No. 23-5566

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT A. ANTHONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for sexually exploiting a minor or attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e) (2012).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Pa.)

United States v. Anthony, No. 15-cr-28 (July 15, 2021)

United States Court of Appeals (3d Cir.)

United States v. Anthony, No. 21-2343 (Nov. 30, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-5566

SCOTT A. ANTHONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-9) is not published in the Federal Reporter but is available at 2022 WL 17336206.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2022. A petition for rehearing was denied on February 1, 2023 (Pet. App. 1). On May 5, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and

---

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief uses the pagination of the pdf file on the Court's electronic docket.

including July 1, 2023. The petition was filed on June 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on eight counts of sexually exploiting a minor, in violation of 18 U.S.C. 2251(a) and (e) (2012). Judgment 1. He was sentenced to 192 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 3-9.

1. In March 2012, petitioner's girlfriend and her two daughters, ages 14 and 16, moved into petitioner's home. Pet. App. 5. Two months later, petitioner "instructed" the children to shower in the bathroom attached to his bedroom and "insisted" that the door to his walk-in closet connected to the bathroom remain open. Ibid. Petitioner also instructed that when one of the children needed to shower, the child should tell her mother, who would alert petitioner "so that [petitioner] could first retrieve anything that he needed from the bathroom." Ibid.

Unbeknownst to the others, when the girls were showering, petitioner set up a camera, "wrapped in black athletic tape to cover its shiny surfaces," in his closet to record the reflection in the bathroom mirror. Pet. App. 5; see C.A. App. 95-97, 142. Petitioner moved items from his walk-in closet and the bathroom sink out of the way "to get a more complete shot of the victims."

Presentence Investigation Report (PSR) ¶19; see C.A. App. 93-97, 105, 123-124, 136-138.

In May 2015, petitioner's girlfriend found the camera while tidying up petitioner's closet and contacted the police, who obtained a search warrant. Pet. App. 5-6; PSR ¶ 14. In addition to the camera, police found two flash drives secured in a gun safe that only petitioner could open. Pet. App. 6; PSR ¶¶ 16-17. The drives contained 49 videos capturing the children naked in the reflection in the bathroom mirror. Pet. App. 6; PSR ¶ 17. Eight videos showed the victims as minors. Ibid. The drives also held two photographs of the 14-year-old child focused on her buttocks and taken without her knowledge. Pet. App. 6; PSR ¶ 18. Petitioner labeled the folders where he kept the videos and photos as "Golf" or "Golf Swing." Ibid. (capitalization omitted).

2. A federal grand jury in the Western District of Pennsylvania indicted petitioner on eight counts of sexually exploiting a minor or attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e) (2012), based on the eight videos taken when the children were minors. Superseding Indictment 1-9. Section 2251 prohibits, among other things, "us[ing]" a minor to engage in "sexually explicit conduct" for the purpose of producing a visual depiction. 18 U.S.C. 2251(a) (2012).

For purposes of Section 2251(a), "'sexually explicit conduct' means actual or simulated" "(i) sexual intercourse," "(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) (2012); see Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299, § 7(c)(1), 132 Stat. 4389 (adding "anus" to subparagraph (v)). At trial, the government relied on subparagraph (v), arguing that the videos depicted a lascivious exhibition of the genitals or pubic area of the children. See Pet. App. 7. The jury saw portions of the eight videos and heard testimony from the victims, their mother, and a police officer. Id. at 6.

3. Petitioner moved for a judgment of acquittal, asserting that the videos showed "'basic hygienic behavior[,]'" not "'sexually explicit conduct' within the meaning of" Section 2251(a). Pet. App. 6-7. The district court denied the motion. 11/19/19 Tr. 106; see Pet. App. 7.

The district court looked to the factors articulated in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), affirmed sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987), to "guide" the inquiry into whether "there's a lascivious exhibition." 11/19/19 Tr. 99. Those factors consider (1) whether "the focal point" of the depiction "is on the child's genitalia or pubic area," (2) whether the depiction is "sexually suggestive," (3) whether "the child is depicted in an unnatural pose, or in inappropriate attire," (4) whether "the child is fully or partially clothed, or nude," (5) whether the depiction "suggests sexual coyness or a willingness to engage in sexual

activity," and (6) whether the depiction "is intended or designed to elicit a sexual response in the viewer." Dost, 636 F. Supp. at 832.

