No. _____

In the Supreme Court of the United States

Andrew J. Gibson,

Petitioner,

v.

United States of America,

Respondent.

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

Petition for a Writ of Certiorari

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Questions Presented For Review

I. Must federal appellate courts adjudicate direct appeal challenges to the illegality or unconstitutionality of supervised release conditions imposed at sentencing?

II. Is the standard federal supervision condition requiring third-party risk-notification unconstitutional for its vagueness, overbreadth, and violation of the non-delegation doctrine?

Related Proceedings

1. *United States v. Gibson*, 856 F. App'x 727 (9th Cir. May 20, 2021), *add'l opinion*, *United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021), *pet. for reh'g denied* (June 30, 2021);

2. *United States v. Gibson*, No. 2-14-CR-00287-KJD-CWH, 2020 WL 364109 (D. Nev. Jan. 21, 2020); and

3. *United States v. Gibson*, 783 F. App'x 653 (9th Cir. July 31, 2019).

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Petition for a Writ of Certiorari

Petitioner Andrew J. Gibson respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Orders Below

The district court originally sentenced Gibson to 14 years in prison and lifetime supervision subject to numerous mandatory, standard, and special supervision conditions. *United States v. Gibson*, No. 2-14-CR-00287-KJD-CWH (D. Nev. Aug. 9, 2017), Pet. App. 1a-7a. Gibson appealed several of the supervision conditions as unconstitutional to the Ninth Circuit Court of Appeals. In an unpublished opinion, the Ninth Circuit vacated and remanded the special place restriction condition as unconstitutionally vague and overboard. *United States v. Gibson*, 783 F. App'x 653 (9th Cir. July 31, 2019) (unpublished), Pet. App. 8a-10a. The Ninth Circuit stated Gibson could re-raise constitutional challenges to other supervision conditions on remand.

On remand, the district court reimposed many of the same conditions, including the special place restriction and a standard risk-notification condition, over Gibson's objections. Pet. App. 11a-14a, 15a-21a. Gibson again appealed. The Ninth Circuit affirmed the place restriction, finding Gibson could seek permission from his probation officer or ask to modify the place restriction after completing his prison term to address constitutional familial concerns. Pet. App. 29a-31a. The Ninth Circuit also affirmed the risk-notification condition. Pet. App. 31a-32a.

Jurisdictional Statement

The Ninth Circuit entered its summary order denying Gibson's timely request for panel rehearing and en banc review on June 30, 2021. Pet. App. 33a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254. This petition is timely under Supreme Court Rule 13.3 and this Court's Orders of March 19, 2020 and July 19, 2021, which together extended the deadline from 90 days to 150 days to file a petition for a writ of certiorari if the lower court's order denying discretionary review was entered before July 19, 2021.

Relevant Constitutional, Statutory, and Sentencing Guideline Provisions

The relevant portions of the following provisions are provided in the attached Petitioner's Appendix (Pet. App.):

1. U.S. Const. Art. I, § 1, Pet. App. 34a;
2. U.S. Const. amend. I, Pet. App. 34a;
3. U.S. Const. amend. V, Pet. App. 34a;
4. U.S. Const. amend. VI, Pet. App. 34a;
5. 18 U.S.C. § 3553. Imposition of a sentence, Pet. App. 35a-36a;
5. 18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment, Pet. App. 36a-41a; and
6. U.S.S.G. § 5D1.3. Conditions of Supervised Release (2016), Pet. App. 41a-47a.

Introduction

First-time internet-offender Andrew Gibson was ordered to serve lifetime supervision with 4 mandatory, 13 standard, and 9 special conditions he must follow after he completes his prison term. On direct appeal to the Ninth Circuit Court of Appeals, Gibson challenged two of those conditions as unconstitutional. The Ninth Circuit refused to resolve one challenge and perpetuated an unconstitutional condition in resolving the other.

The Ninth Circuit failed to resolve Gibson's challenge to a "place restriction" the district court imposed as a special supervision condition that impermissibly infringes on his fundamental liberty rights to procreate and to familial association. The place restriction prohibits Gibson from "go[ing] to, or remain[ing] in" any place that his own future children or minor children of family members may be without first obtaining written approval from his probation officer or treatment providers. Pet. App. 19a. But the Ninth Circuit characterized Gibson's challenge to the condition's violation of his fundamental rights to procreate and familial association as hypothetical, relegated it to a footnote, and directed him to resolve the unconstitutional condition in the future by asking his "probation officer for permission to interact with [his own children] or seek[ing] modification from the court." Pet. App. 30a-31a. The Ninth Circuit's ruling adds to the federal circuit split over whether future review of Gibson's constitutional claim through a modification reqiest 18 U.S.C. § 3583(e) is even permissible.

The Ninth Circuit also deepened entrenched confusion in the federal circuit courts regarding the constitutionality of the standard third-party risk condition. The standard risk condition delegates to probation officers the authority to require defendants to notify third parties about any risks the officers determine defendants may pose and authority to confirm defendants have done so. Pet. App. 18a (standard condition 12). The condition delegates this authority without identifying any existing risk, without requiring a nexus between the risk and the underlying offense, without establishing the burden of proof required to establish the existence of any future risks, without providing intelligible principles to measure and constrain the notification procedures for any future risks, and without identifying third-parties to be notified. Pet. App. 18a.

The Ninth Circuit stated it recently interpreted the word "risks" as "those 'posed by the defendant's criminal record.'" Pet. App. 32a. Yet the Ninth Circuit declined to find the condition unconstitutionally vague even though the condition identifies no specific risks relative to Gibson's criminal history warranting notification to specific third-parties and provided no meaningful guidance to his probation officer beyond a generic reference to Gibson's criminal history. Pet. App. 32a.

Both conditions warrant this Court's careful review. Sup. Ct. R. 10.

1. The special place restriction condition is often imposed in criminal cases involving non-contact child pornography offenses and for sexual contact offenses involving minors. Yet, the condition is not a mandatory, standard, or

special condition in the Sentencing Guidelines or the United States Code. It is a creation of the probation department and/or the judiciary that impermissibly prohibits defendants from contact with their own children and the right to procreate, subject to the discretion of a probation officer. *See* U.S. amends. I, V.

The Ninth Circuit, however, avoided its jurisdictional obligation to resolve Gibson's preserved constitutional claims to the place restriction. It instead directed Gibson to seek *modification* of the condition to avoid its constitutional infirmity.

But circuit confusion exists over whether 18 U.S.C. § 3583(e)(2)'s text permits modification of a supervision condition based on the illegality or unconstitutionality of a condition that a defendant could have challenged on direct appeal. *Gibson*'s holding thus adds to now near-complete split over whether appellate courts may avoid adjudicating the legality of a supervision condition raised on direct appeal—a split stemming from disagreement over whether defendants may correct illegal and unconstitutional conditions through a discretionary modification request from a court under 18 U.S.C. § 3583(e)(2).

