No. 21-7259

IN THE SUPREME COURT OF THE UNITED STATES

KEITH PRESCOTT GACE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed legal error in providing the jury with non-exhaustive factors that it could consider in determining whether images produced by petitioner featured a "lascivious exhibition of the genitals or pubic area" of the victim, 18 U.S.C. 2256(2)(A)(v) (2012), and thus constituted child pornography under 18 U.S.C. 2251(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is available at 2021 WL 5579273.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2021. The petition for a writ of certiorari was filed on February 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and (b)(1); receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and (b)(1); possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2); and attempting to destroy property, in violation of 18 U.S.C. 2232(a). Judgment 1-2; Indictment 3-4. Following a jury trial, petitioner was additionally convicted of sexually exploiting a child, in violation of 18 U.S.C. 2251(a) and (e). Judgment 1; Indictment 2-3. He was sentenced to 1020 months of imprisonment, to be followed by a lifetime term of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. A1-A4.

1. On October 5, 2016, Dropbox, Inc., a company that provides cloud-based electronic storage services, reported to the National Center of Missing and Exploited Children that a user was storing or transferring suspicious images through Dropbox services. Gov't C.A. Br. 3. Law enforcement conducted an investigation and discovered that the Dropbox account in question belonged to petitioner and that the material consisted of pornographic videos of children. Ibid.

On January 25, 2018, law enforcement conducted a warrant-authorized search of petitioner's home. Gov't C.A. Br. 4. Petitioner was home with his 12-year-old stepson C.R. and his nine-

year-old biological daughter M.V.1 ("minor victim #1"). Ibid. Petitioner answered the door in his underwear. Ibid. After officers asked him to get dressed, petitioner went to his bedroom, retrieved his cell phone, walked to the bathroom sink, and attempted to submerge his phone in water to render the data irretrievable. Ibid.

In an interview, petitioner denied having a Dropbox account. Gov't C.A. Br. 4. An officer then showed petitioner three images from the Dropbox account, all of which petitioner admitted to having seen previously. Ibid. The first was a collage depicting a four-to-five-year-old girl lying naked on a bed "with her legs exposed showing her anus and her vagina" and the same girl "lying on the bed with an adult male's erect penis touching her on the vagina." Id. at 4-5 (citation omitted). The second photo showed two naked, approximately seven-to-eight-year-old girls sitting in a sauna; one girl had "her legs spread with her vagina" visible. Id. at 5. The third photo showed an approximately seven-to-nine-year-old girl standing partially naked. Ibid. She was topless and wore pink velour pants pulled down to just above her knees. "[T]he central focus appear[ed] to be the child's vagina." Ibid. (citation omitted).

Petitioner also maintained a second Dropbox account. Gov't C.A. Br. 6. In that account, officers found nude images of his nine-year-old daughter, M.V.1. Ibid. The images included: two pictures of M.V.1 sitting naked on her bed with an adult hand on

her back and a silver vibrator visible next to her leg, ibid.; 11/19/19 Trial Tr. (Tr.) 174 (government closing argument); three pictures of M.V.1 naked in bed, with the comforter placed in a manner that highlighted and exposed her buttocks and vagina; and four pictures of M.V.1 standing in the bathtub in different poses that drew attention to her buttocks and vagina, Gov't C.A. Br. 6.

In all, petitioner's two Dropbox accounts and his electronic devices contained 1903 images and 208 videos of young children engaged in sexually explicit conduct. Gov't C.A. Br. 6. In addition to maintaining pictures in his Dropbox accounts, petitioner also participated in electronic chats about acquiring child pornography, in which he expressed his preference for child pornography involving boys and girls aged 0-12. Id. at 5-6. He distributed and received child pornography via the same online messaging service. Id. at 6.

2. On February 27, 2019, a federal grand jury in the Southern District of Texas returned a five-count indictment charging petitioner with distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and (b)(1); receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2)(B) and (b)(1); possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2); attempting to destroy property, in violation of 18 U.S.C. 2232(a); and sexually exploiting a child, in violation of 18 U.S.C. 2251(a) and (e). Indictment 2-4.

On November 6, 2019, petitioner pleaded guilty to all counts of the indictment except the sexual-exploitation count. Gov't C.A. Br. 2; see Pet. App. A1-A2. Petitioner proceeded to trial on that count, which was based on the images of his daughter, M.V.1. Gov't C.A. Br. 2, 6; Indictment 2-3.

