No. 25-971

In the Supreme Court of the United States

ROBERT WAYNE HUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
A. TYSEN DUVA
Assistant Attorney General
SOFIA M. VICKERY
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported petitioner's conviction for sexually exploiting or attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e).

PARTIES TO THE PROCEEDING

Petitioner is Robert Wayne Hutton. Respondent is the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 25-971

ROBERT WAYNE HUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 159 F.4th 636. The order of the district court (Pet. App. 24a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2025. The petition for a writ of certiorari was filed on February 13, 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 Washington, petitioner was convicted of sexually exploiting a minor and attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e). Judgment 1. Following a guilty plea in that court, he was convicted on one count of possessing child pornography, in violation of 18 U.S.C.

2252A(a)(5)(B) and (b)(2). *Ibid.*; Pet. App. 5a n.1. He was sentenced to 240 months of imprisonment, to be followed by a lifetime of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-23a.

1. Sometime before May 2021, petitioner placed a hidden camera to surreptitiously record the shower and toilet in a bathroom regularly used by his stepdaughter, who was 14 years old at the time. Presentence Investigation Report (PSR) ¶ 26. Over the next year, petitioner captured video files and 33 images of the girl, including fully nude photos of her showering and going to the bathroom. PSR ¶¶ 16, 26.

In May 2022, the girl became suspicious after petitioner—who had suggested that long hair is sexy and that she should keep her hair long—allowed his phone to connect to his truck, which briefly displayed a file with her name and the word "sexy." Pet. App. 4a; PSR ¶¶ 11-12. She decided to look at petitioner's phone, where she found photos and videos of herself going to the bathroom and showering. PSR ¶¶ 10-11, 26. On further investigation, she found the camera, hidden in a digital alarm clock, and realized that each time the clock had fallen, someone had propped it up again. PSR ¶ 16.

Police searched petitioner's devices pursuant to a search warrant and recovered images and videos of the girl in various states of undress as well as images of other children, including at least one child under the age of 12. PSR ¶ 26.

2. A federal grand jury in the Eastern District of Washington charged petitioner with sexually exploiting a minor and attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e); and possessing child pornography, including images of minors under the age of 12, in violation of 18 U.S.C. 2252A(a)(5)(B)

and (b)(2). Superseding Indictment 1-2. Petitioner pleaded guilty to possessing child pornography but proceeded to a bench trial on stipulated facts on the sexual exploitation count, which pertained to the videos and images of petitioner's stepdaughter discussed above. Pet. 7; Pet. App. 5a n.1.

The statute prohibiting sexual exploitation of a minor provides that sexual exploitation occurs when a person "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). The definition of "'sexually explicit conduct,'" in turn, includes "sexual intercourse," "bestiality," "masturbation," "sadistic or masochistic abuse," and "lascivious exhibition of the anus, genitals, or pubic area of any person." 18 U.S.C. 2256(2)(A). Following the bench trial, the district court found petitioner guilty of sexually exploiting a minor and (alternatively) attempting to sexually exploit a minor, in violation of 18 U.S.C. 2251(a) and (e). Pet. App. 25a-33a.

In explaining its findings, the district court noted that in determining whether the videos and images at issue featured a "lascivious exhibition," it had considered the factors articulated in *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.), cert. denied, 484 U.S. 856 (1987). Pet. App. 29a-30a. Those factors look to (1) whether "the focal point" of the depiction "is on the child's genitalia or pubic area," (2) whether the setting of the depiction is "sexually suggestive," (3) whether the "child is depicted in an unnatural pose or inappropriate attire," (4) whether "the child is fully or partially clothed or nude," (5) whether the depiction

"suggests sexual coyness or willingness to engage in sexual activity," and (6) whether the depiction "is intended or designed to elicit a sexual response in the viewer." *Id.* at 30a-32a; see *Dost*, 636 F. Supp. at 832.

The district court noted that it found several of those factors to be present here. Pet. App. 30a-32a. It had "no doubt" that "multiple" images focused on the victim's genitalia and pubic area, observing that petitioner specifically retained images with "very close-up views of her breasts and pubic area." *Id.* at 30a. The court also explained that a bathroom setting can be sexually suggestive; identified certain images showing the victim in "sexier, suggestive pose[s]"; observed that numerous images showed the girl nude; and found that petitioner's intent in capturing the images was to elicit a sexual response. *Id.* at 31a-32a.

The district court also added that, "if a reviewing court determines that th[e] photographs * * * do not qualify as sexually explicit conduct," it "further f[ou]nd that [petitioner] intended and attempted to commit the underlying offense." Pet. App. 32a. The court determined that "[i]t was his intent to capture sexually explicit conduct" and that "he took a substantial step towards doing so." *Id.* at 32a.

