No. _____

In the
Supreme Court of the United States

_____

Victor A. Acevedo,
Petitioner,

v.

United States of America,
Respondent.

_____

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

_____

Petition for Writ of Certiorari

_____

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QUESTION PRESENTED

Whether, under Federal Rule of Criminal Procedure 43(a)(3), a district court can lawfully impose the thirteen "standard" supervised-release conditions without telling the defendant during the sentencing hearing that they will apply.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This petition raises an important issue concerning the proper administration of the federal criminal justice system that has left the courts of appeals openly divided: Whether, under Federal Rule of Criminal Procedure 43(a)(3), a district court can lawfully impose the thirteen "standard" supervised-release conditions without telling the defendant during the sentencing hearing that they will apply. This is a "common issue" that has relevance to most federal sentencings. *United States v. Diggles*, 957 F.3d 551, 554 (5th Cir. 2020) (en banc). This Court should address this issue and resolve the entrenched circuit split.

If a district court sentences a defendant to a "term of imprisonment," it can also impose a term of supervised release. 18 U.S.C. § 3583(a). Congress divides the conditions of supervised release into two groups. By statute, courts must impose a small number of conditions. The Sentencing Guidelines call these "mandatory conditions." U.S.S.G. § 5D1.3(a) (capitalization normalized). Any other potential condition is discretionary, and courts can impose a discretionary condition only if the condition is tailored to the statutory sentencing goals listed in 18 U.S.C. § 3583(d).

Within the group of discretionary conditions, the Guidelines identify four subgroups. *See* U.S.S.G. § 5D1.3(b),(c),(d),(e). One subgroup consists of thirteen so-called "standard conditions." *Id.* § 5D1.3(c) (capitalization normalized). These discretionary conditions "substantially restrict" a supervisee's "liberty." *Gall v. United States*, 552 U.S. 38, 48 (2007). Among other things, they restrict where supervisees can live, work, and socialize. U.S.S.G. §§ 5D1.3(c)(3), (5), (7). As with any other discretionary condition, the Guidelines "recommend[]" that courts apply the standard conditions only "to the extent that they serve the purposes of

sentencing" in a particular case. *United States v. Evans*, 883 F.3d 1154, 1162 n.4 (9th Cir. 2018) (citing U.S.S.G. § 5D1.3(a), (c)).

Three courts of appeals—the First, Second, and Ninth Circuits—have held that a district court necessarily imposes the standard conditions by announcing at the sentencing hearing that the defendant will be on supervised release because those conditions are implicit in the imposition of supervised release. *See United States v. Napier*, 463 F.3d 1040, 1043 (9th Cir. 2006); *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169–70 (1st Cir. 2006); *United States v. Truscello*, 168 F.3d 61, 62–64 (2d Cir. 1999). In these circuits, even when a district court doesn't tell a defendant at the sentencing hearing that the standard conditions apply, the court can still later include them as part of the sentence in the written judgment.

That's what happened in this case. The district court never mentioned the standard conditions during Petitioner's sentencing hearing but still included all thirteen in the later-issued judgment. Pet. App. 18a–20a, 26a. The court of appeals upheld the imposition of the standard conditions by reaffirming its published precedent that their imposition "is deemed to be implicit in an oral sentence imposing supervised release." Pet. App. 8a (quoting *Napier*, 463 F.3d at 1043).

Petitioner would have obtained a different result on appeal in the Fourth, Fifth, and Seventh Circuits. In those circuits, courts must orally announce the imposition of the standard conditions in the defendant's presence to lawfully impose them. *See Diggles*, 957 F.3d at 557–59; *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020); *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019). If a court fails to announce a discretionary condition, it is struck from the judgment.

This Court should grant review not only to address the openly acknowledged circuit split but it should do so because the split concerns an important, reoccurring

issue. Imposing supervised release has become a ubiquitous part of federal sentencing. More than 100,000 individuals are serving a federal supervised-release term. U.S. Sentencing Comm'n, Federal Probation and Supervised Release Violations, at 14 (2020). And, as just noted, the standard conditions control nearly every aspect of a supervisee's life. *See Gall*, 552 U.S. at 48. A legal rule that has relevance to the standard conditions, then, will affects many people and will affect them significantly. Moreover, courts have issued a huge number of decisions over the past several years that address how a court can lawfully impose the standard conditions. This Court, then, should weigh in on this dispute.

This Court should also grant review because the Ninth Circuit's decision below is wrong. Under Federal Rule of Criminal Procedure 43(a)(3), defendants must "be present at . . . sentencing." If a court imposes a supervised-release condition in the written judgment that it did not orally pronounce, the defendant will not have been present during that part of the sentencing. This violates Rule 43. Permitting a court to include standard conditions in the judgment that weren't orally announced depends on the misguided premise that imposing them is inherent in imposing supervised release. But the standard conditions—like all discretionary conditions—aren't inherent to the imposition of supervised release. If they were, Congress would have made them mandatory rather than require courts to consider them case by case.

