No. 25-971

IN THE

Supreme Court of the United States

ROBERT WAYNE HUTTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF FEDERAL PUBLIC AND COMMUNITY DEFENDER ORGANIZATIONS OF THE NINTH CIRCUIT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*

The Ninth Circuit Federal and Community Defender Organizations provide representation to accused persons who lack financial means to hire private counsel under 18 U.S.C. § 3006A. The Defenders advocate on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. This mission includes resisting expansive interpretations of criminal statutes, which is consistent with Supreme Court decisions that narrow the scope of federal criminal statutes. Specific to this case, the Defenders regularly represent individuals charged with manufacturing child pornography under circumstances that reach beyond the scope of the statute's plain meaning, especially as construed consistently with the First Amendment's protection against overbreadth and the Due Process Clause's protection against vagueness. This *amicus* brief supports Petitioner's position that surreptitious video recording does not constitute manufacture of child pornography where no "explicit sexual conduct" is portrayed and where there is no "use" of a minor to produce sexually explicit conduct.[1]

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[1] No party or party's counsel or any person other than employees of *amici curiae* authored any part of this brief or contributed money to fund preparing or submitting the brief, and *amici curiae* timely provided counsel of record notice of our intention to file an *amicus curiae* brief supporting Petitioner.

SUMMARY OF ARGUMENT

In *Williams v. United States*, this Court required specificity when interpreting the statutory language describing child pornography: "'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." 553 U.S. 285, 296–97 (2008) (emphasis in original). In contrast, the Ninth Circuit has strayed from the statutory text and adopted six judicially created factors — known as the *Dost* factors — to determine whether an image constitutes child pornography. *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). Rather than staying true to the statutory language, the *Dost* factors add a subjective component — the defendant's sexual response to the image — that appears nowhere in the written law. *Id.* at 832.

Under 18 U.S.C. § 2251, it is a crime with a fifteen-year mandatory minimum term of imprisonment to employ, use, persuade, induce, entice, or coerce a minor "to engage in … sexually explicit conduct for the purpose of producing any visual depiction … of such conduct." 18 U.S.C. § 2251(a), (e). "Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2)(A) to include a list of specific acts. In enacting 18 U.S.C. §§ 2251(a) and 2256(2)(A), Congress laid out in verbs six actions that constitute criminal conduct and provided a narrowing definitional section that required "sexually explicit conduct" to meet express criteria, none of which encompasses the surreptitious photographing of a minor engaged in private, everyday rou-

tines like bathing or undressing. *United States v. Hutton*, 159 F.4th 636, 644–46 (9th Cir. 2025) (Graber, J., concurring) (Under *Dost*'s approach "whenever a child is nude throughout the ordinary course of a day, a person who captures that image could be guilty of producing child pornography"). Contrary to the separation of powers, the *Dost* factors do exactly what this Court forbids: amending statutes outside the legislative process reserved for the people's representatives.

Thus, many Circuits and commentators have rejected *Dost*'s subjective framework as inconsistent with and a broadening of the conduct criminalized by the statute, concluding that the statutory definition of "sexually explicit conduct" in 18 U.S.C. § 2256(2)(A) requires an objective test. This Court should grant a writ of certiorari to resolve the conflicting approaches of different federal circuit courts to this statute. The Court should also grant the writ to address the exceptionally important question of whether the Ninth Circuit's reliance on *Dost*'s subjective factors for determining whether an image constitutes "sexually explicit conduct" endorses judicial legislation inconsistent with sound statutory construction and the separation of powers.

Moreover, certiorari is appropriate because the term "uses" in 18 U.S.C. § 2251 should be narrowly construed to require the active employment or manipulation of a minor, rather than the surreptitious recording of behavior the minor engages in of their own accord. *See Dubin v. United States*, 599 U.S. 110, 130–31 (2023) (rejecting government's broad reading of "uses" in a different statute); *see also Hutton*, 159

F.4th at 644 (Graber, J., concurring) ("Read most naturally, all six verbs in the statute [18 U.S.C. § 2251(a)] suggest causation.").

This Court should also grant the writ because of the exceptional importance of uniformly interpreting the statue's breadth. Congress chose to punish the manufacture of child pornography by a statutory minimum of at least fifteen years in prison. This Court should provide a critical check on prosecutorial and judicial broadening of that law beyond the specific conduct to which Congress chose to attach that significant penalty, as demonstrated by a consistent line of recent cases in which the Court has rejected efforts to enforce federal criminal laws beyond their plain text and the rules of statutory interpretation.

ARGUMENT

A. This Court Should Grant The Writ Of Certiorari Because The *Dost* Approach Clashes With Other Circuits And This Court's Rules Of Statutory Construction.

