No. _____

IN THE
Supreme Court of the United States

THOMAS TRAFICANTE
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 and Congress' intent to provide a streamlined scheme of sentencing review established by the Sentencing Reform Act of 1984, when it denied Traficante's constitutional challenges to his risk condition of supervision as unripe on direct appeal, and departing from the majority view among Courts of Appeals' decisions that have examined similar issues?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Thomas Traficante, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

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Petitioner Thomas Traficante 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 published opinion on July 17, 2020. A three-judge panel of the Second Circuit issued an opinion affirming the judgment of the district court. *See United States v. Traficante*, 966 F.3d 99 (2d Cir. 2020). The opinion is attached as Appendix A.

On August 31, 2020, Mr. Traficante filed a petition for rehearing and suggestion for rehearing en banc. The Second Circuit denied his petition on October 1, 2020. That order is attached as Appendix B.

JURISDICTION

On July 17, 2020, a three-judge panel for the Second Circuit denied Petitioner's appeal and affirmed his sentence in the aforementioned opinion.[1] This Court has jurisdiction to review the Second Circuit's decision pursuant to 28 U.S.C. § 1254.

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[1] The time to file a petition for a writ of *certiorari* runs from the date a timely petition for rehearing is denied. Sup. Ct. R. 13(3). 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 petition for rehearing in this case was denied on October 1, 2020, making the petition for writ of *certiorari* due on December 29, 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 by February 27, 2021.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. Amend. V:

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

I.

STATEMENT OF THE CASE

Petitioner Thomas Traficante was convicted by plea of cyberstalking and a narcotics offense. On June 20, 2018, he was sentenced principally to 48 months incarceration, an above-Guidelines term of incarceration. The district court also imposed a standard condition of supervised release known as the "risk" condition of supervision.[2] On appeal, Mr. Traficante challenged the district court's imposition of the above-Guidelines sentence as procedurally and substantively unreasonable, as well as the risk condition of supervision as impermissibly vague and overbroad.

While Mr. Traficante's appeal was pending, however, that "risk" condition was replaced with another by a standing order issued by the Western District of New York. The standing order was a judicial attempt to conform with a Second Circuit decision finding that an identical risk condition was both vague and an improper delegation of authority to the probation officer. *See*

2 In the Judgment and Commitment, the original risk condition was worded as follows:

> *12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.*

United States v. Boles, 914 F. 3d 95, 111-12 (2d Cir. 2019). The standing order for the Western District of New York vacated and replaced the risk condition with a new risk condition in all judgments in the district and provided:

> *If the court determines in consultation with your probation officer that, based on your criminal record, personal history and characteristics, and the nature and circumstances of your offense, you pose a risk of committing further crimes against another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.*

Mr. Traficante challenged the imposition of this new risk condition. Mr. Traficante argued that judges cannot unilaterally impose a new condition without notice and providing a defendant an opportunity to be heard. The standing order, Traficante argued, violated the requirements of the Federal Rules of Criminal Procedure and Due Process, both of which require notice and the opportunity to be heard.

In any event, Traficante argued, the new "risk" condition remained impermissibly vague. The terms "personal history," "characteristics," and "risk" are vague terms requiring guesswork as to what they mean and are subject to broad interpretation. For example, according to the condition as worded, defendants who pose "risks" of committing "further crimes" related to their "personal history or characteristics," could trigger third party notification about them. But, Traficante argued, it is unclear what part of their "personal history" and which "characteristics" must notify third parties about them. In

addition, Traficante submitted that the phrase "risk" and who must be notified should be defined. If, for instance, it is intended to mean employers and individuals with whom defendants conduct business, it should be defined accordingly. Mr. Traficante was convicted of cyberstalking a former girlfriend. Is the risk condition meant to curtail his association with a future romantic interest? These vague terms, Mr. Traficante argued, lead to subjective interpretation and uneven enforcement.

On July 17, 2020, a three-judge panel of the Second Circuit issued an opinion affirming Mr. Traficante's sentence and judgment. *Traficante*, 966 F.3d at 99. The Second Circuit affirmed the imposition of the above-Guidelines sentence as a permissible variance that was both procedurally and substantively reasonable. It also found that remand for resentencing was unnecessary "because the Western District of New York's standing order permissibly clarifies the risk condition applicable to his supervised release without imposing any additional burden on Traficante." *Id*. at 101. It further held that "any vagueness challenge or challenge to the contemplated delegation of authority to the probation officer in the clarified condition is not ripe." It therefore affirmed the district court's judgment, as modified by the standing order. *Id*. at 103.

Specifically, the Second Circuit held that Traficante's vagueness challenge to the risk condition of his supervision was unripe because "[w]hether couched as a vagueness challenge or a delegation challenge,

Trafiante's argument clearly depends upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id*. at 107 (internal quotations and citations omitted). As such, the Second Circuit found Mr. Traficante's constitutional challenges to the risk condition unreviewable. *Id*.

