No. 23-6161

IN THE SUPREME COURT OF THE UNITED STATES

NORMAN JAVIER HERRERA PASTRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to plain-error relief on his claim that the district court violated the First Amendment by imposing special conditions of supervised release under which petitioner, who was convicted of producing child pornography, may access a computer only in connection with authorized employment and with the prior approval of the court.

2. Whether petitioner is entitled to plain-error relief on his claim that 18 U.S.C. 2251(a) exceeds Congress's power under the Commerce Clause as applied to the intrastate production of child pornography where the materials used to produce the pornographic images have moved in interstate commerce.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-8) is not published in the Federal Reporter but is available at 2023 WL 5623010.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2023. The petition for a writ of certiorari was filed on November 29, 2023. 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 Southern District of Florida, petitioner was convicted on one count of producing child pornography, in violation of 18 U.S.C. 2251(a). Am. Judgment 1. The district court sentenced petitioner to 360 months of imprisonment, to be followed by a life term of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. A1, at 1-8.

1. In July 2018, three sisters, who were 11, 12, and 14 years old, reported to law enforcement that petitioner, their uncle, had sexually abused them. Presentence Investigation Report (PSR) ¶ 14. The eldest sister reported that when she was seven, petitioner abused her while giving her a bath at his home in Miami, Florida. PSR ¶ 15. The other two sisters reported that petitioner had orally and anally penetrated them with his penis on multiple occasions and had taken photos of the abuse. PSR ¶¶ 15, 21; Pet. App. A1, at 1. Police officers arrested petitioner and searched his old cell phone, which contained 47 sexually explicit images that were consistent with the reported abuse. PSR ¶¶ 18, 21; Pet. App. A1, at 1. "The phone was manufactured outside of Florida and was thus shipped and transported in interstate commerce before [petitioner] used" the phone to produce the images in Miami. Pet. App. A1, at 1; see PSR ¶¶ 18-19, 21.

A federal grand jury in the Southern District of Florida indicted petitioner on two counts of producing child pornography,

in violation of 18 U.S.C. 2251(a). Indictment 1-2. Pursuant to a plea agreement, petitioner pleaded guilty to one of the two counts, and the government agreed to dismiss the other. Pet. App. A1, at 1; Plea Agreement 1.

2. The Probation Office's presentence report calculated advisory guidelines ranges of 292 to 360 months of imprisonment and five years to life of supervised release. PSR ¶¶ 83, 87. The report also recommended several special conditions of supervised release, including that petitioner "shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court," PSR ¶ 98, and that petitioner "shall not possess or use any computer" except that he "may, with the prior approval of the Court, use a computer in connection with authorized employment," PSR ¶ 99.

At the sentencing hearing, the mother of the victims "discussed how [petitioner's] actions had permanently changed her daughters, robbing them of their sense of security and safety." Pet. App. A1, at 2; see Sent. Tr. 4-10. Emphasizing the "horrific" nature of petitioner's conduct -- which involved "repeated acts, unspeakable acts, indescribable acts to little unsuspecting girls, members of [petitioner's] family," over a period of "years and years" -- the district court determined that "only a high end of the guideline sentence will suffice" and sentenced petitioner to 360 months of imprisonment. Sent. Tr. 19-20. The court also sentenced petitioner to a life term of supervised release and

stated specifically that petitioner would be subject to the special conditions noted in the presentence report, including the "computer modem restriction" and the "computer possession restriction." Id. at 21. Petitioner did not object to those conditions. See id. at 22-23; PSR Addendum; Pet. 9 (acknowledging that petitioner "did not specially object to the conditions restricting his access to computers and the Internet").

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1, at 1-8.

