No. 25-971

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

REPLY BRIEF FOR PETITIONER

Andrea K. George
Molly M. Winston
FEDERAL DEFENDERS OF EASTERN WASHINGTON & IDAHO
601 W. Riverside Avenue, Ste. 900
Spokane, WA 99201

Thomas M. Bondy
Kamilyn Y. Choi
Luiza Leão
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037

E. Joshua Rosenkranz
Counsel of Record
Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The government does not dispute the clear, acknowledged, and entrenched circuit split on whether a surreptitious recording of quotidian nonsexual activity can depict "sexually explicit conduct" and "lascivious exhibition" under 18 U.S.C. § 2251(a). Nor can it. Since its enactment in 1978, this provision has sown substantial confusion among courts around the country. The roster of disagreement has only continued to expand. In the past four years alone, Judges Graber, Katsas, Easterbrook, Kelly, Stras, and Grasz have all emphasized that the current approach adopted in most circuits is fundamentally at odds with the statutory text. *See* Pet. 13. And the D.C. Circuit has squarely split from the majority view, explaining that whether an image depicts "sexually explicit conduct" is a property of the depicted conduct itself and does not turn on the happenstance of the government having extrinsic evidence that the secret filmer is sexually interested in the image he creates. *See United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022); Pet. 15-17.

The government disputes none of this. Instead, it argues that this incontrovertible split does not matter because the D.C. Circuit is an "outlier." Opp. 12. But the D.C. Circuit is correct, and the fact that only one circuit has gotten it right does not lessen the urgent need for this Court to intervene and weigh in on this fundamental and oft-recurring question of federal criminal law.

Nor has the government identified a vehicle problem by asserting that Petitioner nonetheless

would be guilty of attempt. The government's attempt premise is legally wrong for the same reasons its completed-offense argument is wrong. The Ninth Circuit's decision below does not discuss attempt. There is no vehicle problem.

I. The Government Does Not Dispute The Clear Circuit Split On Whether § 2251(a) Criminalizes Secretly Recording Everyday Nonsexual Activity.

A. The question in this case is whether 18 U.S.C. § 2251, which by its terms requires "sexually explicit conduct," encompasses surreptitiously filming a person's entirely quotidian and wholly nonsexual activity. The government does not dispute that the Ninth Circuit's decision below and the decisions of multiple other circuits expressly conflict on this question with the D.C. Circuit's decision in *Hillie*. Opp. 11-12. As multiple circuits have stressed, *Hillie* "stands contrary" to "numerous other circuits." *United States v. Porter*, 114 F.4th 931, 937 n.2 (7th Cir. 2024); *see* Pet. 19-20. The D.C. Circuit itself expressly acknowledged that divergence, *Hillie*, 39 F.4th at 689. So did the Ninth Circuit, emphasizing that "there is no question that *Hillie* is incompatible with our caselaw." *United States v. Boam*, 69 F.4th 601, 613 (9th Cir. 2023); *see also United States v. Jakits*, 129 F.4th 314, 323 (6th Cir. 2025) (noting that multiple circuits diverge from *Hillie* and compiling cases); *United States v. Sanders*, 107 F.4th 234, 264 (4th Cir. 2024) (same).

The government's main response is to call *Hillie* an "outlier." Opp. 12. But all the government means

by that is that the acknowledged split is a lopsided one. The D.C. Circuit is indeed the only circuit to have correctly construed the plain text of the statute. But a lopsided split is still a split, and the fact that there are many more courts on one side than the other does not make the split's resolution any less urgent. This Court has not shied away from reviewing circuit splits in criminal cases, and then ruling for the defendant, even where a majority of circuits got it wrong. *See* Pet. 20 (compiling examples).

Since *Hillie* was decided, multiple judges across the circuits have expressly endorsed its textualist interpretation of § 2251 and signaled that the majority's reading of the statute is wrong. As Judge Graber noted in her concurrence here, she is not the "first to make th[e] point" that the majority approach strays "far from the statutory text." Pet. App. 22a. *See, e.g.*, *United States v. Hillie*, 38 F.4th 235, 236 (D.C. Cir. 2002) (Wilkins, J.); *id.* at 236-41 (Katsas, J.); *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring) ("I agree with the views expressed by Judge Katsas in *Hillie*."); *United States v. McCoy*, 108 F.4th 639, 654 (8th Cir. 2024) (Stras, J., dissenting) (same); *id.* at 649-50 (Kelly, J., dissenting); *id.* at 651-54 (Grasz, J., dissenting). *Hillie* may stand alone in terms of circuit precedent, Pet. 17, but its interpretation of § 2251 is far from an outlier. *See* Pet. App. 22a.

