FEDERAL COURTS ON CHALLENGING THE LEGALITY OF SUPERVISED RELEASE CONDITIONS UNDER § 3583(E)(2)

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INTRODUCTION: WHY I BECAME THE PRISON'S RESIDENT SCHOLAR ON SUPERVISED RELEASE

My sentencing hearing did not take place in the United States District Courthouse of Southern Indiana, but instead on a laptop, and I was all for it. When my counsel asked me days prior if I would be okay having the hearing in a Zoom room instead of a courtroom, I could not say yes fast enough. This was all thanks to COVID-19, which was running amok in 2021 and had delayed the hearing once already. Now I did not have to be cuffed and shackled, ride in a van to and from Indianapolis for hours or sit in that miserably bright holding cell for more hours. Instead, I would exit my jail unit, walk a few yards down the hall, sit in a little room with the laptop, and would likely be back in my cell by lunchtime.

At that point, I just wanted this all to be over and done with. I had long accepted my fate. As long as the judge signed off on the plea deal, I was going to serve at least ten years in prison. After eight months of waiting in a county jail, I was anxious for some finality and closure: go through the motions, find out what my punishment was going to be, and get to my new prison yard home as soon as possible. But just as anxious as I was for the sentencing showdown, I was equally arrogant in that I was not sweating much about the setting, fancying myself as more prepared than most defendants.

As an ex-government legal worker, I was no stranger in this land by any stretch. I had been in courtrooms countless times. I used to edit judicial orders in a city courthouse. Before that, I was a compliance specialist who negotiated settlement agreements in lawsuits regarding special education law on behalf of a school district. Adversarial proceedings? Check. Top student in my paralegal class? Double check. As a matter of fact, when the officer from the U.S. Probation Office conducted his pre-sentencing investigation interview of me, I gleefully informed him that one of my former jobs included doing pre-sentencing interviews for a state corrections department. In sum, while it was true I knew nothing about federal criminal law, I was comfortable enough in the law world not to despair. This prior experience, however, did not prepare me for what happened at sentencing when I got the shock of my life.

The hearing was underway and all was going smoothly. I recited my apologetic allocution with such aplomb that my counsel told the judge he had nothing else to add. The prosecutor slandered and painted me as a monstrous creature, but that was to be expected. Yawn. The judge said that after considering all of the arguments and statutory factors, he found a prison term of 151 months (12 years and 7 months) to be a sufficient and just punishment for my crime. *Finally*, I thought. It was a couple of years more than what I asked for, but at last I knew. The judge moved onto the next topic, that being supervised release, but my attention waned as I began wondering what would be for lunch. Then my ears perked up when I heard: "I sentence you to a term of 40 years."

I must have misheard.

> Me: Excuse me, Your Honor, did you say 14 years?
>
> Judge: No, I said 40 years of supervised release.

I do not recall if my face on the laptop screen betrayed my flabbergast, but my mind was reeling like I had been smashed by a semi-truck. Forty years! This was outrageous! A decade-plus of prison was bad enough. This supervised release term was more than triple the prison term itself. Sentenced at the age of thrity-six, the entire punishment would not be completed until I was well into my eighties. I was a college-educated, consistently employed, tax-paying citizen with no criminal history. How did it go so wrong?

Back in my jail cell, lunch now ignored, I was in a cerebral mood. Up until that point, I had not given supervised release much thought, nor was I advised that I should have. I discerned from reading the plea agreement that it was sort of like probation (inasmuch as I would have to follow a bunch of cumbersome rules) and that my crime mandated I would have to serve a term between 5 years and life. No doubt I was put on notice about the possible penalty of life supervision (and that, in a practical sense, is what I got). But there was no agreement in the plea about how much time I should receive, nor did the prosecutor take a position at the hearing either. And it was not my counsel who broached the subject; it was I who brought it up once, near the eve of sentencing, and our entire conversation on the topic essentially amounted to a total of two sentences:

> Me: Should we not ask for the 5-year mandatory minimum?
>
> Counsel: I don't think so because if we ask for the minimum, he might think you're not remorseful enough, so we should just let the judge decide and not ask for a specific number.

In effect, I was advised to leave supervised release alone and just take whatever came my way. Unfortunately, that was at my peril. Regardless of whether the judge may have considered my request or if counsel's tactic was sound, I had disregarded supervised release, and my counsel was not much help in explaining it to me. To think about doing a forty-year probation-like sentence after twelve years of prison practically shattered whatever hope I had in ever feeling full freedom again. But instead of wallowing in regret, I was determined to emerge from defeat. I vowed to never be blindsided by such ignorance again. If I was going to be saddled with this forty-year punishment I knew nothing about, then I was adamant to learn everything about it.

Even while in jail, I had already planned on becoming a fixture in the prison law library once I got there. While I would learn federal criminal law to assist fellow incarcerated individuals, supervised release would be my main topic of interest and expertise. This all came to fruition quicker than anticipated. Within a month of arriving at the federal prison in Sandstone, Minnesota, my stellar resume got me recruited by a group of legal-minded incarcerated individuals who called themselves "The Firm." This operation consisted of two jailhouse lawyers, a legal secretary, and a trio who worked the typewriters. While I gratefully accepted a position as their new research paralegal, I insisted on a carveout: any work involving supervised release would fall into my personal fiefdom, as I aspired to be its resident scholar. Recognizing my stake in the matter, they gave me their blessing and I went to work.

By 2024, that title was hard-earned. Since that time, I have amassed a bulging archive of supervised release material. Dozens of folders are filled with my handwritten notes on legal opinions on various circuit and district courts. Hundreds of pages of cases reside in my drawer, all organized categorically. Today, when any incarcerated individual comes to the law library with a supervised release question, they are routed straight to me. But it was a particular client whose unique problem served as the basis for this article.

Like me, he too was offended by his supervised release sentence. For him, though, it was not the term but the conditions, that is, the rules one must follow while on supervision, that he took offense to. He felt some of the conditions were either inapplicable or so restrictive that they must have been illegal, if not unconstitutional. However, he did not object to them at sentencing, nor did he seek an appeal in the circuit court. But he wanted to challenge them, now, years after the fact. One of The Firm's jailhouse lawyers proposed the possibility of using the supervised release statute's allowance of a motion to modify the conditions. But my research resulted in bad news. Our client was unlucky to be sentenced within a circuit that had already spoken on the matter against his favor. His circuit had determined he was out of time to challenge the legality of the conditions, and the modification statute was not meant to be used for legality challenges, even if the conditions were unconstitutional.

But a few circuits disagree in varying ways about such use of that statute. Since the United States Supreme Court has not weighed in on the matter (and has seldom reached questions concerning supervised release at all), it is the circuit courts' interpretations that control. Therefore, this article is meant to help defendants, defense attorneys, and jailhouse lawyers better understand supervised release, their conditions, and navigate the lay of the circuit land when it comes to challenging conditions that may be illegal with the condition modification statute.

I.
SUPERVISED RELEASE, ITS CONDITIONS, AND THE LEGALITY OF CONDITIONS

A. What is Supervised Release?

The Sentencing Reform Act of 1984 (SRA)[1] created supervised release, a confluence of the federal parole and probation systems that monitored those serving sentences in the community. Federal parole would be discontinued, no longer allowing defendants to serve part of their prison term under community supervision.[2] Instead, the SRA now mandated that the whole prison term would be completed in prison, while the new separate supervised release term would be

1. 18 U.S.C. § 3583.

2. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 996 (2013) (noting that, after more than seventy years, "[f]ederal parole was consigned to history"); *see generally id.* (tracing historical roots of supervised release from the Australian penal colony to pre-SRA federal parole).

completed in the community.[3] Previously, federal parole allowed eligible incarcerated individuals to leave prison early before their sentence expired, thanks to the U.S. Parole Commission, which had discretion to grant early release.[4] Upon an order granting parole, the Commission would impose conditions the parolee would have to comply with to remain at liberty.[5] The incarcerated individual would be told at a parole hearing how much parole time they would serve and the conditions they would have to comply with. Supervised release would be different. The defendant would be told by the judge at the sentencing hearing the prison term and the supervised release term and conditions together, making all of them part of the same sentence.[6] With the SRA dissolving parole, supervisory powers shifted to the sentencing court, with the U.S. Probation Office acting as the enforcement arm.[7]

The words "supervised release," "parole," and "probation" have been used interchangeably, and such schemes have even been described as "virtually indistinguishable."[8] Even incarcerated individuals refer to their supervised release terms as probation. It is true they all have similarities, such as having conditions imposed and the requirement to report to probation officers. But parole shortens the carceral sentence by allowing some prison time to be completed in the community. Probation, on the other hand, provides an avoidance of prison altogether if the probationer abides by the conditions.[9] Supervised release, in contrast, is an additional penalty to be served after the prison term, enlarging the concept of the sentence itself, since the defendant would have two distinct terms to complete.[10] Further, when a parolee violates their conditions, their parole may be revoked and

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3. *Id.* at 996–97 ("The Senate report on the SRA renounced the indeterminate sentencing model . . . because release dates from prison were unpredictable and 'no one is ever certain how much time a particular offender will serve if he is sentenced to prison.'").

4. 18 U.S.C. § 4203(b)(1) (1982), *repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984) (authorizing the U.S. Parole Commission to have the power to "grant or deny an application or recommendation to parole any eligible prisoner").

5. *Id.* § 4203(b)(2) (1982) (vesting the U.S. Parole Commission with the "broad authority to impose reasonable conditions in an order granting parole").

6. *See* 18 U.S.C. § 3583(a); *see also* United States v. Perrin, 926 F.3d 1044, 1049 (8th Cir. 2019) (describing supervised release as "a part of the sentence . . . rather than a post-sentence penalty") (internal citations omitted); United States v. Saenz, 833 F. App'x 697, 697 (9th Cir. 2021) ("[H]e has not completed his sentence: he remains subject to the three years of supervised release . . . .").

7. United States v. Bernadine, 237 F.3d 1279, 1283 (11th Cir. 2001) ("[T]he probation officer as an arm of the court, serves as liaison between the sentencing court and the defendant ….") (internal quotation marks omitted).

8. United States v. Carlton, 442 F.3d 802, 807 (2d Cir. 2006) (describing diminished constitutional protections for revocation in all three systems); United States v. Newton, 369 F.3d 659, 665 n.2 (2d Cir. 2004) ("Probation, parole, and supervised release systems are charged with similar duties . . . .").

9. Doherty, *supra* note 2, at 1024 ("Unlike supervised release, both probation and parole were historically conceived as acts of grace that shortened or replaced time in prison.").

10. United States v. Siegel, 753 F.3d 705, 706 (7th Cir. 2014) (explaining that supervised release "lengthens [the] sentence, unlike parole").

they may be reincarcerated to complete the unfinished prison term.[11] A probationer who has their probation revoked may begin serving their previously shelved prison term.[12] However, a supervisee who has their term revoked is penalized with a "fresh term of imprisonment," even though their original incarceration term was already completed.[13] This is why they are not so synonymous and, amongst the three, supervised release is the most severe.[14]

At the sentencing hearing, the supervised release term and conditions follow the pronouncement of the prison term. A supervised release term is mandatory if the offense statute or another statute demands it.[15] Otherwise, a judge may choose to impose it if they determine the defendant needs it.[16] For conditions, the judge must impose the mandatory ones and may impose discretionary ones.[17] When a judge chooses a supervised release term or discretionary condition, they must consider all the same statutory factors they used in fashioning the prison term (18 U.S.C. § 3553(a)) except one: the "just punishment for the offense" factor is not in the supervised release statute.[18]

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11. 18 U.S.C. § 4214 (1982), *repealed by* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027 (1984) (authorizing the U.S. Parole Commission to revoke parole and return the parolee to custody to serve the remainder of the unexpired term).

12. 18 U.S.C. § 3565(a) (authorizing a court, upon revocation of probation, to resentence the defendant to a term of imprisonment).

13. United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015) ("Parole mitigates punishment; supervised release augments it—most dramatically when the defendant, having been determined to have violated a condition . . . is given, as punishment, a fresh term of imprisonment."); United States v. Reese, 71 F.3d 582, 588 (6th Cir. 1995) ("[A] violation of supervised release may result in a cumulative punishment that exceeds the original prison sentence.").

14. United States v. Jackson, 866 F.3d 982, 985 (8th Cir. 2017) ("[S]upervised release is a more severe punishment than probation and parole"); United States v. Reyes, 283 F.3d 446, 457 (2d Cir. 2002) (describing supervised release, unlike probation, as "meted out in addition to, not in lieu of incarceration.").

15. *See*, *e.g.*, 18 U.S.C. § 3583(a) (domestic violence offenses); 18 U.S.C. § 3583(j) (terrorism offenses); 18 U.S.C. § 3583(k) (sex offenses and other offenses under section 1201 involving a minor victim); 21 U.S.C. §§ 841, 846, 960, 963 (drug trafficking offenses).