On appeal, petitioner argued for the first time that the computer restrictions imposed as conditions of his supervised release were unconstitutional under Packingham v. North Carolina, 582 U.S. 98 (2017). See Pet. App. A1, at 6-7; Pet. C.A. Br. 44-46. The court of appeals observed that "because [petitioner] failed to object to the computer restrictions below, plain error review applies." Pet. App. A1, at 6. And the court explained that "Packingham does not clearly establish that the district court erred when it imposed the computer restrictions at issue in this case." Id. at 7. The court of appeals found Packingham "distinguishable for at least two reasons": First, unlike in Packingham, the restrictions in this case do "'not extend beyond [the defendant's] sentence'"; and second, unlike in Packingham, the restrictions here are "'not a complete bar to the exercise'" of "'First Amendment rights'" because petitioner could "'obtain court permission' to access the internet or 'to use a computer in

connection with employment'" -- and, in addition, could "'ask the district court to modify the terms of his supervised release.'" Ibid. (quoting United States v. Bobal, 981 F.3d 971, 977 (11th Cir. 2020), cert. denied, 141 S. Ct. 2742 (2021)). The court of appeals also observed that whereas "the state law in Packingham applied to all registered sex offenders, not only those who used a computer or some other means of electronic communication to commit their offenses," petitioner "used a smartphone, which is an electronic device akin to a computer, to commit the offense in this case." Id. at 8 n.2.

Petitioner additionally argued for the first time on appeal that his conviction for producing child pornography violated the Commerce Clause because his offense was "purely local." Pet. App. A1, at 3; see Pet. C.A. Br. 16-33. The court of appeals again observed that because petitioner had failed to make that argument below, it would review the "constitutional challenge" to his conviction, like the challenge to his sentence, only for "plain error." Pet. App. A1, at 3. The court then found that circuit precedent "foreclosed" petitioner's challenge. Id. at 4. The court explained that "the required nexus" to interstate commerce "was provided by [petitioner's] use of a device" -- namely, a cell phone -- "that had been manufactured out of state and transported in interstate commerce." Id. at 3. And the court observed that, following this Court's decision in Gonzales v. Raich, 545 U.S. 1 (2005), it had "upheld the facial constitutionality of § 2251(a)

and sanctioned its application to facts that [we]re materially indistinguishable." Pet. App. A1, at 4 (citing United States v. Smith, 459 F.3d 1276 (11th Cir. 2006), cert. denied, 549 U.S. 1137 (2007)). The court of appeals therefore determined that petitioner could not "show any error in his § 2251(a) conviction under the Commerce Clause, much less plain error." Ibid.

ARGUMENT

Petitioner contends (Pet. 12-25) that the district court violated his First Amendment rights when it imposed special conditions of supervised release restricting his computer access. Petitioner further contends (Pet. 26-40) that 18 U.S.C. 2251(a), which criminalizes the production of child pornography, exceeds Congress's authority under the Commerce Clause as applied to his conduct. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. In any event, this case would be a poor vehicle for this Court's review because each of petitioner's arguments is reviewable only for plain error. The petition for a writ of certiorari should be denied.

1. Petitioner's constitutional challenge (Pet. 12-25) to the supervised-release conditions restricting his computer access lacks merit, does not implicate a conflict of authority, and does not warrant this Court's review. This Court has recently denied petitions for writs of certiorari raising similar issues. See Alegre v. United States, 144 S. Ct. 344 (2023) (No. 22-7471); Wells

v. United States, 143 S. Ct. 267 (2022) (No. 22-5340); Bobal v. United States, 141 S. Ct. 2742 (2021) (No. 20-7944). The same course is warranted here.*

a. In Packingham v. North Carolina, 582 U.S. 98 (2017), this Court invalidated a North Carolina law that categorically prohibited all registered sex offenders from accessing certain social-media websites, reasoning that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." Id. at 108; see id. at 101, 105-108. The Court found that the State had not "met its burden to show that [its] sweeping law," id. at 108 -- which was applicable even to those "who already ha[d] served their sentence and [we]re no longer subject to the supervision of the criminal justice system," id. at 107 -- was "necessary or legitimate to serve" the State's "preventative purpose of keeping convicted sex offenders away from vulnerable victims," id. at 108.

The Court specifically cautioned, however, that its "opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue." Packingham, 582 U.S. at 107. Concurring in the judgment, Justice Alito elaborated on the point, observing that "[b]ecause protecting children from abuse is a compelling state interest and sex offenders can (and do) use the Internet to engage in such abuse, it is legitimate and entirely

* Another pending petition for a writ of certiorari raises a similar issue. See Finnell v. United States, No. 23-5835 (filed Oct. 16, 2023).

reasonable for States to try to stop abuse from occurring before it happens." Id. at 112-113.

b. Reviewing for plain error, the court of appeals correctly determined that petitioner was not entitled to relief on his Packingham claim. Pet. App. A1, at 6-8. Plain-error review requires, inter alia, that an error be "clear or obvious." Puckett v. United States, 556 U.S. 129, 135 (2009). And as the court recognized, "Packingham does not clearly establish that the district court erred when it imposed the computer restrictions at issue in this case." Pet. App. A1, at 7.

