No. _____

IN THE

Supreme Court of the United States

DANIEL KROEKER,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is widespread disagreement over how to instruct juries on the meaning of the phrase "lascivious exhibition" in child-pornography-related prosecutions. The question presented is:

Whether, in a non-production child-pornography prosecution under 18 U.S.C. § 2252A(a)(2), a trial court should define the phrase "lascivious exhibition" (codified in 18 U.S.C. § 2256(2)(A)(v)) by, *inter alia*, instructing the jury to consider (or not) a list of six optional factors (known as the *Dost* factors) that can be given whatever weight the jury decides, as well as whether the image "would appeal to persons who are sexually attracted to children."

RELATED PROCEEDINGS

United States v. Kroeker, No. 24-3060 (10th Cir. Aug. 22, 2025)

United States v. Kroeker, No. 6:22-cr-10014 (D. Kan. Apr. 25, 2024 (original judgment); Sept. 25, 2025 (amended judgment))

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PETITION FOR WRIT OF CERTIORARI

Daniel Kroeker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished opinion is available at 2025 WL 1878790, and is reprinted in the Appendix (Pet. App.) at 1a-18a. The district court's oral ruling overruling Mr. Kroeker's objections to the jury instruction is reprinted at 19a-29a. The district court's challenged jury instruction is reprinted at 30a-32a. The Tenth Circuit's unpublished order denying rehearing en banc is reprinted at 33a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2256(8)(A) provides:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where [] the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(2)(A)(v) provides:

> Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) bestiality;

(iii) masturbation;
(iv) sadistic or masochistic abuse; or
(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

INTRODUCTION

This case primarily involves six factors a federal district court judge in California used some forty years ago to decide whether images of nude children depicted "lascivious exhibition[s]" of the genitals under 18 U.S.C. § 2256(2)(A)(v) in a production-of-child-pornography prosecution under 18 U.S.C. § 2251. *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986). Today, many courts of appeals use these so-called *Dost* factors in various contexts when deciding whether an image depicts a "lascivious exhibition" under section 2256(2)(A)(v). In doing so, however, there is widespread disagreement over how to apply the factors. *See*, *e.g.*, *United States v. Frabizio*, 459 F.3d 80, 88 (1st Cir. 2006) ("the *Dost* factors have fostered myriad disputes that have led courts far afield from the statutory language"). As just two of many examples, the courts of appeals disagree over whether courts should consider the producer's subjective thoughts under the sixth *Dost* factor, *see*, *e.g.*, *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999), as well as whether a certain number of the factors must be present to find that an image depicts a "lascivious exhibition," *see*, *e.g.*, *Fabrizio*, 459 F.3d at 88.

When it comes to the inclusion of the *Dost* factors within jury instructions in *production cases*, the courts of appeals are divided. Some courts of appeals reject the use of the *Dost* factors in jury instructions because the factors are inconsistent with this Court's precedents, have no statutory basis, and cause confusion not clarity. With

respect to the inclusion of the *Dost* factors within jury instructions in *non-production cases*, the disagreement is even starker. Only four Circuits (including the Tenth Circuit below) have affirmed their use in such cases. Additionally, only the Tenth Circuit has affirmed the inclusion of language instructing juries to consider whether the image "would appeal to persons who are sexually attracted to children." As discussed below, many of the other courts of appeals have expressly rejected such an inquiry.

This Court's review is necessary. There are numerous conflicts in the Circuits over the use of the *Dost* factors to define the phrase "lascivious exhibition." And the Tenth Circuit's decision below adopts the minority position in its affirmance of the *Dost* factors for use in jury instructions in non-production cases. Moreover, the Tenth Circuit's definition of a "lascivious exhibition" as an image that "would appeal to persons who are sexually attracted to children" also creates a conflict in the Circuits. The phrase "lascivious exhibition" should not mean different things in different jurisdictions. Because it does, this Court should grant this petition.

The Tenth Circuit's decision is also wrong. Its definition of "lascivious exhibition" has no statutory basis, is not consistent with the ordinary meaning of "lascivious," conflicts with this Court's precedents, inevitably permits convictions for constitutionally protected speech, and provides no meaningful guidance when used to instruct juries.

And beyond the need to resolve the conflict in the Circuits and to correct the decision below, the question presented is exceptionally important. The phrase

"lascivious exhibition" is an umbrella term that applies to numerous child-pornography-related statutes. The meaning of that phrase has far-reaching consequences. And the *Dost* factors have become little more than a tool that permits the government to prosecute individuals for their subjective thoughts, rather than because the individuals produced, possessed, received, or distributed an image of a child engaged in sexually explicit conduct. For these reasons, challenges to the *Dost* factors will continue to recur until this Court provides necessary guidance. This petition is an excellent vehicle for this Court to provide that guidance, to resolve the lingering Circuit splits, and to correct the Tenth Circuit's erroneous decision below. This Court should grant this petition.

STATEMENT OF THE CASE

A. Legal Background

Congress enacted 18 U.S.C. § 2252A in 1996. Omnibus Consolidated Appropriations Act, Pub. L. 104-208, Div. A, Title I, § 101(a) (Sept. 30, 1996). The current version of the statute is similar to its neighbor, 18 U.S.C. § 2252, which was originally enacted in 1978. Protection of Children Against Sexual Exploitation Act, Pub. L. 95-225, § 2(a), 92 Stat. 7 (Feb. 6, 1978). Both statutes generally prohibit the distribution, receipt, promotion, and possession of child pornography. Section 2256 (also enacted in 1978, but then codified at § 2253), includes definitions for these (and other) statutes. This includes a definition of "child pornography" as: "any visual depiction . . . of sexually explicit conduct, where [] the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A). Congress further defined "sexually explicit conduct" as: "actual or

simulated (i) sexual intercourse []; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v). Congress has not defined the phrase "lascivious exhibition."

When §§ 2252 and 2256 (then § 2253) were enacted, this last phrase included the word "lewd" instead of "lascivious," and the statute only reached "obscene" materials. 92 Stat. 8. Congress switched out "lewd" with "lascivious" and struck the word "obscene" in 1984. Child Protection Act, Pub. L. 98-292, § 5(a)(4), 98 Stat. 204 (1984). It did so two years after this Court's opinion in *New York v. Ferber*, 458 U.S. 747, 774 (1982), which held that a New York statute that prohibited the promotion of sexually explicit materials involving children, including materials depicting the "lewd exhibition of the genitals," did not violate the First Amendment even though the statute reached non-obscene materials. Essentially, *Ferber* held that the Court's test for "obscenity" did not apply to "child pornography." *Id.* at 765. The obscenity "formulation [was] adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Id.* This was so because of the compelling need to prevent "the sexual abuse of children" and materials that are "produced [as] a permanent record of the children's participation." *See id.* at 759. Ultimately, the New York statute passed constitutional muster because its reach was

"directed at the hard core of child pornography." *Id.* at 773. In so holding, *Ferber* held that "nudity, without more is protected expression." *Id.* at 766 n.18.

