No._____

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW RAY YBABEN,

*Petitioner*

v.

UNITED STATES OF AMERICA,

*Respondent*

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether 18 U.S.C. §2251 authorizes conviction upon proof that materials used to produce child pornography once crossed state lines at an unspecified prior occasion, when there is no evidence that the production or possession of child pornography itself caused such movement?

II. Whether courts of appeals enjoy the jurisdiction to hear appeals of conditions of supervised release that are contingent on the discretionary decision of a Probation Officer or other professional, or whether such appeals are "unripe"?

## PARTIES

Andrew Ray Ybaben is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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MISCELLANEOUS

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew Ray Ybaben respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Ybaben*, 809 Fed. Appx. 253 (5th Cir. June 15, 2020)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on December 20, 2020, which judgment is attached as an Appendix. [Appx. B].

## JURISDICTIONAL STATEMENT

The instant Petition is filed within 150 days of an opinion affirming the judgment, which was entered on June15, 2020. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

> The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 2251(a) of the United States Code provides:

> Sexual exploitation of children
>
> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

Section 3583(d) of Title 18 provides in relevant part:

The court may order, as a further condition of supervised release, to the extent that such condition—
(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)...

Section 3742 of Title 18 provides in pertinent part:

(a) Appeal by a defendant.– A defendant may file a notice of appeal in the district for review of an otherwise final sentence if the sentence –
(1) was imposed in violation of law....

28 U.S.C. §1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Article III, Section 2 of the U.S. Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

## STATEMENT

### A. Facts and Trial Proceedings

Petitioner was indicted on one count of producing child pornography using materials that had been mailed, shipped, transported in and affecting interstate and foreign commerce.He pleaded guilty, and admitted in a "factual resume" that he used a phone that had been manufactured outside the state of Texas to produce images of child pornography. The factual resume contained no admission that the phone had moved recently in interstate commerce, nor that its movement had any connection with the offense. Nor did it admit that the images had themselves moved in interstate commerce. The district court accepted the plea and imposed a sentence of 300 months imprisonment and 30 years of supervised release. Over defense objection, the conditions of release included a requirement that the defendant undergo sex offender treatment which "may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen)."

### B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit an offense. Specifically, he argued that 18 U.S.C. §2251(a) should therefore not be construed to reach every production of child pornography involving an object that moved in interstate commerce, nor every possession of an illegal image that was produced with such an object. Rather, he contended that the more sensible construction, and the construction more faithful to our federal system of government, is that it should reach only that activity that causes an object to move in interstate commerce. Alternatively, he contended that it should at least require that the relevant object have moved recently in interstate commerce. Petitioner conceded that this claim could not succeed absent an intervening change in the law, but sought to preserve for review by this Court.

Petitioner also contended that the 'psycho-physiological testing" requirement in Petitioner's supervised release is grossly intrusive, that it implicates multiple constitutional protections, and that it should therefore be reversed as excessive under 18 U.S.C. §3583(d). The Fifth Circuit had held that a defendant may not challenge on direct appeal supervised release requirements that might not

be imposed. *See United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013). So he conceded that his challenge was foreclosed, but submitted to preserve review, that this view of ripeness is flatly contrary to *United States v. Jose*, 519 U.S. 54, 57 (1996).

The court below found both claims to be foreclosed and summarily affirmed. *See* [Appx. A].

## REASONS FOR GRANTING THE WRIT

### I. This Court should hold the instant Petition pending *California v. Texas*.

Federal Rule of Criminal Procedure 11 requires that the admissions made by the defendant in connection with a plea establish a prosecutable offense. *See* Fed. R. Crim. P. 11(b)(3). In Petitioner's district, these admissions are called the "factual resume."

Petitioner's factual resume admitted that the phones used to producean illegal image had been transported from one state or country to the State of Texas. It did not admit that the offense itself caused the movement of the phone, nor that the movement of the phone was recent. Nor did it admit any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §2251.

Section 2251 of Title 18 authorizes conviction when the defendant produces a sexually explicit visual depiction of a minor, "if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer...." 18 U.S.C. §2251(a).[1] To be sure, the statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the production of child pornography with a telephone that crossed state lines years ago for entirely innocent purposes. So too may 18 U.S.C. §2252A(5)(B) be construed to reach the possession of images that were created with such a phone. Under this view of the statutes, Petitioner's conduct represented a federal offense.

