22-1115

To Be Argued By:
ANDREW M. RODDIN

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

BRIAN MAIORANA,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of New York

BRIEF FOR THE UNITED STATES ON REHEARING *EN BANC*

JOSEPH NOCELLA, JR.,
United States Attorney,
Eastern District of New York
271-A Cadman Plaza East
Brooklyn, New York 11201
(718) 254-7000

ANTHONY BAGNUOLA,
ANDREW M. RODDIN,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

GUIDELINES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 22-1115

UNITED STATES OF AMERICA,

Appellee,

-against-

BRIAN MAIORANA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES ON REHEARING *EN BANC*

PRELIMINARY STATEMENT

Brian Maiorana was convicted of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1), and sentenced to 36 months' imprisonment and three years of supervised release. Consistent with *United States v. Truscello*, 168 F.3d 61 (2d Cir. 1999), the district court did not orally recite each standard condition of

supervision at Maiorana's sentencing. For the following reasons, *Truscello* remains correct and was faithfully applied here.

First, the need for defendants to receive notice and an opportunity to challenge their conditions of supervision is adequately addressed by the Court's existing holdings, which only dispense with a judge's in-person recital of conditions that are generally appropriate in all cases, plainly appropriate to specific defendants, or otherwise essential to the functioning of the system of supervised release. Maiorana concedes the sufficiency of this framework by acknowledging that the oral pronouncement rule can be satisfied by something less than a judge's verbatim reading, in the defendant's presence, of the applicable supervised release conditions—that is, by summary reference to a written list of those conditions. Such a process has already been endorsed by this Court and implemented by district judges in the Circuit. As such, overruling *Truscello* would not better vindicate defendants' constitutional right to be present for sentencing, result in more diligent individualized assessments by sentencing judges, or better inform the public debate around criminal sentences.

Second, in the absence of intervening Supreme Court authority, significant considerations of *stare decisis* counsel against overruling a 26-year-old precedent that, given the Court's repeated reaffirmance of its reasoning and core holding, has come to be broadly relied upon by district courts in the Circuit.

Third, overruling *Truscello* would be particularly futile in this case, where Maiorana, a prior parolee, was on notice of the applicable conditions of supervised release and consented to their entry in his judgment. The Court should therefore leave *Truscello* intact and affirm the judgment below.

STATEMENT OF FACTS

I. The Offense Conduct

It is true to say, as Maiorana has, that he "made belligerent social media posts" about the 2020 presidential election. (Br.5).[1] It is also woefully inadequate: in online messages posted between September 2020 and November 2020, Maiorana explicitly threatened to kill politicians, protestors, law enforcement officers, and others based on their political views. (PSR ¶ 4).

The FBI reasonably "regarded these posts as threatening" (Br.5) because they were explicitly and undeniably threatening. On October 19, 2020, for example, Maiorana announced, "It[']s come to the point where pipe bombs need to be thrown into these mobs of . . . protestors." (PSR ¶ 4). On November 5, 2020, he claimed, "The carnage needs to come in the form of extermination of anyone that claims to be democrat . . . as well as their family members." (*Id.*).

---

[1] Parenthetical references to "Br." and "A" are to Maiorana's *en banc* brief and *en banc* appendix. References to "PSR" and "Sentencing Rec." are to the Probation Department's Presentence Investigation Report and Sentencing Recommendation, which have been provided to the Court under seal. "DE" refers to entries on the district court docket.

On November 8, 2020—five days after the election—Maiorana stated, "[a]s the Jew Senator from Jew York said nothing is off the table. The Turner Diaries must come to life. We blow up the FBI building for real. All the alphabet agencies assassination will become the new normal now . . . that the electoral process is finished." (*Id.*).[2] In a series of additional online missives on November 8, 2020, Maiorana stated: "All right thinking people need to hit the street while these scumbags are celebrating and start blowing them away"; "Soap Box, Ballot Box . . . that was fraudulently stolen from us, Now Cartridge Box"; and "The time has now pas[sed] for patriots to stop being on the defensive . . . defensive action is a position of weakness. We must take offensive action starting now. All of you know what that is." (*Id.*).

On November 10, 2020, two days after Maiorana had threatened to "take offensive action" in response to the election and "blow away" anyone with opposing political views, a judicially authorized search of his home turned up a semiautomatic handgun, gun parts,

---

[2] *The Turner Diaries* is a novel depicting a violent revolution incited by a white nationalist movement in the United States that leads to a war in which Jews, people of color, and others are exterminated.

ammunition, a baton, a crossbow, and a taser. (PSR ¶ 9; A:21; *see* DE:18). Because Maiorana had previously been convicted of felonious sexual assault, he was prohibited from possessing firearms. (*See* PSR ¶ 26).[3]

II. The Guilty Plea and Sentencing Proceedings

On April 26, 2021, Maiorana pled guilty to possessing a firearm as a felon. (DE:16). His plea agreement indicated that the count of conviction carried a potential three-year term of supervised release. (A:17). At Maiorana's change-of-plea hearing, the district court explained that portion of the agreement to him, providing specific examples of the conditions of supervision that could be imposed:

> THE COURT: The maximum supervised release term is three years. It would follow any term of imprisonment. If a condition of supervised release were violated, you could be sentenced for up to two years, without credit for pre-release imprisonment or time previously served on post-release supervision.
>
> Do you understand that?
>
> THE DEFENDANT: Yes, your Honor.

