No. _____

In the

Supreme Court of the United States

_____

Robert Keith Kinsey,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Section 3583(g) of United States Code Title 18 requires a district court to revoke a defendant's term of supervised release and impose a term of imprisonment if the court finds, by a preponderance of the evidence, that the defendant possessed a controlled substance.

Does 18 U.S.C. § 3583(g) unconstitutionally deprive federal supervised releasees of the right to trial by jury?

PARTIES TO THE PROCEEDING

Petitioner is Robert Keith Kinsey who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

DIRECTLY RELATED PROCEEDINGS

1. *United States v. Robert Keith Kinsey*, 3:13-CR-251, United States District Court for the Northern District of Texas. Revocation judgment and sentence were entered on April 22, 2022.

2. *United States v. Robert Keith Kinsey*, No. 22-10418, 2022 WL 5417198 (5th Cir. Oct. 6, 2022), Court of Appeals for the Fifth Circuit. The judgment affirming the revocation and sentence was entered on October 6, 2022.

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OPINIONS BELOW

The opinion of the Court of Appeals was not published but is available at *United States v. Robert Keith Kinsey*, No. 22-10418, 2022 WL 5417198 (5th Cir. Oct. 6, 2022), and is reprinted on pages 1a–2a of the Appendix.

JURISDICTION

The Fifth Circuit entered judgment on October 6, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3583(e) of Title 18 reads:

> (e) **Modification of Conditions or Revocation.**—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—
>
> (1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;
>
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence

that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

Section 3583(g) of Title 18 reads:

(g) **Mandatory Revocation for Possession of Controlled Substance or Firearm or for Refusal To Comply With Drug Testing.**—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year; the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Robert Keith Kinsey sustained a conviction for bank robbery and was sentenced to 60 months of imprisonment and a two-year term of supervised release. (ROA.53–59). He began his initial term of supervised release upon completion of his sentence of imprisonment, but the district court revoked his term in 2019 and sentenced him to 18 months of imprisonment and an additional 18-month term of supervision. (ROA.96–100). Mr. Kinsey began serving his second term of supervised release on April 15, 2020. (ROA.112). But he soon faltered due to substance abuse. Mr. Kinsey's probation officer filed a Petition to revoke his term of supervised release alleging that Mr. Kinsey drank alcohol, missed outpatient treatment classes, and possessed a controlled substance. (ROA.112−116,137). The Petition also stated Mr. Kinsey was subject to "[m]andatory revocation for possession of a controlled substance. Sentence to a term of imprisonment. 18 U.S.C. § 3583(g)." (ROA.137). The advisory imprisonment range was 7−13 months. (ROA.138).

At the revocation hearing, Mr. Kinsey pled true to all allegations in the Petition. (ROA.193). Mr. Kinsey's attorney argued for a policy statement sentence, pointing out that Mr. Kinsey suffered a serious, permanent head injury before sentencing and will not be able to receive certain neurological treatments in prison. (ROA.196–197). The government responded that "revocation and imprisonment are mandatory in this case" and advocated for a sentence at the top of the policy statement range. (ROA.199). After noting "[m]aybe your brain will—I know [defense counsel] seems to think that your brain is not going to get better. But I believe that your brain does regenerate a bit, if not all, and I think it will, but it won't with you

out," the district court sentenced Mr. Kinsey to 24 months of imprisonment and no additional supervised release. (ROA.201–202).

Mr. Kinsey appealed, arguing that the district court erred in applying the mandatory revocation provision of 18 U.S.C. § 3583(g) because that provision violates the Fifth and Sixth Amendments under the rationale in *United States v. Haymond*, __ U.S. __, 139 S. Ct. 2369 (2019). He conceded his claim is foreclosed by *United States v. Garner*, 969 F.3d 550 (5th Cir. 2020), and the court of appeals agreed. Appx. A.

REASON TO GRANT THIS PETITION

This Court should grant the petition because the Fifth Circuit's opinion in *United States v. Garner*, 969 F.3d 550 (5th Cir. 2020) conflicts with *United States v. Haymond*, __ U.S.__, 139 S. Ct. 2369 (2019).