But *California v. Texas*, 19-840 and 19-1019, 140 S.Ct. 1262 (March 2, 2020), may provide good reason to eschew such an interpretation. In that case, the Court will hear, *inter alia*, a constitutional challenge to 26 U.S.C. §5000A(a) under the Commerce Clause of Section I, Article

[1]Other portions of the same statutory Subsection authorize conviction only when the defendant's offense conduct is more closely related to interstate commerce, as when the depiction itself travels in interstate commerce, or in the channels of such commerce. Those parts of the statute are not at issue here.

8 of the Constitution. This statute mandates the private acquisition of health insurance. In *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)("*NFIB*"), five Justices agreed that this provision fell outside of Congress's power to regulate interstate commerce. *See NFIB*, 567 U.S. at 561 (Roberts, C.J.), 648 (Scalia, J., dissenting). Specifically, these five Justices agreed that the power to regulate commerce presumed a pre-existing instance of commerce to regulate, and did not encompass a power to compel commercial acts that would not otherwise occur. *See id.* at 550 (Roberts, C.J.), 649 (Scalia, J., dissenting). That distinction, these Justices agreed, helped to cabin federal power and avoid the creation of a general federal police power. *See id.* at 552 (Roberts, C.J.), 652-653 (Scalia, J., dissenting). Significantly, the Chief Justice thought it particularly troubling to the constitution's vision of limited government that the individual mandate acted even in the absence of any *recent* commercial activity by the regulated party. *See id.*, at 556 (Roberts, C.J.)("An individual who bought a car two years ago and may buy another in the future is not 'active in the car market' in any pertinent sense.").

The literal interpretation of the commerce clause embraced by five Justices in *NFIB* creates serious constitutional problems for 18 U.S.C. §2251(a), at least when the statute is interpreted to forbid the criminal use of materials that moved in interstate commerce, without regard to whether the offense caused such movement, nor when it occurred. Under the view of five Justices in *NFIB*, it is difficult to see how Congressional enactments grounded in the commerce clause unless they actually, themselves, regulate commerce. *See id.* at 550 (Roberts, C.J.), 649 (Scalia, J., dissenting). It is not sufficient that they have sufficient connection to commercial acts – they must *be* commercial regulations.

But under the view of §2551(a) underlying the instant conviction, Congress has prohibited the non-commercial act of taking photographs for personal consumption. The tenuous connection required to interstate commerce – that some person moved a phone or a part of a phone across state lines in the indefinite past – does not mean that Congress is "regulating commerce" by prohibiting the taking of pictures. The statute should thus be construed to require either that the defendant's

conduct caused the movement of some object to move across state lines, or at least that it moved in the recent past. Federal courts should not construe federal criminal statutes in ways that appear to create a federal police power, nor to exceed the enumerated powers of Congress. *See Bond v. United States*, 5672 U.S. 844, 858-859 (2014). They should instead be construed to fall clearly within the limits of Congressional power. *See Bond*, 572 U.S. at 858-859.

Nonetheless, several aspects of *NFIB* complicated the case of criminal defendants that it should affect the scope of 18 U.S.C. §2251 and similar statutes. Although five Justices in *NFIB* rejected an unlimited view of the Commerce Power, as discussed above, they did not join a common opinion. Further, all parts of the opinions discussing the reach of the Commerce Power was arguably *dicta*, because the Court ultimately sustained the mandate on the grounds that fell within Congressional taxing power. *See NFIB*, 567 U.S. at 588. And finally, at least one opinion suggested that the Commerce Power may encompass acts that are not themselves the regulation of commercial activity. *See id*. at 549 (Roberts, C.J.)("We have recognized, for example, that '[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states,'" but extends to activities that 'have a substantial effect on interstate commerce.'")(quoting *United States v. Darby*, 312 U.S. 100, 118–119 (1941)).

