

No.

IN THE
Supreme Court of the United States

ROBERT WAYNE HUTTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2251(a) makes it a crime to “use[] ... any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” “[S]exually explicit conduct” is defined to include “lascivious exhibition of the ... genitals[] or pubic area of any person.” 18 U.S.C. § 2256(2)(A).

Petitioner took surreptitious videos of a nude minor getting in and out of the shower. The minor did not know she was being filmed and she engaged in no sexual conduct. The question presented, on which there is an acknowledged circuit conflict, is:

Whether, as a matter of law, secretly recording a minor’s ordinary and routine nonsexual activity falls outside the scope of 18 U.S.C. § 2251(a)?

RELATED PROCEEDINGS

United States of America v. Robert Wayne Hutton, No. 24-2202 (9th Cir. judgment entered Nov. 17, 2025).

United States of America v. Robert Wayne Hutton, No. 2:22-cv-00158-MKD-1 (E.D. Wash. judgment entered Apr. 4, 2024).

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INTRODUCTION

This case presents an important and recurring question about the scope of federal laws criminalizing child pornography: Does an image necessarily fall outside the scope of “sexually explicit conduct” when it depicts no sexual conduct at all? The answer is plainly yes. As relevant here, Congress furnished a controlling definition of “sexually explicit conduct” in the plain terms of the statute: “lascivious exhibition of the anus, genitals, or pubic area of any person.” 18 U.S.C. § 2256(2)(A)(v). As this Court has already explained, “lascivious exhibition” is a term with an objective dictionary meaning. *See United States v. Williams*, 553 U.S. 285, 301 (2008). Yet the Ninth Circuit—alongside nine other circuits—relies on an extratextual six-factor test that departs from that meaning. That amorphous and judge-made test includes speculation about whether a particular defendant considers otherwise totally innocuous material to be lascivious based on his own subjective predilections. Put differently, the Ninth Circuit holds that whether conduct is sexually explicit is in the eye of the beholder. Under that framework, a wholly innocuous visual depiction of a naked child in a bathtub is not child pornography if captured innocently by the child’s parent or nanny, but may be child pornography if the parent or nanny is believed to be a pedophile who perceives the image as a lascivious exhibition. This is worse than “we know it when we see it”; it’s “we know it when we think the defendant sees it.” Such Schrödinger’s pornography cannot be the law.

Nor is it. As Justice Scalia has explained for this Court, “[w]here the material at issue is a harmless

picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a ‘lascivious exhibition of the genitals,’ the statute has no application.” *Williams*, 553 U.S. at 301. Yet nine circuits continue to defy *Williams* by endorsing a test originating from a 1986 Southern District of California decision that superimposes the individual defendant’s own subjective reaction to the visual depiction over the objective statutory criteria Congress prescribed. Only one court of appeals, the D.C. Circuit, has rejected this incorrect view, heeding the plain and express statutory requirement that the video or image must depict a minor engaging in sexual conduct. The result is an explicit and acknowledged circuit split that will not resolve itself absent this Court’s intervention.

As an ever-growing roster of court of appeals judges has observed, and as highlighted by Judge Graber’s pointed concurrence in this case, the majority approach, endorsed by the Ninth Circuit, has “drifted far from the statutory text.” Pet. App. 19a (Graber, J., concurring); *accord United States v. Hillie*, 38 F.4th 235, 236-41 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc); *id.* at 236 (Wilkins, J., concurring in the denial of rehearing en banc); *United States v. Donoho*, 76 F.4th 588, 601-02 (7th Cir. 2023) (Easterbrook, J., concurring), *cert. denied*, 144 S. Ct. 2683 (2024); *United States v. McCoy*, 108 F.4th 639, 651-52 (8th Cir. 2024) (en banc) (Grasz, J., dissenting), *cert. denied*, 145 S. Ct. 551 (2024); *see also id.* at 649-50 (Kelly, J., dissenting); *id.* at 654-55 (Stras, J., dissenting). As a matter of law, a surreptitious video of a minor engaged in innocuous daily bathroom activities like getting in and

out of the shower does not depict “sexually explicit conduct,” including “lascivious exhibition,” under 18 U.S.C. §§ 2251(a) and 2256(2)(A). The Ninth Circuit held otherwise, affirming Petitioner’s conviction based on an erroneous interpretation whereby even images of routine daily tasks can be considered lascivious if they are seen by the defendant to be sexual. Although numerous courts of appeals have come to embrace this approach, its widespread acceptance cannot overcome its fundamental incompatibility with the statutory text. As Judge Katsas on the D.C. Circuit explained, “[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them.” *Hillie*, 38 F.4th at 237.

This does not mean that conduct like Petitioner’s is not criminal. It is, under the federal video voyeurism statute (18 U.S.C. § 1801) and the laws of many states, including Washington (Wash. Rev. Code § 9A.44.115). But here, the issue is whether the conduct is criminal under the text of 18 U.S.C. § 2251(a) as federal child pornography, with attendant and highly punitive mandatory minimum sentences. The Ninth Circuit and other like-minded courts of appeals are freelancing on the definition of a crime, modifying Congress’s clear limitations on the scope of the federal child pornography laws.

There can be no doubt that the question presented is significant and calls for a uniform national rule: The issue is fundamental to scores of convictions under § 2251(a) predicated on secretly recorded images like the ones here. As the government has acknowledged in seeking en banc review on this issue in the

Eighth and D.C. Circuits, “surreptitious-recording cases occur frequently” and implicate questions “of surpassing importance.” Gov’t Pet. for Reh’g En Banc at 14, *United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (No. 21-3895) (internal quotation marks omitted). At this point, there is no benefit to further percolation. Almost every circuit has staked out a position, and there is no reason to expect the D.C. Circuit, having recently denied rehearing en banc in *Hillie*, to reconsider the position that has generated this now-entrenched split. This case is an excellent vehicle to decide the question, as the issue was fully preserved, extensively addressed in the decisions below, and outcome-determinative.

This Court has denied prior certiorari petitions raising this issue. As this case illustrates, the question continues to arise and will not go away until this Court intervenes. The Court should grant this petition.

