No. 23-5835

IN THE

Supreme Court of the United States

SEAN CHRISTOPHER FINNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents two constitutional questions that each warrants review. The first is about the First Amendment internet-access right recognized in *Packingham v. North Carolina*, 582 U.S. 98 (2017). The second is about the Sixth Amendment jury-trial right recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. The Government identifies no basis to deny review on either question. Thus, the real issue here is not *whether* to grant review but rather *which* question to review. The ideal solution is to review them *both* and efficiently resolve two issues in a single case.

I. This Court's review is warranted on the *Packingham* question.

The first question presented is "[w]hether the First Amendment right to access the internet recognized in *Packingham* applies to criminal defendants who are on supervised release." Pet. i. The Government does not dispute that the lower state and federal courts are intractably divided 6–4 on that question of constitutional law. The Government is able to dispute the existence of a conflict only by mischaracterizing the question presented as one about the specific facts of this particular case. But even that tactic fails because Petitioner can easily demonstrate that his *Packingham* claim would have prevailed in at least three other circuits. The Government otherwise makes no effort to defeat review. It does not dispute that the question presented is important and recurring. It does not dispute that, unlike prior petitions, this one cleanly presents the question for review. And its defense of the decision below would untenably allow state and federal courts to freely impose draconian lifetime internet bans on a large swath of defendants, preventing them from reintegrating into society.

A. The lower courts are deeply divided on the question presented.

The Government does not dispute that the lower courts are deeply divided on the question that Petitioner actually presents. Instead, the Government resorts to mischaracterizing the question. But not even that maneuver can obviate the conflict.

1. The parties do not disagree about the relevant standard for analyzing conditions of supervised release. Whether analyzed under intermediate scrutiny or 18 U.S.C. § 3583(d)(2), a condition must be narrowly tailored and involve no greater deprivation of liberty than reasonably necessary to serve a legitimate government interest. *See* Pet. 11; BIO 11. To conduct that overbreadth analysis, courts must determine the degree of "liberty" restricted. In the context of internet restrictions, then, courts must first determine whether the First Amendment right to access the internet recognized in *Packingham* applies to defendants who are on supervision.

Here, the Eleventh Circuit upheld the computer restriction because it held that "*Packingham* does not apply" to such conditions of supervised release. Pet. App. 5a. Applying circuit precedent, it "reasoned that, although the law in *Packingham* restricted sex offenders beyond the completion of their sentence," the computer restriction here "did not extend beyond [the] supervised release term," Pet. App. 6a–7a (applying *United States v. Bobal*, 981 F.3d 971, 977 (11th Cir. 2020)); *see* BIO 6. Petitioner now seeks review of that legal determination. Pet. i. And for good reason: it formed a key basis of the Eleventh Circuit's decision to uphold the restriction here.

Critically, the Government does not dispute that, over the last six-and-half years, the lower courts have divided on that threshold legal question—namely,

whether the First Amendment right recognized in *Packingham* applies to defendants who have not yet completed their sentences and remain subject to supervision. As explained in the Petition, the Fifth, Eighth, Eleventh, and D.C. Circuit have all held that *Packingham* does *not* apply. *See* Pet. 12–14 (discussing cases). By contrast, the Second, Third, and Fourth Circuits, as well as the Supreme Courts of West Virginia, Illinois, and Nevada, have all held that *Packingham does* apply. *See* Pet. 15–18 (discussing cases). Again, the Government does not dispute this fractured landscape.

