24-6674

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

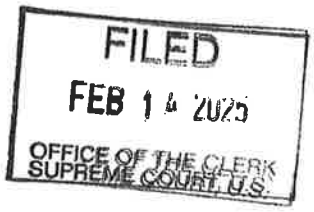
KEVIN MILLETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.



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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a sentencing judge may impose a condition of supervised release that substantially restricts a defendant's access to his own children without finding that the defendant poses a risk of harm to his children.

II. Whether a district court may impose a condition of supervision that severely limits a defendant's access to his children in circumstances where the district court expressly finds it does not know whether the restriction is "doing more harm than good."

III. Whether a sentencing judge may impose a condition of supervised release that requires a defendant found guilty of possessing child pornography not involving his children to obtain a probation officer's prior approval for any contact or association with his own children without first finding that the defendant poses a risk of harm to his children, especially where the defendant has never directly abused any child nor injured his own children nor engaged in any criminal or other harmful conduct with any of them.

LIST OF PARTIES

The parties in all proceedings below were:

1. Petitioner Kevin Millette; and
2. The United States of America.

LIST OF PROCEEDINGS

1. This matter was docketed in the United States District Court for the District of Maine as United States of America v. Kevin Millette, docket number 2:16-cr-00004-NT. The District Court issued no reported decision prior to the entry of judgment. The District Court's judgement in a Criminal Case dated June 6, 2016. [App. p. 1.]
2. In the same proceeding, on May 19, 2020, Millette, through the public defender, moved for compassionate release. The district court's Order granting compassionate release, dated December 21, 2020, is available at 2020 U.S. Dist. LEXIS 239696 and 2020 WL 7502454. [App. p. 8.] The district court's Amended Judgement, dated December 22, 2020, is included in the Appendix at page 24.
3. On August 15, 2023, supervising United States Probation Officer Kate Phillips filed and thereafter the government prosecuted a petition to revoke Mr. Millette's supervised release alleging two sets of violations of special condition 9, which had been added as part of the district court's

order for compassionate release. The condition prohibits Mr. Millette from "association" with any minor, including his own children, except in the presence of a supervisor approved by his supervising officer.

4. On September 25, 2023, the district court found in open court that Mr. Millette had violated condition 9. It sentenced him to sixty days in prison and reimposed, over his objection, what became special condition 8, the same broad restriction on his access to his own minor children. The transcript of the district court's finding is included in the Appendix at pages 154-55.

5. Mr. Millette timely appealed to the United States Court of Appeals for the First Circuit. The court assigned the proceeding Docket Number 23-1819. Its decision affirming the revocation judgment and the reimposition of the broad restriction on Mr. Millette's access to his daughter was published at 121 F.4th 946 (1st Cir. 2024), [App. p. 32].

6. While the appeal was pending, the probation office revoked the approval for each approved supervisor of Mr. Millette's contact with his sole remaining minor child, his daughter A.M. In January 2024, he moved the district court on an emergency basis to approve a supervisor so he could resume meaningful contact with A.M. *See* USA v. Millette, 16-cr-4-NT, ECF Docket No. 149. The motion was finally heard on October 9, 2024.

As summarized in the district court's order, Mr. Millette, his mother, his eldest son and his minor daughter, A.M., all testified that Mr. Millette is an excellent parent who had never hurt, injured or abused any of his children. *See* D. Me. 16-cr-4-NT, ECF Docket No. 178. [App. p. 47.] The district court denied all relief, again without finding that Mr. Millette had ever hurt, injured, victimized or posed a risk to any of his children, including A.M.

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PETITION FOR WRIT OF CERTIORARI

Kevin Millette petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit [Pet. App. p. 32] is published at 121 F.4th 946 (1st Cir. 2024) dated November 26, 2024.

JURISDICTIONAL STATEMENT

The district court had jurisdiction for all of its involvement in this matter pursuant to 18 U.S.C. § 3231. It entered its revocation judgment on September 26, 2023. Mr. Millette timely appealed that judgment to the First Circuit on October 4, 2023. The First Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294. It entered its judgment affirming the district court's judgment and expressly approving the special condition restricting Mr. Millette's access to his own children on November 20, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The relevant Constitutional provision is the Due Process Clause of the Fifth Amendment, which provides as follows:

> No personal shall . . . be deprived of life, liberty, or property, without due process of law"

The statutory provisions relevant to the matter, 18 U.S.C. §§ 3553 & 3558, are set forth in full in the appendix.

