No. 25-6223

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL KROEKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

A. TYSEN DUVA
Assistant Attorney General

SOFIA M. VICKERY
Attorney

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

QUESTION PRESENTED

Whether the district court provided an erroneous definition of child pornography in its instructions to the jury on petitioner’s charge of receiving child pornography, 18 U.S.C. 2252A(a)(2).

PARTIES TO THE PROCEEDING

Petitioner, Daniel Kroeker, was the only appellant in the court of appeals. Respondent, the United States of America, was the only appellee in the court of appeals.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

United States v. Daniel Kroeker, No. 22-3092 (July 8, 2022) (affirming district court's pretrial detention order)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is available at 2025 WL 1878790.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2025. A petition for rehearing was denied on August 22, 2025 (Pet. App. 33a). The petition for a writ of certiorari was filed on November 20, 2025. 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 District of Kansas, petitioner was convicted on one count of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Am. Judgment 1; Pet. App. 3a-4a. He was sentenced to 200 months of imprisonment, to be followed by five years of supervised release. Am. Judgment 2-3. The court of appeals affirmed the receipt conviction but reversed the possession conviction. Pet. App. 1a-18a.

1. In July 2019, petitioner engaged in an online Tumblr conversation from Kansas with another user located in North Dakota. Presentence Investigation Report (PSR) ¶ 16; Pet. App. 2a. After discussing their sexual habits, petitioner asked to see a photo of the other user's six-year-old son's penis. PSR ¶ 16. Petitioner then received a photo of the other user's son naked in a bathtub; the focus of the photo was the child's penis. Ibid. Petitioner responded, "Beautiful." Ibid.

A federal grand jury in the District of Kansas charged petitioner with one count of receiving child pornography, in violation 18 U.S.C. 2252A(a)(2), and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Indictment 1-2. The receipt count pertained to the image of the six-year-

old boy in the bathtub that petitioner had solicited. Pet. App. 6a. Petitioner proceeded to trial. Id. at 4a.

2. The statutory definition of "child pornography" includes any visual depiction whose production involves the use of a minor engaging in sexually explicit conduct; a digital image, computer image, or computer-generated image that is, or is indistinguishable from, a minor engaging in sexually explicit conduct; or a visual depiction created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. 18 U.S.C. 2256(8). The definition of "sexually explicit conduct," in turn, includes "sexual intercourse," "bestiality," "masturbation," "sadistic or masochistic abuse," or "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. 2256(2)(A).

At petitioner's trial, the district court provided the complete definition of child pornography provided by 18 U.S.C. 2256(8), stating that child pornography means a visual depiction of sexually explicit conduct where:

> (A) The visual depiction's production involves using a minor engaging in sexually explicit conduct; (B) The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) The visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Pet. App. 30a. The district court also told the jury, over petitioner's objection, 2/6/2024 Trial Tr. 304, 311, that "lascivious exhibition" means "indecent exposure of the anus, genitals, or pubic area, usually to incite lust." Pet. App. 31a.

The district court made clear that "[n]ot every exposure is a lascivious exhibition," and that the jury should determine whether the visual depiction was a "lascivious exhibition" by considering the "overall content of the visual depiction." Pet. App. 31a. And the court stated that, "[i]n considering the overall content," the jury "may, but [was] not required to, consider the following factors," which it drew from United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), affirmed sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987):

> [(1)] Whether the focal point of the visual depiction is on the child's genitals 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; and [(6)] Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Pet. App. 31a-32a.

The court then stated that:

> Exhibition of genitals or pubic area can encompass visual depictions of a child's genital or pubic area even when those areas are covered by clothing. It is 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. 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 found petitioner guilty on both the receipt count and the possession count. Pet. App. 2a.

3. In an unpublished nonprecedential opinion, the court of appeals affirmed the conviction on the receipt count, and reversed the conviction on the possession count. Pet. App. 1a-18a. With respect to the jury instructions pertaining to the receipt count, the court rejected petitioner's objection to the district court's definition of "lascivious exhibition." Id. at 5a-12a.

In a footnote, the court of appeals found no error in the instructions' "referencing indecency," observing that "Black's Law Dictionary * * * has used indecent as a synonym for lascivious since at least the fifth edition in 1979." Pet. App. 6a n.1. And the court explained that the instructions' inclusion of the proviso "'[n]ot every exposure is a lascivious exhibition'" was "to diffuse suggestion that mere nudity was lascivious." Id. at 6a.