2. The Government nonetheless asserts that the decision below does not "implicate[ ] a conflict." BIO 11. The Government makes this assertion only because it mischaracterizes the question presented as a fact-bound question about the validity of the restriction "in this case." BIO 9; *see* BIO i. But that tactic fails for two reasons.

a. First, as a procedural matter, Petitioner has not urged this Court to go beyond the question presented and decide whether the restriction in this case is valid. Were this Court to grant review and reject the Eleventh Circuit's legal determination that *Packingham* does not apply to defendants on supervised release, then this Court could simply remand for the court of appeals to apply *Packingham* in the first instance and re-evaluate the validity of the restriction. That is the modest course that this Court normally follows, and that is the course that Petitioner has suggested here. *See* Pet. 22 ("Thus, were the Court to hold that *Packingham* applies to those on supervised release, Petitioner would be far more likely to prevail in his challenge").

b. In any event, the Government is plain wrong that no court has reached a contrary conclusion on comparable facts. BIO 8, 11–13. The salient facts here are

that Petitioner was convicted of possessing child pornography; and the district court banned him from using a computer as part of his lifetime term of supervised release, except during employment as approved by the district court. Had Petitioner been sentenced in three other circuits, his *Packingham* challenge would have prevailed.

i. The Government has no answer to *United States v. Holena*, 906 F.3d 288 (3d Cir. 2018). The Government ignores that the Eleventh Circuit expressly reached "the opposite conclusion" as *Holena* and criticized *Holena* for "read[ing] the opinions in *Packingham* too broadly." *Bobal*, 981 F.3d at 978; *see* Pet. 18, 21. More critically, the Government identifies no material distinction between the restriction here and the one invalidated in *Holena*. *See* BIO 12. In fact, the *Packingham* challenge here is *stronger* than the one that prevailed in *Holena*. *See* Pet. 21–22. Both cases involved lifetime computer bans, but the governmental interest was at its apex in *Holena* because, unlike Petitioner here, the defendant there actually "used the internet to try to molest children." 906 F.3d at 293. With all else being equal, Petitioner's claim would have prevailed had he been sentenced in Philly rather than in South Florida. *See United States v. Senke*, 986 F.3d 300, 317–18 (3d Cir. 2021) (following *Holena*).

ii. So too had Petitioner been sentenced in the Big Apple. In *United States v. Eaglin*, 913 F.3d 88, 95–99 (2d Cir. 2019), the Second Circuit applied *Packingham* to vacate an 11-year (not a lifetime) restriction on internet (not all computer) access. *See* Pet. 15–16. The Government asserts that *Eaglin* acknowledged that total internet bans might be justified in certain cases (BIO 12), but the Second Circuit said that would be true "[i]n only highly unusual circumstances." 913 F.3d at 97. And while the

Government observes that the sex offense there did not involve the use of a computer (BIO 12), the Second Circuit in *Eaglin* reaffirmed its pre-*Packingham* precedent invalidating an internet ban "in the case of a defendant who had illegally downloaded child pornography." *Id.* at 96. It also favorably cited other pre-*Packingham* circuit decisions that had "similarly rejected absolute Internet bans even where the defendant had used the computer for ill in his crime," including to possess child pornography. *Id.* at 96–97 (citing cases). Accordingly, the Second Circuit recently applied *Eaglin* to vacate an internet restriction of supervised release on a defendant who, like Petitioner, received child pornography but did not use the internet to prey on children. *United States v. Gonyea*, 2023 WL 7478489, at *2 (2d Cir. Nov. 13, 2023).

iii. The law in the Fourth Circuit is the same. Citing *Eaglin*, the Fourth Circuit in *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021) first recognized that, because *Packingham* applied to those on supervision, "an internet ban implicates fundamental rights" and "imposes a massive deprivation of liberty." *Id.* at 1104–05. While the Government observes that there was no evidence in that case of criminal internet use (BIO 12), *Ellis* explained that internet bans will "rarely be the least restrictive alternative," and "the majority of circuits have held that a complete ban on internet access even where the record contains evidence of non-contact child pornography activity . . . on the internet." *Id.* at 1104–05 & n.10 (quotation omitted). Following *Ellis*, the Fourth Circuit reaffirmed that, "[f]or cases in which there is Internet criminality," internet bans will "sweep[ ] too broadly" where (as in this case) there is "non-contact child pornography activity." *United States v. Hamilton*, 986 F.3d

413, 422 (4th Cir. 2022); *see* Pet. 22. Accordingly, the Fourth Circuit has recently vacated internet bans in cases like this one. *See, e.g.*, *United States v. Jeffrey-Moe*, 2023 WL 3845305, at *3 (4th Cir. 2023); *United States v. Arce*, 49 F.4th 382, 396–97 (4th Cir. 2022). Thus, Petitioner's *Packingham* claim would have prevailed there too.

