No. 18-6758

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BORDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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

QUESTIONS PRESENTED

1. Whether the district court erred in ordering restitution to the child pornography victim in this case based in part on an expert report that did not disaggregate losses caused by the sexual abuse of the victim from the losses caused by the traffic in child pornography depicting the victim's abuse.

2. Whether the district court abused its discretion by imposing, as conditions of supervised release, prohibitions on operating and using photographic equipment, computers, and other devices to view or produce pornography or erotica; possessing and using pornography or erotica; and entering any establishment where pornography or erotica can be obtained or viewed.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 895 F.3d 1048.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on July 17, 2018. A petition for rehearing was denied on August 23, 2018 (Pet. App. C1). The petition for a writ of certiorari was filed on November 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Iowa, petitioner was convicted of sexual exploitation of a minor, in violation of 18 U.S.C. 2251(a) and 2251(e), and possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and 2252A(b)(2). Judgment 1. He was sentenced to 600 months of imprisonment, to be followed by 25 years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A21.

1. In July 2016, Google submitted three tips to the National Center for Missing and Exploited Children concerning child pornography images uploaded to petitioner's account. Presentence Investigation Report (PSR) ¶ 6. One image depicted petitioner's penis pressed against the mouth of his one-and-a-half-year-old daughter, N.B. PSR ¶ 6(B).

On July 21, 2016, Officer Joshua Bell of the Cedar Rapids, Iowa police department interviewed petitioner, who admitted that he belonged to a group that posted and traded child pornography through Kik Messenger, a mobile messaging application. PSR ¶ 7. A forensic search of petitioner's cell phone revealed that petitioner had used Kik Messenger to send and receive child pornography, including several pornographic images and videos of N.B. PSR ¶¶ 10-19. Petitioner also stored child pornography in a Dropbox account, which stores files remotely. PSR ¶ 21. Two folders in that account contained videos from the "Sweet Sugar"

internet child pornography series that depicted a four-year-old victim known as "Pia." Ibid.; Sent. Tr. 16-19.

2. A federal grand jury in the Northern District of Iowa returned a six-count superseding indictment charging petitioner with sexual exploitation of a child under 18, in violation of 18 U.S.C. 2251(a) and 2251(e) (Count 1); distribution of child pornography, in violation of 18 U.S.C. 2252(a)(2) and 2252(b)(1) (Count 2); receipt of child pornography, in violation of 18 U.S.C. 2252(a)(2) and 2252(b)(1) (Count 3); and three counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and 2252A(b)(2) (Counts 4 through 6). Superseding Indictment 1-4. Petitioner pleaded guilty to Counts 1 and 4 pursuant to a plea agreement, which included as a condition that petitioner pay restitution to victims of the dismissed counts. PSR ¶¶ 1, 4.

The Probation Office calculated a total offense level of 43, which reflected a base offense level of 32 under Sentencing Guidelines § 2G2.1(a) (2016), several enhancements based on the specific characteristics of the offense under Section 2G2.1(b), and credits for acceptance of responsibility under Section 3E1.1. PSR ¶¶ 27-32, 37-38; see PSR ¶¶ 25, 40. With a criminal history category of I, petitioner's advisory Guidelines range was life, but was capped at the statutory maximum sentence of 30 years on Count 1 and 20 years on Count 4. PSR ¶¶ 70-71.

The Probation Office also recommended several special conditions of supervised release. First, it recommended a

