No. 19-7165

IN THE SUPREME COURT OF THE UNITED STATES

OMAR MACIAS-MACIAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

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

QUESTION PRESENTED

Whether petitioner was entitled to immediate appellate review of a supervised release condition ordering him to comply with federal sex-offender registration requirements as directed by his probation officer or other specified authorities, where petitioner would be removed after serving his prison term and had not yet been directed to register.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-7165

OMAR MACIAS-MACIAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals dismissing the appeal (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2019. A petition for rehearing en banc was denied on October 2, 2019 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on December 31, 2019. 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 Texas, petitioner was convicted on one count of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 11a. The district court sentenced petitioner to 28 months of imprisonment, followed by three years of supervised release. Id. at 12a-13a. The court of appeals dismissed petitioner's appeal. Id. at 1a.

1. Petitioner is a citizen of Mexico. Presentence Investigation Report (PSR) ¶ 10. In May 2018, petitioner pleaded guilty to one count of illegally reentering the United States after having been removed, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. 11a; C.A. ROA 82-83. Petitioner had previously been convicted in 2009 under Illinois law for "Abduction/Lur[ing]" of a child younger than 16 years. PSR ¶ 30. That conviction triggered a state-law requirement that petitioner register as a sex offender until November 23, 2020. Ibid. Petitioner also had two prior convictions for illegally reentering the United States. PSR ¶¶ 31-32.

At the sentencing hearing, the court imposed a sentence of 28 months of imprisonment, to be followed by three years of supervised release. Pet. App. 18a-19a. The district court informed petitioner that upon the completion of his prison term he would be surrendered to immigration officials for removal, and it ordered

him to "remain outside the United States" in the event of his removal. Id. at 19a. The court also imposed various conditions of supervised release that would apply if petitioner remained in the United States. Among other things, the court directed petitioner to "comply with all registration requirements given your conviction as a sex offender." Ibid. The court emphasized that "you are not going to be in the United States if you are complying with [the court's] order," "[s]o those provisions will apply only if you are here illegally." Id. at 19a-20a.

The court entered a written judgment after the hearing. Pet. App. 11a-15a. As relevant here, the special conditions of supervision required petitioner to be surrendered to immigration authorities at the end of his prison term and to remain outside the United States if removed. Id. at 15a. They further specified that "[i]n the event [petitioner] is not deported upon release from imprisonment," he would be subject to the other mandatory, standard, and special supervised release conditions. Ibid. (emphasis omitted). And the special conditions stated that he "must comply with the requirements of the Sex Offender Registration and Notification Act [SORNA] (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense." Ibid. (emphasis omitted).

2. Petitioner appealed, challenging the special supervised release condition that he register under SORNA as directed by his probation officer or other authorities. Pet. C.A. Br. 7. Petitioner argued that the condition stated in the written judgment was broader than the condition pronounced at sentencing, asserting that the district court's oral pronouncement required him to comply with the registration requirement imposed under Illinois law -- which was set to expire in November 2020 -- while the written judgment extended the duration of his registration obligation to the end of his supervised release term (February 2023) and purported to base the obligation in federal law. Id. at 8-11. He further argued that his Illinois conviction did not trigger mandatory registration under SORNA. Id. at 11-21.

The government moved to dismiss the appeal. It noted the absence of any conflict between the district court's oral ruling and written judgment, observing that the district court at the sentencing hearing had ordered petitioner to "comply with all registration requirements given his conviction as a sex offender," without limiting the obligation to registration requirements arising under state law. Pet. App. 6a (quoting C.A. ROA 103) (emphasis omitted). The government further argued that, in any event, the challenge was unripe because it was contingent on petitioner remaining in the United States (despite his imminent removal) and being directed to register by the specified authorities. Id. at 7a-8a. Although petitioner stated that he

opposed the government's motion, he did not file a written response. See id. at 10a.

In an unpublished, per curiam order, the court of appeals granted the government's motion to dismiss the appeal without elaboration. Pet. App. 1a. Petitioner subsequently filed a petition for rehearing en banc arguing that this Court's precedent categorically forbids the dismissal of an appeal on ripeness grounds. See C.A. Pet. for Reh'g En Banc 5-9. The court of appeals construed the petition as a motion for reconsideration and denied both reconsideration and rehearing en banc in an unpublished, per curiam order. Pet. App. 2a-3a.

