No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

STEVEN DOUGLAS ROCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal statute on producing child pornography includes a definitional section setting out five objective standards defining proscribed images. Through judicial construction, the Ninth Circuit approved judicial expansion of the fifth definition to include consideration of what are known as the *Dost* factors, which permit assessment of subjective intent in deciding whether a visual depiction constitutes a proscribed "lascivious exhibition" of the genitals or pubic area. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). Following *Dost*, appellate courts have split regarding the construction of the producing child pornography statute to cover video voyeurism involving children, and regarding the application and constitutional implications of the *Dost* factors in general. The question presented is:

> Whether the judicial construction of "lascivious exhibition" of the genitals or pubic area of a minor in 18 U.S.C. § 2256(2)(A)(v) to include consideration of subjective factors, beyond the objective meaning of those words, misconstrued the plain language of the statute and injected definitional vagueness and overbreadth into the trial proceedings that unconstitutionally permitted convictions for behavior beyond the scope of the federal statute.

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The petitioner, Steven Douglas Rockett, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 5, 2018.

Opinions Below

Mr. Rockett was convicted of six counts of producing child pornography after the district court gave a jury instruction with the judicial gloss from the six-factor *Dost* test to the define the fifth subsection 18 U.S.C. § 2256(2)(A), which lists images that constitute "sexually explicit conduct" for the purposes of 18 U.S.C. § 2251(a). *See United States v.*

Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). The Ninth Circuit affirmed his convictions in a memorandum opinion on November 5, 2018. *United States v. Rockett*, 752 F. App'x 448 (9th Cir. 2018) (Appendix 1). The Ninth Circuit denied panel and en banc rehearing on February 20, 2019 (Appendix 6).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional And Statutory Provisions

The First Amendment to the United States Constitution states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I. The Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall be "deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. The statute on sexual exploitation of children states:

> 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, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or

transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

18 U.S.C. § 2251(a). The penalty provision of the statute states:

> Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

18 U.S.C. § 2251(e). The definitional section of the statute describes the visual depiction of "sexually explicit conduct" as:

> Except as prohibited in subparagraph (B),[1] "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;

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[1] Subparagraph B references prohibitions on depictions manufactured to simulate identifiable minors engaged in sexually explicit conduct. 18 U.S.C. § 2256(8)(B).

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person[.]

18 U.S.C. § 2256(2)(A). This case involves the scope of the fifth type of visual depiction that received the following judicial interpretation in *Dost*, listing factors to determine the "lascivious exhibition" element:

> 1) whether the focal point of the visual depiction is on 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 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.

636 F. Supp. at 832. The *Dost* test does not require the visual depiction to involve all the factors, leaving the determination to be "be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id.*

Introduction

This Court should grant a writ of certiorari to resolve conflicts and inconsistent opinions and practices regarding what have become known as the *Dost* factors, a judicially-created test adding subjective considerations that expand the proscription on producing

child pornography beyond the statutory language's objective criteria. The Supreme Court of Tennessee, considering an indistinguishable statute, held that hidden camera videos did not constitute "lascivious exhibition," rejecting the *Dost* factors as going beyond the objective language of the statute. *State v. Whited*, 506 S.W.3d 416, 434-37 (Tenn. 2016).

The Circuits have mostly adopted some form of the *Dost* factors, with many inconsistencies as well as two clear splits. First, there is disagreement whether subjective intent can turn a permissible visual depiction into a proscribed one. For example:

- *Wiegand*, 812 F.2d at 1244 (lasciviousness of image should be evaluated "for an audience that consists of himself or likeminded pedophiles").
- *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999) ("If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography").

Second, and relatedly, there is a split among Circuits that limit the "lascivious exhibition" determination to the four corners of the visual depiction and those that allow extrinsic evidence to be considered. For example:

- *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018) ("'[L]ascivious exhibition' depends on the content of the video itself."), *cert. denied*, 139 S. Ct. 931 (2019).
- *United States v. Russell*, 662 F.3d 831, 844 (7th Cir. 2011) ("The sixth *Dost* factor asks whether the charged image was 'intended or designed' to elicit a sexual response in the viewer, and although certain aspects of the image itself will often speak to that question (for example, the setting, and the pose assumed by the minor and any other persons depicted), the photographer's state of mind may also inform this assessment.").

The splits regarding the *Dost* factors are reflected in inconsistent model criminal jury instructions among the Circuits. Further, legal academic writers have noted and criticized

the *Dost* factors for lack of clarity and inconsistencies, expressing concern regarding their constitutionality. Given over 30 years of percolation since *Dost*, no additional time will resolve the varying statutory interpretations or enhance this Court's ability to evaluate the intractable constitutional and statutory issues regarding the *Dost* factors.

In addition to the need to resolve discord among the courts regarding an element of a very serious offense, the Court should grant certiorari because the Ninth Circuit's judicial expansion of the criminal statute runs counter to an unusually large number of this Court's rulings. First, this Court has carefully calibrated child pornography proscriptions to require certainty to avoid vagueness in violation of the Due Process Clause and overbreadth under the First Amendment. *Compare Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), *with United States v. Williams*, 553 U.S. 285, 297 (2008). The expansive generality of the *Dost* factors is inconsistent with this Court's requirement of certainty in outlawing pornography, especially where expression and thought are penalized.

Second, the Ninth Circuit failed to follow this Court's precedent that forecloses judicial construction to fill statutory silence when, in other statutory contexts, Congress has shown it knows how to fill the silence with proscriptive language. For example, the federal sex abuse statute expressly punishes some activities by reference to the defendant's subjective state of mind, but the statute on producing child pornography includes no such element, only objective descriptions. Under this Court's precedent on *expressio unius est exclusio alterius*, the omission of the subjective considerations in the statute forecloses judicial creation of such an element.

Third, the Ninth Circuit ignored the rules of construction that this Court, in cases such as *Williams*, applied to assure certainty, such as *noscitur a sociis* and *ejusdem generis*. The first four statutory definitions of "lascivious exhibition" constitute objective descriptions of child abuse, the visual depiction of which violates the statute. The focus on objective depictions is consistent with this Court's exception of child pornography from constitutional protection "to prevent the abuse of children who are made to engage in sexual conduct." *Ferber v. New York*, 458 U.S. 747, 753 (1982). As in this Court's recent summary reversal of the Ninth Circuit in *Poff v. United States*, the lower court did not apply the rules that avoid vagueness and overbreadth by referencing the other terms in the list. *Poff v. United States*, 139 S. Ct. 790 (2019), *granting, vacating, and remanding for reconsideration in light of Lagos v. United States*, 138 S. Ct. 1684 (2018). Similarly, the vagueness proscribed by this Court in cases such as *Johnson v. United States*, 135 S. Ct. 2551 (2015), was neither addressed nor ameliorated.

