No. 24-_____

In the
Supreme Court of the United States

Christian Genao,

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

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Question Presented

Federal criminal defendants have a right to be present at sentencing, grounded in the Fifth Amendment Due Process Clause and codified in Federal Rule of Criminal Procedure 43(a)(3). Circuits, however, are split as to whether this right requires sentencing courts to orally pronounce non-mandatory conditions of supervised release at sentencing or if these conditions can be added later to the written judgment. Seven circuits require all non-mandatory conditions to be orally pronounced, while two do not.

Must sentencing courts orally pronounce non-mandatory conditions of supervised release to protect defendants' right to be present and to put them on notice of the conditions they must follow to avoid reincarceration?

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The Second Circuit's opinion is reproduced in the appendix at Pet. App. pp. 1-3. The transcript of the district court's sentencing, post-sentencing hearing, the judgment, and the amended judgment is reproduced at Pet. App. 4-64.

Jurisdiction

The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), entered judgment on October 4, 2024, and denied rehearing on December 19, 2024. The district court had jurisdiction under 18 U.S.C. § 3231, entered judgment on June 15, 2023, and entered an amended judgment on June 30, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

I. Fifth Amendment Due Process

> No person shall...be deprived of life, liberty, or property, without due process of law.
>
> U.S. Const. Amend V.

II. Federal Rules of Criminal Procedure Rule 43(a)(3):

> Defendant's Presence
>
> a) When Required. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
> …
>
> (3) sentencing.

III. Revocation of Supervised Release

> The court may…
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release … 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…
>
> 18 U.S.C. § 3583 (e)(3).

IV. "Special" Conditions

> The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:
> …
>
> (4) Substance Abuse
>
> If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.
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> U.S.S.G. § 5D1.3(d)(4).

Statement of the Case

A. Introduction and Summary of Grounds for Certiorari

Hundreds of thousands of people are serving terms of federal supervised release, a kind of "conditional liberty" imposed after completion of a prison sentence. *Mont v. United States*, 587 U.S. 514, 523 (2019). While on supervised release, people are subject to certain statutorily mandated conditions. *See* 18 U.S.C. § 3583(d). Sentencing courts "may" also impose additional, non-mandatory supervised release conditions, if those conditions are "reasonably related" to certain enumerated sentencing factors, involve no greater deprivation of liberty than reasonably necessary, and are consistent with any pertinent Sentencing Commission policy statements. *See* 18 U.S.C. § 3583(d)(1)-(3).

The sentencing guidelines list 36 possible conditions of supervised release, dividing them into categories of "mandatory" and "discretionary" conditions. U.S.S.G. § 5B1.3. The guidelines divide those discretionary conditions into categories called "standard," "special," and "additional" conditions. *Id.* Violating any of the conditions of supervised release can result in years of incarceration, separate from any incarceration on the original offense. 18 U.S.C. § 3583 (e)(3). Thus, to succeed on supervision and avoid reincarceration, people need to know what conditions apply to them.

This case presents an issue that divides courts across the country: must the sentencing court orally pronounce all non-mandatory conditions of supervised release, so that defendants are present to hear them, know what conditions they

need to follow to avoid reincarceration, and have an opportunity to object to conditions imposed? Seven circuits say yes, that all non-mandatory conditions of supervised release must be pronounced orally, in the defendant's presence. Two, including the Second Circuit, say no, and that discretionary "standard" conditions of supervised release need not be orally pronounced.

The Second Circuit has stubbornly maintained its minority position in this long-standing circuit split, refusing to require oral pronouncement of an array of discretionary supervision conditions. Because the Second Circuit includes two districts that supervise a large number of people compared to other districts across the country, this outlier position – if it remains the law – will have outsized importance.

A uniform approach is critical to providing sentencing courts, counsel, and defendants clarity. This Court should grant certiorari.

B. Facts

1. Guilty Plea and Sentencing

On October 21, 2021, Christian Genao flew to New York from the Dominican Republic. PSR 3. He was stopped at the airport, where authorities found drugs hidden under his clothes. PSR 3. He immediately confessed, explaining that, when he agreed to carry these drugs, he owed a debt he could not repay after a car crash. PSR 3, Dkt. 25. Mr. Genao pleaded guilty to importing cocaine.

The district court sentenced Mr. Genao to one year and one day of incarceration, followed by two years of supervised release. Pet. App. p. 18. At the

sentencing, the court imposed two conditions of supervised release: first, that probation could search Mr. Genao's property if there was reasonable suspicion that he violated a condition of supervision, and, second, that Mr. Genao had to participate in outpatient drug treatment. Pet. App. pp. 18-19.

