No. 21-7116

In the
Supreme Court of the United States

Victor A. Acevedo,
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

Reply Brief in Support of Certiorari

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INTRODUCTION

The government doesn't meaningfully dispute that the courts of appeals are openly divided over the question presented: whether a district court must orally announce the standard supervised-release conditions in the defendant's presence to impose them. This is an important issue that affects the liberty of countless people and has generated a great deal of litigation. The lower courts of appeals have thoroughly explored the issue, and additional percolation will not bring further clarity. This Court should grant review and resolve this entrenched split.

ARGUMENT

I. The government's attempt to downplay the openly acknowledged circuit split over the question presented is misguided.

Rather than dispute that the circuits are openly divided over the question presented, the government tries to downplay the split by tepidly contending that "the circuits are in far less tension than petitioner suggests." BIO at 12. The petition, however, accurately captures the scope of the split.

A. Three circuits permit district courts to implicitly adopt the standard conditions at a defendant's sentencing hearing.

As the petition documented, the First, Second, and Ninth permit district courts to include some or all of the thirteen "standard" conditions of supervised release in the judgment, even if the court doesn't tell a defendant at the sentencing hearing that they will apply. *See*, *e.g.*, *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169–70 (1st Cir. 2006); *United States v. Truscello*, 168 F.3d 61, 63–64 (2d Cir. 1999); *United States v. Napier*, 463 F.3d 1040, 1043 (9th Cir. 2006). Thus, in those circuits, a defendant doesn't have to be present when the district court decides which standard conditions (if any) to impose.

In its opposition, the government doesn't dispute that the First and Second Circuits have both held that a judge can impose the "standard" conditions by

including them in the judgment, even if they aren't orally announced. *See Sepulveda-Contreras*, 466 F.3d at 169–70; *Truscello*, 168 F.3d at 63–64.

As for the Ninth Circuit—the court of appeals from which this case arises—the government states that its "approach is not entirely settled." BIO at 12. The Ninth Circuit's rule stems from its 2006 published decision in *Napier*. There, the court affirmed that the "mandatory and standard conditions [are] deemed to be implicit in an oral sentence imposing supervised release" and therefore don't have to be expressly pronounced at sentencing, *Napier*, 463 F.3d at 1043 (citing *Truscello*, 168 F.3d at 62). Still, a Fifth Circuit judge sitting by designation in the Ninth Circuit recently suggested that *Napier*'s statement might be "dicta" and thus does not bind future Ninth Circuit panels. Pet. at 8 (quoting *United States v. Reyes*, 18 F.4th 1130, 1141 n.1 (9th Cir. 2021) (Higginson, J., concurring)). On this basis, the government contends the Ninth Circuit's position is up in the air. *See* BIO at 12.

The government, however, oversells how unsettled the Ninth Circuit rule really is. No other Ninth Circuit judge appears to agree with Judge Higginson that *Napier*'s statement is dicta. Pet. at 12–13. In Petitioner's case, for example, Judge Higginson dissented because the majority—two Ninth Circuit judges—rejected Petitioner's challenge by merely citing *Napier*. Pet. App. 7a–8a. And after Petitioner filed a petition for rehearing challenging *Napier*'s precedential status, the court denied the petition without ordering a response. Pet. App. 10a. Moreover, as Judge Higginson observed, "dozens of unpublished cases" in the Ninth Circuit treat *Napier*'s statement as "determinative[.]" *Reyes*, 18 F.4th at 1141 n.1. So did the government below, characterizing *Napier*'s statement about implicit adoption as the case's "clear holding." Answering Brief for the United States at *34, *United States v. Acevedo*, Dkt. No. 20 (9th Cir. No. 20-50007).

It is true that a single Ninth Circuit panel remanded in three unpublished cases when a court failed to expressly impose the standard conditions. BIO at 12 (citing *United States v. Ballesteros*, 816 F. App'x 74, 78 (9th Cir. 2020); *United States v. Fuentes-Castro*, 809 F. App'x 401, 402 (9th Cir. 2020); *United States v. Rosario-Montalvo*, 816 F. App'x 94, 97 (9th Cir. 2020)). But even that panel reaffirmed *Napier*'s precedential status and merely thought the district court had not sufficiently explained the standard conditions; there was no doubt the conditions were actually imposed. *See Ballesteros*, 816 F. App'x at 78; *Fuentes-Castro*, 809 F. App'x at 402; *Rosario-Montalvo*, 816 F. App'x at 97.

