**NO:**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2022**

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**NORMAN JAVIER HERRERA PASTRAN,**

**Petitioner,**
**v.**

**UNITED STATES OF AMERICA,**

**Respondent.**

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. 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 individuals on supervised release.[1]

2. Whether 18 U.S.C. § 2251(a), which makes it a federal crime to induce a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, in any case where the depiction was "produced ... using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce," exceeds Congress' powers under the Commerce Clause, U.S CONST. art. I, § 8, cl. 3.

[1] A similar question is presented in *Finnell v. United States*, U.S. No. 23-5835 (pet. filed Oct. 16, 2023).

## INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Herrera Pastran submits that there are no parties to the proceeding other than those named in the caption of the case.

## RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

*United States v. Pastran*, No. 21-13829, 2023 WL 5623010 (11th Cir. Aug. 31,2023).

*United States v. Herrera Pastran,* 1:20-cr-20107-CMA (S.D. Fla. Oct. 22, 2021).

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# PETITION FOR WRIT OF CERTIORARI

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Norman Javier Herrera Pastran respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-13829, in that court on August 31, 2023. *United States v. Herrera Pastran*, 2023 WL 5623010 (11th Cir. Aug. 31, 2023).

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Herrera Pastran,* 2023 WL 5623010 (11th Cir. Aug. 31, 2023), is contained in the Appendix (A-1).

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The decision of the court of appeals was entered on August 31, 2023. This petition is timely filed pursuant to SUP. CT. R. 13.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. CONST. art. I, § 8, cl. 3**

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

**U.S. CONST. amend. I:**

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.

**Title 18 U.S.C. § 3583(d)** (in relevant part):

The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate....

**18 U.S.C. § 2251(a)**

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

## INTRODUCTION

This petition presents two important questions of Federal Constitutional law, warranting review.

1. First, Mr. Herrera Pastran asks this Court to settle the conflict over whether the First Amendment right to access the Internet, recognized by this Court in *Packingham v. North Carolina*, 582 U.S. 98 (2017), applies to individuals on supervised release. Four circuits, including the Eleventh Circuit below, have held that because the statute at issue in *Packingham* applied to offenders who had completed their sentences, the ruling does not apply to individuals on supervised release. Thus, notwithstanding the fact that Mr. Herrera Pastran's offense did not involve the Internet, the court of appeals affirmed the lifetime ban on access to the Internet applied in his case.

In contrast, three circuits and the highest courts of three states have held that *Packingham* does apply to defendants on court-ordered supervision. The supervised release conditions applied in Herrera Pastran's case would have been invalidated in any of these jurisdictions. Mr. Herrera Pastran thus ask this Court to resolve the conflict among the circuits, regarding whether a lifetime condition of supervised release, banning a supervisee's access to the Internet, violates the First Amendment.

2. Second, this Court's review is needed to clarify whether the analytical framework applied in *Wickard v. Filburn*, 317 U.S. 111 (1941), and *Gonzalez v. Raich*, 545 U.S. 1 (2005), may be applied to sustain the constitutionality of non-economic criminal statutes.

Mr. Herrera Pastran pled guilty to a single count of violating 18 U.S.C. § 2251(a), which makes it a crime to induce a minor to engage in sexually explicit conduct, for the purpose of producing any visual depiction of such conduct. Although this crime is colloquially referred to as the "production of child pornography," the statute encompasses any sex offense against a minor, in which the defendant takes a picture of his crime. And that is all that happened in this case.

Federal jurisdiction over the offense may be established by showing that any material used in the production of the depiction—in this case, a cell phone—had "been mailed, shipped, or transported in or affecting interstate or foreign commerce." 18 U.S.C. § 2251(a). Prior to this Court's ruling in *Gonzalez v. Raich*, 545 U.S. 1 (2005), the Eleventh Circuit had held, pursuant to *United States v. Lopez,* 514 U.S. 549, 557 (1995) and *United States v. Morrison,* 529 U.S. 598, 608 (2000), that this broad exercise of federal jurisdiction exceeds Congress' powers under the Commerce Clause. Two additional circuits—the Sixth and the Ninth—had similarly found applications of the statute unconstitutional as applied.

In the wake of *Raich*, however, all three circuits reversed. And the Eleventh Circuit did so, notwithstanding its earlier finding that the conduct proscribed by § 2251(a) could not fairly be defined as "economic." But *Raich* never held that its aggregation approach could be applied to non-economic criminal statutes. To the contrary, the Court found that the statute at issue therein regulated "quintessentially 'economic'" activities. *Raich*, 125 S. Ct. at 26.

Prior to *Raich*, the Solicitor General agreed that the question whether 18 U.S.C. § 2251 is " constitutional as applied to the intrastate production and possession of child pornography" is an "important one[] that may ultimately warrant plenary review by this Court." Petition for a Writ of Certiorari, *United States v. Smith*, No. 04-1390, 2005 WL 883803 (U.S. April 15, 2005). The day has come where such review is needed. The Court should grant review to determine whether this Court's this most far-reaching commerce clause precedents, *i.e.*, *Wickard* and *Raich*, may be applied to purely non-economic criminal statutes.

## STATEMENT OF THE CASE

In July 2018, two minor victims, then aged 11 and 12 years old reported that Mr. Herrera Pastran had sexually abused them on multiple occasions—and that he had taken photographs of the abuse using an old cell phone. (DE 41:1). Mr. Herrera Pastran was charged in state court with one count of lewd and lascivious molestation of a child under 12 years, and four counts of sexual battery on a victim under 12 years. (Presentence Investigation Report ("PSI") ¶ 16). While that case was pending, Mr. Herrera Pastran's wife located his old cell phone and provided it to law enforcement. (PSI ¶ 16). A forensic search of that phone revealed 47 images of the abuse. (*See* PSI ¶ 18; DE 41:2). The images had been taken on March 17 and March 20, 2017. (DE 41:2). They had been viewed twice, on March 27 and March 28, 2017, "and then deleted sometime thereafter." (PSI ¶ 18). Nearly three years later, on February 25, 2020, an indictment was filed in federal court, charging Mr. Herrera Pastran with

two counts of production of child pornography, based on the pictures he had taken of the sexual abuse. (DE 1).

