No. 25-6223

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

PETITIONER'S REPLY BRIEF

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The government concedes (BIO 7, 13-14) that there is a conflict in the Circuits over the question presented. The government also does not contest the exceptional importance of the question presented. Instead, the government primarily argues (BIO 7-12) that the jury instruction accurately defined "lascivious exhibition." The government also claims (BIO 15) that this case is a poor vehicle to resolve the Circuit split because of harmless-error concerns. The government's unpersuasive merits-based arguments are not valid reasons for this Court to decline to resolve an acknowledged Circuit split.

A. There Is an Acknowledged Circuit Split Over the Question Presented.

1. The government concedes that there is a Circuit Split over the use of the *Dost* factors[1] in jury instructions to define the phrase "lascivious exhibition." BIO 7, 13-14. This concession is a "compelling reason[]" to grant this petition. Sup. Ct. R. 10.

2a. The government suggests, however, that the conflict is tolerable because it is "narrow." BIO 7, 13-14. According to the government, only the D.C. Circuit has "'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." BIO 14 (quoting *United States v. Hillie*, 39 F.4th 689 (D.C. Cir. 2022)). The government is wrong.

b. In addition to the D.C. Circuit, the First and Seventh Circuits do not define "lascivious exhibition" in jury instructions by using the *Dost* factors. Pet.15-16

[1] *United States v. Dost*, 636 F.Supp. 828 (S.D. Cal. 1986).

(discussing, *inter alia*, *United States v. Price*, 775 F.3d 828, 840 (7th Cir. 2014), and *United States v. Fabrizio*, 459 F.3d 80, 85 (1st Cir. 2006)). The government (BIO 13-14) attempts to dispute this by citing to *United States v. Miller*, 829 F.3d 519 (7th Cir. 2016), and *United States v. Sheehan*, 70 F.4th 36 (1st Cir. 2023). But those cases did not involve instructional issues or discuss whether it was proper to include the *Dost* factors within jury instructions to define "lascivious exhibition." Nor did the panel opinions in those cases purport to overrule earlier settled precedent (*Price* and *Fabrizio*) discouraging the use of the *Dost* factors in jury instructions.

Miller involved appellate sufficiency-of-the-evidence review. 829 F.3d at 524. "Sufficiency review essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to the jury.'" *Musacchio v. United States*, 577 U.S. 237, 243 (2016). It is "a limited inquiry" that "does not rest on how the jury was instructed." *Id.* There is no principled basis to equate a sufficiency determination with a jury instruction's definition of an element of the offense. *See*, *e.g.*, *United States v. Ness*, 124 F.4th 839, 845 (10th Cir. 2024) ("language [that] guides our appellate review of sufficiency of the evidence[] is not workable for instructing the jury"); *Price*, 775 F.3d at 840.

Sheehan involved a Fourth Amendment probable-cause determination. 70 F.4th at 44. "Probable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018). It is "more than bare suspicion," but less than proof beyond a reasonable doubt. *Brinegar v. United States*, 338 U.S. 160, 175 (1949). "[I]nnocent behavior frequently will provide the basis for a showing of probable cause." *Illinois v. Gates*,

462 U.S. 213, 243 n.13 (1983). By contrast, to convict, a jury must find elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). That is a materially different (and heightened) standard. *Sheehan*'s use of the *Dost* factors in the probable-cause context does not translate to the use of the *Dost* factors in jury instructions. In that context, the First Circuit has held that "the standard to be applied by the jury is the statutory standard," which "needs no adornment." *Frabrizio*, 459 F.3d at 85.

c. The government also incorrectly represents (BIO 13) that the Second Circuit has "endorse[d] the *Dost* factors" in jury instructions in non-production cases. The case cited by the government involved sufficiency-of-the-evidence review of a production conviction, not the propriety of jury instructions in a non-production case. *United States v. Spoor*, 904 F.3d 141, 150-151 (2d Cir. 2018). With respect to jury instructions in non-production cases, the Second Circuit has recognized a distinction "between the production of child pornography and possession," and has noted that "adaptations or allowances [may be] warranted by the facts and charges in a particular case." *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008).