---

[3] This offense arose from Maiorana's repeated sexual contact with a 13-year-old that began when he was 38. After serving 10 years in prison, Maiorana was released to local probation approximately three-and-a-half years before committing the crimes at issue here. (*See* PSR ¶ 26).

THE COURT: Once on supervised release, there may be many restrictions on your liberty, including travel limitations, requirements that you report to a probation officer, prohibition on carrying guns and other weapons, and other restrictions; do you understand that?

THE DEFENDANT: Yes, your Honor, I do.

(A:53-54).

On December 6, 2021, the Probation Department disclosed Maiorana's Presentence Investigation Report and a four-page sentencing recommendation that included the full text of six recommended special conditions. (PSR; Sentencing Rec.).

On May 18, 2022, Maiorana appeared for sentencing. (A:70). In his presence, the district court made repeated references to supervised release and emphasized the need for "monitoring . . . so that [Maiorana's] verbal activity, God forbid, will not translate into anything of a physical or harmful nature to people." (A:72-73; *see* A:85 ("to protect the public, we have to . . . have a close look at how he's going to behave when he's released from incarceration.")). The district court then described the recommended special conditions, including the court's assessment of each one's applicability, and invited Maiorana's counsel to make remarks on

Maiorana's behalf. (A:85-88). After mainly discussing the appropriateness of a custodial sentence, counsel concluded by stating, in relevant part, "the search conditions that Your Honor has mentioned, and all the conditions that Your Honor has mentioned of supervised release, are sufficient but not greater than necessary to accomplish the purposes of sentencing." (A:96; *see* A:94 ("We agree with all of them")).

The district court imposed a sentence of 36 months' imprisonment, followed by three years of supervised release. (A:106). In addition to the special conditions that it had previously announced, the district court stated—without any objection or request for clarification—that "general conditions of supervised release . . . will be part and parcel of the judgment." (*Id.*).

Five days later, on May 23, 2022, the written judgment issued. (A:108-14; DE:23). Under the heading "Standard Conditions of Supervision," the judgment listed 13 conditions that generally track the language of § 5D1.3(c) of the United States Sentencing Guidelines (the "Guidelines"). (A:112; *see* Br.10-13 (reproducing standard conditions)).

This appeal followed.

ARGUMENT[4]

POINT ONE

THE EXISTING FRAMEWORK IS SUFFICIENT TO PROVIDE DEFENDANTS WITH NOTICE AND AN OPPORTUNITY TO CONTEST THEIR CONDITIONS OF SUPERVISION

Maiorana principally contends that *Truscello* and its progeny have wrought a problematic system in which sentencing courts, by not orally pronouncing every non-mandatory condition of supervised release, deprive defendants of due process—that is, notice of, and an opportunity to contest, important components of their sentences. In making that point, Maiorana argues that this Court's approach to the oral pronouncement rule differs from the rule in some other circuits. (*See* Br.25-27, 30-33). And he argues that adopting the reasoning of those circuits would result in a better rule in this Circuit that comports with the mandatory-versus-discretionary distinction found in the statute, 18

[4] Given the limited scope of the *en banc* briefing requested by the Court, this brief does not reiterate the issue addressed in the parties' earlier briefing regarding the written judgment's direction that Maiorana contribute to the cost of mental health treatment. (*See* Dkt. No. 37 at 28-29).

U.S.C. § 3583(d), and provides clear guidance to sentencing judges. (*See* Br.28-36).

Contrary to these contentions, however, this Court's framework is not untethered from the statute and does not impede defendants' right to be present for sentencing. Nor would overruling *Truscello* yield the results Maiorana envisions, especially given his concession that the oral pronouncement rule can be satisfied even when the district court declines to read all applicable supervision conditions aloud.

I. Applicable Legal Principles

"Both the Constitution and the Federal Rules of Criminal Procedure grant a criminal defendant the right to be present during sentencing." *United States v. Jacques*, 321 F.3d 255, 262 (2d Cir. 2003).[5] As a general matter, then, "where an unambiguous oral sentence conflicts with the written judgment . . . the oral pronouncement of sentence must control." *Id.* at 263.

---

[5] Unless otherwise noted, all case quotations omit internal quotation marks and citations and accept alterations.

