No. _____

IN THE
Supreme Court of the United States

JOHN DOE #1
Petitioner,

vs.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Second Circuit Court of Appeals erred, in violation of U.S. Const. V, when it imposed the communication condition of supervision which is vague, unfairly impacts John Doe #1's intimate familial relationships, and is an outlier among Courts of Appeals' decisions that have examined similar issues?

Whether a federal district court is permitted boundless discretion to weigh established factors at sentencing, as the Second Circuit has held, or whether, following the majority of circuits, appellate courts must instead determine whether the district court's weighing of sentencing factors was proper?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is John Doe #1, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR CERTIORARI

Petitioner John Doe #1 respectfully prays for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was filed in a summary order on April 27, 2020. A three-judge panel of the Second Circuit issued a summary order (the "Order") affirming in part and vacating in part the judgment of the district court.[1] *See United States v. Doe #1*, 802 Fed. App'x 655 (2d Cir. 2020). The Order is attached as Appendix A.

JURISDICTION

On April 27, 2020, a three-judge panel for the Second Circuit denied Petitioner's appeal and vacated in part and affirmed in part his sentence in the aforementioned Order.[1][2] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. Amend. V:

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1 The panel vacated the $1,020,000 fine imposed and ordered a remand to address this issue.

[2] The time to file a petition for a writ of *certiorari* runs from the date a judgment is entered by a United States court of appeals. Sup. Ct. R. 13(1). A petition for a writ of *certiorari* is timely when filed within 90 days. Sup. Ct. R. 13(1). A petition is timely filed if mailed on the date for filing. Sup. Ct. R. 29.2. If the due date falls on a Saturday, Sunday, federal holiday, or day the Court is closed, it is due the next day the Court is open. Sup. Ct. R. 30.1. The Second Circuit Court of Appeals entered the Order affirming the convictions in this case on April 27, 2020, making the petition for writ of *certiorari* ordinarily due on July 24, 2020. However, an order issued by this Court on March 19, 2020 in response to the COVID-19 pandemic extended the due date to 150 days instead of 90 days making this petition for writ of certiorari due on September 24, 2020.

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

I.

STATEMENT OF THE CASE

Petitioner John Doe #1, ("JD-1"), along with his son, co-defendant John Doe #2, ("JD-2"), appealed from the May 15, 2018 judgments entered in the United States District Court for the Southern District of New York sentencing them to 144 months imprisonment followed by five years of supervised release. In addition, JD-1 was fined $1,020,000 and JD-2 was fined $390,000.

On appeal, JD-1 and JD-2 challenged the imposition of their fines, the substantive reasonableness of their sentences, and two supervised release conditions. At issue in this petition is the communication prohibition condition of supervision and the substantive reasonableness of JD-1's sentence.

The communication prohibition prohibits communicating or interacting with someone known to be a convicted felon without JD-1 first obtaining the permission of his probation officer. The communication condition states:

> 8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

JD-1 submitted that this condition was unlawful and unjustified because it prohibits interaction or communication between JD-1 and his son, JD-2, without advance permission from their probation officers because both

have suffered felony convictions and are subject to the same standard condition. Specifically, JD-1 argued that the condition is vague, overbroad, infringes on his substantive due process rights to familial association, and gives the probation officer unfettered control over his right of association. Its enforcement, JD-1 argued, would result in an improper delegation of authority to the probation officer because it could only be administered in an *ad hoc* and subjective fashion.

With respect to JD-1's substantive due process challenge, although the Second Circuit has previously vacated restrictions on contact among family members in some contexts, *see, e.g., United States v. Myers*, 426 F.3d 117 (2d Cir. 2005), it found no substantive due process error here because the error was not plain.

With regard to the vagueness and overbreadth challenges to the communication condition, the Second Circuit concluded that even if there was error was made, it did not satisfy the plain error standard. The Order did not address JD-1's argument that the communication condition would result in uneven enforcement amounting to affording too much discretion to the probation officer.

