No. 24-_____

In the
Supreme Court of the United States

John Bradley,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Sarah Baumgartel
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8772
Sarah_Baumgartel@fd.org

Counsel for Petitioner

QUESTIONS PRESENTED

1. Under Article II, Section 2 of the Constitution, principal federal officers, including United States District and Circuit Judges, must be nominated by the President and confirmed by the Senate to their office. Does it violate this Appointments Clause for one Circuit Judge to appoint a fellow Circuit Judge to sit continuously for years as a District Judge?

2. Section 291(b) of Title 28 permits a Chief Circuit Judge to "temporarily" designate a fellow Circuit Judge "to hold a district court" when it is "in the public interest." Does it violate this statute for a Chief Judge to appoint a fellow Circuit Judge to sit continuously for years as a District Judge?

3. When a defendant on federal supervised release faces an alleged violation subjecting him to additional mandatory prison time and an increase in the maximum punishment beyond that authorized by his original conviction alone, do the Fifth and Sixth Amendments require the violation to be tried before a jury and proven by more than a preponderance of the evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINION AND ORDERS BELOW

The Second Circuit's opinion is available at 124 F.4th 106 (2d Cir. 2024), and appended at A.5.[1] The relevant designation orders are appended at A.1.

JURISDICTION

The Second Circuit issued its decision on December 23, 2024. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> The President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2.

> 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

---

[1] The appendix to this petition is cited "A."

> property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

> 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.

U.S. Const. amend. VI.

> (a) The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit.
>
> (b) The chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit.

28 U.S.C. § 291.

STATEMENT OF THE CASE

A. Introduction

United States District Judges are nominated by the President and confirmed by the Senate to their office. This is more than just tradition—it is what the Constitution requires. Concerned about the manipulation of appointments, the Founders mandated that important officers in their new government be chosen through a transparent process designed to ensure that qualified candidates would be selected by elected representatives.

Petitioner John Bradley's case was heard by a judge who was not appointed in this lawful manner. Instead, his District Court case, an alleged violation of federal supervised release, was heard by a Circuit Judge who had been appointed to the District Court by a fellow Circuit Judge—an appointment that began over six years ago and is ongoing. Over Petitioner's objection, the designated Circuit Judge tried Petitioner's alleged violations himself, convicted Petitioner, and imposed a sentence carrying additional prison time and supervised release.

The Second Circuit, unlike other circuits, makes a routine practice of appointing Circuit Judges to extended terms in the District Court. This means federal judges in this circuit sit continuously and simultaneously at both the trial and appellate levels. The appointment challenged here—which has

already spanned over half a decade and continues indefinitely—is an extreme example of this all-too-regular practice.

This practice is unlawful. The Constitution's Appointments Clause requires any appointment to a principal federal office, including to the office of District Judge, to be made via presidential nomination and Senate confirmation. There is a limited exception to this constitutional mandate, reflected in 28 U.S.C. § 291(b), for special, temporary appointments necessitated by some exigency. But the appointment here is neither temporary nor precipitated by any exigency. It therefore violates both the Constitution and § 291(b).

In addition, following *United States v. Haymond*, 588 U.S. 634 (2019), Petitioner's alleged violations should not have been adjudicated by a single judge and sustained on a mere preponderance of the evidence. Under the Fifth and Sixth Amendments, he was entitled to a jury trial and greater proof.

This petition raises important questions of federal constitutional and statutory law, which implicate the Appointments Clause, the separation of powers, and this Court's supervisory authority over the federal courts. The Second Circuit's appointment practice—which amounts to a manipulation of the constitutional appointment scheme—so far departs from the accepted and usual course of judicial proceedings as to call for this Court's intervention. This petition should be granted.

B. Petitioner's Original Criminal Case

In 2013, Petitioner John Bradley was charged in the Southern District of New York with unlawfully possessing a firearm, in violation of 18 U.S.C. § 922(g)(1). A.7. His case was assigned to then-District Judge Richard J. Sullivan. Petitioner pled guilty and, in May 2014, was sentenced to three years in prison and three years of supervised release. A.7. Following this federal prison term and an unrelated state sentence, Petitioner began federal supervised release in December 2020. A.8.

C. The Circuit Judge's Appointment to the District Court

In 2018, after Petitioner's federal case concluded and while he was still in prison, Judge Sullivan (hereinafter "the Circuit Judge") left the District Court. A.1, 7-8. He was nominated and confirmed to the United States Court of Appeals for the Second Circuit. *See* Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-present*. His District Court seat was subsequently filled by a different District Judge. *See id.* (noting that the Honorable Jennifer Rearden was appointed to the seat).

