No. 20-6359

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW REY YBABEN, PETITIONER

v.

UNITED STATES

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

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QUESTIONS PRESENTED

1. Whether petitioner's conduct violated 18 U.S.C. 2251(a), which makes it unlawful to produce child pornography "using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce."

2. Whether petitioner was entitled to immediate appellate review of a supervised release condition under which he would be required to participate in plethysmograph testing if treatment authorities were to decide that some form of it was appropriate, where petitioner was not yet on supervised release and had not been directed to undergo any such testing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Ybaben, No. 19-cr-89 (Dec. 20, 2019)

United States Court of Appeals (5th Cir.):

United States v. Ybaben, No. 20-10007 (June 15, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 809 Fed. Appx. 253.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2020. The petition for a writ of certiorari was filed on November 12, 2020. 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 producing child pornography, in violation of 18 U.S.C. 2251(a). Pet. App. B1. He was sentenced to 300 months of imprisonment, to be followed by 30 years of supervised release. Id. at B2-B3. The court of appeals affirmed. Id. at A1-A2.

1. In 2019, in Texas, petitioner used a Microsoft Lumia 640 phone to film and store videos of himself sexually abusing his wife's seven-year-old daughter (Jane Doe) while she slept. Factual Resume 2-5. One video depicted petitioner separating Doe's buttocks to expose her anus. Id. at 2. Another video depicted petitioner rubbing and penetrating Doe's vagina with his fingers. Ibid. The phone that petitioner used to produce the videos was manufactured outside of Texas by Microsoft Mobile, a Finnish corporation with a manufacturing facility in Vietnam. Id. at 4.

A grand jury returned an indictment charging petitioner with one count of producing 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) and (b)(2). Indictment 1-2. Petitioner pleaded guilty pursuant to a plea agreement to the production charge, and the government agreed to seek dismissal of the possession charge. Plea Agreement 1-7. Petitioner admitted to the facts of the crime in a "Factual Resume" accompanying his

plea agreement. Factual Resume 5. Petitioner stipulated that he "committed all the essential elements of the offense" and that the Factual Resume was "not intended to be a complete accounting of all the facts and events related to the offense charged in this case." Id. at 4.

The district court sentenced petitioner to 300 months of imprisonment, to be followed by 30 years of supervised release. Pet. App. B2-B3. Over petitioner's objection, the court imposed a special condition of supervised release that petitioner "shall participate in sex offender treatment services as directed by the probation officer until successfully discharged," and specified that "[t]hese services may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community." Id. at B5; see Sent. Tr. 5 (petitioner objecting to this condition "insofar as [it] requires the test called the []plethysmograph").

2. On appeal, petitioner argued for the first time that the statute of conviction, 18 U.S.C. 2251(a), should be construed to require proof that "the offense itself caused the movement" in interstate commerce of the phone used to produce the pornography, "the movement of the phones was recent," or "the offense involved the buying, selling, or movement of [a] commodity." Pet. C.A. Br. 6. He argued that under such an interpretation, the facts recited

in the Factual Resume -- which showed only that "the phones used to produce the prosecutable material had moved in international commerce" -- were insufficient to support his conviction. Ibid. Petitioner also contended that the district court abused its discretion by imposing the condition of supervised release requiring him to participate in sex offender treatment, potentially including some form of plethysmograph testing, at the direction of his probation officer. Id. at 13-16. Petitioner acknowledged that precedent foreclosed both of his claims, and the court of appeals granted the government's motion for summary affirmance. Pet. App. A1-A2 (citing, inter alia, United States v. Ellis, 720 F.3d 220, 227 (5th Cir.) (per curiam) (holding that a defendant was not entitled to immediate appellate review of a contingent condition of supervised release potentially requiring him to submit to plethysmograph testing in the future), cert. denied, 571 U.S. 1074 (2013)).

ARGUMENT

Petitioner contends (Pet. 5-9) that 18 U.S.C. 2251(a) should be construed narrowly in light of Commerce Clause concerns, and asks this Court to hold his petition pending its decision in California v. Texas, cert. granted, Nos. 19-840 & 19-1019 (Mar. 2, 2020). Petitioner's arguments lack merit, and California is unlikely to affect the proper disposition of this petition. A hold is unwarranted. Petitioner also contends (Pet. 9-17) that he

is entitled to immediate appellate review of the possibility that he may be directed to submit to some form of plethysmograph testing in the future. But the decision below neither conflicts with any decision of this Court nor deprives petitioner of the opportunity for eventual review of the supervised-release condition that would require him to participate in such testing. Contrary to petitioner's assertion, no conflict of any strong practical significance exists in the circuits on this issue. This Court has recently and repeatedly denied petitions for writs of certiorari challenging similar dismissals by the courts of appeals, and should follow the same course here.

