No. _____

IN THE

Supreme Court of the United States

VALERIE FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. **By Disregarding the Government's Failure to Brief a Waiver Argument, Did the Seventh Circuit Errantly Look Past the Government's Waiver of Waiver and Disallow Relief Even for a Supervised Release Condition the Government Admitted was Vague?**

II. **By Using Ms. Flores's Silence at Sentencing to Find She Waived An Appellate Challenge to a Supervised Release Condition, Did the Seventh Circuit Errantly Apply Waiver and Essentially Eliminate Plain Error Review of Supervised Release Conditions?**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

VALERIE FLORES,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, VALERIE FLORES, respectfully prays that a writ of *certiorari* issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on July 3, 2019 that affirmed the denial of Ms. Flores's criminal appeal.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 929 F.3d 443. (Pet. App. 1a-14a)

JURISDICTION

The Seventh Circuit court entered its judgment on July 3, 2019. (Pet. App. 15a). That court had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 3742. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

This petition seeks review of two waiver determinations: (1) whether the Seventh Circuit could disregard the Government's waiver of a waiver argument; and (2) whether the Seventh Circuit correctly found a defendant waives challenges to supervised release conditions imposed at sentencing when the defendant does not object. The circuit courts are split on when the government has waived a waiver. With the issuance of *Flores*, there is now a circuit split as to the circumstances that waive sentencing challenges on appeal. No matter how unlawful a supervised release condition may be (due to vagueness, improper

delegation of sentencing power to a probation officer, etc.), the Seventh Circuit's approach in *Flores* ends plain error review.

1. Ms. Flores pled guilty to possessing marijuana with intent to distribute, a violation of 21 U.S.C. § 841(a). *Flores*, 929 F.3d 445.

2. A U.S. probation officer prepared a presentence investigation report (PSR) and a supervision plan which Mr. Flores received prior to sentencing. As part of the supervision plan, the probation officer proposed a supervised release condition which said:

> • Defendant shall maintain lawful employment, seek lawful employment, or enroll and participate in a course of study or vocational training that will equip defendant for suitable employment, unless excused by the probation officer or the Court.

Id. at 446.

3. Ms. Flores objected to a Guideline enhancement, but she did not object to the proposed condition following her review of the PSR. *Id.* At the sentencing hearing the district court determined her objection had no impact on the advisory Guideline range. *Id.*

4. The district court sentenced Ms. Flores to 10-years' imprisonment and 8-years' supervised release. *Id.* Ms. Flores declined to have the judge orally pronounce the supervised release conditions; so, the district court summarily adopted the supervised release conditions contained in the PSR. *Id.*

5. Ms. Flores appealed to the Seventh Circuit, arguing that supervised release conditions #3 was unlawful because the term "suitable" was vague. (App.R.9).

6. Although the Government never argued waiver, *Flores* concluded that Ms. Flores waived her appellate challenge. 929 F.3d at 445. The Seventh Circuit said:

> We will find waiver, as we do here, when the defendant has notice of the proposed conditions, a meaningful opportunity to object, and she asserts (through counsel or directly) that she does not object to the proposed conditions, waives reading of those conditions and their justifications, challenges certain conditions but not the one(s) challenged on appeal, or otherwise evidences an intentional or strategic decision not to object.

Id. at 450 (footnote omitted).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve two waiver issues. First, the majority of circuits hold that when the government fails to assert a waiver argument as part of its appellate brief, the government waives any waiver argument. *Flores* contributes to a circuit split by disregarding the Government's failure to assert waiver. Second, while waiver is supposed to be liberally construed in a defendant's favor, *Flores* aggressively construes waiver against a defendant by treating silence as proof that a defendant has waived a sentencing issue. That approach not only conflicts with this Court's waiver cases and prior

Seventh Circuit precedent, it creates a circuit split. This case presents an ideal vehicle for resolving the foregoing issues.[1]

I. By Disregarding the Government's Failure to Brief a Waiver Argument, the Seventh Circuit Errantly Looked Past the Government's Waiver of Waiver and Disallowed Relief Even for a Supervised Release Condition the Government Admitted was Vague.