Of the circuits to address the issue, only the Seventh Circuit permits defendants to challenge the illegality or unconstitutionality of supervision conditions through the modification procedure in § 3583(e)(2). The Third Circuit permits a limited as-applied challenge under § 3583(e)(2). The Second, Fourth, Fifth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits do not permit such challenges under § 3583(e)(2). *See United States v. Gross*, 307 F.3d 1043, 1044 (9th Cir. 2002).

Thus, the Ninth Circuit concerningly abdicated its duty to adjudicate Gibson's preserved constitutional challenge to the place restriction's infringement on his fundamental liberty interests to procreate and associate with his family. U.S. Const. amend. V; *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (recognizing the Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests such as the right to become a parent who resides with and cares for his or her child); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984) (acknowledging familial relationships are the quintessential "personal bonds" that "act as critical buffers between the individual and the power of the State"); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (recognizing fundamental right to procreate). Instead, the Ninth Circuit directed Gibson to lodge these constitutional challenges under a statute it holds does not permit such challenges.

This Court should review the Ninth Circuit's refusal to adjudicate Gibson's challenge that the place restriction is unconstitutional and otherwise illegal, as its refusal poses a complete barrier to relief to Gibson and similarly situated defendants seeking to protect their constitutional rights. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) ("[F]ederal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'") (quoting *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not. . . . Questions may

occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

2. The standard third-party risk-notification condition is imposed in nearly all criminal cases because the Sentencing Commission advocates its routine imposition. *See* U.S.S.G. § 5D1.3. And district courts nationwide routinely impose this standard condition as a matter of course in supervised release sentences as it is printed on the judicial form used for final criminal judgments.[1] The widespread imposition of the condition subjects thousands of defendants, some who face lifetime supervision, to an unconstitutionally vague and overbroad supervision condition. *See* U.S. Const. amends. V, VI; *Johnson v. United States*, 576 U.S. 591, 595 (2015) (holding vagueness exists when a provision "fails to give ordinary people fair notice of the conduct it punishes," or is "so standardless that it invites arbitrary enforcement").

The risk condition also exposes defendants to criminal sanctions based on the unfettered discretion of probation officers without guidance for its application, violating the Article I non-delegation doctrine. *See* U.S. Const. art. I, § 1; *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is

[1] *See* Admin. Office of U.S. Courts, Forms, AO 245B - Judgment in a Criminal Case; AO Form 245C - Amended Judgment in a Criminal Case; AO Form 245D - Judgment in a Criminal Case (Revocation of Supervised Release Violation) (eff. Sept. 1, 2019), *available at* https://www.uscourts.gov/services-forms/forms?k=judgment+in+a+criminal+ case&c=All.

not a forbidden delegation of legislative power.'") (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928)).

3. Gibson preserved his right to appeal both constitutional questions presented, making this a fitting case for this Court's consideration. Resolution of these questions will serve the large population of those who are currently subject to these same supervision terms and those who will be subject to them in the future. Guidance from this Court on these important questions is necessary to protect and preserve defendants' constitutional rights and ensure courts are adjudicating those rights in accord with the Constitution and this Court's precedent.

Statement of the Case

I. The Ninth Circuit originally held the special place restriction was unconstitutionally vague and overbroad.

Gibson was a young man with no prior criminal history who was convicted of receiving Internet images of child pornography. ER-24;[2] Presentence Investigation Report (PSR), p. 3.

After his jury trial, Gibson successfully appealed the unconstitutionality of a special place restriction condition that provided: "You must not go to, or remain at, any place where you know children under the age of 18 *are likely to be*, including parks, schools, playgrounds, and childcare facilities." Pet. App. 5a (emphasis added). The Ninth Circuit held the "likely to be" language rendered this condition unconstitutionally vague and overbroad. Pet. App. 10a. The court found this left

[2] "ER" references are to the single-volume Excerpts of Records filed in the Ninth Circuit in Gibson's direct appeal, App. Dkt. No. 8.

"Gibson guessing as to how probable a child's presence would have to be at a given location—even those locations commonly understood to cater predominantly to adults—to trigger Gibson's exclusion," and (2) "even if the condition were more definite, it would still sweep too broadly, effectively barring Gibson from any location—be it a grocery store, hospital, courthouse, or place of worship—where a child was present." Pet. App. 10a.

The Ninth Circuit vacated Gibson's entire supervised release sentence and remanded for resentencing so he could re-raise his challenges to the lifetime supervision term and its conditions, including his objection to the lack of a familial exception to the place restriction condition. Pet. App. 10a.

II. On remand, the district court reimposed a modified special place restriction and the standard third-party risk-notification over Gibson's objections.

At resentencing, the probation officer proposed the place restriction condition with this modification:

> You must not go to, or remain at, any place *primarily used by children* under the age of 18, including parks, schools, playgrounds and childcare facilities. This condition includes those places where members of your family are present, unless approved in advance and in writing by the probation officer in consultation with the treatment providers.

Pet. App. 19a (modification italicized). Gibson objected, arguing the restriction was still unconstitutional for its failure to provide an unconstrained familial exception for children he may have and minor members of his family. ER-21–34, 72–77.

The probation officer also proposed the standard third-party risk-notification condition in U.S.S.G. § 5D1.3(c)(1) (2016):

> 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.

Pet. App. 18a. Gibson objected to this condition as unconstitutionally vague because it lacked meaningful parameters or guidance for its application. ER-46–50, 60–66.

The district court imposed both the special place restriction and the standard risk-notification over Gibson's objections. Pet. App 18a-19a. Gibson timely appealed. ER-1–2.

III. The Ninth Circuit issued two separate decisions.

A. Published opinion: the place restriction and risk condition.

Gibson challenged the place restriction condition a second time for its failure to include a familial exception and requested the condition be struck as an infringement on his fundamental liberty interests. (Opening Brief (OB), App. Dkt. 6-10, 49; Reply Brief (RB), App. Dkt. 25, 2-4). He argued the condition impermissibly prohibits him from going to or remaining anywhere, including his own home, where his *own* future children may be, as well as those places where minor members of his family may be, without first obtaining written, advance approval from his "probation officer in consultation with [any] treatment providers." OB, 7-8. The restriction thus interferes with his fundamental right to procreate

and freely associate with own children in the future and the minor members of his family. OB, 45.