In *Truscello*, however, this Court held that no such conflict exists when the "standard" conditions of supervision outlined in § 5D1.3(c) of the Guidelines are included in a written judgment without having been orally pronounced in the defendant's presence. *See Truscello*, 168 F.3d at 63 ("the difference between the oral pronouncement of sentence and the written judgment did not amount to a conflict, but rather [] the latter reflected a clarification of what the oral pronouncement meant by 'supervised release'").[6] Indeed, the standard conditions of supervision are generally appropriate in every case and "almost uniformly imposed by the district courts." *Id.* That is because they are "[i]mplicit in the very nature of supervised release" and thus "necessary to effect its purpose." *Id.* at 62; s*ee id.* at 63 (standard conditions are "basic administrative requirements essential to the functioning of the supervised release system"). As such, the

---

[6] The *Truscello* court affirmed the sentencing judge's conclusion that the standard conditions listed in the written judgment had constituted "a means of setting forth the procedures and administration of supervision, and explaining to the Defendant exactly what is expected of him while on supervised release." *United States v. Crea*, 968 F. Supp. 826, 830 (E.D.N.Y. 1997).

unannounced inclusion of standard conditions in the written judgment does not offend a defendant's right to be present for sentencing. *See id.* at 64 (rejecting argument that conditions "generally [] appropriate to effect the purpose of supervised release . . . constitute additional punishment, or are in conflict with his oral sentence").

Truscello did not break new ground. As the decision itself recognized, this Court had previously held that only a "*direct conflict* between an unambiguous oral pronouncement of sentence and the written judgment" would implicate a defendant's right to be present for sentencing. *Id.* at 62. By contrast, it had long been the case that "where there was no real inconsistency but rather an ambiguity," the unannounced conditions in a written judgment would not reflect any due process deprivation. *Id.* at 63. That rule has remained unchanged by *Truscello*. *See, e.g.*, *United States v. Handakas*, 329 F.3d 115, 117 (2d Cir. 2003) ("[W]e have not rigidly disregarded all conditions of supervised release later included in a judgment but omitted from the oral pronouncement of sentence"); *see also United States v. Whitaker*, No. 21-1543, 2023 WL 5499363, at *4 (2d Cir. Aug. 25, 2023) ("[W]e have never

articulated a rule that requires district courts to recite at sentencing the complete terms of conditions of supervised release").

In reaching its conclusion, moreover, the *Truscello* court specifically declined to structure its approach according to the mandatory-versus-discretionary distinction drawn in the text of § 3583(d). Instead, the Court determined that the *substantive* impact of a condition of supervision provides a more reliable test for whether it needs to read aloud in a defendant's presence. *See Truscello*, 168 F.3d at 64 ("many of the standard conditions are so clearly necessary to supervised release, that the term 'discretionary' may be a misleading, if technically accurate, modifier for the standard conditions"). Rather than drawing its analytical line between mandatory and discretionary conditions, therefore, the *Truscello* decision deliberately drew the line between "special" conditions that "require the court to justify their imposition," *Crea*, 968 F. Supp. at 832, and "standard" conditions that do not.

And although *Truscello* itself addressed the inclusion of conditions labeled as "standard" in the Guidelines, the decision's analytical framework—*i.e.*, distinguishing between standard and special

conditions—is not limited by the way certain conditions are classified in the Guidelines.

Thus, a written judgment may, consistent with *Truscello*, likewise include unannounced conditions of release that the Guidelines label as "special," such as those in § 5D1.3(d). *See Whitaker*, 2023 WL 5499363, at *4; *Handakas*, 329 F.3d at 117 (discussing precedents "extend[ing] *Truscello* to permit the later inclusion of conditions 'recommended' by subsection 5D1.3(d) of the Guidelines"). In *United States v. Asuncion-Pimental*, 290 F.3d 91, 94 (2d Cir. 2002) (per curiam), for example, the district court properly imposed a special condition prohibiting the defendant, a convicted felon, from possessing a firearm because that restriction was "largely only a clarification of the more general mandatory condition that he not break the law." As the Court there noted, § 5D1.3(d) of the Guidelines had specifically recommended such a condition where the offense of conviction was a felony or the defendant was previously convicted of a felony. *See id.* at 94-95.

Contrary to Maiorana's assertion that the Court's jurisprudence has been tied to "labels used by the advisory Sentencing Guidelines" (Br.27), the Court in *Asuncion-Pimental* explained that such

labels are immaterial to this analysis. Rather, applying the reasoning from *Truscello*, the Court explained that where the relevant factors are present, "the 'special' condition recommended in § 5D1.3(d)(1) is as standard as those conditions recommended in § 5D1.3(c)":

> The fact that the condition concerning firearm possession is labeled "special" by the Guidelines is irrelevant in this case. While the "standard" conditions provided in § 5D1.3(c) are presumed suitable in all cases, the suitability of the conditions provided in § 5D1.3(d) may be contingent on the presence of specific factors in each case. Where these factors are present, however, these "special" conditions are no different in practical terms from "standard" conditions, that is, they are generally recommended.

