No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

LUIS ANDRES MEDEL-GUADALUPE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Does a district court's delegation of authority to a probation officer to determine whether a person on supervised release undergoes inpatient treatment instead of outpatient treatment for substance abuse and/or alcohol abuse constitute an improper delegation to assess "punishment" in contravention of Article III of the Constitution?

2. When a defendant receives a ten-year sentence, is the issue of whether or not a sentence granting a probation officer discretion to determine whether the treatment will be inpatient or outpatient ripe for review?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Luis Andres Medel-Guadalupe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Medel-Guadalupe's conviction and sentence is styled: *United States v. Medel-Guadalupe,* ___ F.3d ___, 2021 U.S. App. LEXIS 3480 (5th Cir. 2021).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Medel-Guadalupe's conviction and sentence was announced on February 8, 2021 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision

U.S. Const. art. III, § 2, cl. 1

> The judicial Power shall extend to . . . Cases . . . [and] Controversies[.]

Statement of the Case

At sentencing, the district court stated as follows regarding special conditions of supervised release as to drug and alcohol treatment:

> [Y]ou must participate in an *inpatient or outpatient* substance abuse treatment program, as well as an *inpatient or outpatient* alcohol abuse treatment program and follow the rules and regulations of those programs. The probation officer will supervise your participation in those programs[.]

The written judgment set forth the special conditions of supervised release as to drug and alcohol treatment as follows:

> You must participate in an *inpatient or outpatient* substance-abuse treatment program and follow the rules of that program. The probation officer will supervise your participation in the program, including the provider, location, *modality, duration, intensity.* The defendant shall pay the costs of such treatment if financially able.
>
> You must participate in an *inpatient or outpatient* alcohol-abuse treatment program and follow the rules of that program. The probation officer will supervise your participation in the program, including the provider, location, *modality, duration, intensity.* The defendant shall pay the costs of such treatment if financially able.

Medel-Guadalupe argued on appeal (citing mostly cases from the Second, Ninth and Tenth Circuits) that allowing a probation officer to determine whether or not a releasee must undergo inpatient or outpatient treatment constituted an impermissible delegation of

authority to the probation officer in that it allows a probation officer to decide the nature or extent of punishment to be imposed.

The Fifth Circuit disagreed with these holdings of other circuits and further suggested that (given the length of Medel-Guadalupe's sentence) that the issue was not ripe for review:

> Medel-Guadalupe notes that some circuits require the district court to make the inpatient or outpatient determination, but others do not. Our precedent only forbids delegating the decision of whether participation is required or not.

Medel-Guadalupe, 2021 U.S. App. LEXIS 3480, at *10.

> Due to the length of Medel-Guadalupe's term, a court cannot predict what the need for substance abuse treatment during supervised release will be. . . . If, upon his release nearly a decade from now, Medel-Guadalupe disagrees with the inpatient/outpatient determination, the district court will have the final say over the decision.

Medel-Guadalupe, 2021 U.S. App. LEXIS 3480, at *10-11.

<u>First Reason for Granting the Writ</u>: Inpatient or residential treatment constitutes "punishment" as compared to outpatient treatment because it affects a defendant's liberty.

"Article III of the Constitution vests responsibility for resolving cases and controversies with the courts." *United States v. Melendez-Santana*, 353 F.3d 93, 101 (1st Cir. 2003), *overruled on other grounds, United States v. Padilla,* 415 F.3d 211 (1st Cir. 2005). "Under our constitutional system the right to . . . impose the punishment provided by law is judicial[.]" *Ex parte United States,* 242 U.S. 27, 41-42 (1916). "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty[.]" *Addington v. Texas,* 441 U.S. 418, 425 (1979). By statute, a district court may not impose a condition of supervised release that involves a greater deprivation of liberty than is reasonably necessary to afford adequate deterrence of criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed training and medical care. 18 U.S.C. § 3583(d)(2). But "[t]he fate of a defendant must rest with the district court, not the probation office." *United States v. Heath,* 419 F.3d 1312, 1316 (11th Cir. 2005).

The Second Circuit has succinctly recognized the differences between inpatient treatment and outpatient treatment:

> There is no dispute that, in the context of supervised release . . . , inpatient drug treatment programs are sufficiently more restrictive than outpatient programs that the difference between the two programs might be said to be the difference between liberty and the loss of liberty. In inpatient drug treatment, the offender can remain at a designated facility 24 hours each day for several months, unable to hold a job or

> regularly commune with friends and family. In outpatient drug treatment, by contrast, the same offender can reside at home and hold a job.

