No. 21-6456

IN THE SUPREME COURT OF THE UNITED STATES

TERRY RAY CARTER, 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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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in imposing a condition of supervised release prohibiting petitioner, who was convicted of child-pornography offenses, from possessing or having under his control "any pornographic matter or any matter that sexually depicts minors under the age of 18."

2. Whether the district court abused its discretion in imposing a condition of supervised release prohibiting petitioner from "access[ing] * * * or loiter[ing] near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer."

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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 857 Fed. Appx. 804.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2021. The petition for a writ of certiorari was filed on November 24, 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 sexually exploiting a child, in violation of 18 U.S.C. 2251(a) and (e); and transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1) and (b)(1). Judgment 1. He was sentenced to 600 months of imprisonment, to be followed by 20 years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. A1-A2.

1. In June 2020, using an internet chat application, petitioner sent an undercover officer 15 files displaying the vagina of a prepubescent female, nine of which were videos of child pornography. Presentence Investigation Report (PSR) ¶ 10. Two of the videos depicted petitioner masturbating over the child victim while she was awake. Ibid. Another video showed petitioner pulling down the child victim's pants and using his fingers to spread open her vagina. Ibid. Petitioner informed the undercover officer that the child in the video was his 11-year-old stepdaughter and that he had engaged in additional sexual activity with her beyond what the videos showed. PSR ¶ 11. In July 2020, petitioner, who lived in Texas, sent to undercover officers in Kansas a 75-second video depicting an adult male striking the buttocks, and inserting his penis into the vagina or anus, of an unidentified nude prepubescent female. PSR ¶ 12. When FBI agents executed a search warrant of petitioner's home, he admitted that

he "produced multiple child pornography images and videos of his stepdaughter" and had "seen and received child pornography" over the Internet. PSR ¶ 13.

Petitioner pleaded guilty to sexually exploiting a child, in violation of 18 U.S.C. 2251(a) and (e), and transporting child pornography, in violation of 18 U.S.C. 2252A(a)(1) and (b)(1). Judgment 1. Petitioner's advisory guidelines range was 600 months of imprisonment, the statutory maximum, PSR ¶ 78, and the Probation Office recommended a supervised release term of life, PSR ¶ 82. The Probation Office also recommended the imposition of 20 discretionary conditions of supervised release, including the following:

> 2. * * * The defendant shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer. * * *
>
> 18. The defendant shall neither possess nor have under his/her 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.

PSR ¶ 95.

The district court overruled petitioner's objections to those conditions, observing that the first is not "unreasonably vague as there is sufficient common understanding of locations frequented by minors," Sentencing Tr. 4, and that the second is not "vague or overly broad and, given the facts of this particular offense,

* * * is tailored to these facts and [is] appropriate under [18 U.S.C.] 3553(a) in this case," id. at 5. The court imposed those discretionary conditions of supervised release. Judgment 4-5.

2. The court of appeals granted the government's motion for summary affirmance. Pet. App. A1-A2. The court observed (id. at A2) that as petitioner had acknowledged, his challenge to the "any pornographic matter" condition as unconstitutionally vague under due process or unconstitutionally overbroad under the First Amendment was foreclosed by the court's prior decision in United States v. Abbate, 970 F.3d 601 (5th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 2635 (2021) (No. 20-6923). The court further observed (Pet. App. A2) that, as petitioner likewise had acknowledged, his challenge to the "places where children may frequently congregate" condition as unconstitutionally overbroad and vague was foreclosed by the court's prior decision in United States v. Paul, 274 F.3d 155 (5th Cir. 2001), cert. denied, 535 U.S. 1002 (2002) (No. 01-8691).

ARGUMENT

Petitioner contends (Pet. 4-9) that the supervised-release conditions (1) prohibiting him from possessing or having under his control "any pornographic matter or any matter that sexually depicts minors under the age of 18," Judgment 5, and (2) restricting his access to "places where children may frequently congregate" without probation officer approval, Judgment 4, are unconstitutionally vague and overbroad. The court of appeals

correctly rejected those contentions, and its decision does not warrant further review. This Court has denied review of petitions challenging similar conditions of supervised release. E.g., Abbate v. United States, 141 S. Ct. 2635 (2021) (No. 20-6923); Bordman v. United States, 139 S. Ct. 1618 (2019) (No. 18-6758); United States v. Esler, 571 U.S. 1205 (2014) (No. 13-6556). The same result is warranted here.