Mr. Traficante's petition should be granted by this Court for at least two reasons.

First, the opinion's conclusion that Mr. Traficante's constitutional challenges to the risk condition are unripe for review runs afoul of Congress' intent to provide a streamlined scheme of sentencing review and is an outlier in the various Courts of Appeals' decisions that have examined similar issues. Resolution of this issue will bring the Second Circuit in line with congressional intent and bring the Second Circuit in line with the majority view.

Second, 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

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 December 28, 2020).

standard condition of supervised release, this vague and overbroad condition is imposed with great frequency and impacts many federal offenders.

II.

ARGUMENT

A. This Court should grant *certiorari* because the Second Circuit's conclusion that Mr. Traficante's constitutional challenges to the risk condition are unripe for review runs afoul of Congressional intent and is an outlier in the various Courts of Appeals' decisions that have examined similar issues.

Although the Second Circuit recognized that Mr. Traficante's vagueness challenge raised a question of law, it labeled the claim "just an abstraction" and found it unripe for decision. *Traficante*, 966 F.3d at 106. *Traficante* reasoned:

> If the court determines that Traficante poses a specific risk and enlarges the condition by requiring him to notify a third party, he can raise any vagueness challenge at the Rule 32.1 hearing accompanying the modification. But chances are that, by the time the court makes a finding that Traficante "pose[s] a risk of committing further crimes against another person [or] organization," March 2019 Standing Order, and directs him to provide notice specifically to the at-risk person or entity – thereby imposing an enlarged condition – the condition will no longer be vague at all.

Id. The opinion further reasoned:

> And while it could be argued that the standing order contemplates vesting the probation officer with a degree of discretion that is inconsistent with our holding in *Boles*, such a challenge would likewise be unripe, since the ostensibly improper delegation may never actually occur. First, the supposed delegation is conditioned on the district court finding, during Traficante's term of supervised release, that he poses a risk of committing further crimes

> against another person. That might not occur. Second, even if it does, the district court still might directly order Traficante to notify the at-risk individual, or alternatively, order the probation officer to require Traficante to so notify the potential victims. In either scenario, the probation officer would lack discretion over whether to impose a notification obligation on Traficante. The allegedly impermissible delegation would therefore never have materialized.
>
> Whether couched as a vagueness challenge or a delegation challenge, Traficante's argument clearly "depends upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"
>
> ****
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> Accordingly, we decline to reach Traficante's vagueness challenge, as well as any delegation challenge, as unripe.

Id. at 106-07 (internal citations omitted).

Traficante's "wait and see" approach in favor of addressing any illegality at a future modification hearing runs counter to the plain language of 18 U.S.C. § 3583(e)(2) and congressional intent. The plain language of subsection 3583(e)(2) indicates that the illegality of a condition of supervised release is not a proper ground for modification under this provision. When a court decides whether or how to modify conditions of supervised release under subsection 3583(e)(2), it is required to consider many of the same factors that it is required to consider in originally imposing a sentence upon a convicted defendant. 18 U.S.C. § 3583(e)(2) (cross-referencing several provisions of section 3553(a), which delineates the "[f]actors to be considered in imposing a sentence." *See* S.Rep. No. 98-225, at 75-78 (1984) ("*Senate Report* "), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3258-61 (discussing section 3553(a))). Section

3583(e), of which subsection 3583(e) is a part, allows that the court may modify conditions of supervised release, "after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)." 18 U.S.C. § 3583(e); *see also Senate Report* at 124-25, *reprinted in* 1984 U.S.C.C.A.N. at 3307-08 ("Subsection (e) permits the court, after considering the same factors considered in the original imposition of a term of supervised release to ... modify, reduce or enlarge the conditions of supervised release...."). Noticeably absent from this list is examining the legality of a condition. As such, other procedures, such as a direct appeal under 18 U.S.C. § 3742 or a collateral attack under 28 U.S.C § 2255 are available to challenge the legality of a condition of supervised release.

In *Lussier*, the Second Circuit detailed the "streamlined scheme of sentencing review" established by the Sentencing Reform Act of 1984 and rejected the defendant's attempt to attack a special condition's legality under 18 U.S.C. § 3583(e)(2) as contrary to congressional intent in enacting that scheme. *United States v. Lussier*, 104 F.3d 32, 34-35 (2d Cir. 1997) ("The plain language of subsection § 3583(e)(2) indicates that the illegality of a condition of supervised release is not a proper ground for modification under this provision" and "does not authorize the court to assess the lawfulness of a condition of release.").