OPINIONS AND ORDERS BELOW

The Ninth Circuit’s decision is reported at 159 F.4th 636 and reproduced at Pet. App. 1a-23a. The relevant proceedings of the district court are unreported and reproduced at Pet. App. 24a-33a.

JURISDICTION

The Ninth Circuit issued its judgment on November 17, 2025. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... shall be punished as provided under subsection (e)

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

(2)(A) “[S]exually explicit conduct” means actual or simulated—

- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
- (ii) bestiality;
- (iii) masturbation;
- (iv) sadistic or masochistic abuse; or
- (v) lascivious exhibition of the anus, genitals, or pubic area of any person

STATEMENT OF THE CASE***Petitioner is charged under 18 U.S.C. § 2251(a) for secretly recording a nude minor in the bathroom getting in and out of the shower***

Petitioner's conviction for production of child pornography arises from recordings he made of his stepdaughter, who was 14 years old at the time. Pet. App. 4a. Petitioner surreptitiously placed a hidden camera in his home's master bathroom and captured several videos and images of the minor undressing and getting in and out of the shower. *Id.* All agree that the minor was alone in the bathroom, she did not know she was being filmed, and she engaged in no sexual conduct of any kind. *See id.*; Pet. App. 35a-36a. Some of the images, "depicting the [minor] showering," were "edited to include only those moments when she was visibly nude rather than obscured behind the shower curtain." Pet. App. 4a.

Based on this evidence, Petitioner was indicted for production and attempted production of child pornography under 18 U.S.C. § 2251(a). Pet. App. 5a; Court of Appeals Excerpts of Record (C.A. ER) 1:2. Pursuant to the terms of the statute, the indictment charged that Petitioner knowingly employed, used, persuaded, induced, enticed, or coerced a minor to engage in "sexually explicit conduct," and that he did so for the purpose of producing a "visual depiction[] of such conduct." C.A. ER 2:196-97. The government alleged that the sexually explicit conduct in question was a "lascivious exhibition" under 18 U.S.C. § 2256(2)(A)(v). *See* Pet. App. 5a-6a; C.A. ER 1:28-31. A search of digital devices seized from Petitioner's

home had also revealed unrelated visual depictions of other minors, and a superseding indictment thus also charged Petitioner, in a second count, with possession of child pornography under 18 U.S.C. § 2252A relating to those other images. Pet. App. 38a; C.A. ER 2:197. Petitioner pleaded guilty to the separate possession count, and that offense is not at issue in this petition. *See* Pet. App. 5a n.1.

Petitioner is convicted under 18 U.S.C. § 2251(a) for producing visual depictions of a minor engaged in sexually explicit conduct

The case proceeded to a bench trial as to the production count, with all relevant facts stipulated in advance. Pet. App. 5a; Pet. App. 34a-39a (stipulation). The undisputed record showed that Petitioner placed a camera in his home's upstairs bathroom, where his minor stepdaughter often showered, and that the camera captured the minor nude and getting in and out of the shower. Pet. App. 4a, 35a.

Petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 5a; C.A. ER 1:23-25, 2:123-48. Petitioner explained that, as a matter of law, the videos did not show any "lascivious exhibition" or sexual conduct of any kind, much less any "sexually explicit conduct" as required for a violation of 18 U.S.C. § 2251(a), because the recordings depicted only the minor engaging in routine, nonsexual conduct, namely getting in and out of the shower. *See* C.A. ER 2:136. Petitioner noted that Rule 29 relief was precluded under Ninth Circuit precedent, C.A. ER 2:128, citing *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023) (upholding § 2251(a)

conviction where defendant secretly recorded minor showering), *cert. denied*, 144 S. Ct. 1345 (2024), and explaining that “this motion is filed to preserve the issue,” C.A. ER 1:24; *see* C.A. ER 2:128. The district court denied the motion. Pet. App. 5a-6a, 32a.¹

The district court at the same time issued its verdict in the case. The court found Petitioner guilty of using a minor to engage in sexually explicit conduct, ruling that the minor’s conduct—getting in and out of the shower—constituted “lascivious exhibition.” Pet. App. 25a-33a (bench ruling). In reaching that conclusion, the district court referred to the six-factor test announced in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d sub nom. United States v. Wiegang*, 812 F.2d 1239 (9th Cir. 1987), which the Ninth Circuit—alongside nine other circuits—has adopted to help assess what constitutes “sexually explicit conduct” under § 2251. Pet. App. 30a (“The Court is to consider the *Dost* factors, which I have done.”). The six *Dost* factors are: (1) whether the focal point of the visual depiction is the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the

¹ Petitioner also moved to dismiss the charge as void for vagueness, alleging that § 2251(a) is unconstitutionally vague as applied to him because it did not provide sufficient notice that his conduct—passively filming a minor while she showered—constituted “using” a minor under the statute or otherwise fell within the scope of the statute. C.A. ER 1:10. The district court also denied that motion, and it is not the subject of this petition. *Id.*

child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. 636 F. Supp. at 832.²

The district court discussed all six factors. *See* Pet. App. 30a-32a. It concluded that the minor’s genitals were the focal point of the visual depiction—factor (1)—because the placement of the camera made clear that this is what it intended to capture. Pet. App. 30a. The court also concluded (factor (2)) that the setting—the bathroom—was “sexually suggestive” because “a bathroom is a place that can be a sexual setting.” Pet. App. 30a-31a. The court further concluded that factors (3) and (5), which go toward the minor’s conduct suggesting “sexual coyness” or whether she was unnaturally posed, were met here because it was “unnatural to be filmed” while in the bathroom. Pet. App. 31a. And factor (4) was met because the recordings captured the minor nude and in various degrees of undress. *See id.*; Pet. App. 8a-9a.