On July 30, 2021, Mr. Herrera Pastran pled guilty to a single count of violating 18 U.S.C. § 2251(a). (DE 40). During the change of plea hearing, the trial prosecutor stated that "[i]f the case had proceeded to trial, the Government would have been able to prove the following elements beyond a reasonable doubt:"

> One, that an actual minor, that is a real person who was less than 18 years old, was depicted.
>
> Two, the defendant used, persuaded, induced, enticed or coerced the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction.
>
> And, three, that the visual depiction was produced using materials that had been mailed, shipped or transported across state lines or in foreign commerce by any means.

(DE 19:7-8). Mr. Herrera Pastran agreed that this was an accurate statement of the elements. (DE 19:8). The parties further stipulated that the images had been taken on a Samsung Galaxy Avant cell phone, which had been "manufactured outside the State of Florida, and therefore had been mailed, shipped, and transported in interstate and foreign commerce." (DE 41:2).

Prior to sentencing, the United States Probation Office prepared a Presentence Investigation Report ("PSI"). (DE 44). Pursuant to 18 U.S.C. § 2251(e), Mr. Herrera Pastran was subject to a 15-year minimum mandatory sentence. (PSI ¶ 82). The probation officer concluded that Mr. Herrera Pastran's advisory Guidelines range was 292-365 months. (PSI ¶ 83). However, because the statutory maximum penalty

was 30-years, the Guidelines range was 292-360 months' imprisonment. (PSI ¶ 83).

Additionally, the applicable statute required, and the Guidelines recommended, a term of supervised release of between 5 years and life. (PSI ¶¶ 86, 87). The PSI also recommended that the district court impose 15 "special conditions of supervision," including the following:

> **Computer Modem Restriction**: The defendant shall not possess or use a computer that contains an external or wireless modem without prior approval of the Court.
>
> **Computer Possession Restriction**: The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

(PSI ¶¶ 98-99).

The district court sentenced Mr. Herrera Pastran to the statutory maximum sentence of 360 months' imprisonment, to be followed by a lifetime term of supervised release. (DE 60:21). The court also stated that it was imposing the special conditions of supervision identified in the PSI, including the computer modem restriction, and the computer possession restriction. (DE 60:21). Mr. Herrea Pastran objected to the lifetime term of supervised release, but did not specially object to the conditions restricting his access to computers and the Internet. (DE 60:22-23).

Mr. Herrera Pastran appealed his conviction and sentence to the United States Court of Appeals for the Eleventh Circuit. On appeal, Mr. Herrera Pastran argued, *inter alia*, that 18 U.S.C. § 2251(a) exceeds Congress' powers under art. I, § 8, cl. 3, of the United States Constitution, *i.e.*, the "Commerce Clause," because it allowed for

him to be convicted of a federal offense simply because he had committed his crime using a cell phone that had been manufactured out of state. He also argued that the special conditions of supervised release, which amounted to a near total ban on his use of computers and the Internet for the rest of his life, were unconstitutional under the First Amendment and this Court's constitutional holding in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

On August 31, 2023, the the Eleventh Circuit issued an opinion affirming Mr. Herrera Pastran's conviction and sentence. *See United States v. Herrera Pastran*, 2023 WL 5623010 (11th Cir. Aug. 31, 2023). The court found that both of Mr. Herrera Pastran's constitutional claims were precluded by Eleventh Circuit precedent.

Mr. Herrera Pastran's challenge to the constitutionality of 18 U.S.C. § 2251(a) was foreclosed by *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006) ("*Smith II*"), "which upheld the facial constitutionality of § 2251(a) and sanctioned its application to facts that are materially identical from the facts of this case for purposes of Commerce Clause purposes." *Herrera Pastran* 2023 WL 5623010 at *5. Like Mr. Herrera Pastran, Smith had been convicted of one count violating § 2251(a). "The Government did not attempt to show the images underlying Smith's conviction traveled or were produced with the intent to travel in interstate commerce." *Id.* "Rather, the Government provided evidence that the photographs were printed and processed using Kodak paper and other equipment manufactured and shipped from out of state." *Id.*

The Eleventh Circuit initially held that Smith's conviction on these facts exceeded Congress' powers under the Commerce Clause. *See United States v. Smith,* 403 F.3d 1303 (11th Cir. 2005) ("*Smith I*"), *vacated*, 545 U.S. 1125 (2005). The court of appeals reversed, however, after *Smith I* was vacated by this Court and remanded for reconsideration in light of *Gonzalez v. Raich*, 545 U.S. 1 (2005). On remand, the Eleventh Circuit held that "where Congress has attempted to regulate (or eliminate) an interstate market, *Raich* grants Congress substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic activity." *Smith II*, 459 F.3d at 1285 (internal quotation marks and citation omitted). Indeed, while the court was uncertain whether Smith's conduct could be described as "economic," it held that "*Raich* made the economic/non-economic distinction irrelevant for aggregation purposes." *Smith II,* 459 F.3d at 1285 n.9.

