No. _____

IN THE

Supreme Court of the United States

SCOTT SPERLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 3553(k) of Title 18, United States Code, provides that "if a defendant required to register under the Sex Offender Registration and Notification Act commits any new criminal offense under Chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than one year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such a term shall not be less than five years."

Although the finding of a new offense requires a mandatory minimum sentence of five years and eliminates the applicable statutory maximums, it is made by the court, not a jury, and is by a preponderance of evidence, not proof beyond a reasonable doubt. The question presented is whether 18 U.S.C. § 3583(k) is unconstitutional in violation of the Fifth and Sixth Amendments as held by the Tenth Circuit in *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017).

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UNITED STATES OF AMERICA,
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Scott Sperling, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The memorandum disposition of the United States Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but is available online at 699 Fed.Appx. 636 (9th Cir. 2017). App., *infra*, 1a-3a.

JURISDICTION

The Ninth Circuit entered its memorandum decision and judgment on October 12, 2017. On December 28, 2017, the court denied Mr. Sperling's petition for rehearing and petition for rehearing *en banc*. App, *infra*, 4a. This petition is

timely filed pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3583(e)(3) provides:

> **(e)** Modification of Conditions or Revocation.—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> **(3)** revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;.

18 U.S.C. § 3383(k), provides:

> **(k)** Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be

> imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

STATEMENT

Following a contested evidentiary hearing in the United States District Court for the Central District of California, the court found true the four alleged violations of Mr. Sperling's supervised release. The court revoked his supervised release and sentenced Mr. Sperling to the mandatory minimum term of five years for the violation under 18 U.S.C. § 3583(k). The court of appeals affirmed the sentence and the judgment revoking supervised release. App., *infra*, 1a-3a.

1. Following his guilty plea to one count of possession of child pornography in violation of 18 U.S.C. § 2252A(5)(B), Mr. Sperling was sentenced in the United States District Court for the Central District of California on August 1, 2007 to 39 months in custody and ten years of supervised release. ER 39-45. Mr. Sperling was released from federal custody and began serving his term of supervised release on September 2, 2009.

2. The probation officer filed a petition and request for an arrest warrant on February 29, 2016 alleging three violations of Mr. Sperling's conditions of supervised release: 1) having been ordered not to not add, remove, upgrade, reinstall, repair, or otherwise modify the hardware or software on the computers without prior approval of the Probation Officer, on or around January 9, 2016, he modified his computer's software without prior approval; 2) having been ordered not

to commit another Federal, state or local crime, on or before February 9, 2016, he possessed 20 still images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B); and 3) having been ordered not to possess any materials, including pictures, photographs, books, writings, drawings, videos, or video games, depicting and/or describing child pornography, as defined in 18 U.S.C. § 2256(8), on or before February 9, 2016, he possessed 20 still images of child pornography. ER 46-47. The probation officer filed a subsequent petition alleging a fourth violation involving Mr. Sperling's possession of a tablet computer. ER 50-51.

At the evidentiary hearing on August 22, 2016, Mr. Sperling admitted the first allegation and contested the remaining three. After hearing testimony, the court issued a ruling finding that the government had established the violations alleged in grounds two, three, and four. ER 29-30.

3. The district court revoked Mr. Sperling's supervised release. The court found that the sustained allegations were grade B violations, and Mr. Sperling was in criminal history category I. The applicable advisory guideline range established by U.S.S.G. § 7B1.4(a) was four to ten months. ER 34. The district court, however, proceeded under the alternative schema called for by 18 U.S.C. § 3583(k) instead of 18 U.S.C. § 3583(e), the general statute governing violations of supervised-release conditions.

Under 3583(e), the court has the option of extending or modifying the term or conditions or revoking supervised release. If the court determines revocation is appropriate, any further imprisonment following a revocation cannot exceed two

years in prison where the original offense constituted a class C felony; there is no minimum term. 18 U.S.C. § 3583(k), added by the Adam Walsh Act of 2006, radically deviates from this procedure. It totally the court's discretion where the alleged violation charges the commission of an offense under Chapter 109A (sexual abuse), 110 (sexual exploitation of children), or 117 (transportation for illegal sexual activity) or sections 1201 or 1501 and the person is under a sex offender registration requirement. The statute makes revocation mandatory, eliminates the statutory cap on imprisonment, permitting a potential term of life imprisonment for the revocation, and requires a mandatory prison term of "not less than five years." 18 U.S.C. § 3583(k). Defense counsel objected that a five-year mandatory minimum sentence could not be predicated on findings made by a preponderance of evidence. ER 30. The court sentenced Mr. Sperling to five years for the violation of supervised release. ER 2, 35.