With *Dost*'s subjective approach, an image of a minor constitutes child pornography if it was "intended or designed to elicit a sexual response in the viewer." *Dost*, 636 F. Supp. at 832.

Dost's focus on subjective intent has fared poorly in other Circuits, with some rejecting the subjective element altogether and others expressing skepticism and adopting the *Dost* factors only in part. The discord among Circuits on this important question begs for this Court's resolution to assure that the harsh pun-

ishments authorized by the manufacture of child pornography statute does not depend on the jurisdiction in which the conduct occurs.

The disarray among the Circuits has resulted in blunt condemnation of the Ninth Circuit's approach:

- "If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography." *United States v. Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

- "We must, therefore, look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand — a legal analysis of the sufficiency of the evidence of lasciviousness." *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989).

- "[O]verreliance on the intent of the photographer, and his idiosyncratic desires, raises constitutional concerns regarding criminalization of expressive conduct and creates a risk that a defendant could be convicted for being sexually attracted to children without regard to whether the material produced is, objectively, child pornography." *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018).

- "A pedophile may be aroused by photos of children at a bus stop wearing winter coats, but

these are not pornographic. Conversely, a photographer may be guilty of child pornography even though he is not aroused by the photos he produces purely for financial gain." *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring).

- "Laws are supposed to give notice so that people know what they may and may not do. Yet [18 U.S.C.] § 2251(a), as understood [applying *Dost*], leaves everything to a jury's sensibilities. That is not how criminal law should work. A conclusion that someone is a scoundrel — a fair description of [the defendants] — is not enough for criminal liability." *United States v. Donoho*, 76 F.4th 588, 601–02 (7th Cir. 2023) (Easterbrook, J., concurring).

- "[T]he *Dost* factors stray too far from [*Williams*'] basic teaching, allowing a depiction that portrays sexually *implicit* conduct in the mind of the viewer to be caught in the snare of a statute that prohibits creating a depiction of sexually *explicit* conduct performed by a minor or by an adult with a minor." *United States v. Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022).

See generally Laura E. Avery, *The Categorical Failure of Child Pornography Law*, 21 WIDENER L. REV. 51, 74–77 (2015) (discussing the "highly subjective, contextually dependent" *Dost* factors); Carissa Byrne Hessick, *The Limits of Child Pornography*, 89 IND. L.J. 1437, 1468-72 (2014) (analyzing *Dost*'s shortcomings); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 953 (2001) (noting that "the *Dost*

test has produced a profoundly incoherent body of case law."); *State v. Whited*, 506 S.W.3d 416, 437 (Tenn. 2016) (because "the sixth *Dost* factor in particular has proven to be analytical quicksand," some courts "reject the use of the *Dost* factors as a 'test' or an analytical framework for determining whether certain materials constitute child pornography").[2]

The disarray among the Circuits regarding the *Dost* factors should be resolved by narrowing the statute to an objective test of whether the image constitutes "sexually explicit conduct." This Court's rules of statutory interpretation — guided by the principle that Congress, not the Judiciary, proscribes conduct and prescribes punishment — compel rejection of the Ninth Circuit's subjective-intent gloss from *Dost*.

1. The Due Process Clause and the First Amendment require narrowing of "sexually explicit conduct" to images that objectively portray sexual conduct involving children.

The *Dost* court's expansive construction of "lascivious exhibition" of genitalia criminalizes subjective or *implicit* conduct. But that broad construction is irreconcilable with *Williams*' narrowing of "sexually *ex-*

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[2] The state statute in *Whited* utilized language like the federal statute, resulting in the Tennessee court's detailed critique of the *Dost* approach.

plicit conduct" to actual depictions of explicit (not implied) sexual conduct. 553 U.S. at 296–97 (emphasis in original).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002), this Court affirmed the lower court's ruling that provisions of the Child Pornography Prevention Act of 1996 (18 U.S.C. §§ 2252A and 2256) were unconstitutionally overbroad under the First Amendment.[3] After *Free Speech Coalition*, this Court, in *Williams*, upheld Congress's successor statute against First Amendment and vagueness challenges. But to do so, the Court narrowed the statute's terms by employing the "commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U.S. at 299. And in delivering the opinion of the Court, Justice Scalia cabined the term "sexually explicit conduct" by emphasizing "explicit" and by noting that that phrase "connotes *actual depiction of the sex act*[.]" *Williams*, 553 U.S. at 296–97 (emphasis added).