The court of appeals additionally observed that the district court "gave the jury tools like the Dost factors" to determine whether the photograph was lascivious and not merely nude, noting that under its precedent "a jury may consult the Dost factors as little or as much as it desires." Pet. App. 6a-7a (citing United

States v. Wells, 843 F.3d 1251, 1254 (10th Cir. 2016), cert. denied, 583 U.S. 830 (2017)). And the court of appeals found that the instructions "properly conveyed this flexibility" and "did not encourage the jury to convict solely based on one factor." Id. at 8a.

The court of appeals also "reject[ed] [petitioner's] suggestion" to "limit using the Dost factors to child-pornography production cases." Pet. App. 8a. The court observed that "[b]oth child-pornography receipt and production cases turn on whether images either produced or received are lascivious, which we have clarified 'is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or [like-minded] pedophiles.'" Ibid. (citation omitted). And, emphasizing that "[l]asciviousness turns * * * on the overall content of the images," the court reasoned that "whether the visual depiction is intended or designed to elicit a sexual response in the viewer is certainly relevant to determining the visual depiction's overall character," even though "producers' intent will not always be relevant" in all receipt or production cases. Ibid. (citations and internal quotation marks omitted).

Finally, the court of appeals rejected petitioner's challenge to the instructions' inclusion of the full statutory definition of child pornography. Pet. App. 11a. The court found "[n]o danger" of confusion regarding computer-generated images because, as

petitioner himself had stated, the jury's guilty verdict was premised on "'an image of a real child,'" which was the only potentially sexually explicit image presented in support of the receipt count at the trial. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 12-38) that the district court erred in instructing the jury on the definitions of "child pornography," 18 U.S.C. 2256(8), and more particularly, "lascivious exhibition," 18 U.S.C. 2256(a)(2)(v). He principally objects to the instructions' inclusion of factors drawn from United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), affirmed sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Petitioner's claims lack merit. In particular, although the courts of appeals have relied to varying degrees on the Dost factors articulated by the district court, any disagreement is narrow. This Court has repeatedly and recently denied petitions for writs of certiorari making similar claims.[1] The same course is warranted here.

1. The court of appeals correctly rejected petitioner's challenge to the district court's instructions regarding the phrase "lascivious exhibition," 18 U.S.C. 2256(a)(2)(v). The

[1] See, e.g., Donoho v. United States, No. 23-803 (June 24, 2024); Boam v. United States, No. 23-625 (Apr. 15, 2024); Kolhoff v. United States, No. 23-6481 (Apr. 15, 2024); Anthony v. United States, No. 23-5566 (Feb. 20, 2024). Similar issues are raised in the currently pending petitions for writs of certiorari in Hutton v. United States, No. 25-971 (filed Feb. 13, 2026), and Dahl v. United States, No. 25-6566 (filed Jan. 9, 2026).

statute does not define the term "lascivious," ibid., which accordingly takes its ordinary meaning. See, e.g., Perrin v. United States, 444 U.S. 37, 42 (1979). The word "lascivious" means "[i]nciting to lust or wantonness." 8 The Oxford English Dictionary 666-667 (2d ed. 1989); see Webster's Third New International Dictionary 1274 (2002) ("tending to arouse sexual desire"). And "exhibition" means a "visible show or display." 5 The Oxford English Dictionary 537 (2d ed. 1989); see also, e.g., United States v. Al-Awadi, 873 F.3d 592, 600 (7th Cir. 2017) ("We have said that a lascivious exhibition 'is one that calls attention to the genitals or pubic area for the purpose of eliciting a sexual response in the viewer.'") (citation omitted); United States v. Courtade, 929 F.3d 186, 191-192 (4th Cir. 2019) (amended July 10, 2019) (examining definitions), cert. denied, 589 U.S. 1135 (2020). The district court's instructions were consistent with that plain meaning.

The district court did not err in referencing factors articulated in Dost -- "[w]hether the focal point of the visual depiction is on the child's genitals or pubic area"; "[w]hether the setting of the visual depiction is sexually suggestive"; "[w]hether the child is depicted in an unnatural pose"; "[w]hether the child is fully or partially clothed, or nude"; [w]hether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity"; and "[w]hether the visual depiction is intended or designed to elicit a sexual response in the viewer"

-- in instructing the jury as to how to determine whether the image depicted a "lascivious exhibition." Pet. App. 31a-32a. The court made clear that "[n]ot every exposure is a lascivious exhibition" and directed the jury to consider the "overall content" of the image. Id. at 31a. The court also told the jurors that they "may" but were "not required to" consider the factors. Ibid.

