No. 21-68

IN THE
Supreme Court of the United States

BRENDON JANIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Standard Condition 12 of supervised release states: "If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction." U.S.S.G. § 5D1.3(c)(12). The circuits are fractured on the constitutionality of Standard Condition 12. In the decision below, the Eighth Circuit upheld Standard Condition 12; the Second, Seventh, and Tenth Circuits have invalidated it; and the Ninth Circuit has upheld it based on a narrowing construction with no basis in the Standard Condition's text. This case is an ideal vehicle to resolve the circuit split.

The brief in opposition ignores broad swaths of the petition. As the petition explained, in the circuits that have invalidated Standard Condition 12, numerous district courts have implemented those circuit precedents by prospectively and retroactively stripping Standard Condition 12 from the sentences of all criminal defendants. Pet. 10-12, 14-15. As a result, this circuit split has unusually far-reaching effect: thousands of prisoners receive differential treatment based on happenstance of geography. Pet. 23-24. Because offenders often move to other states after being released from prison, this disuniformity will cause significant practical problems in the administration of the supervised release system. Pet. 24-25. Rather than engage with these points, the government ignores them. They continue to provide a powerful case for certiorari.

The government's primary argument against

certiorari is that the petition is ostensibly premature because petitioner's release date is a decade from now. However, if petitioner (or anyone else) waited until his release date before challenging Standard Condition 12, the government would be guaranteed to argue that the challenge is an impermissible collateral attack on a sentence that can only be brought on direct appeal. The government's argument, if accepted, would allow it permanently to evade review of Standard Condition 12 by characterizing all petitions as either too early or too late. The Court should reject that cynical effort to avoid Supreme Court review of thousands of unconstitutional sentences and grant certiorari.

I. THERE IS A CIRCUIT SPLIT OVER WHETHER DISTRICT COURTS MAY IMPOSE STANDARD CONDITION 12.

The circuits are divided over the constitutionality of Standard Condition 12. In the decision below, the Eighth Circuit upheld that Standard Condition. By contrast, the Second, Tenth, and Seventh Circuits have invalidated it, while the Ninth Circuit has upheld it subject to a narrowing construction.

A. Second Circuit.

The Eighth Circuit's decision conflicts with *United States v. Boles*, 914 F.3d 95 (2d Cir. 2019). In *Boles*, the Second Circuit invalidated Standard Condition 12, concluding that "the 'risk' condition is vague and affords too much discretion to the probation officer." *Id.* at 111.

The government insists that the Second Circuit did not "mention the nondelegation doctrine." BIO 9. But

the Second Circuit's holding that the standard condition "affords too much discretion to the probation officer," *id.* (quotation marks omitted), is another way of saying that the court delegated too much authority to the probation officer. As for vagueness, the government claims that the Second Circuit "did not conclude that Standard Condition 12 in its entirety is unconstitutionally vague," but instead "vacated the condition principally insofar as it would require notifications to the defendant's employer about his federal conviction." BIO 12. This reading of *Boles* is incorrect. Although *Boles* did point out that the condition "extends to warning employers of risk," 914 F.3d at 112, the Second Circuit did not issue some kind of partial vacatur. Rather, the court concluded that the condition "gives the probation office unfettered discretion with respect to the notification requirement" and hence vacated the condition in its entirety. *Id.*

In addition to being wrong, the government's current position conflicts with the post-*Boles* positions of the government itself, as well as the Second Circuit and district courts within that circuit. Following *Boles*, the government repeatedly conceded that sentences containing Standard Condition 12 must be vacated, and the Second Circuit has repeatedly vacated such sentences.[1] In addition, as the petition explained, the

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[1] *See, e.g.*, *United States v. Griffin*, 839 F. App'x 660, 661 (2d Cir. 2021); *United States v. Schwarz*, 833 F. App'x 916, 917 (2d Cir. 2021); *United States v. Alford*, 829 F. App'x 572, 573 (2d Cir. 2020); *United States v. Booker*, 825 F. App'x 4, 12 (2d Cir. 2020); *United States v. Insaidoo*, 765 F. App'x 522, 526 (2d Cir. 2019).

