No.

In the Supreme Court of the United States

YESID RIOS SUAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should this Court resolve the Circuit split and determine whether an individual has standing to raise a violation of the rule of specialty, as the Third, Eighth, Ninth, Tenth, and Eleventh Circuits have held, or whether that right is only a privilege of the asylum state, as the Second and Seventh Circuits have held?

If the rule of specialty is a privilege of the asylum state and an individual lacks standing to raise a violation of the rule, does an official diplomatic letter to the sentencing judge constitute an official protest?

Did the district court unjustifiably breach the United States' obligations under the extradition agreement in imposing a sentence of 648 months—a de facto life sentence—in violation of the extradition agreement?

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PETITION FOR A WRIT OF CERTIORARI

Yesid Rios Suarez respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit in *United States v. Rios Suarez*, 14-2378-cr, are at 791 F.3d 363, 2015 WL 3953289 (2d Cir. June 30, 2015) (Appendix A) and ---Fed. Appx. ---, 2015 WL 3953328 (2d Cir. June 30, 2015) (summary order) (Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 30, 2015. No petition for rehearing was filed. This petition is timely filed within the 90-day statutory time limitation. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III Section 2 of the United States Constitution provides in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; [. . .]--to controversies to which the United States shall be a party;--to controversies between [. . .] a state, or the citizens thereof, and foreign states, citizens or subjects.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18 of the United States Code section 3582(a) provides:

> Factors To Be Considered in Imposing a Term of Imprisonment.— The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall

> consider the factors set forth in section 3553 (a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

The rule of specialty provides in relevant part:

> (1) A person who has been extradited to another state will not, unless the requested state consents, . . . (b) be given punishment more severe than was provided by the applicable law of the requesting state at the time of the request for extradition.

Restatement (Third) of Foreign Relations Law § 477 (1987).

The diplomatic notes, resolutions of the Colombian Ministry of Justice and Law, extradition order pursuant to which Mr. Rios Suarez was extradited to the United States, and related letters are reproduced in full in Appendices C through H.

STATEMENT OF THE CASE

Petitioner Yesid Rios Suarez respectfully petitions the Court to issue a writ of certiorari to review the holding of the United States Court of Appeals for the Second Circuit that he lacks prudential standing to assert that his sentence violated the terms of the Colombian order of extradition pursuant to which he was subject to the jurisdiction of the United States District Court for the Southern District of New York. Mr. Rios Suarez additionally asks the Court to consider whether the letter sent by the Colombian Consul General to the sentencing judge constituted an official protest and whether the district court unjustifiably breached the United States' obligations under the Colombian extradition agreement in imposing a sentence whose term far exceeded Mr. Rios Suarez' life expectancy, i.e., a de facto life sentence.

Mr. Rios Suarez is a citizen of Colombia whose rights the Colombian government has consistently sought to protect during the course of his extradition, prosecution, and sentencing in the United States. Yet, the Second Circuit has found its efforts unavailing and has upheld Mr. Rios Suarez' de facto life sentence notwithstanding the Colombian government's clear

requirement that a life sentence would neither be sought nor imposed and that the sentence imposed would "have the essential purpose of reform and social adaptation." C-3.

This Court should hear Mr. Rios Suarez' case because it presents important and unresolved questions about the obligations of the judiciary to uphold and enforce the United States' diplomatic agreements and presents an ideal vehicle for this Court to resolve a split in the Circuits over whether an individual has standing to assert a violation of the rule of specialty.

Procedural Background

Mr. Rios Suarez is a Colombian citizen and had never entered the United States until he was extradited from Colombia to face the charges giving rise to this petition in the Southern District of New York in 2013. The district court had jurisdiction under 18 U.S.C. §§ 3231 and 3238. The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

In 2011, Mr. Rios Suarez was charged in the Southern District of New York with violations of federal law including, principally, conspiracy to manufacture and import five kilograms and more of cocaine into the United States in violation of 21 U.S.C. § 963. Mr. Rios Suarez challenged his extradition. The Colombian courts, as well as the Colombian Ministry of Justice and Law, ultimately approved extradition, but with significant conditions.

In approving Mr. Rios Suarez' extradition, the Colombian government stated that, "the [Colombian] Government should make it a condition of delivery that the person required in extradition **may not be** sentenced to death nor tried for acts other than those that motivate extradition, **no[r] subjected to** . . . **life imprisonment** . . ." and that recognized due process guarantees should apply. C-2-3 at ¶ 6 (citing the decision of the Criminal Cassation Division of the Supreme Court of Justice dated September 19, 2012) (emphasis added). Those due process guarantees include assurance "**that the penalty eventually imposed upon him may not be out**

of proportion, . . . and **that the sentenced** [*sic*] **to imprisonment . . . have the essential purpose of reform and social adaptation**." C-3 (emphasis added). *See also* C-6 ("Therefore it is, RESOLVED: . . . Article 3. To order the delivery of the citizen YESID RIOS-SUAREZ, with the commitment on the part of the State Requiring, of compliance with conditions referred to in Section 494.2 of Law 906/2004, that is, that **the required citizen may not be subject to** forced disappearance, torture or cruel, inhuman or degrading treatment, nor to exile, **life imprisonment** and confiscation.") (emphasis added); C-5 (approving extradition on condition that the State Requiring [i.e., the United States] would commit that Mr. Rios Suarez "will not be subjected to . . . torture or cruel, inhuman or degrading treatment or punishment or exile, life imprisonment of confiscation.").