1. Petitioner was convicted under 18 U.S.C. 2251(a), which proscribes child pornography that is "produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means." Although petitioner acknowledges that the phone he used to produce child pornography had traveled in interstate commerce, he argues the provision should be construed to reach only those offenses that caused the movement of goods in interstate commerce, involved a good that recently moved in commerce, or involved the buying or selling of a commodity. Pet. 5. He does not, however, present any argument for plenary review of that issue; he instead asserts only that the petition should be held for California. See Pet. 5-9. That assertion is ill-founded.

a. As a threshold matter, petitioner's decision to plead guilty to the charged offense, without reserving this argument, forecloses him from relying on it now. A defendant who is correctly advised of the elements of a criminal offense, and who enters an unconditional plea of guilty to that offense, necessarily admits that his conduct satisfied those elements. See Brady v. United States, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial."). An unconditional guilty plea therefore forecloses any argument by the defendant that is inconsistent with the premise that he committed the crime, or that the government would be able to establish the requisite elements at trial. See United States v. Broce, 488 U.S. 563, 570-571 (1989).

Because petitioner admitted that he committed all of the elements of the Section 2251(a) offense charged in the indictment, he has relinquished any argument that his conduct did not meet those elements. See Class v. United States, 138 S. Ct. 798, 805 (2018) ("[A] valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.'") (quoting Broce, 488 U.S. at 573-574). Although this Court in Class v. United States, supra, recognized that a defendant who enters an unconditional guilty plea retains the right to challenge the constitutionality of his statute of

conviction, ibid., the Court's decision does not call into question the longstanding rule under which an unconditional guilty plea precludes resurrecting on appeal statutory defenses like the one that petitioner asserts here.[1]

b. Furthermore, petitioner's interpretation of the statute lacks merit. In Barrett v. United States, 423 U.S. 212 (1976), this Court construed a provision of the Gun Control Act of 1968 that made it unlawful for certain classes of individuals to "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Id. at 216 (quoting 18 U.S.C. 922(h)). The Court determined that the statute covered the receipt of firearms that had "traveled in interstate commerce" "at some time in [the] past," and was not limited to offenses in which the receipt "itself [was] part of the interstate movement." Id. at 215-216; see id. at 216-221. The Court emphasized, among other things, that "the interstate commerce reference is in the present perfect tense, denoting an act that has been completed." Id. at 216. In the Court's view, the

[1] Although this ground was not relied on below, this Court may affirm on any ground supported by the record. See, e.g., Lee v. Kemna, 534 U.S. 362, 391 (2002); see also Gov't C.A. Mot. for Summary Affirmance 5 & n.1 (noting that "[b]inding precedent forecloses [petitioner's] arguments," but "reserv[ing] the right to defend the district court's judgment, in this Court or upon further review, on any ground supported by the record and applicable legal authorities").

statute's "language means exactly what it says." Ibid. (citation and internal quotation marks omitted).

The same logic applies here. Section 2251(a) prohibits the production of child pornography using "materials that have been mailed, shipped, or transported" in interstate commerce. 18 U.S.C. 2251(a). As with the statute in Barrett, "there is no warping or stretching of language when the statute is applied to" the production of child pornography that was "preceded by movement [of the production materials] in interstate commerce." Barrett, 423 U.S. at 217, 219. On its face, the statutory text lacks any "limitation" confining the offense to instances where the production materials moved in interstate commerce in the recent past or as a result of the charged offense. Id. at 216. And the rule that statutes should be construed to avoid constitutional problems (see Pet. 6) does not support petitioner's narrow construction of 18 U.S.C. 2251(a). Congress acted within its authority under the Commerce Clause when it prohibited the production of child pornography using materials that had traveled in interstate or foreign commerce.