The Ninth Circuit agreed the place restriction was broad. Pet. App. 30a. But it refused to adjudicate Gibson's constitutional challenge. It instead avoided the constitutional issue, considered Gibson's constitutional rights to be "hypothetical" as he did not yet have "children and specified no minor family members" currently affected by the restriction. Pet. App. 30a. The court directed Gibson to "either ask his probation officer for permission to interact with" his own future children or minor family members "or seek modification from the court" to resolve any imminent constitutional ramifications after he is released from prison. Pet. App. 30a-31a.

Gibson also challenged the constitutionality of the third-party risk-notification condition as unconstitutionally vague and overbroad. The condition fails to provide determinate guidance to anyone—not Gibson, his probation officer, or reviewing courts—as to what constitutes a "risk," thereby vesting unfettered discretion in probation officers to make such assessments in the first instance. OB 23-27, 55-58; RB, 14-16. The government did not identify any such risk; it instead quipped "there is no way to now specify the risks Gibson may pose to individuals or organizations he encounters in the future." Answering Brief (AB), App. Dkt. 17, 33.

But Gibson noted the Ninth Circuit's recent decision in *United States v. Magdirila*, 962 F.3d 1152, 1159 (9th Cir. 2020), compelled remand for specification. OB, 57-58; RB, 14-16. *Magdirila* read the word "risks" in a similar condition

requiring notification of specific risks to specific persons to be those "posed by the defendant's criminal record."[3] 962 F.3d at 1159. *Magdirila* determined the risk condition did not satisfy due process concerns because it did not "answer the question of what conduct the defendant needed to warn the public about." *Id.* *Magdirila* determined the risk-notification obligation should be limited to those "*posed by the defendant's criminal record*" and left it for the district court "to craft a supervised release condition that accord[ed] with Magdirila's criminal history." *Id.* Gibson requested remand for the same relief, otherwise the condition must be struck as unconstitutionally vague. OB, 58.

The Ninth Circuit upheld the constitutionality of Gibson's third-party risk-notification condition *without* remand. It contended that, by adopting the interpretation of risk as stated in *Magdirila*, the "risks" covered by the condition could only be those posed by Gibson without the need for further specification. Pet. App. 32a.[4] In other words, the district court need not identify a specific criminal

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[3] The risk condition vacated in *Magdirila* stated: "As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications." 962 F.3d at 1158.

[4] After the Ninth Circuit's affirmance, the district court amended its written final judgment as directed by the unpublished memorandum. *See* Pet. App. 24a; Dist. Ct. Dkt. 307 (amended judgment). But without providing notice to Gibson, the district court also revised the third-party risk-notification condition sua sponte. Dist. Ct. Dkt. 307, p. 4, (condition 12). The revision appears to be an attempt to comply with *Magdirila*, but the revision fails to "craft a supervised release condition that accord[ed] with [Gibson's] criminal history." 962 F.3d at 1159. The revision simply states, in relevant part: "If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to

history risk to trigger the notification requirement to specific third-parties to limit the condition's parameters.

B. Unreported memorandum: limited remand to conform written judgment with oral pronouncement.

The Ninth Circuit also issued a separate unpublished memorandum in *Gibson*, remanding the final judgment in part and directing the district court to conform its written final judgment to its oral sentencing pronouncement to require the probation officer to cooperate with Gibson's future employers regarding his computer access for employment. Pet. App. 22a-24a.

C. The Ninth Circuit denied rehearing and rehearing en banc without a written opinion.

Gibson petitioned for rehearing and en banc review on the issues presented herein. App. Dkt. 40. The Ninth Circuit issued a summary order denying rehearing. Pet. App. 33a.

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notify the person about specific risks posed by your criminal record and you must comply with that instruction." Dist. Ct. Dkt. 307, p. 4. The revision does not identify any specific risks or specific parties to be given notice of those specific risks.

Reasons for Granting the Writ

I. Must federal appellate courts adjudicate direct appeal challenges to the illegality or unconstitutionality of supervised release conditions imposed at sentencing?

A. The majority of federal circuit courts hold that 18 U.S.C. § 3583(e)(2) prohibits modification of supervision conditions based on illegality or unconstitutionality.

"Congress enacted [18 U.S.C.] § 3583(e)(2) as part of the Sentencing Reform Act of 1984" (SRA). *United States v. Faber*, 950 F.3d 356, 358 (6th Cir. 2020) (citing Pub. L. No. 98-473, § 212, 98 Stat. 1987, 2000 (1984)). Before the SRA, "a defendant could move the district court to 'correct an illegal sentence *at any time*.'" *Faber*, 950 F.3d at 358 (quoting Fed. R. Crim. P. 35(a)) (Rule Applicable to Offenses Committed Prior to Nov. 1, 1987) (emphasis added by *Faber*)). But Congress altered a district court's authority to correct an illegal sentence through the SRA, ultimately requiring motions for relief be filed within 14 days of oral pronouncement of the sentence. *Faber*, 950 F.3d at 358 (citing Fed. R. Crim. P. 35(a)).

Under 18 U.S.C. § 3583(e)(2), district courts now have authority to "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. § 3582(e)(2). Courts may modify supervision "after considering the factors set forth in" 18 U.S.C. § "3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3582(e)(2). The listed modification factors do not identify illegality or unconstitutionality of the supervision condition as a basis for modification. The

statute instead include factors courts consider when imposing sentence in the first instance under § 3553(a).[5] *See Gall v. United States*, 552 U.S. 38, 49 (2007).

[5] The relevant § 3553 factors for modification are:

(a)(1)	the offense's "nature and circumstances" and the defendant's "history and characteristics";
(a)(2)(B)	the need for the sentence "to afford adequate deterrence to criminal conduct";
(a)(2)(C)	the need for the sentence "to protect the public from further crimes of the defendant";
(a)(2)(D)	the need for the sentence to most effectively provide the defendant with "needed educational or vocational training, medical care, or other correctional treatment";
(a)(4)	the applicable Guidelines or policy statements the Sentencing Commission issued under 28 U.S.C. § 994(a)(3), accounting for amendments to them and policy statements via congressional acts even if they have yet been incorporated by the Sentencing Commission into amendments under 28 U.S.C. § 994(p);
(a)(5)	pertinent policy statements by the Sentencing Commission under 28 U.S.C. § 994(a)(2) in effect on at sentencing under 18 U.S.C. § 3742(g), subject to amendments to them by congressional act and regardless of the Sentencing Commission incorporated those amendments under 28 U.S.C. § 994(p);
(a)(6)	"the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and
(a)(7)	need to provide restitution to any victims of the offense."

