

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GARRY LEBRON HAYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 52(b) allows a court of appeals to correct an unpreserved error when the error is “plain.” An error is “plain” when it is “clear” or “obvious” under current law, meaning it is not “subject to reasonable dispute.” *United States v. Olano*, 507 U.S. 725, 734 (1993); *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Congress likewise limits supervised-release conditions. Under 18 U.S.C. § 3583(d)(2), a condition may impose “no greater deprivation of liberty than is reasonably necessary” to serve the purposes of sentencing.

The court of appeals held that the condition here—a one-year ban on any contact with any member of Congress for any reason—violated that limit and burdened Mr. Hayes’s First Amendment right to petition. But the court still refused to correct the error. In the court’s view, the violation was not “plain” because no prior case involved a materially similar condition and because the violation was not severe enough.

The question presented is:

Whether a court of appeals may hold that a condition squarely violated a statutory limit but still say the error was not “plain” because the violation was not severe enough.

PARTIES TO THE PROCEEDING

Petitioner Garry Lebron Hayes was the defendant in the district court and the appellant in the Sixth Circuit. Respondent United States was the plaintiff in the district court and the appellee in the Sixth Circuit.

RELATED PROCEEDINGS

This case arises from these proceedings:

- *United States v. Hayes*, Case No. 1:24-cr-123 (E.D. Tenn.) (judgment entered Sept. 22, 2025)
- *United States v. Hayes*, No. 25-5893 (6th Cir.) (affirmed Sept. 15, 2026)

There are no other proceedings directly related to this case under Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Garry Lebron Hayes respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 2026 WL 2718793, ___ F.4th ___ (6th Cir. 2026). Pet. App. 1a–14a. The judgment of the district court is unpublished but reproduced at Pet. App. 15a–21a.

JURISDICTION

The Sixth Circuit entered its judgment on September 15, 2026. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Federal Rule of Criminal Procedure 52(b) provides: “A plain error that affects substantial rights may be considered even though it was not

brought to the court’s attention.”

Title 18 U.S.C. § 3583(d) 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 . . .

any condition set forth as a discretionary condition of probation in section 3563(b) . . . and any other condition it considers to be appropriate.

INTRODUCTION

The Sixth Circuit held that the district court violated federal law when it barred petitioner, for one year, from contacting any member of Congress for any reason. The court held that the condition burdened his First Amendment right to petition the government. It listed the innocent conduct the ban prohibited: asking a member of Congress about veterans’ benefits, requesting a report, subscribing to a newsletter, even posting an emoji in response to a social-media post. And it identified four narrower conditions that would have served every sentencing

purpose the district court invoked.

Then it affirmed.

The court did so because, in its view, the error was not “plain.” Not because § 3583(d)(2) was unclear. The court read and applied the statute without difficulty. And not because the violation was close. The court held that the condition “squarely fits in the box of a ‘greater deprivation of liberty than was reasonably necessary.’” Pet. App. 7a. Still, the court held that the error was not plain because no binding decision had invalidated a materially similar condition and because this condition, unlike others the court had corrected on plain-error review, “more directly related to the congressional victims of the underlying crimes.” *Id.* at 12a.

That approach cannot be squared with this Court’s cases. Rule 52(b)’s second prong asks whether the error is clear under current law, *Olano*, 507 U.S. at 734, or instead “subject to reasonable dispute,” *Puckett*, 556 U.S. at 135. It does not ask how serious the error was. Yet that is what the decision below does. The court found an unlawful condition but still called the error nonplain because the condition had some connection to the offense. The result is striking: a district court

can squarely violate federal law, and a court of appeals can say so in a published opinion, yet the violation still goes uncorrected because the court does not think it was bad enough.

The court's own reasoning shows the problem. The court found a statutory violation because the condition went much further than necessary. Narrower conditions could have barred threats, harassment, or other harmful contact with members of Congress. But this condition also barred harmless contact: asking about veterans' benefits, subscribing to a newsletter, or posting an emoji. That was why the condition violated § 3583(d)(2). Pet. App. 7a.

