No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The divided decision below struck down critical portions of the sex-offense provision of the federal supervised-release statute, 18 U.S.C. 3583(k) (Supp. IV 2016), as "unconstitutional and unenforceable," Pet. App. 28a. Respondent does not dispute that the constitutionality of that provision is squarely presented for this Court's review. Nor does he dispute that this Court "commonly grants certiorari" when a lower court holds a federal statute unconstitutional, Br. in Opp. 21, even in the absence of a circuit conflict. He nevertheless suggests that this Court should hold off indefinitely, while similar constitutional challenges proliferate, before itself addressing whether its precedents in fact require Section 3583(k)'s substantial invalidation. He provides no sound reason why this Court should do so.

Respondent's primary argument for denying certiorari—that the decision below "applies well-settled constitutional law," Br. in Opp. 21—is insupportable. As

the dissenting judge recognized, that decision "jump[s] ahead of the Supreme Court when it has already spoken on this issue." Pet. App. 34a. Until the panel majority issued its ruling here, no decision of this Court or of any court of appeals had ever applied the Sixth Amendment jury-trial right to the revocation of supervised release or to any similar post-trial context. To the contrary, this Court has made clear that analogous parole-revocation proceedings are "not part of a criminal prosecution" to which the Sixth Amendment applies, *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972), and the Fourth Circuit has rejected a challenge to supervised-release revocation that was premised on arguments indistinguishable from the reasoning of the decision below, *United States* v. *Ward*, 770 F.3d 1090, 1099-1100 (2014). The panel majority's unprecedented holding both frustrates the government's ability to protect the public from recidivist sex offenders through revocation and reimprisonment under Section 3583(k)—a more common occurrence than respondent suggests—and incentivizes further challenges to the constitutionality of Congress's supervised-release scheme. Certiorari is warranted to correct the court of appeals' significant constitutional error.

A. The Decision Below Erroneously Invalidated Multiple Portions Of A Federal Statute

As explained in the petition (at 13-25), the decision below impermissibly expanded the jury-trial and related due-process rights beyond the criminal prosecutions to which they properly apply. Respondent's defense of that decision largely just recites the panel majority's reasoning verbatim, and it repeats the panel majority's errors.

Neither the court of appeals nor respondent has explained how supervised-release revocation—which occurs well after "indictment," "trial by jury," and "imposition of sentence"—can be considered part of the "criminal proceedings" to which the rights associated with a jury trial have traditionally been limited, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 & n.4 (2000). To the contrary, both respondent and the court of appeals effectively acknowledge that supervised-release revocation is *not* part of the "criminal prosecution[]" under the Sixth Amendment. U.S. Const. Amend. VI; see Br. in Opp. 15 ("[R]evocation of supervised release may not directly contemplate a 'criminal prosecution' under the terms of the Sixth Amendment."); Pet. App. 17a ("Revocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation."); see also *id.* at 19a n.1.

That should end the matter. Because supervised-release revocation—like its close analogue, parole revocation—"is not part of a criminal prosecution," the right to a jury trial with findings beyond a reasonable doubt does "not apply," *Morrissey*, 408 U.S. at 480; cf. *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (explaining that "there is no right to a jury trial" before revocation of probation). The cases on which respondent and the court of appeals principally rely (Br. in Opp. 15-18)—*Apprendi*, *supra*; *United States* v. *Booker*, 543 U.S. 220 (2005); and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—all arose from *initial* sentencing proceedings, not from revocation proceedings. See Pet. App. 15a-21a. Revocation of supervised release, like revocation of pa-

role, is part of the *implementation* of a previously imposed sentence, not the imposition of a new one. See 18 U.S.C. 3583(a), (e), and (k); *Johnson* v. *United States*, 529 U.S. 694, 701 (2000). And the Court has made clear that *Apprendi* and its progeny do not apply to proceedings in which "the jury traditionally played no part," *Oregon* v. *Ice*, 555 U.S. 160, 163 (2009), as is undisputedly the case with proceedings like these, see Pet. 17-19.

