No. 18-9411

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN DOUGLAS ROCKETT, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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

QUESTION PRESENTED

Whether the district court plainly erred in treating petitioner's intent in producing, and attempting to produce, images of nude minors as a permissible consideration in determining whether those images constituted "lascivious exhibition[s] of the anus, genitals, or pubic area," 18 U.S.C. 2256(2)(A)(v), of a minor, and hence child pornography produced in violation of 18 U.S.C. 2251(a), (c), and (e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Or.):

United States v. Steven Douglas Rockett, No. 13-cr-00557 (Sept. 13, 2016) (judgment)

United States v. Steven Douglas Rockett, No. 13-cr-00557 (June 13, 2017) (amended judgment)

United States Court of Appeals (9th Cir.):

United States v. Steven Douglas Rockett, No. 16-30213 (Nov. 5, 2018)

United States v. Steven Douglas Rockett, No. 17-30167 (Nov. 5, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 752 Fed. Appx 448.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2018. A petition for rehearing was denied on February 20, 2019 (Pet. App. 6). The petition for a writ of certiorari was filed on May 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted on one count of producing child pornography outside the United States, in violation of 18 U.S.C. 2251(c) and (e); one count of engaging and attempting to engage in illicit sexual conduct with a minor while traveling abroad, in violation of 18 U.S.C. 2423(c) and (e); five counts of producing or attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e); and one count of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Pet. App. 8; C.A. E.R. 1, 8-9. He was sentenced to 720 months of imprisonment, to be followed by a life term of supervised release. Pet. App. 9-10. The court of appeals affirmed. Pet. App. 1-5.

1. Between January 2000 and January 2013, petitioner sexually abused children and produced photographs and videos of children engaging in sexually explicit conduct. As described below, petitioner's activities took place in both the Philippines and the United States. They included taking nude photographs of preteen children in the Philippines as they showered in his hotel room; touching a boy's genitals with his mouth; taking a photograph of himself as he raped a 12-year-old girl in Oregon; attempting to induce children to take nude photographs in exchange for school

supplies, chocolates, and other gifts; and surreptitiously recording naked boys as they showered in his bathroom.

a. Between 2000 and 2013, petitioner, who was married to a Filipino woman from Cebu City, travelled to the Philippines several times. C.A. E.R. 208; Gov't Supp. C.A. E.R. 235-238, 292. During some of those visits, petitioner handed out money to children living in an impoverished area of Cebu City and invited them to join him in his hotel room. Gov't Supp. C.A. E.R. 19-20, 24-27, 105-106, 108-109. Two of these children -- V.P. and G.G. -- testified at trial that petitioner barged into the bathroom as they were showering and took nude pictures, including of their genitals. V.P. and G.G. were 12 or 13 years old at the time. Id. at 22-32, 61-65.

In another instance, petitioner lured J.D.L., a 12- or 13-year-old boy, and other children to his hotel room under the pretense that they could play games and watch television. Gov't Supp. C.A. E.R. 109-110. Petitioner then offered a hot shower to J.D.L., who did not have a shower at home. Ibid. While J.D.L. was showering, petitioner "suddenly" entered the bathroom, touched J.D.L.'s leg and penis, tried to stroke J.D.L.'s penis, and put his mouth on J.D.L.'s penis. Id. at 111, 115-116. Unbeknownst to J.D.L., petitioner was also recording him through a hidden camera as he showered. C.A. E.R. 125-145; Gov't Supp. C.A. E.R. 111-112.

b. In 2009, N.S., a family friend, moved in with petitioner and his family in their Oregon home. Gov't Supp. C.A. E.R. 290-291, 577; Gov't C.A. Br. 3-4 (citing Gov't Trial Ex. 24 (sealed)). N.S. was in the third grade at the time, and her parents were struggling financially. Gov't C.A. Br. 3 (citing Gov't Trial Ex. 24 (sealed)). Petitioner repeatedly abused N.S. during her stay at the home. Ibid. He would take her into his bedroom, tell her to undress, touch her private areas, and take pictures of her naked genitals. Ibid. The following year, petitioner "used his tongue" on her vagina. Ibid. (citation omitted). In 2011, after N.S. refused his sexual demands, petitioner raped her. Id. at 3-4 (citing Gov't Trial Ex. 24 (sealed)). As he was raping N.S., petitioner grabbed a digital camera, pointed it to their genitals, and took a photograph. Id. at 4; see id. at 2. He raped N.S. again in the following months. Id. at 4 (citing Gov't Trial Ex. 24 (sealed)). Petitioner told her that if she kept quiet, he would buy her a phone. Ibid. And he did, in fact, buy N.S. several phones, including an iPhone that he later used to communicate with her via Facebook. Ibid.

