No. _____

In the

Supreme Court of the United States

Jordan Lee Bell,

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

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

PARTIES TO THE PROCEEDING

Petitioner is Jordan Lee Bell, who was the Defendant-Petitioner in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below. No party is a corporation.

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. Bell*, 842 F. App'x 922 (5th Cir. 2021)
- *United States v. Bell*, No. 4:17-cr-00058-Y-1 (N.D. Tex. Feb. 28, 2020)

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 Jordan Lee Bell 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 reported at *United States v. Bell*, 842 F. App'x 922 (5th Cir. 2021). The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit entered judgment on April 5, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES AND GUIDELINES 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

Jordan Bell, Petitioner, is under a lifetime of supervised release for possession of child pornography, which commenced November 14, 2017. (ROA.100-01). On February 28, 2020 the district court revoked Mr. Bell's supervised release for two reasons: (1) he possessed "pornographic matter" and later lied about it; and (2) he created user accounts on the social networking sites LinkedIn, YouTube, Tumblr, and GroupMe. (ROA.142). For these violations, the district court revoked Mr. Bell's supervised release and sentenced him to twenty-four months imprisonment, to be followed again by a life term of supervised release. (ROA.216).

In the district court's revocation judgment, it imposed "the same conditions as were set out in the Judgment in a Criminal Case in this case," with some conditions that had been added after the initial sentencing. (ROA.143). One of the re-imposed conditions was a prohibition on "pornographic matter." (ROA.102).

The Fifth Circuit affirmed the condition as foreclosed under its precedent. This Petition follows to challenge the condition of supervised release as violating both due process and the First Amendment.

REASON FOR GRANTING THIS PETITION

Mr. Bell will return to prison is he ever possesses or controls "pornographic matter." (ROA.102,143). Such a broad and vague condition of supervised release, both as written and as interpreted, violates due process and cannot stand in light of the First Amendment.

I. Due Process

The district court's prohibition on "pornographic matter," as currently written, violates due process because it fails to provide Mr. Bell 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). 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, some episodes of the television show *Game of Thrones*, or even advertisements by Calvin Klein? Reasonable minds could differ, which places

Mr. Bell's freedom under a cloud of uncertainty for the rest of his life. As both the Third Circuit and Ninth Circuit's 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).

"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 court 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. Bell 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.

II. 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 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" in this jurisdiction. *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. Bell 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. Bell 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. Bell from viewing, or even reading, "pornographic matter" was overly broad in light of the First Amendment.

CONCLUSION

Petitioner respectfully prays that this Court grant this Petition and vacate his "pornographic matter" condition of supervised release.

Respectfully submitted,

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