No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH PRESCOTT GACE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

As a matter of statutory interpretation, should a jury or court consider the so-called *Dost* factors when determining whether a visual depiction of a minor constitutes a "lascivious exhibition" for purposes of federal criminal statutes prohibiting, among other things, the production or possession of child pornography, as the majority of federal courts of appeals have held, or should the *Dost* factors not be used because they are in conflict with this Court's precedent and/or lack any basis in the text of the relevant statutes, as the First, Seventh, and D.C. Circuits and Tennessee Supreme Court have held?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Gace*, No. 19-cr-0004, U.S. District Court for the Southern District of Texas. Judgment entered October 28, 2020.
- *United States v. Gace*, No. 20-40718, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 29, 2021.

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MISCELLANEOUS

PRAYER

Petitioner Keith Prescott Gace prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Gace's case is attached to this petition as Appendix A. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on November 29, 2021. *See* Appendix A. This petition is filed within 90 days after the entry of judgment, excluding the last day of the period, which is a Sunday. Sup Ct. R. 12.1, 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

APPENDIX B – 18 U.S.C. § 2251. Sexual exploitation of children

APPENDIX C – 18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

APPENDIX D – 18 U.S.C. § 2256. Definitions for chapter

STATEMENT OF THE CASE

I. Statutory framework

Codified in Chapter 110 of Title 18 of the United States Code, federal law establishes myriad offenses related to child pornography. For example, 18 U.S.C. § 2251(a) prohibits, *inter alia*, the production of child pornography by making it a crime for a person to use "any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." § 2251(a). Similarly, § 2252(a)(4)(B) prohibits, *inter alia*, the possession of child pornography, *i.e.*, the knowing possession of matter that contains "any visual depiction" if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" and "such visual depiction is of such conduct." § 2252(a)(4)(B). Another example from § 2252A is the prohibition on, *inter alia*, advertising or soliciting any material containing "a visual depiction of an actual minor engaging in sexually explicit conduct." § 2252A(3)(B)(ii).

The definitions section for Chapter 110 is currently codified at 18 U.S.C. § 2256. "Minor" is defined as "any person under the age of eighteen years." § 2256(1). "Sexually explicit conduct" is defined 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." § 2256(2)(A). "Lascivious exhibition" is not defined.

Although §§ 2251, 2252, and 2252A(3)(B)(ii) do not use the phrase "child pornography," other sections of § 2252A do. *See, e.g.*, § 2252A(5)(B). The meaning of

"child pornography" in § 2256, though, incorporates the above-quoted definition of "sexually explicit conduct" by defining the term "child pornography" to include a visual depiction of "sexually explicit conduct, where--(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." § 2256(8).

In 1986, a district court in the Southern District of California delineated six non-exhaustive factors for triers of fact to use when evaluating whether a visual depiction of a minor constitutes a "lascivious exhibition":

> 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.

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 (9th Cir. 1987). These six factors have come to be called the *Dost* factors.

II. Factual background

On February 27, 2019, a federal grand jury returned a five-count indictment charging Petitioner Keith Prescott Gace with: Count One, sexual exploitation of children

by producing and attempting to produce child pornography, in violation of 18 U.S.C. § 2251(a) and (e); Count Two, distribution of child pornography, and Count Three, receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(B) and (b)(1); Count Four, possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2); and Count Five, attempted destruction of property, in violation of 18 U.S.C. § 2232(a). On November 6, 2019, Mr. Gace pleaded guilty to all counts except Count One, which proceeded to a jury trial.

Before trial, Mr. Gace filed a motion *in limine* to exclude evidence related to Counts Two through Four, to which he had already pleaded guilty. Mr. Gace offered to stipulate that the images charged in Counts Two through Four depicted actual child pornography, but the government rejected that offer. At trial, the government showed the jury the images that were the subject of Count One, as well as a number of images charged in Counts Two through Four. Mr. Gace's defense to Count One was that those images did not depict "sexually explicit conduct" because they did not depict a "lascivious exhibition" as required by the statute.

Over Mr. Gace's objection, the district court gave the Fifth Circuit pattern jury instruction, which instructs the jury that it may consider all six *Dost* factors, including the sixth factor of "whether the depiction is designed to elicit a sexual response in the viewer." Fifth Circuit Pattern Jury Instruction 2.84. Mr. Gace had sought to exclude the sixth *Dost* factor and to include an instruction that nudity alone is insufficient to find guilt. The district court denied those requests.

