

No. 17-8270

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARCUS L. HARRIS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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REPLY TO GOVERNMENT'S BRIEF  
IN OPPOSITION TO CERTIORARI

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**ARGUMENT**

The district court revoked Petitioner Marcus Harris’s supervised release and sentenced him to thirty days in jail. When the probation officer later filed a new violation petition, the district court re-revoked the same term of supervised release and sentenced Petitioner to thirty-six more months in prison. The Fourth Circuit’s decision affirming this serial revocation deepened a circuit split over whether district courts have jurisdiction to revoke an already-revoked term of supervised release in these circumstances. The courts on the Fourth Circuit’s side of the split have based their decisions on an erroneous interpretation of this Court’s decision in *Johnson v. United States*, 529 U.S. 694 (2000).

In its brief in opposition (“BIO”), the government calls the split “shallow” and in need of further development, despite the reality that the split is both entrenched and deepening. The government next asserts that *Johnson* is correct, but *Johnson* does not squarely address the issue here, and its holding has been undermined by subsequent statutory amendments. In addition, the government draws on irrelevant facts in the case to make the split less clear, even though the lower courts directly acknowledge their division. Finally, the government entirely overlooks a host of practical problems the Fourth Circuit’s rule presents. This Court should not ignore those problems, and instead should resolve the clear split over a district court’s jurisdiction to re-revoke a term of supervised release based on a petition that is filed after the first revocation. This Court should grant the petition.

1. The government’s attempts to deride the circuit split as “shallow” belie the true state of affairs. BIO 11, 16. The government, of course, acknowledges that a split indeed exists. The Fourth and Sixth Circuits expressly disagree with the Ninth Circuit on the issue presented in this case. *Compare* Pet. App. 6a; *United States v. Harris*, 878 F.3d 111, 116-17 & n.2 (4th Cir. 2017) (decision below); *and United States v. Cross*, 846 F.3d 188, 191 (6th Cir. 2017); *with United States v. Wing*, 682 F.3d 861, 863 (9th Cir. 2012). The government also admits that three other circuits have addressed closely related issues. *See* BIO 15-16 & n.2 (citing *United States v. Hendrix*, 630 F. App’x 816, 819 (10th Cir. 2015); *United States v. Vargas*, 564 F.3d 618, 622 (2d Cir. 2009); *United States v. Johnson*, 243 F. App’x 666, 667-68 (3d Cir. 2007)); *see also* Pet. 8-9 (discussing these cases as well as *United States v. Vazquez-Alvarez*, No. 12-286, 2015 WL 5090113, at \*4 (D.P.R. Aug. 24, 2015)).

To call this pool of decisions shallow is to defy reality. The fact that the Ninth Circuit is alone on its side does not make the split any less genuine. That circuit accounts for approximately one-fifth of the nation's federal court caseload. *See* Administrative Office of U.S. Courts, Federal Judicial Caseload Statistics 2017, Tables B & D, *available at* <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017-tables>. For that reason, the split is deeper than it appears at first, because the Ninth Circuit's *Wing* decision governs so much of the country.

The government also asserts that the issue has arisen too infrequently to be worthy of this Court's attention. BIO 11. Again, part of the reason for that is that *Wing* prevents the issue from arising in the Ninth Circuit at all. But if anything, the issue is arising with increasing frequency. Most of the opinions cited above, including this case and *Cross*, have been decided in just the past few years. And the practice of serial revocations of the same term of supervised release has taken hold in the Fourth Circuit, which is already citing the decision below to affirm those revocations. *See United States v. Paige*, 721 F. App'x 296, 297 (4th Cir. 2018); *United States v. Atkins*, 721 F. App'x 268, 269 (4th Cir. 2018). The circuit split is certainly deep enough for certiorari to be warranted, and the Court should grant review before the split gets any deeper.

2. The government attempts to portray this case as a poor vehicle for this Court's review of the serial revocation issue. BIO 16-17. In fact, it is the best opportunity this Court is likely to get. The government points to the initial petition on supervised release (D. Ct. Doc. 46), which charged the same conduct as the eventual petition the district court used for

the revocation Petitioner now challenges (D. Ct. Doc. 100). But the district court dismissed the initial petition. Pet. App. 4a. The government does not explain why it should have any continuing legal significance. Petitioner's argument does not depend on the operative petition being based only on newly-discovered (that is, discovered post-revocation) violations. Indeed, it would be *worse* if the government could raise charges and then strategically dismiss them, only to resurrect them after the defendant's supervised release term has been revoked and the government wants more prison time. But that is what the Fourth Circuit's rule would permit.