This case differs from Packingham in a number of respects. The state law invalidated in Packingham applied across the board to registered sex offenders, without regard to their individual criminal conduct or likely future conduct. See 582 U.S. at 101-102. The special conditions here, in contrast, are a component of petitioner's sentence that the district court found to be appropriate for him. Pet. App. A1, at 6-7; see United States v. Knights, 534 U.S. 112, 119 (2001) (observing that individuals on probation "'do not enjoy "the absolute liberty to which every citizen is entitled,"'" and "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens") (citation omitted). As the court of appeals observed, petitioner "used a smartphone, which is an electronic device akin to a computer," to produce the child pornography in this case. Pet. App. A1, at 8 n.2. Petitioner

also used the smartphone to store and access the child pornography that he produced, id. at 1, and the device would likewise have enabled him to share his child pornography with others. Thus, the special conditions here are specifically based on petitioner's own conduct, not any generalized suppositions about an undifferentiated class of sex offenders.

In addition, unlike the permanent ban in Packingham, which imposed "severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system," 582 U.S. at 107, the special conditions here are coterminous with petitioner's supervised release, see Pet. App. A1, at 7 (observing that the conditions do "not extend beyond [petitioner's] sentence") (citation omitted). The current term of supervised release is a life term, see id. at 3, but petitioner can seek early termination of it, see 18 U.S.C. 3583(e)(1). Furthermore, the conditions of his supervised release are not a blanket ban on computer use. Cf. Packingham, 582 U.S. at 101 (describing a generalized ban on accessing social-media websites). Instead, the conditions allow petitioner "'to obtain court permission' to access the internet or 'to use a computer in connection with employment.'" Pet. App. A1, at 7 (quoting United States v. Bobal, 981 F.3d 971, 977 (11th Cir. 2020), cert. denied, 141 S. Ct. 2742 (2021)). Petitioner also retains the right to ask the district court "to modify" the challenged conditions. Ibid. (citation omitted).

It is thus far from clear or obvious that Packingham precludes the supervised-release conditions that petitioner challenges, which are specific to his particular case and thus even narrower than the sort of "more specific laws," not individually tailored to a particular defendant, that may still be permissible under Packingham. 582 U.S. at 107. And the court of appeals' own precedent in United States v. Bobal, which denied plain-error relief to a defendant challenging identical supervised-release conditions, 981 F.3d at 976-978, is a further impediment to plain-error relief, as any error in the district court's decision was not clear or obvious where it would be contrary to circuit precedent -- as well as precedent in other circuits. See p. 12, infra; cf., e.g., United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (per curiam) (observing that "[w]here neither the Supreme Court nor th[e court of appeals] has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue") (citation omitted; brackets in original); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (similar), cert. denied, 549 U.S. 911 (2006); United States v. Williams, 53 F.3d 769, 772 (6th Cir. 1995) (similar), cert. denied, 516 U.S. 1120 (1996).

In any event, petitioner's First Amendment arguments would not meaningfully alter the analysis in this case. Packingham assumed that intermediate scrutiny -- requiring the law to be "narrowly tailored to serve a significant governmental interest"

-- governed there, 582 U.S. at 105-106 (citation omitted), and the sentencing statutes already required the district court to undertake a similar analysis in this case. Under those statutes, a district court is authorized to impose any special condition of supervised release that "it considers to be appropriate," as long as the condition is "reasonably related" to the nature and circumstances of the offense and the history and characteristics of the defendant, as well as the need to deter and protect the public from future crimes. 18 U.S.C. 3583(d) (incorporating general sentencing factors from 18 U.S.C. 3553(a)); see 18 U.S.C. 3553(a)(1), (2)(B), and (C). A condition must also involve "no greater deprivation of liberty than is reasonably necessary" to achieve statutory purposes. 18 U.S.C. 3583(d)(2).

