No. _____

In the

Supreme Court of the United States

Christopher J. Abbate,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a special condition of supervised release that prohibits possession or control of "any pornographic matter" violate due process as unconstitutionally vague?

II. Does a special condition of supervised release that prohibits possession or control of "any pornographic matter" violate the First Amendment?

III. Even if a ban on "pornographic matter" does not ordinarily violate the First Amendment, did the district court's interpretation of "pornographic" do so here when it found that adult women in bathing suits dancing on a beach was pornographic?

PARTIES TO THE PROCEEDING

Petitioner is Christopher J. Abbate, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

- *United States v. Abbate*, 970 F.3d 601 (5th Cir. 2020)
- *United States v. Abbate*, No. 4:10-cr-00029-A-1 (N.D. Tex. July 11, 2019) (Judgment of Revocation and Sentence)
- *United States v. Abbate*, 435 F. App'x 326 (5th Cir. 2011)
- *United States v. Abbate*, No. 4:10-cr-00029-A-1 (N.D. Tex. Sept. 28, 2010) (Original judgment)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher J. Abbate seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Abbate*, 970 F.3d 601 (5th Cir. 2020). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on August 18, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves the First and Fifth Amendments to the Constitution of the United States of America:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend I.

> No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend V.

STATEMENT OF THE CASE

Christopher Abbate, Petitioner, previously served a ten-year sentence for possession of child pornography. His lifetime term of supervised release commenced on October 29, 2018. On July 11, 2019, the district court revoked Mr. Abbate's supervised release in part because he allegedly possessed "pornographic matter" when he watched a television program that depicted adult women in bathing suits dancing on a beach. The district court imposed a revocation sentence of six months imprisonment, to be followed by another life term of supervised release. In doing so, the district court reimposed the condition, over objection, prohibiting possession or control of "pornographic matter." Petitioner will now have to live the remainder of his life under a cloud of uncertainty—and under threat of reimprisonment—about how broadly the district court will interpret the phrase "pornographic matter."

REASONS FOR GRANTING THIS PETITION

The special condition of supervised release at issue in the case states:

> The defendant shall neither possess nor have under his control any pornographic matter or any matter that sexually depicts minors under the age of 18 including, but not limited to, matter obtained through access to any computer and any matter linked to computer access or use.

The opening phrase of the first condition ("The defendant shall neither possess nor have under his control any pornographic matter…") was treated by the government and district court as a stand-alone restriction, not limited to minors. This is problematic on three grounds. First, it is overly vague because it does not put an ordinary person on notice of what conduct is prohibited. Here, for example, Mr. Abbate was sent to prison for watching a television show that depicted adult women in bathing suits dancing on a beach. Second, it violates the First Amendment as overly broad as written. Third, it violates the First Amendment as applied.

I. A special condition of supervised release that prohibits possession or control of "any pornographic matter" violates due process as unconstitutionally vague.

The district court's prohibition on "pornographic matter," as currently written, violates due process because it fails to provide Mr. Abbate with adequate notice of what he may and may not do. *United States v. Loy*, 237 F.3d 251, 267 (3d Cir. 2001). The condition "forbids … an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). As this Court is aware, "pornography" has been a historically difficult term to define. In *Farrell v. Burke*, the Southern

District of New York described a parole officer's testimony that "pornography" includes Playboy Magazine as well as a photograph of Michelangelo's David. No. 97 Civ. 5708, 1998 WL 751695, 1998 U.S. Dist. LEXIS 16896, at *18 (S.D.N.Y. Oct. 21, 1998). In *American Booksellers Association v. Hudnut*, the Seventh Circuit observed that "pornography" could extend to W.B. Yeats's poem "Leda and the Swan." 771 F.2d 323, 327 (7th Cir. 1985). Here, the Northern District of Texas revoked Mr. Abbate's supervised release and sent him to prison in part because he watched a television program that showed adult women dancing in bathing suits on a beach. What then could be said about Vladimir Nabokov's *Lolita*, Henry Miller's *Tropic of Cancer*, Robert Maplethorpe's photography, most R-rated movies, some PG-13-rated movies, or even advertisements by Calvin Klein? Reasonable minds could differ, which places Mr. Abbate's freedom under a cloud of uncertainty for the rest of his life. As both the Third and Ninth Circuits have held, this violates due process. *Loy*, 237 F.3d at 262-67; *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002).

A. "Pornographic" matter is qualitatively different from "sexually explicit" materials because Congress has provided no guidance on the meaning of "pornographic" matter when adults are depicted.

