No. 17-1672

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Following his conviction for possession of child pornography, a Class C felony that carried a statutory sentencing range of zero to ten years, a district court judge in a revocation hearing specifically found by only a preponderance of the evidence that Andre Haymond had violated the terms of his supervised release by committing a "second sex offense" as set forth in 18 U.S.C. 3583(k). The statute required the district court to impose a sentence of not less than five years up to life in prison for commission of the new crime, rather than the zero to two-year statutory range ordinarily applicable for revocation in Class C felony cases. Did the enhanced sentencing range carrying a mandatory minimum sentence in the revocation proceeding violate the Court's longstanding jurisprudence guaranteeing a defendant charged with a serious criminal offense to a right to a jury trial under the Fifth and Sixth Amendments?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Andre Ralph Haymond respectfully requests that this Court deny the petition for writ of certiorari. The case represents the first challenge to the constitutionality of 18 U.S.C. 3583(k)'s 2006 amendment, which mandated that district courts impose not less than a mandatory five-year prison term up to life in prison for defendants found by a preponderance of the evidence to have committed a second sex offense. The issue has been raised in a second circuit court, but initial briefing has not been completed. Although the government sought rehearing, with the exception of the lone judge filing the dissent, none of the other judges on the Tenth Circuit's diverse court voted for *en banc* review.

The absence of a direct conflict among the circuit courts twelve years after the statute's enactment, combined with the near-unanimity in support of the Tenth Circuit's opinion within that court, suggest that the passage of time would be useful and enable the Court to gather additional circuit court opinions. This approach would be consistent with the Court's tradition to avoid the premature adjudication of constitutional issues. The statute, moreover, has been seldom used, on average only one to two times a year. Few defendants in the criminal justice system are affected by it. Most importantly, the Tenth Circuit correctly applied this Court's longstanding precedents requiring due process protections and right to a jury trial for

defendants facing such serious criminal charges. Review by this Court is therefore unwarranted.

STATEMENT

A. Legal Background

In 1984, Congress enacted an overhaul of federal sentencing in bipartisan legislation. Legislative history of the Sentencing Reform Act of 1984 showed a determination to cast aside an ineffectual parole system that had been used in the United States for the previous seventy-five years. Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705 (1968). "Almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison system," the Senate Report stated. S. Rep. No. 98-225 at 124 (1983), reprinted in 1984 U.S.C.C.A.N. 3221. The legislation replaced parole with a new type of supervision Congress called supervised release.

Supervised release was a short-term period of monitoring by the district court to follow a defendant's sentence of imprisonment. It was not intended to allow a district court judge to impose a new sentence of punishment. "The Committee has concluded that the sentencing purpose of incapacitation and punishment would not be served by a term of supervised release – that the primary goal of such a term is to ease the defendant's transition into the community after the service of a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period of time in prison for punishment or other purposes but still needs supervision and

training after release." *Id.* at 3307. The old parole system, where defendants were released on 'conditional liberty' and could be returned to lengthy prison terms for parole violations, was over. "Under Title II, as reported, a prisoner has completed his prison term when released even if he is released to serve a term of supervised release," Congress stated. *Id.* at 3241.

Initially, supervised release legislation provided no mechanism for re-imprisonment of a defendant for a new criminal law violation. "If he commits a serious violation, he can, depending on the circumstances of the case, be punished for contempt of court or be held pending trial if the violation is a new criminal offense." *Id.* at 3241. Beginning in 1986, however, Congress, without any legislative history to explain its action, enacted legislation that allowed a district court judge to impose limited prison sanctions, based on a finding by a preponderance of the evidence, for violations of supervised release. 18 U.S.C. 3583(e)(4)(1986). For a Class C felony, such as that committed by Andre Haymond, the prison sanction was limited to one year. In 1988, Congress struck the contempt of court sanction language from 18 U.S.C. 3583(e)(3) enacted in 1984, and replaced it with the 1986 provision from 18 U.S.C. 3583(e)(4). In 1994, Congress increased the length of prison sanctions for supervised release. For Mr. Haymond's Class C felony, the maximum prison term sanction was limited to two years.