Asuncion-Pimental, 290 F.3d at 94-95.

In other words, regardless of how the Sentencing Commission has chosen to characterize conditions in the Guidelines, this Court's holdings have deliberately dispensed with the oral pronouncement of conditions of supervised release that are generally appropriate in all cases, *see Truscello*; plainly appropriate to specific defendants, *see Asuncion-Pimental*; or otherwise essential to the functioning of the system of supervised release, *see Jacques*, 321 F.3d at 263 (no oral

pronouncement of conditions that are "plainly appropriate to implement supervised release").

Comfortably on the other side of that line are those conditions of supervised release that must be "indicate[d] . . . with appropriate precision" at the sentencing proceeding because they "place additional burdens on the defendant that are neither necessary to nor a foreseeable result of the imposition of supervised release." *United States v. Thomas*, 299 F.3d 150, 155-56 (2d Cir. 2002).

And even as to such special conditions, this Court has found the oral pronouncement rule to be something of a misnomer. As Maiorana concedes, this Court and several of its sister circuits have found the oral pronouncement rule satisfied by something less than an oral pronouncement—that is, by "summary" reference, *Whitaker*, 2023 WL 5499363, at *4, to some other document where the contemplated conditions of supervised release are listed in full. (*See* Br.36-37). For example, this Court has expressly endorsed the idea that a "sentencing judge may satisfy the oral-pronouncement requirement even for supervised release conditions that are not imposed routinely by 'indicat[ing] that it would incorporate the conditions listed in the PSR.'"

United States v. Washington, No. 22-688, 2024 WL 2232464, at *1 (2d Cir. May 17, 2024), *cert. denied* 145 S. Ct. 330 (2024); *see also United States v. Salazar*, No. 22-1385, 2023 WL 4363247, at *2 n.1 (2d Cir. July 6, 2023). Thus, when defendants have been referred to conditions of supervised release contained within, for example, the PSR, a district court's order, or a districtwide standing order (*see* Br.36), this Court has "repeatedly held in summary orders that defendants waived their claims on appeal that the district court failed to orally pronounce" those conditions, *United States v. Lewis*, 125 F.4th 69, 74-75 (2d Cir. 2025) (per curiam).

II. None of Maiorana's Arguments Compels the Relief He Seeks

A. *Truscello* Need Not Be Overruled in the Interest of Intercircuit Uniformity

The *Truscello* rule is not the "outlier" Maiorana claims. (Br.25). Rather, this Court's jurisprudence has been adopted in full by the First Circuit and is consistent with the approach taken by the Third Circuit.

In *United States v. Tulloch*, 380 F.3d 8, 12-13 (1st Cir. 2004) (per curiam), the First Circuit expressly adopted the reasoning of *Truscello* in rejecting the defendant's contention that the sentencing

court's "general reference to the standard conditions failed adequately to notify him which conditions actually would be imposed, thus depriving him of his opportunity to object to them." *See also United States v. Nardozzi*, 2 F.4th 2, 8 (1st Cir. 2021) (citing *Tulloch* with approval). And while the Third Circuit has not specifically addressed this question, like this Court it has "repeatedly held that a district court must explain its reasons for imposing special conditions of supervised release," implying that non-special conditions need not be addressed with the same level of specificity. *United States v. Azcona-Polanco*, 865 F.3d 148, 153 (3d Cir. 2017).

On the other hand, as Maiorana correctly observes, several other circuits have taken a broader view of the oral pronouncement rule, requiring the announcement at sentencing of any non-mandatory conditions. Those courts' reasoning resembles that of *Truscello* and its progeny, in that it considers whether requiring oral pronouncement is necessary to provide the defendant with notice and an opportunity to object. For example, the Fourth Circuit observed, in declining to require oral pronouncement of the mandatory conditions, that "the defendant has notice, via statute, that he will be subject to those conditions as a matter

of law." *United States v. Rogers*, 961 F.3d 291, 297 (4th Cir. 2020); *see also United States v. Anstice*, 930 F.3d 907, 909 (7th Cir. 2019) ("like all federal criminal defendants, Anstice had notice he was subject to these mandatory conditions because they appear in § 3583(d)"). The Fifth Circuit, in *United States v. Diggles*, tethered its adoption of a broader oral pronouncement rule to the need to "giv[e] the defendant notice of the sentence and an opportunity to object." 957 F.3d 551, 560 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 825 (2020). *See also United States v. Hayden*, 102 F.4th 368, 374-75 (6th Cir. 2024) ("Hayden received full notice of these conditions and had adequate opportunity to challenge them if he so wished"); *United States v. Walker*, 80 F.4th 880, 882 (8th Cir. 2023) ("Pronouncement of sentence affords the defendant an opportunity to object, raise concerns and challenges as to the sentence, and seek tailored conditions of supervised release"). Thus, although several sister circuits have drawn their lines somewhat differently than this Court did in *Truscello*, there is not the sharp split in circuit authority that Maiorana suggests.