On at least two occasions, the Fifth Circuit has previously upheld conditions of supervised release prohibiting "sexually explicit" materials in the face of a due process challenge. *United States v. Brigham*, 569 F.3d 220, 232-33 (5th Cir. 2009); *United States v. Phipps*, 319 F.3d 177, 193-94 (5th Cir. 2003). The Fifth Circuit has done so on two grounds. First, a "sexually explicit" prohibition is not vague when read in a "commonsense way." *See Phipps*, 319 F.3d at 193 ("Such a construction compels

us to disagree with defendants' suggestion that the condition could apply to newspapers and magazines that contain lingerie advertisements or even to the "Song of Solomon."). Second, Congress has provided statutory guidance on what "sexually explicit" means. *Brigham*, 569 F.3d at 233 ("Even so, the definitions of 'child pornography' and 'sexually explicit conduct' set forth in 18 U.S.C. § 2256(2) & (8) offer some practical insight into the meaning of these terms."). Even though the special condition in *Brigham* included the term "pornographic," it—unlike here—listed "sexually oriented or sexually stimulating materials" in the same condition, which focused the meaning of "pornographic" in light of the broader context. *See Brigham*, 569 F.3d at 233.

In *Loy*, the Third Circuit observed the precise distinction that Mr. Abbate advances here. The court explained at length that "sexually explicit materials" do not present the same due process, vagueness concerns over enforcement as "pornography." Just as the court struck down a condition prohibiting possession of pornography, it explained:

> To be sure, we are dealing here with an unusually broad condition. We in no way mean to imply that courts may not impose restrictions on the consumption of sexually explicit materials by persons convicted of sex crimes. … [T]here is no question that the District Court could, perfectly consonant with the Constitution, restrict Loy's access to sexually oriented materials, so long as that restriction was set forth with sufficient clarity and with a nexus to the goals of supervised release. Further, the Constitution would not forbid a more tightly defined restriction on legal, adult pornography, perhaps one that clarified whether it extended non-visual materials, or that borrowed applicable language from the federal statutory definition of child pornography located at 18 U.S.C. S 2256(8).

Loy, 237 F.3d at 266-267. Thus, a prohibition on "pornography" should be treated differently from a prohibition on "sexually explicit" materials.

B. The fact that the Mr. Abbate admitted to masturbating while watching the television show does not, as the district court believed, render the television show "pornographic."

The district court, at revocation, did not appear sympathetic to Mr. Abbate's vagueness concerns. After defense counsel explained that "the term 'pornography' is too subjective, too vague, in order to give Mr. Abbate reasonable notice of what … conduct or what type of materials are prohibited," the district court responded that Mr. Abbate "was viewing things that he thought were appropriate for him to masturbate by, and I think that, in any common understanding of pornography, is what he considered to be pornography, so he was viewing what he considered to be pornography." This definition of "pornography" reflects two layers of subjectivity, either of which renders the term vague. "Pornography," according to the district court, goes beyond "I know it when I see it." It is now "I know it when I see the way he sees it." That cannot possibly be right.

In response, the government may point to *Brigham*, in which the Fifth Circuit did consider the defendant's conduct when construing whether material was "pornographic, sexually oriented, or sexually stimulating." *Brigham*, 569 F.3d at 233 ("[W]hile the videotape might not be objectionable in a different context, it depicted sexual intercourse with a woman with whom Brigham no longer was romantically involved, *and* was viewed by him for the purpose of masturbating."). But *Brigham* is

distinguishable because the content in question was clearly sexual in nature: it was a videotape of two adults, naked, having sex. *Id*. Although this was complicated somewhat by the fact that Mr. Brigham was one of the adult participants, it was nonetheless undeniably pornographic in the truest sense: videotaped intercourse. *See id*.

While accompanying behavior (*e.g.* masturbation) certainly is indicative of whether material is "sexually stimulating," it does not shed the same light on whether material is "pornographic." That's because arousal has nothing inherently to do with pornography. In fact, many people find hardcore pornography disgusting, exploitative, and altogether offputting. Conversely, people may be aroused by material that no one would consider pornography or material that exists in an undefinable gray area. Our pop culture is filled with such material: literature, music videos, visual art, artistic photography, mainstream movies, etc. By example, just because George Costanza was caught masturbating to an issue of *Glamour Magazine* in season 4 episode 11 of *Seinfeld* does not render *Glamour Magazine* pornographic. If so, then we've fallen into such an abyss of subjectivity that due process cannot survive.

C. The fact that the district court has provided some guidance on what it means by "pornographic matter" through one course of revocation and re-imprisonment does not mitigate the cloud of uncertainty Mr. Abbate must live under.

Because he was revoked and sent back to prison, Mr. Abbate now knows to never watch television shows that depict women in bathing suits dancing on a beach. Or, perhaps, not to masturbate while doing so. This additional guidance—conveyed the hard way—is still not enough to cure vagueness concerns. As the Ninth Circuit explained in *United States v. Guagliardo*, such an "after-the-fact definition, however, leaves [the defendant] in the untenable position of discovering the meaning of his supervised release condition only under continual threat of reimprisonment, in sequential hearings before the court." 278 F.3d 868, 872 (9th Cir. 2002) (internal quotation marks omitted). The same is true here. Mr. Abbate now knows more about what the district court believes "pornographic matter" to mean but he does not know nearly enough to tailor his behavior to avoid another revocation and reimprisonment.