This case is also an excellent vehicle to resolve the circuit split implicated by the question presented. The court of appeals below squarely rejected Petitioner's argument about the implicit imposition of the standard conditions. Pet. Ap. 8a. Granting review will allow this Court to resolve the circuit split.

OPINION BELOW

The unpublished memorandum disposition of the U.S. Court of Appeals for the Ninth Circuit is reproduced on pages one through nine of the appendix.

JURISDICTION

The court of appeals entered judgment on November 26, 2021. Pet. App. 1a. The court denied a timely petition for rehearing on January 5, 2022. Pet. App. 10a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of 18 U.S.C. § 3583 are set forth on pages 28 through 32 of the appendix.

STATEMENT OF THE CASE

I. Congress created a supervised-release system in which district courts must impose a handful of mandatory conditions and have discretion to impose other conditions, including thirteen conditions that the Sentencing Guidelines label standard.

When Congress passed the Sentencing Reform Act of 1984, it replaced parole with a "new system of supervised release." *Gozlon-Peretz v. United States*, 498 U.S. 395, 397 (1991). In this new system, if a court sentences a defendant to a "term of imprisonment," it "may include as a part of the sentence a requirement that the defendant" serve a "term of supervised release" once released from custody, though certain serious offenses require a supervised-release term. 18 U.S.C. § 3583(a), (k).

"Congress intended supervised release to assist individuals in their transition" back into "community life." *United States v. Johnson*, 529 U.S. 53, 59–60 (2000). "To promote that reintegration and protect the public from further crimes, courts often impose conditions on a releasee." *United States v. Diggles*, 957 F.3d

551, 554 (5th Cir. 2020) (en banc) (citing *Mont v. United States*, 139 S. Ct. 1826, 1833 (2019)). While the "goal" of "conditions is to help the releasee lead a productive and crime-free life, failure to comply can result in a return to a prison." *Id.* Conditions, then, are "important features of the federal criminal justice system." *Id.*

Congress created two types of supervised-release conditions. By statute, courts *must* impose a handful of conditions as part of every defendant's supervised-release term. *See* U.S.S.G. § 5D1.3(a) (listing these conditions with statutory cross references). The Sentencing Guidelines call these congressionally required conditions, "mandatory conditions." *Id.* (capitalization normalized). As an example of a mandatory condition, courts must "order . . . that the defendant not commit another Federal, State, or local crime during the term of supervision[.]" 18 U.S.C. § 3583(d). District courts must impose these mandatory conditions; they lack discretion not to.

Any non-mandatory condition is discretionary. That is, outside the mandatory conditions, courts have discretion to impose any other condition. This discretion, however, is cabined by the statutory requirement that the condition (1) "reasonably relate[] to" various sentencing factors, (2) "involve no greater deprivation of liberty than is reasonably necessary," and (3) be "consistent with any pertinent policy statements issued by the Sentencing Commission." 18 U.S.C. § 3583(d)(1)–(3).

The Guidelines further split the group of potential discretionary conditions into four subgroups, calling some "Discretionary Conditions," others "Standard Conditions," yet others "'Special' Conditions," and some "Additional Conditions." U.S.S.G. § 5D1.3(b), (c), (d), (e). While the Guidelines describe these sub-groups, they all fit within the larger framework of discretionary, non-mandatory conditions.

Thus, the Guidelines merely "recommend[]" them "to the extent that they serve the purposes of sentencing" in a particular case. *United States v. Evans*, 883 F.3d 1154, 1162 n.4 (9th Cir. 2018) (citing U.S.S.G. § 5D1.3(a), (c)).

The subgroup of discretionary conditions that the Guidelines call "standard conditions" are popular conditions to impose. While common, courts do not always impose all of them. This is likely because they "substantially restrict" a supervisee's "liberty." *Gall v. United States*, 552 U.S. 38, 48 (2007). Among other things, they restrict where and how supervisees can live, work, and socialize. U.S.S.G. §§ 5D1.3(c)(3), (5), (7). For example, one conditions prohibits a supervisee from leaving the "federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer." *Id.* § 5D1.3(c)(3). Another requires a supervisee to "work full time" unless the "probation officer excuses the defendant from doing so." *Id.* § 5D1.3(c)(7). And another gives a probation officer veto power over where the defendant "live[s]." *Id.* § 5D1.3(c)(5).

These conditions restrict the conduct of a small city's worth of people at any given moment. Over 100,000 people are now serving a federal supervised-release term. U.S. Sentencing Comm'n, Federal Probation and Supervised Release Violations, at 14 (2020). This is because about three in four defendants "convicted of federal offenses" serve a supervised-release term. Congressional Research Service, *Supervised Release* (Parole): An Overview of Federal Law, at *1 (Sept. 28, 2021).

II. After the district court orally imposed only five special supervised-release conditions at Petitioner's sentencing hearing, the court included all thirteen discretionary standard conditions in the later-issued written judgment.

Petitioner, a 22-year-old naturalized U.S. citizen, grew up in Mexico. Before this case, he had no criminal history.