All this is to say there's no indication the Ninth Circuit plans to retreat from *Napier*'s rule. The Ninth Circuit is therefore firmly on the side of the First and Second Circuits in the circuit split over the question presented.

In any event, it doesn't matter if Ninth Circuit's rule is "not entirely settled." BIO at 12. Given the depth of disagreement between the other circuits, the circuit split will persist no matter what the Ninth Circuit does.

B. Three circuits do not permit district courts to implicitly adopt the standard conditions at a defendant's sentencing hearing.

The petition also documented that the Fourth, Fifth, and Seventh hold that a district court may not include in the judgment any discretionary condition, including the standard conditions, that it doesn't orally pronounce. *See*, *e.g.*, *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020); *United States v. Diggles*, 957 F.3d 551, 557–59 (5th Cir. 2020) (en banc); *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019). In these circuits, a defendant must be present when the district court decides which standard conditions (if any) to impose.

In response, the government tries to cast doubt on the clarity of these circuit's holdings. BIO at 13–16. But the government's quibbling doesn't amount to much.

1. Starting with the Fifth Circuit, that court recently held in a unanimous en banc decision that a "sentencing court must pronounce conditions that are discretionary." *Diggles*, 957 F.3d at 563. All seventeen judges rejected "the byzantine distinctions" that court had previously "drawn between standard, mandatory, standard-but-listed-in-the-judgment-as-special, 'true' special, and not-really-special conditions when it comes to pronouncement." *Id.* at 599. While the Sentencing Guidelines drew these distinctions, the relevant statutory scheme did not. *Id.* (citing 18 U.S.C. § 3583(d)). Thus, *all* discretionary conditions must be announced to be imposed. *Id.* at 563.

Still, the government notes the conditions challenged in *Diggles* happen to be ones the Guidelines label as "special" rather than "standard." BIO at 13. The government suggests that this makes *Diggles* not directly responsive to the question presented. *See* BIO at 13.

But the very point of *Diggles* is that no meaningful distinction exists between the various discretionary conditions for pronouncement purposes. *All* discretionary conditions are the same: "[i]f a condition is discretionary, the court must pronounce it to allow for an objection." *Diggles*, 957 F.3d at 559. The Fifth Circuit, in fact, has remanded many cases based on *Diggles* when the district court included the standard conditions in the judgment without having orally announced them. *See*, *e.g.*, *United States v. Mercado-Bravo*, 2022 U.S. App. LEXIS 7325, at *2–3 (5th Cir. March 21, 2022); *United States v. Ramos-Alvarenga*, 2022 U.S. App. LEXIS 6980, at *1–2 (5th Cir. March 17, 2022); *United States v. Chavez*, 2022 U.S. App. LEXIS 6422, at *10–14 (5th Cir. March 14, 2022); *United States v. Jackson*, 2022 U.S. App. LEXIS 6363, at *9–10 (5th Cir. March 11, 2022); *United States v. Mosley*, 2021 U.S. App. LEXIS 21599, at *2 (5th Cir. July 21, 2021). That *Diggles* resolves cases

involving standard conditions is so obvious that the government has conceded error in the Fifth Circuit when a court includes the standard conditions in the judgment without orally pronouncing them. *See*, *e.g.*, *Mercado-Bravo*, 2022 U.S. App. LEXIS 7325, at *2; *Mosley*, 2021 U.S. App. LEXIS 21599, at *2.

2. The Seventh Circuit sides with the Fifth Circuit. In *Anstice*, the Seventh Circuit held that, "[i]f a district court does choose to impose" standard conditions, "they must be announced at sentencing." 930 F.3d at 910.

The government's opposition doesn't dispute that the Seventh Circuit requires courts to orally impose the standard conditions. Instead, the government points out that the remedy the Seventh Circuit requires is a resentencing, where "[t]he district court has ample authority to impose these conditions on remand." BIO at 14 (quoting *Anstice*, 930 F.3d at 910). This remedy, the government suggests, means there is no "real practical difference between *Anstice* and the decision below." BIO at 14.

The government's claim is misguided on multiple levels.

First, it's just not true that affirming the imposition of a condition is the same thing as remanding for a court to reconsider the condition. District courts often reconsider issues on remand and come to a new conclusion. The government's position rests on a cynical view of judges: that they won't change their mind when they have discretion not to. Experience suggests judges are not so closed minded.