B. The government also concedes that there is "disagreement among the circuits" about the *Dost* factors. Opp. 12. It does not dispute that the *Dost* test, by adding extratextual factors to the § 2251 inquiry, foments confusion about the statute and exacerbates

the circuit split at issue. Pet. 20-21. While downplaying this disharmony as "narrow," Opp. 12, the government's own brief describes those multiple divergences in detail for nearly four pages, Opp. 12-16. Indeed, the government in the same breath states that "[c]ourts *uniformly* agree" on the usefulness of the *Dost* factors as guidelines, Opp. 12 (emphasis added), while also averring that "[s]even courts of appeals" apply the factors "as an aid," and "[f]our circuits" have declined to definitively endorse them, with one noting that there is a "'thicket surrounding the *Dost* factors,'" Opp. 12, 13 (quoting *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019)). Some uniformity.

In reality, the discord is fundamental: Even on the government's telling, the circuits that apply the *Dost* factors urge "'caution'" and "'discourage[]'" their application in all circumstances. Opp. 13 (quoting *United States v. Sheehan*, 70 F.4th 36, 46 n.4 (1st Cir. 2023); *United States v. Miller*, 829 F.3d 519, 525 n.1 (7th Cir. 2016)). Other circuits have "expressed 'serious doubts'" about the sixth factor, which, as this case exemplifies, "turn[s] innocuous images into pornography" based on extrinsic evidence of the secret filmer's idiosyncratic "subjective response" to the image he creates. Opp. 15 (quoting *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999)); *see also* Pet. 22-23. There is good cause for this uneasiness, and its persistence only underscores that the courts of appeals are rightly troubled by the majority approach to § 2251 even as they continue to apply it. *See* Pet. 20-24.

In any event, this Court does not have to resolve the "thicket surrounding the *Dost* factors" to settle the question presented here. *Courtade*, 929 F.3d at 192. Dating back to a 1986 district court decision, *see* Pet. 8, the *Dost* factors are divorced from the statutory text, which is what this Court is called upon to construe. That different circuits apply *Dost* in disparate ways to reach inconsistent outcomes merely highlights the "confusion" in the circuits on the crucial underlying question of the proper meaning and scope of § 2251. Opp. 14.

II. The Ninth Circuit's Decision Is Wrong.

A. The decision below is wrong on the merits because it is so starkly unmoored from the statutory text. A § 2251(a) conviction requires the defendant to have "employ[ed], use[d], persuade[d], induce[d], entice[d], or coerce[d] any *minor to engage* in … sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a) (emphasis added). As a matter of law, a video or image depicting only ordinary daily behavior and absolutely no sexual conduct does not and cannot depict a "minor engag[ing] in … sexually explicit conduct" under 18 U.S.C. §§ 2251(a) and 2256(2)(A).

"In everyday speech, nobody would say that … tak[ing] a shower" "is sexually explicit conduct," *Hillie*, 38 F.4th at 237-38 (Katsas, J.). Yet that is precisely the conduct at issue here, Pet. App. 4a-5a. And the fact "[t]hat [Petitioner]" himself "may have found the images" that he created "sexually exciting … can't suffice" to create criminal liability under § 2251(a) where "[t]here is nothing sexually

suggestive in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J.). A person is not engaged in "sexually explicit conduct" or "lascivious exhibition" when taking a routine shower. The fact that someone is secretly filming one's getting in and out of the shower does not transform such activity into "sexually explicit conduct" or a "lascivious exhibition" simply because the secret filmer may be sexually interested in the depiction he produces.

To support its position, the government urges that "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for … himself or like-minded pedophiles." Opp. 7-8 (quoting *United States v. Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016)). But that "cannot be reconciled with the governing statutory text," *Hillie*, 38 F.4th at 238 (Katsas, J.), which requires the defendant to "inten[d] that such *minor engage in* … sexually explicit conduct" that is then shown in a visual depiction, 18 U.S.C. § 2251(a) (emphasis added). "[I]t is the photographed child who must [be] engage[d] in 'sexually explicit conduct' under section[] 2251(a)," "and thus the child who must [be engaged in] a 'lascivious exhibition' under section 2256(2)(A)(v)." *Hillie*, 38 F.4th at 238 (Katsas, J.).

