No. 10-83

In the Supreme Court of the United States

GARY E. PEEL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2252A(a)(5)(B) violates the First Amendment as applied to petitioner because the statute makes it unlawful to possess (in 2006) sexually explicit photographs of a 16-year-old girl that were produced before Congress outlawed child pornography and at a time when the age of consent in the State where the photographs were produced was 16.

2. Whether petitioner's convictions for possessing (in 2006) sexually explicit photographs of a 16-year-old girl violate the Ex Post Facto Clause of the Constitution because the photographs were produced before Congress outlawed child pornography and at a time when the age of consent in the State where the photographs were produced was 16.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 595 F.3d 763. The relevant opinion of the district court (Pet. App. 23a-36a) is unreported but is available at 2007 WL 2126257.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2010. A petition for rehearing was denied on March 15, 2010 (Pet. App. 45a). On June 2, 2010, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 12, 2010, and the petition was filed on July 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of one count of bankruptcy fraud, in violation of 18 U.S.C. 152(6); one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and two counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). The district court sentenced petitioner to 144 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed in part and reversed in part, remanding to the district court with instructions to vacate either the bankruptcy fraud or the obstruction of justice conviction, and resentence petitioner after redetermining the advisory Sentencing Guidelines range. Pet. App. 1a-22a, 39a-41a.

1. In 1974, petitioner had an affair with his then-wife's 16-year-old sister. During the affair, which lasted several months, petitioner took several nude, sexually explicit photographs of his sister-in-law. The photographs depicted the 16-year-old girl sitting naked on the floor of petitioner's law office with her legs spread and with the focus on the girl's pubic area. When his sister-in-law requested the pictures, petitioner gave her some, which she destroyed, but retained others without her knowledge. Pet. App. 1a-2a, 25a-26a.

In 2003, petitioner and his wife divorced and agreed to a marital settlement. The following year, petitioner filed suit in Illinois state court seeking to vacate the settlement. Petitioner subsequently filed for bankruptcy and asked the bankruptcy court to discharge his financial obligations to his ex-wife under the terms of the marital settlement. Petitioner's ex-wife opposed the discharge and filed a claim for the money petitioner

owed her under the terms of the original settlement. Pet. App. 2a.

During the course of settlement negotiations, petitioner told his ex-wife that he had nude photographs of her younger sister and that he would make those pictures public, and send them to her elderly parents, if the ex-wife did not agree to a favorable settlement. Petitioner then placed photocopies of the pictures in his ex-wife's mailbox. The ex-wife informed law enforcement authorities about the threat and, at their direction, recorded subsequent conversations with petitioner. The recorded conversations confirmed that petitioner was blackmailing his ex-wife with the sexually explicit photographs. Pet. App. 2a-3a; 10/29/2009 Gov't C.A. Br. 4.

2. On March 22, 2006, a grand jury in the Southern District of Illinois returned an indictment charging petitioner with one count of bankruptcy fraud, in violation of 18 U.S.C. 152(6); one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and two counts of possession of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Indictment 3-5. As relevant here, the indictment charged petitioner with the possession of child pornography in January 2006. *Id.* at 4-5.

At that time, 18 U.S.C. 2252A(a)(5)(B) made it unlawful to knowingly possess material "that contains an image of child pornography * * * that was produced using materials that have been mailed, or shipped, or transported in interstate and foreign commerce by any means." Child pornography was defined to include a visual depiction of "sexually explicit conduct, where" "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(A). The term "minor" was defined as

"any person under the age of eighteen years." 18 U.S.C. 2256(1).[1]

Section 2252A(c) of Title 18 provided an affirmative defense to a charge of possessing child pornography if:

> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors.

To assert this defense, the defendant must provide timely notice before trial. 18 U.S.C. 2252A(c). If the defendant fails to comply with the statute's notice requirements, the district court "shall, absent a finding of extraordinary circumstances that prevented timely compliance," prohibit the defense. *Ibid.*

Petitioner did not give the district court or the government notice of any intent to raise an affirmative defense under 18 U.S.C. 2252A(c), nor did he in fact raise such a defense at trial or in his post-trial motions. 09/11/2009 Pet. C.A. Br. 34. At trial, petitioner argued, *inter alia*, that he could not be found guilty of the child pornography offenses because, at the time of possession, he believed that the photographs depicted his ex-wife's sister over the age of 18. 10/29/2009 Gov't C.A. Br. 32.