STATEMENT OF THE CASE

In 2016 defendant Kevin Millette waived indictment and pleaded guilty to Transportation of Child Pornography in violation of 18 U.S.C. §2252. He has never been convicted or charged with molesting any child. His only prior conviction was a 2010 Maine state court conviction for possessing child pornography.

Because of his prior state court conviction, however, Kevin was subject to a mandatory minimum prison sentence of 120 months. On May 11, 2016, he was sentenced to 120 months in prison and seven years of supervised release. The conditions of supervised release included no restriction on his association with minors. His parental rights concerning his three minor children were subject to a Maine family court divorce decree granting shared parental rights.

In 2020, Mr. Millette moved for compassionate release. On December 21, 2020, the district court granted the motion, noting that Mr. Millette had never been charged with creating pornography or with sexually contacting any child, that he had significant physical and mental health issues, that he had an appropriate plan for release, including living at his parents' house, that he had been subject to a widely criticized mandatory minimum sentence, that the government conceded

"extraordinary and compelling reasons" warranted release, that he could be the object of effective supervision, and that accordingly compassionate release was appropriate. The district court's written order stated that the court was "imposing an additional condition of supervised release that will strictly limit his contact with minors." Although designated as a "special condition" the new condition had become – and is – a condition routinely imposed in the District of Maine in child pornography cases.

Accordingly, on December 21, 2020, the district court entered an Amended Judgment, reducing Kevin's sentence to "time served," ordering him released in twenty-one days and imposing a term of supervised release of 84 months. Special condition 9 of the Amended Judgment provided as follows:

> Defendant shall not associate, or have verbal, written, telephonic or electronic communication, with persons under the age of eighteen, except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense, and who has been approved by the probation officer. This restriction does not extend to incidental contact during ordinary activities in public places.

The conditions also include regular polygraph examinations, which Kevin takes. The Amended Judgment was entered while Kevin was in prison. Accordingly, the court did not explain the conditions to him, nor did he execute the document on the provided signature line. [App. p. 9.]

In August 2023, supervising United States Probation Officer Kate Phillips filed a petition to revoke Mr. Millette's supervised release alleging two sets of

violations of special condition 9. The first set involved a 2021 birthday party and a July 4th celebration at the home of Kevin's parents, where Millette resides. The functions were attended by Kevin's minor daughter, A.M., who was then 13 (she turned 17 in December 2024), and a second minor, the birthday girl, who is a grandniece of Mr. Millette's father. Mr. Millette's mother, Melodie Millete, who was an approved supervisor under special condition 9, was present throughout, as was the birthday child's father. Both Ms. Millette and the birthday girl's father, among other attendees, knew of Kevin Millette's background and convictions. The government and probation office contended, however, that the probation office had intended to approve Ms. Millette as supervisor only with respect to Kevin's own children, not with respect to other relatives. Probation and the government contended that, under condition 9, in addition to needing an approved supervisor for any association with a minor the individual "minor would also have to be approved." [App. p. 168.]

The second set of alleged violations arose during August 2023. Mr. Millette acknowledged that at times when his daughter, A.M., then 15, was visiting the Millette family home, defendant Millette's mother, the approved supervisor, was sometimes on the back deck and sometimes in a separate room, although she was always present at the home, including on the weekend of August 11-12. That evening, Kevin and his daughter fell asleep while watching television in separate

beds (a cot and a bed) in Kevin's room in his parents' two-bedroom ranch-style home. The government and probation contended that a supervisor is "present" within the meaning of special condition 9 only if she has continuous visual observation of Mr. Millette. Although Mr. Millette respectfully disagreed with that interpretation, which had never been explained to him or to his three approved supervisors, he thereafter complied. Nevertheless, the government and probation pressed their contention that Millette's supervised release should be revoked.

