

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MAX TAFOYA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

What standard applies in reviewing the constitutionality of restrictions on the right to international travel?

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Petitioner Richard Tafoya respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The court of appeals affirmed Mr. Tafoya's conviction and sentence in an unpublished memorandum. *See United States v. Tafoya*, 856 F. App'x 647 (9th Cir. 2021).¹ It then summarily denied his petition for rehearing en banc.²

JURISDICTION

On August 18, 2021, the court of appeals filed its opinion. On November 4,

¹ A copy of the memorandum is attached at Appendix A (APP.A).

² A copy of the denial is attached at Appendix B (APP.B).

2021, the court of appeals denied Mr. Tafoya’s petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Tafoya tried to cross the border with methamphetamine hidden in his pants. Agents arrested him and he pleaded guilty. At sentencing, without explanation, and without exception, the district judge prohibited all travel to Mexico: “Mr. Tafoya is not to go into Mexico for any reason.” ER-56.³ The judge imposed the condition even though Mr. Tafoya had a girlfriend in Mexico and frequently travelled there. PSR-5-6; ER-48.

On appeal, Mr. Tafoya argued the travel ban was impermissible. He explained that, under binding precedent, “to impose a condition that implicates a significant liberty interest, the district court must support its decision on the record with evidence justifying the condition.” *United States v. Watson*, 582 F.3d 974, 983 (9th Cir. 2009). The travel ban, he argued, triggered this heightened requirement because it infringed on his constitutional right to international travel, which in turn implicated a significant liberty interest. The district judge, therefore, was required to justify the ban with particularized findings.

The panel disagreed, concluding the district court did not commit error “in failing to support, with record evidence, the travel restriction. Courts must comply

³ The Excerpts of Record are on file with the court of appeals.

with this ‘enhanced procedural requirement[]’ when a supervised-release condition implicates a particularly significant liberty interest. Our case law, however, has not established that the right to travel abroad constitutes such an interest for sentencing purposes.” APP.A:2 (citations omitted).

The court of appeals then summarily denied Mr. Tafoya’s petition for rehearing en banc. *See* APP.B.

REASONS FOR GRANTING THE PETITION

Review is warranted to address the scope of constitutional protection afforded to international travel.

Review is warranted to address the scope of constitutional protection afforded to international travel. This issue impacts numerous areas of both criminal and civil law – e.g., conditions of supervised release and probation, passport requirements, immigration regulations, etc. Indeed, given the COVID-19 pandemic and its resulting governmental travel restrictions, the issue is ripe for review.

This Court previously held, “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.” *Kent v. Dulles*, 357 U.S. 116, 125 (1958). To this end, “[f]reedom of movement *across frontiers in either direction*, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.”

Id. at 126 (emphasis added).

The Court, however, has not clarified how the lower courts should evaluate restrictions that burden this right. What sort of balancing (if any) is required? What is the due process analysis? Should courts apply, strict, intermediate, rational-basis scrutiny? Something else? These questions remain unanswered. That is a problem.

Since the Court spoke to the issue in 1958, the world has become an increasingly globalized. And the right to international travel has become increasingly important. With the pandemic, we are witnessing firsthand the social, familial, and economic problems that come from international-travel restrictions.

Nor have the courts of appeals reached consensus on this issue. Take the Ninth Circuit for example. Its decision in *Eunique v. Powell*, 302 F. 3d 971 (9th Cir. 2002) – with its three differing opinions by the three panel members – highlights the disagreement.

In *Eunique*, the court considered the constitutionality of 42 U.S.C. § 652(k), which allowed the government to deny a passport to citizens in arrears on their child support payments. *See id.* at 972. The analysis turned on the importance of the established “constitutional right to international travel.” *Id.* at 973.

The panel majority held, “[i]t is undoubtedly true that there is a constitutional right to international travel.” *Id.* But the extent of the right was the subject of much debate. Judge Fernandez’s lead opinion found the right to be relatively

unimportant, especially in comparison to the “right of interstate travel.” *Id.* As such, he concluded that restrictions on international travel – like the one before the court – were permissible so long as they could pass “rational basis review.” *Id.* at 974.

Judge McKeown concurred in the outcome but disagreed with Judge Fernandez’s analysis. She explained, “[t]hat the right to travel abroad is an important one is beyond dispute. The Supreme Court has not, however, declared international travel to be a fundamental right.” *Id.* at 976. Thus, she concluded “intermediate scrutiny” was the proper test. *Id.* And because the statute passed muster under the standard, she concluded it was valid. *See id.* at 978.

Judge Kleinfeld dissented. Traveling back to Socrates, he showed that “[t]he right to leave is among the most important of all human rights.” *Id.* at 979. And mindful of past horrors, he reminded, “[i]n Europe in the 1930s and 1940s, for many citizens emigration or not meant life or death.” *Id.* at 980.

Based on all the available authority, Judge Kleinfeld concluded: “Travel restrictions must be justified by an important or compelling government interest and must be narrowly tailored to that end. **Travel bans aimed at specific individuals or classes of individuals must be more narrowly tailored than bans aimed at specific countries.**” *Id.* at 981 (emphasis added). Because the statute at issue did not meet this standard, it was unconstitutional. *See id.* at 984. In Judge Kleinfeld’s words: “Debts for child support have special moral force. But that does not

justify tossing away a constitutional liberty so important that it has been a constant of Anglo-American law since Magna Carta, and of civilized thought since Plato. We should reverse.” *Id.*

This Court has not yet acted to address the divergent analysis or to answer the important question of where the right to international travel falls on the continuum of constitutional protection. Now is the time. And this case provides an excellent vehicle because the issue is outcome determinative.

Under Judge Kleinfeld’s rubric – requiring narrowly tailored restrictions – Mr. Tafoya’s travel ban could not be sustained. Certainly, a more narrowly tailored restriction was available – e.g., allowing travel with permission of the probation officer. The same result would likely be true under Judge McKeown’s intermediate-scrutiny analysis. *Id.* at 976. Under Judge Fernandez’s view, however, the right would not be particularly significant and thus could be restricted with little to no explanation.

Which view controls, if any? Currently, none. The Court, therefore, should grant review in this case to determine where the right to international travel falls on the continuum of constitutional protection.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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