Crucially, in applying the sixth *Dost* factor—the intent to elicit a sexual response in the viewer—the district court considered not an average viewer, but rather the defendant himself. Concluding that the standpoint “of the photographer” is what matters, the

² Although some courts treat the *Dost* factors as “helpful guides for juries in the ‘lascivious exhibition’ inquiry,” *Donoho*, 76 F.4th at 592, many courts—including the Ninth Circuit and the district court below—have endorsed those factors as a guide for any trier of fact, including in bench trials. *Dost* itself involved a bench trial and stipulated facts, as here. *See Dost*, 636 F. Supp. at 830.

court reasoned that the fact that Petitioner was “an individual who has a sexual interest in children” showed that the visual depictions here were “designed to elicit a sexual response in the viewer,” *i.e.*, Petitioner, and for that reason they constituted child pornography. Pet. App. 8a-9a; Pet. App. 32a. The court based this analysis on the facts that Petitioner had in 2009 pleaded guilty to an unrelated misdemeanor offense involving sexual conversations with a friend’s 15-year-old daughter; that Petitioner had made sexual comments to the minor in this case, such as telling her that her long hair was “sexy”; that at least one of the videos here was later saved in Petitioner’s phone under the label “[Minor’s name]-sex”; and that Petitioner pleaded guilty to Count 2 of the indictment, concerning possession of child pornography involving different and wholly unrelated images of other minors. Pet. App. 8a-9a & n.2; Pet. App. 26a-27a, 37a. The district court added that “if a reviewing court determines that th[e] photographs ... do not qualify as sexually explicit conduct, ... Mr. Hutton intended and attempted to commit the underlying offense,” because he had the “intent to capture sexually explicit conduct” and “took a substantial step towards doing so by virtue of placing the camera in the room.” Pet. App. 32a.

Section 2251 provides for a mandatory minimum sentence of 15 years of imprisonment for first-time offenders. *See* 18 U.S.C. § 2251(e). The district court sentenced Petitioner to a term of 20 years’ imprisonment. Pet. App. 6a. At the same sentencing proceeding, the court also imposed a concurrent 20-year term on the separate count for possession of child pornography under § 2252A, the statutory maximum for

Petitioner's § 2252A offense. C.A. ER 1:3, 2:118, 2:172-73.

The Ninth Circuit affirms the conviction based on circuit precedent holding that routine, nonsexual activity can constitute “sexually explicit conduct”

The Ninth Circuit affirmed Petitioner's § 2251 conviction in a precedential decision, addressing several issues.³ As relevant to the question presented, the panel held that “existing Circuit precedent forecloses” Petitioner's challenge to the district court's definition of “sexually explicit conduct” and “lascivious exhibition.” Pet. App. 7a (citing, *inter alia*, *Boam*, 69 F.4th at 608). In *Boam*, the Ninth Circuit upheld a conviction under 18 U.S.C. § 2251(a) where the defendant surreptitiously recorded a minor showering. In so ruling, the *Boam* court invoked and applied the *Dost* factors (69 F.4th at 608-10) and emphasized extraneous evidence of the defendant's sexual interest in the minor, including evidence that he had raped her months after the recordings were made (*id.* at 605, 606, 611, 612). The court of appeals here explained that, under that precedent, the district court properly concluded that the images in this case were likewise of “lascivious exhibition” and thus “sexually explicit conduct” under § 2251(a), even though they have no sexual content beyond mere nudity, because “the depictions,” though indisputably of commonplace

³ The court affirmed the district court's determinations regarding vagueness and use. As noted, those questions are not directly at issue in this petition. *See supra*, n.1; Pet. App. 10a-11a; Pet. App. 11a-19a.

and entirely nonsexual activity, “were designed to elicit a sexual response’ in [Petitioner].” Pet. App. 9a-10a; *see also* C.A. ER 1:31 (government arguing that “really the crux under a whole case like this is if the images were intended to be sexual by the person creating them”). The panel did not address any issue of attempt.

Judge Graber wrote a separate concurrence, agreeing with the panel’s opinion under circuit precedent but emphasizing that “judicial interpretations of 18 U.S.C. § 2251(a) have drifted far from the statutory text.” Pet. App. 19a. She admonished that the courts were “stretch[ing] the meaning of this statute to cover nearly all deplorable conduct by pedophiles—at increasing risk of the Supreme Court’s overruling our cases.” *Id.*

Judge Graber reiterated that “[t]he statute requires that the minor engage in ‘sexually explicit conduct,’ which Congress defined to include ‘lascivious exhibition of the anus, genitals, or pubic area of any person.’” Pet. App. 21a-22a. Yet “[o]ur cases have expanded the meaning of this statute to encompass everyday ordinary behavior, such as a person,” not even aware they are being filmed, merely “entering and exiting a shower.” Pet. App. 22a.

“Here, for example,” Judge Graber noted that “we inquire into Defendant’s state of mind by looking into his past criminal conduct and by assessing his past comments to the victim; and we look at how he later edited and labeled the videos and images. Those factors certainly strike at Defendant’s moral and criminal culpability generally.” Pet. App. 23a. “But it is a

stretch to say that those factors—which look to the past, the future, and the image rather than the conduct—play a role in the narrow question whether the [minor] was engaging in sexually explicit conduct at a specific moment in time. And what it all means is that, so long as one of the specified body parts is nude, *any* commonplace activity—entering the shower, using the toilet, getting dressed, and so on—could qualify as ‘lascivious.’” *Id.*

Judge Graber stressed as well that she was “not the first to make this point.” Pet. App. 22a (citing *Donoho*, 76 F.4th at 601-02 (Easterbrook, J., concurring); *Hillie*, 38 F.4th at 236 (Wilkins, J., concurring in the denial of rehearing en banc); *id.* at 236-41 (Katsas, J., concurring in the denial of rehearing en banc); *United States v. Steen*, 634 F.3d 822, 828-30 (5th Cir. 2011) (Higginbotham, J., concurring)); *see also McCoy*, 108 F.4th at 651-54 (Grasz, J., dissenting); *id.* at 649-50 (Kelly, J., dissenting); *id.* at 654-55 (Stras, J., dissenting)).⁴

REASONS FOR GRANTING THE WRIT

The courts of appeals are expressly and intractably divided over whether surreptitious images of minors engaged in wholly innocent daily activity may nonetheless be deemed to depict “lascivious exhibition” of the genitals and thus “sexually explicit con-

⁴ In *Boam*, the recent Ninth Circuit precedent that the panel followed here, the defendant sought rehearing en banc, and the Ninth Circuit denied the rehearing petition without comment. 69 F.4th 601, Dkt. 55 (9th Cir. Sept. 8, 2023). Against that backdrop, Petitioner did not seek rehearing in this case.

duct” under 18 U.S.C. §§ 2251(a) and 2256(2)(A). This case squarely presents this consequential and recurring question and is an excellent vehicle for answering it. The Ninth Circuit’s position is also profoundly wrong: As a matter of law, an image depicting quotidian tasks like getting in and out of the shower does not and cannot depict “sexually explicit conduct” regardless of whether the photographer happens to have his own peculiar, sexual interest in the images he creates. This Court should grant certiorari to resolve the conflict in the circuits and to reverse the Ninth Circuit’s misguided and legally incorrect ruling.

