No. 21-68

In the Supreme Court of the United States

BRENDON JANIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the supervised-release condition recommended in Sentencing Guidelines § 5D1.3(c)(12) impermissibly delegates judicial authority or is unconstitutionally vague.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

United States v. *Janis*, No. 20-1077 (Apr. 27, 2021)

United States District Court (D. S.D.):

United States v. *Janis*, No. 17-cr-50076 (Jan. 6, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 995 F.3d 647.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2021. The petition for a writ of certiorari was filed on July 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioner was convicted of conspiring to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846, and possessing a firearm as a prohibited person, in violation of 18 U.S.C. 922(g)(3). Pet. App. 11a-12a. He was sentenced to 180 months of imprisonment,

to be followed by five years of supervised release. *Id.* at 13a-15a. The court of appeals affirmed. *Id.* at 1a-10a.

1. In 2015, petitioner and others participated in an extensive conspiracy to distribute methamphetamine in South Dakota. See Gov't C.A. Br. 4-7. One confidential informant later testified that he purchased methamphetamine from petitioner 50 to 60 separate times. *Id.* at 4. A co-conspirator testified she purchased "8-balls of methamphetamine" from petitioner "so many times [that she] could not remember," but "she knew it had been at least 10 times." *Id.* at 6. Another co-conspirator described a time when petitioner hid drugs and guns from police at a hotel. *Id.* at 5. And another testified that petitioner sent him to meet "the 'big homies,' drug suppliers from California, to pick up drugs." *Ibid.*

In 2017, law enforcement officers executed search warrants for petitioner's home and car and found drugs, guns, and drug-trafficking paraphernalia inside. Gov't C.A. Br. 3. A federal grand jury charged petitioner with conspiring to distribute methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846, and possessing firearms as a prohibited person, in violation of 18 U.S.C. 922(g)(3). Pet. App. 2a. The jury found petitioner guilty on both counts. *Ibid.* The district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at 13a-15a.

2. Under 18 U.S.C. 3583(d), a sentencing court may impose any condition of supervised release that "it considers to be appropriate," as long as three requirements are satisfied. First, the condition must be "reasonably related" to the nature and circumstances of the offense and the history and characteristics of the defendant, and to the objectives of deterring criminal conduct;

protecting the public from further crimes; and providing needed training, medical care, or effective correctional treatment. 18 U.S.C. 3583(d)(1) (incorporating factors set forth in 18 U.S.C. 3553(a)). Second, the condition must involve "no greater deprivation of liberty than is reasonably necessary" to deter criminal conduct and to protect the public. 18 U.S.C. 3583(d)(2). Finally, the condition must be "consistent with any pertinent policy statements" of the U.S. Sentencing Commission. 18 U.S.C. 3583(d)(3); see 28 U.S.C. 994(a)(2)(B) (directing the Sentencing Commission to issue policy statements regarding conditions of supervised release).

Shortly after its creation, the Sentencing Commission issued a list of standard conditions of supervised release. Sentencing Guidelines § 5B1.4 (1987). Those standard conditions included (and still include), for example, requirements that a defendant report to a probation officer in keeping with the probation officer's instructions, answer all questions posed by the probation officer, notify the probation officer of changes in residence or employment, and refrain from criminal or other specified activities. See *ibid.*; Sentencing Guidelines § 5D1.3(c) (current version).

Standard Condition 13 of the initial list of standard conditions provided that, "as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement." Sentencing Guidelines § 5B1.4(a)(13) (1987). Over time, several courts criticized that recommended condition on vagueness grounds, noting in particular that the condition could leave a defendant

"guessing as to whom he would need to notify and what he would need to tell them." *United States* v. *Gibson*, 998 F.3d 415, 422 (9th Cir. 2021) (describing earlier decision); see, *e.g.*, *United States* v. *Thompson*, 777 F.3d 368, 379 (7th Cir. 2015).

In response to that criticism, the Sentencing Commission in 2016 amended the recommended condition in an effort to remove any "potential ambiguity in how the condition is * * * phrased." Sentencing Guidelines App. C Supp., Amend. 803 (Nov. 1, 2016). The revised language 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. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

Sentencing Guidelines § 5D1.3(c)(12). Unlike the previous version of the recommended condition, which stated that "the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics," *id.* § 5B1.4(a)(13) (1987), the current version requires only that the defendant "comply with [an] instruction" by the probation officer "to notify" an identified person of an identified risk, *id.* § 5D1.3(c)(12).

