No. 09-392

In the Supreme Court of the United States

VIRGIL MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
RICHARD M. RE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled under Federal Rule of Criminal Procedure 32(i)(1)(C) to receive presentencing notice of potential conditions of supervised release.

2. Whether sex-offender conditions of supervised release were "reasonably related" to statutory sentencing goals under 18 U.S.C. 3583(d), 18 U.S.C. 3553(a), and Sentencing Guidelines § 5D1.3, when the crime of conviction did not involve sexual activity, but petitioner had a 13-year-old conviction for a sex offense against a four-year-old girl, had an additional conviction related to a sexual assault, had failed to register as a sex offender as required by state law, and had violated his earlier conditions of supervised release.

3. Whether it was "reasonably necessary" for the achievement of the statutory sentencing goals set out in 18 U.S.C. 3553(a) to condition petitioner's use and possession of an Internet-accessible computer on his probation officer's approval, in light of his prior sex offense against a four-year-old girl, his additional conviction related to a sexual assault, his failure to register as a sex offender, and his earlier violation of conditions of supervised release.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines and rules:

In the Supreme Court of the United States

No. 09-392

VIRGIL MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 573 F.3d 1132.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2009. The petition for a writ of certiorari was filed on September 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). He was sentenced to 63 months of imprisonment, to be followed by three years of super-

vised release. Pet. App. 18-20. The court of appeals affirmed. *Id.* at 1-17.

1. In 1994, petitioner pleaded no contest to state-law charges of lewd and lascivious conduct on a child under the age of 16 (arising from an incident when he inserted his finger into the vagina of a four-year-old girl) and assault (arising from a separate incident when he beat, kicked, and raped a woman at knifepoint). Pet. App. 3-4. As a condition of probation, petitioner was required to attend sex-offender counseling. Presentence Investigation Report ¶ 33 (PSR).

In 1998, petitioner was convicted in federal court for unlawfully transporting firearms and knowingly making false statements in acquiring them. Pet. App. 2. In 2004, he failed to report a change of residence to his probation officer. *Ibid.* When federal officers searched petitioner's residence, they discovered a .25-caliber firearm among his possessions. *Id.* at 2-3.

Petitioner was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 924(e). Pet. App. 2-3. The indictment noted his prior convictions for grand theft, committing a lewd and lascivious act on a child, and dealing in stolen property. *Id.* at 3. Petitioner pleaded guilty to the charged offence without a plea agreement.[1] *Ibid.* By the time of his federal sentencing hearing, petitioner had also been charged under Florida law with failing to register as a

---

[1] The PSR also indicated that petitioner had been arrested on three separate occasions in 1994 and 1995 for sexual misconduct against his wife and child. On each occasion, the charges were ultimately dropped. Petitioner objected to their inclusion in the PSR, the sentencing court accepted petitioner's claims of innocence "at face value," and the court of appeals repeated but did not otherwise rely on those accusations. Pet. App. 4-5.

sex offender and had an outstanding arrest warrant for that offense. *Ibid.*

2. On April 27, 2007, the district court sentenced petitioner to 63 months of imprisonment, to be followed by three years of supervised release. Pet. App. 19-20. The district court also imposed both standard and special conditions on petitioner's supervised release. *Id.* at 22-26. The special conditions required petitioner to participate in a mental health program for sex offenders; to register with sex-offender registries in any State where he resides, visits, is employed, or is a student, subject to his probation officer's direction; to supply his probation officer with information required by the Florida sexual predator and sexual offender notification and registration statutes; to avoid direct contact with minors and areas where minors typically congregate without his probation officer's written approval; not to possess child pornography; not to possess or use a computer with Internet access without his probation officer's approval; and to submit to any reasonable search, including a search of any computer, based on a reasonable suspicion that petitioner possesses contraband or has violated a condition of release. *Id.* at 5-6, 24-26.

