No. _____

IN THE

Supreme Court of the United States

JASON L. SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Historical documents showing that the Framers would have understood the jury right to apply to forfeitures of recognizance, a proceeding similar to revocations of supervised release in form, function, and purpose. In light of this historical record, should this Court's holding in *United States v. Haymond*, 139 S. Ct. 2369 (2019), be expanded to hold that the Sixth Amendment, including the right to confront accusers, applies to all revocations of federal supervised release?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Smith, No. 23-2449, (June 17, 2024)

United States v. Carpenter, No. 23-3295, (June 17, 2024)

United States District Court (N.D. Ind.):

United States v. Smith, No. 10-cr-107, (July 17, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jason L. Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The Seventh Circuit's opinion is unpublished but available on Westlaw at 2024 WL 3026127 and included as Appendix A. The Seventh Circuit's companion opinion in *United States v. Carpenter*, No. 23-3295, is published at 104 F.4th 655 and included as Appendix B. The district court's revocation judgment is unpublished and included as Appendix E. The district court's order granting the government's motion to present testimony by video is unpublished and included as Appendix C. The revocation and sentencing hearing transcript is unpublished and included as Appendix D.

JURISDICTION

The Seventh Circuit entered judgment on June 17, 2024. App. 1a. Neither side petitioned for rehearing. This petition is filed within 90 days of the June 17, 2024 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution states:

> 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 defense.

Title 18 U.S.C. § 3583(e) provides in relevant part:

> 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)— […]
>
> (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;

INTRODUCTION

Five years ago, this Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019). It was the first time this Court considered the scope of the Sixth Amendment as it applied to revocations of federal supervised release. This Court had previously determined that revocations of probation and parole were not "criminal prosecutions" subject to Sixth Amendment protection. *See Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). But it had never extended that logic to supervised release.

As it turned out, the differences between parole and probation versus supervised release were significant. In a fractured 4-1-4 decision, this Court struck down a five-year mandatory minimum under 18 U.S.C. § 3583(k) for revocations of certain sex offenders. *Haymond*, 139 S. Ct. 2369. Writing for a plurality, Justice Gorsuch explained that unlike with probation or parole, a revocation of federal supervised release allows a judge to impose additional prison time beyond that authorized by a jury's verdict. *Id.* at 2382. As Justice Alito pointed out in dissent, the *Haymond* plurality's reasoning "strongly suggest[s] that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding." *Id.* at 2387 (Alito, J., dissenting).

Justice Alito disagreed with the plurality that supervised release was structurally different from parole, but one point of agreement between the plurality and dissent was the need to look at historical evidence about the jury right at the time of the founding. *Id.* at 2376, 2392. And in response to this Court's guidance in *Haymond*, legal scholars dived into historical evidence on this issue. New research now confirms that jury trials were the norm for forfeitures of recognizance—a historical proceeding that looked very similar to modern revocations of supervised release. *See* Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. 1381 (2024). A colonial-era judge transported into a modern revocation hearing would be shocked to see what seems like a recognizance proceeding, but with the conspicuous absence of a jury.

This new historical research forms the basis of Jason Smith's appeal. The government sought to revoke Smith's supervision, alleging that Smith violated drug conditions and committed new crimes under Indiana and Michigan law by fleeing from police in a high-speed chase. During the revocation proceedings, however, the government repeatedly relied on hearsay evidence to prove its allegations. Despite Smith's dogged objections that such evidence violated his confrontation rights under the Sixth Amendment, the district court ruled that the Confrontation Clause does not apply to revocation proceedings and allowed the evidence.

Smith is only one of tens of thousands of supervisees whom the federal courts send to prison every year without the protections of the Confrontation Clause. The federal courts of appeals, including in the Seventh Circuit where Smith is from, have long assumed that the Sixth Amendment does not apply to revocations of supervised release. *See, e.g., United States v. Boultinghouse*, 784 F.3d 1163, 1171 (7th Cir. 2015). But this Court has never endorsed that assumption. In fact, as the Seventh Circuit recognized, the *Haymond* plurality's logic directly contradicts Seventh Circuit precedent. And with new historical evidence about how the Framers understood the jury right, Smith has a strong case that he was entitled to confront his accusers before revocation. This Court should pick up the threads left by *Haymond* and address whether the Sixth Amendment applies to federal supervisees facing revocation.

This petition is being filed contemporaneously with a petition for certiorari in a companion case, *United States v. Carpenter*, No. 23-3295 (7th Cir.), which the Seventh Circuit decided on the same day as Smith's appeal.

STATEMENT OF THE CASE

I. Background on the history of community supervision in the United States

To understand why the lower courts have concluded that the Sixth Amendment does not apply to supervised-release revocations, we need to start with a history of this Court's jurisprudence surrounding probation and parole.

For most of the 20th century, the federal government used a system of parole. *Tapia v. United States*, 564 U.S. 319, 323-25 (2011). Judges sentenced convicted defendants to terms of imprisonment, and after they had served one third of their sentences, they could apply to a parole board for conditional release. *See id.* But the balance of any remaining prison sentence remained hanging over parolees. When defendants violated a condition of parole, the board could "revoke" their release and send them back to prison to serve the rest of their original sentences. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 985 (2013).

This Court addressed the application of the Sixth Amendment to parole revocations in *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972). By its text, the Sixth Amendment applies only to "criminal prosecutions." U.S. Const. amend. VI. And this Court held that because "revocation of parole is not part of a criminal

prosecution," the "full panoply of rights" available under the Sixth Amendment did not apply. *Id.* at 480. A revocation proceeding, this Court explained, "arises after the end of the criminal prosecution, including imposition of the sentence." *Id.* at 480. In other words, parole did not affect the underlying prison sentence that was the result of the criminal prosecution. The "essence of parole" was early release on condition that prisoners abide by certain rules "during the balance of the sentence." *Id.* at 477. But the balance remained if parole was revoked.

A year later, this Court tackled the same question regarding probation. It looked to *Morrissey*: "we held that the revocation of parole is not a part of a criminal prosecution"—again referencing the Sixth Amendment's textual limitation. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (citing *Morrissey*, 408 U.S. at 480). Again, the framing of revocation as outside the Sixth Amendment made sense because revocation of probation did not result in a new criminal sentence. Rather, probation was a result of the trial court's power to "suspend" the sentence that had resulted from the prosecution, with the understanding that the defendant would need to serve the suspended sentence if probation was revoked. *See id.* at 779; *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

More than a decade after *Morrissey* and *Gagnon*, Congress invented federal supervised release as part of the Sentencing Reform Act of 1984. 98 Stat. 1987; *Tapia*, 564 U.S. at 325. With the invention of supervised release, Congress jettisoned the rehabilitative-imprisonment model, abolished parole for new convictions, and shifted federal law to a system of determinate sentencing. No

longer may prisoners seek relief from a portion of their prison sentence through parole. *Id.* at 324. Federal prisoners now serve the entirety of their prison terms (minus small adjustments for "good time" and other nuances not relevant here).