18 U.S.C. § 3583(e) (refencing 18 U.S.C. § 3553(a)).

It is with this understanding of the SRA, the text of § 3583(e)(2), and Rule 35(a) that the majority of the federal circuit courts prohibit correction of illegal or unconstitutional sentences beyond the 14-day period that Fed. R. Crim. P. 35(a) provides. *See United States v. McLeod*, 972 F.3d 637, 642 (4th Cir. 2020) ("This interpretation is bolstered by the contrast between § 3583(e) and 18 U.S.C. § 3742(a)(1), the general provision authorizing appellate review of sentences, which authorizes defendants to seek review of an otherwise final sentence if it 'was imposed in violation of law.'"). The circuit majority concludes it would violate congressional intent to encourage timely sentencing challenges and the plain language of § 3583(e)(2) if courts permitted challenges to illegal and unconstitutional sentences under the modification statute when the illegality was known or foreseen to the defendant at the time of sentencing.

This majority view is followed by the Second, Fourth, Fifth, Fifth, Sixth, Eighth, Ninth (*Gibson* notwithstanding), Tenth, and Eleventh Circuits. *United States v. Lussier*, 104 F.3d 32, 34-37 (2d Cir. 1997); *United States v. McLeod*, 972 F.3d 637, 644 (4th Cir. 2020); *United States v. Hatten*, 167 F.3d 884, 886-87 (5th Cir. 1999); *Faber*, 950 F.3d at 358; *United States v. Still*, 275 F. App'x 561 (8th Cir. 2008) (unpublished); *Gross*, 307 F.3d at 1044; *United States v. Blackwell*, 81 F.3d 945, 948 (10th Cir. 1996); *United States v. McClamma*, 676 F. App'x 944, 948 (11th Cir. 2017) (unpublished).[6]

[6] This issue appears to be unresolved in the First Circuit. *See United States v. Garrasteguy*, 559 F.3d 34, 43 (1st Cir. 2009) (noting circuit split but acknowledging that, in First Circuit, "[t]he showing required for a defendant to obtain a

The case most often cited among the circuit majority is the Second Circuit's decision in *Lussier*. In *Lussier*, after the Second Circuit issued its mandate following the defendant's unsuccessful direct appeal, he filed a motion in district court arguing for the first time that his restitution order was illegal under the restitution statute, 18 U.S.C. § 3663(g). 104 F.3d at 33. Because payment of the illegal restitution was a condition of the defendant's supervised release, he also moved to modify his supervision under 18 U.S.C. § 3583(e)(2) to remove that condition. *Id.*

The Second Circuit concluded § 3583(e)(2)'s plain language reveals the "illegality of a condition of supervised release is not a proper ground for modification." *Lussier*, 104 F.3d at 34. Rather, § 3583(e)(2) requires a court to "consider many of the same factors that it is required to consider in originally imposing a sentence upon a convicted defendant." *Id.* at 34-35 (referencing provisions of 18 U.S.C. § 3553(a)). The *Lussier* decision also turned to § 3583's legislative history, which further provides a district court may modify a supervision term "after considering the same factors considered in the original imposition of a term of supervised release"—§ 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)." *Id.* (referencing S. REP. 98-225, 124-25, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3307-08 (capitalizing omitted)). Thus, like initial sentencing proceedings, the Second Circuit concluded the focus of supervision modification proceedings is

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modification of a condition of supervised release pursuant to section 3583(e) is an open question").

limited to "deterrence, public safety, rehabilitation, proportionality, and consistency." *Id.* at 35.

The Second Circuit found it important that the legality of the supervision condition is "[c]onspicuously absent from the list of relevant considerations" for modification requests under § 3583(e). *Lussier*, 104 F.3d at 35. Legal and constitutional challenges were simply not authorized by § 3583. *Id.* Rather, legality of a condition is one to be resolved through other available "procedures, such as a direct appeal under 18 U.S.C. § 3742 or a collateral attack under 28 U.S.C. § 2255." *Id.*

The Second Circuit explained that Congress enacted the SRA and 18 U.S.C. § 3742 to provide defendants specific ways and certain timeframes within which to challenge their sentences. *Lussier*, 104 F.3d at 36-37. Before the SRA, defendants had three chief ways to seek review of their federal criminal sentences based on illegality—direct appellate review; habeas review under 28 U.S.C. § 2255; and sentence correction "at any time" under the prior version of Rule 35(a) of the Federal Rules of Criminal Procedure. *Id.* (citing *United States v. Jordan*, 915 F.2d 622, 626 (11th Cir. 1990)). But after the SRA, 18 U.S.C. § 3742 gave defendants and the government the right to a direct "appeal" of "certain guidelines sentences." *Id.* "Congress also amended Rule 35(a), . . .authoriz[ing] the district court, on remand, only to 'correct a sentence that is determined on appeal under 18 U.S.C. § 3742 to have been imposed in violation of law.'" *Id.* (citing *United States v. Henrique*, 988 F.2d 85, 86 (9th Cir. 1993); Fed. R. Crim. P. 35(c) (authorizing

district court to correct "arithmetical, technical, or other clear error" within a certain number of days of the oral pronouncement of sentence)). For these reasons, the Second Circuit believed the "streamlined scheme" the SRA provided for resolving criminal sentences "would be disrupted" if district courts could "modify or rescind an allegedly illegal condition of supervised release" at any time. *Lussier*, 104 F.3d at 37.

The Second Circuit later provided a clarification to *Lussier* in *United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016). In *Parisi*, the Second Circuit stated that as long as the district court considers the relevant § 3553(a) sentencing factors when modifying supervised release, "there is no additional requirement that it make a finding of new or changed circumstances." 821 F.3d at 347. Thus, while the circumstance underlying the modification request need not be new, the request must still be grounded in the relevant § 3553(a) sentencing factors.

B. Two federal circuit courts hold that 18 U.S.C. § 3583(e)(2) permits modification of supervision conditions based on illegality or in limited situations.

