No. 20-6359

IN THE

Supreme Court of the United States

ANDREW REY YBABEN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

I. The Court should resolve the undisputed split on whether appeals from final judgments can be "unripe."

The government admits the circuits have split on whether an appeal from a final judgment is ripe if it challenges a supervised-release condition that may be enforced in future. But it says this conflict lacks "practical significance" because a defendant can eventually seek to modify the release condition and then appeal, so the split goes not to "*whether* review is available . . . but instead *when* it is available." See Opp. 5, 17–18, 21. That is wrong. In all circuits but one, illegality is not a ground to modify release conditions. So courts denying direct review, like the Fifth Circuit, foreclose *any* review for illegality. The split thus has immense practical significance, because the rule applied below allows illegal supervised-release conditions to evade appellate review. And the decision below conflicts directly with this Court's holding that "[f]inality, not ripeness," dictates when a losing party can appeal. *United States* v. *Jose*, 519 U.S. 54, 57 (1996) (per curiam). Review is warranted to resolve these conflicts.

A. The split goes to whether—not just when—illegal supervised-release conditions are reviewable.

18 U.S.C. § 3583(e)(2) does not allow review for illegality. *Contra* Opp. 18–19. That provision lets a court modify supervised-release conditions based on certain listed factors. "Not included: illegality of the condition." *United States* v. *Faber*, 950 F.3d 356, 358 (6th Cir. 2020). Thus, "[t]he plain language of subsection 3583(e)(2) indicates that the illegality of a

condition of supervised release is not a proper ground for modification." *United States* v. *Lussier*, 104 F.3d. 32, 34 (2d Cir. 1997). A release condition's legality is thus reviewable on direct appeal—or not at all.

The government responds that *Lussier* merely "concluded that a defendant could not move under Section 3583(e)(2) to challenge an order . . . that immediately went into effect when the court issued his sentence and that could have been challenged at that time." Opp. 19. But the court's holding was clear: § 3583(e)(2) "does not authorize the court to assess the lawfulness of a condition of release." 104 F.3d at 35. Only "a direct appeal" allows such review. *Id.*; see also *United States* v. *Myers*, 426 F.3d 117, 123 (2d Cir. 2005) (reaffirming this holding).

Indeed, the other circuits to address the issue "virtually all agree" that § 3583(e)(2) does not allow review for illegality. *Faber*, 950 F.3d at 359 (collecting cases); see *United States* v. *McLeod*, 972 F.3d 637, 642 (4th Cir. 2020); *United States* v. *Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002); *United States* v. *Jackson*, 691 F. App'x 595, 597 (11th Cir. 2017). That includes the Fifth Circuit, which agrees that § 3583(e)(2) does "not provide a jurisdictional basis" "to modify the conditions of supervised release on the grounds of illegality." *United States* v. *Hatten*, 167 F.3d 884, 886 (5th Cir. 1999).

"The Seventh Circuit alone takes a different view," *Faber*, 950 F.3d at 359, holding that a defendant in petitioner's position "can later petition the district court to modify the condition," *United States* v. *Rhodes*, 552 F.3d 624, 629 (7th Cir. 2009); see *United States* v. *Neal*, 810 F.3d 512, 517 (7th Cir. 2016) (noting that other circuits' "precedential opinions" are "not consistent with our approach"). This is presum-

ably why the government cites *Rhodes*, Opp. 17, 21, and not the many contrary decisions just noted.

The government also points to Fifth Circuit dicta suggesting that a defendant "may petition the district court for a modification of his conditions." *United States* v. *Ellis*, 720 F.3d 220, 227 (5th Cir. 2013) (per curiam); Opp. 18. But *Ellis* does not say a modification petition can raise an illegality claim, does not mention the statutory text omitting that factor, and does not address the circuit's binding decision in *Hatten* foreclosing such claims, see 167 F.3d at 886. And the unpublished decision in *United States* v. *Insaulgarat* (Opp. 18) merely vacated a denial of modification because the district court "denied the motion without reasons"; it said nothing about the issues presented here. 280 F. App'x 367, 368 (5th Cir. 2008) (per curiam).