The Court has denied certiorari on this question on previous occasions. *See, e.g., McCoy*, 145 S. Ct. 551 (2024) (No. 24-380); *Donoho*, 144 S. Ct. 2683 (2024) (No. 23-803); *Boam*, 144 S. Ct. 1345 (2024) (No. 23-625); *Anthony v. United States*, 144 S. Ct. 827 (2024) (No. 23-5566). But the reasons the government has given for opposing prior petitions do not withstand scrutiny. As this case shows, the issue and the circuit split persist and will continue to persist, and the Court’s intervention is needed to resolve the entrenched disagreement among the courts of appeals on this matter of fundamental legal and practical significance.

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

A. The circuits are split on the question presented.

1. The Ninth Circuit’s decision directly conflicts with the D.C. Circuit’s decision in *Hillie*, a case construing the same statutory provision on materially identical facts.

In *Hillie*, as here, the defendant took surreptitious videos of a minor engaging in routine bathroom activity. *Compare United States v. Hillie*, 39 F.4th 674, 678, 686 (D.C. Cir. 2022), *with* Pet. App. 4a. And as in this case, the trier of fact found the defendant guilty of producing child pornography under 18 U.S.C. § 2251(a) even though the videos in question did not depict the minor engaging in any sexual conduct. *Hillie*, 39 F.4th at 678-79. On appeal, *Hillie* argued there was insufficient evidence for conviction because none of the recordings depicted conduct that could be described as a lascivious exhibition of the genitals or pubic area, *id.* at 680-81—like here, the only category of “sexually explicit conduct” at issue. *Compare id.* at 681, 691, *with* Pet. App. 7a-10a.

The D.C. Circuit agreed with the defendant. It held that “lascivious exhibition” under § 2256(2)(A) requires displaying private parts “in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in *any* type of sexual

activity.” *Hillie*, 39 F.4th at 685. The videos there did not meet that standard, the *Hillie* court explained, because even though those videos showed the minor’s nude body, they only depicted the minor “engaged in ordinary grooming activities, some dancing, and nothing more.” *Id.* at 686. Because the minor “never engage[d] in any sexual conduct whatsoever, or any activity connoting a sex act,” “no rational trier of fact could find [the minor’s] conduct depicted in the videos to be a ‘lascivious exhibition of the ... genitals’ as defined by § 2256(2)(A),” and so acquittal was compelled as a matter of law. *Id.* And the court explained that the same logic also precluded any attempt conviction, absent evidence that the defendant intended the recordings to capture the minor “not just in the nude,” but “engaging in sexually explicit conduct.” *Id.* at 692.

As part of its holding, the D.C. Circuit in *Hillie* rejected the government’s argument that it should interpret the statute’s definition of “lascivious exhibition” “in accordance with the so-called *Dost* factors.” *Hillie*, 39 F.4th at 686; *see id.* at 686-90. The D.C. Circuit faulted courts—including the Ninth Circuit, in the precedent the panel followed and reaffirmed here—for invoking *Dost* to hold that a “picture of a child engaged in sexually explicit conduct within the meaning of 18 U.S.C. §[] 2251 ... is a picture of a child’s sex organs ... presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.” *Id.* at 688 (internal quotation marks omitted) (quoting *Wiegand*, 812 F.2d at 1244); *compare* Pet. App. 7a-8a (relying on *Wiegand*, 812 F.2d at 1243-45). The D.C. Circuit observed that such an approach “did not abide by” this Court’s construction of almost identical language in similar statutes, and that this Court had

“expressly rejected” this kind of reliance on the photographer’s own idiosyncratic and “subjective[]” sensibilities. *Id.* at 687, 688 (quoting *United States v. Williams*, 553 U.S. 285, 301 (2008)).

In an 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: “Sexually explicit conduct” requires that the video depict sexual conduct, and “[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them.” 38 F.4th at 236-37.

In this case, the Ninth Circuit came to the opposite conclusion on analogous facts, relying precisely on the precedent that the D.C. Circuit rejected in *Hillie*, which it had reaffirmed in *Boam*. Here, as in *Boam*, the Ninth Circuit held that a trier of fact could conclude that Petitioner’s surreptitious videos of a minor met the statutory requirement of “sexually explicit conduct,” in the form of a “lascivious exhibition,” even where the relevant videos depict only routine, nonsexual bathroom activities. Pet. App. 7a-10a. The crux of the Ninth Circuit’s decision here is its holding that the district court properly concluded that the videos in this case depicted “sexually explicit conduct” and “lascivious exhibition” because “the depictions ‘were designed to elicit a sexual response’ in [Petitioner].” Pet. App. 9a.

