No. 19-428

In the Supreme Court of the United States

RYAN COURTADE, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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The Court should grant certiorari to resolve two circuit splits arising from the federal child-pornography statute: (1) the standard of appellate review when determining whether an image or video depicted a "lascivious exhibition," and (2) whether the child-pornography statute allows courts to consider the producer's subjective intent in addition to the objective conduct of the minor. At a minimum, the Court should grant, vacate, and remand so that the court of appeals can review the video at issue in this case and state explicitly which standard of appellate review it applied when affirming the district court's conclusion that the video contained a "lascivious exhibition" of Doe's pubic area.

I. The Court should resolve the circuit split over the standard of appellate review; at a minimum, the case should be GVR'd for further analysis and explanation.

A. The court of appeals reviewed for clear error only.

The government concedes that the court of appeals failed to review the video at issue and did not state that it was reviewing the district court's "lascivious exhibition" conclusion *de novo*. See Br. in Opp. 11. Yet the government speculates that the court of appeals conducted *de novo* review, because the court's general postconviction precedent—which the court did not cite—"called for de novo review of the ultimate determination of actual innocence." *Ibid.* (citing *O'Dell* v. *Netherland*, 95 F.3d 1214, 1250 (4th Cir. 1996), aff'd on other grounds, 521 U.S. 151 (1997). In relying on actual-innocence cases unrelated to the federal child-pornography statute, the government conflates (1) background rules governing collateral review and (2) specific rules governing the particular question under the federal child-pornography statute.

Because actual innocence "means factual innocence," Pet. App. 9a (quotation marks omitted), the court of appeals's ultimate conclusion turned on a combination of facts and law. *O'Dell* itself recognizes as much, noting that when reviewing a claim of actual innocence, the court of appeals "review[s] the district court's underlying factual findings for clear error." 95 F.3d at 1250. In other words, even if the court of appeals followed circuit precedent to a T, the court still needed to decide whether to treat "lascivious exhibition" as a legal question (to review *de novo*) or a factual question (to review for clear error).

Meanwhile, the government overlooks the most salient clue: The court of appeals did not review the video at issue in this case—even though the case turned on whether the video's exhibition was lascivious. In a child-

pornography or obscenity case, appellate review of the video is the essence of *de novo* review; in failing to review the video, the court of appeals necessarily reviewed the mixed question for clear error. See Pet. 14–15, 20–21 (collecting cases). The Fourth Circuit itself has recognized that *de novo* review requires independent review of the photos or video. See Pet. 15 & n.2 (discussing *United States* v. *Nemuras*, 740 F.2d 286 (4th Cir. 1984) (per curiam)).

The government also does not address Courtade's alternative argument: If the Court remains uncertain about which standard of review the court of appeals applied to the mixed question, the Court should grant, vacate, and remand for the court of appeals to (1) state explicitly which standard of review it applied, and (2) independently review the video. See Pet. 21.

B. The circuits are split on the standard of review.

After misconstruing the court of appeals' analysis, the government tries to minimize the clarity and depth of the relevant circuit split. At the outset, the government spends a page describing the circuits' consensus about a different rule that is not at issue in this case. In a trial, the government observes, the "lascivious exhibition" question is addressed initially by the factfinder. See Br. in Opp. 15. That is true but beside the point; the question here is which standard the appellate court applies when reviewing that initial decision.

When finally addressing the precise circuit split at issue here, the government acknowledges that the First Circuit reviews this question *de novo*. See Br. in Opp. 17. The government also concedes that the Seventh and Ninth Circuits review the "lascivious exhibition" conclusion for clear error, *id.* at 17; in a footnote, the government concedes the same about the Fifth Circuit, *id.* at 16 n.3. This alone establishes the split.

