No. ___ – _____

In the Supreme Court of the United States

DONNIE BARNES, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The D.C. Circuit recently held that the definition of "lascivious exhibition" in the federal child pornography statute, 18 U.S.C. § 2256, is limited by the term it is defining -- "sexually explicit conduct" -- and by the statutory definitions that accompany it. *United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021). Other circuits, including the Ninth Circuit, interpret the phrase "lascivious exhibition" more expansively by conducting a case-by-case analysis using the factors listed in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987).

The question presented is whether an instruction on the *Dost* factors authorizes a conviction for production of child pornography on broader grounds than authorized by 18 U.S.C. §§ 2251(a) and 2256.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donnie Barnes, Sr. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

Mr. Barnes was convicted of production, distribution, and possession of child pornography. AER 2.[1] At trial and on appeal, Mr. Barnes argued that the photographs he produced did not depict a minor engaged in "sexually explicit conduct" as required by 18 U.S.C. §§ 2251(a), 2256, and that the district court's jury instructions authorized his conviction for conduct beyond the scope of that statute. AER 316-317. The Ninth Circuit affirmed Mr. Barnes' convictions in a memorandum opinion on October 22, 2021. *United States v. Barnes*, 2021 WL 4938126 (9th Cir. Oct. 22, 2021) (Appendix 1).

JURISDICTION

28 U.S.C. § 1254(1) confers jurisdiction on this Court.

[1] "AER" refers to Appellee's Excerpts of Record filed by Respondent in the Ninth Circuit Court of Appeals in Case Number 20-30059.

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 that no person shall be "deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

The statutes on sexual exploitation prohibit individuals from possessing, distributing, or producing a "visual depiction" of a minor engaged in "sexually explicit conduct." 18 U.S.C. §§ 2251, 2252.

"[S]exually explicit conduct" means actual or simulated - (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person. 18 U.S.C. § 2256(2)(A).

This case involves the meaning of the term "lascivious exhibition" in 18 U.S.C. § 2256. In its instructions to the jury, the district court supplemented "lascivious exhibition" with a list of factors, taken from

United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), that the jury could consider to determine whether that element has been proven:

- whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- whether the child is fully or partially clothed, or nude;
- whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

AER_047-48. The *Dost* test does not require that a visual depiction involve all characteristics listed, but rather leaves the determination to 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 regarding the scope of 18 U.S.C. § 2251(a) caused by the inconsistent use of what have become known as the *Dost* factors, a judicially created test

that expands the definition of child pornography beyond statutory language.

Both the D.C. Circuit and the Supreme Court of Tennessee have rejected the *Dost* factors as a means of defining the term "lascivious exhibition." *See United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021); *State v. Whited*, 506 S.W.3d 416, 434-37 (Tenn. 2016). The D.C. Circuit explained that the *Dost* factors derive from a single district court's "misinterpret[ation] of a single floor statement of a single Senator," and have expanded the meaning of "lascivious exhibition" beyond the narrow definition demanded by its statutory context and this Court's precedent. *Id*. at 684-686 (*reviewing Miller v. California*, 413 U.S. 15 (1973); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. X-Citement Video*, 514 U.S. 64 (1994); and *United States v. Williams*, 553 U.S. 285 (2008)).

Nonetheless, most Federal Circuits have adopted some form of the *Dost* factors, albeit with great inconsistency. The Circuits disagree, for example, on whether a defendant's subjective intent can turn a permissible visual depiction into a proscribed one. *Compare Wiegand*, 812 F.2d at 1244 (lasciviousness of image should be evaluated "for an

audience that consists of himself or likeminded pedophiles") *with 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"). Circuits also disagree on whether the jury's "lascivious exhibition" determination is limited to the four corners of the visual depiction or whether it may also consider extrinsic evidence. *Compare 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) *with 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 disagreements that have developed between circuit courts since *Dost* was issued 36 years ago make it clear that additional time will not help resolve the varying approaches or enhance this Court's ability to evaluate the limits of the statutory language. To the contrary: the *Dost*

factors "import unnecessary interpretive conundrums into a statute…that lay people are perfectly capable of understanding," *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006).

Last, the Court should grant certiorari to emphasize that circuit courts should not fill statutory silence with judicially-created factors when ordinary techniques of textual analysis suffice to provide certainty. Here, for example, the Ninth Circuit adopted a judge-made gloss on the statutory definition of "lascivious exhibition," but ignored this Court's authoritative definitions of similar language. The Ninth Circuit also did not apply the rules of construction, such as *noscitur a sociis* and *ejusdem generis*, that this Court has used to determine the breath of child pornography laws. *See Williams*, 553 U.S. at 294.