d. Similarly, the government also incorrectly represents (BIO 13) that the Sixth and Eighth Circuits have "endorse[d] the *Dost* factors" in jury instructions in non-production cases. They have not. Pet.17. The Sixth Circuit case cited by the government involved a sentencing guidelines issue, not an instructional issue. *United States v. Hodge*, 805 F.3d 675 (6th Cir. 2015). The Eighth Circuit case involved sufficiency-of-the-evidence review in a production case. *United States v. Petroske*, 928

F.3d 767, 773 (8th Cir. 2019). That case did not "endorse the *Dost* factors" in jury instructions; the jury instruction defining "lascivious exhibition" did not even include the *Dost* factors. *Id.* at 771.

e. When the cases are viewed correctly, the Circuit split is not "narrow" (BIO 7), and we have not "overstated" the tension among the courts of appeals (BIO 14). The government is also incorrect when it states (BIO 15) that we have "not identified any court of appeals that would find error in instructing the jury on the *Dost* factors in the circumstances here." The D.C. Circuit would find reversible error. *Hillie*, 39 F.3d at 689. So too the First and Seventh Circuits. *Frabrizio*, 459 F.3d at 85; *Price*, 775 F.3d at 831. And possibly the Second Circuit. *Rivera*, 546 F.3d at 253. And several other Circuits would find error with respect to the appeals-to-pedophiles language, Pet. 24-25, a compelling point the government ignores entirely.

3a. The government also states (BIO 13) that any disagreements over "how to apply the *Dost* factors" are "narrow and do not warrant this Court's review." The government does not address the numerous conflicts, however. *See* Pet.14 (listing seven conflicts involving how the lower courts apply the *Dost* factors). Instead, the government claims in a footnote (BIO 15 n.4) that, because these conflicts involve "different factual scenarios," they do not "demonstrate a disagreement as to whether the district court properly instructed the jury in this case." This is incorrect. The various conflicts over how to apply the *Dost* factors all have relevance to this case.

The conflict over the number of *Dost* factors (Pet.18) is relevant because the jury instructions included six, not eight factors. The other two factors used by the Eighth

and Ninth Circuits – whether the picture portrayed the minor as a sexual object and any captions on the pictures, Pet.18 – do not support the jury verdict. The image is of a nude child sitting in a bathtub. The minor is not portrayed as a sexual object. And there are no captions on the picture. These factors could have resulted in an acquittal here because the jurors were told that they could consider (or not) any (or all) of the factors and give whatever weight to any of the factors. Pet.App.32a.

The conflict over 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 (Pet.18-20) is relevant because the government introduced significant evidence of the producer's (Kyle Enzminger; not Kroeker) pedophilic tendencies. Had the jury been told that this sixth factor is not concerned with the subjective intent of the producer, but is instead about "the objective criteria of the photograph's design" that turns "on the content of the [photo] itself and not on the sexual predilection of its creator," Pet.19 (discussing precedent from the First, Second, and Third Circuits), the jury may have acquitted Kroeker.

The conflict over whether a certain number of the *Dost* factors must be present to convict (Pet.20-21) is relevant because the jury may have acquitted had they been instructed that they had to find the existence of two of the factors to convict. Instead, the jury was told to consider all the factors and to give whatever weight it wanted to each factor, which permitted the jury to give dispositive weight to just one factor.

The conflict over whether juries can consider the "overall context," a more "limited context," or just the "four corners of the image" (Pet.21-22) is relevant because the

jury may have acquitted under a "limited context" or "four corners" test considering that the image is of a nude child in a bathtub and the government introduced significant extraneous evidence about the pedophilic tendencies of the producer and Kroeker. As instructed, it is likely that the jury convicted, not because the image itself depicted a child engaged in a "lascivious exhibition" of the genitals, but because the "overall context" indicated that the producer and receiver subjectively viewed the image as "lascivious."