On February 24, 2020, petitioner was released from custody. See Fed. Bureau of Prisons, U.S. Dep't of Justice, Find an Inmate, www.bop.gov/inmateloc (information for BOP Register Number 84010-279). The Department of Homeland Security has represented to this Office that he was removed to Mexico the same day.

ARGUMENT

Petitioner seeks review of the court of appeals' dismissal of his appeal challenging one condition of his supervised release. Further review is not warranted. At the outset, petitioner failed to raise his current arguments in a timely fashion in the court below, and in addition, his subsequent removal has potentially mooted his claim. In any event, the decision below does not conflict with any decision of this Court, nor does it deprive petitioner of the opportunity for eventual appellate review. And

no conflict on the question presented of any strong practical significance exists in the courts of appeals. This Court has repeatedly denied previous petitions for writs of certiorari challenging similar dismissals by the courts of appeals. See, e.g., Velasquez-Huipe v. United States, 137 S. Ct. 590 (2016) (No. 16-5583); Leyva-Samaripa v. United States, 136 S. Ct. 403 (2015) (No. 15-5472); Williams v. United States, 136 S. Ct. 318 (2015) (No. 14-10443); Lopez v. United States, 136 S. Ct. 318 (2015) (No. 14-10405); Camillo-Amisano v. United States, 135 S. Ct. 2377 (2015) (No. 14-8107); Oliphant v. United States, 568 U.S. 828 (2012) (No. 11-9686); Christian v. United States, 559 U.S. 1071 (2010) (No. 09-7950). The Court should follow the same course here.

1. Petitioner's current argument does not warrant review because he failed to raise it until his petition for rehearing in the court of appeals. In its motion to dismiss, the government suggested that petitioner's appeal of the supervised release condition was unripe. Pet. App. 7a. Although petitioner asked the government to note in its certificate of conference that he opposed dismissal, see id. at 10a, petitioner did not file a written opposition to the government's motion.[1] Not until the petition for rehearing did petitioner make any arguments as to why dismissal would be improper. See C.A. Pet. for Reh'g En Banc.

[1] Petitioner notes (Pet. 26) that a party has only 10 days to respond to a motion to dismiss in the court of appeals under Fed. R. App. P. 27(a)(3), but makes no claim that he needed more time to prepare a response or that he was precluded from asking the court to grant him additional time.

It is well established that courts of appeals are not obligated to address matters first raised in petitions for rehearing. See, e.g., United States v. Lewis, 412 F.3d 614, 615-616 (5th Cir. 2005) (per curiam); United States v. Patzer, 284 F.3d 1043, 1045 (9th Cir. 2002); United States v. Martinez, 96 F.3d 473, 475 (11th Cir. 1996) (per curiam), cert. denied, 519 U.S. 1133 (1997). And because this Court "is 'a court of review, not of first view,'" it rarely reviews matters that were not properly raised before or passed upon by the court of appeals. Byrd v. United States, 138 S. Ct. 1518, 1527 (2018) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)); see ibid. (noting that "it is generally unwise" for this Court "to consider arguments in the first instance").

The Court should follow its traditional practice here. Petitioner criticizes (Pet. 12-14) the purportedly inconsistent practices of the courts of appeals, but his failure to raise any argument at the panel stage denied the panel the opportunity to issue an opinion explaining why dismissal was warranted in the circumstances of this case. Indeed, the panel's unpublished, per curiam, two-sentence order dismissing the appeal does not even expressly state that ripeness was the reason for the dismissal. Pet. App. 1a. The order denying the en banc petition is the same. Id. at 2a; see Wills v. Texas, 511 U.S. 1097, 1097-1098 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been

the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of [the rule] to the facts of petitioner's case."). The lack of development below is alone sufficient reason for the Court to deny the petition.

2. Petitioner's challenge to the SORNA condition of supervised release is also potentially moot in light of his removal. The SORNA condition was included in the judgment as a "special condition[] of supervision," Pet. App. 15a (capitalization and emphasis omitted), and the judgment instructed that "the defendant shall comply with the * * * special conditions stated herein" "[i]n the event [petitioner] is not deported upon release from imprisonment," ibid. (emphasis altered). Because petitioner was removed immediately upon release from prison (apparently without ever being required to register under SORNA), the condition has not been triggered, and it is not clear that it would be even if he returned to the United States -- which he has not suggested that he would, or even can, do. Accordingly, it is far from clear that petitioner faces any ongoing harm from the challenged condition (such as collateral consequences) that might preserve a live dispute. See Lane v. Williams, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences,

and since those sentences expired during the course of these proceedings, this case is moot.").