Fourth, the *Dost* factors' expansion of federal criminal jurisdiction runs counter to this Court's jurisprudence requiring a clear congressional statement before federal jurisdiction intrudes into the States' traditional governance over criminal violations. *Bond v. United States*, 572 U.S. 844, 848 (2014) ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach."); *see Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (rejecting the government's "unrestrained reading" of "tangible object" in 18 U.S.C.

§ 1519). Video voyeurism is punished in most, if not all, states as a criminal invasion of privacy, as does the federal statute proscribing such conduct on federal enclaves. 18 U.S.C. § 1801. The judicial shift from visual depictions of child abuse to protection of privacy rights exceeds the statutory language.

Fifth, given the uncertainties reflected in the chaotic constructions and controversies regarding the *Dost* factors, the narrow reading of the statute should be required by the rule of lenity, a liberty-protecting and separation-of-powers-promoting rule that is "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). As Chief Justice Marshall wrote, the rule is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95. The rule of lenity forbids a court to criminalize an act simply because the court deems that act "of equal atrocity, or of kindred character, with those which are enumerated." *Id.* at 96.

Procedural Background

Steven Rockett was convicted of six counts of producing child pornography after the district court gave a jury instruction based on the six-factor *Dost* test. Appendix 7. In Count 1, Mr. Rockett was convicted of producing child pornography in the Philippines from January 23, 2000, to January 29, 2013, for secretly videotaping nude minors in a

bathroom. In Counts 4, 5, and 6, Mr. Rockett was convicted of attempting to produce child pornography for soliciting nude photos of children. In Counts 7 and 8, Mr. Rockett was convicted of producing child pornography for surreptitiously recording children in the bathroom. Although he asserted the videotaping and photos did not constitute child pornography in his trial memorandum and oral arguments, the defense recognized the *Dost* factors as governing Ninth Circuit law that the trial judge included in the jury instructions. The sentencing judge imposed consecutive sentences totaling 720 months imprisonment. Appendix 9.

On appeal, Mr. Rockett challenged his convictions, arguing that the *Dost* factors' subjective components injected unconstitutional vagueness and overbreadth into his trial proceedings beyond the legitimate scope of the statute, in violation of controlling rules of statutory construction. The defense asserted that the evidence failed on sufficiency grounds and that the *Dost* instruction constituted plain error, allowing conviction for conduct that did not meet the elements of the crime charged under *Class v. United States*, 138 S. Ct. 798, 801 (2018). In its memorandum opinion, the Ninth Circuit approved of the *Dost* factors, asserting it was not plain error to apply them in Mr. Rockett's case and that controlling circuit precedent approved of the *Dost* manner of determining the element of "lascivious exhibition" against the vagueness challenge. Appendix 2-3.

Reasons For Granting The Writ

A. This Court Should Grant The Writ Because A State Court Of Last Resort Decided An Important Federal Question In Direct Conflict With Federal Courts Of Appeal, Which Are Also In Conflict On The Same Federal Question As Reflected In Opinions Providing Inconsistent Interpretations And Applications Of The *Dost* Factors.

Only this Court can resolve the conflicting opinions regarding a recurring federal question of basic importance: what is the scope of the visual depictions criminalized and designated for the harshest penalties for producing child pornography? Some courts reject the *Dost* factors, some disagree on their meaning, and others fully adopt or even add to them. This Court should grant review to bring uniformity and coherence to an important question of federal law that frequently arises in district courts throughout the country.

1. The Supreme Court Of Tennessee, In Conflict With The Courts Of Appeal, Rejects The Dost Factors.

In *State v. Whited*, the Supreme Court of Tennessee reversed convictions for surreptitious videos made of a minor under a state statute indistinguishable from the federal statute, concluding that the *Dost* factors exceeded the text of the statute defining "lascivious exhibition." 506 S.W. 3d 416 (2016). As in the federal statute, the term "lascivious exhibition" is not defined in the Tennessee statute, so the Tennessee court considered how to determine whether images depict "lascivious exhibition" by reference to the similar federal proscription. *Id.* at 426. The court began by reference to this Court's *Ferber* exception to protected images for "works that visually depict sexual conduct by children." *Id.* at 430 (citing *Ferber*, 458 U.S. at 764-65).

The court then canvassed the federal cases establishing that nudity alone in a visual depiction was insufficient to establish the crime. *Id.* at 431. The court turned to the *Dost* factors, noting that, although it is the leading case in both state and federal jurisdictions, courts "have come to differing conclusions about whether the factors should be considered and, if so, the extent to which they should be considered." *Id.* at 431-36 (documenting the numerous disputes regarding the meaning and application of each factor). After weighing the value of the cases construing *Dost*, the court stated it joined the First Circuit in deciding they should not be applied:

> We have noted that courts applying *Dost* almost invariably include caveats to the effect that the *Dost* factors are not "comprehensive," are not "necessarily applicable in every situation," are merely a "starting point," et cetera. Despite these recitations, many seem inexorably drawn to using *Dost* as a lasciviousness definition or a test of sorts, with lengthy analysis and weighing of each "factor" and debate regarding different courts' interpretation of specific factors. This often ends up pulling them "far afield" from the task at hand, namely, applying the statutory language to the materials at issue. As discussed above, the sixth *Dost* factor in particular has proven to be analytical quicksand. For this reason, we reject the use of the *Dost* factors as a "test" or an analytical framework for determining whether certain materials constitute child pornography.

Id. at 437 (citations and footnote omitted). "In sum, we conclude that the fact-intensive determination of whether particular materials contain sexual activity or a lascivious exhibition of private body areas is not facilitated by the adoption of a one-size-fits-all 'multi-factor analysis' such as the *Dost* factors." *Id.* at 438.

The Tennessee court then engaged in standard statutory construction, contrasting the state's definition of "lascivious exhibition" with other Tennessee statutes that expressly

included the subjective intent of the accused, and with the California state definition of sexual conduct that includes "[e]xhibition of the genitals or the pubic or rectal area of any person *for the purpose of sexual stimulation of the viewer*." *Whited*, 506 S.W.3d at 440 (quoting Cal. Penal Code § 311.3(b)(5)) (emphasis added). The Tennessee court concluded that statutory silence on the subjective intent of the defendant indicated legislative intent that the "assessment of whether the material is prohibited by the child sexual exploitation statutes does not turn on the defendant's intent or purpose of sexual arousal or gratification." *Whited*, 506 S.W.3d at 441.

2. The Circuit Courts Of Appeals Inconsistently Construe The Child Pornography Statute, Including Splits On Consideration Of Subjective Factors and Matters Outside The Four Corners Of The Visual Depiction.

As set out in *Whited*, the Circuits are in complete disarray on whether and how to incorporate the *Dost* factors into a description of visual depictions that meet the statutory element for child pornography convictions. Within the wide range of opinions, two related conflicts have emerged: some courts look to and others reject consideration of subjective factors to determine whether a visual depiction constitutes a "lascivious exhibition"; and some courts limit the determination to the four corners of the visual depiction while others go beyond the depiction to determine whether it is a "lascivious exhibition."