But when the court asked whether that violation was plain, it focused on something different. It emphasized that the condition, taken as a whole, concerned the same group as the victims of petitioner's crimes: members of Congress. *Id.* at 12a.

That misses the point. No one disputes that some restrictions on petitioner's contact with members of Congress could have been justified. The statutory violation was that this condition went further than necessary. So the question should have been whether the additional restrictions were clearly unnecessary. And they were. Preventing

petitioner from subscribing to a congressional newsletter protects no victim. It deters nothing. It rehabilitates no one. The court never explained why the justified parts of the condition made the unjustified parts any less clearly unlawful.

The court's rule creates another problem. Section 3583(d)(2) sets a standard: a condition may impose no greater deprivation of liberty than reasonably necessary. Applying that standard will often depend on the particular condition in the particular case. Yet the decision below says that even a clear violation ordinarily will not be plain unless an earlier case involved a materially similar condition.

For many supervised-release conditions, that case will never exist. Conditions take countless forms. And because defendants often do not object to them at sentencing, many challenges arrive on plain-error review. Under the Sixth Circuit's rule, those challenges can fail because no earlier case addressed the same kind of condition. But if those cases fail for that reason, they can never become the precedent the next defendant needs. The rule feeds on itself.

The consequences extend far beyond this case. Section 3583(d)(2) protects the liberty of more than 100,000 people serving terms of federal

supervised release across the country. Under the decision below, even a clear violation of that command may escape correction simply because no earlier court confronted the same unusual restriction.

This case presents the question cleanly. There is no dispute that the district court erred; the court of appeals found the error itself. Prong two is the only obstacle to relief. The condition burdened an enumerated constitutional right. And the Sixth Circuit explained, in a published opinion, exactly why it would not correct the statutory violation it had just identified.

The petition should be granted.

STATEMENT OF THE CASE

A. Legal background

Supervised release follows nearly every federal prison sentence. But Congress didn't give district courts free rein to impose whatever conditions they think appropriate. Section 3583(d) imposes three limits. A discretionary condition must be reasonably related to specified sentencing purposes, § 3583(d)(1); impose "no greater deprivation of liberty than is reasonably necessary" to serve those purposes, § 3583(d)(2); and be consistent with the Sentencing Commission's policy

statements, § 3583(d)(3).

The second limit is a tailoring requirement. A court may have good reason to restrict a defendant's liberty. But it may not restrict more liberty than necessary to accomplish the legitimate sentencing purpose.

If the defendant doesn't object at sentencing, review is for plain error under Federal Rule of Criminal Procedure 52(b). The familiar framework has four parts: there must be (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 732–36.

This case concerns the second step of plain-error review. An error is plain when it is clear under current law, *id.* at 734—that is, when it is not “subject to reasonable dispute,” *Puckett*, 556 U.S. at 135. Put simply, prong two asks how clear the error was.

The Sixth Circuit has put that clarity inquiry in two ways. First, it has said that “[a] lack of binding case law that answers the question presented” forecloses plain error, on the premise that an unanswered question is open to reasonable dispute. *United States v. Al-Maliki*, 787

F.3d 784, 794 (6th Cir. 2015). Second, sitting en banc, it has said that reversal is reserved for “exceptional circumstances,” where the error is so obvious that “the trial judge was derelict in countenancing it.” *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc). Both formulations ask the same basic question as *Olano* and *Puckett*: was the error clear, or was it reasonably debatable?

The decision below asked a different question. Section 3583(d)(2) says a condition can’t take more liberty than necessary. So if there is no materially similar case, the question is still simple: was it clear that this condition went too far? The Sixth Circuit didn’t ask that. It asked how far the condition went. Because the restriction still had some connection to the people Mr. Hayes had threatened, the court treated the error as nonplain. But that doesn’t show the line was unclear. It shows only that the court didn’t think the district court crossed it badly enough. In short, the court turned a question about clarity into a question about severity.

