No. 25-

IN THE

Supreme Court of the United States

BRANDON GRUNWALDT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a video of a minor in a bathroom engaged in ordinary grooming activities depict "the lascivious exhibition of the anus, genitals, or pubic area" of the minor?

RELATED CASES

United States v. Grunwaldt, No. 3:21-cr-182, U. S. District Court for the Western District of North Carolina. Judgment entered March 31, 2023.

United States v. Grunwaldt,, No. 23-4257, U. S. Court of Appeals for the Fourth Circuit. Judgment entered June 6, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Grunwaldt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the court of appeals, *United States v. Grunwaldt*, No. 23-4257 (4th Cir. June 4, 2025), is reported at 2025 WL 1577561 and reproduced at App 1a.

The district court's oral opinion is reproduced at App 31a.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 2251, 18 U.S.C. 2252A, and 18 U.S.C. 2256, part of the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225, are reprinted in full in App. 32a.

INTRODUCTION

Child pornography allegations are repulsive. *United States v. Sanders*, 107 F.4th 234, 263 (4th Cir. 2024); *United States v. Bosyk*, 933 F.3d 319, 369 (4th Cir. 2019) (Wynn, J., dissenting); *United States v. Rivera*, 546 F.3d 245, 252 (2d Cir. 2008); *United States v. Goff*, 501 F.3d 250, 260 (3d Cir. 2007); *United States v.*

Brown, 843 F.3d 74, 86 (2d Cir. 2016) (Sack, J., concurring). This is because, of "all the crimes known to our society, perhaps none is more revolting than the sexual exploitation of children, *particularly for the purpose of producing child pornography*." 1986 U.S. Code Cong. & Admin. News 5952, 5953 (emphasis added).

They are "so repulsive of a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules." *Bosyk*, 933 F.3d at 369 (*quoting United States v. Coreas*, 419 F.3d 151, 151 (2d Cir. 2005) (Wynn, J., dissenting). When we as humans "are confronted with behavior that generates an especially strong, visceral revulsion in most, or perhaps all, of us" there will be a "certain, intense sympathy for the victims of such offenses . . . ." *United Brown*, 843 F.3d at 86 (Sack, J., concurring).

This natural repulsion raises "the risk that jurors will react to raw images in a visceral way," and thus allow their visceral revulsion and disgust to overcome objective analysis. *See Sanders*, 107 F.4th at 263. Thus, "[j]urors (and judges) need neutral references and considerations to avoid decisions based on individual values or the revulsion potentially raised in a child pornography prosecution." *United States v. Rivera*, 546 F.3d 245, 252 (2d Cir. 2008).

The jury instructions in Grunwaldt's case did not provide the neutral references and considerations necessary to prevent the jury from falling prey to the revulsion raised in the face of the allegations against him, leading to his conviction on five counts of violating 18 U.S.. 2251 and one count of violating 18 U.S.C. 2252A(a)(5)(B). The jury instruction misstated the law as to what they could

consider in deciding whether each of the five videos at issue depicted the necessary "lascivious exhibition" to constitute child pornography.

"[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal." *Bousley v. United State*s, 523 U.S. 614, 620 (1998). When Congress defines a crime narrowly and a court interprets and applies it more broadly—and when an appellate court fails to properly review a district court decision doing the same—serious harm results. There is harm to separation of powers: The executive prosecutes people for, and the judiciary convicts people of, crimes that the legislature did not actually create. There is harm to federalism: As it did here, the federal government effectively displaced the state from exercising its own police power to enforce its own state laws. And there is harm to individual liberty: Defendants are convicted of conduct that is not actually a crime under the statute at issue.

STATEMENT

A. Statutory Background

This case concerns the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. 95-225 ("Act"). The Act sought to fight "trafficking * * * in pornographic materials" by "highly organized, multimillion dollar industries that operate on a nationwide scale," S. Rep. 95-438, at 15.

The Act prohibits the production and possession of visual materials in which a minor "engage[s] in" "sexually explicit conduct." Production is prohibited by 18 U.S.C. 2251(a), which covers conduct aimed at having a minor "engage in[]

sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Possession is covered by 18 U.S.C. 2252A(a)(5)(B).

The production and possession provisions' operative phrase—"engag[e] in sexually explicit conduct"—does not comprise all nude depictions of a minor's genitals or pubic area. Rather, the phrase refers to depictions of "(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 genitals or pubic area of any person." 18 U.S.C. 2256(2)(A). This definition comes from the "lewd exhibition" language from this Court's objective test for obscenity. S. Rep. 95-438, at 11 (*citing Miller v. California*, 413 U.S. 15 (1973)).

In focusing on sexual acts, Congress rejected a proposal for a subjective standard—one that would have prohibited depicting child nudity "for the purpose of sexual stimulation or gratification of any individual who may view such depiction." S. Rep. 95-438, at 11 (emphasis added). Instead, "'sexually explicit conduct' was more the child was engaged in sexually-oriented acts." *Id.* at 13. Congress rejected a proposal for the definition of "prohibited sexual acts" to include nudity, even "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction," in favor of the alternative definition of "lewd exhibition of the genitals" out of concerns about vagueness and overbreadth. Annemarie J. Mazzone, United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child

Pornography Laws, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174–79 (1994) (discussing congressional debates). The definition also excluded everyday activities like "skinny dipping." *Id.* at 11. Similarly, the House Report stated that "definition of 'sexually explicit conduct' [should] be interpreted so as to apply only to conduct that is sexual in nature. For example, the term 'bestiality' as used in this definition would only apply to sexual bestiality." H.R. Conf. Rep. 95-811, at 6.

Notwithstanding this statutory language, context, and history, most federal courts have interpreted "lascivious exhibition" using a six-part test first applied by a district court in *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987). The *Dost* factors are: (1) "whether the focal point of the visual depiction is on the child's genitalia or pubic area"; (2) "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity"; (3) "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child"; (4) "whether the child is fully or partially clothed, or nude"; (5) "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity"; and (6) "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* at 832. Although most federal courts have relied at least in part on *Dost* and its six factors, the motive-oriented sixth factor has been called the "most confusing and contentious" of those factors. *United States* v. *Amirault*, 173 F.3d 28, 34 (1st Cir. 1999).

The phrase, "lewd exhibition of the genitals," had recently been used by the Court in *Miller v. California* to describe one type of conduct that could be prohibited under state obscenity statutes. 413 U.S. 15 (1973). In *Miller*, the Court upheld a state statute prohibiting the mailing of unsolicited obscene materials against a First Amendment challenge. *Id.* at 17. The Court clarified that the "obscene material" it was discussing "is more accurately defined as 'pornography' or 'pornographic material,'" which is a "a subgroup of all 'obscene' expression." *Id.* at 18 n.2. In holding that this kind of "obscene material" is categorically unprotected by the First Amendment, *id.* at 23, the Court proceeded to articulate basic guidelines for proscribing works that depicted sexual conduct:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24–25 (cleaned up).

A "plain example[ ]" of the kind of pornographic, obscene material a state can regulate includes "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25. The Court was satisfied that "[u]nder the holdings announced today,[1] no one will

[1] The Court decided *United States v. 12 200-Foot Reels of Super 8mm Film*, 413 U.S. 123 (1973), on the same day as *Miller*, and clarified that the "standards for testing the constitutionality of state legislation regulating obscenity" announced

be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law." *Id.* at 27. These "concrete guidelines," the Court was confident, would "isolate 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29; *see also id.* at 35 ("the public portrayal of hard-core sexual conduct for its own sake" is not protected by the First Amendment).

2. The Court first held that child pornography was a category of unprotected speech in *New York v. Ferber*, 458 U.S. 747 (1982). The Court rejected a constitutional overbreadth challenge to a New York statute prohibiting "the use of a child in a sexual performance," which was defined as a performance "includ[ing] sexual conduct by a child." *Id.* at 750-51. The statute defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado- masochistic abuse, or lewd exhibition of the genitals." *Id.* at 751. The Court held that child pornography may be regulated without infringing on the First Amendment, regardless of whether it is obscene, because of the harm it causes to the children who appear in it. *Id.* at 756-58, 761. The Court emphasized, however, that "[t]here are, of course, limits on the category

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in *Miller* "are applicable to federal legislation." *Id.* at 129-30. It noted that "[i]f and when such 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*." *Id.*

of child pornography which, like obscenity, is unprotected by the First Amendment." *Id.* at 764. That is, "[t]he category of 'sexual conduct' proscribed must . . . be suitably limited and described." *Id.* The New York law was suitably limited, the Court explained, because the forbidden acts "are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'" *Id.* at 765. The Court noted that "[t]he term 'lewd exhibition of the genitals,'" in particular, "is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation." *Id.* The Court then reiterated that "the reach of the statute is directed at the hard core of child pornography," *id.* at 773, repeating the kind of prohibited "sexual conduct" articulated in *Miller*.

2. Congress revised the child pornography statutes after *Ferber* by enacting the Child Protection Act of 1984 to broaden "its application to those sexually explicit materials that, while not obscene as defined by *Miller*, could be restricted without violating the First Amendment as explained by *Ferber*." *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 74 (1994); *see also* Pub. L. No. 98-292, §§ 2–9, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2254) (1988 & Supp. IV 1992). Among the amendments, Congress replaced the word "lewd" with "lascivious" as part of the definition of "sexually explicit conduct," but provided no clarifying definition. Pub. L. No. 98-292, § 5(4), 98 Stat. at 205.

3. In 1986, the United States District Court for the Southern District of California interpreted the term "lascivious exhibition" in the federal child pornography statutes' post-1984 definition of "sexually explicit conduct." *United States v. Dost*, 636 F. Supp. 828, 830-31 (S.D. Cal. 1986). In *Dost*, two defendants were prosecuted for conspiracy, production, and receipt and distribution of child pornography. *Id.* at 829-30.

