No. 20-6808

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS TRAFICANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner is not entitled to immediate appellate review of the possibility that the district court might modify his conditions of supervised release in the future to impose a notification requirement.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

United States v. Traficante, No. 18-cr-6034 (June 28, 2018)

United States Court of Appeals (2d Cir.):

United States v. Traficante, No. 18-1962 (July 17, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 966 F.3d 99.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2020. A petition for rehearing was denied on October 1, 2020 (Pet. App. B1). The petition for a writ of certiorari was filed on December 29, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of New York, petitioner was convicted on one count of cyberstalking, in violation of 18 U.S.C. 2261A(2)(B) and 2261(b)(5), and one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A.

1. In May 2017, petitioner began a romantic relationship with K.K., a college student whom he met using an online dating application. Presentence Investigation Report (PSR) ¶ 20. Petitioner confided in K.K. that he had previously used drugs and "done some bad things in order to get even with people," including posting one person's information on a prostitution website. Ibid.; see PSR ¶ 21. But he assured her "it won't happen [to you] UNLESS you do some shit that I strongly disagree with." PSR ¶ 20. Petitioner also acknowledged that he had engaged in hacking in the past, and hacked into several of K.K.'s social media accounts. PSR ¶¶ 19, 22, 24.

On October 26, 2017, K.K. ended her relationship with petitioner. PSR ¶ 25. The breakup was not amicable. PSR ¶ 19. On October 31, K.K.'s university received an anonymous complaint that K.K. was purchasing illegal drugs and having them shipped to her university mailbox. PSR ¶ 18. Police thereafter intercepted

a suspicious package containing cocaine. Ibid. When police interviewed K.K., she explained that she had no knowledge of the cocaine and suggested that petitioner may have been responsible. PSR ¶ 19. Police subsequently intercepted several additional packages containing illicit substances directed to K.K.'s university mailbox. PSR ¶¶ 28, 35, 46.

K.K. and her classmates also began to receive threatening text messages from an anonymous number. On November 10 and 11, 2017, K.K. and several of her sorority sisters received messages stating that "its not safe out there tonight" and "harm is coming." PSR ¶ 29. On November 16, K.K. reported that she believed that petitioner had posted her contact information on a prostitution website, resulting in her receiving approximately 60 calls and text messages from persons soliciting sex. PSR ¶ 30.

K.K.'s classmates continued to receive threatening texts and phone calls from the same phone number. One student received a text message that said, "im excited for the wedding," and "hope you don't wear anything that can stain." PSR ¶ 31. Another received a message stating that "my goal is to create the most amount of turmoil and pain within greek life." PSR ¶ 32. Petitioner also continued to text K.K. despite her requests for him to stop. PSR ¶ 33.

On November 20, 2017, K.K.'s stepfather reported that the driver's side front window of K.K.'s vehicle had been broken. PSR

¶ 36. Her stepfather also observed a hole in the front window of the family home, consistent with the discharge of a BB gun. Ibid.

On December 2, 2017, several students received a text message from the same number stating "youre all crazy if you think im not still out there." PSR ¶ 40. That same day, sorority members received a voicemail in which the caller claimed that "I'm in the house." PSR ¶ 41. On December 5, K.K. reported that online chemistry quizzes she was scheduled to take had been submitted prior to completion, resulting in her receiving zeros on the assignments. PSR ¶ 43. The next week, K.K.'s mother reported that K.K. had received a package at the family residence containing a book entitled "I AM WATCHING YOU." PSR ¶ 45.

Following an investigation, federal agents executed a search warrant at petitioner's residence on December 20, 2017. PSR ¶ 47. Petitioner was arrested during the search. Ibid.

2. In March 2018, petitioner waived indictment and pleaded guilty to an information charging him with one count of cyberstalking, in violation of 18 U.S.C. 2261A(2)(B) and 2261(b)(5), and one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). See Information 1-2; D. Ct. Doc. 19 (Mar. 22, 2018). The district court sentenced petitioner to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The district court also imposed a then-standard condition of supervised release that provided:

> 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.

Judgment 4 (the "risk condition").

Petitioner appealed his sentence, challenging (as relevant here) the risk condition. Pet. C.A. Br. 38-43. While petitioner's appeal was pending, the Second Circuit invalidated the standard risk condition in a separate case. See United States v. Boles, 914 F.3d 95, 112, cert. denied, 139 S. Ct. 2659 (2019). The District Court for the Western District of New York responded through a standing order that removed the risk condition for petitioner and other similarly situated defendants from the judgment and replaced it with the following:

> 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.

Amended Standing Order, In re: United States v. Boles (W.D.N.Y. Mar. 22, 2019) (emphasis omitted), https://www.nywd.uscourts.gov/sites/nywd/files/PTPR-2019-AmendedBolesStandOrd.pdf.

3. The court of appeals affirmed. Pet. App. A1-A19. The court deemed petitioner's challenge to the original risk condition moot in light of the standing order. Id. at A10. And it rejected

his argument that the standing order's modification required resentencing. Id. at A12.

