

No. ____

In The Supreme Court of The United States

Plamen Georgiev Velinov,

Petitioner,

v.

United States of America,

Respondent.

**On Petition for Writ of Certiorari to the United
States Court of Appeals
for the Eleventh Circuit**

Petition For Writ Of Certiorari

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QUESTION PRESENTED

Whether courts' inclusion of what are known as the "*Dost* factors" to instruct a criminal jury in ascertaining a "lascivious exhibition" under 18 U.S.C. § 2256(2)(A)(v), render such jury instructions impermissibly vague?

PARTIES TO THE PROCEEDING

The parties to the proceedings are:

Plamen Georgiev Velinov, Petitioner

United States of America, Respondent

None of the parties to this proceeding are corporations, and none have stock ticker symbols. S. Ct. R. 14.1(b)(i).

RELATED PROCEEDINGS

The following proceedings relate directly to the case before the Court:

United States v. Plamen Georgiev Velinov, No. 23-12136, 2025 WL 883975 (11th Cir. Jul. 8, 2026).

United States v. Plamen Georgiev Velinov, No. 8:21-cr-00342-VMC-SPF (M.D. Fla.). Judgment entered June 16, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered in case number 23-12136, in that court on July 8, 2026. *United States v. Plamen Georgiev Velinov*, No. 23-12136, 2026 WL 1970554 (11th Cir. Jul. 8, 2026).

OPINION BELOW

The opinion of the court of appeals is unreported but available at 2026 WL 1970554 and is reproduced in Appendix A at pages 1–30.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231, as Velinov was charged with an offense against the United States. The court of appeals had jurisdiction under 28 U.S.C. § 1291, which provides for jurisdiction over appeals from all final decisions of district courts of the United States. The court of appeals entered its judgment on July 8, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part, "Congress shall make no law . . . abridging the freedom of speech . . ."

The Fifth Amendment to the United States Constitution provides, in part, "No person shall . . . be deprived of life, liberty or property, without due process of law."

Section 2256 of Title 18 of the United States Code, "Definitions for Chapter," (full text reproduced in Appendix B at 31–33) . . . provides, in pertinent part:

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2) (A) . . . "[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;

.....

Section 2251 of Title 18 of the United States Code, "Sexual Exploitation of Children," is reproduced in full in Appendix C at 34–43.

Section 2252 of Title 18 of the United States Code, "Certain Activities Relating to Material Involving Sexual Exploitation of Minors," is reproduced in full in Appendix D at 44–47.

INTRODUCTION

Plamen Velinov is a 53-year-old foreign national with no prior criminal record. The petitioner is not a pedophile and has never abused a child. He provided information technology support to an openly available website, repeatedly described as "commercial child erotica" by an FBI agent at his trial. The site featured no nudity or explicit sexual acts. Velinov has been convicted of conspiracies to advertise and distribute images of "minors engaging in sexually explicit conduct," and sentenced to 25 years in prison.

Velinov was prosecuted as part of the government's increasingly aggressive efforts to combat the terrible scourge of child pornography, much of it vile, explicit and easily identifiable as "hard core." A series of Supreme Court decisions has repeatedly sanctioned efforts aimed at the "hard core of child pornography" as constitutional. At the same time, over the past several decades, federal courts have recognized a legal genre of sexually suggestive, even salacious "child erotica" but—according to police and prosecutors—not "sufficiently explicit" to come within the ambit of "sexually explicit conduct" proscribed by federal law.

This appeal is about drawing a line that "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This Court recently held that when a jury is instructed to apply an unconstitutionally vague legal standard to a criminal statute, the defendant is denied a fair trial. *See Percoco v. United States*, 598 U.S. 319 (2023). That is at the heart of this petition.

Child pornography prosecutions present an increasingly significant—and fast growing—portion of federal law enforcement actions.

Between 1994 and 2022, federal child-pornography prosecutions increased by over 3,200 percent, more than any other category of crime, from 61 per year to 2,015 per

year. The average sentence imposed for child-pornography convictions increased by 590 percent over the same period—from 42 months' imprisonment in 1994 to 293 months' in 2022. In 2022, the latest year for which data are available, more people were sentenced to life imprisonment for federal child-pornography offenses than any other category of federal crime except narcotics offenses.¹

The *Dost* Test

Juries in all but two federal circuits,² and in many state courts, are instructed to apply "a pivotal but deeply problematic . . . six-factor '*Dost* test',"³ called "Trial by Rorschach Test" by one scholar, who found the factors "pose severe and unrecognized First Amendment problems."⁴ Another scholar more recently identified the *Dost* factors as "provid[ing] the foundation for the First through Eleventh Circuits' current interpretation of the child-pornography statutes and sentencing guidelines."⁵ The *Dost* factors are particularly problematic when juries are instructed to apply them to images of minors with no nudity and no sexual conduct to discern whether the depictions are "lascivious exhibitions" under 18 U.S.C. § 2256(2)(A)(v). If members of a jury find even one of the six factors apply, a long prison term is almost always the result. Other defendants are spared prosecution based on subjective decisions by police and prosecutors that identical images, even with nudity, are "insufficiently lascivious"—therefore lawful—"child erotica."

¹ OWEN SENDERS, MISREADING THE FEDERAL CHILD PORNOGRAPHY STATUTES, GEORGIA CRIM. L. REV., VOL. 3[2025] NO. 1, ART. 3, at 52 (citing U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS). *See id.*, n.1–3 for details.

² The D.C. Circuit has rejected use of *Dost* to instruct juries, *United States v. Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022) and the Seventh Circuit has discouraged their "routine use" because a juror's "common understanding" of lascivious exhibition is sufficient. *United States v. Price*, 775 F.3d 828, 840 (7th Cir. 2014).

³ *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).