4. Mr. Sperling appealed the revocation and sentence to the Ninth Circuit Court of Appeals. He challenged the sufficiency of the evidence supporting the revocation and the constitutionality of sentence. Specifically, he argued that the mandatory-minimum sentence of five years required by 18 U.S.C. § 3583(k), based on facts neither found by a jury beyond a reasonable doubt nor admitted by him, violated the Sixth Amendment under *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013).

The court of appeals affirmed the judgment and sentence. The court found petitioner had failed to raise the constitutional challenge in the district court and

applied plain-error review. The court held that because the precedent of this Court and the Ninth Circuit Court of Appeals held that the Sixth Amendment does not apply to revocation proceedings, the district court did not commit a clear or obvious error. App., *infra*, 2a-3a.

Mr. Sperling petitioned for rehearing and rehearing en banc, noting the conflict between this case and the Tenth Circuit's decision in *United States v. Haymond*, 869 F.3d 1153 (10th Cir. 2017) which found 3583(k)'s mandatory minimum penalties unconstitutional. The Ninth Circuit denied the petition for rehearing. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

Deviating from the historic practice granting courts wide discretion upon finding violations of parole and supervised release, 18 U.S.C. § 3583(k) requires the court to impose a mandatory minimum prison term of five years where the court finds the defendant has violated a condition of supervised release by committing new criminal conduct specified in the statute. Six months ago, the Tenth Circuit held 3583(k) unconstitutional:

> We conclude that 18 U.S.C. § 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted, and punished.

United States v. Haymond, 869 F.3d 1153, 1162 (10th Cir. 2017). In this case, the Ninth Circuit found 3583(k) was not obviously unconstitutional, because the Sixth Amendment does not apply to revocation proceedings, affirming the mandatory five-year prison term for petitioner and contributing to the clear conflict between the federal courts on the constitutionality of 3583(k). Review by this Court is required to resolve the conflict and address the important and recurring issue of whether the mandatory penalty provisions of 3583(k) are constitutional.

A. The Ninth Circuit's decision, finding no obvious constitutional infirmity with 18 U.S.C. § 3583(k), conflicts with the Tenth Circuit's decision in *Haymond*, holding the mandatory penalty provisions unconstitutional, on an important and recurring issue.

This Court should grant review because the constitutionality and enforceability of the provisions of 18 U.S.C. § 3583(k), requiring a mandatory minimum five-year prison term if the court finds the defendant violated the terms of supervised release by committing one of the criminal offenses specified in the statute, is unsettled in the circuits. Here, relying on plain-error review, the Ninth Circuit found that 3583(k) was not obviously unconstitutional and affirmed the mandatory five-year minimum sentence 3583(k) required. App., *infra*, 2a-3a. The Ninth Circuit's decision is directly contrary to the Tenth Circuit's holding that mandatory penalty provisions of 3583(k) are "unconstitutional and unenforceable." *Haymond*, 869 F.3d at 1168. There is now a clear conflict between the Circuits on the constitutionality of 3583(k). The Ninth Circuit has enforced the mandatory five-year sentence against petitioner; the same provision is unenforceable in the 10th Circuit.

The constitutionality of 3583(k) is an important and recurring issue, one that was unsettled by *Haymond*. Where the constitutionality of a federal statute has been called into question, it invokes "the gravest and most delicate duty that this Court is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)). This Court's review is necessary to resolve the constitutionality of 3583(k) and provide guidance

to the district courts as to whether the mandatory five-year penalty provision may be enforced. *See, e.g., United States v. Carpenter*, No. 09-36, 2017 WL 6032985 (M.D. Fla. Dec. 12, 2017) (order denying motion to strike unconstitutional portion of 18 U.S.C. § 3583(k)). Review is necessary to ensure the uniform application of federal criminal statutes. *See*, *e.g.*, *Bailey v. United States*, 514 U.S. 137, 142 (1995). The necessity accelerates where a circuit court has held a statute unconstitutional. *See*, *e.g.*, *United States v. Alvarez*, 587 U.S. 709 (2012) (certiorari granted where circuit court found 18 U.S.C. § 704 unconstitutional).