Nonetheless, the Circuit Judge continued to sit in the District Court, now by judicial "designation." Between 2018 and 2024, citing 28 U.S.C. § 291(b), the Second Circuit's Chief Judge repeatedly appointed the Circuit Judge "to sit in the United States District Court for the Southern District of New York" for as long as "may be required to complete unfinished business." A.1. The Chief

Judge signed contiguous orders so appointing this Circuit Judge in 2018, 2022, 2023, and 2024. A.1-4. Based on these orders, the Circuit Judge has sat continuously on the District Court from 2018 through the present, and this appointment is ongoing.

The appointment orders are not limited to particular cases and, since 2018, the Circuit Judge has heard hundreds of District Court matters. From 2019 forward, Westlaw reports over 190 opinions and orders by this Circuit Judge in District Court cases. Even the Circuit Judge's individual rules state that he "maintains a sizeable docket of cases on the United States District for the Southern District of New York."[2]

This continuous appointment is part and parcel of a larger practice within the Second Circuit. According to the Government and the circuit itself, the Second Circuit makes a "routine[]," *see* Brief of the United States, *United States v. John Bradley*, at 33, and "common[]," A.13, practice of appointing Circuit Judges to extended terms in the District Court.

D. The Supervised Release Violation Proceedings

Petitioner began federal supervised release in 2020 and was scheduled to complete his term in December 2023. However, in November 2023, the

---

[2] *See Individual Rules and Practices of Judge Richard J. Sullivan When Sitting By Designation In The United States District Court*, *available at* https://nysd.uscourts.gov.

Circuit Judge directed the Probation Department to file violation allegations against Petitioner based on his reported marijuana use.[3] A.8.

Then, in December 2023, a former romantic partner claimed Petitioner had assaulted her during an argument. Petitioner adamantly denied this claim. This romantic partner first made this allegation to Petitioner's probation officer, who encouraged her to contact the police. She then filed a complaint with local police. However, local authorities did not pursue criminal charges against Petitioner.

Instead, the Probation Department charged state criminal allegations, violations of New York Penal Law §§ 120.00 and 121.12 (assault and strangulation), as new violations of Petitioner's federal supervised release.

Petitioner asserted that he was innocent of these charges and that his former partner was not credible. He moved for a trial before a jury, where the government would be required to prove the violation allegations beyond a reasonable doubt. Petitioner also objected to the Circuit Judge presiding over his violation proceedings and moved that the case be reassigned to a lawfully appointed District Judge. A.8-9.

---

[3] In 2021, New York legalized recreational marijuana use by adults. Petitioner also obtained a state medical marijuana certification. Nonetheless, the Circuit Judge directed Probation to bring a violation petition because marijuana is a controlled substance, and Petitioner's federal supervised release conditions prohibit him from using controlled substances.

The Circuit Judge denied these applications. A.9. He conducted a hearing, taking testimony from Petitioner's former romantic partner and his probation officer. Crediting this testimony, the Circuit Judge found Petitioner guilty, by a preponderance of the evidence, of (i) possessing and using a controlled substance (marijuana); (ii) traveling to Queens, New York without permission;[4] and (iii) assaulting his former romantic partner, in violation of New York Penal Law §§ 121.12 and 120.00. A.9. The Circuit Judge sentenced Petitioner to 18 months in prison and an additional 18 months of supervised release. A.9.

E. Appeal

Petitioner timely appealed. He reiterated his arguments that the Circuit Judge's appointment to the District Court was unlawful because it violated the Appointments Clause and § 291(b), and that the Fifth and Sixth Amendments entitled him to a jury trial and proof beyond a reasonable doubt.

By order dated December 23, 2024, the Second Circuit rejected these arguments. A.5. The circuit held that the Circuit Judge's appointment to the District Court did not violate either the Appointments Clause or § 291(b),

[4] A condition of Petitioner's supervised release was that be obtain permission to travel outside his federal district of residence. Petitioner resided in the Bronx, the Southern District of New York, and Queens is in the Eastern District of New York.

because judges were permitted to sit "by designation," and "judges from this Court have commonly sat by designation, many of them in order to continue working on cases over which they presided originally as district court judges." A.13.

Further, although the Circuit Judge's appointment to the District Court had already spanned several years, the circuit held that the appointment comported with § 291(b) and was sufficiently temporary because the appointment would end upon "the completion of 'unfinished business.'" A.13; *see also* A.14-15 ("Even if reference to the termination of 'unfinished business' is not especially specific, we are nevertheless satisfied that the phrase cannot reasonably be understood as a permanent authorization.").

