No. _____

IN THE

Supreme Court of the United States

SELDRICK CARPENTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Historical documents show that the Framers would have understood the jury right to apply to forfeitures of recognizance, a proceeding similar to revocations of supervised release in form, function, and purpose. In light of this historical record, should this Court's holding in *United States v. Haymond*, 139 S. Ct. 2369 (2019), be expanded to hold that the Sixth Amendment, including the right to a trial by jury, applies to all revocations of federal supervised release?

II. Does Article III, Section 2, Clause 3 of the Constitution, which guarantees that "all Crimes" shall be tried by jury, create an additional jury right for revocation proceedings when revocation is based on an allegation that the supervisee committed new crimes?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Carpenter, No. 23-3295, (June 17, 2024).

United States District Court (C.D. Ill.):

United States v. Carpenter, No. 18-cr-10009, (November 15, 2023).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Seldrick Carpenter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The Seventh Circuit's opinion is published at 104 F.4th 655 and is included as Appendix A. The district court's revocation judgment is unpublished and included as Appendix E. The relevant excerpts of the revocation hearing transcript are unpublished and included as Appendices B and C. The sentencing transcript is unpublished and included as Appendix D.

JURISDICTION

The Seventh Circuit entered judgment on June 17, 2024. App. 1a. Neither side petitioned for rehearing. This petition is filed within 90 days of the June 17, 2024 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The jury clause of Article III of the Constitution states:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. art. III, § 2, cl. 3.

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

> the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18 U.S.C. § 3583(e) provides in relevant part:

> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)— […]
>
> (3) revoke a term of supervised release, and require the 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 without credit for time previously served on post-release supervision, 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, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case;

INTRODUCTION

Five years ago, this Court decided *United States v. Haymond*, 139 S. Ct. 2369 (2019). It was the first time this Court considered the scope of the jury right under the Sixth Amendment as it applied to revocations of federal supervised release. This Court had previously determined that revocations of probation and parole were not "criminal prosecutions" subject to Sixth Amendment protection. *See Morrissey v.*

Brewer, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). But it had never extended that logic to supervised release.

As it turned out, the differences between parole and probation versus supervised release were significant. In a fractured 4-1-4 decision, this Court struck down a five-year mandatory minimum under 18 U.S.C. § 3583(k) for revocations of certain sex offenders. *Haymond*, 139 S. Ct. 2369. Writing for a plurality, Justice Gorsuch explained that unlike with probation or parole, a revocation of federal supervised release allows a judge to impose additional prison time beyond that authorized by a jury's verdict. *Id.* at 2382. As Justice Alito pointed out in dissent, the *Haymond* plurality's reasoning "strongly suggest[s] that the Sixth Amendment right to a jury trial applies to any supervised-release revocation proceeding." *Id*. at 2387 (Alito, J., dissenting).

Justice Alito disagreed with the plurality that supervised release was structurally different from parole, but one point of agreement between the plurality and dissent was the need to look at historical evidence about the jury right at the time of the founding. *Id*. at 2376, 2392. And in response to this Court's guidance in *Haymond*, legal scholars dived into historical evidence on this issue. New research now confirms that jury trials were the norm for forfeitures of recognizance—a historical proceeding that looked very similar to modern revocations of supervised release. *See* Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. 1381 (2024). A colonial-era judge transported into a modern revocation hearing would be

shocked to see what seems like a recognizance proceeding, but with the conspicuous absence of a jury.

This new historical research forms the basis of Seldrick Carpenter's appeal. Carpenter was on supervised release when locals in Peoria, Illinois, accused him of arson. The evidence against Carpenter was weak, and the accusers had motive to lie because Carpenter and his family were (for unrelated reasons) the target of local activists who wanted to see Carpenter in prison. But because Carpenter was on supervised release, Illinois authorities were able to avoid a messy trial in state court by handing off the case to the United States Attorney's Office.

Through revocation proceedings, federal prosecutors could imprison Carpenter without a jury and based on only a preponderance of the evidence. They were also able to avoid procedural irritations like the Confrontation Clause or rules of evidence. This sidestep of Carpenter's trial rights allowed the government to present a hearsay video of a witness who said that Carpenter confessed to the crime. Carpenter denied confessing to the woman. But, although the local campaign against Carpenter gave the witness motive to lie, Carpenter had no opportunity to cross examine her.

Carpenter is only one of tens of thousands of supervisees whom the federal courts send to prison every year without a jury trial. The federal courts of appeals, including in the Seventh Circuit where Carpenter is from, have long assumed that the Sixth Amendment does not apply to revocations of supervised release. *See, e.g., United States v. Boultinghouse*, 784 F.3d 1163, 1171 (7th Cir. 2015). But this Court

has never endorsed that assumption. In fact, as the Seventh Circuit recognized, the *Haymond* plurality's logic directly contradicts Seventh Circuit precedent. And with new historical evidence about how the Framers understood the jury right, Carpenter has a strong case that he was entitled to a jury trial before revocation.

This Court should pick up the threads left by *Haymond* and address whether the Sixth Amendment applies to federal supervisees facing revocation. While doing so, this Court should also consider whether Article III's jury clause creates a separate jury right, distinct from the Sixth Amendment, which also applies to revocation proceedings based on accusations of new "crimes."

This petition is being filed contemporaneously with a petition for certiorari in a companion case, *United States v. Smith*, No. 23-2449 (7th Cir.), which the Seventh Circuit decided on the same day as Carpenter's appeal.

STATEMENT OF THE CASE

I. Background on the history of community supervision in the United States

To understand why the lower courts have concluded that the Sixth Amendment does not apply to supervised-release revocations, we need to start with a history of this Court's jurisprudence surrounding probation and parole.

For most of the 20th century, the federal government used a system of parole. *Tapia v. United States*, 564 U.S. 319, 323-25 (2011). Judges sentenced convicted defendants to terms of imprisonment, and after they had served one third of their sentences, they could apply to a parole board for conditional release. *See id*. But the

balance of any remaining prison sentence remained hanging over parolees. When defendants violated a condition of parole, the board could "revoke" their release and send them back to prison to serve the rest of their original sentences. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 985 (2013).

This Court addressed the application of the Sixth Amendment to parole revocations in *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972). By its text, the Sixth Amendment applies only to "criminal prosecutions." U.S. Const. amend. VI. And this Court held that because "revocation of parole is not part of a criminal prosecution," the "full panoply of rights" available under the Sixth Amendment did not apply. *Id.* at 480. A revocation proceeding, this Court explained, "arises after the end of the criminal prosecution, including imposition of the sentence." *Id.* at 480. In other words, parole did not affect the underlying prison sentence that was the result of the criminal prosecution. The "essence of parole" was early release on condition that prisoners abide by certain rules "during the balance of the sentence." *Id.* at 477. But the balance remained if parole was revoked.

