No. 22-7471

IN THE

SUPREME COURT OF THE UNITED STATES

RENZO ALEGRE
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

The government does not dispute the existence of a clear conflict on the question presented in Mr. Alegre's petition, *i.e.,* whether the constitutional holding of *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)—which recognized a First Amendment right to access the Internet for sex offenders who had completed their sentences—applies to offenders on supervised release. Nor does the government dispute that this is an important, unresolved, and frequently-recurring question of constitutional law, over which there is a clear split among the circuit courts.

Instead, the government rewrites the question presented in order to focus its response on whether Mr. Alegre "is entitled to plain-error relief" in light of the current circuit split. *See* Brief for the United States in Opposition ("BIO") at I, 10. But the argument that certiorari is unwarranted because there is no split on the plain error question is wrong for multiple reasons, as is the government's suggestion that the "invited error" doctrine is a barrier to review. For the reasons detailed below, far from providing a substandard vehicle, this case presents a properly raised and cleanly presented question of law. It thus provides an excellent vehicle for the Court's review.

I. There is a clear circuit conflict on the question presented.

The government does not dispute that in *United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020)—the precedent followed in the decision below—the Eleventh Circuit directly addressed the question of whether the First Amendment right to access the Internet, recognized by this Court in *Packingham*, applies to individuals on supervised release. While admittedly, the issue in *Bobal* was raised on plain error

review, the Eleventh Circuit nonetheless decided the constitutional issue by expressly rejecting the Third Circuit's analysis in *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). *See* Petition For a Writ of Certiorari ("Pet.") at 10-12; *Bobal*, 981 F.3d at 978 (holding that "*Holena* read the opinions in *Packingham* too broadly," and that neither the majority nor concurring opinions in *Packingham* "addressed whether the First Amendment is violated by a special condition of supervised release . . ."). Moreover, *Bobal* has been interpreted by the Eleventh Circuit, in an opinion decided under an abuse of discretion standard, to "squarely foreclose" the claim that *Packingham* rendered a similar supervised release condition unconstitutional. *See United States v. Cordero*, 7 F.4th 1058, 1070-71 (11th Cir. 2021). Thus, even before the decision in Mr. Alegre's case, the law of the Eleventh Circuit was clear: "[n]othing in *Packigham*" limits district courts' discretion in establishing conditions of supervised release. *See id.* at 1071 (quoting *Bobal* for the proposition that "[n]othing in *Packingham* undermines the settled principle that a district court may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens during supervised release") (further citation omitted).

The same holds true in the Eighth Circuit. *See United States v. Perrin*, 926 F.3d 1044, 1047 (8th Cir. 2019) (holding that it "need not go through the [plain error] test in depth, because '[t]he threshold requirement for relief under the plain-error standard is the presence of an error and' here, that error is missing").

The Ninth Circuit has since joined the Eleventh and the Eighth Circuits in holding that *Packingham* does not establish a First Amendment right to access the

Internet while on supervised release. *See United States v. Wells*, 29 F.4th 580 (9th Cir. 2022). In rejecting Wells' preserved challenge to a computer and Internet-use restriction, the Ninth Circuit wrote that "Wells' reliance on *Packingham*" was "misguided." 29 F.4th at 591 n.5. Like the Eighth and Eleventh Circuits before it, the Ninth Circuit reasoned that "*Packingham* involved 'severe restrictions on persons who have already served their sentences and are no longer subject to the supervision of the criminal justice system,'" and therefore did not apply to Wells, who was "an individual currently subject to the supervision of the criminal justice system and specific supervised release conditions tailored to his conviction and circumstances." *Id*.

These cases stand in clear and irreconcilable conflict with *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019), and *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018), which each expressly recognized that *Packingham's* constitutional holding applies to individuals on supervised release. *See Eaglin*, 913 F.3d at 96 (acknowledging the distinctions between the law at issue in *Packingham* and conditions of supervised release, but holding that "*Packingham* nevertheless establishes that, in modern society, citizens have a First Amendment right to access the Internet"); *Holena*, 906 F.3d at 294 (offering "guidance on how *Packingham* informs the shaping of supervised-release conditions," and holding that "the District Court must . . . take care not to restrict Holena's First Amendment rights more than reasonably necessary or appropriate to protect the public").

The government faults Mr. Alegre for failing to "identif[y] any court that would grant plain-error relief in the circumstances here." BIO at 8. But the question before this Court is not simply whether any particular court would have found plain error in the 20-year computer ban applied in Mr. Alegre's case (although certainly the Second and Third Circuits would have, under *Eaglin* and *Holena*). The question is whether this Court's milestone constitutional ruling in *Packingham* applies, at all, to individuals on supervised release.