Despite the seismic impact of the Sentencing Reform Act, more than 35 years passed without this Court addressing whether the holdings of *Gagnon* and *Morrissey* also applied to federal supervised release. Nonetheless, the federal courts of appeals repeatedly assumed that they do. *See, e.g., United States v. Work*, 409 F.3d 484, 491 (1st Cir. 2005); *United States v. Carlton*, 442 F.3d 802, 809–10 (2d Cir. 2006); *United States v. Kelley*, 446 F.3d 688, 690 (7th Cir. 2006); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005). Because this Court had held that other types of "revocations" do not fall within the Sixth Amendment, lower courts concluded that supervised release probably does not either.

Significantly, however, this Court never blessed the idea of applying *Morrissey* and *Gagnon* to supervised-release revocations. Until *Haymond*, this Court simply did not have cause to address the issue.

II. This Court's decision in *United States v. Haymond*

After 35 years of federal supervised release, this Court finally had opportunity to address the Sixth Amendment's effect on revocations of supervised release in *United States v. Haymond*, 139 S. Ct. 2369. In a 4-1-4 decision, this Court struck down a five-year mandatory minimum for revocation of certain sex offenders. *See* 18 U.S.C. § 3583(k).

The plurality, written by Justice Gorsuch, concluded that § 3583(k) violated the jury right under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 US 99 (2013), because it triggered a new prison sentence based on facts found by a judge, not a jury. *See id.* at 2375-76. Although revocation of parole and probation did not require a jury, the plurality identified a "structural difference" between those forms of supervision and supervised release. *Id.* at 2382. Parole and probation both "replace[d] a portion" of a prison term, and therefore revoking them exposed the defendant "only to the *remaining* prison term authorized for his crime of conviction, as found by a unanimous jury." *Id.* Supervised release, by contrast, runs "after the completion" of a prison sentence, and thus revocation can expose a defendant "to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict." *Id.*

The *Haymond* plurality also delved deeply into Founding-era documents for first principles. Justice Gorsuch explained that the revocation proceeding was a "criminal prosecution" within the meaning of the Sixth Amendment because, at the time of the founding, a "prosecution" of a defendant "simply referred to 'the manner of [his] formal accusation.'" *Id.* at 2376 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 298 (1769)). Similarly, the Framers understood that "the concept of a 'crime' was a broad one linked to punishment"—that is, a crime refers to any acts done by a defendant "to which the law affixes punishment." *Id.* at 2376 (quoting 1 J. Bishop, Criminal Procedure §§ 80, 84, pp. 51–53 (2d. ed. 1872)) (cleaned up and additional citation omitted).

On the other side of the Court was Justice Alito, writing for a four-Justice dissent. Beyond the narrow question presented in *Haymond*, the dissent recognized that the plurality's logic would apply to supervised release as a whole. "[The plurality's implication] is clear enough: All supervised release proceedings must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial." *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting). There is no other option: the supervised-release revocation statute "sets out the procedure" for "all supervised-release revocation proceedings," so if it's unconstitutional regarding the mandatory minimum at issue in *Haymond,* then "the whole idea of supervised release must fall." *Id*.

The dissent further criticized the plurality for "mak[ing] no real effort to show that the Sixth Amendment was originally understood to require a jury trial in a proceeding like a supervised-release revocation proceeding." *Id*. at 2392. Justice Alito identified how, prior to the adoption of the Sixth Amendment, "convicted criminals were often released on bonds and recognizances," and they could be imprisoned if they violated the conditions attached. *Id.* at 2396. The dissent saw "no evidence that there was a right to a jury trial at such [recognizance] proceedings," and thus nothing supporting trial rights at supervised-release proceedings. *Id*. But the discussion of recognizances was cursory, as the parties had not focused on recognizance proceedings as a historical analogue.

Justice Breyer was the tiebreaker. He declined to apply *Apprendi* and *Alleyne*. *See id*. at 2385-86 (Breyer, J., Concurring). Instead, he concluded that

§ 3583(k) was unconstitutional because of "three aspects" of the provision: (1) it applied to a discrete set of federal criminal offenses, (2) it took away the judge's discretion, and (3) it imposed a five-year minimum prison sentence. *Id.* at 2386. These aspects led him to "think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Id*.

Although *Haymond* divided the Court, the overlap between the opinions was enough to cause jurists to question the previously accepted wisdom that the Sixth Amendment did not apply to supervised-release revocations. The *Haymond* plurality flatly rejected the assumption of lower courts that *Gagnon* and *Morrissey* apply to supervised release. *See, e.g., United States v. Pratt*, 52 F.3d 671, 675 (7th Cir. 1995); *United States v. Kirby*, 418 F.3d 621, 627 (6th Cir. 2005). And the opinions of both the *Haymond* plurality and dissent pointed toward a new method for assessing the question: look at the original understanding of the Sixth Amendment at the time of the founding. *See Haymond,* 139 S. Ct. at 2375–77, 2392–93.

Thus, cases popped up around the country. Ten circuits rejected post-*Haymond* calls to reconsider circuit precedent surrounding the Sixth Amendment and supervised-release revocations.[1] But those challenges all lacked historical

[1] *See United States v. Peguero*, 34 F.4th 143 (2d Cir. 2022); *United States v. Seighman*, 966 F.3d 237, 239 (3d Cir. 2020); *United States v. Ka*, 982 F.3d 219 (4th Cir. 2020); *United States v. Aguirre*, 776 F. App'x 866, 867 (5th Cir. 2019; *United States v. Robinson*, 63 F.4th 530, 539 (6th Cir. 2023); *United States v. Eagle Chasing*, 965 F.3d 647, 651 (8th Cir. 2020); *United States v. Richards*, 52 F.4th 879, 883 (9th Cir. 2022); *United States v. Salazar*, 987 F.3d 1248, 1261 (10th Cir. 2021); *United States v. Moore*, 22 F.4th 1258, 1267–69 (11th Cir. 2022); *United States v. Casseday*, 807 F. App'x 5, 9 (D.C. Cir. 2020) (plain-error review).

evidence necessary to address the key question asked by the *Haymond* dissent: How did the Framers think of the jury right as it applied to similar proceedings? Only this year, in a law review article published last May, did new research provide the means to answer that question. *See* Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. 1381 (2024).

