerces. Each of these verbs, Petitioner explained, requires the offender to take some action upon the minor victim to involve the minor in sexually explicit conduct.

Applying this related meaning to "uses" therefore suggests the term should be interpreted as requiring some action upon the minor to involve the minor in sexually explicit conduct. In contrast, Petitioner argued that if "uses" were interpreted broadly to mean employ in any sense, it would subsume the other words, rendering them surplusage.

The Sixth Circuit noted that it's precedent in United States v. Wright, 774 F.3d 1085 (6th Cir 2014) was binding, and concluded that it was compelled to follow the precedent unless overruled by an en banc court or the United States Supreme Court. Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985); see also 6th Cir. R. 206(c) (explaining that "[r]eported panel opinions are binding on subsequent panels").

Petitioner filed a request for an en banc hearing arguing that the Sixth Circuit precedent in United States v. Wright, was misguided on the issue of meaning of the term "use" in 18 U.S.C. Section 2251. The Appeal's court decision not only failed to acknowledge the Supreme Court's precedent in Dubin, but also was contrary to every acceptable maxims of statutory interpretation.

REASONS FOR GRANTING THE PETITION

The circuit courts are openly divided over the reach of the production of child pornography statute, 18 U.S.C. §2251(a). The court below held that "an ordinary reading of § 2251(a) * * * suggests that a minor is 'used' if she is 'made use of' in a sexually explicit videotape or if an adult 'avails himself of' the child's presence as the object of his sexual desire by masturbating in her presence." Dawson, 645 F.4that 1236 (internal alterations omitted). That decision directly conflicts with the Seventh Circuit's decision in United States v. Howard, which holds that §2251(a)'s text does not extend so far as to criminalize conduct involving an offender taking pictures of himself engaging in his own, solo sexual act nearby a fully clothed minor. See968 F.3d 717, 721 (7th Cir. 2020). Other circuits, including the Second, Third, Eighth, Ninth, and D.C. Circuits have all had different takes on §2251(a)'s reach under similar facts, creating an intractable division among the lower courts on the proper scope of the statute. This Court to resolve this conflict on this important and recurring issue and resolve the meaning of "use" a minor "to engage in" sexually explicit conduct under §2251(a).

A. The term "uses" in 18 U.S.C. Section 2251 requires a defendant to have active interaction with a minor.

Every lower court had completely failed to consult the definition of "uses," as prescribed by Congress in a similar statute. Title 18 U.S.C. Section 25, titled as "Use of minors in crimes of violence" provides in pertinent part:

(a) Definitions. In this section, the following definitions shall apply:

(3) Uses. The term "uses" means employs, hires, persuades, induces, entices, or coerces.

Id. (Added April 30, 2003, P.L. 108-21, Title VI, Sec. 601, 117 Stat. 686 "PROTECT ACT OF 2003").

In 2003, Congress enacted the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 686. Section 601 of the Act added 18 U.S.C. Sec. 25 and Section 103 amended 18 U.S.C. 2251(a) by increasing the mandatory minimum sentence under Section 2251(a) from ten to fifteen years, but otherwise left Section 2251(a) unchanged. The amendment of 18 U.S.C. Section 2251(a) by Section 103 and the simultaneous enactment of 18 U.S.C. Section 25 by Section 601 of the PROTECT Act proves that Congress intended the term "uses," as used in Section 2251, also to be defined as to mean "employs, hires, persuades, induces, entices, or coerces."

The normal rule of statutory construction prescribes "that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995). Moreover, it makes particular sense to follow that canon here because these two statutes cover the same subject matter, using a minor. See Barnhart v. Walton, 535 U.S. 212, 221 (2002); Comm'r v. Lundy, 516 U.S. 235, 249-50 (1996).

The statues criminalize similar acts -- use of a minor – and do so from slightly different angles, to commit a crime of violence, or to engage in Sexually Explicit Conduct. And while the term "uses" is specifically defined as "employs, hires, persuades, induces, entices, or coerces" in Section 25, the term "uses" in 2251(a) follows the same set of verbs, plainly referring to direct interaction with a minor. Using the statutory definition in both statutes provides coherent context and avoids redundant provisions, and there is no reason to define "uses" differently from one provision to the next.

In any case, this is how Congress has chosen to define "uses" for purposes of 18 U.S.C. Sections 25 (and 18 U.S.C 2251 by implication), a decision that the Courts must respect. See Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute indicates an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); Tenn. Protection & Advocacy, Inc. v. Wells, 371 F.3d 342, 349-350 (6th Cir. 2004) ("[I]t is well-settled law that when a statutory definition contradicts the everyday meaning of a word, the statutory language generally controls: judges should 'construe legislation as it is written, not as it might be read by a layman.'" (internal citations omitted)); see also 73 Am. Jur. 2d Statues Sec. 136 (2d ed. 2013) ("[I]f the legislature has provided an express definition of a term, that definition is generally binding on the courts. In the exercise of its power to define terms, the legislature may include within the concept and definition of a term ideas which may not be strictly within its ordinary definition.").