In United States v. Lopez, 514 U.S. 549 (1995), this Court held that the Commerce Clause empowers Congress to regulate activities that "substantially affect" interstate commerce. Id. at 558; see id. at 558-559. In United States v. Morrison, 529 U.S. 598 (2000), the Court identified four factors to be considered

in determining the existence of a "substantial effect[]" on interstate commerce: (1) whether the activity the statute proscribes is commercial or economic in nature; (2) whether the statute contains an express jurisdictional element involving interstate commerce that might limit its reach; (3) whether Congress has made specific findings regarding the effect of the proscribed activity on interstate commerce; and (4) whether the link between the proscribed conduct and a substantial effect on commerce is attenuated. Id. at 611; see id. at 610-612.

Materials-in-commerce prosecutions under Section 2251(a) are a constitutional exercise of the commerce power because the production of child pornography substantially affects interstate commerce. The ban on the production of child pornography is an integral feature of a statutory scheme directed at large-scale commercial activity. Congress has long recognized that the production and marketing of child pornography is "a large industry * * * that operates on a nationwide scale and relies heavily on the use of the mails and other instrumentalities of interstate and foreign commerce." S. Rep. No. 438, 95th Cong., 1st Sess. 6-7 (1977) (Senate Report). A ban on the intrastate production of child pornography effectuates the ban on interstate trafficking, because it reduces the supply of, and demand for, child pornography. See United States v. Rodia, 194 F.3d 465, 476-477 & n.5 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000).

Each factor identified in Morrison supports the conclusion that the intrastate production of child pornography using materials that traveled in interstate commerce substantially affects interstate or foreign commerce. First, the conduct at issue is economic in character. As the Fifth Circuit has explained, "much of the interstate traffic in child pornography 'involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers.'" United States v. Kallestad, 236 F.3d 225, 228 (2000) (quoting U.S. Dep't of Justice, Attorney General's Commission on Pornography, Final Report 408 (1986)); cf. New York v. Ferber, 458 U.S. 747, 761 (1982) ("The advertising and selling of child pornography provide an economic motive for * * * the production of such materials."). Second, Section 2251(a) contains an express jurisdictional element requiring that the visual depiction be produced using materials that have traveled in interstate commerce. That jurisdictional element serves to limit prosecutions to "a smaller universe of provable offenses" and "reflects Congress's sensitivity to the limits upon its commerce power." Kallestad, 236 F.3d at 229.

Third, Congress has made explicit findings about the extensive national market in child pornography and the need to reduce it by prohibiting intrastate production. See, e.g., Protection of Children Against Sexual Exploitation Act of 1977,

Pub. L. No. 95-225, § 2(a), 92 Stat. 7; Senate Report 5 ("[C]hild pornography * * * ha[s] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale * * * [and that is] carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (similar); H.R. Rep. No. 536, 98th Cong., 1st Sess. 17 (1983) ("Generally, the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers."); id. at 16 ("Those [collectors of child pornography] who do not sell their material often loan or trade collections with others who share their interest."); see also Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121(1)(10), 110 Stat. 3009-26 ("[T]he existence of and traffic in child pornographic images * * * inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography.").

Finally, Congress rationally determined that "it must reach local, intrastate conduct in order to effectively regulate [the] national, interstate market" for child pornography. Kallestad, 236 F.3d at 229. As the Second Circuit has explained, "Congress understood that much of the pornographic material involving minors that feeds the market is locally produced, and this local or

'homegrown' production supports demand in the national market and is essential to its existence." United States v. Holston, 343 F.3d 83, 90 (2d Cir. 2003). And even if a particular item of child pornography is not itself transported interstate, "[t]he nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted." Id. at 90-91 (brackets in original; citation omitted).

c. The constitutionality of Section 2251(a) as applied to materials-in-commerce prosecutions is confirmed by this Court's decision in Gonzales v. Raich, 545 U.S. 1 (2005). There, the Court rejected a Commerce Clause challenge to the application of the federal Controlled Substance Act, 21 U.S.C. 801 et seq., to the purely intrastate manufacture and possession of marijuana for medical purposes, explaining that the activity at issue substantially affected interstate commerce. The Court emphasized Congress's power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17. The Court made clear that the substantiality of an individual's own activities is of no moment, so long as the aggregate activity substantially affects interstate commerce. Ibid. The Court determined that Congress could rationally conclude that the growers' activities substantially affected commerce because the high demand for

marijuana in the interstate market created a likelihood that marijuana grown for local consumption would be drawn into the interstate market, id. at 19, and because the exemption of intrastate marijuana would impair the ability of Congress to enforce its interstate prohibition, given the difficulty of distinguishing between marijuana grown locally and that grown elsewhere, id. at 22.