The court determined that the government had "produced sufficient evidence to at least submit this matter to the jury." 11/19/19 Tr. 106. The court then instructed the jury that it could consider the six Dost factors "as an aid" in determining whether any given video depicted a "lascivious exhibition" within the meaning of Section 2251. D. Ct. Doc. 114, at 37 (Nov. 21, 2019) (capitalization omitted) (jury instructions); see id. at 36-38. The instructions emphasized that "not every exposure of the genitals or pubic area of a child constitutes a lascivious exhibition" and that "the sixth factor," the intent or design of the depiction, "must be applied in a limited way." Id. at 35-37 (capitalization omitted).

The jury found petitioner guilty on all eight counts of sexually exploiting a minor. Pet. App. 7. The jury was instructed that if it found petitioner not guilty of exploitation on any given count, it should determine whether petitioner was guilty of attempted exploitation; but having found petitioner guilty of exploitation on each count, the jury had no occasion to reach the attempt question as to any count. See D. Ct. Doc. 114, at 43-45 (jury instructions on attempt); D. Ct. Doc. 118, at 1-8 (Nov. 21, 2019) (jury verdict form). The district court sentenced petitioner

to 192 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 3-9.

Viewing the evidence in the light most favorable to the verdict, the court of appeals determined that a rational juror could find that the videos depicted a "lascivious exhibition" of the children's genitals and pubic areas. Pet. App. 7-8. Recognizing that the Dost factors are "neither dispositive nor exhaustive," the court explained that a rational juror could find that the depictions satisfied several of those factors: petitioner positioned the camera so that the children's genitals and pubic areas were the "'focal point'"; a shower, especially with a camera pointed at it, "can be associated with sexual activity"; the videos showed the children "entirely nude"; and "the content of the videos, [petitioner's] repeated production of them, and the steps he took to conceal the videos from his family" showed that the videos were designed to "'elicit a sexual response'" Id. at 8-9. And the court found it "unsurprising" that the other factors -- unnatural posing and sexual coyness -- might be absent given that petitioner had "secretly record[ed]" the children. Id. at 9.

ARGUMENT

Petitioner renews his contention (Pet. 1-18) that insufficient evidence supported the jury's determination that the videos depicted a "lascivious exhibition of the genitals or pubic

area" under 18 U.S.C. 2256(2)(A)(v) (2012). The court of appeals correctly rejected that contention, and its unpublished decision does not conflict with any decision of this Court. And although the courts of appeals have relied to varying degrees on the Dost factors, any disagreement is narrow. This Court has repeatedly and recently denied petitions for certiorari raising similar issues,[2] and the same course is warranted here.

1. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence.

a. Under Section 2251, "[a]ny person who," inter alia, "employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," or any person who attempts to do so, is subject to criminal penalties. 18 U.S.C. 2251(a) and (e) (2012). The statute defines "sexually explicit conduct" to include, as relevant here, "actual or simulated * * * lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v) (2012).

---

[2] See, e.g., Cohen v. United States, 144 S. Ct. 165 (2023) (No. 22-7818); Lopez v. United States, 143 S. Ct. 1043 (2023) (No. 22-6845); Gace v. United States, 142 S. Ct. 2877 (2022) (No. 21-7259); Barnes v. United States, 142 S. Ct. 2754 (2022) (No. 21-6934); 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 (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 statute does not define "lascivious exhibition," which accordingly should take its ordinary meaning. See, e.g., Delaware v. Pennsylvania, 598 U.S. 115, 128 (2023). The word "lascivious" means "[i]nciting to lust or wantonness." 8 The Oxford English Dictionary 667 (2d ed. 1989). And "exhibition" means a "visible show or display." 5 The Oxford English Dictionary 537 (2d ed. 1989). Here, a rational juror could determine that the videos petitioner surreptitiously took of the children in the shower constituted a visible display designed to incite petitioner's lust.