The Colombian Resolutions also noted the importance of family contact, making it a "condition of delivery" that Mr. Rios Suarez be offered "rational and real possibilities [for] . . . regular contact with his close family," C-3, and specified that Mr. Rios Suarez "is entitled to recognition by the State Requiring [] of the time he has spent detained by reason of the extradition proceedings." C-6. On December 14, 2012, the Colombian Ministry of Interior and Justice issued Resolution 453, upholding Resolution 382. *See* Appendix D.

The diplomatic note pursuant to which the United States of America responded to the Colombian resolutions, dated March 21, 2013, guaranteed that, "a sentence of life imprisonment will not be sought or imposed." E-1. Furthermore, the diplomatic note guaranteed that, "no person extradited to the United States from Colombia will be subject to torture or cruel and unusual punishment . . ." E-2.

Thereafter, Mr. Rios Suarez was extradited to the United States, appearing in the Southern District of New York on April 25, 2013. *See* Appendix F. The Colombian government

provided him with a letter stating that he was entitled to credit for the time he had served in Colombia contesting extradition. *See* Appendix G. Rios Suarez pled not guilty to the charges in the indictment (see *United States v. Rios Suarez*, 11-CR-836 (KBF), at unnumbered Dkt. Entry dated May 2, 2013). On January 31, 2014, while Mr. Rios Suarez was in pretrial detention, the Consulate General of Colombia, by Elsa Gladys Cifuentes Aranzazu sent a letter to the Honorable Katherine B. Forrest, reiterating the Colombian government's interest in Mr. Rios Suarez' prosecution and reminding the district court that:

> It is important to note that honoring [the assurances made by the Government of the United States to the Government of Colombia] is of utmost importance. Included in those assurances, the Government of the United States recognizes the conditions under which the Government of Colombia agreed to the extradition of Mr. RIOS SUAREZ, and guarantees the Government of Colombia that a sentence of life imprisonment will not be sought or imposed on Mr. RIOS SUAREZ, . . . that he will not be subject to . . . cruel and unusual punishment . . .

The Consul General requested that a copy of the Order of Judgment and Commitment be provided if Mr. Rios Suarez was convicted after a plea or at trial, in order to ensure that Mr. Rios Suarez' conviction and detention were in compliance with Resolutions 382 and 453. *See* Appendix H.

As detailed in Mr. Rios Suarez' appellate brief (*United States v. Rios Suarez*, 14-2378 [2d Cir.] at Dkt. Entry # 28), Mr. Rios Suarez pled guilty to the indictment on February 4, 2014. Following a *Fatico* hearing, he was sentenced on June 27, 2014, to 648 months (54 years) of imprisonment. Mr. Rios Suarez was 46 years old at sentencing. Acknowledging counsel's argument that the Colombian extradition order prohibited a life sentence, the sentencing court determined that it was not bound by the Executive Branch's diplomatic assurances or by the Colombian extradition order. I-45-47. The district court declined to credit Mr. Rios Suarez with the 100-month sentence already imposed but not yet served in Colombia, because the court could

not be sure that Mr. Rios Suarez would serve that time. I-44. Further, the district court declined to make a recommendation to the Bureau of Prisons concerning credit for the time that Mr. Rios Suarez had spent awaiting extradition, noting that because Mr. Rios Suarez had contested his extradition, the district court found it inappropriate to recommend credit for the time spent in those extradition proceedings. I-47. This ruling was directly contradictory to the Colombian resolutions' requirements and the extradition guarantees made by the Colombian government to Mr. Rios Suarez.

In imposing the sentence, the district court acknowledged that the sentence was "effectively a life sentence," but stated twice that, "I am not pronouncing a life sentence." I-48. This statement is at odds with the United States Sentencing Commission's determination that a sentence of 470 months is equivalent to a life sentence. *See* U.S. Sent. Comm'n., *Life Sentences in the Federal System* (2015) at p. 10-14 and 23 n.52[1] (internal citation omitted) (discussing "de facto life sentences" and noting that, "The Commission assigns a value of 470 months (39 years and two months) to sentences of life imprisonment for any statistical analysis in which a term of months is required. . . . This sentence length is consistent with the average life expectancy of federal criminal offenders.").[2]

Mr. Rios Suarez timely appealed his sentence to the United States Court of Appeals for the Second Circuit, raising several issues including the district court's violation of the Colombian extradition order's conditions, arguing in part that the 648-month sentence was effectively a life sentence because it substantially exceeded his life expectancy. On June 30, 2015, the Court of

[1] Available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

[2] *See also id.* at 12 (noting that "the average age of the offenders" sentenced to de facto life imprisonment was 37 years and concluding that the sentences of over 470 months "support a presumption that the judges imposing them intended the offenders to remain incarcerated for the remainder of their lives in most instances.").