In early 2019, Petitioner agreed to smuggle drugs across the international border to make money to help support his family. He was arrested at the port of entry with methamphetamine in his car. Soon after, he accepted responsibility for his conduct and pleaded guilty to conspiring to import a controlled substance, a felony in violation of 21 U.S.C. § 963.

At Petitioner's sentencing hearing, the district court imposed a six-and-a-half-year prison term followed by a five-year supervised-release term. After imposing supervised release, the court told Petitioner that "[t]he conditions of supervised release are these," at which point the court announced five—and only five—conditions. Pet. App. 19a. Those orally imposed conditions require Petitioner to: (1) obtain permission from the court or his probation officer before going to Mexico; (2) participate in drug counseling; (3) tell his probation officer about any cars he owns; (4) attend school or work full time; and (5) submit to a search by his probation officer. Pet. App. 19a–21a.

Eight days after the sentencing hearing, the district court issued a written judgment. The judgment formally memorializes Petitioner's prison and supervised-release terms. Pet. App. 24a–25a. It includes the five supervised-release conditions that the court told Petitioner applied. Pet. App. 27a. Besides those announced conditions, the judgment includes the thirteen "standard" conditions, conditions that the court did not announce at the hearing. Pet. App. 26a. It also includes various statutorily mandated conditions. Pet. App. 25a.

III. The court of appeals rejected Petitioner's challenge to the lawfulness of the district court's silent imposition of the thirteen discretionary standard conditions.

On appeal, Petitioner challenged, among other things, the imposition of the discretionary "standard" conditions that the district court did not orally announce.

Alternatively, Petitioner argued that the district court erred by not making findings to support those conditions.

Following oral argument, a divided panel issued a memorandum disposition rejecting Petitioner's contentions about the standard conditions. Following circuit precedent, the majority held that the standard conditions are "deemed to be implicit in an oral sentence imposing supervised release." Pet. App. 8a (quoting *United States v. Napier*, 463 F.3d 1040, 1043 (9th Cir. 2006)). Thus, according to the majority, the district court silently imposed the conditions at the hearing merely by announcing the imposition of supervised release.

Judge Higginson—sitting by designation from the Fifth Circuit—dissented. In doing so, he referenced his concurring opinion from *United States v. Reyes*, 18 F.4th 1130 (9th Cir. 2021), a decision issued the same day. Pet. App. 9a. The same panel that resolved Petitioner's case decided *Reyes*. The defendant in *Reyes* similarly challenged whether a court could impose the standard conditions without announcing them at the sentencing hearing. The court in *Reyes*, however, did not reach the issue because the panel reversed on another ground. *See* 18 F.4th at 1139 & n.4. Still, in his concurring opinion in *Reyes*, Judge Higginson suggested that *Napier*'s statement about "implicit" adoption "appears . . . to be dicta." *Id.* at 1141 n.1. He then suggested that the court "realign" its case law with that of the Fourth, Fifth, and Seventh Circuits. *Id.* Those circuits, Judge Higginson noted, do not permit district courts to silently adopt discretionary conditions, no matter if the Guidelines label them "standard." *Id.* In the decision below, Judge Higginson said that, based on his reasoning in *Reyes*, the standard conditions could not "be deemed implicit in the oral pronouncement of sentence when they appear for the first time in the written judgment." Pet. App. 9a.

Petitioner filed a petition for rehearing en banc. In that petition, he asked the court to overrule *Napier* and to adopt the position of the Fourth, Fifth, and Seventh Circuits, as Judge Higginson suggested.

The court of appeals denied the rehearing petition. Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

This Court should grant review to resolve the circuit split over a "common," reoccurring issue that concerns an "important feature[] of the federal criminal justice system": whether a district court can implicitly impose the thirteen discretionary standard conditions as part of the defendant's sentence by simply not mentioning them at the sentencing hearing. *United States v. Diggles*, 957 F.3d 551, 554 (5th Cir. 2020) (en banc). Three circuits—including the court of appeal below—have held a district court may. Three circuits have held a district court may not. This split is well developed, openly acknowledged, and entrenched.

This Court should grant review to resolve this circuit split. Granting review is particularly warranted because the question presented raises an important, reoccurring issue; the decision of the court of appeals below is wrong; and this petition is an excellent vehicle to resolve the circuit split.

I. The courts of appeals are divided over the question presented.

Six courts of appeals have considered whether a district court can silently adopt the thirteen discretionary "standard conditions" at a defendant's sentencing hearing. U.S.S.G. § 5D1.3(c) (capitalization normalized). Three have held yes; three have held no. This Court should grant review to resolve this openly acknowledged conflict.

A. Three circuits permit district courts to implicitly adopt the standard conditions at the defendant's sentencing hearing.

In the First, Second, and Ninth Circuits, a district court may say nothing to the defendant during the sentencing hearing about the standard conditions and yet still lawfully impose them by checking the relevant boxes in the later-issued written judgment.