United States v. Matta, 777 F.3d 116, 122 (2d Cir. 2015); see also *United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) ("In terms of the liberty interest at stake, confinement to a mental health facility is far more restrictive than having to attend therapy sessions, even daily. Our conclusion in this regard is bolstered by Congress' recognition of procedural and substantive protections that apply to civil commitment to inpatient facilities."); *United States v. Mike,* 632 F.3d 686, 695 (10th Cir. 2011) ("Conditions [like inpatient treatment] that touch on significant liberty interest are qualitatively different from that that do not.").

Second Reason for Granting the Writ: There is a split among the circuits (with the Fifth Circuit being in the minority) as to whether allowing a probation officer to determine whether treatment is inpatient or outpatient constitutes an improper delegation of authority.

As noted above, in the instant case, although the district court stated "[Y]ou must participate in an *inpatient or outpatient*" program, the decision as which of these sorts of treatment will be selected was at least implicitly left to the probation officer.

The Second, Ninth, Tenth and Eleventh Circuits appear to have specifically held that it is improper to allow a probation officer to determine whether a defendant shall undergo inpatient or outpatient treatment. *See United States v. Matta,* 777 F.3d 116, 122-23 (2d Cir. 2015) (Plain error for district court to impose condition of supervised release allowing probation department to determine whether defendant should under *inpatient or outpatient* drug treatment); *United States v. Esparza*, 552 F.3d 1088, 1091 (9th Cir. 2009) (The following condition: "The defendant shall participate in a psychological/psychiatric counseling and/or sex offender treatment program, *which may include inpatient treatment, as approved and directed by the Probation Officer*," held to be an improper delegation in that it allowed probation officer to decide the nature and extent of punishment imposed.); *United States v. Mike,* 632 F.3d 686, 690, 695-96 (10th Cir. 2011) (Conditions allowing probation officer to decide whether treatment programs would be *outpatient or residential* implicated liberty interest tantamount to allowing probation officer to assess punishment); *United States v. Heath,* 419 F.3d 1312 (11th Cir. 2005) (Plain error in violation of Article III to impose the following condition: "The defendant shall participate if and as

directed by the probation office in such mental health programs as recommended by a psychiatrist to include *residential treatment, outpatient treatment*, and psychotropic medications as prescribed by a medical doctor.").

The First, Third, and Seventh Circuits have held that it is improper to grant the probation officer discretion as to whether or not a defendant will participate in a treatment program at all. *See United States v. Melendez-Santana*, 353 F.3d 93, 100-02 (1st Cir. 2003) (Condition providing that if defendant tested positive for drugs, "at the discretion of the probation officer, [he shall] participate in a substance abuse treatment program arranged and approved by the probation officer until duly discharged by authorized program personnel with the approval of the probation officer" held to be an improper delegation of court's Article III responsibilities); *United States v. Pruden,* 398 F.3d 241, 250-51 (3d Cir. 2005) (Plain error for court to grant probation officer authority to decide whether or not defendant would have to participate in mental health treatment program, as this constituted authority to decide nature or extend of punishment); *United States v. Wagner*, 872 F.3d 535, 543 (7th Cir. 2017) ("[I]mposition of treatment 'as deemed necessary by

probation, is particularly troubling and can be viewed as a delegation of the underlying judgment of *whether* the condition will be imposed at all."). The Fourth Circuit has held likewise in a recent unpublished decision. *See* *United States v. Byrd,* 808 F. App'x 162, 164 (4th Cir. 2020) ("Delegating to the probation officer the authority to decide whether a defendant will participate in a treatment program is a violation of Article III.").

The Eighth Circuit has held there is no improper delegation unless the district court specifically relinquishes authority to the probation officer. *See United States v. Fenner,* 600 F.3d 1014, 1027 (8th Cir. 2010) (No improper delegation where district court does not disclaim ultimate authority of deciding appropriateness of treatment; thus phrase "as approved by the probation officer" did not constitute improper delegation).

Only the Fifth and perhaps the Sixth Circuits have held that probation officers can properly determine on their own whether to require a defendant to participate in an inpatient treatment program. *See United States v. Carpenter,* 702 F.3d 882, 884-85 (6th Cir. 2012)

("Decisions such as which program to select and how long it will last can be left to the discernment of the probation officer.").

<u>Third Reason for Granting the Writ</u>: The Fifth Circuit incorrectly suggested that Medel-Guadalupe will not be disadvantaged by waiting until he is released from prison to raise the inpatient/outpatient issue.