The court also rejected Mr. Herrera Pastran's argument that *Packingham v. North Carolina*, 582 U.S. 98 (2017) "clearly establishe[d] the district court's error in imposing the computer restrictions at issue in here." *Herrera Pastran*, 2023 WL5623010 at *9. Following *United States v. Bobal,* 981 F.3d 917, 977-78 (11th Cir. 2020), the court distinguished *Packingham* because "the North Carolina law at issue in *Packingham* 'restricted sex offenders even after they had completed their sentences," whereas the restriction in this case was a condition of supervised release. *Id*.

This petition follows.

## REASONS FOR GRANTING THE PETITION

### I. This Court should resolve the conflict among the lower courts about whether individuals under court-ordered supervision have a First Amendment right to access the Internet.

#### A. *Packingham* recognized a First Amendment right to access the Internet.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak, listen, speak, and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734 (2017). Today that place is "cyberspace – the 'vast democratic forums of the Internet.'" *Id.* (citation omitted).

In *Packingham*, the Court struck down a North Carolina law that made it a crime for any registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members" as violative of the First Amendment. *Id.* at 1734. The Court assumed the restriction was content-neutral, and subjected it to intermediate scrutiny. *Id.* "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" *Id.* at 1736 (citation omitted). "In other words, the law must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (citation and internal quotation marks omitted). North Carolina's social networking ban failed this test.

The Court held that, by prohibiting sex offenders from accessing social media websites, the statute "bar[red] access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the

modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* "In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 1737.

The Court noted that the North Carolina law was "unprecedented in the scope of First Amendment speech it burdens," and found it "instructive that no case or holding of this Court has approved a statute as broad in its reach." *Id.* at 1337-38. Because the law restricted far more speech than was necessary to protect children, it failed to survive intermediate scrutiny review. *Id.* at 1738.

### B. The lower courts are divided over whether *Packingham* applies to individuals under court-ordered supervision.

In *United States v. Bobal*, 981 F.3d 917, 977-78 (11th Cir. 2020), the opinion relied on below, the Eleventh Circuit held that this Court's constitutional ruling in *Packingham* does not apply to defendants on supervised release. The defendant in *Bobal*, like Mr. Herrera Pastran, argued that the computer restriction imposed in his case violated his First Amendment rights under *Packingham*. Indeed, the restriction of liberty goes far beyond the "unprecedented" restriction struck down in *Packingham*. While the law at issue in *Packingham* was limited to social networking

websites, the restrictions imposed in *Bobal* and herein effect a complete ban on Internet access, absent prior court approval. *See* 981 F.3d at 975.

The Eleventh Circuit found, however, that "*Packingham* is distinguishable because [the defendant's] computer restriction does not extend beyond his term of supervised release, it is tailored to his offense, and he can obtain the district court's approval to use a computer for permissible reasons." *Bobal*, 981 F.3d at 973. And the Eleventh Circuit expressly rejected the Third Circuit's contrary ruling in *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018), which, according to the Eleventh Circuit, " read the opinions in *Packingham* too broadly:"

> Both the majority opinion and the concurring opinion in *Packingham* agreed that the North Carolina law infringed the First Amendment rights of registered sex offenders, who would be committing an entirely new felony if they accessed certain websites. But neither opinion addressed whether the First Amendment is violated by a special condition of supervised release for a sex offender who is serving a sentence for an offense involving electronic communications sent to a minor.

*Bobal*, 981 F.3d at 978. Based on that reasoning, the Eleventh Circuit affirmed Bobal's sentence, and rejected the application of *Packingham* to conditions of supervised release.

While, like here, 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 contrary analysis in *Holena*. And, *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, the law of the Eleventh Circuit is clear: "[n]othing in *Packigham*" limits district courts' discretion in establishing conditions of supervised release. *See Cordero*, 7 F.4th 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 Eighth Circuit similarly found *Packingham* inapplicable to the case of a defendant who had been sentenced to a 20-year term of supervised release, with the special condition that he "not possess or use a computer or have access to any online service without the prior approval of the U.S. Probation and Pretrial Services Office," in *United States v. Perrin*, 926 F.3d at 1044, 1048 (8th Cir. 2019). "*Packingham*," the court held, was "of no help to Perrin for at least three reasons." *Id.* 1045. First, the defendant in *Perrin*, unlike the petitioner in *Packingham*, had used the internet to contact a minor. *Id.* at 1048. "Second, the statute at issue in *Packingham* prohibited registered sex offenders from accessing commercial social-networking sites, even after 'hav[ing] completed their sentences," whereas the defendant in *Perrin* was still under a criminal justice sanction. *Id.* at 1049. Third, the court found, implausibly, that the restriction in Perrin's case was less restrictive than the social media ban in

*Packingham*, because the defendant had the option of seeking permission from his probation officer to access those websites. *See id*.[2]

As in *Bobal* and here, the First Amendment challenge in *Perrin* was brought under plain error review. The Eighth Circuit nonetheless resolved the substantive question and held that "the special condition at issue does not involve a greater deprivation of liberty than is reasonably necessary." *Perrin*, 926 F.3d at 1050. "Accordingly, the district court did not err, much less plainly err, in imposing the special condition." *Id. See also id*. at 1047 (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"). *See also United States v. Halverson,* 897 F.3d 645, 658 (5th Cir. 2018) ("*Packingham* does not—certainly not 'plainly'—apply to the supervised-release context.").

The Ninth Circuit also held that *Packingham* does not establish a First Amendment right to access the Internet while on supervised release, in *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 in *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

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[2] As discussed *infra*, the Second Circuit correctly recognized that such a condition is, in fact, far more onerous than the restriction struck down in *Packingham*.

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 decisions stand in stark contrast to decisions of the Second, Third, and Fourth Circuits, all of which have recognized *Packingham's* application to defendants on supervised release. The highest courts of three states – West Viriginia, Illinois, and Nevada—have also recognized *Packingham*'s application to conditions court-ordered supervision.