And contrary to the government's assertion, Opp. 9, adhering to the plain statutory language in this respect does not prevent § 2251(a) from applying where a "[y]oung child[] with no concept of sexual intent can be posed in sexually suggestive positions," as Petitioner explained. Pet. 26. If a defendant causes or attempts to cause a minor to engage in sexual

conduct or to pose in sexually suggestive positions, that would qualify for criminal liability under the statutory text, as would possession of such an image, *see* 18 U.S.C. §§ 2251(a), 2252A. As the petition explained and the government does not refute, the point is not that the minor needs to have sexual intent; the point is that the statutory language requires that the minor be engaged in sexually explicit conduct, which is absent if the minor is engaged in totally ordinary daily activity that involves no sexual conduct.

Finally, the government misreads *United States v. Williams*, 553 U.S. 285 (2008). There, this Court recognized that "sexually *explicit* conduct" "connotes … the sex act" and includes "lascivious exhibition of the genitals." *Id.* at 296-97. But the government's response that a "lascivious exhibition" reflects a "sex act," Opp. 8, is a tautology. All agree that there must be a "lascivious exhibition" or specified "sex act"; the disagreement is over what that means. *Williams* was clear: A "lascivious exhibition" must involve an "explicitly portrayed" sexual or sexually suggestive display of specified private parts, 553 U.S. at 296-97—something beyond mere nudity and commonplace nonsexual activity like showering. The government's attempt to differentiate a "harmless picture of a child in a bathtub," *id.* at 301, from this case fares no better. Opp. 8. The question is whether this kind of conduct falls within the text of this particular federal criminal statute; the government does not advance its case by seeking to emphasize instead that what the defendant did here was harmful. And as this Court explained, where a defendant for his own subjective reasons believes the "harmless picture of a child in a bathtub

… constitutes a 'lascivious exhibition of the genitals,'" yet the image itself does not "meet the statutory definition," "the [child-pornography] statute has no application." *Williams*, 553 U.S. at 301.[1]

B. It does not help the government to characterize Petitioner's correct reading of the statute as advancing some sort of "categorical rule." Opp. 6. According to the government, "whether a depiction is a lascivious exhibition of the genitals or pubic area of a child is … a question for the factfinder, to be determined using common sense." Opp. 7. That may well be so in general, but not where, as here, the conduct is manifestly outside the scope of the statute as a matter of law. The legal issue here is whether a secret recording of mere nudity and routine showering activity can depict a "lascivious exhibition" based purely on extrinsic evidence of the subjective sexual predilections of the filmer, absent any evidence that the video itself depicts the minor engaging in sexual conduct or that the defendant had intended in any way to use the minor to engage in such conduct.

To be clear, "the defendant's behavior," Opp. 7, is certainly relevant under another dimension of § 2251(a), as the statute requires proof that the

---

[1] As for the federal video-voyeurism statute, the government gets nowhere by contending the statute "criminalizes different conduct." Opp. 9. Petitioner's point was that, even though Congress knows how to criminalize video voyeurism and knows that similar criminal video-voyeurism prohibitions exist under state law, it has not criminalized such mere voyeurism under § 2251. Pet. 27; *see* Defender Orgs. of the Ninth Circuit Amicus Br. 11.

defendant "use[d]" the "minor to engage in" a lascivious exhibition. But in the context of a secret recording that captures only innocuous conduct and nudity and was not intended or expected to capture anything beyond that, the happenstance that the government has evidence of a defendant's peculiar predilections cannot transmogrify quotidian nonsexual activity into something sexual, much less "sexually explicit" and "lascivious."

Crucially, this Court has "'traditionally exercised restraint in assessing the reach of a federal criminal statute.'" *Dubin v. United States*, 599 U.S. 110, 129 (2023). This restraint arises "both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed." *Id.* Here, the "far-reaching consequences" of the government's reading "underscore[] the implausibility of the government's interpretation." *Id.* at 130.