A year later, this Court tackled the same question regarding probation. It looked to *Morrissey*: "we held that the revocation of parole is not a part of a criminal prosecution"—again referencing the Sixth Amendment's textual limitation. *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (citing *Morrissey*, 408 U.S. at 480). Again, the framing of revocation as outside the Sixth Amendment made sense because revocation of probation did not result in a new criminal sentence. Rather, probation

was a result of the trial court's power to "suspend" the sentence that had resulted from the prosecution, with the understanding that the defendant would need to serve the suspended sentence if probation was revoked. *See id.* at 779; *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

More than a decade after *Morrissey* and *Gagnon*, Congress invented federal supervised release as part of the Sentencing Reform Act of 1984. 98 Stat. 1987; *Tapia*, 564 U.S. at 325. With the invention of supervised release, Congress jettisoned the rehabilitative-imprisonment model, abolished parole for new convictions, and shifted federal law to a system of determinate sentencing. No longer may prisoners seek relief from a portion of their prison sentence through parole. *Id.* at 324. Federal prisoners now serve the entirety of their prison terms (minus small adjustments for "good time" and other nuances not relevant here).

Despite the seismic impact of the Sentencing Reform Act, more than 35 years passed without this Court addressing whether the holdings of *Gagnon* and *Morrissey* also applied to federal supervised release. Nonetheless, the federal courts of appeals repeatedly assumed that they do. *See, e.g., United States v. Work*, 409 F.3d 484, 491 (1st Cir. 2005); *United States v. Carlton*, 442 F.3d 802, 809–10 (2d Cir. 2006); *United States v. Kelley*, 446 F.3d 688, 690 (7th Cir. 2006); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005). Because this Court had held that other types of "revocations" do not fall within the Sixth Amendment, lower courts concluded that supervised release probably does not either.

Significantly, however, this Court never blessed the idea of applying *Morrissey* and *Gagnon* to supervised-release revocations. Until *Haymond*, this Court simply did not have cause to address the issue.

II. This Court's decision in *United States v. Haymond*

After 35 years of federal supervised release, this Court finally had opportunity to address the Sixth Amendment's effect on revocations of supervised release in *United States v. Haymond*, 139 S. Ct. 2369. In a 4-1-4 decision, this Court struck down a five-year mandatory minimum for revocation of certain sex offenders. *See* 18 U.S.C. § 3583(k).

The plurality, written by Justice Gorsuch, concluded that § 3583(k) violated the jury right under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 US 99 (2013), because it triggered a new prison sentence based on facts found by a judge, not a jury. *See id*. at 2375-76. Although revocation of parole and probation did not require a jury, the plurality identified a "structural difference" between those forms of supervision and supervised release. *Id*. at 2382. Parole and probation both "replace[d] a portion" of a prison term, and therefore revoking them exposed the defendant "only to the *remaining* prison term authorized for his crime of conviction, as found by a unanimous jury." *Id*. Supervised release, by contrast, runs "after the completion" of a prison sentence, and thus revocation can expose a defendant "to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict." *Id.*

The *Haymond* plurality also delved deeply into Founding-era documents for first principles. Justice Gorsuch explained that the revocation proceeding was a "criminal prosecution" within the meaning of the Sixth Amendment because, at the time of the founding, a "prosecution" of a defendant "simply referred to 'the manner of [his] formal accusation.'" *Id.* at 2376 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 298 (1769)). Similarly, the Framers understood that "the concept of a 'crime' was a broad one linked to punishment"—that is, a crime refers to any acts done by a defendant "to which the law affixes punishment." *Id.* at 2376 (quoting 1 J. Bishop, Criminal Procedure §§ 80, 84, pp. 51–53 (2d. ed. 1872)) (cleaned up and additional citation omitted).

On the other side of the Court was Justice Alito, writing for a four-Justice dissent. Beyond the narrow question presented in *Haymond*, the dissent recognized that the plurality's logic would apply to supervised release as a whole. "[The plurality's implication] is clear enough: All supervised release proceedings must be conducted in compliance with the Sixth Amendment—which means that the defendant is entitled to a jury trial." *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting). There is no other option: the supervised-release revocation statute "sets out the procedure" for "all supervised-release revocation proceedings," so if it's unconstitutional regarding the mandatory minimum at issue in *Haymond*, then "the whole idea of supervised release must fall." *Id.*

The dissent further criticized the plurality for "mak[ing] no real effort to show that the Sixth Amendment was originally understood to require a jury trial in

a proceeding like a supervised-release revocation proceeding." *Id*. at 2392. Justice Alito identified how, prior to the adoption of the Sixth Amendment, "convicted criminals were often released on bonds and recognizances," and they could be imprisoned if they violated the conditions attached. *Id.* at 2396. The dissent saw "no evidence that there was a right to a jury trial at such [recognizance] proceedings," and thus nothing supporting trial rights at supervised-release proceedings. *Id*. But the discussion of recognizances was cursory, as the parties had not focused on recognizance proceedings as a historical analogue.

Justice Breyer was the tiebreaker. He declined to apply *Apprendi* and *Alleyne*. *See id*. at 2385-86 (Breyer, J., Concurring). Instead, he concluded that § 3583(k) was unconstitutional because of "three aspects" of the provision: (1) it applied to a discrete set of federal criminal offenses, (2) it took away the judge's discretion, and (3) it imposed a five-year minimum prison sentence. *Id.* at 2386. These aspects led him to "think it is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach." *Id*.

Although *Haymond* divided the Court, the overlap between the opinions was enough to cause jurists to question the previously accepted wisdom that the Sixth Amendment did not apply to supervised-release revocations. The *Haymond* plurality flatly rejected the assumption of lower courts that *Gagnon* and *Morrissey* apply to supervised release. *See, e.g., United States v. Pratt*, 52 F.3d 671, 675 (7th Cir. 1995); *United States v. Kirby*, 418 F.3d 621, 627 (6th Cir. 2005). And the opinions of both the *Haymond* plurality and dissent pointed toward a new method

for assessing the question: look at the original understanding of the Sixth Amendment at the time of the founding. *See Haymond*, 139 S. Ct. at 2375–77, 2392–93.

Thus, cases popped up around the country. Ten circuits rejected post-*Haymond* calls to reconsider circuit precedent surrounding the Sixth Amendment and supervised-release revocations.[1] But those challenges all lacked historical evidence necessary to address the key question asked by the *Haymond* dissent: How did the Framers think of the jury right as it applied to similar proceedings? Only this year, in a law review article published last May, did new research provide the means to answer that question. *See* Jacob Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. 1381 (2024).