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[1] Congress passed the first federal child pornography statute in 1978 and, at that time, defined a "minor" as anyone under the age of 16. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2253(1), 92 Stat. 8. An amendment in 1984 redefined "minor" as anyone under the age of 18. Child Protection Act of 1984, Pub. L. No. 98-292, § 5(a), 98 Stat. 205. And, in 1990, Congress for the first time made it unlawful to possess images of child pornography. Crime Control Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4814.

The jury disagreed and convicted petitioner on all counts. Pet. App. 1a, 39a.

3. a. After initial briefing by petitioner's counsel, the court of appeals issued an order striking the brief and allowing petitioner to proceed pro se. 8/18/2008 Order. Petitioner then filed a pro se brief arguing, for the first time, that the affirmative defense set forth in 18 U.S.C. 2252A(c) rendered the evidence insufficient to sustain his convictions because, at the time he produced the photographs at issue, his ex-wife's sister was not a minor under then-applicable state or federal law. 12/01/2008 Pet. Pro Se C.A. Br. 19-21.

The court of appeals subsequently issued an order striking all previously filed briefs, appointing new counsel for petitioner, and ordering briefing of all "issues counsel deem[s] appropriate" as well as:

> With respect to [petitioner's] convictions for possessing child pornography in violation of 18 U.S.C. [] 2252A(a)(5)(B)—
>
> a) Whether the government's evidence was sufficient to support [petitioner's] convictions where the images in question were sexually explicit photographs of a sixteen-year-old female taken prior to the enactment of a federal criminal statute regulating child pornography, as defined to cover any person under the age of eighteen years?
>
> b) Whether [petitioner] complied with the procedural requirements for asserting the affirmative defense available under 18 U.S.C. [] 2252A(c), and if not, what is the effect of such noncompliance?

03/24/2009; 04/13/2009 Orders.

With respect to petitioner's child pornography convictions, petitioner's newly appointed counsel made two arguments. 09/11/2009 Pet. C.A. Br. 28-38. First, petitioner argued that the evidence was insufficient to establish that he knowingly possessed child pornography. *Id.* at 28-33. According to petitioner, while the evidence may have shown that he knew the age of his ex-wife's sister at the time the photographs were taken in 1974, the evidence was insufficient to show that he knew the photographs depicted a 16-year-old girl at the time of his unlawful possession in 2006. *Id.* at 32-33. Second, petitioner argued that the district court should have granted a judgment of acquittal because he could have successfully asserted the affirmative defense available under 18 U.S.C. 2252A(c), since his ex-wife's sister was "an adult at the time the material was produced." 09/11/2009 Pet. C.A. Br. 33-38. Because there was no federal child pornography law at the time the pictures were produced, and because the age of consent in the State of production (Illinois) was 16 at that time, petitioner argued that his ex-wife's sister was an "adult" when the photographs were produced. *Id.* at 37-38. In other words, petitioner argued, 18 U.S.C. 2252A(c) is a "grandfather clause" "which makes legal alleged child pornography that depicts an individual who was an adult at the time the material was produced." 11/20/2009 Pet. C.A. Reply Br. 19 (citation omitted).

Petitioner acknowledged that he "neither provided the district court with formal notice that he intended to invoke 18 U.S.C. [] 2252A(c)'s affirmative defense nor explicitly raised that defense at trial." 09/11/2009 Pet. C.A. Br. 34. He argued, however, that the notice requirement was really meant for "virtual" child pornography cases and that, in the alternative, the court of ap-

peals should treat petitioner as having forfeited the affirmative defense and, thus, review should be for plain error. *Id.* at 34-36.

b. The court of appeals affirmed petitioner's child pornography convictions. Pet. App. 10a-15a. As to petitioner's first argument, the court concluded that the evidence was sufficient to establish that, in 2006, petitioner knew that his ex-wife's sister had been younger than 18 years old at the time the photographs were produced. *Id.* at 15a. As to petitioner's second argument, the court of appeals first noted that petitioner "did not raise th[is] issue in the district court." *Id.* at 11a. The court also made clear that petitioner was not now arguing that "Congress can't criminalize the continued possession of pornography that was legal when created," nor was he arguing "that because the photos of his sister-in-law were not illegal when he took them, they could not constitute sexual abuse of a minor." *Id.* at 11a, 13a-14a. Instead, the court explained, petitioner was arguing that the affirmative defense "grandfather[s] the possession of pornography that was legal when it was created." *Id.* at 11a.