The jury returned a verdict of guilty on Count One. The district court sentenced Mr.

Gace to serve a total of 1,020 months in the custody of the Bureau of Prisons on the five counts of conviction. Mr. Gace timely appealed to the United States Court of Appeals for the Fifth Circuit, and raised as foreclosed the question that he seeks to have this Court resolve: whether the *Dost* factors are an appropriate consideration for triers of fact evaluating whether a visual depiction constitutes a "lascivious exhibition."

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to resolve an important question of statutory interpretation that has created an intractable divide among federal and state appellate courts.

Contested charges under federal statutes that prohibit various activities relating to child pornography often hinge on whether the image charged in the indictment qualifies as depicting a "lascivious exhibition of the genitals." Federal statutes define child pornography offenses, ranging from possession to production, by reference to whether the image in question depicts "the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(4)(B). The phrase "sexually explicit conduct" is defined as "(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." § 2256(2)(A). "Lascivious exhibition" is not defined.

A district court in 1986 set forth a list of six non-exhaustive factors for triers of fact to consider when determining whether an image qualifies as a "lascivious exhibition." *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 (9th Cir. 1987). These so-called *Dost* factors are:

> 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.

Dost, 636 F. Supp. at 832. As will be explained, although many federal courts of appeals and some state courts have adopted the *Dost* factors, a few others have eschewed them as in conflict with this Court's precedent interpreting similar statutory language and/or lacking any basis in the text of the relevant statutes. Petitioner's case presents an ideal vehicle for this Court to resolve the longstanding division on this important question of statutory interpretation.

A. Many federal courts of appeals and some state courts have held that a trier of fact may consider the *Dost* factors to determine whether a visual depiction constitutes "lascivious exhibition," even though the factors lack a textual basis and conflict with this Court's precedent construing similar statutory language.

A majority of federal courts of appeals—the Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits—as well as a number of state courts have adopted the *Dost* factors for a trier of fact to consider when determining whether a visual depiction constitutes a "lascivious exhibition of the anus, genitals, or public area of any person." The *Dost* case itself was affirmed by the Ninth Circuit under a co-defendant's name, although the Ninth Circuit observed that aspects of the district court's formulation went "beyond what [was] necessary to find the picture within the statutory definition." *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). Despite that initial concern, the six-factor test continues to be treated in the Ninth Circuit as the "typical starting point for determining

whether a particular image is lascivious, and therefore pornographic." *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017). The Ninth Circuit regularly cautions, however, that the *Dost* factors "are neither exclusive nor conclusive," and that other relevant factors may be considered in a particular case. *Id.* (quoting *United States v. Overton*, 573 F.3d 679, 686-87 (9th Cir. 2009)).

Reliance on the *Dost* factors quickly spread to other circuits. A few months after the Ninth Circuit affirmed *Dost* in *Wiegand*, the Fifth Circuit upheld as "legally correct" a jury instruction that the district court had given at the government's request that recited the six *Dost* factors, although *Dost* goes uncredited as the source. *United States v. Rubio*, 834 F.2d 442, 448 (5th Cir. 1987); *see United States v. Carroll*, 190 F.3d 290, 297 (5th Cir. 1999), *opinion withdrawn in part, reinstated in relevant part on reh'g*, 227 F.3d 486 (5th Cir. 2000). The use of the factors within the circuit has been further solidified by their addition to the pattern jury instructions, as noted in the Fifth Circuit's opinion in petitioner's case. *United States v. Gace*, ___ Fed. Appx. ___, No. 20-40718, 2021 WL 5579273, at *2 (5th Cir. Nov. 29, 2021).

Two years later, the Third and Tenth Circuits both followed suit. According to the Third Circuit, the meaning of the word "lascivious" "is less than crystal clear," and the *Dost* factors "provide specific, sensible meaning." *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989). *Villard* established parameters for considering the *Dost* factors in that a jury should be instructed on all six factors, all six do not need to be present, and "more than one factor must be present in order to establish 'lasciviousness.'" *Id.* The Tenth Circuit, in adopting the *Dost* factors, "wholly agree[d]" with the Third Circuit's *Villlard*

opinion that not all of the *Dost* factors must be present. *United States v. Wolf*, 890 F.2d 241, 245 (10th Cir. 1989). But the Tenth Circuit parted ways with the Third by holding that a finding of lasciviousness could be made based on the presence of only one *Dost* factor. *Id.* at 245 n.6.