In *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019), the Second Circuit reversed a supervised release condition banning a defendant's access to the Internet and adult pornography, because the record was insufficient to justify the restriction. 913 F.3d at 95. That court rejected the government's position that "Eaglin has no constitutional right to access the Internet," finding it "outdated and in conflict with recent Supreme Court precedent," specifically, *Packingham*. *See id*. Moreover, the Second Circuit recognized that the special condition of supervised release imposed therein was "broader in its terms, if not in its application, than that struck down in *Packingham*." *Id*. at 96. "Whereas the *Packingham* statute banned access only to certain social networking sites where minors may be present, such as Facebook and Twitter, the condition imposed on Eaglin prohibits his access to *all* websites." *Id*. (emphasis in original). "Because the District Court adopted the condition on the government's recommendation for a complete Internet ban and required specific

permission from the court for any desired instances of internet access," the Second Circuit "underst[oo]d the condition effectively to operate as a total Internet ban." *Eaglin*, 913 F.3d at 95 n.7.

The Second Circuit recognized that "[t]he restriction in *Packingham* created a permanent restriction in the form of a criminal statute applicable to all registered sex offenders," and noted that "[c]ertain severe restrictions may be unconstitutional when cast as a broadly-applicable criminal prohibition, but permissible when imposed on an individual as a condition of supervised release." *Eaglin*, 913 F.3d at 95-96. In the court's view, however, "*Packingham* nevertheless establishes that, in modern society, citizens have a First Amendment right to access the Internet." *Id.* at 96. The court held that "Eaglin has a First Amendment right to be able to email, blog, and discuss the issues of the day on the Internet while he is on supervised release." *Id.* And, "as emphasized by *Packingham's* recognition of a First Amendment right to access certain social networking websites, the imposition of a total Internet ban as a condition of supervised release inflicts a severe deprivation of liberty." *Eaglin*, 913 F.3d at 97. The Second Circuit thus held that, "[i]n only highly unusual circumstances will a total Internet ban imposed as a condition of supervised release be substantively reasonable and not amount to a 'greater deprivation of liberty than is reasonably necessary' to implement the statutory purposes of sentencing." *Id.* (citations and internal quotation marks omitted).

As noted above, the Third Circuit has also held that *Packingham's* constitutional holding does apply to individuals on supervised release. *Holena*, 906 F.3d 288. The defendant in *Holena* "was convicted of using the internet to try to entice a child into having sex." *Id.* at 290. In such a case, the Third Circuit recognized that "a sentencing judge may restrict a convicted defendant's use of computers and the internet." *Holena*, 906 F.3d at 290. "But to respect the defendant's constitutional liberties, the judge must tailor those restrictions to the danger posed by the defendant." *Id.*

The court noted that 18 U.S.C. § 3583 "places 'real restrictions on the district court's freedom to impose conditions of supervised release.'" *Id.* (alteration and citation omitted). In language mirroring the intermediate scrutiny standard, § 3583(d)(2) requires that special conditions of supervised release not deprive a defendant of "more liberty 'than is reasonably necessary' to deter crime, protect the public, and rehabilitate the defendant." *Holena*, 906 F.3d at 291 (citing 18 U.S.C. § 3583(d)(2)). This "tailoring requirement reflects constitutional concerns." *Id.* at 294. "Conditions that restrict fundamental rights must be 'narrowly tailored and ... directly related to deterring [the defendant] and protecting the public.'" *Id.* (internal quotation marks and citations omitted). "And a condition is 'not 'narrowly tailored' if it restricts First Amendment freedoms without any resulting benefit to public safety.'" *Id.* (citation omitted). *See also id.* at 295 ("Under *Packingham*, blanket internet restrictions will rarely be tailored enough to pass constitutional muster.").

The Third Circuit agreed that restricting Mr. Holena's access to the Internet was "necessary to protect the public." But the prohibition imposed in his case was "not tailored to the danger he poses." *Id.* Among other problems with Mr. Holena's supervised release conditions, the court found that the Internet ban "prevent[ed] Holena from accessing anything on the internet – even websites that are unrelated to his crime." *Id.* at 293.

> On this record, we see no justification for stopping Holena from accessing websites where he will probably never encounter a child, like Google Maps or Amazon. The same is true for websites where he cannot interact with others or view explicit materials, like Dictionary.com or this Court's website.

*Id.* The court thus remanded the case for a more narrow tailoring of Mr. Holena's release conditions, and instructed the district court to "take care not to restrict Holena's First Amendment rights more than reasonably necessary or appropriate to protect the public." *Id.*

In *United States v. Ellis*, 984 F.3d 1092, 1095 (4th Cir. 2021), the Fourth Circuit held that special conditions of supervised release banning the defendant from accessing the Internet were "overbroad," and could not be sustained as "reasonably related" to the factors identified in 18 U.S.C. § 3583(d), where there was no evidence that the defendant's offense involved the Internet. The court cited *Packingham* for the proposition that "[a] complete ban on [I]nternet access is a particularly broad restriction that imposes a massive deprivation of liberty." *Id.* at 1104. The Court also recognized that an Internet ban "implicates fundamental rights," and cited *Eaglin*, 913 F.3d at 96, which in turn cited *Packingham,* 137 S. Ct. at 1737-38, for the

proposition that "[The defendant] has a First Amendment right to be able to email, blog, and discuss the issues of the day on the Internet while he is on supervised release." *Ellis*, 984 F.3d at 1105.