The court of appeals rejected petitioner's argument, concluding that 18 U.S.C. 2252A(c) could not be read such that "anyone who happened to have pornographic photographs of 16- and 17-year-olds taken before 1984 would be free to market them." Pet. App. 14a-15a. The court reasoned that the affirmative defense under 18 U.S.C. 2252A(c) was largely irrelevant after this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). Pet. App. 13a-14a. When the affirmative defense was added to the statute in 1996, the court explained, the purpose was "to exculpate child pornography made with adult rather than child models,

at a time when the Supreme Court had not yet ruled that the making of such pornography could not constitutionally be punished, and therefore at a time when Congress thought it could place the burden of proof concerning the age of the model used in producing the pornography on the defendant rather than on the government." *Id.* at 14a. The court continued, because the government is now required to "prove beyond a reasonable doubt that the apparent child in the pornographic image is a real child, the only work left for the provision creating the affirmative defense is to require * * * that the defendant notify the government of his intention to challenge the government's proof that a child was used." *Ibid.*; *id.* at 11a-12a (noting that the government's lawyer conceded at argument "that to prove a violation of the statute [it] has to prove that a real-life minor, not a computer simulation or an adult looking like a minor, was used in the creation of the pornography"). The court of appeals thus upheld petitioner's child pornography convictions.

The court of appeals held, however, that petitioner's convictions for both bankruptcy fraud and obstruction of justice violated the Double Jeopardy Clause of the Fifth Amendment. Pet. App. 3a-10a. The court also concluded that the district court erred in its calculation of intended loss for the purpose of determining the advisory Guidelines range for those convictions. *Id.* at 15a-21a. The court of appeals therefore remanded the case to the district court with "directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. [] 3553(a)." *Id.* at 22a.

ARGUMENT

Petitioner now argues that the child pornography statute violates the First Amendment as applied to him (Pet. 7-12), and that the interpretation of the statute adopted by the court of appeals raises serious ex post facto concerns (Pet. 13-15). The court of appeals' decision is interlocutory, petitioner did not raise either of these constitutional claims below, and the court of appeals did not pass on them. Because petitioner also failed to raise either claim in the district court, they are waived or, at most, reviewable for plain error. Petitioner cannot satisfy that stringent standard and his newly asserted claims do not implicate a conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review of petitioner's constitutional claims is unwarranted at this time because the case is in an interlocutory posture. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (noting that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (describing the interlocutory nature of a decision as "a fact that of itself alone furnishe[s] sufficient ground for the denial of" certiorari). The court of appeals reversed in part and remanded with "directions that the judge vacate either the bankruptcy fraud conviction or the obstruction of justice conviction, recalculate the intended loss, redetermine the guidelines sentencing range, and resentence the defendant in accordance with 18 U.S.C. [] 3553(a)." Pet. App. 22a. After the district court resentences petitioner, he will be able to raise his current claims—together with any other

claims that may arise during resentencing—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. Review is also unwarranted because petitioner never challenged his child pornography convictions on First Amendment or ex post facto grounds in the court of appeals or the district court. Accordingly, no court has passed on these constitutional questions. This Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed on below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). There is no reason to depart from that general rule here.

In the district court, petitioner failed to even raise the affirmative defense set forth in 18 U.S.C. 2252A(c), or give notice as required by statute. 09/11/2009 Pet. C.A. Br. 34. And, on appeal, petitioner made only the statutory interpretation argument that his child pornography convictions should be overturned because he *could have* raised a successful affirmative defense under 18 U.S.C. 2252A(c), since his ex-wife's sister was an "adult" at the time the images were produced. 09/11/2009 C.A. Br. 33-38. Whereas petitioner now claims that the First Amendment is implicated because the photographs he was convicted of possessing "have nothing at all to do with child sexual abuse, as they were taken in the course of a relationship between consenting adults," Pet. 10, before the court of appeals "[h]e d[id] not argue that because the photos of his sister-in-law were not illegal when he took them, they could not con-

stitute sexual abuse of a minor," Pet. App. 13a-14a.[2] Similarly, whereas petitioner now argues that his convictions raise ex post facto concerns because he "became subject to criminal prosecution for possessing materials that previously" were legal when Congress outlawed the possession of child pornography, Pet. 13, before the court of appeals he did "not argue that Congress can't criminalize the continued possession of pornography that was legal when created," Pet. App. 11a. Finally, whereas petitioner now argues that "it is far from clear" that the affirmative defense provisions of 18 U.S.C. 2252A(c) could save the child pornography statute from First Amendment challenge, Pet. 11, petitioner urged the court of appeals to overturn his convictions because he could have successfully raised that defense at trial, 09/11/2009 Pet. C.A. Br. 33-38.