The Seventh Circuit concluded the better interpretation of 18 U.S.C. § 3583(e)(2) is "to allow a defendant to bring substantive challenges to the current legality of conditions of supervised release" "at any time." *United States v. Neal*, 810 F.3d 512, 518 (7th Cir. 2016). In *Neal*, after the defendant completed his revocation prison term, he requested the district court rescind a supervision condition authorizing warrantless searches of his person and home. *I*d. at 514. The district court denied relief, and the defendant appealed. *Id.* On appeal, the defendant challenged "for the first time the legality of all of the standard conditions

of supervised release that were imposed initially" in his original sentencing hearing in 2001 and in his revocation sentencing hearing in 2013. *Id.*

On the "threshold question" of whether the district court had authority to modify an alleged illegal supervised release condition that "could have been challenged on direct appeal but was not, the Seventh Circuit answered affirmatively. *Neal*, 810 F.3d at 514. The Seventh Circuit held § 3583(e)(2) permits a defendant to request relief from a condition of supervised release on substantive grounds—such as illegality of the condition or its failure to serve its intended purpose—and the district court is authorized to grant such relief. *Id.* However, *Neal* made clear that § 3583(e)(2) does not permit "late challenges" to a supervised release condition due to alleged "procedural errors" existing at the "original sentencing," e.g., claims that a court failed to provide a sufficient explanation for the condition, or there was insufficient evidence to support the then-unchallenged condition. *Id.*

Neal found no "reason to treat a condition of supervised release that arguably is facially invalid or even unconstitutional differently from conditions that are ambiguous or outdated. A term of supervised release should 'simulate life after the program's end.'" 810 F.3d at 520 (quoting *United States v. Perazza-Mercado*, 553 F.3d 65, 71 (1st Cir. 2009)). Thus, through modification requests, defendants in the Seventh Circuit can address issues before being put at risk of potentially violating a supervision condition. *Id.* at 519-20 (citing *United States v. Lilly*, 206 F.3d 756, 759, 761–62 (7th Cir. 2000) (explaining modification under § 3583(e)(2) authorizes

"clarification of a term or condition of supervised release so that the defendant may have an opportunity to comply with the court's order without first having to violate it").

The Third Circuit takes a different view by only allowing modifications of illegal conditions in limited circumstances. In *United States v. Loy*, 237 F.3d 251, 270 (3d Cir. 2001), the Third Circuit summarily concluded a defendant who did not yet have children could contest the constitutionality of the supervision condition prohibiting his contact with minors in the future through a modification request under § 3583(e)(2). In doing so, the Third Circuit specifically "reject[ed] the government's suggestion that the condition receive a broad construction" until the defendant petitioned for a modification in the event that he had children before the end of his supervision term. *Id.*

C. The established circuit split over 18 U.S.C. § 3583(e)(2) leaves defendants like Gibson without reliable recourse to challenge illegal and unconstitutional supervised release conditions.

The Ninth Circuit's failure to adjudicate Gibson's constitutional challenges to the place restriction highlights the urgency for this Court's resolution of the circuit split. In circuits not permitting modification under § 3583(e)(2) of conditions based on illegality, direct appellate review is the only path to challenge the illegality of known, foreseeable conditions. Thus, resolution of the circuit split is necessary to obtain uniformity in federal jurisprudence and ensure defendants are not left without meaningful review of illegal, unconstitutional supervised release conditions. Otherwise, regardless of whether the illegality or unconstitutionality of

supervision conditions is known or reasonably foreseeable to defendants at the time of the defendant at the time of sentencing, those conditions may never be subject to review and correction in the majority of the circuits.

The need for resolution of § 3583(e)(2)'s application is especially apparent given the failure of appellate courts to resolve illegal and unconstitutional supervision conditions on direct appeal, as demonstrated here. Though Gibson preserved his constitutional challenge to the place restriction in the district court and appealed its unconstitutionality to the Ninth Circuit, the court directed him to raise his challenge in the future as a modification request. Pet. App. 30a-31a. *Gibson*'s directive conflicts with Ninth Circuit precedent which holds "illegality is not a proper ground for modification." *Gross*, 307 F.3d at 1044.

But as a three-judge panel decided *Gibson,* it could not overrule *Gross*. We must thus presume the *Gibson* panel did not believe its holding violated circuit precedent.[7]

Gibson instead evaded *Gross* by avoiding its obligation to adjudicate Gibson's claim that the place restriction condition violated his constitutional rights. It did so by characterizing Gibson's constitutional right to procreate and to familial association as "hypothetical" because he did not yet have children and did not

[7] Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 721 n.91 (2001) ("Panels in each circuit have consistently stated that they lack the authority to overrule decisions by prior panels; thus, as a general matter, a panel's decision binds subsequent panels absent an intervening decision of the Supreme Court, act of Congress, or en banc decision by the court as a whole.").

identify specific minor family members. Pet. App. 30a-31a. But Gibson always possesses the right to procreate and familial association. The fact that he does not yet have children does not minimize or obscure that right. The Ninth Circuit's holding to the contrary impermissibly chills those rights. This chilling effect will have dire repercussions on Gibson, especially given his lifetime supervision term. The Ninth Circuit's avoidance of Gibson's constitutional claims thus serves as a strong case to resolve circuit confusion over the scope of 18 U.S.C. § 3583(e)(2).

There have, however, been differing approaches within the circuit majority to that taken in *Gibson* to avoid denying defendants the opportunity for relief as the circuits struggle and await this Court's guidance. Though the approaches do not resolve the circuit conflict over § 3583(e)(2), they have helped to provide relief in some cases.

1. Construing the condition not to violate defendants' constitutional rights.

In *United States v. Loy*, 237 F.3d 251, 267-70 (3d Cir. 2001), the defendant challenged the unconstitutionality of his supervision on direct appeal. The condition, imposed for three years, prohibited defendant's unsupervised contact with minors and required that any contact be supervised by someone other than defendant's wife. *Id.* at 255. Though the defendant did not currently have any children, he argued on direct appeal that this condition was unconstitutional for potentially chilling his ability to have and raise children, violating his fundamental rights to procreation and familial integrity. *Loy*, 237 F.3d at 267-70.

The Third Circuit rejected the government's suggestion that it refrain from adjudicating the constitutional claims simply because the defendant did not yet have children. 237 F.3d at 256-61. Instead, *Loy* determined defendant's claim was ripe for adjudication as: (1) the court possessed "case or controversy" jurisdiction; (2) defendant presented a legal issue it could "easily resolve without reference to concrete facts"; (3) the defendant will suffer hardship without resolution of the issue; (4) traditional canons counseling resolution "are inapplicable in the context of supervised release conditions"; and (5) "the judicial system has an interest in dealing with this case as expeditiously as possible, instead of waiting for a distinct appeal of a conviction for a violation of the conditions of release." *Id.* at 261. It believed adjudication would also avoid disrupting Congress's intent to streamline procedures for reviewing supervised release terms. *Id.* at 256.

