No. 21-7259

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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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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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?

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner Keith Prescott Gace files this Reply to the Brief for the United States in Opposition ("BIO"). Contrary to the government's claims, the question presented has intractably divided various federal courts of appeals and state courts of last resort, the Court should not wait any longer to decide the important question of statutory interpretation, and the issue was preserved in petitioner's case.

Petitioner's petition for a writ of certiorari ("Pet.") describes at length the conflicting conclusions on the question presented by various federal courts of appeals and state courts. Pet. 9-19. Yet the government contends that there is no conflict between the Fifth Circuit's opinion in petitioner's case and the decisions of the Tennessee Supreme Court, First Circuit, and Seventh Circuit. The government is mistaken.

The government first claims that the Tennessee Supreme Court's decision "cannot" conflict with the decision in petitioner's case because the Tennessee Supreme Court was addressing state law. BIO 12-13. The government has overlooked that the Tennessee Supreme Court itself found "[f]ederal decisions on the question of lasciviousness [to be] useful for comparison because federal law is similar to Tennessee law in the area of child sexual exploitation." *State v. Whited*, 506 S.W.3d 416, 426 (Tenn. 2016). The *Whited* Court further explained that the federal and Tennessee statutes "both include the 'lascivious exhibition' of the genitals or pubic area," and it would thus "look particularly to federal caselaw for guidance in 'lascivious exhibition' cases." *Id.* The Tennessee Supreme Court went on to thoroughly review federal cases, including *United States v. Dost*, 636 F. Supp.

828 (S.D. Cal. 1986). *Whited*, 506 S.W.3d at 430-38. Surely the Tennessee Supreme Court would have noticed if these federal cases were irrelevant due to a salient difference between the federal and state statutes. For its part, the government never explains why the state-versus-federal distinction matters—a telling omission.

In addition, the government's "cannot conflict" claim is undermined by its own argument that "lascivious" is undefined in the federal statute and therefore "takes its ordinary meaning." BIO 8. Like its federal counterpart, the Tennessee statute in *Whited* does not define "lascivious." *See Whited*, 506 S.W.3d at 428. And the Tennessee Supreme Court rejected the *Dost* factors and relied on "the ordinary meaning" of the terms "sexual or lascivious" to hold that the videos at issue did not qualify as "the 'lascivious exhibition' of the minor's private body areas." *Id.* at 437, 447.

The government also argues that the Tennessee Supreme Court's decision "does not conflict" with the Fifth Circuit's decision in petitioner's case because the Tennessee 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.'" BIO 13 (quoting *Whited*, 506 S.W.3d at 437). But the government omits the beginning of that sentence, which is: "Our rejection of the *Dost* factors as a 'test' or an analytical framework . . . ." *Whited*, 506 S.W3d at 437. The Tennessee Supreme Court's "rejection of the *Dost* factors" stands in stark contrast to the Fifth Circuit's adoption of the *Dost* factors as the test for whether an image constitutes a lascivious exhibition in the circuit's pattern jury instructions, as the decision in petitioner's case notes. *See United States v. Gace*, ___ Fed. Appx. ___, No. 20-40718, 2021 WL 5579273, at *2 (5th Cir. Nov. 29,

2021) (unpublished) ("the district court's instruction followed the Fifth Circuit Pattern Jury Instructions, and the district court did not abuse its discretion") (citing Fifth Circuit Pattern Jury Instruction 2.84).