B. The question presented is important and recurring.

The Government does not dispute that the *Packingham* question presented is important, recurring, and otherwise warrants this Court's review. *See* Pet. 19–20.

1. In light of the disagreement in the lower courts, geography alone now determines whether defendants on supervision enjoy a First Amendment right. As a practical matter, that right is vital to function in today's internet-based society. Indeed, those who cannot access the internet must effectively live in exile. The happenstance of geography should not determine who can participate in our society.

2. The question presented is also recurring. A staggering number of Americans currently live under supervision.[1] As to federal supervised release, the Sentencing Guidelines recommend that computer restrictions be imposed on the most common federal sex offenses, as this case reflects. *See* Pet. 19–20 (citing U.S.S.G. § 5D1.3(d)(7)(B)). And there have been about 3,000 such prosecutions per year for the past five years. *See* U.S. Courts, Statistics & Reports, Table D-2 (Dec. 31, 2023). The recurring nature of the question presented is confirmed by the number of federal and

[1] There are over 100,000 people on federal supervised release. U.S. Courts, Statistics & Reports, Table E-2 (Dec. 31, 2023). And there are over 3 million people on state probation or parole. *See* Leah Wang, Prison Policy Initiative, Punishment Beyond Prisons 2023: Incarceration and supervision by state (May 2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023_data_appendix.html.

state appellate cases addressing it since *Packingham*. *See* Pet. 19. Even more such decisions have issued since this Petition was filed, including decisions invalidating internet restrictions. *See, e.g.*, *State v. Nelson*, 2024 WL 564570, at *11–12 (Wash. Ct. App. Feb. 13, 2024); *Gonyea*, 2023 WL 7478489, at *2–3 (2d Cir. Nov. 13, 2023).

3. Finally, only this Court can resolve the confusion about the applicability of its own precedent in *Packingham*. *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.5 pp. 4-23–24 (11th ed. 2019) (explaining that this Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification"). And there is no reason for delay.

C. This case is an ideal vehicle.

1. This case is an ideal vehicle, for it cleanly presents the *Packingham* question. Indeed, the Government does not dispute that Petitioner preserved his *Packingham* argument below. *See* Pet. 4–6, 20–21; BIO 4, 6. And it does not dispute that the court of appeals squarely decided the question presented (*see* Pet. 6–7, 21; BIO 6), holding that "*Packingham* does not apply" to supervised release, Pet. App. 5a.

2. The Government observes that, over the last three years, this Court has twice denied review of the question presented. BIO 8 & n.1 (citing *Alegre v. United States* (No. 22-7471) (cert. denied Oct. 30, 2023) and *Bobal v. United States* (No. 20-7944) (cert. denied June 7, 2021)). But the Government omits that the *Packingham* question was unpreserved in both of those cases and was therefore reviewable only for plain error. *See United States v. Alegre*, 2022 WL 18005680, at *6 (11th Cir. Dec. 30, 2022) (concluding that the defendant had invited the alleged error, precluding

review entirely, but adding that the challenge would fail even reviewing for plain error); *Bobal*, 981 F.3d at 973, 975–78 (repeatedly invoking the plain-error standard).