1. Under 18 U.S.C. 3583(d), a sentencing court is authorized to impose a 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).

2. a. Petitioner first contends (Pet. 4-6) that the supervised-release condition prohibiting him from possessing or having under his control "any pornographic matter or any matter that sexually depicts minors under the age of 18," Judgment 5, is vague. 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 manner, 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 in asserting (Pet. 4) 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' earlier decision in United States v. Abbate, 970 F.3d 601 (5th Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 2635 (2021) (No. 20-6923), thus appropriately emphasized that those definitions would delimit the scope of a similar supervised-release condition, and rejected a vagueness claim. Id. at 604-605 (relying on Simmons and Brigham); see Pet. App. A2 (relying on Abbate).

b. Petitioner separately contends (Pet. 6-8) that the supervised-release condition is overbroad because it limits him from possessing adult pornography in addition to child pornography. The court of appeals correctly rejected an identical

contention in Abbate, and the decision below likewise does not warrant further review.

The condition restricting petitioner's possession of adult pornography was well within the district court's "wide discretion" in prohibiting both child and adult pornography given petitioner's offenses of sexually exploiting a child and transporting child pornography. Abbate, 970 F.3d at 605 (citation omitted); see D. Ct. Doc. 18, at 3-5 (Sept. 16, 2020) (factual resume for plea agreement). The district court explained that the restriction was "tailored" to "the facts of this particular offense," Sentencing Tr. 5 -- namely, child-pornography offenses that petitioner himself described as being the result of his being "unable to control [his] desires," PSR ¶ 67.

Several courts, including the court below, have recognized that child-pornography defendants like petitioner can be subject to such conditions without raising constitutional problems. See United States v. Bordman, 895 F.3d 1048, 1059-1062 (8th Cir. 2018), cert. denied, 139 S. Ct. 1618 (2019) (No. 18-6758); Simmons, 343 F.3d at 80-82. In doing so, those courts have generally construed the term, in accord with its statutory child-pornography analogue, not to 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).

The district court here 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. Petitioner provides no sound basis to review that factbound determination.

To the extent that petitioner suggests (Pet. 5, 6) that the decision below conflicts with decisions of the Third and Ninth Circuits, that suggestion is mistaken. In United States v. Loy, 237 F.3d 251 (2001), the Third Circuit rejected the use of the term "pornography" in supervised-release conditions on the premise that the term lacks a definite meaning and could reach mere nudity -- e.g., in an artistic context. See id. at 261, 263-267 (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"). The Ninth Circuit suggested a similar reading in United States v. Guagliardo, 278 F.3d 868 (per curiam), cert. denied, 537 U.S. 1004 (2002). See id. at 872 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). 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).

In any event, 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 sexual abuse of a child and transportation of child pornography. See, e.g., United States v. Thielemann, 575 F.3d 265, 268 (3d Cir. 2009) (recognizing 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' terminological 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."). In relying on prior circuit precedent in Abbate, the decision below simply reaffirms that limited scope as to petitioner's own supervised-release condition. Pet. App. A2; see Abbate, 970 F.3d at 605-606. 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.

3. Petitioner also cannot show error in the conditions restricting his access to "places where children may frequently congregate" without probation officer approval. Judgment 4. Consistent with district courts' broad statutory discretion to

craft case-appropriate supervised-release conditions, the courts of appeals have routinely upheld conditions of supervised release that restrict a defendant's contact with minors (or require a probation officer's permission for such contact) when the defendant's crime showed that he posed a risk to children. See, e.g., United States v. Esler, 531 Fed. Appx. 502, 504 (5th Cir. 2013) (per curiam), cert. denied, 571 U.S. 1205 (2014) (No. 13-6556); United States v. Muhlenbruch, 682 F.3d 1096, 1103-1105 (8th Cir. 2012); United States v. Moran, 573 F.3d 1132, 1140 (11th Cir. 2009), cert. denied, 559 U.S. 1005 (2010); United States v. MacMillen, 544 F.3d 71, 73, 75-76 (2d Cir. 2008); United States v. Stoterau, 524 F.3d 988, 1008 (9th Cir. 2008), cert. denied, 555 U.S. 1123 (2009); United States v. Sullivan, 451 F.3d 884, 892, 896 (D.C. Cir. 2006); United States v. Roy, 438 F.3d 140, 144-145 (1st Cir.), cert. denied, 548 U.S. 919 (2006); United States v. Mark, 425 F.3d 505, 507-508 (8th Cir. 2005).