16. 18 U.S.C. § 3583(a); *see also* Johnson v. United States, 529 U.S. 694, 709 (2000) (asserting that courts have the "freedom to provide post-release supervision for those, and only those, who [need] it"); *but see* Christine S. Scott-Hayward, *The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 214–15 (2013) (finding that judges "almost uniformly impose supervised release" and the U.S. Sentencing Commission in its advisory Sentencing Guidelines "recommend[s] virtually automatic application of supervised release" if a defendant has more than a year of imprisonment imposed per U.S. SENT'G GUIDELINES MANUAL § 5D1.1(a)(2) (U.S. SENT'G COMM'N 2025)); U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 7, 52 n.241 (finding that, between 2005 and 2009, 99.1% of offenders who received a term of at least a year that were not statutorily mandated to receive a supervised release term had it imposed on them anyway).

17. *See infra* Part I.B. (outlining mandatory and discretionary conditions).

18. Neither 18 U.S.C. § 3583(c) nor 18 U.S.C. § 3583(d) provides for "the need for the sentence imposed—to reflect the seriousness of the offense." § 3553(a)(2)(A); *see* Esteras v. United States, 606 U.S. 185, 196 (2025) ("We have twice interpreted the omission of § 3553(a)(2)(A) from the provision governing the imposition of supervised release

The absence of the "just punishment" factor has been interpreted to mean that supervised release is not meant as punishment but to ensure the successful re-entry of the defendant back into society. A Senate Report from 1983 concerning the SRA explained that a supervised release term "may not be imposed for purposes of punishment or incapacitation" because that is the purpose of incarceration.[19] The Supreme Court, in its rare forays into supervised release, has described the system as "the decompression stage" between prison and full release[20] that is meant to "fulfill rehabilitative ends, distinct from those served by incarceration"[21] and "is not punishment in lieu of incarceration."[22] While some courts have echoed this sentiment,[23] others have made it plain that supervised release is obviously punishment since it entails an extra term to complete, limits a defendant's liberty, and can lead to more prison time if violated.[24]

Rehabilitation, deterrence, and protection of the public are considered the three foundational purposes of supervised release,[25] but they are often pursued in a coercive manner. While the Supreme Court has said conditions are meant to "improve the odds of a successful transition from the prison to liberty,"[26] a "rehabilitate or else" attitude permeates throughout the system, demanding compliance

(§ 3583(c)) to mean that district courts may not consider that factor when imposing supervised release.").

19. S. Rep. No. 98-225, at 125 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3308.

20. United States v. Johnson, 529 U.S. 53, 59 (2000).

21. Johnson v. United States, 529 U.S. 694, 709 (2000).

22. United States v. Granderson, 511 U.S. 39, 50 (1994).

23. *See* United States v. Aldeen, 792 F.3d 247, 252 (2d Cir. 2015) ("Supervised release is not, fundamentally, part of the punishment . . . ."); United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012) ("[T]he primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than to punish them.") (internal quotation omitted); United States v. Ellis, 984 F.3d 1092, 1100 (4th Cir. 2021) (explaining that, since punishment is an omitted factor in 18 U.S.C. § 3583(d)(1), it cannot be used as a basis for conditions).

24. *See* United States v. Dozier, 119 F.3d 239, 242 (3d Cir. 1997) ("Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act. A defendant on supervised release is subject to various terms and conditions which restrict his freedom and make him vulnerable to further punishment should he violate them. Such subsequent punishment may again include more imprisonment and more supervised release."); United States v. Martin, 363 F.3d 25, 35 n.17 (1st Cir. 2004) ("'Supervised release' is a punishment in addition to incarceration, served after completion of a prison term.") (internal quotation omitted); United States v. Ginyard, 215 F.3d 83, 87 (D.C. Cir. 2000) ("Supervised release is punishment . . . ."); United States v. Lominac, 144 F.3d 308, 318 (4th Cir. 1998) (same).

25. *See* United States v. Neal, 810 F.3d 512, 519 (7th Cir. 2016) ("The point of supervised release is to rehabilitate persons discharged from prison and to assist their law-abiding return to society . . . . Protection of the public from further crime by the defendant is also an important goal."); *Aldeen,* 792 F.3d at 252 ("Supervised release is not, fundamentally, part of the punishment; rather, its focus is rehabilitation."); United States v. Gementera, 379 F.3d 596, 602 (9th Cir. 2004) (explaining that supervisory conditions are meant for rehabilitating the defendant and protecting the public); United States v. Kappes, 782 F.3d 828, 836 (7th Cir. 2015) (listing "rehabilitation, deterrence, training and treatment, protection of the public, and reduction of recidivism" as purposes of supervised release).

26. Johnson v. United States, 529 U.S. 694, 696 (2000).

with a litany of conditions that have the force of law.[27] This means defendants do not even need to commit a new crime to be subject to reimprisonment, followed by more supervised release.[28] Factoring in the original prison term, these revocation sentences can add up to an amount of time served in prison that exceeds the statutory maximum of the original crime.[29] For defendants under lifetime supervision, this can create an "endless cycle of reimprisonment and release."[30] The Supreme Court even soberly commented that "the sword of Damocles hangs over a defendant 'every time [he] wakes up to serve a day of supervised release.'"[31]

Transitioning from prison to supervision is akin to moving from a cage to a leash because a defendant is still not completely emancipated. While the supervision term deals with time, the conditions are the key features that indicate the punitive level. They shape the contours of what liberty remains, with restrictions on where a defendant may live, with whom they may associate, GPS monitoring, curfews, and mandatory psychological testing, just to name a few. In other words, the conditions dictate how tight the leash is.

B. The Nature of Conditions

There is a ponderous irony in the expectations the criminal justice system places on defendants who, after being warehoused for a significant amount of years with fellow lawbreakers, begin serving their community terms. Not only do they have to follow the same laws as before, but they must also comply with additional conditions—supralegal rules—most of which are chosen by the judge. The supervisee is obliged to behave beyond the normal laws of ordinary citizens, lest they find themselves back in prison. But the criminal justice system exclaims

27. One criticism of the old parole system which has re-emerged here is that rehabilitation based on the threat of non-compliance is coercive and, inevitably, less effective in the long term. *See* Doherty, *supra* note 2, at 1012, 1018–19 ("Supervised release conditions . . . grant the government a cheapened form of leverage over people who have been previously adjudicated as criminals . . . . [Especially] with respect to substantial amounts of non-criminal conduct").

28. *Id.* at 1016 ("Non-criminal violations, also known as technical violations, commonly include conduct such as failing to report to the probation officer, failing to submit monthly reports, and failing to attend drug or mental health treatment."); Johnson v. United States, 529 U.S. 694, 700 (stating that violations can lead to re-imprisonment and do not have to be crimes); United States v. Dowling, 822 F. App'x 114, 115 n.7 ("[T]echnical violations . . . are a major contribution to revocation.").

29. United States v. Salazar, 987 F.3d 1248, 1254 (10th Cir. 2021) ("§ 3583 authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute.") (internal quotation omitted).

30. United States v. Bruley, 15 F.4th 1279, 1284 (10th Cir. 2021) ("[It is Congress's] prerogative to decide whether some convictions should carry the potential of a lifetime of supervised release, even though habitual violators . . . could be stuck in a cycle of successive revocations."); *see* Doherty, *supra* note 2, at 1011 (asserting that, for those convicted of drug trafficking, terrorist offenses, or sex offenses, "there is no cap on a potential lifetime cycle of reimprisonment for supervised release violations").

31. United States v. Haymond, 588 U.S. 634, 648 n.5 (2019).

that strict adherence to these conditions is the necessary proof that the defendant deserves acceptance back into society.

A person on supervised release is still serving their sentence, so they are closer to still being a prisoner than someone who is fully free. Supervision, while not physical custody, is a form of "constructive custody," as a defendant remains in the legal custody of the sentencing court.[32] As it was earlier established in parole and probation law, those under community sentences are not at full liberty but at conditional liberty "properly dependent on observance of special restrictions."[33] So, despite the fact that a parolee was still finishing their prison term and a probationer was avoiding one, this conditional release status was grafted onto the supervisee, even though they had completed their prison term. The varying degrees of liberty's diminishment are reflected in the conditions that are ultimately imposed.

There are only two types of conditions: mandatory conditions and discretionary conditions.[34] Discretionary conditions are usually referred to by the categories named by the U.S. Sentencing Commission[35] as "standard,"[36] "special,"[37] "additional,"[38] and "judge-made."[39] But it must be made plain there are, statutorily, only two kinds: those Congress said must be imposed, and those the judge (after applying the enumerated factors) may impose.[40] Arguably, there is a continuum

32. *See* United States v. Presley, 487 F.3d 1346, 1349 (11th Cir. 2007) ("[O]ne who is on supervised release [is] in 'constructive custody' . . . [and] the step from constructive custody to actual custody is shorter than the leap from unsupervised freedom to actual custody."); *see also* United States v. Sandles, 469 F.3d 508, 517 (6th Cir. 2006) (characterizing a supervisee as in custody); Maleng v. Cook, 490 U.S. 488, 491 (1989) (asserting that custody is defined not only as physical confinement but includes circumstances entailing limitations on a person's liberty as those during parole).

33. Morrissey v. Brewer, 408 U.S. 471, 480 (1972); United States v. Douglas, 806 F.3d 979, 985 (7th Cir. 2015) ("The Supreme Court has made clear that persons on probation, parole, supervised release, or other forms of criminal justice supervision short of full-time custody are not entitled to the full range of constitutional liberties."); United States v. Collins, 684 F.3d 873, 890 (9th Cir. 2012) ("[C]onditions of supervised release [can] impose significant—even extreme—restrictions on . . . liberty.").

34. U.S. SENT'G GUIDELINES MANUAL §§ 5D1.3(a)–(b) (U.S. SENT'G COMM'N 2025).

35. The U.S. Sentencing Commission is a quasi-legislative body created by the SRA that promulgates sentencing guidelines (which used to be mandatory) and policy statements under 28 U.S.C. § 994(a)(3). The Commission has only promulgated policy statements as it pertains to supervised release. *See* USSG §§ 5Dl.3(b)(2)–(3).

36. U.S. SENT'G GUIDELINES MANUAL § 5D1.3(b)(2) (U.S. SENT'G COMM'N 2025).

37. *Id.* § 5D1.3(b)(3).

38. *Id.* § 5D1.3(e).

39. 18 U.S.C. §§ 3583(d)(1)–(3); *see* U.S. SENT'G GUIDELINES MANUAL §§ 5D1.3(a)–(b) (U.S. SENT'G COMM'N 2025); *see also* United States v. Siegel, 753 F.3d at 707 (asserting that, as long as they are in compliance with 18 U.S.C. § 3583(a), "sentencing judges can impose conditions of their own devising").

40. 18 U.S.C. § 3583(d) (stating that a court may impose a discretionary condition if it: "(l) is 'reasonably related' to the statutory sentencing factors in 18 U.S.C. §§ 3553(a)(l) and 3553(a)(2)(B)–(D), which include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to protect the public from further crimes of the defendant, and the need to provide needed educational or vocational training, medical care, or other correctional treatment; (2) involves 'no greater deprivation of liberty

that exists between these categories denoting the general to the specific: the mandatory (for all); the standard (practically for all as they have been considered administratively necessary);[41] the special (particularized conditions based on the circumstances or on the type of offense);[42] and the judge-made (individualized based on the history, character, and needs of the defendant).[43]

Since mandatory conditions are not up for debate, the judge focuses on which discretionary ones are applicable to a defendant. Discretionary conditions may be easily justified based on evidence in the record[44] or if the condition was recommended by the Sentencing Commission.[45] The more specific the condition (typically, a special condition), the narrower it is to be tailored to the individual, and a more robust explanation is needed when its justification is not evident from the record. This also serves to discourage courts from imposing broad, boilerplate conditions on a category of offenders without reasons.[46]

Judge-made conditions (also called special conditions) are to be unique to the defendant, crafted to cabin the future supervisee's activities related to them individually, as long as they are properly formed, relevant, and statutorily sound. The

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than is reasonably necessary'" for the same purposes in subsection (1) except § 3553(a)(1); and "(3) is consistent with any policy statements issued by the Sentencing Commission").

41. United States v. Matthews, 54 F.4th 1, 6 (D.C. Cir. 2022) ("[The Second and Ninth Circuits] have held that these standard conditions need not be orally pronounced . . . [as] standard conditions form the administrative backbone of supervised release, and so they are 'almost uniformly imposed.' We respectfully disagree . . . . [T]he governing statute classifies them as discretionary, as does the policy statement itself." (quoting United States v. Truscello, 168 F.3d 61, 63 (2d Cir. 1999)) (citing United States v. Napier, 463 F.3d 1040, 1043 (9th Cir. 2006)). The Second Circuit has recently course corrected its *Truscello* holding, sitting en banc to align with the circuits requiring judges to orally pronounce standard conditions at sentencing. United States v. Maiorana, 153 F.4th 306, 311 (2d Cir. 2025) (en banc).

42. U.S. SENT'G COMM'N, PRIMER ON SUPERVISED RELEASE 11 (2025).

43. United States v. Martinez-Torres, 795 F.3d 1233, 1237 (10th Cir. 2015) ("When, however, neither the Sentencing Commission nor Congress has required or recommended a condition, we expect the sentencing court to provide a reasoned basis for applying the condition to the specific defendant before the court.").