3. At sentencing in this case, the district court imposed all of the recommended standard conditions of supervised release. Pet. App. 17a-19a. Petitioner objected to imposition of the condition in Sentencing Guidelines § 5D1.3(c)(12) on the theory that it would unconstitutionally delegate judicial authority to the pro-

bation officer and was unconstitutionally vague. Pet. App. 29a-32a. The court, however, found no unlawful delegation of judicial authority to the probation officer because "the decision * * * as to whether or not there should be a sanction" remained "a judicial determination." *Id.* at 30a. The court noted that "if a probation officer determined that [petitioner] violated standard condition No. 12, a document would be provided to [the court], setting out the circumstances of that" asserted violation "and asking for a determination of what type of action, if any, should be taken." *Ibid.* The court explained that there would then be "a judicial determination as to the handling of these standard conditions before any sanction is imposed," and that the probation officer would accordingly not have authority to impose any sanction. *Ibid.*; see *ibid.* ("Everything goes back to the sentencing judge.").

The court of appeals affirmed. Pet. App. 1a-10a. Relying on its prior decision in *United States* v. *Robertson*, 948 F.3d 912 (8th Cir.), cert. denied, 141 S. Ct. 298 (2020), the court explained that the challenged condition was not unconstitutionally vague "because the probation officer will identify and communicate the risk to [a defendant] before [the defendant] has a duty to inform another person of that risk." Pet. App. 9a (quoting *Robertson*, 948 F.3d at 920). The court added that, "if there is genuine confusion about what the condition requires, [a defendant] may ask questions of his probation officer, who is statutorily required to instruct him as to the conditions specified by the sentencing court." *Ibid.* (quoting *Robertson*, 948 F.3d at 920) (brackets, ellipsis, and internal quotation marks omitted). The court also explained that the condition does not constitute "an impermissible delegation of authority" to the probation

officer because the district court gave no "'affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.'" *Id.* at 10a (quoting *Robertson*, 948 F.3d at 919).

ARGUMENT

Petitioner renews (Pet. 8-30) his contention that the standard condition of supervised release recommended by the Sentencing Commission in Sentencing Guidelines § 5D1.3(c)(12) is unconstitutional. As an initial matter, petitioner is not scheduled to be released from federal prison until 2031, so the condition will not have any effect on him for the next decade, and he will have an opportunity to challenge the condition if it remains in place and has the potential to cause him practical harm upon his release. In any event, the court of appeals correctly determined that petitioner's constitutional claims lack merit; his allegations of a circuit conflict are overstated; and if any meaningful circuit conflict were to develop, the Sentencing Commission could amend the condition to address concerns raised by the courts—as it recently did. See pp. 3-4, *supra*; cf. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). This Court recently denied review of the decision that the court of appeals relied on in this case, see *Robertson* v. *United States*, 141 S. Ct. 298 (2020) (No. 19-8608), and review is unwarranted here as well.

1. As a threshold matter, certiorari is unwarranted because the questions presented will take on practical importance, if ever, only after petitioner concludes his term of imprisonment—which is currently scheduled for October 20, 2031. See Federal Bureau of Prisons, *Find an inmate*, https://www.bop.gov/inmateloc (Register Number 17134-273). In the roughly ten years between now and then, the law governing supervised

release might change; the Sentencing Commission might amend the recommended condition, as it did in 2016, see pp. 3-4, *supra*; or the probation officer might decline to require petitioner to notify anyone of a risk that he presents. If the condition ever has the potential to cause petitioner any practical harm, moreover, he can seek modification of the condition. 18 U.S.C. 3583(e); see Fed. R. Crim. P. 32(c). Accordingly, no need exists to review his challenge at this time. Cf. *United States* v. *Williams*, 840 F.3d 865, 865 (7th Cir. 2016) (per curiam) (affirming district court decision to deny as premature a motion to revise conditions of supervised release where the defendant had 14 years of incarceration remaining because "the governing law * * * may change between now and then," and the defendant could raise claims regarding his supervised release later).

2. In any event, petitioner's constitutional arguments lack merit and do not warrant further review.

a. Although probation officers are Judicial Branch officials, see 18 U.S.C. 3602(c), the court of appeals accepted that a "'special condition of supervised release'" is "an impermissible delegation" of authority to a probation officer if "'the district court gives an affirmative indication that it will not retain ultimate authority over all of the conditions of supervised release.'" Pet. App. 10a (quoting *Robertson*, 948 F.3d at 919). It nevertheless correctly found no impermissible delegation because the district court here never abdicated its ultimate authority to enforce the challenged condition, much less empowered the probation officer to punish petitioner or otherwise undertake any action that would curtail his liberty interest without the court's approval. To the contrary, the district court made clear at sentencing that "the decision as to what should be done, as

to whether or not there should be a sanction or that enhanced supervision or special condition should be applied * * * is a judicial determination" made by the court—not one "made by the * * * United States probation officer." *Id.* at 30a (brackets omitted). As a result, "[e]verything goes back to the sentencing judge." *Ibid.*; see *id.* at 10a (court of appeals echoing that reasoning, which it endorsed in *Robertson*, 948 F.3d at 919).