The Ninth Circuit in the original *Dost* appeal stated that the lasciviousness of an image should be evaluated "for an audience that consists of himself or likeminded pedophiles." *Wiegand*, 812 F.2d at 1244. Similarly, other Circuits have called upon the

jury to inject subjective considerations in determining whether a visual depiction constitutes a "lascivious exhibition." *See United States v. Brown*, 579 F.3d 672, 682 (6th Cir. 2009) ("The use of the word 'intended' [in the sixth *Dost* factor] seems to establish that the subjective intent of the photographer is relevant"); *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008) ("A reasonable jury could therefore find that Rivera composed the images in order to elicit a sexual response in a viewer—himself"); *United States v. Wolf*, 890 F.2d 241, 247 (10th Cir. 1989) ("[L]asciviousness is. . .a characteristic. . .of the exhibition that the photographer sets up for an audience that consists of himself or like minded individuals.").

In contrast, as noted in *Whited*, many courts have questioned and, in some cases, rejected, the subjective *Dost* factors. The First Circuit has called the sixth factor "the most confusing and contentious of the *Dost* factors":

> We believe, however, that it is a mistake to look at the actual effect of the photograph on the viewer, rather than upon the intended effect. If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography. … We have serious doubts that focusing upon the intent of the deviant photographer is any more objective than focusing upon a pedophile-viewer's reaction; in either case, a deviant's subjective response could turn innocuous images into pornography. Moreover, a focus on the photograph's use seems inconsistent with the statute's purpose of protecting the child.

Amirault, 173 F.3d at 34 (internal citations omitted); *see also United States v. Frabizio*, 459 F.3d 80, 90 (1st Cir. 2006) ("We do not hold that the *Dost* factors may never be used. We hold only that they are not the equivalent of the statutory standard of 'lascivious

exhibition' and are not to be used to limit the statutory standard."). The Third Circuit has likewise criticized the use of the subjective factor as a separate substantive inquiry:

> We must, therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand—a legal analysis of the sufficiency of the evidence of lasciviousness.

United States v. Villard, 885 F.2d 117, 125 (3d Cir. 2006); *see also Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) ("The final *Dost* factor simply puts again the underlying question: Is the exhibition lascivious?"). "[O]verreliance on the intent of the photographer, and his idiosyncratic desires, raises constitutional concerns regarding criminalization of expressive conduct and creates a risk that a defendant could be convicted for being sexually attracted to children without regard to whether the material produced is, objectively, child pornography." *Spoor*, 904 F.3d at 151.

The subjective considerations permit conviction where the objective image itself involves no nudity or partial nudity because of the deviate manner in which an image may be perceived:

> A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic. Conversely, a photographer may be guilty of child pornography even though he is not aroused by the photos he produces purely for financial gain.

United States v. Steen, 634 F.3d 822, 829 (5th Cir. 2011) (Higgenbotham, J., concurring); *see United States v. Wallenfang*, 568 F.3d 649, 659 (8th Cir. 2009) (finding defendant's posting of images in an online newsgroup "known to be used by people interested in

viewing and trading child pornography" suggests intent to elicit a sexual response in the viewer); *United States v. Helton*, 302 Fed. Appx. 842 (10th Cir. 2008) (defendant's demonstrated sexual interest in female underpants rendered image "lascivious exhibition").

The conflicting authority results in conviction for Mr. Rockett, while in many other courts, as in *Whited*, indistinguishable hidden-camera images of nude minors engaged in everyday conduct was insufficient to establish a "lascivious exhibition" of the minor's private body areas. *See, e.g., United States v. Romero*, 558 F. App'x 501, 503 (5th Cir. 2014) (photos of girl sleeping and playing was not use of a minor engaging in lascivious exhibition for purposes of sentence enhancement); *Steen*, 634 F.3d at 828 (reversing conviction when the defendant surreptitiously recorded a sixteen-year-old girl who was fully nude as she readied herself to use a tanning bed because the video reflected mere voyeurism "upon an unaware subject pursuing activities unrelated to sex"); *United States v. Honori Johnson*, No. 2:10–CR–71–FtM–36DNF, 2011 WL 2446567, at *9 (M.D. Fla. June 15, 2011) (hidden-camera bathroom video showing completely nude minor constituted mere voyeurism); *Lockwood v. State*, 588 So. 2d 57, 58 (Fla. Dist. Ct. App. 1991) (hidden-camera videos of a sixteen-year-old "undressing, showering, toweling herself dry, and performing other acts of feminine hygiene" did not constitute "sexual performance" defined as "lewd exhibition" by a child); *Fletcher v. State*, 787 So. 2d 232, 235 (Fla. Dist. Ct. App. 2001) (father's placement of hidden camera in his daughter's bedroom and bathroom did not support a finding of probable cause). Depending on the jurisdiction and the interpretation, the same conduct can constitute no crime, or a

misdemeanor, or the basis for the type of extremely long sentences imposed in the present case.

3. *The Inconsistent Interpretations Reflected In Conflicting Model Jury Instructions And Academic Criticism Support This Court's Review Of The Federal Child Pornography Statute's Scope.*

The variations in model criminal jury instructions reflect the chaotic approach to the *Dost* factors among the Circuits. Of the Circuits that have model instructions on "lascivious exhibition," the Seventh and Ninth Circuits do not include any more than the statutory language.[2] Of those that include the *Dost* factors, the Fifth Circuit defines the sixth factor to say "designed," but drops "intended," to elicit a sexual response in the viewer.[3] The Eleventh Circuit rewrites the sixth factor to say "appears to be designed" with no reference to "intended."[4] And the Eighth Circuit adds two factors to *Dost*, one of which blurs objective and subjective criteria, while the other adds speech as potentially criminalizing an otherwise lawful depiction: "(7) whether the picture portrays the minor as a sexual

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[2] Pattern Criminal Jury Instructions of the Seventh Circuit 18 U.S.C. § 2256(2)(A) (2012) (7th Cir. Pattern Crim. Jury Instr. Comm., amended 2018); Ninth Circuit Manual of Model Criminal Jury Instructions § 8.185 (2010) (9th Cir. Jury Instr. Comm., revised 2019).

[3] Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 2.84 (2015) (5th Cir. Comm. on Pattern Jury Instr., revised 2019).

[4] Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § O82 (2016) (11th Cir. Comm. on Pattern Jury Instr., revised 2019).

object; and (8) the caption(s) on the picture(s)."[5] The variation among the model instructions demonstrates the need for this Court to bring uniformity to the definition of one of the most serious of federal crimes.