The child sexual-exploitation statute makes it a crime to "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. 2251(a). "'[S]exually explicit conduct,'" in turn, means "sexual intercourse," "bestiality," "masturbation," "sadistic or masochistic abuse," or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A) (2012).

The district court instructed the jury that "not every exposure of the genitals or pubic area constitutes lascivious exhibition." Jury Instructions 12. The court informed the jury that it:

> may consider such factors as whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the depiction is sexually suggestive, that is, in a place or pose 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 nude; whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or whether the depiction is designed to elicit a sexual response in the viewer.

Id. at 12-13. The court explained that "[t]his list is not exhaustive, and no single factor is dispositive." Id. at 13. And

it made clear that "[w]hether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material." Id. at 12.

The jury found petitioner guilty. Pet. App. A1.

3. The court of appeals affirmed. Pet. App. A1-A4. It rejected petitioner's argument that the district court erred in permitting the jury to consider whether the images were designed to elicit a sexual response in the viewer. The court of appeals observed that the district court's instruction was consistent with circuit precedent and pattern jury instructions, and found no abuse of discretion. Id. at A3.

ARGUMENT

Petitioner contends (Pet. 13-19) that the district court erred in its instructions to the jury on the meaning of "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012). Petitioner largely, if not entirely, forfeited that argument by proposing most of the instruction that he now criticizes and challenging only one aspect of the given instruction in the court of appeals. In any event, petitioner's contention lacks merit; this Court has repeatedly denied petitions for writs of certiorari in cases challenging the use of factors like the ones that the district court identified here;[1] and any disagreement in the lower courts is narrow, nascent, and may resolve itself. Further review is unwarranted.

[1] See, e.g., Fernandez v. United States, 141 S. Ct. 2865 (2021) (No. 20-7460); Courtade v. United States, 140 S. Ct. 907 (2020) (No. 19-428); Rockett v. United States, 140 S. Ct. 484

1. In his petition for a writ of certiorari, petitioner challenges the full list of non-exhaustive factors that the district court identified for the jury to consider in determining whether the images at issue constituted a "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012). Pet i. But in the district court, petitioner affirmatively proposed all of those factors except the sixth, "whether the depiction is designed to elicit a sexual response in the viewer." Jury Instructions 13; see D. Ct. Doc. 41 at 2 (Nov. 15, 2019) (petitioner's proposed jury instructions). Similarly, in the court of appeals, petitioner challenged only the sixth factor. Pet. C.A. Br. 55. As a result, the court of appeals limited its analysis to that factor, and did not address the broader list. See Pet. App. A3.

Contrary to petitioner's contention (Pet. 20), this case is therefore not a suitable vehicle for resolving the question presented. See McLane Co. v. EEOC, 137 S. Ct. 1159, 1170 (2017) ("[W]e are a court of review, not first view.") (citation omitted); United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted). At a minimum, his challenge to the factors as

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(2019) (No. 18-9411); Wells v. United States, 138 S. Ct. 61 (2017) (No. 16-8379); Miller v. United States, 137 S. Ct. 2291 (2017) (No. 16-6925); Holmes v. United States, 137 S. Ct. 294 (2016) (No. 15-9571). The pending petition for a writ of certiorari in Barnes v. United States, No. 21-6934 (filed Jan. 19, 2022), raises a similar issue.

a whole would be subject to plain-error review. See Fed. R. Crim. P. 52(b). A showing of plain error requires establishing "an error or defect" that was "clear or obvious," that "affected the [defendant's] substantial rights," and that "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" Puckett v. United States, 556 U.S. 129, 135 (2009) (brackets and citation omitted). Petitioner has not suggested that he could satisfy that standard, nor would he be able to do so.

2. Even if petitioner had preserved his objection to each of the factors, that objection would lack merit. The statute does not define the term "lascivious," 18 U.S.C. 2256(2)(A)(v) (2012), which accordingly takes its ordinary meaning. See, e.g., Perrin v. United States, 444 U.S. 37, 42 (1979). The word "lascivious" means "[i]nciting to lust or wantonness." 8 The Oxford English Dictionary 666-667 (2d ed. 1989) (emphasis omitted); see Webster's Third New International Dictionary 1274 (2002) ("tending to arouse sexual desire"); see also, e.g., United States v. Al-Awadi, 873 F.3d 592, 600 (7th Cir. 2017) ("We have said that a lascivious exhibition 'is one that calls attention to the genitals or pubic area for the purpose of eliciting a sexual response in the viewer.'") (citation omitted); United States v. Courtade, 929 F.3d 186, 191-192 (4th Cir. 2019) (as amended July 10, 2019) (examining definitions), cert. denied, 140 S. Ct. 907 (2020).