In June 2013, N.S. used more data with her iPhone than petitioner's billing plan allowed. C.A. E.R. 70. Petitioner increased her data plan, but warned her: "[I]n return you need to send me some updated good quality pictures of yourself." Ibid. He repeated the same demand multiple times. Id. at 70-74. He

specified that the pictures "better be good quality and no shy," id. at 71, and that N.S. was to "make sure you show front and back and show everything no shy," id. at 72. N.S. understood that petitioner wanted naked pictures of her genitals. Gov't C.A. Br. 4-5.

Around the same time, N.S. told petitioner that her phone had been stolen. C.A. E.R. 75. Petitioner responded: "[I]f you are going to call the phone a lost and want a replacement phone then you will need to come over here and spend the night and do work to help pay for the replacement phone." Ibid. N.S. understood that petitioner wanted to abuse her sexually. Gov't C.A. Br. 5.

c. In 2013, petitioner separately attempted to obtain naked images of his nine-year-old niece (H.J.) and her eight-year-old friend (M.G.), who lived in Cebu City. C.A. E.R. 78-83 (Gov't Trial Ex. 2), 84-123 (Gov't Trial Ex. 4).

Starting in February 2013, petitioner exchanged hundreds of Facebook messages with his sister-in-law, Charis Jumao-as. C.A. E.R. 84-123. Jumao-as was H.J.'s mother. Gov't Supp. C.A. E.R. 88. In one message, petitioner announced that he was sending H.J. a "digi cam" and cell phone "for her birthday." C.A. E.R. 84. He urged Jumao-as to teach H.J. how to use the digi cam so "she can send me pictures of the neighborhood and her and her friends." Id. at 90. He repeatedly steered their exchanges to the photographs he wanted of H.J. See, e.g., id. at 86, 91, 95. He

also encouraged Jumao-as to have H.J.'s friend, M.G., join for some of the pictures. E.g., id. at 97-98.

By late April 2013, petitioner's demands were direct. He wrote: "[W]hen [H.J.] gets digi cam you have to send me private pictures of [H.J.] and her friend [M.G.] so I can see how they are eating and how their bodies change as they get older." C.A. E.R. 99. He wanted the children's pictures to be "both front and back full body," id. at 100, with "no clothes," id. at 102. When Jumao-as explained that the girls would resist, petitioner suggested that Jumao-as "have them model swim suits," instruct them to remove the suits, and then "take pictures front and back." Id. at 103. Petitioner also promised to send H.J. more gifts and candy "if she takes good pictures with [M.G.]." Ibid. In exchange for more pictures, petitioner also promised money and other goods for Jumao-as. See id. at 108 ("make sure it is a lot of pictures and shows front and back and no shy. [A]nd no worry, only I will ever see the pictures."), id. at 109 ("Send me a lot of the pictures and I will send the money right away.").

At one point, Jumao-as asked petitioner for money for school supplies. C.A. E.R. 111. He responded: "[W]ell, I can send some money tonight * * * but first [you] need to send me the pictures I request[ed] before but of" H.J. and another child. Ibid. When Jumao-as reported that H.J. was "very shy" and did that he would only help her in return for the pictures. Ibid.; see id. at 114

("[J]ust tell [H.J.] she needs to do it for the school supplies[.] * * * Tell [her] I will send her some more chocolates soon * * * if she [does] not complain about the pictures."), id. at 115 ("[Jumao-as:] there no other option so you can help?"; "[Petitioner:] not right now * * * if I send money [I] have to get something from her in return.").

Petitioner also exchanged Facebook messages directly with M.G., H.J.'s eight-year-old friend. Gov't Supp. C.A. E.R. 86; see id. at 88 (stating that M.G. was 11 years old in 2016). In one message, he told M.G. that he did "not want [her] to ask for items if [she was] not going to send pictures." C.A. E.R. 80. When M.G. later complained that she had no school supplies, petitioner responded: "well, I can only send money for school supplies if you send me the special pictures." Id. at 81. M.G. understood that petitioner wanted naked images of her. Gov't Supp. C.A. E.R. 86-87.

d. In August 2013, state investigators obtained a warrant and searched petitioner's residence in Forest Grove, Oregon. Gov't Supp. C.A. E.R. 262-263. During the search, they seized numerous electronic devices. Id. at 264. The evidence that investigators found on the devices included surreptitiously captured videos of two 12-year-old twin boys (B.S. and D.S.) who were friends of petitioner's sons. Gov't C.A. Br. 12; Gov't Supp. C.A. E.R. 188, 211-212, 366-367, 414-415. The boys had sleepovers at petitioner's

previous home in Aloha, Oregon, and on nearly every visit, they took showers -- sometimes at petitioner's direction. Gov't Supp. C.A. E.R. 189-191, 213-215. The surreptitiously captured videos, which petitioner had then edited, depict the boys' naked bodies as they entered and exited petitioner's shower. Id. at 366-369, 413-414. Because petitioner positioned the camera just above the bathroom counter, the boys' torsos and genitals are clearly visible. Gov't C.A. Br. 12-13.