In 2003, Congress enacted its first version of 18 U.S.C. 3583(k), which is the first sentence of the current statute. The provision increased the

authorized term of supervised release for sex offenders (as defined in the statute) to "any years or life." The legislative history for this provision indicates that Congress believed that the "current length of supervision periods is not consistent with the need presented by many of these offenders for long-term, and in some cases, life-long monitoring and oversight." See H.R. Conf. Rep. No. 108-66, reprinted in 2003 U.S.C.C.A.N. 683, 884. Congress did not amend section 3583(e)(3), which allowed a judge at a revocation hearing to "require a 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."

Three years later in 2006, Congress enacted the current version of 18 U.S.C. 3583(k), which provided for a mandatory minimum sentence of 5 years for anyone subject to the Sex Offenders Registration and Notification Act (SORNA) based on a district court making a finding the person had committed a violation of a "second sex offense." The legislative history does not indicate that Congress considered the constitutionality of either the potential enhanced life-long revocation prison sentence enacted in 2003 or the mandatory minimum sentence enacted in 2006. *See Rostker v. Goldberg,* 453 U.S. 57, 64-65 (1981)(deference given where "Congress expressly considered the question of the statute's constitutionality").

The statutory provisions found unconstitutional by the Tenth Circuit in this case under 18 U.S.C. 3583(k) are the opposite of what supervised release

was meant to be under the Sentencing Reform Act of 1984. The statute reads: "If a defendant required to register under the Sex Offender Registration and Notification Act commits any offense under Chapter…110, for which imprisonment for a longer term than one year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment.… Such term shall not be less than five years." The severity of the sanction imposed by 3583(k) was dramatic. A person like Mr. Haymond was required to be sentenced to not less than five years and up to life if the judge alone believed he had committed a second sex offense under a preponderance of the evidence standard.

B. Proceedings in the District Court

Andre Haymond was 18 years old when he was first charged with possession of child pornography under 18 U.S.C. 2252(a)(4)(B) and (b)(2). See *United States v. Haymond,* 672 F.3d 948, 950 (10th Cir. 2010). His case was not the run-of-the-mill child pornography case, where most defendants' computers or smartphones contain hundreds, even thousands, of contraband images that have been downloaded daily. *See United States v. Helton,* 782 F.3d 148, 158 n. 4 (4th Cir. 2015) (Gregory, J. concurring) (79% of non-production cases have 600 or more images) (quoting United States Sentencing Comm's Use of Guidelines and Specific Offense Characteristics, 40-41 (2013)). The government based its case against Mr. Haymond on seven tiny thumbnail images of child pornography. These images were never

clicked and were found inaccessible to a normal computer user like Mr. Haymond in his computer's Internet cache. The images contained no metadata to make it possible to determine how or when the images got there. *Haymond,* 672 F.3d at 952. A total of only 9 illicit images of minors were found on his computer. *Id.,* n. 9.

Mr. Haymond said he had never seen any of the illicit images. The computer contained over 60,000 images he had made of heavy metal music and gaming activities received from unknown persons or entities over the Internet. *Id.* A government agent testified Mr. Haymond said he was "addicted to child pornography," statements which most agents would have been expected to record, *see Helton,* 782 F.3d at 150, but were not. Mr. Haymond emphatically denied he ever made them. *Haymond,* 672 F.3d at 951, n. 4. He pled not guilty, had a jury trial, but was convicted. He was sentenced to 38 months in prison, within the applicable Sentencing Guidelines range, to be followed by 10 years of supervised release. Pet. App. 37a. Mr. Haymond appealed, but his conviction was affirmed. *United States v. Haymond,* 672 F.3d 948 (10th Cir. 2012). This Court denied certiorari. 567 U.S. 923 (2012).