Respondent offers no solution to the logical problems inherent in the court of appeals' decision. He adopts the panel majority's view that Section 3583(k) imposes "punishment for commission of a *new* designated offense," Br. in Opp. 16 (emphasis added) (citing Pet. App. 21a), but fails to reconcile that view with this Court's determination that "postrevocation penalties" for violations of supervised release are "attribute[d] * * * to the *original* conviction," *Johnson*, 529 U.S. at 701 (emphasis added). He likewise fails meaningfully to distinguish Section 3583(k) from other provisions of the supervised-release statute that he and the court of appeals appear to accept as constitutional. He has no quarrel with the court of appeals' view that his supervised release can be revoked, and a term of imprisonment ordered, based on a judicial finding by a preponderance of the evidence under 18 U.S.C. 3583(e). See Pet. App. 28a (remanding for such a proceeding). But if that revocation and reimprisonment is constitutional, then similar revocation and reimprisonment under Section 3853(k) should be as well. See Pet. 23-25; Pet. App. 33a (Kelly, J., concurring in part and dissenting in part).

Nor does respondent provide any valid basis for the court of appeals' choice of remedy for the constitutional violation it perceived. See Pet. 25-27. He briefly suggests (Br. in Opp. 19-20) that invalidating Section 3583(k),

rather than simply requiring the jury findings that the court believed the Constitution demanded, was analogous to this Court's determination in *Booker* to render the federal Sentencing Guidelines advisory rather than mandatory. But the court of appeals' remedy here, unlike the remedy in *Booker*, does not allow for the effectuation of Congress's directive even in modified form. It instead strikes down that directive altogether. A remedy that still allowed for revocation and reimprisonment in accord with the terms of Section 3583(k), but with heightened procedural requirements, would necessarily be more consistent with "legislative intent," *Booker*, 543 U.S. at 246, than the panel majority's far more disruptive remedy of wholesale judicial nullification.

B. This Court's Review Is Warranted

As the petition explains (at 27-32), the anomalous invalidation of important federal statutory provisions presents a straightforward and compelling basis for granting certiorari. Respondent fails to justify his suggestion that this Court, in a departure from its typical practice, should nevertheless allow the decision below to stand unreviewed.

1. As respondent acknowledges (Br. in Opp. 21), this Court often grants certiorari "in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional," *United States* v. *Kebodeaux*, 570 U.S. 387, 391 (2013); see also, *e.g.*, *United States* v. *Morrison*, 529 U.S. 598, 605 (2000) ("Because the Court of Appeals invalidated a federal statute on constitutional grounds, [the Court] granted certiorari."). Respectful of the effect of such a circuit decision on the coordinate Branches, this Court does not require a circuit conflict as a prerequisite for its own intervention. See Pet. 27 (citing cases).

Aside from his misplaced assertion (Br. in Opp. 21) that the decision below simply "applies well-settled constitutional law," respondent proffers little support for his suggestion that the Court sit back while Congress's supervised-release scheme is hampered and the government is forced to fend off challenges to Congress's enactment in other courts. Respondent cites a handful of cases in which this Court has declined to grant review of lower-court decisions invalidating federal statutes. *Id.* at 21-22. But the cited cases are not comparable to this one. For example, in *American Civil Liberties Union* v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009), this Court had already held in an earlier stage of the litigation that the statute likely violated the First Amendment, see *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 660-661 (2004), and may well have concluded that the matter was adequately addressed in its prior opinion. The decision in *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998), was highly fact-bound and rested on the government's failure to introduce sufficient factual evidence that the federal ban on broadcast advertisement of casino gambling advanced substantial government interests. *Id.* at 1336. And, as respondent appears to recognize, the Solicitor General did not seek certiorari in either *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997), which arose in an unusual attorneys' fees posture, or *Wilson* v. *NLRB*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992), in which a private party had unsuccessfully challenged an NLRB decision.