Three days after sentencing, a written judgment was filed, which added a condition that Mr. Genao "shall not consume any alcohol or other intoxicants during and after [drug] treatment." Pet. App. p. 56. The written judgment also required Mr. Genao "submit to testing during and after treatment to ensure abstinence from drugs and alcohol." Pet. App. p. 56.

Mr. Genao's counsel objected by letter and asked the court to correct the judgment under Federal Rules of Criminal Procedure 36, by striking the alcohol prohibition so that the drug treatment condition in the judgment matched what the court ordered at sentencing. Dkt. 33. Counsel noted that the "oral pronouncement of sentence" controls when there is a conflict between the oral pronouncement and the written judgment, citing *United States v. Rosario*, 386 F.3d 166, 168 (2d Cir. 2004), *United States v. MacMillen*, 544 F.3d 71, 74 n.2 (2d Cir. 2008), and Fed. R. Crim. P. 43(a)(3).

In response, the district court issued a written order stating that it "underst[oo]d that the Probation Department has determined that alcohol usage does have a nexus to drug treatment, because use of alcohol tends to loosen a person's defenses and thus increase the likelihood of that person's return to drug usage." Dkt. 34. Two weeks after the sentencing, the district court summoned the

parties and Mr. Genao back to court to attempt to add the condition, a procedure to which Mr. Genao objected. Pet. App. p. 37-40. After this proceeding, the court filed an amended judgment with the same supervision conditions. Pet. App. p. 63.

Mr. Genao concluded his term of custody on July 15, 2024; he has served only about eight months of supervised release.

2. The Second Circuit's Decision

On appeal, Mr. Genao argued that the supervised release condition prohibiting the use of alcohol should be removed from the written judgment because the court did not mention it during the oral sentencing and it was not reasonably related to the sentencing factors for Mr. Genao.

The Second Circuit rejected this argument, citing its prior decisions declining to require oral pronouncement of various non-mandatory conditions of supervised release. It explained that "we have not rigidly disregarded all conditions of supervised release later included in a judgment but omitted from the oral pronouncement of sentence." Pet. App. p. 1, citing *United States v. Handakas*, 329 F.3d 115, 117 (2d Cir. 2003). The circuit explained that sentencing courts were not required to orally pronounce the "standard" conditions of supervision "set forth in § 5D1.3(c) of the United States Sentencing Guidelines." Pet. App. p. 1, citing *United States v. Truscello*, 168 F.3d 61, 63 (2d Cir. 1999).

The circuit then held that certain "special" conditions in § 5D1.3(d) of the guidelines also did not need to be orally pronounced. Pet. App. p. 1. The court explained that for people in drug treatment, "the Guidelines generally recommend

that the district court prohibit the defendant from using or possessing alcohol as a condition of supervised release." Pet. App. p. 2. It then concluded that "[i]t is therefore 'irrelevant' that the Guidelines label the condition 'special'; in this case, the condition is 'no different in practical terms' from the standard conditions in § 5D1.3(c), which the district court need not orally pronounce." Pet. App. p. 2, citing *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002).

Put differently, the summary order stated that, "Because the Guidelines generally recommended that the district court prohibit [Mr.] Genao from using or possessing alcohol while on supervised release, it was permissible for the district court to impose the alcohol prohibition as a condition in its written judgment without pronouncing it orally at sentencing." Pet. App. p. 2.

Reasons for Granting the Writ

I. The Second Circuit's holding that non-mandatory conditions of supervised release need not be pronounced orally conflicts with the precedents of seven other circuits.

Both the Due Process Clause and Federal Rule of Criminal Procedure 43(a)(3) guarantee criminal defendants the right to be physically present at sentencing. This right means that a court must orally pronounce its sentence in the defendant's presence. This oral sentence constitutes the judgment of the court and if a later written judgment conflicts with the oral pronouncement, it is the oral sentence that controls. Based on these well-established rules of criminal procedure, most circuits hold that a sentencing court must orally pronounce any conditions of supervised

release that it intends to impose in addition to those mandated by statute. This is the law in the Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits.

The law in the Second Circuit is different. Rather than requiring oral pronouncement of all non-mandatory conditions, the Second Circuit follows an increasingly untenable, ad hoc approach. Because Second Circuit law conflicts with other "United States court[s] of appeals on the same important matter," Sup. Ct. R. 10(a)—and the Second Circuit is wrong—this Court should grant certiorari.