Even without the full historical context, however, the view of the judiciary post-*Haymond* was far from unanimous. The issue created split panels in the Second, Fourth, Ninth, and Eleventh Circuits. *See Peguero*, 34 F.4th at 167 (Underhill, D.J., dissenting) (supervisees facing revocation are entitled to an indictment, jury trial, and confrontation rights); *Ka*, 982 F.3d at 228 (Gregory, J. dissenting) (after *Haymond*, courts must "reconsider the presumption that parole and probation case law apply equally to supervised release"); *United States v.*

[1] *See United States v. Peguero*, 34 F.4th 143 (2d Cir. 2022); *United States v. Seighman*, 966 F.3d 237 (3d Cir. 2020); *United States v. Ka*, 982 F.3d 219 (4th Cir. 2020); *United States v. Aguirre*, 776 F. App'x 866 (5th Cir. 2019); *United States v. Robinson*, 63 F.4th 530 (6th Cir. 2023); *United States v. Eagle Chasing*, 965 F.3d 647 (8th Cir. 2020); *United States v. Richards*, 52 F.4th 879 (9th Cir. 2022); *United States v. Salazar*, 987 F.3d 1248 (10th Cir. 2021); *United States v. Moore*, 22 F.4th 1258 (11th Cir. 2022); *United States v. Casseday*, 807 F. App'x 5 (D.C. Cir. 2020) (plain-error review).

Henderson, 998 F.3d 1071, 1084 (9th Cir. 2021) (Rakoff, J., dissenting) (would adopt Justice Gorsuch's reasoning to hold that revocation under § 3583(e)(3) violated Sixth Amendment); *Moore*, 22 F.4th at 1279 (Newsom, J., dissenting in part) (revocation sentence violated Fifth and Sixth Amendments). *See also Moore*, 22 F.4th at 1279 (Lagoa, J., concurring in part) (voting to affirm only because defendant forfeited claim and error was not plain).

In this Court, it remains an open question whether the Sixth Amendment applies to revocations under 18 U.S.C. § 3583(e). *See Peguero*, 34 F.4th at 166 (Underhill, J., dissenting) ("no decision of the Supreme Court … has ever analyzed whether a person on supervised release facing violation charges punishable by more than one year in prison has a right to indictment [and, therefore,] Sixth Amendment rights.") Outside this Court, however, the Seventh Circuit was one of only a few circuit courts that had not yet published a post-*Haymond* decision on this issue. At least until Carpenter, armed with new historical research about the jury right at the time of the founding, brought his case to that court.

III. The district court proceedings in this case

In 2018, Seldrick Carpenter pleaded guilty to distribution of fentanyl. (R. 13.) After serving a prison sentence of 37 months, Carpenter started a six-year term of supervised release. (R. 19.)

A couple years into Carpenter's supervision, his probation officer petitioned to revoke his supervised release because he refused a home inspection. (R. 27.) But the true basis for Carpenter's revocation came when the probation officer

supplemented the petition to allege that Carpenter committed the new crimes of criminal damage to property, arson, and intimidation. (R. 37.) The crux of the government's allegations was that Carpenter had set a parked car on fire because he was frustrated that the car's owner would not move the vehicle.

1. Carpenter moves for a jury trial.

Prior to the revocation hearing, Carpenter moved for a jury trial. (R. 44.) He raised two arguments. First, based on the Supreme Court's decision in *United States v. Haymond*, 139 S. Ct. 2369, as well as new research about the right to a jury for analogous proceedings at the time of the founding, Carpenter argued he was entitled to a jury under the Sixth Amendment. (R. 44 at 1–9.) Second, he argued that the jury clause of Article III, Section 2, Clause 3 of the Constitution created an additional jury right when, as here, revocation was based on allegations of new "crimes." (R. 44 at 7; R. 47 at 2–3.) To hammer the point that his potential revocation was essentially a new criminal prosecution, Carpenter pointed out that he faced a new sentence of up to 36 months in prison—only one month less than he received for his original conviction. (R. 47 at 1–2.)

The district court denied the motion. (App. 21a.) "To me, it's clear that there's no entitlement to a jury trial for supervised release issues." (App. 21a.)

2. The government relies on hearsay to prove Carpenter's guilt for arson and damage to property.

At the revocation hearing, the government presented security videos of someone damaging and then igniting the car. (R. 57 at 31–32.) But the nighttime

videos were blurry and partially obscured, and the district judge noted that he could not "make as much of the videos as the government wants me to." (App. 30–31a, 35a.) Nonetheless, the government called Carpenter's probation officer, who claimed she could identify a man in the videos as Carpenter because she recognized the car the man was driving. (R. 57 at 89.)

The government's other key evidence was a video of a police interview with a third party who claimed that Carpenter confessed to the arson. (R. 57 at 51; Gov't Revocation Ex. 12 at 11:15–11:32.) According to the video-recorded statement, Carpenter admitted to the woman that he set the car on fire because the owner would not move it. (Gov't Revocation Ex. 12 at 18:02–18:55.) Carpenter objected to the interview, arguing that he should have a chance to cross-examine the witness at trial pursuant to his Sixth Amendment rights. (R. 57 at 52–53.) But when the court again denied Carpenter's request for a trial, defense counsel conceded that he had no grounds to object to the video. (R. 57 at 54.)

Carpenter's defense to the arson allegations was twofold.

First, he presented evidence that he could not be identified as the man in the security videos. Among other things, Carpenter established that he and his two brothers looked similar and were easily confused. (R. 57 at 65, 67–69.) He also presented repair records showing that his car was in the shop at the relevant time. (R. 57 at 103.) After seeing these records, Carpenter's probation officer conceded that she was wrong that the man in the security video was driving Carpenter's car. (R. 57 at 104.)

Second, Carpenter presented evidence of a local campaign against him that could have motivated witnesses to falsely implicate him. A police officer who investigated the arson admitted that he was aware of a social-media campaign against Carpenter and his family because of local suspicion that they were involved in a woman's disappearance years earlier. (R. 57 at 61–66.) The defense played a video of a demonstration outside Carpenter's house, in which protestors demanded justice for the missing woman. (R. 57 at 62–65.) And as further evidence of the community's bias against Carpenter, the defense presented Facebook posts calling for Carpenter's imprisonment. (R. 57 at 70; Def. Revocation Ex. 4C.) These included a video posted by the car's owner, which was then disseminated by an anti-Carpenter campaign group. (Def. Revocation Ex. 4C at 1.)

3. The district court's ruling

The district court found Carpenter guilty of five violations: (1) refusal to permit a home visit; (2) failure to complete a therapy program; (3) committing the new offense of criminal damage to property; (4) committing the new offense of arson; and (5) committing the new offense of intimidation. (App. 66–67a.)

Regarding the car fire, the court said that it could not give much credibility to any witness's claim to identify Carpenter in the arson video. (App. 29a, 30–31a, 35a.) So, instead of relying on the grainy security videos, the court found Carpenter guilty of arson and damage to property largely because of the police video of the witness who claimed that Carpenter had confessed. (App. 35a.) The court referred to the alleged confession as "very strong evidence." (App. 35a.) The court rejected the

defense's argument that the woman had motive to lie against Carpenter, concluding that there was not enough evidence tying the local campaign against Carpenter to the witness. (App. 35–36a.)