As reflected by the inconsistencies among the Circuits in model instructions, legal academicians have identified multiple failings of the *Dost* factors, especially the constitutional implications of the vague and overbroad judicial interpretations of what should be uniform standards. In canvassing the lack of coherence and constitutional dangers of the *Dost* factors, Professor Amy Adler also critiques them for twisting jurors into adopting the lens of the pedophile to make what should be objective determinations in a chapter entitled *The "Dost Test" in Child Pornography Law: "Trial by Rorschach Test."* Chapter 3, REFINING CHILD PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 85 (Carissa Byrne Hessick ed., 2016); *see also* Laura E. Avery, *The Categorical Failure of Child Pornography Law*, 21 Widener L. Rev. 51, 74-77 (2015) (discussing problems of "highly subjective, contextually dependent" *Dost* factors); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 Ind. L. J. 1437, 1468-72 (2014) (analyzing shortcomings of *Dost*). While recognizing the difficulties in legal analysis of behavior that is often "abhorrent and deeply disturbing," Adler, *supra*, at 89, the current

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[5] Eighth Circuit Manual of Model Criminal Jury Instruction for the District Courts of the Eighth Circuit § 6.18.2252A cmt. (Jud. Comm. On Model Jury Instr. for the 8th Cir. 2017) (citing *United States v. Arvin*, 900 F.2d 1385 (9th Cir. 1990)).

state of the law fails to provide the uniformity and predictability required for the severe consequences that follow from conviction.

B. Based On This Court's Precedent On Statutory Construction, The Child Pornography Statute Does Not Authorize Consideration Of Defendants' Subjective Intent To Determine Whether A Visual Depiction Constitutes A "Lascivious Exhibition."

Perhaps because the *Dost* factors were first announced in 1986, this Court's intervening precedent has not been effectively applied to the statutory construction question, leaving the field dominated by the *Dost* court's pervasive factors. But the *Dost* methodology conflicts with this Court's precedent requiring narrow construction of pornography statutes, rejecting judicial creation of criminal liability from statutory silence, implementing contextual rules to foreclose broad catch-all phrases in criminal statutes, and disallowing expansion of federal jurisdiction in the absence of clear congressional direction. Without applying the Court's precedent on statutory interpretation, state and federal courts continue to apply some form of the *Dost* factors that criminalizes conduct beyond the statute's plain language. This Court should apply its well-established rules of construction to the statutory definition of "lascivious exhibition" to bring the lower courts into conformance with this Court's precedent. The Court should narrow the scope of a statute that has become mutable beyond the objective proscription of its language and the tolerance of the constitutional requirements that criminal statutes not be vague or overbroad. Properly read under this Court's precedent and canons of statutory construction, "lascivious exhibition" does not include voyeurism upon an unaware subject pursuing

activities unrelated to sex with no posing or other active display. This Court should grant certiorari to vindicate its precedent on statutory construction that, when ignored, results in citizens being exposed to varying standards for criminal liability depending on the jurisdiction and location of prosecution.

1. This Court Requires Clarity And Certainty In Pornography Statutes To Avoid The Type Of Unconstitutional Vagueness And Overbreadth Inherent In The Subjective Dost Factors.

The *Dost* court's expansive construction of "lascivious exhibition" of the genitals is inconsistent with this Court's focus on the harm caused by production of the visual depiction of sexual abuse of children in *Ferber*, 458 U.S. at 764, and the narrowing of "sexually explicit conduct" to actual depictions of sex acts in *United States v. Williams*, 553 U.S. 285, 296-97 (2008). In 2002, this Court affirmed the Ninth Circuit's ruling that the Child Pornography Prevention Act of 1996 was unconstitutionally overbroad under the First Amendment without reaching vagueness under the Due Process Clause that had also been found below. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999), *affirmed*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002). After *Free Speech Coalition*, the Court in *Williams* upheld Congress's successor statute against First Amendment and vagueness challenges. In doing so, the Court described the narrowing and specificity that saved the statute from overbreadth, especially the term "sexually explicit conduct" and the "commonsense canon of *noscitur a sociis*." *Williams*, 553 U.S. at 294-97. "'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion it is occurring." *Id.* at 297 (emphasis in original).

In contrast to the specificity required in *Williams* to uphold the statute, the injection of a subjectively based actus reus through the *Dost* factors returns to the type of vagueness and overbreadth condemned in the *Free Speech Coalition* opinions. The definitional vagueness allowed conviction to be based on production of images that do not objectively constitute "lascivious exhibition" and "actual depiction of the sex act." And the statute speaks for itself in limiting the scope: the statute punishes any person "who employs, uses, persuades, induces, entices, or coerces any minor," "with the intent that such minor engage in," "any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," which is defined as "lascivious exhibition of the anus, genitals, or pubic area of any person[.]" The statute, in focusing on depictions of minors and defining "sexually explicit conduct" to include the phrase "lascivious exhibition," provides objective descriptions of the statute's proscriptions. 18 U.S.C. § 2256(2)(A)(i)-(v); *see Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'").

This Court's requirement of clarity and certainty in federal child pornography statutes is framed by *Free Speech Coalition* and *Williams*. To interpret the statute broadly, as in *Dost* by inserting a subjective element into the objective descriptions of the actus reus, invites vagueness and overbreadth while the narrower construction avoids such constitutional problems. *See Skilling v. United States*, 561 U.S. 368, 405 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."). With the

Dost gloss of determining whether a depiction is "intended or designed to elicit a sexual response in the viewer," the criminal statute is no longer anchored to its language, but can criminalize some images but not others depending on whether the "sexual response" appeals to a pedophile, a voyeur, or an ordinary person's prurient interest.

This Court has consistently invalidated criminal statutes dependent on similarly vague standards that reference the reactions of others. In *Coates v. Cincinnati*, the Court held an ordinance prohibiting conduct "annoying to persons passing by" unconstitutionally vague because it failed to put people on notice of what conduct was criminally "annoying." 402 U.S. 611, 614 (1971). Similarly, in *Chicago v. Morales*, the Court struck down on vagueness grounds an ordinance that prohibited remaining "in any one place with no apparent purpose" in the company of a gang member. 527 U.S. 41, 57-58 (1999). In *Johnson v. United States*, the Court invalidated a statute "in all its applications" because the statute provided no objective criteria for courts to determine whether the "ordinary case" of a crime presented a "serious potential risk of physical injury." 135 S. Ct. 2551, 2560-61 (2015). The "sexual response" language in *Dost* presents the same constitutional infirmities as "annoy" in *Coates*, "no apparent purpose" in *Morales*, and the "ordinary case" in *Johnson*. The *Dost* factors potentially criminalize a broad range of activities without providing guidance to the fact-finder on the type of sexual response that is proscribed.