D.S. and B.S. testified at trial that petitioner would sometimes "walk in with his camera" and take pictures while they were naked in the shower. Gov't Supp. C.A. E.R. 192-193, 216. They also testified that he touched their genitals. Id. at 197, 220.

2. In December 2015, a federal grand jury in the District of Oregon returned a second superseding indictment charging petitioner with (i) producing child pornography outside the United States, in violation of 18 U.S.C. 2251(c) and (e), in connection with the images petitioner took of G.G., V.P., and J.D.L. (Count 1); (ii) engaging and attempting to engage in illicit sexual conduct with a minor while traveling abroad, in violation of 18 U.S.C. 2423(c) and (e), in connection with petitioner's sexual abuse of J.D.L. in Cebu City (Count 2); (iii) three counts of attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e), in connection with petitioner's attempt to coerce

M.G. (Count 4), H.J. (Count 5), and N.S. (Count 6) to take or pose for sexually explicit photographs; (iv) two counts of producing or attempting to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e), in connection with petitioner's surreptitious recording of D.S. (Count 7) and B.S. (Count 8); and (v) one count of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B), (b)(2) (Count 9), in connection with two images depicting child pornography found on petitioner's computers. C.A. E.R. 250-254; Gov't C.A. Br. 14-15.[1]

Petitioner proceeded to trial. At the close of the evidence, petitioner moved for a judgment of acquittal on two counts of attempting to produce child pornography (Counts 4 and 5), two counts of producing and attempting to produce child pornography (Counts 7 and 8), and the count of possession of child pornography (Count 9). Gov't Supp. C.A. E.R. 473. Petitioner did not challenge the sufficiency of the evidence supporting the remaining counts. With respect to the attempt charges in Counts 4 and 5, petitioner appeared to argue that his efforts to coerce M.G. (Count 4) and H.J. (Count 5) did not constitute a substantial step toward

[1] The indictment also contained an additional count of engaging and attempting to engage in illicit sexual conduct with a minor while traveling abroad (Count 3), C.A. E.R. 251, which the district court dismissed during trial at the government's request, 13-cr-577 Docket entry 134 (May 23, 2016). In addition, petitioner was separately charged, tried, and convicted in state court of rape, sex abuse, sexual exploitation, and sodomy, in connection with his abuse of N.S. and others. See Presentence Investigation Report ¶¶ 152-153. He was sentenced to 630 months in state prison for those convictions. Ibid.

the production of child pornography, as required for attempt liability. Id. at 474-475. With regard to the charges of producing and attempting to produce child pornography in connection with D.S. (Count 7) and B.S. (Count 8), petitioner argued that "the evidence shown from the bathroom footage [did] not meet the six-part test enunciated in [United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)]" for determining whether an image depicts a "lascivious exhibition" of a minor's genitals or pubic area. Gov't Supp. C.A. E.R. 475, 481; see 18 U.S.C. 2256(2)(A)(v).

The district court denied the motion. Gov't Supp. C.A. E.R. 476. In rejecting petitioner's argument that the government had not presented sufficient evidence from which a jury could find that the bathroom videos in Counts 7 and 8 satisfied the test in Dost, the court found that "at least two of the factors" in that test were "satisfied." Ibid. The court observed that as to each count, it was undisputed that "the child is nude." Ibid. And as to each, the court wrote, "the image [wa]s intended or designed to elicit a sexual response in the viewer." Ibid.

The district court then instructed the jury on the charges, giving the instruction that petitioner himself proposed regarding the statutory phrase "lascivious exhibition." That instruction, which reflected the six so-called "Dost factors," stated:

> In determining whether an image constitutes a lascivious exhibition of the genitals or pubic area of any person, you should consider the following factors:
>
> Whether the focal point of the image is on the child's genitalia or pubic area.
>
> Whether the setting of the image is sexually suggestive, such as in a place or pose generally associated with sexual activity.
>
> Whether the child is depicted in an unnatural pose or in inappropriate attire considering the age of the child.
>
> Whether the child is fully or partially clothed or nude.
>
> Whether the image suggests sexual coyness or a willingness to engage in sexual activity.
>
> Whether the image is intended or designed to elicit a sexual response in the viewer.
>
> An image need not involve all of these factors to be a lascivious exhibition of the genitals or pubic area of a person. Your determination should be based on the overall content of the image taking into account the age of the minor.