The district court sentenced petitioner to 20 years of imprisonment and a lifetime of supervised release on each of the two counts, with the sentences to run concurrently. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-23a. The court found sufficient evidence that the images were a lascivious exhibition, noting among other things the district court's findings that the "'focal point of the visual depictions is on the child's genitals or pubic area'" and the circumstances "'indicative of

[petitioner's] intent,'" which included "'the particular curation' of the images" and the "'direction of the * * * camera.'" *Id.* at 9a (citation omitted).

Judge Graber concurred in full. Pet. App. 19a-23a. In her view, however, Congress "might consider clarifying criminal liability" by providing "[c]lear statutory text" because judicial consideration of a defendant's subjective state of mind "stretche[s] the meaning" of the existing statutory text. *Id.* at 19a.

ARGUMENT

Petitioner renews his contention (Pet. 24-33) that the evidence was insufficient to support his conviction under the sexual-exploitation statute, 18 U.S.C. 2251, 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 videos and images he captured depict a "lascivious exhibition of the anus, genitals, or pubic area" of the victim. 18 U.S.C. 2256(2)(A)(v). The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Although the courts of appeals have relied to varying degrees on the *Dost* factors, any disagreement is narrow. This Court has repeatedly and recently denied petitions for certiorari making similar claims.[1] The same course is warranted here.

---

[1] See, *e.g.*, *McCoy* v. *United States*, 145 S. Ct. 551 (No. 24-380) (2024); *Donoho* v. *United States*, 144 S. Ct. 2683 (No. 23-803) (2024); *Boam* v. *United States*, 144 S. Ct. 1345 (No. 23-625) (2024); *Kolhoff* v. *United States*, 144 S. Ct. 1356 (No. 23-6481) (2024); *Anthony* v. *United States*, 144 S. Ct. 827 (No. 23-5566) (2024). Similar issues are raised in the pending petitions for writs of certiorari in *Dahl* v.

1. Under Section 2251, "[a]ny person who," *inter alia*, "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," or any person who attempts to do so, is subject to criminal penalties. 18 U.S.C. 2251(a) and (e). The statute defines "sexually explicit conduct" to include, as relevant here, "actual or simulated * * * lascivious exhibition of the anus, genitals, or pubic area." 18 U.S.C. 2256(2)(A)(v).

The statute does not define the term "lascivious," 18 U.S.C. 2256(2)(A)(v), which accordingly takes its ordinary meaning. See, *e.g.*, *Delaware* v. *Pennsylvania*, 598 U.S. 115, 128 (2023); *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). "[E]xhibition" means a "visible show or display." 5 *The Oxford English Dictionary* 537 (2d ed. 1989). Here, a rational factfinder could permissibly determine that the videos petitioner surreptitiously took of his stepdaughter constituted a visible display designed to incite lust.

Petitioner asserts (Pet. 27) that images of "innocuous daily activity" can never be a "'lascivious exhibition'" and therefore that the images here depicting the victim engaging in "ordinary daily bathroom activity" are not a lascivious exhibition as a matter of law. See Pet. 24 n.5, 30 (citation omitted). But such a categorical rule is unsound. As a threshold matter, as the courts of appeals generally have recognized, the question of

---

United States, No. 25-6566 (filed Jan. 9, 2026), and *Kroeker* v. *United States*, No. 25-6223 (filed Nov. 20, 2025).

whether a depiction is a lascivious exhibition of the genitals or pubic area of a child is not subject to categorical rules but instead is a question for the factfinder, to be determined using common sense. See, *e.g.*, *United States* v. *Miller*, 829 F.3d 519, 525 (7th Cir. 2016) (leaving the question "to the factfinder to resolve, on the facts of each case, applying common sense") (citation omitted), cert. denied, 582 U.S. 933 (2017); *United States* v. *Frabizio*, 459 F.3d 80, 85 (1st Cir. 2006) ("'Lascivious' is a 'commonsensical term,' and whether a given depiction is lascivious is a question of fact for the jury.") (citation omitted).