Appeals rejected Mr. Rios Suarez' arguments, holding that he lacked prudential standing to raise a challenge that his sentence had violated the Colombian extradition order. *See* Appendix A.

The Opinion and Concurrence of the Court Below

The Second Circuit held that Mr. Rios Suarez lacked prudential standing to challenge the district court's sentence as a violation of the Colombian extradition order. The Court explained that the rule of specialty applies in the context of sentencing. A-4; *United States v. Suarez*, 791 F.3d 363, 366 (2d Cir. 2015) (referencing *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007)). Finding that the extradition documents, including the formal diplomatic notes pursuant to which Mr. Rios Suarez was extradited, have the same legal status as extradition treaties (A-6; *Suarez*, 791 F.3d at 367 ["For purposes of our analysis here, extradition documents such as Diplomatic Notes implicate the same international legal rights as treaties because "a violation of [an] extradition agreement may be an affront to the surrendering sovereign."] [internal citations omitted]), the Second Circuit ruled that the rule of specialty was a privilege that must be asserted by the asylum state and that Mr. Rios Suarez had only derivative rights under the extradition order, that is, "Suarez would only have prudential standing to raise the claim that his sentence violated the terms of his extradition if the Government of Colombia first makes an official protest." A-7; *Suarez*, 791 F.3d at 367.

In a concurring opinion, Circuit Judge Kearse noted that Second Circuit precedent foreclosed the argument that a sentence expressed as a term of years could violate an extradition agreement, even if it was "the functional equivalent of life imprisonment." A-10; *Suarez*, 791 F.3d at 368.

REASONS FOR GRANTING THE WRIT

Summary of the Argument

In the Third, Eighth, Ninth, and Tenth Circuits, a defendant who is extradited pursuant to an extradition treaty or through an arrangement by diplomatic note has standing to raise violations of the rule of specialty arising out of his prosecution and/or sentence. In the Eleventh, he has standing if extradited pursuant to treaty but not if jurisdiction is obtained by means of diplomatic note or other non-treaty agreement. In the Second and Seventh, he has no standing. In the Fifth, First, and Sixth Circuits, the question is wholly undecided.[3]

By chance of fate, Petitioner, Mr. Rios Suarez, was arraigned, convicted, and sentenced in the Second Circuit. The Second Circuit denies Mr. Rios Suarez, who was 46 years old at sentencing, the standing to challenge the district court's 648-month (54-year) sentence, which violates the rule of specialty and the Colombian government's prohibition of a sentence of life imprisonment[4] and denies him credit for time spent detained during extradition proceedings in Colombia, again in violation of the Colombian government's order. The Second Circuit's view is in the minority and is unsupported by this Court's precedent.

This Court should grant certiorari in this case to resolve the Circuit split, should hold that those Circuits which have found individual standing to assert violations of the rule of specialty have properly applied this Court's holding in *United States v. Rausche*r, 119 U.S. 407, 422, 7

[3] The Fourth and D.C. Circuits have assumed that a petitioner has standing without deciding the question. *See infra* at p. 12-13.

[4] As argued in Mr. Rios Suarez' moving brief on appeal, life expectancy for a Colombain male of his age is 58.3 years. See http://countryeconomy.com/demography/life-expectancy/colombia (accessed April 24, 2014). Assuming that Mr. Rios Suarez serves 85% of the district court's sentence (i.e., with full credit for "good time"), he would be eligible for release at the age of approximately 92.

S.Ct. 234, 30 L.Ed. 425 (1886), and should remand Mr. Rios Suarez' case for consideration of the merits of his sentencing appeal.

This Court should likewise grant certiorari to address the questions of (1) whether an official diplomatic letter to the sentencing judge is sufficient to constitute a protest by the asylum state and (2) whether a sentence that exceeds a petitioner's life expectancy and is greater than the term of months calculated by the United States Sentencing Commission to represent a life sentence is, in fact, a life sentence even if expressed as a term of months and, if so, whether the imposition of that sentence is a violation of the United States' obligations under the Colombian extradition order which this Court is obligated to correct (or to remand for resentencing) based on its holding in *Rauscher*.

Argument

I.
This Court Should Grant Certiorari to Resolve the Circuit Split on Whether an Individual Has Standing to Assert a Violation of the Rule of Specialty.

A. Applicable Law

1. This Court's Precedent Establishes that an Individual Has Standing to Object to a Violation of the Rule of Specialty.

This Court has held that an individual has standing to object to a violation of the rule of specialty[5] even if the extraditing state does not object on his behalf. *See Rauscher*, 119 U.S. at 424 (emphasis supplied) (referring to the rule of specialty as a "right conferred *upon persons* brought from a foreign country" via extradition proceedings). More recently, this Court confirmed *Rauscher*'s continuing validity, noting that, "if [an] [e]xtradition [t]reaty has the force of law . . . it would appear that a court must enforce it *on behalf of an individual* regardless of the

[5] Courts appear to use the terms "specialty" and "speciality" interchangeably.

offensiveness of the practice of one nation to the other nation." *United States v. Alvarez–Machain,* 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) (emphasis supplied).