The government doubts the conflict between the petitioner's case and precedents of the First and Seventh Circuits, too. *See* BIO 13-14. Again, the government is wrong. More than two decades ago the First Circuit gave only "a *qualified* endorsement of the *Dost* factors," *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999) (emphasis added), and much more recently has criticized a district court's overemphasis of the *Dost* factors by "accord[ing] to them the same status as the statutory definition itself," *United States v. Frabizio*, 459 F.3d 80, 87 (1st Cir. 2006). The Seventh Circuit has expressly "discourage[d]" district courts from using the *Dost* factors. *United States v. Price*, 775 F.3d 828, 831 (7th Cir. 2014). That differs significantly from the state of the law in circuits like the Fifth Circuit, where the *Dost* factors are in the pattern jury instruction and are routinely used by district courts to instruct juries, even over objection as in petitioner's case. *See Gace*, 2021 WL 5579273, at *2; *United States v. Petroske*, 928 F.3d 767, 773 (8th Cir. 2019); *United States v. Guy*, 708 Fed. Appx. 249, 261-62 (6th Cir. 2017) (unpublished); *United States v. Hunter*, 720 Fed. Appx. 991, 996 (11th Cir. 2017) (unpublished).

The government also attempts to cast doubt on the conflict's existence because the jury in petitioner's case was instructed that the *Dost* factors are non-exhaustive. BIO 14. Common sense tells another story. Imagine jury deliberations. Will the jury focus on the specific enumerated factors that the district court identifies for them? Or will the jury focus on unarticulated, undefined factors? The Tennessee Supreme Court soundly rejected the

effectiveness of caveats about the *Dost* factors' exhaustiveness:

> 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. *Frabizio*, 459 F.3d at 88. 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.

State v. Whited, 506 S.W.3d 416, 437 (Tenn. 2016) (footnotes omitted).

Regarding the conflict between the Fifth Circuit and the D.C. Circuit, the government admits that a split exists, as it must—the D.C. Circuit expressly acknowledged that it was parting ways with not only the Fifth but the Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits. *United States v. Hillie*, 14 F.4th 677, 691-92 (D.C. Cir. 2021), *petition for rehearing filed* (No. 19-3027). Despite that express conflict, the government still resists recommending that the Court grant the petition "at this time," because it has filed a petition for panel and *en banc* rehearing in the D.C. Circuit. BIO 15. The government goes on to speculate that if the D.C. Circuit "grants the petition, it may eliminate the alleged conflict altogether," BIO 15, and thus claims that the conflict "may resolve itself." BIO 6. Petitioner has just shown that the conflict will persist even if the D.C. Circuit reserves course. Many months have passed since the government's petitions were filed in mid-December 2021. Furthermore, that the government sought *en banc* review in *Hillie* demonstrates that the

question presented is important and worthy of this Court's attention. Moreover, the arguments for and against the *Dost* factors have been well-aired in the lower courts since *Dost*'s publication more than three decades ago, in 1986. Since then, the factors have become widespread and entrenched, despite the lack of a textual basis for them.

The government asserts that this Court has "repeatedly denied" similar petitions, and cites six cases in a footnote. BIO 6-7.[1] But those petitions raised different questions presented, had obvious vehicle problems, or were filed before the Tennessee Supreme Court's *Whited* decision. *Fernandez v. United States*, S. Ct. No. 20-7460, and *Rockett v. United States*, S. Ct. No. 18-9411, asked different questions, respectively, of (1) whether First Amendment and Due Process concerns required the lasciviousness determination to be limited to the "four corners" of the image or whether context could be considered and (2) whether the judicial construction of "lascivious exhibition" rendered the statute vague and overbroad. Both *Courtade v. United States*, S. Ct. No. 19-428, and *Wells v. United States*, S. Ct. No. 16-8379, had obvious vehicle problems. The court of appeals in *Courtade* had not actually resolved either of the questions presented. The petitioner in *Wells* had "agreed in principle" in the court of appeals "that the *Dost* factors guide[d] [the] inquiry," and merely disputed their application. *United States v. Wells*, 843 F.3d 1251, 1254 (10th Cir. 2016). The petitions in *Miller v. United States*, S. Ct. No. 16-6925, and *Holmes v. United States*, S. Ct. No. 15-9571, were filed before the Tennessee Supreme Court published its decision in *Whited*.

[1] The government also cites a seventh case, *Barnes v. United States*, No. 21-6934 (filed Jan. 19, 2022), as pending. The Court denied that petition on May 31, 2022.

