No. 17-735

In the Supreme Court of the United States

CHRISTOPHER G. LEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined, on plain-error review, that the evidence was sufficient to convict petitioner of attempted destruction of evidence, in violation of 18 U.S.C. 1512(c)(1).

2. Whether the court of appeals correctly determined, on plain-error review, that the evidence was sufficient to convict petitioner of sexual exploitation of children, in violation of 18 U.S.C. 2251(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is reprinted at 701 Fed. Appx. 175.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2017. On October 3, 2017, Justice Alito extended the time to file a petition for a writ of certiorari to and including November 9, 2017, and the petition was filed on November 8, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of sexual exploitation of children, in violation of 18 U.S.C. 2251(a); obstruction of justice by attempted destruction of evidence, in violation of

18 U.S.C. 1512(c); receipt of child pornography, in violation of 18 U.S.C. 2252A(a)(2); and possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Judgment 1-2. He was sentenced to 216 months of imprisonment, to be followed by 20 years of supervised release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioner operated the Boal Mansion Museum in Boalsburg, Pennsylvania and invited young people, mostly teenagers, to work there as docents. Pet. App. 1a-2a. The docents would live at the Mansion during their time as volunteers. *Id.* at 3a. In 2014, a 17-year-old boy who had traveled to the Mansion to participate in the docent program alleged that petitioner had attempted to touch his genitals and had enticed him to engage in sexual contact. *Ibid.* The police obtained and executed search warrants for petitioner's laptop computer and other items. *Ibid.* On petitioner's devices, the police found thousands of graphic images of prepubescent boys and lists of websites known for child pornography. *Id.* at 4a.

Some of the devices included photographs that petitioner had taken of the young docents. Pet. App. 4a. Petitioner had edited, or "cropped," the images to focus on the minors' genitals, buttocks, or pubic areas. *Ibid.* For example, one photograph showed a young man exiting a swimming pool wearing a bathing suit with his legs spread apart; the photograph was cropped to focus on the youth's crotch and his genitals were evident beneath his bathing suit. *Ibid.* Another image appeared to depict one boy touching another boy's genitals, and another showed a boy who appeared to be touching himself. *Id.* at 12a n.6. Petitioner also had 26 sexually explicit stories featuring young boys. *Id.* at 4a. Petitioner

had placed images into the texts to illustrate the stories, and some stories were illustrated with the cropped images of the children from the docent program. *Id.* at 4a-5a. The narratives were created under petitioner's name. *Id.* at 5a.

Petitioner was arrested and charged with multiple crimes relating to the sexual exploitation of minors. Pet. App. 5a. While incarcerated, petitioner called his cousin several times, asking the cousin to retrieve petitioner's cell phone from the FBI and to contact an individual who could "wipe" the data from the phone. *Ibid.* (citation omitted). When the cousin did not do so, petitioner asked the cousin to give him the contact information for the individual so that petitioner could make that request himself. *Ibid.* Despite his efforts, petitioner did not succeed in getting the data on the phone deleted. *Ibid.*

The jury found petitioner guilty on four counts, including, as relevant here, sexual exploitation of children, in violation of 18 U.S.C. 2251(a), and obstruction of justice by attempted destruction of evidence, in violation of 18 U.S.C. 1512(c). Judgment 1-2.

2. The court of appeals affirmed. Pet. App. 1a-17a. As relevant here, petitioner argued that the evidence was insufficient to support his convictions for sexual exploitation of minors and for attempted obstruction of justice. *Id.* at 6a-7a. Petitioner conceded that plain-error review applied, see Pet. C.A. Br. 22, 32, because he had not moved for judgment of acquittal in the district court, and the court of appeals reviewed both of petitioner's challenges for plain error. See Pet. App. 10a-11a, 16a.

As to petitioner's conviction under Section 2251(a) for sexual exploitation of children, the court of appeals

began by observing that the statute prohibits, as relevant here, "us[ing] * * * any minor to engage in * * * , with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," with "sexually explicit conduct" defined to include a "lascivious exhibition of the genitals or pubic area." 18 U.S.C. 2251(a), 2256(2)(A)(v); see Pet. App. 11a. The court further observed that, under its precedent, a "lascivious exhibition" is not limited to nudity and does not require that the child's genitals or pubic area be discernable, but instead encompasses any "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." Pet. App. 11a (citation omitted).