Two years later, a federal district court judge in California (Gordon Thompson) published an opinion in *Dost*, 636 F. Supp. 828. *Dost* involved two men who *produced* nude images of two children. *Id.* at 830. Judge Thompson believed that Congress's switch from "lewd" to "lascivious" "broaden[ed] the scope of the existing 'kiddie porn' laws." *Id.* at 831.[1] He also believed that a child's "lascivious exhibition" must "be different" from an adult's "lascivious exhibition" because children "would presumably be incapable of exuding sexual coyness." *Id.* at 832. He stated that a "trier of fact," "in determining whether a visual depiction of a minor constitutes a 'lascivious exhibition of the genitals or pubic area . . ., should look to the following factors, among any others that may be relevant in the particular case:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4) whether the child is fully or partially clothed, or nude;
5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

Id. According to Judge Thompson, "a visual depiction need not involve all of these factors to be a 'lascivious exhibition of the genitals or pubic area.' The determination

[1] This belief was incorrect. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

will have to be made based on the overall content of the visual depiction, taking into account the age of the minor." *Id.*

Over the years, for reasons that we cannot fathom or explain, numerous courts have used Judge Thompson's so-called *Dost* factors to define the phrase "lascivious exhibition" in the child-pornography context. As discussed below, however, there is no consensus on when or how to use the factors; just confusion and chaos.

This Court has never addressed the *Dost* factors. It has made clear, however, that prohibitions on child pornography cannot reach "innocuous photographs of naked children." *Osborne v. Ohio*, 495 U.S. 103, 114 (1990). It has also reaffirmed that Congress may, consistent with the First Amendment, ban "the possession of *pornography* produced by using children." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250 (2002) (emphasis added). *Ashcroft* struck down statutes prohibiting virtual child pornography (child pornography that is not produced using real children). *Id.* at 258. In doing so, the Court referred to child pornography as "the product of child sexual abuse," and a "crime of child abuse," *id.* at 249, 254; *see also id.* at 250-251 ("*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated."). The Court also made clear that "[t]he government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'" *Id.* at 253. "Protected speech does not become unprotected merely because it resembles the latter." *Id.* at 255.

More recently, while addressing the constitutionality of § 2252A(a)(3)(B) (the child-pornography promotion statute), the Court discussed the definition of "sexually

explicit conduct" in § 2256(2)(A). *United States v. Williams*, 553 U.S. 285, 296 (2008). "'Sexually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." *Id.* at 297. The Court further addressed the definition of "lascivious exhibition" found at section 2256(2)(A)(v), rejecting the government's argument that a child-pornography "statute could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious'" because the "material in fact (and not merely in his estimation) must meet the statutory definition." 535 U.S. at 301 (giving as an example "a harmless picture of a child in a bathtub"). *Williams* is consistent with how this Court has historically defined "lascivious." *See*, *e.g.*, *Swearingen v. United States*, 161 U.S. 446, 451 (1896) (defining "lasciviousness" as "that form of immorality which has relation to sexual impurity").

B. Proceedings in the District Court

In March 2022, a federal grand jury charged Mr. Kroeker with receipt of child pornography, 18 U.S.C. § 2252A(a)(2). Pet. App. 1a.[2] This count involved one image of a naked six-year-old boy in a bathtub. Pet. App. 2a. Mr. Kroeker received the image from the boy's father (Kyle Enzminger) during a sexually charged online chat session. Pet. App. 2a. There was no evidence that Enzminger took the photo at Kroeker's request (although he sent it to Kroeker at Kroeker's request).

The issue at trial was whether the image qualified as child pornography, specifically, whether it depicted a "lascivious exhibition" of the genitals under 18

[2] Mr. Kroeker was also charged with and convicted of possession of child pornography, but the Tenth Circuit reversed the conviction for insufficient evidence. Pet. App. 2a, 12a-18a. That reversed conviction has no relevance here. Thus, we do not mention it again.

U.S.C. § 2256(2)(A)(v). Pet. App. 3a. Over Mr. Kroeker's objections, Pet. App. 26a-29a, the district court provided a lengthy, meandering definition of "lascivious exhibition," Pet. App. 31a-32a.

The instruction first stated that "lascivious exhibition" "means indecent exposure of the anus, genitals, or pubic area, usually to incite lust. Not every exposure is a lascivious exhibition." Pet. App. 31a. The instruction then told the jury that it "must consider the overall content of the visual depiction," and, in doing so, "may, but [was] not required to, consider" the six *Dost* factors (listed above). The instruction continued by informing the jury that a "lascivious exhibition" could include visual depictions of the "genital or pubic area even when those areas are covered by clothing," and that it was "not necessary that the images be intended or designed to elicit a sexual response in the average viewer, and you may consider whether the visual depictions would appeal to persons who are sexually attracted to children." Pet. App. 32a. The instruction ended with this sentence: "A visual depiction need not involve all of these factors to be a lascivious exhibition, and it is for you to decide the weight or lack of weight to be given to any of these factors." Pet. App. 32a. The jury was not instructed that it could consider factors other than the six *Dost* factors.

Also over Mr. Kroeker's objection, the district court included the definitions of "child pornography" from 18 U.S.C. § 2256(8)(A), (B), **and** (C), even though the indictment only alleged that Kroeker received child pornography as defined in § 2256(8)(A). Pet. App. 10a, 30a.

At trial, the government introduced substantial evidence that portrayed Kroeker as a pedophile. *See* R2.95-121[3]; Pet. App. 2a (mentioning Kroeker's post-arrest admission that he obtained child pornography from the Internet). Not surprisingly, with the district court's wide-ranging "lascivious exhibition" instruction at hand, the jury convicted Kroeker of the receipt count. Pet. App. 4a. The district court denied a motion for judgment of acquittal. Pet. App. 4a.

The district court imposed a 200-month prison sentence. R1.224. Enzminger somehow fared much better. He was prosecuted in North Dakota state court for producing the image. *See* R1.21. He received a sentence of one year and one day, with 352 days suspended, and 5 years' probation.[4] Had he been prosecuted in federal court for producing the image, he would have been subject to a 15-year mandatory minimum sentence under 18 U.S.C. § 2251(e).

C. Proceedings in the Tenth Circuit

On appeal, Kroeker challenged the use of the *Dost* factors to define "lascivious exhibition" in this non-production case. Pet. App. 7a-9a. The Tenth Circuit acknowledged (but did not discuss) "critical case law from other circuits" before rejecting Kroeker's arguments as "misplaced." Pet. App. 7a. The Tenth Circuit relied on the instruction's "flexibility" – that "a jury may consult the *Dost* factors as little or as much as it desires." Pet. App. 7a. In doing so, the Tenth Circuit noted that no "more

[3] We cite the record on appeal in the Tenth Circuit for facts not mentioned in the Tenth Circuit's opinion. Also, the actual image at issue in this case was made part of the (sealed) appellate record.
[4] *See* North Dakota Sex Offender Registry, Offender Profile, available at: https://sexoffender.nd.gov/offender/details/8dcdc679-7bb3-41d4-beb3-f88459880853 (last visited November 3, 2025).

than one *Dost* factor must be present" to find that an image qualifies as a "lascivious exhibition." Pet. App. 7a (quoting *United States v. Wells*, 843 F.3d 1251, 1254 (10th Cir. 2016)). Yet the Tenth Circuit ultimately concluded that the jury instruction "accurately state[d] the law on how [the Tenth Circuit has] explained juries should use the *Dost* factors, and did not encourage the jury to convict solely based on one factor as Defendant fears." Pet. App. 8a.[5] The Tenth Circuit further refused to limit the *Dost* factors to production cases. According to the Tenth Circuit, the producer's intent – which is the focus of the sixth *Dost* factor – is "not always relevant" in any type of case (non-production or production). Pet. App. 8a. Thus, there was presumably no reason to treat the cases differently.