Millette's motion to dismiss the petition on the grounds that the never-explained conditions were ambiguous was addressed at the outset of the revocation hearing. The district court agreed that special condition 9 was ambiguous, and it encouraged the government to consider a constructive resolution, saying, "I do agree that special condition 9 has some ambiguity to it." [App. p. 75.] Further addressing the government, the district court repeated examples explaining the ambiguity and absurdity of the condition as construed by the probation office and the government:

> what happens if the approved chaperone has to use the restroom, then is it required that the -- the minor and the – and Mr. Millette, you know, go to separate rooms, what happens in situations where, you know, the chaperone has to be momentarily out of the room. ***And really what is the definition of presence? Is it within earshot and eyeshot? Is it -- you know, what is it? And I do say that there is some ambiguity there.***

[App. p. 76 (emphasis supplied).]

After consulting with probation, the government opposed clarifying condition 9, asking the court to find a violation, impose a four-month prison sentence, and refuse to clarify the condition. The government contended the probation office should have discretion to interpret the condition (and charge violations) without clear rules, as follows:

> Your Honor, there's some concern that modifying the condition, especially on the fly, would be kind of difficult and it might have unintended consequences. It could introduce further ambiguity. And I think that the problem here is that we don't know exactly what circumstances are going to arise in the future with respect to these conditions and how, you know -- whether that condition could cover every single possible, you know, circumstance that the defendant might find himself in. I think it's difficult to craft a condition that would cover every possible circumstance.
>
> And I think that the -- at least probation has advised me that the way that they would prefer to deal with it with Mr. Millette is to sit down with him and go over this condition again and to discuss and instruct him regarding what his obligations are under these -- under this condition and what he is expected to do in situations that arise in a manner that would be documented so that it would be clear that he's been advised as to what that condition requires. And that's essentially what I have at this point.

[App. p. 78.]

Defense counsel explained that while the facts were not disputed, he could not "recommend to [Mr. Millette] that he admit [to] a violation because" the ambiguous rules should be construed in the defendant's favor, at least until clarified and that, until clarified, "present" should be construed in its natural meaning to include "at home." [App. p. 80.] Counsel argued the interpretation of

probation and the government was unnatural and that, although the court was no doubt "trying to do good," it would likely do more harm than good to A.M. by resolving the ambiguity in the government's favor. Counsel explained that if Kevin needed to reprimand or commend A.M. with respect to "chores around the house" or school attendance he should be able to do so in a private conversation, even if a supervisor was required in the house and that probation's interpretation could "driv[e] a wedge" and be "doing more harm . . . than good." [App. p. 80.]

The hearing went forward. The government offered and the court admitted transcripts of the probable cause hearing testimony of Officer Phillips and Kevin's mother, Melodie Millette. [App. p. 160; App. p. 196.]

In the admitted transcript from the probable cause hearing, Officer Phillips testified that Mr. Millette had conceded he had been at the birthday party of his first cousin once removed, but in the continuous presence of his mother. Officer Phillips testified she had not intended to authorize Ms. Millette to supervise Kevin's association with any children other than his own. Therefore, Officer Phillips and the government contended, Kevin had violated the conditions of his release in the summer of 2021, even though an approved supervisor and the second minor's father were always present. [App. p. 165-168, 175-176.] Officer Phillips testified that Mr. Millette told her he did not understand he was required to report the name of every minor at a function or have a supervisor separately approved for

each minor. [App. p. 167.] Officer Phillips admitted her interpretation of the condition had never been explained to Kevin until after the July 2021 event. [App. p. 177.] Officer Phillips agreed "the information [probation has] is" that "Kevin hasn't been in the presence of any minor other than his daughter" at any time after she explained that probation interpretated condition 9 to require minor-specific approvals. [App. p. 177.]

Officer Phillips further testified that what is meant by "present" is "difficult" to define and that "every situation is different and needs to be reviewed." [App. p. 167.] She testified that she had told Kevin "about the necessity of a chaperone," but did not recall any conversation with him "breaking down specific examples" of what would and would not be considered "present." [App. p. 168-169.] She contended, however, that being in the same room with his daughter while his mother was on the back deck or in an adjacent bedroom was a violation, as she learned had occurred when she appeared for an unannounced visit on August 12, 2022. [App. p. 165-170.]

When Officer Phillips arrived, Kevin, his 15-year-old daughter and Kevin's father were in the family living room while Kevin's mother, the approved supervisor, was on the adjacent back deck. [App. p. 170-171.] Kevin and Ms. Millette acknowledged that Kevin and A.M. had fallen asleep in different beds

watching television the prior evening, while Kevin's mother was present in the other bedroom. [App. p. 97.]