4. The district court reopens the jury question under Article III.

Before sentencing, the district court briefly reopened the question of whether Carpenter had a jury right under Article III of the Constitution. (App. 37a.) But after additional briefing and argument (R. 49; App.42–48a), the court again denied the request (App. 49a). The issue would need to go up for appeal, the court explained, and if a higher court "tells me I'm wrong, I'll follow that instruction." (App. 49a.)

5. Carpenter is sentenced to prison.

The district court imposed a sentence of 30 months' imprisonment. (App. 63a, 68a.) It ordered no additional supervised release. (App. 63a.) Had the court wanted, however, it could have increased the length of Carpenter's supervision any amount it wanted: The drug-trafficking statute underlying Carpenter's original conviction allows a lifetime term of supervised release, 21 U.S.C. § 841, so any violation of supervised release re-exposed Carpenter to a lifetime term. *See* 18 U.S.C. § 3583(h).

IV. The Seventh Circuit's decision

On appeal to the Seventh Circuit, Carpenter contended that the district court erred by revoking his supervised release without first holding a jury trial. (App. 1–2a.) He argued that federal supervisees had a Constitutional right to a jury trial pursuant to both the Sixth Amendment and Article III's jury clause. (App. 1–2a.) He

relied on this Court's opinion in *Haymond*, and on new historical research about the scope of the jury right at the founding. (App. 3a, 5a.)

Citing "thirty years of contrary precedent" in the Seventh Circuit, that court rejected Carpenter's Sixth Amendment claim. (App. 4a.) The court recognized that the *Haymond* plurality opinion "appeared to suggest that—contrary to our precedent—most, if not all, supervised release revocations are 'criminal prosecutions.'" (App 6a.) But it viewed Justice Breyer's concurrence as the controlling opinion, and it concluded that Justice Breyer's narrow analysis did not upset circuit precedent. (App 9–10a.)

The Seventh Circuit also rejected Carpenter's Article III claim. (App. 10–13a.) The court recognized that the Sixth Amendment had not supplanted Article III's jury clause, and that the two provisions were designed to "operate in tandem." (App. 12a.) But it viewed the Sixth Amendment as meant to complement the jury right under Article III, and it held that "a proceeding that does not trigger the Sixth Amendment cannot independently trigger Article III, § 2." (App. 13a.)

REASONS FOR GRANTING THE PETITION

When the Framers codified the jury right in the Constitution, they would have recognized postconviction recognizances as a common legal device imposed on criminal defendants. And the Framers would have known that defendants received jury trials when facing forfeitures of recognizance (the historic equivalent to modern revocation). Our forefathers wrote the Constitution to protect that jury right. Because federal supervised release is an analytical match for postconviction

recognizances in form, function, and purpose, our forefathers would have understood the jury right to apply to those proceedings too.

The Seventh Circuit rejected Carpenter's claim because of its own precedent holding that the Sixth Amendment does not apply to supervised-release revocations. But this Court does not face similar constraints, as this Court has not yet tackled the question of whether revocations under 18 U.S.C. § 3583(e)(3) implicate the Sixth Amendment. It should take up the question now, as well as the related question of whether supervisees have a jury right under Article III, § 2 of the Constitution.

Split panels from multiple circuits also show that jurists are divided on the existence of a jury right post-*Haymond*. This Court's intervention is necessary to clarify whether, and to what extent, the Sixth Amendment applies to revocations of supervised release under § 3583(e)(3). At the same time, because almost every lower court has already decided this issue, Carpenter's case is one of the few chances left for this Court to address it.

Addressing the issue is also necessary to vindicate the right of the People to police criminal proceedings through jury trials. As for the criminal defendants, the liberty of tens of thousands of Americans is at stake. Almost every felony sentence in federal court includes a component of supervised release. And court records show that the government frequently uses revocation to punish supervisees in situations where it would not be able to carry its burden in a criminal trial.

Finally, this case would be an excellent vehicle for this Court to address the issue. To any layperson, Carpenter's revocation would have looked exactly like a

criminal prosecution. He was accused of committing multiple crimes. Members of his community, already out for blood, wanted to see Carpenter go away for those crimes. The State's Attorney's Office could have pursued a trial in state court to prosecute Carpenter on state charges. But, because Carpenter was already on federal supervised release, the state could instead hand off the case to federal authorities to pursue revocation. The revocation in this case was simply an easier alternative for the government to punish Carpenter.

I. The Sixth Amendment provides a jury right to federal supervisees at revocation.

Federal supervised release is different from probation or parole. The Framers would have recognized supervised-release revocations as analogous to forfeitures of recognizance, an historical proceeding for which the jury right attached. And although Carpenter does not challenge this Court's holdings that no jury right attaches to revocations of probation or parole, the *Haymond* plurality correctly identified structural differences between supervised release versus probation and parole. The Seventh Circuit thus got it wrong when it affirmed Carpenter's revocation.

1. The Framers would have understood the Sixth Amendment to apply to supervised-release revocation proceedings.

a. Forfeitures of recognizance are a close historical analogue for federal supervised release.

In his *Haymond* dissent, Justice Alito cited recognizances as an historical analogue to modern federal supervised release. *Haymond*, 139 S. Ct. at 2396 (Alito,

J., dissenting). He was right to do so—recognizances and supervised release are close siblings. Founding-era courts used recognizances, also called a "peace bond" or "surety for the peace," to impose conditions on criminal defendants. *See* Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1384 (citing Lawrence M. Friedman, *Crime & Punishment in Am. History* at 38 (1993); 4 Blackstone, *Commentaries* at 251).

In the founding era, American judges used recognizances widely—so often that legal treatises contained stock forms. *Id.* at 1405. One of "the most published and widely circulated" treatises in early-American legal use, *The New Virginia Justice*, included fill-in-the-blank recognizances. *Id.* at 1405 (quoting Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J.S. Legal Hist. 315, 328 (2018)). *See also* William Hening, *New Virginia Justice* at 25, 438 (1795) (available at: https://bit.ly/3sNicUI). The Framers of the Sixth Amendment were undoubtedly familiar with this procedure. *The New Virginia Justice* counted both James Madison and Thomas Jefferson among its subscribers. *See* William Hening, *New Virgina Justice* (listing subscribers at front of treatise, unpaginated). And founding-era newspapers matter-of-factly discussed recognizances in criminal news of the day. *See* Aurora Gen. Advertiser at 2 (Feb. 7, 1805) (No. 4401) (available at: https://bit.ly/3Z64Q1Q) (reporting on a jury trial for breach of recognizance); The Centinel No. 43 at 339 (Mar. 25, 1807) (available at: https://bit.ly/3ENh2eN) (discussing Aaron Burr's recognizance proceedings); Norfolk Gazette & Publick

Ledger No. 136 at 3 (May 29, 1807) (same). The term "recognizance" was everyday fare understood by the public at large.