44. United States v. Betts, 511 F.3d 872, 876 (9th Cir. 2007) (finding that the record can be enough to justify a condition); United States v. Carson, 924 F.3d 467, 474 (8th Cir. 2019) (asserting that individualized findings were unnecessary since the reason for imposing the condition was in the record).

45. United States v. Perazza-Mercado, 553 F.3d 65, 77 (1st Cir. 2009) ("The Sentencing Commission creates . . . generally applicable conditions of supervised release.").

46. *See* United States v. Smith, 606 F.3d 1270, 1283 (10th Cir. 2010) ("The district court is required to provide at least generalized reasons for imposing special conditions."); United States v. McMiller, 954 F.3d 670, 676 (4th Cir. 2020) (finding that the failure to explain the imposition of an onerous condition constituted a procedural error); United States v. Canfield, 893 F.3d 491, 496 (7th Cir. 2018) (asserting that judges must explain why a condition is necessary rather than just say it is so); United States v. Inman, 666 F.3d 1001, 1004–06 (6th Cir. 2012) (vacating a lifetime term and onerous special conditions because no explanation was given to justify their imposition); United States v. Caravayo, 809 F.3d 269, 276 (5th Cir. 2015) ("[S]pecial conditions must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course in a particular district."); United States v. Burroughs, 613 F.3d 233, 245 (D.C. Cir. 2010) (finding that the district court erred where the judge did not explain the reason for a condition and the record did not provide a basis for it).

discretion a judge is given is wide but not unrestrained because the § 3583(d) factors limit them to relevancy to the defendant, ability to protect the public, and the necessary amount of liberty to be affected.[47] Such conditions may include not being able to hold union positions[48] or be a member of motorcycle clubs.[49] These conditions tend to have a direct relation to the instant conviction or lifestyle that is related to the crime.[50]

Therefore, a condition can be illegal when it is not applicable to the defendant, the statutory factors were not properly applied, or the explanation and record were not adequate to support its imposition. Discretionary conditions, then, can affect any liberty, even up to the point of piercing constitutional dimensions and conditions of this sort are not in and of themselves illegal.

Conditions can be characterized by their intensity and their intrusiveness. An example would be a supervisee who is subjected to 104 drug tests and 208 alcohol tests per year.[51] This is a very demanding condition to comply with, not to mention very time consuming, and means a supervisee would not have the liberty to socially drink at a bar. This could be seen as extreme, but if the supervisee has historically struggled with both drugs and alcohol and their use was linked to criminal conduct, one would be hard-pressed to deem the condition illegal. Its intrusiveness impinges on the spectrum of liberties, sometimes called liberty interests.[52] Liberty interests may include freedom to drink at a bar or even the ability to travel.[53] More significant liberty interests include the freedom to associate with a life partner and the freedom from restraint.[54] Fundamental liberty interests are the most significant as they are enshrined in the U.S. Constitution and protected in the Due Process Clause.[55] Therefore, not all conditions are the same, and there is a qualitative

47. United States v. Amer, 110 F.3d 873, 883 (2d Cir. 1997) (asserting that judges have broad but not "untrammelled" discretion to tailor conditions based on specifics of the case); United States v. Duke, 788 F.3d 392, 398 (5th Cir. 2015) (describing discretion as wide but not "unfettered").

48. United States v. Beros, 833 F.2d 455, 467 (3d Cir. 1987).

49. United States v. Bolinger, 940 F.2d 478, 480–81 (9th Cir. 1991).

50. *See* Turner v. United States, 347 F. App'x 866, 868 (3d Cir. 2009) (citing several cases upholding similar associational conditions); United States v. Martinez-Torres, 795 F.3d 1233, 1237 (10th Cir. 2015) (finding that a reasoned basis from the sentencing court is expected when neither Congress nor the Sentencing Commission has required or recommended a condition).

51. United States v. McDonough, 233 F. Supp. 3d 231, 246 (D. Mass. 2017).

52. *See* Rudow v. New York, 642 F. Supp. 1456, 1468 (S.D.N.Y. 1986) (defining liberty as "the right of an individual to engage in the common occupations of life and to enjoy privileges recognized as essential to the orderly pursuit of happiness") (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972)).

53. *See* United States v. Warren, 186 F.3d 358, 365 (3d Cir. 1999) ("Standard conditions of probation include restrictions on a defendant's right to travel."); *see also* United States v. Sicher, 239 F.3d 289, 292 (3d Cir. 2000) (upholding travel restriction condition preventing defendant from entering two counties in Pennsylvania without permission).

54. *See* United States v. Napulou, 593 F.3d 1041, 1047 (9th Cir. 2010) (finding that a condition restricting association with a life partner implicates a significant liberty interest); United States v. Bear, 769 F.3d 1221, 1231 (10th Cir. 2014) (holding that inpatient treatment implicates a significant liberty interest).

55. *See* discussion *infra* Part I.C.

difference between those that touch on significant liberty interests and those that do not.[56]

C. Conditions That Infringe Protected Liberty Interests and Their Limitations

Fundamental rights and significant liberty interests are protected by the constitutional amendments and the Due Process Clause of the Fifth and Fourteenth Amendments.[57] When these rights and interests are involved, the government "may not interfere with them, even with adequate procedural process, unless the infringement is 'narrowly tailored' to serve a compelling state interest."[58] So while fundamental interests such as marriage, having children, freedom from physical restraint, freedom of association, and even pornography are protected,[59] they are not so absolute that supervised release conditions cannot touch them.[60] Restrictions on significant liberties are acceptable to a couple of circuit courts as long as the sentencing judge justifies them with "particularized findings" and "compelling circumstances."[61] But when it comes to these protected liberties, relying on the record without a sufficient explanation may not be enough.[62]

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56. United States v. Mike, 632 F.3d 686, 695 (10th Cir. 2011) ("Conditions that touch on significant liberty interests are qualitatively different from those that do not."); *see also* United States v. Perez, 666 F. App'x 735, 738 (10th Cir. 2016) ("Every condition of supervised release restricts liberty to some degree. Yet not every condition affects a fundamental liberty interest.").

57. U.S. CONST. amend. V; U.S. CONST. amend. XIV; Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[T]he Due Process Clause . . . protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.") (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)) (internal citation omitted).

58. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

59. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (marriage); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (freedom from physical restraint); Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544–45 (1987) (freedom of association); United States v. Eaglin, 913 F.3d 88, 99 (2d Cir. 2019) (banning access to legal pornography implicates a First Amendment right).

60. *See* United States v. Myers, 426 F.3d 117, 125 (2d Cir. 2005) (affirming that the parent's interest in maintaining a relationship with their child is protected by the Due Process Clause though these constitutional privileges "are hardly absolute"); United States v. Woods, 547 F.3d 515, 519 (5th Cir. 2008) ("It is axiomatic that the infringement of constitutional liberties occurs concomitantly with conviction of a crime, and many conditions of supervised release therefore permissibly infringe liberty interests."); United States v. Smith, 436 F.3d 307, 310–11 (1st Cir. 2006) (same); United States v. Sines, 303 F.3d 793, 801 (7th Cir. 2002) (same).

61. *See* United States v. Burns, 775 F.3d 1221, 1222–23 (10th Cir. 2014) (requiring particularized findings and compelling circumstances before intruding upon the "constitutional right to have parental contact with child"); United States v. Sims, 92 F.4th 115, 123–24 (2d Cir. 2024) (requiring the court to articulate particularized findings so too much liberty is not deprived from the defendant, especially if no evidence is in the record and the condition is not obviously related to sentencing objectives).

62. United States v. Koch, 978 F.3d 719, 726 (10th Cir. 2020) (requiring an on-the-record "meaningful and rigorous analysis when the special condition implicates a fundamental right or interest"); United States v. Williams, 356 F.3d 1045, 1057 (9th Cir. 2003)

Significant liberty interests have been infringed upon in the probation context long before supervised release existed. In a 1974 case in the Ninth Circuit, defendant Malone appealed some of his probation conditions as unconstitutional under the First Amendment.[63] Malone received two years probation for exporting firearms to the United Kingdom in support of the Irish Republic Army, and the sentencing court imposed the following particularized conditions, amongst other standard conditions:

- That he not participate in any American Irish Republican movement;
- That he belong to no Irish organizations, cultural or otherwise;
- That he not belong or participate in any Irish Catholic organizations or groups;
- That he not visit any Irish pubs; and
- That he accept no employment that directly or indirectly associates him with any Irish organization or movement.[64]

While these conditions appear excessive since they affect political activity, association, religious practice, and employment, the reviewing court found them sound.[65] The Ninth Circuit discerned that the district court sought to prevent Malone from associating with those who may "lead him to future criminality" since "the crime stemmed from high emotional involvement with Irish Republic sympathizers."[66] There is reasonable nexus between the probation conditions and the goals of probation. A convicted criminal may be reasonably restricted as part of his sentence with respect to his associations in order to prevent his future criminality.[67]

Malone's holding remains good law as it applies to supervised release condition cases involving associational restrictions.[68] This reasonable nexus between the condition and the liberty interest being implicated is, on the whole, necessary in a judge's articulation of reasons to impose it.

(requiring evidence on-the-record to support its finding that the condition is necessary and liberty is not too deprived if a significant liberty interest is involved); United States v. Wolf, 699 F.3d 1082, 1090 (9th Cir. 2012) (requiring justification for a condition that implicates a fundamental liberty interest where the rationale is not apparent); *but see Smith*, 436 F.3d at 310–311 ("The hallmark that separates impermissible conditions from permissible ones is whether on a given set of facts, a particular restriction is clearly unnecessary.").

63. Malone v. United States, 502 F.2d 554 (9th Cir. 1974).

64. *Id.* at 555.

65. *Id.* at 556–57.

66. *Id.* at 556.

67. *Id.* at 556–57.

68. *See*, *e.g.*, United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991) (ban from motorcycle clubs); United States v. Showalter, 933 F.2d 573, 575 (7th Cir. 1991) (ban from associating with skinheads and neo-Nazis); United States v. Bolin, 976 F.3d 202, 212–13 (2d Cir. 2020) (applying *Malone* narrowly to circumscribe the defendant's rights to free expression and separate him from racist, anti-Semitic, or anti-Muslim communications).

After the district court sentenced defendant Voelker for receipt of child pornography, he appealed some of the special conditions.[69] One of them was a broad, sweeping, total ban on Voelker possessing any sexually explicit materials, "including pictures, photographs, books, writings, drawings, videos or video games."[70] Voelker challenged the condition as unconstitutional under the First Amendment.[71] The Third Circuit acknowledged that Voelker's conduct "offers some support for this restriction" and district courts can "restrict [an offender's] access to sexually oriented materials."[72] However, his conduct alone without further explanation could not sustain such a ban when his access to legal pornography is protected by the First Amendment.[73] The Third Circuit said there was no support in the sentencing court's record that supplied the requisite nexus to balance "against the serious First Amendment concerns endemic in such a restriction."[74] Without findings that Voelker's watching explicit material involving adults was linked to the conviction, or that viewing of legal materials would cause him to recidivate, the condition was vacated.[75]

Thus, it follows that conditions, especially those that involve constitutional rights and significant liberty interests, can go too far to the point of illegality. That is, a leash can indeed be too tight. Besides, a "defendant does not surrender all of his constitutional rights as he enters a prison door to serve his term of incarceration, less so as he exits it on supervised release."[76] The balance is finding where the government interest ends and where liberty must hold its line.

D. Vague and Broad Conditions Can Be Unconstitutional

It has been established that activity that is lawful for the average citizen may be restricted for supervisees, even if that activity is protected by the Due Process Clause and constitutional amendments.[77] Restrictiveness alone will not negate the reasonableness of a condition when it is circumscribed enough and justified sufficiently.[78] This careful delineation also matters because conditions, like laws, must be well-worded and well-defined.[79] Conditions should not be so badly constructed

69. United States v. Voelker, 489 F.3d 139 (3d Cir. 2007).
70. *Id.* at 143.
71. *Id.* at 150.
72. *Id.* (quoting United States v. Loy, 237 F.3d 251, 267 (3d Cir. 2001)).
73. *Id.* at 151.
74. *Id.*
75. *Id.*
76. United States v. Bolin, 976 F.3d 202, 214 (2d Cir. 2020).
77. United States v. Woods, 547 F.3d 515, 519 (5th Cir. 2008) ("[M]any conditions of supervised release therefore permissibly infringe liberty interests.").
78. *See generally* United States v. Ellis, 112 F.4th 240 (4th Cir. 2024) (rejecting defendant's argument that device-approval condition and location-monitoring were too restrictive in light of the district court's application of relevant sentencing factors and circumscribed nature of the restrictions).
79. United States v. Sales, 476 F.3d 732, 737 (9th Cir. 2007) ("Because [defendant] cannot be left to guess about the intended meaning of the [conditions] of his supervised release, clarification is required."); United States v. Sandidge, 784 F.3d 1055, 1067 (7th

as to unintentionally forbid legal conduct. Because violations can lead to a loss of liberty, due process demands that supervisees have a right to know what conduct will result in reimprisonment.[80]

The Supreme Court has long held that a criminal statute can be void-for-vagueness under the Due Process Clause when it "either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[81] This doctrine equally applies to conditions. The fair warning and notice requirement means a condition must be clear in a commonsense way so a supervisee may conduct themselves with confidence knowing what they can and cannot do to avoid violating them.[82] A condition can also be too broad to the point of prohibiting so much conduct that it could be near-impossible for the defendant to comply with it. Nevertheless, courts are not expected to craft conditions "to the point of pedantry," either.[83]

For example, in *Green*, the defendant challenged a condition that prohibited him from the "wearing of colors, insignia, or obtaining tattoos or burn marks (including branding or scars) relative to [criminal street gangs]."[84] What colors, then, could Green be allowed to wear that bore no connection to gangs? The Second Circuit remarked that gangs utilize a vast amount of colors, so Green would be hard-pressed to choose just about any article from his wardrobe without violation.[85] The condition was vacated as unconstitutionally vague since Green could not reasonably know what color clothes he could wear and "[p]eople of ordinary intelligence would be unable to confidently comply with this condition."[86] The court made it clear, however, that not all broad conditions are unconstitutional and

Cir. 2015) ("We have long counseled district courts to adopt precise supervised release conditions.").