But the government disputes that the Third Circuit reviews the question *de novo*, and in the process misconstrues the Third Circuit's decision in *United States* v. *Knox*, 32 F.3d 733 (3d Cir. 1994) (cited at Pet. 13). According to the government, *Knox* did not address the mixed question—did the image contain a "lascivious exhibition"?—and applied *de novo* review only to pure questions of statutory interpretation. See Br. in Opp. 16. Yet the government ignores a key part of the Third Circuit's discussion: After stating that statutory interpretation is reviewed *de novo*, the Third Circuit then applied the statute "in the present case." *Knox*, 32 F.3d at 747. To do so, the Third Circuit described the images at issue—without referring, much less deferring, to the district court's description—and then announced that "the totality of these facts lead us to conclude" that the images met the legal standard of "lascivious[ness]." *Ibid.* This homegrown discussion illustrates that the Third Circuit considers "lascivious exhibition" *de novo* as well.

Nevertheless, the government writes that these conflicting decisions evince only "[s]ome tension" and that "any disagreement is far narrower than petitioner suggests." Br. in Opp. 17. Notwithstanding the government's effort to redefine a circuit split as circuit tension, the courts of appeals are cleanly split over whether the "lascivious exhibition" conclusion must be reviewed *de novo* or for clear error. And that circuit split is worthy of this Court's attention.

C. The standard of review affects this case's outcome.

The standard of review, moreover, likely affects the outcome of this case. In cases involving visual materials, even a written summary or transcript cannot replace the primary source—especially when that primary source runs twenty-four minutes and comprises audio and video.

Cf. *Scott* v. *Harris*, 550 U.S. 372, 378–379 (2007) ("The videotape tells quite a different story."). Courts have previously rejected the government's argument that reading a summary of a video may replace watching that video, even when the video's basic contents are undisputed. See *United States* v. *Cunningham*, 694 F.3d 372, 383 (3d Cir. 2012) (rejecting government's argument that "the District Court had no duty to view the video excerpts because it understood the content and character of the excerpts that the government intended to offer from the summary that [the defendant] had provided to the Court").

Indeed, even the old adage—"'one picture is worth a thousand words'"—"fails to convey adequately the comparison between the impact of the portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader." *Id.* at 387 (alteration and quotation marks omitted). And here, the actual video conveys material information, illustrating that the exhibition is not lascivious, that the written summary and transcript does not. See Pet. 16–17 (examples).

D. *De novo* review is required even when there is no direct First Amendment challenge.

Finally, the government's defense of clear-error review is unsupported and its proposed rule is unworkable. The government acknowledges that mixed questions involving First Amendment rights must be reviewed *de novo*. Br. in Opp. 12–13. But in the government's view, an identical or near-identical question gets one standard of review (clear error) when evaluated under a statute or common-law cause of action, and gets a different standard of review (*de novo*) when evaluated under the First Amendment—even when the mixed question is nearly or actually identical under either source of law.

The government cites no case drawing this blurred line. Although the government claims support from *New York* v. *Ferber*, 458 U.S. 747 (1982), before this Court it was undisputed that the images at issue were child pornography; the only question, then, was whether the First Amendment protected non-obscene child pornography as a class. See *id.* at 750–753. In the footnote quoted by the government, the Court did not distinguish statutory disputes from First Amendment disputes; it distinguished disputed cases from undisputed cases. Br. in Opp. 14 (quoting *Ferber*, 458 U.S. at 774 n.28). Because the *Ferber* Court concluded that the state statute's "definable class" of material lacked First Amendment protection, see *Ferber*, 458 U.S. at 764, a pornographic image of a child would both violate the statute and lack First Amendment protection. And if it were not pornographic, it would neither violate the statute nor lose First Amendment protection. These identical questions would and should trigger the same standard of review.

The government's proposed approach would be equally confounding in defamation appeals. See *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964) (appeals courts must independently review record to ensure that defamation liability "does not constitute a forbidden intrusion on the field of free expression"). Yet under the government's theory, review would be *de novo* if the appellant argued "the speech was not defamatory and thus protected by the First Amendment"; but review would be deferential if the appellant argued merely that "the speech was not defamatory"—even though the latter implies the former, and vice-versa.

