No.

IN THE
Supreme Court of the United States

WILLIAM DAHL,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2252A criminalizes the receipt of child pornography. A depiction counts as child pornography if its "production . . . involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A). "Sexually explicit conduct" includes a "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

Congress pinned punishment to *objectively* lascivious exhibitions, not depictions that are *subjectively* lascivious "in [a defendant's] estimation[.]" *United States v. Williams*, 553 U.S. 285, 301 (2008). Yet some Circuits graft subjective intent and desire onto this scheme by telling factfinders, when deciding if a depiction shows a lascivious exhibition, to consult subjective factors from a forty-year-old judicial opinion. *See United States v. Dost*, 636 F.Supp. 828 (S.D.Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)).

The question presented is:

How, if it all, may courts direct factfinders to rely on the "*Dost* factors" in deciding whether a depiction includes a "lascivious exhibition of the anus, genitals, or pubic area of any person?"

INTERESTED PARTIES

All parties are named in the caption.

RELATED PROCEEDINGS

Dahl v. United States, No. 25A592 (U.S.)

United States v. Dahl, No. 23-3721 (8th Cir.)

United States v. Dahl, No. 4:21-cr-00290-JAR-1 (E.D. Mo.)

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PETITION FOR A WRIT OF CERTIORARI

William Dahl respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DECISION BELOW

A copy of the Eighth Circuit's opinion appears at Pet. App. 1a – 6a and is reported at 144 F.4th 1076. The Eighth Circuit denied rehearing or rehearing en banc in an order appearing at Pet. App. 7a and reported at 2025 WL 2450168.

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Eighth Circuit had jurisdiction under 28 U.S.C. § 1291. It entered its judgment on July 22, 2025, and denied rehearing and rehearing en banc on August 26, 2025. Pet. App. 1a – 7a.

Justice Kavanaugh granted Petitioner until January 23, 2026, to file this petition. Pet. App. 8a – 9a.

RELEVANT PROVISIONS

18 U.S.C. § 2252A provides, in relevant part, that:

"Any person who—

(2) knowingly receives or distributes—

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or

transported in or affecting interstate or foreign commerce by any means, including by computer . . .

shall be fined under this title and imprisoned not less than 5 years and not more than 20 years[.]"

18 U.S.C. § 2256(8) provides that:

" '[C]hild 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—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such 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) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."

18 U.S.C. § 2256(2)(A) provides, in relevant part, that:

" '[S]exually 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

Congress fixed stiff, mandatory minimum punishment for those who receive "child pornography." It also tied child pornography's meaning to "sexually explicit conduct," a term that includes a "lascivious exhibition of the anus, genitals, or pubic area of any person."

This Court has observed that these statutes create an objective test that an ordinary person can apply. Some Circuits accordingly trust factfinders to apply the statutes as written.

However, many Circuits have reached beyond the text to provide their own guidance. Those Circuits tell factfinders to reference six judicially-crafted factors when asking if an exhibition is "lascivious." Those factors first appeared forty years ago in an opinion out of the Southern District of California. Aimed at broadening the inquiry to capture exhibitions that are not sexual on their face, the factors ask, *e.g.*, "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

These factors tell judges and jurors that they can rest a conviction on an exhibition that they do not find to be objectively lascivious. Under the factors, an objectively non-lascivious exhibition can trigger liability if the factfinder thinks the producer intended his depiction to appeal to a pedophile's subjective tastes.

Whatever policy merit such a standard may have, it is not the one Congress chose.

The factors have split the Circuits for decades. Courts are still divided over not only *whether* factfinders may employ them, but *how*. This confusion impacts around two thousand cases a year—serious cases that come with significant punishment.

In the opinion below, the Eighth Circuit relied on these factors to affirm Petitioner's convictions. His case presents an excellent opportunity for the Court to reorient our child pornography laws back toward the text.

STATEMENT OF THE CASE

A. Legal Background

1. Federal law prohibits the knowing receipt or distribution of child pornography. 18 U.S.C. § 2252A(a)(2). Violators face at least five years in prison, and as many as twenty. 18 U.S.C. § 2252A(b)(1).

Congress decided that a depiction qualifies as "child pornography" if its "production . . . involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(A). It listed five types of "sexually explicit conduct." 18 U.S.C. § 2256(2)(A)(i)-(v).