In response to JD-1's claim that his sentence was substantively unreasonable because the district court placed too much weight on one factor—JD-1's alleged breach of his cooperation agreements—and not enough weight on other factors, such as his extraordinary cooperation efforts, the Second

Circuit affirmed his sentence. The Second Circuit stated that, "A sentence is substantively unreasonable when it is manifestly unjust or when it shocks the conscience. *Id.* at 656 (citing *United States v. Mumuni*, 946 F.3d 97, 107 (2d Cir. 2019). It stated that it should not "second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor" when reviewing sentences for substantive reasonableness. *Id.* at 657.

The Second Circuit vacated the fines and remanded to the district court to address the appropriateness of fines. The panel affirmed JD-1 and JD-2's sentences in all other respects, including the challenged supervised release conditions.

JD-1's petition should be granted by this Court for at least four main reasons.

First, the Order's conclusion that the communication condition does not violate JD-1's substantive due process rights when it impacts his familial relationships is an outlier among Courts of Appeals' decisions. *See e.g.*, *United States v. Hall*, 912 F.3d 1224, 1226 (9th Cir. 2019) (reversing, as violative of due process, a condition of supervised release limiting defendant's interaction with his adult son, with whom he conspired on the underlying offense). It also contradicts authority within the Second Circuit. *See e.g.*, *United States v. Myers*, 426 F.3d 117, 130 (2d. Cir. 2005) (vacating condition of supervised release which prohibited defendant from visiting with his own

son unless he precleared visit with probation).

Second, the Order's conclusion that the communication condition is not unconstitutionally vague and overbroad is an outlier in the various Courts of Appeals' decisions that have examined similar issues. Resolution of this issue will lead to circuit courts' uniformity.

Third, the issue has national importance. With nearly 190,000 inmates, the federal prison system is the largest in the nation. *Number of Offenders on Federal Supervised Release Hits All-Time High*, The Pew Charitable Trusts, (Jan. 24, 2017).[3] The number of offenders serving a term of supervised release has risen three-fold in the last two decades. *Id.* (comparing statistics between 1995-2015). More than eight in ten offenders sentenced to federal prison are subject to court-ordered supervised release. *Id.* As a standard condition of supervised release, this troublesome condition is imposed with great frequency and impacts many federal offenders.

Finally, regarding the substantive reasonableness of the sentence imposed, unlike the Second Circuit, the majority of circuits have ruled that the appellate court should review whether a district court properly weighed legal factors at sentencing. Under this view, "[t]he abuse of discretion standard is not a rubber stamp, counseling affirmance of every discretionary decision made by a trial court." *United States v. Del Valle-Cruz*, 785 F.3d 48, 58 (1st Cir.

3 The information cited herein can be found at： https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high (last visited on September 16, 2020).

2015) (internal quotation marks omitted). The First Circuit reasoned: "The [district] court exceeds its discretion when it fails to consider a significant factor in its decisional calculus, if it relies on an improper factor in computing that calculus, or if it considers all of the appropriate factors but makes a serious mistake in weighing such factors." *Id.* (quoting *Colon–Cabrera v. Esso Standard Oil Co. (P.R.), Inc.*, 723 F.3d 82, 88 (1st Cir. 2013)). Several other circuits apply some form of the same test. *See e.g.*, *United States v. Diehl*, 775 F.3d 714, 724 (5th Cir. 2015); *United States v. Wright*, 747 F.3d 399, 413 (6th Cir. 2014); *United States v. Jenkins*, 758 F.3d 1046, 1050 (8th Cir. 2014); *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010). The Second Circuit is an outlier in finding that a sentence must be shocking or manifestly unjust before permitting meaningful review of how a district court weighs the relevant sentencing factors.

II.

ARGUMENT

A. This Court should grant JD-1's petition to resolve the split of Circuit authority regarding this condition's legality.

1. This Court should grant *certiorari* because the communication condition unfairly impacts JD-1's intimate familial relationships and this Order is an outlier among Courts of Appeals' decisions that have examined similar issues, even within the Second Circuit.

