No. _____

In The
Supreme Court of the United States

CHRISTIAN TIRADO,
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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QUESTION PRESENTED

Is a special condition of supervised release that prohibits a supervisee from possessing any of a laundry list of items "known to represent association with or membership in . . . any [ ] criminal street gang" unconstitutionally vague?

RELATED PROCEEDINGS

United States v. Christian Tirado, No. 21-50247 (9th Cir. Jan. 6, 2023).

United States v. Christian Tirado, No. 3:20-cr-03314-TWR (S.D. Cal. Nov. 5, 2021).

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

INTRODUCTION

It is critical that individuals subject to federal supervision be able to rely on a single national standard for supervised release conditions and to know what is required of them in order to comply. But a circuit split has developed about the scope of restrictions on what a person with prior contacts with gangs may wear and possess while on federal supervised release. In the Ninth Circuit, individuals with alleged histories of gang involvement are subject to broad and indeterminate

restrictions on the kinds of clothing they may wear and the items they may possess while on supervised release. This prohibition includes an enormous range of everyday items unrelated to the defendant's own history. The range of colors and objects is so vast as to leave the supervisee forever guessing at what is required of him and which course of action may return him to custody. But the Ninth Circuit has rejected due process vagueness challenges to the prohibition.

Relying on the vagueness doctrine, however, the Second Circuit has limited the class of prohibited items to those associated with gangs with which a supervisee has a demonstrated history. The Second Circuit has held that prohibitions that relate to all gangs, such as the one upheld by the Ninth Circuit, are vague and offer the supervisee no hope of being able to conform their behavior to the condition.

This circuit split warrants resolution to ensure that supervisees do not receive disparate treatment on account of geography. Moreover, the circuit split will cause significant practical problems in the administration of supervised release, as probation officers and courts struggle to determine which circuit's rule applies to a particular supervisee.

This case is an ideal vehicle. Petitioner expressly preserved the vagueness challenge, and the Ninth Circuit addressed the challenge *de novo*. Hence, the Court should grant certiorari in this case to resolve the circuit split.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not reported in the Federal Reporter, but can be found at 2023 WL119584, and is reprinted in the appendix, ("Pet. App.") at 1a–7a.

JURISDICTION

The Court of Appeals entered judgment on January 6, 2023. It denied Mr. Tirado's petition for rehearing and rehearing en banc on March 17. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Statutory background

Title 18, Section 3583 authorizes a term of supervised release to follow any term of imprisonment.

Some statutes, such as 21 U.S.C. § 841(b)(1)(B)(viii), require the imposition of a term of supervised release. Even in cases in which supervised release is not statutorily mandated, courts impose supervise release in virtually all cases in which it is statutorily available. *See* United States Sentencing Commission, Federal Offenders Sentenced to Supervised Release 4 (2010) (from 2005 through 2009 sentencing courts imposed supervised release in 99.1% of cases where it was not statutorily required).

Some supervised release conditions are expressly required by statute. *See* 18 U.S.C. § 3583(d) (enumerating mandatory standard release conditions, such as conditions that defendants must not commit future crimes, make restitution, and not unlawfully possess controlled substances).

In addition to those conditions, the sentencing court may order further conditions of supervised release so long as such conditions involve no greater deprivation of liberty than is reasonably necessary to achieve the purposes of supervision. 18 U.S.C. § 3583(d)(2).

In fashioning such conditions, the sentencing court must consider the nature and circumstances of the offense and the history and characteristics of the defendant, the need for supervised release to afford adequate deterrence to criminal conduct, to protect the public from further crimes, and to provide the supervisee with needed services. 18 U.S.C. § 3583(c).

Supervised release conditions may not be unconstitutionally vague. *United States v. Loy*, 237 F.3d 251, 263 (3d Cir. 2001); *United States v. Sandidge*, 863 F.3d 755, 758 (7th Cir. 2017); *United States v. Evans*, 883 F.3d 1154, 1162–64 (9th Cir. 2018); *United States v. Rock*, 863 F.3d 827, 832–33 (D.C. Cir. 2017).

If the defendant violates a supervised release condition, the court may revoke the term of supervised release and require the defendant to serve additional prison time, followed by an additional period of supervised release after the defendant's release. 18 U.S.C. § 3583(e)(3).