Gov't Supp. C.A. E.R. 481-482; accord D. Ct. Doc. 112, at 12 (May 10, 2016) (petitioner's proposed jury instructions). The jury returned guilty verdicts on all counts. C.A. E.R. 8-9.

In advance of sentencing, the Probation Office determined that petitioner faced an initial advisory Guidelines range of life imprisonment, subject to statutory maximum terms of 30 years each on Counts 1 through 8 and 10 years on Count 9. Presentence Investigation Report ¶¶ 170-171. The district court imposed a

below-Guidelines sentence of an aggregate term of 720 months in prison. Pet. App. 9.[2]

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-5.

Applying plain-error review, the court rejected petitioner's challenge to the jury instruction to consider the Dost factors in determining whether the relevant images depicted "lascivious exhibition[s]" of the minors' genitals or pubic areas. Pet. App. 2. The court found "no plain error," observing that it had "repeatedly adopted and applied the Dost factors as written." Ibid. And it wrote that it had "repeatedly confirmed that the sixth Dost factor properly considers the depiction from the photographer's -- or intended viewer's -- perspective." Ibid.

The court of appeals also rejected petitioner's argument that the sixth factor rendered the statutory definition of "sexually explicit conduct" unconstitutionally vague. Pet. App. 2-3. "Rather than granting unfettered discretion to prosecutors," the court explained, the Dost factors "add specificity to the meaning of 'lascivious exhibition of the genitals.'" Id. at 2. The court further observed that the district court's instruction directed

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[2] The district court imposed terms of 180 months in prison on Counts 1 through 8 (excluding Count 3, see p. 9 n.1, supra), and 84 months in prison on Count 9, with the sentences on Counts 1, 6, 7, 8 to run consecutively to each other. Gov't Supp. C.A. E.R. 530-538. Petitioner's sentence for Count 6, which involved the abuse of N.S., runs concurrently with his state sentence. Id. at 536.

the jury to base its finding "on the factors as a whole, not just the sixth factor." Id. at 3.

In addition, the court of appeals rejected petitioner's contention that insufficient evidence supported petitioner's convictions on Counts 4, 5, 7, and 8. Pet. App. 3. The court reasoned that "[a] reasonable jury applying the Dost factors could have found that the actual and attempted images associated with these counts depicted the 'lascivious exhibition of the genitals or pubic area of any person.'" Ibid. (quoting 18 U.S.C. 2256(2)(A)(v) (2012)). The court of appeals also upheld the district court's restitution award. Id. at 3-4.

ARGUMENT

Petitioner renews his claim (Pet. 18-30) that the district court erred in treating evidence that a visual depiction of the genitals or pubic area was "intended or designed to elicit a sexual response in the viewer," Gov't Supp. C.A. E.R. 481, as a permissible consideration in assessing whether the visual depiction constitutes lascivious exhibition of the genitals or pubic area of a minor. The court of appeals correctly rejected this claim, which is subject to plain-error review because it was not raised in the district court, and its decision does not conflict with the decision of any other court of appeals. This Court has denied certiorari in several cases presenting similar claims. See Wells v. United States, 138 S. Ct. 61 (2017) (No. 16-

8379); Miller v. United States, 137 S. Ct. 2291 (2017) (No. 16-6925); Holmes v. United States, 137 S. Ct. 294 (2016) (No. 15-9571). It should follow the same course here.

1. Although the petition does not make clear whether petitioner is challenging the district court's jury instructions regarding lasciviousness or the district court's sufficiency-of-the-evidence analysis, either challenge would be reviewable at most for plain error.[3] Petitioner did not object in the district court to the use of the factors set forth in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), or, more specifically, to the consideration of whether a depiction of a child's genitals or pubic area is intended or designed to arouse a sexual response. He proposed the jury instruction containing the Dost factors that the district court gave. D. Ct. Doc. No. 112, at 12. And he challenged the sufficiency of the evidence against him (on some counts) on the ground that the relevant images did not satisfy the Dost factors -- without disputing those factors' relevance.

Under these circumstances, petitioner's claims are properly treated as waived under the invited-error doctrine, see United

[3] To the extent that petitioner challenges the sufficiency of the evidence, petitioner has not made or preserved any such challenge with respect to Counts 1, 2, 6, and 9, and the court of appeals did not pass on sufficiency with respect to those counts. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding a grant of certiorari when "the question presented was not pressed or passed upon below") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

States v. Wells, 519 U.S. 482, 488 (1997), or as reviewable, at most, for plain error. Under plain-error review, petitioner would be entitled to relief only if he could show (1) "an error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Marcus, 560 U.S. 258, 262 (2010) (citation and internal quotation marks omitted).

