No. 20-6808

IN THE

Supreme Court of the United States

THOMAS TRAFICANTE,

Petitioner,

v.

UNITED STATES

Respondent.

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

REPLY BRIEF

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I. INTRODUCTION

The Second Circuit's conclusion that Mr. Traficante's constitutional challenges to the risk condition are unripe for review runs counter to Congress' intent to create a streamlined scheme of sentencing review. By foreclosing direct appeal as a procedural avenue to challenge the condition's constitutionality, the decision, in effect, deprives Mr. Traficante of the only meaningful forum to bring such a claim.

Likewise, the decision is an outlier in the various Courts of Appeals' decisions that have examined similar issues. *See United States v. Evans*, 833 F.3d 1154, 1164 (9th Cir. 2018); *United States v. Sexton*, 719 F. App'x 483, 484-85 (6th Cir. 2017); *United States v. Bickart*, 825 F.3d 832, 841-42 (7th Cir. 2016). These Circuits rejected nearly identical risk conditions as unconstitutionally vague on direct appeal. Similarly, the decision is an outlier in the Second Circuit, which frequently reviews a condition's legality on direct appeal. *See United States v. Boles*, 914 F.3d 95 (2d Cir. 2019); *United States v. Myers*, 426 F.3d 117, 123 (2d Cir. 2005). As set forth in the petition, this Court should grant *certiorari* to bring clarity to this issue and create a uniform approach for circuit courts to use when reviewing conditions of release.

In response, the respondent urges this Court to deny Mr. Traficante's petition for three reasons. First, the respondent contends that granting *certiorari* is unnecessary because the decision does not prevent all judicial review of the risk condition. Second, the respondent argues that this case is

unsuitable for review because the decision does not create an intercircuit split. Third, the respondent asserts that Mr. Traficante's case is inappropriate for review because the decision does not conflict with other Second Circuit cases. For the reasons discussed below, none of these arguments are persuasive.

II. ARGUMENT

1. Respondent's argument that this Court should deny review because Mr. Traficante could challenge the condition's legality at a modification hearing is wrong.

The respondent argues that this Court should deny relief because Mr. Traficante can challenge the condition's legality at a modification hearing held per 18 U.S.C. § 3583(e)(2) and in accordance with Federal Rule of Criminal Procedure 32.1(c). As such, the respondent maintains that the decision does not hinder Mr. Traficante's ability to challenge the condition's legality. Gov't BIO 8-9. The respondent's argument is wrong as a matter of law.

First, "[t]he 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." *United States v. Lussier*, 104 F.3d 32, 34 (2d Cir. 1997). Subsection 3583(e)(2) specifies the factors that a district court may consider when modifying a condition of release. *See* 18 U.S.C. § 3583(e)(2). "These factors are: the circumstances of the crime; the history and characteristics of the defendant; the need for deterrence; protection of the public; provision of educational or vocational training, medical care or other treatment; the kinds of sentence and the sentencing range established by the

Sentencing Commission and Congress; the relevant policy statements of the U.S. Sentencing Commission; the need to avoid disparities among defendants with similar records and similar conduct of guilt; and the need to provide restitution to the victim." *United States v. McLeod*, 972 F.3d 637, 641 (4th Cir. 2020). Noticeably absent from this long list is examining the legality of the condition.

The overwhelming majority of Circuits to consider this question have reached the same conclusion—a supervised release condition cannot be modified based on its alleged illegality. *See United States v. Faber*, 950 F.3d 356, 358-59 (6th Cir. 2020) ("Section 3583(e) enumerates the factors that a district court may consider; we may not judicially augment that list" to include "illegality of the condition"); *United States v. McClamma*, 676 F. App'x 944, 948 (11th Cir. 2017) ("Accordingly, § 3583(e)(2) may not be used to challenge the legality or constitutionality of a supervised release condition.") (unpublished); *United States v. Nestor*, 461 F. App'x 177, 179 (3rd Cir. 2012) ("The plain language of subsection 3583(e)(2) indicates that the illegality of a condition of release is not a proper ground for modification under this provision.") (internal citation omitted) (unpublished); *United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002) ("[I]llegality is not a proper ground for modification."); *United States v. Hatten*, 167 F.3d 884, 886 (5th Cir. 1999) (district court lacked jurisdiction to modify conditions of supervised release on the grounds of illegality); *Lussier*, 104 F.3d at 34–35; *but see McLeod*, 972 F.3d

at 643-44 (concluding that § 3583(e)(2) authorizes district courts to consider the legality of a condition in narrow circumstances); *United States v. Neal*, 810 F.3d 512, 518 (7th Cir. 2016) ("We conclude that § 3583(e)(2) is better interpreted to allow a defendant to bring substantive challenges to the current legality of conditions of supervised release.").