As the Government's Opposition in *Alegre* explained, the plain-error standard rendered those cases unsuitable vehicles for further review because it could have obstructed the Court's ability to resolve the *Packingham* question. *See Alegre v. United States*, BIO i, 5–7, 10, 12–13 (No. 22-7471) (Sept. 20, 2023). The same dynamic exists in another case now pending in this Court. *See Herrera Pastran v. United States*, Pet. 14, 16, 24–25 (No. 23-6161) (pet. filed Nov. 29, 2023) (conceding that the *Packingham* claim was raised for the first time on appeal); *United States v. Herrera Pastran*, 2023 WL 5623010, at *8–10 (11th Cir. Aug. 31, 2023) (applying plain error).

These other petitions thus underscore that the question presented is recurring, and that this Petition is the best vehicle to reach this Court since *Packingham*.

D. The decision below is wrong.

Petitioner previously explained why the Eleventh Circuit was legally wrong to hold that *Packingham* is limited to those who have already completed their sentences. Practically too, those on supervision desperately need internet access to successfully reintegrate into American society and become productive citizens. *See* Pet. 22–25. The Government does not engage with Petitioner's arguments on that front. It merely observes that the law in *Packingham* applied to those who had already completed their sentences whereas the supervised release condition here was imposed as part of Petitioner's sentence. BIO 10. But that observation does little more than restate the question presented: does *Packingham* apply to those on supervised release or not?

Rather than grapple with that legal question, the Government argues that the condition "in this case" is not overbroad. BIO 9. The Government emphasizes that the law in *Packingham* applied to a general class of sex offenders while the condition here is specifically tailored to Petitioner's offense and characteristics. BIO 9–10. That is not quite accurate. In accordance with U.S.S.G. § 5D1.3(d)(7)(B), the probation officer recommended the condition here only because Petitioner used a computer. PSR ¶ 109. The district court then adopted that condition over Petitioner's objection, but without making any findings. Dist. Ct. ECF No. 106 at 6–7. The findings upon which the Government now relies were made only in connection with the length of the sentence.

In any event, even if the district court had based the condition on Petitioner's particular conduct and characteristics, it would still be overbroad if *Packingham* applies. That is because the condition would restrict far more First Amendment liberty than reasonably necessary to prevent access to child pornography. Indeed, the restriction denies Petitioner *any* use of a computer at all—to prepare a resume, write a novel, send/receive email, read the news, apply for jobs, purchase airline tickets, make medical appointments, etc.…. Those restrictions bear no relationship to the goals of sentencing. Given this obvious overbreadth, the *only* way to uphold the extreme ban here is to conclude, as the Eleventh Circuit did, that "*Packingham* does not apply" to conditions of supervised release at all. Pet. App. 5a. Thus, a contrary holding by this Court on the question presented should be dispositive of this case.[2]

[2] Contrary to the Government's puzzling suggestion (BIO 10), Petitioner is not mounting a "facial" challenge just because he has not identified specific non-child pornography websites he would like to visit upon release. No court has required that

The Government's remaining case-specific arguments underscore rather than undermine that fatal overbreadth. Although Petitioner is subject to a *lifetime* computer restriction, the Government curiously asserts that it is not a "permanent ban" like the law in *Packingham* because he can later move to modify it. BIO 10. But such a request would be subject to the court's broad discretion. And that speculative avenue of relief does not "immunize the ban" from judicial scrutiny as it now exists. *United States v. Ramos*, 763 F.3d 45, 61 (1st Cir. 2014). The Government also asserts that the restriction here is not a "blanket ban" like the one in *Packingham* because it allows him to use a computer for employment with prior approval of the court. BIO 10. But even if such approval were liberally granted, it would still not allow him to use a computer at all in his daily life, where it is needed most. And the Government omits that the restriction here is broader in scope than the law struck down in *Packingham*, which restricted access to social media websites alone—not *all* websites.