2. Petitioner cannot show error, let alone error that is "clear or obvious, rather than subject to reasonable dispute," Marcus, 560 U.S. at 262 (citation omitted), in the district court's jury instructions or sufficiency-of-the-evidence analysis.

a. Section 2251 imposes criminal penalties on "[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," or any person who attempts to do so. 18 U.S.C. 2251(a); see 18 U.S.C. 2251(e). The statute defines the term "sexually explicit conduct" to include "actual or simulated * * * (i) sexual intercourse * * * ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A) (2012).

This case involves actual and attempted production of images in the last category: "lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A)(v) (2012). The word "lascivious" means "[i]nciting to lust or wantonness." 8 Oxford English Dictionary 667 (2d ed. 1989); see Webster's Third New International Dictionary of the English Language 1274 (1993) ("tending to arouse sexual desire"). Courts of appeals have described the question whether an image meets that definition as a question for the factfinder, to be determined under an objective standard, see, e.g., United States v. Amirault, 173 F.3d 28, 34-35 (1st Cir. 1999); United States v. Villard, 885 F.2d 117, 125 (3d Cir. 1989); United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987), through the application of common sense, see, e.g., United States v. Miller, 829 F.3d 519, 525 (7th Cir. 2016) ("left to the factfinder to resolve, on the facts of each case, applying common sense") (citation omitted), cert. denied, 137 S. Ct. 2291 (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); United States v. Arvin, 900 F.2d 1385, 1390 (9th Cir. 1990) ("'commonsensical term'" and "a determination that lay persons can and should make") (citation omitted), cert. denied, 498 U.S. 1024 (1991); United States v.

Reedy, 845 F.2d 239, 241 (10th Cir. 1988) ("commonsensical term") (citation omitted), cert. denied, 489 U.S. 1055 (1989).

b. Here, the district court committed no error, and certainly no plain error, in giving the instruction that petitioner himself requested describing the Dost factors, including "[w]hether the image is intended or designed to elicit a sexual response in the viewer," as relevant considerations in assessing whether petitioner created or attempted to create lascivious images of minors. Gov't Supp. C.A. E.R. 482. As the district court correctly instructed the jury, the primary focus in evaluating whether an image constitutes lascivious exhibition of the genitals or pubic area of a minor turns on "the overall content of the image." Ibid.; see, e.g., United States v. Wells, 843 F.3d 1251, 1254 (10th Cir. 2016) (lasciviousness "turns on the 'overall content of the visual depiction'") (citation omitted), cert. denied, 138 S. Ct. 61 (2017). And as the court of appeals recognized, a factfinder making the commonsense determination whether an image is lascivious may treat as relevant surrounding circumstances that provide evidence of a creator's intent to arouse sexual desire. See Pet. App. 2. The creation of an image or video for a particular purpose (here, sexual arousal) makes it more likely that the resulting image or video will be one that tends to achieve that purpose. Evidence of intent and surrounding circumstances can thus "help to place an image in context" and

separate the production of innocent images from exploitative ones. United States v. Russell, 662 F.3d 831, 844 (7th Cir. 2011), cert. denied, 566 U.S. 914 (2012). Such context is particularly useful because "the type of sexuality encountered in pictures of children * * * often is imposed upon [the images] by the attitude of the viewer or photographer," rather than the subject, as children "are not necessarily mature enough to project sexuality consciously." Arvin, 900 F.2d at 1391.

Permitting a factfinder to consider a creator's intent in determining whether an image of a child's private parts constitutes a lascivious image accords with the design of the child-pornography statute. When an individual creates an image of a child's genitals or pubic area that is designed to arouse pedophilic desire, the individual creates "a permanent record of the child[]'s participation" in the production of such material. New York v. Ferber, 458 U.S. 747, 759 (1982). The harm from such images arises in part from "their circulation." Ibid.; see, e.g., S. Rep. No. 169, 98th Cong., 1st Sess. 6-7 (1983); H.R. Rep. No. 536, 98th Cong., 1st Sess. 2-3 (1983). Where, as here, a child learns that a family member or other person of trust has produced (or attempted to produce) an image depicting his or her nude body for the purpose of furthering a sexual desire, the child suffers all the psychological harm of being exploited as a sexual object. In addition, images of naked children created to satisfy a pedophile's

sexual desires are more likely than innocent photographs to be circulated on child pornography distribution networks. That prospect, in turn, increases the likelihood of later humiliation for the child. Indeed, the trial record in this case illustrates that even the fear that the images may be circulated harms the child's psychological well-being. See, e.g., Gov't Supp. C.A. E.R. 64-65 ("I was afraid * * * [t]hat the picture would spread."); C.A. E.R. 116 (reporting H.J.'s fear that petitioner "will take [naked] picture[s] * * * and s[e]l[l] it"). The district court did not err in permitting jurors to consider whether petitioner intended or designed the images he sought to be lascivious.

c. Petitioner also cannot demonstrate plain error in the district court's sufficiency determinations.