The first four types are discrete, identifiable sex acts: "sexual intercourse"; "bestiality"; "masturbation"; and "sadistic or masochistic abuse[.]" 18 U.S.C. § 2256(2)(A)(i)-(iv). It is no surprise that Congress chose those acts; they "are all 'sexually explicit conduct' in the ordinary sense of that phrase." *United States v. Hillie*, 38 F.4th 235, 238 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc).

The fifth type of conduct is a "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v).

2. Many courts have landed on an unusual way to detect lasciviousness. They adopted a six-factor test from a 1986 district court opinion. Those "*Dost* factors" ask:

a. whether the focal point of the visual depiction is on the child's genitalia or pubic area;

b. whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity;

c. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

d. whether the child is fully or partially clothed, or nude;

e. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]

f. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F.Supp. 828, 832 (S.D.Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239, 1242-45 (9th Cir. 1987)).

Some Circuits have "adopted or endorsed" these factors, in whole or in part, as an "aid in determining whether a certain visual depiction connotes a lascivious exhibition." *United States v. Sanders*, 107 F.4th 234, 261 (4th Cir. 2024) (collecting cases). Among them is the Eighth Circuit, which issued the decision below. *See* Pet. App. 3a (noting the Circuit's prior adoption of the factors).

B. Procedural History and the Decision Below

After a bench trial, the District Court convicted Petitioner of two counts of receiving child pornography and one count of producing child pornography. *See* Dist. Ct. Dkt. 156.

The receipt convictions involved a video and a photograph, each of which the District Court found to include a lascivious exhibition. *See id*. at 9-12. It reached that conclusion by applying the *Dost* factors to those depictions.[1] *See, e.g.*, *id*. at 10 ("The video readily satisfies nearly all of the factors enumerated in *Dost*."), 11 ("As referenced above, the *Dost* factors guide the fact-finder's determination whether an image constitutes a lascivious exhibition. Again here, the Court has no difficulty finding that the image exposing 'M's' genitals, created by her mother, portraying the child as a sexual object for [Petitioner's] gratification, constitutes a

[1] The production statute uses the same "child pornography" and "sexually explicit conduct" definitions as the receipt statute. *See* 18 U.S.C. § 2251. However, the production count here involved a depiction of sexual intercourse, not a lascivious exhibition. *See* Dist. Ct. Dkt. 156, at 8. It therefore did not implicate the *Dost* factors and is not at issue.

lascivious exhibition."). Petitioner had asked the District Court not to consult those factors. *See* Dist. Ct. Dkt. 145, at 9 n.1.

Having found Petitioner guilty, the District Court sentenced him to 600 months in prison and lifetime supervision. Dist. Ct. Dkt. 180, at 2, 3. That sentence included concurrent 240-month prison terms on the receipt counts. *Id.* at 2.

Petitioner appealed. His opening brief challenged the *Dost* factors and urged the Eighth Circuit to prohibit or limit their further use. COA Appellant's Br., at 22-38.

The Eighth Circuit held Petitioner's appeal in abeyance while the en banc court considered a related case. COA Order (8th Cir. Apr. 17, 2024).

In that separate case, the en banc court ultimately reaffirmed the *Dost* factors by a single vote. *See United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (en banc). Six judges found no plain error in the lower court's use of those factors. *Id.* at 643-46.

Five others dissented across three opinions. *Id.* at 649-55. Notably, all five dissenters signed on to Judge Grasz's opinion that called for the Circuit to "overrule [its] case law blessing the instruction of the jury on the *Dost* factors to determine whether a visual depiction could be construed as containing 'sexually explicit conduct.' " *Id.* at 654 (Grasz, J., dissenting, joined by Smith, C.J., and Kelly, Erickson, and Stras, JJ.).

Following *McCoy*, the government filed its response brief in Petitioner's case. It argued that *McCoy* foreclosed the *Dost* argument. COA Gov. Br., at 13-16. Petitioner conceded as much in his reply. COA Reply Br., at 2-4.

The Eighth Circuit panel held oral argument and later affirmed Petitioner's convictions. It agreed that *McCoy* disposed of the *Dost* challenge. Pet. App. 3a n.2. It then applied the *Dost* factors to the video and image and concluded that a reasonable factfinder

could conclude that, based on those factors, each depicted a lascivious exhibition. Pet. App. 3a-5a.[2]

Petitioner sought rehearing en banc. He noted that while *McCoy* had reviewed only for plain error, he preserved *de novo* review of his challenge. COA Petition, at 1. He urged the full Eighth Circuit "[t]o take up the matter it could not squarely reach in *McCoy*[.]" *Id*.