Anstice, in fact, is an example. At the initial sentencing, the court included two conditions in the judgment that it had not orally announced. One condition required the defendant to "report to the probation office within 72 hours of his release," and the other prohibited him from "possessing a firearm, destructive device, or other dangerous weapon." *Anstice*, 930 F.3d at 910. On remand, while the

court had "ample authority to impose these [same] conditions" again, it chose not to. *Id*. After holding a hearing, the court modified aspects of both conditions, giving the defendant more flexibility as to when he needed to report and clarifying that he could not possess ammunition as well. *See United States v. Anstice*, Order, Dkt. No. 165, 18-CR-50-WMC-3 (W.D. Wis. Oct. 31, 2019).

Anstice is no outlier. As the government pointed out, one Ninth Circuit panel in three unpublished cases remanded for the district court to explain its decision to impose the standard conditions. *See Ballesteros*, 816 F. App'x at 78; *Fuentes-Castro*, 809 F. App'x at 402); *Rosario-Montalvo*, 816 F. App'x at 97. On remand in *each* case, the court exercised its discretion not to impose some or all the standard conditions. *See*, *e.g.*, Judgment After Remand, *United States v. Ballesteros*, 18-CR-4457, Dkt. No. 51 (S.D. Cal. July 6, 2020) (declining to impose Standard Condition No. 12); Judgment After Remand, *United States v. Fuentes-Castro*, 18-CR-5142, Dkt. No. 39 (S.D. Cal. Sept. 11, 2020) (declining to impose any standard condition); Judgment After Remand, *United States v. Montalvo*, 18-CR-4862, Dkt. No. 34 (S.D. Cal. July 1, 2020) (declining to impose any standard condition). Thus, forced to think through the appropriateness of the standard conditions, the court loosened the restrictions on the supervisees considerably.

In any event, even if a defendant would invariably receive the same sentence on remand, the Seventh Circuit's substantive rule vindicates a foundational guarantee that the First, Second, and Ninth Circuits have undermined. Defendants have a right to be present when sentenced. This basic requirement follows not only from important practical concerns, but also from the "fundamental" idea that defendants should not be sentenced in secret. *Rogers*, 961 F.3d at 296. They should receive a sentence in open court in their presence. This rule, codified in Federal

Rule of Criminal Procedure 43(a), finds its roots in the constitutional guarantee of due process. *See Diggles*, 957 F.3d at 558 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934)). Thus, the Seventh Circuit's rule ensures that the judiciary respects important fundamental values. The contrary view does not.

Moreover, a remand for resentencing is not the only remedy that the courts of appeals apply when the oral pronouncement conflicts with the judgment. The Fifth Circuit, for example, remands solely to require the district court to strike any unannounced condition, a remedy that seems much more appropriate to correct the wrong. *United States v. Bigelow*, 452 F.3d 378, 383 (5th Cir. 2006).

3. To complete the split, the Fourth Circuit has "sided with the Fifth and Seventh Circuits" against the First, Second, and Ninth Circuits. *Rogers*, 961 F.3d at 296. The Fourth Circuit has held "that all non-mandatory conditions of supervised release must be announced at a defendant's sentencing hearing." *Id.* While the Fourth Circuit will "assume that every oral sentence of supervised release imposes the conditions mandated by statute," the court will not make the same assumption with the "discretionary conditions." *Id.* at 297. And the "fact that the Guidelines have labelled certain conditions as standard conditions does not change the fact that Congress has classified those conditions as discretionary[.]" *Id.* at 299 (quoting *United States v. Cabello*, 916 F.3d 543, 547 (5th Cir. 2019) (Elrod, J., concurring)).

In its opposition, the government claims that *Rogers* is distinguishable because it involved a "revocation resentencing hearing for which no presentence report was prepared." BIO at 13–14 (citing *Rogers*, 961 F.3d 294–95). According to the government, this means the "defendant in *Rogers* . . . did not receive the same degree of notice afforded to petitioner here" because petitioner's presentence report recommended that the court impose the standard conditions. BIO at 14.

But this distinction misunderstands the nature of the split. Petitioner has not complained that he didn't receive notice that the standard conditions might be imposed. Nor does the circuit split concern whether a defendant received sufficient notice. The question is what the district court *actually imposed* at sentencing.