"The rule of in pari materia-like any canon of statutory construction-is a reflection of

practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a later act can be regarded as a legislative interpretation of an earlier act in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting, and is therefore entitled to great weight in resolving any ambiguities and doubts." Erlenbaugh v. United States, 409 U.S. 239, 243-45, 93 S. Ct. 477, 34 L. Ed. 2d 446 (1972). the Court clarified a limitation to the in pari materia canon, which is that only "statutes addressing the same subject matter generally should be read as if they were one law." See Wachovia Bank v. Schmidt, 546 U.S. 303, 315-16, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)

When, as here, when the Court is "confronted with two Acts of Congress allegedly touching on the same topic, we are "not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624, 200 L.. Ed. 2d 889 (2018) (quoting Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). And as this Court has repeatedly stressed, courts analyzing statutes must pay attention not just to the particular word, phrase, or provision at issue in the case, but instead how Congress legislates across the entire corpus juris, such that like provisions are treated in pari materia and dissimilar provisions are treated differently. See generally United States v. Ressam, 553 U.S. 272, 277, 128 S. Ct. 1858, 170 L. Ed. 2d 640 (2008); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007).

In addition, the Supreme Court has also long looked to the titles of statutory provisions to determine congressional intent. See Yates v. United States, 574 U.S. 528, 540, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015); Almendarez-Torres v. United States, 523 U.S. 224, 234, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)).

Therefore, the fact that ORDINARY MEANING of "uses" can be concluded as requiring a mere presence of a minor, (Id. United States v. Wright, 774 F.3d at 1089, 1091), is immaterial. Rather, the STATUTORY DEFINITION of "uses" means "employs, hires, persuades, induces, entices or coerces," all of which require active and direct interaction with a minor. The Sixth Circuit failed to consult this statutory definition of "uses" in section 25, and applied the ordinary meaning to the term "uses," thereby interpreting the materially identical word in entirely different ways. This resulted in the Sixth Circuit ignoring the traditional rule that "a legislative body generally uses a particular word with a consistent meaning in a given context." See. Erlenbaugh v. United States, 409 U.S. 239, 243 (1972). Whatever force this interpretive presumption may have as to one "particular word," it must carry more as applied to the words replicated in Sections 25 and and Sections 2251(a).

The Sixth Circuit also fails to explain why it ignored the phrase "to engage in" which follows the verb "uses," thereby leaving the phrase as surplusage. Nor the Sixth Circuit considered the canons noscitur a sociis and ejusdem generis in its decision, which

advises that words grouped in a list be given similar meanings and that a general term following specific words embraces things of a similar kind, respectively. In reaching its conclusion, the Sixth Circuit plainly violated the established canon of statutory construction forbidding that terms in a statute should not be considered so as to render any provision of that statute meaningless or superfluous"). see also TRW Inc. v. Andrews, 534 U.S. 19, 29 (2001) (declining to interpret statute in a away that would "in practical effect" render a provision "superfluous in all but the most unusual circumstances.").

Under the Wright's Panel's reasoning, the phrase "to engage in" would be entirely unnecessary to the Section 2251(a) offense, and the scope of offense would be exactly the same even without any active participation or engagement of a minor. But that is not how the statute was written, and Courts cannot disregard the term "to engage in," which itself requires active participation. See, e.g., TRW Inc. v. Andrews, 534 U.S. 19, 32 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'. . . . We are 'reluctant to treat statutory terms as surplusage in any setting.'" (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001))).

Simply put, the Sixth Circuit offered no explanation for why Congress deliberately chose to define "uses" in Title 18 U.S.C. section 25, enacted by PROTECT Act, and not to include that definition in 18 U.S.C. Section 2251(a), which was also amended by the PROTECT Act. Insofar, Petitioner's decision rests on the precedent established by United States v. Wright, neither Wright or Petitioner's decision can ground its reasoning based on the

statutory text.

B. Ordinary Meaning Analysis And Other Traditional Statutory Construction Rules Support Narrowly Construing The Term "Uses" in § 2251(a).

Courts must begin their statutory analysis by looking at the plain language of the statute, United States v. Turkette, 452 U.S. 576, 580 (1981), giving each word its "ordinary meaning," Richards v. United States, 369 U.S. 1, 9 (1962). Here, the statutory language that requires a mandatory minimum 15 years in prison provides: "[a]ny 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." § 2251(a), (e) (emphasis added). Under ordinary meaning analysis, the Court should not equate (a) actively using a minor to create a sexually explicit image with (b) surreptitiously photographing a minor without actively using the minor. See Bailey v. United States, 516 U.S. 137, 143 (1995) (holding that the term "use" ought to be narrowly interpreted to require evidence of "active employment").

If Congress intended the act of surreptitiously photographing a minor naked to result in liability and a mandatory minimum sentence of 15 years under § 2251(a), such words would be in the statute. See 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain— neither to add nor to subtract, neither to delete nor to distort."). Congress laid out six actions that constitute a crime, none of which is the mere act of surreptitiously photographing a minor engaged

in private routines like bathing or undressing.

Both the doctrines of noscitur a sociis and ejusdem generis, along with the surplusage canons of construction strongly favor the narrow meaning of "uses" in this context. Defining "uses" to require causing the minor "into action or service" to create sexually explicit images is appropriate because it is consistent with an ordinary meaning analysis, Dubin, and bedrock rules of statutory construction, and Congressional definition of "uses" in Title 18 U.S.C. § 25.