Contrary to the specificity required in *Williams* to uphold the statute, *Dost*'s injection of a subjectively based actus reus impermissibly expands the statute back to the type of vagueness and overbreadth condemned in the *Free Speech Coalition* opinions. The

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[3] This Court did not reach vagueness under the Due Process Clause, although the Ninth Circuit had found the provisions unconstitutionally vague in *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999).

statute speaks for itself in limiting its reach, mandating a minimum fifteen-year prison term for "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in … any sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" 18 U.S.C. § 2251(a), (e). In focusing on depictions of minors and defining "sexually explicit conduct" to include the phrase "lascivious exhibition," the statute provides specific, objective descriptions. 18 U.S.C. § 2256(2)(A)(i)-(v).

Free Speech Coalition and *Williams* frame this Court's clarity-and-certainty requirement for a valid federal child pornography statute. But by inserting a subjective element into the statute's objective descriptions of the crime, *Dost* continues to infect the statute with vagueness and overbreadth. In contrast, the narrower construction is true to the statutory text and avoids such constitutional problems. *See Skilling v. United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.").

With *Dost*'s subjective approach, an image of a minor constitutes child pornography if it was "intended or designed to elicit a sexual response in the viewer." *Dost*, 636 F. Supp. at 832. This subjective approach is divorced from the criminal statute and criminalizes images depending on whether the images subjectively arouse a pedophile, a voyeur, or an ordinary person. This Court has consistently invalidated criminal statutes because of similarly vague standards. *See infra*

Part B. By narrowly construing the statute, this Court vindicates its precedent rejecting the expansive reading of federal criminal statutes.

2. Congress included subjective factors in a different section of the same act, so their absence in the section defining "sexually explicit conduct" forecloses expansion of that definition.

"When Congress includes language in one section of a statute but omits it from a neighbor, [this Court treats] that difference in language [as conveying] a difference in meaning (*expressio unius est exclusio alterius*)." *Bittner v. United States*, 598 U.S. 85, 94 (2023). A purely objective test for "sexually explicit conduct" finds support in the definitional section's *lack* of any reference to the defendant's intent or purpose. 18 U.S.C. § 2256(2)(A)(i)-(v). Unlike § 2256, a neighboring section's definition of "sexual act" *includes* the subjective intent of the accused in its definition of sexual touching: "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years *with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person*." 18 U.S.C. § 2246(2)(D) (emphasis added).

Congress could have imported subjective intent language into "sexually explicit conduct" to define "lascivious exhibition" as it did in § 2246(2)(D), but it chose not to. The statutory silence should not be filled by *Dost*'s judicially-created subjective intent approach. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404-05 (1991) ("Where Congress includes particular

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (cleaned up) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord Lagos v. United States,* 584 U.S. 577, 582–84 (2018); *Honeycutt v. United States*, 581 U.S. 443, 451–52 (2017); *Dean v. United States*, 581 U.S. 62, 70 (2017).

This rule of construction applies in a second way as well, because Congress expressly enacted a separate statute punishing invasions of privacy on federal enclaves in the Video Voyeurism Prevention Act of 2004. Pub. L. No. 108-495, 118 Stat. 3999 (codified at 18 U.S.C. § 1801). That law shows that Congress knows how to federalize privacy crimes and has explicitly set out protections against "acts of video voyeurism[.]" 150 CONG. REC. H7267–68 (daily ed. Sep. 21, 2004) (statement of Rep. James Sensenbrenner). Yet in 18 U.S.C. § 2251(a), it is the "use" of a minor to engage in specific sex acts, not video voyeurism, that Congress chose to criminalize. Video voyeurism can be criminalized and condemned while being distinct from the creation of images of "sexually explicit conduct" that Congress proscribed in a different statute.

3. The *noscitur a sociis* canon requires an objective definition of "sexually explicit conduct."

"Under the familiar interpretive canon *noscitur a sociis*, 'a word is known by the company it keeps.'" *Dubin*, 599 U.S. at 124 (quoting *McDonnell v. United*

States, 579 U.S. 550, 568–69 (2016)). "This canon is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* at 124–25 (quoting *McDonnell*, 579 U.S. at 569). In *Williams*, this Court expressly referenced the rule of *noscitur a sociis* as providing an important level of certainty to avoid overbreadth and vagueness in the pornography statute. 553 U.S. at 294. Nonetheless, the *Dost* factors ignore that interpretive rule by injecting subjective factors in a list of objective circumstances defining "sexually explicit conduct."

