No. 23-803

In the Supreme Court of the United States

SHANNON DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming petitioner's convictions for producing and attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 76 F.4th 588. The opinion of the district court (Pet. App. 31a-46a) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2023. A petition for rehearing was denied on October 13, 2023 (Pet. App. 47a-48a). On January 2, 2024, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including January 25, 2024. The petition for a writ of certiorari was filed on January 23, 2024. 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 Wisconsin, petitioner

was convicted on one count of attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e); one count of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2); and seven counts of producing child pornography, in violation of 18 U.S.C. 2251(a) and (e). Judgment 1. He was sentenced to 210 months of imprisonment, to be followed by 25 years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-30a.

1. In 2018, a police detective in Hartford, Wisconsin, discovered that an IP address belonging to petitioner was hosting child pornography. Presentence Investigation Report (PSR) ¶ 10. Officers obtained and executed a search warrant for petitioner's residence. *Ibid.* The search uncovered several electronic devices, including two GoPro cameras, multiple hard drives, and computer devices with software for editing GoPro videos. *Ibid.*; see Pet. App. 2a. A forensic examination of the devices revealed videos and images of child pornography, including videos and images produced by petitioner between September 2015 and July 2018. PSR ¶¶ 5, 11; Pet. App. 2a.

A federal grand jury in the Western District of Wisconsin returned an indictment charging petitioner with one count of attempting to produce child pornography (Count 1), in violation of 18 U.S.C. 2251(a) and (e); one count of possessing child pornography (Count 2), in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2); and seven counts of producing child pornography (Counts 3-9), in violation of 18 U.S.C. 2251(a) and (e). Second Superseding Indictment 1-5.

The production counts (Counts 1 and 3-9) involved videos and images that petitioner had captured of two nine-year-old girls in the bathroom. See PSR ¶¶ 47-59.

The victim's genitals or pubic area are depicted in each of the videos and images, save for the video underlying the attempt count (Count 1), which shows the victim's buttocks as she uses the toilet. See *ibid.*; Pet. App. 3a-4a (describing the videos and images in more detail). Petitioner himself briefly appears in the three videos underlying Counts 1, 3, and 4; in one of them, he falsely tells the victim that the camera is not recording her while she showers. Pet. App. 3a. Petitioner also appears in two of the images (the ones underlying Counts 8 and 9); in both, the child victim is seated on his lap with her legs spread to reveal her vagina. *Id.* at 4a.

All of those counts were charged under Section 2251, which 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). 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)). The government invoked subparagraph (v), arguing that the videos and images charged in Counts 3 through 9 depicted a lascivious exhibition of the minor victim's genitals or pubic area, and that the video charged in Count 1 was an attempt to produce such a depiction. See Pet. App. 5a.

2. The parties engaged in an extensive back-and-forth about how to instruct the jury on what constitutes a lascivious exhibition. See Pet. App. 5a-11a (describing the various proposals). At times, the parties disputed

the relevance or applicability of the six non-exhaustive 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). See Pet. App. 6a-7a. 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; see Pet. App. 6a-7a.

Ultimately, the district court declined to include the *Dost* factors in the jury instructions. See Pet. App. 10a. Instead, the court instructed the jury that it "must consider the overall content of the visual depiction, while taking into account the age of the child depicted." *Ibid.* (citation omitted). The court also instructed that "[m]ere nudity does not make an image lascivious; instead, the image must tend to arouse sexual desire by the viewer." *Ibid.* (citation omitted). And the court further instructed the jury that "[u]ltimately, whether the government has proven an image is lascivious beyond a reasonable doubt is left to you to decide on the facts before you applying common sense." *Ibid.* (citation omitted).[1] And after closing arguments, the court summa-

[1] The jury instructions permitted the jury to find petitioner guilty if the videos or images depicted a lascivious exhibition of the "anus, genitals, or pubic area" of the victim, Pet. App. 10a (citation omitted), even though "anus" was not added to the statute until Decem-

rized the parties' respective positions and told the jury that it "can and should consider the aspects of the image itself, the setting, the pose assumed by the minor and any other persons depicted. You can consider the photographer's state of mind, but ultimately you need to decide * * * as the conscience, the lay conscience, of society" whether a depiction constitutes a lascivious exhibition. 5/13/21 Tr. 143-144; see Pet. App. 11a.

