No. _____

In the Supreme Court of the United States

ELROY WILKERSON, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *United States v. Williams*, the Court interpreted "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A) to mean that an actual minor is engaged in the actual or explicit portrayal of five types of conduct enumerated in the statute. 553 U.S. 285, 296–97 (2008). At issue here is the fifth type of "sexually explicit conduct" under § 2256(2)(A)(v): "lascivious exhibition of the anus, genitals, or pubic area."

One court of appeals holds that, consistent with *Williams*, "lascivious exhibition" under § 2256(2)(A)(v) refers to "hard core" pornography—i.e., the minor's conduct depicted in the images "must consist of her displaying her anus, genitalia, or pubic area in a lustful manner that connotes the commission of a sexual act"—in order to be construed consistently with the four preceding types of conduct—intercourse, bestiality, masturbation, and sado-masochistic abuse. *United States v. Hillie*, 39 F.4th 674, 683–86 (D.C. Cir. 2022). In that circuit, visual depictions of a minor engaged in ordinary, nonsexual activities, despite fleeting views of nudity or the pubic area, do not meet the statutory definition of "sexually explicit conduct." *Id*. at 686.

In sharp contrast, the Fifth Circuit rejected *Williams* as authority for interpreting the "lascivious exhibition" subcategory of

"sexually explicit conduct." Instead, the Fifth Circuit relies on any combination of non-textual factors first articulated in *United States v. Dost*, 636 F. Supp. 828, 831–32 (S.D. Cal. 1986), which include mere nudity and the sexual response of the viewer to the image, to determine whether the image itself—and not the minor's conduct recorded on camera—is a "lascivious exhibition." Thus, images of a minor changing her clothes and entering or exiting the shower depict "sexually explicit conduct."

The question presented is:

Does a voyeur produce or possess visual depictions of a minor engaged in "sexually explicit conduct" when the images recorded the minor engaged in only ordinary, nonsexual activities?

RELATED PROCEEDINGS

- *United States v. Wilkerson*, No. 4:22-cr-00772-DC (W.D. Tex. Aug. 31, 2023) (judgment)
- *United States v. Wilkerson*, No. 23-50626 (5th Cir. Dec. 30, 2024)

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Petitioner Elroy Wilkerson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

For almost 50 years, federal law has criminalized various types of conduct—including production and possession—that involve child pornography. 18 U.S.C. §§ 2251(a), 2252A(a)(5)(B). Between 1994 and 2023, prosecutions of child pornography crimes in-

creased from 61 cases in 1994 to around 2,000 cases per year beginning in 2018 forward.[1] The penalties for these crimes are severe, and the mean sentence imposed for these crimes has sharply increased from approximately 42 months' imprisonment in 1994 to 181 months' imprisonment in 2023.[2]

An essential element of federal child pornography crimes—and what distinguishes them from crimes for surreptitiously filming a minor[3]—is that the images depict actual minors engaged in "sexually explicit conduct." 18 U.S.C. § 2256(2)(A). Under § 2256(2)(A), "sexually explicit conduct" "means actual or simulated (i) sexual intercourse …; (ii) bestiality; (iii) masturbation;

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[1] Federal child pornography crimes are typically prosecuted under 18 U.S.C. §§ 2251, 2251A, 2252, and 2252A. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING STATISTICS, https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-CriminalCodeStats&tab=CriminalCodeStatistics (last visited Apr. 28, 2025).

[2] *See id*.

[3] At least 46 states—including Texas—have criminalized the surreptitious recording of a minor. *See* Valerie Bell, Craig Hemmens, & Benjamin Steiner, *Up Skirts and Down Blouses: A Statutory Analysis of Legislative Responses to Video Voyeurism*, 19 CRIM. JUST. STUDIES 301, 306–07 (2006) (collecting state statutes). Video voyeurism is also a federal crime if it occurs in the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1801.

(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).

In *United States v. Williams*, the Court applied 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"—to uphold the federal child pornography statute that criminalized the pandering or solicitation of child pornography against overbreadth and vagueness challenges. 553 U.S. 285, 288, 294 (2008). For the element of "'sexually explicit conduct' (the visual depiction of which, [is] engaged in by an actual minor)," the Court explained that Congress had "used essentially the same constitutionally approved definition" as the definition of "sexual conduct" in *New York v. Ferber*, 458 U.S. 747 (1982).[4] *Id.* at 296. But

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[4] *Ferber*, in turn, relied on *Miller v. California* to uphold a New York statute, reasoning that "the term 'lewd exhibition' is not unknown in this area," and "was given in *Miller* as an example of a permissible regulation." 458 U.S. at 765 (citing *Miller*, 413 U.S. 15, 25 (1973)). The *Miller* Court emphasized that the category of proscribed speech it discussed was "hard core" pornography. *See* 413 U.S. at 18 n.2, 27, 29; *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (holding

the federal definition rendered itself "more immune from facial constitutional attack," because "'[s]exually *explicit* conduct' connotes actual depiction of the sex act" or "one that is explicitly portrayed … [and] cause[s] a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id*. at 296–97 (emphasis in original).

