No. 23-6161

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

NORMAN JAVIER HERRERA PASTRAN,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO THE BRIEF IN OPPOSITION

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.

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

Instead, the Government rewrites the question presented in order to focus its response on whether Mr. Herrera Pastran "is entitled to plain error relief" in light of the current circuit split. *See* Brief for the United States in Opposition ("BIO") at I, 10. But this is the wrong focus. As discussed in Mr. Herrera Pastran's petition, this Court regularly resolves legal questions that are the subject of circuit splits, without resolving subsidiary issues like the standard of review. *See* Petition for Writ of Certiorari ("Pet.") at 25. Moreover, on the facts of this case—which did not involve the Internet—there is no doubt that Mr. Herrera Pastran would have been entitled to relief in the Second, Third, and Fourth Circuits. Thus, far from providing a

substandard vehicle, this case presents an ideal vehicle through which to resolve the conflict among the lower courts.

A. There is a clear and established conflict regarding the question presented.

In *United States v. Bobal*, 981 F.3d 971 (11th Cir. 2020)—the precedent followed in the decision below—the Eleventh Circuit "squarely foreclose[d]" the claim that *Packingham* rendered the Internet restriction imposed in this case unconstitutional. *See United States v. Cordero*, 7 F.4th 1058, 1070-71 (11th Cir. 2021) (finding that *Bobal* "squarely foreclose[d]" appellant's claim that a similar Internet restriction was "unconstitutional as a matter of law"). Irrespective of the standard of review, the law of the Eleventh Circuit is clear: "[n]othing in *Packingham*" limits district courts' discretion in establishing supervised release conditions. *Cordero*, 7 F.4th at 1071.

The same holds true in the Eighth Circuit. In *United States v. Perrin*, 926 F.3d 1044, 1047 (8th Cir. 2019), the court held 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 the court found no error in Perrin's case. Thus, the law of the Eleventh and Eighth Circuits is squarely aligned with that of the Ninth Circuit—which held, under a *de novo* standard, that *Packingham*'s constitutional rule did not apply to an individual on supervised release. *United States v. Wells*, 29 F.4th 580, 583 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 267 (2022) (No. 22-5340).

These cases stand in direct and irreconcilable conflict with decisions of the Second, Third, and Fourth Circuits, as well as the highest courts of Illinois, West Virginia, and Nevada—all of which have recognized that *Packingham*'s constitutional holding applies to individuals on supervised release or similar court-ordered supervision. *See United States v. Eaglin*, 913 F.3d 88, 96 (2d Cir. 2019); *United States v. Holena*, 906 F.3d 288, 294 (3d Cir. 2018); *United States v. Ellis*, 984 F.3d 1092, 1095 (4th Cir. 2021); *Illinois v. Morger*, 160 N.E. 3d 53, 63 (Ill. 2019); *Mutter v. Ross*, 811 S.E. 866, 871, 873 (W.V. 2018); *Adalpe v. Nevada*, 535 P.3d 1184 (Nev. 2023).

The government attempts to limit these cases to their facts, and argues that they "do not suggest that supervised-release conditions like the ones here are plainly inappropriate in petitioner's circumstances." BIO at 15. But Mr. Herrera Pastran, whose offense did not involve the Internet and who has no history of using the Internet in connection with criminal conduct, would clearly have been entitled to relief in the Second, Third, or Fourth Circuits. More importantly, the question before this Court is not simply whether a particular condition of supervision is inappropriate in a particular circumstance. The question is whether the Court's threshold constitutional ruling in *Packingham* applies to individuals on supervised release. This is an important question of federal constitutional law, on which there is a direct and established conflict among the lower courts, warranting review.