That said, the *Rogers* defendant *did* have notice that the court might impose the standard conditions. The Sentencing Guidelines put all defendants "on constructive notice" that the standard conditions might apply, *Sepulveda-Contreras*, 466 F.3d at 169 (citing U.S.S.G. § 5D1.3(c)), a point the government echoes, BIO at 9. The defendant in *Rogers* was also sentenced in a district that had a "standing order that governs supervised release" that recommends that the standard conditions apply. 961 F.3d at 295. Going into the sentencing hearing, then, the defendant had notice that the district court might impose the standard conditions. Still, the court of appeals reversed. *Id*. at 296–99.

In any event, the Fourth Circuit applies *Rogers* to cases involving sentencings with presentence reports; in those cases, the Fourth Circuit has still remanded when the district court failed to orally announce the standard conditions. *See*, *e.g.*, *United States v. Jenkins*, 2022 U.S. App. LEXIS 973, at *3–5 (4th Cir. Jan. 12, 2022); *United States v. McCormick*, 2021 U.S. App. LEXIS 31978, at *4 (4th Cir. Oct. 25, 2021); *United States v. McEachin*, 2021 U.S. App. LEXIS 26864, at *8–9 (4th Cir. Sept. 7, 2021). This conclusion so obviously follows from *Rogers* that the government has conceded error in the Fourth Circuit when a court included the standard conditions in the judgment without having orally pronounced them, even though a presentence report was prepared. *See McCormick*, 2021 U.S. App. LEXIS 31978, at *4. Thus, contrary to the government's position, in the Fourth Circuit, the issuance of a presentence report doesn't affect the pronouncement analysis.

In sum, the courts of appeals are openly divided over the question presented. The same words uttered by a sentencing judge in different circuits should not lead to different sentences. This Court should grant review to resolve this circuit split and settle a "common" issue that involves an "important feature[] of the federal criminal justice system." *Diggles*, 957 F.3d at 554.

II. The question presented raises an important, reoccurring issue that deserves immediate resolution.

The main thrust of the government's opposition is to downplay the importance of question presented. For the government, whether a court orally imposes the standard conditions or later when filling out the judgment doesn't much matter. *See* BIO at 12–16. The government's position, however, blinks reality.

The standard conditions are not just administrative requirements of supervised release. Instead, the conditions "substantially restrict" a supervisee's "liberty." *Gall v. United States*, 552 U.S. 38, 48 (2007). They can govern nearly every aspect of a supervisee's life, including restricting where they can live, work, and socialize. U.S.S.G. §§ 5D1.3(c)(3), (5), (7).

Judges are more likely to reflexively impose all 13 standard conditions—and their substantial restriction on liberty—without regard to case-specific facts if the conditions don't have to be mentioned at the sentencing hearing. By forcing judges to articulate the conditions, judges are less likely to treat the standard conditions as meaningless boilerplate and instead properly treat them as serious restrictions on liberty. Indeed, as already noted, this point is not theoretical. When courts have remanded cases for improperly imposing standard conditions, courts do sometimes rethink the conditions and tailor them to the specific defendant's case.

This case is a good example of a court likely reflexively imposing the standard conditions. The conditions prohibit Petitioner, for example, from owning a

"taser," though he has no history of violence. Pet App. at 26a. Similarly, if Petitioner's probation officer decides he "poses a risk" to someone, he can be required to tell that person, even though it is hard to imagine whom he might pose a risk to, given his criminal conduct amounts to just driving drugs across the border. Pet App. at 26a. These conditions don't make much sense as applied to Petitioner. Thus, the court might have exercised its discretion to not impose these conditions if it had discussed them at Petitioner's hearing.

Requiring judges to announce the conditions also makes it more likely that defendants and their counsel will meaningfully engage with whether a particular condition is appropriate. Forgoing "oral pronouncement of discretionary conditions will leave defendants without their best chance to oppose supervised-release conditions that may cause them unique harms[.]" *Rogers*, 961 F.3d at 298.

The pronouncement rule the Fourth, Fifth, and Seventh Circuits follow thus makes it less likely district courts impose needless restrictions on liberty. And even a small change in practice would have an enormous impact in the real word. After all, over 100,000 people are on supervised release. *See* U.S. Sentencing Comm'n, Federal Probation and Supervised Release Violations, at 14 (2020).