2. *Because The Federal Statutory Scheme Includes Subjective Factors When Congress So Intends, Their Absence In The Definitions Of "Sexually Explicit Conduct" Forecloses Judicial Addition To The Breadth Of The Criminal Statute.*

The reasoning of *Whited* applies directly to the federal definition of "sexually explicit conduct," which includes the "lascivious exhibition" of the genitals or pubic area with no reference to the defendant's intent or purpose. 18 U.S.C. § 2256(2)(A)(v). As with the Tennessee state statute, the federal statute does not include any reference to the defendant's subjective purpose of sexual arousal or gratification. In contrast, in a different federal statute involving contact abuse, the federal definition of "sexual act" includes the subjective intent of the accused in its definition of sexual touching: "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years *with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.*" 18 U.S.C. § 2246(2)(D) (emphasis added).

Congress could have imported such language into "sexually explicit conduct," to define "lascivious exhibition" as it did in § 2246(2)(D). Yet it did not do so. The statutory silence cannot be filled by the judicially-created subjective intent in *Dost* to expand the scope of the criminal statute. When Congress intended for a statute to authorize courts and juries to consider a defendant's subjective intent, the statute said so explicitly. *See Gozlon-Peretz v. United* States, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is

generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Consistently with this rule of construction, this Court has repeatedly held that statutory silence cannot be filled by judicial accretions when Congress has spoken clearly in a separate statutory provision. *Lagos v. United States*, 138 S. Ct. 1684, 1689-90 (2018) (judicial expansion of the Mandatory Victims Restitution Act improper where Congress expressly provided for specific restitution in at least one other statute but the MVRA had no similar provision); *Honeycutt v. United States*, 137 S. Ct. 1626, 1634 (2017) (judicial approval of collection method omitted from applicable forfeiture statute but present in another "would allow the Government to circumvent Congress' carefully constructed statutory scheme[.]"); *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (disregard of sentence on mandatory consecutive sentence in 18 U.S.C. § 1028A foreclosed same reading from statutory silence in 18 U.S.C. § 924(c)). As in each of these cases, the presence of language in a related statute – another restitution statute in *Lagos*, the joint and several liability provisions in *Honeycutt*, the aggravated identity theft statute in *Dean* – foreclosed judicial filling of silence by interpretation to add to the criminal sanction.

This rule of construction applies with particular authority in the present case where Congress expressly enacted a separate statute punishing invasions of privacy on federal enclaves in the Video Voyeurism Prevention Act of 2004. Pub. L. No. 108-495, 118 Stat. 3999 (codified at 18 U.S.C. § 1801). Where Congress seeks to federalize privacy crimes, Congress has demonstrated how to do it:

> Many states have since passed laws that target video voyeurism to protect those in private areas, but there are fewer protections for those who may be photographed in compromising positions in public places. S. 1301 makes the acts of video voyeurism illegal on Federal land such as national parks and Federal buildings, using the well-accepted legal concept that individuals are entitled to a reasonable expectation of privacy. It also serves as model legislation for States that have not yet enacted their own laws or need to update existing laws to account for the rapid spread of camera technology.

150 Cong. Rec. H7267-68 (daily ed. Sept. 21, 2004) (statement of Rep. James Sensenbrenner). And in this context, Congress demonstrated particular concern regarding the First Amendment implications of the prohibition. H.R. Rep No. 108-504, at 13-14 (2004) (statement of Rep. Sheila Jackson Lee) ("Without that qualification of intent as to broadcasting the voyeuristic material, the provision would run the risk of failing constitutional muster."). Especially in this sensitive area, the legislature has not undergone the deliberative process necessary to prohibit video voyeurism under the statute on producing child pornography.

3. The Rules Of Construction On Grouped Words Limit The Definition Of Pornography To Objectively "Sexually Explicit Conduct."

In *Williams*, the Court expressly referenced the rule of *noscitur a sociis* as providing an important level of certainty regarding the verbs "advertises, promotes, presents, distributes, or solicits" to avoid overbreadth and vagueness in the pornography statute. 553 U.S. at 294. Nonetheless, the lower courts have declined to use this interpretive rule to reject subjective factors in what is plainly a list of objective circumstances defining "sexually explicit conduct." Similarly, in *United States v. Poff*, the Ninth Circuit rejected a defendant's argument that, under the statutory interpretation canon of *ejusdem generis*, the

MVRA does not require a prisoner to turn over veteran's benefits in his inmate trust account to the Bureau of Prisons. *United States v. Poff*, 727 F. App'x 249, 251 (9th Cir. 2018), *cert. granted, judgment vacated*, 139 S. Ct. 790 (2019). The defendant had argued that the statute's language, which referenced "substantial resources" including "inheritance, settlement, or other judgment," refers only to windfalls unforeseen at the time of sentencing. *Poff*, 727 F. App'x at 251. This Court granted certiorari and remanded for further consideration in light of *Lagos*.

This Court in *Lagos* specifically rejected a broader interpretation of the MVRA based on application of "*noscitur a sociis*, the well-worn Latin phrase that tells us that statutory words are often known by the company they keep." *Lagos*, 138 S. Ct. at 1688-89. This Court considered the statutory phrase that lists three specific items that must be reimbursed – namely, lost income, child care, and transportation – and then adds the words "and other expenses." *Lagos* at 1688 (quoting § 3663A(b)(4)). The Court concluded that the statutory words indicate "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Id.* As a result, the Court held that reimbursable expenses do not include the costs of private investigation since those are not the kind of expenses that a victim would be likely to incur when work is missed to participate in the government's criminal prosecution. *Id.*

As in *Lagos*, the application of *noscitur a sociis* limits the child pornography statute to depictions of sexual conduct, not mere nudity. Section 2256 defines "sexually explicit conduct" as "actual or simulated" –

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

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

18 U.S.C. § 2256(2)(A). Sexual intercourse, bestiality, masturbation, and sadistic abuse are types of conduct that can be objectively categorized as sexual without consideration of the viewer or actor's intent. Additionally, the words of the statute contain "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Lagos*, 138 S. Ct. at 1689. The statute says nothing about child nudity or the subjective intent of the actor or viewer. Under *Lagos* and *noscitur a sociis*, the child pornography statute should be narrowly construed to avoid consideration of the subjective intent of the viewer, as permitted by the *Dost* factors.

4. In The Absence Of A Clear Congressional Statement, The Statute Should Not Be Construed To Expand Federal Criminal Jurisdiction To Include Privacy Crimes Generally Prosecuted In State Court.

The *Dost* factors expand the federal statute on producing child pornography to encompass run-of-the-mill state privacy law violations that are not expressly covered by the federal statute. "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Bond*, 572 U.S. at 848. Where the government's interpretation intrudes on traditional state

criminal jurisdiction, the Court avoids reading statutes to have such reach in the absence of a clear statement of congressional intent. *Id.* at 857 (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)). In the absence of clearly stated congressional intent, this Court has consistently limited the scope of broadly worded federal crimes to preclude federal prosecution of matters traditionally regulated by the States.