Upon his release from prison in April, 2013, Mr. Haymond obtained a job, Pet. App. 37a, but spent his leisure time still engaged in gaming activities on the Internet with persons he had never met. "Internet gaming is a dangerous process," a forensic expert testified at his revocation hearing, "because you're

exposing your phone…or your computer…to attack from software infiltration or by a hacker" (CA10 record, Vol. II:172). His probation officer required him to take lie detector tests, which asked whether he had possessed or viewed child pornography since the previous test. Mr. Haymond answered "No" each time, and the test indicated no deception every time he took it. The last such test was taken in September of 2015. Pet. App. 38a.

In October of 2015, Mr. Haymond's probation officer searched his smartphone. Again, thousands of images appeared on the phone, Pet. App. 38a, linked to Mr. Haymond's gaming activities and music interests. Again, however, a few thumbnail images of child pornography, never clicked on, were found inside his Internet browser cache, his Gallery photo cache, or from malware. Pet. App. 42a-43a. All of these images were distinctive, in that they were embedded, which means they were a "file within a file" (CA10, Vol. II:130). These images had somehow arrived on Mr. Haymond's smartphone and been swept into the phone's cache by an automatic downloading process unique to the smartphone. *Id.* Had he clicked on any of these images, a second identical image would have appeared, but that never occurred. Pet. App. 44a. As before, none of these images were accessible, and none of the contraband images possessed any metadata to show how or when they got onto the smartphone. Pet. App. 43a.

Although the government claims the district court found Mr. Haymond had viewed the child pornography on the inaccessible, embedded images, Pet.

at 6, this is incorrect. The district court thought Mr. Haymond had viewed legal adult pornography that had cascaded onto his smartphone, possibly from redirected links after Mr. Haymond had unwisely entered the search term "open relationships" the evening before the search. Pet. App. 40a. Mr. Haymond disputed he accessed this adult pornography, but he did not appeal the district court's adverse ruling that constituted a minor Grade C violation of his supervised release. The district court found no connection between the adult pornography and the embedded child pornography images hidden in Mr. Haymond's smartphone cache. Pet. App. 44a.

Mr. Haymond was charged with a violation of his supervised release under 18 U.S.C. 3583(k), based on his alleged commission of a second sex offense, which was his second alleged possession of child pornography. The penalty for such a violation was not less than five years. Such a sentence, even at the low end, was well in excess of the 38-month prison term imposed for his original child pornography possession offense. At the high end, which could include as much as a life sentence, it exposed the 26-year-old to a period of incarceration far in excess of the ten-year statutory maximum term of imprisonment for his original offense of conviction.

The district court ultimately found Mr. Haymond illegally possessed 13 contraband images (the ones found in the Gallery photo cache), holding he had volitionally downloaded those images. Pet. App. 59a-66a. This finding was later held to be clear error by the Tenth Circuit. Pet. App. 4a-9a. The

district court, however, in no uncertain terms, stated the government had not proved that Mr. Haymond had knowingly possessed any of the contraband images beyond a reasonable doubt found in the Internet browser cache, the Gallery cache, or from malware. "The United States failed…to prove Haymond possessed any of the 59 (illicit) images beyond a reasonable doubt," the court held. Pet. App. 68a. "If this were a criminal trial, and the Court were the jury, the United States would have lost." *Id.* The Tenth Circuit later agreed, even though it found sufficient evidence to sustain the possession of child pornography revocation violation. "This is a close case," the appellate court stated, "even under the preponderance of the evidence standard…" Pet. App. 9a.