This Court should not allow continued confusion and disagreement about what it means to "use" a minor "to engage in" sexually explicit conduct and thereby produce child pornography. To begin with, this Court routinely grants certiorari to resolve questions of statutory interpretation that determine the reach of a federal criminal statute. See Van Buren v. United States, 141 S. Ct. 1648 (2021); Marinello v. United States, 138 S. Ct. 1101 (2018); Maslenjak v. United States, 137 S. Ct. 1918 (2017); McDonnell v. United States, 136 S. Ct. 2355 (2016); Bond v. United States, 134 S. Ct. 2077 (2014). Indeed, this Court has addressed the meaning of "uses" many times, including as recently as last term, given that "uses" is susceptible to a broad interpretation that dramatically extends a statute's breath. See, e.g.,Dubin v. United States, No. 21-10, – S. Ct. – (2023); Smith v. United States, 508 U.S. 223, 232 (1993); Bailey v. United States, 516 U.S. 137, 143 (1995); Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). And in most instances, the Court has cabined the reach of a statute by interpreting "uses" consistent with its statutory context and potential for prosecutorial abuse.See Dubin, Slip Op. 4–17; see also id. at 18 ("Time and again, this

Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."); id.at 19 ("We cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (cleaned up).

C. Proper Statutory Construction of 18 U.S.C. Section 2251(a) requires minor's active interaction

Petitioner was convicted under 18 U.S.C. Section 2251(a), which mandates a minimum 15-year prison term for:

> 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 ...

Section 2251(a)'s actus reus starts with six active verbs. The first two verbs, "uses" and "employs" (as a synonym for "uses"), require that defendant's acts cause the minor as an active participant in engaging in sexually explicit conduct. The other four verbs (plus "employs," when used in the sense of "hires") involve pressuring the child, physically or psychologically, to engage in sexually explicit conduct, whether alone or with the defendant or someone else. See Ortiz-Graulau v. United States, 756 F.3d 12, 19 (1st Cir. 2014). Congress used this wide variety of verbs to reach a broad range of activities involved in producing child porn. See id.

But all six verbs also signal that the defendant must intend some resulting action.

* Use, verb (defs. II & 8b), Oxford English Dictionary Online (Sept. 2022) ("To put to practical or effective use.... With to and infinitive, expressing the end or purpose of the use.")

* Employ, verb (defs. 1a, 4a), id. ("To apply (a thing) to a definite purpose; to use as a means, instrument, material, etc.... To use the services of (a person) to undertake a task, carry out work, etc.");

* Persuade, verb (def. 2a), id. ("To urge successfully to do something; to attract, induce, or entice to something or in a particular direction. Also: to talk into, to, unto a course of action, position, etc.");

* Induce (def. 1), id. ("To lead (a person), by persuasion or some influence or motive that acts upon the will, to (into, unto) some action, condition, belief, etc.; to lead on, move, influence, prevail upon (any one) to do something.");

* Entice (def. 2a), id. ("To allure, attract by the offer of pleasure or advantage; esp. to allure insidiously or adroitly. Often const. from, to (a course of conduct, a place).");

* Coerce (defs. 2a, 2b), id. ("To compel of force to do anything.... To force into (an action or state).").

On top of the six active verbs, the statute adds another verb phrase: the intended resulting acts must themselves be "engage[d] in." Engage, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on."); cf. United States v.

Laursen, 847 F.3d 1026, 1032 (9th Cir. 2017) (using "take part in" as a synonym for "engage in" when describing Sec. 2251(a)'s elements); United States v. Broxmeyer, 616 F.3d 120, 124 (2d Cir. 2010) (same); United States v. Malloy, 568 F.3d 166, 169 (4th Cir. 2009) (same). Thus accused must instigate sexually explicit conduct by the child, or by himself or through a third party involving the child.

In Petitioner's case, the government did not argue that Petitioner intended to employ, persuade, induce, entice, or coerce minors to engage in sexually explicit conduct; rather the Government's theory is that Petitioner somehow intended to "use" minors to engage in sexually explicit conduct. The government also did not argue that Petitioner intended for himself to engage in sexually explicit conduct with Jane Doe 3 & 4, as the phrase "employ[] [or] use[] . . . a[] minor to engage in . . . sexually explicit conduct" might seem to require. See Webster's Third New int'l Dictionary (1976) (defining "employ" to mean, among others, "to make use of" and "to use or engage the services of"); Black's Law Dictionary (4th ed. 1951) (defining "employ" to mean, among others, "to engage one's service").

Instead, the Government's theory of the case was that by using a hidden video camera in the bathroom ceiling, Petitioner "used" Jane Doe 3 & 4 to engage in sexually explicit conduct so that he could videotape such conduct. But the term "uses," requires some active or coercive component, or, in other words, to require a causal, interactive relationship between himself and the minor in engaging her in sexually explicit conduct. Petitioner's placement of the hidden camera in the bathroom, without any explicit

direction to Jane Does 3 & 4 or enlistment or proactive engagement, Petitioner may have acted as a voyeur, and, as such, he could not be found guilty of having "used" Jane Does 3 & 4 in the manner required by the statute.

