No. 20-5746

IN THE
Supreme Court of the United States

BRANDON THOMAS FINNESY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government acknowledges that the Circuits are split over whether 28 U.S.C. § 636(b)(3)'s additional duties clause permits a federal magistrate judge to accept a felony guilty plea with the parties' consent. BIO 7, 16-17. The government makes no serious argument that the lower courts will resolve this conflict on their own. Nor could it. Pet. 10-11. The conflict is neither "shallow" nor "undeveloped." BIO 7, 20. It is well-established and entrenched. Pet. App. 9-13. To reiterate a phrase from Chief Judge Tymkovich: "Regardless of how we, as a circuit, continue to handle these matters, the Supreme Court will have the final word." *United States v. Garcia*, 936 F.3d 1128, 1142 (10th Cir. 2019). There is no reason to delay. The final word on this critically important question must come from this Court, and this case is an excellent vehicle to put the conflict to rest. Whether the Tenth Circuit erred or not (we think it obviously did, Pet. App. 17-20), the practical consequences of this lingering Circuit split cry out for its resolution by this Court. Pet. 13-17.

I. The Circuit split is not "shallow" or "undeveloped."

There is no dispute that a federal magistrate judge may conduct a felony plea *colloquy* with the parties' consent. But the Circuits are split 6-3 over whether a magistrate judge has the statutory authority under § 636(b)(3) to *accept* a defendant's felony guilty plea with the parties' consent. Pet. 9-10. The government disagrees that the split is so extensive. BIO 17-20. According to the government, only the Seventh Circuit has held that magistrate judges cannot accept felony guilty pleas under § 636(b)(3) with the parties' consent. BIO 17-18.

The government is wrong. The law in the Second, Fifth, Sixth, Eighth, and Ninth Circuits is analogous to that in the Seventh Circuit. Pet. 9-10.

The Second Circuit was the first Court to hold that § 636(b)(3)'s additional duties clause permits a magistrate judge, with the parties consent, to "administer[] a Rule 11 felony allocution." *United States v. Williams*, 23 F.3d 629, 633-634 (2d Cir. 1994). There, the magistrate judge did not accept the defendant's guilty plea (as magistrate judges do in the Fourth, Tenth, and Eleventh Circuits, *see* Pet. 9), but instead conducted the plea colloquy and "recommended to the district court that it be accepted," 23 F.3d. at 631. On appeal, the defendant challenged the magistrate judge's authority to conduct the change-of-plea colloquy. *Id.* at 630.

The Second Circuit upheld that practice, but only "[b]ecause the district court remains in control of the proceeding, and the matter is reported to that court for its approval." *Id.* at 634. And subsequent precedent makes clear that, under *Williams*, a federal magistrate judge's § 636(b)(3) authority in the Second Circuit extends only to the plea allocution, and not to the acceptance of the plea. *See*, *e.g.*, *United States v. Choudhury*, 582 Fed. Appx. 25, 26 n.1 (2d Cir. 2014) (unpublished) (reminding district courts "of their responsibility to accept guilty pleas prior to sentencing" in light of *Williams*); *United States v. Brumer*, 528 F.3d 157, 160 (2d Cir. 2008) (where a magistrate judge conducted the plea colloquy, "defendants were not entitled to be present when the district judge reviewed the allocution transcripts and signed the orders accepting the pleas").

Fifth Circuit precedent is analogous. In *United States v. Dees*, 125 F.3d 261, 263 (5th Cir. 1997), a magistrate judge conducted the plea colloquy, then "recommended

to the district court that it accept her plea," which the district court did. In upholding this practice under § 636(b)(3), the Fifth Circuit, like the Second Circuit, relied on the "district court's unfettered authority to review a magistrate judge's recommendation regarding the voluntariness of a plea." *Id.* at 265-266. "The taking of a plea by a magistrate judge does not bind the district court to accept that plea. Rather, the district court retains ultimate control over the plea proceedings, which are submitted to the court for its approval." *Id.* at 268 (citing *Williams*). And subsequent precedent makes clear that, under *Dees*, a federal magistrate judge's § 636(b)(3) authority in the Fifth Circuit extends only to the plea allocution, and not to the acceptance of the plea. *See*, *e.g.*, *United States v. Underwood*, 597 F.3d 661, 669 (5th Cir. 2010) ("Subpart (b)(3) allows a district judge to delegate discrete tasks to a magistrate judge, but retain the last word through deciding whether to accept the resulting magistrate judge's report and recommendation.").