80. United States v. Hill, 818 F.3d 342, 345 (7th Cir. 2016) ("[T]he more vague a condition is, the harder it is for the defendant to determine what restrictions it actually imposes and whether any of them are so onerous that he should object."); United States v. Brown, 223 F. App'x 722, 724 n.1 (9th Cir. 2007) ("violations may be determined under a reasonably definite standard" so the condition on remand should be narrowly restricted).

81. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); *see also* United States v. Davis, 588 U.S. 445, 447 (2019) ("A vague law is no law at all.").

82. United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir. 2002) ("[A supervisee] has a separate due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison."); United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2003) (same); United States v. Adkins, 743 F.3d 176, 193 (7th Cir. 2014) (same).

83. United States v. Hamilton, 986 F.3d 413, 420 (4th Cir. 2021) ("We recognize the difficulty of writing restrictions that protect the public without turning the conditions sheet into a prolix code of Hammurabian proportions."); United States v. Johnson, 446 F.3d 272, 280 (2d Cir. 2006) ("However, conditions need not 'be cast in letters six feet high, or . . . describe every possible permutation, or . . . spell out every last, self-evident detail. Conditions . . . may afford fair warning even if they are not precise to the point of pedantry.'") (quoting United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994)).

84. United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010).

85. *Id.*

86. *Id.*

would withstand scrutiny "so long as they are sufficiently clear to provide the defendant with notice of what conduct is prohibited."[87]

Similarly, in *Aquino*, the Ninth Circuit granted the defendant Aquino's vagueness challenge to the prohibition that she could not use any substance she "believe[s] is intended to mimic the effect[s] of any controlled substance."[88] It acknowledged the sentencing court's intention to keep her away from dangerous substances but concluded the condition was impermissibly vague because, as worded, it could prevent her from enjoying "chocolate or coffee" even if the court did not mean for it to do so.[89] It held, "Aquino should not be forced to guess whether an overzealous probation officer will attempt to revoke her supervised release for drinking a grande iced nonfat chai with a shot of espresso."[90] The Ninth Circuit agreed with the reasoning of the Seventh Circuit in *Siegel*, where it vacated a similar condition that banned "mood altering substances."[91] The Seventh Circuit lamented that a "serious problem with the current system is that . . . a number of . . . conditions that judges . . . invent[] are vague."[92]

Not only do unconstitutionally vague or broad conditions beget ambiguity, but they also invite potentially arbitrary enforcement from probation officers, as hypothesized above.[93] Some courts, however, have counseled that probation officers have the power to give instruction and guidance to defendants on potentially vague and broad conditions.[94] Prosecutors tend to promise that vaguely worded conditions will be interpreted narrowly to prevent capricious enforcement from happening.[95] But good faith enforcement discretion was not good enough for the Third Circuit, which held in its *Loy* decision that badly worded conditions "cannot be cured by allowing the probation officer an unfettered power of interpretation, as this would create one of the very problems against which the vagueness doctrine

87. *Id.*

88. United States v. Aquino, 794 F.3d 1033, 1037 (9th Cir. 2015).

89. *Id.*

90. *Id.*

91. *Id.* at 1037–38 (citing United States v. Siegel, 753 F.3d 705, 713 (7th Cir. 2014)).

92. *Siegel*, 753 F.3d at 708.

93. United States v. Van Donk, 961 F.3d 314, 323–24 (4th Cir. 2020) ("A condition of supervised release is unconstitutionally vague if it doesn't give a probationer 'fair notice of the conduct that it punishes' or is 'so standardless that it invites arbitrary enforcement.'") (quoting Johnson v. United States, 576 U.S. 591, 595 (2015)); United States v. Adkins, 743 F.3d 176, 193 (7th Cir. 2014) ("The possibility for inconsistent enforcement also concerns us, as different minds may interpret the same broad phrases differently.").

94. United States v. King, 608 F.3d 1122, 1128–29 (9th Cir. 2010) ("A probation officer's instructions are relevant to whether a supervised release condition gives fair warning of prohibited conduct."); United States v. Stergios, 659 F.3d 127, 134 (1st Cir. 2011) ("Should [a supervisee] find [a] special condition unduly restrictive upon his release, he need only speak with his supervising officer and, if that does not succeed, raise the issue with the district court.").

95. *See*, *e.g.*, United States v. Edwards, 944 F.3d 631, 638 (7th Cir. 2019) ("We also presume, as the government itself does, that the conditions will not be construed so broadly as to include truly inadvertent transgressions.").

is meant to protect."[96] The Fourth Circuit in *Castellano* rejected the government's argument that the defendant's failure to comply with the condition is relevant to the condition's enforceability:

> A court can't impose a condition so broad that it sets the defendant up to fail, then cite that failure as a reason to keep the condition in place. Standing alone, a defendant's failure to comply with a condition says little about whether the condition "impermissibly restricts more liberty than is reasonably necessary."[97]

In sum, all conditions fall somewhere on a spectrum of liberty deprivation. Discretionary conditions are up to the judge, but they must meet expectations depending on how much liberty is at stake, especially when the liberty interests are significant or fundamental. Additionally, conditions must be carefully defined so that a defendant is aware of what conduct is allowed of them. A defendant thus is protected inasmuch as courts do not have carte blanche to run roughshod all over their rights, either procedurally or substantively. Otherwise, the condition is arguably illegal. But what is to be done when a judge does impose a possibly illegal or unconstitutional condition, even over an objection at sentencing? While a defendant can lodge a legality challenge over such a condition, they will be limited in both the manner in which they are able to challenge a condition and the stage of the proceeding when such a challenge should be lodged.

E. Challenging a Condition Is Challenging the Sentence

When a defendant challenges either the term or a condition of supervised release, they are, in effect, challenging the sentence itself. Courts have made it clear that any component of supervised release is part of the sentence.[98] Therefore, if a judge at sentencing imposes a condition that the defendant believes is illegal (procedurally or substantively erroneous, non-applicable, vague, overbroad, or unconstitutional), they must challenge it as if it were an illegal prison term or conviction by following the same avenues to receive relief. These challenges are subject to specific statutes that are time-sensitive and have standards to be met. Failing to properly challenge the problematic condition may result in the defendant being stuck with it, which can impact their basic rights and complicate their transition back into society.

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96. United States v. Loy, 237 F.3d 251, 266 (3d Cir. 2000); *see also* United States v. Blair, 933 F.3d 1271, 1280 (10th Cir. 2019) (asserting that a supervisee does not have "to wait until the condition has been enforced to test its validity.").

97. United States v. Castellano, 60 F.4th 217, 226 (4th Cir. 2023) (quoting United States v. Ellis, 984 F.3d 1092, 1101 (4th Cir. 2021)).

98. United States v. Higgins, 739 F.3d 733, 738 (5th Cir. 2014) ("This court—as well as Congress—has deemed [supervised release] to be a part of the sentence.") (footnote omitted); United States v. Thompson, 777 F.3d 368, 373 (7th Cir. 2015) ("Conditions of supervised release [are] part of the sentence."); United States v. Paskow, 11 F.3d 873, 882 (9th Cir. 1993) ("The supervised release statute also makes it clear that the terms and conditions of supervised release are a part of the sentence.").

This standard scheme of review consists of either filing a notice of appeal in the district court (within fourteen days after sentencing)[99] or filing a habeas petition to the sentencing court (after the sentence and conviction have become final).[100] Defendants are typically put on notice of any condition being considered by the prosecutor through the pre-sentencing report, plea agreement, or a standing order from the court. Judge-made conditions may not be known until sentencing takes place, leaving counsel unprepared to mount a proper objection.[101] Nevertheless, the most significant step in challenging any proposed condition is to make an objection with reasons when it is proposed or pronounced from the bench. This preserves the argument for later appellate review.[102] Non-frivolous objections give the judge an opportunity to address the concern, tailor the condition if necessary, or justify it with their reasons.[103] With preserved objections, appellate courts will review the lower court's decision for abuse of discretion.[104] If the preserved objection is a question of law or a constitutional issue, it will receive *de novo* review.[105] If a defendant raises an objection without adequate reasoning or raises

99. 18 U.S.C. § 3742; FED. R. APP. P. 4(b)(1)(A)(i).

100. 28 U.S.C. §§ 2255(a), 2255(f).

101. *See Thompson*, 777 F.3d at 373 ("Often a defendant is given no notice in advance of the sentencing hearing of the conditions of supervised release that the judge is thinking of imposing, which can make it difficult for his lawyer to prepare arguments in opposition."); United States v. Cope, 527 F.3d 944, 953 (9th Cir. 2007) ("The district court has discretion as to the form and timing of the notice, and either advanced written notice or oral notice at the sentencing hearing may be sufficient, depending on the circumstances.").

102. United States v. Dorvee, 616 F.3d 174, 179 (2d Cir. 2010) ("To preserve an objection for appellate review, a defendant must articulate it to the trial court 'with sufficient distinctness to alert the court to the nature of the claimed defect.'") (quoting United States v. Gallerani, 68 F.3d 611, 617 (2d Cir. 1995))).

103. United States v. Hahn, 551 F.3d 977, 985–86 (10th Cir. 2008) (contending that, because the supervisee did not object, the judge did not have an opportunity to respond to the problematic condition); *see also* United States v. Lozano, 962 F.3d 773, 782–83 (4th Cir. 2020) (asserting that the court must consider non-frivolous challenges and explain why it has rejected them).

104. United States v. McCullock, 991 F.3d 313, 317 (1st Cir. 2021) ("The abuse-of-discretion standard is multi-dimensional . . . . Within it, we inspect fact findings for clear error . . . and judgment calls with some deference. . . . [W]e will find an abuse of discretion only when left with a definite conviction that 'no reasonable person could agree with the judge's decision.'"); United States v. Weber, 451 F.3d 552, 557 (9th Cir. 2006) ("In fashioning conditions of supervised release, a district court 'has at its disposal all of the evidence, its own impressions of a defendant, and wide latitude.' In light of this 'wide latitude,' we give considerable deference to a district court's determination of the appropriate supervised release conditions, reviewing those conditions deferentially, for abuse of discretion.") (quoting United States v. Williams, 356 F.3d 1045, 1052 (9th Cir. 2004)).

105. United States v. Watson, 582 F.3d 974, 981 (9th Cir. 2009) ("Whether a supervised release condition illegally exceeds the permissible statutory penalty or violates the Constitution is reviewed de novo."); United States v. Johnson, 446 F.3d 272, 277 (2d Cir. 2006) ("In reviewing conditions of supervised release imposed by a district court, issues of law are reviewed de novo. . . . Conditions of supervised release are judged by an abuse of discretion standard, where any error of law constitutes an abuse of discretion.").

no objection at all, they will have to settle for a more deferential plain error review.[106]

Appellate courts give district courts a lot of latitude in their decision-making since they are more familiar with the facts and the defendant.[107] But when judges fail to give an adequate explanation or the rationale is unclear, especially when the condition touches significant liberty interests, the reviewing court will vacate and remand since substantial rights are affected.[108] The Second Circuit said it will "carefully scrutinize unusual and severe conditions."[109] While appellate waivers would typically bar any review, illegal conditions can be an exception to this bar.[110]

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106. United States v. Hoffman, 710 F.3d 1228, 1231 (11th Cir. 2013) ("Plain error requires the defendant to show: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. . . . An error is not plain unless it is contrary to explicit statutory provisions or to on-point precedent in this Court or the Supreme Court." (internal quotation marks and citation omitted)); *but see* United States v. Malone, 937 F.3d 1325, 1327 (10th Cir. 2019) ("[A] party that has forfeited a right by failing to make a proper objection may obtain relief for plain error; but a party that has waived a right is not entitled to appellate relief. . . . Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it. While forfeiture comes about through neglect, waiver is accomplished by intent." (quoting United States v. Cruz-Rodriguez, 570 F.3d 1179, 1183 (10th Cir. 2009))).