Moreover, interpreting § 3583(e)(2) to authorize a district court to modify an allegedly illegal condition at anytime would disrupt the "streamlined scheme of sentencing review" established by the Sentencing Reform Act of 1984. *Lussier*, 104 F.3d at 32. Congress "enacted the Sentencing Reform Act of 1984 . . . to overhaul federal sentencing practices." *Tapia v. United States*, 564 U.S. 319, 325 (2011). Congress enacted § 3583(e)(2) as part of the Sentencing Reform Act. Despite including a detailed list of the factors a court may consider when modifying a condition of release under § 3583(e)(2), Congress omitted any reference to the illegality of the condition. *Lussier*, 104 F.3d at 35. This was "no oversight.'" *Faber,* 950 F.3d at 358. Accordingly, "[c]onstruing § 3583(e)(2) as allowing district courts to eliminate an allegedly illegal condition at any time would disregard the plain text of the statute and frustrate Congress's intent to encourage timely challenges." *Id.*

Respondent makes no meaningful attempt to rebut the text of § 3583(e)(2), its history, or the Court of Appeals' decisions interpreting it. Instead, respondent argues, without explanation, that Mr. Traficante could challenge the legality of a condition at a modification hearing and cites two

Second Circuit cases for support. Gov't BIO 8 (citing *United States v. Murdock*, 735 F.3d 106 (2d Cir. 2013) and *United States v. Parisi*, 821 F.3d 343 (2d Cir. 2016)). Neither case, however, supports the government's position.

In *Murdock*, the defendant moved to modify his conditions of release pursuant to § 3583(e) to provide that his supervision occur in a different district than the one in which he was convicted. *Murdock*, 735 F.3d at 108-09. At the defendant's modification hearing, the district court denied his request finding that it had no authority to grant it without the permission of the other jurisdiction. *Id*. at 109. The district court did not expressly consider any of the relevant § 3553(a) factors listed in § 3583(e). *Id*. at 113. On appeal, the *pro se* defendant primarily argued that the district court had unlimited authority to transfer a supervisee's term of release to another district, even without that district's consent. *Id.* at 110. The Second Circuit specifically rejected the defendant's argument that a district court's authority was limitless. Even so, it vacated and remanded because the district court failed to consider the relevant § 3553(a) factors in denying his modification request. *Id.* at 112-13. The Second Circuit recognized that "the [district] court's discretion to modify supervised-release conditions is not unfettered," instead "[a] modification of supervised-release conditions is permitted only *after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C)*, (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." *Id.* at 111-12 (internal quotation marks and citation omitted) (emphases in original). Thus, the *Murdock* decision does not support the

respondent's argument. *Murdock* is inapposite because it does not address the issue of whether constitutional challenges to supervised release conditions can be brought at a modification hearing. Further, *Murdock*'s reasoning ultimately undermines the respondent's position because *Murdock* recognized the court's authority at a modification hearing is limited by the factors listed in § 3583(e).

The respondent's reliance on *Parisi* is similarly misplaced. In *Parisi*, the district court granted Probation Services' request to impose two new conditions after the defendant had begun serving his term of supervised release. *Parisi*, 821 F.3d at 346. The two conditions had become standard in sex offense cases during the ten years he was incarcerated. *Id.* On appeal, the defendant argued, *inter alia*, that the district court erred in modifying the conditions of his release because the newly imposed conditions did not comply with the sentencing factors listed in §§ 3553(a), 3583(d), (e). *Id.* at 347-48. The defendant also argued that the hearing held pursuant to Rule 32.1 was inadequate because he was not invited to speak on his own behalf. *Id.* at 349. Mr. Parisi did *not* argue that the conditions themselves were unconstitutional. Thus, the Second Circuit did not consider whether a defendant may challenge the constitutionality of conditions at a modification hearing.

As such, neither case cited by the respondent addresses the issues presented by *Traficante*. Instead, these two cases support the unchallenged (and unremarkable) proposition that, absent certain exceptions, district courts should hold a hearing pursuant to Fed. R. Crim. P. 32.1 before modifying

conditions of release. *See Murdock*, 735 F.3d at 113 (noting that a hearing may be required); *Parisi*, 821 F.3d at 349 (rejecting defendant's argument that his modification hearing was inadequate). Mr. Traficante does not argue to the contrary.

Instead, Traficante argues that the plain text of § 3583(e)(2) as interpreted by the majority of the circuits, as well as the congressional intent behind the Sentencing Reform Act of 1984, demonstrates that defendants cannot challenge the constitutionality of a condition of release at a modification hearing at all. Respondent fails to provide any textual basis or legal authority to support its contrary conclusion. Gov't BIO 8-9. As such, respondent's argument against review on this basis is simply wrong.

2. The respondent's argument that Mr. Traficante's case is unsuitable for review because it does not conflict with other Courts of Appeals' decisions is unpersuasive.

The respondent argues that Mr. Traficante's case is unsuitable for review because the decision does not conflict with other Courts of Appeals' decisions. Gov't BIO 9 (citing *Evans*, 833 F.3d at 1164 (rejecting nearly identical risk condition as unconstitutionally vague on direct appeal); *Sexton*, 719 F. App'x at 484-85 (same); and *Bickart*, 825 F.3d at 841-42 (same)). The respondent claims these cases do not conflict with *Traficante* because each Circuit mistakenly overlooked ripeness when each decided, on direct appeal, that virtually identical risk conditions were unconstitutional. Gov't BIO 9. This argument is unpersuasive for at least two reasons.