Even without the full historical context, however, the view of the judiciary post-*Haymond* was far from unanimous. The issue created split panels in the Second, Fourth, Ninth, and Eleventh Circuits. *See Peguero*, 34 F.4th at 167 (Underhill, D.J., dissenting) (supervisees facing revocation are entitled to an indictment, jury trial, and confrontation rights); *Ka*, 982 F.3d at 228 (Gregory, J. dissenting) (after *Haymond*, courts must "reconsider the presumption that parole and probation case law apply equally to supervised release"); *United States v. Henderson*, 998 F.3d 1071, 1084 (9th Cir. 2021) (Rakoff, J., dissenting) (would adopt Justice Gorsuch's reasoning to hold that revocation under § 3583(e)(3) violated Sixth Amendment); *Moore*, 22 F.4th at 1279 (Newsom, J., dissenting in part) (revocation sentence violated Fifth and Sixth Amendments). *See also Moore*, 22 F.4th at 1279 (Lagoa, J., concurring in part) (voting to affirm only because defendant forfeited claim and error was not plain).

In this Court, it remains an open question whether the Sixth Amendment applies to revocations under 18 U.S.C. § 3583(e). *See Peguero*, 34 F.4th at 166 (Underhill, J., dissenting) ("no decision of the Supreme Court … has ever analyzed whether a person on supervised release facing violation charges punishable by more

than one year in prison has a right to indictment [and, therefore,] Sixth Amendment rights.") Outside this Court, however, the Seventh Circuit was one of only a few circuit courts that had not yet published a post-*Haymond* decision on this issue. At least until Smith, armed with new historical research about the jury right at the time of the founding, asked to vindicate his Confrontation Clause rights.

III. The district court proceedings in this case

In 2011, Jason Smith was convicted of possession with intent to distribute cocaine base, illegally possessing a firearm as a felon, and possessing a gun in furtherance of drug trafficking. (R. 57.) After serving a prison sentence of 147 months (R. 114), Smith started a three-year term of supervised release in June 2022 (R. 137; R. 188 at 1).

About a year into his supervision, the government sought to revoke Smith's supervised release, alleging that Smith violated various conditions related to drug use and committed a new crime when he fled from Indiana and Michigan police in a high-speed chase. (R. 188 at 2–3.)

1. Government's motion to present video testimony

Prior to the revocation hearing, the government moved to allow Smith's former probation officer, Abram Jones, to testify by video. (R. 192.) The sole basis for the request was that Jones had moved out of state. (R. 192 at 3.)

Smith objected to remote testimony on the basis that it would violate the Sixth Amendment. (App. 30–31a.) He argued that the Confrontation Clause granted him the right to confront his accusers face-to-face. (App. 31a.) And he maintained

that the revocation proceeding was a criminal prosecution, for which his Sixth Amendment rights would apply. (App. 31a.)

The court acknowledged that application of the Sixth Amendment to revocation proceedings was an issue "yet to play out completely in the courts." (App. 31a.) But it nonetheless rejected Smith's objection. (App. 31a.)

2. Evidence of drug-related violations

At the revocation hearing, the government called Smith's former probation officer Jones to testify about Smith's alleged drug violations. (App. 22–24a, 31a.) Jones testified remotely by video. (App. 29a.) The transcript suggests that, during at least some portions of Jones's testimony, Smith's attorney had trouble hearing Jones. (App. 61a.)

During Jones's testimony, the government submitted three reports allegedly showing that Smith's urine had tested positive for marijuana. (App. 39–40a, 46–47a, 49a.) These reports were not created by Jones; rather, they came from a lab to which Jones said he had sent Smith's urine samples. (App. 39–40a.) Smith objected to each of the lab reports, arguing that the government had failed to lay foundation, establish a chain of custody, or establish that the lab used reliable principles to develop the reports. (App. 40–41a, 47a, 49a.) Smith further objected that the reports violated the Confrontation Clause unless the expert who prepared each report personally appeared to testify. (App. 42a, 47a, 49a.)

In response to Smith's objections, the court asked the government to clarify if it intended to submit the reports only for a limited, nontestimonial purpose.

(App. 40–41a.) But the government confirmed that, no, it was submitting the reports for the truth of the matter asserted within them. (App. 41a.) Nonetheless, the government insisted that the reports were sufficiently reliable for admission at a revocation hearing. (App. 41a.) The court overruled Smith's objections and admitted all three reports, on the basis that the court could "infer" that the tests were reliable because the court could "infer" that the probation office probably had a contract with the testing lab. (App. 42–43a, 48–49a.)

3. Alleged high-speed chase in Indiana and Michigan

For the high-speed chase that Smith allegedly committed in Indiana and Michigan, the government decided to pursue only an allegation that Smith had violated Indiana law. (R. 188 at 2; App. 29–30a.) It argued that Smith committed the Indiana felony offense of resisting law enforcement in violation of Ind. Code 35-44.1-3-1. (R. 188 at 2.) The government relied on two witnesses.

First, the government called a police officer from South Bend, Indiana. (App. 63a.) He testified that the United States Marshals asked him to help surveil Smith. (App. 63a.) According to the officer, the marshals provided a photo of Smith, explained that Smith had an outstanding warrant, and told the officer that Smith was going to drive to a local liquor store in a white Chevy Malibu. (App. 64–65a.) The officer staked out the location with his partner, both of whom were in an unmarked car. (App. 64–65a, 70a.)

The officers saw a Malibu enter the liquor store's parking lot, and then speed away when marked squad cars approached. (App. 65a, 68–69a.) According to the

testifying officer, he was able to identify the Malibu's driver as Smith using the photograph he received from the Marshals. (App. 65–66a.) The photo showed a black man with a hat and a beard, and the driver was also a black man with a hat and a beard. (App. 66a.) Over Smith's objection, the officer said that his partner also identified Smith. (App. 65a.)

On cross, Smith poked some holes in the officer's testimony. Smith pointed out that the photo of a man in a hat was not the clearest means of identification. (App. 73–74a.) The officer also conceded that his partner was the one sitting closer to the target Malibu. (App. 73a.) Yet, according to the police report, the non-testifying partner had described the passenger of the Malibu as having a different appearance than the testifying officer claimed. (App. 66a, 71–72a.)

The second witness was another South Bend police officer, who followed the Malibu in a high-speed chase. (App. 75a.) He described chasing the car to the Michigan border, after which he let Michigan police take over. (App. 77–81a.) Michigan police later found the parked car, with the passenger still inside but no sign of the driver. (App. 82–83a.) This officer conceded that he never saw or identified the Malibu's driver; he merely relied on other officers' assertion that the driver was Smith. (App. 84–85a.)