After announcing the sentence, including the special conditions, the district court asked for objections. Pet. App. 6. Petitioner's counsel raised "a generalized objection," saying he was "not really prepared to respond to all of the sexual-offender conditions." *Ibid.* The court recessed for lunch. *Ibid.* After the recess, which lasted more than an hour, petitioner's counsel stated that he had not "specifically examined the statutes" relating to the special conditions of supervised release, but he raised several grounds for an "objection" to the special conditions. *Ibid.*; 4/27/07 Tr. 80-81. He argued that

the special conditions were "unnecessary" because petitioner had not been convicted of a sex offense since 1994, that such conditions had not been imposed as part of his earlier federal sentence, and that many of the other allegations of illegal sexual activity were "false" and "unsubstantiated" and had ultimately not been prosecuted. Pet. App. 6-7. In response, the probation officer indicated that the special conditions were appropriate because petitioner had, at the least, "commit[ted] a lewd and lascivious act on a four-year-old child," and that sex-offender treatment would be "dynamic" and could be adjusted if at some point petitioner no longer needed it. *Ibid*. The court overruled petitioner's objection to the conditions of supervised release. *Ibid*.

3. The court of appeals affirmed petitioner's sentence. Pet. App. 1-17.

a. The court of appeals first addressed petitioner's contention that he was entitled to advance notice that he might be subject to special conditions of supervised release. Pet. App. 8-11. Petitioner relied on *Burns* v. *United States*, 501 U.S. 129 (1991), which invoked due process principles in interpreting Federal Rule of Criminal Procedure 32 to require defendants to receive notice of upward departures from the Sentencing Guidelines. The court of appeals instead followed this Court's more recent decision in *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), which distinguished *Burns* and held that defendants are not entitled to advance notice of potential variances from advisory Guidelines ranges. *Id.* at 2202; Pet. App. 10. The court of appeals noted the existence of "procedural protections," including the "rights to review and object to the presentence report," and concluded that a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of

supervised release." *Ibid.* The court held that "[t]he district court was not required to notify [petitioner] before it imposed special conditions to address his proclivity for sexual misconduct." *Id.* at 11. It also concluded that petitioner "did not allege, nor does the record suggest, that he was prejudiced by" the lack of advance notice. *Ibid.* The court explained that petitioner's underlying misconduct had been detailed in the PSR, and petitioner's counsel had specifically "addressed the allegations of sexual misconduct both before and at sentencing, and he did not move for a continuance to develop additional arguments or submit evidence to refuse those allegations." *Ibid.*

b. The court of appeals then considered whether the district court had imposed any special condition of supervised release that was unnecessarily restrictive in light of the purposes of sentencing and the relevant factors from 18 U.S.C. 3553(a). 18 U.S.C. 3583(c) and (d)(1)-(2); Pet. App. 11-12. Considering each condition of supervised release in light of petitioner's history and characteristics, the court concluded that the sentencing court had not abused its discretion. *Id.* at 12-17.

ARGUMENT

1. Petitioner principally contends (Pet. 9-28) that the district court was required to provide him with advance notice of potential conditions of supervised release. The court of appeals correctly rejected that contention in light of this Court's decision in *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), which held that a defendant is not entitled to notice of a potential variance from the sentencing range under the advisory Sentencing Guidelines. There is no conflict among post-*Irizarry* decisions in the courts of appeals. In addition, this case

would make a poor vehicle for addressing *Irizarry*'s applicability to conditions-of-release cases, because any error in petitioner's case was harmless. Accordingly, no further review by this Court is warranted.

a. Federal Rule of Criminal Procedure 32(i)(1)(C) provides that sentencing courts "must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence." In *Burns* v. *United States*, 501 U.S. 129 (1991), this Court held that a defendant is entitled to receive notice of a potential departure from the Sentencing Guidelines on the basis of similar language—then located at Rule 32(a)(1). See *id.* at 136. The *Burns* Court noted that a contrary reading of Rule 32 would raise a "serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138. More recently, however, the Court held in *Irizarry* v. *United States*, *supra*, that the decision in *Burns* should not be "extend[ed]" to require advance notice to a defendant of a potential variance from the Sentencing Guidelines, which had been rendered advisory by *United States* v. *Booker*, 543 U.S. 220 (2005).[2] See *Irizarry*, 128 S. Ct. at 2203. *Irizarry* relied on several considerations fully applicable to the question at issue in this case.