This Court has long recognized a constitutional right to freedom of association. *Roberts v United States*, 468 U.S. 609, 617 (1984). Included in this right is the "freedom of intimate association," which is exemplified by

those personal affiliations that "attend the creation and sustenance of a family—marriage; childbirth; the raising and education of children; and cohabitation with one's relatives ." *Id.* at 619 (citations omitted). It is well-established that a parent's interest in maintaining a relationship with his or her child is protected by the Due Process Clause. *Wilkinson v. Russell*, 182 F.3d 89, 103-04 (2d. Cir. 1999).

Conditions prohibiting or limiting a defendant's associational interests, particularly with minors, have been vacated by other appellate courts. *See, e.g.*, *United States. v. Fey*, 834 F.3d 1, 5-6 (1st Cir. 2016) (vacating condition restricting the defendant's contact with children); *United States v. Sainz*, 827 F.3d 602, 608 (7th Cir. 2016) (vacating condition prohibiting any contact with children and remanding it in order to modify the condition to exclude incidental contact with children in commercial settings); *United States v. LeCompte*, 800 F.3d 1209, 1215-1218 (10th Cir. 2015) (remanding condition restricting contact with minors because the court did not adequately explain how applying such a condition related to the defendant's criminal offense, the defendant's history and characteristics, or how it served the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation). *See e.g. United States v. Wolf Child*, 699 F3d 1082, 1095-96 (9th Cir. 2012) (if the record does not justify imposing a supervised release condition that infringes on a defendant's liberty interest, the limiting condition may not be imposed simply because a probation officer has the authority to mitigate the

severity of the improper deprivation of liberty); *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) (finding condition that restricted contact with defendant's own children violated defendant's constitutional liberty interest in his relationship with his children).

In *United States v. Myers*, then Judge Sotomayor writing for the Second Circuit held that a condition of supervision restricting familial association with a defendant's minor children in a case where the defendant had suffered a conviction for receiving child pornography was unreasonable:

> In short, when a fundamental liberty interest is implicated by a sentencing condition, we must first consider the sentencing goal to which the condition relates, and whether the record establishes its reasonableness. We must then consider whether it represents a greater deprivation of liberty than is necessary to achieve that goal. Here, however, the record was inadequate on both prongs of the inquiry, allowing us neither to identify the goal to which the condition related nor to determine whether an undue deprivation of liberty occurred.

426 F.3d 117, 126 (2d. Cir. 2005).

The Order's conclusion that the communication condition did not violate JD-1's substantive due process rights when it interferes in his most intimate familial relationships contradicts *Myers*. It also stands among Courts of Appeals' decisions that have examined similar issues. *See e.g.*, *United States v. Hall*, 912 F.3d 1224, 1226 (9th Cir. 2019) (reversing, as violative of due process, a condition of supervised release limiting defendant's interaction with his son to "normal familial relations.").

Here, a fundamental interest is at stake. As worded, the condition is a greater deprivation of liberty than what is necessary to further any legitimate governmental concern. As such, this condition unnecessarily infringes upon JD-1's protected associational interest—communicating with his own son.

This Court should grant *certiorari* to correct these significant departures from established Constitutional principles.

2. The Order's conclusion that the communication condition is not unconstitutionally vague or overbroad is part of growing split in the various Courts of Appeals' decisions that have examined similar issues.

The Order's conclusion that the communication condition is not unconstitutionally vague or overbroad is part of a growing split in the various Courts of Appeals' decisions that have examined similar issues. *See generally United States v. Munoz*, 812 F.3d 809 (10th Cir. 2016) (noting disagreement between the circuits regarding several standard conditions of supervision, including the communication condition).