Petitioner invokes (Pet. 24-25) United States v. Villamonte-Marquez, 462 U.S. 579, 581 n.2 (1983), and United States v. Campos-Serrano, 404 U.S. 293, 295 n.2 (1971), which held that a defendant's removal did not moot the appeal of a criminal conviction. But while a criminal conviction may have continuing "collateral consequences," Spencer v. Kemna, 523 U.S. 1, 8, 14 (1998), petitioner points to no such consequences here. See, e.g., United States v. DeLeon, 444 F.3d 41, 56 (1st Cir. 2006) (defendant failed to "identif[y] any practical impact" of supervised release); United States v. Williams, 475 F.3d 468, 479 n.6 (2d Cir. 2007) ("quixotic" chance of legal reentry to serve remaining term of supervised release is insufficient), cert. denied, 552 U.S. 1105 (2008). At the very least, the presence of a mootness issue -- which would need to be resolved before the Court could reach the underlying dispute, but does not itself warrant certiorari -- renders this case a poor vehicle for resolving the question presented.

3. In any event, the court of appeals' dismissal of petitioner's appeal did not conflict with any decision of this Court, nor did it deprive petitioner of the opportunity for judicial review. Petitioner's reliance (Pet. 17-18) on United States v. Jose, 519 U.S. 54 (1996) (per curiam), which held that

the IRS could appeal from a district court's order that conditioned enforcement of an IRS summons on notice by the IRS to the opposing party of its intent to use the summoned information internally, id. at 55, 57, is misplaced. The condition imposed on the government by the district court in Jose had an immediate adverse effect -- the IRS was prohibited from taking a certain step without complying with a certain procedural requirement -- whereas here the registration condition imposed no immediate harm on petitioner. Even at the time of his appeal, it was improbable that he would ever be required to submit to it, given that he was unlikely to be in the United States during his supervised release term and any registration obligation depended on a third party instructing him to register under SORNA.

Nor is petitioner correct in suggesting (Pet. 21) that the condition, if ever applicable, could evade judicial review. If he did find himself in a position where it appeared that a probation officer or other authority would actually order him to register under SORNA pursuant to the supervised release term, he could seek relief at that time. In particular, he could ask the district court, pursuant to 18 U.S.C. 3583(e)(2), to modify the terms of his supervised release to eliminate the challenged condition and appeal any adverse decision. See, e.g., United States v. Rhodes, 552 F.3d 624, 629 (7th Cir. 2009); see also 18 U.S.C. 3583(e)(2) (court may modify conditions of supervised release at any time

before the supervised release period ends); Fed. R. Crim. P. 32.1(c) (governing modification); 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).

Petitioner contends (Pet. 20) that a district court could not entertain a petition for modification on the ground that the condition is unlawful, but that contention lacks merit. In United States v. Ellis, 720 F.3d 220 (per curiam), cert. denied, 571 U.S. 1074 (2013), the Fifth Circuit rejected as unripe a defendant's challenge to "the possibility [that] he might be required to submit to" a certain form of medical testing as a condition of supervised release. Id. at 227. But the court expressly noted that, "[i]f [the defendant] is required to submit to such * * * testing, he may petition the district court for a modification of his conditions." Ibid.; see also United States v. Christian, 344 Fed. Appx. 53, 57 (5th Cir. 2009) (per curiam) (similar), cert. denied, 559 U.S. 1071 (2010). The same option would become available to petitioner in the event he is ever required to register under SORNA. Petitioner cites (Pet. 20) United States v. Hatten, 167 F.3d 884 (5th Cir. 1999), but that case is not to the contrary. There, the court concluded that a defendant could not move under Section 3583(e)(2) to challenge an order of restitution that immediately went into effect when the court issued his sentence

and that could have been challenged at that time. Hatten, 167 F.3d at 886. Hatten did not suggest that a court could foreclose a challenge to a condition of supervised release that the same court previously held was not ripe for review.