B. Proceedings below.

Mr. Tirado pleaded guilty to importation of methamphetamine and fentanyl in violation of 21 USC §§ 952 and 960. Prior to sentencing, a presentence report identified Mr. Tirado as having past associations with a gang known as the El Cajon Dukes. In light of the record, all parties agreed that some special conditions related to gang involvement were appropriate.

Parties disagreed, however, about the scope of one of the conditions imposed. At sentencing, Mr. Tirado expressly objected to the imposition of a "special" condition of supervised release that he "not wear, display, use or possess any insignias, photographs, emblems, badges, buttons, caps, hats, jackets, shoes, flags, scarves, bandannas, shirts or other articles of clothing that are known to represent criminal street gang affiliation, association with or membership in the El Cajon Dukes street gang, unless given permission by the probation officer." Mr. Tirado explained that the condition was "too vague" and "unclear" and "didn't inform Mr. Tirado" what was required of him.

The district court overruled Mr. Tirado's objection without explanation. The contested gang paraphernalia condition became part of the judgment.

On appeal, Mr. Tirado argued that the condition was unconstitutionally vague because it was not limited to groups that Mr. Tirado was alleged to have associated with in the past. Mr. Tirado pointed out that, as written, the condition applied to such a broad range of items that compliance was virtually impossible. He

also pointed to the Second Circuit's decision in *United States v. Green*, 618 F.3d 120 (2d Cir. 2010) finding similar language unconstitutionally vague. *Id.* at 124.

The Ninth Circuit disagreed. The court held that "the inclusion of a scienter element negates a valid objection based on vagueness." Pet. App. 5a. The court thus held that the scienter requirement, "known to represent criminal street gang affiliation," sufficiently narrowed the universe of offending items such that the condition did not require Mr. Tirado to guess at is meaning. The court affirmed the imposition of the condition. The court made no attempt to reconcile this holding with the Second Circuit's holding in *Green*.

Mr. Tirado filed a petition for rehearing or rehearing en banc, again citing *Green* and the panel's break with the Second Circuit. The petition was denied.

REASONS FOR GRANTING THE PETITION

I. Courts are divided over the extent to which the due process vagueness doctrine limits gang paraphernalia prohibitions.

A clear circuit split has developed between the Second and Ninth Circuit regarding the how the vagueness doctrine applies to gang paraphernalia prohibitions.

A. The Second Circuit holds that a prohibition on gang paraphernalia that is not tied to any specific gang is unconstitutionally vague.

In *Green*, the Second Circuit considered a condition prohibiting a defendant from "wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs." 618 F.3d at 124. The Second Circuit invalidated the condition, holding the condition "is not statutorily defined

and does not provide Green with sufficient notice of the prohibited conduct." *Id.* "Th[e] condition is therefore unconstitutionally vague." *Id.*

The Second Circuit elaborated: "The range of possible gang colors is vast and indeterminate. For example, the L.A. Police Department's explanation of gang colors and clothing includes 'white T-shirts,' 'blue or black or a combination of the two,' red, green, black, brown and purple." *Id.* "Eliminating such a broad swath of clothing colors would make [a supervisee's] daily choice of dress fraught with potential illegality." *Id.* "People of ordinary intelligence would be unable to confidently comply with this condition." *Id.*

The Second Circuit distinguished the condition in *Green* from other "broad" conditions that it had previously upheld in *United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008) and *United States v. Johnson*, 446 F.3d 272 (2d Cir. 2006). It explained that not all broad prohibitions are unconstitutional "so long as they are sufficiently clear to provide the defendant with notice of what conduct is prohibited." *Green*, 618 F.3d at 124. The court explained, however, that "[t]he condition of supervised release at issue here contains no limited list of the colors or insignia that are typically associated with any particular gangs to guide Green in his clothing choices, and is, therefore, much more vague than the prohibited conditions in *MacMillen* and *Johnson*."

B. The Ninth Circuit holds that a condition that prohibits possession of any and all gang paraphernalia is not unconstitutionally vague.