The government further argues that the Fourth Circuit's decision in *Ellis* was decided on "statutory, not First Amendment, grounds." BIO at 13. But the statutory standard mirrors the intermediate scrutiny standard applied in *Packingham*. *See*

Ellis, 984 F.3d at 1104 (citing *United States v. Maleyna*, 736 F.3d 554, 559 (D.C. Cir. 2013), for the proposition that "Section 3582(d)(2) is thus . . . 'a narrow tailoring requirement.'") (further citation omitted). Furthermore, *Ellis* cited *Packingham* for the proposition that "[a] complete ban on internet access is a particularly broad restriction that imposes a massive deprivation of liberty," and recognized that an Internet ban "implicates fundamental rights." *Ellis*, 984 F.3d at 1095-1096. Thus, the Fourth Circuit, like the Second and Third, recognizes *Packingham's* application to individuals on supervised release—something the Eighth, Ninth, and Eleventh Circuits expressly reject.

B. The constitutional issue cannot be resolved through a statutory claim.

The government argues that 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1 provide a mechanism through which a defendant may seek to modify the conditions of his supervised release. *See* BIO at 15. But the Eleventh Circuit, along with the Second, Fifth, and Ninth Circuits, have held that § 3583(e) "cannot be used to challenge the legality or constitutionality of supervised release conditions." *Cordero*, 7 F.4th at 1070 (first citing *United States v. Lusser*, 104 F.3d 32, 34 (2d Cir. 1997); then citing *United States v. Hatten*, 167 F.3d 884, 886 (5th Cir. 1999); and then citing *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2022)). "Rather, [§ 3583(e)] sets forth the factors a court should consider in determining whether to modify or terminate a condition of supervised release and illegality or constitutionality is not one of them." *Id*. Thus, the question of *Packingham's* application to supervised release

conditions will need to be resolved by this Court on review from the imposition of a defendant's sentence, and not during a § 3853(e) proceeding. And this case provides an excellent vehicle for doing so.

C. There are no vehicle problems.

This case provides an ideal vehicle through which to resolve the circuit conflict because there can be no argument that the Internet ban is related to the facts and circumstances of Mr. Herrera Pastran's offense. 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 attempted to contact a minor using the Internet. The Government notes the Eleventh Circuit's finding that Mr. Herrera Pastran took the pictures on a cell phone, which is "akin to a computer." *See* BIO at 5. But the constitutional problem in this case involves access to the *Internet*—which indisputably played no part in Mr. Herrera Pastran's crime. *See* Pet. App. A-1 at 8 (recognizing that there was "less direct of a relationship between the offense conduct and the computer restriction" in Petitioner's case, "than there was in *Bobal*").

The fact that the constitutional issue was raised on plain error is no barrier to review. Mr. Herrera Pastran has identified numerous cases where this Court has either decided an issue that was reviewed for plain error in the court of appeals or left questions regarding the standard of review to be answered on remand. *See* Petition at 25. *See also McNeil v. United States*, 508 U.S. 106, 110 (1993) (noting the court of appeals' holding "that the District Court had not committed plain error"); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 352-53 (1995) (noting plain error standard in

the court of appeals); *United States v. Tapia,* 376 F. App'x 707, 707 (9th Cir. 2010) ("Tapia contends that the district court committed plain error by basing her 51-month sentence on speculation about whether and when Tapia could enter and complete the Bureau of Prison's 500-hour drug abuse treatment program. No reversible error was committed."), *rev'd, Tapia v. United States*, 564 U.S. 319 (2011); *Dubin v. United States*, 599 U.S. 10, 116 n.3 (2023) ("The Government argued below that . . . petitioner . . . cannot obtain relief without meeting the higher bar for plain-error review. The Fifth Circuit below did not decide that question, which this Court leaves for remand.").

Furthermore, if this Court were to answer the question presented in the affirmative—and hold that *Packingham* does apply to individuals on supervised release—Mr. Herrera Pastran would be entitled to relief. A ruling for petitioner on the question presented would satisfy the first two prongs of the plain error test. *See Henderson v. United States*, 568 U.S. 266 (2013) (holding that error is "plain" within the meaning of Fed. R. Crim. P. 52(b), if it is plain at the time of appellate review). And there is no doubt that a lifetime ban on an important First Amendment right would satisfy the third and fourth prongs of the plain error test as well. *See id*. at 278; *see also Packingham*, 137 S. Ct. at 1738 (recognizing the First Amendment right to access "websites integral to the fabric of our modern society and culture").