First, *Irizarry* emphasized that a defendant's desire to obtain notice of a potential variance is not an "expectation subject to due process protection." 128 S. Ct. at 2202. Before *Booker*, "a criminal defendant would re-

[2] As *Irizarry* explained, a "'[d]eparture' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." 128 S. Ct. at 2202. A "variance," by contrast, is merely a deviation from the advisory Guidelines range in light of the statutory sentencing factors set out in 18 U.S.C. 3553(a). 128 S. Ct. at 2202-2203.

ceive a sentence within the presumptively applicable guideline range." *Ibid.* But that presumption no longer exists. "Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness." *Ibid.* Thus, "the justification for [this Court's] decision in *Burns* no longer exists." *Id.* at 2203. That reason applies fully to conditions of supervised release. There is no "presumption of unreasonableness" pertaining to special conditions of release. On the contrary, it is well established that sentencing courts have broad discretion when choosing such conditions. See 18 U.S.C. 3583(d) ("The court may order, as a further condition of supervised release * * * any other condition it considers to be appropriate."). Thus, as in *Irizarry*, there is not "the same degree of reliance * * * that gave rise to a special need for notice in *Burns*." 128 S. Ct. at 2202. While a condition of supervised release still must serve a subset of the factors set out at 18 U.S.C. 3553(a), see 18 U.S.C. 3583(d)(1) and (2), those are the same factors that constrain the imposition of a variance from the advisory Guidelines range, see *Booker*, 543 U.S. at 245-246, 259-260. Because those factors do not create an "expectation subject to due process protection" in connection with a variance, *Irizarry*, 128 S. Ct. at 2202, they must also fail to create such an expectation in connection with a condition of supervised release.

Second, *Irizarry* explained that normally "a competent lawyer . . . will anticipate most of what might occur at the sentencing hearing—based on the trial, the pre-sentence report, the exchanges of the parties concerning the report, and the preparation of mitigation evidence." 128 S. Ct. at 2203 (quoting *United States* v. *Vega-Santiago*, 519 F.3d 1, 5 (1st Cir.) (en banc), cert. denied, 129 S. Ct. 92 (2008)). That reasoning fully ex-

tends to a condition of supervised release, which—as with a variance from the Guidelines range—is imposed "at the sentencing hearing." *Ibid.* (quoting *Vega-Santiago*, 519 F.3d at 5). Because "[m]ost probationers are * * * subject to individual 'special conditions' imposed by the court," *Gall* v. *United States*, 552 U.S. 38, 48 (2007), a defendant "ordinarily should not be surprised when a sentencing court imposes conditions of supervised release," Pet. App. 10. "Garden variety considerations of culpability, criminal history, likelihood of reoffense, seriousness of the crime, nature of the conduct and so forth should not generally come as a surprise to trial lawyers who have prepared for sentencing." *Irizarry*, 128 S. Ct. at 2203 (quoting *Vega-Santiago*, 519 F.3d at 5). Accordingly, there is no general need for notice of a specific condition of release contemplated by the sentencing judge. Indeed, in this case, petitioner's lawyer knew that petitioner was a convicted sex offender —the PSR even mentioned his outstanding arrest warrant for failing to register as a sex offender—and he had specifically objected to some of the allegations of sexual misconduct identified in the PSR. Pet. App. 3-4.[3]

---

[3] Petitioner objects that PSRs do not provide adequate notice to defendants because they do not "typically list potential special conditions of supervised release." Pet. 25. Yet PSRs also do not (and could not) list all potential variances. Cf. *Irizarry*, 128 S. Ct. at 2203 ("Sentencing is 'a fluid and dynamic process and the court itself may not know until the end whether a variance will be adopted, let alone on what grounds.'") (quoting *Vega-Santiago*, 519 F.3d at 4). Nonetheless, *Irizarry* found that pre-sentencing notice is not categorically required to ensure that "all relevant matters relating to a sentencing decision have been considered before the final sentencing determination is made." *Id.* at 2203-2204. That conclusion forecloses petitioner's argument here. In any event, even apart from the specific procedural protections associated with the PSR, a defendant is also allowed at the sentencing "to