A. The Circuits are split.

Seven circuits require that all non-mandatory conditions of supervised release be orally pronounced at sentencing. *United States v. Montoya*, 82 F.4th 640, 645 (9th Cir. 2023) (en banc); *United States v. Geddes*, 71 F.4th 1206, 1215 (10th Cir. 2023); *United States v. Rodriguez*, 75 F.4th 1231, 1247-48 (11th Cir. 2023); *United States v. Matthews*, 54 F.4th 1 (D.C. Cir. 2022); *United States v. Rogers*, 961 F.3d 291, 297 (4th Cir. 2020); *United States v. Diggles*, 957 F.3d 551, 558 (5th Cir. 2020); *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019).

These seven circuits follow a clear, straightforward approach, grounded in 18 U.S.C. § 3583(d)'s statutory text—which distinguishes between a limited number of mandatory supervised release conditions and all other conditions, which are discretionary.[1] This oral pronouncement requirement gives defendants an

[1] The Sixth and Eighth Circuits also largely agree with the majority position. *See United States v. Pasley*, No. 23-5230, 2024 WL 2862562, at *3 (6th Cir. June 6, 2024) (explaining that the sentencing court "must alert defendants orally at sentencing that it is imposing" "standard discretionary conditions"); *United States v. Walker*, 80 F.4th 880, 882 (8th Cir. 2023) (explaining that "the failure to

opportunity to object to and "defend against" discretionary conditions at sentencing, and to "dispute whether" a particular condition is "necessary or what form it should take." *Montoya*, 82 F.4th at 650 (cleaned up). As the Fourth Circuit reasoned, a sentencing court "cannot assume that any set of discretionary conditions – even those categorized as 'standard' by the Guidelines – will be applied to every defendant placed on supervised release, regardless of conduct or circumstances." *Rogers*, 961 F.3d at 297-98. Requiring all non-mandatory conditions to be orally pronounced preserves defendants' "best chance to oppose supervised-release conditions that may cause them unique harms." *Id.* at 298.

The First and Second Circuits take a different approach. In the First Circuit, sentencing courts are not required to provide a full oral pronouncement of standard discretionary conditions. Instead, defendants are "deemed to be on constructive notice" for " standard conditions announced for the first time in a written judgment." *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169 (1st Cir. 2006). The First Circuit has not, however, extended this rule to any special conditions.

The Second Circuit's position is an outlier. This circuit does not require oral pronouncement of a wide swath of discretionary conditions, including any conditions that the sentencing guidelines label "standard," U.S.S.G. § 5D1.3(c), along with other "special" conditions that the circuit deems similar to standard conditions. For example, if the "special condition" is a "clarification of [a] mandatory condition,"

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specifically address the standard conditions of supervised release [orally]… was [likely] a matter of mere oversight," but vacating those conditions and remanding to the sentencing court to give the defense the opportunity to object).

then it need not be orally pronounced. *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002). And, if the "special condition" is a "basic administrative requirement," that is "routinely-imposed," it need not be orally pronounced. *United States v. Thomas*, 299 F.3d 150, 154 (2d Cir. 2002).

Indeed the Second Circuit has adopted its own definition of "special conditions," calling some conditions that are designated as "special" in the sentencing guidelines, "recommended." As the Second Circuit recently explained,

> While the Guidelines technically describe a category of "recommended" conditions as "special" because their appropriateness is contingent on whether certain circumstances are present, we consider those recommended conditions to be "as necessary to the administration of supervised release as the standard conditions," which "are presumed suitable in all cases."

United States v. Sims, 92 F.4th 115, 119, n.1 (2d Cir. 2024).

This ad hoc approach means that, in the Second Circuit, a judge does not have to announce at sentencing – or give the defense any opportunity to object to – such restrictive conditions as (i) a total ban on consuming alcohol (Mr. Genao's case); (ii) allowing probation to search a "person," "property, residence, [and] vehicle," *United States v. Meadows*, No. 22-3155, 2025 WL 786380, at *5 (2d Cir. Mar. 12, 2025), (iii) monitoring of the person's computer and internet use, *see United States v. Whitaker*, No. 21-1543, 2023 WL 5499363, at *2 & n.1 (2d Cir. Aug. 25, 2023); (iv) or an obligation to obtain permission from a probation officer before opening any new financial accounts, *see United States v. Ross*, No. 23-7210, 2025 WL 45287, at *2 (2d Cir. Jan. 8, 2025).

The Second Circuit thus requires fewer conditions of supervised release be imposed orally than any other Circuit, although its rule about which conditions need to be orally imposed is imprecise. Mr. Genao's case presents a prime example of the Second Circuit's confused oral pronouncement law. Alcohol bans are "special conditions" under the Sentencing Guidelines. *See* U.S.S.G. § 5D1.3(d)(4)(b). Nonetheless, the Second Circuit held that a ban on alcohol did not need to be orally imposed. Pet. App. 1-2.