This Court should not be the first court to review these constitutional questions. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

3. Even if this Court were to overlook petitioner's failure to raise these claims in the court of appeals, this

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[2] In his petition for rehearing, petitioner suggested that the court of appeals' ruling conflicts with *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), since petitioner "could not have committed sexual abuse of" his ex-wife's sister "because she was above the age of consent at th[at] time." 02/26/2010 Pet. C.A. Petition for Reh'g 10-11. This Court's traditional practice, however, is "to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari); *Easley* v. *Reuss*, 532 F.3d 592, 595 (7th Cir. 2008) (issue cannot be raised for first time in rehearing petition). In any case, the rehearing petition does not even mention the First Amendment—let alone argue that petitioner's convictions were constitutionally invalid for that reason.

case does not squarely present the issues petitioner seeks to raise. Because petitioner did not raise either constitutional claim before trial or at any other time in the district court, the claims are waived. See Fed. R. Crim. P. 12(b)(3)(A)-(B) and (e); *United States* v. *Petitjean*, 883 F.2d 1341, 1344 (7th Cir. 1989) ("defenses and objections based on defects in the indictment must be raised prior to trial," "[o]therwise, they are waived"); *United States* v. *Feliciano*, 223 F.3d 102, 125 (2d Cir. 2000) (facial and as-applied constitutional challenges not raised in district court were waived on appeal), cert. denied, 532 U.S. 943 (2001).

At most, petitioner's newly asserted claims would be reviewable only for plain error. See Fed. R. Crim. P. 52(b). In order to satisfy that standard, petitioner must show that "(1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010) (brackets in original) (quoting *Puckett* v. *United States*, 129 S. Ct. 1423, 1429 (2009)). Petitioner cannot establish error, let alone error that is "obvious" under current law. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) ("At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law.").

a. Petitioner argues (Pet. 7-12) that 18 U.S.C. 2252A(a)(5)(B) violates the First Amendment, as applied to him, because the 16-year-old child depicted in the photographs was actually an "adult" at the time the pic-

tures were produced—and, thus, his possession of the sexually explicit, but nonobscene, images was constitutionally protected. To reach the conclusion that his ex-wife's sister was an "adult" at the time the pictures were produced, petitioner appears to argue that (i) child pornography can only be banned consistent with the First Amendment if the images depict the crime of child sex abuse, Pet. 10-12, and (ii) the photographs in question do not involve the crime of child sex abuse because, in 1974 when the photographs were produced, the age of consent in Illinois was 16 and there was no federal child pornography law on the books, Pet. 2-3. That argument fails.

As this Court held in *New York* v. *Ferber*, 458 U.S. 747 (1982), depictions of real children engaging in sexually explicit conduct lack First Amendment protection. Petitioner nevertheless asserts that the First Amendment does protect child pornography as long as production of the underlying image was not itself a crime. If petitioner's argument were correct, the market for child pornography produced overseas, in countries where there is no age of consent (or where the age of consent is, for example, 12 years old) and where the production of child pornography is legal, would be constitutionally protected. This Court's cases provide no support for such a narrow reading of *Ferber*.

Petitioner relies on *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), but such reliance is misplaced. In that case, this Court addressed the narrow issue of whether the generally applicable criminal ban on "virtual" child pornography in the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009, survived constitutional scrutiny. In reaching the conclusion that the ban violated the First Amendment, the Court distinguished "virtual"

child pornography from child pornography that depicted actual children. *Free Speech Coalition*, 535 U.S. at 240. Sexually explicit materials depicting actual children can be banned even if not obscene, the Court explained, because the use of a child in the production of such material exploits the child and is itself a form of sexual abuse. *Id.* at 240, 249-250. The Court did not, however, hold that the sexual exploitation of a child occurs only when the law in effect at the time of production criminalizes the underlying act. Nor would such an approach make sense. Whether production of the images constitutes child sex abuse in that place or at that time, the continued possession and dissemination of those images remains a "permanent record of the children's participation and the harm to the child"—harm that is not restricted to then-chargeable sexual abuse. *Ferber*, 458 U.S. at 759; cf. *Free Speech Coalition*, 535 U.S. at 242 (explaining that a separate provision, which prohibited the computer alteration of innocent pictures of real children, was not challenged but would "implicate the interests of real children and are in that sense closer to the images in *Ferber*").