The Dost court acknowledged *Miller* and *Ferber*, but not the Court's discussions about the meaning of "lewdness" or "lasciviousness." *Id.* at 831-32. The *Dost* court reasoned that, because "legal scholars have struggled for years" over the definition of either lewdness or lasciviousness, "lascivious exhibition" should be determined "on a case-by-case basis using general principles as guides for analysis." *Id.* at 832. The court then offered a non-exhaustive list of six factors the trier of facts should examine:

> 1) whether the focal point of the visual depiction is on the child's genitalia or public area;
>
> 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
>
> 4) whether the child is fully or partially clothed, or nude;
>
> 5) whether the visual depiction suggests sexual coyness or

a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Id. Applying these factors, the court found that the photographs depicted the "lascivious exhibition of the genitals or pubic area." *Id.* at 833.

The Ninth Circuit affirmed, endorsing the district court's reading. *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987). Its examination focused on whether the pictures themselves were lascivious exhibitions "and presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur," rather than the minor's conduct recorded on camera. *Id.* It explained that "[p]lainly the pictures were an exhibition. The exhibition was of the genitals. It was a lascivious exhibition because the photographer arranged it to suit his peculiar lust." *Id.* The court then concluded that, "[i]n the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles." *Id.* (emphasis added).

4. Unlike the district court in Dost, which expressed confusion over the meaning of "lascivious exhibition," this Court has been consistent and straightforward in its long-held understanding of that term. In *X-Citement Video*, the Court rejected vagueness and overbreadth challenges to the statutory term "lascivious exhibition of the . . . genitals." 513 U.S. at 78-79. The challenges were premised on Congress having "replaced the term 'lewd' with the term 'lascivious'

in defining illegal exhibition of the genitals of children." *Id.* The Court regarded these challenges as "insubstantial." *Id.* (adopting the reasoning of the Court of Appeals in *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1288 (9th Cir. 1992) ("'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld" in *Miller* and *Ferber*)) (cleaned up). In his dissent, Justice Scalia agreed with that portion of the Court's holding that incorporated the "hard core" characterization of the prohibited "lascivious exhibition of the genitals" from *Miller* onto the construction of the federal child pornography statute. *Id.* at 84 (Scalia, J., dissenting) ("'[S]exually explicit conduct,' as defined in the statute, does not include mere nudity, but only conduct that consists of 'sexual intercourse . . . between persons of the same or opposite sex,' 'bestiality,' 'masturbation,' 'sadistic or masochistic abuse,' and 'lascivious exhibition of the genitals or pubic area.' What is involved, in other words, is not the clinical, the artistic, nor even the risqué, but hardcore pornography.").

5. The Court subsequently identified limits to the reach of the federal child pornography crimes when it held facially overbroad two provisions of the federal child pornography statutes in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002). The first provision—relevant here—banned the possession and distribution of "'any visual depiction'" that "'is, or appears to be, of a minor engaging in sexually explicit conduct,'" even if it contained only youthful looking adults or virtual images of children generated by a computer. *Id.* at 239-41

(*quoting* 18 U.S.C. § 2256(8)(B)). This provision was deemed invalid because the prohibited images did not involve actual minors. *Id.* at 249-51, 254. The Court explained that "Ferber's judgment about child pornography was based upon how it was made, not on what it communicated." *Id.* at 250-51. Thus, where child pornography "is neither obscene nor the product of sexual abuse," the Court reasoned that "it does not fall outside the protection of the First Amendment." *Id.* at 251. Because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," the Court rejected arguments by the government that it could "prohibit speech [in the form of virtual child pornography] on the ground that it may encourage pedophiles to engage in illegal conduct." *Id.* at 252-54.

6. In *United States v. Williams*, the Court upheld the statutory subsection prohibiting the pandering or solicitation of child pornography against overbreadth and vagueness challenges. 553 U.S. 285, 288 (2008). Relevant here, the Court construed § 2256(2)(A)'s definition of "sexually explicit conduct." *Id.* at 296. It explained that Congress "used essentially the same constitutionally approved definition" as the definition of "sexual conduct" in Ferber. *Id.* at 296. But the federal definition rendered itself "more immune from facial constitutional attack," because "'[s]exually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring." *Id.* at 296-97 (emphasis in original). And a "simulated" sex act is one "that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually

have occurred," "caus[ing] a reasonable viewer to believe that the actors actually engaged in that conduct on camera." *Id.* at 297. The Court reiterated that "lascivious exhibition of the anus, genitals, or pubic area" is "essentially the same constitutionally approved definition" from Ferber. *Id.* at 296. Because the statute focuses on whether the depicted "actors actually engaged in that conduct on camera," *id.* at 301, the Court rejected the Eleventh Circuit's reasoning that "the statute could apply to someone who subjectively believes that an innocuous picture of a child is 'lascivious." *Id.* at 301. That is because the "material in fact . . . must meet the statutory definition. Where the material at issue is a harmless picture of child in a bathtub . . . the statute has no application." *Id.*

B. Trial Proceedings

Grunwaldt placed a camera in a bathroom in his residence and recorded five videos of his minor daughter. None of the five videos showed the minor in the shower. C.A. App. 228. They were created on February 16, 2020, March 2, 2020, March 8, 2020, August 14, 2020, and October 31, 2020. They totaled two hours, twenty-two minutes, and thirteen seconds. The February 16, 2020, video "was 26 minutes and 4 seconds in length." C.A. App. 204. The March 2, 2020, video "was approximately 30 minutes and 50 seconds long." C.A. App. 199. The March 8, 2020, video "was approximately 33 minutes and 32 seconds long." C.A. App. 214. The August 14, 2020, video "was 26 minutes and 52 seconds in length." C.A. App. 216. The October 31, 2020, video "was approximately 18 minutes and 58 seconds in length." C.A. App. 217.

As to the government's question regarding the February 16, 2020, video—did it "show her breasts and genitalia"—she answered yes. C.A. App. 204. The video, however, was not published to the jury but was only admitted into evidence as Exhibit 8. In lieu of showing the video to the jury, the government published six clips as Exhibits 8C through 8H. C.A. App. 205. These selected clips totaled approximately 10 minutes and 50 seconds. *See* Exhibits 8C-8H.

As to the government's question regarding the March 2, 2020, video—did it "show her breasts and genitalia"—she answered yes. C.A. App. 199. The video, however, was not published to the jury but was only admitted into evidence as Exhibit 2. In lieu of showing the video to the jury, the government published clips marked as Exhibits 2C through 2H. C.A. App. 218. However, the clips published as 2F and 2G were identical, each lasting three minutes and three seconds. None of the 14 jurors sitting when 2F and 2G were played for their attention, nor anyone else involved in the trial, appeared to notice they were identical. Thus, the clips played for the jury totaled six minutes and five seconds, or approximately 22% of the full video marked as Exhibit 2. *See* Exhibits 2F-2D.

As to the March 8, 2020, video, it showed the minor "coming in and getting undressed, getting ready to take a shower, so she was nude. Getting in the shower, getting out and doing her – what she did when you get out of the shower. Getting dried off, you can see her genitalia." C.A. App. 214. The video, however, was not published to the jury but was only admitted into evidence as Exhibit 10. In lieu of showing the video to the jury, the government published clips marked as

Exhibits 10C through 10G. C.A. App. 215. These selected clips totaled approximately 3 minutes and 30 seconds, constituting approximately 10 percent of the video. *See* Exhibits 10C-10G.

As to the August 14, 2020, video, it showed the "minor victim going in, getting undressed, getting ready for a shower where she's naked, exposing her genitalia, is exposed to the camera, and then getting out of the shower, getting dressed . . . ." C.A. App. 216. The video, however, was not published to the jury but was only admitted into evidence as Exhibit 11. In lieu of showing the video to the jury, the government published clips marked as Exhibits 11C through 11E. C.A. App. 216. These selected clips totaled 5 minutes and 45 seconds, constituting approximately 18 percent of the video. *See* Exhibits 11C-11E.

As to the October 31, 2020, video, "the camera view was more so between the toilet and the shower view." C.A. App. 218. It "showed the minor victim walking in to use the bathroom where her genitalia was exposed." C.A. App. 218. Her "genitalia was exposed and her breasts were exposed multiple times." C.A. App. 218. The video, however, was not published to the jury but was only admitted into evidence as Exhibit 12. In lieu of showing the video to the jury, the government published clips marked as Exhibits 12C and 12D. C.A. App. 218. These selected clips totaled 9 minutes and 32 seconds, constituting approximately 49 percent of the video. *See* Exhibits 12C-12D.

Based on the events recounted above, Grunwaldt was charged in Count One of his Indictment with sexually exploiting a minor by causing a minor's

participation in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, in violation of 18 U.S.C. § 2251(a), *i.e.*, producing child pornography. Grunwaldt was charged with additional violations of 18 U.S.C. § 2251(a) (Counts Two, Three, Four, and Five), and with possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count Six).

During trial, Grunwaldt challenged the district court's jury instruction defining "lascivious exhibition," App. 14a, which was part of the definition of sexually explicit conduct with respect to the child pornography production charges. Grunwaldt relied on the analysis set out by the United States Court of Appeals for the D.C. Circuit in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). App. 19a, 25a. The district court overruled the objection and instructed the jury that "lascivious exhibition" means

> In deciding whether there is a visual depiction that amounts to a lascivious exhibition of the anus, genitals or pubic area of a person, you should be guided by the following:
>
> The word "lascivious" is defined as of or marked by lust or exciting sexual desires.
>
> The term "lascivious exhibition" means a depiction which displays or brings forth to view to attract notice to the anus, genitals, or pubic area of children in order to excite lustfulness or sexual stimulation of the viewer.
>
> Lasciviousness is not a characteristic of the child videotaped, but of the exhibition which the producer sets up for an audience that consists of himself or others. Even videos of children acting innocently can be considered lascivious if they are intended to excite lustfulness or sexual stimulation of the viewer.
>
> However, not every exposure of the genitals, anus or pubic area of children constitutes a lascivious exhibition. More than

> nudity is required to render a video lascivious. Rather, the focus of the video must be on the anus, genitals, or pubic area in order to excite lustfulness or sexual stimulation of the viewer.
>
> In deciding whether the Government has proven beyond a reasonable doubt that the defendant acted for the purpose of producing a video of sexually explicit conduct, you may consider all of the evidence concerning the defendant's conduct.