condition prohibiting petitioner from "operat[ing] or us[ing] photographic equipment, a computer, or any electronic storage device to view or produce any form of pornography or erotica." PSR ¶ 80. The Probation Office explained that the condition "was recommended based on the nature and circumstances of the instant offense": "Specifically, [petitioner] was producing images of child pornography and distributing them to others." Ibid. Second, the Probation Office also recommended that petitioner not be permitted to "own or possess any pornographic materials," "use any form of pornography or erotica," or "enter any establishment where pornography or erotica can be obtained or viewed." PSR ¶ 81. The Probation Office explained that this condition was also recommended based on petitioner's offense conduct, noting that petitioner "had an interest in other forms of pornography -- bestiality -- and that he appeared willing to trade images and/or videos of child pornography for images and/or videos of other forms of pornography." Ibid.; see PSR ¶¶ 10-21; PSR ¶¶ 18-19 (describing communications on Kik Messenger in which petitioner had offered to trade child pornography images for videos depicting bestiality); PSR ¶ 46 (describing communications in which petitioner appeared to threaten four different women that he would post or otherwise disclose sexually explicit pictures of them).

3. Before sentencing, the government received a request for $5000 in restitution from the attorney representing "Pia," the child victim in two of the videos that petitioner possessed in his

Dropbox account. Gov't C.A. Br. 10-11; Gov't Sent. Exh. 1, at 3. According to Pia's counsel, following the arrest of Pia's abuser, Pia participated in counseling and appeared to be recovering from the abuse. Gov't Sent. Exh. 1, at 4. Years later, however, Pia learned that the images of her abuse were being circulated among strangers on the Internet, which "de-stabiliz[ed]" her "coming as it did, years after the original abuse, and at a time when [she] thought [she] had left [her] abuse in the past." Ibid.

Pia's attorney also submitted an evaluation by a forensic psychologist, who explained that "[s]eparating the extent to which [Pia's identified] difficulties are related to sexual abuse versus her awareness that others are viewing her sexual abuse is not entirely possible," and documented the significant harm caused by the victim's knowledge that the images of her sexual abuse were permanently accessible online. Gov't Sent. Exh. 1, at 37-39. Pia's attorney also included a written statement by Pia's mother, who reported that Pia needed treatment to address the effects of the continuing circulation of the videos. Id. at 12-15.

4. At sentencing, the district court adopted the Probation Office's undisputed Guidelines calculations. Sent. Tr. 6. The court then turned to restitution. The government requested an award of $3000, relying on the victim impact statement from Pia's mother, the psychologist's report, and a list of defendants who previously had been ordered to pay restitution and the amount ordered, all of which the court admitted into evidence. Id. at 9;

see Gov't Supp. Sent. Mem. 13-14. The government also relied on the testimony of Officer Bell, who described the nine-minute videos depicting Pia's abuse. Sent. Tr. 11, 15-19. Officer Bell described the videos as "more graphic" than other child pornography depictions he had reviewed in his capacity as an investigator of such offenses. Id. at 20.

The government acknowledged that its recommendation did not "divide out the percentage of harm due to the original abuse and due to the dissemination of images." Sent. Tr. 22-23. But it noted that while the initial abuse had occurred more than nine years ago, the dissemination of the images over the Internet -- and the corresponding harm to Pia -- had "continue[d] to increase over the years." Id. at 23. The government also asked the district court to consider that the child pornography images were in a video, that petitioner had the same video in different folders in his Dropbox account, and that the nature of the video made it especially harmful to the victim. Id. at 23-24.

Although the district court described determining the amount of restitution as "a difficult call," it stated that after consideration of the arguments of counsel and their briefing as to the relevant precedent that a $3000 award was "appropriate." Sent. Tr. 24. It also imposed the conditions of supervised release recommended by the Probation Office relating to pornography and erotica. Id. at 30-31. The court explained that petitioner had produced, accessed, and distributed child pornography. Id. at 31.

He also had "an interest, apparently, in bestiality and adult pornography." Ibid. The court explained that "[d]eterrence is obviously very critical here," that petitioner was at an "extremely high risk to recidivate," and that the conditions were necessary to protect the public. Ibid.