The highest courts of three states courts have also held that *Packingham* applies to offenders serving a criminal justice sentence. In *Mutter v. Ross*, the West Virginia Supreme Court vacated a parole condition that prohibited the defendant from possessing or having contact with any computer that had Internet access, and rejected the State's attempt to distinguish *Packingham* based on the defendant's status as a parolee. 811 S.E. 866, 871, 873 (W.V. 2018). That court wrote: "*Packingham* is clear that a government restriction on internet access must be narrowly tailored so as to not burden more speech than is necessary to further the government's legitimate interests. On this well-established rule, *Packingham* made no exception for parolees." *Id.* The court concluded that "generally, under *Packingham* ..., a parole condition imposing a complete ban on a parolee's use of the internet impermissibly restricts lawful speech in violation of the First Amendment of the United States Constitution." *Id.*

The Illinois Supreme Court similarly held, in *Illinois v. Morger*, 160 N.E.3d 53, 63 (Ill. 2019), that *Packingham* applied to conditions of probation. That court criticized those courts "limiting the reach of *Packingham*" by finding "that the principles of *Packingham* do not apply to those still serving their sentences—a group the *Packingham* Court had no reason to address." *Id.* at 68. "Applying the tenets of *Packingham*," the court held that a mandatory probation condition, which banned

access to all social media and applied to all sex offenders, was "overbroad and facially unconstitutional." 160 N.E.3d at 69.

Most recently, in *Adalpe v. Nevada*, 535 P.3d 1184 (Nev. 2023), the Supreme Court of Nevada held that, under *Packingham*, a statutory condition of probation prohibiting sex offenders from accessing the internet without permission violated the First Amendment. The court expressly rejected the state's effort to "limit the rights recognized in *Packingham* to people who, unlike Aldape, have completed their sentence and are no longer under court-supervised release." *Id.* at 1190. The court acknowledged that defendants on probation enjoyed less liberty, "[b]ut that does not mean that the First Amendment right to internet access recognized in *Packingham* has no application to probationers." Id. at 1191. "*Packingham* therefore assists us in holding that the First Amendment protects the right of court supervisees, including Aldape, to access the internet." *Id.*

### C. The decision below is wrong.

As the Court recognized in *Packingham*, the importance of the Internet to individuals attempting to reintegrate into society cannot be overstated. "[I]n applying the First Amendment to 21st century norms, *Packingham* formalized an undeniable truth—there is simply no way to participate in modern society without internet access or a device capable of accessing the Internet," such as a modem. *Aldape*, 535 P.3d at 1191 (internal quotation marks omitted). "That fact does not change, and perhaps becomes even more salient, when applied to people under active court supervision." *Id.* "It would, for example, be hopelessly difficult to meet with one's probation officer

without using a cell phone to make the appointment, get directions, arrange transportation, and set reminders. Then there are the rehabilitative steps: finding a job, renting a home, communicating with family and friends, and civic participation all often require an internet connection." *Id.* As the Court recognized in *Packingham,* "[e]ven convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." *Packingham*, 137 S. Ct. at 1737.

There is no doubt that a court may impose narrowly tailored restrictions on an offender's First Amendment rights, in order to prevent the commission of future crimes and safeguard the community. *See Packingham*, 137 S. Ct. at 1737 ("Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, 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."). But no circumstances justify the lifetime ban on access to the Internet imposed in Mr. Herrera Pastran's case.

The far-reaching restriction "precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child," and cannot survive intermediate scrutiny. *See Packingham*, 137 S. Ct. at 1741 (Alito, J., concurring). It does not stop at restricting his access to social media and nationally prominent websites such as Amazon.com, WebMd.com and Washingtonpost.com. *See Packingham*, 137 S.Ct. at 1376. It will prevent him from accessing the website of his

local municipality to learn essential information such as when the trash collector is coming, whether public health measures are in effect, or where to obtain needed benefits. Mr. Herrera Pastran will lack access to the most up- to-date weather alerts in the event of an oncoming hurricane or other weather emergency. He will be unable to look up a bus schedule, or learn about planned service outages. He will be unable to access his own medical or financial information, or participate in remote medical care through a smartphone or on-line portal. He will be precluded from participating in online religious services. Mr. Herrera Pastran would not even be able to access the live broadcast of a legal argument in his own case. The computer restriction thus burdens substantially more speech than is necessary, and prevents Mr. Herrera Pastran from "engaging in the legitimate exercise of First Amendment rights" *Packingham*, 137 S. Ct. at 1737.

**D. This case is an excellent vehicle.**

Though Mr. Herrera Pastran raised the issue for the first time on appeal, and the Eleventh Circuit held it was bound by its prior decision in *Bobal*, *Bobal* (also a plain error case) resolved the constitutional issue presented herein on the merits. It expressly disagreed with the Third Circuit's holding that *Packingham* applied to supervised release conditions. *Bobal*, 981 F.3d at 978 ("*Holena* read the opinions in Packingham too broadly."). And it concluded that *Packingham* is distinguishable, in part "because [the defendant's] computer restriction does not extend beyond his term of supervised release." 981 F.3d at 973. The Eleventh Circuit has just as clearly and

definitively held that *Packingham's* constitutional rule does not apply to persons on supervised release. *See Cordero*, 7 F.4th at 1071.

Furthermore, unlike many cases in which this issue arises, Mr. Herrera Pastran's offense did not involve a computer or the Internet. Nor is there any evidence that Mr. Herrera Pastran had ever viewed child pornography, or sought to meet a minor, using the Internet. There can be no argument, therefore, that the Internet ban was justified based on the unique circumstances of Mr. Herrera Pastran's case.

The fact that the *Packingham* issue was raised for the first time on appeal is not a barrier to review. To the contrary, "[a]fter 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.*, *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). Thus, this case presents an ideal vehicle to resolve the circuit conflict.

## II.

### The Court's review is needed to clarify whether non-economic criminal statutes are subject to federal regulation under the *Wickard/Raich* "aggregate effects" framework.