App. 30a--31a.

Grunwaldt was convicted as charged. On appeal, Grunwaldt again challenged the district court's definition of "lascivious exhibition." App. 6a-7a. The Fourth Circuit affirmed. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court should resolve a longstanding and entrenched circuit split over the interpretation of a frequently used federal criminal statute.

A. The courts of appeal are divided over the interpretation of a frequently used federal criminal statute.

1. The Fourth Circuit's interpretation of "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A), which is an element of the child pornography production crime at issue, directly conflicts with the D.C. Circuit's decision in *United States v. Hillie*, 39 F.4th 674 (D.C. Cir. 2022). The courts of appeal have taken irreconcilable approaches to the fundamental questions of (1) whether the *Dost* factors provide a permissible framework for determining whether there has been a "lascivious exhibition of [a person's] anus, genitals, or pubic area," § 2256(2)(A), and (2) whether the lascivious exhibition consists of the conduct depicted or of the depiction itself.

In *Hillie*, the defendant took surreptitious videos of a minor engaged in routine, non-sexual bathroom activities. *Id.* at 678, 686. He was convicted for producing child pornography under 18 U.S.C. § 2251(a). *Id.* at 678-790. On appeal, Hillie, like Grunwaldt, argued the minor's conduct depicted in the recordings did not meet the definition of a lascivious exhibition of the genitals or pubic area, *id.* at 680-81, which, as in the conviction challenged here, was the only category of "sexually explicit conduct" at issue. *Id.* at 681, 691.

The D.C. Circuit reversed. It applied the *noscitur a sociis canon* of statutory interpretation to interpret "sexually explicit conduct" under § 2256(2)(A) and construed "lascivious exhibition" by considering the other terms surrounding it, consistent with this Court's decisions in *Williams*, *Ferber*, and *Miller*. *Id.* at 39 F.4th at 681-86. It held that the videos, which depicted the minor in "ordinary grooming activities, some dancing, and nothing more," albeit with some nudity and "fleeting views of her pubic area," could not be reasonably described as "hard core" sexually explicitly conduct. *Id.* at 686. Because the minor "never engage[d] in any sexual conduct whatsoever, or any activity connoting a sex act," the Court held "no rational trier of fact could find [the minor's] conduct depicted in the videos to be a 'lascivious exhibition of the ... genitals…' as defined by § 2256(2)(A)." *Id.* Acquittal was therefore required. *Id.*

In reaching its conclusion, the court expressly rejected the government's argument that "lascivious exhibition" should be construed in accordance with the *Dost* factors. *Id.* at 686-90. It concluded the *Dost* factors were "fatally flawed" and

inconsistent with the Court's precedents in *Miller*, *X-Citement Video*, and *Williams* that tie the statutory term "lascivious exhibition" to the "minor's conduct that the visual depiction depicts." *Id*. at 687-88 (emphasis added). The D.C. Circuit faulted courts that have adopted the *Dost* factors, especially the sixth factor's consideration of whether the picture is presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur, because such an approach did not abide by the Court's construction of almost identical language in similar statutes, and this Court had "expressly rejected" reliance on the photographer's subjective sensibilities. *Id*. at 687, 688; *see Williams*, 553 U.S. at 301.

In his opinion concurring in the denial of the government's petition for rehearing en banc in *Hillie*, Judge Katsas reiterated the panel's commonsense reading of the statute: "'[L]ascivious' modifies the 'exhibition' … to define one category of sexually explicit conduct. 'Lascivious' does not modify the 'visual depiction' of the exhibition . . . ." *United States v. Hillie*, 38 F.4th 235, 237 (D.C. Cir. 2022) (denying reh'g en banc) (Katsas, J., concurring in the denial of rehearing en banc). Thus, "[a] child who uncovers her private parts to change clothes, use the toilet, clean herself, or bathe does not *lasciviously* exhibit them." *Id*. Opinions from other circuits that reason that "the videos themselves 'were an exhibition,' which were made 'lascivious' when 'presented by the photographer so as to arouse or satisfy the sexual cravings of the voyeur' . . . cannot be reconciled with the governing statutory text." *Id*. at 238. It is the "child who must make a 'lascivious exhibition' under § 2256(2)(A)." *Id*.

The Fourth Circuit reached the opposite conclusion on analogous facts without addressing the precedential effect of *Williams* and its antecedents. App. 1a-12a. Instead, the Fourth Circuit relied exclusively on its own case law, which in turn lacked any analysis of this Court's binding precedent. App. 7a (discussing *United States v. Sanders*, 107 F.4th 234 (4th Cir. 2024), *cert. denied,* 145 S. Ct. 1434, 221 L. Ed. 2d 557 (2025); *United States v. Courtade*, 929 F.3d 186 (4th Cir. 2019), *as amended* (July 10, 2019)). Based on these authorities, the Fourth Circuit held that a jury could conclude the surreptitiously recorded images underlying. Grunwaldt's conviction on Counts One thru Six met the statutory requirement of "sexually explicit conduct," and "lascivious exhibition" in particular, even though the images depicted the minor engaged in only nonsexual activities, such as entering or exiting the shower. App. 1a-12a. The Fourth Circuit defines "lascivious exhibition" as "a *depiction* which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019), as amended (July 10, 2019) (emphasis added, quotation marks omitted). Additionally, it approves use of the *Dost* factors for determining lasciviousness. *United States v. Sanders*, 107 F.4th 234, 262-63 (4th Cir. 2024). Thus, under the Fourth Circuit analysis, the focus of the "lascivious exhibition" inquiry is the depiction, not the minor.

2. Eight other federal courts of appeals expressly use the *Dost* factors to determine whether there was a lascivious exhibition. *See, e.g., United States v.*

Amirault, 173 F.3d 28 (1st Cir. 1999); *United States v. Rivera*, 546 F.3d 245 (2d Cir. 2008); *United States v. Villard*, 885 F.2d 117 (3d Cir. 1989); *United States v. Wilkerson,* 124 F.4th 361 (5th Cir. 2024); *United States v. Brown*, 579 F.3d 672 (6th Cir. 2009); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999); *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023); *United States v. Wolf*, 890 F.2d 241 (10th Cir. 1989).

Moreover, at least nine other circuits are aligned with the Fourth Circuit in concluding that surreptitious recordings of minors engaged in non-sexual activities depict "lascivious exhibition[s]," and thus "sexually explicit conduct." *See, e.g., United States v. Goodman*, 971 F.3d 16, 19 (1st Cir. 2020) (depicting minor undressing and entering and exiting the shower); *United States v. Spoor*, 904 F.3d 141, 149 (2d Cir. 2018) (bathroom videos that "d[id] not involve suggestive posing, sex acts, or inappropriate attire"); *United States v. Anthony*, No. 21-2343, 2022 WL 17336206, at *3 (3d Cir. Nov. 30, 2022) (surreptitious videos of minors showering); *United States v. Wilkerson,* 124 F.4th 361, 364-65 (5th Cir. 2024) (images of nude minor engaged in innocent conduct in bedroom); *United States v. Donoho*, 76 F.4th 588, 591, 600-01 (7th Cir. 2023) (bathroom videos and images of minors showering and using the toilet); *United States v. McCoy*, 108 F.4th 639 (8th Cir. 2024) (en banc) (bathroom videos of minor showering); *United States v. Boam*, 69 F.4th 601, 609-12 (9th Cir. 2023) (same); *United States v. Wells*, 843 F.3d 1251, 1255-57 (10th Cir. 2016) (same); *United States v. Holmes*, 814 F.3d 1246, 1247 (11th Cir. 2016) (videos of minor "performing her daily bathroom

routine"). These cases, like the decision below, would come out differently in the D.C. Circuit, insofar as they uphold convictions for depictions of "sexually explicit conduct" where the recordings in question depicted the minor engaged in ordinary, non-sexual activities. *See Hillie*, 39 F.4th at 689.

3. Among courts that endorse use of the *Dost* factors, reliance on the *Dost* factors has "produced a profoundly incoherent body of case law." Amy Adler, *Inverting the First Amendment*, 149 U. PENN. L. REV. 921, 953 (2001). That is because the circuits, and even some panels of the same court,[2] apply the *Dost* factors differently. Conflicts exist over whether more than one *Dost* factor is required to support lasciviousness;[3] whether showers and bathrooms are sexually suggestive settings;[4] and whether the sixth factor—whether the image is intended or designed to elicit a sexual response in the viewer—must be evaluated

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[2] *Compare United States v. McCall*, 833 F.3d 560, 564 (5th Cir. 2016) (finding images lascivious because the defendant created them "for the admitted purpose of satisfying himself during masturbation") (emphasis added) with *Wilkerson*,124 F.4th 361, 371 & n.46 (rejecting the concern that the sixth *Dost* factor is contingent upon the arousal of the defendant).

[3] *Compare Villard*, 885 F.2d at 122 (requiring more than one Dost factor but not all six factors), with *Spoor*, 904 F.3d at 151 n.9 (rejecting jury instruction that more than one Dost factor must be present as an incorrect statement of law); Wolf, 890 F.2d at 245 n.6 ("We do not hold that more than one Dost factor must be present[.]").