B. Factual and procedural background

Between 2022 and 2024, Mr. Hayes left four threatening voicemails for two members of Congress: three for a House member from Georgia

and one for a Senator from South Carolina. Pet. App. 2a; Pet. C.A. Reply Br. 7. The messages were vile. In December 2022, Mr. Hayes told the Congresswoman that he would “meet [her] one day” and beat her in front of her children. Pet. App. 2a. In early 2024, he told the Senator that he would slit his throat. *Id.* And in July 2024, calling from his mother’s home in Chattanooga, Tennessee, Mr. Hayes left another voicemail threatening to kill the Congresswoman. *Id.*; Pet. C.A. Br. 5.

But the threats never went beyond those remote communications. Mr. Hayes never approached either member, tried to locate either one, or took any step to carry out a threat. Pet. C.A. Br. 6; Pet. C.A. Reply Br. 7. Neither member represented Tennessee or Mr. Hayes’s congressional district. Pet. App. 4a. And Mr. Hayes never contacted his own representatives or any other member of Congress from Tennessee. Pet. C.A. Reply Br. 7.

Mr. Hayes pleaded guilty to transmitting a threatening communication in interstate commerce, in violation of 18 U.S.C. § 875(c), based on the July 2024 voicemail. Pet. C.A. Br. 7. The district court calculated an advisory Guidelines range of 18 to 24 months and imposed 24 months’ imprisonment, followed by one year of supervised release.

R. 61.

The court also imposed a special condition barring Mr. Hayes from:

hav[ing] contact with the victims or any members of Congress, directly, indirectly, through a third party, through social media, or in any way that could be construed as harassing or threatening.

Pet. App. 2a–3a. As the parties agreed below, and the court of appeals accepted, that condition reached every member of Congress and every member of their staffs, regardless of how Mr. Hayes sought to communicate or what he sought to say. *Id.* at 4a. The district court said the condition was necessary to protect the public and deter others from engaging in this type of conduct. *Id.* at 3a. Mr. Hayes didn’t object. Judgment was entered on September 22, 2025. R. 53.

Mr. Hayes has never argued that no restriction was warranted. In the district court and on appeal, he accepted that some restriction was appropriate. His argument was more specific: this restriction swept more broadly than § 3583(d)(2) allows. He identified several narrower alternatives. The court could have barred contact with the victims, prohibited threatening or harassing communications to public officials, restricted private outreach while preserving lawful civic contact through public channels, or paired those limits with monitoring or treatment

conditions. Pet. C.A. Br. 13. He challenged only the condition's breadth, not the district court's explanation of it. Pet. C.A. Br. 10 ("Mr. Hayes does not raise a procedural challenge here."); Pet. App. 12a–13a n.4. The issue, then, has always been whether § 3583(d)(2) permits this sweeping ban when narrower conditions would have done the job.

C. The decision below

The court of appeals affirmed in a published opinion. Judge Bush wrote for the court, joined by Judge Stranch. Judge Murphy joined only Part II.B and concurred in the judgment.

The violation. Part II.A held that the condition violated § 3583(d)(2). The court started with common ground: "no one disputes that a condition restricting Hayes's speech and petition rights in some capacity is appropriate." Pet. App. 4a. The question was simply "whether this specific condition goes too far." *Id.* It did.

The condition burdened both free speech and the right to petition. And the court explained that prisoners and former prisoners have long exercised that right, tracing the tradition from the colonial period through modern testimony before Congress. *Id.* at 5a–7a. Against that history, "[c]ompletely barring Hayes from any contact with Congress

for a year” was “inconsistent with that understanding of the right.” *Id.* at 5a.