B. The Ninth Circuit erroneously found 3583(k) was not obviously unconstitutional.

Section 3583(k) is a radical departure from the procedures, established by 18 U.S.C. § 3583(e), applicable to virtually all other alleged violations of supervised release. The fundamental differences, ignored by the Ninth Circuit, make the statute unconstitutional. The differences transform the statute from one governing supervised release into a penal statute, constituting punishment for new criminal conduct. They include:

- Mandatory revocation upon a finding of a violation — 3583(e) vests the district court with discretion to extend, terminate, modify or enlarge the conditions of supervised release or revoke. 3583(k) strips the court of discretion and requires revocation.[1]

[1] Only one other statute, 18 U.S.C. § 3583(g) provides for mandatory revocation. 3583(g) requires revocation where the violation involves possession of a controlled substance, possession of a firearm, refusal to comply with drug testing conditions, or more than three positive tests for controlled substances in one year.

- Mandatory minimum term of imprisonment — under 3583(e), if the court determines reimprisonment is warranted, the court may choose any term it deems appropriate within the statutory limits. 3583(k) requires a term of at least five years.
- Substantial increase in maximum term of imprisonment — 3583(e)(3) limits the maximum term of imprisonment based on the seriousness of the original offense. If the original offense carried a sentence of less than life imprisonment, the new term can be no more than three years for a class B felony and two years for a class C or D felony. 3583(k) eliminates those limits and allows reimprisonment for the entire term of supervised release, potentially life.
- Revocation and enhanced punishment triggered by court's finding that a defendant, whose original offense required registration under the Sex Offender Registration and Notification Act, committed a specified new offense.

3583(k)'s divestment of the court's traditional discretion in handling violations of supervised release and parole and imposition of a mandatory minimum five-year prison sentence upon a finding of new criminal conduct make 3583(k) a penal provision instead of one governing violations and conditions of supervised release. And defendants are entitled to the same constitutional

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Unlike 3583(k), however, 3583(g) does not require a mandatory minimum prison term and does not eliminate the statutory limits on the permissible term of reimprisonment.

protections required when the government seeks to imprison a person for alleged criminal conduct.

The district court's finding, based upon a standard less than proof beyond a reasonable doubt, that petitioner had possessed child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) raised the minimum sentence from zero days to five years and quintupled the statutory maximum from two years to ten years. In *Alleyne v. United States*, 570 U.S. 99 (2013), this Court held the Sixth Amendment requires any finding triggering a higher mandatory minimum sentence be submitted to a jury and proved beyond a reasonable. *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000) established the same constitutional requirement for any finding raising the statutory maximum penalty. 3583(k) does both; it violates the Sixth Amendment. *Haymond*, 869 F.3d at 1165.

The court of appeals pointed to the body of case law, including *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), holding that because revocation proceedings are not part of a criminal prosecution and relate back to the original offense, they do not implicate the Sixth Amendment. App., *infra*, 2a-3a. But 3583(k) operates as a new criminal prosecution. Its enhanced statutory minimum and maximums are predicated on the court's finding that the defendant committed one of the offenses specified in the statute. Unlike other revocation proceedings, the fact of the *new* offense establishes the increased minimum and maximum punishments.

Thus, if the defendant commits any violation, other than one of the offenses specified in 3583(k), the maximum term of imprisonment is limited by the original offense of conviction. It is only 3583(k) that separates the minimum and maximum terms from the original offense of conviction. By operation, it imposes mandatory punishment for a new offense and is effectively a new criminal prosecution—but one without the constitutional protections of a jury and proof beyond a reasonable doubt. The increase in the available minimum and maximum term of imprisonment violates the constitution.

3583(k) also strips the court of all discretion. It requires revocation and a mandatory minimum sentence of 5 years, irrespective of any of the other considerations, including the history and characteristics of the defendant, that traditionally guide the court's discretion in the disposition of parole and supervised release violations. The discretion and flexibility eliminated by 3583(k) were the very factors relied upon by this Court to find Sixth Amendment protections unnecessary in revocation proceedings. *Morrisey*, 408 U.S. at 483-84. Instead of discretion and flexibility, 3583(k) mandates revocation and reimprisonment for no less than five years, irrespective of any other factors. That is a very different scheme than the one considered in *Morrisey*; it requires full Sixth Amendment protections for a proceeding that is effectively a new criminal prosecution. The court of appeals erred in affirming Mr. Sperling's unconstitutional sentence.

C. The Court should grant the petition pending its disposition of the government's potential petition for writ of certiorari in *Haymond*.

Haymond held 3583(k) unconstitutional. The Tenth Circuit denied the Government's petition for panel rehearing and rehearing en banc on January 16, 2018, making a potential petition by the Government for a writ of certiorari due by April 16, 2018. Should the Court decide petitioner's case is not suited for plenary review, petitioner requests the Court grant and hold the petition pending the disposition of *Haymond*.