[4] *Compare Spoor*, 904 F.3d at 149 ("bathrooms also can be the subject of sexual fantasy"); *Wells*, 843 F.3d at 1256 (same); *Larkin*, 629 F.3d at 183 (same); with *Brown*, 579 F.3d at 681-82 ("The setting of most of the photographs—the bathtub, the toilet, and the floor—is not sexually suggestive[.]"); *Doe v. Chamberlin*, 299 F.3d 192, 196 (3d Cir. 2002) (open shower near a beach not associated with sexual activity).

under an objective standard.[5] Courts have referred to the sixth *Dost* factor as the "most confusing and contentious," *Amirault*, 173 F.3d at 34, and "[p]articularly divisive," ensnaring judges in a confusing "thicket," *Courtade*, 929 F.3d at 192. The sixth 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." *Brown*, 579 F.3d at 682.

In sum, an entrenched and irreconcilable circuit split exists over the statutory interpretation of an essential element of the federal criminal statute about whether "sexually explicit conduct," and "lascivious exhibition," in particular, describe the minor's conduct depicted in the image, or whether the image itself is the "lascivious exhibition" as determined by one or more of the non-textual *Dost* factors. The D.C. Circuit has expressly rejected the use of the *Dost* factors, in contrast to the Fourth Circuit's approval of their use. The D.C. Circuit instead followed this Court's decisions in *Williams*, *Ferber*, *X-Citement Video*, and *Miller* to hold that a minor engaged in ordinary activities does not depict the kind

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[5] *Compare Amirault*, 173 F.3d at 34 ("If Amirault's subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography.") (cleaned up); *Villard*, 885 F.3d at 125 ("If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping"); with *Spoor*, 904 F.3d at 151 ("the subjective intent of the photographer can be relevant to whether a video or photograph is child pornography."); *United States v. Larkin*, 629 F.3d 177, 183–84 (3d Cir. 2010) (holding that "trafficking [a] photograph over the internet to an interested pedophile" "tip[ped] the balance on the side of qualifying the photograph as exhibiting lascivious conduct"); *United States v. Cohen*, 63 F.4th 250, 256 (4th Cir. 2023) (finding that pictures were not, on their face, lascivious, but their exchange "in the context of a sexual conversation" was sufficient to render them so).

of hard-core pornography that a "lascivious exhibition" requires. *Hillie*, 39 F.4th at 688-89. Other circuits that have approved use of the *Dost* factors have rejected these precedents as controlling on the question presented. *See United States v. Wilkerson,* 124 F.4th 361, 368-69 (5th Cir. 2024) (*Williams* does not abrogate circuit precedent adopting *Dost* factors); *United States v. Jakits*, 129 F.4th 314, 323-34 (6th Cir. 2025) (same); *Boam*, 69 F.4th at 613 (*Hillie*'s reasoning incompatible with circuit precedent upholding use of *Dost* factors); *McCoy*, 108 F.4th at 643-44 (same). And the Fourth Circuit omitted any discussion of Supreme Court precedent from its analysis. App. 1a-12a.

B. The question is important, regularly recurs, and this case presents an excellent vehicle in which to decide it.

Every year, federal courts sentence close to 2,000 defendants for offenses incorporating the definition of "sexually explicit conduct." The stakes are significant because expanding the reach of child pornography crimes beyond the First Amendment limitation articulated in *Ferber* threatens protected speech and subjects defendants to severe punishments. Criminal liability should not turn on non-textual factors, including mere nudity, that "move[] the law decidedly away from the statute's text and into the vague and uncertain arena of subjective intent." *McCoy*, 108 F.4th at 652 n.11 (Grasz, J., with whom Smith, C.J., and Kelly, Erickson, and Stras, J.J., join, dissenting). Nor should this indeterminacy of the statutory interpretation of a criminal element turn on the geographic circuit in which the defendant happens to be charged.

The question presented is critically important. Thousands of defendants are prosecuted federally every year for crimes involving child pornography, and they are punished harshly. The Court's intervention would resolve an irreconcilable split between the courts of appeals over the interpretation of a statutory element of child pornography crimes, and this case is an ideal vehicle to resolve it. The Court should grant certiorari.

This Court has recognized the importance of determining "which kind of court"—trial or appellate—"is better suited to resolve" a mixed question of law and fact. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The standard-of-review question presented here is especially important because of its First Amendment implications and the increasing frequency with which these questions will arise in the coming years. A Westlaw search reveals that in 2018, 108 circuit-court cases and 181 district court cases cited 18 U.S.C. 2256 (which defines "sexually explicit conduct"). From 2010 to 2018, 178 circuit courts and 223 district courts applied the phrase "lascivious exhibition" in child-pornography cases. Those numbers will only increase as federal prosecutors bring more and more child-pornography cases. *See, e.g.*, Press Release, Number of Persons Prosecuted for Commercial Sexual Exploitation of Children Nearly Doubled from 2004 and 2013, Bureau of Justice Statistics (Oct. 12, 2017), https://tinyurl.com/yxd7f66m. In the future, they will likely rise dramatically. *See* Michael H. Keller & Gabriel J.X. Dance, The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong? N.Y.

Times (Sept. 29, 2019), https://tinyurl.com/y4lmbm9c ("[L]ast year, tech companies reported over 45 million online photos and videos of children being sexually abused—more than double what they found the previous year."). Trends like these make it especially important for the Court to ensure uniformity—with federal child-pornography defendants having the same appellate rights no matter where they live.

This case presents a purely legal issue for which there are no jurisdictional problems, factual disputes, or preservation issues. The images on which Grunwaldt' convictions depend depict a minor engaged in nonsexual activities while nude and whose pubic area is incidentally visible (but not a particular focus of the images). The question presented—whether such images depict "sexually explicit conduct," and the "lascivious exhibition of the anus, genitals, or pubic area," in particular, were raised, thoroughly briefed and argued, and addressed in the Fourth Circuit in a precedential opinion. If the surreptitious videos of a minor engaged in nonsexual activity cannot as a matter of law depict "lascivious exhibition" or "sexually explicit conduct" under 18 U.S.C. § 2256(2)(A), the Court should grant the petition and reverse the Fourth Circuit on the merits with respect to Counts One thru Six.

C. The Fourth Circuit's decision below is wrong and conflicts with this Court's precedent.

Where, as with respect to the conviction challenged here, the only sexually explicit conduct alleged was the lascivious exhibition of the genitals and pubic area, the question of whether Grunwaldt' surreptitious recording was illegal

"depends on whether the [minor] engaged in any sexually explicit conduct" as depicted in the recording at issue. *Hillie*, 38 F.4th at 236 (Katsas, J., concurring in the denial of rehearing en banc). This, in turn, "depends on whether [the minor] made a lascivious exhibition of her genitals." *Id.* Thus, "[a] child engages in 'lascivious exhibition' under section 2256(2)(A)(v) if, but only if, she reveals her . . . genitals, or pubic area in a sexually suggestive manner." *Id.* In other words, at an absolute minimum, the minor must "display[] his or her ... genitalia, or pubic area in a manner connoting that the minor, or any person or thing appearing with the minor in the visual depiction, exhibits sexual desire or an inclination to engage in any type of sexual activity." *Hillie*, 39 F.4th at 685.

The Fourth Circuit's interpretation of § 2251(a), which ties the meaning of "lascivious exhibition" to the depiction of the image itself, rather than the minor's conduct, violates canons of statutory interpretation and is contrary to the Court's precedent. The term "lascivious exhibition" in § 2256(2)(A)(v) refers to one of the five types of "sexually explicit conduct" that must be captured in the "visual depiction" produced. *See* § 2251(a). Under this Court's precedent, what makes a visual depiction illegal is not whether the image created and viewed is a "lascivious exhibition," but whether the minor's conduct on camera constitutes a "lascivious exhibition of the genitals"—or sexual intercourse, bestiality, masturbation, or sado-masochistic abuse. *See Williams*, 553 U.S. at 296-97.

In *Williams*, the Court emphasized that "sexually explicit conduct" means the "actual or simulated" conduct "engaged in by an actual minor" on camera—not

merely the depiction itself. 553 U.S. at 296-97. And consistent with *X-Citement Video*, *Ferber*, and *Miller*, a "lascivious exhibition" requires that the minor's conduct be more than mere nudity or that which is risqué in order to connote "hard core" pornography. *X- Citement Video*, 513 U.S. at 84 (Scalia, J., dissenting) ("What is involved … is not the clinical, the artistic, nor even the risqué, but hard-core pornography").

This natural limitation on the plain language of § 2256(2)(A)—which ties "lascivious exhibition" to the minor's conduct—is made further obvious when compared to the federal statute that makes "video voyeurism" a crime. 18 U.S.C. § 1801. Section 1801 is violated when a person "has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy." *Id*. North Carolina has a similar statute. N.C. Gen. Stat. § 14-202. The federal child pornography statute under which Grunwaldt was convicted does not encompass mere voyeurism but instead requires that the image depict a "lascivious exhibition of the . . . genitals," rather than merely a recording of an individual's "private area." 18 U.S.C. § 2251(a); *Hillie*, 39 F.4th at 685, 692 n.1. Congress chose to criminalize video voyeurism only within specified federal jurisdictions, leaving prosecution of offenses occurring in other jurisdictions to the states. H.R. Rep. No. 108-504, at 2-3 (2004); *see supra* n.3.