1. The Second Circuit addressed this issue in *United States v. Truscello* 168 F.3d 61, 63–64 (2d Cir. 1999). There, the district court said nothing about the standard conditions during the sentencing hearing but included them in the judgment. *Id.* at 62. On appeal, the defendant argued that this failure to announce the standard conditions caused a conflict between the sentence's oral pronouncement and the written judgment. *Id.* The defendant argued that, because Federal Rule of Criminal Procedure 43(a)(3) requires the defendant's appearance at "sentencing," the oral pronouncement of sentence, and its lack of standard conditions, controlled. *Truscello*, 168 F.3d at 62.

In rejecting the defendant's argument, the court of appeals agreed that a district court must orally announce the sentence under Rule 43. *Truscello*, 168 F.3d at 62. But the court ruled that the standard conditions are "basic administrative requirements essential to the functioning of the supervised release system." *Truscello*, 168 F.3d at 63 (quoting *United States v. Smith*, 982 F.2d 757, 764 (2d Cir. 1992)). Accordingly, the court of appeals held that the district court merely "clarifi[ed] . . . what the oral pronouncement meant by 'supervised release'" when it included the standard conditions in the written judgment. *Id.* In other words, to impose supervised release is to impose the standard conditions. The implicit adoption of the standard conditions at the hearing meant that the oral pronouncement did not conflict with the judgment. *Id.*

The Second Circuit has since "extended *Truscello*" to some of the "'special' conditions[] recommended for specific type of cases or situations by U.S.S.G. § 5D1.3(d)." *United States v. Jacques*, 321 F.3d 255, 263–64 (2d Cir. 2003) (citing *United States v. Asuncion-Pimental*, 290 F.3d 91, 95 (2d Cir. 2002)). The Second Circuit has also "extended *Truscello*" to any condition the court considers "administrative," even if the condition is not a standard one. *Id.* at 264 (citing *United States v. Thomas*, 299 F.3d 150, 154 (2d Cir. 2002)). Thus, the Second Circuit has further entrenched *Truscello*'s holding. *See also United States v. Singh*, 726 F. App'x 845, 849 (2d Cir. 2018) (rejecting claim that the district court's failure to announce two standard conditions meant it had not lawfully imposed them).

2. The First Circuit adopted *Truscello*'s reasoning in *United States v. Tulloch*, 380 F.3d 8, 12 (1st Cir. 2004). There, the First Circuit held that it didn't matter that the district court had failed to announce a drug-testing condition, a mandatory condition. Instead, citing *Truscello,* the court held that "implicit in the very nature of supervision is that conditions are placed on the supervised defendant." *Id*. The First Circuit held that the district court had therefore implicitly mentioned the drug-testing condition to the defendant at the sentencing hearing. *Id*. As a result, the oral pronouncement of sentence did not conflict with the written judgment. *Id*.

The First Circuit expanded *Tulloch*'s holding to the standard conditions in *United States v. Sepulveda-Contreras*, 466 F.3d 166, 169–70 (1st Cir. 2006). There, the court broadly concluded that "[d]efendants are deemed to be on constructive notice for mandatory and standard conditions announced for the first time in a written judgment, and therefore have no right-to-be-present claim with respect to any such condition." *Id.* at 169–70 (citing *Tulloch*, 380 F.3d at 13–14 & n.8); *see also*

United States v. Gambaro, 2005 U.S. App. LEXIS 20319, at *4–5 (1st Cir. Sept. 22, 2005) (unpublished) (holding that, by announcing that the defendant was "subject to supervision," the court necessarily imposed the "thirteen standard conditions of supervised release").

3. The Ninth Circuit adopted the Second Circuit's reasoning from *Truscello* in *United States v. Napier*, 463 F.3d 1040 (9th Cir. 2006), the decision cited by the panel below. Pet. App. 8a. In *Napier*, the court stated that many supervised-release conditions are "recommended by the Guidelines as standard, boilerplate conditions[.]" *Id.* at 1042–43 (citing U.S.S.G. § 5D1.3(c)). According to the Ninth Circuit, these conditions "are sufficiently detailed that many courts find it unnecessarily burdensome to recite them in full as part of the oral sentence." *Id.* at 1043. Citing *Truscello,* the Ninth Circuit stated that "imposition of these mandatory and standard conditions is deemed to be implicit in an oral sentence imposing supervised release." *Id.* (citing *Truscello*, 168 F.3d at 62). Thus, "[w]hen those standard conditions are later set forth in a written judgment, the defendant has no reason to complain that he was not present at this part of his sentencing because his oral sentence necessarily included the standard conditions." *Id.*