Like this Court, moreover, many of those circuits have explicitly permitted the oral pronouncement requirement to be satisfied

by something less than a verbatim recitation of the applicable conditions. (*See* Br.36-37 (citing out-of-circuit cases for proposition that "a court can impose discretionary conditions by clearly referencing" a standalone document)). *See Hayden*, 102 F.4th at 374 ("the district court must alert defendants orally at sentencing that it is imposing" standard conditions and may do so by reference to a standing order or PSR); *United States v. Montoya*, 82 F.4th 640, 650-52 (9th Cir. 2023) (en banc) (oral pronouncement is required and can be satisfied by "incorporating by reference one or more discretionary conditions from a document or list provided to the defendant in advance of the hearing"); *United States v. Rodriguez*, 75 F.4th 1231, 1246 (11th Cir. 2023) (district court "may easily satisfy [oral pronouncement] requirement by referencing a written list of supervised release conditions," including those "recommended in the defendant's PSR or in a standing administrative order"); *Diggles*, 957 F.3d at 557, 559-60 (approving oral in-court adoption of list of supervised release conditions).

This Court is clearly not outside the mainstream on this issue, let alone such an "outlier" as to justify overruling *Truscello*.

B. The *Truscello* Rule Does Not Impede Defendants' Due Process Rights

Insofar as it permits sentencing judges to dispense with routine, plainly applicable, and administrative supervised release conditions, while requiring "appropriate precision" for the imposition of non-routine and burdensome conditions, the *Truscello* rule is inoffensive to criminal defendants' due process rights. Indeed, as this Court has recognized for over two decades, eminently predictable post-release obligations like reporting, allowing home visits, and not possessing firearms are "presumed suitable in all cases," *Asuncion-Pimental*, 290 F.3d at 94, because their ability to advance the purposes of sentencing following a defendant's release from custody is obvious, *see* 18 U.S.C. § 3553(a)(2)(B)-(D) (requiring sentencing court to consider the need for the sentence to promote deterrence, protect the public, and provide the defendant with needed educational or vocational training, among other goals). Declining to fully recite those requirements in a defendant's presence simply does not implicate his constitutional right to be present for sentencing.

Critically, even Maiorana concedes that a defendant's right to be present for sentencing can be honored *without* a literal oral pronouncement of his supervised released conditions. Consistent with this Court's repeated endorsements, Maiorana acknowledges that district courts throughout the Circuit have already implemented a process by which the contemplated conditions of supervised release are distributed to a defendant *before* sentencing—*i.e.*, not in his presence—and summarily referenced at the sentencing hearing. (*See* Br.37 n.8). Other than merely accelerating the lower courts' adoption of that process, then, it is unclear why overruling *Truscello* is necessary at all.

Maiorana has no good answer, let alone one that would justify upending longstanding precedent. He concedes the sufficiency, from a due process standpoint, of something less than a verbatim recitation of supervised release conditions, namely, a judge's oral "referenc[e]" to the PSR or some similar document. (Br.36). That is, of course, what the law already allows. *See Whitaker*, 2023 WL 5499363, at *4 (approving "oral[] reference . . . in summary fashion during sentencing"). Yet *Truscello* must still be overruled, he argues, because it establishes an insufficient standard for how a judge's oral reference must be performed. Maiorana's

desired level of specificity for the oral pronouncement rule in these circumstances is unclear, illustrating the unlikelihood that his preferred outcome would promote clarity, reduce litigation, and preserve appellate resources. In this regard, he advocates for a "clear[] referenc[e]" or "specific reference" to the conditions, which would entail something less than a "word-for-word" recitation but "more than a general allusion." (Br.36-37). What exactly that looks like remains a mystery. Yet, it is easy to see how charting the boundaries of his new rule would readily consume the same appellate resources Maiorana claims would be spared by overruling *Truscello*, all while introducing to district judges a malleable new standard to apply.

C. Overruling *Truscello* Would Not Result in Better Outcomes for Judges, Defendants, or the Public

Maiorana further contends that several desirable outcomes would follow from overruling *Truscello*, to include more fully vindicating defendants' due process rights by providing an opportunity to make timely objections; encouraging judges to make the required individualized assessments of the need and suitability of supervised

release in particular cases; and providing transparency and promoting public confidence in the judicial process. (*See* Br.38-44).