The district court's instruction in this case was consistent with that plain meaning. The court made clear that "not every exposure of the genitals or pubic area constitutes lascivious exhibition." Jury Instructions 12. And it informed jurors that they "may consider" several commonsense factors, including "whether the focal point of the visual depiction is on the child's genitalia or pubic area" and "whether the depiction is designed to elicit a sexual response in the viewer." Id. at 12-13; see, e.g., United States v. Rivera, 546 F.3d 245, 252-253 (2d Cir. 2008) (explaining that such factors "impose useful discipline on the jury's deliberations"), cert. denied, 555 U.S. 1204 (2009). The court made clear that "this list is not exhaustive" and "no single factor is dispositive." Jury Instructions 13. Ultimately, "the 'lascivious exhibition' determination must be made on a case-by-case basis using general principles as guides for analysis," 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), cert. denied, 484 U.S. 856 (1987), and the district court here appropriately left it to the jury to determine whether the "visual depiction constitute[d] such a lascivious exhibition" based on "a consideration of the overall content of the material," Jury Instructions 12; see, e.g., United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999) ("The inquiry will always be case-specific.").

Petitioner suggests (Pet. 13-16) that the decision below conflicts with this Court's interpretation of the same or similar terms in prior decisions. But petitioner does not identify any respect in which the non-exhaustive considerations provided by the district court diverge from this Court's precedents. Indeed, those considerations interpret the phrase "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), in light of the Court's decision in New York v. Ferber, 458 U.S. 747 (1982), see Dost, 636 F. Supp. at 832, on which petitioner relies, see Pet. 14. Petitioner argues that this Court's caselaw limits "lascivious exhibition" to "actual depiction[s] of the sex act," Pet. 17 (citation omitted), but that interpretation cannot be squared with the plain text of the statute and would potentially render the phrase superfluous in light of the alternative statutory definitions of "sexually explicit conduct," which directly cover depictions of actual "sex act[s]." See 18 U.S.C. 2256(2)(A)(i)-(iv) (2012).

Petitioner suggests that the noscitur a sociis canon limits "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), to conduct "connot[ing] the commission of" the other four activities listed in the statute -- namely, "sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse," Pet. 16 (quoting United States v. Hillie, 14 F.4th 677, 686-687 (D.C. Cir. 2021)). But "lascivious exhibition" is not a catchall clause; instead, it is one of five, independent kinds of "'sexually explicit conduct'" listed in the statute. 18 U.S.C. 2256(2)(A)(i)-(v). It makes no

more sense to limit "lascivious exhibition" to conduct connoting the other list items than it would to limit those other list items in the same way -- for example, by limiting "sexual intercourse" to "sexual intercourse" "connot[ing]" "bestiality." Pet. 16 (citation omitted).

Finally, petitioner contends that the sixth factor, "whether the depiction is designed to elicit a sexual response in the viewer," Jury Instructions 13, improperly focuses on the defendant's "subjective" intent, rather than the objective characteristics of the image, Pet. 17. But the district court instructed the jury that "[w]hether a visual depiction constitutes such a lascivious exhibition requires a consideration of the overall content of the material," Jury Instructions 12, and this is not a case involving depictions of "everyday activities" of the sort on which petitioner premises his argument, Pet. 20 (citation omitted). Moreover, to the extent that petitioner's interpretation would exclude clandestine photography of minors in compromising positions, see ibid., it would be contrary to the statute's basic purpose. See, e.g., United States v. Petroske, 928 F.3d 767, 770-774 (8th Cir. 2019), cert. denied, 140 S. Ct. 973 (2020); United States v. Spoor, 904 F.3d 141, 146-150 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019); United States v. Holmes, 814 F.3d 1246, 1247, 1251-1253 (11th Cir.), cert. denied, 137 S. Ct. 294 (2016); see also United States v. Vallier, 711 Fed.

Appx. 786, 788 (6th Cir.) (per curiam), cert. denied, 139 S. Ct. 442 (2018).

3. Petitioner asserts (Pet. 9-19) that the lower courts are divided regarding whether and how to apply factors described in United States v. Dost, supra, in assessing whether a particular image involves "lascivious exhibition of the genitals or pubic area," 18 U.S.C. 2256(2)(A)(v) (2012). Petitioner overstates the tension in the lower courts, which does not warrant this Court's intervention.