II. A special condition of supervised release that prohibits possession or control of "any pornographic matter" violates the First Amendment.

A special supervised release condition that bans sexually explicit material involving adults has "First Amendment implications." *United States v. Thielemann*, 575 F.3d 265, 272 (3d Cir. 2009). The district court imposed an anti-pornography condition in this case that is so broad it forbids him to have legal adult pornography—and has been interpreted to include much less—which impinges his First Amendment rights. As the Fifth Circuit has repeatedly observed, the question of whether a pornography prohibition violates the First Amendment is "unsettled." *See United*

States v. Prieto, 801 F.3d 547, 555 (5th Cir. 2015) ("Because our law is unsettled, and the law of our sister circuits is not uniformly in the defendant's favor, plain error is not demonstrated.").

"When a ban restricts access to material protected by the First Amendment, courts must balance the § 3553(a) considerations 'against the serious First Amendment concerns endemic in such a restriction.'" *Thielemann*, 575 F.3d at 272–73 (internal citation omitted). In so doing, the courts must ensure that restrictions on a defendant's "pornographic matter" have "a clear nexus to the goals of supervised release." *Id*. at 272 (quoting *Loy*, 237 F.3d at 267). No such nexus existed here. While the record reveals that Mr. Abbate viewed child pornography in the past, nothing shows that pornographic material involving only adults contributed in any way to his offence. *United States v. Voelker*, 489 F.3d 139, 151 (3d Cir. 2007) (vacating ban on legal adult pornography); *Thielemann*, 575 F.3d at 274 (narrow ban on adult pornography upheld where record showed defendant's experience with adult pornography inextricably linked to his sexual interest in children).

Neither was there any reason to believe that viewing adult pornography would cause Mr. Abbate to reoffend. *Voelker*, 489 F.3d at 151; *Thielemann*, 575 F.3d at 274 (record showed defendant's exposure to adult pornography will contribute to future offenses against children); *Brigham*, 569 F.3d at 234 (evidence that sexually stimulating adult images would contribute to defendant's risk of recidivism supported ban on sexually stimulating material). Because this nexus was absent, the condition

banning Mr. Abbate from viewing, or even reading, "pornographic matter" was overly broad in light of the First Amendment.

III. Even if a ban on "pornographic matter" does not ordinarily violate the First Amendment, the district court's interpretation of "pornographic" did so here when it found that adult women in bathing suits dancing on a beach was pornographic.

Here, the restriction is excessive as applied to Mr. Abbate and inevitably impinges upon his First Amendment rights. Even after considering the nature of Mr. Abbate's initial conviction, possessing child pornography, the restriction fails to reasonably relate to his offense. While the possession of lawful pornography is not precluded from First Amendment protection, Mr. Abbate recognizes that those under supervised release, like himself, are subject to restricted rights which fall within the bounds of the Constitution.

But those restrictions are not unlimited. The lower court revoked Mr. Abbate's supervised release in part based on the condition that he shall not possess nor have under his control any "pornographic matter." The alleged material was a part of a television show that depicted adult women in bathing suits dancing on a beach.

In *Phipps*, the Fifth Circuit rejected argument that conditions prohibiting a releasee from possessing "pornography" and "sexually oriented or sexually stimulating materials" because "*Paul* requires it be read in a commonsense way." *Phipps*, 319 F.3d at 193 (quoting *United States v. Paul*, 274 F.3d 155, 166-67 (5th Cir. 2001)). As such, "a commonsense reading of the special conditions satisfies the dictates of due process." *Id*. Subsequently, in *United States v. Locke*, the Fifth Circuit rejected an as-applied challenge because the defendant's revocation violation–

downloading and viewing internet pornography–involved the very thing he was originally convicted for, and found the prohibition reasonable. 482 F.3d 764, 768 (5th Cir. 2007) ("Under these circumstances, Locke had sufficient notice that the pictures he downloaded to his wife's computer were 'pornography' within the meaning of his probation condition.").

But that is expressly not the situation in Mr. Abbate's case, where the district court found that the television program depicting adult women in bathing suits on a beach was "pornographic" because Mr. Abbate had masturbated while watching it. A commonsense application of the condition would immediately lead a reasonable person to recognize the television program as non-pornographic, no different from what would ordinarily appear on MTV or in PG-13 movies, and very different from what one would find in an adult video store.

As applied to Mr. Abbate, the district court's un-commonsense approach would apply to nearly anything in modern popular culture, from television to movies to Calvin Klein advertisements. It stands beyond reason that a condition proscribing "pornography," written and applied in this manner, denied Mr. Abbate even the most basic constitutional protections. There was no legal inquiry by the district court that the alleged television program was indeed pornography. The "commonsense" application must have definable limits lest there be no discernable boundaries to what a court might consider "pornography."

CONCLUSION

Petitioner requests that this Court grant his Petition for Writ of Certiorari and allow him to proceed with briefing on the merits and oral argument.

Respectfully submitted,

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