The court then explained just how far the condition reached. Mr. Hayes couldn’t contact a member of Congress “to inquire about his veteran benefits, encourage action on a certain policy issue, request a copy of a report, or seek information about a candidate’s position.” *Id.* at 7a. He arguably couldn’t write a letter, post “an emoji response on social media,” or even sign up for a newsletter. *Id.* That, the court held, “squarely fits in the box of a ‘greater deprivation of liberty than was reasonably necessary.’” *Id.*

And the problem wasn’t hard to fix. The district court could have limited whom Mr. Hayes could contact, how he could contact them, or what he could say. Or it could have allowed legitimate contact with his probation officer’s approval. *Id.* at 7a–9a. Those narrower conditions, the court explained, “would still have served the purposes outlined in 18 U.S.C. § 3553(a).” *Id.* at 8a. Its bottom line was clear: “the district court’s one-year ban on any contact with Congress was in error.” *Id.* at 9a.

The refusal to correct it. Part II.B nevertheless held that the error

wasn't plain. This time, the court framed the question much more narrowly: could a district court bar "any and all contact with any and all members of Congress and their staffs" for a year after a defendant had threatened some members of Congress? *Id.* at 10a. Because no binding case had answered that precise question, the court held that the error wasn't obvious. Indeed, it said "[t]he only way" to put the issue "plainly beyond doubt" was "to have a binding case on point." *Id.*

The court recognized two decisions in which it had found plain error without an on-point case. In *United States v. Lantz*, 443 F. App'x 135 (6th Cir. 2011), it expressly recognized that no binding case controlled, yet still found plain error in a condition barring material that "alludes to" sexual activity because it could "encompass essentially all literature and media." Pet. App. 11a. And in *United States v. Borders*, 489 F. App'x 858 (6th Cir. 2012), it found plain error in a condition covering anything "sexually suggestive." *Id.*

The court distinguished those cases because their conditions were even further removed from legitimate sentencing purposes. The restrictions in *Lantz* and *Borders*, it said, "did not even arguably relate to victim protection" and were "so broad" that they "seem[ed] to have

little to do with any of the sentencing factors.” *Id.* at 12a. “Not so here.” *Id.* Here, the condition at least focused on “Hayes’s specific victim group: members of Congress.” *Id.* Because it “more directly related to the congressional victims of the underlying crimes,” the court held that the error wasn’t plain. *Id.* at 12a–13a.

Judge Murphy wouldn’t have reached the merits. He saw the condition as sitting “in between” the class-based no-contact orders the court has upheld and the sweeping internet and sexual-material conditions it has reversed. *Id.* at 14a. “One could reasonably conclude,” he wrote, that this case “resembles those upholding no-contact orders more.” *Id.* He therefore would have left both the statutory and First Amendment questions unresolved. *Id.*

REASONS FOR GRANTING THE WRIT

I. The decision below replaces Rule 52(b)’s clarity inquiry with a sliding scale of severity.

Rule 52(b)’s second prong asks a straightforward question: was the error clear under current law? *Olano*, 507 U.S. at 734. This Court has put the same point in slightly different terms. An error is plain when it is not “subject to reasonable dispute,” *Puckett*, 556 U.S. at 135, and when the law is “settled” at the time of appellate review, *Henderson v. United*

States, 568 U.S. 266, 269 (2013). The question is whether the law was clear. It isn't whether the violation was especially severe, how far the district court crossed the line, or whom the restriction happened to cover.

The decision below asks a different question. The court first held that the condition violated § 3583(d)(2). Not arguably. Not under one plausible reading. It held that the condition “squarely” imposed more liberty than reasonably necessary. Pet. App. 7a. But when the court turned to plain error, it focused on how badly the district court had crossed that line. It distinguished *Lantz* and *Borders* because the conditions there “did not even arguably relate to victim protection,” while this condition “more directly related to the congressional victims.” *Id.* at 12a.

That's a difference in degree, not clarity. Section 3583(d)(2) already asks whether a condition goes too far. Once the court answered that question and held that this one did, Rule 52(b) posed a separate question: was the governing law clear enough to make that error obvious? The court instead asked whether the condition went as far as the conditions in *Lantz* and *Borders*. That turns plainness into a sliding scale of severity: unless the district court crosses the line badly enough,

the error isn't clear.

