No. _____

In the Supreme Court of the United States

FERNANDO ANGEL PUGA, *PETITIONER*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

MAUREEN SCOTT FRANCO
Federal Public Defender

BRADFORD W. BOGAN
Assistant Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
(210) 472-6700
(210) 472-4454 (Fax)

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

When a district court imposes a term of supervised release as part of a sentence, 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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Petitioner Fernando Angel Puga 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 March 28, 2024.

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. Puga*, No. 3:19-CR-1359-DCG-1 (W.D. Tex.) (criminal judgment entered Oct. 27, 2022; amended judgment on remand for correction entered Apr. 26, 2024)

- *United States v. Puga*, No. 22-50957 (5th Cir.) (judgment entered Mar. 28, 2024)

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OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Puga*, No. 22-50957 (5th Cir. 2024) (per curiam) (unpublished), is reproduced at Pet.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 March 28, 2024. 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

Puga and a codefendant were charged in a three-count indictment with 1) kidnapping, 18 U.S.C. § 1201(a)(1); 2) carjacking resulting in serious bodily injury, 18 U.S.C. § 2119(2); and 3) transporting a stolen vehicle in interstate commerce, 18 U.S.C. § 2312. Puga went to trial; a jury found him guilty of all three counts.

The district court sentenced Puga to concurrent terms of 372 months' imprisonment on count one, 300 months on count two, and 120 months on count three. The court also imposed concurrent supervised release terms of five, five, and three years, respectively, to follow Puga's prison sentence "under standard conditions which this Court adopts." Puga did not object to the imposition of these conditions.

The judgment included all the "mandatory" and "standard" conditions from the Western District standing order. *See* Order, Conditions of Probation and Supervised Release (W.D. Tex. Nov. 28, 2016).[1] One of the conditions from the standing order—stand-

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

ard condition 12, drawn from Sentencing Guidelines policy statement §5D1.3(c)(12)—delegates to the probation officer the authority to require Puga 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.

Puga appealed. He argued that the risk-notification condition impermissibly delegates judicial power to the probation officer. Pet. App. 1a–2a. The Fifth Circuit rejected Puga's argument as foreclosed by its decision in *United States v. Mejia-Banegas*, 32 F.4th 450 (5th Cir. 2022), and granted the Government's motion for summary affirmance on that basis.[2] Pet. App. 2a.

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[2] The court also remanded for the limited purpose of correcting the judgment to reflect Puga's conviction on count three, which had been omitted from the original judgment. Pet. App. 2a.

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. 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; *see also United States v. Oliver*, No. 20-4500, 2022 WL 1223716, at *6 n.6 (4th Cir. 2022) (per curiam) (unpublished) (noting that "[w]e have suggested that imposing this condition without giving the probation officer meaningful guidance

in applying it may be an improper delegation of judicial power[,]" citing *United States v. Boyd*, 5 F.4th 550, 558 (4th Cir. 2021)); *cf. United States v. Campbell*, 77 F.4th 424, 432 (6th Cir. 2023) (holding that district court's "expla[nation] that if there were 'any questions or concerns,' the court would 'take [the issue] up' to 'resolve' it … was enough to satisfy any delegation concerns under our precedent.") (second alteration in original).

The Second Circuit has likewise recognized that Standard Condition 12 contains an improper delegation of authority. *United States v. Boles*, 914 F.3d 95, 112 (2d Cir. 2019) (vacating condition and remanding to district court to clarify the condition's scope because it "gives the probation office unfettered discretion with respect to the notification requirement").

The Second and Tenth Circuits have the better view, one that is consistent with the Fifth Circuit's precedent on other improper delegations. "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)); *see also United States v. Martinez*, 987 F.3d 432, 435 (5th Cir. 2021); *Campbell*, 77 F.4th at 432 (rejecting challenge to this risk-notification condition where "the record indicate[d] that the [district] court reserved the 'ultimate authority' to determine the condition's contours"). 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, Puga asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

MAUREEN SCOTT FRANCO
Federal Public Defender
Western District of Texas
300 Convent Street, Suite 2300
San Antonio, Texas 78205
Tel.: (210) 472-6700
Fax: (210) 472-4454

s/ Bradford W. Bogan
BRADFORD W. BOGAN
Assistant Federal Public Defender

Counsel of Record for Petitioner

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