Following a three-day trial, the jury found petitioner guilty on all counts. Pet. App. 13a; see Judgment 1. Petitioner moved for a judgment of acquittal on the Section 2251 counts. D. Ct. Doc. 119 (May 27, 2021). Among other things, petitioner challenged the sufficiency of the evidence on Counts 1, 3, 4, 5, and 7 (but not Counts 6, 8, or 9), asserting that the videos and images underlying those counts did not depict "lascivious exhibitions" within the meaning of Section 2256(2)(A)(v). See *id.* at 21-24. The district court denied petitioner's motion. Pet. App. 31a-46a. The court imposed 120 months of imprisonment on the possession count and below-guidelines sentences of 210 months of imprisonment on each of the eight Section 2251 counts, all to run concurrently. Judgment 2; see Sent. Tr. 7, 21-22; PSR ¶¶ 133-134.

3. The court of appeals affirmed, rejecting petitioner's challenges to the jury instructions and suffi-

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ber 2018, after the charged conduct here, see p. 3, *supra*. Petitioner, however, has forfeited any challenge to the instructions on that ground, and in any event that case-specific error is harmless because all of the videos and images depicted or attempted to depict the victims' genitals or pubic areas, see Pet. App. 3a-4a. Cf. *Neder* v. *United States*, 527 U.S. 1, 8-10 (1999).

ciency of the evidence on the Section 2251 counts.[2] Pet. App. 1a-30a.

a. Petitioner argued that the jury instructions impermissibly "permitted consideration of his intent and failed to require that the charged images depict conduct connoting sex acts with the minor." Pet. App. 17a. The court of appeals rejected both arguments. *Id.* at 17a-25a.

As to intent, the court of appeals noted that it had "squarely held that evidence of the defendant's intent [i]s 'a relevant consideration' in evaluating" whether visual depictions constitute a lascivious exhibition. Pet. App. 17a; see *id.* at 17a-20a (citing circuit precedent). But it made clear "that lasciviousness must be an objective quality" and that "the purpose for which certain conduct is captured in an image" is "a relevant factor in an objective assessment of the lasciviousness of the depicted conduct." *Id.* at 18a; see *id.* at 19a (noting that in "the act of recording a visual depiction, the manner in which the depiction is framed very often changes the characterization of the portrayed conduct").

"For example," the court of appeals observed, "excluding the face and head of the photo's subject and focusing instead on the genitals, as many of [petitioner]'s images did, can alter significantly the relationship between image and depicted conduct." Pet. App. 19a (citation omitted). And the court reasoned that because the lascivious nature of a given depiction "is context dependent," the "reason why the producer of the image elected to emphasize a particular gesture, pose, or expression can help the trier of fact to assess the contextual significance of the conduct that is depicted." *Ibid.*;

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[2] Petitioner did not challenge the sufficiency of the evidence on Counts 8 and 9. Pet. App. 25a n.27.

see *id.* at 20a ("Whether the image 'arouses sexual desire' is informed by the intent of the person creating the image.") (citation omitted).

The court of appeals also rejected petitioner's contention that the "the jury should have been instructed that the image in question had to depict conduct connoting commission of a sex act with a minor." Pet. App. 21a. Petitioner's contention drew from the D.C. Circuit's decision in *United States* v. *Hillie*, 39 F.4th 674 (2022), which took the view that a lascivious exhibition under Section 2251 requires a "display[]" of a minor's genitals 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. The court stated that it "respectfully disagree[d] with [*Hillie*'s] reasoning," which was based on "a series of First Amendment cases addressing the constitutionality of obscenity and pornography statutes." Pet. App. 21a-22a.

The court of appeals explained that the observation in those cases that "'hard core' sexual conduct" "may be regulated without offending the First Amendment" was not intended to provide a limiting construction of the term "'lascivious exhibition,'" which the court observed "is *already* a sufficiently concise and definite description of prohibited depicted conduct." Pet. App. 23a. And the court found that because the question "whether an image is lascivious 'is left to the factfinder to resolve, on the facts of each case, applying common sense'" the district court "instruction[s] adequately framed the inquiry for the jury that, as the trier of fact, had the ultimate responsibility to determine whether the image was lascivious." *Id.* at 21a (citation omitted).