The plain text of section 2251(a) does not extend so far as to criminalize conduct involving an offender taking pictures of a minor who is not otherwise participating or engaged in the sexual conduct. The word "use" connotes action or activity. And beyond the verb "use," Section 2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Thus, reading "uses" (verb) together with "to engage in" (adverbial prepositional phrase) under the ordinary rules of English grammar shows that for each charge under Section 2251(a), the government has to prove that an offender both (1) took an action involving a minor (use), which (2) caused the minor's participation (to engage in) in sexually explicit conduct.

The starting point in all statutory construction begins with the text itself, giving the words their plain, everyday, ordinary meaning in context. Beyond the verb "use," section 2251(a)'s reach is limited by the adverbial propositional phrase, "to engage in." Black's Law Dictionary defines "engage" as "to employ or involve oneself to take part in; to embark on." Black's Law Dictionary 549 (7th ed. 1999). Merriam-Webster Online defines "engage" as "to begin and carry on an enterprise or activity; to take part" and lists the word participate as a synonym. http://www.mirriam-webster.com/dictionary/engage.

These definitions, along with the explicit definition by Congress in 18 U.S.C. § 25, reveal

that some participation on the minor's part is needed to constituted "engaging in" sexually explicit conduct. Applying ordinary English grammar rules, reading "uses" (verb) together with "to engage in" (adverbial prepositional phrase), shows that for each charge under section 2251(a), the government has to prove both an action involving a minor (uses) with some casual relationship to the minor's participation (to engage in) in sexually explicit conduct. The meaning of a statutory term, of course, should not be "determined in isolation," but "must be drawn from the context in which it is used." Deal v. United States, 508 U.S. 129, 132 (1993); see also Tyler v. Cain, 533 U.S. 656, 662 (2001) (emphasizing that courts should not "construe the meaning of statutory terms in a vacuum"). "Particularly when interpreting a statute that features as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it." Leocal, 543 U.S. at 9.

The contextual canon noscitur a sociis, which instructs that "words grouped in a list should be given related meaning," is particularly helpful in understanding the meaning of "uses" a minor "to engage in" sexually explicit conduct. Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990). The principle of noscitur a sociis helps to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (internal quotation marks omitted); see also Antonin Scalia & Bryan A. Garner, Reading law: The Interpretation of Legal Texts 195 (2012) (discussing noscitur a sociis). Such interpretation would also be in agreement with the Congressional definition of

"uses" in 18 U S.C. § 25.

"Uses" is surrounded by five companion verbs: employs, persuades, induces, entices, or coerces. As Howard court explained, these five verbs "require some action by the offender to cause the minor's direct engagement in sexually explicit conduct." 968 F.3d at 721-22. For instance, saying that an offender "persuades" a minor to engage in sexual conduct grammatically reads as requiring the government to prove an offender convinced a minor to participate in some sexually explicit act. Saying that an offender "coerced" a minor to engage in sexually explicit conduct means the government must show the offender forced a minor to participate in some illicit conduct. And to say that an offender "induced" a minor means the offender must have caused the minor's assent.

Each of these verbs requires the offender to take some action upon the minor victim to cause the minor to engage in sexually explicit conduct. Applying this related meaning to "uses" suggests the term should be interpreted as requiring some action upon the minor to involve the minor in sexually explicit conduct. Requests to have a minor take and send pictures matching certain descriptions are sufficient to support specific intent to produce child pornography such as when a defendant directs children to take sexually explicit photographs matching his descriptions and send them to him. See United States v. Merrill, 23 F.4th 766, 767-68, 770, 771 (7th Cir. 2022) (describing that the defendant "directed" a "real-time" photo shoot" in concluding that the evidence was sufficient to sustain a production conviction). Other circuits have reached a similar conclusion. In United States v. Isabella, 918 F.3d 816, 834 n.17 (10th Cir. 2019), the Tenth Circuit concluded that a

defendant's "explicit request for 'naughty' and 'naked' photos were more than sufficient to infer specific intent to persuade [a minor] to send him child pornography."

For the most part, experience teaches that cases involving the production of child pornography fall firmly in line with Section 2251(a)'s text. If one has sex with a minor and films it, it qualifies. As do all the other myriad (and tragic) ways a minor can be sexually abused, whether it involves bestiality, masturbation, sado-masochistic abuse, or the lascivious display of genitalia. Over time, though, the government has pushed the statute's reach, using Section 2251(a) to prosecute defendants who create images that don't involve sexual abuse but simply capture nude minors – what is commonly called voyeurism. In doing so, the government has conflated the statutory terms "lascivious exhibition" and "visual depiction," and argued that the statute applies to any defendant who produces a visual depiction that focuses on a minor's genitals -- regardless of what conduct the minor engaged in.

D. The Courts of Appeal Are Openly and Intractably Divided Over the Reach of the Production of Child Pornography Statute.

Beginning with the Second Circuit, it seeks to find a middle ground between the Seventh and Eleventh Circuits. See United States v. Osuba, 67 F.4th 56 (2d Cir. 2023). The question in Osuba was whether the defendant "used the minor to engage in sexually explicit conduct when he filmed himself masturbating toward her." Id. at 62. Agreeing with the parties and the Seventh Circuit, the Second Circuit read §2251(a) as requiring the minor

to engage in sexually explicit conduct. Id. (citing Howard, 968 F.3d at 721–22); see also id.at 63 ("We agree with Howard that the minor must engage in the sexually explicit conduct.").