2. Individual Standing to Challenge Violations of the Rule of Specialty Does Not Conflict With the Court's Precedent on Article III and Prudential Standing.

This Court's doctrine on standing encompasses an Article III requirement and a prudential requirement, both of which are satisfied by this Court's holding in *Rauscher*.

The "case and controversy" requirement of Article III of the United States Constitution presents a threshold question of justiciability—"A federal court's jurisdiction . . . can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975) (internal quotation omitted) (citations omitted). *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) ("[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.").

In contrast to Article III standing, "prudential standing" asks "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500 (internal footnote omitted). "The common thread underlying both requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."

Barrows v. Jackson, 346 U.S. 249, 255, 73 S. Ct. 1031, 1034, 97 L. Ed. 1586 (1953) (internal footnote omitted).

Although this Court has generally denied standing to a party who bases his "claim to relief on the legal rights or interests of third parties," this rule is not absolute. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30, 125 S. Ct. 564, 567-68, 160 L. Ed. 2d 519 (2004) (quoting *Warth*, 422 U.S. at 499). If the claimant establishes both a "'close' relationship with the person who possesses the right" and that there "is a 'hindrance' to the possessor's ability to protect his own interests," third party standing may be established. *Kowalski*, 543 U.S. at 130 (referencing *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). "[I]n several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S at 130 (quoting *Warth*, 422 U.S. at 510 (emphasis in *Kowalski*) [additional citations omitted]). *See also Kowalski*, 543 U.S. at 136-37 (Ginsburg, J., dissenting) (internal citations omitted) (The requirement that a litigant have suffered injury in fact is an Article III requirement, but "the close relation and hindrance criteria are 'prudential considerations.'").

3. The Circuits are Split as to Whether an Individual Has Standing to Assert a Violation of the Rule of Specialty

Despite *Rauscher*'s unambiguous holding, the Circuits have split as to whether an individual has standing to assert a violation of the rule of specialty. Where they have denied standing, they have generally found that an individual lacks prudential standing, although *Kowalski* does not support that argument.

The Third, Eighth, Ninth, Tenth, Eleventh Circuits—i.e., a majority of the Circuits—have held that an individual has standing to assert a violation of the rule of specialty. *See United*

States v. Lomeli, 596 F.3d 496, 499-500 (8th Cir. 2010) ("This circuit has held that extradited individuals such as Lomeli have standing to raise any objection that the surrendering country might have raised to their prosecution."); *United States v. Thomas*, 322 Fed. Appx. 177, 180 (3d Cir. 2009) ("we believe, as do the majority of other Circuits to rule on this issue, that a defendant . . . has standing to raise . . . arguments [invoking a treaty or the rule of specialty]"); *Gallo-Chamorro v. United States*, 233 F.3d 1298, 1306 (11th Cir. 2000) (holding that "a defendant may assert a violation of an extradition treaty on dual criminality grounds")[6]; *United States v. Levy*, 905 F.2d 326, 328 n. 1 (10th Cir. 1990) (citing *Rauscher*); *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988) ("[a] person extradited may raise whatever objections the extraditing country would have been entitled to raise"). *See also* Restatement (Third) of Foreign Relations Law § 477, comment b ("While the case law in the United States and elsewhere is not consistent, it appears that the person extradited has standing to raise the issue....").

The Fourth and D.C. Circuits have assumed without deciding that an individual has standing to assert a violation of the rule of specialty. *See United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012), *cert. denied*, *United States v. Day*, 133 S.Ct. 2038 (2013), *reh'g denied*, *United States v. Day*, 134 S.Ct. 25 (2013) (noting that "the circuits are split on the question of whether an individual defendant has standing to raise a specialty violation, and the Fourth Circuit

[6] *See also United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989) ("The extradited individual . . . can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty."). *But see Ocoro v. United States*, 607 Fed. Appx. 864, 868 (11th Cir. 2015) (finding that the defendant, who was extradited pursuant to diplomatic notes rather than to an extradition treaty "lacked standing to assert a violation of the rule of specialty."); *United States v. Valencia–Trujillo,* 573 F.3d 1171, 1179 (11th Cir. 2009) ("[t]he rule of specialty applies only to extraditions pursuant to treaty"). This position evidences yet another Circuit split concerning application of the rule of specialty. *Compare Suarez*, A-6; 791 F.3d at 367 (internal citations omitted) ("For purposes of our analysis here, extradition documents such as Diplomatic Notes implicate the same international legal rights as treaties because 'a violation of [an] extradition agreement may be an affront to the surrendering sovereign.'").

has yet to rule on the matter.")[7]; *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 206 (D.C. Cir. 2013) (noting "conflicting authority as to whether a criminal defendant—as opposed to the extraditing state—has standing to assert the doctrine of speciality" and assuming without deciding that appellant had standing to raise the claim).