b. The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence. Pet. App. 25a-27a. The court observed "that the Government presented ample evidence at trial that [petitioner] was the individual who hid and operated the GoPro cameras that captured visual depictions of the nude or partially nude minors." *Id.* at 25a. The court also observed, with respect to all of the counts as to which petitioner had challenged the sufficiency of the evidence (Counts 1 and 3-7), see p. 6 n.2, *supra*, that "each of the images and videos in Counts 3 through 7 actually captured depictions of Minor B's pubic area or genitals, and the Count 1 video, which captured Minor A pulling down her pants to use the toilet, reflected an attempt to capture a depiction of her genitals or pubic area." Pet. App. 26a.

c. Judge Easterbrook concurred, explaining that although the court of appeals' judgment was dictated by circuit precedent, he "agree[d] with the views expressed by Judge Katsas" in his opinion concurring in the denial of rehearing en banc in *United States* v. *Hillie*, 38 F.4th 235 (D.C. Cir. 2022) (per curiam). Pet. App. 29a; see *id.* at 28a-30a.

ARGUMENT

Petitioner renews his contention (Pet. 13-31) that his convictions for producing and attempting to produce child pornography should be reversed because the videos and images underlying those convictions do not depict a "lascivious exhibition of the genitals or pubic area" under 18 U.S.C. 2256(2)(A)(v) (2012). Although he alternatively frames his claim in terms of jury instructions and sufficiency of the evidence, petitioner's basic contention is that a "lascivious exhibition" under Section 2251 requires that a video or image show the minor engaging in "sexual conduct" or activity "connot-

ing a sex act." Pet. 26 (citation omitted). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. And although the courts of appeals have taken slightly different approaches to determining what constitutes a lascivious exhibition, including with respect to the relevance of the *Dost* factors, any disagreement is narrow and nascent. This Court has recently and repeatedly denied petitions for certiorari raising similar issues—including most recently in *Boam* v. *United States*, No. 23-625 (Apr. 15, 2024); *Kolhoff* v. *United States*, No. 23-6481 (Apr. 15, 2024); and *Anthony* v. *United States*, No. 23-5566 (Feb. 20, 2024)—and the same course is warranted here.[3]

1. The court of appeals correctly rejected petitioner's challenges to the jury instructions and 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). The statute defines "sexually explicit conduct" to include, as relevant here, "actual or simulated * * *

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[3] See, *e.g.*, *Cohen* v. *United States*, 144 S. Ct. 165 (2023) (No. 22-7818); *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*, 583 U.S. 830 (2017) (No. 16-8379); *Miller* v. *United States*, 582 U.S. 933 (2017) (No. 16-6925); *Holmes* v. *United States*, 580 U.S. 917 (2016) (No. 15-9571).

lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v) (2012).

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 and images petitioner produced of the two child victims constituted a visible display designed to incite petitioner's lust, as well as the lust of others who become sexually excited by such images, and the district court's instructions to the jury to "consider the aspects of the image itself, the setting, the pose assumed by the minor and any other persons depicted," as well as "the photographer's state of mind," 5/13/21 Tr. 143-144, were consistent with the common definitions of the statutory terms.

Petitioner contends that a "lascivious exhibition" "must * * * involve, at a minimum, an 'explicitly portrayed' sexual or sexually suggestive display of private parts." Pet. 25 (citation omitted); see Pet. 22-28. And because the victim "depicted in the images here 'never engages in any sexual conduct whatsoever, or any activity connoting a sex act,'" petitioner contends that "'no rational trier of fact could find her conduct depicted in the videos to be a "lascivious exhibition of the genitals."'" Pet. 25-26 (brackets, citation, and ellipses omitted). Petitioner's myopic focus on the minor's conduct is misplaced. 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).

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 emphases omitted), cert. denied, 583 U.S. 830 (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.[4]

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[4] Petitioner notes (Pet. 23) that the government's brief in *Knox* v. *United States*, 510 U.S. 939 (1993), stated that "the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)," U.S. Br. at 9, *Knox*, *supra* (No. 92-1183); see *id.* at 13 ("Depictions therefore come within the statute only if they show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas."). But that case presented the separate question whether the statute encompassed depictions of fully clothed children. And in any event, the arguments in that brief were quickly repudiated. See Lawrence A. Stanley, *The Child Porn Storm*, Washington Post, Jan. 30, 1994, at C3 (recounting that President Clinton "denounced the reasoning of his own solicitor general" and that "[w]ithin a few weeks, the Senate had passed a unanimous, non-binding resolution condemning the [government's] brief"). On remand from this Court, the Third Circuit reinstated the defend-

b. As the courts of appeals generally have recognized, whether a depiction constitutes a lascivious exhibition of the anus, 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, 582 U.S. 933 (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 "lascivious[ness]" as a "'commonsensical term'" and "a determination that lay persons can and should make") (citation omitted), cert. denied, 498 U.S. 1024 (1991).