While a Fifth Circuit judge sitting by designation (Judge Higginson) has suggested that *Napier*'s statement about implicit "appears . . . to be dicta," *Reyes*, 18 F.4th at 1141 n.1, no judge on the Ninth Circuit appears to agree. As Judge Higginson noted, the Ninth Circuit has "applied *Napier*'s" statement about implicit adoption "in *dozens* of unpublished cases." *Id.* (emphasis added). Indeed, over *just* the past few years, the Ninth Circuit has cited *Napier* to continuously reaffirm that "mandatory and standard conditions [are] deemed to be implicit in an oral sentence imposing supervised release" in rejecting arguments that a district court cannot

silently adopt the standard conditions. *See*, *e.g.*, *United States v. Knopping*, 848 F. App'x 353, 354 (9th Cir. 2021); *United States v. Guerrero*, 837 F. App'x 483, 485 (9th Cir. 2020); *United States v. Mendoza-Lopez*, 812 F. App'x 698, 699 (9th Cir. 2020); *United States v. De Luna-Ortiz*, 775 F. App'x 948, 949 (9th Cir. 2019). And, of course, the court of appeal below viewed *Napier*'s statement as a holding, *see* Pet. App. 8a, and the court denied a petition for rehearing in which Petitioner challenged *Napier*'s precedential status, *see* Pet. App. 10a. There is no indication, then, that the Ninth Circuit plans to retreat from *Napier*. It is well entrenched. That said, the circuit split will persist no matter what the Ninth Circuit does, given the other courts that have considered the issue.

B. Three circuits do not permit district courts to implicitly adopt the standard conditions at the defendant's sentencing hearing.

In the Fourth, Fifth, and Seventh Circuits, district courts cannot silently adopt the standard conditions; instead, they may lawfully adopt the standard conditions only if they orally mention the conditions in the defendant's presence at the sentencing hearing.

1. Initially, the Fifth Circuit followed the Second Circuit's decision in *Truscello* and held that a district court need not announce the standard conditions at the sentencing hearing to impose them. *United States v. Torres-Aguilar*, 352 F.3d 934, 936 (5th Cir. 2003). According to the Fifth Circuit, this conclusion flowed from the fact that the standard conditions were "implicit in the very nature of supervised release[.]" *Id*. (quoting *Truscello*, 168 F.3d at 62).

In 2019, however, a Fifth Circuit judge observed that its "sister circuits that have examined the issue have expressed different views," though noting that at that time only the Seventh Circuit had strayed from the Second Circuit's decision in

Truscello. *United States v. Cabello*, 916 F.3d 543, 547 (5th Cir. 2019) (Elrod, J., concurring) (citing *United States v. Kappes*, 782 F.3d 828, 846 (7th Cir. 2015)).

That prompted the Fifth Circuit to take up en banc whether a district court could silently impose the standard conditions in *United States v. Diggles*, 957 F.3d 551 (5th Cir. 2020) (en banc). There, *all seventeen judges* on the court agreed that because the standard conditions are discretionary, a district court must orally announce them at the sentencing hearing to impose them. *Id*. at 557–59. This, the en banc court held, follows from the constitutional requirement that a defendant be present at every "critical stage" of the case, a requirement enshrined in Federal Rule of Criminal Procedure 43(a)(3). *Diggles*, 957 F.3d at 558 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107–08 (1934)). The en banc court also reasoned that this conclusion appropriately aligns the standard conditions with every other discretionary condition. *Id*.

2. The Seventh Circuit has a similar rule to the Fifth Circuit. In *United States v. Anstice*, 930 F.3d 907, 910 (7th Cir. 2019), the district court imposed two standard conditions without "saying anything about" those conditions at the sentencing hearing. The Seventh Circuit held that, "[i]f a district court does choose to impose" standard conditions, "they must be announced at sentencing." *Id*. For this reason, the court vacated the two standard conditions imposed and remanded. *Id*.

3. Likewise, the Fourth Circuit has sided "with the Fifth and Seventh Circuits" and concluded "that all non-mandatory conditions of supervised release must be announced at a defendant's sentencing hearing." *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020) (citing *Diggles*, 957 F.3d at 557–59 & *Anstice*, 930 F.3d at 910). The court stated that, while it "must . . . assume that every oral

sentence of supervised release imposes the conditions mandated by statute," "the same is not true of discretionary conditions." *Id.* at 297. And the "fact that the Guidelines have labelled certain conditions as standard conditions does not change the fact that Congress has classified those conditions as discretionary conditions under § 3583(d)." *Id.* at 299 (quoting *Cabello*, 916 F.3d at 547 (Elrod, J., concurring)). Thus, a court must announce the standard conditions at sentencing to lawfully impose them under Federal Rule of Criminal Procedure 43(a)(3). *Rogers*, 961 F.3d at 298.

As a result, in the Fourth Circuit, when a district court fails to announce a standard condition and then imposes it in the judgment for the first time, the court will "remand to the district court for resentencing." *Rogers*, 961 F.3d at 300–01. In reaching this conclusion, the Fourth Circuit expressly noted its disagreement with the Second and Ninth Circuits. *Id.* at 298 (citing *Napier*, 463 F.3d at 1042–43 & *Thomas*, 299 F.3d at 155).

* * *

In sum, an openly acknowledged circuit split exists over the question presented. Without this Court's intervention, this split over this issue will persist and is likely to deepen without the Court's prompt intervention. This Court should not wait for further percolation, especially because the two positions have been thoroughly explored by the courts of appeals.

II. The question presented raises an important, reoccurring issue that deserves immediate resolution.

The question presented not only implicates a circuit split, but it also implicates a "common" issue that is an "important feature[] of the federal criminal justice system." *Diggles*, 957 F.3d at 554. That is, it implicates an important,

reoccurring issue that this Court should not continue to linger in uncertainty any longer.