Each supervisor's approval had been oral, never in writing. [App. p. 165-170.] The probation office's contention that approval was child specific had not been explained previously, and Officer Phillips understood the birthday girl's father (and Ms. Millette) were present throughout the functions. Nevertheless, in 2021 Ms. Phillips had revoked Ms. Millette's approval to supervise Kevin's visits even with his own children, thereby interrupting Kevin's regular visits with A.M.; the visits resumed after Ms. Millette completed a training course and was again approved. [App. p. 169.]

Similarly, prior to the August 2023 incident, Officer Phillips had never told Mr. Millette or the supervisors that they would be considered "present" only if they were in the same room as Kevin and A.M., nor that being home with them was insufficient. [App. p. 172.]

On cross-examination at the revocation hearing, Officer Phillips initially testified that mailing a birthday card to his daughter was not restricted, but then agreed Kevin could do so only in the "presence" of an approved supervisor. [App. p. 102.] She explained that if A.M. called her dad on the phone, Kevin could answer only if an approved supervisor was present. [*Id.*]

Officer Phillips had never communicated with Kevin's daughter, A.M. [App. p. 85.] She did not know Maine child protective services had investigated or ever been involved in the relationship. [App. p. 85.] Nor has she investigated or evaluated how restricting A.M.'s contact with her father affects A.M. [App. p. 85.] She knows of no published studies or similar materials that support prohibiting a father, convicted of possessing child pornography, from accepting a call from his daughter without a third person present. [App. p. 101.]

Kevin's middle child, Corbin (age 19), works for Portsmouth Naval Shipyard. [App. p. 110.] He testified that Kevin had been honest about his own difficult childhood and his convictions for possessing child pornography. [App. pg. 110-111.] He explained that Kevin accepts responsibility for his crimes, is attentive to and open about his mental health issues and is a good and caring father. [App. p. 111.] Corbin explained that to that point Kevin had spent "a lot" of time with A.M., that his sister is comfortable around Kevin and that she would confide in Corbin if she had any issues or felt unsafe or uncomfortable around their dad. [App. p. 112.] Corbin emphasized that he has a "very close bond" with his sister and that from his involvement he knew Kevin and the family had not been trying to "get around" the conditions imposed on Kevin, but instead that everyone had been trying to "comply with the conditions." [App. p. 112.]

Corbin acknowledged that when his sister was seven years old, she had said, and their mother had employed in litigation an assertion, that Kevin touched A.M. [App. p. 116.] Corbin also explained, however, that the allegation had been investigated, had been proven false, and that his sister had assured him that Kevin never touched her inappropriately. [App. p. 115]

The three women whom probation had approved to supervise Kevin's association with minors, Kim Lapierre, Melodie Millette, and Karen Stewart, testified. Those approved prior to 2021 had not been told their approval was limited only to Kevin's children. [App. p. 118, 125, 133.] But after probation told them their approval was so limited, they and Kevin complied, limiting his supervised contact with minors exclusively to his children. [*Id.*]

As Officer Phillips conceded, prior to August of 2023 no probation official had told any of them that the requirement that one of them be "present" when Kevin associated with his minor children required them to be in the same room, rather than at the property. [App. p. 118, 126.] Ms. Lepierre, Kevin's sister, testified that she is "very close" to her brother and to his children, that Kevin is a "great father" and that they tried to comply with the "vague" rules imposed as explained to them. [App. p. 119-120.] Although she trusts Kevin, she explained she would comply with any clarified instructions. Accordingly, although she believes it unnecessary to have prior approval for each minor present at a function

with an approved supervisor, she has complied with that interpretation. No minor other than Kevin's children had been in his presence to her knowledge since the 2021 clarification of probation's interpretation in that regard. [App. p. 120.]