Petitioner's offense, which involved (among other things) sexually assaulting while filming his 11-year-old stepdaughter -- in part because he was "unable to control [his] desires," PSR ¶ 67 -- justified the tailored restrictions on his contacts with children. Those restrictions satisfy 18 U.S.C. 3583(d)(1) because they are "reasonably related" to petitioner's "history and characteristics," 18 U.S.C. 3553(a)(1), and serve to protect the public and to deter petitioner from future crimes against children, 18 U.S.C. 3553(a)(2)(B) and (C). The district court thus did not

abuse its discretion in imposing those restrictions. Petitioner provides no sound basis to review that factbound determination.

Petitioner's contention (Pet. 8) that the restrictions would preclude his going to "grocery stores, gas stations, restaurants, and just about any other public place" is unfounded. As the court of appeals observed in United States v. Paul, supra -- on which the district court relied in imposing the condition, see Sentencing Tr. 4 -- "there is sufficient common understanding of the types of locations that constitute 'places * * * frequented by minors' to satisfy the constitutional requirement of reasonable certainty." 274 F.3d at 167. The "common understanding" of the phrase "places where children may frequently congregate" would not reasonably include chance encounters in gas stations and restaurants.

That is especially true given that the phrase is preceded by a list of specific locations and the qualifier "or other": "[petitioner] shall not have access to or loiter near school grounds, parks, arcades, playgrounds, amusement parks or other places where children may frequently congregate, except as may be allowed upon advance approval by the probation officer." Judgment 4 (emphasis added). That locution serves to limit the class of "other places where children may frequently congregate," ibid., to places similar to schools and playgrounds -- not gas stations. See Paul, 274 F.3d at 167; see also Antonin Scalia & Bryan A. Garner, Reading Law 195-196 (2012) (explaining that "'words grouped in a list should be given related meanings'" in order "to

limit a general term to a subset of all the things or actions that it covers") (quoting Third National Bank v. Impac Ltd., 432 U.S. 312, 322 (1977)). And should a question arise about a particular location, "[t]he district court's restrictions permit flexibility by allowing the probation officer to consider all the circumstances." Esler, 531 Fed. Appx. at 504 (citation and ellipsis omitted).

4. In any event, this case would be a poor vehicle in which to address the questions presented. First, petitioner's claims are premature for this Court's consideration because they "rest[] upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (citations omitted). Petitioner, who is 36 years old, is currently serving a 600-month (50-year) sentence. He will not be subject to the conditions of supervised release for several more decades, at which time he would be entitled to seek modification or reduction of any condition of supervised release under 18 U.S.C. 3583(e)(2). See Fed. R. Crim. P. 32.1(c).

Second, petitioner's plea agreement includes an appeal waiver encompassing his sentence. See Plea Agreement ¶ 13 ("The defendant waives the defendant's rights * * * to appeal the * * * sentence."); Gov't C.A. Motion for Summary Affirmance 2 n.1 (preserving "the right to defend the judgment on any and all grounds supported by the case law and the record"). As part of that sentencing waiver, petitioner reserved the right to appeal

only "a sentence exceeding the statutory maximum punishment" or "an arithmetic error at sentencing," neither of which is alleged here. Plea Agreement ¶ 13. The term "sentence" includes both the term of imprisonment and the term of supervised release. Cf. Mont v. United States, 139 S. Ct. 1826, 1834 (2019) ("Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence."). It follows that an appeal waiver encompassing a sentence also encompasses conditions of supervised release. See United States v. Joyce, 357 F.3d 921, 924 (9th Cir.) (explaining that by waiving the right to appeal his sentence, the defendant "knowingly and voluntarily waived his right to challenge the special conditions of supervised release on the grounds he now raises"), cert. denied, 543 U.S. 915 (2004). Petitioner's appeal waiver thus forecloses his challenge to his conditions of supervised release and provides an independent ground to affirm the judgment below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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