This reliance on *Darby* is difficult to square with any textual analysis that excludes the individual mandate from the Commerce Clause for want of a commercial activity to regulate. The Chief Justice explained, "[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated." *Id*. at 550 (Roberts, C.J.). As this passage makes clear, it is not sufficient that Congress act to regulate *something* – the Commerce Power by its terms gives it the right to regulate a (pre-existing) "commercial activity." And taking pictures for personal use no more represents a "commercial activity" than the failure to buy health insurance. Nonetheless, *NFIB* does provide some basis to sustain enactments like §2251(a) insofar as it permits Congress to regulate matters that "affect commerce." See *United States v. Romero*, 2015 WL 13694648, at *6 (W.D. Tex. July 2, 2015), *aff'd*, 705 Fed. App'x 319 (5th Cir. 2017)(sustaining §2251(a) and distinguishing *NFIB*

because "there is no doubt that child pornography is an 'activity,'" and "the question is simply whether it is a purely intrastate activity or one sufficiently affecting interstate commerce.")

The same individual mandate is before the Court in *California v. Texas*, 19-840 and 19-1019, 140 S.Ct. 1262 (March 2, 2020), again challenged as an overreach of the Commerce Power, but without its chief defense under the taxation power. Accordingly, there is a very good probability that forthcoming precedent will address – perhaps in a majority holding – the propriety of Congressional enactments under the Commerce Clause that do not actually regulate commercial activity. The validity of Petitioner's conviction depends on the answer to this question.

This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting).) It should do so here. Although the statutory challenge was not raised in district court, and must accordingly submit to plain error review, an error may become plain at any time during the pendency of direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013).

In any case, it is clear that the mechanism of granting certiorari, vacating judgment, and remanding a case for reconsideration in light of intervening authority (GVR) does not require this Court to find that Petitioner would ultimately prevail on the merits of his claim, only that a substantial question has been raised as to the validity of the prior result in light of an intervening development. *See Tyler v. Cain*, 533 U.S. 656, 665, n.6 (2001) (stressing that GVR is not a decision on the merits); *accord. State Tax Commission v. Van Cott*, 306 U.S. 511, 515–516 (1939). Thus, a case need not be free from all obstacles to reversal to merit GVR. *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964). The fact that preservation issues may stand in the way of relief should not preclude a remand; the Court of Appeals should be permitted to consider these procedural obstacles in the first instance. *Cf. Torres-Valencia v. United States*, 464 U.S. 44 (1983)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the Court of Appeals in the first instance).

Indeed, the inability of a lower court to consider, or of a party to raise, an intervening change in the law is perhaps the archetypical use of GVR. *See Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893 (1997)(GVR in spite of the fact that the Petitioner raised intervening authority in Petition for Panel Rehearing); *Blackburn v. Alabama*, 354 U.S. 393 (1957)(utilizing GVR where it was unclear whether court of appeals dealt with one of Petitioner's claims). It should come as no surprise, then, that this Court has utilized the GVR mechanism to see that claims for relief based on an arguably controlling precedent are heard by the Court of Appeals, even where the claims were not raised below in any forum. *See Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting) (speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the Court of Appeals).

## II. The courts of appeals are divided on a basic jurisdictional question governing the appeals of supervised release conditions. Moreover, the position of the court below and two of its sister circuits is plainly contrary to this Court's opinion in *United States v. Jose*, 519 U.S. 54 (1996).

District courts may impose only those conditions of supervised release that "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)C), and (a)(2)(D)" of Title 18. 18 U.S.C. §3583(d)(2). Section 3742(a) permits appeals of sentences imposed in violation of law. 18 U.S.C. §3742(a)(1). Section 1291 endows the courts of appeals with jurisdiction to hear appeals "from all final decisions of the district courts of the United States . . . ." 28 U.S.C. §1291. Petitioner appealed from his sentence, challenging a special condition of supervised release that authorized use of plethysmograph testing. The court of appeals ruled that it lacked subject matter jurisdiction (because the issue is not ripe for review) and dismissed the appeal. *See* [Appx. A]. Because there is a circuit split on the ripeness question, this Court should grant a writ of certiorari to review the decision of the Fifth Circuit.