The conflict over whether juries can consider factors other than the *Dost* factors (Pet.23) is also relevant because the failure to tell Kroeker's jury that it could consider factors other than the *Dost* factors effectively turned the factors into a mechanical checklist that superseded the statutory text. In doing so, the jury did not convict because it found that the image depicted a child engaged in sexually explicit conduct, but because it found that the image satisfied one of the *Dost* factors.

The conflict over whether juries should be instructed to consider whether an image "would appeal to persons who are sexually attracted to children" (Pet.24-25) is extremely relevant because the government introduced evidence that Kroeker was sexually attracted to children. The jury may have acquitted had they not been instructed to consider this factor to determine whether the image depicted a "lascivious exhibition." And again, several other Circuits have rejected this reasoning; no other Circuit has adopted it. Pet. 24-25.

Finally, the overarching conflict over the definition of "lascivious exhibition" (Pet.25-27) is relevant because the jury was told that the image need only be an

"indecent exposure" to convict. If the jury was not given this watered-down definition of "lascivious exhibition," it might not have convicted Kroeker.

Considering the nature and number of disagreements within the Circuits, the government's claim that the Circuit split is "narrow" has no support. As we have discussed throughout our Petition, many courts and many Judges have identified the various Circuit splits and the need for their resolution. This Court should grant this petition.

B. The Government Does Not Contest the Importance of the Question Presented.

The government does not appear to contest the exceptional importance of the question presented. *See* Pet.38-39. At most, the government indicates (BIO 7) that this Court has recently denied petitions raising *Dost*-factor-related questions, and argues that the "same course is warranted here." But the fact that there are so many recurring *Dost*-factor-related petitions is not a reason to deny this Petition; it is a reason to grant it. Until this Court provides guidance in this area of the law, litigants will continue to file petitions asking this Court for such guidance. The recurring nature of the question presented further supports review here.

Additionally, the prior petitions were not proper vehicles to address the instructional issue presented here. The four cases cited by the government (BIO 15 n.4) were production cases challenging the sufficiency of the evidence; they were not non-production cases challenging jury instructions. The jury instructions in one case (*Donoho*) did not even include the *Dost* factors. And the pro se petition in another case (*Kolhoff*) did not cite or discuss the *Dost* factors. None of the cited petitions are

analogous to the question presented. Nor do the denial of those petitions undermine the exceptional importance of the instructional issue presented here.[2]

C. The Government's Position Is Incorrect.

1. The government first claims (BIO 8) that courts should define "lascivious exhibition" according to its ordinary meaning – "inciting to lust or wantonness," and that the instruction at issue here is "consistent with" that ordinary meaning. We agree with the first part of this argument. It has always been our position that courts should define "lascivious exhibition" according to its ordinary meaning – "exciting sexual desires; salacious." Pet.30. The government's ordinary-meaning definition is not materially different than our definition. Had the district court simply defined "lascivious exhibition" via this ordinary meaning, there would have been no objection (and likely no conviction), and this Petition would not exist.

In the district court, however, the government advanced the meandering definition of "lascivious exhibition" that is at issue here. And the government now claims (BIO 8) that this meandering definition is somehow "consistent with" the phrase's ordinary meaning. We do not agree with this argument. The district court's definition went far afield of the ordinary meaning, asking whether the image was an "indecent exposure," and instructing the jury to consider the *Dost* factors and whether a pedophile would be sexually aroused by the image.

This Court has made clear that "indecent" covers a much broader swath than "lascivious." Pet.33-34. The government (BIO 12) is simply incorrect when it

[2] The government also cites two pending petitions. Both of those petitions involve sufficiency-of-the-evidence challenges, rather than the clean instructional issue presented here.

summarily states that "indecent" "match[es] the ordinary meaning of lascivious." And the *Dost* factors exist because of a district court's belief that a child's "lascivious exhibition" is "different" from the ordinary meaning of that phrase. Pet.6. Stated differently, the *Dost* factors are not "consistent with" the ordinary meaning of "lascivious"; they purposefully expand that definition to reach beyond what one might ordinarily consider lascivious conduct. Moreover, as several courts have noted (Pet.33), pedophiles are often aroused by non-lascivious images of children. Thus, asking the jury to consider whether an image appeals to a pedophile also expands the definition to reach non-lascivious conduct. The district court should have simply provided (at most) the ordinary meaning of "lascivious" to the jury, not the meandering definition that strayed "far afield from the statutory language." *Frabizio*, 459 F.3d at 88; *Price*, 775 F.3d at 840 (similar).