⁴ AMY ADLER, THE "*DOST TEST*" IN CHILD PORNOGRAPHY LAW: TRIAL BY RORSCHACH TEST, CHAPTER 3, in *Refining Child Pornography Law: Crime, Language, and Social Consequences*, at 81, CARISSA BYRNE HESSICK, ed., University of Michigan Press (2016) (internal citations omitted).

⁵ OWEN SENDERS, *supra*, n.1 at 66–67.

Non-Obscene Child Pornography Is Not Protected By the First Amendment.

More than four decades ago, this Court held a state child pornography law did not violate the First Amendment *because the material is the product of the sexual abuse of children*. *New York v. Ferber*, 458 U.S. 747 (1982) (italics added). Like the federal statute at issue in this petition, 18 U.S.C. § 2256, the state law prohibited presentations of minors engaged in obvious "sexual conduct" as well as "lewd exhibition of the genitals."⁶ The Court was confident the state's law was "directed at the *hard core of child pornography*," and, importantly, that courts would not "widen the possibly invalid reach of the statute by giving expansive construction to 'lewd exhibition(s) of the genitals.'" *Id.* at 773 (italics added). Two decades later, this Court reiterated, "[*Ferber*] reaffirmed that where speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002).

Much prohibited "sexually explicit conduct" described in 18 U.S.C. § 2256 unambiguously qualifies under the standard the Court articulated in *Ferber* and *Free Speech Coalition*, e.g., sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, § 2256(2)(A)(i)–(iv). The difficulty arises with prosecutions under sub-paragraph (v) "lascivious exhibition," where lower courts have permitted convictions simply based on the subjective intent of those *viewing* images, under increasingly expansive standards. For example, in 2016, the Eleventh Circuit announced:

Today, we join the Eighth, Ninth, and Tenth Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, *even when the original depiction is one of an innocent child acting innocently*.

United States v. Holmes, 814 F.3d 1246, 1252 (11th Cir. 2016) (italics added).

⁶ Mean[ing] actual or simulated sexual intercourse, . . . bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals," 458 U.S. at 751.

Ambiguity and confusion have compounded with the appearance of what courts have termed "child erotica," defined as—lawful— "material that depicts 'young girls as sexual objects or in a sexually suggestive way,' but is not 'not sufficiently lascivious to meet the legal definition of sexually explicit conduct' under 18 U.S.C. § 2256." *United States v. Vosburgh*, 602 F.3d 512, 520 n.7 (3rd Cir. 2010) (citing an FBI affidavit describing child erotica as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children."). Another circuit court has acknowledged it is "often difficult to distinguish between child pornography and child erotica." *United States v. Prideaux-Wentz*, 543 F.3d 954, 959–60 (7th Cir. 2008).

With all this ambiguity, and it being left to police, prosecutors and courts sorting (*apparently* lawful) child erotica from (unlawful) child pornography without sex acts or even nudity, the "expansive construction of . . . lewd exhibition" the Court warned of in *Ferber* has come to fruition. This confusion has been greatly facilitated by the widespread use of what are known as the "*Dost* Factors" in jury instructions, the focus of this petition.

Mr. Velinov argues that these factors given to juries in all but the D.C. and Seventh circuits, give jurors leave to find even lawful images are "sexually explicit conduct" under § 2256(2)(A)(v) by relying—separately—on one or more of the vague "*Dost* factors." In emotionally charged cases often involving no sexual conduct at all, these "guidelines" give jurors alternative non-unanimous reasons to find pictures the government tells them are child pornography to be "lascivious exhibitions." These very different "factors" justify a juror's very consequential vote for "guilty" when the images in question may not in any objective sense depict the "sexually explicit conduct" the law requires.

One juror might look at an image of a clothed young girl and take note of factor number four: "the minor appears to be displayed in an unnatural pose or in inappropriate attire."⁷ Yet another juror might simply think the first factor justifies a guilty verdict: "the overall content of the material." Still another may think number seven applies, believing the "depiction appears to have been designed to elicit a sexual response in the viewer." Each vote for "guilty," no matter which *Dost* factor relied upon by a juror, counts the same.

This Court should grant a writ of certiorari to resolve the circuit split on the use of the "*Dost* factors" in jury instructions and to provide further guidance to the lower courts on the standards to prove images meet the definitions set forth in 18 U.S.C. § 2256.

STATEMENT OF THE CASE

Plamen Velinov was indicted for conspiracy to advertise visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2251(d) and (e), and conspiracy to distribute visual depictions of minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). Dist. Ct. Doc. 1 at 1–2.

After a jury trial, Mr. Velinov was found guilty on both counts. Dist. Ct. Doc. 123. On June 15, 2023, he was sentenced to 300 months' imprisonment, Dist. Ct. Doc. 148, a sentence Velinov is currently serving. Velinov has no prior criminal record. Dist. Ct. Doc. 162 at 238. He is a 53-year-old foreign national with training and experience in computers and software engineering. Dist. Ct. Doc. 163 at 17, 20. No evidence was produced to suggest that Velinov was a pedophile, consumer of child pornography or ever abused a child. *See* Dist. Ct. Doc. 161 at 29, 56; Doc. 170 at 19–20.

⁷ This and the other two factors from *Dost* were included in the instructions to Petitioner's jury, taken from 11th Circuit Pattern Jury Instructions.

A. Proceedings in the District Court

At trial, the government established that Velinov primarily provided remote technical support for what was billed as a child modeling website known as Newstar. FBI Special Agent ("SA") Alison Boos testified that she accessed the Newstar websites and viewed some of the available images. Dist. Ct. Doc. 161 at 33–40. SA Boos confirmed that she reported she had "purchased access to the websites and . . . and the images depicted *clothed minors*, some clearly pre-pubescent, and many are posed in a *sexually suggestive manner*." *Id.* at 57 (emphasis added).