Vagueness principles have been applied to conditions that impact defendants and their relationships with their adult children. For example, in *United States v. Hall*, Gordon Hall ("Hall") and his son, Benton ("Benton") were both sentenced to prison for their business venture helping others defraud the government through false money orders. *Hall*, 912 F.3d at 1226. The two were already incarcerated for a separate joint criminal enterprise. *Id.* Hall appealed a special condition of his release restricting his relationship with his family. *Id.* That condition provided that Hall "is permitted to have contact

with Benton [ ] only for normal familial relations but is prohibited from any contact, discussion, or communication concerning financial or investment matters except matters limited to defendant's own support." *Id.* On appeal, Hall objected at sentencing that the condition was unconstitutionally vague and the Ninth Circuit struck the offending words. *Id.* at 1227.

This condition is also vague. It does not define what it means to "interact" with someone but prohibits any interaction. The Order relies on this Court's decision in *Arciniega v. Freeman*, 404 U.S. 4, 4 (1971), to solve the vagueness issue. *Doe #1*, 802 Fed. App'x at 657. In *Arciniega*, a parolee had his parole revoked on the sole ground that he worked at a restaurant where other ex-convicts worked. *Id.* The trial court found him in violation of a parole condition prohibiting him from associating with other ex-convicts. *Id.* In a *per curiam* opinion, this Court reversed and held that the condition was not intended to prohibit "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer." *Id.* This Court did not consider whether the condition was vague or overbroad. As such, the Second Circuit's reliance on *Arciniega* is misplaced.

The problem of vagueness often goes hand-in-hand with enforcement issues and such is the case here. For example, if JD-1 waved to JD-2 upon their release, would that constitute a prohibited "communication"? If both showed up for a family function at the same time, is that a prohibited "interaction"? But such problems extend beyond intimate family relationships.

If JD-1 knew that the person bagging his groceries at the local market had a felony conviction and JD-1 exchanged pleasantries with her on a regular basis, is that prohibited conduct if he has not first obtained permission from his probation officer?

In general, the probation office is responsible for implementing the conditions imposed by the court and, in doing so, can exercise discretion. The enforcement of the communication condition results in an improper delegation of authority to the probation officer because it can only be administered in an *ad hoc* and subjective fashion. That is, the condition, due to its vagueness, leaves it to the discretion of the probation officer to determine whether JD-1 can have interaction with his son, or has had a prohibited interaction and in turn, whether to file a petition seeking revocation of JD-1's supervision.

Notwithstanding the vagueness and enforcement issues, it is simply not reasonably related to the factors set forth in section 3553(a) as worded. It is unclear how prohibiting JD-1 from interacting with anyone who has ever suffered a felony conviction, no matter how old or how unrelated to the instant offense, relates to any permissible goal of supervised release—certainly none was offered by the government, probation, or district court at the time of sentencing. Such a vague and overly broad condition is unsupported by adequate findings and it is not well-tailored to serve the purposes of deterrence, rehabilitation, and protection of the public.

JD-1 urges this Court to grant his petition so that the Second Circuit can be brought in line with the majority view.

3. This Court should grant *certiorari* because conditions of supervision like this one are imposed frequently and are untethered from the goals of reducing recidvisim and helping an offender reintegrate.

This Court grant this petition on this issue because it raises an issue of national importance. With nearly 190,000 inmates, the federal prison system is the largest in the nation. *Number of Offenders on Federal Supervised Release Hits All-Time High*, The Pew Charitable Trusts, Jan. 24, 2017. The number of offenders serving a term of supervised release has risen three-fold in the last two decades. *Id.* (comparing offender statistics between 1995-2015). More than eight in ten offenders sentenced to federal prison are subject to court-ordered supervised release. *Id.* In 2015, ninety-nine percent of all offenders on federal post-prison supervision were on supervised release, with 1 percent still serving time under the old system of parole. While, Congress created supervised release in 1984 as a way to help former inmates make the transition back into the community and reduce rates of reoffending, one common result is that more offenders are sent to prison for violating the terms of their supervision (known as technical violations) than for new crimes. More than two-thirds of all federal offenders who are revoked from supervised release each year committed technical violations but were not convicted of new crimes. Although post-prison monitoring may be an important part of a defendant's reintegration, extended periods of community supervision coupled