No further time is needed for percolation. Eleven circuits have already addressed this question. This entrenched circuit split will not be obviated if the Third Circuit were to issue a decision on this matter. This Court should resolve this conflict.

B. The question presented is important.

Whether sentencing courts must tell defendants the non-mandatory conditions of supervised release that apply in their case implicates core constitutional due process rights and liberty interests. This is because criminal defendants have a statutory and due process right to be present at sentencing. Fed. R. Crim. P. 43(a); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").

This is not a technical right, but has a real-life impact on a huge swath of criminally-justice involved people. Millions of people are or have been on supervised

release. *See* United States Sentencing Commission, "Federal Offenders Sentenced to Supervised Release," July 2010, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf (from the late 1980s until 2009, nearly one million people were sentenced to terms of supervised release). And, hundreds of thousands of people are charged with violating their conditions of supervised release. United States Sentencing Commission, "Federal Probation and Supervised Release Violations," July 2020, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf (between study period of 2013-2017, over 100,000 violation hearings were held across the country).

If defendants and their lawyers do not know what conditions are being imposed, they cannot object, which can result in inappropriate and unnecessary conditions being imposed. If defendants do not know what conditions they must follow, they will be less likely to succeed on supervision. Violating any condition of release – even seemingly technical conditions, such as, in Mr. Genao's case, not having a beer while watching a football game – can result in reincarceration. Indeed, according to the Sentencing Commission's most recent data, more than half of alleged violations were of the least serious type. *Id.* at 4.

Moreover, the outlier rule in the Second Circuit has an outsize impact because, of the districts around the country with the most people on supervised release, two of the top 10 are located in the Second Circuit. *Id.* at 16 (noting that the

Eastern District of New York and the Southern District of New York were both in the top 10 districts in the country based on the number of people on supervised release during study period, 2013-17, which is the most recent published data from the Commission).

Unsurprisingly, given the lack of clarity in the rule and the vast number of people on supervised release, the Second Circuit currently spends considerable time and judicial resources parsing conditions of supervised release and deciding whether a particular condition should have been orally imposed or not. The circuit has issued six summary orders related to this question already in the first three months of this year. *Meadows*, 2025 WL 786380 (vacating part of a search condition not announced orally, while upholding other part of the same condition); *United States v. Roberson*, No. 24-31, 2007 WL 10131753, at *1 (2d Cir. Feb. 6, 2025) (rejecting argument that court's comment that it would "read out loud the conditions of supervised release" "suggested that it had orally pronounced all of the conditions that it intended to impose"); *United States v. Leavens*, No. 23-7993, 2025 WL 387810, at *2 (2d Cir. Feb. 4, 2025) (rejecting argument that the oral pronouncement was too "general and vague," but striking portion of a condition from the written judgment because it was not orally imposed); *United States v. Rascoll*, No. 23-7425, 2025 WL 367029, at *3 (2d Cir. Feb. 3, 2025) (holding that the reference at sentencing that the prior conditions were being reimposed was sufficient, but amending the written judgment so that conditions were indeed the same as previously imposed); *Ross*, 2025 WL 45287, at *2 (upholding financial

condition in written judgment that "clarified" the oral pronouncement); *United States v. Lewis*, 125 F.4th 69, 74 (2d Cir. 2025) (finding that lawyer's waiver of the reading of four special conditions also waived the argument on appeal that those conditions were not properly imposed). Last year, the Second Circuit also issued three published decisions about the pronouncement of supervised release conditions. *United States v. Rosado*, 109 F.4th 120, 126 (2d Cir. 2024); *Sims*, 92 F.4th 115; *United States v. Oliveras,* 96 F.4th 298 (2d Cir. 2024).

Confusion abounds—both within and among circuits—about which conditions a judge must pronounce orally and which it can skip. This Court should resolve this split.

C. This case presents a suitable vehicle for resolving the question presented.

This case also provides an appropriate certiorari vehicle. Petitioner objected below as soon as the written judgment was filed, and raised the same issue to the Second Circuit Court of Appeals, specifically urging the court of appeals to strike the special condition prohibiting the consumption of alcohol because it was not orally imposed. *See* Petitioners Second Circuit Brief, pp. 15-18. The facts are undisputed. The Second Circuit cleanly decided the question of oral pronouncement and declined to reach alternative issues. Pet. App. pp. 1-2.

Conclusion

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

Respectfully submitted,

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