Smith himself testified last. (App. 86a.) He explained that prior to his arrest, he learned from his girlfriend that marshals had come to his girlfriend's work to look for him. (App. 87a.) After learning this information, Smith called the probation office to ask if he needed to turn himself in. (App. 87a.) The probation officer whom

he spoke with told him no, he needed only to confirm his contact information. (App. 87–88a.) The government did not dispute any of Smith's testimony. (App. 89a.)

4. The district court's findings and sentence

The government argued that it had proved four drug violations, plus Smith's violation of the Indiana offense of resisting law enforcement. (App. 89–90a.) Smith, on the other hand, continued to dispute several drug violations. (App. 90a.) And on the more serious charge of committing a new felony, Smith challenged the witness's ability to identify him as the driver of the runaway Malibu. (App. 90a.) In particular, Smith pointed out that the non-testifying partner gave an inconsistent description of the car's occupants. (App. 90–91a.)

The court nonetheless found Smith guilty of all disputed violations. Relying on Probation Officer Jones's remote testimony and the objected-to lab reports, the court found Smith guilty of four drug violations. (App. 91a.) For the new felony in Indiana, the court found that the witness's identification of Smith proved Smith's involvement in the high-speed chase. (App. 92a.) "I suppose there's a remote chance that [the testifying officer] was mistaken, but it's not a very significant possibility." (App. 92a.) The witness's non-testifying partner had concurred in the identification, the court continued, which bolstered the evidence. (App. 92a.)

The court imposed 21 months' imprisonment. (App. 102a.) It also imposed a new term of supervised release. (App. 102a.) The court could have increased the length of Smith's supervision any amount it wanted: The drug-trafficking statute allows a lifetime term of supervised release, 21 U.S.C. § 841, so any violation of

supervised release re-exposes Smith to a lifetime term. *See* 18 U.S.C. § 3583(h). The court imposed one year, concluding that a year would be sufficient for Smith to obtain needed programming. (App. 102a.)

IV. The Seventh Circuit's decision

On appeal to the Seventh Circuit, Smith contended, among other things, that the revocation proceedings violated his rights under the Sixth Amendment's Confrontation clause. (App. 4–5a.) In rejecting this argument, the Seventh Circuit referenced its opinion in *United States v. Carpenter*, No. 23-3295, which was issued the same day as the court's opinion in this case. (App. 5a.)

In *Carpenter*, the Seventh Circuit addressed arguments based on this Court's opinion in *Haymond*, and on new historical research about the scope of the jury right at the time of the founding. (App. 10a, 12a.) Citing "thirty years of contrary precedent" in the Seventh Circuit, that court rejected Carpenter's and Smith's Sixth Amendment claims. (App. 11a.) The court recognized that the *Haymond* plurality opinion "appeared to suggest that—contrary to our precedent—most, if not all, supervised release revocations are 'criminal prosecutions.'" (App 13a.) But it viewed Justice Breyer's concurrence as the controlling opinion, and it concluded that Justice Breyer's narrow analysis did not upset circuit precedent. (App 16–17a.)

REASONS FOR GRANTING THE PETITION

When the Framers codified the jury right in the Sixth Amendment, including the right to confront witnesses, they would have recognized postconviction recognizances as a common legal device imposed on criminal defendants. And the

Framers would have known that defendants received jury trials when facing forfeitures of recognizance (the historic equivalent to modern revocation). Our forefathers wrote the Constitution to dictate how jury trials—including for forfeitures of recognizance—should proceed. Because federal supervised release is an analytical match for postconviction recognizances in form, function, and purpose, our forefathers would have understood the Confrontation Clause to apply to those proceedings too.

The Seventh Circuit rejected Smith's Confrontation Clause claim because of its own precedent holding that the Sixth Amendment does not apply to supervised-release revocations. But this Court does not face similar constraints, as this Court has not yet tackled the question of whether revocations under 18 U.S.C. § 3583(e)(3) implicate the Sixth Amendment. It should take up the question now.

Split panels from multiple circuits also show that jurists are divided on the application of the Sixth Amendment post-*Haymond*. This Court's intervention is necessary to clarify whether, and to what extent, the Sixth Amendment applies to revocations of supervised release under § 3583(e)(3). At the same time, because almost every lower court has already decided this issue, Smith's case is one of the few chances left for this Court to address it.

Addressing the issue is also necessary to vindicate the right of the People to police criminal proceedings through jury trials. As for the criminal defendants, the liberty of tens of thousands of Americans is at stake. Almost every felony sentence in federal court includes a component of supervised release. And court records show

that the government frequently uses revocation to punish supervisees in situations where it would not be able to carry its burden in a criminal trial.

Finally, this case would be an excellent vehicle for this Court to address the issue. Smith repeatedly objected to the violation of his Confrontation Clause rights during his revocation proceedings. And under circuit law, he would have been able to exclude vital evidence against him if the government were forced to proceed via jury trial. Because circuit law dictated that he Sixth Amendment does not apply to revocation proceedings, however, the government was able to skirt around the Confrontation Clause. Smith's case demonstrates how the right to confront witnesses can make a difference in the outcome of the case.

I. The Sixth Amendment provides a right to confront accusers before revocation of supervised release.

Federal supervised release is different from probation or parole. The Framers would have recognized supervised-release revocations as analogous to forfeitures of recognizance, an historical proceeding for which the Sixth Amendment attached. And although Smith does not challenge this Court's holdings that the Sixth Amendment does not apply to revocations of probation or parole, the *Haymond* plurality correctly identified structural differences between supervised release versus probation and parole. The Seventh Circuit thus got it wrong when it affirmed Smith's revocation.

1. The Framers would have understood the Sixth Amendment to apply to supervised-release revocations.

a. Forfeitures of recognizance are a close historical analogue for federal supervised release.

In his *Haymond* dissent, Justice Alito cited recognizances as an historical analogue to modern federal supervised release. *Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting). He was right to do so—recognizances and supervised release are close siblings. Founding-era courts used recognizances, also called a "peace bond" or "surety for the peace," to impose conditions on criminal defendants. *See* Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1384 (citing Lawrence M. Friedman, *Crime & Punishment in Am. History* at 38 (1993); 4 Blackstone, *Commentaries* at 251).

