No. 20-6923

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER J. ABBATE, 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

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QUESTION PRESENTED

Whether, following its revocation of the initial supervised release of petitioner, who was convicted of child-pornography offenses, the district court impermissibly reimposed a supervised-release condition prohibiting his possession or control of "any pornographic matter."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 970 F.3d 601.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2020. On March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. The petition for a writ of certiorari was filed on January 15, 2021. 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 of possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). C.A. ROA 164. He was sentenced to 120 months of imprisonment, to be followed by a life term of supervised release. Id. at 164-165. After completing his term of imprisonment, petitioner violated several conditions of his supervised release. The district court revoked his supervised release and imposed six months of reimprisonment, to be followed by a life term of supervised release. Pet. App. B1-B4. The court of appeals affirmed with a modification. Id. at A1-A5.

1. In July 2009, petitioner's wife alerted the police department in Arlington, Texas, that petitioner had abused her and that she suspected he possessed child pornography. C.A. ROA 404. Petitioner had shown child pornography to his wife "in hopes that she would be interested in the same sexual material." Id. at 405. Petitioner's wife also reported that petitioner wanted her to "pretend that she was a '12-year-old little girl' and to participate in a three-some with a 12-year-old girl." Ibid. Petitioner had threatened to kill his wife and hide her body if she reported his behavior to the authorities. Ibid.

Petitioner's wife gave officers a compact disc belonging to petitioner that "contained hundreds of digital jpeg images of child

pornography." C.A. ROA 406. Officers subsequently seized computers and other digital-storage media (including a separate hard drive) from petitioner's home, and they found "over 20,000 images of child pornography" on those media. Id. at 407. The images included depictions of toddlers engaged in sexual intercourse with adults as well as images "depict[ing] bondage of prepubescent minors['] hands and feet, prepubescent children engaged in bestiality (sexual acts) with animals, and acts of violence." Ibid. The disc and other media also contained numerous child-pornography videos, some of which depicted "toddlers and prepubescent and minor females * * * having sexual intercourse (oral and vaginal) with adult males" and "bondage of minor females and males." Ibid.

The authorities also learned from a woman named Kashandra Prince that she met petitioner when she was 15 years old and he was 27 years old; they began a sexual relationship when she was 16 years old; and she was pregnant with his child by age 17 and later gave birth to their daughter. C.A. ROA 404, 406.

2. A grand jury charged petitioner with receiving child pornography, in violation of 18 U.S.C. 2252(a)(2) and (b)(1), and possessing child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). C.A. ROA 60-63. Petitioner pleaded guilty to the possession count based on five of the images found on one of his computer hard drives. Id. at 148-150, 263-264.

In September 2010, the district court sentenced petitioner to a 120-month term of imprisonment and a life term of supervised release. C.A. ROA 164-165. The court included a number of special conditions of supervised release, including that petitioner "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." Id. at 165.

3. Petitioner completed his prison term and began his term of supervised release on October 29, 2018. C.A. ROA 179. On June 11, 2019, the Probation Office filed a petition alleging that petitioner had violated numerous conditions of his supervised release, including a condition prohibiting the possession and use of controlled substances; a condition requiring him to participate in sex-offender-treatment services; a condition requiring him to not leave the district without the permission of the district court or his probation officer; a condition prohibiting him from using or owning "any device that allows Internet access other than authorized by the U.S. Probation Office"; a condition requiring him to answer all inquiries from his probation officer honestly; and Special Condition 8, the condition prohibiting him from possessing or having under his control any pornographic material. Id. at 181; see id. at 179-182.