5. The court of appeals affirmed. Pet. App. A1-A21.

As relevant here, the court first determined that the district court did not abuse its discretion in awarding $3000 in restitution to Pia. Pet. App. A9-A15. In particular, it rejected petitioner's argument that the district court abused its discretion by not disaggregating the harm caused by the initial abuse from the harm caused by petitioner's possession of the child pornography videos. Id. at A14-A16. The court of appeals observed that this Court in Paroline v. United States, 572 U.S. 434 (2014), had acknowledged that "'[c]omplications'" could arise relating to such disaggregation, but had "set 'those questions . . . aside.'" Pet. App. A13 (quoting Paroline, 572 U.S. at 449). The court explained, however, that Paroline had nonetheless "account[ed] for disaggregation" by listing as a potentially relevant factor in determining restitution "'[w]hether the defendant had any connection to the initial production of the images.'" Id. at A15 (quoting Paroline, 572 U.S. at 460). The court "decline[d] to transform one of the Paroline factors -- the disaggregation factor -- from a 'rough guidepost' into a 'rigid formula.'" Ibid. (quoting Paroline, 572 U.S. at 460).

The court of appeals also affirmed the supervised-release portion of petitioner's sentence, rejecting petitioner's claim that the two conditions of supervised release relating to pornography and erotica were overbroad and vague. Pet. App. A15-A21. Relying on its precedent, the court held that the district court did not abuse its discretion by imposing conditions that were tailored to petitioner's characteristics and offense. Id. at A18-A21.

ARGUMENT

Petitioner contends (Pet. 8-12) that the district court abused its discretion by ordering him to pay $3000 in restitution to "Pia," a victim who was sexually abused in child pornography that petitioner possessed, without disaggregating harm that Pia suffered from dissemination of that pornography from the harm Pia suffered as a result of the abuse itself. The district court did not abuse its discretion in making the restitution award. And although some tension exists in the case law regarding disaggregation following Paroline v. United States, 572 U.S. 434 (2014), petitioner's case is not a suitable vehicle for addressing any disagreement. Petitioner separately contends (Pet. 8-9, 12-18) that his supervised-release conditions are overbroad and vague. The court of appeals correctly rejected that contention, and any tension in the reasoning of the circuits in this area does not warrant this Court's intervention, particularly in a case in

which the supervised-release term will not begin until petitioner completes a 50-year prison term.

1. a. The Mandatory Restitution for Sexual Exploitation of Children Act, 18 U.S.C. 2259, "states a broad restitutionary purpose." Paroline, 572 U.S. at 443. It requires district courts to order restitution to the victims of "a number of offenses involving the sexual exploitation of children and child pornography in particular." Ibid. The amount of restitution should equal "the full amount of the victim's losses," including "costs incurred by the victim for," among other things, medical or psychological care, lost income, attorneys' fees, and "any other losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2259(b)(1) and (3).

In Paroline, this Court addressed the application of Section 2259 to child pornography offenders like petitioner, who possess images of child pornography but did not create the images or personally abuse the victims. Paroline held that "[r]estitution is * * * proper under § 2259 only to the extent the defendant's offense proximately caused a victim's losses." 572 U.S. at 448. The Court stated that it was "perhaps simple enough for the victim to prove the aggregate losses, including the costs of psychiatric treatment and lost income," id. at 449, but that determining the losses attributable to individual possessors of child pornography was more difficult, id. at 448-462. But it reasoned that in the case at hand, it could "set aside" the "[c]omplications" that "may

arise in disaggregating losses sustained as a result of the initial physical abuse." Id. at 449. Earlier in its opinion, the Court had noted that the victim had appeared to be "'back to normal'" after participating in therapy following the initial abuse but suffered "a major blow to her recovery * * * when, at the age of 17, she learned that images of her abuse were being trafficked on the Internet." Id. at 440 (citation omitted).

This Court explained that in the context of child pornography offenses, "where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to an individual defendant by recourse to a more traditional causal inquiry," a court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." 572 U.S. at 458. "This cannot be a precise mathematical inquiry," but instead requires district courts to exercise "discretion and sound judgment" to evaluate "the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses." Id. at 459.