In any event, contrary to petitioner's suggestion (Pet. 12), the fact that petitioner's then-sister-in-law was above the age of consent in Illinois at the time the photographs were taken does not mean that petitioner's sexual relationship with a 16-year-old girl was lawful at that time. In 1974, any person age 14 or older who had sexual intercourse with "any person under the age of 18" was guilty under Illinois law of "contributing to the sexual delinquency of a child." *People* v. *Keegan*, 286 N.E.2d 345, 346 (Ill. 1971), cert. denied, 406 U.S. 964 (1972); cf. *People* v. *Beksel*, 261 N.E.2d 40, 44-45 (Ill. App. Ct. 1970) (allowing the commitment of individuals

who are "suffering from a mental disorder" and have "demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children," and defining "children" to mean people under the age of 18) (emphasis omitted).

In sum, the First Amendment does not preclude Congress from banning the possession of sexually explicit images of children under 18 that were created before 1984 in the more than a dozen states (or federal territories) where the age of consent was 16 years old. See *Ferber*, 458 U.S. at 764 n.17. Rather, only "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

b. Petitioner contends (Pet. 13-15) that his convictions "raise[] significant *ex post facto* concerns." That claim is similarly lacking in merit.

Section 2252A(a)(5)(B) does not criminalize conduct that occurred wholly before the current version of the statute was enacted. To the contrary, petitioner's convictions clearly rest on post-amendment conduct. Petitioner is being punished for his possession of child pornography in 2006—16 years after the statute was amended to criminalize the possession of child pornography involving children under the age of 18. See p. 4 n.1, *supra*. Thus, Section 2252A(a)(5)(B) does not violate the Ex Post Facto Clause because it does not "operate[] retroactively" in the sense of applying to conduct that was "completed before its enactment." *Johnson* v. *United States*, 529 U.S. 694, 699 (2000); see *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995); *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990); *Miller* v. *Florida*, 482 U.S. 423, 430 (1987).

A number of courts have thus correctly held that a conviction for the possession of child pornography does not violate the Ex Post Facto Clause, even if the defendant first obtained possession of the images prior to the effective date of the criminal prohibition. See, *e.g.*, *United States* v. *Paton*, 110 F.3d 562, 564-565 (8th Cir. 1997); *United States* v. *Bateman*, 805 F. Supp. 1053, 1055 (D.N.H. 1992); *United States* v. *Porter*, 709 F. Supp. 770, 774 (E.D. Mich. 1989), aff'd, 895 F.2d 1415 (6th Cir.), cert. denied, 498 U.S. 1013 (1990); cf. *United States* v. *Trupin*, 117 F.3d 678, 686-687 (2d Cir. 1997) (finding no ex post facto violation where defendant was prosecuted for possession of a stolen painting he acquired in 1980, before the 1986 amendment that made it a federal crime to "possess" stolen goods that have crossed state lines), cert. denied, 522 U.S. 1051 (1998); *United States* v. *Waters*, 23 F.3d 29, 36 (2d Cir.) (same with gun possession), cert. denied, 513 U.S. 867 (1994).

Contrary to petitioner's suggestion (Pet. 13-15), *United States* v. *Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), petition for cert. pending, No. 09-940 (filed Feb. 9, 2010), is inapposite. In that case, the Ninth Circuit held that the application of the registration and notification provisions of the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590, to a juvenile who was adjudicated delinquent under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.*, before SORNA's enactment violated the Ex Post Facto Clause. The defendant's juvenile adjudication which triggered the registration requirement occurred before the enactment of SORNA; the disputed issue is whether the registration and notification requirements constitute "punishment" for ex post facto purposes. See Pet. at 14-26, *Juvenile Male, supra* (No.

09-940), available at 2010 WL 531758. Here, in contrast, petitioner's possession of child pornography occurred after the enactment (and amendment) of Section 2252A(a)(5)(B). Even if this Court were to grant the petition for a writ of certiorari in *Juvenile Male*, that would have no bearing on the outcome of petitioner's case.[3] Accordingly, there is no reason to hold this petition pending a ruling on the *Juvenile Male* petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

[3] This Court certified a question of state law to the Montana Supreme Court to determine whether the case was moot, and reserved further proceedings. See *United States* v. *Juvenile Male*, 130 S. Ct. 2518 (2010). The certified question has been briefed and the case is scheduled for argument before the Montana Supreme Court in January 2011.