The government filed a motion to revoke petitioner's supervised release. C.A. ROA 196-200. At the revocation hearing, petitioner pleaded "true" only to allegations concerning his marijuana use, in violation of the condition prohibiting drug use. Id. at 293; see id. at 199. The government presented evidence concerning the remaining allegations. With respect to petitioner's violation of Special Condition 8, the government introduced his written admission that he "viewed sexually explicit material online," id. at 199, in three ways -- via a pop-up advertisement on the Internet; on a pornography website; and on a streaming television application, which petitioner described as "women in bikinis (non-nude) for masturbation few times a month," id. at 388. The probation officer testified that petitioner admitted verbally to the conduct described in his written admissions. Id. at 307-311. Petitioner argued that Special Condition 8's prohibition on possession of pornography was unconstitutionally vague and overbroad. Id. at 348, 350, 366. He also argued that "none of the testimony" proved that he viewed "sexually explicit material." Id. at 349-350.

The district court held that petitioner had violated the conditions of his supervised release regarding drug use, participation in sex-offender treatment, using an internet-access device, lying to his probation officer, leaving the district without permission, and viewing pornographic material. C.A. ROA

350-352. As relevant here, the court found that petitioner viewed "pornographic matter, as well as sexually explicit material." Id. at 351. The court also stated that petitioner "was viewing things that he thought were appropriate for him to masturbate by" and that was "what he considered to be pornography, so he was viewing what he considered to be pornography." Id. at 350.

The district court revoked petitioner's supervised release, imposed six months of reimprisonment, and reimposed a life term of supervised release. C.A. ROA 351, 363. The court also reimposed the special conditions of supervised release from the prior judgment, plus an additional condition limiting petitioner's possession or use of gaming consoles. Id. at 363-365. The court overruled petitioner's objection that the pornography condition was vague and overbroad. Id. at 366.

4. Petitioner appealed only the imposition of the pornography condition and the gaming-console condition. Pet. App. A1. The court of appeals affirmed. Id. at A1-A5.

The court of appeals first held that the pornography condition was not unduly vague. Relying on its prior decision in United States v. Brigham, 569 F.3d 220, 223 (5th Cir.), cert. denied, 558 U.S. 1093 (2009), as well as a similar decision from the Second Circuit, the court reasoned that "the definitions of 'child pornography' and 'sexually explicit conduct' set forth in 18 U.S.C. 2256(2) and (8) offered 'some practical insight' into the

condition's meaning." Pet. App. A2 (quoting Brigham, 569 F.3d at 233); see id. at A2-A3 (citing United States v. Simmons, 343 F.3d 72, 81-82 (2d Cir. 2003)). While acknowledging the "difficult[ies]" in "pin[ning] down a definition of the term 'pornography' in artistic contexts," the court determined that the "criminal context provides us the necessary commonsense understanding." Id. at A3. Specifically, the court agreed with the Second Circuit that "when references to minors are omitted, the child pornography law 'defines the more general category of pornography,' thereby eliminating any vagueness concerns." Id. at A3 (quoting Simmons, 343 F.3d at 82). The court likewise rejected petitioner's overbreadth challenge to the extent that it overlapped his vagueness challenge. Id. at A3 & n.20 ("Because [petitioner] alleges the supervised release condition is vague and, in turn, encompasses protected conduct, the vagueness and overbreadth analysis invariably overlap.").

The court of appeals also rejected petitioner's argument that the pornography condition was overbroad because it prohibited his possession of sexually explicit material involving adults. Pet. App. A3-A4. The court explained that the record, including testimony from petitioner's counselor adduced at the revocation hearing, established that petitioner's "interest in child pornography is intertwined with adult pornography." Id. at A4. Having found that petitioner's "access to such material could

'influence[] his subsequent behavior,' putting both his rehabilitation and the public at risk," the court determined that "the special condition survives [petitioner's] First Amendment challenge." Id. at A4 (citation omitted; first set of brackets in original).

Petitioner separately challenged the supervised-release condition relating to gaming consoles. The court of appeals affirmed the imposition of that condition with a modification, Pet. App. A4, and petitioner does not renew his challenge to that condition here.