The Court noted "a variety of factors district courts might consider in determining a proper amount of restitution." Paroline, 572 U.S. at 459. It stated that such factors "could include the number of past criminal defendants found to have contributed to

the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonably reliable estimate of the broader number of offenders involved * * * whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." Id. at 460. It also stated that the government "could also inform district courts of restitution sought and ordered in other cases." Id. at 462. The court emphasized, however, that the factors it set out "need not be converted into a rigid formula, especially if doing so would result in trivial restitution orders." Id. at 460. Instead, the Court explained that the factors should "serve as rough guideposts for determining an amount that fits the offense," ibid., and stressed that the district court's ultimate restitution determination would involve "discretion and estimation," id. at 462.

b. The district court did not abuse that discretion in ordering petitioner to pay $3000 in restitution to Pia. The district court considered several factors suggested in Paroline -- the number of past defendants found to have contributed to the

victim's losses and the number of images that petitioner possessed, 572 U.S. at 460 -- as well as the highly graphic nature of the videos, Sent. Tr. 20. See Paroline, 572 U.S. at 460 (instructing sentencing courts to consider "other facts relevant to the defendant's relative causal role"). And its award was consistent with other awards to Pia. See id. at 462 (stating that the government "could also inform district courts of restitution sought and ordered in other cases").

Petitioner asserts (Pet. 9-12) that the district court's analysis constituted an abuse of discretion because the restitution award did not disaggregate the harms Pia suffered from the distribution of videos of her sexual abuse from the harms Pia suffered as a result of the abuse itself. But this Court emphasized in Paroline that it would be inappropriate "to prescribe a precise algorithm" for restitution, because "[d]oing so would unduly constrain the decisionmakers closest to the facts of any given case." 572 U.S. at 459-460; see id. at 462 (restitution determinations will involve "discretion and estimation"). Moreover, while this Court did not find occasion in Paroline to directly address disaggregation of the harms from sexual abuse from the harms of child pornography in the case before it, it included a factor pertaining to disaggregation in the explicitly discretionary and non-exhaustive list of factors that district courts might consider. Pet. App. A15; see Paroline, 572 U.S. at

460 (describing "whether the defendant had any connection to the initial production of the images" as a relevant factor).

Petitioner's argument that disaggregation is an invariable prerequisite for restitution is also inconsistent with Paroline more generally. This Court acknowledged in Paroline that it would often not be possible to disaggregate the harms caused by particular possessors of child pornography. See 572 U.S. at 458. But it concluded that rather than ordering no restitution "where it is impossible to trace a particular amount of those losses [suffered by a child-pornography victim] to the individual defendant," courts should "order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." Ibid. This Court's reasoning regarding the apportionment of losses caused by multiple child-pornography defendants strongly suggests that courts may order restitution in those cases in which it is not possible to ascertain what portion of the harms suffered by child victims stems from the underlying abuse and what portion stems from the dissemination of pornography depicting that abuse. See Pet. App. A13 n.3.

c. Two other courts of appeals have considered child-pornography restitution cases in which they have disapproved of a district court's reliance on a report that does not attempt disaggregation. In United States v. Dunn, 777 F.3d 1171 (2015), in which the parties agreed that a pre-Paroline award of $583,955

in restitution required vacatur under Paroline, the Tenth Circuit concluded that a loss report that failed to "clearly distinguish the primary harms associated with [the victim's] original abuse from those secondary harms flowing from the dissemination of images of her online" had been a flawed starting point for the district court's analysis. Id. at 1181 (citation omitted).

And the Ninth Circuit vacated a restitution award that used as its starting point a loss calculation that included "future lost earnings, medical expenses incurred after the date of the earliest crimes for which [the defendant] was convicted, * * * vocational rehabilitation, and the cost of an economic report," when "no attempt was made to disaggregate the losses resulting from the original abuse from the losses resulting from [the child-pornography defendant's] own activities." United States v. Galan, 804 F.3d 1287, 1291 (2015). The court concluded that "the losses * * * caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible," and remanded for further proceedings. Id. at 1291 (emphasis added).