1. Waiver is the intentional relinquishment of a known right. *See United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006). By contrast, forfeiture "occurs when a defendant accidentally or negligently fails to assert his or her rights in a timely fashion." *Id.* The difference between the two things is critical since "[w]aiver of a right extinguishes any error and precludes appellate review, whereas forfeiture of a right is reviewed for plain error." *United States v. Brodie*, 507 F.3d 527, 530 (7th Cir. 2007). The party seeking the benefit of a waiver has the burden of establishing a valid waiver. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 404 (1977).

2. The Government never argued that Ms. Flores waived her supervised release challenge. *See Flores*, 929 F.3d at 451. Instead, it argued that her supervised release challenge failed under plain error review. *Id*.

3. Despite the Government's failure to argue waiver or present any facts or legal supporting waiver, the Seventh Circuit declined to enforce the

[1] These issues have also been presented in a pending *certiorari* petition. *See Tjader v. United States of America*, Case No. 19-5962 (2019).

Government's waiver. *Id.* at 451.

4. That was an error. Since the Government never offered facts or legal to establish a valid waiver, it could not have met its burden of proof. *See, generally, Brewer*, 430 U.S. at 404. That alone should have caused the Seventh Circuit to steer clear of finding that Ms. Flores waived her challenge. But rather than allowing the parties to advocate, the Seventh Circuit championed a position the Government never even took and it led to a denial of Ms. Flores's requested relief. That cuts against basic principles of the adversary system and bleeds into an inquisitorial system that has no place in this country's courthouses. *See McNeil v. Wisconsin*, 501 U.S. 171, 181 n. 2 (1991) ("What makes a system adversarial rather than inquisitorial is … the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.").

5. Additionally, *Flores* is contrary to Seventh Circuit precedent that holds the government waives waiver by not asserting a waiver claim. *See United States v. Adigun*, 703 F.3d 104 (7th Cir. 2012) ("An opposing party can 'waive waiver' if it fails to assert the preclusive effect of the waiver before the appellate court.")(citations omitted). While *Flores* relied on *United States v. Combs*, 657 F.3d 565, 571 (7th Cir. 2011) (*per curiam*) and *United States v. Schmidt*, 47 F.3d 188, 190

(7th Cir. 1995) to avoid the Government's waiver of waiver, those cases are inapposite.

6. *Combs* said:

> If we accept the government's position that its oversight or acquiescence can permit a defendant to challenge an adverse ruling on a pretrial motion, then we must also countenance that the government can usurp the district court's independent right to accept or reject a conditional plea. In effect the government would read out of Rule 11(a)(2) its requirement that a plea agreement allowing for a conditional plea have the district court's blessing.

657 F.3d at 571.

Unlike *Combs*, Ms. Flores's case does not involve a governmental oversight or acquiescence that in any way reads a requirement out of the Federal Rules of Criminal Procedure.

7. In *Schmidt*, a defendant signed a plea agreement that included an appeal waiver, but the government did not assert the waiver as grounds to terminate the appeal. 47 F.3d 190. Schmidt said that "[i]n deciding whether to determine the merits of the Schmidts' arguments or overlook the government's failure to argue waiver, one controlling consideration is whether the waivers were 'certain or debatable.'" *Id.* (quoting *United States v. Giovannetti*, 928 F.2d 227 (7th Cir. 1991) (*per curiam*)). *Schmidt* focused its attention on the circumstances surrounding the defendants' execution of their plea agreements. *Id.* at 191.

Schmidt noted that each agreement contained an appeal waiver, the defendants' plea colloquies statements clearly indicated they waived appeal, and the defendants' education helped establish the waivers were knowing. *Id.* By improperly looking to a defendant's actions to determine if the government waived, *Schmidt* went off track. Waiver of a right (such as the right to enforce an appeal waiver) is determined by the actions of the party who engages in the alleged waiver, not the party who benefits from it. Even if that wasn't so, Ms. Flores had no appeal waiver and she did not make any of the explicit statements the defendants made in *Schmidt* that were key to *Schmidt's* waiver determination.