The district court similarly spared no words in attacking 18 U.S.C. 3583(k). In its opinion and order, the district court stated: "This Court is troubled by Congress's decision to permit prosecutors to elect a revocation proceeding over a criminal trial, while at the same time secure a minimum 5-year sentence and the possibility of a life term on supervised release." Pet. App. 50a. "This places the Court in a position to conduct what is in essence a criminal trial without a jury, 'revoke' based merely on a preponderance of the evidence, and then be bound to a mandatory *minimum* sentence at the *maximum* sentencing range for even the most serious Class A felonies in other revocation proceedings." *Id.* (emphasis in original)

In advance of his sentencing on the district court's revocation of his supervised release, Mr. Haymond argued the mandatory and enhanced sentencing provisions of 18 U.S.C. 3583(k) were unconstitutional (CA10 record, Vol. I:179-184). At the revocation sentencing, the district court reiterated its concerns expressed in the opinion and order. "It's repugnant to me that there is a mandatory five-year sentence in such a case where a defendant does not have the opportunity to ask for a jury or to be tried under what should be the legal standard that is beyond a reasonable doubt…," the district court stated. BIO App. 9. "So the court's considered the sentencing guideline along with the factors set forth in 18 U.S.C. 3553(a) to reach a sentence…I don't know that it is an appropriate or reasonable sentence in the case, but I'm supposed to say its appropriate and reasonable." *Id.*

But for the provision of 18 U.S.C. 3583(k), the district court said it "would have looked at Haymond's revocation as a grade B violation and probably would have sentenced in the range of two years or less." BIO App. 10. Such a sentence would have been the statutory maximum prison sanction for a supervised release violation under 18 U.S.C. 3583(e)(3) for all defendants convicted of Class C felonies other than those found to be repeat sex offenders. Despite its misgivings about section 3583(k), the district court nevertheless applied the provision and sentenced Mr. Haymond to the mandatory minimum five years in prison, to be followed by five years of supervised release.

C. Proceedings in the Court of Appeals

On appeal by Mr. Haymond, the Tenth Circuit vacated his revocation sentence and remanded for resentencing. "We conclude that 18 U.S.C. Sect. 3583(k) violates the Fifth and Sixth Amendments because (1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and (2) it imposes heightened punishment on sex offenders expressly based, not on their original crime of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt and for which they may be separately charged, convicted and punished." Pet. App. 15a.

In so ruling, the Tenth Circuit applied this Court's precedent from five key cases involving due process and a defendant's right to a jury trial. *Morrissey v. Brewer,* 408 U.S 471 (1972), held that due process under the Fifth Amendment must be flexible to protect a defendant where a grievous loss could occur. The Tenth Circuit found this language could apply to defendants in revocation hearings, where a substantial mandatory minimum prison sentence is imposed. Pet. App. 19a. *Johnson v. United States*, the court noted, held that using revocation of supervised release as a punishment, rather than as a rehabilitative tool, would raise serious constitutional questions. *Id.* (citing 529 U.S. 694 (2000). The Tenth Circuit also relied on *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348 (2000), in which this Court used the Fifth and Sixth Amendments to strike down the increasing

use of sentencing enhancements enacted by legislative bodies that imposed often substantial increases in sentences based on facts never presented to a jury. Pet. App. 17a. The court ultimately focused on *United States v. Booker,* 543 U.S. 220 (2005), a federal sentencing case, for its broad application of the Sixth Amendment that would make possible its use in revocation proceedings like Mr. Haymond's, where substantial enhancements to the original sentence are imposed, based on the commission of an entirely new criminal offense. Pet. App. 16a, 20a.

Finally, the Tenth Circuit relied on *Alleyne v. United States,* 133 S.Ct. 2151 (2012), to find that the imposition of a mandatory minimum in a revocation proceeding, when one had not applied to a defendant's original conviction, was just as much an impermissible sentencing enhancement as if it had come about at the time of the original sentence. Pet. App. 16a. The Tenth Circuit applied the same remedy, excision of the impermissible language from 18 U.S.C. 3583(k), that had been held proper in *Booker.* Pet. App. 26a-28a.