The district court also explained that "[a] visual depiction need not involve all of these factors to be a lascivious exhibition" and that it was for the jury "to decide the weight or lack of weight to be given to any of these factors." Pet. App. 32a. As the court of appeals explained, these factors acted as "tools" for the jury in considering the "overall content" of the photograph. Pet. App. 6a-8a; see, e.g., United States v. Rivera, 546 F.3d 245, 252 (2d Cir. 2008) (explaining that such factors "impose useful discipline on the jury's deliberations"), cert. denied, 555 U.S. 1204 (2009). Ultimately, "the 'lascivious exhibition' determination must be made on a case-by-case basis using general principles as guides for analysis," Dost, 636 F. Supp. at 829, and the district court here appropriately left it to the jury to make that determination. Pet. App. 31a-32a. See, e.g., United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999) ("The inquiry will always be case-specific.").

2. Petitioner's arguments to the contrary lack merit.

Petitioner errs in suggesting (Pet. 27-29) that the jury could have returned a guilty verdict based on the producer's "subjective

intent" or "simply because the defendant thinks that the image is lascivious." The court's recitation of the sixth Dost factor referenced "[w]hether the visual depiction is intended or designed to elicit a sexual response in the viewer," and "whether the visual depictions would appeal to persons who are sexually attracted to children" -- not whether the viewer did in fact have a sexual response to the image. Pet. App. 32a (emphasis added). The court also took care to articulate the Dost factors as simply a set of "factors" that the jury was "not required to[] consider," potentially relevant to the jury's overarching consideration of the "overall content" of the visual depiction. Pet. App. 31a-32a.

Petitioner's assertion (Pet. 27-28) that the Dost factors should be limited to production cases cannot be squared with the fact that the definitions of "child pornography" and "sexually explicit conduct" apply "[f]or the purposes of th[e] chapter" that contains both types of crimes. 18 U.S.C. 2256. And petitioner is incorrect in suggesting (Pet. 30) that the Dost factors have "no basis" in the statute. As the court of appeals explained, the Dost factors provide jurors potential "tools" to consider whether the "overall content" of a visual depiction meets the ordinary definition of the statutory term lascivious exhibition. Pet. App. 6a-8a. Although petitioner characterizes (Pet. 30) the factors as "unnecessary," he has not shown that any factor is inherently inconsistent with the statutory text. To the extent that petitioner challenges (Pet. 29) the fourth factor, which considers

whether the child is nude, Pet. App. 31a, nudity is clearly relevant -- albeit not necessarily dispositive -- in assessing whether a visual depiction is a "lascivious exhibition of the anus, genitals, or pubic area," 18 U.S.C. 2256(2)(A)(v). Petitioner's concern (Pet. 29) that the jury in his case might have relied on nudity alone fails to properly account for the district court's admonishment that "[n]ot every exposure is a lascivious exhibition." Pet. App. 31a.

Petitioner is also incorrect in asserting (Pet. 29, 31) that the district court's use of the Dost factors was inconsistent with this Court's decision in United States v. Williams, 553 U.S. 285 (2008). While the Court's decision in Williams, which rejected a First Amendment overbreadth challenge, described "'[s]exually explicit conduct'" as "connot[ing] actual depiction of the sex act rather than merely the suggestion that it is occurring," id. at 297 (emphasis omitted), it recognized that the statutory definition of "sexually explicit conduct" includes "lascivious exhibition of the genitals," id. at 301 (citation omitted), recognizing that such exhibition is in itself a "sex act," id. at 297. See also id. at 296 (noting Court's prior approval of definition of "sexual conduct" that included "lewd exhibition of the genitals") (citation omitted). And petitioner's reliance (Pet. 29) on this Court's decisions for the proposition that a nude picture of a child may be innocuous fails to account for the

ways in which the instructions in this case precluded conviction based solely on nudity. See Pet. App. 6a.