The court of appeals relied on plain-error review to affirm petitioner's sentence, finding no plain error because this Court has not spoken on the issue. App., *infra*, 3a. Of course, the Court may now speak on the issue in *Haymond*, making the error plain if the Court finds 3583(k) unconstitutional. *Henderson v. United States*, 568 U.S. 266, 277 (2013) (error must be plain at time of review for all cases not yet final on direct appeal). The error is correctable on appeal where there is a reasonable probability that the defendant would have received a lesser sentence absent the error. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016). Here there is certainty. Absent the application of 3583(k), the maximum sentence for petitioner was two years; he was sentenced to five.

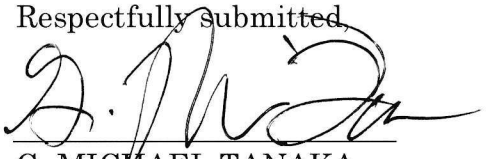
Mr. Sperling is identically situated to Mr. Haymond. Both were subject to the five-year mandatory minimum sentence upon the court's finding that they committed a new offense of possession of child pornography, and both were sentenced to five years. Both appealed, but the Tenth Circuit found 3583(k)

unconstitutional and vacated Mr. Haymond's sentence. The Ninth Circuit found no obvious constitutional infirmity and affirmed Mr. Sperling's sentence. The disparate treatment under the same federal law is repugnant to fundamental notions of fairness. Just as there "can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), justice cannot vary based on the venue of the federal court. Review is required.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,



DATED: March 28, 2018

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APPENDIX

FILED

OCT 17 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT ALLEN SPERLING, Defendant-Appellant.	No. 16-50342 D.C. No. 2:06-cr-00911-ODW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted October 5, 2017
Pasadena, California

Before: RAWLINSON and N.R. SMITH, Circuit Judges, and KORMAN,** District Judge.

Scott Allen Sperling appeals the district court's revocation of his supervised release and imposition of five years additional imprisonment under 18 U.S.C. § 3583(k), after finding Sperling had violated the terms of his supervised release

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

by possessing or accessing with intent to view images of child pornography. We have jurisdiction under 18 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm.

1. The district court did not clearly err in its factual findings, *see United States v. Lomayaoma*, 86 F.3d 142, 146 (9th Cir. 1996), nor abuse its discretion in revoking Sperling's supervised release, *see United States v. Thum*, 749 F.3d 1143, 1145 (9th Cir. 2014). The Government met its burden to prove Sperling possessed or accessed with intent to view images of child pornography by a preponderance of the evidence. *Id.* at 1145-46 (quoting *United States v. King*, 608 F.3d 1122, 1129 (9th Cir. 2010)). As such, the district court's conclusion was sufficient; not "illogical, implausible, or without support in the record." *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010).

2. Plain error review applies to Sperling's claim that his sentence violated his Sixth Amendment rights, because he failed to raise the issue below. *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012). Under plain error review, 18 U.S.C. § 3583(k) is not obviously unconstitutional. Supreme Court precedent and this Court's precedent hold that the Sixth Amendment does not apply to

revocation proceedings.[1] *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) ("[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); *Johnson v. United States*, 529 U.S. 694, 701 (2000) ("[P]ostrevocation penalties [are attributed] to the original conviction."); *Spangle*, 626 F.3d at 494 (citing *Brewer*, 408 U.S. at 480) ("[T]he Sixth Amendment has no application to supervised release proceedings."); *United States v. Gavilanes-Ocaranza*, 772 F.3d 624, 628 (9th Cir. 2014) ("We have held that the supervised release system under 18 U.S.C. § 3583, including revocation of that release and imposition of additional prison time as a result of a violation of a term of the release, does not violate a defendant's right to trial by jury."). Thus, the district court did not commit a clear or obvious legal error in sentencing Sperling to five years' imprisonment for violating the terms of his supervised release.

AFFIRMED.

[1] There is no plain error where this court and the Supreme Court have not spoken on an issue and the authority in other circuits is split, *United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996), much less where there was no contrary authority at the time of sentencing.

FILED

DEC 28 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SCOTT ALLEN SPERLING, Defendant-Appellant.	No. 16-50342 D.C. No. 2:06-cr-00911-ODW-1 Central District of California, Los Angeles ORDER

Before: RAWLINSON and N.R. SMITH, Circuit Judges, and KORMAN,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Rawlinson and N.R. Smith have voted to deny the petition for panel rehearing en banc, and Judge Korman has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.