No. _____

In the Supreme Court of the United States

ANTONIO OSORIO-MENDEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The United States Sentencing Commission recommends imposing a long list of "standard" conditions of supervised release. Standard Condition 12 reads:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

U.S.S.G. § 5D1.3(c)(12), p.s. The question presented is:

Does Standard Condition 12 unconstitutionally delegate judicial authority to the probation officer?

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UNITED STATES OF AMERICA, *RESPONDENT*

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Petitioner Antonio Osorio-Mendez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on September 6, 2022.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Antonio Osorio-Mendez*, No. 4:18-CR-456-DC-1 (W.D. Tex.) (order revoking supervised release entered July 15, 2021)
- *United States v. Antonio Osorio-Mendez*, No. 4:21-CR-146-DC-1 (W.D. Tex. (judgment entered July 15, 2021)

- *United States v. Antonio Osorio-Mendez*, Nos. 21-50651 & 21-50658 (5th Cir.) (judgment and opinion entered Sept. 6, 2022)

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A copy of the unpublished opinion of the court of appeals, *United States v. Osorio-Mendez*, Nos. 21-50651 & 21-50658 (5th Cir. Sept. 6, 2022) (per curiam), is reproduced at Pet. App. 1a–2a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on September 6, 2022. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIIDELINE INVOLVED

United States Sentencing Guidelines policy statement §5D1.3(c)(12) recommends, as a "standard" condition of supervised release:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

STATEMENT

Osorio was charged in a one-count indictment with illegally reentering the United States after having been removed, in violation of 8 U.S.C. § 1326. He pleaded guilty to the indictment.[1]

In the presentence report, the probation officer calculated a Guidelines range of 21 to 27 months' imprisonment. The report also said that the statutory maximum term of supervised release was three years, citing 18 U.S.C. § 3583(b)(2). The Sentencing Guidelines recommended a term of one to three years. *See* U.S.S.G. §5D1.2(a)(3)). The report recommended that the district court impose the "mandatory and standard conditions of supervision adopted by the Court," but no special conditions. Osorio did not object to the report.

The district court sentenced Osorio to 27 months' imprisonment. The court also imposed a three-year term of supervised release to follow Osorio's prison sentence, with "[t]he standard and

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[1] The probation officer also filed a motion to revoke Osorio's supervised release from a 2018 illegal reentry conviction, based on this new offense.

mandatory conditions of supervision[.]"[2] Osorio did not object. The judgment included all the mandatory and standard conditions adopted in a standing order by the judges of the Western District of Texas. *See* Order, Conditions of Probation and Supervised Release (W.D. Tex. Nov. 28, 2016).[3] One of those conditions—standard condition 12, which comes from Sentencing Guidelines policy statement §5D1.3(c)(12)—delegates to the probation officer the authority to require Osorio to notify people of any risk he may pose to them:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

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[2] The district court also revoked Osorio's supervised release from the earlier conviction and sentenced him to 14 months' imprisonment, to run consecutively to the sentence in the new case, with no supervised release to follow.

[3] *Available at* https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Conditions%20of%20Probation%20and%20Supervised%20Release.pdf.

Osorio appealed.[4] He argued that the risk-notification condition impermissibly delegates judicial power to the probation officer. Pet. App. 2a. The Fifth Circuit rejected Osorio's argument as foreclosed by its recent decision in *United States v. Mejia-Banegas*, 32 F.4th 450 (5th Cir. 2022). There, the Fifth Circuit held that "that there was no error," in imposing the condition, "plain or otherwise, because the condition 'does not impermissibly delegate the court's judicial authority to the probation officer.'" Pet. App. 2a (quoting *Mejia-Banegas*, 32 F.4th at 452). For that reason, the Fifth Circuit affirmed Osorio's judgment. Pet. App. 2a.

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[4] He also appealed from the revocation order but did not challenge any aspect of his revocation.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to say whether Standard Condition 12 impermissibly delegates judicial authority to the probation officer.

Federal sentencing courts may, and in some cases must, "include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a). Defendants on supervised release must abide by the conditions imposed by the sentencing court. If the defendant violates a supervised release condition, the court may revoke the term of supervised release and require the defendant to serve additional prison time, followed by an additional period of supervised release after the defendant's release. 18 U.S.C. § 3583(e)(3).

Some supervised release conditions are expressly required by statute. *See* 18 U.S.C. § 3583(d) (enumerating mandatory standard release conditions, such as conditions that defendants not commit future crimes, make restitution, and not unlawfully possess controlled substances). In addition to those conditions, Congress has provided:

> The court may order, as a further condition of supervised release, to the extent that such condition—
> (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
> (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate.

18 U.S.C. § 3583(d).

Congress has also authorized the Sentencing Commission to promulgate "general policy statements" regarding "the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18." 28 U.S.C. § 994(a)(2)(B). Pursuant to that authority, the Sentencing Commission has promulgated a policy statement containing a series of "'standard' conditions" that "are recommended for supervised release." U.S.S.G. §5D1.3(c), p.s.

One of those conditions—Standard Condition 12—delegates to the probation officer the authority to require a defendant to notify people of any risk he may pose to them:

> If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

U.S.S.G. §5D1.3(c)(12), p.s.