Karen Stewart testified that she, too, is very close to the entire Millette family, calling herself "like an adopted daughter" of Kevin's parents, whom she calls "Mom and Dad." [App. p. 124-125.] She had never been told and did not understand being "present" required an approved supervisor to be in the same room with Kevin and his children. [App. p. 126.] When she was occasionally out of the room (but in the same structure nearby) while serving as supervisor, it had never occurred to her that such was a violation. [App. p. 126.] She "absolutely believed we were complying with the rules." [App. p. 126.] Ms. Stewart confirmed Kevin is an "excellent parent" and the "better parent" as compared to his ex-wife, the children's mother. [App. p. 126.] Ms. Stewart also explained that further division between Kevin and his children would be counterproductive, "His kids call him, depend on him, and ask him for stuff all the time; Kevin and I are together a lot." [App. p. 127.] Ms. Stewart is "very close" to Kevin's three children and very familiar with their relationship with their dad. [App. p. 127.] She is also Kevin's employment supervisor and considers him highly dependable, responsible and an "excellent worker." [App. p. 128.]

Kevin's mother, Melodie Millette, testified that she and Kevin had always tried to comply with the rules as they understood them; that she had not understood, in 2021, that she was approved only to supervise Kevin's association with his own children; and that it had not occurred to her that Kevin's presence at the 2021 parties was a violation, nor did she understand that being "present" during A.M.'s visits required her to be in the same room. [App. p. 132-133.] She explained that she understood probation again revoked her approval as a supervisor after August 12, 2023 (as Officer Phillips had in 2021); thereafter, either Karen or Kim was present whenever Kevin was with A.M., although of course Ms. Millette continued to visit her grandchildren on her own. [App. p. 173.] Asked by the district court about the withdrawn allegation by A.M. or A.M.'s mother, Melodie explained that the Maine Department of Human Services had interviewed A.M. and determined the misunderstood allegation was false, that Ms. Millette, too, had discussed the matter with A.M. and was assured no inappropriate contact had ever occurred. [App. p. 143.] She explained that, eventually, A.M.'s mother admitted she had fabricated the allegations. [*Id.*]

After both parties rested, the district court ruled that Kevin and A.M. sleeping in the same room, but with the approved supervisor in an adjacent room, was a violation. [App. p. 144-145.] The district court appeared to dismiss the

allegations related to the 2021 parties that included the birthday girl, saying simply, "As for the birthday thing, that's smoke and mirrors." [App. p. 156.]

Asked to comment on proposed punishment, defense counsel argued the conditions of supervision "should be clarified . . . by the Court" and not by the probation office. "The court needs to set those kinds of rules" that define what is meant by presence and that restrict a parent's contact with his own child. Counsel acknowledged that, of course, the "court doesn't want to feel responsible if something bad happens," but argued that in clarifying the rules the district court should bear in mind, as the magistrate judge had articulated in releasing Kevin on clarified conditions, that the important parent-child relationship "needs to be fostered and understood and cherished." [App. p. 150.]

The district court had articulated that the ambiguity relevant to the alleged August 11-12 violation was "*what is the definition of presence? Is it within earshot and eyeshot? Is it -- you know, what is it?* [App. p. 75 (emphasis supplied).] But in finding a violation the court did not address or clarify that ambiguity. Instead, the court addressed only the meaning of "association," saying "no contact with minors means no minors sleeping in your room." [App. p. 154.]

The district court agreed the condition should be clarified [App. p. 155], and it admitted the court did not know whether the conditions were doing more harm than good:

> As far as doing more harm than good, we don't know who's doing more harm than good. It could go either way, Mr. MacColl. We could be doing more harm than good by allowing it to continue, saying how it's just a miscommunication. We could be doing a lot of harm that way too. We don't know. I don't know and you don't know.

[App. p. 155.]

The district court sentenced the defendant to two months in prison, followed by five years of supervised release. Without reference to the factors prescribed by 18 U.S.C. § 3553 or providing any meaningful explanation, the conditions of supervised release were explained and imposed as follows:

> The defendant shall comply with the newly imposed standard conditions effective November 1, 2016, and all previously imposed special conditions except special condition 8. And I would just note to the probation office that we need to regroup and talk about special condition No. 9.

[App. p. 156.] The written Judgment in a Criminal Case renumbered special condition 9 as special condition 8 but otherwise included no clarification of or change to it. [App. p. 1.]