II. This Court's review is warranted on the *Apprendi* question.

The second question presented is whether the rule of *Apprendi* applies to criminal restitution. Pet. i. The Government emphasizes that the lower courts have uniformly declined to apply *Apprendi* to criminal restitution. That is true. But most of them reached that erroneous conclusion before this Court applied *Apprendi* to criminal fines in *Southern Union Co. v. United States*, 567 U.S. 343 (2012). And in the decade following *Southern Union*, the lower courts have stubbornly reaffirmed

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pointless exercise. And Petitioner is not denying that tailored internet restrictions may be appropriate. He is simply arguing that *Packingham* applies in this context; and, as a result, the total ban here restricts more liberty than reasonably necessary.

those decisions under the banner of *stare decisis*. Thus, only this Court can ensure fidelity to the Sixth Amendment. The Government does not otherwise dispute that this question is important and recurring, as two Justices of this Court recognized five years ago. *Hester v. United States*, 139 S. Ct. 509 (2019) (Gorsuch, J., joined by Sotomayor, J., dissenting from the denial of certiorari). And while the Government has identified vehicle defects in every post-*Hester* petition presenting this question, the Government does not dispute that this case cleanly presents it at long last.

A. The lower courts are flouting the Sixth Amendment.

1. *Apprendi* held that, except for a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In the decade following *Apprendi*, this Court struck down various sentencing procedures pertaining to incarceration and the death penalty. *See* Pet. 26–27. During that time, however, the lower courts uniformly declined to apply *Apprendi* to restitution. *See* BIO 16–17.

But then came *Southern Union*. This Court made clear that there was "no principled basis for treating criminal fines differently" from incarceration or the death penalty. *Southern Union*, 567 U.S. at 349. The Court explained: "In stating *Apprendi*'s rule, we have never distinguished one form of punishment from another. Instead, our decisions broadly prohibit judicial factfinding that increases maximum criminal 'sentences,' 'penalties,' or 'punishments'—terms that each undeniably embrace fines." *Id.* at 350 (brackets and citations omitted). The upshot is that, since *Apprendi* applies to criminal fines, it must apply to criminal restitution as well.

Yet in the dozen years since *Southern Union*, the lower courts have steadfastly refused to take that logical next step. Indeed, every circuit with criminal jurisdiction (with the exception of the D.C. Circuit) has now considered the question and held that *Apprendi* does not apply to restitution, reaffirming pre-*Southern Union* precedents. *See* Pet. App. 10a–12a; Pet. 28 & n.2, 32; BIO 20–21. However, there is no principled basis for applying the rule of *Apprendi* to incarceration, the death penalty, *and* fines—but *not* restitution. Because the lower courts have made clear that they will refuse to effectuate this Court's Sixth Amendment jurisprudence, this Court's review is necessary to prevent this continued erosion of the fundamental right to a jury trial.

2. To avoid that conclusion, the Government attempts to distinguish criminal fines from restitution. Like the courts of appeals, the Government identifies two potential distinctions: (a) criminal fines have a prescribed "statutory maximum" whereas restitution is governed by an "indeterminate" scheme that lacks a "concrete cap"; and (b) criminal fines are a form of criminal punishment whereas restitution instead has a compensatory or restorative purpose. *See* BIO 17–19. But Petitioner pre-emptively explained why neither distinction is sound. *See* Pet. 29–34. Despite the Government's extensive merits arguments, it offers no persuasive defense to either.

a. The argument that restitution lacks a "statutory maximum" is irreconcilable with *Blakely v. Washington*, 542 U.S. 296 (2004). *Blakely* explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," "not the maximum sentence a judge may impose after

finding additional facts." 542 U.S. at 303–04. Under the statute here, the amount of restitution was tied to the victims' losses. But the jury did not find any losses (or even any victims). So, under *Blakely*, the "statutory maximum" here was zero. *See* Pet. 29–30; *Hester*, 139 S. Ct. at 510 (Gorsuch, J., dissenting from the denial of certiorari).

The Government acknowledges *Blakely*'s holding but fails to explain why Petitioner's application is wrong. *See* BIO 14, 21–22. Changing tack, it argues instead that the restitution statute here differs from the fine statute in *Southern Union* because the latter imposed a $50,000 maximum fine for each day of a violation. BIO 19. But the "statutory maximum" under both statutes still depends on a particular fact—here the loss, there the number of days. So those facts must be found by a jury. *See* Pet. 31. And the Government does not dispute that *Southern Union* cited fine statutes that, like the statute here, hinged on loss amount. 567 U.S. at 349–50 & n.4.

b. The argument that restitution is compensatory fails for two reasons.