Petitioner "concede[d] that at least some of the photographs in question were lascivious in nature," Pet. App. 11a-12a, but argued that the government had not proven that, when he took the pictures, he had the intent to "'produc[e] any visual depiction' of a minor who was 'engaged in any sexually explicit conduct.'" *Id.* at 12a (quoting 18 U.S.C. 2251(a)) (brackets omitted). The court of appeals rejected that argument, finding sufficient circumstantial evidence of petitioner's intent to support the jury's verdict. The court explained that petitioner's "sexually explicit stories strongly suggest that [petitioner] took the images with the requisite intent," because "[t]he cropped images were closely connected to the narratives that [petitioner] illustrated": one story described a child wearing the same clothing as the child in a photograph, and another involved a child telling an adult to "'let me sleep,'" which was the same thing that a child said to petitioner in one of the

videos. *Id.* at 13a (citation omitted). The court also explained that "the large number of images and stories that the police uncovered"—"over two dozen stories, scores of sexually explicit cropped images, and thousands of images of child pornography"—made it "natural to conclude that [petitioner] took pictures of youth with his pornographic predilection in mind rather than innocently." *Ibid.*

The court of appeals separately affirmed petitioner's conviction for obstruction of justice by attempted destruction of evidence under 8 U.S.C. 1512(c)(1). Pet. App. 16a-17a. Petitioner argued that he did not take a "substantial step" toward destruction of the evidence. *Id.* at 16a (citation omitted). But the court concluded that there was no error, let alone a plain one. *Id.* at 17a. The court identified ample evidence in the record from which the jury could reasonably find that petitioner had taken a substantial step: petitioner told his cousin to retrieve his phone from the FBI and have someone wipe the data from it; when that did not happen, petitioner told his cousin to have the phone wiped remotely; he persistently asked his cousin whether the cousin had successfully had the phone wiped; and when his cousin refused to destroy the evidence, petitioner asked for the contact information for someone who could wipe the phone so that petitioner himself could make the arrangements. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-27) that the evidence was insufficient to sustain his convictions for obstruction of justice by attempted destruction of evidence and for sexual exploitation of a minor. But some arguments raised in the petition were not presented to the district court or the court of appeals, and they have therefore

not been preserved. In any event, the evidence was sufficient for a reasonable jury to find petitioner guilty of every element of both offenses beyond a reasonable doubt. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The questions presented are factbound, and the plain-error posture of this case makes it an especially poor vehicle for considering them. Further review is not warranted.

1. Petitioner first contends (Pet. 9-18) that the court of appeals erred by affirming his conviction for attempted destruction of evidence under 18 U.S.C. 1512(c)(1). Section 1512(c)(1) prescribes criminal punishment for anyone who "corruptly * * * alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." *Ibid.* The elements of an attempt offense are: (1) intent to commit the substantive offense and; and (2) taking a substantial step towards its commission. See *Braxton* v. *United States*, 500 U.S. 344, 349 (1991); *United States* v. *Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014); *United States* v. *Howard*, 766 F.3d 414, 419 (5th Cir. 2014), cert. denied, 135 S. Ct. 1015 (2015). A substantial step requires conduct that corroborates the firmness of the defendant's intent; it must be more than mere preparation, but is less than the last necessary act before the crime is committed. *Howard*, 766 F.3d at 419; *United States* v. *Yousef*, 327 F.3d 56, 134 (2d Cir.), cert. denied, 540 U.S. 933 (2003).

a. The court of appeals correctly determined that petitioner took several substantial steps to destroy evidence under Section 1512(c)(1), by repeatedly asking his cousin to obtain his phone and to have a third party

erase the incriminating data from it, and, after those requests were refused, asking his cousin for the contact information of that third person so that petitioner could himself request destruction of the evidence. Pet. App. 17a. Further review of that factbound determination is unwarranted because determining the sufficiency of the evidence is primarily the responsibility of a court of appeals, see *Hamling* v. *United States*, 418 U.S. 87, 124 (1974), and this Court does not ordinarily grant review to review the evidence or to discuss specific facts. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10.