Here, in contrast, the constitutional question is squarely presented. Respondent identifies no vehicle problems or procedural bases for denying review. Nor

does he provide any sound reason why further percolation in the circuits might be necessary. Although no other court of appeals has published a decision squarely addressing the constitutionality of the portions of Section 3583(k) at issue here, courts of appeals addressing the broader question whether the rights to a jury trial and factual findings beyond a reasonable doubt apply to revocations of supervised release and subsequent orders of reimprisonment have uniformly agreed that they do not. Pet. 29-31 (collecting cases). And the Fourth Circuit in *United States* v. *Ward*, *supra*, rejected a Sixth Amendment challenge to a since-repealed provision (18 U.S.C. 3583(g) (1988)) that, like current Section 3583(k), mandated revocation of supervised release and reimprisonment for a minimum period of time based on judicial findings of fact. See Pet. 31-32. Respondent does not cite, much less distinguish, that decision, which rests on reasoning irreconcilable with the rationale of the divided decision below.

Respondent appears to recognize (Br. in Opp. 21) that the question presented in this case *would* warrant review once some (undefined) number of additional courts of appeals have directly addressed it. No justification exists for requiring the government to litigate the issue indefinitely before this Court weighs in. The government has already addressed a similar challenge (in a plain-error posture) in the Ninth Circuit, see *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (2017), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018); another challenge is before the Seventh Circuit, *United States* v. *Hollman*, appeal pending, No. 18-1874 (oral argument scheduled for Sept. 28, 2018); and yet another is before the Eleventh Circuit, which has stayed proceedings pending this Court's resolution of this petition, see

Order, *United States* v. *Carpenter*, No. 17-15683 (July 18, 2018). Litigants have also relied on the decision below to attack Section 3583(k) on other grounds. See, *e.g.*, *United States* v. *Wilson*, No. 17-cr-539, 2018 WL 3159085 (E.D. Mo. June 28, 2018) (rejecting Double Jeopardy Clause challenge), appeal pending, No. 18-2591 (8th Cir. filed July 26, 2018). These and other cases will inevitably result in either a square circuit conflict or further erroneous invalidation of a federal statute. This Court should act expeditiously to restore clarity.

2. As the pendency of the aforementioned cases—which may only be the tip of the iceberg—makes clear, respondent errs in suggesting (Br. in Opp. 22) that Section 3583(k) is "seldom used." He supports that assertion only with a citation to Sentencing Commission data that do not, in fact, track the number of supervised-release revocations under Section 3583(k). See U.S. Sentencing Comm'n, *Commission Datafiles*, https://www.ussc.gov/research/datafiles/commission-datafiles#individual (collecting data on various other sentencing matters). The government is not aware of any statistics on exactly how often Section 3583(k) is applied in the revocation of supervised release, but the government's experience is that it occurs with some frequency. See Pet. 29. And it will likely occur with increasing frequency in the future, given the large number of sex offenders on supervised release and the long terms of supervised release many are serving.

In any event, this Court has granted certiorari when lower courts have struck down federal statutes that are not applied with great frequency. See, *e.g.*, *United States* v. *Alvarez*, 567 U.S. 709 (2012); *United States* v. *Stevens*, 559 U.S. 460 (2010). And certiorari is especially appropriate here because the decision below invalidated a

statute designed to protect the public against the serious dangers created by sex offenders. See *Kebodeaux*, 570 U.S. at 395. As noted in the petition (Pet. 27-28), this Court has granted review in a number of cases in which lower courts held unconstitutional provisions of statutes designed to serve that purpose, including in two cases involving provisions of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587—the same statute at issue in this case. See *Kebodeaux*, 570 U.S. at 395; *United States* v. *Comstock*, 560 U.S. 126, 149-150 (2010). Review is similarly warranted here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2018