Defendant Millette appealed the revocation of supervised release and the reimposition of the broad and ambiguous restriction on his association with his daughter without meaningful or appropriate findings. The First Circuit affirmed. [App. p. 32.] It found that "a condition that limits Millette's unsupervised conduct with minors is . . . 'reasonably related' to his specific offense and his history and characteristics," including because he had "admitted . . . that viewing child

pornography has been a 'life-long' problem for him." [App. p. 43.] The First Circuit noted that "district court expressed concerns that 'there is a serious epidemic' of people sexually assaulting children and circulating those images and noted that Millette has 'fallen into [possessing images] twice now.'" [App. p. 44.] The court stated that the condition does not "overly restrict Millette's constitutional interest in parenting his daughter." Quoting *United States v. Del Valle-Cruz*, 785 F.3d 48, 62 (1st Cir. 2015), the court stated, "Conditions that 'would impair a defendant's relationship with his child' require a 'greater justification." Neither the district court nor the First Circuit, however, provided a "greater justification." Instead, the First Circuit cited *United States v. Pabon*, 819 F.3d 26, 31 (1st Cir. 2016), for the proposition that "[c]onditions that limit a defendant's association with minors, including his children, are proper when, among other things, the defendant's conduct otherwise indicates an enhanced risk to minors" generally. (App. p. 45.)

The defendant in *Pabon*, however, had not challenged in the district court the restrictions on his parenting rights, nor the sufficiency of the court's findings. Accordingly, although the First Circuit described Pabon's challenge to the adequacy of the findings to restrict that familial access as his "most plausible challenge," the court reviewed that the failure to make findings of a particularized threat to Pabon's own child only for "plain error." Here, the First Circuit

acknowledged that Mr. Millette *had* preserved the issue. Yet it applied Pabon's finding that no "plain error" occurred to reject Millette's well preserved challenge.

Although the First Circuit asserted that "Millette's probation officer did not 'unreasonably withhold permission' from Millette 'to see his own children" [App. p. 46app.], the court was aware that while the appeal was pending and after Millette served his sixty-day sentence, the probation office rescinded approval for *all* Millette's approved supervisors and that Millette responded by promptly filing (on January 26, 2024) an emergency motion to approve a supervisor and for other relief. For many months his only contact with his daughter was by probation-monitored text messages. While the motion was pending and after Mr. Millette's mother completed a third substantial (16-week) chaperone course, she was again approved to supervise visits, but *only* for association between Mr. Millette and A.M. in *public places*.

On October 9, 2024, the district court belatedly held a hearing concerning Mr. Millette's motion to approve a supervisor and amend the condition restricting his access to his daughter. Mr. Millette, Millette's eldest son, his minor daughter, A.M., Melodie Millette, and others testified to Mr. Millette's qualities as a loving father who had never harmed or made any of his children feel uncomfortable. At Mr. Millette's suggestion, the government and probation had arranged for a trained child abuse counselor to interview A.M. The government introduced a recording

of the interview between A.M. and the counselor at which A.M. explained her father had never touched her inappropriately or made her feel uncomfortable and that she wished to have more contact with her father. The government did not call the counselor, and it offered no evidence the trained counselor doubted A.M.'s assurances.

Without finding that Kevin poses any risk to A.M., the district court denied all relief. Kevin continues to have severely limited and brief supervised association with his daughter. He is allowed only pre-arranged, supervised visits in public places. He is prohibited from calling or video chatting with A.M and from writing her, other than via probation-monitored text messages.

Such restrictions have become common in the District of Maine and the First Circuit for defendants guilty of possessing child pornography, even those, like Kevin, who have not directly abused any child, harmed their own children in any way, or created or distributed child pornography.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Petitioner, Kevin Millette, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on November 20, 2024.

I. The writ should be allowed because the decision below conflicts with decisions of other circuits requiring that conditions of supervision that severely restrict a defendant's right and ability to parent and associate with his minor children require a finding and evidence that he poses a threat to them

The relationship between a parent and child is a fundamental liberty interest protected by the due process clause. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)(plurality opinion of Justice O'Connor); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The First Circuit's treatment of this liberty interest and its application of sentencing statutes when reviewing conditions of release that restrict parental rights and duties is grossly disparate from that of sister circuits.

At least the Second, Third, Fourth, Eighth, and Tenth Circuits require an evidence-based finding that the defendant poses a threat *to his children* before a condition of supervision may substantially restrict a parent's rights to associate with and parent his child.