Mr. Kroeker also challenged the appeal-to-pedophiles language in the instruction as unsupported by precedent and unmoored from the statute's text. *See* Pet. App. 9a. The Tenth Circuit disagreed and concluded that a "viewer's response to the image, whether because of their pedophilic tendencies or not, can be relevant to determine if an image's overall content is lascivious." Pet. App. 9a. The Tenth Circuit also stated that this inquiry "largely recapitulates the sixth *Dost* factor." Pet. App. 10a. The Tenth Circuit further noted that "Enzminger's image could appeal to those with pedophilic tendencies was just one statement among several in the jury instructions," and that "[a] reasonable jury would not believe the law required it to find a particular

[5] This statement was factually inaccurate: prior to the decision below, the Tenth Circuit had never affirmed the use of the *Dost* factors in jury instructions, as opposed to their use when analyzing the sufficiency of the evidence on appeal.

image was lascivious merely because it could appeal to those with pedophilic tendencies because" this was "just one factor among many." Pet. App. 10a.

Mr. Kroeker also challenged the "indecent exposure" language as inconsistent with the ordinary meaning of "lascivious." *See* Pet. App. 5a. The Tenth Circuit rejected this argument in part because the instruction included the *Dost* factors, which "gave the jury the tools … so it could determine whether Enzminger's photograph of the six-year-old child was lascivious and not merely nude." Pet. App. 6a. In a footnote, the Tenth Circuit also noted that Black's Law Dictionary uses "indecent as a synonym for lascivious." Pet. App. 6 n.1.

Finally, Mr. Kroeker challenged the district court's inclusion of the definitions of child pornography from 18 U.S.C. § 2256(8)(B) and (C) because the indictment only alleged that he received child pornography under § 2256(8)(A). Pet. App. 10a. The Tenth Circuit acknowledged the point but concluded that the "district court did not err" because the instruction "directly quote[d] [the] statutory language" and did not "mislead or confuse the jury." Pet. App. 11a-12a.

Mr. Kroeker petitioned for rehearing en banc because the Tenth Circuit's opinion conflicted with this Court's precedents and numerous precedents from the other courts of appeals. The Tenth Circuit denied the petition. Pet. App. 33a.

This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The lower courts have debated "the propriety of jury instructions based on the *Dost* factors" for years. *United States v. Noel*, 581 F.3d 490, 499-500 (7th Cir. 2009).

The debate continues unabated. *See*, *e.g.*, *United States v. Hillie*, 39 F.4th 674, 689 (D.C. Cir. 2021) ("we decline to adopt the *Dost* factors, and thus we find unpersuasive those decisions of our sister circuits that follow the *Dost* factors"). *Just this week*, another Judge added to the un-ending chorus of criticism. *United States v. Hutton*, ___ F.4th ___, 2025 WL 3202003, at *7 (9th Cir. Nov. 17, 2025) (Graber, J., concurring) (criticizing the use of the *Dost* factors as "far from the statutory text"). This un-ending criticism is valid; the *Dost* factors "create more confusion than clarity." *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring). Only this Court can bring needed clarity to this area of the law. And it should. This Court should grant this petition to resolve the numerous *Dost*-factor-related conflicts that exist in the lower courts.

This Court should also grant this petition to correct the Tenth Circuit's erroneous decision below. The Tenth Circuit not only affirmed the use of the *Dost* factors in jury instructions in a non-production case, but also included unprecedented appeal-to-pedophiles language, unprecedented language referring to a "lascivious exhibition" as an "indecent exposure," and statutory definitions that were not charged in the indictment.

The question presented is also exceptionally important. The phrase "lascivious exhibition" has broad application to numerous child-pornography-related statutes. And the government has used the unprincipled, wide-ranging *Dost* factors to prosecute individuals for their subjective pedophilic thoughts, rather than because the individuals produced, possessed, received, or distributed images of children

engaged in sexually explicit conduct. The question will continue to recur until this Court resolves it.

Finally, this case is an excellent vehicle to resolve the question presented. There are no vehicle problems whatsoever. This petition should be granted.

I. Review is necessary to resolve several conflicts in the Circuits.

The Tenth Circuit's opinion deepens several long-running conflicts. It also creates new conflicts. These conflicts include: (1) whether to include the *Dost* factors in jury instructions; (2) if so, whether to include the *Dost* factors in jury instructions in non-production cases; (3) the number of *Dost* factors; (4) whether the sixth *Dost* factor is objective or subjective; (5) whether a certain number of the *Dost* factors must be present; (6) whether juries should consider the "overall context," a more "limited context," or just the "four corners of the image"; (7) whether juries should be told that it can consider factors other than the *Dost* factors; (8) whether the appeal-to-pedophiles language is a correct statement of the law and should be included within jury instructions; and (9) how otherwise to define "lascivious."

1a. Unlike this case, the *Dost* factors originated in a *production* case under § 2251. 636 F.Supp. at 832. And five courts of appeals, in published opinions, have affirmed the inclusion of the *Dost* factors in jury instructions in *production* cases. *United States v. Rivera*, 546 F.3d 245, 250 (**2d Cir**. 2008); *United States v. Heinrich*, 57 F.4th 154, 161 (**3d Cir**. 2023); *United States v. Deritis*, 137 F.4th 209, 213 (**4th Cir**. 2025); *United States v. Wilkerson*, 124 F.4th 361, 372-373, (**5th Cir**. 2024); *United States v. Ward*, 686 F.3d 879, 881-882 (**8th Cir**. 2012). The Second Circuit, however, has

remarked that "it is possible to charge a jury without using" the *Dost* factors. *United States v. Spoor*, 904 F.3d 141, 150-151 n.7 (2d Cir. 2018).

b. The **Ninth Circuit** has affirmed the use of the *Dost* factors in jury instructions in production cases in an unpublished opinion. *United States v. Barnes*, 2021 WL 4938126, at *1 (9th Cir. Oct. 22, 2021). Although the **Tenth Circuit** has never affirmed the use of the *Dost* factors in jury instructions in a production case, it affirmed their use in this non-production case. Pet. App. 7a-8a. And the **Sixth Circuit** includes the *Dost* factors in its pattern jury instructions for production cases, and has also affirmed their use in an unpublished opinion in an attempted production case (but never in a production case, published or unpublished). *See United States v. Guy*, 708 Fed. Appx. 249, 262 (6th Cir. 2017).

c. The **Eleventh Circuit** also includes the *Dost* factors in its pattern jury instruction for production cases, *see United States v. Tala*, 2023 WL 5500829, at *4 (11th Cir. Aug. 25, 2023), but has never "decide[d] whether *Dost* applies in" the Eleventh Circuit, *United States v. Hunter*, 720 Fed. Appx. 991, 996 (11th Cir. 2017); *see also United States v. Grzybowicz*, 747 F.3d 1296, 1306 (11th Cir. 2014) (refusing to use the *Dost* factors to conduct sufficiency review). The **First Circuit** has consulted the *Dost* factors, *United States v. Charriez-Rolon*, 923 F.3d 45, 53 (1st Cir. 2019) but it has never approved their use in jury instructions. Rather, the First Circuit has referred to the *Dost* factors as "problematic" and has commented that "the standard to be applied by the jury is the statutory standard," which "needs no adornment." *Frabrizio*, 459 F.3d at 85.

d. The **Seventh Circuit** has "discourage[d] the use of the *Dost* factors [in jury instructions]; they are unnecessary in light of the clear statutory definition of the term 'sexually explicit conduct.'" *United States v. Price*, 775 F.3d 828, 831 (7th Cir. 2014). "Instructing a jury on the *Dost* factors can seem like a command to take a detailed and mechanical walk through a checklist, which risks taking the inquiry far afield from the already clear statutory text." *Id.* at 840. "The jury's common understanding is enough to distinguish artistic and other licit photos of children from child pornography as that term is defined in the statutory text." *Id.* And the **D.C. Circuit** forbids their use in jury instructions. *United States v. Hillie*, 39 F.4th 674, 689-690 (D.C. Cir. 2021).