Even if intermediate scrutiny differs in some respects from those criteria, petitioner does not explain how it would make a difference in this or a significant number of other cases. See Pet. App. A1, at 7 (finding that the "district court did not obviously violate any of those limitations here"). Indeed, a more limited restriction might present significant enforcement concerns, as it would require intensive and specific monitoring of the precise ways in which petitioner used a computer -- or, as here, a mobile device -- which might, among other difficulties, be modified to obscure or altogether conceal prohibited practices.

c. Petitioner is mistaken in asserting (Pet. 13-22) that the decision below implicates a conflict among the lower courts.

Consistent with the decision below, the Fifth, Eighth, and D.C. Circuits have recognized that "even after Packingham, a district court does not commit plain error" by imposing special conditions on supervised release like those in this case. Bobal, 981 F.3d at 978 (citing United States v. Halverson, 897 F.3d 645, 658 (5th Cir. 2018); United States v. Perrin, 926 F.3d 1044, 1049-1050 (8th Cir. 2019); United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017)). And the Ninth Circuit has recognized that Packingham does not preclude district courts from imposing computer-related supervised-release conditions that are "tailored to [the defendant's] conviction and circumstances." United States v. Wells, 29 F.4th 580, 591 n.5 (9th Cir.), cert. denied, 143 S. Ct. 267 (2022).

Although petitioner cites (Pet. 17-21) decisions from the Second, Third, and Fourth Circuits, none of those decisions reached a contrary result in similar circumstances. The Second Circuit's decision in United States v. Eaglin, 913 F.3d 88 (2019), involved abuse-of-discretion review, not plain-error review, because the defendant there had properly raised his objection before the district court. Id. at 91, 93-94. Moreover, Eaglin relied on the absence of evidence suggesting that a supervised-release condition banning Internet access was "warranted by [the defendant's] criminal history or characteristics" or "the need for deterrence or to protect the public." Id. at 99. Significantly, the defendant's offense of conviction was "failing to register as a

sex offender." Id. at 97. There was "no evidence that [he] accessed child pornography online (or at all)," ibid., nor was there "evidence suggesting that [he] [wa]s likely to seek out children on social media or prey on them in reality," id. at 98 -- as petitioner did here, see Pet. App. A1, at 1. Indeed, the court recognized that even a "total Internet ban" might be justified in different circumstances. Eaglin, 913 F.3d at 97; see id. at 96 (recognizing that "[c]ertain severe restrictions" may be "permissible when imposed on an individual as a condition of supervised release").

The Third Circuit's decision in United States v. Holena, 906 F.3d 288 (2018), likewise did not involve plain-error review. Id. at 291. Furthermore, although the decision stated that "blanket internet restrictions will rarely be tailored enough to pass constitutional muster," id. at 295, the Third Circuit emphasized that its rejection of the particular restrictions in that case was "fact-specific," id. at 292, and recognized that, "[i]n appropriate cases" involving a different "record," a district court "may" "impose sweeping restrictions" on a defendant's internet access, id. at 293.

The Fourth Circuit's decision in United States v. Ellis, 984 F.3d 1092 (2021), also did not involve plain-error review. Id. at 1098, 1102-1105. And although it rejected a supervised-release condition that prohibited Internet access, it did so on statutory, not First Amendment, grounds. Id. at 1102-1105. As in Eaglin and

Holena, moreover, that rejection was grounded in the facts of the particular case. Although the Fourth Circuit found "no evidentiary basis for the district court's finding that an outright ban on [the defendant's] internet access was 'reasonably related'" to his "only federal offense" (namely, "failing to register as a sex offender") or his "violations of his supervised release" (i.e., "travelling without permission, dishonesty with the probation officer, [and] failing to cooperate with treatment"), id. at 1103, the Fourth Circuit recognized that "evidence could theoretically be put forward to support an internet restriction" on a different "record," id. at 1103-1104.

