No. 25-6566

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM DAHL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2).

PARTIES TO THE PROCEEDING

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 144 F.4th 1076. The opinion of the district court is available at 2023 WL 5722622.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2025. A petition for rehearing was denied on August 26, 2025 (Pet. App. 7a). On November 19, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 23, 2026, and the petition was filed on

January 9, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of producing child pornography, in violation of 18 U.S.C. 2251(a); and two counts of receiving child pornography, in violation of 18 U.S.C. 2252A(a). Resentencing Judgment 1. He was sentenced to 600 months of imprisonment, to be followed by a life term of supervised release. Id. at 2-3. The court of appeals affirmed the conviction, but vacated the sentence for clarification of whether it should run concurrently with or consecutively to certain state offenses. Pet. App. 1a-6a. On remand, the district court again sentenced petitioner to 600 months imprisonment, clarifying that petitioner's sentence should run concurrently with any sentence imposed in specified state cases. Resentencing Judgment 2.

1. From approximately 2007 to 2009, petitioner had a sexual relationship with a girl who was 12 or 13 years old when it began. Presentence Investigation Report (PSR) ¶ 11. Petitioner and the girl exchanged approximately 100 sexual images over email or Facebook. Ibid. One of those images, which petitioner produced between October 2007 and January 2008, depicted petitioner's penis penetrating the genital area of the girl, who was then 14 years old. Ibid.

Between 2020 and 2021, petitioner gifted a different teenage girl a cellphone, asked the girl to send him nude photos of herself, and sent the girl photos and videos showing his exposed penis. PSR ¶ 7. One of the videos that petitioner received depicted the girl, who was then 16 years old, bending over and "twerking" without clothing and exposing her genitals. Ibid.; Pet. App. 4a.

Between 2018 and 2021, after petitioner told an adult sexual partner that he was "into kids," the partner e-mailed petitioner photos of her then nine-year-old daughter. PSR ¶ 9. One of those images, taken after the mother moved the child's underwear to the side, depicted the child's genital area with her mother's fingers on her vagina. Ibid.

2. A federal grand jury in the Eastern District of Missouri charged petitioner with producing child pornography, in violation of 18 U.S.C. 2251(a); and two counts of receiving child pornography, in violation of 18 U.S.C. 2252A(a)(2). Second Superseding Indictment 1-4. The receipt counts related to the twerking video and the image of the genital area of the daughter of petitioner's sexual partner. PSR ¶¶ 7, 9.

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). And 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).

Following a bench trial, the district court found petitioner guilty on all counts. D. Ct. Doc. 156 (Sept. 5, 2023). In describing its findings for the receipt offenses, the court stated that determining whether the video and image at issue featured a "lascivious exhibition" required considering certain factors that it quoted from 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 (9th Cir.), cert. denied, 484 U.S. 856 (1987):

> (1) whether the focal point of the picture is on the minor's genitals or pubic area; (2) whether the setting of the picture is sexually suggestive, that is, in a place or pose generally associated with sexual activity; (3) whether the minor is depicted in an unnatural pose or in inappropriate attire, considering the age of the minor; (4) whether the minor is fully or partially clothed, or nude; (5) whether the picture suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the picture is intended or designed to elicit a sexual response in the viewer; (7) whether the picture portrays the minor as a sexual object; and (8) the caption(s) on the picture(s).

D. Ct. Doc. 156, at 9-10. The court made clear that it understood that "[a]n image need not involve all of these factors to constitute a lascivious exhibition"; that it is "for the fact-

finder to decide the weight to be given to any of these factors"; and that the "inquiry is always case-specific." Id. at 10.

In this case, the district court had "no difficulty" finding that the video and image featured a lascivious exhibition, observing that the twerking video featured the victim "completely nude" "aiming her buttocks, anus, and genitals at the camera" and that the genital-area image "expos[ed] [the child's] genitals * * * portraying the child as a sexual object for [petitioner]'s gratification." D. Ct. Doc. 156 at 10-11.

3. The court of appeals affirmed. Pet. App. 1a-6a. The court of appeals found sufficient evidence to support petitioner's convictions, explaining that given the overall content and context of the video and image, a reasonable factfinder applying the Dost factors could find that each depiction featured a lascivious exhibition. Id. at 4a-5a. In a footnote, the court of appeals relied on circuit precedent to reject petitioner's challenge to the district court's reference to the Dost factors. Id. at 3a n.2 (citing United States v. McCoy, 108 F.4th 639, 643 (8th Cir.) (en banc), cert. denied, 145 S. Ct. 551 (2024)).