The Fifth Circuit has recently declined to rule on the question, observing that, "It is still an open question in this circuit whether a criminal defendant has standing to assert the rule of speciality." *United States v. Angleton*, 201 Fed. Appx. 238, 243 n.12 (5th Cir. 2006) (deciding the case on other grounds).[8] Likewise, the First Circuit has declined to rule on the issue. *United States v. Saccoccia*, 58 F.3d 754, 767 n.6 (1st Cir. 1995). In *Saccoccia*, however, the First Circuit noted that, "the side that favors individual standing has much to commend it." *Id*. at 767 n.6 (referencing *Rauscher,* 119 U.S. at 422–24 [referring to specialty as a "right conferred upon persons brought from a foreign country" via extradition proceedings]; *United States v. Thirion*, 813 F.2d 146, 151 & n. 5 (8th Cir. 1987) [same]; *see also Alvarez–Machain*, 504 U.S. at 659–60 [suggesting the continuing vitality of the *Rauscher* decision]). Similarly, the Sixth Circuit "has not expressly decided whether an extradited individual has standing to seek the enforcement" of the rule of specialty. *United States v. Garrido-Santana*, 360 F.3d 565, 579 n.10 (6th Cir. 2004) (referencing *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985) [observing that a serious question existed as to whether the defendant had standing to assert the rule of specialty

[7] *But see Zhenli Ye Gon v. Holt*, 774 F.3d 207, 220 (4th Cir. 2014) *cert. denied sub nom. Zhenli Ye Gon v. Aylor*, 135 S. Ct. 2859 (2015) (holding, in the context of a defendant fighting extradition from the United States to Mexico, that "The rule of specialty is a privilege of the asylum state, which it may assert or waive as it so chooses; it is not a substantive right under the Treaty accruing to Ye Gon.").

[8] *But see United States v. Kaufman,* 874 F.2d 242, 243 (5th Cir.1989) (per curiam) (denying petition for rehearing and suggestion for rehearing en banc) (holding that "only an offended nation can complain about the purported violation of an extradition treaty.").

because "[t]he right to insist on application of ... [that principle] belongs to the requested state, not to the individual whose extradition is requested," yet addressing the merits of such a claim]).

In contrast, only the Second and Seventh Circuits have held that there is no individual standing to raise a violation of the rule of specialty. *See Suarez*, 791 F.3d at 367-68[9]; *United States v. Burke,* 425 F.3d 400, 408 (7th Cir. 2005) (declining to consider defendant's specialty argument because "extradition treaties do not create personal rights enforceable by criminal defendants. . . . Instead they create rules for the relations between nations."). Furthermore, the Seventh Circuit has recently called *Burke*'s holding into question. *United States v. Stokes*, 726 F.3d 880, 888-89 (7th Cir.) *cert. denied*, 134 S. Ct. 713, 187 L. Ed. 2d 573 (2013) (discussing this Court's opinion in *Rauscher*, 119 U.S. at 419, 430 and noting that, "On the face of it, *Burke* appears to foreclose further inquiry into the Rule of Specialty. But there is reason to question this circuit precedent.").

Supporting *Stokes*' observation, Petitioner notes that the Third Circuit has recently reevaluated its view, holding that an individual does have standing to raise a violation of the rule of specialty. *Compare United States v. Riviere*, 924 F.2d 1289, 1299-300 (3d Cir. 1991) (finding a lack of individual standing based on "the sovereignty of a nation to control its borders and to enforce its treaties") and *United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997) ("Because treaties are agreements between nations, individuals ordinarily may not challenge treaty interpretations in the absence of an express provision within the treaty or an action brought by a signatory nation.") with *Thomas*, 322 Fed. Appx. at 180 ("[W]e believe, as

[9] In so holding, the Second Circuit appears to have disavowed without expressly overruling its previous statement that, to the extent that an extradited individual asserts that his prosecution breached the extradition agreement and "may be an affront to the surrendering sovereign," the extradited individual may raise those objections. *United States v. Baez*, 349 F.3d 90, 92 (2d Cir. 2003) (internal citations omitted).

do the majority of other Circuits to rule on this issue, that a defendant . . . has standing to raise . . . arguments [invoking a treaty or the rule of specialty]").

B. Discussion: This Court Should Grant Certiorari to Resolve the Circuit Split.

The Second Circuit's view of standing to assert a violation of the rule of specialty is at odds with this Court's holding in *Rauscher* and is opposed to the majority of the Circuits that have conclusively decided the issue. Holding, as does the Second Circuit, that the rule of specialty is a privilege of the asylum state, defies longstanding principles of standing as enunciated in *Warth* and *Kowalski* because it denies relief to the individual who has been actually injured by the violation while simultaneously elevating the rights of the asylum state over the rights of the actually injured party. Under any analysis, Mr. Rios Suarez has suffered an actual injury because the district court imposed a 648-month sentence in violation of the Colombian extradition order. Remand of his case for re-sentencing in compliance with the extradition order would redress his injury. *Lujan*, 504 U.S. at 560-61.