It declined to do so. Pet. App. 7a.

REASONS FOR GRANTING THE WRIT

A. The Circuits are divided over the *Dost* factors' place in the statutory scheme.

The *Dost* factors have created an entrenched, multi-faceted split.

1. The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits use at least some of the *Dost* factors as a non-exclusive way to spot a "lascivious exhibition." *See, e.g.*, *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999); *United States v. Rivera*, 546 F.3d 245, 250 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989); *Sanders*, 107 F.4th at 261; *United States v. Grimes*, 244 F.3d 375, 380 (5th Cir. 2001); *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999); *United States v. Overton*, 573 F.3d 679, 686 (9th Cir. 2009); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019).

That group may include the Eleventh Circuit as well. The Eleventh has applied the *Dost* factors in an unpublished opinion when both the appellant and appellee framed their arguments around them. *United States v. Hunter*, 720 F. App'x 991, 996 (11th Cir. 2017). It has

[2] The panel ordered a limited remand so the District Court could "clarify whether it intended to run [Petitioner's] sentence consecutive" to certain then-pending state cases. Pet. App. 6a. The District Court issued that clarification, *see* Dist. Ct. Dkt. 207, at 3, but left the receipt convictions intact and did nothing that would moot this challenge.

also noted that "[t]he *Dost* factors are incorporated into [its] pattern jury instructions[.]" *United States v. Tala*, No. 22-13027, 2023 WL 5500829, at *4 (11th Cir. Aug. 25, 2023) (unpublished).

Approval is not unanimous within these Circuits. For example, the Eighth recently reaffirmed its *Dost* commitment by just one vote over three dissents from five judges. *McCoy*, 108 F.4th at 643-45. And individual judges within these Circuits have written separately to express their concerns. *See, e.g.*, *United States v. Hutton*, 159 F.4th 636, 644-46 (9th Cir. 2025) (Graber, J., concurring) (arguing that the Circuit's lasciviousness caselaw "is far from the statutory text"); *United States v. Steen*, 634 F.3d 822, 828 (5th Cir. 2011) (Higginbotham, J., concurring) ("While I agree with the panel opinion, I write separately to note my misgivings about excessive reliance on the judicially created *Dost* factors that continue to pull courts away from the statutory language . . .").

2. Two Circuits have definitively staked out positions on the other side.

The D.C. Circuit rejected *Dost* in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022), *rh'g pet. denied*, 38 F.4th 235 (D.C. Cir. 2022). *Hillie* noted that under this Court's precedent, "lascivious" carries the same meaning as "lewd." *See id*. 686-87. It further observed that the Court has interpreted "lewd exhibition of the genitals" to refer to " 'hard core' sexual conduct." *Id*. at 687 (quoting *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973)). In that context, there was no need for *Dost* to "craft[] its own definition" of lasciviousness, *id*., especially a broad definition that conflicts with this Court's construction of the synonymous term "lewd."

Hillie also heavily criticized the sixth *Dost* factor as contrary to text and precedent. That factor asks "whether the photo or video 'is designed to elicit a sexual response in the viewer,

albeit perhaps not the 'average viewer,' but perhaps in the pedophile viewer.' " *Hillie*, 39 F.4th at 688 (quoting *Dost*, 636 F. Supp. at 832).

As *Hillie* explained, this factor focuses on subjective intent even though the Court "rejected this line of reasoning in *Williams*." *Id*. (discussing *United States v. Williams*, 553 U.S. 285 (2008)). Years earlier, *Williams* had stated that a similar statute could not apply "to someone who subjectively believes that an innocuous picture of a child is 'lascivious.' " *Id*. (quoting *Williams*, 553 U.S. at 301). "The statutory term 'lascivious exhibition' . . . refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself." *Id*. So even if a producer intends a depiction's overall effect to be arousing, or if someone is indeed aroused by that depiction, that is irrelevant unless the *exhibition itself* is *objectively* sexual. *Id*. "That is why the Supreme Court repeatedly describes 'lascivious exhibition of the genitals' to mean depictions showing a minor engaged in 'hard core' sexual conduct, not visual depictions that 'elicit a sexual response in the viewer,' as the *Dost* court concluded." *Id*.

For these reasons, the D.C. Circuit "reject[ed] the *Dost* factors as a definition of ' lascivious exhibition[.]' " *Id*. at 689.