In the founding era, American judges used recognizances widely—so often that legal treatises contained stock forms. *Id.* at 1405. One of "the most published and widely circulated" treatises in early-American legal use, *The New Virginia Justice*, included fill-in-the-blank recognizances. *Id.* at 1405 (quoting Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J.S. Legal Hist. 315, 328 (2018)). *See also* William Hening, *New Virginia Justice* at 25, 438 (1795) (available at: https://bit.ly/3sNicUI). The Framers of the Sixth Amendment were undoubtedly familiar with this procedure. The *New Virginia Justice* counted both James Madison and Thomas Jefferson among its subscribers. *See* William Hening, *New Virgina Justice* (listing subscribers at front of treatise, unpaginated). And founding-era newspapers matter-of-factly discussed recognizances in criminal news

of the day. *See* Aurora Gen. Advertiser at 2 (Feb. 7, 1805) (No. 4401) (available at: https://bit.ly/3Z64Q1Q) (reporting on a jury trial for breach of recognizance); The Centinel No. 43 at 339 (Mar. 25, 1807) (available at: https://bit.ly/3ENh2eN) (discussing Aaron Burr's recognizance proceedings); Norfolk Gazette & Publick Ledger No. 136 at 3 (May 29, 1807) (same). The term "recognizance" was everyday fare understood by the public at large.

These recognizances, widespread and well-known to the Framers, have multiple similarities with modern supervised release. At least five core functions overlap between the two.

First, recognizances operated like supervised release—imposing conditions and revocable release. "Every recognizance was [] 'subject to a *condition*,'" that might last until "the next court session, for a fixed period of time, or even for life." Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1407 (citations omitted). Two common conditions, found in the form order printed in *The New Virginia Justice*, were "to keep the peace" and "be of good behavior." *Id.* at 1405, 1408. A person could violate the keep-peace condition by violent crimes, "some act, as an affray, or battery, or the like." *Id*. at 1408 (quoting 1 Edward Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* at 179 (1797)). The good-behavior condition was broader, barring a person from "scandal against good morals." *Id*. at 1408 (quoting Hening, *New Virginia Justice*, at 440. These conditions are analogous to modern conditions prohibiting supervisees from committing new crimes and imposing technical rules to ensure moral behavior.

Second, founding-era courts imposed recognizances as part of criminal sentences—precisely like modern courts impose supervised release. Early American treatises listed recognizances attached to criminal sentences. *Id.* at 1410 (citing 4 Blackstone, *Commentaries* at 248) (additional citation omitted). The Supreme Court of Pennsylvania held that judges had "inherent power to take recognizance for good behavior after conviction." *Id*. at 1410 (citing *Commonwealth v. Davies*, 1 Binn. 97, 98 n. a (Pa. 1804)). And states enacted laws empowering judges to impose recognizances for numerous crimes. *Id.* at 1410–11. Postconviction recognizances were widespread in the courts of Philadelphia, New York, Virginia, Maryland, Connecticut, and New England. *Id.* at 1411–12.

Third, recognizances, like supervised release, came with surveillance and reporting. Judges required recognizors to find sureties—third parties who were "expected to exercise some supervision over the bonded person," including arresting a breaching recognizor and delivering him to court to be incarcerated. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1412–13 (citation omitted).

Fourth, for defendants who violated recognizance conditions, courts could and did impose jail—like supervised release. *See Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting) (violating recognizance could result in "a loss of liberty"). The process was framed as a debt, but functionally courts could levy impossible recognizance amounts. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1415. Judges used recognizances effectively as warrants by "sometimes order[ing] recognizors to pledge enormous sums of money that no one in the community could have

realistically afforded," and thereby "keep them in prison" with no ability to pay. *Id.* at 1416–17 (quoting Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania*, 111 (1907)) (internal quotes omitted) (additional citations omitted).

Fifth, the two schemes share the same purpose: public protection. Courts imposed recognizances conditioned on good behavior "to prevent criminal actions by the defendant"—the purpose "was to prevent crimes, or public wrongs, and misdemeanors, and for no other purpose." *Respublica v. Cobbett****Error! Bookmark not defined.,*** 3 U.S. 467, 475 (Penn. 1798). Courts understood that recognizances were self-evidently "of a criminal nature" with a purpose identical to modern supervised release. *See id.*

In short, Founding-era recognizances were a common and well-known analogue to modern supervised release.

b. The Framers understood defendants facing recognizance forfeiture to have Sixth Amendment rights.

The *Haymond* dissent saw "no evidence that there was a right to a jury trial" at recognizance proceedings and, without such evidence, concluded that the original scope of the Sixth Amendment couldn't encompass something like supervised release. *Haymond*, 139 S. Ct. at 2398 (Alito, J., dissenting). At the time, Justice Alito was right about the lack of such evidence—there had been virtually nothing written on the topic. That has changed because of post-*Haymond* scholarship.

New research shows that unequivocally "yes. At the time the Constitution was ratified, recognizance forfeitures required a jury trial." Schuman, *Revocation at*

the Founding, 122 Mich. L. Rev. at 1417–18. The evidence is ample; numerous historic cases discuss recognizance juries.[2]

Beyond judicial opinions, long-preserved court records show defendants received recognizance juries as far back as the 15th century. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1419 (citing The Year Books: Report #1494.073, *Legal History: The Year Books, Boston University School of Law*) (available at: https://bit.ly/3ErE8Y7). Treatises show that English courts in the 1600s and 1700s would empanel a "jury" to decide whether a defendant "forfeited his recognizance by breach of the peace." *Id.* at 1419. Early American courts were the same. *Id.* at 1419–21.

In short, the Framers of the Sixth Amendment understood that the amendment would codify an existing jury right for postconviction recognizances, a system matching supervised release in form, function, and purpose. The two need not be identical—indeed, historical practices rarely are. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022) ("[A]nalogical reasoning

[2] *See, e.g., Mix v. People*, 29 Ill. 196, 197–98 (1862) ("upon a common recognizance … The verdict of the jury was ... for the plaintiff"); *Regina v. Harmer*, 1859 WL 9677 (U.C. Q.B. 1859); *Sans v. People*, 3 Gilman 327, 329 (Ill. 1846) ("[A] scire facias issued against him, and … his security … The jury returned a verdict against the plaintiff, upon which judgment was rendered by the court."); *Rex v. Wiblin*, 2 Car. & P. 9 n. 2 (1825) ("When a person has entered into a recognizance to keep the peace … If the jury find that the recognizance has been forfeited, they find a verdict for the crown, and judgment is entered up."); *Commonwealth v. Emery*, 2 Binn. 431, 433–35 (Pa. 1810) ("The objections are, that the evidence given to the jury was not a recognizance, but only a loose note ... But I see nothing illegal or dangerous in the[] practice of taking and certifying recognizances by short minutes, or in permitting those minutes to be given in evidence to juries, as often as questions arise on the recognizances."); *Commonwealth v. Davies*, 1 Binn. 97, 99–100 (Penn. 1804) ("The point which led ultimately to the present argument ... was this, that unless the jury might find less than the whole amount, and this it was said they could not do, a recognizance of this kind if forfeited by a libel would prove a direct restraint upon the press.").

requires only ... a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough."). And because of their similarity, supervisees should receive the same constitutional protections their forebears possessed, nothing less.