A decade later, the Eighth Circuit also adopted the *Dost* factors. *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999). But the Eighth Circuit later modified its multi-factor analysis, again taking its cue a Ninth Circuit's affirmance of a district court's formulation, to add two more factors to its model jury instruction: "(7) whether the image portrays the minor as a sexual object; and (8) any captions on the images." *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019) (citing Eighth Circuit Model Criminal Jury Instructions 6.18.2252A)).[1]

The Sixth Circuit first joined these circuits in an unpublished opinion by relying on the *Dost* factors to evaluate a sufficiency-of-the-evidence challenge. *United States v. Campbell*, 81 Fed. Appx. 532, 536 (6th Cir. 2003) (unpublished). A few years later, the Sixth Circuit did so in a published decision. *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009). The *Dost* factors have been incorporated into the circuit's pattern jury instructions, and have been described by the court as giving "the legal definition of 'lasciviousness.'" *United States v. Guy*, 708 Fed. Appx. 249, 261-62 (6th Cir. 2017) (unpublished).

[1] The seventh and eighth factors were originally adopted by a district court in the Northern District of California and approved by the Ninth Circuit in *United States v. Arvin*, 900 F.2d 1385, 1390-92 & n.4 (9th Cir. 1990). Other courts have not embraced these additional factors.

By contrast, the Second Circuit has explained that the factors "are not definitional" and has recognized "valid criticisms" of the *Dost* factors. *United States v. Rivera*, 546 F.3d 245, 250, 252 (2d Cir. 2008). Nevertheless, the Second Circuit has held that a district court does not err in recommending to the jury "the *Dost* factors as considerations, making any adaptations or allowances warranted by the facts and charges in a particular case." *Rivera*, 546 F.3d at 252-53.

The Eleventh Circuit initially declined to embrace the *Dost* factors, finding that the case before it did not "not require a multi-factor analysis" given that the images were "blatantly lascivious." *United States v. Grzybowicz*, 747 F.3d 1296, 1306 (11th Cir. 2014). Later on, however, the court indicated its approval of the *Dost* factors by analyzing a sufficiency claim with reference to them, and noted without criticism that "[the court] provide[s] the *Dost* factors as the definition of lascivious exhibition in [its] model jury instructions." *United States v. Hunter*, 720 Fed. Appx. 991, 996 (11th Cir. 2017) (unpublished).

A number of state courts of last resort have likewise adopted the *Dost* factors for use in their jurisdictions where the state's statute uses language that is similar to the federal counterpart. *See, e.g.*, *State v. Sawyer*, 225 A.3d 668, 676-77 (Conn. 2020); *State v. Smith*, 873 N.W.2d 169, 193 (Neb. 2016); *Purcell v. Commonwealth*, 149 S.W.3d 382, 391-92 (Ky. 2004), *overruled on other grounds by Commonwealth v. Prater*, 324 S.W.3d 393 (Ky. 2010), *and holding on other grounds modified by Mason v. Commonwealth*, 331 S.W.3d 610 (Ky. 2011); *People v. Lamborn*, 708 N.E.2d 350, 354 (Ill. 1999).

In sum, a majority of federal circuits and some state courts have adopted the *Dost*

factors. And, in a number of those jurisdictions, the *Dost* factors have taken on definitional status and become entrenched in model or pattern jury instructions, despite their lack of a textual basis and without regard to this Court's precedent construing similar statutory language.

B. The First, Seventh, and D.C. Circuits and Tennessee Supreme Court have rejected the *Dost* factors as in conflict with this Court's precedent and/or lacking any basis in the statutory text.