In a series of "status reports" to her DOJ superiors filed between July 2017 and March 2019, SA Boos reported that the case "targets [four American subjects other than Velinov who are] running and facilitating commercial *child erotica* websites." *Id.* at 56, 58 (emphasis added). The agent saw no nudity or minors having sex on the sites. *Id.* at 59. No images depicting nudity or sexual acts were introduced at trial. The court sustained numerous objections to defense questions as to whether the models posed in a "sexually explicit manner" or if SA Boos observed "sexually explicit conduct," or any questions concerning the significance of the term "child erotica," as well as to the admission of the status reports SA Boos adopted as her true and correct statements." *Id.* at 57–83. All told, Newstar operated on the public or "clear" internet for 14 years, from about 2005 until four years *after* the agent's 2015 purchase, when the government shut the site down in November 2019. *Id.* at 77–78.

Velinov's Defense at Trial Was Legal Insufficiency of Evidence.

While a substantial percentage of the images were sexually suggestive, none depicted nudity or any sexual acts. Mr. Velinov's defense was simply that the images at issue in this

case are indistinguishable from what courts recognize as legal "child erotica." His case focused on the fundamental issue presented in this appeal—where the line *is* between *lawful* child erotica—and *unlawful* images depicting "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A)(v), namely, the "lascivious exhibition of the . . . genitals, or pubic area [of a minor]." Velinov's defense simply challenged the claim that the images advertised and distributed were in fact child pornography as defined by the statutes; given no nudity, no explicit sexual conduct, and no minors having sex. *Id.* at 25–31.

Velinov objected to inclusion of the *Dost* factors at the charge conference, arguing that the factors, included in the two offense instructions, rendered the statutory language unconstitutionally vague.

The "*Dost*" factors were included as part of the jury instructions for both charged offenses, Dist. Ct. Doc. 122 at 20–21, 24–25, over defense objections. Specifically, Velinov objected to inclusion of the *Dost* factors, identifying them by line and page numbers in the instructions, because they "render[ed] the statute unconstitutionally vague." Dist. Ct. Doc. 164 at 4. Velinov did not object to the statute itself, or the definitions in 18 U.S.C. § 2256, as unconstitutionally vague, but only to the *Dost* factors given in the court's instructions to the jury.

The *Dost* factors were laid out by the court separately in each offense instruction as follows.

Factors you may consider include:

- the overall content of the material;
- whether the focal point of the visual depiction is on the minor's anus, genitalia or pubic area;
- whether the setting of the depiction appears to be sexually inviting or suggestive – for example, in a location or in a pose associated with sexual activity;

- whether the minor appears to be displayed in an unnatural pose or in inappropriate attire;
- whether the minor is partially clothed or nude;
- whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity; and
- whether the depiction appears to have been designed to elicit a sexual response in the viewer.

*A visual depiction **need not have all these factors** to be a lascivious exhibition.*

Dist. Ct. Doc. 122 at 20–21, (repeated for Count Two at) 24–25 (emphasis added).

B. Proceedings in the Eleventh Circuit

The Eleventh Circuit affirmed the conviction and sentence and, while listing the *Dost* factors in a footnote, declined to identify them by the commonly used term. Instead, the appellate court uses the euphemism "additional considerations" for the *Dost* factors and dismisses Velinov's objection that they render the statute unconstitutionally vague. "If anything, the additional considerations the district court gave to the jury clarified the line between a lascivious depiction . . . and one that is not." Essentially—in arguably circular reasoning—the court found that use of the "additional considerations" (the *Dost* test) was justified because they were "essentially the same as the usual factors we look at to determine whether a depiction is a 'lascivious exhibition.'" *United States v. Velinov*, 2026 WL 1970554 at *8–*9.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on instructing juries using the *Dost* factors. Presently, two circuits reject or "discourage" their use. Two circuits limit their use. One circuit limits the use of one of the factors, and another requires more than one factor be present to establish "lasciviousness."

A. In 2022, the D.C. Circuit disavowed "*Dost*:"

For all these reasons, we decline to adopt the *Dost* [636 F.Supp. 828 (S.D. Cal. 1986)] factors, and thus we find unpersuasive those decisions of our sister circuits that follow the *Dost* factors, or that use *Dost* as the foundation for construing "lascivious exhibition of the anus, genitals or pubic area," rather than *Miller* and its progeny, including *Ferber*, *X-Citement Video*, and *Williams*. . .⁸

Today this court simply rejects 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, depicted visually, constitutes "lascivious exhibition of the anus, genitals, or pubic area of any person."

United States v. Hillie, 39 F.4th 674, 689–90 (D.C. Cir. 2022).

Hillie, in relevant part, concerned surreptitious video photography of minors displaying nudity but no sexual conduct, *id.* at 677–78. The court vacated convictions on three counts, with the evidence deemed insufficient as a matter of law to be "sexually explicit conduct" in the form of "lascivious exhibition" as meant in 18 U.S.C. § 2256(2)(A)(v), *id.* at 680–86. The court rejected "the Government's argument (adopted by the dissent) that 'lascivious exhibition of the genitals' as defined in §2256(2)(A), should be construed in accordance with the *Dost* factors, *id.* at 686.

According to the D.C. Circuit, *id.* at 686–87, the "fundamental premise of *Dost*, that [a] 1984 amendment of the definition of "sexually explicit conduct" broadened the reach of the

⁸ The D.C. Circuit here refers to this Court's decisions in *Miller v. California*, 413 U.S. 15 (1973) and its progeny, including *Ferber*, 458 U.S. 747 (1982), *United States v. X-Citement Video*, (513 U.S. 64) (1994) and *United States v. Williams*, 553 U.S. 285 (2008).

federal statute, is fatally flawed." "[T]he *Dost* court completely ignored the holdings of *Miller*, 413 U.S. at 27, and [*United States v.*] *12 200-Foot Reels of Super 8mm Film*, 413 U.S. [123] at 130 n.7 [(1973)], that 'lewd exhibition of the genitals' refers to 'hard core' sexual conduct." [R]ather than relying upon the authoritative construction of "lewd exhibition" in these Supreme Court cases, the *Dost* court cited a district court opinion that concluded "there are no cases interpreting the word 'lewd' as used in this [the federal child pornography] statute," 636 F. Supp. at 831–32 . . . and crafted its own definition.