The Second and Third Circuits have clearly held that the First Amendment rights recognized in *Packingham* apply to individuals on supervised release. *See Eaglin*, 913 F.3d at 96; *Holena*, 906 F.3d at 294. As noted in the Petition at 16-17, but ignored by the government, the highest courts of at least two states, Illinois and West Virginia, have held similarly with respect to individuals on probation and parole, respectively. *See* Pet. at 16-17 (discussing *People v. Morger*, 160 N.E.3d 53, 64 (Ill. 2019), and *Mutter v. Ross*, 811 S.E. 866, 871, 873 (W.V. 2018)). Just as clearly, the Eight, Eleventh, and Ninth Circuits have held that *Packingham* is materially distinguishable, and imposes no constitutional limitations on a district court's discretion with respect to supervised release conditions. *See Bobal*, 981 F.3d 978, *Cordero*, 7 F.4th at 1070-71, *Perrin*, 926 F.3d at 1048-49; *Webb*, 29 F.4th at 591 n.5. This is a direct and mature split of authority on an important and broadly-applicable question of First Amendment law, warranting review.

II. The question presented is properly before the Court and there are no barriers to review.

The government's assertion that "Petitioner's constitutional challenge . . . is not properly presented because the court of appeals did not address it" (BIO at 5), is false for multiple reasons. First, although the court of appeals did *sua sponte* invoke the doctrine of invited error, it went on to hold that "even reviewing for plain error, [Alegre's] claim fails, as it is precluded by our decision in *Bobal*." *United States v. Alegre*, 2022 WL 18005680 *6 (11th Cir. Dec. 30, 2022). In the Eleventh Circuit, "additional or alternative holdings are not dicta, but instead are binding as solitary holdings." *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008). The issue was thus definitively ruled on by the court of appeals, following its binding precedent in *Bobal*.

Second, this Court has expressly held that the doctrine of invited error does not "oust" the "traditional rule" that this Court "may address a question properly presented in a petition for certiorari if it was '[p]ressed [in] or passed on' by the Court of Appeals." *United States v. Wells*, 519 U.S. 482, 488 (1997) (citation omitted). The government actually cites this very sentence from *Wells* in its brief—but it buries (actually, omits) the lead. Far from merely "recogniz[ing] the 'valu[e]' of the invited error doctrine," BIO at 6, *Wells* states that "however valuable th[e] doctrin[e] may be in controlling the party who wishes to change its position on the way from the district court to the court of appeals, [it] cannot dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari if it

was '[p]ressed [in] or passed on' by the Court of Appeals." *Wells*, 519 U.S. at 488. Indeed, so long as the question was at least pressed in the court of appeals, this Court has treated even express changes in a party's litigating position "as just one of several considerations bearing on whether to decide a question." *Id.*

Relatedly, the government also misleadingly cites *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), for the proposition that "[t]his Court is one 'of review, not of first view,' and it ordinarily does not address issues that were not passed upon below." *See* BIO at 7. But the arguments at issue in *Cutter* "were not addressed by the Court of Appeals," and so the Court declined to consider them. Here, by contrast, the issue raised for review was unquestionably pressed in the briefs, and passed on by the Eleventh Circuit, and is properly before this Court.

Finally, the invited error doctrine simply "prevents a defendant from leading a district court 'down a primrose path' and later, on appeal, profiting from the invited error." *United States v. Stricker*, 4 F.4th 624 (8th Cir. 2021). But that is not what happened here. In the district court, Mr. Alegre's counsel advocated a non-incarceral, probationary sentence of 5 years, with one year of home detention. During such a limited period of time, defense counsel suggested that the court could impose the conditions of supervised release contemplated by the PSI. *See* DE 41:12, 14. But defense counsel never suggested that such conditions would be appropriate for a 20-year term of supervised release. "Limiting the duration of a broad internet restriction is one way that a court can narrowly tailor such a prohibition." *United States v. Callier*, --- F.4th ---, 2023 WL 5605341 *4 (5th Cir. Aug. 30, 2023). And, to be sure,

there is a world of difference between a 5-year restriction on someone's First Amendment rights, and the imposition of the same restrictions for 20 years.

Mr. Alegre did not invite the district court to impose the sentence it chose. Nor did he receive the probationary sentence he advocated—or anything close to it. And there is no suggestion that defense counsel's actions in the district court were the result of gamesmanship, or that counsel sought any strategic benefit by failing to object when the court imposed the 20-year term of supervision, accompanied by the overbroad computer ban. Tellingly, the government did not even argue below that Mr. Alegre had invited the error. *See Brief for the United States*, *United States v. Alegre*, No. 22-10260, 2022 WL 2399552 (11th Cir. June 27, 2022). Rather, the government advocated that the issue should be reviewed for plain error, *id*. at *12, which Mr. Alegre agrees is the proper standard of review. The Eleventh Circuit's *sua sponte*—and erroneous—application of the invited error doctrine should not defeat review.