Petitioner asserts that the condition recommended by Sentencing Guidelines § 5D1.3(c)(12) is unconstitutional because it provides no "intelligible principle" to which probation officers are "directed to conform." Pet. 29 (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989)). To the extent that this Court's "intelligible principle" doctrine for delegations from the Legislative Branch to the Executive Branch applies in this circumstance, the directive here readily qualifies as an intelligible principle under this Court's nondelegation-doctrine decisions. See, *e.g.*, *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (citation omitted); *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001); *Mistretta*, 488 U.S. at 372. The instruction that a probation officer "may require the defendant to notify [a] person about [a] risk" if the officer "determines that the defendant poses a risk to [that] person," Sentencing Guidelines § 5D1.3(c)(12), provides just as much, if not more, specificity as other delegations that this Court has upheld—including statutes authorizing agencies "to regulate in the 'public interest,'" to "set 'fair and equitable prices,'" or to adopt air-quality standards that "are 'requisite to protect the public health.'" *Gundy*, 139 S. Ct. at 2129 (plurality opinion) (citations omitted).

Petitioner contends (Pet. 12) that the court of appeals' rejection of his delegation claim conflicts with the Tenth Circuit's decision in *United States* v. *Cabral*, 926 F.3d 687 (2019). But the decision in *Cabral* was limited to invalidating the "risk-notification condition, *as imposed by the district court*" in that case. *Id.* at 699 (emphasis added). The Tenth Circuit emphasized that the district court in *Cabral* had "express[ly] * * * *refus[ed]* to limit" the potential breadth of Standard Condition 12, and had instead "emphatically opened the door to boundless scenarios implicating various liberty interests," including family relationships and potential employment. *Id.* at 698. Here, in contrast, the district court made clear that it did not "want to limit people's liberty interests * * * unless there is a proper basis in the record to do so." 1/3/20 Sent. Tr. 34. The court of appeals thus had no need to address how it would approach a situation like the one in *Cabral*, and *Cabral* likewise had no need to consider how it would approach a situation like the one here.

Petitioner also briefly states (Pet. 2) that the "Second Circuit has invalidated" the condition recommended by Sentencing Guidelines § 5D1.3(c)(12) "on nondelegation * * * grounds." But the decision he appears to invoke for that asserted conflict, *United States* v. *Boles*, 914 F.3d 95 (2d Cir.), cert. denied, 139 S. Ct. 2659 (2019), did not mention the nondelegation doctrine. Instead, as petitioner's description of the decision recounts, the Second Circuit in *Boles* concluded that "the 'risk' condition is vague and affords too much discretion to the probation officer." *Id.* at 111; see Pet. 9-10.

b. Petitioner's vagueness challenge also lacks merit. Petitioner contends (Pet. 25-28) that the condition recommended by Sentencing Guidelines § 5D1.3(c)(12) is

vague because it provides too little guidance about what kind of risks a defendant may be required to notify others about. That is, however, precisely the concern that the Sentencing Commission resolved in revising the prior Standard Condition 13. See pp. 3-4, *supra*. Unlike that prior condition, which courts had read to require defendants to guess about which risks they must notify others about, the revised condition makes clear that the probation officer must first "determine whether [a defendant] poses a risk to a particular person, and only then" may the probation officer require a defendant "to notify that person of the particular risk" that the probation officer has specified. Pet. App. 9a (quoting *Robertson*, 948 F.3d at 920). "[B]ecause the probation officer will identify and communicate the risk" to a defendant before the defendant "has a duty to inform another person of that risk," the "'scope of this condition can be ascertained with sufficient ease.'" *Ibid.* (quoting *Robertson*, 948 F.3d at 920). And if the defendant has any confusion, he can ask his probation officer, who is required by statute to provide information in response. *Ibid.*; see 18 U.S.C. 3603.

Courts that had expressed vagueness concerns about the prior language have accordingly recognized that the revised language removes those concerns. For example, the Ninth Circuit, which had invalidated the prior recommended condition as unconstitutionally vague, recently found "nothing unconstitutionally vague about" the revised version. *United States* v. *Gibson*, 998 F.3d 415, 423 (2021). As the court explained, under the current condition (unlike the former one), "[t]he probation officer"—not the defendant—"makes the determination of the nature of the risk, and to whom the warning must be given." *Ibid.* "And, importantly, the probation

officer must give the probationer a specific instruction and the probationer 'must comply with that instruction.'" *Ibid.* The Tenth Circuit has similarly explained that the revised condition is not unconstitutionally vague because it "clearly and specifically states that [a defendant] must provide notice" only "when required to do so by his probation officer." *United States* v. *Hull*, 893 F.3d 1221, 1224 (2018). The court found "no ambiguity in th[at] directive," given that a defendant's "obligation to notify third parties when so instructed by his probation officer is clear from the terms of the condition and can be understood by any ordinary person." *Ibid.*