Petitioner contends (Pet. 11-12) that, notwithstanding that ordinary meaning, the lascivious-exhibition provision was intended to cover only "hardcore" depictions akin to those involved in materials containing obscenity. In particular, petitioner argues (ibid.) that the term "lascivious" is identical to the term "lewd," which was used in a prior version of the statute, see Protection of Children Against Sexual Exploitation Act of 1977, § 2(a), 92 Stat. 8, and which the Court has viewed as in accord with the legal definition of obscenity, see New York v. Ferber, 458 U.S. 747, 764-765 (1982). But although the terms are analogous in many respects, and may largely overlap, the term "lascivious" covers the conduct that its ordinary meaning clearly includes.

Petitioner also contends (Pet. 3) that the noscitur a sociis canon narrows "lascivious exhibition" to conduct that "connotes the commission of one of the four sexual acts" listed in the

statute -- namely, "'sexual intercourse,' 'bestiality,' 'masturbation,' and 'sadistic or masochistic abuse.'" That contention lacks merit. The noscitur a sociis (or associated-words) canon applies only to items in a list that are "conjoined in such a way as to indicate that they have some quality in common." Antonin Scalia & Bryan A. Garner, Reading Law 196 (2012). Here, the five items in Section 2256(2)(A) are not meaningfully alike one another; instead -- as evidenced in part by the fact that each is contained in its own separately numbered subparagraph -- they define five different types of "sexually explicit conduct," each of which should be interpreted independently. 18 U.S.C. 2256(2)(A) (2012).

It would make no more sense to limit "lascivious exhibition" to conduct connoting the other listed items than it would to limit those other listed items in the same way -- for example, by limiting "masturbation" to "masturbation" connoting "bestiality." 18 U.S.C. 2256(2)(A) (2012). Indeed, such a limitation would render subparagraph (v) largely superfluous because the statute defines sexually explicit conduct to include not just "actual," but also "simulated," sexual intercourse, bestiality, masturbation, and sadistic or masochistic abuse. Ibid. A "lascivious exhibition" connoting one of the other actions almost certainly would qualify as a "simulat[ion]" of that other action as well. Ibid.

Petitioner additionally contends (Pet. 4-5) that "'lascivious exhibition'" must be evaluated based solely on "the minor's conduct." But although Section 2251 refers to depictions in which a minor "engage[s] in * * * any sexually explicit conduct," the focus of the statutory prohibition is on the defendant's behavior: he must not "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in" such conduct. 18 U.S.C. 2251(a) (2012). Thus, "a perpetrator can 'use' a minor to engage in sexually explicit conduct without the minor's conscious or active participation." United States v. Finley, 726 F.3d 483, 495 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014).

Indeed, because "lascivious" modifies "exhibition," "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for * * * himself or like-minded pedophiles." United States v. Wells, 843 F.3d 1251, 1255 (10th Cir. 2016) (brackets, citation, and emphasis omitted), cert. denied, 138 S. Ct. 61 (2017). Petitioner's contrary reading would implausibly narrow the statute by requiring a child victim to display a lustful manner even if she is unaware that she is being filmed, or too young to express sexual desire, or perhaps even unconscious or drugged. See Finley, 726 F.3d at 495.

b. As the courts of appeals generally have recognized, whether a depiction constitutes a lascivious exhibition of the genitals or pubic area of a child is a question for the factfinder,

to be determined using common sense. See, e.g., United States v. Miller, 829 F.3d 519, 525 (7th Cir. 2016) (leaving the question "to the factfinder to resolve, on the facts of each case, applying common sense") (citation omitted), cert. denied, 137 S. Ct. 2291 (2017); United States v. Frabizio, 459 F.3d 80, 85 (1st Cir. 2006) ("'Lascivious' is a 'commonsensical term,' and whether a given depiction is lascivious is a question of fact for the jury.") (citation omitted); United States v. Arvin, 900 F.2d 1385, 1390 (9th Cir. 1990) (describing "lasciviousness" as a "'commonsensical term'" and "a determination that lay persons can and should make") (citation omitted), cert. denied, 498 U.S. 1024 (1991).