The government agrees these are desirable outcomes but fails to see how they would be furthered by this Court overruling *Truscello*. Maiorana admits that even a new rule purporting to require the pronouncement of non-mandatory conditions could easily be satisfied by the same system that is being implemented today around the Circuit: orally referencing a written list of those conditions, which list is not read in the defendant's presence. If, as the parties appear to agree, that system has the Court's imprimatur and comports with defendants' due process rights, then it is difficult to see what increased benefit would be realized by a new rule that would mostly preserve the status quo. After all, the predominant feature of the "oral reference" procedure is the distribution of a verbatim list of contemplated supervised release conditions in advance of sentencing, specifically facilitating a defendant's ability to lodge objections. As described above, Maiorana may take issue with the *Truscello* opinion's approval of a mere "general allusion" to routine conditions, 168 F.3d at 63, but any effort to craft a new standard

will present the same problems of imprecision, unclarity, and resource allocation that Maiorana contends exist under the current framework.

Nor is there any non-speculative basis to conclude that overruling *Truscello* will change sentencing judges' behaviors, including by encouraging them to make individualized assessments of defendants' needs for supervised release. To begin with, judges are *already* required to make such individualized assessments, and Maiorana points to nothing indicating that judges in this Circuit are neglecting that responsibility. Rather, he argues abstractly that "[c]ourts are not supposed to mechanically impose a list of 'boilerplate' additional supervision conditions in every case," and he refers to unspecified judges' "rote imposition of a litany of discretionary conditions in every case." (Br.40). Over the course of several pages in his *en banc* brief, Maiorana cites research questioning the efficacy of supervised release for many defendants. (*See* Br.40-43). But this line of argument fundamentally mischaracterizes the existing legal framework.

Contrary to Maiorana's implication, *Truscello* does not *require* judges, as a matter of course, to silently impose all "standard" conditions listed in the Guidelines, or any other conditions for that matter.

Sentencing judges today remain free—indeed, are required—to conduct the individualized assessment called for under § 3583(d) and determine whether and to what extent non-mandatory conditions are suitable in a particular case, without regard to the labeling employed in the Guidelines. At the same time, this Court's existing holdings require judges to articulate with "appropriate precision" any conditions that "place additional burdens on the defendant that are neither necessary to nor a foreseeable result of the imposition of supervised release." *Thomas*, 299 F.3d at 155-56.

Lastly, Maiorana's stated interest in allowing the public "to be present to hear what sentences judges are imposing and why" (Br.38), runs headlong into his admission that judges can satisfy the oral pronouncement rule by orally referencing—but not reading aloud—some other document. Unless sentencing judges forgo the time-saving option of referencing another document and instead make the deliberate decision to read, verbatim, every supervised release condition in open court (a choice they equally have today), the public debate around criminal sentences will not be furthered by overruling *Truscello*. Indeed, even those circuits whose approaches Maiorana prefers have endorsed an

oral reference to a defendant's PSR—a document that is ordinarily not public and thus unlikely to promote the kind of transparency Maiorana envisions.

* * *

While the government shares Maiorana's interests in preserving defendants' due process rights, encouraging diligence by sentencing judges, and fostering public trust in the judicial system, Maiorana has not demonstrated that his proposed innovation would further those aims. The Court's existing framework—especially as augmented by the process of orally referencing a written list of supervised release conditions—goes just as far toward protecting a defendant's due process rights as would Maiorana's alternative rule. As Maiorana's own sentencing shows, the existing framework provides busy district courts the flexibility to focus on sentencing issues that are seriously in dispute and to address the aspects of individualized post-release supervision that implicate a defendant's fundamental rights. A contrary rule would mandate a rote recitation of standard conditions, likely at the expense of proceedings that are beneficial to the defendant and meaningfully advance due process.

POINT TWO

FUNDAMENTAL PRINCIPLES OF *STARE DECISIS* COUNSEL AGAINST OVERRULING *TRUSCELLO*

Maiorana's *en banc* brief fails even to acknowledge the principles of *stare decisis* that set the stage for this Court's reexamination of *Truscello*. As explained below, however, these principles are fundamental, must not be taken lightly, and provide essential perspective for the extraordinary relief Maiorana requests.

I. *Stare Decisis* Is a Bedrock Principle of Judicial Review

"[*S*]*tare decisis* is a foundation stone of the rule of law," *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014), and the Supreme Court has thus counseled that adherence to precedent "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has likewise recognized that "the principle of stare decisis counsels against overruling" a prior precedent. *Global Reinsurance Corp. of America v. Century Indemnity Co.*, 843 F.3d 120, 126 (2d Cir. 2016). In this Circuit, the need to follow precedents faithfully "is taken seriously"

and, as a result, "the day-to-day practice of the court is to accept and follow prior decisions of the Circuit." Jon O. Newman, *In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 382-83 (1984).