In addition, even if rights under an extradition treaty or other extradition agreement are technically rights accruing to the contracting parties (i.e., the treaty states), Mr. Rios Suarez satisfies *Kowalski*'s requirements by establishing both a "close relationship with the person who possesses the right" and that there "is a hindrance to the possessor's ability to protect his own interests." *Kowalski*, 543 U.S. at 130. As a citizen of Colombia and the individual on whose behalf and for whose benefit the extradition agreement was negotiated, Mr. Rios Suarez has a close relationship with (that is, his interests are closely aligned with) the contracting party. Moreover, as argued below, because Colombia did attempt to protest the violation of Mr. Rios Suarez' rights but did so in a manner that the Second Circuit found inadequate, there is a hindrance to Colombia's assertion of rights under the extradition agreement. If Colombia

possesses the right to assert that its extradition agreement has been violated, Mr. Rios Suarez, as the beneficiary of that agreement and as the individual in the best position to determine whether the agreement has been violated, should have standing to assert that he has not received the benefit of that agreement.

Mr. Rios Suarez has also established prudential standing because the Second Circuit's affirmance of his sentence and consequent disregard of the terms of the Colombian extradition agreement has violated Colombia's rights under the extradition agreement. *Kowalski*, 543 U.S at 130 ("[I]n several cases, this Court has allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.").

The Second Circuit's interpretation of standing to assert violations of the rule of specialty is directly contradictory to the Supreme Court's long-standing precedent in *Rauscher* and to the majority of Circuits that have considered the question. Strikingly, even the Seventh Circuit, which had previously taken the Second Circuit's view, has recently noted that the validity of its position is doubtful. *See Stokes*, 726 F.3d at 888-89. In addition, the First, Fourth, Fifth, Sixth, and D.C. Circuits, while not ruling on the question of standing, have assumed standing and considered appellants' arguments on the merits. *See supra*, p.12-13. Only in the Second Circuit, then, is an individual in Mr. Rios Suarez' position conclusively denied relief from an erroneous sentencing decision or prosecution that violates the rule of specialty.

The Eleventh Circuit's analysis in *United States v. Puentes*, 50 F.3d 1567, 1574 (11th Cir. 1995) supports Petitioner's argument that this Court's intervention is required. In *Puentes*, the Eleventh Circuit described extradition treaties as contracts, characterizing the right to contest a violation of the rule of specialty as a right that may be conferred on individuals who are the

non-party objects of the contract and noting that, "[w]e believe that *Rauscher* clearly confers such a right on the extradited defendant." *Puentes*, 50 F.3d at 1574. The Eleventh Circuit described the holdings of those Circuits with contrary views (such as the Second and Seventh Circuits) as "consider[ing] the requested state's objection to be a condition precedent to the individual's ability to raise the claim," and noted that this Court's opinion in *Alvarez–Machain*, 504 U.S. 655 "seriously undermines any vitality that approach may have once possessed." *Puentes*, 50 F.3d at 1574-75 (citing *Alvarez–Machain*, 504 U.S. at 667 ["if the [e]xtradition [t]reaty has the force of law ... it would appear that a court must enforce it on behalf of an individual *regardless of the offensiveness of the practice of one nation to the other nation.*"]) (emphasis in *Puentes*).

It cannot be the case that individuals have the right to challenge violations of an extradition order (or treaty) in some parts of the country and not in others. The rights of individual defendants, whether they are citizens of the United States or of some other country, should not depend on the location of the courthouse in which they are charged. The Court's assistance and direction are required in order to resolve this split in the Circuits and to insure that individuals who are subject to the jurisdiction of the district courts are treated justly and that a uniform standard is applied.

For these reasons, this Court should grant Mr. Rios Suarez' petition for certiorari to resolve the split in the Circuits and should rule that *Rauscher*'s holding applies with equal force today as it did when decided, consequently instructing the Second Circuit to consider Mr. Rios Suarez' arguments on their merits because an individual has standing to raise a claim that his sentence violates the rule of specialty.

II.
In the Alternative, this Court Should Find that an Official Diplomatic Letter to the Sentencing Judge Constitutes an Official Protest, Sufficient to Assert a Violation of the Rule of Specialty.

A. Applicable Law

The question of whether an official letter from the Consul General or other diplomatic representative of an asylum state constitutes an appropriate means by which to protest the terms of an individual defendant's prosecution or sentence appears not to have been conclusively decided by this Court. The courts that have considered the adequacy of communications transmitted directly to the district court have found a letter to the district judge generally appropriate as a means of communicating official government views. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1193 (E.D. Pa. 1981) ("We can discern no reasons for requiring diplomatic transmittal of Ambassador Okawara's letter in this case. In order to promote consistent practice as between courts on the appellate and trial levels, we think that, in general, the views of foreign governments should be communicated directly to the district court where the litigation is pending. Since there is no equivalent of an amicus brief in the Federal Rules of Civil Procedure, and since the Japanese government's statement is only two double-spaced pages in length, we think it entirely appropriate for that statement to be communicated in a letter to the court."); *id.* (referencing *Puente v. Spanish National State*, 116 F.2d 43 [2d Cir. 1940]; *United States v. Melekh*, 190 F. Supp. 67 [S.D.N.Y. 1960] [noting that, "even prior to 1978, the federal courts apparently did occasionally consider the statements of foreign governments when presented directly to the courts by letter."]). *See also* 1 Waller, Antitrust & American Bus. Abroad § 4:14 (3d ed.) ("Past practice was for State to receive the communication, which was then transmitted to Justice and, from Justice, to the court. This was