For example, in *Cleveland v. United States*, the Court rejected prosecutors' efforts to extend the "property" element of the mail fraud statute to licenses held by the state in the absence of clear language extending its scope to "a wide range of conduct traditionally regulated by state and local authorities." 531 U.S. 12, 24-27 (2000). In *Yates*, the Court rejected the government's view that an undersized fish was a "tangible object" in a statute aimed at document destruction. 135 S. Ct. at 1088-89. And in *McDonnell v. United States*, the Court rejected the government's "boundless interpretation" of the "official act" element of the federal bribery statute, finding that "significant federalism concerns" supported a narrow reading. 136 S. Ct. 2355, 2372-73 (2016).

Consistently with this line of cases, the federal statute on producing child pornography contains no clear statement that it covers privacy-invading visual depictions, nor does it include subjectively defined images. On the contrary, in the context of this Court's reasoning in *Ferber* focusing on images of child abuse, the inclusion of such images as produced child pornography is not only not clearly within the statutory proscription but outside it. The States may well view privacy-invasion and other types of repellent images as criminal, but the federal crime must be clearly described to warrant the

federal intrusion into what, under the system of federalism, falls within the police power of the States.

5. If The Statute Is Not Construed To Foreclose The Dost Gloss, Sufficient Ambiguity Remains To Apply The Rule Of Lenity.

If nothing else, the discord regarding the scope of "lascivious exhibition" demonstrates the phrase's ambiguity, requiring the application of the rule of lenity. *Granderson*, 511 U.S. at 54 ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,]" the Court applies the rule of lenity to "resolve the ambiguity in [the defendant's] favor."). In addition to the interpretive conflicts and inconsistencies regarding the *Dost* factors in state and federal courts, even the government has inconsistently described the term "lascivious exhibition."

In *United States v. Knox*, the Third Circuit upheld a conviction based on an interpretation of "lascivious exhibition" that did not require nudity or partial nudity. 977 F.2d 815, 820-23 (3d Cir. 1992), *vacated*, 510 U.S. 939 (1993). On the petition for certiorari, the government conceded error, appearing to embrace an objective definition of the term:

> In our view, the plain meaning of the statute requires a prohibited depiction to contain two elements that the court of appeals did not consider: (a) the material must include a visible depiction of the genitals or pubic area of the body (as distinguished from a depiction of the clothing covering those areas); and (b) the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer).

Brief for the United States, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183), 1993 WL 723366, at *9. This Court granted certiorari and remanded "in light of the position asserted by the Solicitor General in his brief for the United States." *Knox v. United States*, 510 U.S. 939 (1993). But on the remand, the court rejected the concession, instead adopting the Ninth Circuit's affirmance of *Dost* as focusing on the subjective intent of the photographer. *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994) (citing *Wiegand*, 812 F.2d at 1244-45).

The chaotic constructions call for clarity from this Court through application of the rule of lenity:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008). The application of the rule of lenity in this context is especially apt because it implicates both the hesitancy to incarcerate in the absence of clear legislative pronouncement and the protection of the legislative function in the separation of powers. And most specifically, this case implicates Chief Justice Marshall's warning regarding the temptation to expand legislative enactments to reach conduct judicially deemed to be "of equal atrocity, or of kindred character, with those which are enumerated," even though not within the actual statutory language. *Wiltberger*, 18 U.S. at 96.

The Court's rules of construction provide abundant tools to narrow the scope of the criminal statute to avoid vagueness and uncertainty. If after application of those tools ambiguity remains, this Court should apply the rule "perhaps not much less old than construction itself" to resolve the interpretation in the individual's favor. *Wiltberger*, 18 U.S. at 95; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES, at 88 (1765) ("Penal statutes must be construed strictly").

Conclusion

For the foregoing reasons, the Court should grant a writ of certiorari.

Dated this 21st day of May, 2019.

Stephen R. Sady
Attorney for Petitioner

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOUGLAS ROCKETT, Defendant-Appellant.	No. 16-30213 17-30167 D.C. No. 3:13-cr-00557-SI-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted October 10, 2018
Portland, Oregon

Before: FISHER, CLIFTON and CALLAHAN, Circuit Judges.

Stephen Rockett appeals his convictions for one count of producing child pornography outside the United States, *see* 18 U.S.C. § 2251(c), (e); one count of engaging in illicit sexual conduct with a minor in a foreign place, *see id.* § 2423(c), (e); five counts of producing or attempting to produce child pornography, *see id.* § 2251(a), (e); and one count of possession of child pornography, *see id.*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

§ 2252A(a)(5)(B), (b)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Because Rockett failed to object to the *Dost* factor jury instruction at trial, we review for plain error. *See United States v. Fuchs*, 218 F.3d 957, 961-62 (9th Cir. 2000). Here, there is no plain error. We have repeatedly adopted and applied the *Dost* factors as written. *See United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017); *United States v. Overton*, 573 F.3d 679, 686-89 (9th Cir. 2009); *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). We also have repeatedly confirmed that the sixth *Dost* factor properly considers the depiction from the photographer's – or intended viewer's – perspective. *See, e.g.*, *United States v. Arvin*, 900 F.2d 1385, 1389 (9th Cir. 1990) ("The statute reflects a legislative determination that it is a form of child abuse for a photographer to pose a child sexually for purposes of the photographer's sexual gratification, and that the abuse continues with dissemination of the photos for purposes of satisfying others.").

2. The sixth *Dost* factor does not make § 2251 unconstitutionally vague. Rather than granting unfettered discretion to prosecutors, these factors add specificity to the meaning of "lascivious exhibition of the genitals." Rockett's contention that the statute is vague because the *sixth* factor is vague also ignores

the fact that the jury's finding of lasciviousness must be based on the factors as a whole, not just the sixth factor.

3. Sufficient evidence supports the verdicts on Counts 4, 5, 7 and 8. A reasonable jury applying the *Dost* factors could have found that the actual and attempted images associated with these counts depicted the "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v). Similarly, Rockett's argument that his convictions on Counts 1 and 9 should be overturned fails because the district court did not err by allowing the jury to consider depictions related to other counts that constituted lascivious exhibitions under *Dost*. Rockett did not move to sever the counts at trial.

4. The district court did not abuse its discretion by awarding restitution for family therapy. Although Rockett argues to the contrary, the record shows the court awarded family therapy to award the *victims* of Rockett's crimes, not to compensate their family members. District courts, moreover, "have broad discretion in ordering restitution . . . to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse." *United States v. Laney*, 189 F.3d 954, 966 (9th Cir. 1999). Under 18 U.S.C. § 2259(b)(3), recoverable losses include medical services relating to physical, psychiatric or psychological care; physical and occupational therapy or rehabilitation;" and "any other losses suffered by the victim as a proximate result of the offense." The

restitution order was within "the bounds of the statutory framework" and supported by testimony. *United States v. Brock-Davis*, 504 F.3d 991, 996 (9th Cir. 2007).