As a general matter, this Court overrules its own precedent only when an intervening decision of the Supreme Court has either explicitly or implicitly abrogated that precedent. *See, e.g.*, *Illarramendi v. United States*, 906 F.3d 268, 270 (2d Cir. 2018) (per curiam) (declining to follow 1990 Second Circuit precedent that conflicted with 2009 Supreme Court decision); *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372, 381 (2d Cir. 2016) (overruling Second Circuit precedent where an intervening Supreme Court decision "cast[] doubt on the prior ruling"), *abrogated by Badgerow v. Walters*, 596 U.S. 1 (2022); *United States v. Parkes*, 497 F.3d 220, 229-30 & n.7 (2d Cir. 2007) (overruling *United States v. Fabian*, 312 F.3d 550 (2d Cir. 2002), via "mini-*en banc*" procedure because "[s]ubsequent to *Fabian*, the Supreme Court has sharpened our focus on the separate consideration of each element that composes an offense"); *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc) (overruling Second Circuit precedent where

intervening Supreme Court decision itself had "overrule[d] our Circuit precedents . . . insofar as they" reached holdings contrary to that decision). Maiorana does not—and cannot—identify any higher authority abrogating *Truscello*.

II. In the Absence of Intervening Supreme Court Authority, No Compelling Basis Exists to Reexamine *Truscello*

Principles of *stare decisis* counsel against overruling *Truscello*, which, in the 26 years since it was decided, has been repeatedly reaffirmed and extended by the Court and relied upon by district courts throughout the Circuit.

Since 1999, this Court has reaffirmed and extended the *Truscello* rule to permit district courts to impose so-called standard conditions of supervised release, certain special conditions of supervised release, and conditions of probation without a verbatim recitation of those conditions in the defendant's presence. *See Jacques*, 321 F.3d at 264 ("Appellant urges that *Truscello* should not apply to her case because *Truscello* involved supervised release rather than probation. We do not agree."); *Thomas*, 299 F.3d at 154 (special conditions that are basic administrative requirements necessary to the operation of the supervised

release system need not be orally pronounced); *Asuncion-Pimental*, 290 F.3d at 94-95 (special condition prohibiting possession of firearm or destructive device by convicted felon need not be orally pronounced).

The Court has also repeatedly—and recently—cited *Truscello* and its progeny with approval, signaling the continuing viability of *Truscello*'s reasoning. *See United States v. Roberson*, No. 24-31-CR, 2007 WL 10131753, at *1 n.1 (2d Cir. Feb. 6, 2025); *United States v. Genao*, No. 23-6710-CR, 2024 WL 4404042, at *1-2 (2d Cir. Oct. 4, 2024); *United States v. Bernard*, No. 23-6646, 2024 WL 1904576, at *2 (2d Cir. May 1, 2024); *Whitaker*, 2023 WL 5499363, at *3-4. That sets this case apart from other instances in which this Court reexamined precedent in the absence of an intervening Supreme Court decision. *See, e.g.*, *United States v. Bedi*, 15 F.4th 222, 226 (2d Cir. 2021) (overruling as wrongly decided *N.L.R.B. v. E.D.P. Medical Computer Systems, Inc.*, 6 F.3d 951 (2d Cir. 1993), which this Court had previously cited only once in approximately 28 years).

And of course, when imposing sentences that include terms of supervised release, district courts have relied on *Truscello* for over two-and-a-half decades, further underscoring its continued applicability. For

example, consistent with *Truscello*'s progeny, the United States District Courts for the Northern and Western Districts of New York each maintain a standing order setting forth those courts' standard conditions of release. *See* N.D.N.Y. General Order No. 23 (Amended); *In the Matter of Revised Standard Conditions of Probation and Supervised Release* (W.D.N.Y. Apr. 4, 2017). Individual district judges have also faithfully applied *Truscello*'s teaching in declining to orally impose standard conditions of supervised release. *See United States v. Schofield*, No. 23-CR-481 (CBA), 2025 WL 416873, at *1 (E.D.N.Y. Feb. 6, 2025) ("the Second Circuit has not required the district court to make an explicit reference to each condition imposed under U.S.S.G. §§ 5D1.3(c) and (d) so long as its imposition is justified by the record"); *United States v. Robinson*, No. 22-CR-403 (FB), 2024 WL 245302, at *1 (E.D.N.Y. Jan. 23, 2024) ("district courts must orally impose sentences, including conditions of supervised release, except where such standard conditions amount to basic administrative requirements or are generally recommended special conditions presumed suitable by the United States Sentencing Commission."), *aff'd*, 134 F.4th 104 (2d Cir. 2025).