2. The government also claims that the instruction properly "left it to the jury to" determine whether the image depicted a "lascivious exhibition." BIO 9. We do not disagree that the jury was properly asked to decide whether the image depicted a "lascivious exhibition." But the instruction itself permitted the jury to convict even if the image did not depict a "lascivious exhibition."

This is so in part because the instruction gave the jury the option to consider (or not) the *Dost* factors and to give them whatever "weight or lack of weight" it wanted (and without instructing the jury that it could consider other factors). That unbounded discretion means that the jury could have considered just one factor – like nudity – and given it dispositive weight. Pet.28-29.

The government resists this obvious conclusion because the jury was also instructed that "[n]ot every exposure is a lascivious exhibition." BIO 11. But that truism provides no guidance whatsoever. It also has nothing to do with nudity (it does not reference a "nude exposure," for instance). After all, the jury was told that a "lascivious exhibition" could include a visual depiction of the "genital or pubic area even when those areas are covered by clothing." Pet.App.32a. It is much more sensical to read the "not every exposure" language as referring to non-nude images, not nude images.

The unbounded discretion provided by the jury instruction also means that the jury could have considered just the sixth factor – the producer's subjective intent – and convicted solely because the producer (Enzminger) had pedophilic tendencies. Pet.28-30. The government appears to resist this conclusion (BIO 9-10) because the instructions did not reference "whether the viewer did in fact have a sexual response to the image." This argument is a non sequitur. The problem with the sixth *Dost* factor is that it focuses on *the producer's* subjective intent, not that it focuses on *the viewer's* sexual response to the image. Pet.27-28. And here, the producer was not the defendant (Kroeker received the image; he did not produce it).

The government's only other attempt to respond to this point is to assume that the *Dost* factors are appropriate in production cases, then reason from that premise that it would not be possible to exclude them in non-production cases because the statutory phrase "lascivious exhibition" applies in both contexts. But the government itself takes the position (BIO 9-10) that not every *Dost* factor needs to be present (or

even considered by the jury) to convict in any case. That reasoning confirms what some courts have acknowledged: the *Dost* factors are not "necessarily applicable in every situation." *Sheehan*, 70 F.4th at 46 n.4; *Rivera*, 546 F.3d at 252-253 (similar). That reasoning also undermines the government's argument (BIO 10) that the *Dost* factors have a basis in the statute. If the *Dost* factors were found within the statute, they would not be optional factors. But they are not found within the statute; they are found in a lone 40-year-old district court opinion about the sufficiency of the evidence in a production case. Congress has never imported them into the statute. Courts should not import them into jury instructions that define statutory terms. Pet.30-32.

The government (BIO 10) attempts to shoehorn the district court's appeals-to-pedophiles language into the sixth *Dost* factor and to justify it because the language does not require the jury to ask whether "the viewer did in fact have a sexual response to the image." But the sixth *Dost* factor asks about the producer's intent, not about the sexual predilections of a pedophile viewer. Pet.32-22. Multiple courts of appeals who otherwise use the *Dost* factors in some capacity have expressly rejected the appeals-to-pedophiles reasoning. Pet.24-25. Only the Tenth Circuit in this case has affirmed that language. Moreover, it does not matter that the instruction in this case asked whether a pedophile (and not Kroeker specifically) would have a sexual response to the image. The government introduced a significant amount of evidence that Kroeker had pedophilic tendencies, as well as evidence that the image at issue

appealed to him. Pet.10, 24-25. In doing so, the district court effectively directed a guilty verdict for the government.