Four Eighth Circuit judges also believe that "the *Dost* factors are not appropriate in a jury instruction because they may steer juries away from applying the plain words of the statute adopted by Congress." *United States v. McCoy*, 108 F.4th 639, 653 (8th Cir. 2024) (en banc) (Grasz, J., dissenting; joined by Chief Judge Smith and Judges Kelly and Erickson). Other Judges have also criticized the use of the *Dost* factors to define the phrase "lascivious exhibition." *United States v. Steen*, 634 F.3d 822, 829-830 (5th Cir. 2011) (Higginbotham, J., concurring) (urging courts to define "lascivious" based on "the statute, not a lonely decision of a district court"); *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring) (agreeing with the reasoning in *Hillie*); *Hutton*, ___ F.4th ____, 2025 WL 3202003, at *8 (Graber, J., concurring) (the use of the *Dost* factors "is far from the statutory text").

2a. With respect to *non-production* cases, only three Circuits (in dated opinions) have affirmed their use in jury instructions in published opinions. *United States v. Villard*, 885 F.2d 117, 122 (**3d Cir**. 1989); *United States v. Rubio*, 834 F.2d 442, 448 (**5th Cir**. 1987); *United States v. Arvin*, 900 F.2d 1385, 1391 (**9th Cir**. 1990). But the Ninth Circuit has more recently acknowledged that the *Dost* factors may not be appropriate in non-production cases. *United States v. Overton*, 573 F.3d 679, 688 (9th Cir. 2009) (noting that the sixth *Dost* factor is helpful only in production cases). The **Tenth Circuit** below also affirmed the use of the *Dost* factors in jury instructions in an unpublished decision in a non-production case. Pet. App. 7a-9a (rejecting Kroeker's argument that the instructions should be used, if at all, only in production cases).

b. The **Sixth, Eighth, and Eleventh Circuits** include the *Dost* factors in their pattern non-production instructions, *see* Sixth Circuit Pattern Jury Instruction 16.07; Eighth Circuit Pattern Jury Instruction 6.182252A, *Tala*, 2023 WL 5500829, at *4, but have never affirmed their use in a non-production case. Rather, the Sixth Circuit has acknowledged that "the *Dost* factors may not be necessary or helpful in every child pornography prosecution." *United States v. Sanders*, 107 F.4th 234, 263 (6th Cir. 2024).

c. Other courts of appeals have recognized that the *Dost* factors are problematic in non-production cases. In addition to the **Seventh** and **D.C. Circuits**, which do not use the *Dost* factors in jury instructions in any case, *Price*, 775 F.3d at 831, 840; *Hillie*, 39 F.4th at 689-690, two other courts of appeals have indicated that the instructions should not be used in non-production cases. *United States v. Sheehan*, 70 F.4th 36, 46

n.4 (**1st Cir**. 2023) (the *Dost* factors are not "necessarily applicable in every situation"); *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999). (criticizing the use of the sixth *Dost* factor "where the circumstances of the photograph's creation are unknown"); *United States v. Rivera*, 546 F.3d 245, 252-253 (**2d Cir**. 2008) ("it matters whether production or possession is the charge"; "[t]he sixth *Dost* factor is not easily adapted to a possession case").

3. There is also a Circuit split on the number of *Dost* factors. While nearly every Circuit uses the six Dost factors outlined above, the **Eighth Circuit** includes two additional factors ("the *Dost*-plus factors"): "(7) whether the picture portrays the minor as a sexual object; and (8) the captions on the pictures." *United States v. Dahl*, 144 F.4th 1076, 1078 (8th Cir. 2025). The **Ninth Circuit** has also affirmed the use of the *Dost*-plus factors in one case. *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990).

4a. The Circuits also do not agree on whether the sixth *Dost* factor -- whether the visual depiction is intended or designed to elicit a sexual response in the viewer – is a subjective or objective inquiry. The **Tenth Circuit** below considered the sixth *Dost* factor a subjective inquiry into the mind of the producer (Kyle Enzminger, not Kroeker). Pet. App. 8a. As do most other courts of appeals, including the **Fourth Circuit**, *Deritis*, 137 F.4th at 220; **Fifth Circuit**, *Wilkerson*, 124 F.4th at 371; **Sixth Circuit**, *United States v. Stewart*, 729 F.3d 517, 529 (6th Cir. 2013); **Eighth Circuit**, *McCoy*, 108 F.4th at 646; and **Ninth Circuit**, *United States v. Boam*, 69 F.4th 601, 610-612 (9th Cir. 2024). Additionally, although the **Seventh Circuit** discourages the

use of the *Dost* factors in jury instructions, it considers a defendant's subjective intent when conducting a sufficiency-of-the-evidence analysis. *Donoho*, 76 F.4th at 597.

b. **Eleventh Circuit** precedent is unclear. It initially appeared to adopt an objective-inquiry test in the sufficiency-of-the-evidence context in *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), rev'd, 553 U.S. 285 (2008), but more recently considered the defendant's subjective intent to uphold convictions in a case that involved a minor engaged in "innocent conduct," *United States v. Holmes*, 814 F.3d 1246, 1251-1252 (11th Cir. 2016).

c. In contrast to these other courts of appeals, the **First, Second, and Third Circuits** consider the sixth *Dost* factor an objective inquiry that focuses on "the objective criteria of the photograph's design." *Amirault*, 173 F.3d at 34. "[T]he sixth *Dost* factor, rather than being a separate substantive inquiry about the photographs, is useful as another way of inquiring into whether any of the other five Dost factors are met." *Id.* at 34-35; *United States v. Spoor*, 904 F.3d 141, 150-151 (2d Cir. 2018) (similar; "Whether a video is, objectively, a 'lascivious exhibition' depends on the content of the video itself and not on the sexual predilection of its creator."); *Heinrich*, 57 F.4th at 161 (similar; "It does not matter whether the defendant subjectively intended the conduct or depiction to be 'sexually explicit' or 'lascivious.'"); *United States v. Villard*, 885 F.2d 117, 124 (3d Cir. 1989) ("our focus must be on the contents of the picture itself rather than on the producer of the picture"). The **D.C. Circuit** also does not rely on subjective intent (or any other *Dost* factor). *Hillie*, 39 F.4th at

688 (the picture "in fact (and not merely in his estimation) must meet the statutory definition") (quoting *Williams*, 553 U.S. at 301).