III. This Case Is An Ideal Vehicle To Review An Important And Recurring Question.

The question presented is squarely teed up for this Court's review. There are no factual complications in this case—indeed, the district court convicted Petitioner after a bench trial on stipulated facts. Pet. 7. The government does not dispute that the videos and images here depict a minor getting in and out of the shower and that the minor did not know she was being filmed. Pet. 6. And the undisputed

record shows the minor was engaged in no sexual conduct whatsoever. Pet. 7.

The government says that "the *district court's* alternative finding of guilt on an attempt theory makes this an exceedingly poor vehicle." Opp. 16 (emphasis added). But the district court's remarks in that regard were conclusory, Pet. App. 32a, and the Ninth Circuit did not pass upon any distinction between attempted and completed offenses, instead treating Petitioner's conviction as a completed offense, Pet. App. 5a-10a. Nothing in the Ninth Circuit's analysis says anything about an attempt theory.

Regardless, the attempt theory fails. The government recites that attempt requires "proof that the defendant had 'intent to capture sexually explicit conduct, and he took a substantial step towards doing so.'" Opp. 10. But even under that formulation, as under the plain statutory language, the government must still "introduce[] … evidence from which the jury, without speculation, could reasonably infer that [the defendant] intended to capture" images of a minor "*not just in the nude, but of her engaging in sexually explicit conduct*." *Hillie*, 39 F.4th at 692 (emphasis added).

There is nothing in the stipulated facts from which a factfinder could remotely infer that Petitioner's "intent here was to obtain images" of the minor "not just in the nude," *id.*, but engaging in sexually explicit conduct. *Contra* Opp. 11. Petitioner's conduct consisted of placing a hidden camera in the bathroom. There is no evidence in this case that

Petitioner intended or expected the minor to engage in any sexual activity, and the government at no point made any such claim below. *See, e.g.*, C.A. Gov't Br. at 25-26 & n.3.[2]

Indeed, the government's reliance on Judge Katsas's concurrence in the *Hillie* en banc denial (at Opp. 10-11) only underscores the inaptness of its position. The *Hillie* panel decision *vacated* the attempt conviction, 39 F.4th at 691. And Judge Katsas's attempt standard would require crucial evidence lacking here: "that [Petitioner] hoped to capture sexually explicit conduct, not merely things like changing clothes or using the toilet" or taking a shower. *Hillie*, 38 F.4th at 241 n.1 (Katsas, J.).

Equally unavailing is the government's assertion that "this case does not present an issue of general importance," because the same evidence "generally will support a conviction for attempted production or possession of child pornography." Opp. 16. To the extent this proposition relies on the government's flawed attempt theory, it is wrong for the reasons already given. But the assertion also highlights that the government's misguided conception of "sexually explicit conduct" infects a range of offenses and that the reach and import of the error here extend beyond this one important and oft-used federal law.

---

[2] The government also does not dispute that, if this Court grants and reverses, Petitioner's resentencing on the separate possession count involving totally unrelated images could well result in a different sentence. Pet. 34.

In the end, the government does not dispute that the question presented frequently recurs and that the sentencing ramifications are severe. Pet. 31-32. The government offers no explanation as to how the question presented is any less important than when the government itself affirmatively petitioned for rehearing en banc in other cases, stressing the fundamental gravity of this same question presented. *See* Pet. 32-33. Nor does the government dispute Petitioner's contention that these issues "are becoming even more salient" today with ever more invasive technology that automatically captures images of people, including children, engaging in ordinary activity. Pet. 33 n.6.

Unable to deny any of this, the government leans on the repeated denials of "petitions for certiorari making similar claims." Opp. 5 & n.1. That is not a reason to deny review here, but rather to grant it and allow this Court finally to weigh in on an important question of federal statutory interpretation that has bedeviled the circuits for years, and shows no sign of abating.

CONCLUSION

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

Respectfully submitted,

Andrea K. George
Molly M. Winston
FEDERAL DEFENDERS OF EASTERN WASHINGTON & IDAHO
601 W. Riverside Avenue, Ste. 900
Spokane, WA 99201

Thomas M. Bondy
Kamilyn Y. Choi
Luiza Leão
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Avenue, NW
Washington, DC 20037

E. Joshua Rosenkranz
Counsel of Record
Daniel A. Rubens
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

June 5, 2026