Third, *Irizarry* explained that the appropriate remedy for any surprise at sentencing is not to require advance notice but to "grant[] a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial." 128 S. Ct. at 2203. That continuance-based approach can be tailored to the relatively unusual cases in which "the factual basis for a particular sentence will come as a surprise to a defendant or the Government." *Ibid.* In contrast, petitioner proposes much broader requirement—a *per se* rule mandating notice in a vast range of sentencing cases. Because it would apply "even where the content of the * * * notice would not affect the parties' presentation of argument and evidence," petitioner's rule—like the proposed rule rejected in *Irizarry*—would accomplish nothing but "unnecessary delay." *Ibid.* As in *Irizarry*, a more narrowly drawn solution is "more appropriate" than the one petitioner proposes. *Ibid.*

b. Although petitioner claims that the decision in this case "conflicts with decisions" from four other circuits, Pet. 10-11, he concedes that all of the other decisions are "pre-*Irizarry*," Pet. 27. Because the other circuits may reconsider their prior positions in light of *Irizarry*, review by this Court at this time would be premature. While *Irizarry*'s applicability to potential conditions of supervised release is, as petitioner claims, an issue that is "likely to recur," *ibid.*, it appears to have arisen in only three cases (including this one) since June 2008. And the courts in the other two cases did not even need to resolve the question, though they both recog-

---

comment on 'matters relating to an appropriate sentence'" and is "given an opportunity to speak and present mitigation testimony." *Id.* at 2204 n.2 (quoting Fed. R. Crim. P. 32(i)(1)(C) and citing Fed. R. Crim. P. 32(i)(4)(A)(ii)).

nized that *Irizarry* might require a departure from prior circuit precedent in an appropriate case. See *United States* v. *Weatherton*, 567 F.3d 149, 156 (5th Cir.), cert. denied, 130 S. Ct. 300 (2009); *United States* v. *Ybarra*, 289 Fed. Appx. 726, 733-734 (5th Cir. 2008). Thus, the volume of cases presenting the issue is not sufficient to create a kind of urgency that might otherwise warrant this Court's intervention when only one court of appeals has addressed how *Irizarry* should apply in this context.

c. In any event, this case would be a poor vehicle in which to consider the need for advance notice of potential conditions of supervised release, because any error by the district court in failing to provide such notice was harmless. See *Irizarry*, 128 S. Ct. at 2203 (finding lack of notice "harmless" because "the record does not indicate that a statement announcing [the possibility of a variance] would have changed the parties' presentations in any material way").

As the court of appeals below noted, petitioner "did not allege, nor does the record suggest, that he was prejudiced by the court's pronouncement." Pet. App. 11. Although petitioner's counsel expressed surprise at the conditions imposed on petitioner, the conduct by petitioner that prompted those conditions "was detailed in the presentence investigation report, and the record reflects that [petitioner] knew the district court likely would consider his criminal history in determining an appropriate sentence." *Ibid*. And petitioner's counsel did, after the benefit of a 77-minute recess, present reasons in support of his objections to the court's proposed conditions of supervised release. *Id*. at 6; 4/27/07 Tr. 80-81. Moreover, those reasons included the same kinds of considerations that petitioner raises now: that he had only one conviction for a sex offense; that the sex-

offense conviction was from 1994; that he had received sex-offender treatment at the time; that he had in the meantime been sentenced for other federal crimes without receiving any sex-offender-related conditions; that other allegations of sexual misconduct in the PSR were "unsubstantiated" and had not been prosecuted; and that the court could adequately protect the public through a less-restrictive means ("a mental evaluation and then treatment as necessary if * * * [petitioner] is some kind of a threat"). 4/27/07 Tr. 81-83; compare Pet. 33-34 (listing reasons he now contends that sex-offender special conditions are inappropriate in this case). Because the record does not establish that petitioner either encountered unfair surprise or was prejudiced by any lack of advance notice, further review of the notice question is not warranted.