Judges from other Circuits also disagree that factfinders should consider the producer's subjective intent. *Steen*, 634 F.3d at 829 (Higginbotham, J., concurring) ("The sixth factor … is especially troubling. Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this *Dost* factor encourages both judges and juries to improperly consider a non-statutory element"); *McCoy*, 108 F.4th at 654 (Stras, J., dissenting) (rejecting the proposition that a "defendant's subjective intent" is relevant); *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) ("the [statutory] definition turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition"); *Hutton*, 2025 WL 3202003, at *8 (Graber, J., concurring) (an inquiry "into how the defendant has captured and manipulated the video or image of the conduct" "is far from the statutory text").

5a. The Circuits also disagree over whether a certain number of the *Dost* factors must be present to convict. In the **Third Circuit**, at least two of the factors must be present. *Heinrich*, 57 F.4th at 161.

b. In the **Fourth, Sixth, Eighth, and Tenth Circuits**, just one factor is sufficient to convict. *United States v. Wolf*, 890 F.2d 241, 245 n.6 (10th Cir. 1989) ("[w]e decline to hold that more than one *Dost* factor must be present …."); *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009) (giving the jury complete discretion

to give whatever "weight or lack of weight" to the factors); *Deritis*, 137 F.4th a 220 (same)); *United States v. Wilson*, 142 F.4th 1045, 1050 (8th Cir. 2025) (same)

c. The **Second Circuit** also permits a conviction based on one factor, with the exception that "it is improper for a jury" to convict based solely on the sixth *Dost* factor. *Spoor*, 904 F.3d at 151.

d. In the **First**, **Fifth, and Ninth Circuits**, none of the factors must be present to convict. *United States v. Silva*, 794 F.3d 173, 181 (1st Cir. 2015) (the *Dost* factors are not an 'exclusive list of factors … that must be met for an image (or a film) to be 'lascivious'"); *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001) ("no single factor is dispositive"); *United States v. Overton*, 573 F.3d 679, 686–87 (9th Cir. 2009) ("the jury should not be made to rely on the *Dost* factors with precision to reach a mathematical result, or to weigh or count them, or to rely on them exclusively"). So too in the **Seventh, Eleventh, and D.C. Circuits**, as those Circuits have not adopted the *Dost* factors. *See Donoho*, 76 F.4th at 598 (also expressly holding that a conviction cannot be based solely on the producer's intent, which is essentially the sixth *Dost* factor); *Grzybowicz*, 747 F.3d at 1306 ("this case does not require a multi-factor analysis"); *Hillie*, 39 F.4th at 650.

6a. There is also disagreement over whether factfinders should consider the "overall context," a more "limited context," or just the "four corners of the image" when answering the "lascivious exhibition" inquiry. Most Circuits, including the **First**, **Second**, **Fourth**, **Fifth**, **Ninth**, and **Tenth Circuits**, look beyond the four corners of the image to the "overall context," which includes extrinsic evidence of a

defendant's sexual interest in children. *Frabizio*, 459 F.3d at 89 (rejecting a four corners test); *Spoor*, 904 F.3d 141, 150; *Deritis*, 137 F.4th at 220; *United States v. Barry*, 634 Fed. Appx. 407, 413-415 (5th Cir. 2015) (expressly rejecting a "limited context" test); *Boam*, 69 F.4th at 611-612; Pet. App. 8a-10a (discussing evidence of Kroeker's pedophilic tendencies). When conducting sufficiency review, the **Seventh Circuit** also looks to extrinsic evidence (or the "overall context"). *Donoho*, 76 F.4th at 597. It has done so over Judge Easterbrook's strong disagreement. *Id.* at 601 ("Shannon Donoho is a liar and invader of young girls' privacy" who "has committed [state] torts and may well have committed [state] crimes … . [b]ut he did not produce child pornography").

b. The **Eighth Circuit** has sent mixed signals. It has stated that "the issue is not whether the images were intended to appeal to the defendant's sexual interests, but whether they appear to be of a sexual character on their face," yet also considers the producer's "purpose" and intent. *McCoy*, 108 F.4th at 646; *see also United States v. Ward*, 686 F.3d 879, 884 (juries can consider "extrinsic evidence, such as [an] extensive child pornography collection" when analyzing the sixth *Dost* factor); *but see United States v. Kemmerling*, 285 F.3d 644, 646 (8th Cir. 2002) ("it is the duty of the trier of fact in this kind of case to examine the pictures to determine whether they are designed to appeal to the sexual appetite").

c. The **Sixth Circuit** has adopted a "limited context" test "that permits consideration of the context in which the images were taken, but limits the

consideration of contextual evidence to the circumstances directly related to the taking of the images." *Brown*, 579 F.3d at 683.

d. The **Third, Eleventh, and D.C. Circuits** limit the inquiry to the four corners of the image. *Heinrich*, 57 F.4th at 161; *Williams*, 444 F.3d at 1299; *Hillie*, 39 F.4th at 688. Judges from other Circuits agree with this approach. *See, e.g.*, *Hutton*, 2025 WL 3202003, at *8 (Graber, J., concurring) (criticizing the Ninth Circuit's approach, which inquires "into Defendant's state of mind by looking into his past criminal conduct," because it permits convictions for mere nudity based solely on the defendant's past conduct).

7a. The Circuits also disagree about whether courts should consider factors other than the *Dost* factors. Consistent with the three Circuits that have not adopted the *Dost* factors (the **Seventh, Eleventh, and D.C. Circuits**), the **First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits** consider factors other than the *Dost* factors. *Silva*, 794 F.3d at 181; *Rivera*, 546 F.3d at 252–53; *United States v. Knox*, 32 F.3d 733, 747 (3d Cir. 1994); *Deritis*, 137 F.4th at 220; *Wilkerson*, 124 F.4th at 367; *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011); *McCoy*, 108 F.4th at 645; *Boam*, 69 F.4th at 609.

b. By contrast, and inconsistent with every other Circuit, the Tenth Circuit below affirmed an instruction that did not instruct the jury that it could consider factors other than the *Dost* factors. Pet. App. 30-32.

8a. The **Tenth Circuit** also stands alone in instructing juries to consider whether an image "would appeal to persons who are sexually attracted to children." Pet. App. 9a.

b. The **First, Third, Sixth, Ninth, and Eleventh Circuits** disagree than an image can qualify as a "lascivious exhibition" because a pedophile might be attracted to it. *Amirault*, 173 F.3d at 34 (indicating "serious doubts" about focusing on "a pedophile-viewer's reaction;" "a deviant's subjective response could turn innocuous images [including a "Sears catalog"] into pornography"); *United States v. Perez-Colon*, 62 F.4th 805, 818 (3d Cir. 2023) ("[w]hen a picture does not constitute child pornography, even though it displays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it"); *Brown*, 579 F.3d at 683 (cautioning against any "emphasis on the subjective intent of the … viewer"); *Overton*, 573 F.3d at 688 (refusing to consider the "actual effect of the photographs on the viewer"); *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1987) ("[t]he crime … does not consist in the cravings of … [the] audience"); *Williams*, 444 F.3d at 1299 ("Many pedophiles collect and are sexually stimulated by nonpornographic depictions of children such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines—otherwise innocent pictures that are not traditionally seen as child pornography and which non-pedophiles consider innocuous." "We cannot, however, outlaw those legal and mainstream materials and we may not outlaw the thoughts conjured up by those legal materials.").