2. The *Haymond* plurality correctly identified a "structural difference" between supervised release versus probation or parole.

The history of the forfeiture jury also supports the *Haymond* plurality's conclusion that supervised release is structurally different from probation or parole. When the Constitution was ratified, the common law required juries for recognizance forfeitures because recognizance was structured as an additional sentence. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1434.

Then, during the 1800s, the systems of community supervision slowly changed. Beginning in the 1830s, judges who had long relied on recognizances began slowly adopting a new practice called "laying a case on file," which was simply to postpone sentencing indefinitely. *Id.* at 1426–28; *see also Ex Parte U.S.*, 242 U.S. 27, 50 (1916) (discussing "a system styled 'laying the case on file'"). Later developments, like the development of parole and the formalization of "laying a case on file" into "probation," further changed the structure of community supervision from an additional penalty to a withheld punishment. This change is the reason why the forfeiture jury disappeared during the 19th century. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1434. Revocation of these newer forms of

supervision was merely reinstatement of a prison term that had been "imposed previously," not a new punishment necessitating a jury. *Gagnon*, 411 U.S. at 782 n.3.

For federal supervised release, Congress intended to switch back to a version of supervision that was like old-fashioned recognizances and unlike the withheld-punishment models of parole and probation. Prior to the Sentencing Reform Act, the parole system was premised on the idea that prison was rehabilitative. *Tapia*, 564 U.S. at 324. But in the final quarter of the twentieth century, lawmakers started to doubt the prison system's ability to rehabilitate inmates. *Mistretta*, 488 U.S. at 365. In part to reject the rehabilitative model, Congress abolished parole. *Mistretta*, 488 U.S., at 365. Now, federal inmates can no longer obtain early suspension of a portion of their prison sentences.

When abolishing parole, Congress wrote the Sentencing Reform Act to emphasize that supervised release is structurally different. Because a federal parole board can no longer set aside part of a defendant's prison sentence, the Sentencing Reform Act stripped courts of any power to order rehabilitative programming for imprisoned persons. *Tapia*, 564 U.S. at 325–26. Prison sentences are now determinate and exclusively for the purposes of retribution, deterrence, and incapacitation. *Id.*; 18 U.S.C. §§ 3553(a)(2), 3582(a). Courts can still address rehabilitative concerns through a *separate* term of supervised release, and courts remain empowered to order rehabilitative programming for supervisees. 18 U.S.C. § 3583(c); *Tapia*, 564 U.S. at 330. But Congress made sure to create a firewall

between a prison sentence, which is punitive and "not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. § 3582(a), and a supervised-release sentence, which is rehabilitative but cannot be part of a defendant's punishment, 18 U.S.C. § 3583(c). Two separate terms serving two separate purposes.

And that's the dispositive difference. Defendants on parole or probation were relieved from their prison sentences and owed a balance for withheld punishment. With a debt outstanding, courts correctly reasoned that revocations were not "prosecutions" under the Sixth Amendment but rather the reimposition of a previously imposed sentence. But when a defendant starts his first day of supervised release, he does so only "after the completion of his prison term," owing not a single day in prison for his original offense. *See Haymond*, 139 S. Ct. at 2382 (citing U.S. Sent. Comm'n, Guidelines Manual, ch. 7, pt. A(2)(b) (Nov. 2012) and Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. at 1024). "Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term." *Johnson v. United States*, 529 U.S. 694, 725 (2000)) (Scalia, J., dissenting).

The *Haymond* plurality recognized that this "structural difference"—the change from a balance-owed to a no-balance system—bares "constitutional consequences." *Haymond*, 139 S. Ct. at 2382. Structurally, supervised release shares more in common with historical recognizances than parole. A jury right that applied to recognizors facing revocation should apply equally to federal supervisees.

3. The Sixth Amendment is a bundle of rights.

Most of the case law and history cited above regards the Sixth Amendment's jury right, the specific right at issue in *Haymond*. Smith did not assert his right to a jury during his revocation hearing, only a right to confrontation. Accordingly, Smith recognized that any argument that he should have received a jury trial was forfeited and did not press that issue before the Seventh Circuit.

Smith's Confrontation Clause argument, however, is fully preserved. And because the Sixth Amendment encompasses a bundle of rights related to criminal prosecutions, Smith's claim under the Confrontation Clause has just as much merit as a post-*Haymond* trial demand.

The Framers adopted the Sixth Amendment to protect a system of interrelated trial rights, including the right to a speedy trial, public proceedings, and an impartial jury. *Haymond*, 139 S. Ct. at 2376. The Framers intended this amendment to dictate *how* criminal trials should proceed, writing the Confrontation Clause to proscribe "a procedure for determining the reliability of testimony in criminal trials." *Crawford v. Washington*, 541 U.S. 36, 67 (2004). This is because the Sixth Amendment requires not just any trial, but a trial with the same protections that historically applied at the time of the founding. *Oregon v. Ice*, 555 U.S. 160, 170 (2009); *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000). Indeed, Justice Alito's opinion in *Haymond* saw the Sixth Amendment as a package deal, recognizing that a jury for revocation proceedings would also requires courts to "try all those proceedings in accordance with the Sixth Amendment's Confrontation Clause."

Haymond, 139 S. Ct. at 2388 (Alito, J., dissenting). *See also id.* at 2394–95 (collecting jury-right, speedy trial, and confrontation cases as all relevant to Sixth Amendment analysis).

Smith did not need to request a jury to take advantage of the Sixth Amendment's other protections. Criminal defendants are generally free to waive their jury right and proceed to a bench trial when they would rather have a judge act as factfinder. *See, e.g., United States v. Williams*, 559 F.3d 607, 609 (7th Cir. 2009). And a defendant who waives a jury is entitled to the same confrontation rights during a bench trial as would apply in front of a jury. *See Davis v. Washington*, 547 U.S. 813, 820, 829–33 (2006) (affidavit admitted at bench trial violated Confrontation Clause). Smith deserved Confrontation Clause protection in this case even without a jury present.

4. The Seventh Circuit's decision is wrong.

The Seventh Circuit rejected Smith's Confrontation Clause claim, concluding that *Haymond* had not undone its own "thirty years of contrary precedent." (App. 5a, 11a.) But the Seventh Circuit did not grapple with the historical evidence outlined above, nor did it address the merits of the *Haymond* plurality's analysis that supervised release is structurally different from probation or parole. *Haymond*, 139 S. Ct. at 2382. Instead, the court concluded that well-established circuit law foreclosed a substantive analysis of the merits of Smith's arguments. (App. 11–17a.)