Eaglin, Holena, and Ellis thus do not suggest that supervised-release conditions like the ones here are plainly inappropriate in petitioner's circumstances. Petitioner is also mistaken in asserting (Pet. 21-22) that the decision below conflicts with three state-court decisions. Like Eaglin, Holena, and Ellis, those decisions rested on case-specific determinations and did not involve plain-error review. See People v. Morger, 160 N.E.3d 53, 60, 67, 69 (Ill. 2019) (invalidating, on de novo review, a "total ban on access to social media applicable to all sex offenders," "admitting of no exceptions for legitimate use" that "could be supervised or overseen by a defendant's probation officer"); Aldape v. State, 535 P.3d 1184, 1190, 1192 (Nev. 2023) (invalidating, on de novo review, a statute prohibiting any defendant on probation for a sexual offense from accessing the

Internet, "regardless of crime, rehabilitative needs, history of internet usage, or victim," while recognizing that "[b]road restrictions on internet access may be justified" where "'particular and identifiable characteristics of the defendant suggest[] that such a restriction [i]s warranted'") (citation omitted); Mutter v. Ross, 811 S.E.2d 866, 869, 871 (W. Va. 2018) (invalidating, on de novo review, a special condition of parole that "went even further than the statute struck down in Packingham" by prohibiting the defendant from even "being in the same building as a computer with internet access").

d. In all events, this case would be a poor vehicle for considering the constitutionality of the computer restrictions. At a minimum, the court of appeals' reliance on the plain-error standard of review would complicate this Court's consideration of the issue. Pet. App. A1, at 6. Moreover, had petitioner raised his objection to the computer restrictions before the district court, that court could have determined whether any additional case-specific tailoring was appropriate as a statutory matter. Indeed, even now, petitioner could seek a modification of the special conditions from the district court if he believes it warranted under the statute. See 18 U.S.C. 3583(e)(1) and (2); Fed. R. Crim. P. 32.1(c). Petitioner presents no sound reason for this Court to address a constitutional issue that is reviewable only for plain error and that could have been -- and still could be -- obviated by a statutory claim.

2. Petitioner's constitutional challenge (Pet. 26-40) to his conviction for producing child pornography likewise lacks merit, does not implicate any conflict of authority, and does not warrant this Court's review. This Court has previously denied petitions for writs of certiorari raising the same issue, see, e.g., Ybaben v. United States, 141 S. Ct. 2571 (2021) (No. 20-6359); Sullivan v. United States, 578 U.S. 1024 (2016) (No. 15-7875); Armstrong v. United States, 565 U.S. 942 (2011) (No. 10-10409), and it should follow the same course here.

a. In United States v. Lopez, 514 U.S. 549 (1995), this Court held that Congress may regulate under its commerce power activities that "substantially affect" interstate commerce. Id. at 559; see id. at 558-559. In United States v. Morrison, 529 U.S. 598 (2000), the Court identified four factors to be considered in determining the existence of a "substantial effect[]" on commerce: (1) whether the activity that the statute proscribes is commercial or economic in nature; (2) whether the statute contains an express jurisdictional element involving interstate commerce that might limit its reach; (3) whether Congress has made specific findings regarding the effect of the proscribed activity on interstate commerce; and (4) whether the link between the proscribed conduct and a substantial effect on commerce is attenuated. Id. at 611; see id. at 610-612.

Section 2251(a) prohibits the production of child pornography using "materials that have been mailed, shipped, or transported"

in interstate or foreign commerce. 18 U.S.C. 2251(a). Materials-in-commerce prosecutions under Section 2251(a) are a constitutional exercise of the commerce power because the production of child pornography substantially affects interstate commerce. The ban on the production of child pornography is an integral feature of a statutory scheme directed at large-scale commercial activity. Congress has long recognized that the production and marketing of child pornography is "a large industry * * * that operates on a nationwide scale and relies heavily on the use of the mails and other instrumentalities of interstate and foreign commerce." S. Rep. No. 438, 95th Cong., 1st Sess. 6-7 (1977) (Senate Report). A ban on the intrastate production of child pornography effectuates the ban on interstate trafficking because it reduces the supply of, and demand for, child pornography. See United States v. Rodia, 194 F.3d 465, 477 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000).