Until *Traficante*, the "wait and see" approach it adopts had been soundly rejected by Second Circuit for over a decade in favor of reviewing a condition's

legality on direct appeal. *See e.g. United States v. Myers*, 426 F.3d 117, 123 and n.5 (2d Cir. 2005) (vacating a special condition of supervised release on direct appeal and explicitly rejecting the government's "wait and see" argument as running counter to congressional intent); *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019) (vacating a previous version of the risk condition as vague and as an improper delegation of authority on direct appeal while the defendant was still serving his custodial sentence); *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) (invalidating a similar risk condition as an improper delegation of authority while defendant was on direct appeal).

Finding the condition unripe based on this "wait and see" reasoning, runs afoul of those Second Circuit's decisions. For example, in *Myers*, then Judge Sotomayor writing for the Second Circuit vacated a special condition of supervised release on direct appeal. *Myers*, 426 F.3d at 130. In *Myers*, the government argued that the Second Circuit should not consider the defendant's claim for relief because it was premature. The government pointed out that Myers was in custody while on direct appeal and his circumstances could change such that his concerns about his conditions of supervised release might never materialize. *Id*. at 122-23. Expressly rejecting the "wait and see" argument, Judge Sotomayor noted, "Taken to its logical extreme, we note that the government's wait and see argument would apply to any incarcerated defendant challenging a condition of supervised release on direct appeal, thereby disrupting Congress's intent in providing streamlined procedures for

reviewing terms of supervised release." *Id*. at 123, n.5. *Traficante's* reasoning here is contrary to *Myers* which found that challenges to the lawfulness of a condition are properly brought on direct appeal.

Similarly, in *United States v. Boles*, the Second Circuit vacated the previous version of Mr. Traficante's risk condition as unconstitutionally vague and an improper delegation of authority. 914 F.3d at 111. When *Boles* vacated Boles' risk condition, Boles was on direct appeal and serving his ten-year custodial sentence. *Id*. at 99. The Second Circuit did not find the claim unripe despite the fact a violation was contingent on future events that may or may not occur. This is because Congress intended streamlined procedures on *direct appeal* for reviewing terms of supervised release. *Myers*, 426 F.3d. at 123 and n.5 (citing *Lussier*, 104 F.3d at 34-35 ("The plain language of subsection 3583(e)(2) indicates that the illegality of a condition of supervised release is not a proper ground for modification under this provision" and "does not authorize the court to assess the lawfulness of a condition of release.")).

In *United States v. Peterson*, the Second Circuit vacated a district court's imposition of another iteration of the risk condition on direct appeal because it too gave the probation officer too much discretion amounting to an improper delegation of authority. 248 F.3d at 86. In *Peterson*, the Second Circuit held that one of the conditions that required Peterson to notify employers about his federal conviction at the discretion of his probation officer was impermissible. *Id*. The Court did not recognize the claim as unripe and properly decided the

condition's lawfulness on direct appeal. *Id*. at 86.

The Second Circuit also created inter-circuit split when it found unripe Traficante's claim that the risk condition of his supervision was unconstitutionally vague. The Sixth, Seventh, and Ninth Circuits have already rejected nearly identical risk conditions as unconstitutionally vague on direct appeal. *See e.g.*, *United States v. Evans*, 883 F.3d 1154, 1164 (9th Cir. 2018) (vacating similar risk condition as vague stating that "[a] probationer must be put on clear notice of what conduct will (and will not) constitute a supervised release violation."); *United States v. Bickart*, 825 F.3d 832, 841-42 (7th Cir. 2016) (same); *United States v. Sexton*, 719 Fed. App'x 483 484-85 (6th Cir. 2017) (same). The Second Circuit has now emerged as an outlier for its positions on both ripeness and vagueness.

In *Bickart*, the Seventh Circuit recently addressed a similar condition[4] and remanded because, despite requiring judicial pre-approval, the condition remained impermissibly vague. *Bickart*, 825 F.3d at 841 (7th Cir. 2016). Rejecting the government's argument that the condition was cured with the addition of prior judicial approval, the *Bickart* court held:

> Although the district court's modification softens the consequences of the vagueness we identified in *Thompson* and *Kappes*, the underlying vagueness remains. We

4 On plain error review, the Seventh Circuit rejected the following condition as unconstitutionally vague:

> *If the Probation Officer believes notification is necessary, she shall inform the defendant and seek the Court's permission in advance. The defendant shall be given 7 days advance notice in order to object and seek legal representation from his attorney and/or the Federal Defender's Office. If the defendant does not object within the 7 day time frame, the Probation Officer shall make the notification, with the Court's permission.*

> disapproved of the condition in *Thompson* and *Kappes* because we thought that "personal history," "characteristics," "risks," and "third parties," were impermissibly vague. The modified condition in this case still contains these vague terms and offers no additional guidance as to their meaning. We appreciate the district court's effort to rescue this condition by adding a procedural mechanism, but we believe that it is appropriate to tackle vagueness head-on by defining or removing vague terms. As we noted in *Kappes*, "[p]resumably, the meaning of these terms would change from defendant to defendant, which makes definitions particularly important with this condition." 782 F.3d at 849. Therefore, the district court abused its discretion by imposing this condition, and we must remand for resentencing of [Bickart] with respect to this condition.