This Court would face no similar barrier to considering the merits of Smith's Sixth Amendment claim. Unlike the lower courts, this Court has never held that

Morrissey and *Gagnon* apply to supervised-release revocations. *Contrast, e.g., Pratt*, 52 F.3d at 675. This Court has never decided whether a federal supervisee is entitled to Sixth Amendment protections when facing felony prison time at revocation. *See Peguero*, 34 F.4th at 166 (Underhill, J., dissenting). This Court can do what the Seventh Circuit couldn't. It can consider the historical evidence and address the question head on.

II. This issue has caused debate in the judiciary that requires this Court's intervention.

Every court of appeals to address the scope of the jury right post-*Haymond* has continued to hold that the Sixth Amendment does not apply to most revocations of supervised release. *See, supra,* n.1. But that does not mean that members of the judiciary are unanimous. The issue created split panels in four circuits. *See Peguero*, 34 F.4th at 167 (Underhill, D.J., dissenting); *Ka*, 982 F.3d at 228 (Gregory, J. dissenting); *Henderson*, 998 F.3d at 1084 (Rakoff, J., dissenting); *Moore*, 22 F.4th at 1279 (Newsom, J., dissenting in part); *Moore*, 22 F.4th at 1279 (Lagoa, J., concurring in part). A real divide is growing among judges over whether the Sixth Amendment should apply to some or all supervised-release revocations.

As demonstrated by the Seventh Circuit's opinion in this case, however, the courts of appeals are unlikely to consider the historical evidence without this Court's intervention. Like the Seventh Circuit, virtually every circuit has "thirty years of contrary precedent" holding that supervised-release revocations fall outside the Sixth Amendment. (App. 4a.) Even though this Court has not issued its own

opinions on the matter, the courts of appeals do not lightly discard their own precedent without higher guidance.

At the same time, this case (and the companion case in *United States v. Carpenter*) may be one of the last opportunities for this Court to take up the issue. The Seventh Circuit was the eleventh court of appeals to address this question; ten other circuits had already decided the issue. Litigants are unlikely to raise this claim again once it has been foreclosed by circuit law. If this Court does not grant certiorari now, it may not have another opportunity to do so.

III. Resolution of this issue is necessary to vindicate the rights of federal supervisees nationwide, as well as the rights of the People to police the Executive and Judicial branches.

The rights of tens of thousands of Americans are at stake. Each year, around 50,000 federally sentenced individuals begin serving terms of supervised release.[3] More than double that number are actively serving supervised-release terms.[4] Convictions for drug distribution, or for other crimes like "terrorism" or certain sex offenses, can trigger mandatory minimum supervised release terms of two to ten years, and maximum terms of life. 18 U.S.C. § 3583(j)-(k); 21 U.S.C. § 841(b). And sentencing courts may extend a term supervised release up to the maximum "at any

[3] *See* U.S. Dep't of Justice, Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release 2 (2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf; Administrative Office of the United States Courts, Statistics and Reports, Table E-1—Federal Probation System Statistical Tables for the Federal Judiciary, U.S. Courts, https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2023/12/310.

[4] Administrative Office of the United States Courts, Statistics and Reports, Table E-2-Federal Probation System Statistical Tables for the Federal Judiciary, https://www.uscourts.gov/report-names/statistical-tables-federal-judiciary.

time," 18 U.S.C. § 3583(e)(2), or impose additional years up to the maximum upon a finding of violation. 18 U.S.C. § 3583(h). In short, Congress has created a system by which a class of Americans can be stripped of their Sixth Amendment rights *for life*.

As it stands, nothing prevents Congress from adopting similar lifetime supervision laws for even more types of offenses. Without constitutional protection, "Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything." *Haymond*, 139 S. Ct. at 2380. The Constitution cannot allow this.

The deprivation of these Americans' rights is not mere hypothetical. Federal prosecutors frequently use revocation proceedings to circumvent supervisees' trial rights. Revocation offers a streamlined alternative with a lower burden of proof and without pesky irritations like the Confrontation Clause or rules of evidence. Take Eric Colclough, for example, a 33-year-old Black man who was serving supervised release in New Jersey. In November 2023, a local police officer called Mr. Colclough's supervision officer, claiming that video footage showed Mr. Colclough attempting to fire a gun near a corner store in Jersey City.[5] The video was far from conclusive, showing only a "darkened" person walking down the street in "a hoodie,"

[5] Violation of Supervised Release Hearing Transcript at 10, *United States v. Colclough*, No. 21-cr-814 (D. NJ. Jan. 31, 2024).

whose face was not visible, and who was not even clearly holding a firearm.[6] But recognizing that the standard of proof was lower at revocation hearings, the district court revoked Colclough's supervised release based on (1) hearsay police reports from non-testifying officers who did not witness the incident; and (2) the supervision officer's hearsay recollection of his call with a local police officer (neither of who witnessed the incident).[7] Colclough went to prison.[8] And he is not alone in being sent to prison based on evidence that would have been insufficient at trial.[9]

Even worse, federal prosecutors frequently pursue revocations after a jury has *acquitted* a supervisee of the very same conduct. Consider James Harris, a 32-year-old Black man charged in Illinois state court with unlawful possession of a firearm as a felon.[10] Police arrested Harris for carrying a purse with a gun inside.[11] But Harris later showed at trial that neither the purse nor gun belonged to him; he was returning the forgotten purse to a female friend, and he claimed not to know its contents.[12] Although a jury acquitted Harris, the government pressed for revocation based on the same incident.[13] And, under the lower standard of evidence that

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[6] *Id.* at 22–25.

[7] *Id.* at 10, 25–26, 31.

[8] *Id.* at 46–47.

[9] *See, e.g., United States v. Dunlap*, No. 8:06CR244, 2012 WL 3656636, at *3 (D. Neb. Aug. 24, 2012) (revoking supervision while recognizing that government would not have been able to pursue criminal prosecution); *United States v. Robinson*, 63 F. 4th 530, 533 (6th Cir. 2023) (revoking supervisee based on fruits of illegal search that would not have been admissible at trial); *United States v. Phillips*, 914 F.3d 557, 559 (7th Cir. 2019) (same, holding that exclusionary rule does not apply to revocation hearings).

[10] *See People v. Harris*, 21CR13123-01 (Ill. Cir. Ct. Cook County).

[11] Violation of Supervised Release Hearing Transcript at 12–19, *United States v. Harris*, No. 1:11-CR-00667 (N.D. Ill. July 12, 2023).

[12] *Id.* at 14–15, 24–25.