Finally, it is unlikely that a more specific objection would have made a difference in the proceedings. (BIO at 15). Mr. Herrera Pastran objected to the lifetime term of supervised release in the district court, and that objection was

overruled. *See* Pet. App. A-1 at 3. Had Mr. Herrera Pastran raised the specific constitutional challenge herein, the district court would have been bound by Eleventh Circuit precedent to overrule that objection as well. *See Cordero*, 7 F.4th at 1070-71. Thus, no purpose would be served by denying certiorari based on the standard of review in the court of appeals.

Nonetheless, if this Court denies review herein, Mr. Herrera Pastran respectfully urges this Court to grant the petition in *Finnell v. United States*, No. 23-5835, and to hold Mr. Herrera Pastran's case pending the resolution of *Finnell*.

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.

A. This Court has never applied the *Wickard/Raich* aggregation framework to non-economic criminal statutes.

Mr. Herrera Pastran has asked this Court to answer an important question of federal law that has never been decided by this Court, *to wit:* whether the aggregation theory 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 federal statutes directed at wholly intrastate, non-economic criminal activity. The government has refused to engage in this debate.

Instead, the government baldly asserts that "the conduct at issue is economic in character." BIO at 17. But this is not so. The relevant facts establish only that Mr. Herrera Pastran took photographs on a cell phone that had been manufactured out of state. The pictures were viewed twice, and then deleted. They were discovered only

after forensic search of the phone, which occurred a year-and-a-half later, during a separate investigation into allegations of sexual abuse. *See* Pet. App. A-1 at 1. There was no evidence that Mr. Herrera Pastran either shared or intended to share the pictures with any other individual. Nor was there evidence that Mr. Herrera Pastran had ever viewed child pornography online, or in any way participated in a market for child pornography.

No fair characterization of these facts can describe Mr. Herrera Pastran's conduct as "economic." Instead, the government's theory seems to be that the mere existence of an interstate market for child pornography transformed his act of taking pictures into economic activity. "This expansive interpretation of Congress' commerce power has no limit." *United States v. Kallestad*, 236 F.3d 225, 233 n.3 (5th Cir. 2000) (Jolly, J., dissenting). "An interstate market exists for virtually any product one might possess. Under this formulation, one would be 'hard pressed to posit any activity by an individual that Congress is without power to regulate.'" *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

Mr. Herrera Pastran's offense was similarly not "in commerce." His crime became a federal offense solely because he used a camera that had been manufactured out of state, at some point before it came into his possession. The government refers to this as a "materials-in-commerce prosecution[]." BIO at 19. But this is a misnomer—because the materials Mr. Herrera Pastran used were not "in commerce," in any sense of the words, at the time of the offense. *See United States v. American Bldg. Maintenance Indus.*, 422 U.S. 271, 285 (1975) (finding that companies

were not "engaged in commerce" within the meaning of Section 7 of the Clayton Act; "By the time the Benton companies purchased their janitorial supplies [from local distributors], the flow of commerce had ceased.").

More importantly, in *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006)—the precedent relied on in the decision below—the Eleventh Circuit questioned whether the appellant's conduct could be described as economic, and held that *"Raich* made the economic/non-economic distinction irrelevant for aggregation purposes." *Smith,* 459 F.3d at 1285 n.9. Thus, the question before the Court is whether the *Wickard/Raich* analysis can be applied where the underlying conduct is ***not*** economic.