ARGUMENT

Petitioner renews his contention (Pet. 13-16) that the evidence was insufficient to support his convictions for receipt of child pornography on the theory that the district court improperly considered 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), in finding that the image and video featured a "lascivious exhibition of the anus, genitals, or pubic area" of the victims, 18 U.S.C. 2256(2)(A)(v), and thus constituted child pornography under 18 U.S.C. 2252A(a)(2). That contention lacks merit. 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 application of the phrase "lascivious exhibition." 18 U.S.C. 2256(2)(A)(v). The 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) (emphasis omitted); see Webster's Third New International Dictionary 1274 (2002) ("tending to arouse sexual desire") (emphasis omitted). 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

[1] See, e.g., McCoy v. United States, No. 24-380 (Nov. 12, 2024); 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).

'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 analysis was consistent with that plain meaning.

The district court did not err in referencing factors articulated in Dost -- "whether the focal point of the picture is on the minor's genitals or pubic area"; "whether the setting of the picture is sexually suggestive"; "whether the minor is depicted in an unnatural pose or in inappropriate attire"; "whether the minor is fully or partially clothed, or nude"; "whether the picture suggests sexual coyness or a willingness to engage in sexual activity"; "whether the picture is intended or designed to elicit a sexual response in the viewer"; "whether the picture portrays the minor as a sexual object"; and "the caption(s) on the picture(s)," D. Ct. Doc. 156, at 9-10 -- in its determination of whether the video and photo depicted a "lascivious exhibition." The district court made clear that "it is for the fact-finder to decide the weight to be given to any of th[o]se factors," "an image need not involve all of [the] factors to constitute a lascivious exhibition," and "[t]he inquiry is always case-specific." Id. at 10. Such nondispositive reference to the factors as "guid[ing]," id. at 11, was permissible, and the court of appeals did not err

in finding sufficient evidence to support petitioner's receipt convictions.

Petitioner errs in suggesting (Pet. 15-16) that the court of appeals' approach allowed it to find the genital-area image constituted a lascivious exhibition of the genitals or pubic area simply because of his subjective intent regarding the image.[2] The court's recitation of the factors referenced "whether the picture is intended or designed to elicit a sexual response in the viewer," Pet. App. 3a (emphasis added) -- not whether the viewer did in fact have a sexual response to the image. And as the district court explained, the factfinder must "decide the weight to be given to" the Dost factors on a "case-specific" basis. D. Ct. Doc. 156, at 10. In applying the factors, neither the panel nor the district court mentioned petitioner's subjective perception.

With respect to the twerking video, the district court first noted the video's "overall nature," in which the victim was "completely nude, turns around, bends over at the waist, and begins to 'twerk,' aiming her buttocks, anus, and genitals at the camera." D. Ct. Doc. 156, at 10. The panel emphasized similar aspects of the video. Pet. App. 4a. And with respect to the genital-area image, the court focused on image's portrayal of the child "as a sexual object" and the fact that the image involved the child's

[2] Notably, petitioner did not dispute that the genital-area image was child pornography at his bench trial. See D. Ct. Doc. 145, at 4-5 (raising affirmative defense as to "prohibited images").

exposed genitals. D. Ct. Doc. 156, at 11. The panel did the same, specifically discussing the contents of the image in reasoning that "a reasonable factfinder could conclude that the image showed a lascivious exhibition of [the minor's] genitals." Pet. App. 4a. Petitioner is thus incorrect to suggest (Pet. 15) that the panel "pointed to nothing about the exhibition itself" in rejecting his sufficiency claim. Nor, in any event, would a defendant's subjective perception be categorically irrelevant to whether an image is "objectively sexual," as it could provide at least some evidence of whether the exhibition "[i]ncit[es] to lust or wantonness." Pet. 13; 8 The Oxford English Dictionary 666-667 (2d ed. 1989) (defining "lascivious") (emphasis omitted); see, e.g., United States v. McCoy, 108 F.4th 639, 646 (8th Cir.) (en banc), cert. denied, 145 S. Ct. 551 (2024)).

2. Petitioner asserts (Pet. 7-11) that the lower courts are divided regarding whether and how to apply the Dost factors. But any disagreements among 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); Pet. App. 2a-5a (citing McCoy, 108 F.4th at 643); United States v. Perkins, 850 F.3d 1109, 1121 (9th Cir. 2017); 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 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

[3] As petitioner notes (Pet. 7-8), 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 (11th Cir. Aug. 25, 2023) (per curiam).

"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." Ibid. Rather, the court "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. 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 made clear that "it is for the fact-finder to decide the weight to be given to any of [the Dost] factors," on a "case-specific" basis, D. Ct. Doc. 156, at 10 -- and then relied heavily on objective aspects of the video and image at issue in reaching its conclusions, see id. at 10-11 -- this case would be a poor vehicle in which to address any disagreement about the proper consideration of those factors. The trial evidence amply proved that the video and image were lascivious under any ordinary understanding of that term. See Gov't C.A. Br. 18-24 (discussing content of the video and image in detail).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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