Finally, the government's argument fares no better in cases, like this one, prosecuted under the federal child-pornography statute. Although Courtade does not challenge his conviction directly under the First Amendment,

he argued to the court of appeals that the government's interpretation and application of the statute would raise serious First Amendment concerns. See Pet. App. 12a (describing Courtade's arguments). And the statutory definition of child pornography is based on the "lewd exhibition" language from the Court's test for distinguishing obscenity from expression protected by the First Amendment. Pet. 5 (citing S. Rep. No. 95-438, at 11 (1977)); *Miller* v. *California*, 413 U.S. 15 (1973)). Because the child-pornography statute is written to avoid First Amendment concerns, there is no principled basis for the circuit courts to review statutory arguments and First Amendment arguments under different standards.

II. The Court should resolve the circuit split over whether and to what extent a "lascivious exhibition" depends on the defendant's subjective intent.

In discussing the second question presented—whether courts may consider the defendant's subjective intent when evaluating whether the minor's exhibition was "lascivious"—the government notes that the court of appeals "specifically disclaimed any reliance on subjective intent." Br. in Opp. 19. But the government then concedes that the court of appeals relied on "parts of the video that demonstrated petitioner's motive." *Ibid.* This is another way of saying that the court of appeals evaluated Courtade's subjective intent, instead of focusing solely on the statutory question: Whether the video showed the minor "engaging in sexually explicit conduct." 18 U.S.C. 2252(a)(4)(B). In relying on Courtade's subjective intent, the court of appeals joined the three-way circuit split on whether and to what extent courts may do so.

A. The government appears to acknowledge two parts of this tripartite split: Some courts have considered wide-ranging evidence of subjective intent (Pet. 22–23), while others, including the Fourth Circuit, have considered

more limited evidence of intent (*id.* at 23–24). And the government's efforts to downplay the third part of the split—the First and Eighth Circuits' focus on objective acts, not subjective intent (*id.* at 23)—are unavailing.

First, the government argues that in *United States* v. *Frabizio*, 459 F.3d 80 (1st Cir. 2006), the First Circuit undermined its earlier decision, in *United States* v. *Amirault*, 173 F.3d 28 (1st Cir. 1999), which expressed "serious doubts that focusing on the intent of the deviant photographer is any more objective than focusing upon a pedophile-viewer's reaction," given that "in either case, a deviant's subjective response could turn innocuous images into pornography." *Id.* at 34.

Although *Amirault* added that "[i]n any event," the government's proposed reliance on the photographer's subjective intent did not help the government in this case, because "the circumstances of the photograph's creation are unknown," *ibid.*, that alternative holding did not erase what came before it. On the contrary, the First Circuit proceeded to analyze "the objective criteria of the photograph's design" by evaluating what the minor was doing. See *id.* at 34–35. Since then, courts inside and outside the First Circuit have taken *Amirault* at its word. See, *e.g.*, *United States* v. *Brown*, 579 F.3d 627, 683 (6th Cir. 2009) (citing *Amirault* for proposition that courts should not rely too heavily on subjective intent of photographer or viewer); *United States* v. *Hernandez*, 183 F. Supp. 2d 468, 474 (D.P.R. 2002) (quoting *Amirault*'s conclusion that "the focus should be on the objective criteria of the photograph's design" and "not on the actual effect of the photograph on the viewer"). Nor did the First Circuit break new ground in *Frabizio*, which bypassed arguments about subjective intent because they "had not been squarely presented." 459 F.3d at 90.