This Court's review is warranted on the Commerce Clause question, because the decision below contravenes this Court's precedents, and raises important questions about the extent of the federal government's power as well as the proper framework for analyzing challenges under the Commerce Clause.

Mr. Herrera Pastran committed a grievous, but entirely local, crime. He was brought into the federal government's regulatory grasp by the mere fact that he took pictures of his offense on a cell phone which—like virtually *all* products in modern society—had been manufactured out of state. These pictures, which Mr. Herrera Pastran took and then deleted shortly thereafter, bore no relationship to any market for child pornography. There was no evidence that Mr. Herrera Pastran intended to share the pictures in an interstate market, or with any market, for that matter. There was not even evidence that Mr. Herrrera Pastran had previously participated in, or viewed images from, a market for child pornography. Instead, the mere fact that Mr. Herrera Pastran used the camera on a cell phone in the commission of his offense was sufficient to transform his conduct into a federal crime.

This Court has repeatedly warned that:

> the scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that

> to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

*United States v. Lopez*, 514 U.S. 549, 557 (2000) (quotation omitted). *See also United States v. Morrison*, 529 U.S. 598, 608 (2000) (same). The decision below eviscerates any such distinction between federal and local police powers, and warrants the Court's review.

### A. The Eleventh Circuit has improperly extended the *Wickard*/*Raich* aggregation framework to non-economic criminal statutes.

1. "[T]he principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *Morrison*, 529 U.S. at 607, 618 n.8 (citations and internal quotation marks omitted). "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (1995) (quotations omitted). The federal government may enact and enforce criminal laws only insofar as they fall within one of Congress' specifically enumerated powers under Article I. *See Bond v. United States*, 572 U.S. 844, 876-77 (2014) (""The Constitution confers upon Congress . . . not all governmental powers, but only discrete, enumerated ones.' . . . And, of course, 'enumeration presupposes something not enumerated.'") (alterations and citations omitted).

In *Lopez*, 514 U.S. 549, the Court identified three broad categories of activities that Congress may regulate pursuant to the Commerce power. *See* U.S. CONST. art. I, § 8, cl. 3. First, "Congress may regulate the use of the channels of interstate

commerce." *Lopez*, 549 U.S. 559. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce." *Id.* Third, Congress may regulate "those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

*Lopez* involved a challenge to the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which the Court described as "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561. Importantly, the Court found that § 922(q) was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. Furthermore, the Court rejected the government's argument that the statute could be regulated under the Commerce Clause because "the presence of guns in schools poses a substantial threat to the educational process," that would, in turn, "have an adverse effect on the Nation's economic well-being." *Id.* at 564. Such reasoning, the Court noted—and the government agreed—would allow Congress to "regulate not only violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.*

Five years later, the Court again rejected the argument that "Congress may regulate noneconomic, violent criminal conduct 'based solely on that conduct's aggregate effect on interstate commerce.'" *Morrison*, 529 U.S. at 617. The Court explained, again, that "[t]he Constitution requires a distinction between what is truly

national and what is truly local." *Id.* (citing *Lopez*, 514 U.S. at 568) (further citation omitted). And, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* (citation omitted). "Indeed," the Court could "think of no better example of the police power, which the Founders denied to the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." *Id.* (footnote omitted).

2. Relying on these precedents, in 2004**,** the Eleventh Circuit vacated a conviction for the possession of child pornography under a statute with a jurisdictional hook materially identical to the one at issue here. *See United States v. Maxwell*, 386 F.3d 1042, 1045 (11th Cir. 2004) ("*Maxwell I*"), *overruled*, 446 F.3d 1210 (11th Cir. 2006) ("*Maxwell II*"). Maxwell had been convicted of possessing child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B), which, like § 2251(a), requires proof only that the images had been "produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer." The evidence established Maxwell possessed images of child pornography that were "saved on computer disks that had traveled from out-of-state before they contained illegal images." *Maxwell I*, 386 F.3d at 1054. "The Government proved nothing more." *Id.*

Relying on *Lopez* and *Morrison*, the Eleventh Circuit originally held that the application of § 2252(A)(5)(B) to the facts of Maxwell's case "amount[ed] to an unconstitutional exercise of the Commerce Clause." *Maxwell I*, 386 F.3d at 1044.

Recognizing that § 2252(A) "does not govern 'the channels of interstate commerce,' and the Government did not establish that the proscribed images were 'things in interstate commerce,'" the court found that if the statute fell within Congress' enumerated powers, "it must be because the intrastate possession [of] child pornography falls within *Lopez's* third category of activities that 'substantially affect interstate commerce.'" *Id.* at 1055.

Thereafter, the Court considered four considerations articulated in *Morrison*, "for determining whether an activity 'substantially affects' interstate commerce such that it can be validly regulated through Commerce Clause legislation." *See id.* at 1056. They are:

> 1) whether the statute in question regulates commerce "or any sort of economic enterprise"; 2) whether the statute contains any "express jurisdictional element which might limit its reach to a discrete set" of cases; 3) whether the statute or its legislative history contains "express congressional findings" that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and a substantial effect on interstate commerce is "attenuated."

*Id.* (citations omitted).

"Turning to *Morrison's* first consideration," the court "discern[ed] nothing commercial or economic about the possession of child pornography, even if that pornography is saved on computer disks that were imported from out-of-state." *Id.* at 1056. The court further found that Maxwell's conduct could "be sharply distinguished" from the activity at issue in *Wickard v. Filburn*, 317 U.S. 111 (1942), in which case a farmer had challenged a statutory penalty assessed to any farmer who grew more wheat than permitted by a quota. *See Maxwell I*, 386 F.3d at 1056-

1057. In *Wickard*, "the challenged act constituted a civil scheme directed at controlling the cost and flow of rival goods in the marketplace," and this Court's "holding relied heavily on the statute's economic purpose and Congress's long-recognized authority to enact price regulations that affect the national market." *Maxwell I*, 386 F.3d at 1057.