Southern, Western, and Eastern Districts of New York have issued district-wide administrative orders vacating Standard Condition 12 in light of *Boles*, both retroactively and prospectively. Pet. 10-12. All criminal defendants in those districts, including already-sentenced defendants, are now subject to a risk condition requiring the judge, not the probation officer, to impose the risk-notification requirement. *Id.* Recently, the Second Circuit upheld that updated risk condition in a published decision. *United States v. Traficante*, 966 F.3d 99 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2634 (2021). Notably, the court "agree[d] with Traficante that the previous risk condition can no longer be imposed on him following [*Boles*]," while rejecting Traficante's challenge to the new condition. *Id.* at 101.

Until now, no one—not the government, nor the Second Circuit, nor any district court—has ever proposed the government's new theory that *Boles* is a narrow decision about employment conditions. However, even if the government's newly-minted understanding of *Boles* is right, the die has already been cast. The Second Circuit, and district courts within it, have interpreted *Boles* to establish that Standard Condition 12 is unconstitutional and have replaced Standard Condition 12 with a new condition that requires judicial pre-approval of the risk notification requirement. Hence, without this Court's intervention, thousands of criminal defendants within the Second Circuit will be treated differently from identically-situated defendants in the Eighth Circuit by happenstance of geography.

B. Tenth Circuit.

The Eighth Circuit's decision conflicts with *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019). In *Cabral*, the Tenth Circuit invalidated Standard Condition 12. *Id.* at 696-99. The court held that Standard Condition 12 violated the nondelegation doctrine, emphasizing that the court "task[ed] Mr. Cabral's probation officer with determining whether Mr. Cabral poses a 'risk' to others in any facet of his life." *Id.* at 697.

The government's argument regarding *Cabral* is difficult to understand. The government points to language in *Cabral* in which the district court refused to limit the potential breadth of Standard Condition 12. BIO 9. That is exactly right—rather than narrow the condition to a particular category of risks, the district court imposed Standard Condition 12 as written, which applies to "risks" without limitation. That condition is identical to the condition imposed in this case, creating the circuit split.

Next, the government quotes the sentencing transcript in this case for the proposition that the district court did not "want to limit people's liberty interests … unless there is a proper basis in the record to do so." BIO 9 (quoting 1/3/20 Sent. Tr. 34). The government fails to mention, however, that this quotation does not appear in the portion of the transcript addressing Standard Condition 12, but instead appears in an unrelated colloquy addressing

petitioner's alcohol use.[2] Moreover, all circuits, including the Tenth Circuit, presumably would require a "proper basis in the record" to take away "liberty interests." In sum, the government identifies no intelligible ground for reconciling *Cabral* and the decision below.

Moreover, the situation within the Tenth Circuit is much like the situation within the Second Circuit. Following *Cabral*, the government has conceded that sentences containing Standard Condition 12 must be vacated, and the Tenth Circuit has repeatedly vacated such sentences. Pet. 13. Multiple districts within the Tenth Circuit have issued district-wide administrative orders vacating Standard Condition 12 in light of *Cabral*, both retroactively and prospectively. Pet. 14-15. All criminal defendants in those districts, including already-sentenced defendants, are now subject to a risk condition requiring the judge, not the probation officer, to impose the risk condition. *Id.*

Hence, as in the Second Circuit, thousands of criminal defendants within the Tenth Circuit are receiving disparate treatment from similarly situated defendants in the Eighth Circuit by virtue of geography.

C. Seventh Circuit.

The Eighth Circuit's decision conflicts with *United States v. Greco*, 938 F.3d 891 (7th Cir. 2019). In *Greco*,

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[2] The full transcript is publicly available on PACER. *United States v. Janis*, No. 17-cr-50076 (D.S.D. Feb. 6, 2020), Dkt. 228.

the Seventh Circuit invalidated a condition that was materially identical to Standard Condition 12. *Id.* at 897. The parties agreed that the condition was unconstitutionally vague in view of *United States v. Bickart*, 825 F.3d 832 (7th Cir. 2016), where the court "held that a similar condition was impermissibly vague because, among other things, it did not define the term 'risks.'" *Greco*, 938 F.3d at 897 (summarizing *Bickart*). The *Greco* court accepted the parties' concession and remanded for the district court to "provide more guidance on what types of risk trigger the notification requirement." *Id.*

The government observes that the condition at issue in *Bickart* contained additional ambiguities. BIO 12-13. This is a non sequitur. Regardless of the facts of *Bickart*, *Greco* is a precedential decision from the Seventh Circuit establishing that Standard Condition 12 is unconstitutional. Therefore, there is a circuit split.