done in *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 [D.D.C. 1960]. Now both State and Justice urge foreign governments to submit their views directly to antitrust courts as amici curiae. *See, e.g.,* Letter of Roberts B. Owen, Legal Adviser of the Department of State, to John H. Shenefield, Associate Attorney General [Mar. 17, 1980], reprinted in, 74 Am. J. Int'l L. 665 [1980]; Letter of Mr. Shenefield to U.S. District Judge Prentice H. Marshall [May 6, 1980], reprinted in, 5 Trade Reg. Rep. [CCH] ¶50, 416."). *But see Alvarez-Machain*, 504 U.S. at 670 and 670 n.16 (finding that consideration of Mexico's position as stated in diplomatic notes was a matter for the Executive Branch and noting "[t]he advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations"); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1367-68 (9th Cir. 1991) (Browning, C.J., concurring in part and dissenting in part) *cert. granted, judgment vacated,* 505 U.S. 1201, 112 S. Ct. 2986, 120 L. Ed. 2d 864 (1992) (discussing a series of diplomatic communications and concluding that they were insufficient to demonstrate that the Mexican government sought return of the defendant for prosecution in Mexico).

B. Discussion

In affirming Mr. Rios Suarez' sentence, the Second Circuit ruled that Mr. Rios Suarez lacked standing to appeal the terms of his sentence. A-7; *Suarez*, 791 F.3d at 367-68 (describing Mr. Rios Suarez' rights as "derivative through the state" and finding that he would only have prudential standing "if the Government of Colombia first makes an official protest"). The Second Circuit's holding ignores the letter sent to the district judge by Colombia's Consul General in anticipation of sentencing, which reminded the district court of the "utmost importance" of honoring the assurances made by the United States to Colombia during the negotiations for Mr. Rios Suarez' extradition, including guarantees against imposition of a life

sentence and against cruel and unusual punishment. H-1. Likewise, the Consul General requested a copy the Order of Judgment and Commitment in order to ensure that the terms of the extradition agreement had been met. H-2.

Given the unsettled state of the law as to what constitutes a sufficient protest, and given the Second Circuit's minority position concerning violations of the rule of specialty as discussed in Point I, above, the Second Circuit's failure to treat the Consul General's letter as an official protest cannot be said to have been correct. This Court's guidance is required to resolve the question of whether an official governmental letter sent to a sentencing judge is sufficient to constitute an official protest.

If, as Petitioner suggests would be appropriate, this Court finds that the Consul General's letter constituted an official protest, Mr. Rios Suarez' case should be remanded for consideration of the Colombian government's position and for re-sentencing that complies with the terms of the extradition order.

III.
This Court Should Find that the District Court Breached the United States' Obligation Under the Extradition Agreement by Imposing a De Facto Life Sentence and that the Second Circuit Misapplied Its Own Precedent in Upholding that Sentence.

A. Applicable Law

1. Interpretation of the Extradition Agreement Requires Analysis of the Parties' Intentions.

The Court's "role is limited to giving effect to the intent of the Treaty parties." *Coplin v. United States*, 761 F.2d 688, 691-92 (Fed. Cir. 1985) *aff'd sub nom. O'Connor v. United States*, 479 U.S. 27, 107 S. Ct. 347, 93 L. Ed. 2d 206 (1986) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)) (referencing *Great-Western Life Assurance Co. v. United States,* 678 F.2d 180, 183, 230 Ct.Cl. 477 (1982) (same)).

When interpreting a treaty, "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S.Ct. 1054, 10 L.Ed.2d 184 (1963)).

Treaty obligations "should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them." *Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 54 S. Ct. 191, 195-96, 78 L. Ed. 315 (1933) (citations omitted). Therefore, it is appropriate to "look beyond" the words of a treaty "to the negotiations and diplomatic correspondence of the contracting parties relating to the subject-matter, and to their own practical construction of it." *Id.*, 290 U.S. at 294-95 (citations omitted).

In the context of extradition agreements, the Second Circuit has held that "[t]he rule of specialty, which is derived from principles of international comity, 'generally requires a country seeking extradition to adhere to any limitations placed on prosecution by the surrendering country.'" *Cuevas*, 496 F.3d at 262 (quoting *Baez,* 349 F.3d at 92). The rule applies to sentencing proceedings as well. *Cuevas*, 496 F.3d at 262. In the context of sentencing, "a district court 'should temper [its] discretion in sentencing an extradited defendant *with deference to the substantive assurances made by the United States to an extraditing nation.*" *Cuevas*, 496 F.3d at 262 (quoting *Baez*, 349 F.3d at 93) (emphasis in *Cuevas*). *See also Rodriguez Benitez v. Garcia*, 495 F.3d 640, 644 (9th Cir. 2007) (observing that "[a]greed-upon sentencing limitations are generally enforceable" and quoting *Rauscher*, 119 U.S. at 419 ["[i]t is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the

demanding government without any limitation, implied or otherwise, upon its prosecution of the party."]).