5. The district court properly awarded restitution for future educational and occupational expenses. A psychologist, who had separately met with each of the victims, testified that all four victims faced difficulty in school because of Rockett's conduct, and the victims needed educational assistance "because the rehabilitation of these children [does not] end with their psychology issues." Although other factors may have contributed to the victims' inability to perform at or attend school, "it was perfectly reasonable for the [district court] to conclude that the additional strain or trauma stemming from defendant's actions was a substantial factor in causing the ultimate loss." *United States v. Doe*, 488 F.3d 1154, 1158 (9th Cir. 2007). Rockett suggests these awards were improper because there is no guarantee the victims will actually complete school or enroll in college. We have, however, affirmed restitution in similar cases without requiring actual use of the award for its specified purpose. *See id.* at 1160-61; *Laney*, 189 F.3d at 967 ("[I]f Congress intended crime victims who required long-term psychological or physical therapy to receive restitution only after they actually paid their therapists, it created a strangely unwieldy procedure in Section 3664, which would require a victim to petition the court for an amended restitution order every 60 days for as long as the therapy lasted."). The district court did not abuse its discretion.

AFFIRMED.

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN DOUGLAS ROCKETT, Defendant-Appellant.	Nos. 16-30213 D.C. No. 3:13-cr-00557-SI-1 District of Oregon, Portland ORDER

Before: FISHER, CLIFTON and CALLAHAN, Circuit Judges.

The panel judges voted to deny Appellant's petition for rehearing. Judge Callahan voted to deny the petition for rehearing en banc, and Judges Fisher and Clifton recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and rehearing en banc (Dkt. 74), filed January 18, 2019, is denied.

OTHER DEFINITIONS

Instruction No. 24: Lascivious Exhibition Defined

In determining whether an image constitutes a lascivious exhibition of the genitals or pubic area of any person, you should consider the following factors:

1. Whether the focal point of the image is on the child's genitalia or pubic area;

2. Whether the setting of the image is sexually suggestive, such as 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 image suggests sexual coyness or a willingness to engage in sexual activity;

6. Whether the image is intended or designed to elicit a sexual response in the viewer.

An image need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area of a person. Your determination should be based on the overall content of the image, taking into account the age of the minor.

Instruction No. 25: Child Pornography Defined

"Child pornography" is defined in 18 U.S.C. § 2256(8)(A) as any visual depiction,

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

STEVEN DOUGLAS ROCKETT

Defendant.

JUDGMENT IN A CRIMINAL CASE

Case No.: 3:13-CR-00557-SI-1

USM Number: 75742-065

Andrew D. Coit and Cheslea B. Payment
Defendant's Attorney

Paul T. Maloney and Gary Y. Sussman,
Assistant U.S. Attorney

THE DEFENDANT:

☒was found guilty on count(s) 1, 2, and 4 through 9 of the Second Superseding Indictment after a jury trial. The defendant is adjudicated guilty of the following offense(s):

Title, Section & Nature of Offense		Date Offense Concluded	Count Number
18:2251(c) and (e) - Producing Child Pornography	-	Beginning on or about 1/23/2000 and continuing until 1/29/2013	1ss
18:2423(c) and (e) - International Travel and Engaging in Illicit Sexual Conduct with a Minor	-	Beginning on or about 10/10/2007 and continuing until 10/28/2007	2ss
18:2251(a) and (e) - Producing Child Pornography	-	Beginning on or about 5/6/2013 and continuing until 6/11/2013	4ss
18:2251(a) and (e) - Producing Child Pornography	-	Beginning on or about 4/26/2013 and continuing until 6/22/2013	5ss
18:2251(a) and (e) – Producing Child Pornography	-	Beginning on or about 5/2/2013 and continuing until 6/22/2013	6ss
18:2251(a) and (e) – Producing Child Pornography	-	Beginning on or about 11/10/2004 and continuing until 9/12/2012	7ss
18:2251(a) and (e) – Producing Child Pornography	-	Beginning on or about 11/10/2004 and continuing until 9/12/2012	8ss
18:2252A(a)(5)(B) and (b)(2) - Possession of Child Pornography	-	On or about 8/23/2013	9ss

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒Count(s) Count 3 of the Second Superseding Indictment and the underlying indictments are dismissed on the motion of the United States.

☒The defendant shall pay a special assessment of $800 for Count(s) 1, 2, and 4 through 9 of the Second Superseding Indictment payable immediately to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

September 08, 2016
Date of Imposition of Sentence

Signature of Judicial Officer

Michael H. Simon, U.S. District Judge
Name and Title of Judicial Officer

September 12, 2016
Date

IMPRISONMENT

As to Count 1 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of one hundred-eighty (180) months, said sentence to be served consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 2 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be served concurrently with the sentence imposed in Count 1, and consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 4 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be served concurrently with the sentence imposed in Count 1, and consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 5 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be served concurrently with the sentence imposed in Count 1, and consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 6 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be served consecutively to all counts and concurrent to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 7 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be service consecutively to all counts and consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 8 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of One hundred-eighty (180) months, said sentence to be service consecutively to all counts and consecutively to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

As to Count 9 of the Second Superseding Indictment, the defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of eighty-four months (84) months, said sentence to be served concurrently with all counts and concurrently to the sentence imposed in Washington County Case Nos. C131929Cr and C132673Cr.

☒The court makes the following recommendations to the Bureau of Prisons:

1. That the defendant be incarcerated in FCI Sheridan to be near family who live in the area

☒ The defendant is remanded to the custody of the United States Marshal.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

As to Counts 1, 2, and 4 through 9, and upon release from imprisonment, the defendant shall be on supervised release for a term of **Life**.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties section of this judgment.

The defendant shall comply with the Standard Conditions of Supervised Release that have been adopted by this court as set forth in this judgment. The defendant shall also comply with the Special Conditions of Supervision as set forth below and any additional conditions attached to this judgment.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall cooperate in the collection of DNA as directed by the probation officer, if required by law.

2. The defendant shall pay full restitution to the victim identified in the presentence report in an amount to be determined in 90 days. If there is any unpaid balance at the time of the defendant's release from custody, it shall be paid at the maximum installment possible and not less than $100 per month.

3. To the extent there is any unpaid restitution, the defendant is prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation officer.

4. To the extent there is any unpaid restitution, the defendant shall disclose all assets and liabilities to the probation officer. Defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the probation officer.

5. To the extent there is any unpaid restitution, the defendant shall authorize release to the U.S. Probation Officer any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer.

6. The defendant shall participate in a sex offender assessment and treatment program, as directed by the probation officer. The defendant shall abide by all rules and requirements of such program. This assessment and treatment program may include the use of the polygraph to assist in case planning and case monitoring.

7. The defendant shall not view, purchase, or possess (1) any materials including visual depictions of minors under the age of 18 engaged in sexually explicit conduct, as defined in 18 U.S.C. § 2256(2); or (2) any materials depicting sexually explicit conduct involving adults.