These recognizances, widespread and well-known to the Framers, have multiple similarities with modern supervised release. At least five core functions overlap between the two.

First, recognizances operated like supervised release—imposing conditions and revocable release. "Every recognizance was [] 'subject to a *condition*,'" that might last until "the next court session, for a fixed period of time, or even for life." Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1407 (citations omitted). Two common conditions, found in the form order printed in *The New Virginia Justice*, were "to keep the peace" and "be of good behavior." *Id.* at 1405, 1408. A person could violate the keep-peace condition by violent crimes, "some act, as an affray, or battery, or the like." *Id*. at 1408 (quoting 1 Edward Coke, *The Fourth Part of the Institutes of the Laws of England Concerning the Jurisdiction of the Courts* at 179 (1797)). The good-behavior condition was broader, barring a person from "scandal against good morals." *Id*. at 1408 (quoting Hening, *New Virginia Justice*, at 440). These conditions are analogous to modern conditions prohibiting supervisees from committing new crimes and imposing technical rules to ensure moral behavior.

Second, founding-era courts imposed recognizances as part of criminal sentences—precisely like modern courts impose supervised release. Early American treatises listed recognizances attached to criminal sentences. *Id.* at 1410 (citing 4 Blackstone, *Commentaries* at 248) (additional citation omitted). The Supreme Court

of Pennsylvania held that judges had "inherent power to take recognizance for good behavior after conviction." *Id.* at 1410 (citing *Commonwealth v. Davies*, 1 Binn. 97, 98 n. a (Pa. 1804)). And states enacted laws empowering judges to impose recognizances for numerous crimes. *Id.* at 1410–11. Postconviction recognizances were widespread in the courts of Philadelphia, New York, Virginia, Maryland, Connecticut, and New England. *Id.* at 1411–12.

Third, recognizances, like supervised release, came with surveillance and reporting. Judges required recognizors to find sureties—third parties who were "expected to exercise some supervision over the bonded person," including arresting a breaching recognizor and delivering him to court to be incarcerated. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1412–13 (citation omitted).

Fourth, for defendants who violated recognizance conditions, courts could and did impose jail—like supervised release. *See Haymond*, 139 S. Ct. at 2396 (Alito, J., dissenting) (violating recognizance could result in "a loss of liberty"). The process was framed as a debt, but functionally courts could levy impossible recognizance amounts. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1415. Judges used recognizances effectively as warrants by "sometimes order[ing] recognizors to pledge enormous sums of money that no one in the community could have realistically afforded," and thereby "keep them in prison" with no ability to pay. *Id.* at 1416–17 (quoting Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania*, 111 (1907)) (internal quotes omitted) (additional citations omitted).

Fifth, the two schemes share the same purpose: public protection. Courts imposed recognizances conditioned on good behavior "to prevent criminal actions by the defendant"—the purpose "was to prevent crimes, or public wrongs, and misdemeanors, and for no other purpose." *Respublica v. Cobbett*, 3 U.S. 467, 475 (Penn. 1798). Courts understood that recognizances were self-evidently "of a criminal nature" with a purpose identical to modern supervised release. *See id.*

In short, Founding-era recognizances were a common and well-known analogue to modern supervised release.

b. The Framers understood defendants facing recognizance forfeiture to have Sixth Amendment rights.

The *Haymond* dissent saw "no evidence that there was a right to a jury trial" at recognizance proceedings and, without such evidence, concluded that the original scope of the Sixth Amendment couldn't encompass something like supervised release. *Haymond*, 139 S. Ct. at 2398 (Alito, J., dissenting). At the time, Justice Alito was right about the lack of such evidence—there had been virtually nothing written on the topic. That has changed because of post-*Haymond* scholarship.

New research shows that unequivocally "yes. At the time the Constitution was ratified, recognizance forfeitures required a jury trial." Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1417–18. The evidence is ample; numerous historic cases discuss recognizance juries.[2]

[2] *See, e.g., Mix v. People*, 29 Ill. 196, 197–98 (1862) ("upon a common recognizance … The verdict of the jury was ... for the plaintiff"); *Regina v. Harmer*, 1859 WL 9677 (U.C. Q.B. 1859); *Sans v. People*, 3 Gilman 327, 329 (Ill. 1846) ("[A] scire facias issued against him, and … his security … The jury returned a verdict against the plaintiff, upon which judgment was rendered by the court.");

Beyond judicial opinions, long-preserved court records show defendants received recognizance juries as far back as the 15th century. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1419 (citing The Year Books: Report #1494.073, *Legal History: The Year Books, Boston University School of Law*) (available at: https://bit.ly/3ErE8Y7). Treatises show that English courts in the 1600s and 1700s would empanel a "jury" to decide whether a defendant "forfeited his recognizance by breach of the peace." *Id.* at 1419. Early American courts were the same. *Id.* at 1419–21.

In short, the Framers of the Sixth Amendment understood that the amendment would codify an existing jury right for postconviction recognizances, a system matching supervised release in form, function, and purpose. The two need not be identical—indeed, historical practices rarely are. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2133 (2022) ("[A]nalogical reasoning requires only ... a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough."). And because of their similarity,

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Rex v. Wiblin, 2 Car. & P. 9 n. 2 (1825) ("When a person has entered into a recognizance to keep the peace … If the jury find that the recognizance has been forfeited, they find a verdict for the crown, and judgment is entered up."); *Commonwealth v. Emery*, 2 Binn. 431, 433–35 (Pa. 1810) ("The objections are, that the evidence given to the jury was not a recognizance, but only a loose note ... But I see nothing illegal or dangerous in the[] practice of taking and certifying recognizances by short minutes, or in permitting those minutes to be given in evidence to juries, as often as questions arise on the recognizances."); *Commonwealth v. Davies*, 1 Binn. 97, 99–100 (Penn. 1804) ("The point which led ultimately to the present argument ... was this, that unless the jury might find less than the whole amount, and this it was said they could not do, a recognizance of this kind if forfeited by a libel would prove a direct restraint upon the press.").

supervisees should receive the same constitutional protections their forebears possessed, nothing less.

2. The *Haymond* plurality correctly identified a "structural difference" between supervised release versus probation or parole.

The history of the forfeiture jury also supports the *Haymond* plurality's conclusion that supervised release is structurally different from probation or parole. When the Constitution was ratified, the common law required juries for recognizance forfeitures because recognizance was structured as an additional sentence. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1434.

Then, during the 1800s, the systems of community supervision slowly changed. Beginning in the 1830s, judges who had long relied on recognizances began slowly adopting a new practice called "laying a case on file," which was simply to postpone sentencing indefinitely. *Id.* at 1426–28; *see also Ex Parte U.S.*, 242 U.S. 27, 50 (1916) (discussing "a system styled 'laying the case on file'"). Later developments, like the development of parole and the formalization of "laying a case on file" into "probation," further changed the structure of community supervision from an additional penalty to a withheld punishment. This change is the reason why the forfeiture jury disappeared during the 19th century. Schuman, *Revocation at the Founding*, 122 Mich. L. Rev. at 1434. Revocation of these newer forms of supervision was merely reinstatement of a prison term that had been "imposed previously," not a new punishment necessitating a jury. *Gagnon*, 411 U.S. at 782 n.3.