The Osuba Court reasoned that "[t]he other verbs in § 2251(a)'s list ('employs,' 'persuades,' 'induces,' 'entices,' and 'coerces') all require the minor to engage in sexually explicit conduct." Id. "Reading 'uses' in §2251(a) to allow the explicit conduct to be only that of the defendant or some third party, but not the minor, would give the provision 'a jarringly different meaning.'" Id. (quoting Howard, 968 F.3d at 722).

Osuba disagreed with Dawson that "the minor need not be the one engaging in sexually explicit conduct," explaining that it was "not convinced" that Dawson's reading of §2251(a)'s "six verbs as lying on a 'spectrum'" of active to passive conduct "is the best reading of the statute." Id. at 63. Even so, Osuba said that Dawson supported its holding because the Osuba Court found "that on the facts of this case, the minor's passive involvement as the intended recipient of Osuba's actions suffices to constitute her 'engage[ment]' under § 2251(a)." Id. (quoting Howard, 968 F.3d at 722).

The Third, Eighth, and D.C. Circuits also seem to support an interpretation of "use" in §2251(a) that requires showing a minor engaged in sexually explicit conduct, which aligns with Howard but departs from Dawson. The Third Circuit, for instance, supports the view that a jury could find a defendant "'use[d]' a minor to engage in sexually explicit without the minor's conscious or active participation" if a defendant depicts the minor as

a sexual object in an image while the minor is asleep. United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013).

Similarly, the Eight Circuit, on plain-error review, found that evidence was sufficient to find images fell under §2251 because the images did not involve the "mere presence" of a minor; rather "the setting of the images was sexually suggestive; the images were intended to elicit a sexual response in the viewer; and K.S. was portrayed as a sexual object." United States v. Lohse, 797 F.3d 515, 521–22 (8th Cir. 2015). The definition of "child pornography" used for the production count in Lohse required the minor to engage in sexually explicit activity. See United States v. Lohse, Case 5:13-cr-04053, Doc. 68.

Moreover, the D.C. Circuit provides that "if a defendant, knowing that a minor masturbates in her bedroom, surreptitiously hides a video camera in the bedroom and films her doing so, then he uses or employs, i.e., avails himself of, a minor to engage in sexually explicit conduct (with herself) with the intent that she engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct." United States v. Hillie, 14 F.4th 677, 693–94 (D.C. Cir. 2021), reh'g granted, 37 F.4th 680 (D.C. Cir. 2022), and on reh'g, 39 F.4th 674 (D.C. Cir. 2022). So in Hillie, the D.C. Circuit concluded that "the Government was required to prove that Hillie intended to use JAA to engage in the lascivious exhibition of her genitals by displaying her anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act." Id.(emphasis supplied).

Finally, the Ninth Circuit addressed the meaning of "use" in United States v. Laursen, 847 F.3d 1026, 1032 (9th Cir. 2017). There, the Ninth Circuit "explained that the dictionary definition of 'use' is 'to put into action or service,' 'to avail oneself of,' or to 'employ.'" Id. (citation omitted). Emphasizing the similarities between "use" and "employ," the Lauren Court reasoned that although the minor in its case took the nude, pornographic selfies, Laursen "used or employed his victim to produce sexually explicit images by telling her that the two looked good together and that he wanted to take pictures." Id. (cleaned up).

The Ninth Circuit cited Laursen with approval in United States v. Mendez, 35 F.4th 1219 (9th Cir. 2022). There, "Mendez hid cameras in the eye of a stuffed animal, then placed the stuffed animal in the girl's bedroom." Id. at 1220. "Video footage recovered by police officers spanned six months in 2018 and showed the girl in various states of undress. Several videos showed her masturbating." Id. Affirming Mendez's §2251(a) conviction for the production of child pornography under these facts, Mendez explained that Laursen compelled its conclusion that the surreptitious photographing constituted "use" of a minor "to engage in" sexually explicit conduct.

Mendez, however, acknowledged that "writing on a clean slate, some of us might interpret § 2251(a) differently by, for example, concluding that the statutory language requires the perpetrator to cause the minor to 'to engage in sexually explicit conduct.'" Id. at 1222–23. To that end, Mendez recognized that its precedent in Laursen foreclosed adopting Howard's reading of "use," which requires proof that an offender acted to "cause the minor to engage in sexually explicit conduct for the purpose of creating a

visual image of that conduct." Id. at 1223 (quoting Howard, 968 F.3d at 721). Thus, Mendez appears to be at odds with Howard, but closer to Dawson, on the question of whether to "use" a minor "to engage in" sexually explicit conduct requires showing that the minor herself engages in the sexual act.

E. The Sixth Circuit's Interpretation of "Use" a Minor "To Engage In" Sexually Explicit Conduct under §2251(a) is Wrong.

"As the Court has observed more than once, the word use poses some interpretational difficulties because of the different meanings attributable to it." Dubin, Slip. Op. 6 (internal quotation marks omitted). At the same time, this Court has both said the word "use" necessarily "draws its meaning from context" and traditionally exercised restraint in ascribing "use" to its broadest possible meaning. See Id.