D. Ninth Circuit.

In *United States v. Gibson*, 998 F.3d 415 (9th Cir. 2021), the Ninth Circuit upheld Standard Condition 12 subject to a limiting condition: "the risks referenced in the condition are limited to the specific risks *posed by the defendants' criminal record*." *Id.* at 423 (internal quotation marks omitted; emphasis in original). Based on that narrowing construction, the court held that "probation officers do not have unfettered discretion under this condition." *Id.* "The limited discretion vested in the probation officer as to when the condition should be triggered does not render it unconstitutionally vague." *Id.*

The government concedes that "the court below did not articulate that same limitation in rejecting petitioner's vagueness challenge." BIO 13. But the government attempts to avoid review by invoking this Court's denial of certiorari in *Robertson v. United States*, which the government also raises in the first paragraph of its "Argument" section. BIO 6, 13.

The government's citation of *Robertson* is misleading. The government asserts that "[t]his Court recently denied review of the decision that the court of appeals relied on in this case," citing *Robertson*. BIO 6. The government's statement implies that the Court denied certiorari *on the question presented*. In fact, however, the *Robertson* petition did not even mention the supervised release condition. Instead, each of the 13 questions presented in that handwritten pro se petition pertained to Robertson's conviction. As such, the denial of certiorari in *Robertson* has no relevance to this petition.

In sum, the Eighth Circuit's decision conflicts with decisions of four other circuits.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT IN THIS CASE.

The petition advanced several reasons why the Court should resolve this circuit split. Because the government ignores these arguments, petitioner will recapitulate them only briefly.

First, the issue in this case affects almost all criminal defendants in the United States. Pet. 23. As matters now stand, thousands of criminal defendants receive disparate treatment based on geography. Pet.

23-24.

Second, granting certiorari would be consistent with the Court's practice of resolving circuit splits related to federal sentencing. Pet. 24.

Third, the split will cause practical problems in the administration of supervised release because released offenders move between jurisdictions. Pet. 24-25.

Fourth, this case is the perfect vehicle to resolve the circuit split. Pet. 25.

These points continue to establish a powerful basis for Supreme Court review.

III. THE GOVERNMENT'S ARGUMENTS AGAINST REVIEW ARE UNPERSUASIVE.

The government makes two primary points against review. First, it claims that this petition is premature because petitioner will not be released until 2031. Second, it argues that the Sentencing Commission can clarify Standard Condition 12. Both points are unpersuasive.

A. The petition is not premature.

Petitioner will be released from prison in 2031, when he is 46 years old. The government contends that this petition is therefore premature. BIO 6-7. That argument is unpersuasive.

Petitioner's petition is ripe because he is challenging a condition that has already been imposed on him. The government insisted that Standard Condition 12 be inserted into petitioner's sentence at the time of

sentencing. It successfully argued to both the district court and Eighth Circuit that Standard Condition 12 was constitutional. It successfully obtained a precedential decision from the Eighth Circuit upholding Standard Condition 12. Having obtained such a ruling, it cannot evade review by arguing that the petition is premature.

Indeed, if petitioner were to wait for his release to challenge Standard Condition 12, the government would undoubtedly argue that his challenge is an impermissible collateral attack on his sentence that he should have advanced on direct appeal. The government regularly makes this argument and wins. *See, e.g.*, *United States v. Miller*, 557 F.3d 910, 913 (8th Cir. 2009) ("Miller first argues that the District Court erred in revoking his supervised release based on violations of Special Conditions 8 and 9 because those conditions were vague, ambiguous, and contrary to law. … We reject Miller's attempt to collaterally attack the validity of his underlying sentence in an appeal of the revocation of his supervised release. A defendant may challenge the validity of his underlying conviction and sentence through a direct appeal or a habeas corpus proceeding, not through a collateral attack in a supervised-release revocation proceeding."); *United States v. Simpson*, 932 F.3d 1154, 1156 (8th Cir. 2019) (similar), *cert. denied*, 140 S. Ct. 826 (2020).