STATEMENT OF THE CASE

Mr. Barnes was charged, among other offenses, with distribution and production of child pornography, based on a video he took of his sleeping stepdaughter's genitals. Both parties agreed that the sole dispute was whether that video captured a "lascivious exhibition" of the genitals. AER_049-050; AER_285-294; AER_170-198. At trial, Mr. Barnes argued that while he had committed a grave, criminal invasion of

his stepdaughter's privacy, the video did not depict "sexually explicit conduct," including a "lascivious exhibition" of her genitals. AER_186-187. The government's contrary argument was premised, in part, on Mr. Barnes's subjective intent. *E.g.* AER _214.

A jury convicted Mr. Barnes after the district court, over Mr. Barnes's objection, gave a jury instruction supplementing the statutory definition of "sexually explicit conduct" with the six-factor *Dost* test. AER_047-048. At sentencing, the court lamented his obligation to impose a 15-year minimum penalty: "I just simply believe that the 15-year mandatory minimum is, in this case, more than is necessary." AER_032.

Mr. Barnes renewed on appeal his argument that the *Dost* factors authorized his conviction on grounds not supported by the statute. In a memorandum opinion, the Ninth Circuit affirmed Mr. Barnes' conviction and, specifically, the instruction on the *Dost* factors. *See* Appendix 1.

REASONS FOR GRANTING THE PETITION

A. This court should grant the writ to resolve a widening split over the scope of an increasingly common statute.

Only this Court can resolve the conflicting decisions on a recurring federal question of basic importance: when does a "lascivious exhibition"

of the genitalia depict "sexually explicit conduct" for purposes of the statute criminalizing and imposing the highest penalties for production of child pornography?

The D.C. Circuit, after surveying this Court's opinions and the statutory context, concluded that "lascivious exhibition" "cover[s] visual depictions in which a minor, or someone interacting with a minor, engages in conduct displaying their anus, genitalia, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." *United States v. Hillie*, 14 F.4th 677, 687 (D.C. Cir. 2021). The Ninth Circuit, by contrast, has declined to state an authoritative construction, favoring a case-by-case analysis based on judge-created factors in *Dost*. *United States v. Overton*, 573 F.3d 679, 686-89 (9th Cir. 2009).

Other circuits fall in between. 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 arises with increasing frequency in district courts throughout the country.[2]

1. The *Dost* factors impermissibly expand the scope of 18 U.S.C. §§ 2251, 2256.

In *Hillie*, 14 F.4th at 67, the District of Columbia Circuit was called upon to state when a "lascivious exhibition" of a minor's genitals will depict "sexually explicit conduct" as those two phrases are used in 18 U.S.C. § 2256 and 18 U.S.C. § 2251. Beginning with the text of the statute, *Hillie* noted that this Court, in a series of first amendment cases dating back to *Miller v. California*, has limited "the same or similar phrasing" as "lascivious exhibition" to depictions of patently offensive, "hard core" conduct. *Id.* at 684 (*citing Miller*, 413 U.S. at 27). This Court's use of the canon of *noscitor a sociis* to assess the scope of the child pornography statute buttressed the Fifth Circuit's conclusion. *See Williams,* 553 US at 297. ("sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that it is

[2] *See* "Federal sentencing of child pornography: production offenses," United States Sentencing Commission (October 13, 2021) ("the expansion of digital and mobile technology has contributed to a 422 percent increase in the number of production offenders sentenced over a 15-year period.") (available at https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-production-offenses).

occurring.") (emphasis in original). That is, "[b]ecause 'lascivious exhibition of the anus, genitals, or pubic area' appears in a list with 'sexual intercourse,' 'bestiality,' 'masturbation,' and 'sadistic or masochistic abuse,' its 'meaning[ ] [is] narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.'" *Hillie*, 14 F.4th at 688. Based on this examination of this Court's prior relevant definitions and the application of standard canons of statutory interpretation, *Hillie* concluded that a "lascivious exhibition" shows "sexually explicit conduct" when it depicts "a minor, or someone interacting with a minor, engag[ing] in conduct displaying their anus, genitalia, or pubic area in a lustful manner that connotes the commission of sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse." *Id.* at 687.