Here, the Sixth Circuit erred in relying on a single dictionary definition to interpret "use" of a minor broadly to mean avail oneself of a minor in any sense. See Op. 9 (citing Dawson). Rather, interpreting "use" a minor "to engage in" sexually explicit conduct requires a holistic endeavor and should never turn "solely on dictionary definitions of its component words." See Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion).

1. The starting point in all statutory construction begins with the text itself, giving the words their plain, everyday, ordinary meaning in context. See King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). Furthermore, in deciding what a statute defines as an offense, the "verb test" is a valuable interpretive tool. See United States v. Rodriguez–Moreno, 526

U.S. 275, 279–80 (1999).

The verbs listed in the production of child pornography statute are employ, use, persuade, induce, entice, or coerce any minor to engage in any sexually explicit conduct to produce any visual depiction of such conduct. See§2251. In ordinary usage, the word "use" connotes action or activity. The ordinary and natural meaning of "use" is variously defined as "[t]o convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of." Bailey, 516 U.S. at 144–45 (superseded by statute). In other words, "use" is the "application or employment of something." Black's Law Dictionary 1681 (9th ed. 2009)

Puzzlingly, the Sixth Circuit's reasoning was based entirely on "ordinary understanding" and dictionary definitions of the word "use." Yet, this is not the way that we are to interpret that chameleon-like word, "use." See Bailey v. United States, 516 U.S. 137, 143 (1995) ("[T]he word "use" poses some interpretational difficulties because of the different meanings attributable to it . . . 'Use' draws meaning from its context, and we will look not only to the word itself, but also to the statute and the [surrounding] scheme, to determine the meaning Congress intended."). If the Sixth Circuit had referenced Title 18 U.S.C. § 25, it would not have faced any interpretational difficulty.

This interpretation of the statute has the virtue of consistency with the comprehensive scheme that Congress created to combat child pornography. Laws dealing with a single subject, or in pari materia ("in a like manner"), "should if possible be interrelated

harmoniously." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252-55 (2012). Here, Congress crafted a comprehensive scheme to prohibit the receipt, distribution, sale, production, possession, solicitation, and advertisement of child pornography. This statutory scheme broadly covers material depicting minors engaged in sexually explicit conduct. Specifically, this cluster of statutes penalizes advertising, 18 U.S.C. Sec. 2251(d)(1); transporting, id. Sec. 2252(a)(1)(A); receiving or distributing, id. Sec. 2252(a)(2)(A); selling, id. Sec. 2252(a)(3)(B); and possession or accessing, id. Sec. 2252(a)(4)(B), material involving "the USE OF A MINOR ENGAGING IN sexually explicit conduct." (emphasis added). The Sixth Circuit's interpretation of Section 2251(a) creates an odd statutory mismatch, penalizing the production of material that is not child pornography.

2. Beyond the verb "use," §2251(a)'s reach is limited by the adverbial prepositional phrase, "to engage in." Black's Law Dictionary defines "engage" as "to employ or involve oneself to take part in; to embark on." Black's Law Dictionary 549 (7th ed. 1999). Merriam–Webster Online defines "engage" as "to begin and carry on an enterprise or activity; to take part" and lists the word participate as a synonym. http://www.mirriam-webster.com/dictionary/engage. These definitions reveal that some participation on the minor's part is needed to constitute "engaging in" sexually explicit conduct.

Applying ordinary English grammar rules, reading "uses" (verb) together with "to engage in" (adverbial prepositional phrase), shows that for each charge under §2251(a), the government has to prove both an action involving a minor (uses) with some causal

relationship to the minor's participation (to engage in) in sexually explicit conduct. Uses (verb) any minor (direct object employed as a means) to engage in (adverbial prepositional phrase) any sexually explicit conduct (action)

Consider these examples of the grammatical reading of "uses...to engage in" to illustrate the proper English reading of the phrase. Suppose John "uses" a computer "to engage in" online shopping. An ordinary English speaker would understand that John availed himself of a computer as a means to purchase some items on the internet; but not assume, for instance, that John stared at his computer while buying items through an app on his cellphone. Likewise, if a person says Jenny "uses" a fountain pen "to engage in" calligraphy, an ordinary English speaker would comprehend that Jenny is producing calligraphic art with a fountain pen. An ordinary English speaker, however, would not take from this statement that Jenny produced her calligraphy with a paintbrush while drawing inspiration from a fountain pen for her design. Similarly, a person would naturally say that an offender produces child pornography by "using" a child "to engage in" sexually explicit conduct when the offender involves the minor in a sexual act; but not simply when the offender's sexual appetite is fueled by a minor's presence or focuses a visual depiction on a minor in a sexually suggestive way to excite a sexual desire.

3. The meaning of a statutory term, of course, should not be "determined in isolation," but "must be drawn from the context in which it is used." Deal v. United States, 508 U.S. 129, 132 (1993); see also Tyler v. Cain, 533 U.S. 656, 662 (2001) (emphasizing that courts should not "construe the meaning of statutory terms in a vacuum"). "Particularly when

interpreting a statute that features as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it." Leocal, 543 U.S. at 9.