A. *Garner* misapplies *Haymond*.

Other than the fact of a prior conviction, any fact that increases the defendant's maximum or minimum term of imprisonment must be proven to a jury beyond a reasonable doubt, and, in federal cases, placed in the indictment. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Alleyne v. United States*, 570 U.S. 99, 102 (2013); *United States v. Cotton*, 535 U.S. 625, 627 (2002). There is some controversy, however, as to how this rule might apply to facts that give rise to a revocation of supervised release.

In *United States v. Haymond*, __U.S.__, 139 S. Ct. 2369 (2019), five Justices held that supervised release revocations are exempt from a mechanical application of this rule. *See Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring); *id.* at 2391 (Alito, J., dissenting). At the same time, however, five Justices held that 18 U.S.C. §3583(k), which mandates revocation and a five-year mandatory minimum upon a judge's finding that the defendant possessed child pornography, violates the Sixth Amendment guarantee of a jury trial. *See Haymond*, 139 S. Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring). This equivocal outcome resulted from a splintered opinion whose holding should be clarified by a majority of the Court. Further, even giving the decision a narrow reading, lower courts, including the court below, have not correctly recognized its implications for 18

U.S.C. §3583(g). They have accordingly continued to sanction the widespread violation of the Sixth Amendment, a fundamental protection against oppressive governmental power to incarcerate.

Haymond addressed the constitutionality of 18 U.S.C. §3583(k), which requires revocation and a five-year term of imprisonment when sex offenders on federal supervised release possess child pornography. *See Haymond*, 139 S. Ct. at 2375 (Gorsuch, J., plurality op.). Five Justices found that the provision violates the jury trial guarantee of the Sixth Amendment, though they did not join a common opinion. *See Haymond*, 139 S. Ct. at 2385 (Gorsuch, J., plurality op.); *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring). Nonetheless, all five of these Justices concurred that imprisonment following a revocation constitutes punishment for the defendant's initial offense, not for subsequent conduct committed while on release. *See Haymond*, 139 S. Ct. at 2378 (Gorsuch, J., plurality op.) ("The defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime."); *Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring) ("Revocation of supervised release is typically understood as 'part of the penalty for the initial offense.'") (quoting *Johnson v. United States*, 529 U.S. 694, 700 (2000)).

A four Justice plurality of Gorsuch, Kagan, Sotomayor, and Ginsburg treated facts found in a revocation proceeding just like facts found in a sentencing proceeding, labels and timing notwithstanding. *See Haymond*, 139 S. Ct. at 2379–381 (Gorsuch, J. plurality op.). Because the finding that Haymond committed a new sex crime on

supervised release produced a mandatory minimum and expanded maximum, it was, in the plurality's view, subject to the jury trial and reasonable doubt guarantees. Justice Gorsuch explained:

> Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a "sentencing enhancement." Calling part of a criminal prosecution a "sentence modification" imposed at a "postjudgment sentence-administration proceeding" can fare no better. As this Court has repeatedly explained, any "increase in a defendant's authorized punishment contingent on the finding of a fact" requires a jury and proof be-yond a reasonable doubt "no matter" what the government chooses to call the exercise.

Id. at 2379.

In a concurrence, Justice Breyer did not go so far. In his view, supervised release may be likened to parole, violations of which may be ordinarily found without the aid of a jury. *See Haymond*, 139 S. Ct. at 2385 (Breyer, J., concurring). But he vacated Haymond's sentence because of three features of §3583(k):

> First, § 3583(k) applies only when a defendant commits a discrete set of federal criminal offenses specified in the statute. Second, § 3583(k) takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long. Third, § 3583(k) limits the judge's discretion in a particular manner: by imposing a mandatory minimum term of imprisonment of "not less than 5 years" upon a judge's finding that a defendant has "commit[ted] any" listed "criminal offense."

Id. at 2386.