The child pornography statute, "by contrast, *has no clear economic purpose*." *Id.* (emphasis added). "It makes no effort to control national trade by regulating intrastate activity," nor did "it seem that § 2252(A) represents a federal effort to reduce the trafficking of cameras, computers, staples, blank paper, film or disks in interstate commerce." *Id.* The true purpose of the statute, instead, was to criminalize the possession of child pornography. *See id.* at 1058 (citation omitted).

The Eleventh Circuit acknowledged other circuits which had concluded that the intrastate possession of child pornography has a direct impact on the national market for child pornography by looking beyond the isolated conduct of the defendant and considering the aggregate effect of such possession by others throughout the country." *Id.* at 1059 & n. 17 (first citing *United States v. Holston,* 343 F.3d 83, 90 (2d Cir. 2003); then citing *United States v. Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000), and then citing *United States v. Angle*, 234 F.3d 326, 338 (7th Cir. 2000)). The court found, however, that "this aggregate approach cannot be applied to intrastate criminal activity of a noneconomic nature." *Id.* The Eleventh Circuit thus reversed Maxwell's conviction. *Id.*

The Eleventh Circuit then applied *Maxwell I* to hold that 18 U.S.C. § 2251(a)—the statute at issue herein—similarly exceeded Congress' commerce power. *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2015) (*Smith I*), *vacated*, 545 U.S. 1125 (2005) (mem). The government subsequently filed petitions for certiorari in both *Maxwell* and *Smith*. *See United States v. Maxwell*, No. 04-1382 (U.S. Apr. 14, 2005); *United States v Smith*, No. 04-1390 (U.S. June 20, 2005). While those petitions were pending, *Gonzalez v. Raich*, 545 U.S. 1 (2005), was decided.

3. The respondents in *Raich* sought to prohibit the enforcement of the federal Controlled Substances Act, "to the extent it prevents them from possessing, obtaining, or manufacturing [locally-grown] cannabis for their personal medical use." 545 U.S. at 8. The specific question before the Court was "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9 (emphasis added). The Court held that it did.

The Court reviewed the lengthy history of federal regulation over markets for both legal and illegal drugs. For over 100 years, Congress has regulated medications and medicinal substances through various mean, including labeling requirements, reporting and registration requirements, and revenue laws. *See Raich*, 545 U.S. at 10-11. In 1970, "prompted by a perceived need to consolidate the growing number of piecemeal drug laws and enhance federal drug enforcement powers, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act," Title II of which became the Controlled Substances Act ("CSA"). *Id.* at 12. Congress, through the CSA,

sought control both the "legitimate and illegitimate traffic in controlled substances," and to "prevent the diversion of drugs from legitimate to illegitimate channels." *Id.* at 12-13. "To effectuate these goals, Congress devised a "closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13.

Significantly, and in contrast to the case here, the respondents in *Raich* did not contend that either the CSA or "any provision or section of the CSA" exceeded Congress' authority. *Id.* at 15. They simply argued that their purely intrastate manufacture and possession of marijuana should be exempted from the otherwise concededly valid law.

The Court disagreed. Relying largely on *Wickard*, the Court wrote: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (emphasis added and citations omitted). Therefore, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic effect* on interstate commerce." *Id.* (emphasis added and citation omitted). "When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (quotation omitted). Thus, when "a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no

consequences." *Id*. (citing, *e.g.*, *Lopez,* 517 U.S. at 558) (internal quotation marks and further citation omitted).

The Court found that Congress could rationally have determined that the respondents' activities, "taken in the aggregate," could substantially affect the interstate market for marijuana. "Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id*. at 22. The Court concluded that, "as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority," to regulate the market. *See id*.

Following *Raich*, the Court granted the government's petitions for *certiorari* in both *Maxwell I*, and *Smith I*, vacated the judgment of this court of appeals in both, and remanded the cases to the Eleventh Circuit. *See United States v. Maxwell*, No. 04-1382, 546 U.S. 801 (U.S. Oct 3, 2005); *United States v. Smith,* No. 04-1390, 545 U.S. 1125 (U.S. June 20, 2005).

4. On remand, the Eleventh Circuit reversed its holdings in both cases, in light of *Raich*. *See United States v. Maxwell,* 446 F.3d 1210 (11th Cir. 2006) ("*Maxwell II*"); *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006) (*Smith II*).

In *Maxwell II,* the Eleventh Circuit held that, pursuant to *Raich*, "Congress can regulate purely intrastate activity that is not itself 'commercial' in that it is not

produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Maxwell II*, 446 F.3d at 1214. The court found that *Raich* overruled its earlier holding that the "aggregation approach" to finding a substantial effect on interstate commerce was "inapplicable to non-economic intrastate activity." *Id*. at 1218. And, because *Raich* suggested that Congress could eliminate *all* intrastate possession of child pornography, no meaningful nexus to interstate commerce was constitutionally required. *See id*. at 1218.

The Eleventh Circuit followed the same course in *Smith*, holding that "where Congress has attempted to regulate (or eliminate) an interstate market, *Raich* grants Congress substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic activity." *Smith II*, 459 F.3d 1285 (internal quotation marks and citation omitted). Indeed, while the court was uncertain whether Smith's conduct could be described as "economic," it held that "*Raich* made the economic/non-economic distinction irrelevant for aggregation purposes." *Smith II,* 459 F.3d at 1285 n.9.