In *United States v. Voelker*, 489 F.3d 139 (3d Cir. 2007), the court vacated a condition prohibiting the defendant "from associating with minors without the prior approval of the Probation Officer" applying the "plain error" standard to an unpreserved objection, even though Voelker had "exposed his daughter's buttocks over the internet" and "offer[ed] her for sex." *Id.* at 153-54. The Third Circuit explained the sentencing judge had provided too few guidelines for the probation

office, making the office "the sole authority for deciding if Voelker will ever have unsupervised contact with any minor, including his own children." *Id.* at 154. The court emphasized that "the court should proceed cautiously in imposing any condition that could impact Voelker's parental rights." *Id.* at 155.

In *United States v. Davis*, 452 F.3d 991 (8th Cir. 2006), defendant Davis "challenge[d]" on appeal, but not in the district court, a special condition of his supervised release that bars him from having any "unsupervised contact with his own daughter," the condition imposed on Millette. *Id.* at 994. Applying the "plain error" standard the court vacated the condition. Davis argued on appeal "that because there is no evidence that he has abused a child, the condition interferes with his parental rights to a greater degree than is reasonably necessary." *Id.* at 995. The court acknowledged that in appropriate circumstances sentencing judges may impose restrictions on the constitutionally-protected "parent-child relationship," but it held "a court may not categorically impose such a condition in every child pornography case that comes before it; since the relevant statutory and constitutional considerations look to whether the condition is more restrictive than what is needed to satisfy the governmental interest in a specific case, the district court must decide whether to impose such a condition based on specific facts." *Id.* at 996.

Also applying plain error review to an unpreserved challenge, the Fourth Circuit, "agree[d] with the Eighth Circuit that if the evidence fails to show that the defendant poses a danger to his own child or loved one, a condition that limits access to those individuals is not reasonably necessary to protect those individuals or further the defendant's rehabilitation." *United States v. Worley*, 685 F.3d 404, 408 (4th Cir. 2012). The court explained that because there was no "evidence that suggests Worley was a threat to his children or girlfriend, we exercise our discretion to correct the error and reverse the imposition of" a condition prohibiting unsupervised contact with any child.

In *United States v. Smith*, 606 F.3d 1270 (10th Cir. 2010), the court addressed a prohibition against the defendant, who had a documented history of preying on young children, from "contact with children under the age of 18 without prior authorization of the probation officer." The Tenth Circuit agreed it appeared to apply to the defendant's own children, and it construed this Court's precedent as requiring that "only a compelling government interest can override the . . . fundamental right of familial association." *Id.* at 1283. The court vacated the condition and required the district court on remand to "clarify the scope of the condition as to" the defendant's own children. *Id.* at 1284.

In *United States v. Lonjose*, 663 F.3d 1292 (10th Cir. 2011), the court reiterated that restrictions on "familial association" must be narrowly drawn, must

"involve no greater deprivation of liberty than is reasonably necessary," and must be supported by "*a record that unambiguously supports a finding that the defendant is a danger to his own family members*." *Id.* at 1302 (emphasis added).

In *United States v. Myers*, 426 F.3d 117 (2nd Cir. 2005), the court vacated a condition prohibiting a defendant from unsupervised contact with his son without probation approval because the district court had not found a risk to the son and had failed to make appropriate findings.

Below and in other cases, however, the First Circuit has diverged from its sister circuits. It does not require a finding that the defendant poses a threat to his own children to substantially restrict his parental rights and contact. As noted above, the First Circuit stated below that restrictions on a defendant's contact with his own children required a "greater justification" than restrictions on his contact with other children, but it found – and has stated in other cases – that the supposedly greater justification is present if there is evidence the defendant poses a risk to minor's generally, and the First Circuit and the District of Maine have further found, in this and other cases, that attraction to child pornography *alone* automatically proves that requisite general threat. The First Circuit expressly so found in this case, citing *United States v. Pabon*, 819 F.3d at 31.

Although Pabon was a "plain error" case, in this case and in other recent cases the First Circuit has upheld broad restrictions against a father's contact with

his own children, based solely on his admission or evidence that he is attracted to child pornography *without* a finding that he poses a threat to his children. *E.g., United States v. Benoit*, 975 F.3d 20 (1st Cir. 2020); *United States v. Dasilva*, 844 F.3d 8 (1st Cir. 2016).