2. Petitioner also contends (Pet. 28-34) that sex-offender conditions of supervised release were inconsistent with 18 U.S.C. 3583(d) and Sentencing Guidelines § 5D1.3, which require that discretionary conditions of supervised release must be "reasonably related to" a subset of the sentencing considerations set out in Section 3553(a), including "the history and characteristics of the defendant," "the need for the sentence imposed * * * to protect the public from further crimes of the defendant," and the need to supply the defendant with "correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(1) and (2). But the special conditions were consistent with the statute and Guidelines; there is no square conflict with other courts of appeals; and there is no need for further review of this factbound question.

a. The record supports special conditions of supervised release because of petitioner's "history," his poten-

tial threat to "the public," and his need for "treatment." 18 U.S.C. 3553(a)(1) and (2). Petitioner had previously pleaded no contest to the charge of committing a lewd and lascivious act on a child under the age of sixteen. Pet. App. 3. Petitioner's offense conduct entailed inserting his finger into a four-year-old girl's vagina. *Ibid.* Petitioner had also pleaded no contest to a separate charge of assault after being charged with sexual assault for beating and forcibly raping his victim. *Id.* at 3-4. Moreover, petitioner had failed to comply with state law requiring him to register as a sex offender, and he had violated earlier conditions of supervised release by changing his place of residence without notice and, soon after his release from prison, "was discovered in a household containing a minor female." *Id.* at 13.

Petitioner's special conditions of supervised release were responsive to those facts. For example, one condition ensures that petitioner will receive psychiatric treatment that may help him avoid further sex offenses, and another condition limits petitioner's ability to "communicate with potential victims" through the Internet. Pet. App. 12-14, 16. The special conditions imposed on petitioner were "reasonably related to" petitioner's "history," potential threat to "the public," and need for "treatment." 18 U.S.C. 3583(d), 3553(a)(1) and (2).

b. Petitioner argues (Pet. 29-34) that the decision below conflicts with decisions of the Sixth, Eighth, and Ninth Circuits that invalidated sex-offender conditions of supervised release. But the cases he cites are readily distinguishable. Indeed, petitioner himself characterizes those cases as "hold[ing] that a defendant's commission of a sex offense that is remote in time, *without more*, does not establish the requisite relationship between sex offender special conditions and the defen-

dant's history and characteristics or the statutory purposes of sentencing." Pet. 30 (emphasis added). As already noted, this case does involve "more" than a single, dated sex offense. Petitioner had convictions stemming from unlawful sexual activity with two different victims, including a four-year-old girl; he had violated earlier conditions of supervised release; he had violated state law by failing to register as a sex offender; and he was found residing in a household with a minor female. All of those factors prevent this case from presenting any square conflict with those he cites.[4] Additional review of petitioner's factbound question is accordingly unwarranted.

3. Petitioner finally contends (Pet. 34-38) that the condition of supervised release restricting his access to the Internet for three years without his probation offi-

---

[4] See *United States* v. *Carter*, 463 F.3d 526, 532 (6th Cir. 2006) (vacating conditions of supervised released based exclusively on 17-year-old conduct and emphasizing that "[w]e need not and do not decide precisely how much time must elapse before a sex offense becomes too remote in time to be reasonably related to a sex-offender condition"); *United States* v. *T.M.*, 330 F.3d 1235, 1240-1241 (9th Cir. 2003) (vacating conditions of supervised release "predicated upon twenty-year-old incidents, without more"; noting that "more recent relevant events may revive old offenses and justify the imposition of supervised release conditions related to sex offender status"); *United States* v. *Scott*, 270 F.3d 632, 636 (8th Cir. 2001) (vacating conditions of supervised release based on 15-year-old conduct where sex-offender conditions had never before been imposed on defendant and where there was "no evidence" that defendant repeated or would repeat his past sexual misconduct); *United States* v. *Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) (reversing psychiatric-counseling condition imposed on a defendant convicted of mail fraud, because it was based on his abusive behavior toward his wife 13 years earlier, and the district court had conceded that defendant did not "present[] a threat to anyone except possibly" his wife, with whom he had reconciled).