4. Petitioner contends that the Third and Ninth Circuits would have reached a different result in this case, asserting that, in contrast to other courts of appeals, those courts have "rejected the appellate-ripeness doctrine for supervised release appeals." Pet. 14 (emphasis omitted); see Pet. 14-15.[2] Petitioner overstates the tension in the case law, which, in any event, does not warrant this Court's review.

In United States v. Loy, 237 F.3d 251 (3d Cir. 2001), the Third Circuit concluded that a convicted defendant could appeal a condition of supervised release restricting his access to "all forms of pornography, including legal adult pornography." Id. at 253. Loy did not categorically reject the possibility of ripeness concerns in that context, instead finding the ripeness inquiry satisfied in that case. Id. at 257-258. And because the challenged condition in Loy undeniably governed the defendant's

[2] Petitioner also suggests that the Seventh Circuit has concluded that no appeal should be dismissed as unripe. See Pet. 22 (citing In Re UAL Corp. (Pilots' Pension Plan Termination), 468 F.3d 444 (7th Cir. 2006), cert. denied, 549 U.S. 1321 (2007)). But the Seventh Circuit has specifically dismissed a challenge to a supervised release condition as unripe, see Rhodes, 552 F.3d at 626-629, as petitioner acknowledges, see Pet. 10-11.

conduct on supervised release, such that it was not a matter of speculation whether the condition would apply, the court did not have occasion to address circumstances like those here, where petitioner could be required by the condition of his supervised release to register under SORNA, in the future, only if he were in the United States and certain specified authorities directed him to do so. See p. 4, supra; see Artway v. Attorney Gen., 81 F.3d 1235, 1252 (3d Cir. 1996) (finding challenge to sex offender notification statutory provision was not ripe because it remained a matter of speculation whether plaintiff would ever be subject to the provision).

The Ninth Circuit decisions cited by petitioner (Pet. 14-15) likewise did not address circumstances akin to those here. In United States v. Rodriguez-Rodriguez, 441 F.3d 767 (2006), cert. denied, 555 U.S. 922 (2008), the Ninth Circuit concluded that a condition requiring the defendant to report to a probation office within 72 hours of release from custody or reentry into the United States was ripe. Id. at 771. And in United States v. Weber, 451 F.3d 552 (2006), the Ninth Circuit ruled that a defendant's challenge to a medical-examination condition of supervised release was ripe. Id. at 556-557. The injury in both cases was more concrete than the alleged injury here. In Rodriguez-Rodriguez, the reporting requirement was determinate, rather than contingent upon a future decision by a probation officer. 441 F.3d at 769.

And in Weber, the defendant was already serving his term of supervised release at the time of appellate review, and the possibility that he would be subjected to the disputed condition was therefore less speculative. 451 F.3d at 556 n.5.[3]

Furthermore, to the extent that the circuits disagree, the disagreement does not pertain to whether review is available (all agree that it is), but instead when it is available -- namely, in an initial appeal from final judgment or in a subsequent proceeding, such as a request for modification of a now-relevant condition. See, e.g., Rhodes, 552 F.3d at 629. The circuit decisions cited by petitioner do not reflect recent legal developments, and this Court has repeatedly denied review of similar questions presented since they were decided. See, e.g., Velasquez-Huipe, supra (No. 16-5583); Leyva-Samaripa, supra (No. 15-5472); Williams, supra (No. 14-10443); Lopez, supra (No. 14-10405); Camillo-Amisano, supra (No. 14-8107); Oliphant, supra (No.

[3] Petitioner also suggests (Pet. 12) that the various circuits that have dismissed appeals in these circumstances differ from each other in their precise approaches. Any tension in the courts on that point is not presented here, as petitioner does not contend that the court below misapplied the doctrine. See Pet. 7. Moreover, petitioner fails to show that the purported differences in outcome could not be explained by differences in the underlying facts. Compare, e.g., United States v. Ford, 882 F.3d 1279, 1286 (10th Cir. 2018) (holding that appeal was "not ripe for review" where "the polygraph term is contingent"), with United States v. Zinn, 321 F.3d 1084, 1089 n.5 (11th Cir.) (holding that appeal was ripe where sentence "mandat[ed] polygraph testing"), cert. denied, 540 U.S. 839 (2003) (cited at Pet. 12).

11-9686); Christian, supra (No. 09-7950). Nothing suggests that the practical significance of the issue has increased, or that review is warranted in this particular case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

SANGITA K. RAO
Attorney

MAY 2020