But the Fifth Circuit rejected *Williams* as binding precedent in this case for interpreting "sexually explicit conduct" and "lascivious exhibition of the anus, genitals, or pubic area." Pet. App. 8a, 10a. Instead, it relied on the non-textual *Dost* factors,[5] to hold that the surreptitiously-recorded images of a minor changing her clothes and entering or exiting the shower are themselves "lascivious exhibitions" because the minor was nude and Wilkerson's vocalized arousal to peering at the minor from outside her window indicated an intent that the recorded images were designed to elicit a sexual response in the viewer. Pet. App. 14a–15a.

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that any constitutional challenge based on the use of "lascivious" rather than "lewd" is insubstantial); *Hamling v. United States*, 418 U.S. 87, 113 (1974) (construing federal statute's use of "lewd" and "lascivious" to "that specific 'hard core' sexual conduct given as examples in *Miller*").

[5] *See United States v. Dost*, 636 F. Supp. 828, 831–32 (S.D. Cal. 1986).

The Fifth Circuit is not alone. Only the D.C. Circuit Court of Appeals has followed *Williams* and its necessary antecedents to interpret "lascivious exhibition" consistently with its neighboring subcategories of "sexually explicit conduct," and held that images of a minor engaged in ordinary activities, despite nudity or the presence of the pubic area, do not depict a minor engaged in "sexually explicit conduct." *United States v. Hillie*, 39 F.4th 674, 686 (D.C. Cir. 2022).

The question presented is critically important. Thousands of defendants are prosecuted federally every year for crimes involving child pornography, and they are punished harshly. The Court's intervention would resolve an irreconcilable split between the courts of appeals over the interpretation of a statutory element of child pornography crimes, and this case is an ideal vehicle to resolve it. The Court should grant certiorari.

OPINION BELOW

The Fifth Circuit's opinion, *United States v. Wilkerson*, No. 23-50626 (5th Cir. Dec. 30, 2024), is reported at 124 F.4th 361 and reproduced at Pet. App. 1a–18a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on December 30, 2024. Justice Alito granted Wilkerson's motion to extend the time for filing a petition for writ of certiorari to April 29, 2025. *See Wilkerson v. United States*, No. 24A844. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

18 U.S.C. § 2251(a) (2008) provides in relevant part:

> Any person who … uses, … any minor to engage in, … with the intent that such minor 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. § 2252A(a)(5)(B) (2018) provides in relevant part:

> Any person who … knowingly possesses, … any … material that contains an image of child pornography … shall be punished as provided in subsection (b).

18 U.S.C. § 2256 (2018) provides in relevant part:

> (2)(A) … "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;
>
> ….

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, … where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct ….

STATEMENT

A. Legal background.

1. An essential element of federal child pornography crimes, including the production and possession crimes at issue here, is that the offending image depicts a minor engaged in "sexually explicit conduct." 18 U.S.C. §§ 2251(a)(1), 2252A(a)(5)(B), 2256(2)(A), (8)(A). The term "sexually explicit conduct" "means actual or simulated—(i) sexual intercourse …; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." § 2256(2)(A).

The predecessor to the current definition of "sexually explicit conduct" was enacted when Congress passed the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 (1978).[6]

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[6] Section 2253(2) of the 1977 Act, which ultimately became § 2256, defined "sexually explicit conduct" as actual or simulated sexual intercourse, bestiality, masturbation, sado-masochistic abuse (for the purpose of sexual stimulation), and lewd exhibition of the genitals or pubic area of any person.

Congress rejected a proposal for the definition of "prohibited sexual acts" to include nudity, even "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction," in favor of the alternative definition of "lewd exhibition of the genitals" out of concerns about vagueness and overbreadth. Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174–79 (1994) (discussing congressional debates).

The phrase, "lewd exhibition of the genitals," had recently been used by the Court in *Miller v. California* to describe one type of conduct that could be prohibited under state obscenity statutes. 413 U.S. 15 (1973). In *Miller*, the Court upheld a state statute prohibiting the mailing of unsolicited obscene materials against a First Amendment challenge. *Id*. at 17. The Court clarified that the "obscene material" it was discussing "is more accurately defined as 'pornography' or 'pornographic material,'" which is a "a subgroup of all 'obscene' expression." *Id*. at 18 n.2. In holding that this kind of "obscene material" is categorically unprotected by the First Amendment, *id*. at 23, the Court proceeded to articulate basic guidelines for proscribing works that depicted sexual conduct:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24–25 (cleaned up).

A "plain example[ ]" of the kind of pornographic, obscene material a state can regulate includes "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id*. at 25. The Court was satisfied that "[u]nder the holdings announced today,[7] no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law." *Id*.

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[7] The Court decided *United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973), on the same day as *Miller*, and clarified that the "standards for testing the constitutionality of state legislation regulating obscenity" announced in *Miller* "are applicable to federal legislation." *Id*. at 129–30. It noted 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 v. California*." *Id*.

at 27. These "concrete guidelines," the Court was confident, would "isolate 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29; *see also id.* at 35 ("the public portrayal of hard-core sexual conduct for its own sake" is not protected by the First Amendment).