Second, the government suggests that *United States* v. *Petroske*, 928 F.3d 767 (8th Cir. 2019), petition for cert. pending, No. 19-6940 (filed Dec. 9, 2019), modifies the Eighth Circuit's earlier decision, *United States* v. *Kemmerling*, 285 F.3d 644 (8th Cir. 2002). See Br. in Opp. 22–23. The government overlooks a key aspect of *Petroske*: One of the two challenged convictions was for attempted production, rather than actual possession; subjective intent is necessarily at issue when attempt is involved, because the defendant may have tried to produce a different image than he actually produced. See 928 F.3d at 771 ("In this case, Petroske's intent is critical to establishing the attempt charge."). At the same time, *Petroske* approvingly quoted *Kemmerling*'s conclusion that in determining whether a minor's exhibition is "lascivious," "the relevant factual inquiry . . . is not whether the pictures in issue appealed, or were intended to appeal, to [the defendant's] sexual interests but whether, on their face, they appear to be of a sexual character." *Id.* at 773 (quoting *Kemmerling*, 285 F.3d at 646).

The government also downplays the significance of divisions among state high courts interpreting state statutes with identical or near-identical language. See Br. in Opp. 24 n.5. As the petition explains, several state high courts rely on "on federal cases and language" to interpret their similarly or identically worded state statutes. Pet. 24–25; see also *id.* at 26 & n.3 (more examples). Also highlighting the need for review: Courtade would likely be innocent under Virginia's child-pornography statute, even though its language is nearly identical to that of the federal statute. See *id.* at 26–28. This anomaly, if unaddressed, would encourage prosecutors to forum shop, as they appear to have done in this case. See *id.* at 27–28.

B. The government further argues that this case is a poor vehicle, claiming that Courtade ultimately would receive no relief because he is not actually innocent of the more serious crime of attempting to produce child pornography. Br. in Opp. 24–25 (citing *Bousley* v. *United States*, 523 U.S. 614, 624 (1998)). Of course, the Court regularly reviews legal questions in criminal cases even if a defendant who wins at this Court may eventually lose on remand. See, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2219 (2018) (government violated defendant's Fourth Amendment rights by accessing cell-phone records of his past movement); *United States* v. *Carpenter*, 926 F.3d 313, 314 (6th Cir. 2019) (on remand, court of appeals declined to suppress fruits of this illegal search and affirmed defendant's convictions).

In any event, if the video does not depict a lascivious exhibition of Doe's pubic area, then Courtade is also actually innocent of attempting to produce child pornography. When addressing potential criminal liability for attempt, the Fourth Circuit evaluates "how probable it would have been that the crime would have been committed —at least as perceived by the defendant—had intervening circumstances not occurred." *United States* v. *Pratt*, 351 F.3d 131, 136 (4th Cir. 2003). Here, the government cannot point to any intervening circumstances. It would be one thing if Courtade had asked Doe to pose sexually or perform sex acts and she had declined to do so. But nothing like that happened here: The actual video was the video that Courtade attempted to produce.

C. Finally, the government fails to justify the court of appeals' reliance on Courtade's subjective intent. The government ignores the petition's detailed analysis of the statutory text, the canon of *noscitur a sociis*, Congress's rejection of amendments with broader, intent-focused language, and the differences between this statute and

other statutes that ban a wider range of conduct. See Pet. 28–30. Each reinforces that the statute focuses on whether the image or video shows the minor "engaging in sexually explicit conduct," 18 U.S.C. 2252(a)(4)(B)—not on the producer's motive, whether captured on screen or off.

Instead, the stresses the seriously harms caused by videos of this nature. See Br. in Opp. 20–21. With this argument, the government proves too much. The serious and troubling harms to children identified by the government may be caused by conduct that falls well outside the federal child-pornography statute; other state or federal laws may and do address them. See, *e.g.*, Pet. 8 (Courtade was originally charged with taking indecent liberties with a child); 18 U.S.C. § 1801 (prohibiting "video voyeurism"). In trying to replace precise statutory language with a broader, unenacted policy-driven regime, the government would "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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