In reaching this holding, the D.C. circuit "reject[ed] the Government's argument…that 'lascivious exhibition of the genitals,' as defined in § 2256(2)(A), should instead be construed in accordance with the so-called *Dost* factors." *Hillie*, 14 F.4th at 689. Unlike the text-based approach favored above, the *Dost* factors are unpersuasive because the

district court in *Dost*, by "misinterpret[ing] a single floor statement of a single Senator," proceeded from the false premise that Congress intended to "broaden the scope of the existing 'kiddie porn' laws" when it substituted the word "lascivious" for the word "lewd." *Id.* at 689. In fact, as *Hillie* shows and this Court has acknowledged, Congress intended to use those words interchangeably. *Id.* The *Dost* factors, by encouraging an expansive reading of a statutory phrase that Congress did not intend to expand, therefore authorizes convictions for conduct beyond the intended reach of the statute. *Id.* at 690.

The Supreme Court of Tennessee, analyzing an identical statute, reached the same conclusion. *See State v. Whited*, 506 S.W.3d 416, 437 (Tenn. 2016). After weighing the value of the cases construing *Dost*, the Supreme Court explained the danger of instructing the jury on the *Dost* factors, even when the instruction is accompanied by a warning that the factors are not exhaustive:

> 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 (emphasis added, citations and footnote omitted).

In sum, depending on whether a jurisdiction has adopted the *Dost factors*, the same conduct can constitute no crime, a misdemeanor, or form the basis for the type of extremely long sentences imposed here. Indeed, Mr. Barnes was convicted for producing images that do not meet the statutory definition of sexually explicit conduct in the D.C. Circuit, and arguably other circuits. *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); *See United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011) (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); *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). This Court's intervention is necessary to insure that this criminal statute is applied consistently in accordance with its text.

2. The *Dost* factors have led the circuits to construe the child pornography statute inconsistently.

The circuits are in disarray as to whether and how to use the *Dost* factors to define the term "lascivious exhibition" of the genitals. The First, Second, and Seventh Circuits have expressed skepticism or discouraged their use. *See Frabizio*, 459 F.3d at 88 (the *Dost* factors "import unnecessary interpretive conundrums into a statute…that lay people are perfectly capable of understanding,"); *Amirault*, 173 F.3d at 34 ("the sixth factor that focuses on subjective thoughts of the accused is "confusing and contentious."); *Spoor*, 904 F.3d at 151 (limiting "the role of the sixth *Dost* factor," insofar as "the defendant's subjective intent alone is not sufficient to find the content lascivious"); *United States v. Price*, 775 F.3d 828, 839–40 (7th Cir. 2014) (holding that district court

did not plainly err by instructing jury on *Dost* factors, but declining to endorse the factors and "discourag[ing] their routine use"). A Fifth Circuit judge has stated similar misgivings. *See Steen*, 634 F.3d at 829 (Higginbotham, J., concurring) ("The sixth factor, which asks whether the visual depiction was intended to elicit a sexual response in the viewer, is especially troubling. Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this *Dost* factor encourages both judges and juries to improperly consider a non-statutory element.") (footnote omitted).

By contrast, the Third, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have "adopted the '*Dost* factors' as a rubric for analyzing whether a particular image is lascivious." *United States v. Hodge*, 805 F.3d 675, 679 (6th Cir. 2015). *See also United States v. Franz*, 772 F.3d 134, 156-57 (3d Cir. 2014)*; United States v. McCall*, 833 F.3d 560, 563 (5th Cir. 2016)*; United States v. Lohse*, 797 F.3d 515, 520-21 (8th Cir. 2015)*; Overton*, 573 F.3d at 686-89; *United States v. Wells*, 843 F.3d 1251, 1253-54 (10th Cir. 2016).

Within this 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, including the Ninth Circuit, authorize the jury to go beyond the depiction to determine whether it is a "lascivious exhibition."

The Ninth Circuit, for instance, urges a subjective inquiry in which the lasciviousness of an image is evaluated "for an audience that consists of himself or likeminded pedophiles." *Wiegand*, 812 F.2d at 1244. Building from *Dost*, the Second and Sixth Circuits likewise encourage the jury to consider the photographer's subjective intent when 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").

But other courts have concluded that the focus on the defendant's subjective intent, rather than the objective characteristics of the image,

unconstitutionally expands the scope of 18 U.S.C. § 2256. As *Hillie* explains, "the *Dost* factors…allow a depiction that portrays sexually *implicit* conduct in the mind of the viewer to be caught in the snare of a statute that prohibits creating a depiction of sexually *explicit* ..." *Hillie*, 14 F.4th at 691. For this reason, the First Circuit has called the sixth factor "the most confusing and contentious of the *Dost* factors.'" *See Amirault*, 173 F.3d at 34 ("If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography. . . Moreover, a focus on the photograph's use seems inconsistent with the statute's purpose of protecting the child."). The Third Circuit likewise has 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). As Judge Higgenbotham explains, the problem is that consideration of the photographer's subjective intent permits a defendant's conviction for

production of child pornography, even when the images are not pornographic:

> 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.