2. The Court first held that child pornography was a category of unprotected speech in *New York v. Ferber*, 458 U.S. 747 (1982). The Court rejected a constitutional overbreadth challenge to a New York statute prohibiting "the use of a child in a sexual performance," which was defined as a performance "includ[ing] sexual conduct by a child." *Id.* at 750–51. The statute defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751. 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 756–58, 761. The Court emphasized, 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. That is, "[t]he category of 'sexual conduct' proscribed must ... be suitably limited and described." *Id.* The New York law was suitably limited, the

Court explained, because the forbidden acts "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. The Court noted 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 then reiterated that "the reach of the statute is directed at the hard core of child pornography," *id*. at 773, repeating the kind of prohibited "sexual conduct" articulated in *Miller*.

3. Congress revised the child pornography statutes after *Ferber* by enacting the Child Protection Act of 1984 to broaden "its application to those sexually explicit materials that, while not obscene as defined by *Miller*, could be restricted without violating the First Amendment as explained by *Ferber*." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 74 (1994); *see also* Pub. L. No. 98-292, §§ 2–9, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2254) (1988 & Supp. IV 1992). Among the amendments, Congress replaced the word "lewd" with "lascivious" as part of the

definition of "sexually explicit conduct," but provided no clarifying definition. Pub. L. No. 98-292, § 5(4), 98 Stat. at 205.

4. In 1986, the United States District Court for the Southern District of California interpreted the term "lascivious exhibition" in the federal child pornography statutes' post-1984 definition of "sexually explicit conduct." *United States v. Dost*, 636 F. Supp 828, 830–31 (S.D. Cal. 1986). In *Dost*, two defendants were prosecuted for conspiracy, production, and receipt and distribution of child pornography. The offending images consisted of 21 photographs of a minor who assumed various supine and sitting poses while nude, and one photo was of a girl sitting nude on a beach. *Id.* at 830.

The *Dost* court acknowledged *Miller* and *Ferber*, but not the Court's discussions about the meaning of "lewdness" or "lasciviousness." *Id.* at 831–82. The *Dost* court reasoned that, because "legal scholars have struggled for years" over the definition of either lewdness or lasciviousness, "lascivious exhibition" should be determined "on a case-by-case basis using general principles as guides for analysis." *Id*. The court then offered a nonexhaustive list of six factors the trier of facts should examine:

1) whether the focal point of the visual depiction is on the child's genitalia or public area;
2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4) whether the child is fully or partially clothed, or nude;
5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. Applying these factors, the court found that the photographs depicted the "lascivious exhibition of the genitals or pubic area." *Id*. at 833.

The Ninth Circuit affirmed, endorsing the district court's reading. *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). Its examination focused on whether the pictures themselves were lascivious exhibitions "and presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur," rather than the minor's conduct recorded on camera. *Id*. It explained that "[p]lainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arranged it to suit his peculiar lust." *Id*. The court then concluded that, "[i]n the context of the statute applied to the conduct of children, *lasciviousness is not a characteristic of the child photographed* but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles." *Id*. (emphasis added).

5. Unlike the district court in *Dost* that expressed confusion over the meaning of "lascivious exhibition," the Court reiterated

its long-held understanding of "lascivious exhibition" in *X-Citement Video*. The *X-Citement Video* Court rejected vagueness and overbreadth challenges to the statutory term "lascivious exhibition of the … genitals," because "Congress replaced the term 'lewd' with the term 'lascivious' in defining illegal exhibition of the genitals of children," and regarded these claims as "insubstantial." 513 U.S. at 78–79 (adopting the reasoning for the court of appeals in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) ("'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld" in *Miller* and *Ferber*)) (cleaned up). In his dissent, Justice Scalia agreed with that portion of the Court's holding that incorporated the "hard core" characterization of the prohibited "lascivious exhibition of the genitals" from *Miller* onto the construction of the federal child pornography state. *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 hardcore pornography").

6. The Court subsequently identified limits to the reach of the federal crimes when it held facially overbroad two provisions of the federal child pornography statutes in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002). The first provision—relevant here—banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful looking adults or virtual images of children generated by a computer. *Id.* at 239–41 (quoting 18 U.S.C. § 2256(8)(B)). This provision was invalid because the prohibited images did not involve actual minors. *Id.* at 249–51, 254. The Court explained that "*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250–51. Thus, where child pornography "is neither obscene nor the product of sexual abuse," the Court reasoned that "it does not fall outside the protection of the First Amendment." *Id.* at 251. Because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," the Court rejected arguments by the government that it could "prohibit speech [in the form of virtual child pornography] on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 252–54.