The problem is easy to see here. A federal statute required the condition to take no more liberty than reasonably necessary. The court of appeals held that this condition took more. It identified several narrower restrictions that would have served the same purposes. Pet. App. 7a–9a. Yet the condition survives because the district court's overreach bore some relationship to the people Mr. Hayes had threatened. That may bear on how far the condition went. It doesn't tell us whether the rule it violated was clear.

The government may say the court was simply using *Lantz* and *Borders* to decide whether the error was reasonably disputable. But that just restates the problem. The breadth of the condition is the merits question under § 3583(d)(2). Using the same question again to decide plainness collapses error and plain error into one sliding scale: the more excessive the condition, the clearer the error; the less excessive, the less clear. That isn't *Olano*'s framework. A court first asks whether there was error. It then asks whether the law made that error clear.

Here, the court answered the first question yes. It answered the second no because, in its view, the district court hadn't crossed the line

badly enough. Rule 52(b) doesn't make clarity turn on degree.

II. The rule below is unworkable, as shown by its first application.

The decision below doesn't say that a tailoring violation can never be plain. Instead, it says the error becomes plain only when the condition is essentially untethered from a legitimate sentencing purpose—when it is “so broad that it seems to have little to do with any of the sentencing factors.” Pet. App. 12a (quoting *Lantz*, 443 F. App'x at 141).

This case shows the problem. To find the violation, the court focused on the excess. It asked what this categorical ban prohibited beyond the narrower restrictions that everyone agreed would have been lawful. The answer was ordinary civic activity: asking about veterans' benefits, requesting a report, subscribing to a newsletter, or posting an emoji. *Id.* at 7a. That excess is why the condition imposed more liberty than reasonably necessary. *Id.*

But when the court turned to plain error, it looked at the restriction more broadly. “The focus of the district court's prohibition,” it reasoned, “was Hayes's specific victim group: members of Congress.” *Id.* at 12a. So although the condition went too far, the court held that the error

wasn't plain because the restriction still had some connection to victim protection.

That change in focus matters. Look at the excess, and the court's own test points the other way. Barring Mr. Hayes from subscribing to a congressional newsletter doesn't protect a victim. Neither does barring him from requesting a government report or posting an emoji. Those restrictions have, in the court's own words, "little to do with any of the sentencing factors." *Id.* And a ban on posting an emoji is no more tied to those purposes than the restriction in *Lantz* on material that merely "alludes to" sexual activity—a condition this same court found plainly erroneous. *Compare id.* at 7a, *with id.* at 12a.

The statute gives a more concrete way to look at the problem. Section 3583(d)(2) asks whether a condition imposes a "greater deprivation of liberty than is reasonably necessary." In other words, what extra liberty does the condition take beyond what the sentencing purposes actually require? That is how the court below found the violation. And once that excess is identified, the next question should be simple: did settled law make that violation clear? Not: was the excess bad enough?

The rule below therefore leaves the outcome to depend on which frame a court picks. Measure the excess, and the error is plain. Measure the condition as a whole, and it isn't. The decision below did both without acknowledging the switch.

The government may say the veterans'-benefits, newsletter, and emoji examples merely showed that the condition was overbroad. But that's exactly the point. Those examples show what made the condition unlawful. They identify the liberty the condition took without enough justification. The court relied on that excess to find a violation. It can't then put the excess to one side and ask whether the condition, viewed more generally, still had enough connection to a sentencing purpose to avoid plain error.

And the problem isn't limited to supervised-release conditions. The decision below adopts a broader way of applying Rule 52(b). Whenever the law uses a standard instead of a bright-line rule, a court could find that the standard was violated but still ask whether it was violated badly enough to make the error plain. That is a different question. Plainness asks whether the law made the error clear, not how serious the court thinks the violation was. Once those two questions are

blurred, plain error becomes a matter of judicial judgment rather than legal clarity.