cer's approval violated 18 U.S.C. 3583(d)(2), which provides that discretionary conditions of supervised release must involve "no greater deprivation of liberty than is reasonably necessary" to achieve a subset of the sentencing considerations set out in Section 3553(a).

Consistent with the statute's reasonable-necessity standard, sentencing courts are afforded broad discretion in imposing special conditions of supervised release; appellate courts review such conditions only for abuse of discretion. See, *e.g.*, *United States* v. *Taylor*, 338 F.3d 1280, 1283 (11th Cir.), cert. denied, 540 U.S. 1066 (2003); *United States* v. *Cothran*, 302 F.3d 279, 290 (5th Cir. 2002); *United States* v. *Gallaher*, 275 F.3d 784, 793 (9th Cir. 2001); *United States* v. *Wilson*, 154 F.3d 658, 667 (7th Cir. 1998), cert. denied, 525 U.S. 1081 (1999). Given the applicable legal standards, petitioner's objection is erroneous and in any event not worthy of further review by this Court.

a. The sentencing court's decision to impose a limited restriction on petitioner's access to the Internet satisfied Section 3583(d)(2)'s deferential standard of reasonable necessity, which must be evaluated in light of the facts and circumstances of each case. The need for a restriction arose from petitioner's past sexual misconduct, including against a four-year-old girl; from petitioner's failure to comply with sex-offender-registration requirements; and from the police's discovery of petitioner living in a home occupied by a minor female in violation of his earlier conditions of supervised release. As the court of appeals noted, unlimited access to the Internet would facilitate petitioner's access to child pornography and his ability to "communicate with potential victims." Pet. App. 16. Thus, the district court did not abuse its discretion in concluding that some constraint

on petitioner's ability to access the Internet was reasonably necessary for petitioner's rehabilitation, as well as for the protection of the public.

Unlike the conditions invalidated in some other cases, the special condition imposed by the sentencing court here is not a total ban on access to the Internet. The restriction is instead limited in two important respects. First, petitioner is permitted to use the Internet if he obtains his probation officer's permission. Pet. App. 16. That not only provides petitioner with the ability to use the Internet, but also enhances the probation officer's ability to supervise and support petitioner's rehabilitation (*e.g.*, by making approved usage subject to periodic inspections of petitioner's computer). In that regard, the restriction here is materially similar to special conditions that were upheld even by some of the courts of appeals that petitioner contends are on the other side of the circuit split he alleges. See, *e.g.*, *United States* v. *Stults*, 575 F.3d 834, 856 (8th Cir. 2009) (upholding a "special condition barring Internet access unless approved by the probation office"), cert. denied, No. 09-8153 (Jan. 25, 2010); *United States* v. *Thielemann*, 575 F.3d 265, 278 (3d Cir. 2009) (upholding ten-year restriction on Internet usage in part because defendant "may seek permission from the Probation Office to use the [I]nternet"), cert. denied, No. 09-7854 (Jan. 11, 2010); *United States* v. *Ristine*, 335 F.3d 692, 696 (8th Cir. 2003) (upholding prohibition on Internet usage at home in part because "the defendant was not completely prohibited from using a computer" and "could possess a computer with the permission of the probation officer"); *United States* v. *Crandon*, 173 F.3d 122, 128 (3d Cir.) (upholding limit on Internet usage without probation officer's approval), cert. denied, 528 U.S. 855 (1999).