This case would not be a suitable vehicle for addressing any tension in the courts of appeals' approaches, however. Like the victim in Paroline, Pia had received counseling following the initial abuse and "appeared to be recovering" until she learned that the images of her abuse were circulating on the Internet.

Gov't Sent. Exh. 1, at 4. That makes this case, like Paroline, one in which the questions surrounding "disaggregating losses sustained as a result of the initial physical abuse * * * may be set aside," 572 U.S. at 449. Moreover, the forensic psychologist's evaluation itself made clear that Pia had suffered significant harms from the dissemination of her images. While the forensic psychologist stated that it was "not entirely possible" to "[s]eparat[e] the extent to which [Pia's] difficulties are related to sexual abuse versus her awareness that others are viewing her sexual abuse," the psychologist identified distinct harms Pia had suffered from the distribution of the pornography. Gov't Sent. Exh. 1, at 38. In particular, the psychologist related Pia's fear that others would recognize her from the images of her abuse, described Pia's atypical "level of suspiciousness and concern about exploitation," and reported that Pia "appears to be dealing with unwanted feelings about that and a sense of powerlessness to change it by withdrawing from the world and adopting an exceptionally passive stance" that "is likely to affect virtually every aspect of her life as she matures." Ibid. Because it is not clear that any court would require further disaggregation when a victim had been recovering before learning of the dispersal of her images, as in Paroline, or when a forensic evaluation made clear that the victim suffered distinct and serious harm from that dispersal, this case would not be an appropriate vehicle for review of the nascent law concerning disaggregation following Paroline.

2. Petitioner separately challenges (Pet. 12-18) the conditions of supervised release prohibiting him from viewing, producing, using, or possessing pornography and erotica and entering establishments where pornography or erotica can be obtained or viewed. He argues that the conditions are impermissibly vague or, alternatively, overbroad. The court of appeals correctly rejected those challenges and its determinations do not warrant further review.

a. Under 18 U.S.C. 3583(d), a sentencing court is authorized to impose any special condition of supervised release that "it considers to be appropriate," as long as three requirements are satisfied. First, the condition must be "reasonably related" to (a) the nature and circumstances of the offense and the history and characteristics of the defendant; (b) deterring criminal conduct; (c) protecting the public from further crimes; and (d) providing needed training, medical care, or effective correctional treatment. 18 U.S.C. 3583(d)(1) (incorporating factors set forth in 18 U.S.C. 3553(a)). Second, the condition must involve "no greater deprivation of liberty than is reasonably necessary" to deter criminal conduct and to protect the public. 18 U.S.C. 3583(d)(2). Finally, the condition must be "consistent with any pertinent policy statements" of the Sentencing Commission. 18 U.S.C. 3583(d)(3).

District courts have substantial discretion in imposing conditions that satisfy those statutory requirements. See, e.g.,

United States v. Hahn, 551 F.3d 977, 983 (10th Cir. 2008) (explaining that district courts have broad discretion to impose supervised release conditions that "satisfy the three statutory requirements laid out in [Section] 3583(d)"), cert. denied, 556 U.S. 1160 (2009); see also United States v. Accardi, 669 F.3d 340, 346 (D.C. Cir.), cert. denied, 568 U.S. 857 (2012); United States v. Kennedy, 643 F.3d 1251, 1259 (9th Cir. 2011); United States v. Woods, 547 F.3d 515, 517 (5th Cir. 2008) (per curiam).

b. i. Petitioner first contends (Pet. 14-16) that his conditions of supervised release are impermissibly vague because the terms "'pornographic material,' pornography, and erotica do not provide" sufficient "specificity." Pet. 14. That contention lacks merit. "Conditions of supervised release need only give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." United States v. Balon, 384 F.3d 38, 43 (2d Cir. 2004) (citation and internal quotation marks omitted). "[F]air warning" does not require conditions to "describe every possible permutation, or to spell out every last, self-evident detail." United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994). Rather, "conditions of [supervised release] can be written -- and must be read -- in a commonsense way." Ibid.; see United States v. Paul, 274 F.3d 155, 167 (5th Cir. 2001) ("Sentencing courts must inevitably use categorical terms to frame the contours of supervised release conditions."), cert. denied, 535 U.S. 1002 (2002).