First, the purpose of restitution is irrelevant to the plain text of the Sixth Amendment, which applies to all "criminal prosecutions." *See* Pet. 32–33. And the Government expressly concedes, as it must, that criminal "restitution is imposed as part of a defendant's criminal conviction." BIO 15–16 (citing *Pasquantino v. United States*, 544 U.S. 349, 365 (2005)). Nor does the Government dispute that the restitution statute in this case, like other restitution statutes, describes restitution as punishment for the criminal offense. *See* Pet. 33. Yet the Government makes no effort to explain why the text of the Sixth Amendment, which applies to all "criminal prosecutions," does not apply to criminal punishment in the form of restitution.

Second, and in any event, the Government's argument is again contrary to this Court's precedent. As Petitioner explained, *Kelly v. Robinson*, 479 U.S. 36 (1986) described restitution as a criminal penalty notwithstanding its compensatory effects. *See* Pet. 33–34. The Government simply ignores that precedent. Likewise, and as Petitioner already explained (Pet. 34), this Court in *Pasquantino* explained that "[t]he purpose of awarding restitution" is "to mete out appropriate criminal punishment." 544 U.S. at 365. Yet the Government makes no attempt to reconcile *Pasquantino* with its argument that restitution is compensatory rather than punitive. *See* BIO 16–18.

B. The question presented is important and recurring.

The Government does not otherwise dispute that the question presented warrants review. As Petitioner explained, federal courts impose *billions* in restitution on *thousands* of criminal defendants every year—all without the protections of a jury and without regard to their economic circumstances. *See* Pet. 35–37. And the number of appellate decisions addressing the question since *Southern Union* confirms that it is recurring. Finally, the Government wholly ignores Justice Gorsuch's dissent in *Hester*, which recognized that this question was "worthy of [the Court's] review" back in 2019. 139 S. Ct. at 509. The last five years have shown that it is not going away.

C. This case is an ideal vehicle.

The Government observes that, since the denial of review in *Hester*, this Court has denied review in six cases presenting this question. BIO 13–14 & n.2. However, as Petitioner pre-emptively explained, these cases were all defective vehicles. *See* Pet. 38. Indeed, in five of the six cases, the question was not properly preserved

below, as the Government explained in each of its Oppositions. And, in the sixth case (*George*), the Government waived its response and this Court did not call for one.

In this case, by contrast, the Government does not dispute that Petitioner preserved his *Apprendi* argument in the lower courts, which squarely rejected it. *See* Pet. 8–10, 37; BIO 4, 6–7. Nor does the Government dispute that this case is otherwise an ideal vehicle, since a judge (not a jury) imposed a six-figure restitution award on a pauper after a trial where the Government presented no evidence about the victims or their losses. *See* Pet. 4, 37–38. Finally, the statute here mandates a $3,000 minimum restitution award per victim, colliding with *Alleyne v. United States*, 570 U.S. 99 (2013). So if *Apprendi*'s rule does not apply to *this* statute, as the court of appeals held (Pet. App. 11a–12a), then it would not apply to *any* restitution statute.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] The $3,000 minimum thus provides yet another reason why this case is an optimal vehicle. Contrary to the Government's suggestion, Petitioner has not presented that as a "distinct" question for review. BIO 22 n.3. The Government also asserts that the restitution statute here does not impose a "true" mandatory minimum because restitution liability may be terminated in the future. But mandatory minimum terms of imprisonment are subject to *Alleyne* even though they too can be relieved. *See, e.g.*, 18 U.S.C. § 3553(f) (safety valve); Fed. R. Crim. P. 35(b)(4) (substantial assistance).