The as-applied constitutionality of Section 2251 -- which includes an express interstate commerce hook -- follows a fortiori from Raich. The intrastate production of child pornography using materials that have traveled in interstate commerce contributes to a significant national market for child pornography. Congress rationally decided to criminalize intrastate production in order to dry up that market. Because Congress acted within its authority under the Commerce Clause in proscribing that conduct in Section 2251(a), no basis exists for construing the statute narrowly to avoid constitutional problems.

Petitioner contends that National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (NFIB), casts doubt on a literal reading of Section 2251(a). NFIB addressed the constitutionality of the Affordable Care Act's (ACA) individual mandate, requiring individuals to obtain health insurance or pay a penalty. The majority upheld the mandate, with its associated penalty, as a permissible exercise of the taxing power. See id.

at 574. Although five members of the Court expressed the view that the mandate exceeded Congress's authority under the Commerce Clause, that has no bearing on 18 U.S.C. 2251(a), which plainly regulates a preexisting activity -- namely, the production of child pornography using material that has moved in interstate commerce.

NFIB casts no doubt on the precedents discussed above or their application here. See, e.g., NFIB, 567 U.S. at 557 (opinion of Roberts, C.J.) (noting that Raich "involved preexisting economic activity," i.e., "growing marijuana"). Accordingly, the courts of appeals have consistently rejected the argument that "NFIB altered the constitutional status of the child pornography statutes." United States v. Wellbeloved-Stone, 777 Fed. Appx. 605, 607 (4th Cir. 2019) (per curiam) (unpublished), cert. denied, 140 S. Ct. 876 (2020); see United States v. Humphrey, 845 F.3d 1320, 1323 (10th Cir.) (concluding that NFIB did not support a Commerce Clause challenge to 18 U.S.C. 2251(a)), cert. denied, 137 S. Ct. 2145 (2017); United States v. Sullivan, 797 F.3d 623, 632 (9th Cir. 2015) (concluding that NFIB was "not applicable" to 18 U.S.C. 2251 and 2252 because they "do not compel commerce, but merely regulate an activity that Congress could rationally determine would affect interstate commerce, taken in the aggregate"), cert. denied, 136 S. Ct. 2408 (2016); United States v. Parton, 749 F.3d 1329, 1331 (11th Cir.) ("Unlike the inactivity of the uninsured individuals addressed by the Chief Justice and the four dissenters in [NFIB],

[the defendant] produced child pornography; it was this activity which was criminalized by § 2251(a).”), cert. denied, 574 U.S. 914 (2014); United States v. Rose, 714 F.3d 362, 371 (6th Cir.) (“[The defendant’s] expansive reading of [NFIB] to include stripping Congress of its authority to regulate the intrastate manufacture and possession of child pornography is inaccurate.”), cert. denied, 571 U.S. 910 (2013).

d. Petitioner identifies no circuit conflict or other reason why the first question presented might warrant this Court’s review. He instead requests (Pet. 8) that the Court hold his petition for a writ of certiorari pending its decision in California v. Texas, supra, a follow-on to NFIB. That request is misplaced.

In California, this Court granted certiorari to determine whether the ACA’s individual mandate exceeds Congress’s constitutional authority now that Congress has eliminated the penalty imposed on individuals who fail to maintain health insurance. The only potentially relevant question presented in that case -- whether the mandate can reasonably be characterized as a tax in the absence of the penalty, or whether Congress otherwise possesses the authority to order individuals to engage in commerce, see Pet. i, California v. Texas, supra (No. 19-840) -- has no bearing on the questions presented here. Petitioner’s

request to hold his petition pending resolution of California is therefore unwarranted.

2. Petitioner also renews his contention (Pet. 9-17) that he is entitled to immediate appellate review of the possibility that he may in the future, if treatment authorities ultimately judge it appropriate, be required to undergo some form of plethysmograph testing, in accordance with the conditions of his supervised release. This Court has repeatedly denied previous petitions for writs of certiorari raising similar issues. See, e.g., Macias-Macias v. United States, 141 S. Ct. 90 (2020) (No. 19-7165); Velasquez-Huipe v. United States, 137 S. Ct. 590 (2016) (No. 16-5583); Leyva-Samaripa v. United States, 577 U.S. 959 (2015) (No. 15-5472); Williams v. United States, 577 U.S. 923 (2015) (No. 14-10443); Lopez v. United States, 577 U.S. 923 (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.

a. The decision below did not conflict with any decision of this Court, nor did it deprive petitioner of the opportunity for judicial review. Petitioner's reliance (Pet. 14-15) 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 supervised release condition imposed no immediate harm on petitioner. It is entirely speculative that petitioner will ever be required to undergo plethysmograph testing -- and the circumstances and precise nature of any such testing are unknowable at this time -- given that he is subject to a 25-year prison sentence and the release condition merely requires him to undergo sex-offender treatment "as directed by the probation officer," which "may include" plethysmograph testing. Pet. App. B5 (emphasis added).