By directing the jury to focus on the image, rather than the minor's conduct depicted therein, the Fourth Circuit conflated two distinct elements of the offense

of conviction, 18 U.S.C. § 2251(a). It conflates the statute's requirement for "sexually explicit conduct" (*e.g.*, "lascivious exhibition") with the separate requirement regarding a "depiction" of "such conduct." *Id.* Whether the minor's nudity constituted a lascivious exhibition must be considered independently of the depiction that was produced. *United States v. Hillie*, 39 F.4th 674, 688 (D.C. Cir. 2022) ("'lascivious exhibition'...refers to the minor's conduct that the visual depiction depicts, and not the visual depiction itself"). The Fourth Circuit also erred by allowing consideration of a future viewer's reaction to depictions of the minor's conduct. That a defendant "may have found the images sexually exciting ... can't suffice" where there is no sexually explicit conduct "in the videos" themselves. *Donoho*, 76 F.4th at 602 (Easterbrook, J., concurring in the judgment). No one would "say that a girl performing [ordinary] acts" such as "tak[ing] a shower" "is engaged in sexually explicit conduct just because someone else looks at her with lust." *Hillie*, 38 F.4th at 238 (Katsas, J., concurring in the denial for rehearing en banc).

Williams established that statutes criminalizing depictions of "sexually explicit conduct" cannot apply simply because "someone … subjectively believes that an innocuous picture of a child is 'lascivious.'" 553 U.S. at 301. "[The] material in fact (and not merely in [the defendant's] estimation) must meet the statutory definition." *Id.* For example, "[w]here the material at issue is a harmless picture of a child in a bathtub" but the defendant subjectively "believes that it constitutes a 'lascivious exhibition of the genitals,' the statute has no application." *Id.*

The fact that a minor is at times nude while engaging in everyday, nonsexual activities is insufficient to transform a depiction of innocent activity into a depiction of "sexually explicit conduct." The Fourth Circuit erred as a matter of law by allowing a jury to convict Grunwaldt for producing images depicting "sexually explicit conduct" when they do not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4257

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRANDON GRUNWALDT,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:21-cr-00182-RJC-SCR-1)

Submitted: March 4, 2025 Decided: June 4, 2025

Before THACKER, QUATTLEBAUM, and RUSHING, Circuit Judges.

Affirmed by unpublished opinion. Judge Quattlebaum wrote the opinion, in which Judge Thacker and Judge Rushing joined.

ON BRIEF: David Q. Burgess, DAVID BURGESS LAW, PC, Charlotte, North Carolina, for Appellant. Dena J. King, United States Attorney, Charlotte, North Carolina, Amy E. Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

QUATTLEBAUM, Circuit Judge:

After being convicted by a federal jury, Brandon Grunwaldt appeals his conviction for producing and possessing child pornography in violation of 18 U.S.C. § 2251(a) and § 2252A(a)(5)(B). He challenges the district court's jury instructions, admission of evidence of his internet history and denial of his motion for an acquittal. Finding no reversible error, we affirm.

I.

From February through October of 2020, Grunwaldt and his now ex-wife were living in separate homes. Their daughter, who was 14 at the time, lived with her mother during the week and with Grunwaldt on the weekends. Five separate times during that time period, Grunwaldt set up one of his cell phones inside of a hair dryer box with a hole cut into the side of it, placed the box on the bathroom counter, pointed it at the toilet or the shower and filmed videos of his minor daughter undressing, showering and using the bathroom.[1] Grunwaldt filmed the fifth video on October 31, 2020. That time, his daughter found his iPhone inside of the hair dryer box actively recording. She left the house that day and tried to call her mother. But Grunwaldt followed her outside and asked her not to. So, she waited until she returned to her mother on Monday to tell her what happened. Her mother then assisted her in reporting the incident to the police.

Detective Michael Maness and Captain Wedra with the Mint Hill, North Carolina Police Department worked on the investigation. With Grunwaldt's cooperation, they

[1] The videos were captured on February 16, 2020; March 2, 2020; March 8, 2020; August 14, 2020; and October 31, 2020.

obtained two phones, which they searched. Officers later obtained a search warrant for Grunwaldt's home, electronics, vehicle and several iCloud accounts. While searching his home, they found the hair dryer box with a hole cut out that Grunwaldt had used to hide his iPhone while filming his daughter, as well as an iPad. Analyst Amy Olsen with Homeland Security Investigations extracted data from Grunwaldt's phones and his iPad. She found five videos that Grunwaldt had made of his daughter. The videos showed Grunwaldt placing his phone in a box on the bathroom counter, adjusting the box to point the camera at various parts of the bathroom and departing before his daughter entered the bathroom and undressed and showered.

In addition, Olsen extracted Grunwaldt's browser and internet history from his iPad and gave the data to Agent Aaron Bode, also a special agent with Homeland Security Investigations. Grunwaldt's internet history showed websites that Grunwaldt had visited, searches he had run and videos he had viewed and saved as favorites. That history showed that on March 5, 2020, Grunwaldt ran Google searches for phrases like "Daddy-Daughter Porn" and other phrases describing father-daughter sexual activity. J.A. 243. And on April 19, 2020, Grunwaldt viewed several videos on motherless.com, a website that contains a wide variety of pornographic material.[2]

Later, a federal grand jury indicted Grunwaldt with five counts of producing or attempting to produce child pornography in violation of 18 U.S.C. § 2251(a) and one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Underlying

[2] Examples of the videos that Grunwaldt viewed on that website include titles such as "Perving on my Daughter" and "Hidden Cam Shower Vids." J.A. 245.

the five production counts were the five hidden-camera videos Grunwaldt filmed of his fourteen-year-old daughter while she was nude in their shared bathroom. And those same videos were the basis of the possession count.

Prior to trial, the United States filed a notice of its intent to admit evidence of Grunwaldt's use, during the same time frame in which he was filming graphic videos of his minor daughter in their bathroom, of motherless.com to view and save videos depicting fathers secretly filming their daughters in the bathroom and fathers having sex with their daughters. The government argued it would "provide[] background and context to the crimes charged in the indictment" and would "serve to complete the story for the jury." J.A. 20. The government also argued that it was admissible to show Grunwaldt's motive and intent with respect to the charged crimes. At a pretrial conference, over Grunwaldt's objection, the district court held that the internet-use evidence was admissible and that its probative value substantially outweighed any prejudicial effect.

Grunwaldt's trial began in mid-February of 2022. The government introduced evidence of the five videos found on his devices and in his iCloud account, as well as testimony about what they showed. It also introduced evidence of Grunwaldt's internet use. Agent Bode specifically testified that Grunwaldt's history of using motherless.com was pertinent to their investigation because "it can on occasion have child pornographic material on there." J.A. 240.

After the close of all evidence[3] and closing arguments, the district court instructed the jury on the applicable law. Each of Grunwaldt's charged offenses required the government to prove that Grunwaldt had produced, and in turn possessed, a video depicting a minor engaged in "sexually explicit conduct."[4] 18 U.S.C. § 2251(a). The relevant definition of sexually explicit conduct required the government to prove that the videos depicted a "lascivious exhibition." 18 U.S.C. § 2256(2)(A)(v). Thus, the court explained to the jury that "lascivious exhibition of the anus, genitals, or pubic area of a person . . . means a depiction which displays or brings forth to view to attract notice to the anus, genitals, or pubic area of children in order to excite lustfulness or sexual stimulation of the viewer." J.A. 387–88. It also explained that "[l]asciviousness is not a characteristic of the child videotaped, but of the exhibition which the producer sets up for an audience that consists of himself or others" and that "[e]ven videos of children acting innocently" can satisfy the definition "if they are intended to excite lustfulness or sexual stimulation [in] the viewer." J.A. 388. Finally, the court explained that "[m]ore than nudity is required to render a video lascivious," that the focus of the video must be on an individual's genitals or pubic area and that the jury needed to consider "all of the evidence concerning the defendant's conduct" in making its determination. J.A. 388–89.

[3] At trial, Grunwaldt testified on his own behalf and was cross-examined by the government. He did not present any evidence or other witnesses aside from his own testimony.

[4] Grunwaldt's production counts also charged him with attempting the production offenses.

Grunwaldt also moved for a judgment of acquittal at the close of the government's case, and he renewed his motion at the close of his own case. The district court denied both motions.

The jury ultimately found Grunwaldt guilty of all six counts. Following his sentencing, Grunwaldt timely noticed this appeal.

II.

Grunwaldt makes three primary challenges to his convictions. He argues that the district court's jury charge prejudiced his case by misstating the law; that the district court abused its discretion in admitting evidence of his internet use and permitting Agent Bode to testify about the contents of the motherless.com website; and that the district court erred in denying his motion for a judgment of acquittal. We address his arguments in turn.[5]

A.

Grunwaldt first argues that the district court incorrectly stated the law when it instructed the jury on the meaning of lascivious exhibition.[6] He contends that the district court wrongly instructed the jury that it could consider his subjective intent by using the sixth *Dost* factor and "compounded its error by excluding the other five *Dost* factors." Op. Br. at 30–31. By way of background, the *Dost* factors were developed by the Southern District of California to aid triers of fact "in determining whether a visual depiction of a

[5] We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[6] We review "a district court's jury instructions decision for [] abuse of discretion," *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013), and we review de novo whether the jury instructions in question correctly state the law, *see United States v. McLaurin*, 764 F.3d 372, 379 (4th Cir. 2014).

minor constitutes a 'lascivious exhibition of the genitals or pubic area' under § 2255(2)(E)." *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986); *see also United States v. Sanders*, 107 F.4th 234, 263 (4th Cir. 2024). The first few factors include "whether the focal point of the visual depiction is on the child's genitalia or pubic area," "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity." *Id.* The sixth factor is "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.*

Grunwaldt's argument fails for three reasons. First, the district court did not simply instruct the jury using the sixth *Dost* factor while disregarding the other five factors. Rather, it quoted one of our precedent's explanations of lascivious exhibition almost exactly, which explained that lascivious exhibition means "a depiction which displays or brings forth to view in order to attract notice to the genitals or pubic area of children, in order to excite lustfulness or sexual stimulation in the viewer." *United States v. Courtade*, 929 F.3d 186, 192 (4th Cir. 2019) (quoting *United States v. Knox*, 32 F.3d 733, 745 (3d Cir. 1994)); *see also* J.A. 388 (same). Thus, the district court's instructions on lascivious exhibition were consistent with Fourth Circuit law. Second, even if the court had used the *Dost* factors in its instructions, we have sanctioned their use post-*Courtade*. *See Sanders*, 107 F.4th at 263 (explaining that "the *Dost* Factors may not be necessary or helpful in every child pornography prosecution" but that "the trial court did not err in using those Factors in these circumstances"); *see also United States v. Deritis*, No. 23-4150, 2025 WL 1386211, at *6–7 (4th Cir. May 14, 2025). Third, we held in *Courtade* and *Sanders* that subjective intent

can be considered when evaluating lasciviousness. So, the district court did not err in instructing the jury to that effect. *See Courtade*, 929 F.3d at 192–93; *see also Sanders*, 107 F.4th at 262; *Deritis*, 2025 WL 1386211, at *7–8. For these reasons, we find no error in the district court's jury instructions.