The district court followed that same approach here, instructing the jury that "[u]ltimately, whether the government has proven an image is lascivious beyond a reasonable doubt is left to you to decide on the facts before you applying common sense." Pet. App. 10a (citation omitted). And as the court of appeals explained, a rational jury applying its common sense could find that, "based on the content, setting, and framing of the[] images and videos and the steps [petitioner] took to capture them," petitioner "used or attempted to use [the two victims] to create visual depictions of lascivious exhibitions of their genitals, anus, or pubic area." *Id.* at 26a-27a. Among other things, "each of the images and videos in Counts 3 through 7 actually captured depic-

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ant's convictions in a thorough opinion analyzing—and rejecting—the arguments in that brief. See *United States* v. *Knox*, 32 F.3d 733, 743-752 (1994), cert. denied, 513 U.S. 1109 (1995).

tions of [the victim's] pubic area or genitals, and the Count 1 video, which captured [the victim] pulling down her pants to use the toilet, reflected an attempt to capture a depiction of her genitals or pubic area." *Id.* at 26a. Furthermore, the evidence showed that petitioner "aimed the camera in directions that were likely to capture the [victims] nude and took steps to hide the camera from the view of the [victims]." *Ibid.*

c. At a minimum, one of the counts on which petitioner was convicted and sentenced to 210 months of imprisonment is for attempted production of child pornography, which requires only proof that the defendant intended to and took a substantial step toward producing a lascivious exhibition, not actual completion of the offense. See, *e.g.*, *United States* v. *Hansen*, 599 U.S. 762, 774-775 (2023) (describing an attempt 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.").

Here, the video underlying the attempt count shows petitioner setting up the camera immediately before the victim uses the bathroom, aiming it at the toilet, and then retrieving the camera once she had finished. See Pet. App. 3a; PSR ¶ 47. In addition, "the jury saw evidence, related to the Count 2 possession charge, that [petitioner] possessed a large number of child pornography images unrelated to the images he himself had produced, and it could reasonably conclude from this that he had a sexual interest in children." Pet. App. 26a.

Under those circumstances, "a jury could readily infer that [petitioner's] interest in the girls was sexual, not sartorial or urological," *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), and that petitioner took substantial steps toward the completion of the offense when he made the video underlying the attempt count. Indeed, especially given the other videos and images in the record—in particular, the images underlying Counts 8 and 9, in which the victim is seated on petitioner's lap while spreading her legs to reveal her vagina—a jury could readily infer that petitioner's intent was to obtain videos that fit even his own narrow definition of "lascivious exhibition." Any failure to capture such images would suggest only that his efforts were unsuccessful—not that he never tried.

2. Petitioner contends (Pet. 13-19) that the decision below conflicts with a recent decision by the D.C. Circuit, and claims (Pet. 19-22) the lower courts are divided on when and how to use the *Dost* factors. But any disagreements among the courts of appeals on those issues are narrow, nascent, and do not warrant this Court's review.

a. 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 that the minor victim 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 (citation and emphasis omitted). But *Hillie* is an outlier, and any conflict with the decision below does not warrant this Court's review. And even if review of the circuit disagreement

were otherwise warranted, it would be premature, because the practical effect of *Hillie* remains unclear.

Both before[5] and after[6] *Hillie*, other courts of appeals have 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 is sufficient to support a conviction for attempt under 18 U.S.C. 2251(e), which does not turn on the actual image produced. See *Hillie*, 38 F.4th at 241 n.1 (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 interest in the girls [i]s sexual, not sartorial or urological."). Thus, at a minimum, petitioner has not iden-

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[5] 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), 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, 580 U.S. 917 (2016).

