No. 20-7460

IN THE

Supreme Court of the United States

CARLOS RODRIGUEZ FERNANDEZ,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The government does not—and cannot—dispute that there is significant and meaningful variation among the circuits on the question of what juries may consider in assessing whether otherwise non-sexual images meet the test for "lascivious exhibition." Courts following the "limited context" approach consider only the image at issue and the defendant's actions in creating it. Other courts permit an expanded approach wherein juries hear "unlimited context" in addition to (and sometimes in place of) the image itself. This includes the defendant's innocent activities, sexual interests, prior bad acts, and possession of other child pornography or First Amendment-protected erotica. Although the government points to intra-circuit conflicts in the First, Third, and Fifth Circuits, these contradictions only serve to highlight the confusion and uncertainty that burdens courts, prosecutors, defendants, and jurors.

The government's further claim that the question presented is not dispositive in this case is equally flawed. The trial court's instruction allowed for unbounded consideration of Mr. Rodriguez Fernandez's "actions," regardless of whether they had any nexus to the production of the videos at issue. That instruction authorized the jury to rely on Mr. Rodriguez Fernandez's possession of erotica and use of the anonymous Tor browser and wiping application in order to find that the videos he made were lascivious and thus find him guilty of producing child pornography. The Sixth Circuit's "limited context" test precludes consideration of such attenuated facts and protected speech. Mr. Rodriguez Fernandez's actions here, however unsavory, take on a far different light without their association with computer wiping pro-

grams, commercial child pornography, and other erotica. No limiting instruction was included to separate the evidence for the third count of possession from the production counts. Pet. 21–22.

Finally, the government's argument that any instructional error was harmless simply begs the question presented. The government contends that, in any event, a jury could have found Mr. Rodriguez Fernandez guilty of *attempted* production of child pornography. But the elements of attempt crimes turn on whether there was the requisite intent to commit the crime itself and whether, as relevant here, the defendant took acts in furtherance of creating videos with a "lascivious exhibition." What constitutes "lascivious exhibition" thus also governs the requisite elements of attempt, returning us to the question presented.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NEEDED TO SETTLE THE CIRCUIT SPLIT AND CONFUSION AMONG THE COURTS TO CLARIFY WHAT LASCIVIOUS EXHIBITION TEST APPLIES.

The government's Opposition sets up two straw men. First, the government suggests that the circuits generally apply the *Dost* factors to determine whether an image includes "lascivious exhibition of the anus, genitals, or pubic area," 18 U.S.C. § 2256(2)(A)(v); Opp. 21–24. But the circuit courts' glaringly inconsistent application of *Dost*'s non-exhaustive factors does not resolve the question of what test applies to the definition of "lascivious exhibition." Second, the government asserts that "[n]o court of appeals has foreclosed consideration of context." Opp. 19. But that claim fails to account for the

broad array of opinions as to what properly can and cannot be considered as "context."

A. The *Dost* factors do not eliminate the need for this Court to define the appropriate test for "lascivious exhibition."

The government repeatedly cites the decision in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir. 1987), and *aff'd,* 813 F.2d 1231 (9th Cir. 1987), to imply that *Dost* provides necessary guidance and structure to circuit courts interpreting the meaning of "lascivious exhibition" and to juries applying the *Dost* factors. However, *Dost* does not answer the question presented. For one, it is not a decision of this Court, and although multiple circuits recognize the *Dost* factors as helpful, these courts also agree that the factors are "neither definitive nor exhaustive." *E.g.*, *United States* v. *Johnson*, 639 F.3d 433, 440 (8th Cir. 2011) (internal citation omitted); *United States* v. *Rivera*, 546 F.3d 245, 252–53 (2d Cir. 2008) (describing the *Dost* facts as "not definitional nor do they purport to be . . . they are not mandatory, formulative, or exclusive"); *United States* v. *Frabizio*, 459 F.3d 80, 87 (1st Cir. 2006) ("We did not, however, suggest that the *Dost* factors were the equivalent to—or established the limits of—the statutory term 'lascivious.' Indeed, we reached the opposite conclusion.").