In short, if petitioner tried to follow the government's proposed course, *Hatten* would doom his effort. In the Fifth Circuit—as in all circuits except the Seventh—"a district court does not have the authority under 18 U.S.C. § 3583(e)(2) to modify a [release condition] on the ground of illegality," *Hatten*, 167 F.3d at 886, so the court of appeals cannot review the condition that way. Nor would the Fifth Circuit allow a "subsequent appeal from [an] order revoking probation" for failure to comply with the testing condition. *United States*. v. *Irvin*, 820 F.2d 110, 111 (5th Cir. 1987). Petitioner can thus challenge the condition's legality only by "direct appeal." *Lussier*, 104 F.3d. at 35. In other words, "*whether* review is available" and "*when* it is available," Opp. 21, are the same question.

B. The government fails to minimize the undisputed split.

The circuits are openly divided on when—and thus whether—an appeal of arguably uncertain supervised-release conditions is proper, with at least three courts on each side of the split. See Pet. 10–14. The government responds that this "tension" is "overstate[d]" because the cases allowing direct appeals involved release conditions more certain or imminent than petitioner's. See Opp. 19–20. Not so. Each case allowed review even though the condition at issue may not have been enforced or was years in the future.

The government says the condition in *United States* v. *Weber* was "far less speculative" than here. Opp. 19. But "nothing in the record indicat[ed] that Weber ha[d] yet been ordered to undergo plethysmograph testing," and it was "not certain that he [would] ever be ordered to do so." 451 F.3d 552, 556 (9th Cir. 2006). Still, this did "not make th[e] case unripe": "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 556–57.

The government also misreads *United States* v. *Rodriguez-Rodriguez*, 441 F.3d 767 (9th Cir. 2006), and *United States* v. *Williams*, 356 F.3d 1045 (9th Cir. 2004). Though the government now says the condition in *Rodriguez-Rodriguez* was "determinate, rather than contingent," Opp. 20, it argued the exact opposite there: The condition was "hypothetical," depending "on several contingencies that have yet to occur." 441 F.3d at 771. But that did not mean the appeal was premature; a supervised release "condition is . . . a final judgement subject to immediate appeal." *Id.* at 771–72. And *Williams* reiterated that "a defendant may challenge the legality of a supervised release

condition by direct appeal." 356 F.3d at 1051 (cleaned up).

The government similarly tries to distinguish *United States* v. *Rock*, arguing that the defendant there faced a direct order to undergo plethysmograph testing. Opp. 20–21. But the D.C. Circuit did not see it that way, allowing a direct appeal even though it was "not clear that [defendant] will ever be subject to" testing. 863 F.3d 827, 833 n.1 (D.C. Cir. 2017). Indeed, the language at issue there—defendant "*shall* submit to penile plethysmograph testing *as directed by*" the probation office—is not meaningfully different from the language here: Petitioner "*shall* participate in sex offender treatment services *as directed by* the probation officer," which "may include" the testing. See Opp. 21 (emphasis added). In both cases, testing depends on the intervening contingency of the probation office's direction—but the D.C. Circuit allowed an appeal, and the Fifth Circuit did not. *Rock* also involved a long prison sentence, 863 F.3d at 833, a factor the government says makes a condition "entirely speculative," Opp. 17.

Finally, the government observes that the First Circuit, in allowing direct appeals of release conditions, has noted that the defendant "could be subject to the condition he challenges in the near term." Opp. 20 (quoting *United States* v. *Medina*, 779 F.3d 55, 67 (1st Cir. 2015)); see also *United States* v. *Davis*, 242 F.3d 49, 50–51 (1st Cir. 2001) (per curiam). That does not avoid the conflict. The First Circuit holds that "a challenge to even a contingent supervised release condition [is] ripe, and not hypothetical, where the judgment explicitly spelled out the condition and the defendant challenge[s] the special condition itself, not its application or enforcement." *Medina*, 779 F.3d at 66–67 (cleaned up). That rule clashes

with the Fifth Circuit's rule, applied below, that a defendant's challenge is ripe only "[i]f he is required to submit" to the condition. *Ellis*, 720 F.3d at 227. And the First Circuit explicitly rejected the Sixth and Seventh Circuits' ripeness analysis—including *Rhodes*, which the Fifth Circuit followed. See *Medina*, 779 F.3d at 66; *Ellis*, 720 F.3d at 227 (citing *Rhodes*); *United States* v. *Christian*, 344 F. App'x 53, 56 (5th Cir. 2009) (following *Rhodes* and rejecting *Weber*). In the First Circuit, the government could not evade petitioner's direct appeal. In the Fifth, it can.