ARGUMENT

Petitioner contends (Pet. 3-11) that the supervised-release condition prohibiting him from possessing or having under his control "any pornographic matter" is vague or, alternatively, overbroad. The court of appeals correctly rejected those challenges, and its determinations do not warrant further review. This Court recently denied review in a case raising similar issues, see Bordman v. United States, 139 S. Ct. 1618 (2019) (No. 18-6758), and the same result is warranted here.

1. 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).

a. Petitioner first contends (Pet. 3) that the supervised-release condition prohibiting him from possessing or having under his control "pornographic matter" is impermissibly vague because

the term "pornography" fails to give him "adequate notice of what he may and may not do." 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). And "fair 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). Read in that matter, the supervised-release condition prohibiting petitioner from possessing pornography or having it under his control is not impermissibly vague.

The "common understanding" of the "pornography" prohibition in this context includes only "'material that depicts nudity in a prurient or sexually arousing manner'" or "explicit material intended to stimulate, arouse, or the like." United States v. Gnirke, 775 F.3d 1155, 1165, 1167 (9th Cir. 2015) (citation omitted); see Black's Law Dictionary 1349 (10th ed. 2014) (defining

"pornography" as material "depicting sexual activity or erotic behavior in a way that is designed to arouse sexual excitement"). Petitioner thus errs (Pet. 4) in asserting that the condition is ambiguous as to whether it would cover books such as "Vladimir Nabokov's Lolita, Henry Miller's Tropic of Cancer, Robert Maplethorpe's photography, most R-rated motives, some PG-13-rated movies, or even advertisements by Calvin Klein." 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." 18 U.S.C. 2256(8). As the Second Circuit has explained, "[w]hen the references to minors are omitted" from that definition, "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." 18 U.S.C. 2256(2)(A); see United States v. Brigham, 569 F.3d 220, 233 (5th Cir.) (explaining that the definitions of "child pornography" and "sexually explicit conduct" in Sections 2256(2)(A) and (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). The court of appeals here thus appropriately emphasized that those definitions would delimit the scope of petitioner's supervised-release condition, and rejected his vagueness claim. Pet. App. A2-A3 (relying on Simmons and Brigham).

b. Petitioner contends (Pet. 4) that the pornography condition is overbroad because the district court construed it to cover petitioner's viewing of "adult women dancing in bathing suits on a beach" for purposes of masturbation. That objection is misplaced for several reasons.

As a threshold matter, to the extent that petitioner raises the issue of his viewing of women dancing in bathing suits to impugn the revocation of his supervised release for violating the pornography condition in his initial judgment, petitioner did not contest that revocation in the court of appeals; he sought only to invalidate prospectively the pornography condition after it was reimposed. See Gov't C.A. Br. 23-24; Pet. C.A. Br. 22; Pet. C.A. Reply Br. 4. In any event, petitioner's description of the relevant district court proceedings is incomplete. As noted above,

petitioner admitted in the district court that he had viewed "sexually explicit material(s)" in three forms, one of which was the television streaming application depicting women in bikinis dancing on a beach. C.A. ROA 388. Given petitioner's own admission that the material he viewed was sexually explicit -- along with the lack of detailed evidence as to what petitioner actually viewed -- no basis exists to interpret the decision below, which emphasizes the limits of the pornography condition on petitioner's supervised release, as endorsing any views about those images in particular. Accordingly, petitioner's focus on that underdeveloped, case-specific issue does not provide a sound reason for further review.

Moreover, to the extent petitioner has concerns about the status of particular materials going forward, he may seek clarification of his conditions from his probation officer and, if necessary, seek 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). 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).

c. Petitioner separately contends (Pet. 8-10) that the supervised-release condition imposed by the district court was

overbroad in light of the facts and circumstances of his case, particularly because it limits him from possessing adult pornography in addition to child pornography. The court of appeals correctly rejected that claim as well. Pet. App. A3-A4.