107. *See* United States v. Eaglin, 913 F.3d 88, 94 (2d Cir. 2019) (asserting that, when reviewing district court decisions, the Second Circuit will generally defer to the sentencing court's discretionary assessment of the suitability of conditions); United States v. Warren, 843 F.3d 275, 283 (7th Cir. 2016) (stating that sentencing judges are "in a superior position to find facts and judge their import under 18 U.S.C.S. § 3553(a)"); United States v. Schave, 186 F.3d 839, 843 (7th Cir. 1999) (stating that, on appeal, the court will defer to the district court's decision to impose special conditions of supervised release and review under an abuse of discretion standard).

108. *See generally* United States v. Boyd, 5 F.4th 550, 559 (4th Cir. 2021) (asserting that when the sentencing court is not compliant with § 3583(d), the appellate court "will vacate the sentence and remand for resentencing unless context makes the court's reasons for rejecting the non-frivolous objections patently obvious.") (citation omitted); United States v. Salazar, 743 F.3d 445, 451 (5th Cir. 2014) (stating that the reviewing court will vacate a condition when the sentencing court's rationale is unclear); United States v. Bailey, No. 22-4524, 2023 U.S. App. LEXIS 12527, at *2 (4th Cir. May 22, 2023) (finding that the district court committed a procedural error when it imposed twenty special conditions of supervised release but failed to explain why it was doing so).

109. *Eaglin*, 913 F.3d at 94 (quoting United States v. Peterson, 248 F.3d 79, 82 (2d Cir. 2001) (per curiam)); United States v. Armel, 585 F.3d 182, 186 (4th Cir. 2009) (same); United States v. Ritter, 118 F.3d 502, 504 (6th Cir. 1997) (asserting conditions that implicate fundamental rights to be subject to "careful review").

110. United States v. Ornelas, 828 F.3d 1018, 1020–21 (9th Cir. 2016) (finding appellate waiver unenforceable if sentence is illegal); United States v. Adkins, 743 F.3d 176, 192–93 (7th Cir. 2014) (asserting that the Due Process Clause permits review of conditions for unconstitutional vagueness, even if supervisee waived right to appeal); *but see* United States v. Flores, 929 F.3d 443, 445 (7th Cir. 2019) (finding it to be an "intentional relinquish[ment]" of the challenge when, absent compelling reasons, a supervisee does not object to the condition and waives right to appeal); United States v. Holzer, 32 F.4th 875 (10th Cir. 2022) (maintaining appeal waiver despite objection to condition on constitutional grounds).

A defendant may choose to file a § 2255 habeas petition to collaterally attack the problematic condition. Habeas petitions involve the domain of constitutionality, but they are not a substitute for an appeal.[111] They are normally reserved for ineffective assistance of counsel claims, which, as is relevant here, would be a claim that counsel was ineffective in allowing an illegal condition to go unchallenged and did not file an appeal in time when instructed to.[112] A defendant procedurally defaults on a claim if they raise it in a habeas petition instead of a direct appeal unless they can establish cause and prejudice as to why the defendant could not appeal and had to take the habeas route.[113]

This tight clock is especially difficult because defendants may not fully experience, and be harmed by, the limitations and restrictions of the conditions until time has passed. It is much easier to conceptualize the harm of a long prison sentence than it is to know in advance how a supervised release condition could be so harmful and restrictive that it is arguably illegal. The defendant ignores this at their own peril, but this inattention is a reflection of a bigger problem: supervised release is largely ignored.

F. The Tragic Neglect of Supervised Release

Legality challenges are often belated because supervised release is not given proper attention by the participants in the criminal law world, relegating it to an afterthought in the criminal process. While tragic, this is not at all surprising because in a sentencing context, prison is the immediate concern. For defendants, supervised release conditions are often not seen as relevant until after the prison term is complete. Defendants and their counsel are more likely to give serious and careful thought to and focus on negotiations for the prison term than on the supervised release portion of the sentence.[114]

Even the judge is simply speculating as to what conditions would be appropriate in the future based on the defendant standing before them, who has not begun the prison term.[115] Facts and circumstances may change over time, and federal prison terms tend to be long. One's age, prison behavior, risk of recidivism, and other external circumstances may alter the necessity of some conditions once the

111. Coleman v. United States, 318 F.3d 754, 760 (7th Cir. 2003) ("A § 2255 motion is not a substitute for direct appeal.").

112. *E.g.*, Pippin v. United States, Nos. 3:15-CR-69-RLJ-HBG; 3:16-CV-681-RLJ-HBG, 2021 U.S. Dist. LEXIS 188559 (E.D. Tenn. July 6, 2021) (denying relief for supervisee alleging his counsel to have been ineffective for failing to appeal special condition prohibiting internet use for fifteen years).

113. Murray v. Carrier, 477 U.S. 478, 491 (1986).

114. United States v. Thompson, 777 F.3d 368, 373 (7th Cir. 2015) (explaining that defendants often have little interest in challenging release conditions because they take effect after their prison term is complete).

115. Scott-Hayward, *supra* note 16, at 216; United States v. Siegel, 753 F.3d 705, 708 (7th Cir. 2014) ("The longer the sentence, the less likely the guess is to prove accurate.").

defendant is released. Because a list of imposed conditions can be numerous, judges may tend to not give a proper explanation for each of them.[116]

Professor Scott-Hayward studied how supervised release was being treated in the Eastern District of New York, a very busy federal courthouse.[117] After reviewing data compiled in 2012, she found that supervised release was of low priority as it was hardly discussed, and defense attorneys never once objected to any imposed condition.[118] While judges were wont to impose special conditions, in none of the hearings she personally attended did they ever explain on the record why a condition was necessary.[119]

Not only may a defendant express little interest in challenging conditions because of the lack of immediacy, but they may also be loath to do so because of the immediate consequences concerning their prison term.[120] For instance, in *Barrett*, the defense counsel's decision to not challenge a condition banning the possession of legal pornography for his client, who was facing a child pornography conviction, was considered strategic.[121] The Seventh Circuit acknowledged that despite legal pornography's First Amendment protection, the challenge may have been indicative of Barrett's lack of contrition or his not taking the charge seriously enough.[122] This, too, is a consequence, as there is fear that behind a challenge lurks resistance to deterrence and rehabilitation. But these potential interpretations from the court mean challenges may not occur as often as they should, which is its own form of neglect.

These postures have wrought negative effects and have been criticized in the courts. The Tenth Circuit opened its opinion in *Martinez-Torres* by sounding off on the historical neglect of supervised release by the participants in the criminal law world:

> The most important thing at sentencing is determining whether the defendant will be incarcerated and, if so, for how long. Other matters, such as restitution and conditions of supervised release, are, appropriately, of secondary concern. But they are not inconsequential and deserve focused attention. Readily avoidable errors regarding these "secondary matters" appear too frequently on

116. *Thompson*, 777 F.3d at 374.

117. Scott-Hayward, *supra* note 16, at 204–13.

118. *Id.* at 208–09.

119. *Id.* at 211–13 ("[I]nformal conversations with judges outside the Eastern District [of New York] suggest that there is a similar lack of attention to supervised release in other districts.").

120. *Thompson*, 777 F.3d at 373 ("Defendants or their lawyers . . . worry that a successful challenge to a condition or conditions of supervised release may induce the judge to impose a longer prison sentence, thinking that resistance to supervised release implies recidivist tendencies or intentions.").

121. United States v. Barrett, 981 F.3d 644, 646 (7th Cir. 2020).

122. *Id.*; *see also* In re Ray, No. 20-5501, 2021 U.S. App. LEXIS 949, at *6 (6th Cir. Jan. 13, 2021) (finding that the district court did not abuse its discretion in denying motion for compassionate release from prison because, inter alia, it perceived a lack of contrition from defendant because he challenged his conditions at sentencing).

> our docket. Particularly frustrating is that often the errors were not raised by defense counsel until the appeal. If the prosecutor, the defense attorney, and the district court would devote a bit more time at sentencing hearings to issues beyond incarceration, much time and effort will be saved in the long run.[123]

While supervised release may not seem pertinent because it is not a prison term and it takes place in the future, the reality is that it remains a punishment that will bear heavy consequences on the day-to-day life of a defendant, a fact that is too costly to overlook. But because supervised release is being ignored on the front end, defendants find themselves in a reactionary position fighting problematic conditions on the back end.

G. But What About § 3583(e)(2), the Condition Modification Statute?

The focus on prison and inattention to supervised release has caused defendants to not challenge the legitimacy of problematic conditions until the time for review has long passed. This has led them to seek other means to address them. One of those is the condition modification statute, § 3583(e)(2), where a court, after considering the enumerated factors "may modify [or] reduce . . . the conditions of supervised release[] at any time prior to the expiration or termination of the term of supervised release."[124] On its face, this statute has appeared not only as a viable alternative route to obtain relief from illegal conditions but as an obvious choice as well.

Since the emphasis of supervised release is on rehabilitation and re-entry, it is reasonable that while the term is being served, the conditions may need changing depending on the compliance of the supervisee and the needs of the public. Long-term compliance would induce a judge to lessen a condition's intensity, while repeated struggle to comply may necessitate the opposite. Supervised release is fluid and evolving, so flexibility for courts to respond to circumstances with alterations is essential to meet its purpose,[125] in addition to implementing new ideas and methods of rehabilitation.[126]

But can the terms "modify" and "reduce" be applicable in challenging a condition based on its legality? Is such use following the spirit of the statute? As we shall see in the next section, most circuit courts have concluded that § 3583(e)(2) was not meant for legality challenges of conditions. Such courts have said that Congress, in passing the SRA, made it clear that only the standard scheme of

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123. United States v. Martinez-Torres, 795 F.3d 1233, 1234 (10th Cir. 2015).

124. 18 U.S.C. § 3583(e)(2).

125. United States v. Begay, 631 F.3d 1168, 1173 (10th Cir. 2011); *see also* United States v. Myers, 426 F.3d 117, 129 (2d Cir. 2005) (finding that modification may be proper as facts and relationships change over time); *cf.* United States v. Reyes, 283 F.3d 446, 457 (2d Cir. 2002) (finding that probation officers, when dealing with supervisees who are not meeting up to standards, may opt to modify conditions instead of initiating revocation proceedings).

126. United States v. Evans, 727 F.3d 730, 732–33 (7th Cir. 2013) (citing FED. R. CRIM. P. 32.1 advisory committee note regarding modification of conditions).

review is available for relief. One circuit said the modification statute is available if, and only if, the standard scheme of review was exhausted.[127] Only one contrarian circuit has held that the statute is an acceptable way to challenge the legality of conditions.[128] And another circuit struck a balance between the two points, stating it depends on factual changes of the defendant or legal changes in the landscape.[129] Because the Supreme Court has not reached the issue, we must turn to the circuits.

II.
COURT OPINIONS ON THE CONDITION MODIFICATION STATUTE FOR LEGALITY CHALLENGES

A. The Lussier *Standard (Second, Ninth, and Fifth Circuits)*

Decided in the late 90s and early 2000s, *Lussier*,[130] *Hatten*,[131] and *Gross*[132] decisions would set the tone and scope on the condition modification statute for roughly twenty years without disagreement. These opinions read § 3583(e)(2) narrowly enough to prevent circumventing the standard scheme of review set by the SRA.[133] Before the SRA was enacted, an illegal sentence could be corrected at any time by filing a motion under the former Federal Rule of Criminal Procedure 35(a).[134] These appellate courts surmised that when the SRA went into effect and did away with former Rule 35(a)'s allowance for courts to correct illegal sentences, it was Congress's intent that such challenges were only permitted through the standard scheme of review.