[6] 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. *Anthony*, No. 21-2343, 2022 WL 17336206 (3d Cir. Nov. 30, 2022), cert. denied, No. 23-5566 (Feb. 20, 2024); *United States* v. *Clawson*, No. 22-4141, 2023 WL 3496324, at *1-*2 (4th Cir. May 17, 2023) (per curiam); *Vallier* v. *United States*, No. 23-1214, 2023 WL 5676909, at *3 (6th Cir. Aug. 2, 2023); *United States* v. *Boam*, 69 F.4th 601, 608-614 (9th Cir. 2023), cert. denied, No. 23-625 (Apr. 15, 2024).

tified any court of appeals that would overturn his conviction for attempting to sexually exploit the child victim in Count 1, and the remaining challenged counts would likewise qualify at least as attempts to produce child pornography even on petitioner's construction of "lascivious exhibition."

b. Any disagreement in 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); *United States* v. *McCall*, 833 F.3d 560, 563 (5th Cir. 2016), cert. denied, 580 U.S. 1076 (2017); *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, including the court below, 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.'"); *United States* v. *Courtade*, 929 F.3d 186, 192 (4th Cir. 2019) (explaining that the court "need not venture into the thicket surround-

ing 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, including the defendant's intent in producing the depictions.

In any event, the district court here did not expressly instruct the jury on the *Dost* factors, and instead instructed it to consider the "overall content of the visual depiction" while cautioning that "[m]ere nudity does not make an image lascivious." Pet. App. 10a (citation omitted). Petitioner provides no sound basis to conclude that any court of appeals would find the instructions here to constitute reversible error.

3. At all events, this case would be a poor vehicle in which to address the question presented for several reasons.

First, as the government observed in the court below, petitioner forfeited his contention, based on *Hillie*,

that the jury instructions should have required the jury to find that the videos and images "depicted 'conduct that connotes sex acts involving a minor.'" Pet. App. 20a-21a (citation omitted). The court of appeals deemed it unnecessary to address forfeiture because it found "no error, plain or otherwise," *id.* at 21a n.24, but providing any relief to petitioner on the question presented *would* require addressing that point. The threshold, factbound question whether petitioner adequately preserved his contention, and thus whether his claim is subject to plain-error review, could complicate this Court's review of the question presented.

Second, as noted, the district court did not instruct the jury on the *Dost* factors, but instead reiterated that lasciviousness was ultimately a factual question for the jury to decide by using "common sense" and acting "as the conscience, the lay conscience, of society." Pet. App. 10a-11a (citations omitted). That makes this case a poor vehicle in which to address any disagreement in the courts of appeals with respect to use of the *Dost* factors.

Third, petitioner frames the question presented as whether "secretly recording a nude minor engaging in ordinary daily activities" constitutes production of a lascivious exhibition. Pet. i; see, *e.g.*, Pet. 1 (contending that "a surreptitious image of a minor engaged in ordinary activities like disrobing, showering, and urinating does not depict 'sexually explicit conduct,' including 'lascivious exhibition,' under 18 U.S.C. §§ 2251(a) and 2256(2)(A)"). But at least three of the images here—the ones underlying Counts 6, 8, and 9 (the latter two of which are not part of petitioner's sufficiency claim)—depict far more than just "ordinary daily activities." See Pet. App. 4a (describing the images); PSR ¶¶ 56, 58, 59 (same). And because petitioner received identical

concurrent 210-month sentences on those counts, he would presumably still be serving the same overall sentence even if he were correct that depictions of nude minors performing "ordinary daily activities" designed to incite lust could not constitute lascivious exhibitions under Section 2256(2)(A)(v).

Fourth, this case is a poor vehicle in which to address the question of what constitutes a "lascivious exhibition," 18 U.S.C. 2256(2)(A)(v) (2012), because all of 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." As noted above, petitioner was convicted of attempt in Count 1, and he provides no sound basis to conclude that any court of appeals would reverse his conviction on that count, for which he also is serving a concurrent 210-month sentence.

4. More fundamentally, as this case illustrates, the evidence presented in a surreptitious recording case generally will support a conviction for attempted production or possession of child pornography irrespective of the meaning of "lascivious exhibition." See pp. 13-14, *supra*; cf. *Hillie*, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc). Although Counts 3 through 9 were not charged as attempted production of child pornography in this case, they could have been, and similar conduct may be charged as such in the future. Notably, attempted sexual exploitation of a minor under Section 2251(a) carries the same penalties as the completed offense does. See 18 U.S.C. 2251(e). Accordingly, as a practical matter, the importance of both the question presented and the lopsided circuit conflict with respect to completed offenses likely will diminish.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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