It is not impossible for curated and edited images of bathroom activity to constitute a "lascivious exhibition" under the plain meaning of that term. Petitioner's singular emphasis on the minor's conduct is at odds with the statutory text. Although Section 2251 refers to depictions in which a minor "engage[s] in * * * any sexually explicit conduct," the focus of the statutory prohibition is on the defendant's behavior: he must not "employ[], use[], persuade[], induce[], entice[], or coerce[] any minor to engage in" such conduct. 18 U.S.C. 2251(a). And "a perpetrator can 'use' a minor to engage in sexually explicit conduct without the minor's conscious or active participation." *United States* v. *Finley*, 726 F.3d 483, 495 (3d Cir. 2013), cert. denied, 574 U.S. 902 (2014). Indeed, because "lascivious" modifies "exhibition," "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for * * * himself or like-minded pedophiles." *United States* v. *Wells*, 843 F.3d 1251, 1255

(10th Cir. 2016) (brackets, citation, and emphasis omitted), cert. denied, 583 U.S. 830 (2017).[2]

Petitioner's reliance (Pet. 1-2, 27-28, 30) on *United States* v. *Williams*, 553 U.S. 285 (2008), is misplaced. While the Court's decision in *Williams*, which rejected a First Amendment overbreadth challenge, described "'[s]exually explicit conduct'" as "connot[ing] actual depiction of the sex act rather than merely the suggestion that it is occurring,"*id.* at 297 (emphasis omitted), it recognized that the statutory definition of "sexually explicit conduct" includes "lascivious exhibition of the genitals," *id.* at 301 (citation omitted), making such exhibition in itself a "sex act." *Id.* at 297; see also *id.* at 296 (noting the Court's prior approval of definition of "sexual conduct" that included "lewd exhibition of the genitals") (citation omitted). Nor does *Williams*'s reference to "a harmless picture of a child in a bathtub," *id.* at 301, foreclose application of the statutory definition to surreptitious images like the ones here, which

---

[2] Petitioner observes (Pet. 25-26) that the government's brief in *Knox* v. *United States*, 510 U.S. 939 (1993), stated that "the material must depict a child lasciviously engaging in sexual conduct (as distinguished from lasciviousness on the part of the photographer or consumer)," U.S. Br. at 9, *Knox*, *supra* (No. 92-1183). But that case presented the separate question whether the statute encompassed depictions of fully clothed children, see *id.* at I; the arguments in that brief were quickly repudiated, see Lawrence A. Stanley, *The Child Porn Storm*, Washington Post, Jan. 30, 1994, at C3 (recounting that President Clinton "denounced the reasoning of his own solicitor general" and that "[w]ithin a few weeks, the Senate had passed a unanimous, non-binding resolution condemning the [government's] brief "); and on remand from this Court, the Third Circuit reinstated the defendant's convictions in an opinion analyzing—and rejecting—the arguments in that brief, see *United States* v. *Knox*, 32 F.3d 733, 743-752 (1994), cert. denied, 513 U.S. 1109 (1995).

are anything but harmless to the victim, Sentencing Tr. 26-31; PSR ¶¶ 33-34.

Petitioner is wrong to suggest (Pet. 26-27) that a separate statute prohibiting video voyeurism "in the special maritime and territorial jurisdiction of the United States," 18 U.S.C. 1801, limits the scope of the sexual-exploitation statute. Section 1801—which applies to adults and children alike and does not require that the captured images be sexual in nature—criminalizes different conduct than the sexual-exploitation statute does. And Congress did not need to use voyeurism-specific language from Section 1801, a statute prohibiting a distinct set of conduct, for the sexual-exploitation statute to maintain its natural reach. As petitioner recognizes (Pet. 26), "[y]oung children with no concept of sexual intent can be posed in sexually suggestive positions, and a pedophile can even curate a sexually suggestive scene in which a child is asleep (or unconscious or drugged)." The same logic shows that curated images of bathroom activity can likewise violate the statute.

To the extent that petitioner suggests (Pet. 29-30) that a producer's intent in producing an image is categorically irrelevant, he is likewise incorrect. Because evidence of whether an image is intended or designed to sexually arouse has evidentiary value in establishing whether the image is one "[i]nciting to lust or wantonness," 8 *Oxford English Dictionary* 667 (defining "lascivious"), evidence of intention or design can be relevant in determining whether an image meets that definition.

2. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence. Here, as the district court reasonably found, petitioner's recording and retention of videos and images of his stepdaughter before, during and after her showers

was undertaken in a manner that produced a lascivious exhibition. While his stepdaughter believed that she was undertaking "everyday" activities, Pet. 26, petitioner curated a lascivious exhibition by using a hidden camera to capture her in various states of undress, focusing the images on her breasts and pubic area and retaining images with particularly close-up views or that showed her body in "sexier, suggestive" poses. Pet. App. 31a.