7. In *United States v. Williams*, the Court upheld the statutory subsection prohibiting the pandering or solicitation of child pornography against overbreadth and vagueness challenges. 553 U.S. 285, 288 (2008). Relevant here, the Court construed § 2256(2)(A)'s definition of "sexually explicit conduct." *Id*. at 296. It explained that Congress "used essentially the same constitutionally approved definition" as the definition of "sexual conduct" in *Ferber*. *Id*. at 296. But the federal definition rendered itself "more immune from facial constitutional attack," because "'[s]exually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." *Id*. at 296–97 (emphasis in original). And a "simulated" sex act is one "that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred," "caus[ing] a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id*. at 297. The Court reiterated that "lascivious exhibition of the anus, genitals, or pubic area" is "essentially the same constitutionally approved definition" from *Ferber*. *Id*. at 296. Because the statute focuses on whether the depicted "actors actually engaged in that conduct on camera," *id*. at 301, the Court rejected the Eleventh Circuit's reasoning that "the statute could apply to someone who subjectively believes that an innocuous picture of a child is

'lascivious." *Id.* at 301. That is because the "material in fact … must meet the statutory definition. Where the material at issue is a harmless picture of child in a bathtub … the statute has no application." *Id.*

B. Proceedings below.

1. The teenage daughter of Wilkerson's girlfriend had been living at his trailer. As she was moving out of the trailer, she made statements to a sheriff's deputy that indicated Wilkerson may have committed the crime of invasive video recording.[8] Pet. App. 2a. Investigators executed a search warrant for Wilkerson's trailer that yielded six cell phones. *Id.* The investigation revealed none of the typical hallmarks of a person engaged in the production or possession of child pornography—there were no downloads of known images of child pornography from the internet, nor was there any evidence that Wilkerson was sharing any such images. C.A. ROA.521, 523–26, 830, 842. On two of the cell phones, however, investigators discovered video recordings and still images of the minor changing her clothes or exiting the shower. Pet. App. 2a–4a.

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[8] It is a felony crime in Texas to photograph or videotape the "intimate area of another person" if the recorded person is in a bathroom or changing area. Tex. Penal Code § 21.15.

2. Wilkerson was indicted for producing visual depictions of a minor engaged in "sexually explicit conduct," in violation of 18 U.S.C. § 2251(a), (e), and knowingly possessing a cell phone that "contained images/videos of child pornography," in violation of 18 U.S.C. § 2252A(a)(5)(B), (b)(2). C.A. ROA.25–26. At trial, the government introduced 13 exhibits that it alleged were visual depictions of a minor engaged in sexually explicit conduct. Pet. App. 2a–4a. Those images were surreptitiously recorded on three separate days from the same vantage point: looking through a crack in the curtains from outside the minor's bedroom window. Pet. App. 2a; C.A. ROA.543–44.

The images showed the minor "in her bedroom fully or partially nude while changing her clothes and entering or exiting the shower." Pet. App. 12a; *see also* Pet. App. 2a–4a. In some images her pubic area was visible. Pet. App. 2a–4a. Two videos recorded the minor walking around her room, carrying a towel, and getting dressed, and a voice identified as Wilkerson's can be heard moaning, or making comments like, "there you go," "good lord," and "come on back" after the minor walks out of screen Pet. App. 3a–4a. None of the images "suggest[ed] sexual coyness." Pet. App. 14a.

Wilkerson moved for a judgment of acquittal under Rule 29, which the district court denied. *See* Pet. App. 4a. Wilkerson then

submitted a proposed jury instruction that defined "lascivious exhibition" and clarified that it is the minor's conduct that must meet that definition:

> As used in both charged offenses, the phrase "sexually explicit conduct" means actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation, sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.
>
> The phrase "lascivious exhibition" requires that the minor display 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. This means the "lascivious exhibition" must be performed in a lustful manner that connotes the commission of a sexual act.

C.A. ROA.170.

In support of the proposed instruction, Wilkerson cited *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), which similarly defined "lascivious exhibition" based on *Williams*, *Ferber*, and *Miller*. *See* C.A. ROA.171–75, 602–05.

Wilkerson also objected to the Fifth Circuit's Pattern Jury Instruction that instructs the jury to consider the *Dost* factors for determining "lascivious exhibition," *id*. at 604–05, which instructs the jury that:

> You may consider such factors as: (1) whether the focal point of the visual depiction is on the child's genitalia or

> pubic area; (2) whether the setting of the depiction is sexually suggestive, that is, in a place or pose associated with sexual activity; (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the depiction is designed to elicit a sexual response in the viewer. This list is not exhaustive, and no single factor is dispositive.

Fifth Circuit Pattern Jury Instructions (Criminal) § 2.84 (2019); *see also Dost*, 636 F. Supp. at 832.

The district court denied Wilkerson's proposed instruction and adopted the pattern jury instruction. C.A. ROA.607–08, 956–59. The jury found Wilkerson guilty of both counts. Pet. App. 4a. The district court imposed concurrent terms of 188 months' imprisonment, to be followed by a life term of supervised release.[9] *Id.*

3. On appeal, Wilkerson argued that the trial evidence failed to show that the surreptitiously recorded images of a minor getting dressed were actual depictions or explicit portrayals of the minor engaged in "sexually explicit conduct." In particular, he argued that the Fifth Circuit's adopted definition of lascivious exhibition, which focuses on the response the image elicits from the viewer,

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[9] The Fifth Circuit's opinion incorrectly states that the term of imprisonment was 118 months. Pet. App. 4a; *but see* C.A. ROA.187.

and use of the *Dost* factors, was incompatible with *Williams*'s interpretation of "sexually explicit conduct," and "lascivious exhibition" must be construed more narrowly to exclude images of a minor engaged in non-sexual activity, even if she appears nude. For the same reasons, the pattern jury instruction on "sexually explicit conduct" misstated the law.