Without *Dost*'s subjective expansion, the statute defines "sexually explicit conduct" as "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;

18 U.S.C. § 2256(2)(A). Sexual intercourse, bestiality, masturbation, and sadistic abuse are types of conduct that can be objectively categorized as sexual without considering the viewer or actor's intent. Additionally,

the words of the statute contain "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Lagos,* 584 U.S. at 582. The statute says nothing about images limited to child nudity or to the subjective intent of the actor or viewer. Under *noscitur a sociis*, the child pornography statute should be narrowly construed to foreclose consideration of the subjective intent of the viewer.

4. Absent a clear congressional statement, the statute should not be construed to expand federal criminal jurisdiction to include privacy crimes generally prosecuted in state courts.

"Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Bond v. United States*, 572 U.S. 844, 848 (2014). The *Dost* factors' subjective focus expands § 2256(2)(A) to encompass run-of-the-mill state privacy law violations.

Absent clearly stated congressional intent, this Court has consistently limited the scope of broadly worded federal crimes to preclude federal prosecution of matters traditionally regulated by the States. In *Ciminelli v. United States*, this Court found no clear congressional statement and, therefore, rejected a government theory of fraud because it "vastly expands federal jurisdiction without statutory authorization." 598 U.S. 306, 315 (2023). "Absent a clear statement by Congress, courts should not read … statutes to place under federal superintendence a vast array of

conduct traditionally policed by the States." *Id.* at 315–16 (cleaned up); *see McDonnell*, 579 U.S. at 568–69 (rejecting the government's "boundless interpretation" of the "official act" element of the federal bribery statue, finding that "significant federalism concerns" supported a narrow reading).

Because the States can and do criminalize and punish privacy-invading videos, the federal crime must be clearly described to warrant intrusion into what, under the system of federalism, falls within the police power of the States. Yet the federal production of child pornography statute contains no clear statement that it covers surreptitious videoing of spontaneous quotidian activities, nor does it contain subjective terms when listing what constitutes an image of "sexually explicit conduct."

5. The statute's "uses" element requires the active employment of a minor, not the passive, surreptitious recording of spontaneous quotidian conduct encompassed by *Dost*.

The Ninth Circuit has interpreted the verb "uses" a minor in producing images of "sexually explicit conduct" to include passive recording of the minor's spontaneous nonsexual conduct, stating: "We, along with our sister circuits, 'broadly' interpret the 'use' element of § 2251(a)." *United States v. Boam*, 69 F.4th 601, 607 (9th Cir. 2023) (citing *United States v. Laursen*, 847 F.3d 1026, 1033 (9th Cir. 2017)). But this Court in *Dubin*, defining the identical statutory word, concluded that a *narrow* reading properly narrowed the scope of a federal crime. *Dubin*, 599 U.S. at 118; s*ee Bailey v.*

United States, 516 U.S. 137, 143 (1995) (holding that the term "use" ought to be narrowly interpreted to require evidence of "active employment"); *see also Hutton*, 159 F.4th at 644 (Graber, J., concurring) ("The statute appears to contemplate that the defendant's actions must cause the minor to engage in sexually explicit conduct.") (underline emphasis in original). By following this Court's intervening construction of "uses," the statute's element requiring active use of the minor forecloses the Ninth Circuit's *Dost* factors, which sweep in passive, surreptitious recording of spontaneous quotidian conduct.

In *Dubin*, the Court noted the "interpretational difficulties" around "use" and the need to consider context to determine congressional meaning of the aggravated identity theft statute. 599 U.S. at 118. In determining that "uses" has a narrow meaning requiring active use, the Court relied on narrowing theories that are directly applicable to the present case:

- The Court looked to the label "aggravated identity theft" as meaning more than ordinary use of one's identifying information, *id.* at 123–24, just as "sexually *explicit* conduct" should be construed to require active "use" of the minor in a sexual way or context rather than being read to include surreptitious recordings that are devoid of explicit sexual conduct, *Williams*, 553 U.S. at 296-97 (emphasis in original).

- Applying the canon of *noscitur a sociis*, the neighboring words convey active use in the identify theft context, *Dubin*, 599 U.S. at 124-26, just as the neighboring words for "uses" —

"employs, uses, persuades, induces, entices, or coerces" — are all active in § 2251(a).

- Narrowly construing "uses" also follows the surplusage canon, *Dubin*, 599 U.S. at 126, which equally applies to the present statute because a broad meaning of "uses" would render the neighboring words superfluous.

- Both statutes involve the narrow reading of criminal statutes because "this Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Id.* at 130.

As in *Dubin*, the specific context of "uses" and the broader context of the statute as a whole support only active "use" of a minor in producing "sexually explicit conduct." *See Nken v. Holder*, 556 U.S. 418, 426 (2009) ("[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole[.]") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The statutory context of the "uses" element forecloses the *Dost* factors' inclusion of passive, surreptitious recordings of a minor's unmodified, spontaneous, nonsexual conduct as constituting production of child pornography.