The Ninth Circuit upheld a broad prohibition on gang paraphernalia on grounds that "the inclusion of a scienter element negates a valid objection based on

vagueness." Pet. App. 5a. In doing so, it relied on its own prior holding in *United States v. Soltero*, in which it held that a condition prohibiting the defendant from "associate[ing] with any known member of any criminal street gang . . . , specifically, any known member of the Delhi street gang" was constitutional. 510 F.3d 858, 866 (9th Cir. 2007). The Ninth Circuit quoted a footnote from *Soltero* "not[ing] that the defendant only violates the condition if the gang member he associates with is *known to him* to be a gang member[.]" Pet. App. 5a (quoting *Soltero*, 510 F.3d at 867 n.9) (internal alterations omitted; emphasis in original). Reasoning from *Soltero*, the Ninth Circuit held that the condition imposed on Mr. Tirado was not unconstitutionally vague.

II. The Court should resolve the circuit split over this important federal question.

The Court should grant certiorari to resolve the circuit split. The issue is important, the split will cause practical problems, and this case is an ideal vehicle. First, the issue in the case is important. Tens of thousands of people are placed on supervised release each year. For example, in fiscal year 2021, 57,287 individuals received federal sentences, and 80% of those individuals received a term of supervised release. *See* U.S. Sentencing Commission, Overview of Federal Criminal Cases—Fiscal Year 2021 (August 2022), 1, 10, available at bit.ly/45MGq0j.

Gang members and former gang members make up a disproportionate proportion of prison populations. Data from the Bureau of Prisons suggests that as many as 10% of all federal inmates have been identified as members of a Security Threat Group, defined as groups, gangs, or inmate organizations that have acted in

concert to promote illegal activity. Nat. Drug Intel. Ctr., Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas (2008) The permitted scope of restrictions on possession of paraphernalia by current and former gang members and affiliates is, therefore, an issue that affects a large number of individuals.

As a result of this circuit split, defendants in the Ninth Circuit are subject to a broad gang paraphernalia condition, whereas defendants in the Second Circuit are subject to prohibitions only on items associated with specifically enumerated gangs. The Ninth Circuit in particular is the most populous in the nation. Thus, even though only two circuits have directly addressed this special condition in the context of a vagueness challenge, it affects a disproportionate number of criminal defendants.

In addition, while only two circuits have directly addressed the constitutionality of a broad gang paraphernalia condition, it appears that variations on this condition are being imposed by at least some courts in other circuits. *See, e.g.*, *United States v. Cortez Ponce*, No. 08-2118, 339 Fed. Appx. 249, 250 (3d Cir. Jul. 27, 2009) ("The defendant . . . shall not wear, display, use or possess any insignia, emblem, logo, jewelry, cap, hat, bandana, shoelace or any article of clothing which has any gang significance or is evidence of affiliation with or membership in a street gang."); *United States v. Dacosta*, No. 18-4622, 781 Fed. Appx. 150, 151 (4th Cir. Jul. 3, 2019) ("[Defendant] shall not wear, display, use or possess any clothing or accessories which have any gang or security threat group

significance."); *United States v. Banks*, No. 17-1167, 722 Fed. Appx. 505, 512 (6th Cir. Jan. 30, 2018) (defendant prohibited from "own[ing] or wear[ing] clothing that could signify [gang] affiliation"). Granting certiorari will provide clarity to all courts about the constitutional scope of such a condition.

Granting certiorari in this case would be consistent with the Court's recent practice. The Court regularly resolves circuit splits related to federal sentencing. For instance, in recent years, the Court has resolved two splits concerning constitutional challenges to applications of the advisory Guidelines. *See Beckles v. United States*, 580 U.S. 256 (2017) (Due Process challenge); *Peugh v. United States*, 569 U.S. 530 (2013) (Ex Post Facto challenge). The Court also regularly resolves splits concerning federal sentencing procedures. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 578 U.S. 189 (2016).

This Court is also the only body that can resolve this split. The special condition imposed on Mr. Tirado is not one of the enumerated special conditions included in the United States Sentencing Guideline Manual at § 5D1.3(d). Thus, the split is unlikely to be resolved by the Sentencing Commission and will persist until the Court weighs in.