A. The way a court should impose the standard conditions is an issue that affects thousands and thousands of individuals and affects them in a significant way.

Supervised release is a common part of federal sentencing. As noted, over 100,000 people are serving a term of supervised release. U.S. Sentencing Comm'n, Federal Probation and Supervised Release Violations, at 14 (2020). Most defendants sentenced in federal court serve a term of supervised release. Congressional Research Service, *Supervised Release* (Parole): An Overview of Federal Law, at *1 (Sept. 28, 2021). A legal rule that has relevance to every case in which supervised release is imposed, then, will impact a huge number of cases every day.

As also noted, the standard conditions "substantially restrict" a supervisee's "liberty." *Gall*, 552 U.S. at 48. Thus, a legal rule that affects the imposition of the standard conditions will not only affect thousands and thousands of people, but it will also greatly impact their liberty.

For these reasons, the legal issue raised by the question presented has far-reaching impact. It will affect the lives of thousands and thousands of individuals in a significant way.

B. The way a court should impose the standard conditions is an issue that has repeatedly come up on appeal over the last several years.

The question presented is also one that has often arisen in recent years. Over just the past four years, there are a huge number of decisions addressing whether and under what circumstances a district court can silently impose the standard conditions.

Some are published. *See*, *e.g.*, *United States v. Boyd*, 5 F.4th 550, 559 (4th Cir. 2021); *Reyes*, 18 F.4th at 1140–41 (Higginson, J., concurring); *Diggles*, 957 F.3d at 557–59; *Rogers*, 961 F.3d at 299–301; *Cabello*, 916 F.3d at 547 (Elrod, J., concurring).

Some, like the decision below, are unpublished. *See*, *e.g.*, *United States v. Cruz*, 2022 U.S. App. LEXIS 2061, at *3–5 (4th Cir. Jan. 24, 2022); *United States v. Conley*, 2022 U.S. App. LEXIS 1719, at *4 (4th Cir. Jan. 20, 2022); *United States v. Sanchez*, 2022 U.S. App. LEXIS 1593, at *2 (4th Cir. Jan. 19, 2022); *United States v. Mateo*, 2022 U.S. App. LEXIS 2471, at *12–13 (11th Cir. Jan. 26, 2022); *Knopping*, 848 F. App'x at 354; *Guerrero*, 837 F. App'x at 485; *Mendoza-Lopez*, 812 F. App'x at 699; *De Luna-Ortiz*, 775 F. App'x at 949; *Singh*, 726 F. App'x at 849.

Collectively these decisions establish that this is an issue that will continue to generate litigation until this Court steps in and establishes one clear uniform rule.

III. The decision below is incorrect.

Review is also warranted because the court of appeals below is on the wrong side of the circuit split. A district court, consistent with Federal Rule of Criminal Procedure 43(a)(3), cannot silently impose any discretionary condition, including the thirteen standard conditions.

A. Under Federal Rule of Criminal Procedure 43(a)(3), a district court cannot silently impose any discretionary supervised-release condition, including the standard conditions.

1. Under Federal Rule of Criminal Procedure 43(a)(3), "the defendant must be present at . . . sentencing." Because a defendant must be present during sentencing, all the federal courts of appeal agree that an unambiguous oral

pronouncement of sentence in the defendant's presence controls over a later issued conflicting judgment. *See United States v. Love*, 593 F.3d 1, 9 (D.C. Cir. 2010) (listing cases).

Supervised release and its conditions are "part of [a defendant's] sentence." 18 U.S.C. § 3583(a). That is, a defendant's "final sentence includes any supervised release sentence he may receive." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019). Thus, the basic principle undergirding Rule 43(a) compel the conclusion that a district court may not include a supervised-release condition unless it is imposed in the defendant's presence. That is, to impose a supervised-release condition lawfully, a district court must impose it at the defendant's sentencing hearing.

2. This conclusion means that a district court need not explicitly orally announce the conditions "mandated by statute" at the defendant's sentencing hearing to impose them. *Rogers*, 961 F.3d at 297. Because a court "must" impose these mandatory conditions, they are "*necessarily*[] part of any term of supervised release pronounced at sentencing[.]" *Rogers*, 961 F.3d at 296–97 (emphasis added). "No circuit to have considered this question has reached a contrary conclusion." *Anstice*, 930 F.3d at 909.

3. A different result, however, is appropriate for any discretionary condition, including the so-called "standard conditions." This is because "Congress has not mandated their imposition." *Anstice*, 930 F.3d at 910. Instead, the Guidelines "merely recommend[]" the standard conditions "to the extent that they serve the purposes of sentencing" in a particular case. *Evans*, 883 F.3d at 1162 n.4. As a result, the standard conditions—like any discretionary condition—"could not be imposed . . . without an exercise of the district court's discretion, based on its

individualized assessment of the defendant and the statutory factors" under 18 U.S.C. § 3583(d). *Rogers*, 961, F.3d at 297 (cleaned up).