Steen, 634 F.3d at 829 (Higgenbotham, J., concurring). It is also contrary to this Court's precedent. *See also Williams*, 553 U.S. at 301 (the statute cannot "apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.'"). And, indeed, consideration of subjective factors has permitted convictions because of the deviate manner in which an image may be perceived, even where the objective image itself involves no nudity or simply voyeurism. *E.g. 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 sexual interest in female underpants rendered image "lascivious exhibition"); *United States v. Rockett*, 752F. App'x 448 (9th

Cir. 2018) (affirming convictions for secretly videotaping children in bathroom).

3. The disarray among the circuits is reflected in the model jury instructions and reinforced by academic criticism regarding the manner in which courts use the *Dost* factors.

The variations in model criminal jury instructions reflect the Circuits' chaotic approach to the *Dost* factors. Of the Circuits that have model instructions on "lascivious exhibition," the Seventh and Ninth Circuits include only the statutory language.[3] 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.[4] The Eleventh Circuit rewrites the sixth factor to say "appears to be designed" with no reference to "intended."[5] And the Eighth Circuit adds two factors to *Dost*, one of which blurs objective and subjective criteria, while the

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[3] 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).

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

[5] Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § 082 (2016) (11th Cir. Comm. on Pattern Jury Instr., revised 2019).

other adds speech as potentially criminalizing an otherwise lawful depiction: "(7) whether the picture portrays the minor as a sexual object; and (8) the caption(s) on the picture(s)." The inconsistencies among model instructions demonstrates the need for this Court's intervention to bring uniformity to the definition of one of the most serious of federal crimes.

Academic criticism of the *Dost* factors also reinforces the need for this Court's intervention. Academics 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. Professor Amy Adler, for example, criticizes the *Dost* factors for forcing jurors to place themselves into the shoes of a pedophile to determine whether a "lascivious exhibition" amounts to "sexually explicit conduct." *The 'Dost Test' in Child Pornography Law: "Trial by Rorschach Test*." Chapter 3, *Refining Child Pornography Law: Crime, Language, and Social Consequences* (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*). Professor Adler acknowledges the difficulties in legally analyzing behavior that is "abhorrent and deeply disturbing," but observes that the current state of the law fails to provide the uniformity and predictability required for the severe consequences that follow from conviction. Adler, *supra*, at 89.

B. The Ninth Circuit errs by adding purportedly clarifying "factors" without first conducting statutory analysis.

Finally, this Court should grant certiorari to emphasize that reliance on judge-made factors should not substitute for statutory analysis using the text of the statute and any authoritative definitions of this Court. A return to the statutory text here and in the future will avoid the inconsistent applications described above.

The Ninth Circuit's statutory analysis is flawed in at least two ways. First, it is axiomatic that this Court's "authoritative construction of statutory language must be followed in subsequent prosecutions because it is that construction which provides fair notice to citizens of what conduct is proscribed." *Hillie*, 14 F.4th at 686 (*Citing Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (unexpected or unforeseen authoritative judicial construction that broadens clear and more precise

statutory language violates due process)). But the Ninth Circuit has ignored this Court's authoritative construction of the "same or similar phrasing," in favor of an open-ended interpretation of "lascivious exhibition" based on judge-made factors. *id.* at 684 (reviewing this Court's definitions of "lewd" or "lascivious" in *Miller v. California*, 413 U.S. 15 (1973); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *New York v. Ferber*, 458 U.S. 747 (1982); *United States v. X-Citement Video*, 514 U.S. 64 (1994); and *United States v. Williams*, 553 U.S. 285 (2008)).

Second, instead of using canons of statutory construction to interpret the scope of a child pornography statute as this Court did in *Williams*, the Ninth Circuit ignores traditional analysis in favor of a non-statutory approach based in moral opposition to the objectification of children. *See Wiegand*, 812 F2d at 1245 ("It was a lascivious exhibition because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object."). Coupled with an adoption of the *Dost* factors, the Ninth Circuit's approach imposes no meaningful limit on the reach of the federal laws criminalizing child pornography.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted this 19th day of January 2022.

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