The government filed a petition for a panel rehearing and for rehearing *en banc* (CA 10 record, 10/16/2017). It raised arguments identical to those raised before this Court in its petition for certiorari. The government insists that revocation hearings are a No Man's Land, where constitutional protections are limited. Relying on language originally formulated during the parole era in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the government

argues that revocation proceedings are not part of a "criminal prosecution" as described in the text of the Sixth Amendment. Pet. 9. To the extent Congress enacted a statute that makes possible for a district court to decide under a preponderance of the evidence standard that a new sex offense has been committed that would constitute a violation of a previously-convicted sex offender's supervised release conditions (what the government refers to, using the old parole jargon, as his "conditional form of liberty," Pet. at 4), the government argues nothing should prohibit sending the supervised release violator to prison for life as a 'sanction.' Pet. 12, citing *United States v. Haymond,* 869 F.3d 1153, 1168 (10th Cir. 2017) (Kelly, J., dissenting). The government further argues that nothing should prevent Congress from telling the judge that the supervised release sanction can be no less than 5 years, even if the sanction eliminates the judge's discretion in handling revocations of supervised release and greatly exceeds the punishment ordered for the original offense, which had no mandatory minimum term at all. Pet. at 16.

The Tenth Circuit denied both the government's petition for panel rehearing and for a rehearing *en banc.* Pet. App. 70a. The panel's dissenting judge voted for a rehearing before the panel, but no judge requested that the court be polled for an *en banc* hearing. *Id.* The government did not seek to stay the mandate. The case was remanded to the district court, where Mr. Haymond was sentenced to time served on February 14, 2018, approximately 28 months after his arrest and detention on the supervised release violation.

The district court also imposed an additional 24 months of supervised release. The sentence was subject to the government's right to appeal the Tenth Circuit's decision.

ARGUMENT

Three reasons compel restraint by this Court in granting certiorari in this case. First, this is the sole circuit court decision addressing 18 U.S.C. 3583(k)'s constitutionality following its enactment twelve years ago. Second, the statute has been rarely invoked. Few defendants within the criminal justice system are affected by it. Most importantly, the Tenth Circuit's straightforward approach applying this Court's Fifth and Sixth Amendment jurisprudence is a correct analysis of the law.

I. The Tenth Circuit Correctly Applied Longstanding Supreme Court Precedent Guaranteeing a Defendant a Right to a Jury Trial When Charged with a New Serious Offense

The Tenth Circuit decision in this case faithfully adheres to this Court's well-known precedents. Both the Fifth and Sixth Amendments apply to Mr. Haymond's case. "General principles of due process govern the procedures that must be afforded a defendant in a revocation hearing," the court stated, Pet. App. 19a, noting *Morrissey's* holding that termination of a parolee often "inflicts a 'grievous loss' on the parolee and others." *Morrissey,* 408 U.S. at 481. As *Morrissey* held, "Due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

This Court has long recognized that the Constitution insures the right to a jury trial whenever a defendant faces the possibility of a long prison

sentence, regardless of the criminal proceeding. Over a century ago, this Court wrote, "The word 'crime,' in its more extended sense comprehends every violation of public law; in its limited sense, it embraces offenses of a serious or atrocious character." *Callan v. Wilson,* 127 U.S. 540, 547 (1888). The Court found "no conflict" between the Sixth Amendment and other provisions of the Constitution guaranteeing a right to a jury trial whenever a defendant was charged with such a crime. *Id.* See also *Bloom v. Illinois,* 391 U.S. 195, 211 (1968) (citing constitutional provisions common in right to jury trial analysis).