The circuit also ruled that Petitioner's violations did not need to be heard by a jury or subject to a higher standard of proof than a mere preponderance of the evidence. The circuit opined that Petitioner's violation—and 18-month prison sentence—for committing new state assault and federal drug crimes was not "akin to 'punishment for a new offense.'" A.16-17 (citing *United States v. Haymond*, 588 U.S. 634, 659 (2019) (Breyer, J., concurring)). The circuit further noted that it had repeatedly held that the jury trial right, and the requirement of proof beyond a reasonable doubt, did not attach to violation proceedings. A.17 (citing *United States v. Peguero*, 34 F.4th 143 (2d Cir. 2022);

United States v. Diaz, 986 F.3d 202 (2d Cir. 2021); *United States v. Doka*, 955 F.3d 290 (2d Cir. 2020)).

The circuit reiterated these holdings even with respect to violations for possession of a controlled substance—which carry "mandatory revocation" of supervised release, *see* 18 U.S.C. § 3583(g)(1)—because, per the circuit, any mandatory prison term could be short. A.20-21.

REASONS FOR GRANTING THE PETITION

The Second Circuit makes a common practice of appointing Circuit Judges to extended, multiyear terms on the District Court. The appointment challenged here takes this practice to an extreme. Since 2018, the appointed Circuit Judge has sat continuously and simultaneously on both the District and Circuit Courts, maintaining a "sizeable" District Court docket and adjudicating hundreds of District Court matters while also sitting on the court that hears those appeals. His service on both courts is ongoing, with no end in sight for his District Court appointment. There are several problems with this arrangement.

First, this practice, and the challenged appointment, violate the Appointments Clause. A single judge may not lawfully designate a fellow judge to an extended term in a principal office different than that to which he was constitutionally appointed. The Second Circuit's habit of making these appointments circumvents one of the "significant structural safeguards of the

constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), and undermines the Appointments Clause's purpose of preventing "the manipulation of appointments" to key federal offices, *see Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991).

Second, these extended appointments violate the relevant judicial designation statute, 28 U.S.C. § 291(b). Congress has historically permitted federal judges to be designated to a different judicial office on a special and temporary basis, due to some public need. But designations to a distinct principal office are lawful only insofar as they are temporary and precipitated by some public need or exigency. Section 291(b) explicitly requires judicial designations from the Circuit Court to the District Court to be "temporarily" made in the "public interest," and that is the only way such designations could comport with the Constitution. The appointment challenged here—which has already spanned over six years, is ongoing, and has no set end date—is not based on any exigency and does not meet any plausible definition of temporary.

Third, the Second Circuit's practice undermines the critical values protected by the Appointments Clause, not to mention the fairness of judicial proceedings. There is no public accountability for judge-made judicial appointments, and they may be based on favoritism, including personal or political preferences of the appointing judge. Further, when a judge sits simultaneously on both the trial and appellate courts in the same jurisdiction,

it risks undermining the rigor and independence with which the judge's trial decisions are reviewed.

By routinely issuing banket appointments allowing Circuit Judges to serve as District Judges, the Second Circuit is not just wrong; it is eroding the very foundation of the Appointments Clause. This Court should therefore address the significant constitutional concerns raised by the Second Circuit's practice and exercise its supervisory authority to end this manipulation of judicial appointments.

Point I

A. The decision below is wrong: The Circuit Judge's multiyear, continuous, and ongoing appointment to the District Court violates the Constitution and the temporary designation statute.

1. District and Circuit Judges are principal United States officers, who must be appointed by the President and confirmed by the Senate to their office.

Under Article II, Section 2 of the Constitution, the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

This Appointments Clause establishes three categories of federal positions: (i) "principal" or "noninferior" officers, who must be nominated by the President and confirmed by the Senate; (ii) "inferior" officers, whose appointment Congress may vest in "the President alone," "Courts of Law," or the "Heads of Departments"; and (iii) non-officer employees, who may be appointed in some other manner. *E.g.*, *United States v. Arthrex, Inc.*, 594 U.S. 1, 12-13 (2021). To serve as a "principal" officer, one must be appointed to that position by Presidential nomination and Senate confirmation.

The Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 at 659. It reflects "the Founders' reaction to 'one of [their] generation's greatest grievances against [pre-Revolutionary] executive power,'" namely, "the manipulation of appointments." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv.*, 590 U.S. 448, 457 (2020) (quoting *Freytag*, 501 U.S. at 883). The Clause was intended "to assure a higher quality of appointments" and limit "personal favoritism" in selections by making the President and Senate directly politically accountable for nominees: making the President accountable for putting forth a bad nominee and the Senate accountable for rejecting a good one. *Edmond*, 520 U.S. at 659-60.

District and Circuit Court Judges are principal officers of the United States. Although this Court has not explicitly so held, it has long assumed that

they are. *See Freytag*, 501 U.S. at 884 (listing examples of "principal federal officers" as "ambassadors, ministers, heads of departments, and judges"); *Weiss v. United States*, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (citing 3 J. Story, Commentaries on the Constitution 456, n.1 (1833)) ("Article III circuit and district judges" are "principal officers"; this has been the understanding "from the early days of the Republic.").[5]

This assumption is supported by the Court's various decisions distinguishing officers from mere employees, and principal from inferior officers. Life-tenured Article III Circuit and District Court Judges hold a continuing position established by law; may only be removed for cause; and exercise significant, independent authority. These are the hallmarks of a principal officer. *See, e.g.*, *Lucia v. S.E.C.*, 585 U.S. 237, 245 (2018) (defining "officer" as one who occupies a "continuing" position "established by law" and exercises "significant authority pursuant to the laws of the United States"); *Arthrex, Inc.*, 594 U.S. at 16 (distinguishing principal versus inferior officers based on criteria including whether the officer is subject to supervision and

[5] As *Freytag* and other cases make clear, Article III judges are "officers" for purposes of the Appointments Clause, even though they sit outside the Executive Branch. The Clause itself specifically refers to "judges of the Supreme Court," indicating that it was intended to include Article III judges.

removal by a superior and "appraisal of how much power an officer exercises free from control by a superior").

2. District and Circuit Judgeships are distinct principal offices, and the Constitution restricts judges' ability to assume a different office than that to which they were appointed.

Relevant statutes make clear that modern Circuit Court and District Court Judgeships are also distinct offices. Circuit and District Judges are each separately appointed and confirmed to their positions; they sit on distinct courts; and they have different roles and responsibilities within the federal judicial system. *See* 28 U.S.C. § 44 *et seq.*; 28 U.S.C. § 132 *et seq.* This statutory framework evinces a "congressional intent to create [] separate office[s]." *See Weiss*, 510 U.S. at 171 (recognizing requirement of separate appointments to certain positions indicates an intent to create separate offices).

Because modern Circuit and District Court Judgeships have been established as distinct principal offices, Congress cannot evade the requirements of the Appointments Clause in appointing individuals to these offices. Even when Congress creates an office, the Appointments Clause restricts how officers can be appointed and removed from that office. *See, e.g.*, *Arthrex, Inc.*, 594 U.S. at 18-23. "[T]hough Congress has broad power to create federal offices and assign duties to them, ... it may not, even with the President's assent, disregard the Constitution's distinction between principal and inferior officers. It may not, in particular, dispense with the precise process

of appointment required for principal officers, whether directly or 'by indirection.'" *Weiss*, 510 U.S. at 183 (Souter, J., concurring) (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)).

Thus, Congress may not unilaterally appoint an incumbent officer to a distinct office under the guise of giving him new duties. *See Weiss*, 510 U.S. at 173-74 (citing *Shoemaker v. United States*, 147 U.S. 282, 300 (1893)). Similarly, Congress may not empower another to make such appointment: "Violation of the Appointments Clause occurs not only when (as in *Shoemaker*) Congress may be aggrandizing itself (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, without aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies." *Weiss*, 510 U.S. at 196 (Scalia, J., concurring).

As relevant here, this means Congress could not constitutionally pass a statute that permits a Circuit Judge to permanently assume the full responsibilities of a District Judge, or vice versa, because those are distinct principal offices.

3. The challenged appointment violates both the Appointments Clause and 28 U.S.C. § 291(b) because it is neither temporary nor based on any exigency.

When the Circuit Judge conducted Petitioner's supervised release hearing in 2024, he was no longer lawfully sitting as a District Judge. In 2018,

he left the District Court and was appointed to the separate and distinct office of Circuit Judge. His multiyear, open-ended appointment by a fellow judge back to the District Court, a different principal office, was unlawful. While the Second Circuit found that this appointment was justified by 28 U.S.C. § 291(b), that statute requires any designation to be "temporar[y]," and in the "public interest." The Second Circuit's reading of the statute—as giving a chief circuit judge unbridled (and unreviewable) discretion to make District Court appointments even absent any public necessity or exigency, and without "especially specific" end-dates, *see* A.14-15—would render the statute unconstitutional under the Appointments Clause.