This split is thus open and entrenched. The First, Ninth, and D.C. Circuits disagree with the Fifth, Sixth, and Seventh Circuits. And as explained above, this split dictates whether a supervised-release condition's legality is reviewable at all. The split thus has "strong practical significance." *Contra* Opp. 5.

C. The decision below is wrong.

The decision below conflicts directly with this Court's holding that "[f]inality, not ripeness, is the doctrine governing appeals from district court to court of appeals." *Jose*, 519 U.S. at 57. Because a "term of supervised release, even if contingent, is part and parcel of the defendant's sentence," it "can be challenged on direct appeal" from the final judgment. *Weber*, 451 F.3d at 556–57; *Medina*, 779 F.3d at 66–67; *Rock*, 863 F.3d at 833 n.1.

The government cannot distinguish *Jose*. It says the prospect "that petitioner will ever be required to undergo plethysmograph testing" is "entirely speculative." Opp. 17. This differs from *Jose*, the government claims, because the order challenged there "had an immediate adverse effect—the IRS was prohibited from taking a certain step without complying with a

certain procedural requirement." *Id.* But as the lower court in *Jose* explained, there was no sign that the IRS actually intended to take that step, so "any detrimental impact" was "purely speculative." 519 U.S. at 56. This Court did not question that conclusion—but it did not matter. What mattered was that "the District Court completed its adjudication"; the decision was thus final and appealable. *Id.* at 57. Indeed, this Court found "no authority" for the notion that a "conditional" order is "not ripe for appeal." *Id.*

That holding should control here. After all, "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal." *Hall* v. *Hall*, 138 S. Ct. 1118, 1124 (2018). And a judgment in a criminal case is "final" even though the sentence "can subsequently be . . . modified." 18 U.S.C. § 3582(b)(1). So, like anyone who loses in the district court, petitioner is now under a legal compulsion to obey the judgment until a higher court says otherwise. "Indeed," after an adverse final judgment, "it is impossible to see how an appeal could *ever* be dismissed as 'unripe.'" *In re UAL Corp.*, 468 F.3d 444, 452–53 (7th Cir. 2006). Because the district court entered a final judgment, and the challenged condition is part of that judgment, petitioner can appeal it.

What is more, *prudential* ripeness—the ground on which courts have rejected appeals like petitioner's, see *United States* v. *Cabral*, 926 F.3d 687, 695 & n.5 (10th Cir. 2019)—is a particularly unsound basis to reject an appeal from a final judgment. The very notion of prudential ripeness "is in some tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 167 (2014) (cleaned up). But whatever the "continuing vitality of the prudential

ripeness doctrine," see *id.*, it cannot apply here. This Court recently rejected a prudential-ripeness rule that created a "Catch-22," stripping takings plaintiffs of their right to a federal forum. *Knick* v. *Twp. of Scott*, 139 S. Ct. 2162, 2167, 2178 (2019). Likewise here, the Fifth Circuit's rule deprives petitioner of his appellate rights: He cannot challenge the condition's legality on direct appeal because his claim is "not ripe," *Ellis*, 720 F.3d at 227, and he cannot challenge it later because illegality is not grounds for modification, *Hatten*, 167 F.3d at 886. That makes no sense.

In all events, petitioner's claim *is* ripe. Ripeness turns on "the fitness of the issues for judicial decision and the hardship of withholding court consideration." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) (cleaned up). Fitness depends on whether the issue is "purely legal, and will not be clarified by further factual development." *Driehaus*, 573 U.S. at 167. And as the First, Ninth, and D.C. Circuits agree, "supervisory conditions are ordinarily ripe for challenge upon imposition, especially when . . . the argument presents a purely legal issue requiring no further factual development." *E.g.*, *Rock*, 863 F.3d at 833 n.1. The government suggests that review should wait until the "circumstances and precise nature" of any testing are clear, Opp. 17, but that assertion misunderstands petitioner's argument. He challenges the "condition itself, not its application or enforcement." *Medina*, 779 F.3d at 66–67; cf. *United States* v. *Bennett*, 823 F.3d 1316, 1326 (10th Cir. 2016) (distinguishing a challenge to "the facial validity" of plethysmograph testing from a challenge to the test as applied to the defendant). This facial challenge needs no more factual development. And petitioner will plainly suffer hardship if his appeal is held unripe, preventing any appellate review.