Moreover, the *Dost* factors have been repeatedly critiqued since their inception. *United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987) (critiquing *Dost* as being "over-generous"), *Frabizio,* 459 F.3d at 88 (the *Dost* factors "have fostered myriad disputes that have led courts far afield from the statutory lan-

guage"); *Rivera*, 546 F.3d at 249 (the "[*Dost*] factors have 'provoked misgivings'").

Finally, the circuits remain divided over whether *Dost's* "intent" or "purpose" factor is properly part of the "lascivious exhibition" test. *E.g., United States* v. *Courtade*, 929 F.3d 186, 192 (4th Cir. 2019) ("Particularly divisive has been the sixth factor, which potentially implicates subjective intent and asks whether the depiction is intended or designed to elicit a sexual response in the viewer."); *United States* v. *Brown*, 579 F.3d 672, 682 (6th Cir. 2009) ("The sixth *Dost* factor . . . does not make clear whether a factfinder should focus only on the content of the image at issue, or whether it may consider the images in context with other images and evidence presented at trial.").

B. Without a clear test for "lascivious exhibition," the case law remains confusing and rife with contradictory outcomes.

The government's attempt (Opp. 20) to paint the case law as uniformly permitting consideration of "context" uses the vaguest of words to elide key differences. For example, in the same string cite the government lumps together instances where the defendant's *subjective* "sexual interest" or "motive" were taken into account with those allowing consideration only of the objective facts surrounding the creation of the images at issue, such as camera setup. Compare *United States* v. *Schuster*, 706 F.3d 800, 808 (7th Cir. 2013) (the defendant's "sexual interest sheds light on why [he] took the photograph of a nude boy's genitals, and whether the image is sexually suggestive") and *United States* v. *Arvin*, 900 F.2d 1385, 1391 (9th Cir. 1990) ("The motive of the photographer in taking the pictures may be a factor which informs the meaning of 'lascivious.'"), with *Brown*, 579 F.3d at 683 (reject-

ing consideration of subjective intent in favor of context limited to "the circumstances directly related to the takings of the images") and *United States* v. *Wolf*, 890 F.2d 241, 247 (10th Cir. 1989) (lasciviousness is a characteristic "of the exhibition that the photographer sets up for an audience that consists of himself or likeminded individuals."). These critical differences are at the heart of the question presented. See Pet. 23.

Furthermore, to the extent that the government disputes (Opp. 20–23) whether the First, Third, and Fifth Circuits apply a "four corners" test by pointing to later panel opinions in those circuits that adopt a different approach, this intra-circuit confusion only underscores the overwhelming uncertainty in this area of law. Several circuits have applied a "four corners" approach, and that case law has not been universally abrogated nor overruled. See *infra* pp. 6–8. The lack of a uniform and principled approach means that the outcomes in cases vary widely, leaving trial courts, prosecutors, and defendants to navigate an uncertain terrain.

For example, in *United States* v. *Villard*, 885 F.2d 117 (3d Cir. 1989), the Third Circuit seemingly adopted a "four corners" rule, disregarding the defendant's intent and stating that "our focus must be on the *contents of the picture itself* rather than on the producer of the picture." *Id.* at 124 (emphasis added). However, two decades later, another panel reversed course in *United States* v. *Larkin*, 629 F.3d 177 (3d Cir. 2010). There, the court evaluated whether a mother's bathtub photos of her children constituted a "lascivious exhibition" and affirmed based upon the sixth *Dost* factor and the mother's purpose in taking the images. *Id.* at 184.

Perhaps the most incoherent body of law stems from the Fifth Circuit. In *United States* v. *Steen*, 634 F.3d 822, 828 (5th Cir. 2011), the Fifth Circuit evaluated a surreptitiously recorded video of a naked teenaged girl climbing into a tanning bed. The majority opinion focused on whether climbing into a tanning bed indicated sexually explicit conduct. Finding none, the court deemed the videographer was a mere "voyeur." Similarly, three years later in *United States* v. *Romero*, 558 F. App'x 501 (5th Cir. 2014) (unpublished per curiam opinion), the Fifth Circuit confined its review to only the photographs a defendant had taken of minor children at a playground. The court disregarded subsequent manipulation and sexually explicit captions that were added, stating: "Romero photographed the victim playing and sleeping, and did not photograph the victim engaging in sexually explicit conduct. The resulting photographs, unconstructed and without their added captions, display no sexual conduct, real or simulated." *Id.* at 503.