In *United States v. Torres*, 258 F.3d 791, 796 (8th Cir. 2001), the Eighth Circuit "agree[d] with the reasoning of the Second and Fifth Circuits." There, the magistrate judge conducted the plea colloquy and then submitted a report and recommendation to the district court, who "conducted a de novo review of the magistrate judge's recommendation before entering the conviction. This is precisely the procedure authorized by *Williams* and *Dees*." *Id.* The Eighth Circuit concluded that "the magistrate judge's involvement did not . . . exceed the grant of power conferred by the Magistrates Act." *Id.* This was so because "the district court retains ultimate control over the plea proceedings, which are submitted to the court for its approval." *Id.* at 796 (quoting *Dees*).

Importantly, the Eighth Circuit acknowledged, but did not adopt, the Tenth Circuit's additional holding "that the district court need not review the proceedings unless the parties so demand." *Id.* at 795-796 (discussing *United States v. Ciapponi*, 77 F.3d 1247 (10th Cir. 1996)). And subsequent precedent makes clear that the Eighth Circuit disagrees with the Tenth Circuit on this point. *See*, *e.g.*, *United States v. Cortez-Hernandez*, 673 Fed. Appx. 587, 590 (8th Cir. 2016) (unpublished) (quoting *Torres* for the proposition that "[a] magistrate judge may take a guilty plea in a felony case when the defendant consents to proceed before the magistrate judge and the district court 'conduct[s] a de novo review of the magistrate judge's recommendation before entering the conviction.'").

Ninth Circuit precedent is also clear on this point. In *United States v. Reyna-Tapia*, 328 F.3d 1114, 1119-1121 (9th Cir. 2003) (en banc), the Ninth Circuit held that magistrate judges may conduct plea colloquies under § 636(b)(3). The Ninth Circuit explained that "defendants have an absolute right to withdraw guilty pleas taken by magistrate judges at any time before they are accepted by the district court." *Id.* at 1121. The only plausible reading of *Reyna-Tapia* is ours: the Ninth Circuit permits magistrate judges to conduct plea colloquies, but only because district courts are required to accept the pleas. *Id.* at 1119-1122. Subsequent precedent proves the point. *See*, *e.g.*, *United States v. Nieto-Gonzalez*, 604 Fed. Appx. 572, 573 (9th Cir. 2015) (unpublished) (vacating and remanding under *Reyna-Tapia* where "following the change of plea hearing, the magistrate judge did not submit findings and recommendations, and the district court did not accept Nieto-Gonzalez's guilty plea").

The government implies that the Fourth Circuit has interpreted *Reyna-Tapia* as not reaching the question presented here. BIO 19 (citing *United States v. Benton*, 523 F.3d 424, 433 n.2 (4th Cir. 2008)). That's wrong. In holding that magistrate judges may accept guilty pleas, the Fourth Circuit "recognize[d] that *Reyna-Tapia* and [] earlier Ninth Circuit cases offer support for Benton's position," but did not "feel compelled to follow them." *Id.* In any event, if *Benton* interpreted *Reyna-Tapia* as not reaching the question presented here, it erred. *Nieto-Gonzalez*, 604 Fed. Appx. at 573.

That leaves the Sixth Circuit. The government is correct that *United States v. Bearden*, 274 F.3d 1031, 1036 (6th Cir. 2001), involved a double-jeopardy challenge, but it is incorrect that, in resolving that challenge, the Sixth Circuit did not interpret § 636(b)(3)'s additional duties clause to resolve the question presented here. The Sixth Circuit held that "jeopardy attaches only when the district court accepts the defendant's guilty [] plea." *Id.* at 1037-1038. The Sixth Circuit rejected the defendant's claim that jeopardy attached when the magistrate judge recommended that the district court accept the plea. *Id.* at 1034, 1036-1037. Under § 636(b)(3), "the district court remains in control of the proceeding, and the matter is reported to that court for its approval." *Id.* at 1037 (quoting *Williams*). "[T]he magistrate judge could not adjudicate Bearden's guilt or finally accept his plea; only the district court could do that." *Id.* at 1038. The Sixth Circuit could not have been any clearer on this point.