Judge Easterbrook agrees with these courts of appeals, *Donoho*, 76 F.4th at 602 ("the [statutory] definition turns on whether the exhibition itself is lascivious, not whether … other viewers have a lustful motive in watching the depiction"). As does Judge Higginbotham, *Steen*, 634 F.3d at 829 ("A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic."). And Judge Graber. *Hutton*, 2025 WL 3202003, at *8 ("We do not ordinarily say that a person has engaged in a certain type of conduct by looking to the state of mind and the later activities of a person who was secretly watching that conduct."). Indeed, no Circuit has ever approved of the Tenth Circuit's appeal-to-pedophiles instruction or the reasoning behind it.

9a. Finally, there is no settled definition of "lascivious exhibition" outside of the *Dost* factors. Indeed, the **Sixth Circuit** has adopted the *Dost* factors as the sole "legal definition of 'lasciviousness.'" *Guy*, 708 Fed. Appx. at 62. The **Eighth Circuit** appears to have done this as well (but adopting the *Dost*-plus factors). *See*, *e.g.*, *Dahl*, 144 F.4th at 1078. And while the **Ninth Circuit** has indicated that the *Dost* factors are "not definitional," it has not appeared to adopt another definition of "lascivious." *Overton*, 573 F.3d at 688.

b. For its part, the **Tenth Circuit** is the only Circuit to define "lascivious exhibition" as an "indecent exposure … usually to incite lust." Pet. App. 5a.

c. The **D.C. Circuit** defines a "lascivious exhibition" differently, as "an exhibition of the genitals [that] is conducted 'in a lustful manner that connotes the commission of a sexual act.'" *Hillie*, 39 F.4th at 689.

d. The **Third, Fourth, and Fifth Circuits** define "lascivious exhibition" as "'a depiction which displays or brings forth to view in order to attract notice to the genitals and pubic area of children, in order to excite lustfulness or sexual simulation in the viewer.'" *United States v. Larkin*, 629 F.3d 177, 182 (3d Cir. 2010); *Deritis*, 137 F.4th at 218; *Wilkerson*, 124 F.4th at 366.

e. The **Second Circuit** has stated that the *Dost* factors are "not definitional." *Rivera*, 546 F.3d at 250. But the Second Circuit has also concluded that "'lascivious' is not self-defining," and that the "dictionary definition" of "lascivious" – "Given to or expressing lust; lecherous" or "[e]xciting sexual desires salacious" – is "of little help in drawing lines." *Id.* at 249.

f. The **Eleventh Circuit** disagrees and has "defined a 'lascivious exhibition' according to "its ordinary meaning of 'exciting sexual desires; salacious.'" *Williams*, 444 F.3d at 1299. The **First Circuit** generally agrees that courts need not provide a definition of "lascivious" because that term "is sufficiently well defined to provide persons 'of reasonable intelligence, guided by common understanding and practices,' notice of what is permissible and what is impermissible." *Frabizio*, 459 F.3d at 85 ("The statutory standard needs no adornment."). The **Seventh Circuit** has also urged district courts not to stray from "a commonsense understanding of 'lascivious exhibition.'" *Price*, 775 F.3d at 840. Other Judges also believe that "lascivious" is self-defining and that courts should stick to the statutory language. *Steen*, 634 F.3d at 829-830 (Higginbotham, J., concurring) (referring to "lascivious" as a term "that lay people are perfectly capable of understanding"; juries should simply ask whether "the

image display[s] sexually explicit conduct" because this inquiry "derives from the statute, not a lonely decision of a district court"); *McCoy*, 108 F.4th at 654 (Graz, J., dissenting) ("the common definitions of 'lascivious' and 'exhibition' provide a sufficient guide"); *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) (similar).

In the end, the *Dost* factors have "produced a profoundly incoherent body of case law." *Frabizio*, 459 F.3d at 88 (quotation omitted). Despite "considerable discussion among the [lower] courts," *United States v. Russell*, 662 F.3d 831, 843 (7th Cir. 2011), the number of disagreements hasn't shrunk. As this case shows, they continue to grow. There is no way for the lower courts to remove themselves from this morass. The disagreements are too many and too complex. Only this Court can step in to bring clarity to this hopelessly confused area of the law. And it should do so. The phrase "lascivious exhibition" shouldn't mean different things in different Circuits. Nor should juries be tasked with different inquiries when deciding whether images satisfy this statutory phrase. Yet that is the reality (and has been for several years). It is time to end the chaos. Review is necessary.

II. The Tenth Circuit erred.

The Tenth Circuit's decision is problematic on several fronts.

First, the Tenth Circuit affirmed the use of the *Dost* factors in the jury instructions below, even though this is a non-production case. That is extremely problematic because the sixth *Dost* factor, as interpreted by the Tenth Circuit, asks about the producer's subjective intent when producing the image. But here, Kroeker did not produce the image; a man named Kyle Enzminger did. Pet. App. 2a. The Tenth

Circuit did not explain how Enzminger's intent could criminalize Kroeker's conduct. Rather, the Tenth Circuit reasoned that, because the producer's "intent will not always be relevant in child-pornography receipt cases, neither is it always relevant in production cases." Pet. App. 8a. For this reason, "the district court did not err in using the *Dost* factors in this case." Pet. App. 9a.

In other words, the Tenth Circuit held that it did not matter that the sixth *Dost* factor is irrelevant in non-production cases (like this one) because it is sometimes irrelevant in production cases as well. But it does not follow from this that courts should therefore *include* the sixth *Dost* factor in jury instructions in *all* production and non-production cases. What follows is that courts should *not include* the *Dost* factors in *some* production and *all* non-production cases (i.e., in those cases where the producer's subjective intent is irrelevant). *See*, *e.g.*, *Rivera*, 546 F.3d at 252-253; *Amirault*, 173 F.3d at 34.

Second, the Tenth Circuit also considered "misplaced" Kroeker's concerns about the *Dost* factors because "a jury may consult the *Dost* factors as little or as much as it desires." Pet. App. 7a. This "flexibility" – that the jury could "decide the weight or lack of weight to be given to any of these factors" and that a "depiction need not involve all of these factors" – "did not encourage the jury to convict solely based on one factor as Defendant fears." Pet. App. 8a.

This reasoning is unsound. By instructing the jury that not all the factors must be met and that it could decide whatever weight to give to any of the factors, it necessarily follows that the jury could convict based solely on one factor. The jury, for

instance, could have given dispositive weight to the sixth factor – Enzminger's sexualized intent when he took a photo of his nude child in the bathtub. Or the jury could have given dispositive weight to the fourth factor – that the child was nude. Indeed, Tenth Circuit precedent clearly states that a jury can convict based on just one factor. *Wolf*, 890 F.2d at 245 n.6. And unlike in every other Circuit (and the instruction in *Dost* itself), the jury was not instructed that it could consider factors other than the *Dost* factors. Pet. App. 30a-32a.

The Tenth Circuit's reasoning is not just unsound; its conclusion conflicts with this Court's precedents (not to mention many of the precedents discussed in the preceding section). This Court has firmly and repeatedly rejected the idea that an image can be "lascivious" simply because the defendant thinks that the image is lascivious: "[t]he "material in fact (and not merely in his estimation) must meet the statutory definition." *Williams*, 553 U.S. at 301 (noting that "a harmless picture of a child in a bathtub" does not depict a "lascivious exhibition" even if the defendant thinks otherwise); *Ashcroft*, 535 U.S. 234 (2002) ("[t]he government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts'"). This Court has also rejected the idea that an image of a nude child qualifies as a "lascivious exhibition." *Ferber*, 458 U.S. at 776 n.18 ("nudity, without more is protected expression").