**B. The decision below is wrong.**

The Eleventh Circuit has extended the analytical framework of *Raich* beyond its limits. In *Raich,* the Court wrote: "Our caselaw firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (first citing

*Perez v. United States*, 402 U.S. 146 (1971), and then citing *Wickard*, 317 U.S. at 128-129). *See also Perez*, 402 U.S. at 154 ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.") (holding that statute prohibiting "extortionate credit transactions," aka loan-sharking, fell within the commerce power, even as applied to wholly intrastate conduct). A pre-requisite for the *Wickard/Raich* framework, however, is that the defendant's activities are, in fact, part of such an economic "class of activities." The Eleventh Circuit held that such a finding was unnecessary in this case. *See Smith* II 459 F.3d at1285 n.9 ("*Raich* left some confusion as to whether *Smith*'s conduct could be considered 'economic.' ... We need not well long on this question, as *Raich* made the economic/non-economic distinction irrelevant for aggregation purposes.").

But neither *Raich*, nor any other decision of this Court, has extended the aggregation framework to a non-economic activities. Instead, the Court held that, unlike the statutes "at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially 'economic.'" *Raich*, 125 S. Ct. at 26.

> "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1996). The CSA is a statute that regulates the production, distribution, and consumoption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. ... Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market.

*Id*. at 26. The Court concluded that "[b]ecause the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." *Id*. at 26-27.

The statute at issue in this case, by contrast, does *not* regulate any sort of economic or commercial activity, of the sort at issue in *Wickard* and *Raich*. To the contrary, 18 U.S.C. § 2251(a) is a standalone criminal statute, the purpose of which is to protect children from sexual abuse. Even when considered together with other child pornography statutes, it bears no semblance to the "closed regulatory system" at issue in *Raich*. It is instead "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. And, even though the offense is colloquially referred to as the "production of child pornography," the statute encompasses any sex offense against a minor in which the defendant takes a picture of his crime. Indeed, in this case, Mr. Herrera Pastran deleted the images before anyone (other than the minors themselves) knew they had been taken. The statute contains no requirement that the defendant either intend to, or in fact create, the sort of fungible, marketable commodity, which would bring the statute within the purview of *Wickard* and *Raich*.

**C. The question presented is important and warrants review.**

The Solicitor General has previously recognized that "[t]he questions whether 18 U.S.C. § 2251(a) and 2252A(a)(5)(B) are constitutional as applied to the intrastate production and possession of child pornography are important ones that may ultimately warrant plenary review by this Court." Petition for a Writ of Certiorari,

*United States v. Smith*, No. 04-1390, 2005 WL 883803 (U.S. April 15, 2005). The day has come where such review is needed.

The Courts of Appeals have interpreted *Raich* in a manner that is fundamentally inconsistent with the limitations on federal power recognized in *Lopez* and *Morrison*. Indeed, the Eleventh Circuit is not alone in interpreting *Raich* to overrule earlier decisions based on *Lopez* and *Morrison*. Both the Sixth and Ninth Circuit had similarly found applications of the federal child pornography statutes to be invalid—only to retreat from those holdings following *Raich*. *See United States v. Corp,* 236 F.3d 325 (6th Cir. 2001) (holding that "the government ... failed to make a showing that Corp's sort of activity would substantially affect interstate commerce"), *abrogation recognized by United States v. Bowers,* 594 F.3d 522, 530 (6th Cir. 2010) ("*Raich* makes clear, however, that Lopez and Morrison are no longer the controlling authorities in this type of as-applied challenge."); *United States v. McCoy*, 323 F.3d 114 (9th Cir. 2003) (holding that 18 U.S.C. § 2252(a)(4)(B), which "prohibits the possession of child pornography made with materials that have traveled in interstate commerce," was unconstitutional as applied to purely intrastate possession), *overruling recognized by United States v. McCalla*, 545 F.3d 750, 756 (9th Cir. 2008) ("[T]o the extent the reasoning employed in McCoy relied on the local nature of the activity, it has been overruled by the Supreme Court's decision in *Raich*.").

But nothing in *Raich* indicated that it was undermining this Court's earlier precedents. Rather, when facing the question presented therein, the Court held that "[w]ell-settled law" controlled the answer. 545 U.S. at 10. The court of appeals,

however, have interpreted and applied *Raich* to eliminate the prohibition on considering the aggregate effect of non-economic crime, which was central to the holdings of *Lopez* and *Morrison*, This Court's review is thus needed to clarify whether a non-economic criminal statute, such as 18 U.S.C. § 2252(a), may be sustained based solely on the aggregate effect of the activity on interstate commerce.

**D. This case is an ideal vehicle.**

This case is an ideal vehicle through which to answer the question, because Mr. Herrera Pastran's case bore no connection, whatsoever, to interstate commerce. He simply took pictures—which he deleted shortly thereafter—on a cell phone that had been manufactured out of state. There was "no evidence that he used the [I]nternet to facilitate his crime or that the images he recorded were related to an online market or otherwise entered the stream of commerce." *Herrera Pastran,* 2023 Wl 5623010 at *3. Nor was there even evidence that Mr. Herrrera Pastran had previously participated, in or viewed images from, an interstate market for child pornography. The mere fact that Mr. Herrera Pastran took pictures on his cell phone was sufficient to transform his purely local crime of sexual abuse, into a federal child pornography offense.

If Mr. Herrera's conviction is sustained on these facts, there is no limit to what Congress can make a federal crime. Indeed, "[i]f Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers." *Raich*, 545 U.S. at 57-58 (Thomas, J., dissenting). "By holding that Congress may regulate activity that

is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power." *Id*. at 58. Because "[t]he Constitution ... does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States,'" *Id*. at 45 (O'Connor, J., dissenting) (citations omitted), the Court should grant review.

## CONCLUSION

Based upon the foregoing, Mr. Herrera Pastran asks this Court to grant certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit.

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