Petitioner's supervised release conditions provide adequate notice. Petitioner argues that conditions are ambiguous as to whether they would cover an advertisement for "'male enhancement' products," "a picture of Michelangelo's sculpture, David," or a Marvin Gaye album. Pet. 16 (citation omitted). But the "commonly understood definition of pornography" reaches "only 'material that depicts nudity in a prurient or sexually arousing manner.'" United States v. Gnirke, 775 F.3d 1155, 1165 (9th Cir. 2015) (citation omitted); see Black's Law Dictionary 1349 (10th ed. 2014) ("Material * * * depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement."). "[E]rotica" similarly refers only to materials that are designed "to arouse sexual desire." Black's Law Dictionary 659. Petitioner's own evident confidence that his hypotheticals will strike a reader as nonsensical itself shows that the conditions of his supervised release would not cover them.

Moreover, any lack of clarity in the meaning of "pornography" "in the unregulated sphere of cultural debate" is "significantly eliminated in the context of federal criminal law." United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2003). Federal law provides substantial guidance on the meaning of the term through its definition of "child pornography." See 18 U.S.C. 2256(8). As the Second Circuit has explained, "[w]hen the references to minors are omitted" from the definition of child pornography in Section 2256(8), "what remains is the definition of the broader category

of pornography: '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.'" Simmons, 343 F.3d at 82; see 18 U.S.C. 2256(8).

Section 2256(2)(A) provides further specificity by defining "'sexually explicit conduct'" as "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 genitals or pubic area of any person." 18 U.S.C. 2256(2)(A) (2012); see United States v. Brigham, 569 F.3d 220, 233 (5th Cir.) (explaining that the definitions of "child pornography" and "sexually explicit conduct" in 18 U.S.C. 2256(2) and 18 U.S.C. 2256(8) "offer some practical insight" into the meaning of the term "pornographic" as used in the conditions of supervised release), cert. denied, 558 U.S. 1093 (2009). Accordingly, as the court of appeals has explained, "pornography" does not reach non-obscene materials that merely contain nudity. United States v. Mefford, 711 F.3d 923, 927-928 (8th Cir.) (explaining that supervised release prohibitions on possessing "pornography" are permissible because such conditions "steer[] clear of" simply "banning materials with 'nudity,'" which would be impermissible) (citation omitted), cert. denied, 571 U.S. 900 (2013).

ii. Petitioner's contention that the terms "pornographic material, pornography, and erotica" are impermissibly vague (Pet. 14-16) does not implicate a conflict in the lower courts that warrants this Court's intervention.

As petitioner notes, some disagreement exists concerning the interpretation of the term "pornography" in supervised-released conditions. The court below and the Second Circuit have concluded that child-pornography defendants like petitioner can be subject to supervised-release conditions referencing pornography without raising vagueness problems. See Pet. App. A16-A21 (citing examples); Simmons, 343 F.3d at 80-82. In doing so, those courts have concluded that the term does not encompass "non-obscene material that may contain nudity." Mefford, 711 F.3d at 927; see Simmons, 343 F.3d at 82 (construing "pornography" in light of federal child-pornography laws as limited to visual depictions of sexually explicit conduct).