A minority of federal appellate courts—the First, Seventh, and D.C. Circuits—and one state court of last resort have bucked the trend and rejected the *Dost* factors. Most recently, a panel of the D.C. Circuit, over a dissent, thoroughly analyzed the issue and held that the *Dost* factors should not be used in that circuit. *See United States v. Hillie*, 14 F.4th 677, 689 (D.C. Cir. 2021), *petition for rehearing filed* (No. 19-3027). The majority began by construing the statutory phrase "lascivious exhibition of the anus, genitals, or pubic area" in light of this Court's precedent. *Id.* at 684-89. The D.C. Circuit found guidance 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, Inc.*, 513 U.S. 64 (1994); and *United States v. Williams*, 553 U.S. 285 (2008). Beginning with *Miller*, the D.C. Circuit noted that the opinion included "lewd exhibition of the genitals" as an example and yet "described its holding as applying only to patently offensive 'hard core' sexual conduct." *Hillie*, 14 F.4th at 684 (quoting *Miller*, 413 U.S. at 27). The D.C. Circuit further observed that in *12 200-Foot Reels*, a case decided the same day as *Miller*, the Court had indicated its readiness to construe terms like lewd and lascivious as limited "to patently offensive representations or descriptions of that

specific 'hard core' sexual conduct given as examples in *Miller*," if a serious doubt about the vagueness of those terms were to arise. *Hillie*, 14 F.4th at 684 (emphasis omitted) (quoting *12 200-Foot Reels*, 413 U.S. at 130 n.7).

From *Ferber*, the D.C. Circuit again noted the inclusion of "lewd exhibition of the genitals" in the New York child pornography statute that was before the Court. Although the Court rejected the applicability of *Miller*'s test for obscenity in the child pornography context, the *Ferber* Court still "emphasized . . . that '[t]here are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment.'" *Hillie*, 14 F.4th at 684-85 (quoting *Ferber*, 458 U.S. at 764). One such limit is that the banned category of sexual conduct must "be suitably limited and described." *Ferber*, 458 U.S. at 764. The state statute at issue in *Ferber* met that standard, explained the *Ferber* Court, because the statute identified the prohibited acts "with sufficient precision" and the listed acts "represent[ed] the kind of conduct that, if it were the theme of a work, could render it legally obscene," including lewd exhibition of the genitals. *Id.* at 765. And, the *Ferber* Court noted that *Miller* had identified "lewd exhibition of the genitals" as "an example of a permissible regulation." *Id.* (citing *Miller*, 413 U.S. at 25). The D.C. Circuit in *Hillie* found significance in the fact that *Ferber* "reiterated that 'the reach of the statute is directed at the *hard core* of child pornography.'" *Hillie*, 14 F.4th at 773 (emphasis added by *Hillie*) (quoting *Ferber*, 458 U.S. at 773).

Turning to *X-Citement Video*, the D.C. Circuit explained that the Court in that case had rejected vagueness and overbreadth challenges to the term "lascivious exhibition" of the genitals in 18 U.S.C. § 2256(2)(A)(v) "because, as the Court of Appeals had explained,

'[l]ascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California* and in *Ferber*." *Hillie*, 14 F.4th at 685 (quoting *United States v. X-Citement Video*, 982 F.2d 1285, 1288 (9th Cir. 1992), and citing *X-Citement Video*, 513 U.S. at 78-79, as "adopting the reasoning of the Court of Appeals"). Significantly, in rejecting those challenges, the Court in *X-Citement Video* "expressly engrafted the 'hard core' characterization of the prohibited 'lascivious exhibition of the genitals' from *Miller* onto the construction of the federal child pornography statute." *Hillie*, 14 F.4th at 685. Although Justice Scalia dissented, he agreed with that part of the majority opinion, focusing on the phrase "sexually explicit conduct" and interpreting that phrase, as defined in the federal child pornography statute to not cover "mere nudity" but various types of sexual conduct and the "lascivious exhibition of the genitals," as involving "not the clinical, the artistic, nor even the risqué, but *hard-core pornography*." *Id.* (emphasis added by *Hillie*) (quoting *X-Citement Video*, 513 U.S. at 84 (Scalia, J., dissenting)).