III. The question is recurring, important, and unlikely to reach this Court without review here.

A. Supervised-release conditions affect the vast majority of federal defendants sentenced to prison.

Supervised release is a routine part of federal sentencing. The Sentencing Commission reports that courts impose it in 83 percent of cases in which a man receives a prison sentence, 86 percent of cases involving a woman, and 99 percent of cases involving U.S. citizens. U.S. Sent’g Comm’n, *Quick Facts: Supervised Release* (FY 2025). At any given time, nearly 120,000 people are under federal post-conviction supervision. Many of them are subject to special conditions that control where they can go, whom they can contact, and what they can do.

And there’s good reason to think those conditions aren’t always tailored to the individual defendant. A recent study of 74 federal sentencings in one district found “nearly identical condition language for most defendants” across the most commonly imposed conditions. Arthur Liman Center for Public Interest Law, *Collecting Conditions: A Snapshot of Supervised Release in 2023 in the U.S. District Court for the*

District of Connecticut 12 (2025).

The Sentencing Commission has recognized the problem too. Effective November 1, 2025, it revised its guidance on discretionary conditions to provide that a court “should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted.” U.S.S.G. § 5D1.3(b)(1); *see* U.S.S.G. App. C, amend. 835 (eff. Nov. 1, 2025).

So this question isn’t unusual. Special conditions are imposed every day in federal court. Defendants often don’t object when they’re imposed, which means appellate review proceeds under Rule 52(b). And when those conditions aren’t properly tailored, the rule announced below determines whether the court of appeals can correct the error. The issue here is built into an ordinary and recurring part of federal sentencing.

B. Other circuits ask whether the excess was clearly unlawful, not whether it was severe enough.

Other circuits take a different approach. The Ninth and Eighth Circuits have corrected § 3583(d)(2) violations on plain-error review without demanding a case on the same facts, without asking whether the violation was especially severe, and without stepping back to judge the condition as a whole. They ask a simpler question: once the condition

takes more liberty than the statute allows, was that excess clearly unlawful?

United States v. Barsumyan, 517 F.3d 1154 (9th Cir. 2008), shows the difference. There, the district court imposed a categorical ban on computer access. The defendant hadn't objected. Even so, the Ninth Circuit held that the condition took more liberty than reasonably necessary and that the error was plain. *Id.* at 1160–61.

The court didn't demand a case with identical facts. Its closest precedent, *United States v. Sales*, 476 F.3d 732 (9th Cir. 2007), involved a narrower restriction imposed on a defendant who had actually used a computer to commit his offense. Barsumyan had not. But that difference made the answer clearer, not less clear. As the court explained, "*Sales* struck down a more defined condition on facts that would make a ban on computer access more appropriate than in this case." 517 F.3d at 1161. If the narrower restriction was unlawful in *Sales*, the broader restriction was plainly unlawful in *Barsumyan*.

The Ninth Circuit didn't ask whether the computer ban was untethered enough from sentencing purposes or whether it was as extreme as some earlier restriction. And it didn't look at the ban as a

whole and ask whether computers had some general connection to supervision. It focused on what made the condition excessive and asked whether existing law made that excess clearly unlawful.

The Eighth Circuit took the same basic approach in *United States v. Lewis*, 166 F.4th 713 (8th Cir. 2026). There, the district court barred the defendant from possessing or using “computers” as defined by 18 U.S.C. § 1030(e)(1)—a definition broad enough to reach alarm clocks, watches, and coffeemakers. *Id.* at 715. The court didn’t decide whether plain-error review applied because the condition failed “even under the more stringent plain error standard.” *Id.* at 714. Applying that standard, it held that the condition “result[ed] in a deprivation of liberty that is greater than reasonably necessary” and that the district court “plainly erred by imposing the special condition on this record.” *Id.* at 715.

Again, the court didn’t demand a prior decision condemning that condition on those facts. It asked whether the record could justify a restriction that broad. It could not. And because settled circuit law already treated computer use as “a basic liberty interest,” the resulting excess was plainly unlawful. *Id.* Notably, the condition already

allowed computer use with the probation office’s approval—the very kind of safeguard whose absence the court below emphasized here. *Id.* The Eighth Circuit vacated anyway.