The Gorsuch plurality reserved any conclusion about the constitutionality of 18 U.S.C. §3583(g), which compels revocation and imprisonment when the district court finds by a preponderance of the evidence that the defendant has used or possessed illegal drugs, failed or refused a drug test, or possessed a firearm. *See id.*

at 2382, n.7 ("Nor do we express a view on the mandatory revocation provision for certain drug and gun violations in § 3583(g), which requires courts to impose 'a term of imprisonment' of unspecified length."). Nonetheless, the straightforward application of *Apprendi* and *Alleyne* championed in this opinion leaves little question about the appropriate treatment of this provision. Subsection (g) imposes a mandatory minimum upon a judge's finding about the defendant's conduct: the defendant must be imprisoned. However the proceeding is labeled, the rule of *Apprendi* and of *Alleyne* require this fact be made by a jury.

A straightforward application of Justice Breyer's concurrence likewise suggests that Subsection (g) offends the constitution. Two of the three factors named by Justice Breyer are present in §3583(g). First Subsection (g) names "a discrete set of federal criminal offenses," namely: unlawful possession of controlled substances, §3583(g)(1), possession of a firearm (necessarily a violation of 18 U.S.C. § 922(g) when the underlying offense is a felony), §3583(g)(2), and repeated use of a controlled substance, as evidenced by positive drug tests, §3583(g)(4). The only other basis for mandatory revocation named in §3583(g)—non-compliance with drug testing—is so closely associated with illegal drug use as to be essentially a means of proving a discrete federal offense. The statute thus creates the appearance of a legislative effort to punish criminal offenses while circumventing cumbersome constitutional guarantees.

Further, the findings in §3583(g) "take[] away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long." They demand imprisonment when found.

The §3583(g) findings do not, like §3583(k), compel a lengthy term of imprisonment. But that should not change the overall outcome. Even a day's prison sentence carries weighty constitutional significance in a free society. *See Glover v. United States*, 531 U.S. 198 (2001) ("any amount of actual jail time has Sixth Amendment significance."). Because a short prison sentence is qualitatively different from a sentence that does not involve imprisonment at all, the length of the minimum is of less significance than the fact of the minimum. *See Gall v. United States*, 552 U.S. 38, 48 (2007) ("We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty.").

The court below continues to grant summary affirmance in favor of the government based on its holding in *United States v. Garner*, 969 F.3d 550 (5th Cir. 2020). Appx. A. *Garner* found that Justice Breyer's concurrence represented the holding of the Court in *Haymond*. *United States v. Garner*, 969 F.3d 550, 552 (5th Cir. 2020) (holding, of Justice Breyer in *Haymond*, that "because he provided the 'narrowest grounds' in a case where 'no single rationale explaining the result enjoys the assent of five justices,' his concurrence represents 'the holding of the Court.'"). It further found that Subsection (g) survived scrutiny under the standards of the

concurrence. *Id.* at 552. But its analysis overlooks the goals of the opinion, and unduly diminishes the protections of the Sixth Amendment.

As to the first factor, the court below held that "while Subsection (g) singles out certain conduct, only some of it is criminal." *Id.* at 553. True, one of the facts that may give rise to revocation—refusal to take a drug test—is not strictly criminal. A person not subject to supervised release may indeed decline drug testing. But the remaining triggers to mandatory revocation named in § 3583(g) do violate criminal prohibitions, at least where the defendant has been convicted of a felony.

Further, the analysis of the court below misses the point of the first factor, which is to ensure that supervised release revocations do not circumvent the constitutional protections accompanying a new prosecution. And the close association of refusing a drug test with criminal activity (use of illegal drugs) makes this a real concern. If Subsection (k) had provided a lengthy mandatory minimum to anyone on release for a sex offense who refused Probation access to his computer, for example, there is little question that this would not have saved it in *Haymond*. That one of the acts triggering a mandatory minimum serves as a proxy for criminal activity, hence lessening the difficulties of proof, does not make the provision less problematic.

As to the second factor, the court below held that "although Subsection (g) takes away the judge's discretion to decide whether a violation should result in imprisonment, it doesn't dictate the length of the sentence." *Garner*, 969 F.3d at 553. But this merely collapses the second and third factors of Justice Breyer's concurrence, which were separately enumerated in that opinion. Subsection (g) carries a

mandatory minimum of one-day imprisonment. The second factor weighs in favor of the constitutional challenge.