2. The D.C. Circuit, although correct, stands alone. At least nine other circuits are aligned with the Ninth Circuit on this issue, concluding that surreptitious recordings of minors engaging in quotidian,

nonsexual bathroom activities may be deemed to depict “lascivious exhibition,” and thus “sexually explicit conduct,” based not on the content of the videos and images themselves but rather on the defendant’s subjective sensibilities and prior and future conduct. *See United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (secretly recorded videos depicting minor undressing and entering and exiting the shower were encompassed by § 2251(a) because *the defendant* had “engaged in sexually explicit conduct” by recording them); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom videos showed “sexually explicit conduct” even though they “d[id] not involve suggestive posing, sex acts, or inappropriate attire”); *United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitiously filmed videos of minors showering violated § 2251(a) because the defendant had “made the videos to ‘elicit a sexual response’ in himself”), *cert. denied*, 144 S. Ct. 827 (2024); *United States v. Deritis*, 137 F.4th 209, 215 (4th Cir. 2025) (surreptitious recording of minor “nude, entering and exiting the shower, and toweling off” fell within § 2251(a) because of the defendant’s documented sexual interest in children), *cert. denied*, 146 S. Ct. 270 (2025); *United States v. McCall*, 833 F.3d 560, 561-64 (5th Cir. 2016) (bathroom video of a minor undressing, grooming, and showering constituted child pornography under § 2251(a) in light of defendant’s “documented sexual interest in children”); *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 violated § 2251(a) because of subjective reaction of the defendant), *cert. denied*, 144 S. Ct. 2683 (2024); *United*

States v. McCoy, 108 F.4th 639, 642 (8th Cir. 2024) (en banc) (bathroom videos of a minor grooming herself and using toilet while nude constituted child pornography under § 2251(a)), *cert. denied*, 145 S. Ct. 551 (2024); *United States v. Wells*, 843 F.3d 1251, 1254-57 (10th Cir. 2016) (bathroom videos of minor showering and using toilet were criminal under § 2251 “because the photographer array[ed] [the images] to suit *his* peculiar *lust*”); *United States v. Holmes*, 814 F.3d 1246, 1247, 1251-52 (11th Cir. 2016) (videos of minor “performing her daily bathroom routine” constituted child pornography under § 2251 “based on the actions of the individual creating the depiction”).

These cases, like the decision below, would come out differently in the D.C. Circuit, insofar as they uphold convictions for depictions of “sexually explicit conduct” where the recordings in question consisted merely of secret images of routine, nonsexual activity. Indeed, in its opinion in *Hillie*, the D.C. Circuit expressly rejected the approaches of multiple circuits. 39 F.4th at 689. And likewise, in its opinion in *Boam* that the panel followed here, the Ninth Circuit in turn expressly noted that it was disagreeing with and departing from the D.C. Circuit’s decision in *Hillie*. *Boam*, 69 F.4th at 613 (“[T]here is no question that *Hillie* is incompatible with our caselaw.”); *see also United States v. Porter*, 114 F.4th 931, 937 n.2 (7th Cir. 2024) (“[T]he D.C. Circuit’s holding ... stands contrary not only to our precedent but that of numerous other circuits, including the Ninth, Third, Eighth, Tenth, Eleventh, and Fifth Circuits.”); *McCoy*, 108 F.4th at 644 (*Hillie* “differs from our settled circuit precedent.”); *United States v. Jakits*, 129 F.4th 314, 323 (6th Cir. 2025) (“*Hillie* ... is incompatible with our

precedent[.]”), *cert. denied*, 145 S. Ct. 2851 (2025); *United States v. Sanders*, 107 F.4th 234, 264 (4th Cir. 2024) (Fourth Circuit precedent “cannot be reconciled with *Hillie’s*” construction of the statute), *cert. denied*, 145 S. Ct. 1434 (2025).

This is a real and genuine conflict in the circuits warranting review, even if only one court of appeals—the D.C. Circuit—is on the correct side of the divide. *See, e.g., Erlinger v. United States*, 602 U.S. 821 (2024) (reviewing 12-0 circuit non-split and ultimately ruling for the criminal defendant); *id.* at 853 (Kavanaugh, J., dissenting) (“The Court today, however, rejects the unanimous conclusions of the 12 [regional] Courts of Appeals.”); *Holguin-Hernandez v. United States*, 589 U.S. 169, 172-73 (2020) (reviewing 7-1 circuit split and ultimately ruling for the criminal defendant); *Hughes v. United States*, 584 U.S. 675, 679 (2018) (reviewing 8-2 circuit split and ultimately ruling for the criminal defendant); *Peugh v. United States*, 569 U.S. 530, 535 & n.1 (2013) (reviewing 5-1 circuit split and ultimately ruling for the criminal defendant).

B. The circuit conflict on what constitutes “sexually explicit conduct” is exacerbated by disagreements over the *Dost* factors, especially factor six.

The division in the circuits regarding the statutory terms “sexually explicit conduct” and “lascivious exhibition” is compounded by the amorphous and extratextual *Dost* test, which has sown broad disagreements among the courts of appeals. The six *Dost* factors, first endorsed by the Ninth Circuit nearly

forty years ago, “often create more confusion than clarity,” *Steen*, 634 F.3d at 829 (Higginbotham, J., concurring), fostering “myriad disputes that have led courts far afield from the statutory language,” *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006). As a result, “the *Dost* test has produced a profoundly incoherent body of case law.” Amy Adler, *Inverting the First Amendment*, 149 U. Penn. L. Rev. 921, 953 (2001); see *United States v. Price*, 775 F.3d 828, 839 (7th Cir. 2014) (“The *Dost* factors are the subject of ongoing debate among the circuits.”); *United States v. Rivera*, 546 F.3d 245, 250-51 (2d Cir. 2008) (“[U]se of the *Dost* factors has provoked misgivings[.]”); see also *McCoy*, 108 F.4th at 654 (Grasz, J., dissenting) (“[T]he court should overrule our case law blessing the instruction of the jury on the *Dost* factors[.]”).

Because the *Dost* factors “risk[] taking the inquiry far afield from the already clear statutory text,” some courts have expressly “discourage[d]” their “routine use.” *Price*, 775 F.3d at 840. As noted, the D.C. Circuit in *Hillie* has specifically rejected reliance on the *Dost* factors to determine whether an image depicts “lascivious exhibition” and “sexually explicit conduct.” 39 F.4th at 686-90.

Even those courts of appeals that more broadly accept the *Dost* factors employ materially different versions of them. For example, in the Third Circuit, “more than one factor must be present to prove lasciviousness.” *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002). But in the Tenth Circuit, one factor apparently is enough. See *United States v. Wolf*, 890 F.2d 241, 245 n.6 (10th Cir. 1989). And the Eighth Circuit

has added two more factors for consideration. *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019).