This Court has recognized limited exceptions to the Appointments Clause, whereby an individual may serve in a principal office on a special and temporary basis without presidential nomination and Senate confirmation to that office. For example, in *United States v. Eaton*, 169 U.S. 331, 336 (1898), the Court approved a statutory provision that permitted inferior officers within a consulate to be "substituted, temporarily, to fill the places of consuls general, … when they shall be temporarily absent or relieved from duty." The temporary appointment at issue in *Eaton* was due to the illness and eventual death of the appointed consul general, and it spanned about ten months. *Id.* at 332-33. This Court found that the purpose of this temporary appointment provision was "to prevent the continued performance of consular duties from

being interrupted by any temporary cause, such as absence, sickness, or even during an interregnum caused by death and before an incumbent could be appointed." *Id.* at 339. This provision did not violate the Appointments Clause because an inferior officer could perform the duties of a principal officer "for a limited time, and under special and temporary conditions." *Id.* at 343.

Similar temporary appointments are sanctioned in the Constitution's Recess Appointments Clause, U.S. Const., Art. II, § 2, cl. 3, and Congressional authorizations allowing particular individuals to temporarily carry out the duties of officers when an office is vacant, and the new officer has yet to be constitutionally appointed, *see, e.g.*, *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 293-96 (2017) (discussing The Federal Vacancies Reform Act of 1998 (FVRA)). These provisions reflect a historical practice of permitting limited exceptions to the requirements of the Appointments Clause for truly temporary, special appointments precipitated by some necessity.

Construed narrowly, 28 U.S.C. § 291(b), and many judicial designations, fit comfortably within this tradition. Judicial designations have historically been used to staff a court on a special and temporary basis when there was no permanent appointed judge; when the appointed judge was ill, disabled, or otherwise unable to hear a case; or when an influx of cases overwhelmed the regular appointed judges. *See generally McDowell v. United States*, 159 U.S. 596, 599 (1895) (discussing history of judicial designation statutes since 1850);

Penn. Steel Co. v. New York City Ry. Co., 221 F. 440, 442–43 (S.D.N.Y. 1915) (discussing judicial designations following 1911 federal court reorganization); Marin K. Levy, *Visiting Judges Riding Circuit and Beyond*, 106 Judicature 20, 21 (2023) (surveying history of federal judicial designations); Marin K. Levy, *Visiting Judges*, 107 Cal. L. Rev. 67, 75 (2019) (same).

In other words, Congress has historically authorized temporary, limited designations between different courts when precipitated by some necessity. Under *Eaton*'s reasoning, even if such temporary designations were between different principal judicial offices, they should be lawful.

But the Second Circuit's routine practice of appointing Circuit Judges to extended terms in the District Court—like the appointment challenged here—breaks with this tradition.[6] There is no particular exigency justifying this Circuit Judge's appointment to the District Court. His District Court seat has already been filled by a different, duly appointed District Judge. The

---

[6] The Second Circuit's practice also appears out of step with most other circuits. Designations to the District Court are rare nationwide. According to data collected by the Administrative Office of the United States Courts for calendar year 2023, "visiting" judges (meaning judges designated from outside a District Court), participated in fewer than 1% of District Court cases. *See* Annual Report 2023, *available at* https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2023. This is consistent with numbers from prior years. *See* Levy, *Visiting Judges Riding Circuit and Beyond*, *supra*, at 22-23 (reporting designated judges participated in fewer than 1% of District Court cases in 2020).

appointment orders themselves do not even state how the appointment is in the "public interest," as § 291(b) requires.

And significantly, the challenged appointment is not special or temporary. The Circuit Judge's appointment to the District Court started in 2018. It has run uninterrupted for over six years. It is still ongoing. And it has no firm end date, continuing for as long as the Circuit Judge feels he has "unfinished business" in District Court. This appointment is not sufficiently temporary to comport with either § 291(b) or the Appointments Clause. The appointment is unlawful.

B. The Court should address the Second Circuit's unlawful appointment practice because it undermines the values protected by the Appointments Clause and the fairness of federal proceedings.

The decision below is not just wrong: It raises important issues regarding the Appointments Clause, the values protected by that Clause, and the fairness and integrity of federal court proceedings. The Court should exercise its supervisory authority to intervene and correct the Second Circuit's unlawful appointment practice.