b. Petitioner now contends that his solicitation of his cousin to erase the data on his phone cannot constitute an "attempt" to destroy evidence under Section 1512(c).

i. As an initial matter, that contention was never raised below and has therefore not been preserved. The court of appeals observed that petitioner did not move for judgment of acquittal in the district court. See Pet. App. 16a. Then in the court of appeals, petitioner argued only that he did not take a "substantial step" toward completion of the offense. See *id.* at 16a-17a; Pet. C.A. Br. 26-30. Petitioner did not argue to either court that the statutory term "attempt" in Section 1512(c) does not include solicitation, and as a result, the lower courts did not decide that question. This Court should follow its "normal practice" of denying review of issues not raised below. *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam); see *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 397 (2015) (a party's argument for an exception "was never presented to any lower court and is therefore forfeited"); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule * * * preclud[ing] a grant

of certiorari * * * when the question presented was not pressed or passed upon below") (citation and internal quotation marks omitted).

ii. In any event, petitioner's argument is incorrect. Traditionally, an attempt occurs when the defendant intends to commit a crime and then takes a substantial step towards its commission, whereas a solicitation occurs when the defendant recruits another person to commit a crime. *United States* v. *Cornelio-Pena*, 435 F.3d 1279, 1286 (10th Cir.), cert. denied, 547 U.S. 1185 (2006). In some jurisdictions, attempt can never be based solely on a solicitation, but in others it can be. See *United States* v. *American Airlines, Inc.*, 743 F.2d 1114, 1120-1121 n.10 (5th Cir. 1984) (collecting cases), cert. dismissed, 474 U.S. 1001 (1985).

There is, however, no circuit conflict on whether an attempt to commit any of the obstruction-of-justice and witness-tampering crimes in Section 1512 may be satisfied by a solicitation. Consistent with the decision below, in *United States* v. *Desposito*, 704 F.3d 221 (2d Cir.), cert. denied, 569 U.S. 995 (2013), the Second Circuit affirmed a defendant's conviction for attempted obstruction of justice under Section 1512(c)(2) where the defendant wrote multiple letters to friends seeking assistance to destroy or manufacture evidence related to a pending charge against him. The Second Circuit concluded that the defendant's written requests constituted a substantial step toward committing obstruction of justice. *Id.* at 230-231. Similarly, in *United States* v. *Veliz*, 800 F.3d 63, 68-73 (2d Cir.), cert. denied, 136 S. Ct. 522, and 136 S. Ct. 848 (2015), the Second Circuit held that a solicitation to commit murder of a witness constitutes an attempt to obstruct justice under Section 1512(b)(3). *Veliz* emphasized that because Section 1512

was enacted to prohibit a "broad constellation of methods of wrongfully impeding witness cooperation," Congress undoubtedly intended to reach solicitations to commit murder under that statute. *Id.* at 73.

Two courts of appeals have reserved the question whether a defendant's solicitation of another person to murder a witness would itself be sufficient to constitute a substantial step toward obstruction of justice under Section 1512(a)(1)(A). See *United States* v. *Irving*, 665 F.3d 1184, 1195-1204 (10th Cir. 2011), cert. denied, 566 U.S. 928 (2012); *United States* v. *Rovetuso*, 768 F.2d 809, 821-823 (7th Cir. 1985), cert. denied, 474 U.S. 1076, and 476 U.S. 1166 (1986). Those courts' reservations, however, do not establish a conflict in the circuits. In each case, it was not necessary for the court to decide that question because additional evidence of substantial steps supported the attempt conviction.