Courts are especially conflicted about how to apply the sixth *Dost* factor—the factor that the courts below placed great weight on here—which calls for courts and juries to consider “whether the visual depiction is intended or designed to elicit a sexual response in the viewer.” Pet. App. 8a. Among the various factors, the sixth is the “most confusing and contentious.” *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999). It is “[p]articularly divisive,” ensnaring judges in a confusing “thicket.” *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019). Specifically, it “does not make clear whether a factfinder should focus only on the content of the image at issue, or whether it may consider the images in context with other images and evidence presented at trial.” *United States v. Brown*, 579 F.3d 672, 682 (6th Cir. 2009). As this case illustrates, the sixth *Dost* factor shifts the focus from the images themselves to whether the photographer would be aroused by them, and invites an open-ended inquiry into extraneous evidence bearing not on the depicted conduct but instead on the nature of the defendant’s sexual interests.

Accordingly, multiple courts of appeals have curtailed application of the defendant’s subjective perceptions of the minor’s conduct. *See, e.g., United States v. Spoor*, 904 F.3d 141, 150 (2d Cir. 2018) (allowing consideration of the sixth *Dost* factor “only to the extent that it is relevant to the jury’s analysis of the five other factors and the objective elements of the image”). Others have barred a subjective-standpoint standard, thereby rendering the sixth factor largely

inoperative. As the First Circuit has explained, a test focused on the filmmaker's own "subjective reaction" to the conduct he is recording would risk turning a "Sears catalog into pornography" based on "a sexual deviant's quirks." *Amirault*, 173 F.3d at 34.

Not the Ninth Circuit, however. There, the defendant's own sensibilities are so central to the analysis that they "often are determinative as to whether the minor engaged in sexually explicit conduct." Pet. App. 23a (Graber, J., concurring). As Judge Graber remarked in the context of this case, by "inquir[ing] into the viewer's subjective frame of mind" in this way, the analysis strays "far from the statutory text." Pet. App. 22a (Graber, J., concurring). After all, "[w]e do not ordinarily say that a person has engaged in a certain type of conduct by looking to the state of mind and the later activities of a person who was secretly watching that conduct." Pet. App. 22a-23a. In the Ninth Circuit, the sixth *Dost* factor allows "the defendant's subjective belief that conduct is arousing" to "make otherwise innocent conduct lascivious." C.A. Appellant's Br. 31-32.

As this cacophony reveals, the circuit split that the question presented raises thus implicates not only an acknowledged and fundamental inter-circuit disagreement about the interpretation of critical terms in a federal criminal statute, but also, relatedly, an equally explicit inter-circuit disagreement regarding application of the *Dost* factors, particularly the relevance of the defendant's own, idiosyncratic predilections to whether a minor's activities fall within the statutory definition of "sexually explicit conduct." See *Hillie*, 39 F.4th at 689. This additional and

interconnected discord serves only to heighten the suitability of, and the need for, this Court’s review.

II. The Ninth Circuit’s Decision Is Wrong.

As a matter of law, a surreptitious video or image of a minor that depicts innocent daily activity does not depict “sexually explicit conduct” or “lascivious exhibition of the ... genitals or pubic area” under 18 U.S.C. §§ 2251(a) and 2256(2)(A). Petitioner’s conviction based on such videos and images reflects legal error.⁵

A. Section 2251(a) prohibits using “any minor to engage in ... any *sexually explicit conduct* for the purpose of producing *any visual depiction of such conduct*.” 18 U.S.C. § 2251(a) (emphases added). So, if a surreptitious video of a minor does not depict the minor engaging in “sexually explicit conduct,” there is no offense under § 2251(a).

Section 2256(2)(A) limits “sexually explicit conduct” to five categories:

- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

⁵ The Ninth Circuit upheld the district court’s factual findings as not clearly erroneous. *See* Pet. App. 9a. But the question before this Court is a purely legal one of statutory interpretation—whether quotidian, nonsexual activity may constitute “lascivious exhibition” and hence “sexually explicit conduct” under 18 U.S.C. §§ 2251(a) and 2256(2)(A). The answer to that question is no as a matter of law.

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

Where, as here, the only sexually explicit conduct alleged is “lascivious exhibition[]” of the minor’s genitals and pubic area, Pet. App. 7a-8a, the question whether a defendant’s surreptitious recording of a minor violates § 2251(a) “depends on whether the [minor] engaged in any sexually explicit conduct” as depicted in the recordings at issue, “which in turn depends on whether she made a lascivious exhibition of her genitals.” *Hillie*, 38 F.4th at 236 (Katsas, J., concurring in the denial of rehearing en banc); see Pet. App. 21a-22a (Graber, J., concurring).

As Judge Katsas explained in his opinion concurring in the denial of rehearing en banc in *Hillie*, “[a] child engages in ‘lascivious exhibition’ under section 2256(2)(A)(v) if, but only if, she reveals her ... genitals, or pubic area in a sexually suggestive manner.” *Hillie*, 38 F.4th at 237; accord Pet. App. 21a-22a (Graber, J., concurring). In other words, at an absolute minimum, the minor must “display[] his or her ... genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in *any* type of sexual activity.” *Hillie*, 39 F.4th at 685. This is the same understanding of “lascivious exhibition” that the Solicitor General has

previously embraced, recognizing that under “the plain meaning of the statute,” “the material must depict a child lasciviously engaging in sexual conduct.” Gov’t Br. at 9-10, *Knox v. United States*, No. 92-1183, 1993 WL 723366, at *9-10 (U.S. Sept. 17, 1993).

To be clear, there is no requirement under 18 U.S.C. § 2251 that the minor have sexual intent or any intent at all. Young children with no concept of sexual intent can be posed in sexually suggestive positions, and a pedophile can even curate a sexually suggestive scene in which a child is asleep (or unconscious or drugged). The point is not at all that the minor must have sexual intent. The point is that, as a matter of plain English and the applicable statutory text, common, everyday nonsexual activity cannot be and is not “sexually explicit conduct,” and is not transmogrified into “sexually explicit conduct” because the prosecution introduces evidence that the voyeur is sexually interested in the visual depiction he creates.