Id. at 841-42. Here, the new condition contains terms virtually identical to those rejected as unconstitutionally vague in *Bickart* and the Seventh Circuit did not reject the claim as unripe.

Finally, the Opinion creates confusion for defendants and practitioners who wish to challenge unlawful conditions of supervision. Where should Traficante and other defendants like him bring their constitutional challenges to conditions if not on direct appeal? *Lussier*'s section 3582(e)(2) interpretation was conceded by the government in *Myers* as barring a defendant's constitutional challenge to a condition at a modification hearing. *Myers*, 426 F.3d at 123 (citing *Lussier*, 104 F.3d at 34-35).

In contrast to *Lussier*, *Traficante* states, "If the court determines that Traficante poses a specific risk and enlarges the condition by requiring him to notify a third party, he can raise any vagueness challenge at the Rule 32.1 hearing accompanying the modification [hearing per 18 U.S.C. § 3583(e)(2)]."

Traficante, 966 F.3d at 106. The opinion's conclusion that the lawfulness of a condition could be assessed and modified later at a modification hearing pursuant to 18 U.S.C. § 3583(e)(2) is inaccurate and runs afoul of its plain language. Thus *Traficante*, along with creating an inter and intra-circuit split, may confuse and dissuade practitioners and defendants from properly raising constitutional challenges to supervised release conditions on direct appeal under the mistaken impression that a modification hearing is the proper forum.

This Court should grant *certiorari* to correct these significant departures from established Constitutional principles and bring the Second Circuit in conformity with congressional intent and with the sister circuits. In each of the aforementioned cases, the claim raised was "just an abstraction," *Traficante*, 966 F.3d at 106, *i.e.*, a challenge brought on direct appeal prior to a modification or violation hearing of any sort. If *Traficante* properly denied review of Mr. Traficante's vagueness claim on ripeness grounds, then *Boles*, *Peterson*, *Myers*, *Evans*, *Bickart*, *Sexton*, and a legion of other cases like them raising similar constitutional claims to supervised release terms on direct appeal were all wrongly decided. Yet in each of those cases, the appellate courts decided the claim. The *Traficante* decision creates an irreconcilable intra and inter-circuit split and confusion for practitioners and defendants which should be corrected by this Court. Left undisturbed, *Traficante* runs afoul of long-standing precedent and creates forum confusion for practitioners

and defendants pursuing such claims.

B. 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 should grant this petition 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. Such conditions make the transition back into the community more difficult and ultimately, do not reduce the rate of reoffending. Such burdensome conditions and the negative consequences for offenders if they fail to heed them should be addressed by this Court.

This Court should also grant this petition because the Second Circuit overlooks that one of the practical objectives in raising a vagueness claim on a direct appeal and prior to any modification or violation hearing is to provide a supervisee with adequate notice of what behaviors will put the supervisee at risk of just such a hearing in the first place. The point of supervised release is to rehabilitate persons discharged from prison and to assist their law-abiding return to society. *See United States v. Johnson*, 529 U.S. 53, 59 (2000). This goal would be defeated by subjecting offenders to conditions of release that are unconstitutional or otherwise invalid. For example, "an offender saddled with fatally vague or overbroad conditions may be more likely to fail. The very nature of some invalid conditions makes compliance difficult or uncertain, and a misstep risks an unjustified return to prison." *United States v. Neal*, 810 F.3d 512, 520 (7th Cir. 2016). *Traficante's* reasoning does not appear to appreciate this concern when it concludes that vagueness should be raised at a Rule 32.1. hearing during a modification proceeding. At that point, the Second Circuit reasoned "the condition will no longer be vague at all." *Id*. at 106. At that point, however, it is too late. A defendant should not be required to guess what behaviors might put him/her/they at risk of increased

notification requirements to third parties, and relatedly, a violation for failing to comply. As written, the risk condition requires the defendant to engage in just such guesswork. That is why the Seventh Circuit has already rejected a virtually identical risk condition as unconstitutionally vague. *Bickart*, 825 F.3d at 841-42. *See also Evans*, 883 F.3d at 1164 and *Sexton*, 719 Fed. App'x at 484-85.

In short, when the Second Circuit rejected Mr. Traficante's constitutional challenge as unripe, it ran afoul of long-standing precedent in its own circuit, created forum confusion for practitioners and defendants pursuing such claims, is an outlier, and negatively impacts thousands of offenders on supervised release.

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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