All of this unmistakably shows that five Circuits agree with the Seventh Circuit that, while § 636(b)(3) permits a magistrate judge *to conduct the plea colloquy*, it does not permit the magistrate judge *to accept the plea.* The Circuits are split 6-3. Pet. 9-13. That is neither a "shallow" nor "undeveloped" conflict. It is an entrenched conflict

that will persist until this Court resolves it. Pet. 10-13. As Chief Judge Tymkovich's opinion in *Garcia* notes, "not all Circuits are in agreement," both litigants and courts could "benefit from clarification by" this Court, and this Court "will have the final word." 936 F.3d at 1138, 1140, 1142. Review is necessary.

II. This issue is extremely important.

The government freely admits that this is a recurring question, but still claims that this Court should not resolve it because it is "of limited prospective importance" in light "of the government's 2016 adoption of a new policy regarding plea proceedings before a magistrate judge." BIO 24. This apparent policy "instruct[s] prosecutors to request that magistrate judges make recommendations to district judges instead of accepting guilty pleas," and "not to oppose a defendant's motion to withdraw a guilty plea for any reason under Rule 11(d)(1) before the plea is accepted by a district judge." BIO 24. The government hasn't provided a copy of this supposed policy.

In any event, this argument is unpersuasive for four reasons. First, it is irrelevant whether a prosecutor "request[s]" a magistrate judge to "make recommendations to district court judges instead of accepting guilty pleas." In the Fourth, Tenth, and Eleventh Circuits, magistrates are authorized under § 636(b)(3) to accept guilty pleas. Pet. 9, BIO 17. And they do. *See* Pet. App. 21a. It would make no sense for a magistrate judge in those Circuits to recommend to the district court to accept a plea that the magistrate judge has already accepted.

Second, the government's promise not to oppose a defendant's Rule 11(d)(1) motion to withdraw his guilty plea prior to the district court's acceptance of that plea is a false promise in the Fourth, Tenth, and Eleventh Circuits. In those Circuits, the

magistrate judge does not recommend that the district court accept the plea; the magistrate judge actually accepts the plea. BIO 17. And with the magistrate judge's acceptance of the plea, a defendant no longer has the right to withdraw his plea under Rule 11(d)(1). *Garcia*, 936 F.3d at 1131 (rejecting this identical argument); *United States v. Chiddo*, 737 Fed. Appx. 917 (11th Cir. 2018) (unpublished) (similar).

Third, the government does not claim that its prosecutors actually follow the "policy." Nor could it. At a minimum, federal prosecutors in Kansas do not follow the "policy," as this case illustrates, and as the government concedes. BIO 24. The government should not be permitted to moot an issue via its own policy when it does not even follow that policy in practice.

Fourth, the government provides no reason to believe that its "policy" sways magistrate-judge practice within the Fourth, Tenth, and Eleventh Circuits. Rather, the government freely admits that "the District of Kansas continues to assign magistrate judges to accept felony guilty pleas with the defendant's consent, and at least one other district in the Tenth Circuit does so as well." BIO 24. There is no reason to believe that other districts within the Fourth, Tenth, and Eleventh Circuits no longer permit magistrate judges to accept guilty pleas because of the government's "policy," especially considering that the Fourth, Tenth, and Eleventh Circuits have held that they can do just that.

The government also claims that the question is unimportant because it "lacks significant practical consequences." BIO 20. But the consequence the government cites – the ability to withdraw a guilty plea for any or no reason at all under Rule 11(d)(1) – is a significant consequence. As it stands now, defendants are treated

differently based solely on geography. A defendant who wishes to withdraw his magistrate-judge-accepted guilty plea in the Fourth, Tenth, and Eleventh Circuits must show a "fair and just reason" to do so. Defendants in six other Circuits can simply withdraw those pleas any time before the district court accepts them. The government does not explain how that differential treatment is inconsequential. And its citation to *United States v. Hyde*, 520 U.S. 670 (1997), BIO 21, misses the point because that case had nothing to do with a magistrate judge's acceptance of a guilty plea. Indeed, because a guilty plea is a "serious act," *Hyde*, 520 U.S. at 677, it is an Article III district court, and not an Article I magistrate judge, that must accept that plea, *United States v. Harden*, 758 F.3d 886, 891 (7th Cir. 2014) (noting that a felony guilty plea "is equal in importance to a felony trial leading to a verdict of guilty").