Finally, that "some types of claims may not usually be well-suited to direct review," Opp. 21, is a non sequitur. This assertion relies on *Massaro* v. *United States*, which observed that ineffective-assistance claims are a poor fit for direct appeal because the trial record "will be devoted to issues of guilt or innocence," not trial strategy or prejudice. 538 U.S. 500, 505 (2003). That observation has no bearing on petitioner's challenge here, which contends that plethysmograph testing is *never* a legal supervised-release condition. This challenge is ripe, and the open circuit split warrants this Court's intervention.

II. The Court should hold this petition for *California* v. *Texas*.

The government says *California* v. *Texas* is "unlikely to affect the proper disposition of this petition" because the Commerce Clause analysis in *NFIB*, which *California* will likely revisit or expand on, "has no bearing on 18 U.S.C. 2251(a), which plainly regulates a preexisting activity." Opp. 4, 14. But the government's focus on "activity" or "inactivity" overlooks the requirement that any activity be "commercial."

Five Justices in *NFIB* concluded that the Affordable Care Act's individual mandate exceeded Congress's Commerce Clause power because the mandate "does not regulate existing commercial activity." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 552 (2012) (opinion of Roberts, C.J.). But uninsured people do engage in commercial activity: they self-insure by buying healthcare out-of-pocket. *Id.* at 605 (Ginsburg, J., concurring in part). So *NFIB* limits Congress's Commerce Clause power not just when no commercial activity occurs, but when no commercial activity occurs *in the relevant interstate market.*

This distinction matters here. To be sure, an interstate child pornography market exists. Opp. 10–11. But petitioner did not participate in it. He produced prohibited images purely for his own use, which involved no commercial activity in any market. Pet. 6. In *NFIB*, the uninsured engaged in at least some commercial activity—though outside the interstate insurance market—by purchasing healthcare out-of-pocket. Petitioner engaged in none.

But because the five Justices embracing this distinction were divided between the majority and dissent in *NFIB*, and because the majority ultimately upheld the individual mandate under Congress's taxing power, lower courts are confused about whether the activity-inactivity distinction represents a binding Commerce Clause holding. See, *e.g.*, *United States* v. *Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014) ("[T]here is no controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause."); *United States* v. *Robbins*, 729 F.3d 131, 135 (2d Cir. 2013) ("It is not clear whether anything said about the Commerce Clause in *NFIB*'s primary opinion . . . is more than dicta."). *California* should help resolve this confusion: It involves a renewed Commerce Clause challenge to the individual mandate that arguably cannot be avoided by relying on the taxing power. See Brief for Respondent/Cross-Petitioner States at 31, *Texas* v. *California*, Nos. 19-840 & 19-1019 (Feb. 3, 2020). The Court should thus hold this petition for *California* and then either grant it or GVR the case so the Fifth Circuit can reconsider the Commerce Clause issue in light of that decision.

Finally, petitioner's guilty plea does not foreclose his Commerce Clause arguments. *Contra* Opp. 6–7. As the government concedes, "a defendant who enters

an unconditional guilty plea retains the right to challenge the constitutionality of his statute of conviction." *Id.* at 6–7 (citing *Class* v. *United States*, 138 S. Ct. 798, 805 (2018)). That is what petitioner seeks to do here. If § 2551(a) criminalizes his entirely non-commercial activities—producing proscribed images purely for personal consumption—then it is unconstitutional as applied to him. Likewise, "[a] guilty plea does not waive the right of a defendant to appeal a district court's finding of a factual basis for the plea on the ground that the facts set forth in the record do not constitute a federal crime." *United States* v. *Reasor*, 418 F.3d 466, 470 (5th Cir. 2005). Petitioner will thus be free on remand to urge a narrower construction of § 2551(a) on constitutional-avoidance grounds based on *California*.

CONCLUSION

The petition should be granted or held for *California*.

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