The Seventh Circuit has also steered clear of *Dost*. While not flatly banning the factors, the Seventh "discourage[s] their routine use." *United States v. Price*, 775 F.3d 828, 840 (7th Cir. 2014). Similar to the D.C. Circuit's textual concerns, *Price* feared that the factors "risk[] taking the inquiry far afield from the already clear statutory text." *Id*. Because those factors "may not helpfully elucidate the statutory standard," *Price* thought the lasciviousness determination better left to jurors' "commonsense understanding[.]' " *Id*.; *see also United States v. Donoho*, 76 F.4th 588, 601-02 (7th Cir. 2023) (Easterbrook, J., concurring) (endorsing a *Dost* alternative).

3. The above summary reflects the basic *Dost* breakdown. However, it would be simplistic to refer to a 10-2 split here. The majority side of the split has its own cleavages, leading to a deeper 6-4-1 divide under the surface.

Some *Dost* Circuits are uncomfortable committing to the sixth factor: the intent behind the depiction. The First, Second, and Third Circuits allow consideration of that factor "only to the extent that it is relevant to the jury's analysis of the five other factors and the *objective* elements of the image." *United States v. Spoor*, 904 F.3d 141, 150 (2d Cir. 2018) (emphasis added); *see also Villard*, 885 F.2d at 125 ("We believe that the 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."); *Amirault*, 173 F.3d at 34-35 (agreeing with *Villard*).

That stance contrasts with the approach in other *Dost* Circuits, where the sixth factor can warp lasciviousness into a primarily subjective question. *See, e.g.*, *McCoy*, 108 F.4th at 646 ("[E]ven images of children acting innocently can be considered lascivious if they are intended to be sexual.") (quoting *United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011) (alteration in *McCoy*); *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) ("[I]t must be recognized that the type of sexuality encountered in pictures of children is different from that encountered in pictures of adults. This is because children are not necessarily mature enough to project sexuality consciously. Where children are photographed, the sexuality of the depictions often is imposed upon them by the attitude of the viewer or photographer.").

This objective vs. subjective fissure is important, but the confusion runs deeper still. The Sixth Circuit has created its own test. *See Brown*, 579 F.3d at 680; *see also Turenne v. State*, 488 Md. 239, 280 n.19 (Md. 2024) (describing the Sixth Circuit's test as "distinct from other

courts' understandings of the *Dost* factors"). The Circuit uses the *Dost* factors, *Brown*, 579 F.3d at 680, including the subjective sixth factor, *see id.* at 683. However, it recognizes that "too much emphasis on the subjective intent of the photographer or viewer" may allow "a seemingly innocuous photograph" to "be considered lascivious based solely upon the subjective reaction of the person who is taking or viewing it." *Id.*

The Circuit has thus straddled a middle ground via a "limited context" test. *Id.* at 683. That test "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. Its hybrid standard focuses on "(1) where, when, and under what circumstances the photographs were taken, (2) the presence of other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images." *Id.* at 684. It "explicitly reject[s]" the relevance of "factors that do not relate directly to the taking of the images, such as past bad acts of the defendant, the defendant's possession of other pornography (pornography of another type or of other victims), and other generalized facts that would relate only to the general 'unseemliness' of the defendant." *Id.*

The state of affairs is thus more muddled than it appears at first glance. The Circuits are split over the *Dost* factors. A strong majority favors their use as a non-exhaustive guide. However, that majority is fractured into two subgroups over the sixth factor, with one Circuit dipping its toes into both subgroups.

B. This split is worthy of the Court's intervention.

1. *Dost* uncertainty is here to stay. Circuits began choosing sides in the 1980s. Four decades later, nearly every Circuit has chimed in. Still, consensus remains elusive.

Since almost everyone has spoken, there is no reason for this Court to wait for new developments. And there is every reason to act, as various voices have not brought clarity despite decades of trying. More delay will not solve a problem that has lingered across dozens of authoritative decisions.

2. This split matters. It affects how we define "sexually explicit conduct," a term that gives meaning to "child pornography" and appears throughout the penal code. *See, e.g.*, 18 U.S.C. § 1466A (obscene visual representations of the sexual abuse of children); 18 U.S.C. § 2251 (sexual exploitation of children); 18 U.S.C. § 2251A (selling or buying of children); 18 U.S.C. § 2252 (certain activities relating to material involving the sexual exploitation of minors); 18 U.S.C. § 2257 (record keeping requirements and offenses); 18 U.S.C. § 2260 (production of sexually explicit depictions of a minor for importation into the United States).