Indeed, other courts have also upheld similar restrictions as an appropriate balance between licit and illicit uses of the Internet. See, *e.g.*, *United States* v. *Zinn*, 321 F.3d 1084, 1092 (11th Cir.), cert. denied, 540 U.S. 839 (2003); *United States* v. *Walser*, 275 F.3d 981, 988 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002); cf. *United States* v. *Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding, in light of defendant's circumstances, a condition of supervised release prohibiting Internet access even though it "contains no proviso permitting [defendant] to use these resources with the approval of his probation office"), cert. denied, 535 U.S. 1002 (2002).

Second, the special condition here is also limited because it lasts for a period of three years—which is a shorter period than many of the restrictions that have been invalidated. See, *e.g.*, *United States* v. *Heckman*, No. 08-3844, 2010 WL 59185, at *3-*6 (3d Cir. Jan. 11, 2010) (invalidating lifetime limit on Internet usage); *United States* v. *Voelker*, 489 F.3d 139, 144 (3d Cir. 2007) (same); *United States* v. *Freeman*, 316 F.3d 386, 391-392 (3d Cir. 2003) (invalidating five-year limit on possessing any computer in defendant's home or using any on-line computer service); *United States* v. *Peterson*, 248 F.3d 79, 81, 83-84 (2d Cir. 2001) (invalidating five-year limit on Internet usage). Indeed, the Third Circuit has explained that one of "two key factors" it considers when evaluating the reasonableness of a special condition limiting Internet access is "the scope of the supervised release condition, including both its duration and its substantive breadth." *United States* v. *Miller*, No. 08-4278, 2010 WL 395917, at *13 (Feb. 5, 2010); see also *Crandon*, 173 F.3d at 128 (upholding three-year limit on Internet usage).

Moreover, petitioner has not identified any personal circumstances that might make a limitation on Internet usage unduly restrictive in his case, which also distinguishes it from some of the cases in which restrictions have been invalidated. See, *e.g.*, *United States* v. *Holm*, 326 F.3d 872, 878 (7th Cir.) (explaining that a special condition restricting Internet usage would jeopardize the defendant's rehabilitation because he had an "almost 30-year history of working in computerized telecommunications" and was "most likely to find gainful employment in the computer field"), cert. denied, 540 U.S. 894 (2003); *Peterson*, 248 F.3d at 83-84 (concluding that a special condition restricting computer and Internet use "constituted an occupational restriction" because the defendant had "consistently worked in computer-related jobs and * * * operated his own computer business").

Finally, even apart from being able to secure approval from his probation officer, petitioner may ask the district court to modify the special condition if there is any evidence of his rehabilitation or a material change in his circumstances. See 18 U.S.C. 3583(e)(2); see, *e.g.*, *United States* v. *Fields*, 324 F.3d 1025, 1027 (8th Cir. 2003) (upholding prohibition on Internet access; noting that defendant may "raise any concrete concerns [about access to educational or vocational training] with his probation officer and the district court if and when they arise").

b. Petitioner contends (Pet. 34-35) that further review is warranted in this case to resolve disagreement among the courts of appeals. The courts of appeals have expressed differing views, in light of the particular records before them, about when conditions of supervised release involving Internet access are reasonably necessary. See, *e.g.*, *United States* v. *Crume*, 422 F.3d 728,

733-734 (8th Cir. 2005) (vacating as overbroad an Internet-usage condition similar to petitioner's where defendant had a criminal history of committing sexual abuse against children and failing to register as a sex offender, but had not "used his computer for anything beyond simply possessing child pornography"); *United States* v. *Sofsky*, 287 F.3d 122, 126-127 (2d Cir. 2002) (vacating limitation similar to petitioner's where defendant had committed larceny and incest but not, for example, sexual assault against children); *Freeman*, 316 F.3d at 392 (vacating as overbroad an Internet-usage condition similar to petitioner's, albeit of longer duration, where defendant had been convicted of possessing child pornography and had admitted committing sexual abuse against children, but the record did not show that defendant had "used the [I]nternet to contact young children"); *Peterson*, 248 F.3d at 83-84 (vacating restriction on computer and Internet usage where defendant's prior incest conduct had no connection to computers and where the restriction would constitute "an occupational restriction"); see also *United States* v. *Silvious*, 512 F.3d 364, 371 (7th Cir. 2008) ("[A] total ban on the use of computers with access to the Internet is in most cases an overbroad condition of supervised release. We have not ruled out the possibility that such a condition might be justified in some cases, but nothing in the record suggests this is one of them.") (citations omitted); *United States* v. *Scott*, 316 F.3d 733, 736 (7th Cir. 2003) (stating as a general rule that conditions of supervised release "should be established by judges *ex ante*, not probation officers acting under broad delegations and subject to loose judicial review *ex post*").