The court of appeals explained that the revised risk condition "does not alter [petitioner's] sentence by imposing new burdens on him," and instead "clarifies that any obligation to notify at-risk individuals is wholly contingent on a subsequent determination by the district court that the supervisee poses a specific risk to such persons." Pet. App. A12. The court observed that, in this respect, the standing "order merely reiterates the existing procedures for adding conditions if and when they become necessary during terms of supervised release." Id. at A12-A13. The court accordingly found that the condition "simply announces what is already true under the law" -- that the district court has the "ability to add conditions of supervised release." Id. at A13-A14 (citing 18 U.S.C. 3583(e)(2) (providing that a court may "enlarge the conditions of supervised release, at any time prior to the expiration * * * of the term" consistent with the Federal Rules of Criminal Procedure)). The court additionally made clear that "if the district court were to make such a finding and impose the additional burden of notification on the supervisee, such an imposition would enlarge the condition, in which case the supervisee would be entitled to a hearing." Id. at A15 (citation, ellipsis, and internal quotation marks omitted).

The court of appeals then rejected as unripe petitioner's contention that the replacement language is "impermissibly vague."

Pet. App. A15. The court observed that "[b]ecause the standing order merely restates what courts are already authorized to do, [petitioner's] behavior is no more constrained by the wording of the order than it is by the ever-present possibility that the district court could modify the terms of his release as necessary." Id. at A17. It observed that "[i]f the court determines that [petitioner] poses a specific risk and enlarges the condition by requiring him to notify a third party, he can raise any vagueness challenge at the * * * hearing accompanying the modification." Ibid. And although petitioner had waived the argument that "the standing order contemplates vesting the probation officer with a degree of discretion that is inconsistent with [the court's prior] holding in Boles," the court of appeals stated that any such "challenge would likewise be unripe, since the ostensibly improper delegation may never actually occur." Id. at A18; see id. at A18 n.1.

4. The court of appeals denied petitioner's request for rehearing and rehearing en banc without recorded dissent. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 6-14) that the Second Circuit erred in dismissing his appeal. The Second Circuit's decision was correct and does not conflict with a decision from any other court of appeals. This Court should deny the petition for a writ of certiorari.

1. Petitioner contends (Pet. 6) that the court of appeals erred in dismissing his challenge to the revised language. But the court of appeals construed the revised language not as a freestanding condition on his supervised release, but instead as "merely reserv[ing] to the district court the power to modify supervised release conditions in the future -- powers that it already has under the law." Pet. App. A19. The court cited 18 U.S.C. 3583(e)(2), which provides that a court may "enlarge the conditions of supervised release, at any time prior to the expiration * * * of the term." Petitioner does not challenge that construction. His objection to a notice requirement that the district court might impose in the future, consistent with Section 3583(e)(2), is no more ripe than a challenge to any other modification that the court could, theoretically, make in the future as circumstances warrant.

Petitioner's arguments appear to rest on a misunderstanding of how the revised language operates. Petitioner principally contends (Pet. 7-8) that any eventual notice requirement might escape judicial review. But the revised language, as construed by the court of appeals, does not in itself add a new condition of supervised release as such, but merely reiterates, focusing on the specific context of risk notification, the district court's preexisting authority under Section 3583(e)(2) to contingently do so. If the district court deems such a notice requirement appropriate, the court would only then be modifying the conditions

of supervised release. See Pet. App. A15. In that event, petitioner "'would be entitled to a hearing' under Federal Rule of Criminal Procedure 32.1(c)" and could raise any "challenge" at the hearing, including a challenge to the legality of the modified conditions. Id. at A15, A17 (quoting United States v. Murdock, 735 F.3d 106, 114 (2d Cir. 2013)). Petitioner would also be able to appeal any enlarged risk condition. See, e.g., United States v. Parisi, 821 F.3d 343, 345 (2d Cir. 2016) (per curiam).

2. The decision below does not conflict with the decision of any other court of appeals. The cases cited by petitioner do not bear on the relatively unique circumstances here. See Pet. 11-12 (citing United States v. Evans, 883 F.3d 1154, 1164 (9th Cir.), cert. denied, 139 S. Ct. 133 (2018); United States v. Bickart, 825 F.3d 832, 841-842 (7th Cir. 2016); United States v. Sexton, 719 Fed. Appx. 483, 484-485 (6th Cir. 2017) (per curiam)). None even mentioned the question of ripeness. See United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) (noting that the Court was "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"). Nor did any involve a condition that, as here, had been definitively construed merely to replicate a district court's background power to modify conditions of release under Section 3583(e)(2). See Pet. App. A19.

Moreover, in petitioner's own view (Pet. 8-11), the decision below creates an intra-circuit conflict. Any such conflict would

not warrant this Court's review, and its asserted existence would be a reason to deny certiorari. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Regardless, petitioner's assertion of an intra-circuit conflict is misplaced. The only decision he cites that even discusses ripeness is United States v. Myers, 426 F.3d 117 (2d Cir. 2005). But that case involved a determinate, not contingent, condition of supervised release, which required the defendant "to obtain authorization from the probation office before he may spend time alone with his son." Id. at 122. The challenge to that condition is far afield of the circumstances here, which involve only a standing order that effectively restates the district court's background authority to modify the conditions of release as appropriate in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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