The government's argument, if accepted, would allow it permanently to evade review of Standard Condition 12. Appealing on direct appeal would be too early; appealing at the time of release would be too late. The Court should reject that position.

The government insists that the law might change in some unspecified way in the next decade, BIO 6-7, but such speculation is an insufficient basis to deny review. Moreover, the question presented has an immediate impact on scores of prisoners who are currently on supervised release or who will be imminently released from prison. There is nothing premature about this petition for certiorari.

B. The possibility of an amendment by the Sentencing Commission does not warrant denial of review.

The government also states that the Sentencing Commission might clarify Standard Condition 12 in the future. BIO 13-14. For three reasons, this argument is no basis for denying review.

First, this case involves a *constitutional* challenge to a Guideline. It is true that this Court typically does not review disputes over interpretations of the Guidelines. That is because the Sentencing Commission promulgates the Guidelines, and hence has primary responsibility to explain what they mean. *Cf. Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

However, this case requires interpreting the Constitution, not the Guidelines. It is this Court, not the Sentencing Commission, that has primary responsibility for determining what the Constitution means. Therefore, this Court's practice is to grant certiorari to resolve circuit splits involving constitutional challenges to the Guidelines. *See, e.g.*, *Beckles v. United States*, 137 S. Ct. 886 (2017); *Peugh v. United States*, 569 U.S. 530 (2013). In *Beckles* and

Peugh, the Sentencing Commission could theoretically have mooted the dispute by amending the applicable Guideline, but that did not stop the Court from resolving the constitutional challenges. The Court should follow that practice and grant certiorari here.

Second, this Court typically denies review in cases involving the interpretation of the advisory Guidelines, because in most such cases, the advisory Guideline is merely a starting point used to guide the court's discretion in calculating a term-of-months sentence. The advisory Guidelines are neither binding nor determinative, so their proper interpretation is of limited significance.

Here, however, petitioner is not challenging the interpretation of an advisory Guideline used to guide the determination of a term-of-months sentence. Instead, petitioner is challenging the constitutionality of a substantive component of his supervised release that directly imposes binding obligations on him. That challenge does not suddenly become less important or cert-worthy merely because the district court followed the recommendation of the Sentencing Commission.

Third, there is no reasonable prospect of the Sentencing Commission amending the condition, even when it is back at full strength. The government points out that the Commission has previously amended Standard Condition 12 in response to judicial criticism. BIO 14. That is true—as the petition described, the Commission preserved the vague term "risks" while making the Guideline even less clear. Pet. 5-6. The Commission has stood its ground that Standard Condition 12 should generically apply to all "risks," and

now it is up to this Court to decide whether that is constitutional.

For these reasons, the theoretical possibility that the Commission may reverse course and modify Standard Condition 12 should not immunize Standard Condition 12 from review.

IV. THE DECISION BELOW IS WRONG.

The government's brief defense of the decision below is unpersuasive. As to nondelegation, the government cites language in the plurality opinion in *Gundy v. United States*, 139 S. Ct. 2116 (2019), observing that the Court has upheld delegations based on vague terms like "public interest." BIO 8 (quotation marks omitted). But the plurality opinion in *Gundy* mustered only four votes. The Court has never held that standardless terms like "public interest"—or here, "risk"—are sufficiently intelligible in a criminal case to withstand a nondelegation challenge.

As to vagueness, the government argues that Standard Condition 12 is sufficiently clear because it "limits the probation officer's authority to circumstances in which the defendant is placing another person at risk of harm." BIO 12. But how is "risk" to be determined, and how "risky" is risky enough? The inherent vagueness of "risk" led the Court to invalidate ACCA's residual clause in *Johnson v. United States*, 576 U.S. 591 (2015). The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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