For federal supervised release, Congress intended to switch back to a version of supervision that was like old-fashioned recognizances and unlike the withheld-punishment models of parole and probation. Prior to the Sentencing Reform Act, the parole system was premised on the idea that prison was rehabilitative. *Tapia*, 564 U.S. at 324. But in the final quarter of the twentieth century, lawmakers started to doubt the prison system's ability to rehabilitate inmates. *Mistretta*, 488 U.S. at 365. In part to reject the rehabilitative model, Congress abolished parole. *Mistretta*, 488 U.S., at 365. Now, federal inmates can no longer obtain early suspension of a portion of their prison sentences.

When abolishing parole, Congress wrote the Sentencing Reform Act to emphasize that supervised release is structurally different. Because a federal parole board can no longer set aside part of a defendant's prison sentence, the Sentencing Reform Act stripped courts of any power to order rehabilitative programming for imprisoned persons. *Tapia*, 564 U.S. at 325–26. Prison sentences are now determinate and exclusively for the purposes of retribution, deterrence, and incapacitation. *Id.*; 18 U.S.C. §§ 3553(a)(2), 3582(a). Courts can still address rehabilitative concerns through a *separate* term of supervised release, and courts remain empowered to order rehabilitative programming for supervisees. 18 U.S.C. § 3583(c); *Tapia*, 564 U.S. at 330. But Congress made sure to create a firewall between a prison sentence, which is punitive and "not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. § 3582(a), and a supervised-release sentence, which is rehabilitative but cannot be part of a defendant's

punishment, 18 U.S.C. § 3583(c). Two separate terms serving two separate purposes.

And that's the dispositive difference. Defendants on parole or probation were relieved from their prison sentences and owed a balance for withheld punishment. With a debt outstanding, courts correctly reasoned that revocations were not "prosecutions" under the Sixth Amendment but rather the reimposition of a previously imposed sentence. But when a defendant starts his first day of supervised release, he does so only "after the completion of his prison term," owing not a single day in prison for his original offense. *See Haymond*, 139 S. Ct. at 2382 (citing U.S. Sent. Comm'n, Guidelines Manual, ch. 7, pt. A(2)(b) (Nov. 2012) and Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. at 1024). "Unlike parole, which replaced a portion of a defendant's prison sentence, supervised release is a separate term." *Johnson v. United States*, 529 U.S. 694, 725 (2000)) (Scalia, J., dissenting).

The *Haymond* plurality recognized that this "structural difference"—the change from a balance-owed to a no-balance system—bares "constitutional consequences." *Haymond*, 139 S. Ct. at 2382. Structurally, supervised release shares more in common with historical recognizances than parole. A jury right that applied to recognizors facing revocation should apply equally to federal supervisees.

3. The Seventh Circuit's decision is wrong.

The Seventh Circuit rejected Carpenter's Sixth Amendment claim, concluding that *Haymond* had not undone its own "thirty years of contrary precedent." (App.

4a.) But the Seventh Circuit did not grapple with the historical evidence outlined above, nor did it address the merits of the *Haymond* plurality's analysis that supervised release is structurally different from probation or parole. *Haymond*, 139 S. Ct. at 2382. Instead, the court concluded that well-established circuit law foreclosed a substantive analysis of the merits of Carpenter's arguments. (App. 4–10a.)

This Court would face no similar barrier to considering the merits of Carpenter's Sixth Amendment claim. Unlike the lower courts, this Court has never held that *Morrissey* and *Gagnon* apply to supervised-release revocations. *Contrast, e.g., Pratt*, 52 F.3d at 675. This Court has never decided whether a federal supervisee is entitled to Sixth Amendment protections when facing felony prison time at revocation. *See Peguero*, 34 F.4th at 166 (Underhill, J., dissenting). This Court can do what the Seventh Circuit couldn't. It can consider the historical evidence and address the question head on.

II. Article III of the Constitution creates a jury right, distinct from the Sixth Amendment, which applies in this case.

Along with the Sixth Amendment, this Court should take up Carpenter's second claim that Article III creates an additional and distinct jury right for federal supervisees facing revocation.

1. Article III's text and history support a jury right distinct from the Sixth Amendment.

First, the text of the Constitution supports the idea that distinct jury rights reside within Article III and the Sixth Amendment. The Sixth Amendment states

that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…" U.S. Const. amend. VI, § 1. The qualifier in the opening clause, limiting the Sixth Amendment to "criminal prosecutions," has been crucial to this Court's cases construing the amendment. *See, e.g., Morrissey*, 408 U.S. at 480.

Article III contains no such limitation; it states simply that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. Const. art. III, § 2, cl. 3. Unlike the Sixth Amendment's limitation to "criminal prosecutions," Article III applies to "all crimes." And Carpenter's revocation, based on the government's accusations that he committed property damage, arson, and intimidation, falls squarely within the term "all crimes."

In addition to the plain text, this Court has also interpreted Article III differently than the Sixth Amendment. In *Williams v. Florida*, 399 U.S. 78, 92 (1970), this Court went through the drafting history of Article III and the Sixth Amendment. It explained that, when initially drafted, opponents complained that Article III did not incorporate all features of the jury at common law. *Id.* In particular, Article III lacked any right to be tried by a "jury of the vicinage" (that is, a local jury). *Id.* Concerns over this omission led in part to the creation of the Sixth Amendment, which included a compromise provision guaranteeing a jury from the district where the crime was committed. *Id.* at 93–96. This Court observed that, although the vicinage requirement was an ingrained feature of the common law, the Framers did not interpret Article III's jury clause to incorporate that feature. *Id.* at

96. *See also Smith v. United States*, 599 U.S. 236, 248 (2023) (summarizing this same drafting history).

In other words, "the Sixth Amendment was drafted on the assumption that the jury clause in Article III, sec. 2 had *not* incorporated the common law features of the jury." *United States v. Turrietta*, 696 F.3d 972, 978 n.10 (10th Cir. 2012) (citing *Williams*, 399 U.S. at 92). Or as put by James McHenry, a signer and advocate of the Constitution, Article III's jury clause was purposely "left open and undefined from the difficulty of attending any limitation to so valuable a privilege, and from the persuasion that Congress might hereafter make provision more suitable to each respective State." 3 Records of the Federal Convention of 1787, p. 150 (M. Farrand ed. 1911). Only later, with the adoption of the Sixth Amendment, did the Framers incorporate rules about what a jury should look like. But the underlying right to *a* jury, as written in Article III, was kept intentionally broad. *Id.*

So if Article III's jury clause does not preserve the *features* of the common-law jury, what does it protect? The answer is *when* the criminally accused is entitled to a jury. James Wilson, a drafter of the Constitution and inaugural member of the Supreme Court, explained that Article III was meant to secure the jury right "[w]henever the general government can be a party against a citizen." *Id.* at 163. Or as this Court explained in the late 1800s, Article III provides a broad jury right whenever one is accused of a "crime," with that word "interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury." *Callan v. Wilson*, 127 U.S. 540, 549

(1888). But Article III only "implie[s] a trial in that mode"; it does not preserve the individual procedural rules of how a jury trial should function. *Id.* The Sixth Amendment provides a separate "declaration of what those [procedural] rules were." *Id. See also Ex Parte Quirin*, 317 U.S. 1, 39 (1942).