8. Also, a minority of circuits recognize the government's waiver of waiver only when the government, despite the availability of a waiver defense, specifically agrees to an issue's consideration. *See United States v. Arteaga*, 102 Fed.App'x. 731, *1 (1st Cir. 2004); *United States v. Metzger*, 3 F.3d 756, 757–58 (4th Cir.1993). However, a majority of circuits are consistent with *Adigun's* view that the government waives waiver by not asserting a waiver claim on appeal. *See United States v. Beckham*, 968 F.2d 47, 54 n.5 (D.C.Cir. 1992) (noting government waiver of waiver issue because of government's failure to brief the issue); *United States v. Doe*, 239 F.3d 473, 474-75 (2d Cir. 2001) (when defendant filed an appeal despite a written appeal waiver in his plea agreement and the government did not assert waiver in its brief, the appeal wasn't barred because "it is well

established that as a general matter 'an argument not raised on appeal is deemed abandoned,' and that 'we will not ordinarily consider such an argument unless manifest injustice otherwise would result.'") (quoting *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (*per curiam*) (internal quotation marks omitted); *United States v. Bonilla–Mungia*, 422 F.3d 316, 319 (5th Cir. 2005) (the government waives a waiver argument when it raises the issue in supplemental briefing); *United States v. Menesses*, 962 F.2d 420, 425-26 (5th Cir. 1992) (government waived its waiver argument when that argument was not made in briefs, but only at oral argument); *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir.) (government waived waiver argument by proceeding on remand without asserting the issue had been waived by not raising it on appeal), *cert. denied*, ––– U.S. ––––, 130 S.Ct. 776, 175 L.Ed.2d 540 (2009); *United States v. Doe*, 53 F.3d 1081, 1082–83 (9th Cir. 1995) ("This court will not address waiver if not raised by the opposing party.") (quoting *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995)); *see also United States v. Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir.), *amended on den. reh'g en banc*, 798 F.2d 1250 (1986) ([b]ecause the government failed to raise [a waiver] question in its brief or at oral argument, we decline to address it."); *United States v. Reider*, 103 F.3d 99, 103 n.1 (10th Cir. 1996) (where defendant admitted supervised release violation in district court and expressly waived the argument that his supervised release had already expired, continued assertion on appeal

might have been waived but for the government's failure to raise a waiver argument; so, the Tenth Circuit didn't consider the issue) (citing *United States v. Archambault*, 62 F.3d 995, 998 (7th Cir. 1995) ("because the government does not argue that [defendant] waived this challenge, it has waived [defendant's] waiver.") (additional citation omitted); *United States v. Lewis*, 928 F.3d 980, 987 (11th Cir. 2019) (rejecting defendant's claim that the government waived waiver, but recognizing that the government can waive waiver either implicitly or explicitly) (citing *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002) and saying that *Garcia-Lopez* "merely states the obvious: anything that can be waived implicitly can also be waived explicitly").[2]

9. Extraordinarily, *Flores* relied on the Government's statements at oral argument to discern a basis for not enforcing a waiver against the Government. 929 F.3d at 450-51. That is not contrary only to the majority circuit court precedent cited above, but it is especially unfair here given *Flores's* enormous effort to apply waiver against her in every way the opinion could.

II. By Using Ms. Flores's Silence at Sentencing to Find She Waived Appellate Challenges to Supervised Release Conditions, the Seventh Circuit Errantly Applied Waiver and Essentially Eliminated Plain Error Review of Supervised Release Conditions.

[2] Mr. Flores was unable to find authority from the Third and Eighth Circuits that addresses the issue.