B.

Grunwaldt next argues that the district court (1) abused its discretion by admitting evidence of his internet history and use from the time frame in which he filmed the videos of his daughter and (2) erred in admitting Agent Bode's statement about the kinds of pornography he had been told motherless.com might contain.[7]

Grunwaldt insists that the district court erred when it found that his internet history and use "completed the story" of his charged offenses. He says this history and use was not probative of an integral component of the crimes on trial because it merely showed he was viewing legal, adult pornography—not child pornography. This argument implicates Rule 404(b) of the Federal Rules of Evidence.

Rule 404(b) prohibits the use of "[e]vidence of any other crime, wrong, or act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, this prohibition "does

[7] We review a district court's decision to admit evidence for abuse of discretion. *See United States v. Hodge*, 354 F.3d 305, 312 (4th Cir. 2004) (citing *United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997)). Further, because Grunwaldt did not object to Agent Bode's testimony below on hearsay grounds, we would ordinarily review this for plain error. *See United States v. Zayyad*, 741 F.3d 452, 458–59 (4th Cir. 2014). However, even if Grunwaldt had properly objected, there would still be no abuse of discretion for the reasons given below.

not apply to *intrinsic* evidence," which is "evidence that is inextricably intertwined with the evidence regarding the charged offense because it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted or serves to complete the story of the crime on trial." *United States v. Hoover*, 95 F.4th 763, 770 (4th Cir. 2024) (cleaned up). Importantly, this Court very recently held that nearly identical evidence of "web searches" from the same time as the charged child pornography offense, located on the same device that the defendant used to "discover, view, create, and store" child pornography, was intrinsic evidence that completed the story of the crime. *Id.* at 770–71.

Our recent *Hoover* decision found that very similar evidence was intrinsic. There, the government introduced evidence that the defendant searched for terms such as "selfies boy oh boy," "selfies boy" and "selfies boy masturbating." *Id.* at 770. We held the admission of that evidence was not improper because it "reveal[ed] Hoover's interest in depictions of minor boys masturbating," which was "'the same sort of conduct' underlying the charged offenses." *Id.* (quoting *United States v. Ebert*, 61 F.4th 394, 403 (4th Cir. 2023)). The same is true here. Regardless of whether Grunwaldt's searches[8] resulted in his viewing actual child pornography or legal adult pornography, they reveal his interest in

[8] Grunwaldt was using his iPhone and iPad to search motherless.com and Google for graphic videos and images. His searches were for phrases such as "Daughter Almost Caught by Dad," and the terms "hidden," "hidden cam," and "masturbation spy." J.A. 241–42, 247. He also found and viewed videos with titles such as "Daddy-Daughter Porn," "Perving on my Daughter," "Daddy Sets Up Spy Cam to See his Daughter Naked," "In the Bath Hidden Camera," and "Sexy Teen Caught Masturbating in Shower." J.A. 243, 245–48.

hidden-camera videos of young girls in the shower or engaging in sexual activity in the bathroom—the same sort of conduct underlying his charged offenses. This is especially true because the internet history is from the same time frame in which Grunwaldt was filming hidden-camera videos of his daughter, using the same phone that he was using to film her—as was the case in *Hoover*. *Id.* Thus, we hold that the district court acted within its discretion in holding that Grunwaldt's internet searches were intrinsic evidence, and their admission did not violate Rule 404(b) or Rule 403. *Id.* at 771.

As to Agent Bode's testimony about motherless.com, Grunwaldt claims it was hearsay testimony that should not have been admitted. At trial, Agent Bode testified, without being prompted, that he had "learned from speaking with" colleagues that motherless.com could "on occasion have child pornographic material on there." J.A. 240. Grunwaldt's trial counsel did not object to this testimony on hearsay grounds.

Assuming, without deciding, that he preserved the hearsay argument, Grunwaldt's argument still fails. The prohibition on hearsay only applies to statements offered for their truth. *See* Fed. R. Evid. 801(c), 802. And Agent Bode's statement about the child pornography on motherless.com that he had been told about was immediately followed by the phrase: "[s]o it is of interest to us." J.A. 240. Thus, the statement was plainly made not to prove what sort of content motherless.com did or did not contain but to explain Agent Bode's heightened interest in that website once he identified it in Grunwaldt's internet history. *See United States v. Love*, 767 F.2d 1052, 1063–64 (4th Cir. 1985) (statements made "for the limited purpose of explaining why a government investigation was undertaken" are not hearsay); *see also United States v. Simmons*, 11 F.4th 239, 263–64 (4th

Cir. 2021) (statements offered to prove their effect on the listener are not hearsay). The district court did not abuse its discretion in admitting the statement.

C.

Finally, Grunwaldt argues that the district court erred in denying his motion for judgment of acquittal as to all counts. We review the district court's denial of Grunwaldt's motion de novo. *See United States v. Davis*, 75 F.4th 428, 437 (4th Cir. 2023). In doing so, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Grunwaldt insists that the five videos he filmed of his daughter do not depict a lascivious exhibition of her "anus, genitals, or pubic area" as required by our *Courtade* decision. Thus, he argues that the evidence at trial was insufficient to prove that he committed or attempted to commit the charged offenses. *Courtade*, 929 F.3d at 192. We disagree.

As explained above, this circuit's law permits courts to consider both the contents of the videos and their maker's purpose and intent in creating the depictions when evaluating lasciviousness. *See Courtade*, 929 F.3d at 192; *see also Sanders*, 107 F.4th at 261–63; *Deritis*, 2025 WL 1386211, at *6–7. First, the videos all show the minor's fully nude breasts and pubic region. Second, the videos show that Grunwaldt (1) used a hidden camera; (2) made adjustments to improve the camera's view of the minor while the camera was filming; (3) changed the focus and positioning of the camera in between some of the videos, to better capture the shower and toilet where the minor was more likely to be fully nude; and (4) repeatedly enlarged the camera hole to better capture the minor. Thus, the

videos, together with Grunwaldt's repositioning and adjusting, satisfy this circuit's definition of "lascivious exhibition." A rational trier of fact could have found that the videos both "display or bring forth to view in order to attract notice" to the minor's genitals and pubic area, and that they were made "in order to excite lustfulness or sexual stimulation in the viewer." *Courtade*, 929 F.3d at 192 (cleaned up). We find no error in the district court's denial of Grunwaldt's motion for judgment of acquittal as to all counts.

III.

For these reasons, the district court's judgment is,

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	)	
	)	DOCKET NO.
vs.	)	3:21-cr-182
BRANDON GRUNWALDT,	)	
Defendant.	)	

TRANSCRIPT OF JURY TRIAL VOLUME 2 OF 2
BEFORE THE HONORABLE ROBERT J. CONRAD, JR.
UNITED STATES DISTRICT COURT JUDGE
TUESDAY, FEBRUARY 15, 2022, AT 8:30 A.M.

APPEARANCES:

On Behalf of the Government:

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Official Court Reporter
United States District Court
Charlotte, North Carolina

violated. And then to give the elements and definitions.

So starting on page 1, I'm going to cover Counts One through Five together. And the indictment sets that out on page 1 and 2.

Give an "on or about" instruction on 3.

Read the statute charged on 4.

Give an "and/or" instruction on 5.

And then give the elements on 6. Any objection to the elements?

MS. RANDALL: No, Your Honor.

MR. ROBERTS: No, Your Honor.

THE COURT: The transition to definitions on 7.

And in addition to the definitions that are there already, I went -- overnight and reviewed the Government's proposed definition on "used" and the Government's proposed definition on "dominant purpose." And I intend to give both of those as well.

So we define "minor," "sexually explicit conduct."

MS. RANDALL: Your Honor, with regard -- do you want me to interrupt you when we get to one of the sections we're talking about?

THE COURT: Sure.

MS. RANDALL: With regard to sexually explicit conduct, we would ask that either the full definition be read, or at least it includes the term "masturbation."

Because we did include "attempt" language here and we did present evidence of videos with watching of people engaging in masturbation on hidden camera or in bathrooms. We think the jury can use it that he was attempting to create a video, hoping to create a video of the victim engaged in masturbation in the bathroom.

The other thing we mentioned kind of throughout this definition is the defendant was charged during a time when the definition of lascivious exhibition had been changed to include the anus. So we use the general pubic area or anus in it.

THE COURT: I was telling TJ yesterday you are much more articulate on terms like that than I am, so I commend you for that.

MS. RANDALL: I don't know if that's a good thing or not.

MR. ROBERTS: I have to -- may I make a comment on that as well.

THE COURT: Yes.