Constitutional ripeness is based on Article III's requirement that courts are to hear only "cases" and "controversies." *United States v. Cabral,* 926 F.3d 687 (10th Cir. 2019). "Ripeness is peculiarly a question of timing." *Buckley v. Valeo,* 424 U.S. 1, 114 (1976). Although there is no mechanistic test for determining whether a dispute is ripe for adjudication, there must be "actual present or immediately threatened injury." *Vitek v. Jones,* 445 U.S. 480, 504 (1980). The ripeness doctrine "prevents a federal court from entangling itself in abstract arguments over matters that are premature for review because the injury is merely speculative and may never occur." *United States v. Balon,* 384 F.3d 38, 46 (2d Cir. 2004). The two main factors in determining whether an issue is ripe for judicial review are (1) fitness of the issues for judicial decision and (2) hardship to the parties of withholding court consideration. *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 733 (1998).

In the instant case, although the Fifth Circuit did not use the term "ripe," the Court implicitly suggested Medel-Guadalupe suffers no harm from the complained-of condition of supervised release because he can raise the issue when he is released from prison:

> Due to the length of Medel-Guadalupe's term, a court cannot predict what the need for substance abuse treatment during supervised release will be. . . . If, upon his release nearly a decade from now, Medel-Guadalupe disagrees with the inpatient/outpatient determination, the district court will have the final say over the decision.

Medel-Guadalupe, 2021 U.S. App. LEXIS 3480, at *10-11. Other circuits have convincingly held to the contrary.

In *United States v. Villafane-Lozada,* 973 F.3d 147 (2d Cir. 2020), wherein the defendant raised an improper delegation issue on direct appeal, the Second Circuit held the issue to be ripe for adjudication:

> Villafane-Lozada is challenging the *already* realized delegation of judicial power to a probation officer, not some hypothetical decision that this delegation might allow in the future. . . . [internal quotation marks omitted] That delegation was either proper or not — and its propriety does not depend on how (or even whether) the probation officer might later choose to wield the delegated power. . . . [T]his delegation has already occurred and is not contingent on future judicial action. . . . In other words, because the permissibility of the delegation is a pure question of law, and because the delegation is not conditioned on future events, it is eminently fit for judicial review. . . . Villafane-Lozada has a

> legitimate interest in having this issue resolved now. Otherwise, he would have fewer procedural avenues through which to raise his concerns once his term of supervision begins. . . . Villafane-Lozada's delegation challenge is therefore ripe for our review.

Id. at 151-52.

In *United States v. Cabral,* the defendant also raised an improper delegation argument on direct appeal. 926 F.3d at 696. The Tenth Circuit noted as to hardship to the parties, "we consider whether Mr. Cabral [internal quotation marks omitted] faces a direct and immediate dilemma arising from the supervised-release condition he is challenging." *Id.* at 693. The Court held the defendant was in fact facing such a dilemma:

> [T]he challenge is fit for judicial resolution because it [internal quotation marks and brackets omitted] presents a legal question that can be easily resolved without additional factual development. . . . Mr. Cabral is challenging the already-realized delegation of judicial power to a probation officer, not merely some hypothetical future violation that delegation might allow. Contrary to the Government's assertion, we need not adjudicate hypothetical scenarios to resolve this challenge. . . . The district court's delegation to the probation officer occurred at the moment the district court tasked the probation officer with assessing Mr. Cabral's risk[.] That delegation was either proper or not—and its propriety does not depend on how (or even whether) the probation officer might later choose to wield the delegated power. . . .

> The burden Mr. Cabral would face if we do not consider his challenge now weighs at least slightly in favor of review. As explained above, the probation officer might never invoke the risk-notification condition, and so Mr. Cabral might never experience any hardship stemming from the alleged improper delegation. But, . . . Mr. Cabral could challenge it [later] only without the benefit of appointed counsel or risk re-incarceration by violating the condition. . . . This dilemma, although still only potential, would certainly place a heavier burden on Mr. Cabral than if we entertained his challenge on direct appeal, while he is represented by appointed counsel.

Id. at 696-97.

Petitioner Medel-Guadalupe is similarly situated to the appellants in *Villafane-Lozada* and *Cabral.* The district court has already made the determination that the decision of whether Medel-Guadalupe undergoes inpatient or outpatient treatment will be left up to the probation officer. If Medel-Guadalupe waits to challenge the condition later, he will do so without appointed counsel or he will run the risk of re-incarceration by violating the condition.

Conclusion

For the foregoing reasons, Petitioner Medel-Guadalupe respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 11th day of March 2021.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Luis Andres Medel-Guadalupe