Counts 4 and 5 charged petitioner with attempting to persuade, induce, entice, or coerce M.G. and H.J to engage in lascivious exhibition of their genitals or pubic area. C.A. E.R. 251-252. Petitioner's Facebook communications amply show that he wanted naked pictures of M.G. and H.J, and that he wanted the pictures to include explicit depictions of the children's genitals. See, e.g., C.A. E.R. 72 (demanding that N.S. "show front and back and show everything no shy"). Petitioner's conduct toward M.G. and H.J. -- including his relentless pursuit of explicit pictures for

money -- further evidenced that petitioner was soliciting photographs that would incite pedophilic lust or desire.

Petitioner similarly cannot demonstrate plain error in the district court's finding that sufficient evidence supported the jury's verdict on Counts 7 and 8. Those counts charged petitioner with producing, and attempting to produce, lascivious images of D.S.'s and B.S.'s genitals and pubic areas by surreptitiously recording naked videos of the boys as they entered and exited petitioner's shower. C.A. E.R. 253; see Gov't C.A. Br. 12. The boys' pubic areas and genitals are clearly visible in the videos; indeed, because petitioner positioned the camera at groin level just above the bathroom counter, their genitals are visible even when their faces are not, shifting the focus of the images to the victims' private parts. Gov't C.A. Br. 12-13. In addition, the videos feature D.S. and B.S. nude in the bathroom -- a "frequent host[] to fantasy sexual encounters." United States v. Larkin, 629 F.3d 177, 183 (3d Cir. 2010), cert. denied, 565 U.S. 908 (2011); see also Wells, 843 F.3d at 1256; United States v. Schuster, 706 F.3d 800, 808 (7th Cir.) (same), cert. denied, 569 U.S. 1036 (2013). And petitioner's surrounding conduct -- including his walking into the bathroom while the boys were showering and snapping pictures -- provided further evidence that the bathroom videos were designed to arouse pedophilic lust.

3. Petitioner contends (Pet. 18-20) that by instructing jurors on the Dost factors -- including the factor of whether an image of a child's genitals or pubic area is intended or designed to elicit a sexual response -- a district court "invites vagueness and overbreadth," Pet. 20. But as the court of appeals correctly explained, the Dost factors "add specificity," not vagueness or breadth, "to the meaning of 'lascivious exhibition of the genitals,'" by providing concrete guideposts for the jury to use in determining whether an image is lascivious. Pet. App. 2. Petitioner does not explain how the statute would be less vague or broad if jurors were asked to apply the term "lascivious" without elaboration. And after having himself proposed the Dost factors below, he proposes no alternative framework of his own.

Contrary to petitioner's suggestion (Pet. 18-20), neither Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), nor United States v. Williams, 553 U.S. 285 (2008), demonstrates error, let alone plain error, in the district court's approach. In Free Speech Coalition, the Court held, without reaching a vagueness claim, that a federal statute prohibiting the possession of "virtual child pornography" (such as entirely computer-generated images) and lawful materials that happened to have been pandered as child pornography violated the First Amendment. See 535 U.S. at 241, 258. The Court reasoned that, because the production of such materials does not implicate the interests of actual children,

the governmental interests that supported the state law at issue in Ferber could not justify the federal ban on virtual child pornography. See id. at 249-251. Here, consistent with the jury instructions, petitioner was convicted for victimizing real children, not virtual ones. His actions squarely implicated the government's interest in protecting children's "physiological, emotional, and mental health." Ferber, 458 U.S. at 758.

Williams, which rejected vagueness and overbreadth challenges to a federal statute that prohibits the pandering and solicitation of depictions of minors "engaging in sexually explicit conduct," 18 U.S.C. 2252A(a)(3)(B); see Williams, 553 U.S. at 307, likewise does not support petitioner's argument. The term "sexually explicit conduct" carries the same meaning for the pandering and solicitation provision at issue in Williams as it carries for the provisions in this case. See 18 U.S.C. 2256(2)(A) (2012) (definition of "sexually explicit conduct" to include "lascivious exhibition of the genitals or pubic area"). As petitioner notes (Pet. 19), in finding Section 2252A(a)(3)(B) constitutional, the Court in Williams observed that "sexually explicit conduct" was a term that "connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." 553 U.S. at 297 (emphasis omitted). But the Court understood "sex act" to include "'lewd'" or "'lascivious exhibition,'" id. at 290, 296-297 (citations omitted). And the Dost factors -- which were already

in common use when the Court decided Williams -- ensure that a defendant is not convicted in the absence of such an exhibition or other "explicit" sex act. They require that an image contain a "lascivious exhibition" of the genitals or pubic area of a minor -- not simply the "suggestion" of a sex act -- assessed in light of the overall content of the image. See Gov't Supp. C.A. E.R. 481-482. And as described above, consideration of whether an image was intended or designed to arouse a sexual response in the viewer is properly considered as part of that inquiry because it bears on whether an image of a minor's genitals or pubic area depicts conduct that tends to arouse the relevant audience.