This Court has not yet addressed the legality of appointments like this under the Constitution. But the Court has frequently taken cases to adjudicate issues arising under the Appointments Clause, to clarify and enforce the requirements of this key structural constitutional safeguard. *See, e.g.*, *Arthrex,*

Inc., 594 U.S. at 23 (Appointments Clause challenge to Administrative Patent Judges); *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 590 U.S. at 453 (Appointments Clause challenge to members of Puerto Rico's Financial Oversight and Management Board); *Lucia*, 585 U.S. at 247 (Appointments Clause challenge to SEC Administrative Law Judges); *Ortiz v. United States*, 585 U.S. 427, 452 (2018) (Appointments Clause challenge to military judges); *Ryder v. United States*, 515 U.S. 177, 182 (1995) (same); *Freytag*, 501 U.S. at 871 (Appointments Clause challenge to tax court special trial judges).

The Court has also regularly intervened in cases involving judicial designations, and similar matters related to the composition of federal courts, to ensure the integrity of federal judicial proceedings. *See, e.g.*, *Nguyen v. United States*, 539 U.S. 69, 77 (2003) (ruling Ninth Circuit's practice of seating Article IV territorial judges on circuit panels violated judicial designation statute); *Yovino v. Rizo*, 586 U.S. 181, 186 (2019) (invalidating Ninth Circuit en banc decision in which deceased judge participated); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 686 (1960) (invalidating Second Circuit en banc decision in which retired judge participated); *Gomez v. United States*, 490 U.S. 858, 875 (1989) (addressing magistrate judges' authority to conduct jury selection in federal criminal trials).

The Court should intervene here because of the extent to which the Second Circuit's appointment practice undermines the values protected by the

Appointments Clause. There is no "public accountability" for judicial appointments made by a single fellow judge. *Cf. Edmond*, 520 U.S. at 659-60. And a single appointing judge may make appointments based on "favoritism," *id.* at 659, including personal or political preferences—recreating the old patronage practices the Constitution sought to abolish and undermining confidence in the integrity and fairness of court proceedings. This concern is not just theoretical: The D.C. Circuit, for example, reportedly stopped hosting designated judges entirely, with several judges noting that the decision "was tied to a concern about how the practice was purportedly politicized under a particular former chief judge." Levy, *Visiting Judges*, *supra* at 107-08. As one judge explained, "it was understood that this former chief judge had been 'using liberals'—that is, that he had been deliberately inviting liberal judges to sit and decide cases" and that the "results were being skewed." *Id.*; *see also id.* at 108 (describing how, even if not overtly political, "familiarity and even friendship might play a role in a visiting judge's selection").

Extended appointments like this are also problematic where one judge sits simultaneously on both the trial and appellate courts in the same jurisdiction—having his own appeals heard by colleagues with whom he regularly sits on appellate panels. Both scholars and judges themselves have recognized that a judge may be less likely to disagree with or reverse the decision of a close colleague. *See, e.g.*, *id.* at 115-17 (recounting judges' own

concerns that visiting judges would be "reluctant to reverse a colleague"); Neal Devins, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1419 (2021) ("For nearly all judges, it makes sense to avoid 'the ill will of one's judicial colleagues—wrangles with colleagues make for a harder job[.]'"); Erwin Chemerinsky, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 72 (1990) ("The danger when judges have strong collegial relationships is that they may be reluctant to challenge colleagues and so decide cases or join opinions to preserve those relationships."). Scholars have documented trial judges' dislike of reversal and appellate judges' aversion to dissents. *See, e.g.*, Jordan T. Smith, *Richard A. Posner, Circuit Judge, Sitting by Designation in the District Courts*, 30 Regent U. L. Rev. 259, 261 (2018). "Appellate review of a fellow circuit court judge's trial rulings entails the worst of both reversal aversion and dissent aversion," since "appellate judges may feel reluctant to reverse a colleague who they like and with whom they will have to work tomorrow." *Id.* When one judge regularly serves on both the trial and reviewing court, that scenario becomes an everyday occurrence. Such service thus risks undermining the rigor and independence with which his trial decisions are reviewed.

This Court has previously touched on the potential risks of such "dual service." In *Ortiz v. United States*, 585 U.S. 427, 452-54 (2018), the Court held that it was legal for a military officer to serve as a judge on both the Air Force

appeals court and the Court of Military Commission Review. As part of this decision, the Court reasoned that there was no risk this simultaneous service would give the officer "undue influence" on any of his judicial colleagues because the two courts were "parts of separate judicial systems," they did "not have any overlapping jurisdiction," and one did not review the other's decisions. *See id.*

Here, however, one judge is simultaneously serving on two courts that are part of the same judicial system, with overlapping jurisdiction, and where one reviews the other's decisions. This sort of dual service creates an intolerable risk of undue influence on one's judicial colleagues.