Instead, the Court should follow its "routine[]" practice of granting certiorari to resolve the important legal question which is dividing the circuits, while leaving ancillary questions regarding the standard of review and the petitioner's ultimate entitlement to relief, for the court of appeals to determine on remand. "After identifying an unpreserved but plain legal error, this Court . . . routinely remands the case so the court of appeals may resolve whether the error affected the defendant's substantial rights and implicated the fairness, integrity, or public reputation of judicial proceedings—and so . . . determine if the judgment must be revised." *Hicks*

v. United States, 582 U.S. 924 (2017) (Gorsuch, J., concurring). *See also, e.g., Dubin v. United States*, 599 U.S. 10, 116 n.3 (2023) ("The Government argued below that because petitioner did not properly raise certain challenges to his § 1028A conviction, he cannot obtain relief without meeting the higher bar for plain-error review. The Fifth Circuit below did not decide that question, which this Court leaves for remand."); *Tapia v. United States*, 564 U.S. 319, 335 (2011) ("Consistent with our practice, *see, e.g., United States v. Marcus*, 560 U.S. 258, 266–267, 130 S. Ct. 2159, 176 L.Ed.2d 1012 (2010), we leave it to the Court of Appeals to consider the effect of Tapia's failure to object when the sentence was imposed."); *Rosemond v. United States*, 572 U.S. 65, 83 (2014) (vacating and remanding without considering the government's arguments about plain and harmless error). The Court should do the same, here.

The government argues that 18 U.S.C. § 3583(e)(2) provides a mechanism by which a defendant on supervised release may seek to modify the conditions of his supervision. *See* BIO at 7-8. But the Eleventh Circuit, along with the Second, Fifth, and Ninth Circuits, have held that § 3583(e)(2) "cannot be used to challenge the legality or constitutionality of supervised release conditions." *Cordero*, 7 F.4th at 1070 (first citing *United States v. Lusser*, 104 F.3d 32, 34 (2d Cir. 1997); then citing *United States v. Hatten*, 167 F.3d 884, 886 (5th Cir. 1999); and then citing *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2022)). "Rather, [§ 3583(e)] sets forth the factors a court should consider in determining whether to modify or terminate a condition of supervised release and illegality or constitutionality is not one of them." *Id.* Thus,

this split of authority over *Packingham*'s application to supervised release conditions will almost certainly need to be resolved by this Court in a case on direct review from the imposition of a defendant's sentence, and not on appeal from a § 3853(e)(2) modification proceeding. And this case provides an excellent vehicle for doing so.

III. This case provides an excellent vehicle to resolve the circuit split.

For all of these reasons, the petition should be granted. The question presented is a pure question of law, which was presented to the court of appeals and passed on by the court's following of *Bobal*. There is a direct and mature circuit split on the question presented. It will impact all of the state courts as well. And the government has not disputed that it is an important and unresolved question of constitutional law, warranting the Court's review.

Furthermore, there are no collateral legal questions which would "complicate this Court's consideration of petitioner's constitutional challenge." *See* BIO at 12. Mr. Alegre has not alleged that the supervised release condition is not reasonably related to his offense or the statutory factors set forth in 18 U.S.C. § 3583(d)(2), or that there was any other procedural impediment to the court's imposition of the release condition. He maintains only that the 20-year restriction on his access to computers and the Internet burdens substantially more speech than necessary to serve any legitimate government interest, and thus violates his First Amendment rights under *Packingham*. And, pursuant to the Court's regular practice, the Court can reserve the subsidiary question of plain error for the Eleventh Circuit to consider on remand. *See*

Henderson v. United States, 568 U.S. 266. 279 (2013) ("[I]t is enough that an error be 'plain' at the time of appellate consideration.") (citation omitted).

Finally, without this Court's clarification that individuals on supervised release retain a First Amendment right to access the Internet, Mr. Alegre's ability to seek a modification of his release conditions under § 3583(e) will not remedy the problem. When Mr. Alegre completes his prison sentence and begins his 20-year term of supervision, he will be 24 years old—a very young man, seeking to rebuild his life in the modern world. The district court assured Mr. Alegre that he would "have a second chance," "be able to finish college," and "be able to pursue a profession." (DE 81:63). But with the computer restriction currently in place, as a practical matter, Mr. Alegre won't be able to do any of that. And, indeed, even if the district court were to allow a special accommodation for Mr. Alegre to complete his education, the computer ban would still burden substantially more speech than the First Amendment allows.

In *Bobal*, the Eleventh Circuit noted this Court's statement that *Packingham* "should not be interpreted as barring a State from enacting more specific laws than the one at issue" in that case. *See Packingham*, 582 U.S. at 98; *Bobal,* 981 F.3d at 977. But the exemplars *Packingham* offered, of laws that conform with the First Amendment, were "narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." *Packingham*, 582 U.S. at 107. The computer restriction in this case, however, contains no such tailoring. Instead, it

prohibits Mr. Alegre from possessing or using "any computer," or accessing the Internet, with the sole exception that the he "may, with the prior approval of the Court, use a computer in connection with authorized employment." PSI ¶ 79. The condition's "wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child," and thus burdens "substantially more speech than is necessary to further the government's legitimate interests." *See Packingham*, 582 U.S. at 113, 114 (Alito, J., concurring) (citation omitted). Because "the government 'may not suppress lawful speech as the means to suppress unlawful speech,'" *Packingham*, 582 U.S. at 109 (citation omitted), the Court should grant review.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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