That is the divergence. The Ninth and Eighth Circuits ask whether settled law made the unlawful excess clear, even when the violation wasn’t unusually severe. The decision below asks something different. It steps back, looks at the restriction more broadly, and asks whether it was disconnected enough from legitimate sentencing purposes to make the error plain. Pet. App. 12a. That added inquiry can change the answer.

C. The rule insulates clear violations from correction.

Section 3583(d)(2) sets a standard, not a list of forbidden conditions. It doesn’t say a court can never impose a particular restriction. It says a condition can’t take more liberty than reasonably necessary. So whether a condition violates the statute will often depend on how far it goes.

The rule below makes those violations especially hard to correct. Unless a binding case has already condemned a similar condition, the error generally won’t be plain unless the condition is almost completely

disconnected from any sentencing purpose. But supervised-release conditions come in countless forms. One case may involve computers, another internet use, another contact with public officials, and another travel, employment, treatment, association, or speech. Different conditions apply to different people for different reasons. So there often won't be an earlier case involving a close enough condition.

That creates a basic problem. A court can hold that § 3583(d)(2) was squarely violated and still deny relief because no earlier case involved a similar enough condition and the violation wasn't severe enough. The law can be clear. The overreach can be obvious. Yet the error still may not be "plain."

And ordinary litigation won't solve the problem. Defendants often don't object to special conditions at sentencing. So the cases that could establish that a particular kind of condition goes too far often arrive on appeal under plain-error review. There, the defendant can lose because no earlier case has already said enough. The court may clarify that one condition, but the next case will involve a somewhat different condition and face the same problem all over again.

Meanwhile, as Part III.B shows, other circuits take a different

approach. They ask whether settled law made the unlawful excess clear. They don't require the same kind of violation to have happened before, and they don't make relief depend on whether the violation was severe enough.

Rule 52(b) shouldn't work that way. A violation that is clear under settled law doesn't become unclear just because the condition looks different from the one in the last case. And a court shouldn't have to cross the line by a mile before the error counts as plain.

D. The rule leaves unlawful burdens on constitutional rights in place.

The stakes here are not abstract. The court below held that the condition burdened Mr. Hayes's right to petition Congress—an enumerated constitutional right with a history the court traced back to the colonial period. Pet. App. 5a–7a. It also held that the restriction went too far and violated § 3583(d)(2). Yet because the violation was not, in its view, severe enough, the condition remains.

That should matter to this Court. Rule 52(b) limits when courts may correct unpreserved errors. It doesn't ask how badly a defendant's rights were restricted. When a court of appeals has identified an unlawful restriction on the right to petition the national legislature,

whether that restriction was “bad enough” should not determine whether it stands.

IV. This case is an especially clean vehicle.

This case is an especially clean vehicle for three reasons.

First, the error is not in dispute. This is not the usual plain-error case, where the Court must first decide whether there was an error at all. The Sixth Circuit already held that the district court violated § 3583(d)(2), and the government has not sought review of that holding. The only issue decided against Mr. Hayes was prong two.

Second, the decision is published and fully reasoned. The court devoted four pages to explaining why it thought the error was not plain. It distinguished its own prior cases and made clear exactly what rule it was applying. There is no uncertainty about what the court held or why.

Third, there is no alternative ground supporting the judgment. Mr. Hayes disclaimed any procedural challenge below. Pet. App. 12a–13a n.4. So there is no separate procedural ruling that could sustain the judgment or make review unnecessary. The court did not reach prongs three and four. Those questions would remain for remand, but they do not complicate the issue presented here. The court itself identified four

narrower conditions the district court could have imposed, strongly supporting prejudice. And because the condition burdened Mr. Hayes's First Amendment right to petition the government, the nature of the error bears directly on whether it warrants correction.

CONCLUSION

For the above reasons, Mr. Hayes respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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