In any event, the government ignores that the question presented poses significant practical consequences to the judiciary, regardless of how this Court resolves the question. Pet. 15. If only district courts may accept pleas, then defendants in at least three Circuits are deprived of the opportunity to withdraw a plea accepted by a magistrate judge. If magistrate judges may accept pleas, then district courts in at least six Circuits are deprived of the opportunity to streamline their dockets by relying on magistrate judges for this task. Pet. 15; *Harden*, 758 F.3d at 891. Either way, review is necessary.

III. The Tenth Circuit erred.

The government defends the Tenth Circuit's holding below. BIO 11-13. But the majority of Circuits disagree. Pet. 9-13. As we have already explained, the majority rule is the better one. Pet. 17-20. And regardless, the government's embrace of a

minority rule is no reason to deny this petition. *See*, *e.g.*, *Brown v. United States*, 139 S.Ct. 14, 16 (2018) (Sotomayor, J., dissenting from the denial of cert.) ("Regardless of where one stands on the merits . . . this case presents an important question of federal law that has divided the courts of appeals . . . . That sounds like the kind of case we ought to hear.").

The government also suggests that our arguments based on Federal Rule of Criminal Procedure 59 and Article III "are not properly before this Court" because they are, according to the government, outside the question presented. BIO 13. The government is wrong. Section 636(b)(3)'s additional duties clause provides that a magistrate judge "may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The statutory analysis thus expressly asks whether the additional duty at issue is inconsistent with the Constitution or other federal laws. It is literally impossible to conduct a § 636(b)(3) analysis without reference to these other sources. For that reason, our discussion of Rule 59 and Article III is undoubtedly "fairly included" within the question presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). And for those reasons already expressed, both Rule 59 and Article III support the majority rule, and not the minority rule embraced by the government. Pet. 18-20.

IV. This petition is not a "poor vehicle" to resolve the conflict.

The government claims that this case is a "poor vehicle" to resolve the conflict because Mr. Finnesy "failed to object in the district court to the magistrate judge's acceptance of his guilty plea, so his claim is subject to review only for plain error." BIO 21. For two reasons, the government's argument is unpersuasive.

First, this argument ignores the question presented. That question asks whether § 636(b)(3) authorizes a magistrate judge to accept a defendant's guilty plea *with the parties' consent* (a circumstance that, by definition, means that neither party objected below). Pet. i. The Circuits are split 6-3 on that question, and, in order for this Court to resolve the conflict, it must grant certiorari in a case, like this one, where the parties consented to the magistrate's acceptance of his plea. If the defendant's consent below is a reason not to grant certiorari, this Court will never grant certiorari to resolve this conflict.

Indeed, this Court has granted certiorari in analogous circumstances. *Peretz v. United States*, 501 U.S. 923 (1991) (resolving whether a defendant's consent permits a magistrate judge to select a jury in a felony trial). This Court reached the merits of the question in *Peretz* without employing waiver principles or plain-error review. *Id.* at 940; Pet. 20-21. This Court should do the same here.

Second, the Tenth Circuit's invocation of plain-error review does not make this a poor vehicle because *Peretz*'s exception to the application of normal forfeiture rules applies here as well. Pet. 20-22. We respectfully disagree with the government's suggestion that we have "identifie[d] no precedent of this Court that would require de novo review." BIO 22. We have done just that. Pet. 20-22. And although we have not sought review of the Tenth Circuit's invocation of plain-error review, that's because the Tenth Circuit found no error at all, and, thus, did not address the other prongs of plain-error review. Pet. 19a. There is no need for this Court to address plain-error review. Pet. 20-21. Finally, if the government invokes plain-error review in its merits brief, then this Court could decide for itself whether to address it. *Yee*, 503

U.S. at 535.

Either way, this case is in the exact procedural posture as any other case raising the question presented. There is a conflict in need of resolution. If the government's vehicle-problems are correct, this Court will never resolve that conflict. For that reason alone, the government's vehicle-problem arguments are unpersuasive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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