Yet, as the foregoing discussion demonstrates, appellate decisions reviewing conditions of supervised release

are highly fact-dependent and address a wide array of unique circumstances—including each defendant's offense conduct, criminal history, and the details of individual conditions of supervised release. See pp. 15-17, *supra*; see also, *e.g.*, *Stults*, 575 F.3d at 856 ("Although it is a close call, we think that this case is more like *Ristine* [in which a limit on Internet usage was sustained] than *Crume* [in which one was invalidated] and hold that the special condition barring Internet access unless approved by the probation office is sufficiently tailored to the particular facts of this case."). Thus, notwithstanding alleged conflicts among the courts of appeals, this Court has repeatedly denied review of cases that sustained conditions of supervised release related to computers and the Internet. See, *e.g.*, *Bell* v. *United States*, 129 S. Ct. 2735 (2009) (No. 08-8179); *Rearden* v. *United States*, 543 U.S. 822 (2004) (No. 03-9465); *Knight* v. *United States*, 542 U.S. 939 (2004) (No. 03-9006); *Walser* v. *United States*, 535 U.S. 1069 (2002) (No. 01-9501); *Paul* v. *United States*, 535 U.S. 1002 (2002) (No. 01-8691); *Crandon* v. *United States*, 528 U.S. 855 (1999) (No. 98-9838).

This Court should likewise decline to undertake such a fact-intensive review here. Even when read as broadly as petitioner suggests, the opinion below, which did not specifically address the relevance of some of the particular considerations identified by other courts of appeals, would stand only for a very narrow proposition—namely, that conditioning a defendant's use of the Internet on prior probation officer approval is not an abuse of discretion when a defendant has previously been convicted of sexual crimes, including against a young child; has failed to register as a sex offender in violation of state law; and has recently violated his terms of supervised

release in order to arrive in circumstances where he might readily victimize another minor. That narrow legal principle does not warrant this Court's review.

This Court's practice of denying review in such cases is especially appropriate in light of the rapidly changing nature of the relevant technology. The availability of less-intrusive alternatives is an important consideration in evaluating the reasonable necessity of a condition of supervised release. See, *e.g.*, *Freeman*, 316 F.3d at 392 ("There is no need to cut off [defendant's] access to email or benign [I]nternet usage when a more focused restriction * * * can be enforced by unannounced inspections."); *Sofsky*, 287 F.3d at 127 (preferring "a more focused restriction"). Thus far, the case law in this area rests in part on judicial evaluations of whether more-narrowly-drawn restrictions on computer or Internet usage would allow probation officers to monitor defendants with roughly equivalent effectiveness. The best available answers to that question may well change or become more clear with time. For example, computer monitoring technologies may render relatively broad restrictions entirely superfluous. See, *e.g.*, *Holm*, 326 F.3d at 879 (invalidating a total ban on Internet usage, but noting that the district court "may wish to consider imposing a requirement that any computer [the defendant] is permitted to use must be" equipped with "filtering software," which "is becoming ever more effective"). Alternatively, software that conceals a computer user's activities may become available and prevent narrower restrictions from being reliably enforced. In a context where decisions about the reasonableness of a restriction on Internet usage are based on multiple, case-specific factors, that dynamic landscape would likely pre-

vent this Court from articulating a lasting, general rule to govern future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
RICHARD M. RE
Attorney

FEBRUARY 2010