The courts that have considered the ripeness of challenges to "penile plethysmograph" testing as a condition of supervised release have reached different conclusions about their jurisdiction to hear such appeals.[2] The Fifth, Sixth, Seventh, and Tenth Circuits have each held that challenges to this condition are barred at the time of the defendant's initial sentencing under the ripeness doctrine. *See United States v. Ellis*, 720 F.3d 220, 227 (5th Cir. 2013); *United States v. Lee*, 502 F.3d 447, 450-51 (6th Cir. 2007); *United States v. Rhodes*, 552 F.3d 624, 628-29 (7th Cir. 2009); *United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016). They reason that the defendant suffers no concrete injury until a Probation Officer actually compels him to undergo the technique, and that he should instead wait until this time to petition the district court for relief. *See Ellis*, 720 F.3d at 227; *Lee*, 502 F.3d at 450-51; *Rhodes*, 552 F.3d at 628-29; *Bennett*, 823 F.3d at 1318. The Ninth Circuit, by contrast, has repeatedly rejected the notion that appeals of final judgments can be treated as unripe, including a case involving the plethysmograph. *See United States v. Weber*, 451 F.3d 552, 556-557 (9th Cir. 2006); *United States v. Rodriguez-Rodriguez*, 441 F.3d 767, 771-72 (9th Cir. 2006); *United States v. Williams*, 356 F.3d 1045, 1049-51 (9th Cir. 2004). It reasons that "[a] term of supervised release, even if contingent, is part and parcel of the defendant's sentence and can be challenged on direct appeal." *Weber*, 451 F.3d at 556. The First Circuit considered the issue, and also held that the challenge is ripe where "the judgment imposing the sentence . . . expressly spells out the condition that the defendant challenges." *United States v. Medina*, 779 F.3d 55, 66-67 (1st Cir. 2015). The D.C. Circuit has also entertained a challenge to the plethysmograph, vacating the condition in spite of the government's ripeness argument. *See United States v. Rock*, 863 F.3d 827, 833, &n.1 (D.C. Cir. 2017).

The circuit split was acknowledged by the Fifth Circuit in *United States v. Christian*, 344 F.

[2] Another court–the United States Court of Appeals for the Second Circuit–also has considered a challenge to penile plethysmograph testing and held that it did not comport with due process, *see United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013), but ripeness was not an issue in the case before the Second Circuit because the defendant had completed his short imprisonment term and was on supervised release at the time the appeal was decided. Brief for the United States at 19 n.7, *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013) (No. 12-3514-CR) (available at 2013 WL 1549477).

App'x 53, 56-57 (5th Cir. 2009)(unpublished). The Fifth Circuit explicitly joined the Sixth and Seventh Circuits in holding that challenges to psycho-physiological testing requirements are "unripe" on direct appeal due to the lack of any "certainty whatsoever the [plethysmograph] procedure will be ordered." *Id.* The court stated that the defendant's challenge should be raised via a different avenue: "Christian can petition the district court to modify this condition if he is ordered to submit to the procedure." *Id.* at 57. The Fifth Circuit reaffirmed that conclusion in its published decision in *Ellis*. *Ellis*, 720 F.3d at 227 (holding the defendant's challenge to the plethysmograph condition was "not ripe for review because Ellis may never be subjected to such . . . testing," and that Ellis "may petition the district court for a modification of his conditions" if he were later required to submit to the testing).

The Sixth Circuit reached the same conclusion. In *United States v. Lee*, the district court had imposed conditions of supervised release requiring the defendant to participate in a sex offender treatment program that may include the use of a plethysmograph. *See Lee*, 502 F.3d at 447. The Sixth Circuit found the condition not "ripe for appellate review" for two reasons. *See id.* at 449-50. First, it noted the possibility that the Probation department would not ultimately compel him to submit to the device at the end of his sentence. *See id.* at 450. Second, and perhaps ironically, the court noted that the device's dubious scientific pedigree, together with its exposure to due process challenges, might render it obsolete by the time his term of supervised release began. *See id.* at 450. It thus found that any challenge to the plethysmograph condition represented a "contingent future event[] that may not occur as anticipated, or indeed may not occur at all." *Id*. at 451 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)(further citations omitted)). This year, the Sixth Circuit cited *Lee* as it declined to review the defendant's challenge to a polygraph requirement. *See United States v. Nichols*, 802 Fed.Appx. 172, 183-184 (6th Cir. 2020)(unpublished).