For this reason, a district court does *not* necessarily impose the standard conditions by merely announcing it is imposing supervised release. No discretionary condition can be inherent in the imposition of supervised release. Thus, unless the court orally announces the standard conditions, it has not imposed them. And if the court includes a standard condition in the judgment without first having announced it in the defendant's presence, the oral pronouncement will conflict with the judgment. In that situation, the oral pronouncement controls under Rule 43. *See Rogers*, 961 F.3d at 296; *Diggles*, 957 F.3d at 558.

This result is supported by the general rule that a district court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing." *Gall*, 552 U.S. at 50 (citing *Rita v. United States*, 551 U.S. 338, 356–58 (2007)). If a court silently adopts any of the thirteen "standard" conditions, the conditions (and their "substantial restrict[ion]" on liberty, *id*. at 48) will not come with "an adequate statement of reasons." *Kappes*, 782 F.3d at 845. While a judge "need not give a speech about each condition," the judge must say something to stay consistent with the explanation requirement. *Id*. at 846; *accord Rogers*, 961 F.3d at 298 n.1. That is, "if the imposition of a discretionary condition must be explained, then, logically, it also must be pronounced as part of the defendant's oral sentence, so that the sentencing transcript will indicate objectively which conditions were imposed and why." *Rogers*, 961 F.3d at 298.

Moreover, treating standard conditions like other discretionary conditions allows courts to "remain faithful to [the] statutory language" in 18 U.S.C. § 3583,

the statute governing supervised release. *Rogers*, 961 F.3d at 299. It is true that the *Sentencing Commission* drew "byzantine distinctions" between various types of discretionary conditions, *Diggles*, 957 F.3d at 559—calling some "Discretionary Conditions," others "Standard Conditions," yet others "'Special' Conditions," and finally some "Additional Conditions." U.S.S.G. § 5D1.3(b), (c), (d), (e). But *Congress* didn't draw these distinctions in enacting 18 U.S.C. § 3583; instead, Congress articulated only a single, simple distinction between mandatory and discretionary conditions. *Diggles*, 957 F.3d at 558. There is no reason, then, to treat standard conditions different than any other discretionary condition.

B. The standard conditions are not "basic administrative requirements essential to the functioning of the supervised release system" and thus cannot be treated as implicit to the imposition of supervised release itself.

The court of appeals below affirmed the district court's inclusion of all thirteen discretionary standard supervised-release conditions in the written judgment, even though the district court hadn't mentioned them during Petitioner's sentencing hearing. Pet. App. 8a. In affirming, the court of appeals quoted its prior published decision in *Napier* in which it stated that the standard conditions are "implicit in an oral sentence imposing supervised release." Pet. App. 8a (quoting *Napier*, 463 F.3d at 1043).

For its part, *Napier* didn't dispute that a district court can lawfully impose a supervised-release condition only if it is imposed in the defendant's presence. Instead, *Napier* pointed to *Truscello*, which held that the "standard" conditions are implicit because they reflect the "basic administrative requirements essential to the functioning of the supervised release system." 168 F.3d at 63 (quoting *Smith*, 982 F.2d at 764). This analysis captures the entirety of the First Circuits' reasoning as

well. *See Tulloch*, 380 F.3d at 12. Thus, under this view, district courts necessarily impose the standard conditions (like the mandatory conditions) by imposing a supervised-release term.

But Congress doesn't view the standard conditions as integral to the working of supervised release. If it did, it would have mandated courts impose them. But it has not "mandated their imposition." *Anstice*, 930 F.3d at 910. Instead, Congress considers the standard condition no different than any other discretionary condition in 18 U.S.C. § 3583. *Diggles*, 957 F.3d at 558.

As for the Sentencing Commission, its Guidelines "merely recommend[]" the standard conditions "to the extent that they serve the purposes of sentencing" in a particular case. *Evans*, 883 F.3d at 1162 n.4. And "the Guidelines do not state that a sentencing court should impose the recommended standard conditions without explaining the reasons for imposing them." *Cabello*, 916 F.3d at 547 (Elrod, J., concurring). Simply put, if the Sentencing Commission considered the standard conditions integral to the working of supervised release, there would be no reason to consider them case-by-case.

Examining the standard conditions underscores the weakness of the claim that they are integral to the "functioning of the supervised release system." *Truscello*, 168 F.3d at 63 (internal quotation marks omitted). One standard condition requires a supervisee to tell a third party, at the probation officer's request, about any "risk" the supervisee poses to them. U.S.S.G. § 5D1.3(c)(12). Another presumptively prohibits a supervisee from knowingly "interact[ing]" with any felons. U.S.S.G. § 5D1.3(c)(8). And another requires the defendant to work full time or receive a probation officer's permission not to. U.S.S.G. § 5D1.3(c)(7). Setting aside the merits of those conditions, supervised release won't fall apart

without them. These conditions might make sense in some cases but not others. That's it.

