No. 25-6566

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

REPLY BRIEF FOR PETITIONER

Eric M. Selig
Assistant Federal Public Defender
1010 Market, Suite 200
St. Louis, MO. 63101
(314) 241-1255

Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONER

The government concedes a split over the *Dost* factors. U.S. Br. at 6, 9-11.[1] It makes no case for percolation, likely because it understands that most Circuits have already weighed in. It does not dispute that Circuit disagreement is entrenched and mirrored by a related state-level split. Nor does it contest that the split affects several oft-used statutes that serve public policy goals while threatening severe punishment.

The ongoing confusion is driving disparate application of our child pornography laws. That situation is untenable, and this case presents an ideal chance to end it. The government identifies no procedural barriers that would obstruct review and does not aver that the petition fails to squarely present the *Dost* issue. In fact, its brief reveals that opportunities like this one rarely show at the Court's door.

This petition cleanly implicates an enduring split. The Court should grant review.

A. The Courts of Appeal have produced a multi-faceted split over the proper use of the *Dost* factors, and that split merits the Court's attention.

The Circuits approach the *Dost* factors from at least four different angles. The D.C. and Seventh Circuits do not use those factors to define a "lascivious exhibition." Pet. Br. at 8-9. The Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits (and perhaps Eleventh) bless all the factors as a factfinding guide. *See id*. at 7-8. The First, Second, and Third Circuits use most of the factors freely but limit use of the subjective sixth factor. *Id*. at 10. And the Sixth Circuit employs its own "limited context" test that sits somewhere between the majority rule and the First, Second, and Third Circuit approach. *Id*. at 10-11.

[1] The government's response is unpaged. In citing that response, Petitioner presumes the question presented is page i and subsequent pages begin with 1 and run in numerical order.

This is a nuanced situation. Yet the response does not engage with nuance. Instead, it dismisses the split as narrow because "courts of appeals do generally agree that a factfinder may consider aspects of the depiction that [the *Dost*] factors encompass." U.S. Br. at 11.

That supposed agreement is beside the point. Petitioner does not ask the Court to disapprove or endorse the *Dost* factors in the abstract. His petition seeks clarity about *how* factfinders can use those factors—a question that courts have struggled with on their way to an undisputed four-way split. *Cf. id*. at 6 (acknowledging that "the courts of appeals have relied to varying degrees on the *Dost* factors").

Since the government defines the split at an artificially high level, it overlooks a key point. It defends the Eighth Circuit's use of the sixth factor by submitting that "a defendant's subjective perception" can serve as "at least some evidence" of whether an exhibition is " 'objectively sexual[].' " *Id*. at 9. That indeed reflects how three Circuits use this factor: solely to inform an objective question. *See* Pet. Br. 10.

But it misdescribes how the Eighth uses the factor. In that Circuit (and others that follow the majority rule), "even images of children acting innocently can be considered lascivious if they are intended to be sexual." *United States v. Johnson*, 639 F.3d 433, 440 (8th Cir. 2011). On that side of the split, courts do not only use the subjective sixth factor as a tool to seek out an objective answer. They allow it to "impose[]" sexuality on objectively non-sexual depictions. *United States v. Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990). So in urging the Court to let the current confusion persist, the government proceeds from a misunderstanding about the nature of the split.

The government also notes that this Court has "recently denied petitions for writs of certiorari making similar claims." U.S. Br. at 6 & n.1. Yet the cited denials signal nothing

noteworthy about the split's importance or the urgency of review. Rather, they reflect this Court's prudence in rejecting poor vehicles.

All five cases came with red flags that cautioned against a grant. For example, the *Donoho* petitioner likely forfeited his *Dost* argument. *United States v. Donoho*, 76 F.4th 588, 598 n.24 (7th Cir. 2023) (noting the possible forfeiture). That problem would have clouded review by requiring a fact-intensive inquiry into preservation before the Court could reach the merits. *Cf. Missouri Dept. of Corr. v. Finney*, 146 S. Ct. 538, 540 (2024) (statement of Alito, J., respecting the denial of certiorari) ("reluctantly" concurring in denial of review of important question because forfeiture "would complicate our review"). *McCoy* shared that problem. *See United States v. McCoy*, 108 F.4th 639, 644-45 (8th Cir. 2024) (en banc) (noting the forfeiture).