MR. ROBERTS: I agree with the Government. I think that sexually explicit conduct is a term of art. It's a defined term in the statute. I think it should have its own -- it should be laid out exactly as the statute.

THE COURT: Well, I do want to -- where there are many ways to violate a statute, and if there's no evidence of

one of the ways, it would be pointless to instruct on it.

But what I hear you saying is that there may be grounds for reading the whole statute. I'm trying to get -- it's 2261A?

MS. RANDALL: 2256.

THE COURT: Oh, the definition.

MS. RANDALL: Yes.

MR. ROBERTS: One thing that the court in Courtade did is that they listed the entire definition but italicized the last one to emphasize -- another way this Court could do it is they could list it and then on a separate page say "the issue in this case is this." And then reiterate it.

THE COURT: So you want me to say all those words?

MR. ROBERTS: I mean, the thing is, it is what the statute says. And when you have -- when we have a situation where we're dealing --

THE COURT: Well, there's no -- so there are at least five ways to violate the statute.

MR. ROBERTS: Right.

THE COURT: And there's no evidence of bestiality at all.

MR. ROBERTS: Right.

THE COURT: And so that's a way of violating the statute that is not presented by these facts. So I'm not sure why I would instruct on it.

MR. ROBERTS: So what I would say, Judge, is what the Court just said. The statute puts five ways you could satisfy the different -- definition of sexually explicit.

And I think that I think, to me, from my perspective, the Government has a different reason, but from my perspective I think it's important for the jury to see the term, "lascivious exhibition."

THE COURT: If you want it out, I'll instruct it that way.

MR. ROBERTS: I would want it, Your Honor.

MS. RANDALL: Your Honor, we would be satisfied on just the masturbation of "lascivious exhibition" because we view that's all the evidence would support a finding of from the jury.

There was no evidence of bestiality, or sadistic or masochistic abuse, or sexual intercourse. We would not be attempting to argue any of those things.

THE COURT: I'm going to list them all and then say -- I'll give some instruction on -- essentially the Government can prove its case if it proves beyond a reasonable doubt any one or more of the ways of violating the statute.

MR. ROBERTS: I actually like what you said earlier. You can add this. Which you said "there are five ways that can satisfy this definition." Because I think it's

important to see that the Congress intended to just --

THE COURT: All right. I'll come up with language that includes all five of the ways of violating the statute.

And, Ms. Randall, you will pay at some point in the future, making me to say that. I'm not telling you when or where I will exact my payment.

And then I'll go on to define "lascivious."

MS. RANDALL: Your Honor, in that paragraph, it appears the definition of lascivious exhibition was pulled from the Fourth Circuit decision in Courtade. And if so, it looks like the word "forth" was left out in the third line of the paragraph "displays or brings forth to view."

THE COURT: Yes. Thank you.

MR. ROBERTS: So I have some concerns about that. Obviously this is "the" thing that I think we need to get as white as possible -- or as clear as possible. And when I read it, I found even that I was a little confused. It would have the effect of not clarifying for me as much.

Would you like me to -- am I okay at this table? Or would you like me at the --

THE COURT: Well, you have to stand. And you can stand at the table. Tell me what you want.

MR. ROBERTS: All right. So let me go point by point.

In terms of Courtade --

THE COURT: I'm just talking about this definition.

MR. ROBERTS: I understand. But I'm referring to Courtade to inform what my arguments should be about this definition. First of all --

THE COURT: I just want to hear what you want. And then tell me --

MR. ROBERTS: I see. I see.

All right. In essence, well, I think the Government also said that what I want is that it -- let's see here. Wait a second.

The first paragraph I'm fine with. And I agree with the Government about just adding language from Courtade.

The second paragraph. It's -- well, first of all, there's a couple of things that I see here. The first sentence of the second paragraph, "Lascivious is not a characteristic of the child photograph."

Well, I don't see anywhere where any court has said, whether it's the court in U.S. v Hilly or the court in Courtade where they have said that lascivious refers to a characteristic of the child.

What I see in Courtade is that it says that -- and here -- let's see here.

THE COURT: Do you have a proposed instruction that's better than the one we have?

MR. ROBERTS: Let's see. First of all, let me

start with this. Let's start -- let me start with -- and I know that we are -- the second sentence -- and I'll go back to the first one in just a moment -- but the second sentence uses terms -- okay. Let me see if I can --

THE COURT: So the first paragraph, "minor" -- no one objects. The second paragraph we expand.

Do you all want to take out the third paragraph?

MR. ROBERTS: Let's see. What's -- the Government -- I would, yes.

MS. RANDALL: Your Honor, we think that that's accurate based on the case law from -- we read it, particularly --

THE COURT: I know. The question is: Is it helpful?

MS. RANDALL: Yes, we do think it is helpful.

MR. ROBERTS: I actually think in terms of if we look at, you know, again, Courtade --

THE COURT: Well, in addition to the lasciviousness, you now interject the issue of masturbation, the attempt. And so I don't want it limited to lascivious.

So I may say "In deciding whether there is a visual depiction rather than" the question for you to decide because what I hear you saying is there's more than one question.

MS. RANDALL: Yes.

THE COURT: "So in deciding whether there's a

visual depiction that amounts to a lascivious exhibition of the genitals, anus, or pubic area of a person, keep in mind the following."

MR. ROBERTS: It's the Court -- that appears to be, in essence, the sixth factor in Dost, because it seems to be bringing in like the six factors as "whether the visual depiction is intended or designed to elicit a sexual response." That's actually even a little bit more specific than just saying "You can consider all of the evidence."

And again, something outside of the four corners of the video. I mean, I don't think that's what Courtade said.

THE COURT: So nothing in my instruction comes from the Dost factors. The instruction comes from a variety of circuits that have defined lascivious in the way paragraph 1, 2, 3, 4 -- paragraph 4 defines it. My plan is to keep 4.

Let's talk about 5. "Lasciviousness is not a characteristic of the child photograph but of the exhibition which the photograph sets up for an audience that consists of himself or others."

MR. ROBERTS: What I would like to say in that first sentence is lasciviousness refers to the conduct that the minor was engaging in that was depicted.

THE COURT: I'm not going to say that. I don't think that accurately states the law.

MR. ROBERTS: Because I mean, it -- what I see here

is visual depictions in the case involving a minor engaging in, a minor engaging in sexually explicit conduct.

THE COURT: What says the Government with respect to the fifth paragraph?

MS. RANDALL: Your Honor, we believe the fifth paragraph is appropriate because it's based on case law from various circuits including the Fourth Circuit.

The only note that we had other than adding the word "anus" to fulfill the definition is the paragraph "even images of children acting innocently can be considered lascivious if they are intended to be sexual."

We would just ask it to say "if the images are intended to be sexual" so it's not confusing that you're talking about the images versus children.

MR. ROBERTS: And my one question is: We use this word "photograph," this word "images." And I guess wonder whether we should just be using the term "visual depiction" because that is a defined term in the statute.

MS. RANDALL: I think we could just use video. It's all video.

MR. ROBERTS: I actually think I would be okay with that. That would be the most straightforward.

THE COURT: Where we have photograph or image we use video?

MR. ROBERTS: Yes, yes, yes.

THE COURT: All right.

MR. ROBERTS: Let's see here.

THE COURT: Yep.

MR. ROBERTS: Now, that second sentence, it says "Even images of children acting innocently can be considered lascivious if they are intended to be sexual."

Shouldn't we say sexually explicit?

THE COURT: Or too, what if we said "to excite lustfulness" or --

MR. ROBERTS: Yeah.

THE COURT: -- "Sexual stimulation of the viewer?"

MR. ROBERTS: Yeah, I think that would be more clear.

MS. RANDALL: That's fine, Your Honor.

THE COURT: All right. I'll do that.

Before we move past lasciviousness, any other comments?

And I'm going to redo this and give each side a copy before I instruct just to make sure we're all on the same page.

MR. ROBERTS: Okay. All right.

THE COURT: So after the first full paragraph on 9, I intend to insert the Government's page 12 request for dominant purpose.

I'm going to define "producing."

The other thing is we have made a decision on our witnesses. We had three witnesses. One of them is out with COVID. The other two -- I know one is Sheri? She's not here. Anyway, one of them is here. The other one is going to -- but we made a decision that we will not be calling any further witnesses.

THE COURT: So I'll let you rest in front of the jury.

MR. ROBERTS: Very good.

THE COURT: Does the Government plan on putting on rebuttal evidence?

MS. RANDALL: No, Your Honor.

MR. ROBERTS: And, Your Honor, I also wanted to renew our motion, but I'd like to be heard briefly on it, if we could.

THE COURT: Mr. Grunwaldt, you can sit down.

I'll hear you from the podium, Mr. Roberts.

DEFENDANT'S ARGUMENT

MR. ROBERTS: Thank you, Your Honor.

Your Honor, we'd like to renew our Rule 29 motion at the close of all the evidence. The evidence in Mr. Grunwaldt's case does not satisfy the definition of lascivious exhibition because the visual depiction of the minor in this case involved only mere nudity and does not contain any audio or visual evidence of deceit, manipulation,

or the directing of the minor within its four corners.

There is no evidence that the minor ever engaged in any sexual conduct whatsoever or any activity connoting a sex act.

The mundane conduct of the visual depictions in this case is distinct from the conduct from the visual depictions in Courtade and analogous to the conduct in the visual depictions in U.S. versus Hilly.

Accordingly, the evidence in Mr. Grunwaldt's case does not satisfy the definition of lascivious exhibition. And since the act, by its terms, prohibits only visual depiction of a minor engaging in sexually explicit conduct, the evidence in Mr. Grunwaldt's case is expected to be insufficient as a matter of law to sustain a conviction in his case.

THE COURT: What says the Government?

PLAINTIFF'S ARGUMENT

MS. RANDALL: Your Honor, we believe the evidence, particularly in light of the most favorable to the Government, clearly is sufficient for this case to go to the jury.