1. The effectiveness of waiver of a federal constitutional right in a proceeding is governed by federal standards. *See Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934 (1965). Typically, the waiver of virtually any right affecting individual liberty must be knowingly and voluntarily made. *See, e.g., Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (discussing waiver of rights incident to guilty plea); *Adams v. United States*, 317 U.S. 269, 275, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (discussing waiver of right to jury trial); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (discussing waiver of right to counsel). A person has a right to be sentenced to supervised release conditions that conform to 18 U.S.C. § 3583(d)'s statutory requirements. Relatedly, a person has the right to have conditions that are as few in number as 18 U.S.C. § 3553(a)(1)'s parsimony principle allows and clear enough to satisfy the Fifth Amendment's due process prohibition on vagueness.[3] "The determination of whether there has been an

[3] Defendants are regularly given supervised release, even when it's not statutorily required. *See United States v. Thompson*, 777 F.3d 368, 372 (2015) (citing United States Sentencing Commission, Federal Offenders Sentenced to Supervised Release 3 (July 2010), www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/2_Federal_Offenders_Sentenced_to_Supervised_Release.pdf). Under supervision, defendants live with parole-like strictures, but are not afforded parole's central benefit of being out of prison. Though supervision is meant to be a period when a defendant transitions back into society, and one would expect that conditions should not go unchanged for the years (sometimes decades) of supervised release, a defendant who signs a plea agreement that waives the ability to challenge a sentence also waives the ability to seek modification under 18 U.S.C. § 3583(e)(2). *See United States v. Miller*, 641 Fed.App'x. 563, 566 (7th Cir. 2016). So, even though a defendant's need for

intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case[.]" *See Zerbst* , 304 U.S. at 464 (*overruled in part on other grounds by Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)). Regardless of what a case's circumstances might be, it is infinitely more difficult to find a valid waiver based on a silent record. *Cf. Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (refusing to infer defendant's waiver in the guilty plea context). Also, because waiver principle must be "construed liberally in favor of the defendant", courts are supposed to be "cautious about interpreting a defendant's behavior as intentional relinquishment". *United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018).

2. *Flores* found that a defendant waives appellate challenges to supervised release conditions if: the defendant received advance notice of supervised release conditions; the defendant had an opportunity to object; the defendant objected to things other than the conditions challenged on appeal; and the appellate court can infer a strategic reason for the defendant's lack of

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supervision may diminish or cease due to a change of circumstances, a defendant who has waived a challenge to his sentence can never seek a modification. By comparison, does a parolee or a probationer who serves time after entering a plea agreement forgo the ability to modify conditions that are no longer needed or ill-suited? Given that one-third of defendants will be re-incarcerated by judges, often for a technical violation of a supervised release condition and the average sentence is 11 months' imprisonment (*see* Christine S. Scott–Hayward, "Shadow Sentencing: The Imposition of Federal Supervised Release," 18 Berkeley J.Crim. L. 180, 182 (2013)), ensuring that valid conditions get imposed is a necessary part of federal criminal cases.

objection to the supervised release conditions. 929 F.3d at 485.

3. *Flores's* fourth factor is alarmingly defective. Rather than construe waiver liberally in favor of a defendant and be cautious about interpreting her behavior (*e.g.*, the lack of an objection to the conditions he appeals) as an intentional relinquishment per *Barnes*, 883 F.3d at 957, *Flores* does exactly what *Barnes* says to avoid. *Flores* aggressively construes waiver in the Government's favor and incautiously conceives strategic reasons to find an intentional relinquishment of the right to live with the fewest and clearest conditions possible. *Flores* combines facts that are common to virtually every case (notice, opportunity to object, objections to some things but not others), and then concludes that another common occurrence (a lack of objection to a supervised release condition) signifies the defendant's consent to the condition. *Flores* presumes the lack of objection to a condition (regardless of the condition's vagueness, its lack of record support, etc.) is strategic and purposeful, but for a condition that is vague, overbroad or inapplicable, the far greater likelihood is that a defendant simply didn't object because the defendant was unaware of the condition's flaw.