The Third Circuit, however, has rejected the use of the term "pornography" in supervised-release conditions because they have concluded that the term lacks a definite meaning and could reach mere nudity. See United States v. Loy, 237 F.3d 251, 261, 263-267 (2001) (finding vague a supervised-release condition prohibiting possession of "'all forms of pornography, including legal adult pornography,'" because "pornography" does not have a legal definition and "could apply to any art form that employs nudity"). The Ninth Circuit has suggested the same, although later

circuit authority creates doubt as to whether it necessarily adheres to that view. United States v. Guagliardo, 278 F.3d 868, 872-873 (9th Cir.) (per curiam) (finding vague a condition that a defendant "not possess 'any pornography,' including legal adult pornography" after concluding that the term pornography is "entirely subjective," and that a probation officer could interpret the term "to include any nude depiction whatsoever, whether 'Playboy Magazine or a photograph of Michelangelo's sculpture, David'"), cert. denied, 537 U.S. 1004 (2002); but see Gnirke, 775 F.3d at 1165, 1167 (more recent Ninth Circuit decision concluding that "pornography" has a "commonly understood definition" referring to "'material that depicts nudity in a prurient or sexually arousing manner'" and rejecting the argument "that pornography lacks a recognized definition in society at large, however fuzzy its edges may be").*

Those decisions do not present a conflict that warrants this Court's intervention. The courts of appeals at issue all agree that district courts may impose supervised-release conditions that

* Petitioner errs in also asserting a conflict between the decision below and State v. Bahl, 193 P.3d 678, 690 (2008) (en banc), in which the Washington Supreme Court held that a restriction on accessing and possessing "pornographic materials" was unconstitutionally vague. The court in Bahl emphasized in reaching that conclusion that Washington statutes -- unlike the provisions of federal law identified in Simmons -- did not give content to the term "pornography." Id. at 687. Petitioner also relies (Pet. 13) on an intermediate state court decision, Diorec v. State, 295 P.3d 409 (Alaska Ct. App. 2013). But decisions of intermediate courts do not generally create conflicts that warrant this Court's review. Sup. Ct. R. 10(b).

restrict access to sexually explicit material by individuals like petitioner, who sexually abused a minor and produced, accessed, and distributed child pornography. See, e.g., United States v. Thielemann, 575 F.3d 265, 268 (3d Cir. 2009) (holding that a condition that prohibited a probationer from "possess[ing] and viewing * * * sexually explicit material, as defined in 18 U.S.C. § 2256(2)(A), does not violate the Constitution"), cert. denied, 558 U.S. 1133 (2010); United States v. Bee, 162 F.3d 1232, 1234-1235 (9th Cir. 1998) (upholding special conditions of supervised release prohibiting a defendant convicted of sexual abuse of minors from possessing "any sexually stimulating or sexually oriented material deemed inappropriate by his probation officer"), cert. denied, 526 U.S. 1093 (1999). While their decisions reflect disagreement on whether the word "pornography" adequately captures that category of materials, that disagreement is of limited practical import, because the circuits permitting use of the term "pornography" in supervised-release conditions have done so in decisions that give that term definite meaning that does not reach "'non-obscene material that may contain nudity.'" Mefford, 711 F.3d at 927; see Simmons, 343 F.3d at 82; see also United States v. Sebert, 899 F.3d 639, 642 n.4 (8th Cir. 2018) (per curiam) (Grasz, J., concurring) ("We have repeatedly affirmed special condition restrictions on pornography because we do not define it as broadly as other circuits."), rehearing and reh'g en banc denied, 906 F.3d 1082 (8th Cir. 2018), cert. denied, 2019 WL 266883

(Feb. 25, 2019). Thus, no meaningful substantive difference exists in the scope of the conditions to which individuals like petitioner may be subjected across the circuits, and the decisions in each circuit give defendants and Probation Officers definitive guidance on the materials that are covered.

The question whether the term "erotica" provides defendants with adequate notice when it is included in supervised-release conditions also does not warrant review. The question does not implicate any conflict. Indeed, petitioner identifies no other court of appeals that has considered whether that term is vague. Moreover, after a member of the court below called into question the use of the term "erotica" in supervised-release conditions, the Probation Office and government developed revised special-condition language, omitting any reference to erotica, which the government advised the court of appeals it expected to be used in future cases. United States v. Sebert, 906 F.3d 1082 (8th Cir. 2018) (Grasz, J., concurring in the denial of rehearing en banc), cert. denied, 2019 WL 266883 (Feb. 25, 2019). As a result, the question whether the term "erotica" is sufficiently specific for purposes of the vagueness doctrine does not appear to be one of broad prospective significance.