This natural limitation on the plain language of § 2256(2)(A) is especially evident when viewed in the context of a separate federal statute that makes “video voyeurism” a crime. 18 U.S.C. § 1801. Section 1801 applies only in the “special maritime and territorial jurisdiction of the United States” and encompasses anyone who “has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy.” *Id.* In contrast, the general federal child pornography statutes under which Petitioner was charged are not voyeurism statutes, do not encompass mere voyeurism, and require that the image depict a

“lascivious exhibition of the ... genitals,” rather than merely recording an individual’s “private area.” 18 U.S.C. § 2251, *et seq.*; see *Hillie*, 39 F.4th at 685, 692 n.1.

Notably, violating 18 U.S.C. § 1801 carries a maximum term of imprisonment of “one year”—not the decades of punishment available under the child pornography statutes. Congress thus criminalized video voyeurism only within specified federal jurisdictions and was aware that similar criminal video-voyeurism prohibitions exist under state laws across the country, including in Washington, where the underlying events in this case occurred. H.R. Rep. No. 108-504, at 2-3 (2004), *reprinted in* 2004 U.S.C.C.A.N. 3292; see, e.g., Wash. Rev. Code § 9A.44.115; Ark. Code Ann. § 5-16-102; Wis. Stat. § 942.09; Fla. Stat. § 810.145; Ky. Rev. Stat. § 531.100; R.I. Gen. Laws § 11-64-2. Courts that apply the federal child pornography statutes to the same conduct are impermissibly arrogating to themselves Congress’s power to decide which crimes to federalize and with what punishment.

Understanding “lascivious exhibition” and “sexually explicit conduct” to require a depiction of the minor engaged in something more than just innocuous daily activity not only comports with the plain statutory language, but it also heeds this Court’s precedent on the meaning of “sexually explicit conduct” in § 2256(2)(A) and related provisions. As Justice Scalia explained for the Court in *United States v. Williams*, “[s]exually *explicit* conduct’ connotes actual depiction of the sex act rather than merely the suggestion that it is occurring.” 553 U.S. 285, 297 (2008) (construing § 2252A). As a category of “sexually explicit conduct,”

“lascivious exhibition” must therefore involve, at a minimum, an “explicitly portrayed” sexual or sexually suggestive display of specified private parts. *Id.*

B. In light of the statutory text, the Ninth Circuit erred in rejecting Petitioner’s challenge to his conviction. Petitioner’s conviction is “difficult to square” with the “words that Congress chose” in §§ 2251(a) and 2256(2)(A)(v). *See* Pet. App. 23a (Graber, J., concurring).

Petitioner “used a hidden camera he had placed in the bathroom” to “record several nude videos and images” of the minor engaging in ordinary activities like showering. Pet. App. 4a. The minor was by herself in the bathroom and did not know she was being recorded. *Id.* Under these circumstances, as a matter of law, the videos at issue did not depict sexually explicit conduct in the form of a lascivious exhibition of the genitals or pubic area. There is no dispute that “entering and exiting a shower” is, by itself, “everyday ordinary behavior.” Pet. App. 22a (Graber, J., concurring). “[N]obody would say that it is sexually explicit conduct to uncover private parts simply to ... take a shower.” *Hillie*, 38 F.4th at 237-38 (Katsas, J.).

C. In upholding Petitioner’s conviction, the Ninth Circuit seriously misconstrued the statutory text. The government’s position below was that “what matters are the Defendant’s intent and his use of the child to obtain lascivious images that he wanted, not whatever the child ends up doing once the camera is on.” C.A. Gov’t Br. at 15; *see also* C.A. ER 1:31-32 (government arguing that depictions of “conduct that would otherwise be innocent” can still “create [a] lascivious

exhibition” because “they can be sexual to someone who has a sexual interest in minors and receives sexual gratification or arousal from images like that”). The Ninth Circuit agreed, holding that factors like Petitioner’s “sexual interest in children” and in the minor in question “support[ed] the district court’s finding that the images here were ‘lascivious exhibitions.’” Pet. App. 8a. And crucially, in making this assessment, the court considered, among other things, wholly extrinsic evidence like statements of a sexual nature that Petitioner had made to this minor and others, and the fact that he later labeled one of the videos “[Minor’s name]—sex.” See Pet. App. 8a-9a & n.2; Pet. App. 26a-27a.

The Ninth Circuit’s approach of “looking to the state of mind and the later activities of a person who was secretly watching [the minor’s] conduct,” Pet. App. 23a (Graber, J., concurring), simply “cannot be reconciled with the governing statutory text,” *Hillie*, 38 F.4th at 238 (Katsas, J.). See also *McCoy*, 108 F.4th at 652 (Grasz, J., dissenting) (characterizing this as the “what’s-in-the-mind-of-the-defendant’ theory of statutory construction,” which “allows for rampant jury speculation”). The secret cameraman’s idiosyncratic sexual interests are insufficient for conviction if the “visual depiction” itself does not show a “minor engag[ing] in ... any sexually explicit conduct.” 18 U.S.C. § 2251(a). As Judge Easterbrook has rightly put it in addressing this exact issue, that a defendant “may have found the images sexually exciting ... can’t suffice” where there is no sexually explicit conduct “in the videos” themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring). To hold otherwise would mean that “so long as one of the specified body

parts is nude, *any* commonplace activity—entering the shower, using the toilet, getting dressed, and so on—could qualify as ‘lascivious.’” Pet. App. 23a (Graber, J., concurring). No one would “say that a girl performing” those ordinary acts “is engaged in sexually explicit conduct just because *someone else* looks at her with lust.” *Hillie*, 38 F.4th at 238 (Katsas, J.); *see also McCoy*, 108 F.4th at 649-50 (Kelly, J., dissenting); *id.* at 654-55 (Stras, J., dissenting).