Petitioner suggests (Pet. 16-18) that the Tenth Circuit requires proof of a "tangible act" to support an attempt conviction and that mere words do not qualify as a "tangible act." His citation of *United States* v. *Monholland*, 607 F.2d 1311, 1316-1318 (10th Cir. 1979), which involved a different statute, does not support that suggestion. In *Monholland*, the Tenth Circuit reversed the defendant's convictions for attempted receipt of an explosive in interstate commerce, in violation of 18 U.S.C. 844(d), because the defendant's preliminary discussion with an undercover agent about obtaining explosives did not qualify as an attempt. 607 F.2d at 1317. But *Monholland*'s holding that the preliminary discussion in that case did not qualify as an attempt does not illustrate that the court would find no substantial step here. The Tenth Circuit indicated that if the defendant had engaged in a "tangible act" that constituted proximate

and tangible evidence of a real effort to commit the crime, then the government's position would have been more tenable. *Ibid.* Here, petitioner's repeated efforts to convince his cousin to have his phone wiped or to assist petitioner in getting his phone wiped, individually and in combination, reflected petitioner's determined effort to obstruct justice to the extent possible while incarcerated.

The remaining Tenth Circuit cases cited by petitioner likewise do not support his argument because in each case, the Tenth Circuit affirmed the attempt conviction under Section 1512 after concluding that the defendant had engaged in more than abstract talk. See *United States* v. *Gordon*, 710 F.3d 1124, 1148-1152 (attempted Section 1512(c)(2) offense), cert. denied, 134 S. Ct. 617 (2013); *United States* v. *Washington*, 653 F.3d 1251, 1264-1266 (2011) (Section 1512(a)(1)(A)), cert. denied, 565 U.S. 1128 (2012). Those cases do not show that the Tenth Circuit would find otherwise here.

2. Petitioner also contends (Pet. 19-27) that his conviction for sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a), is invalid because he did not "use" the young docents to engage in prohibited sexual conduct.

a. Petitioner did not move for judgment of acquittal on the Section 2251 count, see Pet. App. 10a-11a, and in the court of appeals, petitioner primarily argued that the government had failed to prove that, when he took the pictures of the minors, he had the intent to produce a sexually explicit image. *Id.* at 12a. The court rejected that argument, determining that petitioner's use of many of the cropped photographs to illustrate his sexually explicit stories and his large number of images evidenced a pattern that belied any innocent purpose.

Ibid. The court's determination on that point was correct, and petitioner does not renew his argument here. Because petitioner focused on intent, the court of appeals did not decide whether the evidence, viewed in the light most favorable to the government, did not show that he committed the actus reus of the crime.

b. In any event, petitioner errs in contending that his conduct was not proscribed by the statute, and there is no division in the circuits on the question. Section 2251 imposes criminal penalties on "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in * * * any sexually explicit conduct for the purpose of producing any visual depiction of such conduct," or any person who attempts to do so. 18 U.S.C. 2251(a); see 18 U.S.C. 2251(e). Section 2256 defines the term "sexually explicit conduct" to include "actual or simulated * * * (i) sexual intercourse * * * ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area" of a minor. 18 U.S.C. 2256(2)(A).

Petitioner conceded below that some of the images he created were lascivious. Pet. App. 11a-12a. Petitioner now argues (Pet. 22) that his conduct did not fall within the terms of the statute because he did not "use" the minors to engage in sexual activity, but instead took non-sexual photographs and videos that he later cropped to create a sexually explicit display. Petitioner is incorrect. The statutory elements are satisfied if a child is photographed engaging in sexual activity in order to create pornography, even if the activity is consensual, spontaneous, or undertaken without the defendant's direction or participation. See, *e.g.*, *United States* v. *Wright*, 774 F.3d 1085, 1089 (6th Cir. 2014), cert. denied, 135 S. Ct. 1873 (2015); *Ortiz-Graulau* v.

United States, 756 F.3d 12, 18-19 (1st Cir. 2014), cert. denied, 135 S. Ct. 1438 (2015); *United States* v. *Fadl*, 498 F.3d 862, 866 (8th Cir. 2007), cert. denied, 552 U.S. 1220 (2008); *United States* v. *Sirois*, 87 F.3d 34, 41 (2d Cir.), cert. denied, 519 U.S. 942 (1996). Congress's use of several verbs in the statute "reach[es] as broad as possible a range of ways that a defendant might actively be involved in the production of sexually explicit depictions of minors." *Ortiz-Gralau*, 756 F.3d at 19.