Finally, as to the third factor, the court below correctly observed that Subsection (g) does not tell the judge how long to imprison the defendant. *See Garner*, 969 F.3d at 553. That is true, and weighs in favor of the statute's validity. But if this one factor were dispositive, we are left to wonder why the concurrence did not say as much. Instead, it named three factors that all must be weighed.

Further, in assessing the significance of the third factor, the court below should have considered the severity of the conduct targeted by the legislature. The goal—or a goal, at least—of *Apprendi*'s analysis is to ensure that the jury trial guarantee is not circumvented in the punishment of criminal acts. *See Blakely v. Washington*, 542 U.S. 296, 307, & n.10 (2004). As such, the absence of a lengthy mandatory minimum should not much reduce the Court's suspicions that such circumvention is afoot when the targeted criminal activity is relatively minor in nature. A legislature punishing child pornography is likely to prescribe a lengthy mandatory minimum. One punishing drug possessors is likely to prescribe a shorter mandatory minimum. But people accused of both offenses enjoy a fundamental right to trial by jury.

B. The issue merits this Court's attention.

There does not appear to be a division of authority in the courts of appeals as to the constitutionality of 18 U.S.C. § 3583(g). This Court should nonetheless grant certiorari to resolve the question for three reasons.

First, if Subsection (g) in fact violates the constitution, it produces a remarkably widespread deprivation of constitutional rights. The number of federal

supervised release defendants is vast and growing. In 2015, it reached 115,000, having nearly tripled in three decades of steady growth. *See* Pew Charitable Trusts, *Number of Offenders on Federal Supervised Release Hits All-Time High* (Jan. 24, 2017), *available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/01/number-of-offenders-on-federal-supervised-release-hits-all-time-high. All of these individuals stand to lose their liberty on a judge's finding—by a preponderance of the evidence—of noncompliance with drug testing, of drug possession, or of firearm possession. The mandatory revocation provisions of Subsection (g), moreover, are routinely used in revocation proceedings. Mandatory revocation under §3583(g) is no isolated transgression of a constitutional limit. It is the systematic denigration of a core protection against unjust incarceration. And it operates not in a single state or group of states exercising a general police power, but in the machinery of a federal government whose reach the Framers sought strictly to limit.

Second, historically, federal circuits have shown reluctance to apply *Apprendi* precedent to new circumstances. For example, they permitted judges to determine drug quantities that changed the statutory maximum even after *Jones v. United States*, 526 U.S. 227 (1999), signaled the oncoming *Apprendi* rule. *See United States v. Miller*, 217 F.3d 842 (4th Cir. 2000), *on reh'g en banc in part sub nom. United States v. Promise*, 255 F.3d 150 (4th Cir. 2001) ("No circuit to address this question has extended *Jones* to § 841(b)") (collecting cases). And no court of appeals recognized the obvious implications of *Apprendi* for mandatory Guidelines before *Blakely v. United*

States, 542 U.S. 296 (2004). *See* Petition for Certiorari for the United States in *United States v. Booker*, No. 04-104, at *10 (Filed July 21, 2004) ("After this Court's decision four years ago in *Apprendi*, defendants frequently argued that the Sixth Amendment is violated when the judge makes a factual finding under the Sentencing Guidelines that increases the defendant's sentencing range and that results in a more severe sentence than would have been justified based solely on the facts found by the jury. Before *Blakely*, every court of appeals with criminal jurisdiction rejected that argument.") (collecting cases).

In the three years since *Haymond*, there has been no evidence that federal circuits will give serious consideration to the implications of *Haymond* in cases that do not arise from 18 U.S.C. §3583(k). Usually, this Court may assume that close constitutional questions will give rise to circuit splits if they are litigated with sufficient frequency.[1] But this has not been the historic reality with *Apprendi* questions, perhaps because they stand to change very basic trial practices. Accordingly, if this Court waits for a circuit split, it is probably sanctioning the constitutional violation to continue indefinitely.