With regard to the defendant's argument regarding Courtade and what was necessary in Courtade, in Courtade they gave the definition that we already talked about with the jury instructions. And they did rely, in fact, on deceit and

lying done by the defendant in that case.

And we have that in this case. In that case it was nudity including direct shots of the victim's breasts and genitals that were the product of the adult man's deceit, manipulation, and direction as captured in the video; and we have the same thing here.

There is deceit, Your Honor. He had to hide the camera in a box in order to capture the video that he wanted. He took a direct and active role. He didn't do it verbally in this case, but he did it physically.

He has no other shower videos. He only recorded videos when he knew the victim would be showering. And in this case, he used physical direction by placing the camera in a certain place on the counter, ensuring it was at waist level and aimed at her genitals, moving the camera to face different directions and sometimes moving it during the video, knocking any items such as sweatshirts or moving brushes and so forth in order to make sure they did not obscure his angle, and that he would be able to capture the victim.

And then finally moving the camera to ensure that he would capture the victim while sitting on a toilet, which would insure she was fully exposed to the camera. He would leave the camera running the entire time even though he entered and exited multiple times. In doing so he captured

her genital area, her backside and her breasts multiple times.

He selected this victim and directed the content by strategically placing his camera to catch what he wanted to see, Your Honor; and that is consistent with what the Fourth Circuit relied on in Courtade.

THE COURT: He also enlarged holes, which --

MS. RANDALL: That is true, Your Honor. He used scissors and his fingers to enlarge holes.

THE COURT: Very well.

Mr. Roberts, I have to consider your motion in the light most favorable to the Government at this stage. And when I do, I'm going deny to your motion, find that there's sufficient evidence to go to the jury, note your objection. You have that for the record.

Anything else?

MR. ROBERTS: That would be all, Your Honor.

THE COURT: All right. So when the jury comes in, I'll give them some preliminary instructions and then turn it over to the lawyers for final arguments.

Anything further?

MS. RANDALL: Nothing from the Government.

MR. ROBERTS: Nothing from us, Your Honor.

THE COURT: Call the jury.

(The jury came back into the courtroom at 9:39 a.m.,

files:" Count One, February 16, 2020, vid20200216221336.mp4.
Count Two, March 2, 2020, img0403.mov.
Count Three, March 8, 2020, img0406.mov.
Count Four, August 14, 2020, imd0550.mov.
And Count Five, October 31, 2020, img00664.mov.

"Which visual depictions were produced using materials that had been mailed, shipped, or transported in and affecting interstate and foreign commerce by any means, including by computer and the visual depiction was transported using any means and facility of interstate and foreign commerce, on violation of Title 18 United States Code Section 2251A."

You will note that the Bill of Indictment charges that the offense was committed on or about a certain date or dates. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient that the evidence in the case establishes beyond a reasonable doubt the offense in question was committed on a date reasonably near the date or dates alleged.

Title 18 of the United States Code Section 2251 reads in pertinent part as follows: "Any 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 commits an offense. If that visual depiction was produced using

materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means including by computer or if such visual depiction has actually been transported or transmitted using any means or a facility of interstate or foreign commerce or in it or affecting interstate or foreign commerce."

Now, when a statute specifies several alternative ways in which an offense can be committed, in the disjunctive -- we're using the word "or." The indictment may allege several ways in the conjunctive or using the word "and," you may find the defendant guilty of the offense if you find beyond a reasonable doubt that he committed one or more of the means of violating the statute, thus where the indictment uses the term "and," you may consider it as or unless I specifically instruct you differently.

Defendant is charged with five separate violations of 18 United States Code Section 2251A. I remind you that each count and the evidence pertaining to it should be considered separately.

For you to find the defendant guilty of any of the offenses charged in Count One through Five, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

That on or about the date alleged, within the Western District of North Carolina, 1.) the defendant

employed, used, persuaded, induced, enticed or coerced a minor to engage in sexually explicit conduct.

2) the defendant acted with the purpose of producing a visual depiction of such conduct.

3) the visual depiction was produced using materials that had been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means or the visual depiction was actually transported using any means or facility of interstate or foreign commerce.

I shall now define certain terms used in the essential elements, and you are to apply these definitions as you consider the evidence.

I do not define certain words. You will assign to them their ordinary, everyday meaning.

The term "minor" means any person under the age of 18 years.

Sexually explicit conduct means actual or simulated conduct and includes sexual intercourse, including genital-to-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex; bestiality, masturbation; sadistic or masochistic abuse; or lascivious exhibition of the anus, genitals or pubic area of any person.

In deciding whether there is a visual depiction that amounts to a lascivious exhibition of the anus, genitals

or pubic area of a person, you should be guided by the following:

The word "lascivious" is defined as of or marked by lust or exciting sexual desires.

The term "lascivious exhibition" means a depiction which displays or brings forth to view to attract notice to the anus, genitals, or pubic area of children in order to excite lustfulness or sexual stimulation of the viewer.

Lasciviousness is not a characteristic of the child videotaped, but of the exhibition which the producer sets up for an audience that consists of himself or others. Even videos of children acting innocently can be considered lascivious if they are intended to excite lustfulness or sexual stimulation of the viewer.

However, not every exposure of the genitals, anus or pubic area of children constitutes a lascivious exhibition. More than nudity is required to render a video lascivious. Rather, the focus of the video must be on the anus, genitals, or pubic area in order to excite lustfulness or sexual stimulation of the viewer.

In deciding whether the Government has proven beyond a reasonable doubt that the defendant acted for the purpose of producing a video of sexually explicit conduct, you may consider all of the evidence concerning the defendant's conduct.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2251

§ 2251. Sexual exploitation of children

Effective: October 13, 2008
Currentness

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

CREDIT(S)

(Added Pub.L. 95-225, § 2(a), Feb. 6, 1978, 92 Stat. 7; amended Pub.L. 98-292, § 3, May 21, 1984, 98 Stat. 204; Pub.L. 99-500, Title I, § 101(b) [Title VII, § 704(a)], Oct. 18, 1986, 100 Stat. 1783-39, 1783-75; Pub.L. 99-591, Title I, § 101(b) [Title VII, § 704(a)], Oct. 30, 1986, 100 Stat. 3341-75; Pub.L. 99-628, §§ 2, 3, Nov. 7, 1986, 100 Stat. 3510; Pub.L. 100-690, Title VII, § 7511(a), Nov. 18, 1988, 102 Stat. 4485; Pub.L. 101-647, Title XXXV, § 3563, Nov. 29, 1990, 104 Stat. 4928; Pub.L. 103-322, Title VI, § 60011, Title XVI, § 160001(b)(2), (c), (e), Title XXXIII, § 330016(1)(S) to (U), Sept. 13, 1994, 108 Stat. 1973, 2037,

2148; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[4]], Sept. 30, 1996, 110 Stat. 3009, 3009-26, 3009-30; Pub.L. 105-314, Title II, § 201, Oct. 30, 1998, 112 Stat. 2977; Pub.L. 108-21, Title I, § 103(a)(1)(A), (b)(1)(A), Title V, §§ 506, 507, Apr. 30, 2003, 117 Stat. 652, 653, 683; Pub.L. 109-248, Title II, § 206(b)(1), July 27, 2006, 120 Stat. 614; Pub.L. 110-358, Title I, § 103(a)(1), (b), Oct. 8, 2008, 122 Stat. 4002, 4003; Pub.L. 110-401, Title III, § 301, Oct. 13, 2008, 122 Stat. 4242.)

Notes of Decisions (382)

18 U.S.C.A. § 2251, 18 USCA § 2251
Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2252A

§ 2252A. Certain activities relating to material constituting or containing child pornography

Effective: December 7, 2018
Currentness

(a) Any person who--

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes--

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly--

(A) reproduces any child pornography for distribution through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct--

(A) that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

(7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.[1]

shall be punished as provided in subsection (b).

(b)(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense.--It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of evidence.--On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil remedies.--

(1) In general.--Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) Relief.--In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including--

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child exploitation enterprises.--

(1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.

(2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

CREDIT(S)

(Added Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121[3(a)]], Sept. 30, 1996, 110 Stat. 3009-28; amended Pub.L. 105-314, Title II, §§ 202(b), 203(b), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 107-273, Div. B, Title IV, § 4003(a)(5), Nov. 2, 2002, 116 Stat. 1811; Pub.L. 108-21, Title I, § 103(a)(1)(D), (E), (b)(1)(E), (F), Title V, §§ 502(d), 503, 505, 507, 510, Apr. 30, 2003, 117 Stat. 652, 653, 679, 680, 682 to 684; Pub.L. 109-248, Title II, § 206(b)(3), Title VII, § 701, July 27, 2006, 120 Stat. 614, 647; Pub.L. 110-358, Title I, § 103(a)(4), (b), (d), Title II, § 203(b), Oct. 8, 2008, 122 Stat. 4002, 4003; Pub.L. 110-401, Title III, § 304, Oct. 13, 2008, 122 Stat. 4242; Pub.L. 111-16, § 3(5), May 7, 2009, 123 Stat. 1607; Pub.L. 112-206, § 2(b), Dec. 7, 2012, 126 Stat. 1490; Pub.L. 115-299, § 7(b), Dec. 7, 2018, 132 Stat. 4388.)

Notes of Decisions (465)

Footnotes

1 So in original. The period probably should be a comma.

18 U.S.C.A. § 2252A, 18 USCA § 2252A

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

End of Document

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

18 U.S.C. 2256 provides:

§ 2256. Definitions for chapter

For the purposes of this chapter, the term—

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

(2)(A) Except as provided in subparagraph (B), "sexually 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;

(B) For purposes of subsection 8(B) [1] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse

where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the

depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.