An additional consideration bearing on whether review is needed is that petitioner -- when he is subject to the supervised-release conditions after the completion of his 50-year prison term -- will have available the alternative avenue of seeking

clarification of his conditions from his probation officer and, if necessary, seeking modification of the conditions by the district court. See 18 U.S.C. 3583(e)(2); Fed. R. Crim. P. 32.1(b) advisory committee's note (1979) (avenue to obtain clarification from the sentencing court is important because "(1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification"). Appellate review would be available for any denial of such a request for modification. See, e.g., United States v. Insaulgarat, 280 Fed. Appx. 367, 369 (5th Cir. 2008) (per curiam) (vacating district court's denial of motion to modify discretionary condition of supervised release); cf. United States v. Miller, 205 F.3d 1098, 1100-1101 (9th Cir. 2000) (reversing district court's conclusion that it lacked authority to modify mandatory condition of supervised release).

c. Petitioner is also mistaken in contending (Pet. 16-18) that this Court should grant a writ of certiorari to assess whether the supervised-release conditions imposed by the district court were overbroad in light of the facts and circumstances of petitioner's case.

i. To determine whether conditions of supervised release impermissibly infringe on a defendant's rights, the controlling

inquiry is "whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975); see Bee, 162 F.3d at 1234-1235 (upholding conditions prohibiting a defendant convicted of sexual abuse of minors from possessing "any sexually stimulating or sexually oriented material as deemed inappropriate by his probation officer" as designed to "'address [the defendant's] sexual deviance problem'").

The court of appeals reasonably determined that the particular conditions here were appropriate in light of the facts and circumstances in petitioner's case. It was undisputed that petitioner sexually abused his one-and-a-half-year-old daughter and produced, accessed, and distributed child pornography. His online chats also demonstrated that he distributed photographs of his sexual abuse of his daughter in the hope of receiving images of pornography involving bestiality in return. Petitioner's Dropbox account also included "numerous depictions of age-questionable and adult pornography," PSR ¶ 21, and he threatened to distribute intimate photos of several women he knew, PSR ¶ 46. Given that history, the district court did not abuse its discretion in concluding that the limits on petitioner's right to possess pornography and erotica were necessary in order to reduce the risk of recidivism and protect the public. In any event, the question whether the particular conditions imposed were appropriate in

light of petitioner's offense and individual characteristics is a fact-specific question that does not implicate any circuit conflict.

ii. Review of petitioner's claim of overbreadth (Pet. 16-18) in the condition prohibiting him from entering an establishment where pornography or erotica can be "obtained or viewed" is similarly unwarranted. Petitioner's argument that this condition could bar him "from entering any record store, book store, public library or even a grocery store" rests on petitioner's incorrect view, addressed above, see pp. 17-18, supra, that the references to pornography and erotica would reach "love songs or a copy of the latest Sears catalog," Pet. 18. In any event, as noted above, see pp. 22-23, supra, and as the government explained to the court of appeals, the Probation Office and the government have worked together to craft revised conditions of supervised release that provide greater specificity on the establishments that the provision covers. See Gov't Resp. to Def.'s Pet. for Reh'g en banc at 5, Sebert, supra (No. 17-2771) (explaining that the government expects that a "revised condition will be imposed in future cases" that specifies that "'the defendant must not knowingly enter any establishment that derives a substantial portion of its income'" from "'materials that depict sexually explicit conduct as defined in 18 U.S.C. § 2256, or any form of sexually stimulating, sexually oriented, or pornographic materials'") (citation omitted). As a result, petitioner's

challenge to this condition is of limited prospective significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

KIRBY A. HELLER
Attorney

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