Three petitions had problematic framing. *Donoho* and *McCoy* anchored review to a specific scenario: a defendant who "secretly record[s] a nude minor engaging in ordinary daily activities, when the videos and images depict absolutely no sexual or sexually suggestive conduct of any kind[.]" Pet. Br. at i, *Donoho v. United States*, 23-803 (U.S. Jan. 23, 2024); Pet. Br. at i, *McCoy v. United States*, 24-380 (U.S. Oct. 1, 2024) (presenting substantially similar question). The narrow focus diminished the petitions' practical importance. *See* Pet. Reply Br. at 3-4 & n.1, *Donoho v. United States*, 23-803 (U.S. May 10, 2024) (explaining that the petition did "not turn" on "disagreements among the courts of appeals in applying the *Dost* factors" but on the shallower divide over "surreptitious videos"). That is also true of the similar question in a pending petition, *Hutton v. United States*, No. 25-971 (U.S. Feb. 13, 2026).[2]

[2] If the Court believes *Hutton* may be a better vehicle, it should hold this petition pending a *Hutton* resolution.

Kolhoff had the opposite problem. It structured its question in a way that sought to drag the Court into murky due process and vagueness waters. Pet. Br. at i, *Kolhoff v. United States*, No. 23-6481 (Jan. 2, 2024). The petitioner made no claim that lower courts had meaningfully engaged with those constitutional questions in the *Dost* context. On such important matters, the Court generally refrains from jumping the line. *See, e.g.*, *New York v. Uplinger*, 467 U.S. 246, 251 (1984) (Stevens, J., concurring) (dismissing as improvidently granted where "constitutional questions" would otherwise be considered by this Court "premature[ly]").

The remaining two petitions failed to squarely present a *Dost* question. *Boam* involved almost exclusively attempted crimes. *United States v. Boam*, 69 F.4th 601, 604 (9th Cir. 2023) (noting sixteen attempt convictions and one conviction of completed possession). Similarly, the *pro se Anthony* petition sought review after the defendant had been indicted, and the jury instructed, on both attempts and completed crimes. U.S. Br. at 18-19, *Anthony v. United States*, No. 23-5566 (U.S. Jan. 10, 2024) (noting this feature as a reason not to grant).

Attempt cases pose special problems. They do not implicate the dispute over the sixth factor "because the subjective intent of the defendant is relevant in attempt cases." *McCoy*, 108 F.4th at 653 (Grasz, J., dissenting). Moreover, they do not demand rigorous application of the *Dost* factors. To secure an attempt conviction, the government need not prove that a depiction satisfies the factors so long as it can show that the defendant "hoped to capture" a qualifying depiction. *United States v. Hillie*, 38 F.4th 235, 241 n.1 (D.C. Cir. 2022) (Katsas, J., concurring in the denial of rehearing en banc). So neither *Boam* nor *Anthony* cleanly presented the question here.

In sum, the government concedes a *Dost* split. Its response does not label that split as nascent, assert a need for percolation, or minimize the importance of the criminal laws whose

enforcement turns on the *Dost* factors. Instead, it lists inapposite denials and resists a grant based primarily on its misapprehension of the split's depth. Its misreading is not a persuasive case against the Court's involvement.

B. This case is an ideal and rare vehicle.

This petition presents an excellent chance to address the split. It features none of the defects described above. Unlike *Donoho* and *McCoy*, there is no preservation issue.[3] It occupies a middle ground between the too narrow questions in *Donoho* and *McCoy* and the unduly broad one in *Kolhoff*. And no attempt charges or convictions complicate the analysis as they would have in *Boam* or *Anthony*.