The circuits are divided over whether Standard Condition 12 is an impermissible delegation of Article III judicial authority to the probation officer. The Fifth Circuit has held that the condition is not an impermissible delegation. *United States v. Mejia-Banegas*, 32 F.4th 450 (5th Cir. 2022) (per curiam). Following the Eleventh Circuit's lead, the Fifth Circuit concluded that there is no delegation problem because "the probation officer does not unilaterally decide whether the defendant is subject to the condition. Rather, the risk-notification condition only allows the probation officer to direct when, where, and to whom the defendant must give notice." *Id.* at 452 (citing *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006) (per curiam); and *United States v. Porter*, 842 F. App'x 547, 548 (11th Cir. 2021) (per curiam)). This "limited scope of authority[,]" in the court's view, "neither leaves to the probation officer the 'final say' on whether to impose a condition of supervised release nor implicates a significant deprivation of liberty." *Id*. The court also found it significant that the condition had escaped challenge for nearly 30 years. *Id*. Finally, the court suggested that a defendant could seek relief under Fed. R. Crim. P. 32.1 if "an overzealous probation officer" abused his delegated authority. *Id*.

The First and Eighth Circuits have likewise rejected delegation challenges to Standard Condition 12. *United States v. Cruz*, 49

F.4th 646, 654 (1st Cir. 2022); *United States v. Janis*, 995 F.3d 647, 653 (8th Cir.), *cert. denied*, 142 S. Ct. 483 (2021).

The Tenth Circuit, by contrast, has held that Standard Condition 12 is an unconstitutional delegation of judicial authority. *United States v. Cabral*, 926 F.3d 687, 697–99 (10th Cir. 2019). "By tasking Mr. Cabral's probation officer with determining whether Mr. Cabral poses a 'risk' to others in any facet of his life and requiring Mr. Cabral to comply with any order to notify someone of any such risk, the district court delegated broad decision-making authority to the probation officer that could implicate a variety of liberty interests." *Id.* at 697. The court pointed to the district court's recognition that the condition could be applied to numerous unanticipated risks. *Id.* at 697–98. It emphasized that the risk-notification condition could affect Cabral's family relationships and employment prospects. *Id.* at 698–99. "Because the risk-notification condition, as imposed by the district court, grants Mr. Cabral's probation officer decision-making authority that could infringe on a wide variety of liberty interests, it is an improper delegation of judicial power." *Id.* at 699.

The Tenth Circuit has the better view. "The imposition of a sentence, including the terms and conditions of supervised release,

is a core judicial function that cannot be delegated." *Sealed Appellee v. Sealed Appellant*, 937 F.3d 392, 400 (5th Cir. 2019) (quoting *United States v. Franklin*, 838 F.3d 564, 568 (5th Cir. 2016)); *see Cabral*, 926 F.3d at 697. "This limitation comes from Article III of the Constitution, which entrusts judicial functions to the judicial branch." *United States v. Huerta*, 994 F.3d 711, 716 (5th Cir. 2021) (citing *Franklin*, 838 F.3d at 567–68); *see Cabral*, 926 F.3d at 697. Thus, "[i]n the context of conditions of supervised release, a district court may delegate only the 'details' of the conditions; it may not delegate imposition of the conditions themselves." *Huerta*, 994 F.3d at 716.

Standard Condition 12 falls on the wrong side of that line. The condition grants the probation officer sole authority to decide whether a defendant poses a risk to anyone: "If the probation officer determines that the defendant poses a risk to another person (including an organization) …." U.S.S.G. §5D1.3(c)(12), p.s. Even then, the condition does not *require* notification; that is entirely up to the probation officer: "the probation officer *may* require the defendant to notify the person about the risk[.]" *Id.* (emphasis added). And the condition contains no guidance about the type or degree of risk sufficient to trigger the notification requirement.

The condition is, quite simply, a blank check to the probation officer.

These features of the risk-notification condition transgress two principles undergirding the rule against delegating judicial power to a non-Article III actor. First, "'the district court [must] have the final say' on whether to impose a condition." *Huerta*, 994 F.3d at 716–17 (quoting *United States v. Medel-Guadalupe*, 987 F.3d 424, 431 (5th Cir. 2021) (per curiam), *cert. denied*, (U.S. Apr. 19, 2021) (No. 20-7483)); *see also United States v. Martinez*, 987 F.3d 432, 435 (5th Cir. 2021). Here, the probation officer has the final say about whether to impose the condition. Second, although a district court may delegate to a probation officer the details of administering a condition, the officer's authority "ends when the condition involves a 'significant deprivation of liberty.'" *Huerta*, 994 F.3d at 717 (quoting *Martinez*, 987 F.3d at 434, 436); *see Cabral*, 926 F.3d at 697–99. Here, the condition can lead to a significant deprivation of liberty, because it requires the defendant him to abide by the officer's dictates: "[T]he defendant *shall* comply with that instruction." U.S.S.G. §5D1.3(c)(12), p.s.

The Court should grant certiorari and reverse the Fifth Circuit's decision upholding Standard Condition 12.

CONCLUSION

FOR THESE REASONS, Osorio asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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