In 1997, Roger Lussier appealed a district court's dismissal of his § 3583(e)(2) motion for lack of jurisdiction. Lussier had challenged his restitution order condition as illegal under the federal restitution statute and claimed the district court did have jurisdiction pursuant to § 3583(e)(2).[135] Three principal arguments were used by the Second Circuit to affirm the denial of relief and declare district courts lack jurisdiction to review legal and constitutional challenges under 18 U.S.C. § 3583(e)(2): (1) the plain language of the statute does not mention legality in any of the factors that are to be considered before modifying a condition, unlike the pre-SRA former Rule 35(a) that explicitly mentioned legality;[136] (2) § 3583(e)(2) specifically empowers a district court to alter supervised release terms or conditions because of new or unforeseen circumstances, implying that

127. United States v. D'Ambrosio, 105 F.4th 533, 539 (3d Cir. 2024).
128. United States v. Neal, 810 F.3d 512, 514 (7th Cir. 2016).
129. United States v. McLeod, 972 F.3d 637, 644 (4th Cir. 2020).
130. United States v. Lussier, 104 F.3d 32 (2d Cir. 1997).
131. United States v. Hatten, 167 F.3d 884 (5th Cir. 1999).
132. United States v. Gross, 307 F.3d 1043 (9th Cir. 2002).
133. *Lussier*, 104 F.3d at 34; *Hatten*, 167 F.3d at 886; *Gross*, 307 F.3d at 1044.
134. FED. R. CRIM. P. 35(a) (1984) ("The [district] court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.") (repealed by the SRA).
135. *Lussier*, 104 F.3d at 32.
136. *Id.* at 34–36.

legality is excluded as a grounds for review; and (3) the legislative history of 18 U.S.C. § 3583 was not in accord with Lussier's argument of the court's jurisdiction because, if the court did have jurisdiction, it would upset the standard scheme of review established by the SRA.[137] While it is true that the phrase "at any time" was stricken from former Rule 35(a) but appears in § 3583(e)(2), the latter mentions nothing about correcting illegal sentences. Thus, the Second Circuit figured the modification statute is not meant to consider legality issues.[138] With the passing of the SRA, the direct appeal took on that burden, and legality issues could still be challenged with a 28 U.S.C. § 2255 habeas petition, which was untouched by the passing of the SRA.[139] For the Second Circuit, allowing district courts to entertain § 3583(e)(2) motions to consider legality issues would open up a backdoor review that Congress never intended the statute for.[140]

The *Lussier* decision was followed by the *Hatten* and *Gross* decisions, solidifying the issue. In *Hatten*, the defendant also tried to challenge a restitution order that he found illegal, and the government conceded the restitution amount was erroneously set by the probation officer instead of the sentencing court.[141] However, not only did the Fifth Circuit adopt the *Lussier* analysis and deny the motion, but it went a step further, holding that a 28 U.S.C. § 2255 petition would also not save the challenge since restitution lacks the constitutional dimension that § 2255 motions require.[142] In *Gross*, both the defendant and the government stipulated that the conditions being challenged by the defendant were illegal in a § 3583(e)(2) motion, but the Ninth Circuit found this immaterial as well.[143] Citing *Lussier* and *Hatten*, the Ninth Circuit found the language of the statute did not allow illegality to be a proper basis for modification and agreed with its sister circuits that to accept such a reading would contravene Congress's intent.[144]

The § 3553(a) factors listed in § 3583(e)(2) must be considered before conditions can be modified by a court. It is true that illegality is not listed among the factors, but the statute itself is bereft of any triggering event that allows for such a motion in the first place. In *Lussier*, the Second Circuit stated that "new or unforeseen circumstances" allow for modification, but they did not provide any language in the statute to justify that position[145] (and later clarified that those circumstances were not a prerequisite to modify conditions).[146] The circuit courts in *Lussier* and *Gross* acknowledged that a sentencing court must be able to respond to changes in the defendant's circumstances that may render a previously imposed condition of release either too harsh or inappropriately tailored to serve the general goals of

137. *Id.* at 36–37.
138. *Id.* at 37.
139. *Id.* (citing United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990)).
140. *Id.*
141. United States v. Hatten, 167 F.3d 884, 885–86 (5th Cir. 1999).
142. *Id.* at 887.
143. United States v. Gross, 307 F.3d 1043, 1044 (9th Cir. 2002).
144. *Id.* at 1044.
145. *Lussier*, 104 F.3d at 36.
146. United States v. Parisi, 821 F.3d 343, 347 (2d Cir. 2016).

supervised release.[147] But some circuits say that new and unforeseen circumstances are not in the statute, so the statute should not be read so narrowly to make those the activating moment to allow for modification.[148] Yet it seems odd that new and unforeseen circumstances, but not illegality or unconstitutionality, are appropriate triggering events for modification.

B. Roberts *and* D'Ambrosio *(Third Circuit)*

1. Not-So-Narrow Reading

The *Roberts*[149] case was a novel situation involving a same-sex couple who sought the liberty to communicate with one another, but the question was whether or not the challenge was based on constitutionality. Roberts and Mangini were codefendants who both pleaded guilty to possession with intent to distribute methamphetamine. After serving their prison terms, they wished to continue their committed 18-year relationship, but per the standard supervised release condition, association among felons is barred unless permission is granted by the probation officer.[150] Despite their pleadings, the probation officer denied their request, explaining that the probation office based its decision on the seriousness of the offense.[151] Roberts and Mangini had jointly filed a § 3583(e)(2) motion to clarify or modify the terms of their condition to permit continued communication.[152] The district court denied the motion, and the defendants filed a Motion to Reconsider.[153] The district court read the Motion to Reconsider as a facial challenge to the anti-association condition and stated it lacked jurisdiction to consider the motion since it was based on unconstitutionality.[154]

Even discussing the merits, the district court determined the condition was not facially unconstitutional because the anti-association condition was not a total ban, given that permission could be granted by the probation officer.[155] Even though the probation officer had admitted in court that Roberts and Mangini associating with one another would not endanger the public or lead them to commit more crimes, this statement was ignored by the district court.[156] Further, the

147. *Lussier*, 104 F.3d at 36; *Gross*, 307 F.3d at 1043.

148. *See* United States v. Begay, 631 F.3d 1168, 1172 (10th Cir. 2011) (refusing to impose this limitation on the district courts); United States v. Davies, 380 F.3d 329, 332 (8th Cir. 2004) (asserting that such a requirement is not in the statute); United States v. Murray, 692 F.3d 273, 278–79 (3d Cir. 2021) (doubting that such a requirement exists); *but see* United States v. Miller, 205 F.3d 1098, 1101 (9th Cir. 2000) (finding that new and unforeseen circumstances may justify modifications); United States v. Garrasteguy, 559 F.3d 34, 43 n.12 (1st Cir. 2009) (leaving the question open).

149. United States v. Roberts, 229 F. App'x 172 (3d Cir. 2007) (per curiam).

150. *Id.* at 173.

151. *Id.* at 174.

152. *Id.*

153. *Id.*

154. *Id.* at 174–75.

155. *Id.* at 172, 174–75.

156. *Id.* at 174.

couple's argument that the enforcement of the condition violated their Fifth Amendment right to equal protection was rejected on the grounds that the condition was narrowly tailored and protected the public.[157] Roberts and Mangini jointly appealed the decision to the Third Circuit.

The Third Circuit found that the motion should not have been treated as a legality challenge to the condition but a true request for modification: the defendants were challenging the enforcement of the condition.[158] The Third Circuit surmised that Roberts and Mangini were not seeking a backdoor review of the condition facially, and the "new or unforeseen circumstances" applicable here are the probation officer's denial of their request to continue their relationship through the permission language of the anti-association condition.[159]

Rule 32.1 addresses the procedural requirements for modifying conditions of supervised release under § 3583(e)(2). The 1979 Advisory Committee notes pertaining to the rule explain that "conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new methods of rehabilitation."[160] Rule 32.1 also permits a defendant to challenge a probation officer's interpretation of a particular condition of supervised release.[161] While the Third Circuit agreed that a § 3583(e)(2) motion cannot be used for legality challenges, it did hold that defendants can use § 3583(e)(2) "to challenge the arbitrary or unfair application of a condition of release by the probation officer."[162] Roberts and Mangini's challenge was to the probation officer's interpretation of the condition in a way that, they argued, violated their rights to associate as a loving couple. The Third Circuit vacated and remanded the district court's order.

Third Circuit Judge Jordan, in a short concurrence, wanted to make clear to the district court in its remand instructions that, as traditional jurisprudence dictates, that when statutory interpretation can accommodate constitutional avoidance, constitutional issues should be avoided when the merits could be resolved on other grounds.[163] But it was the as-applied challenge of the associational standard condition that led to the Third Circuit's decision to vacate and remand in the end.[164] A constitutional right was implicated in the *Roberts* case. The *Lussier* analysis states that the enumerated § 3553(a) factors must be applied in all

157. *Id.*

158. *Id.* at 177. The defendants were allowed to do so per the provisions of Federal Rule of Criminal Procedure 32.1. FED. R. CRIM. P. 32.1.

159. *Roberts*, 229 F. App'x at 177.

160. FED. R. CRIM. P. 32.1(b) advisory committee's note (1979). The 1989 amendment to Fed. R. Crim. P. 32.1 extended the rule to those on supervised release. It was originally applicable only to those on probation.

161. *Id.* ("[I]n cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification.").

162. *Roberts*, 229 F. App'x at 178.

163. *Id.* at 179 (Jordan, J., concurring) (citing Clark v. Martinez, 543 U.S. 371, 381 (2005)).

164. *Id.* at 178.

modification motions, but the outcome of the *Roberts* case had nothing to do with those factors. At issue in *Roberts* was a permissible condition being unreasonably enforced by a probation officer in an attempt to keep a long-term committed couple from resuming their relationship, thereby violating their constitutional right to associate.

2. Softening the Standard for Legality Challenges

Brian Lee Nestor challenged his conditions barring controlled substance and alcohol use, drug testing, and alcohol treatment, arguing that they were unreasonably and illegally imposed by the district court.[165] According to the Third Circuit, the problem for Nestor was that he did not challenge the conditions, neither when he directly appealed his judgment, nor when he later filed a § 2255 motion.[166] The Third Circuit followed the *Lussier* analysis, finding Nestor's use of a § 3583(e)(2) motion to challenge the conditions for the first time could not be allowed when he had a chance to do it before.[167] Relying on the plain language of the statute, Nestor's denial of relief was affirmed.[168] While the *Lussier* analysis was sustained, what seemed problematic to the court was that the challenge was belated and squandered when he used his appeal and habeas petition on other grounds, but not the conditions.

But 12 years later, in the *D'Ambrosio* decision, the Third Circuit would find a compromise in both respecting the scheme and opening the statute for legality challenges. Anthony D'Ambrosio and Armando Delgado worked in supporting roles for a sex trafficking operation.[169] Following their convictions, both ultimately had the sex offender registration condition imposed on them.[170] Delgado objected at sentencing that his offense did not qualify for the registration condition, which the court improperly delegated to the probation office, which, after his failed appeal, imposed the condition.[171] After the Third Circuit held in another case that judges are required to determine as a matter of law whether an individual's conviction qualifies for sex offense registration, Delgado sought to challenge the condition as illegal with a § 3583(e)(2) motion.[172] The district court acknowledged that the condition was impermissibly imposed on him, but the modification statute did not confer jurisdiction for legal challenges and denied relief.[173] D'Ambrosio also filed a § 3583(e)(2) motion challenging his registration condition, but in contrast, D'Ambrosio did not object to the condition at sentencing, and he did

165. United States v. Nestor, 461 F. App'x 177 (3d Cir. 2012) (per curiam).
166. *Id.* at 179.
167. *Id.*
168. *Id.*
169. United States v. D'Ambrosio, 105 F.4th 533, 534 (3d Cir. 2024).
170. *Id.* at 536.
171. *Id.* at 535–36.
172. *Id.* at 536.
173. *Id.* at 537–38.

not file a direct appeal.[174] His modification motion was also denied on jurisdictional grounds.[175]

After the Third Circuit declared the district judge impermissibly delegated the registration decision to the probation officers, it went to the jurisdictional question of the § 3583(e)(2) motions.[176] Acknowledging that individuals are limited to the standard scheme of review, they held:

> "[A]lthough § 3583(e)(2) does not explicitly list legality as a factor which must be considered, it also does not prohibit legality as a consideration. Legality is at the heart of every decision made by a judge. To forbid a judge from considering legality would render the position, and every judicial determination virtually meaningless. The legality of sentences and conditions of supervised release is a necessary and obvious consideration; nothing in the text of § 3583(e)(2) explicitly prevents its consideration . . . [l]ike [the factors in] § 3583(e)(2), § 3583(c) also omits any mention of the condition's legality. But it would make no sense to say that a court, in imposing a supervised release condition, is prohibited from considering whether that condition is lawful."[177]

While the Third Circuit noted the concerns of its sister circuits about backdoor review, it underlined the need for supervised release's flexibility to respond to rehabilitative needs and assuaged its critics that "[r]equiring individuals to exhaust all timely challenges provides a necessary procedural check to potentially endless challenges that might otherwise be available pursuant to § 3583(e)(2)."[178]

C. The Seventh Circuit Alone Takes a Different View in Neal

With the clear-cut and plain language *Lussier* analysis, which shepherded the subsequent decisions of sister circuits for years, why would the Seventh Circuit deviate from the course to go alone, seeing the purpose and scope of 18 U.S.C. § 3583(e)(2) so differently?