6. Even if other rules of construction do not foreclose *Dost*'s gloss, the rule of lenity requires a narrow reading of the criminal statute.

This Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute." *Dubin*, 599 U.S. at 129 (quoting *Marinello v. United States*, 584 U.S. 1, 11 (2018)); *see United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,]" the Court applies the rule of lenity to "resolve the ambiguity in [the defendant's] favor."). If a straightforward reading of the statutory text based on existing rules of construction do not already doom *Dost*, the discord *Dost* has generated regarding the scope of "sexually explicit conduct" demonstrates the phrase's opacity and triggers application of the rule of lenity.

"Penal statutes must be construed strictly." 1 WILLIAM BLACKSTONE, COMMENTARIES, at 88 (1765); *see also Bittner*, 598 U.S. at 101 ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals.").

Here, not only have many state and federal courts rejected the *Dost* approach, the Solicitor General also appeared to adopt the objective approach in litigation regarding this same statutory language. *See* Brief for the United States, *Knox v. United States*, 510 U.S. 939 (1993) (No. 92-1183), 1993 WL 723366, at *9 ("[T]he material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness

on the part of the photographer or consumer)."). The statute so lacks clarity that the government has taken inconsistent positions on its meaning.

The many courts that reject or question the *Dost* factors demonstrate sufficient lack of clarity that, to protect individuals from prosecution for conduct not clearly described in the statute, as well as to protect the separation of powers, narrow construction is required. *See United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (strict construction of criminal statutes "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."); *see also Dubin*, 599 U.S. at 129–30 ("[C]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language.") (citation omitted).

B. This Court Should Grant A Writ Of Certiorari Because The Question Of The Statute's Reach Is Exceptionally Important.

If Congress intended the act of surreptitiously photographing a naked minor to result in federal criminal liability and a mandatory minimum sentence of fifteen years under § 2251(a), such words would be in the statute. *See 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for [the courts] to ascertain — neither to add nor to subtract, neither to delete nor to distort."). This case presents another example of recent cases before the Court in which the Executive Branch seeks to enforce laws beyond the words of the

congressional enactment, including the following: *Fischer v. United States*, 603 U.S. 480, 494 (2024); *Dubin*, 599 U.S. at 130; *Ruan v. United States*, 597 U.S. 450, 464 (2022); *Van Buren v. United States*, 593 U.S. 374, 393 (2021); *Kelly v. United States*, 590 U.S. 391, 398–404 (2020); *Rehaif v. United States*, 588 U.S. 225, 237 (2019); *Marinello*, 584 U.S. at 11–13; *McDonnell*, 579 U.S. at 574; *McFadden v. United States*, 576 U.S. 186, 187 (2015); *Burrage v. United States*, 571 U.S. 204, 218–19 (2014).

Those cases confirm that this Court acts as a crucial check on both prosecutorial overreach and judicial legislation. They also enforce state-federal comity in a system in which the States provide the general police power and the federal role remains closely cabined by the text of congressional enactments. *See Bond v. United States*, 564 U.S. 211, 221 (2011) ("The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States."). The *Dost* factors exemplify a trend toward expansive federalization of crime, regardless of the limited scope of congressional language, strongly militating in favor of this Court's intervention.

In enacting 18 U.S.C. §§ 2251(a) and 2256(2)(A), Congress laid out in verbs six actions that constitute criminal conduct and provided a narrowing definitional section that required "sexually explicit conduct" to meet express criteria, none of which encompasses the surreptitious photographing of a minor engaged in private, everyday routines like bathing or undressing. Contrary to the separation of powers, the *Dost* factors do exactly what this Court forbids: "If

judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cnty.,* 590 U.S. 644, 654-55 (2020). The *Dost* factors amend the scope of the federal child pornography statute based on judicial imagination that is not grounded in the plain meaning of the statute.

And the extremely harsh punishments for violation of the statute call for both enforcing uniformity and ensuring strict adherence to the narrow statutory text. Given the divergence in the Circuits relating to the *Dost* factors, whether the fifteen-year mandatory minimum imprisonment term applies depends on the jurisdiction in which the offense occurs. This disparate geographic treatment of similarly situated offenders undermines the principle of equal protection and calls for this Court's clarity to achieve uniformity.

The individual liberty at stake, the separation of powers, and the need for consistency in the law all establish a compelling need for this Court to grant the writ of certiorari and reverse the Ninth Circuit's expansive interpretation of the federal criminal statute.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the writ.

Respectfully submitted,

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