Nor do all the Guidelines' standard conditions concern "basic administrative requirements" of supervised release. *Truscello*, 168 F.3d at 63. As this Court has pointed out, the "standard conditions . . . substantially restrict" a defendant's "liberty." *Gall*, 552 U.S. at 48; *see also* U.S.S.G. § 5D1.3(c) (listing standard conditions). They restrict where supervisees can live, work, and socialize. U.S.S.G. §§ 5D1.3(c)(3), (5), (7). They require supervisees to allow a probation officer to enter their home at any time. *Id.* § 5D1.3(c)(6). And they even restrict supervisees' ability to physically protect themselves if needed, including banning them from using a "taser" in self-defense. *Id.* § 5D1.3(c)(10). These are not "basic administrative requirements" of supervised release. *Truscello*, 168 F.3d at 63.

In short, the "standard" conditions are not essential to the administration of supervised release. Thus, the reasoning relied on to claim that a district court can silently impose the standard conditions doesn't withstand scrutiny.

C. Important practical reasons suggest that a district court should impose discretionary conditions only by orally announcing them in the defendant's presence.

Important practical reasons support Federal Rule of Criminal Procedure 43(a)(3)'s requirement that district courts orally announce discretionary standard conditions in the defendant's presence.

1. The sentencing hearing is the only time that non-English-speaking defendants are guaranteed to be told their sentence in a language they understand. At the hearing, an interpreter is present. By contrast, the written judge is not necessarily translated for a defendant. Thus, requiring a court to announce the

standard conditions is the only way to make sure that non-English-speaking defendants receive actual notice of the conditions.

Take this case. Petitioner—who speaks only Spanish—had the help of a court interpreter during his sentencing hearing. *See* Pet. App. 11a. The judgment, however, is in English, a language he can't read and doesn't understand. See Pet. App. 26a. Thus, the record is barren about whether Petitioner knows he must follow the standard conditions.

2. Requiring courts to announce the standard conditions makes it more likely that judges will not just reflexively impose them in every case by checking the necessary boxes on the judgment. Instead, requiring a court either to go through the standard conditions one by one or, at a minimum, to incorporate them by reference, *see Diggles*, 957 F.3d at 562, makes it more likely that the court will meaningfully consider whether it makes sense to impose any particular condition.

This case again proves the point. One standard condition prohibits Petitioner from owning a "taser" in self-defense. Pet. App. 26a. But there's no reason for that condition. Petitioner committed a non-violent drug offense. He has no other convictions or history of violence. Nothing in the record suggests that he would misuse a taser. Had the court been required to talk through the conditions, the court probably wouldn't have applied that restriction. Still, because the court implicitly adopted all the standard conditions, Petitioner cannot possess a taser for five years without facing possible imprisonment.

3. Requiring judges to announce the conditions makes it more likely that defendants and their counsel will meaningfully engage with whether a particular condition is appropriate. As the Fourth Circuit pointed out, forgoing "oral pronouncement of discretionary conditions will leave defendants without their best

chance to oppose supervised-release conditions that may cause them unique harms[.]" *Rogers*, 961 F.3d at 298. An oral pronouncement requirement will give defendants a meaningful opportunity to object and to ensure that the court considers the defendant's perspective.

4. These practical reasons for requiring articulation of any discretionary conditions imposed at sentencing must be weighed against a concern—mentioned by the Ninth Circuit in *Napier*—that articulating the standard conditions as sentencing is "unnecessarily burdensome."463 F.3d at 1043.

It's true that the rule would require some extra effort at sentencing. But, as already explained, these are not trivial requirements. *Gall*, 552 U.S. at 48. And before a judge restricts where a defendant can live, work, and socialize for *years*, it seems worth the judicial burden to spend five or ten minutes going through the conditions. Indeed, even *Napier* conceded that it would be "better practice to advise the defendant orally, at least in summary fashion, of the standard conditions." 463 F.3d at 1043; *see also United States v. Boyd*, 5 F.4th 550, 557–58 (4th Cir. 2021) (holding that the district court's statement that the "standard conditions are warranted in every case" fails the explanation requirement).

* * *

In sum, the decision below is wrongly decided. This, too, establishes that the Court should grant review.

IV. This case provides an excellent vehicle to address the question presented.

In the court of appeals, Petitioner challenged whether a district court may silently impose the standard conditions. In rejecting his argument, the court of appeals relied on its precedent in *Napier* to hold that the "standard conditions" are

"deemed to be implicit in an oral sentence imposing supervised release." Pet. App. 8a (quoting *Napier*, 463 F.3d at 1043). Thus, the court below rejected Petitioner's argument on the merits. No procedural impediment, then, will prevent this Court from resolving the question presented.

The fact pattern here also cleanly raises the question presented. The district court did not refer to the standard conditions during the sentencing hearing or otherwise adopt those conditions by reference. Instead, the court announced five, and only five, special conditions. Pet. App. 18a–20a. Thus, this case squarely raises the question presented.

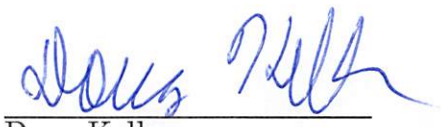
In short, this petition will allow this Court to resolve the question presented.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

February 7, 2022

Respectfully submitted,



Doug Keller