Petitioner also contends (Pet. 22-24) that, had Congress intended to authorize consideration of the defendant's subjective intent, it would have made "the defendant's subjective purpose of sexual arousal or gratification" an element of the offense, as Congress did for another offense. Pet. 22 (citing 18 U.S.C. 2246(2)(D)). But the Dost factors do not make a defendant's subjective purpose an element of the offense. As the court of appeals explained, the photographer's subjective intent is merely one of several factors relevant to determining an image's lasciviousness. Pet. App. 2. Petitioner supplies no reason, and no reason exists, why Congress would have taken the extraordinary step of listing all non-dispositive factors that might inform the lasciviousness inquiry.

Petitioner next contends (Pet. 24-26) that, under the interpretive canon of noscitur a sociis, the phrase "lascivious exhibition" must be construed in light of the other types of conduct listed in Section 2256(2)(A): "'sexual intercourse,'" "'bestiality,'" "'masturbation,'" and "'sadistic or masochistic abuse,'" Pet. 26 (citation omitted). He argues (ibid.) that because those types of conduct "can be objectively categorized * * * without consideration of the viewer or actor's intent," intent should play no role in determining lasciviousness. As an initial matter, contrary to petitioner's premise, an abuser's subjective intent may well be relevant in determining whether the conduct is "sadistic or masochistic abuse." In any event, noscitur a sociis is solely an aid for resolving ambiguity in statutory terms. See, e.g., Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923) (stating that a "word may have a character of its own not to be submerged by its association"). 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 would be relevant under the lascivious-image portion of Section 2256(2)(A)(v) even if such evidence were not relevant in applying the other distinct terms in Section 2256(2)(A)(v).

Finally, petitioner contends (Pet. 26-28) that allowing courts and juries to consider the photographer's intent would federalize "privacy crimes generally prosecuted in state court," Pet. 26 (capitalization and emphasis omitted). But Section 2251 contains separate safeguards against unwarranted intrusion into local or state affairs. It applies only when the statute's carefully calibrated interstate or foreign commerce requirements are satisfied. See 18 U.S.C. 2251(a)-(d). Congress thus considered and explicitly delineated the appropriate balance of federal and state interests when it enacted Section 2251.

4. The decision below does not implicate any circuit conflict. No court of appeals has foreclosed consideration of a creator's intent or design in determining lasciviousness -- let alone held that consideration of intent constitutes plain error. The Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits have each recognized that a factfinder may consider, in one form or another, the creator's intent and the context of an images creation as bearing upon whether a depiction of a minor's genitals or pubic area is lascivious. See, e.g., United States v. Rivera, 546 F.3d 245, 250 (2d Cir. 2008) (stating that "these images have context that reinforces the lascivious impression" when the creator "composed the images in order to elicit a sexual response in a viewer"), cert. denied, 555 U.S. 1204 (2009); Larkin, 629 F.3d at 184 (3d Cir.) (finding images lascivious in part because the

defendant "engineered [the image] for the purpose of eliciting a sexual response"); United States v. Brown, 579 F.3d 672, 682-684 (6th Cir. 2009) (stating that the court has "adopted a test that considers whether 'a visual depiction is intended or designed to elicit a sexual response in the viewer'" and determining that "it is appropriate to apply a 'limited context' test that permits consideration of the context in which the images were taken") (citation omitted), cert. denied, 558 U.S. 1133 (2010); United States v. Johnson, 639 F.3d 433, 441 (8th Cir. 2011) (relying on a defendant's confession about his purpose in assessing lasciviousness); Arvin, 900 F.2d at 1391 (9th Cir.) ("The motive of the photographer in taking the pictures * * * may be a factor which informs the meaning of 'lascivious.'"); see also United States v. Wolf, 890 F.2d 241, 247 (10th Cir. 1989) ("[L]asciviousness is not a characteristic of the child photographed but of the exhibition that the photographer sets up for an audience that consists of himself or likeminded individuals."); Wells, 843 F.3d at 1256-1257 (similar).