The government's view that the question presented doesn't matter is also not shared by other members of the judiciary. Just in the past few years:

- the Fifth Circuit has addressed this issue in an en banc decision, *see Diggles*, 957 F.3d at 557–59;

- the Fourth Circuit has addressed the issue in two published decisions; *United States v. Boyd*, 5 F.4th 550, 559 (4th Cir. 2021); *Rogers*, 961 F.3d at 299–301;

- the Seventh Circuit has addressed the issue in a published decision; *Anstice*, 930 F.3d at 909–10; and

- two judges have issued concurring opinions discussing the issue, *Reyes*, 18 F.4th at 1140–41 (Higginson, J., concurring); *Cabello*, 916 F.3d at 547 (Elrod, J., concurring).

Not only that, but the question presented has generated a great deal of litigation over the past five years, highlighting its importance. *See*, *e.g.*, *Jenkins*, 2022 U.S. App. LEXIS 973, at *3–5; *United States v. Cruz*, 2022 U.S. App. LEXIS 2061, at *3–5 (4th Cir. Jan. 24, 2022); *United States v. Conley*, 2022 U.S. App. LEXIS 1719, at *4 (4th Cir. Jan. 20, 2022); *United States v. Sanchez*, 2022 U.S. App. LEXIS 1593, at *2 (4th Cir. Jan. 19, 2022); *United States v. Mateo*, 2022 U.S. App. LEXIS 2471, at *12–13 (11th Cir. Jan. 26, 2022); *Mercado-Bravo*, 2022 U.S. App. LEXIS 7325, at *2–3; *Ramos-Alvarenga*, 2022 U.S. App. LEXIS 6980, at *1–2; *Chavez*, 2022 U.S. App. LEXIS 6422, at *10–14; *Jackson*, 2022 U.S. App. LEXIS 6363, at *9–10; *United States v. Knopping*, 848 F. App'x 353, 354 (9th Cir. 2021); *McCormick*, 2021 U.S. App. LEXIS 31978, at *4; *McEachin*, 2021 U.S. App. LEXIS 26864, at *8–9; *Mosley*, 2021 U.S. App. LEXIS 21599, at *2; *Ballesteros*, 816 F. App'x at 78; *Fuentes-Castro*, 809 F. App'x at 402; *Rosario-Montalvo*, 816 F. App'x at 97; *United States v. Guerrero*, 837 F. App'x 483, 485 (9th Cir. 2020); *United States v. Mendoza-Lopez*, 812 F. App'x 698, 699 (9th Cir. 2020); *United States v. De Luna-Ortiz*, 775 F. App'x 948, 949 (9th Cir. 2019); *United States v. Singh*, 726 F. App'x 845, 849 (9th Cir. 2018).

Thus, the question presented is hugely important. It affects lots of people's lives in important, practical ways. And a massive amount of judicial time has been spent on this issue over the past five years.

III. The decision below is incorrect.

The government half-heartedly defends the lower court's conclusion that a district court can include standard supervised-release conditions in the judgment

when they are not orally announced. *See* BIO at 9–11. Its arguments merely confirm that the lower court's conclusion lacks any basis in the law.

A. The government's notice-based argument is misguided.

The government doesn't defend *Napier*'s reasoning, adopted by the panel below, that the standard conditions are somehow "implicit" in the very nature of imposing supervised release. Pet. App. 8a (quoting *Napier*, 463 F.3d at 1043). The government instead defends the lower court's conclusion by echoing a noticed-based argument the First Circuit raised in *Sepulveda-Contreras*, 466 F.3d 166, 169–70. The government argues that because "Petitioner had sufficient notice that he would be subject to the standard conditions of supervised release and an opportunity to object to those conditions," the court didn't need to orally announce that it was imposing all the standard conditions. BIO at 9.

As already explained, this argument just confuses the issue. Whether a defendant receives notice of a possible sentence differs from what sentence the defendant actually received. Petitioner is not complaining that he didn't receive notice that the standard conditions might be imposed. Instead, his contention is that by not orally announcing those conditions, the district court didn't actually impose them. Put differently, while Petitioner received notice that the conditions *might* be imposed, he didn't receive notice that they *were* imposed. *See Diggles*, 957 F.3d at 560–61 & n.5 (rejecting notice argument).

B. The government is incorrect that the rule espoused by the Fourth, Fifth, and Seventh Circuit contains exceptions.

As a backup argument, the government contends that, while "Petitioner advocates for a rigid rule," the rule articulated "would necessarily have to be subject to numerous exceptions." BIO at 10. In support, the government points to a supposed exception for mandatory conditions and for adopting conditions by

reference. BIO at 10–11. Even if the existence of exceptions count against adopting a rule, the government is wrong that Petitioner's rule contains any exception.