The Tenth Circuit's decision is consistent with these themes. Although the revocation of supervised release may not directly contemplate a "criminal prosecution" under the terms of the Sixth Amendment, the court held that it can indirectly affect the Sixth Amendment if facts presented based on a new alleged criminal act increase the sentencing range represented by the original offense of conviction. "Holding that the Sixth Amendment does not require particular procedures at a revocation hearing is not the same as holding that a defendant, once convicted of any crime, loses all Sixth Amendment rights during the term of imprisonment and supervised release." *Id.* Citing this Court's decision in *Johnson,* the court continued, "To the contrary, we know that these defendants retain the right to be free from new criminal prosecutions that would violate the Fifth and Sixth Amendments." Pet. App. 19a.

The Tenth Circuit held that *Johnson's* warning, that "serious constitutional concerns" would arise if revocation became "punishment for a violation of the conditions of supervised release," must be heeded. Pet. App. 21a. "When Haymond was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years," the court wrote. Pet. App. 20a. "After the judge found, by a preponderance of the evidence, however, that Haymond had violated a particular condition of his supervised release the mandatory provisions of Sect. 3583(k) required that Haymond be sentenced to a term of reincarceration of at least five years, up to a maximum term of life," the court continued. *Id.* This increased sentencing range, well beyond that authorized by Mr. Haymond's initial conviction, could be characterized in no other way than punishment for commission of a new designated offense. Pet. App. 21a.

These increased statutory ranges in Mr. Haymond's case, the Tenth Circuit noted, were reminiscent of the sentencing enhancements in *Apprendi* found unconstitutional by the Court. Pet. App. 15a-17a. The ruling in *Apprendi* had been influenced by the Court's decision a year earlier in *Jones v. United States,* 526 U.S. 227 (1999), a case involving sentencing enhancements strikingly similar to those in Mr. Haymond's case. *Jones* involved a defendant whose sentencing range had been increased from a maximum 15 years, based on facts submitted to a jury, to life, based on additional facts a judge could find imposing sentence enhancements by a

preponderance of the evidence after the verdict. Applying both the Fifth and Sixth Amendments, the Court held the process unconstitutional. In *Apprendi,* relying often on its decision in *Jones,* the Court noted the defendant's sentencing range had jumped from a maximum of 10 years based on facts presented to the jury to 20 years based on enhancements not submitted to the jury that were decided by a judge by a preponderance of the evidence. "It can hardly be said that the potential doubling of one's sentence – from 10 years to 20 – has no more than a nominal effect…(T)he differential here is unquestionably of constitutional significance." *Apprendi,* 530 U.S. at 495.

The Tenth Circuit ultimately focused on this Court's *Booker* decision. "*Booker*," the court noted, "itself relied on the Sixth Amendment in holding that a judge, during sentencing, must retain discretion." Pet. App. 20a. The court then quoted *Booker:* "It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance." *Id.* The court emphasized that 18 U.S.C. 3583(k) cannot be excused from accountability simply because it is a revocation statute. "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt," *Id.* (quoting *Ring v. Arizona,* 536 U.S. 584, 602 (2002)). The court found that 18 U.S.C. 3583(k) is "unconstitutional because it circumvents the protections of the Fifth and

Sixth Amendments by expressly imposing an increased punishment for specific subsequent conduct." Pet. App. 21a.

Finally, the Tenth Circuit addressed *Alleyne.* "Regardless of the nature or severity of the defendant's original crime of conviction," the court held, "Sect. 3583(k) imposes a mandatory minimum five-year term of imprisonment for only those specified offenses enumerated," and this "heightened penalty…must be viewed, at least in part, as punishment for the subsequent conduct." Pet. App. 23a. The Tenth Circuit was well aware of the many circuit courts, including the Tenth Circuit itself, that had rejected *Booker's* application to revocation hearings. But *Alleyne's* holding in particular distinguished those cases from Mr. Haymond's. "Discretion is key," the Tenth Circuit held, noting that the mandatory minimum stripped the district court of the flexibility required to oversee defendants on supervised release. Pet. App. 16a. This holding was consistent with the holding in those same circuit court cases. "*Booker* has no bearing on this case because the imposition and revocation of supervised release has always been left to the discretion of the court." *United States v. Carlton,* 442 F.3d 802, 808 (2nd Cir. 2006); see *United States v. Cordova,* 461 F.3d 1184, 1188 (10th Cir. 2006) ("revocation of supervised release has always been left to the discretion of the court"); *United States v. Huerto-Pimental,* 445 F.3d 1220, 1224 (9th Cir. 2006) (revocation "is, and always has been fully discretionary"); *United States v. Dees,* 467 F.3d 847, 853 (3d Cir. 2006) (citing