In sum: Article III broadly preserves the right to a jury whenever the government brings claims against a defendant, but it does not dictate the jury's features; the Sixth Amendment creates additional rules about jury features and criminal procedure, but it also includes an additional limitation on when those rules apply (only in "criminal proceedings"). That additional limitation does not apply to Article III's jury clause, the only limitation of which is that the controversy must include a "crime," a broad concept the Framers understood to cover any "acts to which the law affixes punishment." *Haymond*, 139 S. Ct. at 2376 (cleaned up and citations omitted).

Although Article III's jury clause does not incorporate all common-law features of the jury, the scope of the provisions it does include is determined by looking at common-law history. *See Smith*, 599 U.S. at 246–52 (interpreting the venue provision by looking at historical sources). And as outlined above, the common law at the time of the founding would have provided a jury in circumstances that look very similar to Carpenter's revocation hearing. Article III's jury clause protects that common-law right. It may not necessarily entitle Carpenter to a jury with all the features incorporated in the Sixth Amendment, but it entitles him to some sort of jury trial.

2. The Seventh Circuit's decision is wrong.

The Seventh Circuit misunderstood Carpenter's argument as being that "Article III's jury guarantee [is] independent from and broader than that contained in the Sixth Amendment." (App. 11a.) That's not quite right. Carpenter does not maintain that Article III is broader. In many ways, the Sixth Amendment creates greater protections than Article III. But the protections provided by each provision are *different*. And one of those differences is that Article III provides for jury trials in situations that the Sixth Amendment does not, even if those jury trials lack all the formality of Sixth Amendment proceedings.

In fairness to the Seventh Circuit's analysis, however, Article III's jury clause is an underdeveloped area of jurisprudence. The legal community would benefit from this Court's guidance in this area.

III. This issue has caused debate in the judiciary that requires this Court's intervention.

Every court of appeals to address the scope of the jury right post-*Haymond* has continued to hold that the Sixth Amendment does not apply to most revocations of supervised release. *See, supra,* n.1. But that does not mean that members of the judiciary are unanimous. The issue created split panels in four circuits. *See Peguero*, 34 F.4th at 167 (Underhill, D.J., dissenting); *Ka*, 982 F.3d at 228 (Gregory, J. dissenting); *Henderson*, 998 F.3d at 1084 (Rakoff, J., dissenting); *Moore*, 22 F.4th at 1279 (Newsom, J., dissenting in part); *Moore*, 22 F.4th at 1279 (Lagoa, J.,

concurring in part). A real divide is growing among judges over whether the Sixth Amendment should apply to some or all supervised-release revocations.

As demonstrated by the Seventh Circuit's opinion in this case, however, the courts of appeals are unlikely to consider the historical evidence without this Court's intervention. Like the Seventh Circuit, virtually every circuit has "thirty years of contrary precedent" holding that supervised-release revocations fall outside the Sixth Amendment. (App. 4a.) Even though this Court has not issued its own opinions on the matter, the courts of appeals do not lightly discard their own precedent without higher guidance.

At the same time, this case (and the companion case in *United States v. Smith*) may be one of the last opportunities for this Court to take up the issue. The Seventh Circuit was the eleventh court of appeals to address this question; ten other circuits had already decided the issue. Litigants are unlikely to raise this claim again once it has been foreclosed by circuit law. If this Court does not grant certiorari now, it may not have another opportunity to do so.

IV. Resolution of this issue is necessary to vindicate the rights of federal supervisees nationwide, as well as the right of the People to police the Executive and Judicial branches.

The rights of tens of thousands of Americans are at stake. Each year, around 50,000 federally sentenced individuals begin serving terms of supervised release.[3]

[3] *See* U.S. Dep't of Justice, Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release 2 (2023), https://www.justice.gov/d9/2023-05/Sec.%2015%28h%29%20-%20DOJ%20Report%20on%20Resources%20and%20Demographic%20Data%20for%20Individuals%20on%20Federal%20Probation.pdf; Administrative Office of the United States Courts, Statistics and

More than double that number are actively serving supervised-release terms.[4] Convictions for drug distribution, or for other crimes like "terrorism" or certain sex offenses, can trigger mandatory minimum supervised release terms of two to ten years, and maximum terms of life. 18 U.S.C. § 3583(j)-(k); 21 U.S.C. § 841(b). And sentencing courts may extend a term supervised release up to the maximum "at any time," 18 U.S.C. § 3583(e)(2), or impose additional years up to the maximum upon a finding of violation. 18 U.S.C. § 3583(h). In short, Congress has created a system by which a class of Americans can be stripped of their Sixth Amendment rights *for life*.

As it stands, nothing prevents Congress from adopting similar lifetime supervision laws for even more types of offenses. Without constitutional protection, "Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything." *Haymond*, 139 S. Ct. at 2380. The Constitution cannot allow this.

The deprivation of these Americans' rights is not mere hypothetical. Federal prosecutors frequently use revocation proceedings to circumvent supervisees' trial rights. In situations like Carpenter's, in which prosecutors lack sufficient evidence to pursue criminal charges, revocation offers a streamlined alternative with a lower

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Reports, Table E-1—Federal Probation System Statistical Tables for the Federal Judiciary, U.S. Courts, https://www.uscourts.gov/statistics/table/e-1/statistical-tables-federal-judiciary/2023/12/31.

[4] Administrative Office of the United States Courts, Statistics and Reports, Table E-2—Federal Probation System Statistical Tables for the Federal Judiciary, U.S. Courts, https://www.uscourts.gov/report-names/statistical-tables-federal-judiciary.

burden of proof and without pesky irritations like the Confrontation Clause or rules of evidence. Take Eric Colclough, for example, a 33-year-old Black man who was serving supervised release in New Jersey. In November 2023, a local police officer called Mr. Colclough's supervision officer, claiming that video footage showed Mr. Colclough attempting to fire a gun near a corner store in Jersey City.[5] The video was far from conclusive, showing only a "darkened" person walking down the street in "a hoodie," whose face was not visible, and who was not even clearly holding a firearm.[6] But recognizing that the standard of proof was lower at revocation hearings, the district court revoked Colclough's supervised release based on (1) hearsay police reports from non-testifying officers who did not witness the incident; and (2) the supervision officer's hearsay recollection of his call with a local police officer (neither of who witnessed the incident).[7] Colclough went to prison.[8] And he is not alone in being sent to prison based on evidence that would have been insufficient at trial.[9]

Even worse, federal prosecutors frequently pursue revocations after a jury has *acquitted* a supervisee of the very same conduct. Consider James Harris, a 32-

[5] Violation of Supervised Release Hearing Transcript at 10, *United States v. Colclough*, No. 21-cr-814 (D. NJ. Jan. 31, 2024).