None of this is true in the Tenth Circuit. This case literally involves an image of a nude child in a bathtub. Pet. App. 2a. With the *Dost* factors in tow, and evidence of Enzminger and Kroeker's pedophilic tendencies, the jury convicted regardless.

Contrary to the Tenth Circuit's belief, the *Dost* factors' "flexibility" does not provide guidance; it causes confusion and permits convictions for conduct not covered by the statute. *See*, *e.g.*, *Hutton*, 2025 WL 3202003, at *8 (Graber, J., concurring) ("Our cases have expanded the meaning of this statute to encompass everyday ordinary behavior, such as a person entering and exiting a shower, even if the person has no sexual thought or intent whatsoever. We ordinarily would not call such conduct 'lewd' … .").

Third, and relatedly, the Tenth Circuit's adoption of the *Dost* factors has no basis in the statutory text. Congress did not define the phrase "lascivious exhibition" via "a list of difficult-to-apply, judicially-created factors." *Spoor*, 904 F.3d at 150 n.7. It did not define that phrase at all. Thus, the plain, ordinary meaning of that phrase should control. The plain, ordinary meaning of "lascivious" is 'exciting sexual desires; salacious,'" *Williams*, 444 F.3d at 1299. And an "exhibition" is a display or presentation "in order to attract notice to what is interesting or instructive." *Knox*, 32 F.3d at 744. These "common definitions of 'lascivious' and 'exhibition' provide a sufficient guide." *McCoy*, 108 F.4th at 654 (Graz, J., dissenting). "[T]he standard to be applied by the jury is the statutory standard," which "needs no adornment." *Frabrizio*, 459 F.3d at 85. The *Dost* factors "are unnecessary in light of the clear statutory definition of the term 'sexually explicit conduct.'" *Price*, 775 F.3d at 831. "Instructing a jury on the *Dost* factors can seem like a command to take a detailed and mechanical walk through a checklist, which risks taking the inquiry far afield from the already clear statutory text." *Id.* at 840. "The jury's common understanding

is enough to distinguish artistic and other licit photos of children from child pornography as that term is defined in the statutory text." *Id.*

It is important to note that Congress included the phrase "lascivious exhibition of the genitals" in a definition of "*sexually explicit* conduct" in a statutory scheme regulating "child *pornography*." This Court has referred to the phrase in this context as "the hard core of child pornography." *Ferber*, 458 U.S. at 773. And "sexually explicit conduct" otherwise means "sexual intercourse," "bestiality," "masturbation," and "sadistic" or "masochistic abuse," all phrases that (obviously) connote sexual conduct. 18 U.S.C. § 2256(2)(A)(i)-(iv). What follows is that the phrase "lascivious exhibition of the anus, genitals, or pubic area" must also connote some type of sexual conduct. *Williams*, 553 U.S. at 296 ("'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring."); *Hillie*, 39 F.4th at 685 (employing the *noscitur* canon to interpret "lascivious exhibition" "in a manner that connotes the commission of a sexual act").

But the jury instruction in this case strays far off course and permitted the jury to convict based on a nude photo taken by a third party who might have had pedophilic tendencies. That's wrong. *Hillie*, 39 F.4th at 688; *Amirault*, 173 F.3d at 34; *Spoor*, 904 F.3d at 150-151; *Heinrich*, 57 F.4th at 161; *Steen*, 634 F.3d at 829 (Higginbotham, J., concurring) ("Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this *Dost* factor encourages both judges and juries to improperly consider a non-statutory element"); *McCoy*, 108 F.4th at 654 (Stras, J., dissenting) (rejecting the

proposition that a "defendant's subjective intent" is relevant); *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) ("the [statutory] definition turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition"); *Hutton*, 2025 WL 3202003, at *8-9 (Graber, J., concurring) ("what it all means is that, so long as one of the specified body parts is nude, any commonplace activity—entering the shower, using the toilet, getting dressed, and so on—could qualify as 'lascivious'"; "it is difficult to square that result with the words that Congress chose").

Fourth, the Tenth Circuit erred when it affirmed the appeal-to-pedophiles language within the jury instruction ("consider whether the visual depictions would appeal to persons who are sexually attracted to children"). Pet. App. 9a. According to the Tenth Circuit, this language "largely recapitulates the sixth *Dost* factor." Pet. App. 9a-10a. That's wrong. The sixth *Dost* factor has to do with why the producer created the image, not whether a pedophile would be sexually attracted to the image. And regardless, the inclusion of the sixth *Dost* factor in the jury instruction is itself one of the fatal flaws in this non-production case (as explained above).

The Tenth Circuit also reasoned that this portion of the instruction "was just one statement among several in the jury instructions," implying that its inclusion was inconsequential. Pet. App. 10a. But that ignores the trial evidence and the prosecution's trial strategy, which was to convince the jury to convict Kroeker because of his pedophilic tendencies. *See* Pet. App. 2a-3a. It also ignores the devastating effect this language had, considering that any rational jury would conclude that a pedophile

would be attracted to a nude image of a child. *See*, *e.g.*, *Williams*, 444 F.3d at 1299 (acknowledging that "[m]any pedophiles collect and are sexually stimulated by nonpornographic depictions of children …. otherwise innocent pictures that are not traditionally seen as child pornography and which non-pedophiles consider innocuous"); *Amirault*, 173 F.3d at 34 ("a deviant's subjective response could turn innocuous images [including a "Sears catalog"] into pornography"); *Villard*, 885 F.2d at 125 ("Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocuous photo."); *Steen*, 634 F.3d at 829 (Higginbotham, J., concurring) ("A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but these are not pornographic.").

Finally, the Tenth Circuit reasoned that the appeal-to-pedophiles language was not problematic because the jury would not have "believe[d] the law required it to find [that the image was] lascivious merely because it could appeal to those with pedophilic tendencies." Pet. App. 10a. That reasoning too is unsound. Jury instructions are not improper only when they require the jury to convict. Under binding Tenth Circuit precedent, they are improper if they fail to "provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Christy*, 916 F.3d 814, 854 (10th Cir. 2019). That is precisely what the appeals-to-pedophiles language did.

Fifth, the Tenth Circuit's decision affirming the district court's definition of a "lascivious exhibition" as an "indecent exposure," Pet. App. 5a-6a, is an outlier in the lower courts and is inconsistent with this Court's opinions in *Williams*, 553 U.S. at

306, and *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 (1978). This Court has defined "indecent," not as "lascivious" or otherwise as connoting sex, but as "merely refer[ring] to nonconformance with accepted standards of morality." *Pacifica Foundation*, 438 U.S. at 740. Moreover, this Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was … 'indecent'—[a] wholly subjective judgment[] without statutory definition[], narrowing context, or settled legal meaning[]." *Williams*, 553 U.S. at 306. In *Williams*, this Court even contrasted a (problematic) statute that asked whether 'conduct is … 'indecent,'" with a (permissible) statute that asked whether "material or purported material is child pornography." *Id.*

The Tenth Circuit ignored all of this and instead relied on a definition found in Black's Law Dictionary that "use[s] indecent as a synonym for lascivious." Pet. App. 6a n.1. But Black's Law Dictionary does not trump this Court's precedent. Moreover, courts do not blindly extract words from dictionaries to include in jury instructions. *See*, *e.g.*, *Thompson v. United States*, 145 S. Ct. 821, 826 (2025) (refusing to define "false" in a criminal statute as "deceitful" even though some dictionaries define the term that way). Indeed, the word "obscene" is also included within Black's definition, but we know that "lascivious" does not mean "obscene" in this context. *Ferber*, 458 U.S. at 774.