The Fifth Circuit affirmed. It first rejected Wilkerson's argument that *Williams* abrogated the Fifth Circuit's precedent, Pet. App. 8a–10a, concluding that *Williams*'s interpretation of "sexually explicit conduct" "has no bearing on what constitutes 'lascivious exhibition'" because a "lascivious exhibition" is not the kind of sex act that *Williams* discussed. Pet. App. 11a. It then held that, because the focus of the "'lascivious exhibition' inquiry 'is the *depiction*—not the minor,'" Pet. App. 14a, the government's evidence was sufficient to sustain the convictions because the images depicted the "minor in her bedroom fully or partially nude while changing her clothes and entering or exiting the shower," and the purpose of recording the images was to "elicit a sexual response," evidenced by Wilkerson's vocalized arousal. Pet. App. 13a–15a. For the same reasons, the jury instructions were correct. Pet. App. 16a–18a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are divided over the interpretation of a frequently used federal criminal statute.

1. The Fifth Circuit's interpretation and application of "sexually explicit conduct," under 18 U.S.C. § 2256(2)(A), an element of production and possession crimes, is in direct conflict the D.C. Circuit's decision in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022).

In *Hillie*, as here, the defendant took surreptitious videos of a minor engaged in routine, non-sexual bathroom activities. *Compare Hillie*, 39 F.4th at 678, 686, *with* Pet. App. 2a–4a. And as in this case, a jury found the defendant guilty of producing and possessing child pornography under 18 U.S.C. §§ 2251(a) and 2252A. *Hillie*, 39 F.4th at 678–79. On appeal, Hillie, like Wilkerson, argued there was insufficient evidence for his convictions because the minor's conduct depicted in the recordings could not be described as a lascivious exhibition of the genitals or pubic area, *id.* at 680–81, which, like here, was the only category of "sexually explicit conduct" at issue, *compare id.* at 681, 691, *with* Pet. App. 6a.

The D.C. Circuit reversed. To determine whether the minor depicted in Hillie's videos was lasciviously exhibiting her genitals,

the court applied the *noscitur a sociis* canon of statutory interpretation to interpret "sexually explicit conduct" under § 2256(2)(A) and construed "lascivious exhibition" considering the other terms surrounding it, consistent with this Court's decisions in *Williams*, *Ferber*, and *Miller*. 39 F.4th at 681–86. It held that the videos—which depicted the minor in "ordinary grooming activities, some dancing, and nothing more," albeit with some nudity and "fleeting views of her pubic area"—could not be reasonably described as "hard core" sexually explicitly conduct. *Id*. at 686. Because the minor "never engage[d] in any sexual conduct whatsoever, or any activity connoting a sex act," "no rational trier of fact could find [the minor's] conduct depicted in the videos to be a 'lascivious exhibition of the ... genitals' as defined by § 2256(2)(A)" and acquittal was compelled as a matter of law. *Id*.

In reaching this conclusion, the D.C. Circuit expressly rejected the government's argument that "lascivious exhibition" should be construed in accordance with the *Dost* factors. *Id*. at 686–90. The premise of the *Dost* factors was "fundamentally flawed," and ignored the Court's precedents in *Miller*, *X-Citement Video*, and *Williams* that tie the statutory term "lascivious exhibition" to the "minor's *conduct* that the visual depiction depicts." *Id*. at 687–88 (emphasis added). The D.C. Circuit faulted courts that have adopted

the *Dost* factors, especially the sixth factor's consideration of whether the picture is presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur, because such an approach did not abide by the Court's construction of almost identical language in similar statutes, and the Court had "expressly rejected" reliance on the photographer's subjective sensibilities. *Id.* at 687, 688; *see Williams*, 553 U.S. at 301.

In his opinion concurring in the denial of the government's petition for rehearing en banc in *Hillie*, Judge Katsas reiterated the panel's commonsense reading of the statute: "'lascivious' modifies the 'exhibition' … to define one category of sexually explicit conduct. 'Lascivious' does not modify the 'visual depiction' of the exhibition." *United States v. Hillie*, 38 F.4th 235, 237 (D.C. Cir. 2022) (denying reh'g en banc) (Katsas, J., concurring in the denial of rehearing en banc). Thus, "[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them." *Id.* (emphasis added). The sister circuits that reason that "the videos themselves 'were an exhibition,' which were made 'lascivious' when 'presented by the photographer so as to arouse or satisfy the sexual cravings of the voyeur' … cannot be reconciled with the governing statutory text." *Id.* at 238

(cleaned up). It is the "child who must make a 'lascivious exhibition' under § 2256(2)(A)." *Id*.

But the Fifth Circuit reached the opposite conclusion on analogous facts because "[n]othing in *Williams* 'unequivocally overrule[s]'" Fifth Circuit precedent. Pet. App. 7a–8a, 10a. The Fifth Circuit held that a jury could conclude that Wilkerson's surreptitiously recorded images met the statutory requirement of "sexually explicit conduct," and "lascivious exhibition," in particular, even where the images depicted the minor engaged in only non-sexual activities, such as changing clothes and entering or exiting the shower. Pet. App. 12a–16a. The Fifth Circuit defines "lascivious exhibition" as "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer," and employs the *Dost* factors for determining lasciviousness. Pet. App. 6a (quoting *United States v. Grimes*, 244 F.3d 375, 381 (5th Cir. 2001)). Accordingly, "the focus of the 'lascivious exhibition' inquiry 'is the *depiction*—not the minor," Pet. App. 14a (emphasis in original), and "images and videos of a nude minor bending over in her bedroom after exiting the shower and sitting on her bed qualify as sexually suggestive or unnatural," Pet. App. 13a. And the audio accompanying the video was relevant evidence that Wilkerson's

purpose in capturing the video and the video's design were to elicit a sexual response in the viewer. Pet. App. 14a–15a.