Petitioner suggests (Pet. 13-14) that the court of appeals' decision here conflicts with the First Circuit's decision in Amirault, supra, the Second Circuit's decision in United States v. Spoor, 904 F.3d 141 (2d Cir. 2018), cert. denied, 139 S. Ct. 931 (2019), and the Third Circuit's decision in Villard, supra. Petitioner is mistaken. 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 adjudicating that claim, the court used, as guidance, a test for lasciviousness based on the non-exhaustive Dost factors. Id. at 31-32. In elaborating on the sixth Dost factor, the First Circuit observed 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.

Those statements in Amirault do not create any conflict, as a subsequent First Circuit decision has made clear. To begin with, Amirault noted that its expression of doubt concerning the relevance of a creator's intent was dicta. See 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 Frabizio, 459 F.3d at 89 n.15 (noting that in Amirault "the circumstances of the photograph's creation [were] unknown") (citation omitted). Moreover, the First Circuit has since concluded 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. Frabizio thus demonstrates that Amirault did not foreclose consideration of a creator's intent.

For similar reasons, the Second Circuit's recent decision in Spoor does not give rise to a conflict. In Spoor, the court upheld a conviction for producing child pornography, where the defendant -- much like petitioner -- had surreptitiously recorded pre-teen boys while they were naked in a bathroom. 904 F.3d at 146, 152. Petitioner observes (Pet. 14) that Spoor clarified, in dicta, 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." 904 F.3d 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. The upshot of the Spoor dicta is, accordingly, narrow in scope: a "jury may not find a film to be a 'lascivious exhibition' * * * based solely on the defendant's intent in creating the video." Ibid. The decision below in this

case itself explained that the factors work in conjunction, see Pet. App. 2-3, and as explained above, petitioner's intent was not the sole basis for finding that petitioner committed the relevant offenses.

The Third Circuit's decision in Villard is also inapposite. Villard affirmed the district court's post-verdict acquittal of a defendant on a charge of transporting child pornography across state lines, 18 U.S.C. 2252(a) (Supp. IV 1986), on the ground that the image at issue did not depict a "lascivious exhibition of [the] genitals and pubic areas." 885 F.2d at 118; see also id. at 121-126. The Third Circuit used the Dost factors to guide its analysis and concluded that the images at issue did not meet the Dost standard. Id. at 124-125. The Third Circuit later made clear in Larkin, supra, that it does not bar a factfinder from considering a creator's intent in assessing whether a display of a minor's genitals or pubic area is lascivious. Larkin reasoned that a defendant's "design[ing] the image depicted in [a] photograph to arouse" was the factor that "tip[ped] the balance on the side of qualifying the photograph as exhibiting lascivious conduct." 629 F.3d at 184; see ibid. (noting evidence that the defendant "trafficked [the image she produced] over the internet to an interested pedophile"). The court did not read Villard to foreclose consideration of such evidence. Instead, it understood

Villard as "instruct[ing] that the focus must be on the intended effect, rather than the actual effect, on the viewer." Ibid.

Finally, petitioner errs in contending (Pet. 10-12) that the decision below conflicts with the Tennessee Supreme Court's decision in State v. Whited, 506 S.W.3d 416 (2016). It is true that, in Whited, the Tennessee court "consider[ed] the content" of the images at issue "irrespective of the defendant's subjective intent" to determine whether they were lascivious. Id. at 441. But that state decision interpreted the "standard under Tennessee's statute," id. at 438, not federal law. And, in doing so, the state court relied in substantial part on considerations specific to that state statute. See id. at 440 (contrasting Tennessee's child-pornography provision with other Tennessee provisions). The Tennessee decision thus does not generate a conflict on the meaning of federal or state law.[4]

5. In all events, petitioner's case would be an unsuitable vehicle for assessing the significance of a defendant's subjective intent in producing images of nude minors. The case arises in a plain-error posture. And the counts as to which petitioner brought sufficiency challenges each contained an attempt allegation. The

[4] Petitioner also points (Pet. 16-17) to variations in the circuits' pattern jury instructions. But pattern instructions are not the law and do not bind courts. See, e.g., United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012), cert. denied, 568 U.S. 1231 (2013); United States v. Dohan, 508 F.3d 989, 994 (11th Cir. 2007) (per curiam) (similar), cert. denied, 553 U.S. 1034 (2008); Ninth Circuit Jury Instructions Comm., Manual of Model Criminal Jury Instructions iv (2010).

evidence of petitioner's intent and design was obviously relevant to whether an attempt occurred because attempt crimes require intent to commit the underlying offense. See, e.g., United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc). And even assuming that petitioner did not in fact create lascivious images, the evidence at trial was sufficient to establish that petitioner intended to create lascivious images and that he took affirmative steps toward that objective, such that petitioner's sufficiency challenges would fail on that ground alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

SEPTEMBER 2019