Seven courts of appeals, including the court below, endorse the Dost factors as an aid in determining whether an image is lascivious. See Pet. 9-13; see also, e.g., Spoor, 904 F.3d at 150-151 & n.9 (2d Cir.); Salmoran v. Attorney Gen., 909 F.3d 73, 80 n.11 (3d Cir. 2018); United States v. McCall, 833 F.3d 560, 563 (5th Cir. 2016), cert. denied, 137 S. Ct. 686 (2017); United States v. Hodge, 805 F.3d 675, 680 (6th Cir. 2015); Petroske, 928 F.3d at 773-774 (8th Cir.); United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017); United States v. Isabella, 918 F.3d 816, 831 (10th Cir. 2019), cert. denied, 140 S. Ct. 2586 (2020). Petitioner asserts that the decision below conflicts with decisions from the Tennessee Supreme Court as well as the First, Seventh, and D.C. Circuits. Petitioner is incorrect as to the first three, and any tension with the fourth does not warrant this Court's review.

The Tennessee Supreme Court addressed the Dost factors in State v. Whited, 506 S.W.3d 416 (2016), concluding that "[l]ower

courts should refrain from using the Dost factors as a test or an analytical framework in" determining whether an image is lascivious under state law. Id. at 438. Moreover, even as to state law, the court made clear that it was not "preclud[ing] judges from using their good sense to consider these or any other features of a depiction that might tend to make it sexual or lascivious." Id. at 437. Whited accordingly cannot and does not conflict with the decision below.

The First Circuit has observed that "lascivious is a 'commonsensical' term and that there is no exclusive list of factors -- such as the so-called Dost factors -- that must be met for an image (or a film) to be 'lascivious.'" United States v. Silva, 794 F.3d 173, 181 (2015) (emphasis added; citation omitted). But as petitioner acknowledges (Pet. 18), the First Circuit has elsewhere given a "qualified endorsement of the Dost factors, stating that they are 'generally relevant and provide some guidance,'" even if they "'are neither comprehensive nor necessarily applicable in every situation,'" United States v. Frabizio, 459 F.3d 80, 87 (2006) (citation omitted). Thus, nothing indicates that the First Circuit would disapprove of their use as a flexible aid to the jury's specific consideration of the facts here.

The Seventh Circuit has "discouraged" the "mechanical application" of the Dost factors, though it has ultimately declined to decide whether to apply them. United States v. Miller, 829

F.3d 519, 525 n.1 (2016), cert. denied, 137 S. Ct. 2291 (2017); see United States v. Price, 775 F.3d 828, 838-840 (7th Cir. 2014) (no plain error in charging the jury as to the Dost factors but "discourag[ing] their routine use"). Consistent with that approach, the district court here made clear that the Dost factors are not "exhaustive, and no single factor is dispositive." Jury Instructions 13; see Tr. 180 (government closing argument) ("The list is not exhaustive, though. There may be something else in those pictures that you find helpful in your deliberations as you decide what these pictures are, what the defendant was intending or attempting to do when he produced them. No single factor is dispositive. You should look at all of it together.").

Finally, a divided panel of the D.C. Circuit interpreted the phrase "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v), in light of the canon of noscitur a sociis "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" one of the other listed activities, namely, "sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse," Hillie, 14 F.4th at 687-688. The majority clarified that it did not "mean to suggest that evidence concerning all matters described in the [Dost] factors is irrelevant or inadmissible at trial," but rather "simply reject[ed] the practice of instructing the jury on the Dost factors as a matter of course, or in a manner that suggests

those factors are sufficient to determine whether given conduct" satisfies the statute. Id. at 692. In dissent, Judge Henderson "agree[d] with most circuits * * * that the Dost factors are an appropriate, non-exclusive set of factors." Id. at 699 (footnotes omitted).

At the outset, any conflict between the decision below and Hillie would not warrant the Court's review at this time because the government's petition for panel and en banc rehearing is currently pending in that case. See Gov't C.A. Pet. for Reh'g, Hillie, supra (No. 19-3027). If the court of appeals grants the petition, it may eliminate the alleged conflict altogether. And in any event, the panel issued its opinion in Hillie just last year; the majority's view is an outlier; and it is far from clear that the majority's view would ultimately upset a conviction on facts like the ones in petitioner's case, which involves images that highlight and expose the buttocks and vagina of petitioner's nine-year-old daughter, Gov't C.A. Br. 6, and thus "connote[] the commission of sexual intercourse," Hillie, 14 F.4th at 687.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2022