2. Every other federal court of appeals, except the D.C. Circuit, uses the *Dost* factors to determine whether a visual depiction is a lascivious exhibition. *See, e.g., United States v. Amirault*, 173 F.3d 28 (1st Cir. 1999); *United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989); *United States v. Courtade*, 929 F.3d 186 (4th Cir. 2019); *United States v. Brown*, 579 F.3d 672 (6th Cir. 2009); *United States v. Noel*, 581 F.3d 490 (7th Cir. 2009); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999); *United States v. Wolf*, 890 F.2d 241 (10th Cir. 1989); *United States v. Cross*, 928 F.2d 1030, 1042 n.34 (11th Cir. 1991).

As a result, at least eight other circuits are aligned with the Fifth Circuit in concluding that surreptitious recordings of minors engaged in non-sexual activities depict "lascivious exhibition[s]," and thus "sexually explicit conduct." *See, e.g., United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (depicting minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom videos that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitious videos of minors showering);

United States v. Donoho, 76 F.4th 588, 591, 600–01 (7th Cir. 2023) (bathroom videos and images of minors showering and using the toilet); *United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (en banc) (bathroom videos of minor showering); *United States v. Boam*, 69 F.4th 601, 609–12 (9th Cir. 2023) (same); *United States v. Wells*, 843 F.3d 1251, 1255–57 (10th Cir. 2016) (same); *United States v. Holmes*, 814 F.3d 1246, 1247 (11th Cir. 2016) (videos of minor "performing her daily bathroom routine").

These cases, like the decision below, would come out differently in the D.C. Circuit, insofar as they uphold convictions for depictions of "sexually explicit conduct" where the recordings in question depicted the minor engaged in ordinary, non-sexual activities. *See Hillie*, 39 F.4th at 689; *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring in the judgment) (acknowledging that "[t]he law in some other circuits … is more favorable to Donoho").

3. Reliance on the *Dost* factors has "produced a profoundly incoherent body of case law." Amy Adler, *Inverting the First Amendment*, 149 U. PENN. L. REV. 921, 953 (2001); *see also McCoy,* 108 F.4th at 652 (Graxz, J., with whom Smith, C.J., and Kelly, Erickson, and Stras, J.J., join, dissenting) (criticizing the majority opinion for providing "refuge for the government's subjective-guessing standard"); *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011)

(Higginbotham, J., concurring) (*Dost*-like factors "often create more confusion than clarity"). That is because the circuits, and even some panels of the same court,[10] apply the *Dost* factors differently. Conflicts exist over whether more than one *Dost* factor is required to support lasciviousness;[11] whether showers and bathrooms are sexually suggestive settings;[12] and whether the sixth factor—whether the image is intended or designed to elicit a sexual response in the viewer—must be evaluated under an objective

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[10] *Compare United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016) (finding images lascivious because defendant created them "for the admitted purpose of satisfying *himself* during masturbation") (emphasis added) *with* Pet. App. 15a & n.46 (rejecting the concern that the sixth *Dost* factor is contingent upon the arousal of the defendant).

[11] *Compare Villard*, 885 F.2d at 122 (requiring more than one *Dost* factor but not all six factors), *with Spoor*, 904 F.3d at 151 n.9 (rejecting jury instruction that more than one Dost factor must be present as an incorrect statement of law); *Wolf*, 890 F.2d at 245 n.6 ("We do not hold that more than one *Dost* factor must be present[.]").

[12] *Compare Spoor*, 904 F.3d at 149 ("bathrooms also can be the subject of sexual fantasy"); *Wells*, 843 F.3d at 1256 (same); *Larkin*, 629 F.3d at 183 (same); *with Brown*, 579 F.3d at 681–82 ("The setting of most of the photographs—the bathtub, the toilet, and the floor—is not sexually suggestive[.]"); *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) (open shower near a beach not associated with sexual activity).

standard.[13] Courts have referred to the sixth *Dost* factor as the "most confusing and contentious," *Amirault*, 173 F.3d at 34, and "[p]articularly divisive," ensnaring judges in a confusing "thicket," *Courtade*, 929 F.3d at 192. The sixth factor "does not make clear whether a factfinder should focus only on the content of the image at issue, or whether it may consider the images in context with other images and evidence presented at trial." *Brown*, 579 F.3d at 682. And as this case illustrates, a focus on the video recorder's reaction to what he is watching shifts the focus away from what conduct the images depict. *See* Pet. App. 14a–15a; *cf. Williams*, 553 U.S. at 301 (explaining that the statute cannot "apply to someone

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[13] *Compare Amirault*, 173 F.3d at 34 ("If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography.") (cleaned up); *Villard*, 885 F.3d at 125 ("If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping"); *with Spoor*, 904 F.3d at 151 ("the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography."); *United States v. Larkin*, 629 F.3d 177, 183–84 (3d Cir. 2010) (holding that "trafficking [a] photograph over the internet to an interested pedophile" "tip[ped] the balance on the side of qualifying the photograph as exhibiting lascivious conduct"); *United States v. Cohen*, 63 F.4th 250, 256 (4th Cir. 2023) (finding that pictures were not, on their face, lascivious, but their exchange "in the context of a sexual conversation" was sufficient to render them so).

who subjectively believes that an innocuous picture of a child is 'lascivious.'" Rather, "[t]he defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition").