However, shortly thereafter and without addressing *Romero*, the Fifth Circuit rejected an argument that "courts must analyze the *Dost* factors based only upon the 'four corners' of the photos without considering context." *United States* v. *Barry*, 634 F. App'x 407, 413 (5th Cir. 2015) (unpublished per curiam opinion). Instead, the court recast *Steen* as "permit[ting] consideration of a broader context than does *Brown*," and claimed that the *Steen* court evaluated materials outside the "four-corners" of the video. *Id.*; see also *id.* at 414 ("In addition to [Steen's] video, we considered the other videos on [Steen]'s camera . . . the [adult pornographic] contents of his computer . . . that he did not position or direct the victim to expose her genitals."). The *Barry* panel affirmed on the basis of the defendant's photos of nude boys on his computer and his

"chat" history referencing young boys. *Id.* at 415. One year later, in *United States* v. *McCall*, the Fifth Circuit used the defendant's own admission that he filmed his minor niece in order to masturbate as evidence that the videos were lascivious, 833 F.3d 560, 564 (5th Cir. 2016).

Similar confusion exists within the Sixth Circuit. In *Brown*, the Sixth Circuit adopted the "limited context" test that "limits the consideration of contextual evidence to the circumstances directly related to the taking of the images." 579 F.3d at 683. Since *Brown*, however, the Sixth Circuit has permitted additional evidentiary "context" outside circumstances surrounding the image's creation. See *United States* v. *Stewart*, 729 F.3d 517, 528 (6th Cir. 2013) (distinguishing *Brown* to affirm on plain error review the district court's ruling to admit "child erotica and suspected child pornography" into evidence); see also *United States* v. *Vanderwal*, 533 F. App'x 498, 502 (6th Cir. 2013) (affirming based upon "contextual evidence," including the defendant's "collection of child pornography" and "the sexual fantasy story that he wrote"). The Sixth Circuit has made no effort to reconcile *Brown* with its later cases.

Across and within circuits, the applicable standard is far from uniform. Defendants are left uncertain about what evidence prosecutors may adduce and what constitutes a viable defense. The confusion not only leads to inconsistent results (compare this case with *Steen*, 634 F.3d at 827–28) but also to added motions practice before the trial court and additional uncertainty at the plea bargain stage.

II. THE QUESTION PRESENTED HAS IMPORTANT FREE SPEECH AND DUE PROCESS IMPLICATIONS.

As an initial matter, the government argues that the important constitutional flaws in the jury instruction cannot be considered because no "freestanding First Amendment or due-process questions" were previously raised. Opp. 14–15. This argument is meritless. Mr. Rodriguez Fernandez does not and has never raised a free-standing constitutional challenge to the statute. As the government accepts and cannot dispute, Mr. Rodriguez Fernandez is "renew[ing] his contention" that the district court erred in instructing the jury in his trial. Opp. 7. The constitutional concerns that arise here (including Due Process concerns of vagueness and overcriminalization as well as First Amendment considerations) are inherent to the underlying question of whether the test for "lascivious exhibition" is properly bounded. Nor would precedent preclude this Court's consideration of these concerns. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("parties are not limited to the precise arguments they made below" once a claim is raised).

The government claims the First Amendment does not apply because child pornography is not protected speech. Opp. 15. That assumes that the images here were, in fact, "child pornography." Rather, the question Mr. Rodriguez Fernandez presented concerns the critical distinction between images depicting simple nudity and child pornography. Because the instruction here allowed the jury to convict Mr. Rodriguez Fernandez for any of his "actions," the verdict could have been based upon protected speech (erotica). Further, Mr. Rodriguez Fernandez's overbreadth challenge is not directed to the statute, but to the instruction's supplemental language, which exceeded even

the broad holding in *United States* v. *Holmes*, 814 F.3d 1246 (11th Cir. 2016). See Pet. 6–8, 23–24.