Each factor identified in Morrison supports the conclusion that the intrastate production of child pornography using materials that traveled in interstate commerce substantially affects interstate or foreign commerce. First, the conduct at issue is economic in character. As the Fifth Circuit has observed, "much of the interstate traffic in child pornography 'involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers.'" United States v. Kallestad, 236 F.3d 225, 228 (2000) (quoting U.S. Dep't

of Justice, Attorney General's Commission on Pornography, Final Report 406 (1986)); cf. New York v. Ferber, 458 U.S. 747, 761 (1982) ("The advertising and selling of child pornography provide an economic motive for * * * the production of such materials."). Second, Section 2251(a) contains an express jurisdictional element requiring that the visual depiction be produced using materials that have traveled in interstate or foreign commerce. That jurisdictional element serves to limit prosecutions to "a smaller universe of provable offenses" and "reflects Congress's sensitivity to the limits upon its commerce power." Kallestad, 236 F.3d at 229.

Third, Congress has made explicit findings about the extensive national market in child pornography and the need to reduce it by prohibiting intrastate production. See, e.g., Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2(a), 92 Stat. 7; Senate Report 5 ("[C]hild pornography * * * ha[s] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale * * * [and that is] carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce."); Child Protection Act of 1984, Pub. L. No. 98-292, § 2, 98 Stat. 204 (similar); H.R. Rep. No. 536, 98th Cong., 1st Sess. 17 (1983) (House Report) ("Generally, the domestic material is of the 'homemade' variety, while the imported material is produced by commercial dealers."); House Report 16 ("Those [collectors of

child pornography] who do not sell their material often loan or trade collections with others who share their interest."); see also Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, sec. 101(a) [Tit. I, § 121(1)(10)], 110 Stat. 3009-27 ("[T]he existence of and traffic in child pornographic images * * * inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography.").

Finally, Congress rationally determined that "it must reach local, intrastate conduct in order to effectively regulate [the] national, interstate market" for child pornography. Kallestad, 236 F.3d at 229. As the Second Circuit has observed, "Congress understood that much of the pornographic material involving minors that feeds the market is locally produced, and this local or 'homegrown' production supports demand in the national market and is essential to its existence." United States v. Holston, 343 F.3d 83, 90 (2003). And even if a particular item of child pornography is not itself transported interstate, "[t]he nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted." Id. at 90-91 (citation omitted; brackets in original).

b. This Court's decision in Gonzales v. Raich, 545 U.S. 1 (2005), confirms the constitutionality of Section 2251(a) as applied to materials-in-commerce prosecutions, and petitioner errs

in asserting otherwise (Pet. 34-37). In Raich, the Court rejected a Commerce Clause challenge to the use of the federal Controlled Substances Act, 21 U.S.C. 801 et seq., to criminalize the purely intrastate manufacture and possession of marijuana for medical purposes, recognizing that the activity at issue substantially affects interstate commerce. The Court emphasized Congress's 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. The Court made clear that the substantiality of an individual's own activities is of no moment, so long as the aggregate activity substantially affects interstate commerce. Ibid. And the Court explained that Congress could rationally determine that the growers' activities substantially affected commerce because the high demand for marijuana in the interstate market created a likelihood that marijuana grown for local consumption would be drawn into the interstate market, id. at 19, and because the exemption of intrastate marijuana would impair the ability of Congress to enforce its interstate prohibition given the difficulty of distinguishing between marijuana grown locally and that grown elsewhere, id. at 22.

The as-applied constitutionality of Section 2251 -- which includes an express interstate commerce hook -- follows a fortiori from Raich. The intrastate production of child pornography using materials that have traveled in interstate commerce contributes to

a significant national market for child pornography. Congress rationally decided to criminalize intrastate production to dry up that market. See, e.g., Ferber, 458 U.S. at 762 ("[E]nforceable production laws would leave no child pornography to be marketed."); id. at 762 n.15 (citing Section 2251 as an example). Accordingly, the application of Section 2251(a) in this case comports with the Commerce Clause.

c. In any event, this case would be a poor vehicle for this Court's review because petitioner did not raise his Commerce Clause challenge in the district court. Thus, as the court of appeals recognized, petitioner's challenge is subject to plain-error review, Pet. App. A1, at 3-5; see Fed. R. Crim. P. 52(b), and he cannot show that any error was "clear or obvious" as required to obtain relief under that standard, Puckett, 556 U.S. at 135.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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