In sum, an irreconcilable circuit split exists over the statutory interpretation of an essential element of federal criminal statutes about whether "sexually explicit conduct," and "lascivious exhibition," in particular, describe the minor's conduct depicted in the image, or whether the image itself is the "lascivious exhibition" as determined by one or more of the non-textual *Dost* factors. The D.C. Circuit has expressly rejected the use of the *Dost* factors, relied on by the Fifth Circuit, following instead the Court's decisions in *Williams*, *Ferber*, *X-Citement Video*, and *Miller* to hold that a minor engaged in ordinary activities does not depict the kind of hard-core pornography that a "lascivious exhibition" requires. *Hillie*, 39 F.4th at 688–89. The circuits that have been asked to revisit their adoption of the *Dost* factors have rejected the Court's precedent as controlling on the question presented. *See* Pet. App. 10a (*Williams* does not abrogate circuit precedent adopting *Dost* factors); *United States v. Jakits*, 129 F.4th 314, 323–34 (6th Cir. 2025) (same); *Donoho*, 76 F.4th at 599–600 (7th Cir. 2023); *id.* at 602 (Easterbrook, J., concurring in the judgment) (concurring

based on circuit precedent, but agreeing with the views expressed by Judge Katsas in *Hillie*, 38 F.4th at 237); *Boam*, 69 F.4th at 613 (*Hillie*'s reasoning incompatible with circuit precedent upholding use of *Dost* factors); *McCoy*, 108 F.4th at 643–44 (same).

II. The Fifth Circuit's decision below is wrong and conflicts with this Court's precedent.

Where, as here, the only "sexually explicit conduct alleged was the lascivious exhibition of the genitals and pubic area," Pet. App. 4a, the question of whether Wilkerson's surreptitious recordings are illegal "depends on whether the [minor] engaged in any sexually explicit conduct" as depicted in the recordings at issue, "which in turn depends on whether [the minor] made a lascivious exhibition of her genitals." *Hillie*, 38 F.4th at 236 (Katsas, J., concurring in the denial of rehearing en banc). Thus, "[a] child engages in 'lascivious exhibition' under section 2256(2)(A)(v) if, but only if, she reveals her ... genitals, or pubic area in a sexually suggestive manner." *Id.* In other words, at an absolute minimum, the minor must "display[] his or her ... genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the visual depiction, exhibits sexual desire or an inclination to engage in any type of sexual activity." *Hillie*, 39 F.4th at 685.

The Fifth Circuit's interpretation of §§ 2251(a) and 2252A(a)(5)(B), which ties the meaning of "lascivious exhibition" to "the *depiction* [of the image itself]—not the minor," Pet. App. 14a, violates the canons of statutory interpretation and is contrary to the Court's precedent. The term "lascivious exhibition," in § 2256(2)(A)(v), refers to one of the five types of "sexually explicit conduct,"[14] that must be captured in the "visual depiction" produced or possessed. *See* §§ 2251(a), 2252A(a)(5)(B). Under the Court's precedent, what makes a visual depiction illegal is not whether the image itself is a "lascivious exhibition," but whether the minor's conduct on camera constitutes a "lascivious exhibition of the genitals"—or sexual intercourse, bestiality, masturbation, or sado-masochistic abuse. *See Williams*, 553 U.S. at 296–97.

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[14] By enumerating five types of conduct to define what "sexually explicit conduct" "*means*," the term is limited to those five acts. *See Burgess v. United States*, 553 U.S. 124, 130 (2008) (emphasis added) ("As a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated") (cleaned up). Under 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," *Williams*, 553 U.S. at 294—the meaning of "lascivious exhibition of the anus, genitals, or pubic area" must be understood consistently with "sexual intercourse," "bestiality," "sado-masochistic conduct," and "masturbation."

In *Williams*, the Court emphasized that "sexually explicit conduct" means the "actual or simulated" conduct "engaged in by an actual minor" on camera—not merely the depiction itself. 553 U.S. at 296–97. The Court further explained that "'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." *Id*. at 297. While the Court used "sexual intercourse" as an example for interpreting simulated "sexually explicit conduct," it is one of five types of enumerated conduct—along with "lascivious exhibition"—that defines "sexually explicit conduct." § 2256(2)(A). Consistent with canons of statutory interpretation, another subsection of "sexually explicit conduct" would similarly require, for example, that "simulated" "lascivious exhibition" of the genitals or pubic area "is explicitly portrayed" so that the "portrayal must cause a reasonable viewer to believe that the actors actually engaged in that [lascivious exhibition] on camera." *See Williams*, 553 U.S. at 297. And consistent with *X-Citement Video*, *Ferber*, and *Miller*, a "lascivious exhibition" requires that the minor's conduct be more than mere

nudity or that which is risqué in order to connote "hard core" pornography. *X-Citement Video*, 513 U.S. at 84 (Scalia, J., dissenting) ("What is involved … is not the clinical, the artistic, nor even the risqué, but hard-core pornography"); *see supra* n.4.