To "guide" the factfinder's common sense, Pet. App. 5, lower courts generally instruct jurors on the six factors set forth in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), affirmed sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Those courts emphasize -- as the district court here did -- that the factors are "not dispositive and serve only as a guide." United States v. Larkin, 629 F.3d 177, 182 (3d Cir. 2010), cert. denied, 132 S. Ct. 313 (2011); see D. Ct. Doc. 114, at 37 (instructing the jury that the Dost factors "are provided to you merely as an aid in your decision about whether any particular image in question is sexually explicit conduct") (capitalization omitted). Lower courts also emphasize that the inquiry is "always" "case-specific." United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999).

Here, as the court of appeals explained, a rational juror could find that the videos satisfied the first, second, fourth, and sixth Dost factors. Pet. App. 8-9. On the first factor, the camera was positioned so that the children's genitals were the "'focal point'" of the videos; on the second, a shower is "associated with sexual activity[,]" particularly when a camera is "pointed" at it; on the fourth, the videos showed the children fully nude; and on the sixth, the court observed that the contents of the videos, petitioner's "repeated production" of the videos, and the "steps he took to conceal" the videos, permitted a factfinder to find that petitioner made the videos to "'elicit a sexual response' in himself." Ibid. As the court acknowledged, the videos did not meet every Dost factor, but the factors are "neither dispositive nor exhaustive." Id. at 8 (citing Larkin, 629 F.3d at 182, 184). And it is "unsurprising" that the videos did not show "'inappropriate attire,'" "'unnatural pose[s],'" or "'sexual coyness'" because petitioner secretly filmed the children while they were in the bathroom. Id. at 9.

Petitioner states that "courts must make an objective inquiry under the multi-factored test established in [Dost]," Pet. 2, but contends that he "may have committed a crime but it doesn't meet the Dost requirements." Pet. 7; see Pet. 16-18 (disagreeing with the court of appeals' application of the Dost factors in this case). That contention does not account for the sufficiency-of-the-evidence standard of review, under which "evidence is

sufficient to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Coleman v. Johnson, 566 U.S. 650, 654 (2012) (citation omitted). And in any event a factbound disagreement with the jury's and the court of appeals' respective applications of the Dost factors does not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioner suggests that the lower courts are divided on whether a "lascivious exhibition" requires the child to engage in a sex act (Pet. 5, 9-10, 15-16), the applicable standard of review (Pet. 15-16), and the use of the Dost factors (Pet. 10, 14-15, 18).[3] But any disagreements among the courts of appeals on those issues are narrow, nascent, and do not warrant this Court's review.

a. Petitioner contends (Pet. 5, 9-10, 15-16) that the decision below conflicts with decisions from the Fifth, Eighth, and D.C. Circuits as to whether a child must be engaged in a sex act for an image to be a "lascivious exhibition." But petitioner's reliance (Pet. 15-16) on the Fifth Circuit's decision in United States v. Steen, 634 F.3d 822 (2011), is misplaced, as that court has since made clear that "it is the depiction -- not the minor

[3] Petitioner also suggests (Pet. i) the existence of a "split with the 4th" Circuit. But the only Fourth Circuit decision that petitioner cites (Pet. 4) is United States v. McCauley, 983 F.3d 690 (2020), which involved a video of a minor engaging in sexual intercourse and did not address the meaning of "lascivious exhibition," the Dost factors, or any other issue relevant to this case. See id. at 692-693.

-- that must bring forth the genitals or pubic area to excite or stimulate," United States v. McCall, 833 F.3d 560, 563 n.4 (2016). And the Eighth Circuit panel decision on which petitioner relies (Pet. 5, 9) was vacated following a grant of rehearing en banc. See United States v. McCoy, 55 F.4th 658 (8th Cir. 2022), vacated, No. 21-3895, 2023 WL 2440852 (8th Cir. Mar. 10, 2023).

In United States v. Hillie, 39 F.4th 674 (2022), a divided panel of the D.C. Circuit viewed the phrase "lascivious exhibition" in Section 2256(2)(A)(v) to require the minor victim to display her "genitalia[] or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in any type of sexual activity." Id. at 685 (emphasis omitted). But Hillie is an outlier, and any conflict with the unpublished disposition below does not warrant this Court's review. And even if review of circuit disagreement were otherwise warranted, it would be premature, because the practical effect of Hillie remains unclear.