As to Due Process, the government only disputes the need for notice of the offense. Opp. 17. Because the jury instruction was broader than the holding in *Holmes*, Mr. Rodriguez Fernandez was not "on notice" of what might be child pornography as opposed to protected conduct. Importantly, the government does not address the petition's other Due Process points. First, conviction for acts extrinsic to those prosecuted violates Due Process. *Brown*, 579 F.3d at 683-86. The instruction allowing unbridled context may have produced convictions from petitioner's use of an external hard drive, Tor browser, or video viewer application See Appellant's App. Vol. III at 142–220, *United States* v. *Rodriguez Fernandez*, No. 19-13516 (11th Cir. Dec. 23, 2019) (detailing computer forensics and hardware and software used; Appellant's App. Vol. IV at 51–59, *United States* v. *Rodriguez Fernandez*, No. 19-13516 (11th Cir. Dec. 23, 2019) (closing argument expounding on the same). Second, Due Process is offended when a statute allows for differences in application. *Farrell* v. *Burke*, 449 F.3d 470, 484–85 (2d Cir. 2006) (Sotomayor, J.); *e.g.*, Pet. 2–3, 12, 16–17.

The government recasts *Holmes* as offering only "slight variations . . . describ[ing] the factors," referencing *Dost*. Opp. 17. Nevertheless, the trial court's selected verbiage from *Holmes* did not supplement the instruction's *Dost* factors but modified the very definition of "lascivious exhibition." Pet. App. B. The trial court's expansion of the instruction to unrestricted "actions of the individual" is no "slight variation" of law but is the most extreme example in case law of the use of broad and attenuated "context" evidence to prove lasciviousness.

III. THIS CASE IS AN IDEAL VEHICLE.

The government fails in its attempt to characterize the jury instruction as fitting the limited context test. Opp. 13–14 & n.2; 25 (asserting the instruction was "facially" consistent with the Sixth Circuit's limited context test in *Brown*). The instruction's inclusion of "actions of the individual creating the depictions" in no way communicated to the jury that its consideration was limited to actions related to the making of the videos. Pursuant to the plain language of the instruction, jurors could consider any of his "actions," including unrelated and otherwise innocent conduct (such as possession of erotica). Such unbridled context is not only overbroad, but also plainly inconsistent with *Holmes*'s holding. As the government admits, *Holmes* "concerned circumstances relating to the production of the visual depiction." Opp. 13. The jury instruction here was not so limited, and instead permitted jurors to base their verdicts on any "actions."

The government argues that any error in the jury instruction was harmless because a rational jury would have convicted with or without the instruction. Opp. 26–27. That is plainly incorrect because without that error, a myriad of "context" actions would not have been considered in deciding if the videos included "lascivious exhibition." Given that the surreptitious videos depicted normal bathroom activity with no sexual content or even suggestive sexual content, a reasonable probability exists that the jury would have acquitted absent the evidence of Mr. Rodriguez Fernandez's breadth of "actions" and the prosecution's arguments sweeping in that evidence, Pet. 21–22.

The government offers five factually similar petitions that were denied. Opp. 8. Although those cases

were based upon grossly comparable facts, they presented substantially different questions, seeking to eliminate all "context" from finding "lascivious exhibition" or raising statutory challenges. In contrast, Mr. Rodriguez Fernandez's position embraces a reasonable "limited context" test.

The government offers a final thought that any error was harmless because a rational jury would have convicted Mr. Rodriguez Fernandez of *attempted* production of child pornography regardless of whether the videos were lascivious. Opp. 27. But the attempted production of child pornography is tainted by the same error. Criminal attempts are anchored to completed offenses. Wayne R. LaFave, *Criminal Law* § 11.3(a), at 182–82 (7th ed. 2017); see also *United States* v. *Sims*, 708 F.3d 832, 835 (6th Cir. 2013). To prove attempted production of child pornography, the government needed to show: (1) the intent to create *child pornography*; and (2) that the defendant took an affirmative act towards the creation of *child pornography*. *Rosemond* v. *United States*, 572 U.S. 65, 71 (2014). The attempted crime thus also turns on the question of what constitutes child pornography.

Put differently, a defendant may be charged with attempted bank robbery if he enters the bank and demands money, even if he was apprehended before obtaining it. But if he had approached a lemonade stand and made the same demand, he cannot be similarly charged because he did not attempt to rob a *bank*—the object of the offense. For the same reason, if the videos here do not meet the "lascivious exhibition" test and are not child pornography, then Mr. Rodriguez Fernandez cannot be convicted of attempted production of child pornography.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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