Point II

This petition presents a separate, significant constitutional question: whether defendants facing revocation of their federal supervised release, based on allegations of new crimes, should be entitled under the Fifth and Sixth Amendments to a jury trial and proof beyond a reasonable doubt. Even after *United States v. Haymond*, 588 U.S. 634 (2019), circuit courts have resisted every effort to afford defendants the fundamental constitutional protections to which they are entitled in federal revocation proceedings. The Court should grant this petition to clarify the scope of these protections.

A. Petitioner's violations should have been tried before a jury.

The Fifth and Sixth Amendments mandate certain procedures before the Government can condemn an individual to prison. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *Haymond*, 588 U.S. at 637 (plurality op.).

An individual's right to fact-finding by a jury, beyond a reasonable doubt, extends to every element of a crime charged against him. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *Alleyne v. United States*, 570 U.S. 99, 104 (2013). And an "element" of a crime includes any fact, whether labeled an "element" or not, that "increases the penalty for a crime" or "alter[s] the prescribed range of sentences to which a defendant is exposed … in a manner that aggravates the punishment." *Alleyne*, 570 U.S. at 103, 108; *see also Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("Our precedents make clear … that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. … [T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts ….").

In *Haymond*, the Court deemed 18 U.S.C. § 3583(k) unconstitutional because the statute required imposition of a mandatory five-year prison term

following a judge's finding, by a preponderance of the evidence, that a defendant had violated his federal supervised release by possessing child pornography. While five members of the Court agreed that this provision was unconstitutional, their reasoning varied. A four-Justice plurality authored by Justice Gorsuch applied the Court's decisions in *Apprendi* and *Alleyne* to hold that § 3583(k) violated the Fifth and Sixth Amendments by permitting a judge to find facts that increased the legally prescribed range of allowable sentences. *See Haymond*, 588 U.S. at 645-46 (plurality op.).

In a concurring opinion, Justice Breyer opined that § 3583(k) was unconstitutional because it applied when a defendant committed a discrete set of new criminal offenses; took away the judge's discretion to decide whether the violation should result in imprisonment; and required a new, severe mandatory minimum term. *See id.* at 658-59 (Breyer, J., concurring). Based on these characteristics, Justice Breyer opined that the provision "more closely resemble[s] the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* at 659.

Under the reasoning of both the *Haymond* plurality and Justice Breyer's concurrence, the allegations that Petitioner violated his supervised release by unlawfully possessing a controlled substance and committing new state assault offenses should have been submitted to a jury and proven beyond a

reasonable doubt. These violation allegations are essentially new criminal charges, and the imposed 18-month prison sentence is plainly "punishment of [these] new criminal offense," *see id.* But rather than "bother with an old-fashioned jury trial" for these new alleged crimes, the Government opted for a "quick-and-easy 'supervised release revocation hearing' before a judge," displacing the "jury's traditional supervisory role" in the adjudication of criminal offenses, *see id.* at 650 (plurality op.).

Moreover, under the reasoning of *Haymond*, *Apprendi*, and *Alleyne*, Petitioner had the constitutional right to have these allegations presented to a jury because the violations altered the "prescribed range of sentences to which" he was exposed "in a manner that aggravates the punishment," *see Alleyne*, 570 U.S. at 103, 108. Under 18 U.S.C. § 3583(g), when the court found that Petitioner possessed a controlled substance, it was required to revoke supervised release and impose a mandatory prison term—even though Petitioner's original § 922(g)(1) offense carried no mandatory prison term.

In addition, all the charged violations carried up to two additional years in prison, *see* 18 U.S.C. § 3583(e)(3), increasing Petitioner's statutorily authorized maximum prison sentence.

The violation charges also increased the maximum supervised release term Petitioner could be compelled to serve. *See* 18 U.S.C. § 3583(h). For Petitioner, this will mean actually serving more years on supervised release

than the number authorized by his original conviction alone. By the time of his revocation hearing, Petitioner had already spent three years on supervised release, the statutory maximum for a § 922(g)(1) offense. His original supervision term expired while the violation allegations were pending. But based on the judge's finding that Petitioner violated his supervised release, he must now serve an additional 18 months of supervised release beyond the statutory maximum term authorized by his original conviction alone.

In other words, while Petitioner may not face as severe an additional punishment as the defendant in *Haymond*, these proceedings share the key characteristics they led this Court to conclude that *Haymond*'s revocation proceeding violated the Constitution.