[1] The rule of the Fifth and Eleventh Circuits, however, tends to undermine this assumption. Those courts understand the binding force of their own precedent to prevail over intervening Supreme Court opinions, unless the intervening Supreme Court opinion is precisely on point. *See United States v. Patterson*, 829 F. App'x 917, 920–21 (11th Cir. 2020) ("…while *Haymond* invalidated § 3583(k), it did not decide the constitutionality of § 3583(e). . . . As a result, we remain bound by this Court's opinion . . . which forecloses Patterson's challenge to the constitutionality of § 3583(e)(3).")(citing *Haymond*, *supra*, and *United States v. Brown*, 342 F.3d 1245 (11th Cir. 2003)); *United States v. Rose*, 587 F.3d 695, 706 (5th Cir. 2009) ("We will overrule a prior panel opinion in response to an intervening decision of the Supreme Court only if such overruling is unequivocally directed.") (internal quotation marks omitted) (quoting *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 300 (5th Cir.2008) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir.1991))).

Third, a grant of certiorari would permit this Court to clarify the status of *Marks v. United States*, 430 U.S. 188 (1977). *Marks* holds that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Recently questions about the application of *Marks* have generated serious controversy and confusion. In *Ramos v. Louisiana*, __U.S.__, 140 S. Ct. 1390 (2020) (itself a fragmented decision, ironically), the plurality and dissent could not agree as to the proper application of *Marks* when two opinions, both necessary to the outcome, were so different that it became difficult to say which was narrower. *See Ramos*, 140 S. Ct. at 1403 (Gorsuch, J., plurality); *id.* at 1430 (Alito, J., dissenting). Further, as the *Ramos* dissent acknowledged without contradiction, "[t]he *Marks* rule is controversial," and opportunities to clarify its application have recently slipped through the Court's fingers. *Id.* at 1430 (Alito, J., dissenting) (". . . two Terms ago, we granted review in a case that implicated its meaning. . . . But we ultimately decided the case on another ground and left the *Marks* rule intact.") (internal citation omitted) (citing *Hughes v. United States*, 584 U. S. __, 138 S. Ct. 1765 (2018)). *Ramos* was another missed opportunity on this score, as no opinion discussing *Marks* garnered five votes.

The uncertain status and application of *Marks* has generated confusion and conflict in lower courts*, see EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978

F.3d 418, 431 (6th Cir. 2020) (application of *Marks* described as a "vexing task"); *id.* at 437 (disputing application of *Marks* in light of *Ramos*); *id.* at 455 (Clay, J., dissenting) (disputing application of *Marks* in light of *Ramos*); *Whole Woman's Health v. Paxton*, 978 F.3d 896, 904 (5th Cir. 2020) (disputing application of *Marks*), *reh'g en banc granted, opinion vacated*, 978 F.3d 974 (5th Cir. 2020); *id.* at 916 (Willett, J., dissenting) (disputing application of *Marks*), and even this Court, *see June Medical Services v. Russo*, __U.S.__, 140 S. Ct. 2103, 2148 (2020) (Thomas, J., dissenting) (asserting a disputed interpretation of Marks), on the most weighty matters before the federal judiciary. This Court should resolve the confusion quickly.

A grant of certiorari in this case would present an excellent opportunity to address the validity and application of *Marks*. In order to decide whether 18 U.S.C. § 3583(g) survives constitutional scrutiny under *Haymond*, it is first necessary to determine which opinion states the holding of that case. *See Garner*, 969 F.3d at 552 (addressing that question before applying *Haymond*); *United States v. Seighman*, 966 F.3d 237, 242 (3d Cir. 2020) (same); *United States v. Coston*, 964 F.3d 289, 295 (4th Cir. 2020) (same); *United States v. Doka*, 955 F.3d 290, 296 (2d Cir. 2020) (same); *United States v. Watters*, 947 F.3d 493, 497 (8th Cir. 2020) (same); *United States v. Ewing*, 829 F. App'x 325, 329 (10th Cir. 2020) (same). Because no opinion garnered five votes in *Haymond*, the validity and application of *Marks* will likely be a critical part of any merits resolution of the instant case.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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