After a second stint in prison, Tyree Neal filed a § 3583(e)(2) motion to remove a warrantless search condition he thought was inapplicable to him.[179] He believed warrantless search conditions only applied to sex offenders (as they're listed in the Sentencing Guidelines under the "Special Conditions–Sex Offenses" subsection)[180] and not to drug offenders such as himself.[181] The district court

174. *Id.* 536.
175. *Id.*
176. *Id.* at 537.
177. *Id.* at 540.
178. *Id.* at 539.
179. United States v. Neal, 810 F.3d 512, 514 (7th Cir. 2016).
180. *Id.* at 515; U.S. SENT'G GUIDELINES MANUAL § 5D1.3(b)(3)(G) (U.S. SENT'G COMM'N 2025).
181. *Neal*, 810 F.3d at 515.

denied the legality challenge, and Neal appealed.[182] The Seventh Circuit denied his request to remove the warrantless search condition on the merits since that special condition's placement in a particular subcategory did not preclude its ability to be imposed on anyone for whom it could be justified.[183] More consequentially, however, the circuit court reached the issue by bucking the long-held *Lussier* analysis.[184] The Seventh Circuit held that its reading of § 3583(e)(2) allowed for challenges based on substantially unlawful conditions or conditions that no longer serve the purpose of supervised release.[185]

The circuit court cited its *Ramer*[186] decision, in which it allowed a district court to act on the parties' joint motion under § 3583(e)(2) to correct an unlawful condition while a direct appeal was pending.[187] In *Neal*, the Seventh Circuit applied this approach leaning on the "at any time" language of the statute.[188] The court emphasized that the purpose of supervised release is to help guide the defendant back to a normal life, not to serve as a significant barrier to re-entry.[189] They recognized that such barriers could be fatal if problematic conditions that are allowed to stand could send a defendant back to prison.[190] To the Seventh Circuit, conditions that are facially invalid, ambiguous, outdated, or unconstitutional are all the same, and such conditions make compliance with supervised release difficult.[191]

The *Neal* decision also implicitly rejected "the finality of the sentence" as it applies to release conditions.[192] Finality of a prison term, it appears to the circuit court, should not be applied to the more fluid and less custodial supervised release program. The court said in *Neal* that post-release conditions imposed at sentencing will not be truly relevant to a defendant until they are released back into society, which, for many, can be for a lengthy amount of time.[193] In their decision-making, judges are merely making predictions given that changes, especially after a lengthy prison term, are almost inevitable.[194] The circuit court surmised conditions may need to be altered due to changes in society (for example, the luxury of internet access in the early 2000's compared to the prevalence and necessity of it

182. *Id.*
183. *Id.*
184. *Id.* at 517–18.
185. *Id.* at 518–20.
186. United States v. Ramer, 787 F.3d 837 (7th Cir. 2015).
187. *Neal*, 810 F.3d at 517.
188. *Id*. at 518.
189. *Id*. at 519.
190. *Id*. at 520.
191. *Id*.
192. *Id.* at 519–20 (asserting that modification motions permit supervisees to request alteration to conditions imposed at sentencing to ensure they "remain relevant and beneficial" post-release).
193. *Id.* at 519.
194. *Id.*

now), new ideas and methods of rehabilitation, or real-world applications of the conditions.[195]

The plain language *Lussier* analysis was not enough for the Seventh Circuit to foreclose relief from illegal conditions, regardless of § 3583's legislative context, because the stakes are so high and Congress was not as specific as the *Lussier* court had declared.[196] The *Neal* court held it would need more explicit language from Congress before foreclosing relief from illegal conditions via modification motions.[197]

The Seventh Circuit further upset the standard scheme of review by holding that condition modifications may be divorced completely from costly and time-consuming direct appeals and re-sentencings in the interest of the judicial economy.[198] This is further persuasion that, in the view of sentencing as a whole, the finality that comes with a prison term should not be applied to supervised release conditions. The *Neal* decision cited the Circuit's earlier *Tejeda*[199] and *McKissic*[200] decisions where the court had previously declared immediate challenges of imposed conditions right after sentencing are not required because a defendant could utilize a § 3583(e)(2) motion later, closer in time to when it would really matter as circumstances may change during the years of incarceration.[201]

Almost to a fault, the Seventh Circuit implied that condition challenges of any kind should be made near the end of a prison term. This was made clear in a subsequent case, the *Suttory* decision, which put the Seventh Circuit's *Neal* precedent into practice when a movant's substantive challenge to his conditions were considered premature because it was 2018, four years prior to his release date in 2022: "The governing law may change before then and it would be more efficient for the defendant to make all potential arguments at one time."[202] The district court advised the defendant to re-file his § 3583(e)(2) motion six months prior to release.[203] While the Seventh Circuit leaned on the "at any time" language in its *Neal* decision, the district court's decision in *Suttory* held that while modification may be done any time, it does not mean it is the best practice to do so.[204]

But there is a cautionary tale in the Seventh Circuit's conclusion of substantive challenges with § 3583(e)(2) motions: it disallows challenges to erroneous procedural errors that arise from sentencing when conditions are imposed. Missteps and procedural defects that may occur at sentencing include an inadequate explanation of a condition's imposition, a condition not being relevant to the

195. *Id.*
196. *Id.* at 518.
197. *Id.*
198. *Id.* at 518–19 (citing United States v. Silvious, 512 F.3d 364, 371 (7th Cir. 2008)).
199. United States v. Tejada, 476 F. 3d 471, 475–76 (7th Cir. 2007).
200. United States v. McKissic, 428 F.3d 719, 726 (7th Cir. 2005).
201. *Neal*, 810 F.3d at 519.
202. United States v. Suttory, No. 09-cr-30003, 2018 U.S. Dist. LEXIS 181461, at *5 (C.D. Ill. Oct. 22, 2018).
203. *Id*.
204. *Id*.

conviction, or insufficient evidence to support its imposition.[205] The Seventh Circuit plainly stated in *Neal* that these "procedural shortcomings must be raised at the first opportunity or not at all."[206]

D. McClamma *and* Faber *(Eleventh and Sixth Circuits)*

As previously stated, constitutional rights are not absolute in the supervised release system.[207] A workaround to avoid constitutional matters is to craft the condition so it is not a total ban. A condition is not a total ban if a probation officer can make case-specific determinations and decide to give a supervisee permission to engage in certain conduct. In the following two cases, *McClamma* and *Faber*, this will be applied to fundamental rights involving parenting a child and significant liberty rights in being with a life partner. But as seen in the *Roberts* case, these protected liberty interests can be haphazardly affected through the imposition, enforcement, and sustaining of these conditions by courts and probation officers.

When Kyle McClamma[208] was sentenced, a condition was imposed so that he could not have direct contact with minors without the permission of his probation officer. This condition did not make an exception for contact with his daughter.[209] When he was released from prison in 2011, the district court issued a Clarification Order, which modified the condition allowing third-party supervised visits with his daughter and he did not appeal that order.[210] However, in 2012, he filed a § 2255 collaterally challenging the condition as unconstitutional, and, in 2015, the district court denied his § 2255 petition as untimely.[211] After the birth of his second daughter, McClamma filed a § 3583(e)(2) to exclude both of his daughters (a second daughter was born after the imposition of the original condition) from the no-contact condition.[212] The district court granted modification for the younger daughter but not the older one.[213] He appealed that decision to the Eleventh Circuit, but it affirmed the decision.[214]

In 2015, he filed another § 3583(e)(2) on the grounds that new circumstances had occurred and that the condition was "substantively unreasonable and violated his constitutional right to parent a child."[215] He argued that his life was taking a turn for the better: he was attending college, had remarried, and his parents, who served as third-party supervisors, were no longer available; his mother had been

205. *Neal*, 810 F.3d at 520.
206. *Id*.
207. *See supra* Part I.C.
208. United States v. McClamma, 676 F. App'x 944 (11th Cir. 2017) (per curiam).
209. *Id*. at 945.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id*.
215. *Id.*

diagnosed with breast cancer and his father had recently died.[216] Nevertheless, the court did not appear to be convinced by these new and unforeseen circumstances due to the fact that they had affirmed a modification denial "a little over a year ago."[217] This was an alarming position to take since the § 3583(e)(2) language says "at any time," so the recency of the modification denial should have had no bearing on the new request. Ultimately, one can argue that the Eleventh Circuit denied McClamma's request for modification only as a matter of convenience, as the new circumstances presented to the court had no bearing on his visitation restrictions.[218]

The substantively unreasonable and unconstitutional argument failed as well since the Eleventh Circuit adopted the *Lussier* standard[219] and rejected the *Neal* position without addressing it fully.[220] Because McClamma did not directly appeal the original condition when it was imposed, did not appeal the Clarification Order, and his § 2255 petition was denied, the Eleventh Circuit held he could not use § 3583(e)(2) to raise legality and constitutional arguments.[221] One should pause at the obstacles McClamma had to face in his right to parent his child—he could not alter the burdensome condition to allow him to be with his daughter. Thus defendants should take caution when raising new or unforeseen circumstance arguments as not all of them will be treated as such by the courts.

Another jarring opinion involving loved ones is the Sixth Circuit's *Faber*[222] decision. Like the *Roberts* case, *Faber* also involved a same-sex couple but with a distinctly different story and outcome. Once released from prison, Robert Faber moved in with his roommate, Tylyn Gieszer,[223] with whom he entered into a relationship and both later became spouses "according to their neo-pagan religion Wicca."[224] While Faber was on supervised release, a probation officer visited their apartment, and Gieszer was caught covering up for Faber by hiding his laptop and other computer accessories, items Faber was not allowed to have per a condition based on his child pornography conviction.[225] Because Faber had violated the condition, his supervised release was revoked and he was sentenced to serve an additional prison term and a new condition was imposed forbidding him from having any further contact with Gieszer.[226] The district court described their relationship as "toxic" since Gieszer assisted Faber in violating a condition.[227] Faber filed

216. *Id.*

217. *Id.* at 946 (explaining that these new circumstances were not sufficient to remove the restriction).

218. *Id.*

219. The Eleventh Circuit formally joined its sister circuits in adopting the *Lussier* standard in United States v. Cordero, 7 F.4th 1058 (11th Cir. 2021).

220. *McClamma*, 676 F. App'x at 947.

221. *Id.*

222. United States v. Faber, 950 F.3d 356 (6th Cir. 2020).

223. United States v. Faber, 718 F. App'x 349, 351 (6th Cir. 2017).

224. *Faber*, 950 F.3d at 357.

225. *Id.*

226. *Id.*

227. *Faber*, 718 F. App'x at 352 (quoting the district court).

a direct appeal to the no-contact condition, but the Sixth Circuit affirmed the condition.[228] Faber also filed two civil lawsuits against probation officers and filed a § 2255 to be rid of the non-contact condition, all to no avail.[229]

Faber was released from prison but was caught contacting Gieszer, violating his condition again, which led to another prison term and re-imposition of the no-contact condition.[230] Instead of directly appealing the decision as he did before, he filed a § 3583(e)(2), arguing that the no-contact condition order preventing communication with his spouse violated his rights under the Religious Freedom Restoration Act but the district court was unpersuaded and denied the motion.[231] Faber appealed to the Sixth Circuit, which, in turn, said the district court lacked jurisdiction to consider the no-contact order and followed the *Lussier* standard in coming to its conclusion, noting all of its sister courts that have addressed the issue agreed with that analysis except the Seventh Circuit.[232] The Sixth Circuit stated that following the Seventh Circuit's reasoning would mean turning the clock back to the pre-SRA indefinite review of illegality challenges to sentences, and nothing in the statute pointed in that direction.[233] Even though the Sixth Circuit cited the as-applied challenge in the comparable *Roberts* case, they did not think that scenario applied to Faber.[234] To them, the enumerated factors to be considered in modification motions are an exclusive list and the courts are not at liberty to enlarge that list.[235]

Even though the Sixth Circuit acknowledged Faber and Gieszer's relationship, it did not appear important enough to salvage by amending the condition. The Sixth Circuit concluded the district court only erred in considering the motion, allowing the offensive restriction to remain, and no avenue of communication in a supervised or therapeutic setting to detoxify the relationship would be available for the couple. Instead, the courts effectively terminated the relationship with no possibility of reuniting. How long would Faber have to be violation-free before the no-contact condition could be reconsidered and rescinded? The standard anti-association condition in the *Roberts* case was challenged as-applied but, unlike in this case, Gieszer was not a criminal co-defendant with a felony status but a roommate-turned-husband who assisted in covering up a supervised release violation – arguably hardly the kind of activity that should allow courts to put a marriage on ice indefinitely.

228. *Faber*, 950 F.3d at 357.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id*.
233. *Id.* at 359.
234. *Id.*
235. *Id.* at 358 (6th Cir. 2020) (finding that the omission of illegality from the listed factors was not an oversight).

E. The Fourth Circuit Brings Flexibility to Finality

1. Finding a Middle Ground

Yolanda Diggs was about to be sent to prison for assisting her mastermind husband in a bank fraud scheme.[236] She was to serve six months of intermittent confinement for Conspiracy to Commit Bank Fraud, but Diggs begged the district court to defer the sentence.[237] She explained that since her husband was already serving his prison term, this left her as the sole caretaker of their daughter, and so she asked the court to wait for her to finish covering her daughter's high school tuition and witness her daughter's graduation before starting the prison term.[238] The district court rightfully acknowledged the family's need and deferred the prison term.[239] The deferred prison term was listed as a condition of her supervised release, and she was to live under home confinement until her prison term began.[240] She then filed a § 3583(e)(2) motion claiming the district court erred in making a prison term a condition of supervised release.[241] The district court relied on the *Lussier* standard[242] because the Fourth Circuit applied it in *McMahon*, an unpublished opinion that stated that a sentencing court lacked jurisdiction to modify a condition based on illegality, even though the restitution order at issue was, in fact, illegal.[243] The District Court of Maryland was also persuaded by its intra-circuit Western District of Virginia court in its *Wilson*[244] and *Whitten*[245] decisions that likewise followed the *Lussier* standard.[246] In the end, Diggs did not argue against the reasonableness of the prison term until after she started her pre-prison supervised release and only sought the prison term's deferment. The district court never discussed the merits of whether a prison term can legally be a condition of supervised release, and thus Diggs lost a potential challenge by not following the standard scheme of review in her challenge of the condition.