with vague and burdensome conditions of supervision defeat the purpose of helping an inmate especially when they prevent contact with family. Such conditions makes the transition back into the community more difficult and ultimately, does not reduce the rate of reoffending. This case amply illustrates this point. Why must JD-1 obtain permission from his probation officer before he speaks with his son? What rehabilitative purpose does that serve after both defendants will have served 12-year sentences before commencing supervision? If JD-1 and JD-2 wish to get together with family for a holiday, why does the Office of Probation get to decide whether that is okay? Such burdensome conditions and the negative consequences for offenders if they fail to heed them should be addressed by this Court.

B. The Opinion's conclusion that the sentence was substantively reasonable because it did not "shock the conscience" instead of examining the weight the district court assigned to the relevant sentencing factors is an outlier.

The Second Circuit denied JD-1's claim that his sentence was substantively unreasonable sentence without examined whether the district court properly weighed the relevant sentencing factors. The Second Circuit reasoned:

> Although Appellants claim that the district court weighed their crimes more heavily than their cooperation, we will not "second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor" when reviewing sentences for substantive reasonableness. *See United States v. Degroate,* 940 F.3d 167, 178 (2d Cir. 2019) (internal quotation marks and citation omitted). We accordingly affirm the sentences as substantively reasonable.

Doe #1, 802 Fed. App'x at 657. Thus, the Second Circuit only finds a sentence substantively unreasonable only when it is manifestly unjust or when it shocks the conscience. *Id.*

At the substantive stage of reasonableness review, however, an appellate court should consider whether a factor relied on by a sentencing court can bear the weight assigned to it. Although such review is deferential, there should be such a review. *See Gall v. United States*, 552 U.S. 38, 49, 50 n.6 (2007) (holding that appellate court "must give due deference" to the district court's determination as to the "extent" of variance warranted by a given factor). In other words, the appellate courts should consider whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case. Such an approach is consistent with and follows from the Supreme Court's emphasis on "individualized" sentencing, *id.,* because it ensures that appellate review, while deferential, is still sufficient to identify those sentences that cannot be located within the range of permissible decisions.

The Second Circuit, however, abandons this approach making it outlier among decisions by other Courts of Appeals. In *United States v. Del Valle-Cruz*, the First Circuit explained, "The [district] court exceeds its discretion when it fails to consider a significant factor in its decisional calculus, if it relies on an improper factor in computing that calculus, or if it considers all of the appropriate factors but makes a serious mistake in weighing such factors." 785

F.3d 48, 58 (1st Cir. 2015) (internal quotation marks omitted) (dismissing defendant's appeal of his conviction but remanding to the district court for resentencing).

Several other circuits apply some form of the same test. The Fifth Circuit has held that "[a] non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors set forth in § 3553(a) where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *Diehl*, 775 F.3d at 724. The Sixth Circuit similarly finds that a sentence is substantively unreasonable if the district court "gives an unreasonable amount of weight to any pertinent factor." *Wright*, 747 F.3d at 413 (6th Cir. 2014) (internal quotation marks omitted). The Eighth Circuit has prescribed that "'[a] district court abuses its discretion when it (1) 'fails to consider a relevant factor that should have received significant weight'; (2) 'gives significant weight to an improper or irrelevant factor'; or (3) 'considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'" *Jenkins*, 758 F.3d at 1050 (quoting *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009)). And the Eleventh Circuit holds that "a district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably." *Irey*, 612 F.3d at 1189. The Second Circuit, however, has diverged from the majority rule, and instead, acts as a rubber stamp. The Second Circuit affords district

courts virtually unfettered discretion to weigh factors as they see fit, provided they properly identify the relevant factors. This Court must resolve the split in authority and bring the Second Circuit in line with the Sister Circuits.

III.

CONCLUSION

For the foregoing reasons, the petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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