Even though the majority of circuits have adopted the *Dost* factors, that is no reason for this Court not to grant the petition. In its October Term 2018, the Court granted the petition in *Rehaif v. United States*, S. Ct. No. 17-9560, over the Solicitor General's opposition and despite unanimous agreement by the federal courts of appeals on the question presented, to decide an important question of interpreting a federal criminal statute.

The government quibbles with whether the petitioner adequately preserved the question presented below. BIO 7. He did. Petitioner aimed his objection in the district court at the so-called sixth *Dost* factor—whether the depiction is designed to elicit a sexual response in the viewer. He urged the district court to not include the sixth factor because it has been the subject of the most criticism. His objection cited *United States v. Steen*, 634 F.3d 822, 827-28 & n.26 (5th Cir. 2011), where the Fifth Circuit called the sixth factor "the most confusing and contentious of the *Dost* factors." His objection also cited the concurring opinion in *Steen* and its description of the sixth factor as "especially troubling" because the statute "d[oes] not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused" and the sixth factor "encourages both judges and juries to improperly consider a non-statutory element." *Id.* at 829 (Higginbotham, J., concurring). The D.C. Circuit's opinion in *Hillie* was not issued until nearly two years after petitioner's trial. On appeal to the Fifth Circuit, petitioner had to raise his challenge as foreclosed, given that the Fifth Circuit has adopted the *Dost* factors and reviews jury instructions for an abuse of discretion. *Gace*, No. 20-40718, 2021 WL 5579273, at *2 (agreeing with petitioner's concession that "the district court's instruction followed the

Fifth Circuit Pattern Jury Instructions, and the district court did not abuse its discretion"). Although petitioner's question presented for this Court does not single out the sixth factor, it's the same issue that petitioner raised below—whether, as a matter of statutory interpretation, a jury or court should consider the *Dost* factors when they lack any basis in the statute's text.

The government asserts that petitioner hasn't identified how the *Dost* factors "diverge from this Court's precedents." BIO 10. Not so. Relying on the D.C. Circuit's *Hillie* decision, the petition explains at length how the *Dost* factors are in conflict with this Court's decisions 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). Pet. 13-17. For example, the petition highlights how *Dost* found significance in Congress's replacement of "lewd" with "lascivious" as indicating a supposed intent to broaden child pornography statutes, but that interpretation cannot be squared with this Court's conclusion in *X-Citement Video* that "'[l]ascivious' is no different in its meaning than 'lewd.'" *X-Citement Video*, 982 F.2d at 1288. Another example is this Court's emphasis on the term "explicit" in the statutory phrase "sexually *explicit* conduct" in cases like *Williams*. *See Williams*, 553 U.S. at 302. And yet the *Dost* factors permit conviction based on depictions of sexually *implicit* conduct. *See Hillie*, 14 F.4th at 691.

Finally, the government suggests that the images before the jury in petitioner's case might meet the D.C. Circuit's test because they "highlight and expose the buttocks and vagina of petitioner's nine-year-old daughter" and thus "'connote[] the commission of

sexual intercourse.'" BIO 15 (quoting *Hillie*, 14 F.4th at 687). There are two problems with that argument. First, the government exaggerates the sexual explicitness of the images charged in Count One of the indictment. Petitioner went to trial on Count One only, after pleading guilty to Counts Two through Four and admitting that the images charged in those counts met the statutory definition of child pornography. His defense for Count One was that those particular images were in the "gray area" and did not qualify as "lascivious exhibition," but his ability to make that argument was hamstrung by the *Dost* factors' expansive definition of the phrase. Second, the real question is whether the *jury* would have reached a guilty verdict had it been properly instructed that the images had to depict "sexually explicit conduct," as the statutory text requires, rather than mere implicit conduct, as permitted by the atextual *Dost* factors used in petitioner's case.

In sum, this case presents an ideal vehicle for this Court to resolve a question of statutory interpretation of great importance, on which no further percolation is necessary, and on which federal courts and state courts are hopelessly divided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: June 6, 2022

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