In any event, the district court alternatively found petitioner guilty of attempted sexual exploitation, which requires only proof that the defendant had "intent to capture sexually explicit conduct, and he took a substantial step towards doing so," not actual completion of the offense. Pet. App. 32a; see *e.g.*, *United States* v. *Hansen*, 599 U.S. 762, 774-775 (2023) (describing an attempt offense). And considerable evidence supported the finding that petitioner intended to create visual depictions of the victim engaging in a lascivious exhibition of her genitals or pubic area. As the court observed, petitioner placed a hidden camera, focused it on the victim's breasts and pubic area, and retained images showing close-up views of her breasts or pubic area or body in poses that could appeal to a person with a sexual interest in children. Pet. App. 30a-32a.

Those circumstances amply support the finding that petitioner's "interest in the girl[] was sexual," *United States* v. *Hillie*, 38 F.4th 235, 241 n.1 (D.C. Cir. 2022) (per curiam) (Katsas, J., concurring in the denial of rehearing en banc) (discussing sufficient evidence for conviction of attempted child-pornography production), and that petitioner took many substantial steps toward the completion of the offense. Petitioner's conclusory assertion (Pet. 31) that this finding "reflects the same

legal error that infects the completed-offense analysis" lacks merit. A defendant may be found guilty of attempting to create a visual depiction containing a lascivious exhibition whether or not the depiction ultimately contains such an exhibition. See, *e.g.*, *Hillie*, 38 F.4th at 241 n.1; *United States* v. *Sims*, 708 F.3d 832, 835 (6th Cir. 2013) ("To convict [the defendant] of attempted production of child pornography, the government does not need to prove that the videos of [the minor] were actually lascivious.").

Just as one can "readily infer" from a defendant's surreptitious recording of toilet activity that his "interest" in the victim is "sexual, not sartorial or urological," *Hillie*, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc), a factfinder could readily infer that petitioner's intent here was to obtain images that fit even the narrow definition of "lascivious exhibition" he now advances. Any failure to capture such images would suggest only that his efforts were unsuccessful—not that he never tried. He would therefore have a valid conviction irrespective of the precise definition of lascivious exhibition.

3. Petitioner contends (Pet. 15-20) that the decision below conflicts with a decision by the D.C. Circuit and claims (Pet. 20-24) the lower courts are divided on when and how to use the *Dost* factors. But any disagreements in the courts of appeals on those issues are narrow, would not affect the result in this case, and do not warrant this Court's review.

a. In *United States* v. *Hillie*, 39 F.4th 674 (2022), a divided panel of the D.C. Circuit interpreted the phrase "'lascivious exhibition'" in Section 2256(2)(A)(v) to require the minor victim to display her "genitalia[] or pubic area in a manner connoting that the minor, or any

person or thing appearing with the minor in the image, exhibits sexual desire or an inclination to engage in any type of sexual activity," *id.* at 685 (citation and emphasis omitted). But *Hillie* is an outlier, and even in the D.C. Circuit, conduct like petitioner's could be sufficient to support a conviction for attempt. See 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc). And as discussed above, the district court made an alternative attempt finding here.

Nor can petitioner identify any other circuit in which the result in this case would be different. As petitioner recognizes (Pet. 17-19), both before and after *Hillie*, other courts of appeals have upheld "lascivious exhibition" convictions where a defendant secretly recorded an unsuspecting minor who was sleeping, undressing to change clothes, using the toilet, or taking a shower. See *ibid.* (collecting cases); see also, *e.g.*, *United States* v. *Courtade*, 929 F.3d 186, 191-193 (4th Cir. 2019), cert. denied, 589 U.S. 1135 (2020); *Miller*, 829 F.3d at 524-525; *United States* v. *Close*, No. 21-1962, 2022 WL 17086495, at *1-*2 & n.2 (2d Cir. Nov. 21, 2022), cert. denied, 143 S. Ct. 1043 (2023).

b. Similarly, any disagreement among the courts of appeals about the relevance and use of the *Dost* factors is narrow and does not warrant this Court's review. Courts uniformly agree that the *Dost* factors can provide a nonexhaustive guide for the factfinder to determine whether a particular depiction constitutes a lascivious exhibition. And this case would be an especially unsuitable vehicle for reviewing their consideration.

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); *United States* v. *Petroske*, 928 F.3d 767, 773-774 (8th Cir. 2019), cert. denied, 589 U.S. 1184 (2020); Pet. App. 8a (citing *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 (4th Cir.) (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); *Miller*, 829 F.3d at 525 n.1 (7th Cir.) (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 "both [d]efendant and the Government use [them] in analyzing this question").

---

[3] 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 (Aug. 25, 2023) (per curiam).