The government also posits that this Court's review is academic because the district court simply could have waited for Petitioner to finish his thirty-day jail sentence and begin serving his new term of supervision before acting on the post-revocation petition. BIO 13-14. One problem with this argument is that the Fourth Circuit forbids it: that court has held that once a prisoner finishes a revocation sentence and begins serving a new term of supervised release, the court cannot revoke the new term based on violations of the old term. *See United States v. Brown*, 651 F. App'x 216, 219-20 (4th Cir. 2016); *see also* Pet. App. 10a-11a (district court below citing *Brown* in stating that it was re-revoking first term of supervision, not revoking new term). If this understanding of 18 U.S.C. § 3583 is incorrect, that is all the more reason for this Court to clarify whether and under what circumstances a district court can revoke an already-revoked term of supervised release based on pre-revocation violations.

The Court should not be dissuaded by the government's efforts to undermine the suitability of review here. This case is on all fours with *Wing*, yet the circuit courts came to completely opposite conclusions. *See* Pet. 9 (discussing factual similarities with *Wing*); Pet. App. 8a (expressly disagreeing with *Wing*). Petitioner's case directly presents the question of whether a district court can impose serial revocations in these situations, and his lengthy sentence ensures that his case will not become moot before this Court can review it. Pet. 16-17. There is no "vehicle" obstacle to prevent this Court from granting the petition.

3. In the decision below, the Fourth Circuit relied on *Johnson* to support its holding that a district court can re-revoke an already-revoked term of supervised release. Pet. App. 5a; 878 F.3d at 115-16. In its opposition, the government argues that *Johnson* was correctly decided. BIO 12-13. The government, however, does not mount a full-throated defense of that decision, which even the majority of the Court acknowledged adopted an "unconventional" and "very metaphysical" reading of § 3583. *See Johnson*, 529 U.S. at 705-07; *see also id.* at 715 (Scalia, J., dissenting) (criticizing majority's statutory interpretation). Further, as explained in *Wing* and in the petition, Pet. 11-12, more recent amendments to § 3583 have rendered *Johnson*'s "unconventional" reading obsolete.

Notably, the government ignores a variety of practical problems that *Johnson* presents. First, serial revocations of the same term of release "may create burdens for a defendant who must decide whether to wait to appeal his first and second revocation sentences together and thus risk his first sentence becoming moot." *United States v. Winfield*, 665 F.3d 107, 113-14 (4th Cir. 2012). Second, § 3583(i), which allows for "delayed revocation" if a petition is

filed before the end of a supervised release term but not adjudicated until after, would be superfluous in many instances if a probation officer could simply file a new petition while the defendant is serving a revocation sentence in prison. Finally, the government does not discuss 18 U.S.C. § 3624(e), which tolls a term of supervised release while a defendant is incarcerated for thirty days or more. In other words, if supervised release is not running while someone like Petitioner is serving a revocation sentence, then there is no supervised release term to revoke during that time. At a minimum, this Court should resolve this apparent anomaly between *Johnson*'s "unconventional" reading of § 3583(e) and the plain language of § 3624(e).

The government claims that defendants like Petitioner will have a "perverse incentive" to admit to violations – and accept a prison term – in order to prevent adjudication of a subsequent petition filed after revocation. BIO 15. For one thing, there is no evidence that this has been happening in the Ninth Circuit after *Wing*, and to put it mildly, most people who have just finished a prison sentence are reluctant to volunteer to return for another one, even of thirty days. More problematic is the risk – and in the Fourth and Sixth Circuit, the reality – that their revocation sentences could be extended indefinitely, like renewing a lease, as long as the government or probation officer can find even the most minor technical violations dating back to the original term of supervision.

These practical issues are better left for fuller development in merits briefing, but it is telling that the government does not even attempt to rebut these concerns. It indicates that *Johnson* either does not reach the question presented or is no longer viable in light of the

current version of § 3583. The practical complications wrought by the competing interpretations of *Johnson* merit this Court's attention.

4. Contrary to the government's contention, BIO 16, no additional percolation among the lower courts is necessary before this Court should grant review. The sides of the split are well-delineated. The issues have been thoroughly addressed in several published opinions, and waiting for additional circuits to weigh in will provide little value to the Court. The government does not suggest what new approaches or potential solutions other courts could offer. Nor does the government explain how deepening the split will somehow resolve it. As noted in the petition, cases like this will no longer come up in the Ninth Circuit in light of *Wing*, and so the split has no hope of dissolving absent this Court's intervention, no matter how many more courts have their say. Pet. 15.

The "further development" the government seeks will only deepen the split, not cast any new light on the dispute. And to be clear, what that means in practice is that the government is content for a defendant like Petitioner to get years in prison that he could not receive if he had been sentenced in another circuit. Allowing the split to persist allows that disparity to persist, and no "further development" is necessary for this Court to settle the question.

\* \* \*

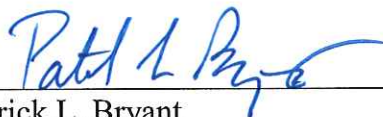
None of the government's arguments against granting the petition are persuasive. The issue is well-developed and provides this Court with an ideal opportunity to resolve a clear split among the circuits. It should grant review in Petitioner's case to do so.

### CONCLUSION

For the reasons given above, as well as those presented in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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