Moreover, there is a particularly pressing need to resolve this circuit split: it will cause significant practical problems in the administration of supervised release. Criminal defendants often move to different locations after they are released from prison, and jurisdiction over those supervisees may be transferred to other courts.

See 18 U.S.C. § 3605. Thus, a single probation officer and court may supervise criminal defendants sentenced within multiple geographic circuits. The circuit split will put probation officers and courts into a difficult situation.

If a probation officer within the Second Circuit supervises an individual who was sentenced by a court in the Ninth Circuit, it is unclear whether the officer must apply the law of the Ninth Circuit (where the condition would prohibit possession of anything related to any gang) or Second Circuit (where the condition would prohibit possession only of items specifically associated with the supervisee's gang). If the former, probation officers and courts will always have to apply the special condition in different ways depending on where the supervisee was sentenced. If the latter, a defendant who moves from the Ninth Circuit to the Second Circuit suddenly faces different conditions of supervised release.

This situation will create unnecessary complexity for probation officers and courts. Further, it will defeat the Sentencing Commission's purpose of providing standard conditions that are supposed to apply to all criminal defendants.

This case is also an ideal vehicle to resolve the circuit split. Mr. Tirado preserved the vagueness challenge. The Ninth Circuit resolved the argument on *de novo* review. And Mr. Tirado's suggestion for rehearing en banc was denied. The issue is therefore squarely presented for the Court's review.

III. The Ninth Circuit's decision is wrong because blanket prohibitions on gang paraphernalia are unconstitutionally vague.

Contrary to the Ninth Circuit's decision, the special condition prohibiting possessing any and all items relevant to any gang, without restriction, is

unconstitutionally vague. It "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

In *Johnson*, the Court held that the Armed Career Criminal Act's residual clause was unconstitutionally vague. That provision stated that an offense that "involves conduct that presents a serious potential risk of physical injury to another" could be a predicate for an enhanced sentence. *Id.* at 596 (internal quotation marks omitted). The Court held that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 598.

Johnson establishes that the special condition is unconstitutionally vague. The special condition bars possession of an extraordinarily broad list of items that are "known to represent criminal street gang affiliation" without providing any guidance on who has determined that the association exists, how close the association must be, whether Mr. Tirado must be possessing the item with the intent of signaling association, or any other information that would allow the provision to be applied intelligibly. The prohibition is thus both vast and indeterminate. And just as in *Johnson*, the condition "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 576 U.S. at 598.

The addition of a scienter requirement does not solve the compounded indeterminacy of the special condition. As the Second Circuit observed, virtually all colors have been "adopted" by at least one gang somewhere in the country, so without further limitation, it risks leaving him virtually without any safe clothing choice at all.

The Ninth Circuit did not deny that the universe of prohibited items was potentially limitless. Instead, it held that an implied scienter requirement that required Mr. Tirado to know of the gang-related associations of the item "negates a valid objection based on vagueness." Pet. App. 5a. This limitation does not, however, resolve the constitutional infirmity. Rather, it ensures that the list of prohibited items will be forever expanding, often arbitrarily and at random for reasons divorced from any conceivable goal of supervision.

For example, if Mr. Tirado reads a book on the history of Los Angeles and learns that red and blue are colors that signify affiliation in the Bloods and the Crips, the condition would appear to require that he immediately divest himself of any and all red and blue clothing in his possession. Merely reading this petition would have the same effect.

The condition also fails in the "more important aspect of the vagueness doctrine . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (internal quotation marks omitted). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows

policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 358 (internal quotation marks and alteration omitted). The same principles apply to a vague condition of supervised release. The judge must provide some minimal guidelines to govern the probation officer. Otherwise, the probation officer can pursue his own standardless predilections on what a supervisee may wear and what items he may possess. Absent intervention of the Court, the special condition leaves supervisees' attire entirely at the mercy of their probation officers.

For these reasons, the Court should grant certiorari and reverse the Ninth Circuit's decision upholding the special condition regarding gang paraphernalia. The condition is unconstitutionally vague and fails to apprise supervisees and probation officers of what is prohibited by the condition.

IV. Conclusion

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

Respectfully submitted,

s/ Kara L. Hartzler

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