Both before[4] and after[5] Hillie, other courts of appeals upheld "lascivious exhibition" convictions where a defendant secretly recorded an unsuspecting minor who was sleeping, undressing to change clothes, using the toilet, or taking a shower. And even in the D.C. Circuit, conduct of that nature could result in a conviction for attempt under 18 U.S.C. 2251(e), which does not turn on the actual image produced. See United States v. Hillie, 38 F.4th 235, 241 n.1 (D.C. Cir. 2022) (per curiam) (Katsas, J., concurring in the denial of rehearing en banc) (observing that an attempt conviction could be supportable when a defendant "surreptitiously record[s] girls 'by hiding a video camera in the bathroom,'" because "a jury could readily infer that his intent in the girls [i]s sexual, not sartorial or urological."); pp. 18-20, infra.

---

[4] See, e.g., United States v. Goodman, 971 F.3d 16, 19 (1st Cir. 2020); United States v. Spoor, 904 F.3d 141, 146-150 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019); Finley, 726 F.3d at 494-495 (3d Cir.); United States v. Courtade, 929 F.3d 186, 191-193 (4th Cir. 2019), as amended (July 10, 2019), cert. denied, 140 S. Ct. 907 (2020); United States v. Vallier, 711 Fed. Appx 786, 788 (6th Cir.) (per curiam), cert. denied, 139 S. Ct. 442 (2018); Miller, 829 F.3d at 523-526 (7th Cir.); United States v. Ward, 686 F.3d 879, 881-884 (8th Cir. 2012); Wells, 843 F.3d at 1254-1257 (10th Cir.); United States v. Holmes, 814 F.3d 1246, 1248-1252 (11th Cir.), cert. denied, 137 S. Ct. 294 (2016).

[5] See, e.g., United States v. Close, No. 21-1962, 2022 WL 17086495, at *1-2 & n.2 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023); United States v. Clawson, No. 22-4141, 2023 WL 3496324, at *1-2 (4th Cir. May 17, 2023); Vallier v. United States, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023); United States v. Donoho, 76 F.4th 588, 599-600 (7th Cir. 2023); United States v. Boam, 69 F.4th 601, 613 (9th Cir. 2023).

b. Petitioner separately asserts a circuit conflict regarding the "usefulness of the Dost factors." Pet. 18; see Pet. 10 (asserting that "courts have begun to distance themselves from the Dost factors"); Pet. 15 (asserting that the Dost factors are "falling out of favor"). But any disagreement among the courts of appeals about the relevance and use of the Dost factors is narrow and does not warrant this Court's review, especially given the courts' uniform agreement that the Dost factors provide, at most, only a non-exhaustive guide for the factfinder to determine whether a particular depiction constitutes a lascivious exhibition.

Seven courts of appeals endorse the Dost factors only as an aid in determining whether a visual depiction is lascivious. See, e.g., Spoor, 904 F.3d at 150-151 & n.9 (2d Cir.); United States v. Heinrich, 57 F.4th 154, 161 (3d Cir. 2023); McCall, 833 F.3d at 563 (5th Cir.); United States v. Hodge, 805 F.3d 675, 680 (6th Cir. 2015); United States v. Petroske, 928 F.3d 767, 773-774 (8th Cir. 2019), cert. denied, 140 S. Ct. 973 (2020); United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017); Wells, 843 F.3d at 1253 (10th Cir.).

Four circuits have declined to take a definitive stance on the Dost factors, even while recognizing their utility. See, e.g., United States v. Sheehan, 70 F.4th 36, 46 n.4 (1st Cir. 2023) ("We caution that although we find these factors 'generally relevant' and useful for the guidance they provide, they are 'neither comprehensive nor necessarily applicable in every situation.'");

Courtade, 929 F.3d at 192 (4th Cir.) (explaining that the court "need not venture into the thicket surrounding the Dost factors" because the depiction of a young girl showering objectively constituted a lascivious exhibition); United States v. Miller, 829 F.3d 519, 525 n.1 (7th Cir. 2016) (explaining that the court "ha[s] discouraged * * * mechanical application" of the Dost factors, but declining to adopt or reject them); United States v. Hunter, 720 Fed. Appx. 991, 996 (11th Cir. 2017) (per curiam) (noting that the court's published decisions had not resolved "whether Dost applies in this circuit," but applying the Dost factors because "both Defendant and the Government use [them] in analyzing this question").