Only the D.C. Circuit has definitively "decline[d] to adopt the *Dost* factors." *Hillie*, 39 F.4th at 689. Yet even then, the court clarified that it "do[es] not mean to suggest that evidence concerning all matters described in the factors is irrelevant or inadmissible at trial." *Ibid.* Thus, although courts of appeals differ on whether they expressly adopt the *Dost* factors, they do generally agree that a factfinder may consider aspects of the depiction that those factors encompass. And given that this case involves a bench trial in which the district court expressly applied the Ninth Circuit's guidance in *United States* v. *Boam*, 69 F.4th 601, 608-609 (2023), cert. denied, 144 S. Ct. 1345 (2024), which directs factfinders to consider the *Dost* factors as "'neither exclusive nor conclusive,' but rather 'general principles as guides for analysis'" in an inquiry that is "case-specific and 'based on the overall content of the visual depiction,'" *id.* at 609 (citation omitted); Pet. App. 30a, this case would be a poor vehicle in which to address any disagreement about the proper consideration of those factors.

c. To the extent that petitioner asserts (Pet. 20-24) confusion in the lower courts as to the specific application of the *Dost* factors, he fails to specify how any such confusion would result in a different outcome in this case. Petitioner notes (Pet. 22-23) in particular the First Circuit's decision in *United States* v. *Amirault*, 173 F.3d 28 (1999), and the Second Circuit's decision in *United States* v. *Spoor*, 904 F.3d 141 (2018). But neither has categorically excluded an image-producer's intent from the inquiry.

In *Amirault*, the defendant challenged the application of a sentencing enhancement that was based on the court's conclusion that the defendant had downloaded

an image involving the lascivious exhibition of the genitals or pubic area of a minor. 173 F.3d at 30-31. In elaborating on the sixth *Dost* factor, the First Circuit stated that "it is a mistake to look at the actual effect of the photograph on the viewer, rather than upon the intended effect," and then expressed "serious doubts" about whether "focusing upon the intent of the deviant photographer is any more objective than focusing upon a pedophile-viewer's reaction" because, "in either case, a deviant's subjective response could turn innocuous images into pornography." *Id.* at 34. But that statement does not support petitioner.

To begin with, the First Circuit noted that its expression of doubt concerning the relevance of a creator's intent was dicta. See *Amirault*, 173 F.3d at 34 (observing that "the circumstances of the photograph's creation [we]re unknown" and that an inquiry into those circumstances accordingly "would not work in this case"); see also *United States* v. *Frabizio*, 459 F.3d 80, 89 n.15 (1st Cir. 2006) (noting that in *Amirault* "the circumstances of the photograph's creation [we]re unknown") (citation omitted). Moreover, the First Circuit has since made clear that "*Amirault* did not express a general rule limiting the question of lasciviousness to the four corners of the photograph" and that "[t]he issue of the four corners rule, and even of what it means, has not been decided by this circuit." *Frabizio*, 459 F.3d at 89 & n.15. The court acknowledged "arguments going different ways" on the issue and found it unnecessary to determine which side was correct. *Id.* at 89.

In *Spoor*, the Second Circuit upheld a conviction for producing child pornography, where the defendant—much like petitioner—had surreptitiously recorded preteen boys while they were naked in a bathroom. 904

F.3d at 146, 152. In the course of its discussion, *Spoor* stated that "the sixth *Dost* factor * * * should be considered by the jury in a child pornography production case 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." *Id.* at 150. But in the next paragraph, *Spoor* made clear that "the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography." *Id.* at 151. Even assuming that those statements are not dicta, the upshot would simply be that a "jury may not find a film to be a 'lascivious exhibition' * * * based solely on the defendant's intent in creating the video," *Id.* at 150 (citation and emphasis omitted). As discussed above, that was not the sole factor here. See p. 9-11, *supra*.

4. At all events, the district court's alternative finding of guilt on an attempt theory makes this an exceedingly poor vehicle for further review. It also illustrates why this case does not present an issue of general importance, as evidence like the evidence here generally will support a conviction for attempted production or possession of child pornography irrespective of the meaning of "lascivious exhibition." Cf. *Hillie*, 38 F.4th at 241 n.1 (Katsas, J., concurring in the denial of rehearing en banc). Attempted sexual exploitation of a minor under Section 2251(a) carries the same penalty as the completed offense. See 18 U.S.C. 2251(e). And it would in this particular case not matter even if petitioner could prevail on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
A. TYSEN DUVA
Assistant Attorney General
SOFIA M. VICKERY
Attorney

MAY 2026