The government does not address the three circuits, including the Eleventh in *Smith*, which had found the child pornography statutes to be unconstitutional as applied to wholly intrastate conduct, only to reverse course in the wake of *Raich*. *See* Pet. at 33-35, 38; *United States v. Smith*, 403 F.3d 1303 (11th Cir. 2005), *vacated*, 545 U.S. 1125 (2005), *and superseded*, 459 F.3d 1276 (11th Cir. 2006); *United States v. Corp,* 236 F.3d 325 (6th Cir. 2001) (finding § 2252(a)(4)(B) unconstitutional as applied), *abrogation recognized by United States v. Bowers*, 594 F.3d 522, 530 (6th Cir. 2010); *United States v. McCoy*, 323 F.3d 114 (9th Cir. 2003) (same), *overruling recognized by United States v. McCalla*, 545 F.3d 750, 756 (9th Cir. 2008). But nothing in *Raich* suggests that it should be applied to the sort of quintessentially criminal, non-economic activity at issue here.

Indeed, this Court has never applied the *Wickard/Raich* rationale to non-economic criminal conduct. "Congress' authority to regulate intrastate possession and consumption of wheat in *Wickard* derived only from the interaction between consumption of home-grown wheat and the market price of wheat." *Kallestad*, 236 F.3d at 233 (Jolly, J, dissenting). "However, the local possession of self-generated child pornography does not have such a direct and substantial [e]ffect on an interstate market." *Id*. Nor does this case involve an economic regulatory scheme over child pornography that is in any way comparable to the Controlled Substances Act at issue in *Raich*. *See* Pet. at 32-33; *Raich*, 545 U.S. at 10-15. The child pornography statutes are stand-alone criminal statutes, designed to eradicate and punish the sexual abuse of children. Indeed, it is only *because* child pornography statutes seek to eradicate the sexual abuse of children that they have been sustained against First Amendment attack.[1]

B. Congress made no findings that the suppression of intrastate pornography is necessary to control the national market.

The Government writes that "Congress has made explicit findings about the extensive national market in child pornography and the need to reduce it by

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[1] *See New York v. Ferber*, 458 U.S. 747, 758 (1982) ("The legislative judgment . . . is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . That judgment, we think, easily passes muster under the First Amendment"); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002) ("*Ferber*'s judgment about child pornography was based on how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

prohibiting intrastate production." BIO at 18-19. However, the majority of findings cited by the government relate to an earlier version of the statute, which was limited to the creation of child pornography that the defendant knew or had reason to know would be "transported in interstate or foreign commerce, or mailed," or that had actually been so transported or mailed. 18 U.S.C. § 2251 (1978). The final quote relates to the Child Pornography Prevention Act of 1996, which banned "virtual child pornography," and which was struck down, in part, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). "[N]o congressional findings support the necessity" of reaching "self-generated pornographic material, where no commercial activity was involved, [and] no interstate transportation took place." *Kallestad*, 236 F.3d at 233 (Jolly, J., dissenting).

C. This case is an ideal vehicle.

The facts of this case render it an ideal vehicle through which to address the reach of Congress' criminal powers. Mr. Herrera Pastran simply took pictures of his purely local crimes, which he deleted long before they were discovered by law enforcement. The pictures were not intended to be viewed by anyone other than himself. They were not intended to enter the stream of commerce; and they did not enter into any marketplace. There was not even evidence that Mr. Herrera Pastran had previously participated in a marketplace for images of child pornography. If Congress can reach Mr. Herrera Pastran's purely local criminal conduct, merely because a piece of equipment used in the crime had previously crossed state lines, there is truly no limit to Congress' police powers. *Cf. Kallestad*, 236 F.3d at 229 ("It

is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons.").

Furthermore, for all the reasons discussed in Issue I, the fact that the issue was raised on plain error should not defeat review. *See infra* at 5; Pet. at 25. After all, there can be "no plainer error than to allow a conviction to stand under a statute which Congress was without power to enact." *United States v. Walker*, 59 F.3d 1196 (11th Cir. 1995) (vacating conviction under 18 U.S.C. § 922(q)(1)(A) following *Lopez*).

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. Alternatively, Mr. Herrera Pastran asks this Court to hold this case pending the resolution of *United States v. Finnell*, No. 23-5835.

Respectfully submitted,

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