The Seventh Circuit addressed this issue in *United States v. Rhodes*, in which the defendant was subjected to a similar condition of supervision, to follow a lengthy term of imprisonment. *See Rhodes*, 552 F.3d at 628. He challenged the term requiring him to submit to the plethysmograph, but

the Seventh Circuit agreed with the Sixth and found the challenge unripe. *See id.* at 628-29. The Seventh Circuit found it significant that the defendant's sex offender treatment program could not possibly commence for several years, when the defendant was released from prison. *See id.* The court also stressed the degree of discretion available to treatment professionals, and accordingly found the appellate issue "full of contingency and abstraction founded in an evolving scientific field." *Id*. at 628. Thus, it expressly declined to join the Ninth Circuit's opinion in *Weber*. *See id.* Just this year, the Seventh Circuit has cited *Rhodes* as it refused to consider the defendant's challenge to a condition that restricted his rights to contact his children. *See United States v. Lee*, 950 F.3d 439, 450 (7th Cir. 2020).

The Tenth Circuit has likewise refused to render decision as to the lawfulness of subjecting the defendant to a penile plethysmograph, citing ripeness concerns. *See United States v. Bennett*, 823 F.3d 1316 (10th Cir. 2016). It explained that "we are faced with too many speculative factors, too far in the future, to make a decision sounding in constitutional principles." *Bennett*, 823 F.3d at 1318. Yet unlike the court below, it dismissed the appeal only without prejudice, so the defendant might presumably obtain the right to direct review of his term of supervision in the event that it is enforced. *See id.* at 1327. *Bennett* acknowledged the division of authority in this area, *see id.* at 1325, and the Tenth Circuit has again recognized an *active* circuit split regarding the ripeness of challenges to supervised release as recently as last year, *see United States v. Cabral*, 926 F.3d 687, 695, n.5 (10th Cir. 2019).

In *United States v. Weber*, the Ninth Circuit considered the ripeness question *sua sponte* and held that there was "no jurisdictional barrier to our consideration of the merits." *Weber*, 451 F.3d at 556-57. The district court had imposed a condition that "require[d] Weber to participate in a sexual offender treatment program and submit to various tests, including plethysmograph testing, as a part of that program." *Id.* at 556. Weber had completed his imprisonment term and was serving his term of supervised release, but there was nothing in the record indicating that Weber "[had] yet been ordered to undergo plethysmograph testing and it [was] not certain that he [would] ever be ordered to do so." *Id.* The Ninth Circuit found no ripeness bar to the appeal, however, because "[a] defendant

need not refuse to abide by a condition of supervised release to challenge its legality on direct appeal from the imposition of sentence." *Id.* "A term of supervised release, even if contingent, is part and parcel of the defendant's sentence and can be challenged on direct appeal." *Id.* at 557.

This position is settled law in the Ninth Circuit; the *Weber* court grounded its decision in two of its own binding precedents: *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004), and *United States v. Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006). *See Weber*, 451 F.3d at 556. *Williams* involved the appeal of a condition requiring the defendant to take psychotropic medication. *See Williams*, 356 F.3d at 1050. The court found the condition appropriate for appellate review even though the defendant could produce no evidence that he had refused medication. *See id.* Similarly, in *Rodriguez-Rodriguez*, the defendant challenged a condition of supervised release requiring the defendant to report to a Probation Officer after any subsequent return to the United States. *See Rodriguez-Rodriguez*, 441 F.3d at 769. The court entertained this challenge even though the condition was contingent upon the defendant's illegal return to the United States. *See id.* at 771-72. The *Weber* court was thus articulating the considered position of multiple panels when it reasoned that even a contingent condition of supervised release "is part and parcel of the defendant's sentence and can be challenged on direct appeal." *Weber*, 451 F.3d at 557. Notably, the Ninth Circuit continues to review the legality of supervised release conditions that may not be enforced, as evidenced by its recent decision to vacate a condition compelling a defendant to take medication if prescribed. *See United States v. Tenorio*, 761 Fed. Appx. 772, 773 (9th Cir. 2019)(unpublished).