The split also has real consequences. The last fiscal year saw 1,375 federal prosecutions related to possessing, receiving, or trafficking child pornography. U.S. Sent. Comm'n, *Quick Facts: Child Pornography Offenses* (2024). Those prosecutions resulted in an average prison sentence of almost ten years. *Id*. On top of those cases, there were approximately 755 more targeting those who produced child pornography. U.S. Sent. Comm'n, *Quick Facts: Sexual Abuse Offenses* (2024) (noting 1,430 abuse cases, of which 52.8% were for producing child pornography). The average producer received a sentence exceeding twenty-two years. *Id*.

So last year alone, about two thousand people were hauled into federal court to face significant prison time for crimes involving child pornography. Because of the ongoing *Dost* divide, the vagaries of geography dictated varying treatment in many of those important cases. That situation is untenable, and will endure absent the Court's involvement.

3. The Court will likely find a bonus salutary effect if it tackles this split: more clarity at the state level. In many states, "the state child sexual exploitation statute is similar to the federal statute[.]" *State v. Whited*, 506 S.W.3d 416, 433 (Tenn. 2016). Some of those state regimes employ the *Dost* factors. *See id*. (collecting cases). Some do not. *See, e.g.*, *Turenne*, 488 Md. at 293 n.24 (declining to "adopt the *Dost* factors in whole or in part"); *Whited*, 506 S.W.3d at 438 ("Lower courts should refrain from using the *Dost* factors as a test or an analytical framework in making [a lascivious exhibition] determination."). As states ask whether they can reconcile the *Dost* factors with their own text, they would benefit from this Court's insight into the federal scheme.

C. The decision below is wrong, and this petition presents an excellent vehicle for resolving the split.

1. *Dost* shifts factfinders away from the straightforward question that the relevant statutes ask. *Cf. McCoy*, 108 F.4th at 653 (8th Cir. 2024) (Grasz, J., dissenting) (criticizing "the decidedly non-textual approach of using the *Dost* factors" for "steering jurors away from the statutory language adopted by Congress").

Congress has not called for a difficult analysis. A lascivious exhibition ought to be easy to spot. After all, "lascivious" is a word that ordinary people understand. *Cf. United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994) ("Respondents argue that § 2256 is unconstitutionally vague and overbroad . . . because Congress replaced the term 'lewd' with the term 'lascivious' in defining illegal exhibition of the genitals of children. We regard these claims as insubstantial, and reject them[.]"). Moreover, exhibitions qualify only if they are *objectively* sexual. *See Williams*, 553 U.S. at 301 (explaining that when it comes to lascivious exhibitions, "[t]he defendant must believe that the picture contains certain material, and that material in fact (and not merely in his estimation) must meet the statutory definition").

In short, Congress has told factfinders to ask if a depiction meets a "commonsensical" standard, and whether it meets that standard on its face. *United States v. Koelling*, 992 F.2d 817, 821 (8th Cir. 1993) (quoting *Wiegand*, 812 F.2d at 1243). That simple task does not demand extra-textual aids. *Cf. Price*, 775 F.3d at 840 (trusting factfinders to interpret "the already clear statutory text" without the *Dost* factors).

Despite Congress's directive, the *Dost* factors march through a broader inquiry into the intent of "the overall content of the visual depiction[.]" *Dost*, 636 F.Supp. at 832. *Dost* ties lasciviousness not to an objective examination of the exhibition, but to "other aspects of the photograph[,]" the "combined effect" of which may reveal that a depiction "is designed to elicit a sexual response in the viewer, albeit perhaps not the 'average viewer,' but perhaps in the pedophile viewer." *Id.* Courts sometimes sanction such a subjective turn even in those Circuits that purport to cabin the sixth factor. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 959 (2001) (observing that "[e]ven those courts that cite the *Villard* approach nevertheless revert to" an approach whereby "an everyday image can be child pornography because a pedophile found it sexually stimulating").

Legislators did not pin severe criminal penalties to a free-wheeling inquiry into the pedophile mind. But thanks to the *Dost* factors, some judges have. Congress' choice must control. *Cf. Pulsifer v. United States*, 601 U.S. 124, 185 (2024) (Gorsuch, J., dissenting) ("[I]n our federal government only the people's elected representatives, not their judges, are vested with the power to 'define a crime, and ordain its punishment.' ") (quoting *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)).