The Tenth Circuit's reasoning is also not persuasive. In support of the district court's "indecent exposure" language, the Tenth Circuit quoted the Third Circuit's entirely different definition of "lascivious" – "a depiction which displays or brings

forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." Pet. App. 6a (quoting *Knox*, 32 F.3d at 745-746). But this materially different definition does not support the "indecent exposure" language from the jury instruction; it undermines it. The Tenth Circuit also relied on the *Dost* factors to justify this language, but again, the *Dost* factors also rendered the instruction infirm (as discussed above).

Sixth, the Tenth Circuit erroneously held that the district court "did not err" when it included the statutory definitions of child pornography from § 2256(8)(B) and (C) in the jury instructions, Pet. App. 11a. While it is true that this language was a "direct[] quote" from the statute, Pet. App. 11a, it was also language that was not charged by the grand jury, Pet. App. 10a (acknowledging that the indictment only alleged receipt of child pornography as defined in § 2256(8)(A)).

It is blackletter law that an indictment cannot be broadened at trial via the jury instructions. *See*, *e.g.*, *Stirone v. United States*, 361 U.S. 212, 215-217 (1960) (the Fifth Amendment's grand-jury presentment clause prohibits a defendant from being tried and convicted of "charges that are not made in the indictment against him"; "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself"); *Schmuck v. United States*, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."); *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008) (Gorsuch, J.) ("[i]t is settled law in this circuit, as elsewhere, that the language employed by the

government in its indictments becomes an essential and delimiting part of the charge itself, such that '[i]f an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars'"). Thus, the jury instructions should not have broadened the indictment to reach different types of child pornography not charged in the indictment. This was error even if the instructions did not "mislead or confuse the jury," Pet. App. 11a.

Moreover, the additional definitions were in fact misleading and confusing. The additional and erroneous definitions instructed the jury that "child pornography" included: (1) "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct"; and (2) any "visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." R1.98. These provisions generally cover virtual child pornography (images that do not, but appear to, involve an actual minor) and morphed child pornography (altered pictures of real children so that the children appear to be engaged in sexual activity). *Ashcroft*, 535 U.S. at 241-242.

This language was problematic here because the receipt count involved an image of a real child (Enzminger's son), and the government did not introduce any evidence, or make any argument, that any other image that it introduced was virtual or morphed child pornography. Defense counsel was correct: this language wasn't applicable because there was no evidence to support it. *See*, *e.g.*, *United States v. Haensgen*, 775 Fed. Appx. 284, 286 (9th Cir. 2019) (noting that this language was

"not implicated" because the defendant "was convicted for child pornography produced with *real* minors"); *Williams*, 444 F.3d at 1296 (same); *United States v. Payne*, 394 Fed. Appx. 891, 896 (3d Cir. 2010) (same).

Absent any evidence or argument about virtual or morphed pornography, this language reinforced the problems created by the *Dost* factors. This is so because, read literally, the language instructed the jury that it should convict if the image did not depict a minor engaged in sexually explicit conduct, but instead was either: (1) a "computer image" that was "*indistinguishable from* that of a minor engaging in sexually explicit conduct"; or (2) a "visual depiction [that] *ha[d] been created to appear that* an identifiable minor [was] engaging in sexually explicit conduct." R1.98 (emphasis added). After all, a "computer image," read literally, can be actual – not virtual – pornography (like the image of Enzminger's son here). *See Payne*, 394 Fed. Appx. at 896. Moreover, here, a "visual depiction" of Enzminger's son was "created" by Enzminger, and so the jury could have convicted if it found that Enzminger "created [the image] to appear that an identifiable minor is engaging in sexually explicit conduct." *See Ashcroft*, 535 U.S. at 241 ("the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a 'picture' that 'appears to be, of a minor engaging in sexually explicit conduct'"). Indeed, the prosecutor used the word "created" to describe the image of Enzminger's son in closing arguments. R2.176.

Like the "lascivious exhibition" instruction, this language effectively told the jury that it could convict even if the image of Enzminger's son was not lascivious. In

context, this language reinforced the unhelpful and inaccurate statements within the "lascivious exhibition" language.

In the end, the Tenth Circuit should not have affirmed the district court's "elaborate" "lascivious exhibition" instruction, Pet. App. 4a. For this reason as well, review is necessary.

III. The question presented is exceptionally important.

Review is also necessary because the question presented is exceptionally important. The "lascivious exhibition" phrase at issue here is an umbrella definition that applies throughout Chapter 110 of the United States Code. Since 2020, over 6,400 individuals have been convicted and sentenced for a Chapter 110 child-pornography offense.[6] Any of these cases could turn on the definition of "lascivious exhibition." And the differing interpretations of that phrase have significant ramifications. In voyeurism cases, for instance, the difference is a conviction or an acquittal. *Compare Hillie*, 39 F.4th at 686 (vacating § 2251 convictions in a voyeurism case), with *Wells*, 843 F.3d at 1254 (affirming § 2251 convictions in a voyeurism case).

The different interpretations can also play a significant role at sentencing. For starters, Chapter 110 is peppered with mandatory minimum sentences. *See*, *e.g.*, 18 U.S.C. § 2251(e) (15-year, 25-year, 30-year, or 35-year mandatory minimum); 18 U.S.C. § 2252(b)(1) (5-year or 15-year mandatory minimum); 18 U.S.C. § 2252A(b)(1) (same); 18 U.S.C. § 2252(b)(2) (10-year mandatory minimum); 18 U.S.C. § 2252A(b)(2)

[6] United States Sentencing Commission, FY 2020 through FY 2024 Datafiles, USSCFY20-USSCFY24, available here: https://www.ussc.gov/research/quick-facts/child-pornography (last visited Nov. 18, 2025).

(same). The sentencing guidelines also include incremental increases for the number of illicit images involved in the offense. USSG § 2G2.2(b)(7). The broader the reach of "lascivious exhibition," the more likely a defendant will be punished severely for his conduct.

The ubiquity of the phrase "lascivious exhibition," and the fierce debate over the *Dost* factors, also ensures that the question presented will continue to recur until this Court addresses the propriety of those factors in jury instructions. This is the opportunity to address that recurring and critically important question. This Court should grant this petition.

IV. This case is an excellent vehicle.

This case is an excellent vehicle to resolve the question presented. Mr. Kroeker objected in the district court, and the Tenth Circuit resolved the appeal on de novo review. Pet. App. 5a. The Tenth Circuit acknowledged "critical case law from other circuits," but ignored all of it in an opinion that exacerbates several Circuit splits and creates two additional Circuit splits over the application of the *Dost* factors. Pet. App. 7a. And the inclusion of the *Dost* factors, as well as the appeal-to-pedophiles language, not to mention the other problems with the instruction, was undoubtedly outcome-determinative under the facts of this case.

There are no vehicle problems or procedural hurdles for this Court to grant this petition and to resolve the confusion and chaos that surrounds the application of the *Dost* factors in the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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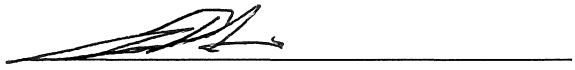

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