Petitioner suggests (Pet. 27-28) that, even if the revised condition ensures fair notice, it nevertheless fails to provide adequate guidance to probation officers. To the extent that argument is distinct from petitioner's flawed delegation challenge, see pp. 7-9, *supra*, it too lacks merit. A criminal-law provision may be unconstitutionally vague if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). But "perfect clarity and precise guidance have never been required." *Ibid.* (citation omitted); see *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 19 (2010). That is particularly true of supervised-release conditions, which "must inevitably use categorical terms," *United States* v. *Paul*, 274 F.3d 155, 167 (5th Cir. 2001), cert. denied, 535 U.S. 1002 (2002), and accordingly should be read "in a commonsense way," *United States* v. *Gallo*, 20 F.3d 7, 12 (1st Cir. 1994).

The language of the condition at issue here supplies sufficient guidance by providing that a probation officer may require notification if the officer "determines that the defendant poses a risk to another person (including

an organization)." Sentencing Guidelines § 5D1.3(c)(12). Although framed in generalized terms, it limits the probation officer's authority to circumstances in which the defendant is placing another person at risk of harm. Cf. *Crawford* v. *Littlejohn*, 963 F.3d 681, 684 (7th Cir. 2020) (distinguishing breadth from vagueness). That limitation is readily understandable and is controlled by the district court's own ultimate enforcement authority. See, *e.g.*, Pet. App. 9a-10a.

Petitioner observes (Pet. 9, 15, 23) that some courts have deemed the revised language to still be too vague, but those decisions do not create any conflict warranting this Court's review. Petitioner points to the Second Circuit's decision in *United States* v. *Boles*, *supra*, but that decision did not conclude that Standard Condition 12 in its entirety is unconstitutionally vague. Instead, relying on its prior decision in *United States* v. *Peterson*, 248 F.3d 79 (2d Cir. 2001) (per curiam), the court vacated the condition principally insofar as it would require notifications to the defendant's employer about his federal conviction. See *Boles*, 914 F.3d at 111-112. Here, the district court stressed the importance of respecting petitioner's liberty interests, see p. 9, *supra*, and did not indicate that the condition would authorize any such notifications to his employer.

The Seventh Circuit's decision in *United States* v. *Greco*, 938 F.3d 891 (2019), is likewise not in meaningful conflict with the decision below. There, the defendant and the government agreed that the condition imposed was "likely unconstitutionally vague," *id.* at 897, under the Seventh Circuit's prior decision in *United States* v. *Bickart*, 825 F.3d 832 (2016). But *Bickart* involved language that was an amalgam of the prior language and the revised language at issue here. See *id.* at 841. And

much of what concerned the court in *Bickart*—notably, ambiguity in what aspects of a defendant's "personal history" and "characteristics" are subject to the notification requirement—is inapposite here, where the condition does not use those terms. *Ibid.* (citation omitted).

Petitioner also suggests (Pet. 21) that the decision below is inconsistent with the Ninth Circuit's decision in *United States* v. *Gibson*, *supra*. But as petitioner acknowledges (Pet. 2, 21), the Ninth Circuit—like the court below—"upheld" the current recommended condition against a vagueness challenge. Petitioner observes that *Gibson*, relying on circuit precedent, stated that the condition is limited to those risks "posed by the defendant's criminal record." 998 F.3d at 422 (citation and emphasis omitted). Although the court below did not articulate that same limitation in rejecting petitioner's vagueness challenge, no reason exists to view the Eighth and Ninth Circuit decisions upholding the condition as presenting a conflict warranting this Court's review. Indeed, review of the question is, if anything, even less warranted now than in October 2020—when this Court denied a petition for a writ of certiorari in *Robertson* v. *United States*, *supra*, the Eighth Circuit decision that was the basis for the decision below—because the Ninth Circuit has now clarified that its view that the prior condition was invalid does not extend to the revised language, see *Gibson*, 998 F.3d at 422-423.

3. To the extent that a narrow conflict might be seen to exist among the circuits on either of petitioner's questions presented, certiorari would remain unwarranted because the Sentencing Commission could amend the condition to address the concerns raised by the courts. See *Braxton*, 500 U.S. at 348 ("Congress necessarily contemplated that the Commission would periodically

review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."). As noted, that is precisely what the Commission did several years ago with respect to this condition. See pp. 3-4, *supra*. The Commission could do so again if meaningful circuit differences or concerns persist. Cf. *Longoria* v. *United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., respecting the denial of certiorari) ("The Sentencing Commission should have the opportunity to address this issue in the first instance, once it regains a quorum of voting members.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2021