Such a petition does not come around often. That much is clear from the failed petitions on which the response leans. That recent history shows that this issue keeps returning to the Court, but only in unsuitable forms. That can end here.

The response nevertheless asserts a vehicle problem: the district court here recognized it discretion to assign weight among the factors and "then relied heavily on objective aspects of the video and image at issue in reaching its conclusions[.]" U.S. Br. at 11.

If a district court's discretion presents an issue, the Court will never see a suitable vehicle. There is no *Dost* Circuit that currently prescribes how courts must apportion weight. Nor does there appear to be any clamoring for such a rule. The response does not argue otherwise. The government is thus implying that the Court should wait for a case that will not come.

[3] The government briefly argues forfeiture as to one count. U.S. Br. at 8 n.2. But it does not question that Petitioner preserved his argument as to the other count, and it never suggests that forfeiture on a single count would interfere with review.

Further, weight is not the real issue here. To repeat, the Circuits differ as to the factors' permitted *uses*. This case implicates that split: the district court was concededly "required" to consider and use those factors according to the Eighth's majority rule. U.S. Br. at 4.

The government's argument is also self-defeating. It emphasizes that the district court "relied heavily on objective aspects *of the video and image* at issue[.]" *Id*. at 11 (emphasis added). That observation, while true, highlights a critical *Dost* problem. Under the relevant statutes, " '[l]ascivious' does not modify the 'visual depiction' of the exhibition[.]" *Hillie*, 38 F.4th at 237 (Katsas, J., concurring in the denial of rehearing en banc). Those statutes instead "require[] *the exhibition itself* to be sexually suggestive." *Id*. (emphasis added).

This case displays *Dost* working as intended by redirecting focus away from the exhibition itself and toward "other aspects of the photograph[.]" *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. 1987). Juries likely use the *Dost* factors in precisely that way, but the Court has no way to know for sure. Here, the district court's stated reasoning is a vehicle feature, not a bug.

Vehicle strength is evident elsewhere. Here is the passage where the district court explained why it believed the image of M depicted sexually explicit conduct:

> 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 Dahl's gratification, constitutes a lascivious exhibition.

Dist. Ct. Dkt. 156, at 11. The district court did not say much in concluding that the exhibition was lascivious. Yet it is clear that the mother's subjective intent in creating the depiction (to appeal to Petitioner's sexual interests) was critical. This analysis demonstrates the sixth factor's power—the exhibition was lascivious because it was meant to be. *But see 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) (explaining that Congress did not pin guilt on "whether the photographer has a lustful motive in visually depicting the exhibition"). Such logic could not have held in the D.C. Circuit or the First, Second, Third, or Seventh Circuits. But in the Eighth, it resulted in a twenty-year prison sentence.

Petitioner has argued that the panel opinion also reflects how, under the majority rule, "evidence of [his] pedophilia could effectively morph a photograph into child pornography." Pet. Br. at 15. In response, the response splits hairs. It notes that the sixth factor considers the intent or design behind a depiction. "not whether the viewer did in fact have a sexual response to the image." U.S. Br. at 8.

The government is correct that *Dost* does not ask whether one enjoyed a depiction. Yet that observation misses the point. *Dost* still allows guilt to turn on a particular pedophile's predilections. This case shows how. According to the panel, it was Petitioner's subjective tastes—evidenced by "conversations about [him] abusing M before she was 18," Pet. App. 4a—which supported the inference that an objectively non-sexual exhibition was "designed to elicit a sexual response . . . in the pedophile viewer," *Dost*, 636 F.Supp. at 832. The panel, like the district court, made a record that neatly illustrates the *Dost* divide.

CONCLUSION

The petition should be granted.

Respectfully submitted this 21st day of April, 2026,

/s/ Eric M. Selig
Eric M. Selig
Assistant Federal Public Defender
1010 Market Street, Suite 200
St. Louis, Missouri 63101
Telephone: (314) 241-1255
Fax: (314) 421-3177
E-mail: Eric_Selig@fd.org

Attorney For Petitioner