8. The defendant is prohibited from being present within 100 feet of places where minor children under the age of 18 congregate, such as playgrounds and schools, unless approved by the probation officer.

9. The defendant is prohibited from residing within 100 yards of schools and playgrounds and other places where minor children congregate, unless approved by the probation officer.

10. The defendant shall register, if required by law, with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student and shall provide written notification of compliance with this condition as directed by the probation officer.

11. The defendant shall reside at a residence approved by the probation officer, and shall notify the probation officer at least 30 days prior to any change in residence.

12. The defendant shall have no contact with minors (in person, by telephone, through correspondence, or a third party) unless approved by the probation officer and the Court.

13. The defendant shall provide the U.S. Probation Officer with truthful and complete information regarding all computer hardware, software, electronic services, and data storage media to which the defendant has access.

14. The defendant is prohibited from using or possessing any computer(s) (including any handheld computing device, any electronic device capable of connecting to any on-line service, or any data storage media) without the prior written approval of the U.S. Probation Officer. This includes, but is not limited to, computers at public libraries, Internet cafes, or the defendant's place of employment or education.

15. The defendant shall submit to a search of his/her computer (including any handheld computing device, any electronic device capable of connecting to any on-line service, or any data storage media) conducted by a U.S. Probation Officer, at a reasonable time and in a reasonable manner, based upon reasonable suspicion of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn all individuals that have access to defendant's computer that it is subject to search and/or seizure.

16. The defendant shall participate in the U.S. Probation Office's Computer Monitoring Program. Participation in the Program may include installation of software or hardware on the defendant's computer that allows random or regular monitoring of the defendant's computer use; periodic inspection of defendant's computer (including retrieval, copying, and review of its electronic contents) to determine defendant's compliance with the Program; and restriction of the defendant's computer use to those computers, software programs, and electronic services approved by the U.S. Probation Officer.

17. The defendant shall have no contact with the victims in this case including MG, HJ, DS, BS, and NS, in person, by telephone, through correspondence or a third party unless approved in advance by the probation officer.

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

The Judges of the District of Oregon adopt the following standard conditions of probation and supervised release to apply in every case in which probation and/or supervised release is imposed upon a defendant. The individual judge may impose other conditions deemed advisable in individual cases of probation or supervised release supervision, as consistent with existing or future law.

1. The defendant shall report in person to the probation office for the district to which he or she is released within 72 hours of release from the custody of the Bureau of Prisons.
2. The defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation or supervised release is mandatory for illegal possession of a controlled substance.
3. The defendant shall not possess a firearm, destructive, or dangerous device.
4. If the defendant illegally uses drugs or abuses alcohol, has a history of drug or alcohol abuse, or drug use or possession is determined to be an element of the defendant's criminal history or instant offense, the defendant shall participate in a substance abuse treatment program as directed by the probation officer which may include urinalysis testing to determine if the defendant has used drugs or alcohol. In addition to urinalysis testing that may be part of a formal drug treatment program, the defendant shall submit up to eight (8) urinalysis tests per month.
5. The defendant shall submit to a search of his/her person, residence, office or vehicle, when conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall warn other residents that the premises may be subject to searches pursuant to this condition.
6. The defendant shall not leave the judicial district without the permission of the court or probation officer.
7. The defendant shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.
8. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer. The defendant may decline to answer inquiries if a truthful response would tend to incriminate him/her. Such a refusal to answer may constitute grounds for revocation.
9. The defendant shall support his or her dependents and meet other family responsibilities to the best of his or her financial ability.
10. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.
11. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
12. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. If, at any time, the probation officer has reasonable cause to believe the defendant is using illegal drugs or is abusing alcohol, the defendant shall submit to urinalysis testing, breathalyzer testing, or reasonable examination of the arms, neck, face, and lower legs.
13. The defendant shall not knowingly frequent places where controlled substances are illegally sold, used, distributed, or administered.
14. The defendant shall not knowingly associate with any persons engaged in criminal activity, and shall not knowingly associate with any person convicted of a felony, unless granted permission to do so by the probation officer.
15. The defendant shall permit a probation officer to visit him or her at any reasonable time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer.
16. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer.
17. The defendant shall not enter into any agreement to act as an informant or special agent of a law enforcement agency without the permission of the court.
18. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his or her criminal record or personal history and characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such a notification requirement. This requirement will be exercised only when the probation officer believes a reasonably foreseeable risk exists or a law mandates such notice. Unless the probation officer believes the defendant presents an immediate threat to the safety of an identifiable individual, notice shall be delayed so the probation officer can arrange for a court hearing and the defendant can obtain legal counsel.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	Assessment (as noted on Sheet 1)	Fine	Restitution	TOTAL
TOTALS	$800	$-0-	$TBD within 90 Days	$800

☐The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all non-federal victims must be paid in full prior to the United States receiving payment.

☐If applicable, restitution amount order pursuant to plea agreement: $_____.

☐The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐The court determined that the defendant does not have the ability to pay interest and it is ordered that

☐The interest is waived for the ☐ fine and/or ☐ restitution.

☐The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment[1] of the total criminal monetary penalties shall be as follows:

A. ☒ Lump sum payment of $800 due immediately, balance due
☐ not later than _____, or

☐ in accordance with ☐ C or ☐ D below; or

B. ☒ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or
C. ☐ If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than $ until paid in full, to commence immediately upon release from imprisonment.
D. ☐ Special instructions regarding the payment of criminal monetary penalties:

☒ Payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) $25 per quarter if the defendant is not working in a prison industries program.

It is ordered that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

Clerk of Court
U.S. District Court - Oregon
1000 S.W. 3rd Ave., Ste. 740
Portland, OR 97204

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ **Joint and Several**

Case Number **Defendant and Co-Defendant Names** (including Defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court costs:
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

See Preliminary Order of Forfeiture and Final Order of Forfeiture filed with this Judgment.

[1] Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

STEVEN DOUGLAS ROCKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within PETITION FOR WRIT OF CERTIORARI on the counsel for the respondent by hand-delivery on May 21, 2019, an exact and full copy thereof addressed to:

Paul T. Maloney, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

Gary Y. Sussman, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

Kelly A. Zusman, Assistant U.S. Attorney
1000 S.W. Third Avenue
Suite 600
Portland, OR 97204

and by depositing in the United States Post Office, in Portland, Oregon on May 21, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 21st day of May, 2019, with first-class postage prepaid.

Dated this 21st day of May, 2019.

Stephen R. Sady
Attorney for Petitioner

Subscribed and sworn to before me this 21st day of May, 2019.

OFFICIAL STAMP
DASHIELL TERRY
NOTARY PUBLIC-OREGON
COMMISSION NO. 977254
MY COMMISSION EXPIRES JULY 24, 2022

Notary Public of Oregon