The D.C. Circuit continued, 39 F.4th at 687–88 (full citations omitted):

When upholding *Dost*, the Ninth Circuit rejected a vagueness challenge to the statutory language "lascivious exhibition of the genitals, "because 'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in *Miller v. California*" *United States v. Wiegand*, 812 F.2d 1239, 1243 (9th Cir. 1987). But without any explanation, *Wiegand* did not abide by *Miller's* construction of "lewd exhibition of the genitals," even though the Supreme Court had previously explained that "[i]f and when ... a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material" in federal statutes, "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California*." *12 200-Foot Reels of Super 8mm. Film*, 413 U.S. at 130 n.7 (emphasis added). Instead, *Wiegand* adopted a modification of the six-factor test created by the district court in *Dost*. 812 F.2d at 1243–45. Even if the relevancy of using *Miller*, *12 200-Foot Reels of Super 8mm. Film*, and *Ferber* to construe the federal statute was unclear at the time of *Dost* and *Wiegand*, but see *Hamling v. United States*, 418 U.S. 87, 105–07, 113–14 [] (1974) (explaining that *12 200-Foot Reels of Super 8mm Film* held that the statutory constructions from *Miller* authoritatively applied to federal statutes with the same language), their pertinence is now clear given *X-Citement Video*, 513 U.S. at 78–79, [] and *Williams*, 553 U.S. at 296, 128 S.Ct. 1830, for the reasons explained above....

Third, the *Dost* court erroneously concluded that whether a photo or video depicts "a minor engaged in sexually explicit activity" depends in part on 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." 636 F. Supp. at 832. The Ninth Circuit agreed, stating that "[t]he picture of a child 'engaged in sexually explicit conduct' within the meaning of 18 U.S.C. §§ 2251 and 2252 ... is a picture of a child's sex organs displayed lasciviously—that is, so presented by the

photographer as to arouse or satisfy the sexual cravings of a voyeur." *Wiegand*, 812 F.2d at 1244.

The Supreme Court expressly rejected this line of reasoning in *Williams*. When construing the federal promotion of child pornography offense, the Court explained that the statute cannot "apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious.'" *Williams*, 553 U.S. at 301 []. Instead, "[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. Where the material at issue is a harmless picture of a child in a bathtub and the defendant, knowing that material, erroneously believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." *Id.* This is because the statutory terms "visual depiction"—in § 2251(a) and § 2252(a)(4)(B)—and "lascivious exhibition"—in § 2256(2)(A)(v)—refer to different things. Sections 2251(a) and 2252(a)(4)(B) require the defendant to have produced or possessed a visual depiction of "a minor [or any minor] engaging in sexually explicit conduct," with sexually explicit conduct defined as, among other things, a "lascivious exhibition of the ... genitals," 18 U.S.C. § 2256(2)(A)(v). The statutory term "lascivious exhibition" therefore refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself. 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. Writing for the Court in *Williams*, and placing emphasis on the word "explicit," Justice Scalia explained that "[s]exually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring," 553 U.S. at 297, [] but the *Dost* factors stray too far from this 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.

The *Hillie* court found that, *id.* at 685–86, instead of the vague *Dost* factors, "lascivious exhibition of the genitals" must be construed consistently with other "sexually explicit conduct" specifically listed, citing:

Williams' (553 U.S. at 294) reliance "upon the *noscitur a sociis* canon to interpret the promotion of child pornography statute, 18 U.S.C. § 2252(A)(3)(B) [] we believe it has relevance here. Because "lascivious exhibition of the anus, genitals and pubic area" appears in a list with "sexual intercourse," "bestiality," "masturbation," and "sadistic or masochistic abuse," its "meaning [] [is] narrowed by the commonsense canon . . . —which counsels that a word is given more precise content by the neighboring words with which it is associated." *Id.* at 294, . . . Thus, the "lascivious exhibition of the anus, genitals or pubic area" must be performed in a manner that connotes the commission of a sexual act, which is consistent with how the prosecutors construed "lewd exhibition of the genitals" when asking the

Supreme Court to uphold the New York statute in *Ferber*. See Brief for Petitioner, *Ferber*, 458 U.S. 747, [] (No. 81-55), 1982 WL 608534, at *24 ("Notably, the statute, in defining sexual conduct, does not include simple nudity, although it does prohibit lewd exhibition of the genitals. Nudity is prohibited only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the prohibited acts. N.Y. Penal Law § 263.00 (3) & (6). In not prohibiting simple nudity, the statute allows producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children."). Further, this construction is consistent with the Court's repeated description of the conduct prohibited by the terms "sexual conduct" and "sexually explicit conduct" in child pornography statutes as "hard core" sexual conduct, as described above.

To be clear, this construction of the statute—although it is informed by First Amendment caselaw—is not a holding that Congress has run up against a constitutional limit on its authority to criminalize conduct like Hillie's. In fact, both federal law and the law of the District of Columbia contain prohibitions on voyeurism. See 18 U.S.C. § 1801 ; D.C. Code § 22-3531. And we see no barrier to imposition of enhanced penalties when the victim is a minor. *Cf. Ferber*, 458 U.S. at 756–57 []. The First Amendment cases are instructive simply in that they shed light on the meaning that Congress ascribed to the statutory term "lascivious exhibition of the anus, genitals, or pubic area of any person."