These courts have done so with good reason: as argued above, the standards promulgated by *Truscello* and its progeny promote efficiency at sentencing while providing defendants notice and an opportunity to object to proposed non-mandatory conditions of supervision. And although Maiorana's *en banc* brief sets forth various reasons why he contends the Court should abandon its long-held precedent, it does so in a vacuum, without regard for the barrier that *stare decisis* erects to sudden and unwarranted changes in Circuit law. Principles of *stare decisis* necessarily inform the sufficiency of Maiorana's reasoning, and removed from that necessary context, his arguments leave unaddressed the Court's historical desirability for stability in the law that is fostered by maintaining a functional framework over many years.

To be sure, overruling *Truscello* is not merely about adding one more item to the list of tasks a district court must perform at a sentencing hearing. It is about unsettling the Circuit's decades-old understanding of a defendant's constitutional and statutory right to be present for sentencing. In that regard, *Truscello*'s holding was not simply intended to save time at sentencing hearings by reducing the amount of

verbiage a district judge has to recite.[7] Rather, *Truscello* reflected this Court's principled assessment that certain conditions of supervision—whether labeled standard or special by the Guidelines—are so generally applicable and so basic to the functioning of the supervised release system that they do not implicate defendants' fundamental rights. From that premise flows the current procedural rule that district courts need not recite every such condition verbatim. And overruling *Truscello* could thus reopen for debate what details of a defendant's post-release experience are significant enough to implicate his rights—that is, to constitute a part of the sentence that must be told to him in person. Such a renewed debate would not only spawn a fresh round of litigation (and thus trial and appellate court resources) but might also extend well beyond conditions of supervision to myriad other aspects of post-release

---

[7] As a practical matter, under Maiorana's proposed rule change, district judges who might currently be inclined to recite special or non-customary conditions, but not all standard conditions, might dispense with reading *any* conditions if the choice is between reciting all of § 5D1.3 or simply referring to the PSR. Such a result would be contrary to Maiorana's stated hopes of enhanced diligence, fact-finding, and transparency.

life of which defendants could claim they were unaware in the absence of an in-person explanation.

Stare decisis "is not an inexorable command," *Payne*, 501 U.S. at 828, and the Court need not follow wrongly decided precedent simply because it is precedent. But *Truscello* was not wrongly decided, and discarding it would not advance the goals of transparency, due process, and resource preservation that all parties agree are valuable. In the absence of a sufficiently powerful reason, the Court should therefore decline Maiorana's invitation to take the momentous step of abandoning *Truscello*.

POINT THREE

A DIFFERENT RULE WOULD NOT HAVE BENEFITED MAIORANA

Overruling *Truscello* would be particularly futile in this case, as Maiorana, a prior parolee, was on notice of the applicable conditions of supervised release and consented to their entry in his judgment.

The record reflects that Maiorana was informed in at least three separate ways of the "standard" conditions of supervised release. First, his written plea agreement, which he reviewed with his attorney (A:17, 52), identified a term of supervised release as one component of his sentence. Second, at his plea hearing, the district court explained that "on supervised release, there may be many restrictions on [Maiorana's] liberty, including" three specific types as examples. (A:54). And third, at sentencing, the court advised Maiorana that "general conditions of supervised release . . . will be part and parcel of the judgment." (A:106).

At no point did Maiorana or his attorney voice any question, concern, or objection about the contemplated conditions of supervised release. Instead, the defense made the strategic choice to accept all proposed supervised release conditions—including special conditions that are more restrictive and less uniformly imposed than the standard

conditions—in an effort to persuade the judge that a sentence of time served would be sufficient to address the court's stated concern about protecting the public from future similar crimes. (A:85, 94-96). The record thus belies Maiorana's characterization of the "pernicious" effect of *Truscello* and his claim that "there was no way for [him] or the public to know that these conditions were being contemplated, let alone imposed, until the written judgment was issued." (Br.24-25).

Simply stated, even if the district court had recited every non-mandatory condition of supervised release in Maiorana's presence at the sentencing hearing, this Court can safely conclude that such an oral announcement would have occasioned neither an objection from Maiorana nor a difference in the judgment.

CONCLUSION

For all the reasons stated above, together with those set forth in the government's prior brief, the Court should leave *Truscello* intact and affirm the judgment below.

Dated: Brooklyn, New York
May 16, 2025

Respectfully submitted,

JOSEPH NOCELLA, JR.,
United States Attorney
Eastern District of New York.

By: /s/ ANDREW M. RODDIN
ANDREW M. RODDIN
Assistant U.S. Attorney

ANTHONY BAGNUOLA,
ANDREW M. RODDIN,
Assistant United States Attorneys,
(*Of Counsel*).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Second Circuit Rule 32.1(a)(4) because the brief contains 6,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: Brooklyn, New York
May 16, 2025

/s/ ANTHONY BAGNUOLA
ANTHONY BAGNUOLA
Assistant U.S. Attorney