The First Circuit similarly reasoned that the finality of the judgment controlled the inquiry. In *Medina*, the First Circuit recounted its earlier decision in *United States v. Davis*, 242 F.3d 49, 51 (1st Cir. 2001), in which it held that "a challenge to even a contingent supervised release condition was ripe, and 'not hypothetical,' where the judgment explicitly spelled out the condition and the defendant challenged 'the special condition itself, not its application or enforcement.'" *Medina*, 779 F.3d at 66-67 (quoting *Davis*, 242 F.3d at 51). Because "[t]he judgment imposing sentence, of which the challenged special condition is a part, is a final judgment," the challenge could proceed. *Id.* at 67 (quoting *Davis*, 242 F.3d at 51). Endorsing its reasoning in *Davis*, the First Circuit held that the

defendant's challenge to a special condition of supervised release compelling submission to plethysmograph testing upon demand was ripe for review on direct appeal from the judgment imposing the condition. *Id.* The First Circuit continues to cite *Medina* as good law. *See United States v. Hood*, 920 F.3d 87, 94 (1st Cir. 2019). Just last year the First Circuit entertained a facial challenge to a polygraph requirement, though it found insufficient factual development to adjudicate an as-applied Fifth Amendment challenge. *See Hood*, 920 F.3d at 94.

In *United States v. Rock*, the D.C. Circuit also rejected the government's ripeness argument, in which it contended "it is not clear that Rock will ever be subject to penile plethysmograph testing in 2026 or thereafter..." *Rock*, 863 F.3d at 833, n.1. The court held that "supervisory conditions are ordinarily ripe for challenge upon imposition, especially when as here the argument presents a purely legal issue requiring no further factual development..." *Id*. It thus agreed with then Judge Kavanaugh that the plethysmograph represented a sufficient intrusion on the defendant's liberty interests as to merit a heightened explanation. *See id*. at 263 (citing *United States v. Malenya*, 736 F.3d 554 (D.C. Cir. 2013)(Kavanaugh, J., dissenting). Finding the requirement unmet, it vacated. *See id.*

The view of the First, Ninth, and D.C. Circuits appropriately recognizes that "[f]inality, not ripeness, is the doctrine governing appeals from district court to court of appeals," *United States v. Jose*, 519 U.S. 54, 57 (1996), and thus it is the only position faithful to this Court's instruction in *United States v. Jose*. In short, *Jose* instructs federal courts that the ripeness of an issue is determined at the time of its appearance in the trial court; there is no separate ripeness inquiry for a case's appellate phase. The term of any judgment finally adjudicating the rights of the parties is immediately ripe for appellate review, irrespective of when it may affect the parties.

In *Jose*, the IRS sought to enforce two summonses for use in a civil proceeding. *See Jose*, 519 U.S. at 54-55. The district court granted its petition but required the IRS to give five days' notice before transmitting any of the documents produced to its criminal division. *See id.* at 55. The IRS appealed the notice requirement but the Ninth Circuit dismissed the appeal "as not ripe." *Id.* The Ninth Circuit saw no evidence that the IRS yet intended to circulate the summoned documents to its criminal division, and accordingly found that "any detrimental impact the district court's order may

have on the IRS's investigation is, at this time, purely speculative." *Id.* at 56. This Court reversed in a brief *per curiam* opinion, holding that either party could appeal the terms of a final judgment under 28 U.S.C. §1291, even if neither was likely to suffer immediate injury therefrom. *See id.* at 57. This view of appellate jurisdiction flows from the principle "that appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court." *Id.* Under *Jose*, an appeal is as ripe as the district court case from which it grows.

Other considerations also support a conclusion that these challenges are ripe for review on direct appeal from the judgments imposing the conditions. Although the Fifth, Sixth, and Seventh Circuits each point to the possibility of a later petition for relief to the district court, it is not clear that the defendant would be entitled to challenge the lawfulness of his conditions of supervision at that later time. Section 3583(e) of Title 18 gives a court authority to modify supervised release conditions only after considering a set of enumerated factors. 18 U.S.C. § 3583(e); *United States v. Lussier*, 104 F.3d 32, 35 (2d Cir. 1997). A motion for modification will only succeed if it is supported by a factor referenced in 18 U.S.C. §3583(e)(2) and specified in section 3553(a). *Lussier*, 104 F.3d at 35; *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002). "Illegality" is not included in these enumerated factors. *Lussier*, 104 F.3d at 35; *Gross*, 307 F.3d at 1044. Thus, the illegality of a condition of supervised release is not a proper ground for modification. *See* 18 U.S.C. § 3583(e); *Lussier*, 104 F.3d at 35.