This natural limitation on the plain language of § 2256(2)(A)—which ties "lascivious exhibition" to whether the minor's conduct is actually or explicitly portrayed—is made further obvious when compared to the federal statute that makes "video voyeurism" a crime. 18 U.S.C. § 1801. Section 1801 is violated when a person "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy." *Id*. The federal child pornography statutes under which Wilkerson was convicted do not encompass mere voyeurism and require that the image depicts a "lascivious exhibition of the ... genitals," rather than merely a recording of an individual's "private area." 18 U.S.C. §§ 2251(a), 2252A(a)(5)(B); *see Hillie*, 39 F.4th at 685, 692 n.1. But Congress chose to criminalize video voyeurism only within specified federal jurisdictions and was aware that similar criminal video-voyeurism prohibitions exist under state laws across the country, including in Texas, where the underlying

events in this case occurred. H.R. Rep. No. 108-504, at 2–3 (2004); *see supra* n.3.

The Fifth Circuit's holdings below cannot be reconciled with the governing statutory text. By directing the jury to focus on the image, rather than the minor's conduct depicted therein, the Fifth Circuit criminalizes nudity by allowing the jury to speculate "what's-in-the-mind-of-the-defendant," *McCoy*, 108 F.4th at 652 (Grasz, J., with whom Smith, C.J., and Kelly, Erickson, and Stras, J.J., join, dissenting). That a defendant "may have found the images sexually exciting ... can't suffice" where there is no sexually explicit conduct "in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring in the judgment). No one would "say that a girl performing [ordinary] acts" such as "tak[ing] a shower" "is engaged in sexually explicit conduct just because someone else looks at her with lust." *Hillie*, 38 F.4th at 238 (Katsas, J., concurring in the denial for rehearing en banc).

Indeed, this Court expressly rejected the Fifth Circuit's line of reasoning in *Williams*. *Williams* criticized the Eleventh Circuit for suggesting that statutes criminalizing depictions of "sexually explicit conduct" "could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.'" 553 U.S. at 301.

"[The] material in fact (and not merely in [the defendant's] estimation) must meet the statutory definition." *Id*. For example, "[w]here the material at issue is a harmless picture of a child in a bathtub" but the defendant subjectively "believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." *Id*.

The fact that a minor is at times nude while she engaged in everyday, nonsexual activities is insufficient to transform a depiction of innocent activity into a depiction of "sexually explicit conduct." The Fifth Circuit erred as a matter of law by allowing a jury to convict Wilkerson for producing and possessing images depicting "sexually explicit conduct" when they do not.

III. This question presented is critically important and regularly recurs.

Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the definition of "sexually explicit conduct."[15] The stakes are significant because expanding the reach of child pornography crimes beyond the First Amendment limitation

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[15] *See supra* n.1.

articulated in *Ferber* threatens protected speech[16] and subjects defendants to severe punishments. Criminal liability should not turn on non-textual factors, including mere nudity, that "move[] the law decidedly away from the statute's text and into the vague and uncertain arena of subjective intent." *McCoy*, 108 F.4th at 652 n.11 (Grasz, J., with whom Smith, C.J., and Kelly, Erickson, and Stras, J.J., join, dissenting). Nor should this indeterminacy of the statutory interpretation of a criminal element turn on the geographic circuit in which the defendant happens to be charged.

IV. This case is an ideal vehicle for addressing the question presented.

This case presents a purely legal issue for which there are no jurisdictional problems, factual disputes, or preservation issues. The images on which Wilkerson's convictions depend depict a minor engaged in nonsexual activities who is at times nude and

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[16] *See, e.g., Donoho*, 76 F.4th at 602 (7th Cir. 2023) (Easterbrook, J., concurring in the judgment) ("Images such as the ones Donoho produced appear in widely distributed films.… Are films such as *The Blue Lagoon*, in which Brooke Shields appeared unclothed while only 15, child pornography because some viewers become sexually excited?"); *Elden v. Nirvana L.L.C.*, 88 F.4th 1292 (9th Cir. 2023) (holding that Spencer Elden, who appeared nude as an infant on the cover of the Nirvana album *Nevermind*, may bring suit against album's producers under § 2255).

whose pubic area is at times visible. The question presented—whether such images depict "sexually explicit conduct," and the "lascivious exhibition of the anus, genitals, or pubic area," in particular, were raised, thoroughly briefed and argued, and addressed by the district court and the Fifth Circuit in a precedential opinion. If the surreptitious videos of a minor engaged in nonsexual activity cannot as a matter of law depict "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A), the Court should grant the petition and reverse the Fifth Circuit on the merits.

CONCLUSION

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

Respectfully submitted.

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April 29, 2025