B. Submitting these violations to a jury would be consistent with defendants' historical Sixth Amendment rights.

Courts have often refused greater constitutional protections in supervised release hearings by reasoning that defendants have no constitutional right to a jury trial before parole or probation is revoked. But supervised release is fundamentally different than parole or probation. If the Court considers closer historical analogues to supervised release, they support Petitioner's argument that the Sixth Amendment embraces the right to have juries hear revocation charges.

Modern federal supervised release originated in 1984. *See Haymond*, 588 U.S. at 651 (plurality op.); *see also* Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N. Y. U. L. Rev. 958, 997 (2013). It was part of Congress's effort to overhaul an indeterminate federal sentencing system and transition away from parole. Supervised release was significantly different from parole (and probation) because, "'[u]nlike parole,' supervised release wasn't introduced to replace a portion of the defendant's prison term, only to encourage rehabilitation after the completion of his prison term." *Haymond*, 588 U.S. at 652 (plurality op.) (citation omitted); *see also Johnson v. United States*, 529 U.S. 694, 724-25 (2000) (Scalia, J., dissenting) ("The Court's effort to equate parole and supervised release … is unpersuasive. Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term imposed at the time of initial sentencing."). Because of this structural difference, parole and probation revocation procedures are not a good model for supervised release revocations.

But supervised release revocation does have a closer historical analogue: forfeiture of a "recognizance" or "bond" to keep the peace or for good behavior. *See* Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. 1381, 1384 (May 2024). Founding Era courts used a complex system of "money escrows or forfeitures, called bails, or, more generally, recognizances" to ensure compliance with court orders and in response to criminal offenses. *See*

Schuman, *supra*, at 1403-07. When taking a person's "recognizance," a court required that person to promise to abide by certain conditions in the community for some time or face monetary sanctions or imprisonment. *See id.* As Justice Alito noted in *Haymond*, "[p]rior to and at the time of the adoption of the Sixth Amendment, convicted criminals were often released on bonds and recognizances that made their continued liberty contingent on good behavior. … If a prisoner released on such a bond did not exhibit good behavior, the courts had discretion to forfeit the bond … or to turn the individual over to the sheriff …." 588 U.S. at 677 (Alito, J., dissenting).

These early recognizances thus share many key characteristics with modern federal supervised release. They could be imposed as part of a sentence for a crime. They allowed for a period of conditional liberty in the community, while subject to supervision. And, when violated, they could result in imprisonment. *See* Schuman, *supra*, at 1407.

And at the time of the founding, defendants had a right to a jury trial to resolve factual disputes before a recognizance could be forfeited. *See id.* at 1417-30 (summarizing caselaw and treatises recounting the use of juries to decide factual disputes in such forfeitures). This historical practice around the time of the adoption of the Sixth Amendment supports providing jury trials to resolve factual disputes in modern supervised release revocations.

C. The violations should have been supported by more than a mere preponderance of the evidence.

At the very least, based on this Court's precedents, Petitioner was entitled to proof greater than a mere preponderance of the evidence before he could be sentenced to additional prison time. Even outside the context of traditional criminal prosecutions, "when the government seeks to take unusual coercive action—action more dramatic than entering an award of money damages or other conventional relief—against an individual," a "more demanding standard" of proof than a mere preponderance of the evidence applies. *See E.M.D. Sales, Inc. v. Carrera*, 604 U.S. ---, 145 S. Ct. 34, 37 (2025). This Court has held that the Due Process Clause requires proof greater than a preponderance of the evidence in cases involving important constitutional rights; where the government seeks a "significant deprivation of liberty" by, for example, civilly committing an individual or terminating his parental rights; or where the government takes other "unusual coercive action" against an individual. *See id.* at 39 (collecting cases where the Court has required proof by clear and convincing evidence).

Consistent with the Due Process Clause, for the Government to commit Petitioner to prison for a year and half, it should have been required to prove his violations by more than a mere preponderance of the evidence. After all, there is no government action as "coercive" as sentencing someone to prison.

CONCLUSION

This petition presents significant and recurring questions of federal constitutional and statutory law implicating the separation of powers; this Court's supervisory authority over the federal courts; and individuals' fundamental liberty interests. The legal issues are fully preserved and presented cleanly for review. The Court should grant this petition.

Respectfully submitted,

By: /s/ Sarah Baumgartel
Sarah Baumgartel
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, New York 10007
Sarah_Baumgartel@fd.org
Tel.: (212) 417-8772