The government also suggests (BIO 10) that we have "not shown that any factor is inherently inconsistent with the statutory text." But it is the government who cannot show that the factors are consistent with the statutory text. And this is especially true when the instruction is read as a whole. Pet 28-30. The instruction's unbounded discretion necessarily permitted a conviction for receipt of a non-lascivious image.

The government disagrees (BIO 11) that the jury instruction was inconsistent with *United States v. Williams*, 553 U.S. 285 (2008), because *Williams* defined a "lascivious exhibition" as a "sex act." But this response misses the point of our argument. *Williams* is relevant because it holds that an image must actually depict a "lascivious exhibition" of the genitals, whereas the jury instruction in this case permits a conviction simply because the jury finds that the producer intended a non-lascivious image to be "lascivious" or because a pedophile would view a non-lascivious image as "lascivious." Pet.29.

Finally, the government (BIO 12) also defends the inclusion of the definitions found in 18 U.S.C. § 2256(8)(B) and (C), even though the indictment was limited to the definition found in § 2256(8)(A). Because those definitions were not included within the indictment, they should not have been included within the jury instruction. Pet.35-36. Contrary to the government's claim (BIO 12 n.2), we do not have to raise a separate constructive amendment claim to note that this mistakenly-

included language further reinforced and exacerbated the unhelpful and inaccurate statements within the "lascivious exhibition" instruction.

D. This Petition Is an Excellent Vehicle.

As already explained, this is the ideal vehicle to resolve the conflicts in the Circuits. Pet.39. The government disagrees for two merits-based reasons.

First, the government claims (BIO 15) that this "would be a poor vehicle" because the district court instructed the jury that is was not required to consider the *Dost* factors and could give whatever weight it wanted to the factors. But again, this amorphous language itself conflicts with the way in which other Circuits use the *Dost* factors, including those Circuits that do not include the *Dost* factors in jury instructions in production or non-production cases, those Circuits that include the "*Dost*-plus" factors, those Circuits that require one or more factors to convict, those Circuits that limit the inquiry to the "four corners" of the image, and those Circuits that permit juries to consider factors other than the Dost factors. Pet.15-23. As discussed above, the language also permits a jury to convict for receipt of a non-lascivious image. *See also* Pet.28-30. This language does not make this a poor vehicle; it solidifies the need to grant this Petition.

Second, the government claims (BIO 15) that this Petition is a "poor vehicle" because any "error was harmless." In arguing that the instructional error was harmless, however, the government does not invoke the ordinary meaning of "lascivious" but instead claims that the image checks four of the six *Dost* factors: (1) the child was nude; (2) the image focused on the child's penis; (3) the producer

intended to elicit a sexual response in the viewer because the image was sent in response to Kroeker's request for an image of the child's penis; and (3) the image would sexually arouse a pedophile, as Kroeker (who had pedophilic tendencies per the government's trial evidence) commented "Beautiful" after he received the image. If it was error, however, to include the *Dost* factors in the instructions, it is unhelpful to frame the harmless-error inquiry around those *Dost* factors.

Moreover, a preserved instructional error is harmless only if the government proves "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15 (1999). Tellingly, the Tenth Circuit did not make an alternate harmless error finding below. Even more tellingly, the government did not even argue harmless error in the Tenth Circuit. The government's one-sentence harmless-error argument in its brief in opposition is the first time that it has raised the argument in this litigation.

It is not surprising that the government did not argue harmless error below. This is a rare child-pornography case that involves just one image. And it is an even rarer child-pornography case in that the one image involved is just a nude child in the bathtub. The image does not "focus on" the child's penis, as the government claims. The image portrays the entire child (head to toes) sitting in a bathtub. The child does not have an erection and is not doing anything sexual in the photo. He's just sitting in the tub. If there were ever a case to explore the propriety of the *Dost* factors, this is that case. And in light of the mass confusion surrounding the *Dost* factors in the

courts of appeals, this Court should grant this perfect vehicle to resolve the question presented.

Respectfully submitted,

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