Yet despite *Loy*'s conclusion that the defendant's constitutional claim was justiciable, it still avoided ruling on the defendant's constitutional challenge to the supervision condition. This was because *Loy* assumed it was "unlikely" that the district count intended to fundamentally infringe on the defendant's constitutional rights and invoke "the constitutional questions that such an interpretation would raise." 237 F.3d at 254. Thus, "absent a clearer sign from the District Court," *Loy* construed the condition "to apply only to other people's children, and not to Loy's own." *Id.* at 270. If in the future the district court modified the condition to extend to the defendant's own children under 18 U.S.C. § 3583(e), the Third Circuit stated it could then review the constitutionality of the restriction. *Id.*

The Ninth Circuit could not make the same assumption *Loy* made in *Gibson*. Gibson repeatedly objected to the place restriction's infringement on his fundamental liberty interests in the district court. ER-21–34, 72–77. The district court refused to correct this constitutional infirmity because it "structured [the condition] to allow modification of the condition based upon [Gibson's] consultation with his probation officer." Pet. App. 12a. This was a "clear sign" from the district court that it did intend the place restriction to apply to Gibson's future children and his minor family members—even though Gibson had no history of contact offenses. Thus, the assumption against unconstitutionality in *Loy* is a case-specific approach that is not a possible solution in all cases.

2. Adjudicating the condition or remanding for further findings to allow appellate review.

In *United States v. Myers*, 426 F.3d 117, 121 (2d Cir. 2005), defendant Myers challenged a special supervision condition that prohibited him from spending time alone with his minor son without authorization from the probation office. Myers argued "the condition encroache[d] upon the constitutionally protected parent-child relationship." *Id.* Then-circuit judge Justice Sotomayor rejected the government's suggestion to follow *Lussier* and "delay or avoid consideration of" the constitutional challenge because it was possible "Myers's family circumstances might change upon Myers's release from prison." *Id.* at 123. There, as in *Gibson*, the government argued Myers could seek relief through modification under § 3583(e)(2) if his family circumstances changed. *Id.* But unlike *Gibson*, the government appeared to later concede Myers could *not* challenge its constitutionality through § 3583(e)(2). *Id.*

Myers stated it would "not delay consideration of this matter due to the possibility of changing circumstances," but that "the district court may later modify the conditions of supervised release if circumstances change." 426 F.3d at 123. In so stating, the Second Circuit noted it had not "squarely addressed a special condition of probation or supervised release implicating a fundamental liberty interest protected by due process," but believed "[t]he statutory architecture for evaluating conditions of supervised release, however, is the same in both contexts." *Id.* at 125-26. Under this "statutory architecture,"

> [i]f a special condition implicates a fundamental liberty interest, we must carefully examine it to determine whether it is "reasonably related" to the pertinent factors, and "involves no greater deprivation of liberty than is reasonably necessary," 18 U.S.C. § 3583(d), and our application of these criteria must reflect the heightened constitutional concerns. If the liberty interest at stake is fundamental, a deprivation of that liberty is "reasonably necessary" only if the deprivation is narrowly tailored to serve a compelling government interest.

Id. at 126 (citations and footnote omitted).

The *Myers* court could not undertake this analysis, however, because "the record was inadequate on both prongs of the inquiry leaving it unable "to identify the goal to which the condition related nor to determine whether an undue deprivation of liberty occurred." 426 F.3d at 130. It therefore remanded for resentencing. It also advised an appropriate course for the district court on remand could be "to *postpone* determining whether a special condition is necessary" and "not improperly *delegate* this determination to the probation office. *Id.* (citation omitted).

Here, though the place restriction condition was fully litigated in the district court, the Ninth Circuit possessed discretion to remand for further district court findings. On remand, the district court would have had several options. It could have:

1. postponed implementation of the place restriction given Gibson's lack of criminal history beyond receipt of child pornography;

2. excluded Gibson's own children and minor children in his family from the place restriction's scope; or

3. engaged the "statutory architecture" analysis and provided the record necessary to allow reviewing courts to assess: (a) the goal of the condition; (b) whether the record supports that goal; (c) whether Gibson has a constitutionally protected right to those the condition restricts him from freely associating with; and (d) whether the condition is "necessary and not a greater deprivation of any identified liberty interests than reasonable to achieve the sentencing goal." *Myers*, 426 F.3d at 130.

But the remand approach in *Myers* is also case-specific and not possible in all scenarios. Nor is the remand approach one used by all courts, as exhibited by the Ninth Circuit's decision here and elsewhere. *See, e.g.*, *United States v. Johnston*, 827 F. App'x 674, 676 (9th Cir. 2020)*, pet. for reh'g denied* ("We will not strike down a condition based on speculation. Johnston has not identified any underage family members with whom he would be prevented from associating under the special condition. . . . And even if he did (or will) have family members under the age of 18, Johnston can seek permission from his probation officer to attend an event involving underage family members.") (unpublished).

D. This issue is one of national importance to thousands of federal defendants sentenced to supervised release conditions who cannot challenge their illegality or unconstitutionality.

Recent Sentencing Commission studies show there are an average of 133,000 individuals on federal supervision each year in United States.[8] This number, though staggering, is unsurprising as nearly all federal criminal sentences include supervision terms, some of which are mandatory. *See* 18 U.S.C. § 3583(a)-(c); U.S.S.G. § 5D1.1. The average supervision term is 43 months, but it is common for these terms to be much higher. For example, district courts in the Ninth Circuit impose an average of 20-years of supervision for child pornography offenses even for those in lowest criminal history category[9] Gibson's lifetime supervision term is not an anomaly.[10]

Among those serving supervision sentences, there are an average of 21,600 reported supervision violations each year.[11] If proven by a mere preponderance of

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[8] United States Sentencing Commission, *Federal Probation and Supervised Release Violations*, (July 2020), p. 14 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf.

[9] *See* United States Sentencing Commission, *Interactive Data Analyzer,* https://ida.ussc.gov/analytics/saw.dll?Dashboard. The data analyzed for this proposition was compiled using: "Sentencing Outcomes," and "Sentencing Length" for each Circuit and criminal history category I, use data points: Fiscal Year: 2019, 2020; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: Child Pornography; Guideline: § 2G2.2; Sentencing Zone: All.

[10] *See United States v. Hess*, 816 F. App'x 164 (9th Cir. 2020) (affirming lifetime supervision term) (unpublished); *United States v. Blick*, 789 F. App'x 40 (9th Cir. 2019) (unpublished) (same); *United States v. Hernandez*, 785 F. App'x 494 (9th Cir. 2019) (unpublished) (same).

[11] Federal Probation and Supervised Release Violations, *supra* note 8, p. 14

the evidence, a supervision violation subjects the defendant to various repercussions ranging from more restrictive conditions to incarceration. 18 U.S.C. § 3583(e).

It is therefore vital that those serving supervised release sentences do so under conditions that clearly and unequivocally provide advance notice of the required obligations and that deprivations of their liberty be constitutionally curtailed. However, the circuit split governing the availability of supervision modifications to adjudicate constitutional infringements and the unwillingness of appellate courts to adjudicate questions concerning those infringements leave thousands of defendants with unchecked deprivations of liberty—and without relief.