Lastly, the D.C. Circuit looked to *Williams*, where this Court heard another overbreadth challenge to another federal child pornography statute, this time the promotion prohibition of 18 U.S.C. § 2252A(a)(3)(B). Justice Scalia, writing for the Court majority this time, "rejected the overbreadth challenge based, in part, on [the Court's] finding that 'sexually explicit conduct' includes only conduct akin to that defined by the New York statute upheld in *Ferber*." *Hillie*, 14 F.4th at 685. In fact, the *Williams* Court emphasized the word "explicit" in "sexually *explicit* conduct" and observed that the use of that word, as opposed to the phrase "sexual conduct" in *Ferber*, made the former "more immune from

facial constitutional attack." *Williams*, 553 U.S. at 296. According to the D.C. Circuit, the Court in *Williams* "made clear that 'sexually explicit conduct' as used in the federal child pornography statutes must be construed consistently with the 'sexual conduct' prohibited in *Ferber*." *Hillie*, 14 F.4th at 686. The D.C. Circuit further noted *Williams*'s use of the *noscitur a sociis* canon of statutory construction, a "commonsense canon . . . 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 (quoting *Williams*, 553 U.S. at 294-95).

Drawing on the statutory constructions in these cases, the D.C. Circuit concluded that it was necessary to construe the phrase "lascivious exhibition of the anus, genitals, or pubic area" in § 2256(2)(A)(v) to "cover 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." *Hillie*, 14 F.4th at 686-87. Given that construction, the D.C. Circuit went on to reject the government's argument in favor of construing the phrase "lascivious exhibition of the genitals" in accordance with the *Dost* factors. *Id.* at 689.

The D.C. Circuit articulated several reasons for rejecting the *Dost* factors. First, the circuit criticized *Dost*'s conclusions that Congress had intended to expand the coverage of child pornography statutes by replacing "lewd" with "lascivious" in the 1984 amendments and that Congress believed that "lewd" was too restrictive due to its association with obscenity standards. *Hillie*, 14 F.4th at 689. *Dost*'s sole source was a single floor statement of one senator. *Id.* Furthermore, that reading of "lascivious" as broader than "lewd"

conflicted with the later-issued *X-Citement Video*. *Hillie*, 14 F.4th at 689.

Second, *Dost*'s error of not equating "lascivious" and "lewd" caused the district court to overlook *Miller* and *12 200-Foot Reels*, which had held that "'lewd exhibition of the genitals' refers to 'hard core' sexual conduct." *Hillie*, 14 F.4th at 689-90. Curiously, the Ninth Circuit in its opinion affirming *Dost* equated "lascivious" and "lewd" and thus relied on *Miller* to reject a vagueness challenge to the phrase "lascivious exhibition of the genitals." *Hillie*, 14 F.4th at 690. Yet the Ninth Circuit, like the district court, overlooked *Miller*'s construction of the phrase. *Id.*

Third, the sixth *Dost* factor in particular conflicts with *Williams*. *Hillie*, 14 F.4th at 690. That factor calls for the trier of fact to consider whether the depiction is "designed to elicit a sexual response in the viewer." *Id.* But the D.C. Circuit read *Williams* as "expressly reject[ing] that line of reasoning." *Hillie*, 14 F.4th at 690. *Williams* held that a defendant's subjective belief in an image's lasciviousness is insufficient; rather, "the material in fact (and not merely in his estimation) must meet the statutory definition." *Williams*, 553 U.S. at 301. In addition, the *Dost* factors conflict with the "basic teaching" of *Williams*—that ""sexually *explicit* conduct" connotes actual depiction of the sex act rather than merely the suggestion that is occurring'"—by "allowing 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* conduct." *Hillie*, 14 F.4th at 691 (quoting *Williams*, 553 U.S. at 297). In its rejection of the *Dost* factors, the D.C. Circuit acknowledged that it was creating a split with the Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits. *Hillie*, 14 F.4th at 691-92.

The Tennessee Supreme Court has also disapproved of the *Dost* factors. *See State v. Whited*, 506 S.W.3d 416, 438 (Tenn. 2016). The court did so for more practical than statutory construction reasons. The court recounted the origin of the *Dost* factors and the federal and state courts that had adopted them. *Id.* at 432-34. But the court noted the unworkability of the factors, with courts often "becom[ing] bogged down in disputes over" the meaning or application of a given *Dost* factor. *Id.* at 434. In addition, the court recapped the "significant controversy" over the years about how to interpret the sixth factor, with some courts using a subjective test, examining the depiction from the defendant's or a "like-minded pedophile['s]" perspective, while others employ an objective one, considering the "average viewer['s]" response. *Id.*

The court further described the evolving view of the First Circuit. At first, that circuit "gave a qualified endorsement of the *Dost* factors." *Id.* at 435 (*United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999)). But later on, the First Circuit changed course and criticized a district court's overemphasis of the *Dost* factors by "accord[ing] to them the same status as the statutory definition itself." *Id.* (quoting *United States v. Frabizio*, 459 F.3d 80, 87 (1st Cir. 2006)). The Tennessee Supreme Court also highlighted a Seventh Circuit case where the court found no error in a district court's use of the *Dost* factors to instruct the jury, but then "discourage[d]" district courts from using the factors in the future. *Id.* (citing *United States v. Price*, 775 F.3d 828, 831 (7th Cir. 2014)).