Nor is petitioner correct in suggesting (Pet. 15) that the challenged procedure could evade judicial review. If petitioner did find himself in a position where it appeared that a treatment authority would determine that some form of plethysmograph testing was appropriate, 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 suggests (Pet. 15) that a district court might not be able to entertain a petition for modification on the ground that the condition is unlawful, but that contention lacks merit in this context. The decision below relied (Pet. App. A2) on United States v. Ellis, 720 F.3d 220 (per curiam), cert. denied, 571 U.S. 1074 (2013), in which the Fifth Circuit rejected an immediate challenge to "the possibility [that the defendant] might be required to submit to" plethysmograph testing as a condition of supervised release. Id. at 227. Ellis expressly observed, however, 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 submit to some form of plethysmograph testing, at which point the circumstances and precise form of such testing would be known. Petitioner cites (Pet. 15) United States v. Lussier, 104 F.3d 32 (2d Cir. 1997), 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. Id. at 33-34. Lussier does not hold that a court could foreclose a challenge to a condition of supervised release that the same court previously deemed unripe for review.

b. Petitioner contends (Pet. 12-14) that some circuits, in contrast to the court below, have heard challenges on direct appeal to contingent conditions of supervised release. Petitioner overstates the tension in the case law, which, in any event, does not warrant this Court's review.

Petitioner first points (Pet. 12-13) to three decisions from the Ninth Circuit. In United States v. Weber, 451 F.3d 552 (9th Cir. 2006), the court entertained a defendant's challenge to a plethysmograph-related condition of supervised release. Id. at 556-557. But 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 far less speculative. Id. at 556 n.5; see United States v. Williams, 356 F.3d 1045, 1047 (9th Cir. 2004) (defendant already serving term of supervised release at time of appeal). And in United States v. Rodriguez-Rodriguez, 441 F.3d 767 (2006), cert. denied, 555 U.S. 922 (2008), the Ninth Circuit entertained

a challenge to a condition requiring the defendant to report to a probation office within 72 hours of release from custody or reentry into the United States. Id. at 769, 771. That reporting requirement, however, was determinate, rather than contingent upon a future assessment of an appropriate course of treatment. Id. at 769.

The First Circuit decision cited by petitioner (Pet. 13-14) likewise did not address circumstances akin to those here. In United States v. Medina, 779 F.3d 55 (1st Cir. 2015), the court entertained a challenge to a condition of supervised release authorizing plethysmograph testing. But the court expressly observed that the defendant -- unlike petitioner in this case, who has decades remaining on his prison sentence, see pp. 2-3, 17, supra -- "could be subject to the condition he challenges in the near term." 779 F.3d at 67 (noting in March 2015 that defendant "was sentenced to thirty months in prison in July of 2013"). And the precedent on which Medina relied, see id. at 66, similarly focused on the fact that the defendant's "term of supervised release will commence in less than two months," concluding that "[u]nder these circumstances, the challenge is not hypothetical." United States v. Davis, 242 F.3d 49, 51 (1st Cir. 2001) (per curiam).

Petitioner also relies (Pet. 14) on United States v. Rock, 863 F.3d 827 (D.C. Cir. 2017). But the sentencing condition in

that case, in contrast to the one here, ordered that the defendant "shall submit to penile plethysmograph testing as directed by the United States probation office." Id. at 833 (emphasis added); compare Pet. App. B5 (ordering that petitioner "shall participate in sex offender treatment services as directed by the probation officer," which "may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen)") (emphasis added). And the court disposed of the reviewability issue in a two-sentence footnote. Rock, 863 F.3d at 833 n.1.

In any event, to the extent 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 condition that has become directly relevant and whose contours are more concrete. See, e.g., Rhodes, 552 F.3d at 629. This Court has recognized that some types of claims may not usually be well-suited to direct review and are best deferred to a more appropriate proceeding. See Massaro v. United States, 538 U.S. 500, 504-508 (2003). Furthermore, 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 p. 16, supra. 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.

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