Petitioner additionally argues (Pet. 33-34) that the district court inaccurately described lascivious exhibition as "indecent exposure of the anus, genitals, or pubic area, usually to incite lust." Pet. App. 31a. But both the reference to "indecent" exposure and the connection to "lust" match the ordinary meaning of lascivious as "[i]nciting to lust or wantonness." See supra p. 8; see also Pet. App. 6a n.1 (citing dictionary definitions of lasciviousness). And his argument -- that the district court separately erred in instructing the jury that child pornography can include digital, computer images, or computer-generated images and visual depictions that appear to show an identifiable minor engaging in sexually explicit conduct, Pet. 35-38 -- is factually unsound. Petitioner does not dispute (Pet. 35) that the definition given by the court accurately quotes the statute. As the court of appeals found, there was "[n]o danger" of confusion because the government's case was "premised" "entirely on the picture of the six-year-old boy." Pet. App. 11a.[2]

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[2] Petitioner briefly refers (Pet. 35-36) to a deviation between the allegations in the indictment and this jury instruction. But petitioner did not present a Fifth Amendment claim below, and this Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). Such a claim would also fall outside the scope of petitioner's question presented. See Pet. i.

3. Petitioner asserts (Pet. 14-27) that the lower courts are divided regarding whether and how to apply the Dost factors. But any disagreements in the courts of appeals on those issues are narrow and do not warrant this Court's review.

Seven courts of appeals, including the court below, endorse the Dost factors only as an aid in determining whether a visual depiction is lascivious. See, e.g., United States v. Spoor, 904 F.3d 141, 150-151 & n.9 (2d Cir. 2018), cert. denied, 586 U.S. 1120 (2019); 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, 589 U.S. 1184 (2020); United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017); Pet. App. 5a-10a (citing United States v. Wells, 843 F.3d 1251, 1253-1254 (10th Cir. 2016), cert. denied, 583 U.S. 830 (2017)).

Four circuits have declined to take a definitive stance on the Dost factors, even while recognizing their utility.[3] 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

[3] As petitioner notes (Pet. 15), the Eleventh Circuit also includes the Dost factors in its pattern jury instructions. Accord United States v. Tala, No. 22-13027, 2023 WL 5500829, at *4 (Aug. 25, 2023).

situation."') (citation omitted); Courtade, 929 F.3d at 192 (explaining that the court "need not venture into the thicket surrounding the Dost factors" because the depiction of a young girl showering objectively constituted a lascivious exhibition); United States v. Miller, 829 F.3d 519, 525 n.1 (7th Cir. 2016), cert. denied, 582 U.S. 933 (2017) (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." United States v. Hillie, 39 F.4th 674, 689 (2022). But even it has made clear that it "do[es] not mean to suggest that evidence concerning all matters described in the factors is irrelevant or inadmissible at trial," but rather "simply reject[ed] the practice of instructing the jury on the Dost factors as a matter of course, or in a manner that suggests those factors are sufficient to determine whether given conduct" satisfies the statute. Id. at 689-690.

Petitioner overstates (Pet. 17) any tension among the courts of appeals on the applicability of the Dost factors in non-production cases. Although some courts of appeals have observed

that certain Dost factors may be less relevant in some non-production cases, such as "where the circumstances of [production] are unknown," Amirault, 173 F.3d at 34, petitioner has not identified any court of appeals that would find error in instructing the jury on the Dost factors in the circumstances here. See Spoor, 904 F.3d at 151 (discussing Dost factors as aid in case involving both production and possession counts).

Thus, courts of appeals do generally agree that a factfinder may consider aspects of the depiction that those factors encompass. And given that the district court in this case expressly instructed the jury that, "[i]n considering the overall content of the image, [it] may, but [was] not required to, consider" the Dost factors and that the jury should "decide the weight or lack of weight to be given to any of these factors," Pet. App. 31a-32a, this case would be a poor vehicle in which to address any disagreement about the proper consideration of those factors.[4]

4. In all events, even if this case implicated some division among the court of appeals, it would still be a poor vehicle for assessing the question presented. Even assuming that the district court incorrectly instructed the jury on how to determine whether the photo was a lascivious exhibition, any such error was harmless. See United States v. Marcus, 560 U.S. 258, 264 (2010) (identifying

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[4] Petitioner's observation (Pet. 18-19) that other circuits have provided additional instructions in other cases involving different factual scenarios also does not demonstrate a disagreement as to whether the district court properly instructed the jury in this case.

"erroneously instructing the jury on an element" as subject to harmless-error analysis); Neder v. United States, 527 U.S. 1, 18 (1999). A rational jury would have found beyond a reasonable doubt that this nude photo, which focused on a six-year-old's penis, was sent in response to petitioner's request to see the child's penis, and elicited petitioner's comment, "Beautiful," PSR ¶ 16, was a lascivious exhibition under any ordinary understanding of that term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

A. TYSEN DUVA
Assistant Attorney General

SOFIA M. VICKERY
Attorney

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