First, in this context, we cannot assume, as respondent suggests, that the Sixth, Seventh, and Ninth Circuits did not discuss ripeness because they accidentally overlooked it. Courts can, and frequently do, address ripeness *sua sponte*. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) ("[T]he question of ripeness may be considered on a court's own motion."). Additionally, "[o]n a regular basis, appellate courts must decide whether a defendant's challenge to a condition of supervised release is ripe . . . ." *Primer on Supervised Release*, United States Sentencing Commission 18 (2020); *see also United States v. Villafane-Lozada*, 973 F.3d 147, 150 (2d Cir. 2020) ("Before assessing the propriety of a condition of release, we must assure ourselves that the defendant's challenge raises issues that are ripe for our consideration."); *United States v. Miller*, 829 F.3d 519, 529-30 (7th Cir. 2016) (considering whether challenge to supervised release condition was ripe); *United States v. Rhodes*, 552 F.3d 624 (7th Cir. 2009) (same). Given the frequency with which courts consider ripeness *sua sponte* in this context, we cannot conclude that the Sixth, Seventh, and Ninth Circuits inadvertently overlooked ripeness and proceeded to the merits. Indeed, the government's own failure to raise ripeness in each of these cases, including *Traficante*, is an indication that it understands direct appeal to be the correct forum to bring constitutional challenges to conditions of release.

Moreover, regardless of whether those decisions discussed ripeness, the simple fact remains that three Courts of Appeals struck down similarly worded

risk conditions as unconstitutionally vague, whereas, after the *Traficante* decision, defendants in the Second Circuit have no opportunity to challenge the constitutionality of the risk condition on direct appeal. Such a result undermines the fundamental principle that "federal law . . . is supposed to be unitary." *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993).

Second, the decision also conflicts with the decisions discussed previously from the Third, Fifth, Sixth, Ninth, and Eleventh Circuits. Those courts uniformly held that a defendant cannot challenge the legality of a condition at a modification hearing. *See Faber*, 950 F.3d at 358-59; *Hatten*, 167 F.3d at 886; *Gross*, 307 F.3d at 1044; *McClamma*, 676 F. App'x at 948. In contrast, the decision concluded that Mr. Traficante "can raise any vagueness challenge at the Rule 32.1 hearing accompanying the modification." *United States v. Traficante*, 966 F.3d 99, 106 (2d Cir. 2020).

In short, *Traficante* conflicts with the well-reasoned decisions from other circuits. Mr. Traficante's case offers a suitable vehicle to provide much-needed clarification and bring the Second Circuit into conformity with the majority view.

3. The respondent's argument against granting *certiorari* because the decision does not conflict with other Second Circuit decisions is incorrect.

Respondent argues that *certiorari* should be denied because the decision does not create an intracircuit conflict and, even if it does, this Court is not

responsible for reconciling the Second Circuit's internal conflicts. Both arguments are unavailing.

First, Respondent's attempt to distinguish *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005), which expressly rejected the government's ripeness argument, is unpersuasive. Respondent argues that *Myers* is distinguishable because it involved a "determinate, not contingent, condition of supervised release." Gov't BIO 10. However, nothing in the court's opinion indicates that its conclusion hinged on the determinate nature of the condition. Instead, the court concluded that the condition was ripe for review because the defendant "would be unable to challenge the constitutionality of the condition" at a modification hearing. *Myers*, 426 F.3d at 123. That concern—the defendant's inability to challenge the condition's legality at a modification hearing—is present regardless of whether the condition is described as contingent or determinate.

Second, for the reasons discussed in the previous section, we should not conclude that the Second Circuit simply overlooked ripeness when ruling on the merits of challenges to other conditions of release on direct appeal. *See Boles*, 914 F.3d 95 at 111-12; *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) (invalidating a similar risk condition as an improper delegation of authority on direct appeal). Accordingly, the decision's "wait and see" approach runs counter to the Second Circuit's practice of reviewing a condition's legality on direct appeal.

Third, respondent makes no attempt to reconcile the decision's "wait and see" approach with the line of Second Circuit cases recognizing that Congress intended to create streamlined procedures for reviewing terms of supervised release on direct appeal when it enacted the Sentencing Reform Act of 1984. *See Lussier*, 104 F.3d at 34-35; *Myers*, 426 F.3d at 123 n.5 (noting "Congress's intent in providing streamlined procedures for reviewing terms of supervised release"). Nor can the decision's conclusion that Mr. Traficante could raise a vagueness challenge at a modification hearing be squared with *Lussier*'s conclusion that "illegality of a condition of supervised release is not a proper ground for modification . . . ." *Lussier*, 104 F.3d at 34. In short, there is no question that the decision conflicts with other Second Circuit decisions and creates confusion about the proper forum to bring a constitutional challenge to a condition of release.

Finally, this Court has granted *certiorari* to resolve an intracircuit conflict. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) ("Because of this intracircuit conflict, we made a limited grant of certiorari."). The case for granting *certiorari* is particularly strong when, as here, the decision involves an issue of national importance, a point the respondent makes no effort to rebut, and the decision creates intracircuit and intercircuit conflict.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, 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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