Two years later, the Fourth Circuit struck a fine balance between the narrow *Lussier* standard and the arguably anti-textual renegade *Neal* decision. George McLeod III[247] pleaded in his § 3583(e)(2) motion that the sex offender registration

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236. *See* United States v. Diggs, No. PX-15-0228, 2018 U.S. Dist. LEXIS 128682, at *3 (D. Md. July 31, 2018) (Diggs describing her husband as "masterminding" the bank fraud scheme).

237. *Id.* at *2–3.

238. *Id.* at *3.

239. *See id.*

240. *Id.*

241. *Id.* at *4–5.

242. *Id.* at *7.

243. United States v. McMahon, No. 99-4239, 2000 U.S. App. LEXIS 18182, at *12–13 (4th Cir. July 28, 2000).

244. United States v. Wilson, No. 5:96-cr-30056-1, 2018 U.S. Dist. LEXIS 12235 (W.D. Va. Jan. 25, 2018).

245. United States v. Whitten, No. 7:14CR00049, 2018 U.S. Dist. LEXIS 69211 (W.D. Va. Apr. 24, 2018).

246. *Diggs*, 2018 U.S. Dist. LEXIS 128682, at *7.

247. United States v. McLeod, 972 F.3d 637 (4th Cir. 2020).

requirement imposed on him was illegal, even though the sentencing court warned him about it before imposition and McLeod informed the court he had spoken to counsel on the matter. The district court acknowledged that while McLeod was right that the interstate prostitution charge did not qualify for the mandatory sex offender registration, the aggravated identity theft count did qualify because the conduct involved him recruiting a minor to cross state lines to work at his strip club for sex solicitation.[248] McLeod appealed the decision and, notably, the Fourth Circuit did not enforce the appeal waiver from his plea deal since McLeod alleged his condition was illegally imposed against the statute, which would render the condition unauthorized.[249] Even though the government argued that his § 3583(e)(2) filing should count as "the conviction or the sentence in any direct appeal or other post-conviction action" per the appeal waiver, the Fourth Circuit disagreed, stating that a § 3583(e)(2) is neither a direct appeal nor a § 2255 petition.[250] Moving to the merits, the Fourth Circuit summarized the cases that applied the *Lussier* standard into two principal points: the § 3553(a) factors enumerated in § 3583(e)(2) are exclusive and the standard scheme of appellate and collateral review would be disturbed if § 3583(e)(2) motions allowed for legality challenges.[251] But they agreed with the *Neal* Court in largely rejecting the finality argument and reading the "at any time" language in the statute to maintain Congress's intent that supervised release is for rehabilitative purposes.[252]

Consequently, the Fourth Circuit in its analysis did away with the finality issue more overtly than the Seventh Circuit, emphasizing that the finality of the sentence that Congress addressed in passing the SRA was concerned with the prison term and not the then-infant supervised release program, as each serves its own distinct purpose.[253] The finality obsession so often invoked yet so arbitrarily applied to supervised release can theoretically derail the path the defendant takes in rehabilitation and transitioning back to their community. The Fourth Circuit recognized that, because § 3583(e)(2) allows for extending, modifying, reducing, and enlarging conditions "at any time," Congress's intent of finality might not apply to supervised release.[254] The new and unforeseen circumstances event trigger was expanded in the *McLeod* decision to include legal or factual circumstances, including those that go to the legality of the sentence.[255] Here, the finality and flexibility are in line with Congress's intent. This ruling treaded further in the legality waters by noting that the "no greater deprivation of liberty" language in the § 3553(a)(6) factor could be construed as a legality issue; the disparity of

248. *Id.* at 640.
249. *Id.* at 640–41.
250. *Id.* at 640; *but see* United States v. Scallon, 683 F.3d 680, 682–84 (5th Cir. 2012) (barring motion to modify original terms of supervised release because of defendant's waiver of right to appeal sentence "on all grounds" or to contest the sentence "in any post-conviction proceeding").
251. *McLeod*, 972 F.3d at 641–42.
252. *Id.* at 642–43.
253. *Id.*
254. *Id.*
255. *Id.* at 644.

sentences that occur when a new law is made connects well with this factor.[256] In other words, a new legal circumstance may implicate a condition that did not have the benefit of foresight at the sentencing phase. But the Fourth Circuit held that factual and legal premises at the time of sentencing lock a defendant to those originally imposed conditions, and there are no avenues outside of the standard review scheme to challenge the conditions' legality.[257] Therefore, § 3583(e)(2) cannot be utilized by the defendant to make legality challenges when no facts nor law have changed since sentencing. The Fourth Circuit determined that McLeod's motion must fail because he did not appeal, he did not collaterally attack, and nothing factual or legal had changed since sentencing, thus there was no basis for changing the condition at all.[258] Because § 3583(e)(2) could not be treated as a substitute for an appeal or habeas petition, McLeod's challenge to the sex offender registration condition was deemed belated.[259]

Fourth Circuit Court Judge Agee, in his concurrence in the *McLeod* decision, seemed terrified that the majority opinion likely opened up the floodgates for legality challenges using § 3583(e)(2) when the *Lussier* standard had it right.[260] Agee cited the Fourth Circuit's decision in *United States v. Webb*, which determined that while a non-enumerated factor could be considered, it could not predominate the decision in modifying a condition the way an enumerated factor must.[261] Agee put forth that if a challenge on legality is allowed in a modification motion, it has to have been based on a non-enumerated factor and thus, in effect, has to be the dominant factor in the decision-making.[262] To this point, Agee believes illegality cannot be the basis for a court's decision to modify a condition, but implicitly hints that it could be a smaller factor to be considered as long as the enumerated factors held more weight.[263]

While the Fourth Circuit did not go as far as the Seventh Circuit in its holding, at least the Fourth Circuit took into account the main purpose of supervised release. That is, they refused to bind the sentencing courts, who hold great control over a defendant's liberty, by striking the right balance of its duties: assisting the defendant by imposing and changing conditions that help their transition back into society without allowing troublesome rules to hamper that transition, all the while not disrupting the standard review scheme set by Congress.

2. Changes in the Legal Landscape

Two years after *McLeod*, a change in the legal landscape did occur in the *Morris*[264] case concerning conditions of internet bans. The U.S. Supreme Court

256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *See id.* at 645–49.
261. *Id.* at 647 (citing United States v. Webb, 738 F.3d 638, 641–42 (4th Cir. 2013)).
262. *See id.* at 647.
263. *Id.*
264. United States v. Morris, 37 F.4th 971, 977 (4th Cir. 2022).

in their *Packingham*[265] opinion held that North Carolina's law preventing sex offenders who were on the registry post-conviction from accessing certain social media did not withstand the high court's intermediate scrutiny review standard; the state's interest was not weighty enough to completely bar a registered sex offender's First Amendment right to speak in the public square, check ads for employment, and "explor[e] the vast realms of human thought and knowledge."[266] As mentioned *supra*, while internet use was not so pervasive 20 years ago, it has become too ingrained and ubiquitous in everyday life for broad sweeping bans of internet access to hold now.[267] But such restrictions are not totally lifted for all sex offenders still serving their supervisory sentences. Individualized factors and evidence are considered by the courts in deciding whether, in the interest of public safety, an internet ban is appropriate[268] or unjustified.[269] Morris challenged his internet use condition in court with a § 3583(e)(2) motion, and the district court denied the motion for lack of jurisdiction to entertain an attack on the original sentence.[270] Morris and the amicus successfully persuaded the Fourth Circuit that the *Packingham*, *Hamilton*, and *Ellis* decisions had changed the legal landscape, the district court was in error and remanded the case back for them to consider his modification challenge.[271] This same legal landscape challenge was applied in the *Debolt*[272] and *Whitten*[273] decisions as well.

F. The Other Circuits

The First Circuit has been silent on this issue. Within its District Court of Rhode Island, the *Manjarres*[274] case only speaks to former Rule 35(a) and how a defendant tried to apply the pre-SRA rule that became defunct after it was enacted in 1984 in a challenge to his sentence imposed in 2001. But § 3583(e)(2) was not mentioned as a possible route to relief while a § 2255 petition was. Neither the D.C. Circuit nor the D.C. District Court has addressed the issue. The Tenth Circuit, in a footnote of its *Nielsen* opinion, explained that it has not yet made a decision on the proper scope of § 3583(e)(2) in a precedential opinion, but the possibility to seek relief through this avenue has not been foreclosed.[275]

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265. Packingham v. North Carolina, 582 U.S. 98 (2017).

266. *Id.* at 105–09.

267. *See* United States v. Neal, 810 F.3d 512, 519 (7th Cir. 2016) (explaining that "a good example" of conditions that likely require modification to account for societal changes are broad internet bans, because of the "practical necessity for [supervisees to have] some access to the internet").

268. United States v. Hamilton, 986 F.3d 413, 421–23 (4th Cir. 2021).

269. United States v. Ellis, 984 F.3d 1092, 1102–05 (4th Cir. 2021).

270. United States v. Morris, 37 F.4th 971, 973 (4th Cir. 2022).

271. *Id.* at 977.

272. United States v. Debolt, 838 F. App'x 785, 786 (4th Cir. 2021) (per curiam).

273. United States v. Whitten, 846 F. App'x 177, 178–79 (4th Cir. 2021) (per curiam).

274. Manjarres v. United States, No. 00-049-ML, 2008 U.S. Dist. LEXIS 92648, at *2 (D.R.I. Nov. 14, 2008).

275. United States v. Nielsen, No. 21-8087, 2022 U.S. App. LEXIS 22198, at *15 n.6 (10th Cir. Aug. 10, 2022). The District Court of Kansas said the Tenth Circuit in *Begay*

Within the Eighth Circuit, the District of Minnesota, in a footnote of its *Pethley* decision, said its appellate court has not addressed the issue.[276] But the Southern District of Iowa, in its *Shipley* opinion, recognized that illegality, vagueness, or improper delegation are not proper challenges via § 3583(e)(2), but such a motion may be appropriate where "fluid circumstances alter either the need for, or the efficacy of, certain conditions."[277] However, the court did accept that § 3583(e)(2) authorizes the court to consider whether conditions are overbroad, particularly in light of any changed circumstances that may have arisen since the condition's imposition.[278] Thus, it appears possible that the Southern District of Iowa may be amenable to changed legal or factual circumstances, similar to the Fourth Circuit's holding in *McLeod*. This may assist the Eighth Circuit in its future decision should it ever have the opportunity to make one.

CONCLUSION

More scrutiny should be directed towards supervised release conditions because they will affect the day-to-day function of the supervisee in their re-entry transition. Illegal and unconstitutional conditions should be identified as early as possible. The best advice for any defendant is to study their plea agreements and pre-sentencing reports and discuss with their counsel any potential challenges. Timely and reasoned objections before and during sentencing are a significant first step, and the standard scheme of review should be utilized when objections are denied. When standard remedies are exhausted or a problematic condition is discovered too late, § 3583(e)(2) may be an acceptable alternative vehicle to challenge the offensive condition, depending on the circuit wherein the defendant was sentenced.

To date, only the Seventh Circuit allows § 3583(e)(2) motions for substantial legal challenges to illegal conditions, although they prefer such challenges to be raised near the end of the prison term. The majority of circuits follow a narrow reading and reject such challenges using the modification motion based on the analysis of the first circuit that addressed it. Two circuits have different exceptions in-between: the Third Circuit says a defendant must exhaust all challenges before a modification motion can be activated for legality challenges, and the Fourth Circuit says that only factual challenges or legal landscape changes since sentencing can allow for legality challenges. Persuasive arguments from favorable circuits

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"determined that a district court may not 'modify conditions of supervised release based on an argument that a particular condition is unlawful.'" United States v. Bronson, No. 20-20042-01-DDC, 2023 U.S. Dist. LEXIS 75607, at *2 (D. Kan. May 1, 2023) (quoting United States v. Begay, 631 F.3d 1168, 1172–73 (10th Cir. 2011)). But the *Begay* court said no such thing. It was merely quoting *Lussier*, not agreeing with it. The footnote in *Nielsen* clearly stated it had not taken a position on the matter. *Begay*, 631 F.3d at 1172–73.

276. Pethley v. United States, No. 21-cv-981 (JRT/TNL), 2021 U.S. Dist. LEXIS 243172, at *5 n.4 (D. Minn. June 24, 2021).

277. Shipley v. United States, 825 F. Supp. 2d 984, 989 (S.D. Iowa 2011) (quoting United States v. Balon, 384 F.3d 38, 47 n.4 (2d Cir. 2004)).

278. *Id.*

should be used if a defendant's particular circuit has not yet made a decision on the matter.

If a defendant is sentenced within an unfavorable circuit that has adopted the *Lussier* standard, they could make legality a non-enumerated factor in their request for modification while exploiting the "no greater deprivation of liberty necessary" directive. Or a defendant can couch the legality issue within the enumerated factors without invoking legality or constitutionality at all. Outside of courts that may allow legality challenges with § 3583(e)(2) in some fashion, using legality-centered arguments to *Lussier*-minded courts without applying the enumerated factors in some way will be a surefire route to dismissal due to the court's lack of jurisdiction.