4. Supervised release conditions imposed pursuant to 18 U.S.C. § 3583(d) have the force of law and more in that they allow for reimprisonment under § 3583(e)(3) and Federal Rule of Criminal Procedure 32.1' s summary

proceedings. "In our constitutional order, a vague law is no law at all." *Davis v. United States*, 139 S.Ct. 2319, 2323 (2019). The vagueness of a condition should render it infirm on appellate review unless there's definitely a waiver. *Flores* weaves common sentencing facts together and infers a lack of objection as proof of waiver, but the few gossamer threads in *Flores* merely dress up a forfeiture and call it waiver. It is a result-driven effort that contorts waiver law.

5. With no record as to why Ms. Flores didn't object to the later challenged condition, which is vague her view infirm and may result in reimprisonment for a § 3583(e)(3) violation during the eight years she is under supervision, *Flores* should not have interpreted silence as assent.[4] Finding

[4] Perhaps more than anything, *Flores* is the result of fatigue. In years past, the Seventh Circuit laudably addressed a raft of defective supervised release condition. *See, e.g., United States v. Thompson*, 777 F.3d 368 (2015); *United States v. Kappes*, 782 F.3d 828 (2015). Having repeatedly spoken of the need to comply with due process as well as 18 U.S.C. §§ 3553(c) and 3583(d) only to have district courts continue to impose invalid conditions must be frustrating. However, the solution isn't to reinvent waiver law. District courts can choose to impose none of the discretionary conditions at issue here. *See* § 3583(d). When they elect to impose a condition, they have a duty to ensure its validity as part of the overarching duty to impose a lawful sentence. A defendant seems least likely to recognize a defective condition. Although *Flores* spoke of how a defendant can seek to modify a condition via 18 U.S.C. § 3583(e)(2), unsophisticated defendants may not know of that option. And since the difficulties of a § 3583(e)(2) modification are well known, *United States v. Johnson*, 765 F.3d 702, 711 (7th Cir. 2014) , rejected the notion that appellate challenges should be batted back in favor of the modification route. Moreover, a defendant who gets revoked for violating a vague condition, and appeals that revocation, will fail. Seventh Circuit precedent holds that a vague condition (whose vagueness the government conceded) must be corrected via a modification and cannot be challenged on appeal. *See United States v. Ellis*, 735 Fed.App'x. 212, 213-14 (7th Cir. 2018) (upholding revocation and one year sentence for defendant who "associate[d]" with another felon).

waiver is supposed to be difficult when a record is silent. *See Boykin*, 395 U.S. at 243. *Flores* turns that principle on its head and uses silence as a cornerstone of its waiver determination. *Flores* is inconsistent with *Boykin*.

6. Moreover, *Flores* creates a circuit split. In *United States v. Barela*, 797 F.3d 1186, 1188 (10th Cir. 2015) (Hartz, Gorsuch, Moritz, J.), a defendant challenged a sentencing enhancement on appeal that he preserved below and he also challenged special conditions of supervised release for the first time on appeal. Although the defendant received notice of the conditions prior to sentencing and objected to an enhancement without also objecting to the supervised release condition he challenged on appeal, *Barela* reviewed the special conditions under plain error. *Id.* at 1192. *Barela* determined the defendant could not show the error warranted relief under plain error review. *Id.* at 1192-94. Importantly, in engaging in plain error review, *Barela* did not find that there was a waiver which precluded all review of the conditions. *Id.*

7. Under broadly identical operative facts, *Flores* concludes there is waiver where *Barela* found a basis for plain error review. That means that while defendants in the Tenth Circuit who raise challenges for the first time on appeal at least have their claims heard under plain error review, similarly situated defendants in the Seventh Circuit have their challenges muted per *Flores*. Defendants should not be treated so unequally by federal appellate courts.

8. This case is an ideal vehicle for resolving whether an appellate court can overlook the government's waiver of waiver. Furthermore, it is an ideal vehicle for resolving whether a defendant's silence at sentencing as to supervised release conditions can properly be deemed a waiver of challenges to the conditions. Since *Barela* found that conditions that were uncontested at sentencing are reviewed for plain error, *Flores* represents a circuit split in its finding that uncontested conditions are waived and cannot be reviewed. The issues were squarely presented to the Seventh Circuit and *Flores* resolved them. However, *Flores* is contrary to precedent on these important points.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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