Only the D.C. Circuit has definitively "decline[d] to adopt the Dost factors." Hillie, 39 F.4th at 689. Yet even then, the court clarified that it "do[es] not mean to suggest that evidence concerning all matters described in the factors is irrelevant or inadmissible at trial." Ibid. Thus, although courts of appeals differ on whether they expressly adopt the Dost factors, they do generally agree that a jury may consider aspects of the depiction that those factors encompass. And given that the district court in this case expressly instructed the jury that the Dost factors were to be used "merely as an aid in your decision about whether any particular image in question is sexually explicit conduct," D. Ct. Doc. 114, at 37 (capitalization omitted), this case would

be a poor vehicle in which to address any disagreement about the proper consideration of those factors.

c. Petitioner additionally contends (Pet. 15-16) that courts of appeals apply different standards of review when assessing whether sufficient evidence supported a factfinder's determination that a visual depiction is lascivious. But in the court below, petitioner agreed that a conviction should be upheld against a sufficiency challenge "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, while viewing the evidence in the light most favorable to the Government." Pet. C.A. Br. 8; cf. Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view"). Moreover, petitioner identifies (Pet. 15-16) the court below as one of the courts that already applies the more defendant-friendly standard of review that he urges, so it is unclear how resolution of the alleged conflict would make a difference to the outcome of this case.

3. Finally, this case is a poor vehicle in which to address the broader question of what constitutes a "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), because petitioner's conduct was punishable as attempted sexual exploitation of a minor under 18 U.S.C. 2251(e) irrespective of the definition of "lascivious exhibition." Section 2251(e) prescribes the same punishment for attempt offenses as for completed ones. See 18 U.S.C. 2251(e). And here, petitioner was indicted on attempt

counts, see Superseding Indictment 1-9, and the jury was instructed on them, see D. Ct. Doc. 114, at 43-45. Had it needed to reach them, it would have found guilt on that equivalent alternative basis.

The ordinary meaning of the word "'attempt'" in criminal law encompasses "taking 'a substantial step' toward the completion of a crime with the requisite mens rea," United States v. Hansen, 599 U.S. 762, 775 (2023) (citation omitted), not actual completion of the offense. Accordingly, a defendant may be found guilty of attempting to create a visual depiction containing a lascivious exhibition whether or not the depiction ultimately contains such an exhibition. See, e.g., United States v. Sims, 708 F.3d 832, 835 (6th Cir. 2013) ("To convict [the defendant] of attempted production of child pornography, the government does not need to prove that the videos of [the minor] were actually lascivious.").

In this case, where petitioner set up a camera to film two minors in a bathroom, the jury would have found that petitioner intended to create a visual depiction of the children engaging in a lascivious exhibition of their genitals or pubic areas, and took substantial affirmative steps to further that goal. Petitioner deceived the children into using his bathroom to shower, required that his closet door remain open, asked them to notify him before showering so that he could set up the concealed camera and clear the sightline of any obstructions, deliberately aimed the camera to capture their genitals and pubic areas in the mirror, hid the

resulting video files in folders called "Golf" or "Golf Swing," and locked the flash drives in a gun safe to which only he had access. See Pet. App. 5-6.

In these circumstances, the jury would "readily infer that his interest in the girls was sexual," Hillie, 38 F.4th at 241 n.1 (Katsas, J., concurring in denial of en banc review), and he inarguably took many substantial steps toward the completion of the offense. Indeed, petitioner repeatedly engaged in his surreptitious video recording for more than three years, saving at least 49 videos (eight of which captured the children as minors). See Pet. App. 6; PSR ¶ 1. And because petitioner would be subject to the same punishment on that independent ground, he would not be entitled to relief even if the question presented were resolved in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Acting Assistant Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

JANUARY 2024