E. This case is the ideal vehicle to resolve the issue.

Gibson fully litigated and preserved his constitutional claims challenging the place restriction. Yet the Ninth Circuit abandoned its obligation to address his claims. By directing Gibson to seek relief for the fundamental infringements of his constitutional rights to procreate and to familial association through a modification under 18 U.S.C. § 3583(e)(2), rather than adjudicate his claims on direct appeal, this case permits the Court to resolve the circuit split on the scope of the statute and how appellate courts should resolve challenges to the illegality and unconstitutionality of supervised release conditions raised on direct review.

II. Is the standard federal supervision condition requiring third-party risk-notification unconstitutional for its vagueness, overbreadth, and violation of the non-delegation doctrine?

A. *Gibson* misinterpreted the third-party risk-notification condition to include additional language that does not address its unconstitutionality.

Though the Sentencing Commission last revised the standard risk-notification condition in U.S.S.G. § 5D1.3(c)(12) on November 1, 2016,[12] the crux of this condition, regardless of the version at issue, permits the probation officer to require the defendant to give notice to yet-to-be-identified third-parties of yet-to-be identified risks the probation officer identifies through yet-to-be identified means. The version at issue here specifically requires that, if a probation officer determines Gibson poses an unidentified risk to an unidentified person or organization:

> (1) the probation officer may require Gibson to notify that unidentified person or organization about the unidentified posed;
>
> (2) Gibson must comply with the probation officer's notification instruction; and
>
> (3) the probation officer may contact the unidentified person or organization to confirm compliance.

Pet. App. 18(a).

[12] *See* U.S.S.G. § 5D1.3(c)(12) (amend. 803 eff. 11-1-2016). The amendment was an attempt by the Sentencing Commission to "address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased." *Id.* (citing *United States v. Thompson*, 777 F.3d 368, 379 (7th Cir. 2015)). *Thompson* found the prior version requiring the notification to third-parties of risks that may be posed by the defendant's "criminal record or personal history or characteristics" "riddled with ambiguities" and impermissibly vague. 777 F.3d at 37.

Gibson challenged the risk condition as unconstitutionally vague, overbroad, and a violation of the non-delegation doctrine. ER-46–50, 60–66. The condition is vague because it lacks any means for Gibson or his probation officer to identify an alleged risk, how to assess whether a risk warrants notification, or how to identify the parties who would be affected by the risk. It is also overbroad in that it extends to everyone, including Gibson's family and future employers—a protected entity the Sentencing Commission was careful to carve out special requirements for before a court or probation officer could interfere. *See* U.S.S.G. § 5F1.5 (listing prerequisites for occupational restrictions). Given the lack of guidance to probation officers to determine the condition's application, it surpasses the proper delegation of tasks probation officers may assume.

The Ninth Circuit, however, inserted language into the risk condition that is not there. The Ninth Circuit interpreted the condition "to limit the 'risks' to those "posed by the defendant's criminal record." Pet. App. 32a (citing *United States v. Magdirila*, 962 F.3d 1152, 1159 (9th Cir. 2020), *pet. for reh'g denied*;[13] *United States*

[13] In his petition for rehearing, Magdirila noted he agreed with the Ninth Circuit that the condition, as modified, allowed the probation officer to require him to "notify specific persons and organizations of specific risks [he] posed" to third parties, but requested the "criminal history" language be struck as it "was nearly identical to and just as unconstitutionally vague as the notification condition" language the court struck down in *United States v. Evans*, 883 F.3d 1154, 1163-64 (9th Cir. 2018). Appellant's Petition for Panel Rehearing, *United States v. Magdirila*, No. 18-50430, Dkt. 51 (9th Cir. June 23, 2020). In *Evans*, the Ninth Circuit remanded a condition requiring the defendant to "notify third parties of risks that may be occasioned by [his] criminal record or personal history or characteristics." *Evans* noted the Sentencing Commission amended the risk condition to remove the ambiguous phrase "personal history or characteristics" and to make clear that probation officers "may only require a defendant to notify specific

v. Evans, 883 F.3d 1154, 1159 (9th Cir. 2018)). *Gibson* believed *Magdirila* appropriately confined the scope of the risk that would be subject to third-party notification. Pet. App. 32a. But even with the interpretive gloss the *Gibson* placed on the condition, the standard risk condition remains unconstitutional as written.

Magdirila considered a prior version of the risk condition and a compilation of general orders from the Central District of California modifying it.[14] The Ninth Circuit remanded with instructions that the district court "may wish to consider the language in United States Sentencing Guideline Manual § 5D1.3(c)(12)" (the

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persons of specific risks that the defendant poses to those persons." 883 F.3d at 1164.

[14] The three risk conditions in *Magdirila* were modified from the standard condition and provided:

> General Order Condition 14: "As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement," . . .
>
> 4. Specific Condition 2: "As directed by the probation officer, the defendant shall notify specific persons and organizations of specific risks and shall permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications";
>
> 5. Standard Condition 14: "As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications."

962 F.3d at 1156 (quoting United States District Court for the Central District of California General Order 05-02).

version at issue in *Gibson*) "which suggests that a defendant's notification obligations should be limited to specific persons regarding specific risks posed by the defendant's criminal record." 962 F.3d at 1159.

Thus, *Magdirila* did not simply remand to the district court with a blanket endorsement of the Guidelines risk condition language. *Magdirila* instead remanded with a proviso: any risk condition that is imposed using the Guidelines' risk condition language should be limited to (1) specific persons and (2) specific risks, (3) posed by this defendant's criminal record, (4) as crafted by the district court.

In *Gibson*, the Ninth Circuit overstated *Magdirila*'s holding. *Gibson* assumed the Sentencing Commission's current version of the risk condition, as written, passed constitutional muster without requiring more information from the district court to limit the notification provisions to specific persons of specific risks posed by the defendant's criminal record. Pet. App. 32a. Based on its misinterpretation of *Magdirila*, *Gibson* affirmed the unguided discretion the risk condition delegates to probation officers. Pet. App. 32a.

B. Federal circuits are divided over the constitutionality of the Sentencing Guidelines' standard third-party risk-notification condition.

A line is now firmly drawn between the federal circuits courts, with the Second and Tenth Circuits holding the standard risk condition is unconstitutional as written, and the Eighth and Ninth Circuits holding it is constitutional. Given this sharp divide, this Court's guidance is necessary.