As summarized above, the district court not only failed to find that Mr. Millette poses a threat to A.M., it expressly conceded it did not know – and could not find – whether the restrictions it was reimposing on Mr. Millette's parental rights were "doing more harm than good." The courts below, therefore, expressly conceded they *could not* make the finding required in other circuits.

Sadly, the imposition of conditions restricting a father's access to his children have become routine in the First Circuit.

Mr. Millette's history while and after his First Circuit appeal was pending demonstrates the danger of the practice in the District of Maine and the First Circuit. Prior to revocation, his ability, right and responsibility to parent his daughter were inappropriately restricted. He could not call her, write her, or speak with her privately about important father-daughter matters, including discipline, college, financial planning, familial responsibilities, his mental health struggles, her mental health struggles, or even their love for each other. But at least to that point Mr. Millette and A.M. enjoyed supervised time together. While the appeal was pending and thereafter, his right and ability to do any meaningful parenting,

even supervised parenting, was effectively terminated. For many months, while the probation office refused to allow even limited supervised contact, he could not see, speak by phone or have any other communication with A.M., other than by probation-monitored text messages.

Currently, Mr. Millette's ability to parent his daughter is limited to probation-approved, brief, supervised *public* meetings. Family holiday dinners, trips that require private transportation, including visits to colleges, and nearly all forms of meaningful contact and parenting are forbidden.

Kevin Millette wishes he were not a minor-attracted person. He works mightily to deal with those attractions. But like most people attracted to one group or another, he is and has been fully able to keep his hands to himself. This is confirmed by his friends and family, by his complete lack of any record of inappropriate physical contact with any person, by the fact that he never created or distributed pornography, and by regular lie detector tests. There is no contrary evidence, nor contrary finding. Instead, in the District of Maine and the First Circuit there is increasingly a controlling, mistaken presumption that fathers attracted to child pornography should be kept from their own children even where, as here, the courts have no evidence of harm or threat, and even where, as here, the courts admit they do not know whether they are "doing more harm than good."

II. The writ should be allowed because the court below decided an important federal question in a way that conflicts with relevant decisions of this Court

The Court has not addressed directly the findings required for a sentencing judge to substantially restrict a supervised defendant's access to his children or his ability to parent them. The Court, however, has made clear that careful fact finding is required when courts curtail parental rights and access. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held that states terminating parental rights must find the supporting facts by clearing and convincing evidence. The Court explained that "a natural parent's 'desire for and right to 'the companionship, care, custody and management of his or her children' is an interest more precious than any property right." *Id.* at 758-59, *quoting Lassiter* v. *Department of Social Services*, 452 U.S. 18, 27 (1981), and *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

The Court's precedents also speak to the harm that is done when people are discriminated against based on their sexual proclivities. In *Bostock v. Cayton County*, 590 U.S. 644 (2020), the Court held that the prohibition against employment discrimination because of sex found in Title VII of the Civil Rights Act of 1964 prohibits employers from firing employees because of their status as homosexuals.

In proceedings below, the government argued vigorously that restricting Mr. Millette's access to his children is appropriate because he admits he is a "minor

attracted person" – a person sexually attracted to minors, even though he controls his conduct and has never assaulted any child or created child pornography. In restricting Mr. Millette's access to his children without finding that he posed any danger and without finding or knowing whether they were doing "more harm than good" the lower courts engaged in discrimination based on status. There is no record evidence minor-attracted persons are more likely than the rest of us to engage in sexual assault. There is no evidence Mr. Millette ever engaged in any assault. With due respect to the lower courts, the restrictions imposed on Mr. Millette, without appropriate findings, are not materially different from the historic discrimination against homosexuals, including prohibiting them from locker rooms or school employment. Both are discrimination based on fear, rather than evidence.

Substantially restricting a father's right and ability to associate with and parent his child based on fear, rather than evidence, especially where, as here, courts concede they do not know whether they are doing "more harm than good" contravenes the principles underlying *Santosky v. Kramer, supra.*

CONCLUSION

For the foregoing reasons, petitioner Kevin Millette respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on November 20, 2024.

Executed at Portland, Maine, this 14 day of February 2025.

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