B. The Seventh Circuit discourages use of the *Dost* factors, which can "seem like a command to take a detailed and mechanical walk through a checklist, which risks taking the inquiry far afield from the already clear statutory text."

The Seventh Circuit held that a district court did not plainly err by instructing the jury on *Dost* factors but declined to endorse the factors and "discouraged their routine use." *United States v. Price*, 775 F.3d 828, 830–31 (7th Cir. 2014). The court found, under a plain error standard, that the jury instruction incorporating *Dost* was neither "legally improper" nor "unconstitutionally overbroad." However, the *Dost* factors were found to be "unnecessary in light of the clear statutory definition of the term "sexually explicit conduct."

We have noted before that the *Dost* factors are the subject of ongoing debate among the circuits. Some view the factors as overly generous to defendants; others suggest that in some cases the *Dost* factors may have the effect of expanding the scope of the term "lascivious exhibition."

This case does not require us to determine whether the *Dost* factors are always or never permissible, but we do take this opportunity to discourage their routine use. Our concern is that the factors may not helpfully elucidate the

statutory standard, which is clear enough on its face. The term "lascivious" is not vague. . . .

Instructing a jury on the *Dost* factors can seem like a command to take a detailed and mechanical walk through a checklist, which risks taking the inquiry far afield from the already clear statutory text. Instead of focusing on a commonsense understanding of "lascivious exhibition," the jurors may be led deep into the weeds of evaluating degrees of nudity, or asking whether an image conveys sexual coyness, expresses a willingness to engage in sexual activity, or depicts a pose or a place associated with sexual activity. These case-and-context-specific factors are better left to the closing arguments of counsel. The jury's common understanding is enough to distinguish artistic and other licit photos of children from child pornography as that term is defined in the statutory text.

Id. at 839–40 (citations omitted).

C. Other circuits have applied the *Dost* factors inconsistently.

Leaving aside the inconsistencies in enforcement caused by police and prosecutors deciding like images are insufficiently "lascivious" and legal "child erotica," the First through Eleventh Circuits have used *Dost* to instruct juries but, in practice, disagreed as to how the factors apply. These inconsistencies mean "that conduct insufficient to warrant conviction in one case is sufficient in another."⁹ Examples include:

- The First Circuit has found that the *Dost* factors "are neither comprehensive nor necessarily applicable in every situation. . . . [but] there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition." *United States v. Amirault*, 173 F.3d 28, 32 (1st Cir. 1999).
- The Second Circuit has limited "the role of the sixth *Dost* factor," given that "the defendant's subjective intent alone is not sufficient to find the content lascivious." *United States v. Spoor*, 904 F.3d 141, 151 (2d Cir. 2018).

⁹ See OWEN SENDERS, *supra*, n.1 at 92–95.

- The Third Circuit requires "more than one factor must be present to establish 'lasciviousness,'" *United States v. Villard*, 885 F.2d 117, 122–25 (3d Cir. 1989). The court found an image of a minor, fully nude and "three quarters erect" not to be a lascivious exhibition because although "a reasonable fact-finder [could find] that the picture in fact elicited a sexual response in the viewers" . . . the image constituted a close-up of the minor's body, as opposed to the genitals specifically; the minor was not in an unnatural position, and there was no evidence that the minor "displayed a willingness to engage in sexual activity."
- The Fifth Circuit found no clear error in a district court's finding of insufficient evidence for a lascivious exhibition although a minor's pubic area was "inescapably . . . the picture's focus," the minor's "convivial facial expression intimate[d] neither sexual coyness nor a willingness to engage in sexual activity," *United States v. Boudreau*, 250 F.3d 279, 283 (5th Cir. 2001). A concurring opinion in the Fifth Circuit questions one of the factor's statutory authenticity. *United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J.). ("The sixth factor, which asks whether the visual depiction was intended to elicit a sexual response in the viewer, is especially troubling. Congress did not make production of child pornography turn on whether the maker or viewer of an image was sexually aroused, and this *Dost* factor encourages both judges and juries to improperly consider a non-statutory element." (footnote omitted)). In *United States v. Romero*, 558 Fed. App'x 501, 502–03 (5th Cir. 2014), the court found that images of a sleeping minor with her "dress pulled up around her waist" with "sexually explicit captions" were not lascivious exhibitions.

- The Eighth Circuit found sufficient evidence to convict a defendant who “freeze-framed” videos of children playing on a beach and a jungle gym at “moments where their pubic areas [were] most exposed, for instance, when they [were] doing cartwheels.” These, the court found, were lascivious exhibitions because, although “the girls [were] wearing swimsuit bottoms,” the minors’ pubic areas were “at the center of the image[s].” *United States v. Horn*, 187 F.3d 781, 789–90 (8th Cir. 1999). But, a panel found insufficient evidence to convict where a defendant had hidden a camera in a closet adjacent to a bathroom, told the minor to use the bathroom, creating multiple videos of the minor nude, because “the focal point was not the minor’s genitals” and the “setting [was not] sexually suggestive under the circumstances.” *United States v. McCoy*, 55 F.4th 658, 660 (8th Cir. 2022), *rev’d en banc*, 108 F.4th 639 (8th Cir. 2024) (notwithstanding the panel’s arguably reasoned application of the *Dost* factors). Five judges dissented in the en banc reversal, *id.* at 649–55.

II. The statutory meaning of “sexually explicit conduct” in the form of “lascivious exhibition of . . . the genitals,” 18 U.S.C. § 2256(A)(2)(v), is the key interpretive problem, raising vagueness concerns.