Huerto-Pimenthal); *United States v. Coleman,* 404 F.3d 1103, 1104-05 (8th Cir. 2005). As the court in *United States v. Hinson,* 429 F.3d 114, 117 (5th Cir. 2005), put it: "Mandatory sentencing guidelines have never been applicable to revocation of supervised release, only advisory policy statements to sentences imposed upon revocation."

The Tenth Circuit holding that "discretion is key" applies similarly to the government's notion that revocation hearings are just administrative proceedings similar to those in *Oregon v. Ice,* 155 U.S. 160 (2009). Just as the circuit courts have held in addressing *Apprendi* issues in revocation matters, *Ice* emphasizes that judges always have had "unfettered discretion" to decide whether a defendant should receive a consecutive or concurrent sentence. *Id.,* 155 U.S. at 714.

After the Tenth Circuit found 18 U.S.C. 3583(k) "unconstitutional and unenforceable," it excised the offending provision. Pet. App. 28a. That remedy was consistent with the Court's ruling in *Booker.* Justice Stevens sought the same remedy the government suggests, Pet. 25, which was to "engraft onto the existing system today's Sixth Amendment 'jury trial' requirement." *Booker,* 543 U.S. at 246 (Stevens, J., dissenting). "The constitutional jury trial requirement would nonetheless affect every case," the Court wrote. "It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge's role in sentencing…" *Id.* "It would create a system far more complex than what

Congress would have intended." *Id.* Congress' intent was that supervised release was to provide post-release monitoring by a district court judge "to assist individuals in their transition to community life." *Johnson,* 529 U.S. at 710. Engrafting a statute such as 18 U.S.C. 3583(k), where a prosecutor would argue to a jury that a defendant should be sent to prison up to life, in the words of *Booker,* "would destroy the system." *Booker,* 543 U.S. at 252. The Tenth Circuit's conclusion, Pet. App. 28a, is the same as what *Booker* held: "Congress would likely have preferred the excision of some of the Act, namely the Act's mandatory language, to the invalidation of the entire Act." 543 U.S. at 249.

II. Because the Tenth Circuit is the First Court Of Appeals to Address the Constitutionality of 18 U.S.C. 3583(k), No Circuit Conflict Exists

At the moment, only the Tenth Circuit has published an opinion on the constitutionality of 18 U.S.C. 3583(k). Although there is another circuit court decision involving 18 U.S.C. 3583(k), *United States v. Sperling,* 699 F. App'x 636, 637 (9th Cir. 2017), it is not helpful, as it was unpublished and addressed the issue on plain error review. As there were no other circuit court decisions at the time, any error was not plain. As the Government recognizes, Pet. 32, a similarly contested revocation hearing is on appeal in the Seventh Circuit. *United States v. Hollman,* 18-1874 (7th Cir., filed April 23, 2018).

The Tenth Circuit's straightforward approach, based on longstanding precedents of this Court, may well point other circuit courts to the same conclusion. If other circuits in contested cases are in unanimity with the Tenth Circuit decision, the Court's review is made easier. *Durham v. United States,* 401 U.S. 481, 483 (1971). A principal purpose for which certiorari is granted is to resolve conflicts among the United States Courts of Appeals, S.Ct. Rule 10; see *Braxton v. United States,* 500 U.S. 344, 347-48 (1991). The absence of a direct conflict among the circuits has traditionally been a reason for the Court to withhold review. *Bunting v. Mellen,* 541 U.S. 1019, 1021 (2004).