Indeed, this Court “expressly rejected this line of reasoning in *Williams*.” *Hillie*, 39 F.4th at 688. *Williams* criticized the Eleventh Circuit for suggesting that statutes criminalizing depictions of “sexually explicit conduct” as defined in § 2256(2)(A) “could apply to someone who subjectively believes that an innocuous picture of a child is ‘lascivious.’” 553 U.S. at 301. “[The] material in fact (and not merely [in the defendant’s] estimation) must meet the statutory definition.” *Id.* For example, “[w]here the material at issue is a harmless picture of a child in a bathtub” but the defendant subjectively “believes that it constitutes a ‘lascivious exhibition of the genitals,’ the statute has no application.” *Id.*

In short, the Ninth Circuit erred as a matter of law in affirming Petitioner’s conviction for producing videos depicting “sexually explicit conduct” when they depicted no such thing. Regardless of the *Dost*-based factors the district court and court of appeals considered, the videos here show only ordinary daily bathroom activity and thus as a matter of law depict no “lascivious exhibition” or “sexually explicit conduct” under 18 U.S.C. § 2251(a). *See* Pet. App. 22a-23a (Graber, J., concurring).

Nor is any of this undermined by the fact that the count of the indictment at issue here was framed both in terms of a completed offense and an attempt offense. C.A. ER 2:196-97. The district court stated that “if a reviewing court determines that th[e] photographs ... do not qualify as sexually explicit conduct, ... Mr. Hutton intended and attempted to commit the underlying offense” because he had the “intent to capture sexually explicit conduct” and “took a substantial step towards doing so by virtue of placing the camera in the room.” Pet. App. 32a. The court of appeals did not address that statement (or the attempt issue at all), and, in any event, it reflects the same legal error that infects the completed-offense analysis. The minor engaged in no sexual conduct at all, and there is no evidence, and the government at no point sought to put forth any, that Petitioner intended or expected her to engage in any such conduct. *See Hillie*, 39 F.4th at 692 (“The Government introduced no evidence from which the jury, without speculation, could reasonably infer that Hillie intended to capture video footage of [the minor] not just in the nude, but of her engaging in sexually explicit conduct.”). This case involves nothing more than a nude minor getting in and out of the shower, something millions of people do every day as part of their ordinary routine. As a matter of law, there can be and is no violation of 18 U.S.C. § 2251(a).

III. The Question Presented Is Important And Recurring.

The question presented is hugely consequential and regularly recurs. Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the definition of “sexually explicit conduct.”

U.S. Sent’g Comm’n, *Federal Sentencing of Child Pornography: Production Offenses* 17 (2021); see also U.S. Sent’g Comm’n, *Quick Facts, Child Pornography Offenses* (2024) (data for nonproduction offenses only). At this point, these prosecutions have become so frequent that nearly every circuit has confronted the underlying issues. See *supra* § I.A.

The stakes are significant, both for Petitioner and for the many criminal defendants in a similar position. The district court sentenced Petitioner to a term of 20 years’ imprisonment based on the images and videos in question. This severe sentence is no aberration. A first-time offender convicted of producing even one image under 18 U.S.C. § 2251(a) faces a statutory minimum of 15 years in prison. 18 U.S.C. § 2251(e). Such severe punishment should not turn on an interpretation of the statute that “encompass[es] everyday ordinary behavior” and “commonplace activity,” rests on “subjective” factors, and strays “far from the statutory text.” Pet. App. 22a-23a (Graber, J., concurring). Making matters worse, that punishment depends on the geographic circuit in which the defendant happens to be charged.

The government cannot deny the importance of the question presented. The government itself has repeatedly sought en banc review in cases raising this very question, including before the D.C. Circuit in *Hillie* and the Eighth Circuit in *McCoy*. The government’s en banc petition in the D.C. Circuit emphasized the need for uniformity on this question. See Gov’t Pet. for Reh’g En Banc at 9, *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022) (No. 19-3027). The government’s en banc petition before the Eighth

Circuit likewise argued that “surreptitious-recording cases occur frequently” and implicate questions “of surpassing importance.” Gov’t Pet. for Reh’g En Banc at 14, *United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (No. 21-3895).⁶

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

This case presents an excellent vehicle for review. The parties agree that the surreptitious videos here depict innocuous and routine bathroom activity, namely getting in and out of the shower. They show no sexual conduct whatsoever, and there is no evidence that Petitioner intended them to. The question whether such recordings of quotidian, nonsexual conduct can nonetheless be deemed to depict “sexually explicit conduct” and “lascivious exhibition” under 18 U.S.C. §§ 2251(a) and 2256(2)(A) was expressly raised, preserved, and ruled upon in both the district court and the Ninth Circuit. The Ninth Circuit directly addressed the question presented in a precedential opinion. And because the depictions here do

⁶ The issues in this case are becoming even more salient with continuing advances in technology. *See McCoy*, 108 F.4th at 649 (Kelly, J., dissenting). Many homes, just as one example, now have motion-activated cameras in the doorways. Many such devices automatically upload captured images to the homeowner’s phone or to the cloud. It is not hard to imagine such a camera capturing young children running naked through a lawn sprinkler. Under the Ninth Circuit’s theory, these kinds of images of wholly innocent and innocuous behavior may be deemed to depict “sexually explicit conduct” under 18 U.S.C. §§ 2251 and 2256 if the government claims it has evidence that the person who placed the camera did so in part because he has a sexual interest in minors.

not contain images of “sexually explicit conduct” as required under § 2251(a), the outcome of the case and the validity of the conviction that drove Petitioner’s 20-year sentence turn on that question.

Nor is the suitability of this case for this Court’s review in any way affected by the fact that Petitioner also pled guilty to a separate count, for possession (not production) of child pornography, involving different and unrelated images of other minors, Pet. App. 5a n.1; C.A. ER 1:2, and that Petitioner received the same 20-year sentences on each count, to run concurrently, *see* Pet. App. 6a; C.A. ER 1:3, 2:118. Petitioner was sentenced on both counts as part of the same sentencing proceeding, and Petitioner’s 20-year sentence on the discrete possession count reflected the maximum sentence for his offense. 18 U.S.C. § 2252A(b)(2); C.A. ER 2:118, 2:172-73. If this Court grants this petition and reverses the Count 1 conviction, Petitioner will be able to pursue resentencing on Count 2.

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

CONCLUSION

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

Respectfully submitted,

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