The contextual canon noscitur a sociis, which instructs that "words grouped in a list should be given related meaning," is particularly helpful in understanding the meaning of "uses" a minor "to engage in" sexually explicit conduct. Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990). The principle of noscitur a sociis helps to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (internal quotation marks omitted); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 195 (2012) (discussing noscitur a sociis).

"Uses" is surrounded by five companion verbs: employs, persuades, induces, entices, or coerces. As Howard explains, these five verbs "require some action by the offender to cause the minor's direct engagement in sexually explicit conduct." 968 F.3d at 721–22. For instance, saying that an offender "persuades" a minor to engage in sexual conduct grammatically reads as requiring the government to prove an offender convinced a minor to participate in some sexually explicit act. Saying that an offender "coerced" a minor to engage in sexually explicit conduct means the government must show the offender forced a minor to participate in some illicit conduct. And to say that an offender "induced" a minor means the offender must have caused the minor's assent.

Each of these verbs requires the offender to take some action upon the minor victim to

cause the minor to engage in sexually explicit conduct. Applying this related meaning to "uses" suggests the term should be interpreted as requiring some action upon the minor to involve the minor in sexually explicit conduct.

In contrast, if "uses" were interpreted as broadly as the Sixth Circuit suggests, simply meaning to avail oneself of a minor in any form, it would subsume the verbs in the statute rendering them surplusage. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (providing that the surplusage canon requires courts to give each word and clause of a statute operative effect, if possible). For example, an offender unquestionably avails himself of a minor whenever he persuades, induces, entices, or coerces a minor. But those verbs have no independent meaning if "uses" is ascribed to its broadest possible interpretation, as the Sixth Circuit holds, meaning "to make use of" or when an adult "avails" himself of a minor. See Dawson, 64 F.4th at 1236.

Section 2251(a)'s placement in the overall statutory scheme suggests that the production of child pornography statute criminalizes the production of images that depict minors in a way consistent with the understanding of what constitutes child pornography—images that depict minors in a sexually suggestive manner or as objects of sexual desire; but not images where minors are merely present and where the child's presence is not intended to elicit a sexual response.

4. Another principle of statutory construction provides against interpreting text leading to an absurd result. See Rowland v. California Men's Colony, Unit II Men's Advisory

Council, 506 U.S. 194, 200 & n.3 (1993) (citing cases beginning in 1869 applying "the common mandate of statutory construction to avoid absurd results"). Again, as Howard explains, the "government's interpretation is strained and implausible," because "taken to its logical conclusion, it does not require the presence of a child on camera at all. The crime could be committed even if the child who is the object of the offender's sexual interest is in a neighbor's yard or across the street." 968 F.3d at 722. Dawson itself does not contend there is a textual limit to §2251(a)'s reaching a scenario when no minor is depicted in the image. Rather, Dawson contends the limits of §2251(a) depend on "fact-specific determinations." Dawson, 64 F.4th at 1238. But relying on the good graces of prosecutors or jury nullification to limit a statute that by the Sixth Circuit's interpretation applies to situations in which no minor is depicted in an image is an approach this Court has rejected over and over. See Dubin,Slip Op. 19.

5. Finally, "when a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite." United States v. Bass, 404 U.S. 336, 347 (1971) (cleaned up). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." See Liparota v. United States, 471 U.S. 419, 427 (1985).

F. The Supreme Court's Opinion In Dubin Requires That Courts Narrowly Construe § 2251(a)'s "Uses" Clause.

The Supreme Court has addressed the meaning of "uses" many times, including as recently as last term, given that "uses" is susceptible to a broad interpretation that dramatically extends a statute's breadth. See, e.g., Dubin v. United States, 599 U.S. 110, 143 S.Ct. 1557 (2023); Smith v. United States, 508 U.S. 223, 232 (1993); Bailey v. United States, 516 U.S. 137, 143 (1995); Leocal v. Ashcroft, 543 U.S. 1, 9 (2004). And in most instances, the Supreme Court has cabined the reach of a statute by interpreting "uses" consistent with its statutory context and potential for prosecutorial abuse. See Dubin, Slip Op. 4-17; see also id. at 18 ("Time and again, this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."); id. at 19 ("We cannot construe a criminal statute on the assumption that the Government will use it responsibly.") (cleaned up).

In Dubin, the Court interpreted the same broad word "uses" in the context of the aggravated identity theft statute. 143 S. Ct. at 1565 (noting the "interpretational difficulties" around "use" and the need to consider context to determine congressional meaning). In determining that "uses" had a narrow meaning requiring active use, the Court relied on narrowing theories directly applicable to the present case:

• The Court looked to the label "aggravated identity theft" as meaning more than ordinary use, id. at 1568-69, just as "sexually explicit conduct" means more than passive

Williams, 553 U.S. at 296-97 (emphasis in original).

• Applying the canon of noscitur sociis, the neighboring words convey active use in the identify theft context, Dubin, 143 S. Ct. at 1569, just as the neighboring words for "uses" — "employs, uses, persuades, induces, entices, or coerces" — are all active in the child pornography context, 18 U.S.C. § 2251(a).

• Narrowly construing "uses" also follows the surplusage canon, Dubin, 143 S. Ct. at 1570, which equally applies to the present statute because a broad meaning of "uses" would render the neighboring words superfluous.