No "exception" exists for mandatory conditions. Mandatory conditions—unlike discretionary conditions—are "necessarily[] part of any term of supervised release pronounced at sentencing[.]" *Rogers*, 961 F.3d at 296–97. Thus, when a court orally announces that the defendant is on supervised release, the court has necessarily orally announced that the defendant will need to abide by the conditions required by statute. *Id*. To announce a defendant is on supervised release is to announce that the defendant must follow the mandatory conditions.

The second "exception"—permitting adopting conditions by reference—is again no exception at all. It is true that the Fourth Circuit permits district courts to "incorporate[e] a written list of proposed conditions, such as recommendations of the probation office set out in a defendant's pre-sentence report." *Rogers*, 961 F.3d at 299. That is, the sentencing court can impose them by telling the defendant that "the standard conditions apply." Still, the adopting must be explicit and occur at the hearing. *See id*. Thus, the conditions *are* adopted in the defendant's presence.

If the government is suggesting that permitting summary adoption undermines the importance of the circuit split, it would be mistaken. "[T]he requirement that a district court expressly adopt a written list of proposed condition is 'not a meaningless formality': It is a critical 'part of the defendant's right to be present at sentencing.'" *Rogers*, 961 F.3d at 300 (quoting *Diggles*, 957 F.3d at 560). In other words, the government's complaint misses the importance of the act of imposing a sentence in the defendant's presence.

The government also misses that, while a summary reference will discharge the court's obligation to impose sentence in the defendant's presence, the practice

can violate the court's *independent* obligation to "adequately explain[]" the sentence. *Rogers*, 961 F.3d at 298. Whether summarily referencing conditions passes muster "will vary with the nature of the condition imposed" and the particulars of the case. *Id*. at 298 n.1 (quoting *United States v. McMiller*, 954 F.3d 670, 677 (4th Cir. 2020)). Thus, courts can't just regularly summarily adopt the standard conditions in circuits that require oral pronouncement. *See United States v. Boyd*, 5 F.4th 550, 557–58 (4th Cir. 2021) (holding that summarily imposing the "standard conditions" was error because they were insufficiently explained); *United States v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015) (holding that the requirement that courts must justify imposing conditions with findings means a "sentencing judge rarely, if ever, should list a multitude of conditions without discussion").

In sum, the lower court's position—that a district court need not orally announce the standard conditions to impose them—is badly flawed. This Court should grant review to correct the propagation of this misguided rule.

IV. This case provides an excellent vehicle to address the question presented.

The government claims that "this case is a poor vehicle" for resolving the question presented. BIO at 16. In doing so, the government doesn't dispute that granting review will allow this Court to resolve the question presented. Nor could it. The issue is properly preserved and squarely presented. *See* Pet. at 24–25.

The government instead claims that, because the decision of the court of appeals was "unpublished" and did not "engage with the recent out-of-circuit decisions" cited by Petitioner, this Court "would benefit from" additional cases in which courts "meaningfully engages with the relevant issues." BIO at 16.

It's not especially relevant that the decision at issue is brief and unpublished. That merely reflected the panel's view that *Napier* resolved the issue. *See* Pet. App. 8a. And *Napier* is neither brief nor unpublished. *See* 463 F.3d at 1042–43.

In any event, allowing this issue to keep percolating will not bring added clarity. The many published decisions on this issue—at least six published decisions, including an en banc decision, and two concurring opinions—have fully exhausted the contours of the debate. *See Reyes*, 18 F.4th at 1140–41 (Higginson, J., concurring); *Rogers*, 961 F.3d at 296; *Diggles*, 957 F.3d at 557–59; *Cabello*, 916 F.3d at 547 (Elrod, J., concurring); *Anstice*, 930 F.3d at 910; *Sepulveda-Contreras*, 466 F.3d at 169–70; *Napier*, 463 F.3d at 1042–43; *Truscello*, 168 F.3d at 63–64. The courts of appeals that have addressed this issue have already fully explored all the points the government's opposition raised. Indeed, the Fifth Circuit in *Diggles* vetted the government's notice-based argument (borrowed from the First Circuit), and all seventeen judges on that court rejected it. *See* 957 F.3d at 561 n.5.

For this reason, delay will not increase the likelihood that further views on the issue will arise. Instead, passing over this case will lead to the continued persistence of an important, openly acknowledged circuit split on an issue that touches on the liberty of thousands of people.

CONCLUSION

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

Respectfully submitted,

Doug Keller