A. Use of the *Dost* factors almost guarantees vagueness.

One legal scholar puts it this way:

The creation of [the] category—“lascivious exhibition of the genitals”—as part of the class of prohibited “sexually explicit conduct” introduced the most problematic aspect of defining child pornography. Determining whether a photo depicts a child being raped, for example, would appear to be a relatively straightforward (albeit repugnant) inquiry. But what exactly constitutes “lascivious exhibition of the genitals”? . . . How does it differ from photographs used in mass marketing advertising, a realm that increasingly relies on highly sexualized images of teens?

The interpretive problems surrounding this category . . . are compounded because the [Supreme] Court has made clear that nudity is *not* the dividing line between protected speech and child pornography. Indeed the [*New York v. Ferber* 458 U.S. at 765 n.18] Court emphasized that child "nudity without more is protected expression." Conversely, and surprisingly, a picture can be criminalized as "lascivious" even if it contains *no* nudity. Although the Supreme Court has never directly approved this interpretation, several influential circuit court opinions have held that a picture can be a lascivious exhibition of a child's genitals—and thus child pornography—even if the child's genitals are not discernable and even if the child is wearing clothes. [*United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), *accord United States v. Helton*, 302 F. App'x. 842, 847 (10th Cir. 2008)]

Further complicating the inquiry is that no identifiable sexual conduct is required in order for the photograph to constitute . . . child pornography. This is peculiar, given that lascivious exhibition is included as one subcategory of the general category of "sexually explicit conduct" that the child pornography statute prohibits. . . . [Indeed], the Eighth Circuit recently made clear, "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)]¹⁰

Perhaps the clearest critique of *Dost*'s vagaries is provided in *United States v. Hill*, 322 F. Supp. 2d 1081 (C.D. Cal. 2004), *aff'd* 459 F.3d 966 (9th Cir. 2006) (Kozinski, J., sitting by designation).

. . . While the *Dost* factors attempt to bring order and predictability to the lasciviousness inquiry, they are highly malleable and subjective in their application. . . .

The first *Dost* factor looks to whether the focal point of the image is the child's pubic area or genitalia. But it is not clear how this factor contributes to lasciviousness. A close-up image of female genitalia in a medical textbook will surely be less lascivious than a photograph showing the entire female body with the pubic area only partially visible. Nor is it easy to tell whether the genitalia are the focus of the picture. Do they need to be at or near the center? Does the subject or another person have to draw particular attention to them? In reality, exposed genitals tend to create their own focal point. Whether the genitalia are the focus of the picture seems to involve as subjective an inquiry as lasciviousness itself.

¹⁰ AMY ADLER, *supra* n.4 at 86.

The second *Dost* factor asks whether the setting is sexually suggestive, but what is a sexually suggestive setting? A bedroom might be a classic example, but that's also one of the most likely places where one might find a nude child. Defendant argues that the first image—the one of a girl about fifteen years old—is not lascivious in part because she is standing in a living room, not a bedroom. The government argues just the opposite: The fact that a fifteen-year-old girl is standing partially nude in the living room—a wholly inappropriate place for nudity—makes the pose sexually suggestive. Similarly, defendant contends that the photograph of the young girls at the beach is not lascivious because the beach is not a sexually suggestive setting. But the beach—where even clothed people wear scanty bathing suits—can be a highly erotic location. Just ask Deborah Kerr and Burt Lancaster. See *From Here to Eternity* (Columbia Pictures Corp. 1953).

The third factor considers whether the pose or attire of the child is inappropriate. Courts applying this factor have mentioned garters, lingerie and high heels. See, e.g., *United States v. Amirault*, 173 F.3d 28, 33 (1st Cir. 1999) . . . Defendant argues that bathrobes and shirts are not inappropriate, nor are the poses. The government counters that it is highly inappropriate for minor girls to pose wearing nothing but an open shirt and socks, and wearing open robes in a public area such as a beach. Nor, contends the government, are a shirt or robes less sexually provocative than garters and high heels; it's a matter of taste. This, too, is a highly subjective and easily manipulated inquiry.

The fourth factor is whether the minor is fully or partially clothed. Again, there is no clear line between lascivious and non-lascivious. The girls . . . were all partially clothed, but their pubic areas and underdeveloped breasts were exposed. Once the genital area is exposed, covering other parts of the body may simply call attention to the parts that are uncovered. And, while an image of a fully clothed minor engaged in sexual conduct could be lascivious, a family snapshot of a nude child bathing presumably would not.

The fifth *Dost* factor measures coyness or the minor's apparent willingness to engage in sexual activity. Almost any facial expression—or lack thereof—could fairly be described as one of these. A young girl looking straight into the camera [as in one of the images being reviewed], could be perceived as willing to engage the viewer. But a naked child looking away from the camera, [as in a second image reviewed], or covering her face with her hands, could be coy. Not much help here.

Finally, the sixth *Dost* factor asks whether the conduct is intended to elicit a sexual response in the viewer. In other words, "[t]he final *Dost* factor simply puts again the underlying question: Is the exhibition lascivious?" [*Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002)]. This factor has no independent force. A close look at the *Dost* factors persuades the court that the test is not particularly helpful. It is indeterminate even for a court that has pictures to

analyze . . . The court therefore adopts a different test, one that it believes better comports with the child pornography statute and provides more meaningful guidance in evaluating lasciviousness. If an image of a minor displays the minor's naked genital area, there is probable cause to believe that the image is lascivious unless there are strong indicators that it is not lascivious.

In this case there were no such indicators. The pictures are not part of a medical text. They do not appear to be bona fide artistic expression, nor do they depict a family setting where exposure of the genitals was incident to an innocuous activity such as swimming or horseplay. The girls in the two pictures posed for the apparent purpose of displaying their genitals to the viewer.

B. The emergent judicially recognized genre of "child erotica,"—sexually suggestive, even lascivious—depictions of minors, with its legality most often decided by police and prosecutors, brings the vagueness problem into sharp relief.