Mr. Haymond recognizes that this Court commonly grants certiorari in cases where "a federal Court of Appeals has held a federal statute unconstitutional." *United States v. Kebodeaux,* 133 S.Ct. 2496, 2501 (2013). However, this Court has denied review in similar constitutional cases when the circuit court opinion, like this one, simply applies well-settled constitutional law. *See, e.g.*, *American Civil Liberties Union v. Mukasey,* 534 F.3d 181 (3d Cir. 2008), *cert. denied,* 129 S.Ct. 1032 (2009) (denying Solicitor General's petition seeking review of appellate decision holding the Child Online Protection Act unconstitutional, where court of appeals applied established First Amendment law); *Valley Broadcasting Co. v. United States,* 107 F.3d 1328 (9th Cir. 1997), *cert. denied,* 522 U.S. 1115 (1998) (denying Solicitor General's petition for review of decision striking down

prohibition on advertising of casino gambling on First Amendment grounds where court of appeals followed established precedent); *ACORN v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied,* 521 U.S. 1129 (1997) (denying review after court of appeals struck down federal Lead Contamination Control Act as unconstitutional); *Wilson v. N.L.R.B.,* 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (denying review of decision holding part of National Labor Relations Act violated First Amendment). The Court should find similar justification for denying the government's request for review in this case.

III. Section 3583(k) Appears To Be Used Only Rarely

Even though 18 U.S.C. 3583(k) has been in existence for over twelve years, it is striking that the constitutionality of the provision has never been tested. The reason may be twofold. First, the statute appears to be seldom used. Since its enactment in 2006, the United States Sentencing Commission Datafiles indicate only 18 revocations and sentences, an average of only one or two a year. https://www.gov/research/datafiles/commission-datafiles. Second, it may well be that many of these cases involved defendants who simply admitted to the allegations, as several of the government's referenced cases indicate. See Pet. 29 (citing *United States v. Nesler,* 659 Fed. Appx. 251 (2016), *United States v. Terry,* 690 F. App'x. 358 (6th Cir. 2017), *United States v. Beyers,* 854 F.3d 1041 (8th Cir. 2017)). Admission by the defendant to the facts charged in the revocation petition in *United States v. Work,* 409

F.3d 484 (1st Cir. 2005), likewise eliminates its application as a conflicting circuit court opinion. Because contested cases under 18 U.S.C. 3583(k) appear to be rare, a case like Mr. Haymond's may be of "isolated significance." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 76 (1955). As Chief Justice Taft once said in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923), "(I)t is very important that we be consistent in not granting certiorari except in principles to settlement of which is of importance to the public, as distinguished from the parties."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 17-1672

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDRE RALPH HAYMOND,

Respondent.

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

AFFIDAVIT OF SERVICE

William D. Lunn, attorney for Respondent Andre Ralph Haymond, hereby attests that pursuant to Supreme Court Rule 29, the preceding Brief for Respondent in Opposition to the Petition for Certiorari to United States Court of Appeals for the Tenth Circuit and accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Petitioner by enclosing a copy of these documents in an envelope, first-class prepaid and addressed to:

Mr. Noel J. Francisco
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

and that the envelope was deposited with the United States Postal Service, Tulsa, Oklahoma 74103, on September 13, 2018, and further attests that all parties required to be served have been served.

_____
William D. Lunn

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 13th day of September, 2018.

_____
Megan McKean
Notary Public

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AFFIDAVIT OF MAILING

WILLIAM D. LUNN, counsel for Respondent Andre Ralph Haymond, and a member of the bar of the State of Oklahoma, attests that he placed the foregoing petition for a writ of certiorari in the United States mail on September 13, 2018.

_____
WILLIAM D. LUNN

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this September 13, 2018.

_____
Megan McKean

Notary Public