[6] *Id.* at 22–25.

[7] *Id.* at 10, 25–26, 31.

[8] *Id.* at 46–47.

[9] *See, e.g., United States v. Dunlap*, No. 8:06CR244, 2012 WL 3656636, at *3 (D. Neb. Aug. 24, 2012) (revoking supervised release while recognizing that government would not have been able to pursue criminal prosecution); *United States v. Robinson*, 63 F. 4th 530, 533 (6th Cir. 2023) (revoking supervised release based on fruits of illegal search that would not have been admissible at trial); *United States v. Phillips*, 914 F.3d 557, 559 (7th Cir. 2019) (same, holding that exclusionary rule does not apply to revocation hearings).

year-old Black man charged in Illinois state court with unlawful possession of a firearm as a felon.[10] Police arrested Harris for carrying a purse with a gun inside.[11] But Harris later showed at trial that neither the purse nor gun belonged to him; he was returning the forgotten purse to a female friend, and he claimed not to know its contents.[12] Although a jury acquitted Harris, the government pressed for revocation based on the same incident.[13] And, under the lower standard of evidence that applies to revocation proceedings, Harris went to federal prison for the exact same crime for which a state jury refused to convict him.[14] Many other federal supervisees who have prevailed against new charges at trial have suffered a similar fate.[15]

Revocation proceedings like the ones outlined above represent a usurpation of the People's authority under the Constitution. The jury power is more than just a "procedural formality" for defendants; the jury is a "fundamental reservation of power" to the American public to check the Executive and Judicial Branches. *Blakely v. Washington*, 542 U.S. 296, 306–07 (2004). "Just as the right to vote

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[10] *See People v. Harris*, 21CR13123-01 (Ill. Cir. Ct. Cook County).

[11] Violation of Supervised Release Hearing Transcript at 12–19, *United States v. Harris*, No. 1:11-CR-00667 (N.D. Ill. July 12, 2023).

[12] *Id.* at 14–15, 24–25.

[13] *Id.* at 11–12, 26, 32.

[14] Revocation and Sentencing Transcript, at 7–8, *United States v. Harris*, No. 1:11-CR-00667 (N.D. Ill. July 14, 2023).

[15] *See, e.g., United States v. Brown*, No. 21-3766, 2022 WL 2709431, at *1 (8th Cir. July 11, 2022) (affirming revocation following acquittal, despite concern that "government essentially got a second bite at the apple."); *United States v. Fredrickson*, 988 F.3d 76, 84 (1st Cir. 2021) (same judge who oversaw jury acquittal later revoked supervisee based on acquitted conduct*); United States v. McCall*, No. 7-cr-96 (W.D. Tex. Mar. 4, 2021) (sentencing supervisee to nearly five years' imprisonment after jury acquitted him for the same conduct in *United States v. McCall*, No. 20-cr-223 (W.D. Tex. Feb. 25, 2021)).

sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S. Ct. at 2375 (citing J. Adams, Diary Entry (Feb. 12, 1771), in 2 Diary & Autobiography of John Adams 3 (L. Butterfield ed. 1961). *See also Erlinger v. United States*, 144 S. Ct. 1840, 1850 (2024). The People's constitutional authority is nullified if the government can simply sidestep an acquittal (or forego the annoyance of a trial entirely) by seeking revocation based on an informal hearing.

Carpenter understands that members of this Court may have concerns about whether courts could empanel enough juries to provide supervisees their constitutional rights. *See Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting) (noting that in 2018, federal district courts completed 1,809 criminal jury trials and 16,946 revocations of supervised release). But guaranteeing federal supervisees their constitutional rights would not be as burdensome to the judiciary as this Court might think. Just as most original criminal prosecutions end in guilty pleas, most revocation petitions also end in deals between the parties. According to statistics compiled by the United States Sentencing Commission, supervisees already admit more than 80 percent of alleged violations. *See Federal Probation and Supervised Release Violations*, United States Sentencing Commission (July 2020), at 30, available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf. The number of

contested revocations would only go down if the government faced the prospect of trial, and thus had more incentive to negotiate deals.

And jury trials for supervision revocations is not a new concept; as originally enacted, the Sentencing Reform Act required full jury trials before sending supervisees back to prison. *See* Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. at 1000. Only through a last-minute amendment before the law went into effect did Congress strip supervisees of their Sixth Amendment rights and create the system of revocations that we have now. *Id*. at 1001. Just as Congress initially envisioned a system that complied with the Sixth Amendment, this Court can restore the constitutional rights of supervisees and the general public without abolishing supervised release.

V. This case is an excellent vehicle for this Court to address the issue.

Any layperson who stepped into the courtroom during Carpenter's revocation would have seen what looked like a criminal trial. The government was trying to prove that Carpenter committed arson, a charge that he denied. And the hearing had all the hallmarks of a criminal proceeding: "(1) the government (2) accuses the defendant (3) of violating a condition of supervised release and, (4) if that charge is proven, the defendant will be sentenced to a new term of imprisonment." *Peguero*, 34 F.4th at 167 (Underhill, D.J. dissenting).

But the proceeding was not a trial. And in Carpenter's case, the government's ability to avoid a trial proved dispositive. The government's evidence against

Carpenter was not strong. For the government's main charges against Carpenter—for arson and damage to property—the government relied primarily on a hearsay video statement claiming that Carpenter had confessed. (Gov't Revocation Ex. 12; App. 35a.) That video would not have been admissible in a jury trial. And because Carpenter lacked the opportunity to cross-examine the witness, he was not able to draw out any information about her knowledge of the local, public-pressure campaign to send him to prison. Had this gone to trial before a jury, Carpenter likely could have obtained acquittal for at least some charges.

Further, Carpenter's original underlying conviction is for distribution of heroin and fentanyl under 21 U.S.C. § 841, one of the statutes that allows life-long terms of supervised release. Thus, any minor violation—missing a single drug test—allows imposition of a new lifetime term. *See* 18 U.S.C. § 3583(h). Although the district court did not impose additional supervised release in this case, it had discretion to do so.

Because Carpenter's case is an example of the types of mini-trials that frequently occur at revocation hearings, and because it illustrates the possibility of lifetime supervision, his case is an ideal representative of the issues at stake.

CONCLUSION

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

Respectfully submitted,

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