This amorphous, ill-defined evolution of various definitions of "lascivious exhibition" has somehow left the courts' recognition of an emergent genre known as "child erotica" out of the equation. Federal courts distinguish unlawful child pornography from child erotica by defining the latter as "material that depicts 'young girls as sexual objects or in a sexually suggestive way,' but not 'sufficiently lascivious to meet the legal definition of sexually explicit conduct' under 18 U.S.C. § 2256." *United States v. Vosburgh*, 602 F.3d 512, 520 n.7 (3rd Cir. 2010) (citing *United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir. 2006) (en banc) (citing an FBI affidavit describing child erotica as "images that are not themselves child pornography but still fuel . . . sexual fantasies involving children"). The term "hard core" is used to denote depictions of children engaged in actual sexual activity. *Vosburgh*, 602 F.3d at 517 n.2. The U.S. Congress has drawn the line between child erotica and child pornography,

requiring "more than nudity [to] make an image lascivious." *United States v. Griesbach*, 540 F.3d 654, 656 (7th Cir. 2008).¹¹

Child erotica has included depictions of a prepubescent female posing by a body of water with her top pulled up exposing her breasts as well as a minor posed fully naked; while a nude, underage female posed lying on her back with the image focused on her exposed vagina, and part of a "known 'child pornography series,'" was determined to be *probable* child pornography. *Griesbach*, 540 F.3d at 656. However, in *United States v. Edwards*, 813 F.3d 953, 957–58 (10th Cir. 2015) (internal citations omitted), many of the following images were found to be lawful child erotica, and insufficient to provide probable cause to support a search warrant for child pornography:

- 715 images in 28 albums of the same prepubescent girl, in some cases clothed and in others only scantily clad, in various suggestive poses on [a] website.
- Viewers of these images left disturbing comments indicating they were sexually attracted to the girl in the images, and [the defendant] left supportive responses, some of which suggested he was also sexually attracted to a girl.
- One photograph showed a girl lying on the floor leaning on her arm and wearing "a pink and blue patterned leotard and sheer ballet skirt." The image was "focused on the child's genital area," and her legs were crossed at the ankles.
- One album contained 17 photographs with the girl wearing shiny red underwear, a red dress that was open down the front, and a red and white hat. One picture in that album depicted her "sitting with her legs spread apart" and smiling at the camera, although the affidavit does not allege that this photograph focused on her genital area.
- Another album contained 25 images showing the girl dressed in what appeared to be a garland strand around her chest and another around her

¹¹ Generally, this distinction arises in discussion of the tendency of those collecting child erotica as more likely to also possess child pornography. See, e.g., *Vosburgh*, 602 F.3d at 538.

genital area. One photograph in that album depicted her with her legs spread apart.

- One album contained 42 photographs of the girl wearing a blue shirt and a woman's thong underwear revealing her entire buttocks. One picture in the album showed the girl "sitting on the floor with her legs bent up and spread apart, showing part of her buttock and barely covering her genital area."

What is sufficiently explicit to render an image unlawful is a judgment call that challenges even trained, experienced experts. For example, in *United States v. Prideaux-Wentz*, 543 F.3d 954, 959–60 (7th Cir. 2008), the court noted that an expert for the National Center for Missing and Exploited Children ("NCMEC") disagreed with a trained FBI special agent on whether some images were legal erotica or illegal pornography. The court noted that "it is often difficult to distinguish between child pornography and child erotica." Since the issue was probable cause for a search warrant, the court relied on the magistrate judge to "make his own determination," using written descriptions of the FBI agent.

The court that issued the warrant in *Prideaux-Wentz* expended substantial effort adjudicating the dispute between the NCMEC expert and the agent who sought the warrant, evaluating image descriptions under both "the *cumbersome six-part test* of *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) [and] the single-factor test of *United States v. Hill*, 322 F. Supp. 2d 1081, 1084–85 (C.D. Cal. 2006)." *United States v. Prideaux-Wentz*, Case No. 3:07-cr-00063-bbc, Doc. 21 at 18 (W.D. Wis. Aug. 3, 2007) (emphasis added). The district court gave "veto power" to the NCMEC expert (eliminating those pictures) and then determined that "eleven images almost certainly constituted ["lascivious exhibitions of genitalia" and therefore] child pornography." These included depictions of "an adult hand fondling a child's genitals" and "a prepubescent boy's erect penis with an adult hand poised nearby." *Id.*

Judges are also challenged by the child erotica/pornography distinction.

For example, in *Johnson*, 639 F.3d 433, n. 10, *supra*, a coach who secretly took nude videos of underage female weightlifters in his charge, was convicted by a jury, then the district judge granted his motion for a judgment of acquittal, finding that the videos were not "lascivious" under the statute. The appellate court reinstated the verdicts. Note, the appeals court found "even images of children acting innocently can be considered lascivious if they are *intended to be sexual*." *Id.* at 440 (emphasis added). Yet, that aptly describes the *least sexual* of what passes for child erotica, by definition, *intended to be sexual*. *Vosburgh*, 602 F.3d 512, 520 n.7. The NCMEC expert in *Prideaux-Wentz* might likely have considered the undressed weightlifters in *Johnson* to be simple child erotica. Yet the highly trained federal judges of the Eighth Circuit all no doubt acted in good faith in making their—very different and very consequential—judgments. What these highly trained, experienced judges struggle with we expect lay juries to decide—one image is child erotica—and another (identical) image means prison—a long time in prison. The very real danger raised in this appeal is what most federal court practitioners know all too well. If the highly skilled advocates chosen to be federal prosecutors presented exactly what the court in *Edwards*, 813 F.3d at 957–58, identified as child erotica, but painted it as unlawful "lascivious exhibitions," most juries would convict, at least on several of those images.

C. The *Dost* factors render the statutory language of the "sexually explicit conduct" in the form of "lascivious exhibition of the genitals . . ." unconstitutionally vague and thus offend a "basic principle of due process."