Further, Petitioner could be barred from challenging the legality of the penile plethysmograph in a motion to modify because it would "not involve changed circumstances . . . ." *Lussier*, 104 F.3d at 32, 36. Although section 3583(e) allows the district court to revoke, discharge or modify any terms or conditions of a defendant's supervised relief in order to account for new or unforseen circumstances (*id.*; *United States v. Roberts*, 229 Fed. Appx. 172, 177 (3d Cir. 2007)(unpublished)), the use of the plethysmograph against Petitioner will not be new or unforseen as the district court's judgment specifically authorizes use of the device in Petitioner's mandatory treatment program.

Additionally, it is not clear that the defendant would be entitled to the assistance of counsel to produce such a petition. The Criminal Justice Act requires the appointment of counsel when a

defendant "faces modification . . . of a condition . . . of a term of supervised release." 18 U.S.C. §3006A(E). It is unclear whether the defendant who *seeks* a modification of his supervised release conditions would be considered one who *faces* a modification under the terms of the Act. The position of the Fifth, Sixth, and Seventh Circuits may very well deprive the defendant of the only opportunity he will ever have to challenge a stunningly intrusive condition of supervised release while assisted by a lawyer.

Finally, this Court should not underestimate the psychological impact of languishing under an intrusive condition of supervised release, or from the knowledge that one may have to defy it in order to secure relief. In practice, the plethysmograph works as follows:

> Prior to beginning the test, the subject is typically given instructions about what the procedure entails. He is then asked to place the device on his penis and is instructed to become fully aroused, either via self-stimulation or by the presentation of so-called "warm-up stimuli," in order to derive a baseline against which to compare later erectile measurements. After the individual returns to a state of detumescence, he is presented with various erotic and non-erotic stimuli. He is instructed to let himself become aroused in response to any of the materials that he finds sexually exciting. These stimuli come in one of three modalities -- slides, film/videoclips, and auditory vignettes -- though in some cases different types of stimuli are presented simultaneously. The materials depict individuals of different ages and genders -- in some cases even possessing different anatomical features -- and portray sexual scenarios involving varying degrees of coercion. The stimuli may be presented for periods of varying length -- from mere seconds to four minutes or longer.
>
> Changes in penile dimension are recorded after the presentation of each stimulus . . . .

*Weber*, 451 F.3d at 562 (quoting Jason Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 8-9 (Fall. 2004)). As the Ninth Circuit noted in *Weber*, "plethysmography testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure." *Weber*, 451 F.3d at 562. Indeed, petitioner's conditions of supervised release explicitly include the "plethysmograph" as part of the "psycho-physiological testing" to which the probation officer may direct him to submit. To say that a judgment compelling submission to this highly invasive procedure raises constitutional concerns is a gross understatement, as Judge Noonan argued in *Weber*:

> I would . . . hold the Orwellian procedure at issue to be always a violation of the

> personal dignity of which prisoners are not deprived. The procedure violates a prisoner's bodily integrity by affecting his genitals. The procedure violates a prisoner's mental integrity by intruding images into his brain. The procedure violates a prisoner's moral integrity by requiring him to masturbate.
>
> By committing a crime and being convicted of it, a person does not cease to be a person. A prisoner is not a mere tool of the state to be manipulated by it to achieve the purposes the law has determined appropriate in punishment. The prisoner retains his humanity and therefore has purposes transcending those of the state. A prisoner, for example, cannot be forced into prostitution to aid the state in securing evidence. A prisoner, for example, cannot be made to perjure himself in order to assist a prosecution. Similarly, a prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities. There is a line at which the government must stop. Penile plethysmography testing crosses it.

*Weber*, 451 F.3d at 570-71 (Noonan, J., concurring). The existence of a judgment compelling submission to this kind of testing by itself communicates to the defendant that his humanity and dignity are of no consequence to the government. These conditions cause emotional distress to those who must live subject to them for extended periods of time, awaiting an opportunity to have their challenge heard in court. Conversely, a defendant given the chance to challenge the condition receives "'an immediate, concrete, and valuable benefit: certainty' regarding whether he will have to face such testing." *Rock*, 863 F.3d at 833, n.1 (quoting *VanderKam v. VanderKam*, 776 F.3d 883, 889 (D.C. Cir. 2015)).

## CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court issue an order granting the writ of *certiorari* to review the decision below, or alternatively, that it grant certiorari, vacate the judgment below, and remand for reconsideration in light of *California v. Texas* or other relevant forthcoming authority.

Respectfully submitted this 12th day of November, 2020.

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