The condition restricting petitioner's possession of adult pornography was well within the district court's "wide discretion in imposing terms and conditions of supervised release." Pet. App. A3 (quoting Paul, 274 F.3d at 274). The court of appeals here reasonably determined that the district court's imposition of a condition prohibiting both child and adult pornography was permissible based on the facts and circumstances in petitioner's case. As the court explained, the "record reveals that" petitioner's "interest in child pornography is intertwined with adult pornography." Id. at A4. The Probation Office reported that, before he was convicted, petitioner possessed "numerous adult pornographic DVD movies with titles suggestive of 'young participants.'" C.A. ROA 407. During that period, petitioner engaged in a sexual relationship with a minor, abused and threatened his wife, and told her that he wanted her to participate in a threesome with a 12-year old girl. Id. at 405, 414. Petitioner's counselor also testified "that [petitioner's] possession of sexually explicit material could result in recidivism." Pet. App. A4. On that record, the court of appeals correctly concluded that the district court did not abuse its

discretion in determining that the limits on petitioner's possession of both child and adult pornography were necessary in order to reduce the risk of recidivism and protect the public. Ibid.

2. Petitioner does not identify any sound basis for further review. As petitioner notes (Pet. 3-6), courts of appeals have addressed supervised-release conditions prohibiting pornography possession in somewhat different ways. Several courts, including the court below, have concluded that child-pornography defendants like petitioner can be subject to such conditions without raising vagueness problems. See Pet. App. A2-A3; United States v. Bordman, 895 F.3d 1048, 1059-1062 (8th Cir. 2018), cert. denied, 139 S. Ct. 1618 (2019); Simmons, 343 F.3d at 80-82. In doing so, those courts have generally concluded that the term does not encompass "non-obscene material that may contain nudity." United States v. Mefford, 711 F.3d 923, 927 (8th Cir.), cert. denied, 571 U.S. 900 (2013); Simmons, 343 F.3d at 82 (construing "pornography" in light of federal child-pornography laws as limited to visual depictions of sexually explicit conduct); see also Pet. App. A3 ("agree[ing]" with Second Circuit's analysis in Simmons).

The Third Circuit has rejected the use of the term "pornography" in supervised-release conditions because it has concluded that the term lacks a definite meaning and could reach mere nudity -- e.g., in an artistic context. 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"). Some decisions of the Ninth Circuit suggest a similar reading. See United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.) (per curiam) (finding vague a condition that a defendant "not possess 'any pornography,' including legal adult pornography" because it could be interpreted "to include any nude depiction whatsoever, whether 'Playboy Magazine or a photograph of Michelangelo's sculpture, David'") (citation omitted), cert. denied, 537 U.S. 1004 (2002). Later authority, however, creates doubt as to whether the Ninth Circuit necessarily adheres to that view. See Gnirke, 775 F.3d at 1165, 1167 (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") (citation omitted).

Those decisions do not present any substantive conflict that warrants this Court's intervention. Whether they interpret the term "pornography" in supervised-release conditions narrowly or instead read the term more broadly and require narrower conditions, the courts of appeals at issue all agree that district courts may

impose supervised-release conditions that restrict access to sexually explicit material by defendants like petitioner, who was convicted of possessing a vast amount of hard-core child pornography and had a history of wanting to engage in -- and engaging in -- sex with minors. 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 conditions 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).

The circuits' semantic disagreement on whether the word "pornography" adequately captures that category of prohibited materials 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."), cert. denied, 139 S. Ct. 1277 (2019); cf. Loy, 237 F.3d at 266 ("Only in the exceptional case, where a ban could apply to any art form that employs nudity, will a defendant's exercise of First Amendment rights be unconstitutionally circumscribed or chilled."). The decision below reaffirms that limited scope as to petitioner's own supervised-release condition. See Pet. App. A3-A4. 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.

Further review is also unwarranted on petitioner's claim (Pet. 8-10) that the condition imposed on him is overbroad because it limits his possession of both child and adult pornography. As noted above, the court of appeals upheld that aspect of the condition based on its analysis of "[t]he record" in this case and petitioner's individual characteristics. Pet. App. A3-A4. That case-specific holding does not implicate any circuit conflict or otherwise warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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