Giving juries the *Dost* test to judge "lascivious-exhibition" cases offends a "basic principle of due process." It is a vague test that "may trap the innocent by not providing fair warning," and fails to "provide explicit standards for those who apply them." It

"impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at 108–09. *See also Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (The jury instruction's wording allowed a finding of guilt based on much less culpability than the criminal statute actually requires. "A fair warning should be given to the world in a language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 703 (internal quotes and citations omitted)); *Percoco v. United States*, 598 U.S. 319, 331 (2023), (Jury instruction failed to define "with sufficient definiteness that ordinary people can understand what conduct is prohibited or in a manner that does not encourage arbitrary and discriminatory enforcement"), and, in a concurrence, *id.* at 333, "'Vague laws' impermissibly 'hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave the people with no sure way to know what consequences will attach to their conduct.'" (Gorsuch, J., joined by Thomas, J., concurring) (internal citations omitted).

The problematic sixth *Dost* factor—whether an image is "designed to elicit a sexual response in the viewer," i.e., is it "lascivious," encapsulates the vagueness problem. As Fifth Circuit Judge Higginbotham put it:

[T]here is apparently no common understanding of what it means for an image of a child to be lascivious. The image need not depict sexually explicit conduct; it need not focus on the genitals; it need not depict nudity. The courts agree that to be lascivious, an image of a child must be of the sort that a pedophile would find arousing, but that hardly narrows the universe of proscribable images. Pedophiles, after all, may be aroused by pictures of children wearing winter coats.¹² The result

¹² *See United States v. Steen*, 634 F.3d 822, 829 (5th Cir. 2011) (Higginbotham, J., concurring).

is that "judges, prosecutors, jurors, and, most important, photographers, [are] unable to determine what is and what is not lawful."^{13 14}

III. The *Dost* factors create substantial First Amendment issues.

Over 40 years ago, the Court declared that non-obscene child pornography was one of only a few categories of speech without First Amendment protection, based on the abuse of children necessitated in production of this material. *Ferber*, 458 U.S. 747. There, a unanimous Court cited five reasons to exempt child pornography from protection by the First Amendment, but the Court's substantive focus was on the harm caused to the child.¹⁵ The Court found that the purpose of child pornography law was "to prevent the abuse of children who are made to engage in sexual conduct." *Id.* at 753. When, 20 years after *Ferber*, the Court invalidated a virtual child pornography law in *Ashcroft v. Free Speech Coalition*, the Court emphasized this rationale, "[W]here speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment," 535 U.S. 234, 251 (2002).

Arguably, the "disconnect" between the Court's rationale for exempting child pornography from First Amendment protection and the expanded definitions of child pornography sanctioned by lower courts has increased over the past four and a half decades and created an incoherent body of case law. Professor Adler writes:¹⁶

So far the Supreme Court has not considered *Dost*. In the absence of guidance from the Court, lower courts have been busily expanding the test, and they have done so

¹³ *United States v. Donoho*, 76 F.4th 588, 601 (7th Cir. 2023) (Easterbrook, J., concurring).

¹⁴ OWEN SENDERS, *supra*, n.1 at 105.

¹⁵ The opinion repeatedly emphasizes this concern for the "welfare of children engaged in [the] production" of child pornography. *Ferber*, 458 U.S. at 764. Indeed, the Court framed the issue as whether "a child has been physically or psychologically harmed in the production of the work." *Id.* at 765. The first three rationales address this central harm. The fourth goes to the assumption that the category of speech in question is "low value"; banning it therefore presents little First Amendment concern. The fifth rationale recognizes the Court's precedent of having banned whole categories of speech before. From AMY ADLER, *Supra*, n.6, at 100–01.

¹⁶ *Id.* at 99.

in a way that I believe raises serious constitutional concerns. Quite simply, lower courts frequently interpret *Dost* to criminalize speech that does not implicate the rationales that the Supreme Court has so far relied on to justify the exclusion of “child pornography” from First Amendment protection. *Dost* in its application has thus become divorced from the Court’s foundational assumptions of why we may ban child pornography consistent with the First Amendment. Many convictions obtained under the test may therefore be of doubtful constitutional validity, at least to the extent that they proceed under the rubric of child pornography law as the Supreme Court has so far envisioned it.

Another scholar has recently argued, the federal courts have “rendered the child-pornography statutes overbroad . . . interpreting “lasciviousness” in this context as in the minds of the viewers, citing a much-quoted court defining it as depending on assessing the thoughts of “likeminded pedophiles” who view an exhibition in question, rather than an objective assessment of the images at issue.¹⁷ “As it turns out, the federal courts do not know a lascivious image when they see it and thus uphold convictions in some cases based on conduct that produces acquittals in others.” This has resulted in “hundreds of wrongful convictions.”

Over the past decades, artists have been arrested by federal law enforcement, and sometimes separated from their children, for producing images of nude children. Others have withdrawn their works from exhibitions, or been turned down by distributors, for fear of prosecution. As Judge Easterbrook recently observed [in *United States v. Donoho*, 76 F.4th 588, 602 (7th Cir. 2023) (Easterbrook, J., concurring in the judgment)] people are charged under the federal child-pornography statutes for possessing images indistinguishable from ones that appear in widely distributed films, raising the specter of prosecution for Hollywood producers and filmmakers.¹⁸

This case presents no vehicle issues.

Mr. Velinov consistently challenged the district court’s interpretation of the relevant statutes, specifically objected to the use of the *Dost* factors in the jury instructions and raised the validity and constitutionality of the inclusion of the factors in the Eleventh Circuit.

¹⁷ OWEN SENDERS, *supra*, n. 1 at 106.

¹⁸ *Id.*

CONCLUSION

Based on the foregoing, the petition should be granted.

Respectfully submitted,

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