The Court should reassert Congress' prerogative.

2. The decision below is a compelling example of *Dost* in action. Take the way that the panel applied *Dost* to a photograph of a minor 'M', which it described as follows:

> M's mother's fingers are shown pulling apart M's labia so her vagina is exposed. The focal point is M's genitals, which are being manipulated into an unnatural pose with her clothing pulled to the side for full exposure.

Pet. App. 4a.

Petitioner argued that "nothing separates M's exhibition from, *e.g.*, an exhibition in a clinical photograph taken for a doctor by a concerned parent." *Id*. The panel apparently did not disagree—it pointed to nothing about *the exhibition itself* that set it apart from an objectively non-lascivious exhibition.

Instead, the panel rejected Petitioner's characterization based on "the context in which [he] received the image[.]" *Id*. That context was simple: Petitioner and M's mother had engaged in "conversations about [Petitioner] abusing M before she was 18[.]" *Id*. Those comments suggested Petitioner's sexual interest in M, which permitted "a reasonable factfinder [to] find that the image is nothing like a clinical photograph and instead was taken to appeal to [Petitioner's] sexual desires." *Id*. So evidence of Petitioner's pedophilia could effectively morph a photograph into child pornography. *Cf.* Adler, at 960 ("Given that everyday pictures of children can also hold sexual appeal for pedophiles, a focus on a photograph's use means that all pictures of children can become suspiciously erotic if they are in the hands of a pedophile. The circularity becomes dizzying: 'child pornography' is defined as pictures that appeal to a pedophile and a 'pedophile' is defined as someone who likes child pornography. The pedophile becomes a nightmarish sort of King Midas: everything he touches turns to smut.").

Dost led the panel astray. Under the statutes as written, guilt "turns on whether the exhibition itself is lascivious, not whether the photographer has a lustful motive in visually depicting the exhibition or whether other viewers have a lustful motive in watching the depiction." *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring) (quoting *Hillie*, 38 F.4th at 237 (Katsas, J., concurring in the denial of rehearing en banc)). Or as this Court has put it, Congress demands that an exhibition "meet the statutory definition" of sexually explicit conduct "in fact," "not merely in [a defendant's] estimation[.]" *Williams*, 553 U.S. at 301.

The decision below did not scrutinize the evidence on those terms. Instead, it followed *Dost* into ruminations on extrinsic details and subjective desire.

Petitioner will serve an extra twenty years in prison due to that detour, a deviation that was possible because his trial occurred on the west bank of the Mississippi River, subject to the Eighth Circuit's rule. Geography should not have swung this case. Petitioner's convictions reflect the anomalies that recur under the current circumstances.

3. This petition presents a clean opportunity to revive a textual approach to our child pornography laws.

Petitioner fully aired out the issue presented. He made his *Dost* pitch to the District Court, the Circuit panel, and (via an unsuccessful rehearing petition) the full Eighth Circuit. In doing so, he preserved a challenge to *Dost* and now squarely presents it to this Court.

The government may disagree. Indeed, it averred below that Petitioner forfeited his *Dost* argument as to one count. *See* COA Gov. Br., at 13.

Even if true, that need not block review. The government agreed that Petitioner preserved his challenge as to the other receipt count. *See id*. at 12-13. The Eighth Circuit seemingly agreed (although it did not speak to the matter directly). *See*, *e.g.*, Pet. App. 3a-4a.

There is thus no procedural barrier to full review of at least one conviction. And if that review vindicates Petitioner's position, error will be plain as to any count for which he suffers from forfeiture. *Cf. Henderson v. United States*, 568 U.S. 266, 279 (2013).

The question presented is also outcome-determinative. At trial, the District Court relied extensively on *Dost* and never said it would have considered the exhibitions lascivious without those factors. *See* Dist. Ct. Dkt. 156, at 9-11. On appeal, the government made a modest attempt to defend the verdict under a non-*Dost* standard. *See* COA Gov. Br., at 18-24. Yet the Eighth Circuit did not take the bait; like the District Court, it built its review around *Dost*. *See* Pet. App. 3a-5a.

On this record, there is no viable, alternative, non-*Dost* ground for affirming the receipt convictions. The Court should seize this clean opportunity to grapple with *Dost*.

CONCLUSION

The petition should be granted.

Respectfully submitted this 9th day of January, 2026,

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