The act element of the crime was met in this case: petitioner repeatedly photographed the young docents at his museum engaging in conduct that could be made to appear to be lascivious, and he then cropped some of the photographs to emphasize the minors' genitalia, buttocks, or pubic areas, thereby completing the creation of sexually explicit depictions. Pet. App. 4a-5a. Petitioner later used some of the cropped photographs to illustrate his sexually explicit stories. *Ibid.* From that evidence, the jury could properly infer that petitioner took the photographs with the intent to create child pornography.

Petitioner cites (Pet. 25-26) cases from the Fourth, Second, and Fifth Circuits, but none suggests that petitioner's conviction would be overturned in those circuits. In *United States* v. *Palomino-Coronado*, 805 F.3d 127 (4th Cir. 2015), the Fourth Circuit held that a defendant did not engage in sexual activity with a minor "*for the purpose* of producing a visual depiction" of such conduct where the defendant and the minor repeatedly had sex over several months, and the defendant took only a single photograph of himself and the minor engaged in sexual activity, which he subsequently deleted. *Id.* at 130. The Fourth Circuit determined that the evidence showed only that the defendant had sex

with a minor and took a picture, not that he had sex with the minor with the intent of taking a picture. *Id.* at 130-133. *Palomino-Coronado* does not support petitioner's argument that he did not commit the actus reus of Section 2251. And it is also inapposite on the issue of intent, because that case involved a single, later deleted, photograph, whereas here, petitioner's intent was established by the fact that he took repeated photographs of the minors, cropped them to emphasize their genitals, buttocks, and pubic regions, and then used some of those photographs to illustrate his sexually explicit stories. Pet. App. 13a.

In *United States* v. *Broxmeyer*, 616 F.3d 120 (2d Cir. 2010), the Second Circuit concluded that the defendant did not "persuade," "induce," or "entice" a minor to be photographed under Section 2251(a) where a minor took photographs of herself before she met the defendant, and transmitted them to him only afterwards. *Id.* at 125-127. The court held that the statute required the defendant to have acted before the photographs were taken. *Ibid.* Here, by contrast, the minors did not take the photographs and give them to petitioner; petitioner arranged for the minors to engage in conduct that allowed him to take the photographs that he cropped to create lascivious illustrations for his sexually explicit stories.

In *United States* v. *Steen*, 634 F.3d 822 (5th Cir. 2011) (per curiam), the Fifth Circuit concluded that the defendant's film of a minor, which briefly revealed her pubic region in a tanning salon, did not meet the "lascivious exhibition" element because the film did not focus on the minor's pubic area; the minor did not know that she was being filmed; a tanning salon is not a sexually suggestive setting; nudity is protected expression

that, without more, does not meet the statutory standard for child pornography; and the brief view of the minor's pubic area on the film was not designed to elicit a sexual response. *Id.* at 826. *Steen* does not support petitioner because he conceded in the court of appeals that at least some of his photographs meet the "lascivious exhibition" standard. Pet. App. 11a-12a. Furthermore, whether an image satisfies that standard is a question for the factfinder. See, *e.g.*, *United States* v. *Amirault*, 173 F.3d 28, 34 (1st Cir. 1999); *United States* v. *Villard*, 885 F.2d 117, 125 (3d Cir. 1989); *United States* v. *Wiegand*, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987). Because the cropped photographs in this case focused on the minors' genitals, buttocks, and pubic areas and were used to illustrate petitioner's sexually explicit stories, the jury could permissibly find that the photographs were lascivious.

3. Finally, even if either of petitioner's two questions presented warranted review, this case would not be a suitable vehicle because the court of appeals reviewed petitioner's claims only for plain error due to his failure to move for judgment of acquittal in the district court. Petitioner acknowledged that plain-error review applied on appeal, see p. 3, *supra*, and he advances no argument why, for example, his new statutory construction arguments show error that is "clear or obvious, rather than subject to reasonable dispute," *United States* v. *Marcus*, 560 U.S. 258, 262 (2010) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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