1. The Second and Tenth Circuits

In *United States v. Boles*, 914 F.3d 95, 110-11 (2d Cir.), *cert. denied*, 139 S. Ct. 2659 (2019), the Second Circuit reviewed the identical risk condition imposed on Gibson. Like Gibson, Boles argued the condition was too vague to be related to any supervision goal because the district court did not define any risk at the time of sentencing and therefore gave the probation officer too much discretion in assessing the existence of any such risk and who should be notified. *Id.* at 111. The Second Circuit agreed on both fronts. *Id.*

As to the notification to third-parties, the Second Circuit determined the condition improperly permitted warned employers about risks unrelated to Boles's federal conviction even though "occupational restrictions must be related to the offense of conviction." *Boles*, 914 F.3d at 112 (citing *United States v. Peterson*, 248 F.3d 79, 86 (2d Cir. 2001) (per curiam); *see also* U.S.S.G. § 5F1.5 (Occupational Restrictions). The condition also prohibitively gave the probation officer unfettered discretion on issues concerning employment notification, a matter district courts must determine. *Boles*, 914 F.3d at 112 (citing *Peterson*, 248 F.3d at 86). The Second Circuit vacated the risk-notification condition and remanded to the district court, instructing the court to "clarify the scope of the "risk" condition." *Id.* at 112.

Following *Boles*, the District Court for the Western District of New York entered a standing district-wide order modifying the standard risk-notification condition that reads:

> "**If <u>the court</u> 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."

United States v. Rasheed, 981 F.3d 187, 199 (2d Cir. 2020) (quoting Am. Standing Order *in re*: *United States v. Boles* (W.D.N.Y. Mar. 22, 2019) [hereinafter "standing order"] (emphasis added).

The standing order's revisions to the standard risk-notification condition cured two central constitutional issues. First, the revisions limited the condition to risks of future crimes based on the defendant's criminal record, personal history and characteristics, and the nature and circumstances of the underlying federal offense—as determined by the court. *Rasheed*, 981 F.3d at 199. Second, the non-delegation doctrine was no longer violated because the probation officer must consult the district court before the condition is triggered. *Id.*[15]

The Tenth Circuit took a similar path in striking the standard risk condition, resting its decision on the non-delegation doctrine. In *United States v. Cabral*, 926 F.3d 687, 699 (10th Cir. 2019), the Tenth Circuit found the risk-notification condition grants the "probation officer decision-making authority that could infringe

[15] The Second Circuit thus subsequently held a defendant's non-delegation challenge to the condition issued in compliance with the standing order was not ripe for review. *Id.* at 200. *See also United States v. Traficante*, 966 F.3d 99, 106 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2634, 209 L. Ed. 2d 758 (2021) ("standing order merely restates what courts are already authorized to do").

on a wide variety of liberty interests," rendering it "an improper delegation of judicial power." Among the liberty interests *Cabral* identified susceptible to impermissible intrusion were the defendant's fundamental familial interests and employment interests. *Id.* at 698-99. It therefore struck the condition. *Id.*

After *Cabral*, the government joined in requests seeking new judgments omitting the risk-notification condition of supervised release. *See, e.g.*, *United States v. Pendleton,* 789 F. App'x 97, 98 (10th Cir. 2019) (unpublished). The District of Colorado also revised its standard risk-notification condition to require probation officers to first obtain district court approval before notifying third-parties of risks presented by defendants or directing defendants to do so. *United States v. Martinez*, 860 F. App'x 584, 585 (10th Cir. 2021) (unpublished).

2. The Eighth and Ninth Circuits

The Eighth Circuit, like the Ninth Circuit,[16] affirms the standard risk condition, content with the lack of limits for identifying risks and the carte blanche delegation to probation officers to trigger the risk-notification to third-parties without juridical guidance or meaningful guidelines.

[16] The Ninth Circuit's decision in *Gibson* follows a series of similar unpublished rulings holding the same. *See United States v. Belt*, 850 F. App'x 500, 503 (9th Cir. 2021); *United States v. Jackson*, 838 F. App'x 262, 265-66 (9th Cir. 2020), *pet. for cert. denied*, No. 21-6034, 2021 WL 5284820 (U.S. Nov. 15, 2021); *United States v. Pruitt*, 839 F. App'x 90, 94-95 (9th Cir. 2020), *pet. for cert.* denied, No. 21-5843, 2021 WL 5284738, at *1 (U.S. Nov. 15, 2021);*United States v. Burleson*, 820 F. App'x 567, 569-70 (9th Cir. 2020), *pet. for cert. denied,* 141 S. Ct. 2817 (2021); *United States v. McPherson*, 808 F. App'x 450, 452 (9th Cir. 2020); *United States v. Oseguera*, 793 F. App'x 579, 581 (9th Cir. 2020); *United States v. Davis*, 785 F. App'x 374, 376 (9th Cir. 2019), *pet. for cert. denied*, 141 S. Ct. 178 (2020).

In *United States v. Janis*, 995 F.3d 647, 653 (8th Cir.), *cert. denied*, No. 21-68, 2021 WL 5284611 (U.S. Nov. 15, 2021), the Eighth Circuit declined to find the risk-notification condition vague or a violation of the non-delegation doctrine. *Janis* relied on a prior decision reviewed for plain error, *United States v. Robertson*, 948 F.3d 912, 920 (8th Cir.), *cert. denied*, 141 S. Ct. 298 (2020).

Robertson addressed the vagueness challenge by rather circularly stating "the 'scope of this condition can be ascertained with sufficient ease,' . . . because the probation officer will identify and communicate the risk to" to the defendant before the defendant has a duty to notify anyone of the risk. 948 F.3d at 920. *Robertson* also disagreed with the non-delegation challenge because it had previously "held a special condition of supervised release is an impermissible delegation of authority 'only where the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.'" *Id.* (quoting *United States v. Thompson*, 653 F.3d 688, 693 (8th Cir. 2011)). Having found no "affirmative indication" that "the district court disclaimed ultimate authority over" supervision, the Eighth Circuit affirmed the condition as written.

C. <u>This Court should resolve the circuit split.</u>

"Few legislative or judicial guidelines prescribe the degree of clarity" that supervised release conditions require. *See* Cohen, Neil, *Informing probationer or parolee of release conditions—Vague or incomprehensible conditions*, Law of Probation & Parole § 7:19 (2d Sept. 2021 update). When this clarity is lacking, we

must call on the judiciary to provide it. And when the lower courts cannot do so, we must turn to this Court to do so.

Neither the Sentencing Guidelines nor any judicial guidelines address the vagueness, overbreadth, and delegation issues that plague the confusion over the risk-notification condition. It remains a standard condition in all but the small minority of districts who have modified its language. And given the ongoing circuit split, it weighs disparately on defendants' fundamental liberty interests, some for life. The case presents a prime opportunity for this Court to provide the necessary clarity.

Conclusion

Gibson requests the Court grant this petition for a writ of certiorari on both questions presented.

Respectfully submitted,

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November 23, 2021