Regarding the district court's opinion in *Dost* itself, the Tennessee Supreme Court found its "attempt to set forth 'general principles' and identify important factors in making lascivious determinations [to be] a laudable attempt to place structure on the sometimes

amorphous legal analysis surrounding pornography, especially child pornography." *Id.* at 436. But, in light of other courts' struggles and experiences, the Tennessee Supreme Court found that the factors "often create more confusion than clarity." *Id.* at 437 (quoting *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring)). The court was also concerned that, despite oft-recited caveats about the factors being non-exhaustive, many courts "seem[ed] 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." *Id.* at 437.

Ultimately, the court concluded that these disputes pulled courts "'far afield' from the task at hand, namely, applying the statutory language to the materials at issue." *Id.* (quoting *Frabizio*, 459 F.3d at 88). To avoid this "analytical quicksand," the Tennessee Supreme Court rejected the *Dost* factors. *Id.* In doing so, the court "agree[d] with the First Circuit that phrases such as 'sexual activity' and 'lascivious exhibition' are 'terms that lay people are perfectly capable of understanding' and that they can be identified by the trier of fact through commonsense observation of the particular features of the subject materials." *Id.* (quoting *Frabizio*, 459 F.3d at 88).

C. The question is important and this petition presents an ideal vehicle for resolving it.

Various federal and state courts are intractably divided as to whether the *Dost* factors are appropriate for a trier of fact to consider when making the sensitive determination about a particular image's lasciviousness. As it currently stands, the happenstance of geography can decide whether the possession of an image subjects a

person to a mandatory minimum of five years in federal prison or not. *See* 18 U.S.C. § 2252(b)(1). For example, the D.C. Circuit's rejection of the *Dost* factors led it to conclude that no rational trier of fact could find that the conduct depicted in the hidden-camera videos at issue in *Hillie* constituted a lascivious exhibition of the genitals. *Hillie*, 14 F.4th at 688. Rather, the videos depicted a minor engaging in "ordinary grooming activities, some dancing, and nothing more." *Id.* Although the videos depicted the minor's nude body and "fleeting views of her pubic area," the court concluded that "[t]here is certainly nothing that could be reasonably described as 'hard core,' sexually explicit conduct." *Id.* at 688-89. Similarly, the Tennessee Supreme Court found that the hidden-camera videos before it did not depict "'sexual activity,' defined as the 'lascivious exhibition' of the minor's private body areas" because the videos showed the minors "engaging in everyday activities that [were] appropriate for the settings," such as showering in a bathroom or changing clothes in a bedroom. *Whited*, 506 S.W.3d at 442, 447. On the other hand, the Fifth, Eighth, and Tenth Circuits have upheld convictions based on hidden-camera videos depicting minors engaging in ordinary activities in a bathroom. *United States v. Wells*, 843 F.3d 1251, 1255 (10th Cir. 2016); *United States v. McCall*, 833 F.3d 560, 561, 564 (5th Cir. 2016); *United States v. Ward*, 686 F.3d 879, 881-84 (8th Cir. 2012).

This case presents an ideal vehicle for the Court to resolve the division. The issue was raised in the district court and preserved for further review on appeal, and so no procedural hurdles hinder review of the question presented. Moreover, the outcome of the question presented clearly matters to petitioner's case. Petitioner's Count One conviction would not be valid under the *Hillie* test, because the images that were the subject of that

count do not meet the D.C. Circuit's construction of the relevant statutory language. But since petitioner's prosecution arose in a circuit that uses the *Dost* factors, a jury was able to convict him for conduct that would not be criminal under the D.C. Circuit's test, based on the atextual consideration of whether the image was "designed to elicit a sexual response in the viewer." Given that numerous courts have weighed in on the issue and the divide among them is longstanding, this Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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