[13] *Id.* at 11–12, 26, 32.

applies to revocation proceedings, Harris went to federal prison for the exact same crime for which a state jury refused to convict him.[14] Many other federal supervisees who have prevailed against new charges at trial have suffered a similar fate.[15]

Revocation proceedings like the ones outlined above represent a usurpation of the People's authority under the Constitution. The jury power is more than just a "procedural formality" for defendants; the jury is a "fundamental reservation of power" to the American public to check the Executive and Judicial Branches. *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004). "Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375 (citing J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary & Autobiography of John Adams 3 (L. Butterfield ed. 1961). *See also Erlinger v. United States*, 144 S. Ct. 1840, 1850 (2024). The People's constitutional authority is nullified if the government can simply sidestep an acquittal (or forego the annoyance of a trial entirely) by seeking revocation based on an informal hearing. And although Smith did not request a jury

[14] Revocation and Sentencing Transcript, at 7–8, *United States v. Harris*, No. 1:11-CR-00667 (N.D. Ill. July 14, 2023).

[15] *See, e.g., United States v. Brown*, No. 21-3766, 2022 WL 2709431, at *1 (8th Cir. July 11, 2022) (affirming revocation following acquittal, despite concern that "government essentially got a second bite at the apple."); *United States v. Fredrickson*, 988 F.3d 76, 84 (1st Cir. 2021) (same judge who oversaw jury acquittal later revoked supervisee based on acquitted conduct*); United States v. McCall*, No. 7-cr-96 (W.D. Tex. Mar. 4, 2021) (sentencing supervisee to nearly five years' imprisonment after jury acquitted him for the same conduct in *United States v. McCall*, No. 20-cr-223 (W.D. Tex. Feb. 25, 2021)).

trial, restoration of the Sixth Amendment in this case would restore the jury right in future cases.

Smith understands that members of this Court may have concerns about whether courts could empanel enough juries to provide supervisees their constitutional rights. *See Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting) (noting that in 2018, federal district courts completed 1,809 criminal jury trials and 16,946 revocations of supervised release). But guaranteeing federal supervisees their constitutional rights would not be as burdensome to the judiciary as this Court might think. Just as most original criminal prosecutions end in guilty pleas, most revocation petitions also end in deals between the parties. According to statistics compiled by the United States Sentencing Commission, supervisees already admit more than 80 percent of alleged violations. *See Federal Probation and Supervised Release Violations*, United States Sentencing Commission (July 2020), at 30, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf. The number of contested revocations would only go down if the government faced the prospect of trial, and thus had more incentive to negotiate deals.

And jury trials for supervision revocations is not a new concept; as originally enacted, the Sentencing Reform Act required full jury trials before sending supervisees back to prison. *See* Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. at 1000. Only through a last-minute amendment before the law went into effect did Congress strip supervisees of

their Sixth Amendment rights and create the system of revocations that we have now. *Id*. at 1001. Just as Congress initially envisioned a system that complied with the Sixth Amendment, this Court can restore the constitutional rights of supervisees and the general public without abolishing supervised release.

IV. This case is an excellent vehicle for this Court to address the issue.

Any layperson who stepped into the courtroom during Smith's revocation would have seen what looked like a criminal trial. The government was trying to prove that Smith violating Indiana law by fleeing from police, a charge that he denied. And the hearing had all the hallmarks of a criminal proceeding: "(1) the government (2) accuses the defendant (3) of violating a condition of supervised release and, (4) if that charge is proven, the defendant will be sentenced to a new term of imprisonment." *Peguero*, 34 F.4th at 167 (Underhill, D.J. dissenting). But the proceeding was not a trial. And in Smith's case, the government's ability to ignore the Confrontation Clause proved dispositive.

First, all of Probation Officer Jones's video testimony violated the Sixth Amendment. At least in the Seventh Circuit, witness testimony by video sits in the nether zone between the Confrontation Clause and the lesser protections of the Fifth Amendment and Federal Rule of Criminal Procedure 32.1 and the. The district court allowed Jones to testify remotely because it concluded, correctly under circuit law, that remote video testimony would be admissible under the Fifth Amendment and federal rules. *See United States v. Jordan*, 765 F.3d 785, 787 (7th

Cir. 2014). But the Confrontation Clause is more restrictive and "guarantees the defendant a *face-to-face* meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (emphasis added). The Sixth Amendment does not allow video testimony except in exceptional circumstances (*e.g.*, young child victims who cannot safely face an abuser) that do not apply here. *See Maryland v. Craig*, 497 U.S. 836, 844 (1990).

Likewise, the third-party lab reports of Smith's drug tests violated the Confrontation Clause. If this were a jury trial, the district court would have undoubtedly excluded the reports; the Seventh Circuit has "repeatedly held that the government may not introduce forensic laboratory reports or affidavits reporting the results of forensic tests and use them as substantive evidence against a defendant unless the analyst who prepared or certified the report is offered as a live witness subject to cross-examination." *United States v. Webster*, 775 F.3d 897, 901 (7th Cir. 2015) (collecting cases) (internal quotation omitted). *See also Bullcoming v. New Mexico*, 564 U.S. 641 (2011). Here, the government relied on third-party reports stating that Smith's urine had tested positive for marijuana. (App. 39a, 46–47a, 49a.) But it never presented for cross examination the lab techs who prepared the reports—or, for that matter, *any* forensic expert who could explain the methods used to test Smith's urine for drugs. And although the reports were generated in a black box, the government disavowed any nontestimonial use for this hearsay. (App. 41a.)

Smith's confrontation rights were further violated when the government put forth evidence of the alleged high-speed chase in Indiana and Michigan. Two officers testified about those events. (App. 63–85a.) But the second witness—the officer who engaged in the actual chase—admitted that he never saw the car's occupants and relied only on others' representations that Smith was the driver. (App. 84–85a.) The first witness claimed that he identified Smith prior to the chase. (App. 66–67a.) But Smith poked several holes in that testimony. (App. 73–74a.) And ultimately, the government needed to rely on hearsay evidence that the witness's non-testifying partner had also positively identified Smith. (App. 65a, 74a.) The district court ultimately cited the non-testifying officer's alleged identification as evidence that the testifying witness had accurately identified Smith. (App. 92a.)

Separate from the merits of Smith's Confrontation Clause challenges, Smith's case also demonstrates the potential of supervisees losing Sixth Amendment rights for life. His original underlying conviction is for distribution of heroin and fentanyl under 21 U.S.C. § 841, one of the statutes that allows life-long terms of supervised release. Thus, any minor violation—missing a single drug test—allows imposition of a new lifetime term. *See* 18 U.S.C. § 3583(h). Although the district court imposed only one year of additional supervision in this case, it had discretion to do impose much more.

Because Smith's case is an example of why the lack of confrontation rights can make a difference at revocation hearings, and because it illustrates the

possibility of lifetime supervision, his case is an ideal representative of the issues at stake.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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September 16, 2024