• Lastly, both statutes involve the narrow reading of criminal statutes because "this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes."Id. at 1572.

The Supreme Court's message in Dubin is unmistakable: Courts should not assign federal criminal statutes a "breathtaking" scope when a narrower reading is reasonable. Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021). Just in the last decade, it has become nearly an annual event for the Supreme Court to give this instruction. See id. at 1661 (avoiding reading Computer Fraud and Abuse Act in a way that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity"); Kelly v. United States, 140 S.Ct. 1565, 1568 (2020) (avoiding reading federal fraud statutes to "criminalize all [] conduct" that involves "deception, corruption, [or] abuse of power"); Marinello v. United States, 138 S. Ct. 1101, 1107, 1110 (2018) (looking to "broader statutory context" or tax

obstruction law to reject reading that would "transform every violation of the Tax Code in [a felony] obstruction charge"); McDonnell v. United States, 579 U.S. 550 (2016) (rejecting "expansive interpretation" of bribery law and refusing to construe it "on the assumption that the Government will 'use it responsible'" (citation omitted)); Yates v. United States, 574 U.S. 528, 540 (2015) (plurality opinion) (looking to obstruction statute's caption and context to avoid reading it as an "across-the-board ban on the destruction of physical evidence of every kind."); Bond v. United States, 572 U.S. 844, 863 (2014) (rejecting government's interpretation of chemical weapons ban when it would transform statute "into a massive federal anti-poisoning regime that reaches the simplest of assaults").

This tradition of "exercis[ing] restraint in assessing the reach of a federal criminal statute" comes "both out of deference to the prerogatives of Congress, . . . and out of concern that 'a fair warning should be given, . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" United States v. Aguilar, 515 U.S. 593, 600 (1995) (citations omitted). Despite the frequency and firmness of this instruction from above, the Wright decision failed to heed it.

G. The Question Presented Involves an Important and Recurring Question of Statutory Interpretation.

This Court should resolve the lower courts' disagreement about what it means to "use" a minor "to engage in" sexually explicit conduct and thereby produce child pornography.

This Court has not hesitated to resolve questions of statutory interpretation that determine the reach of a federal criminal statute.See Van Buren v. United States, 141 S. Ct. 1648 (2021); Marinello v. United States, 138 S. Ct. 1101 (2018); Maslenjak v. United States, 137 S. Ct. 1918 (2017); McDonnell v. United States, 136 S. Ct. 2355 (2016). On several occasions, this Court has also interpreted the meaning of the word "use" in a statute, most recently in Dubin v. United States, 143 S. Ct. 1557 (2023) (finding that "use" implies action and implementation but takes on different meanings depending on context so that the Court will look not only to the word itself, but also to the statute and the surrounding scheme, to determine the meaning Congress intended). Id.at 1565.

The question presented here is also important because the consequences of a broad reading of "uses" a minor "to engage in" sexually explicit conduct are substantial. A first-time offender convicted of producing child pornography under §2251 faces fines and a statutory minimum of 15 years to 30 years maximum in prison. Petitioner received the full 20-year sentence. And he is not alone. The circuit opinions addressed here alone show the frequency with which prosecutors are using §2251(a) under factual scenarios in which no minor is shown actively interacting to engage in production of sexually explicit conduct. The government's aggressive use of 2251(a) prosecutions to imprison people who did not "use" a minor is reason enough to curtail the use of a statute where it is employed to punish those who are not within its reach.

A person can "use" the minor without the minor's knowledge or awareness. For instance, when a perpetrator drugs a minor and abuses him/her, the perpetrator no doubt "uses"

the minor "to engage in" sexually explicit conduct, even though the minor is unconscious. The key in this example is that the offender is taking some action that is causing the minor to be engaged in sexually explicit conduct, knowingly or unknowingly. That is what "use" means in §2251(a). But engagement in sexually explicit conduct has to mean more than that minor (or their image) was the object of the producer's sexual interest.

CONCLUSION

This is a criminal statute that punishes the defendant with a minimum of fifteen imprisonment. The last thing that can stand is a reading of that unambiguous statute that departs from both the text and the relevant Supreme Court holdings. Because when the court leaves those moorings, it produces a standard that is (as Judge Easterbrook observed) "hopelessly vague, leaving judges, prosecutors, jurors, and, most important, photographers, unable to determine what is and what is not lawful."

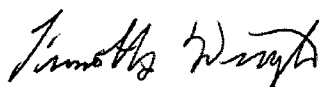
If Congress intended the act of surreptitiously photographing a minor naked to result in liability and a mandatory minimum sentence of 15 years under Section 2251(a), such words would be in the statute. See 62 Cases of Jam v. United States, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain -- neither to add nor subtract, neither to delete nor to distort."). Congress laid out six actions that constitute a crime, none of which is the mere act of surreptitiously photographing a minor engaged in private routines like bathing or undressing. Both noscitur a sociis and the surplusage

canons of construction strongly favor the narrow meaning of "uses" in this context. Defining "uses," based on Congressional definition in 18 U.S.C. § 25, to require causing the minor "into action or service" to create sexually explicit images is appropriate because it is consistent with the Supreme Court decisions and the bedrock rules of statutory construction.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted

Date: March 19, 2025



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