2. The United States Sentencing Commission Defines a "Life Sentence" as 470 Months.

The United States Sentencing Commission has determined that a sentence of 470 months is equivalent to a life sentence. *See* U.S. Sent. Comm'n., *Life Sentences in the Federal System* (2015) at p. 10-14 and 23 n.52 (internal citation omitted) (discussing "de facto life sentences" and noting that, "The Commission assigns a value of 470 months (39 years and two months) to sentences of life imprisonment for any statistical analysis in which a term of months is required. . . . This sentence length is consistent with the average life expectancy of federal criminal offenders."). As the Commission explained, "the average age of the offenders" sentenced to de facto life imprisonment was 37 years, a finding that "support[s] a presumption that the judges imposing them intended the offenders to remain incarcerated for the remainder of their lives in most instances." *Id*. at 12. *See also United States v*. *Pileggi*, 361 Fed. Appx. 475, 476-77 (4th Cir. 2010) (finding Pileggi's 600-month sentence, which was imposed with an incorrect understanding of the terms of the extradition treaty between the United States and Costa Rica, procedurally unreasonable where the treaty prohibited imposition of a sentence of life imprisonment); *United States v*. *Selby*, 184 Fed. Appx. 589, 591 (8th Cir. 2006) (noting that the Sentencing Commission defines a "life sentence" as 470 months).

B. Discussion: The Sentencing Court Was Obligated to Give Effect to the Intent of the Parties to the Extradition Agreement.

In this case, the Second Circuit misapplied its own precedent and ignored its obligations under *Coplin*, *Factor*, and their progeny to give effect to the contracting parties' intentions. Under the extradition agreement, the United States was obliged to impose a sentence of less than

life imprisonment and to ensure that the penalty imposed would "have the essential purpose of reform and social adaptation." C-2-3 ¶ 6. In imposing a sentence, the district court was required to consider that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). The district court was also required to consider the Colombian extradition orders and the United States' diplomatic assurances that "a sentence of life imprisonment will not be sought or imposed" and that Mr. Rios Suarez would not be subjected to "cruel and unusual punishment." E-1.

Yet, the district court's sentence violated the extradition agreement and the United States' representations to the government of Colombia in multiple ways—imposing a sentence that was a de facto life sentence, denying Mr. Rios Suarez credit for the time he had spent during extradition proceedings, and ensuring, through its outrageous sentence, that Mr. Rios Suarez would die in jail and would never see his friends or family—i.e., would never be granted an opportunity for "reform and social adaptation" either in the United States or in Colombia.

Misrepresenting its own precedent, the Second Circuit affirmed Mr. Rios Suarez' sentence, citing *Baez*, 349 F.3d 90 and *United States v. Lopez–Imitalo,* 305 Fed. Appx. 818 (2d Cir. 2009) for the proposition that the district court had acted within the terms of the United States' diplomatic note when imposing a life sentence simply because the district court had expressed the sentence in a term of months. *See* A-10; *Suarez*, 791 F.3d at 368-69 (Kearse, C.J., concurring). However, the Circuit erred in its analysis because the text of the diplomatic note governing Mr. Rios Suarez' extradition contained significantly different language from the notes at issue in *Baez* and *Lopez-Imitalo*.

In *Baez*, the Second Circuit found that the district court had acted within its discretion in imposing a life sentence expressed as a term of months because the diplomatic note required only that:

> should [the defendant] be convicted of the offenses for which extradition has been granted, the United States executive authority, with the agreement of the attorney for the accused, will not seek a penalty of life imprisonment at the sentencing proceedings in this case. The Government of the United States also assures the Government of Colombia that, *should the competent United States judicial authority nevertheless impose a sentence of life imprisonment against Mr. Restrepo,* the United States executive authority will take appropriate action to formally request that the court commute such sentence to a term of years.

Baez, 349 F.3d at 92 (emphasis in original). Likewise, in *Lopez-Imitalo*, the diplomatic note "expressly contemplated the possibility that a sentencing court might impose a term of life imprisonment and assured Colombia that, if that occurred, the executive authority of the United States would seek to have the sentence commuted to a term of years." *Lopez-Imitalo*, 305 Fed. Appx. at 819.

In Mr. Rios Suarez' case, in contrast, the Colombian resolution approving extradition specified explicitly that a sentence of life imprisonment "may not" be imposed. C-2-3 ¶ 6. The United States' responding diplomatic note confirmed that, "Although the maximum statutory penalty for the charge for which extradition was approved is life imprisonment, the Government of the United States assures the Government of Colombia that a sentence of life imprisonment will not be sought or imposed if Rios Suarez is extradited to the United States." E-1. Nonetheless, the Second Circuit upheld the legality of Mr. Rios Suarez' sentence, reasoning that, as in *Baez* and *Lopez-Imitalo*, the respective governments did not "draft[] the note" to provide "an assurance that the U.S. government would not request a determinate sentence exceeding [the defendant's] expected lifespan." A-10; *Suarez*, 791 F.3d at 368-69 (alteration in original) (internal quotation omitted).

This Court should not countenance the Second Circuit's holding, which relies on a plainly erroneous interpretation of the assurances made by the United States Government, namely, that the term "life sentence" in the diplomatic note and in the extradition order in this case mean only a sentence in which the words "life imprisonment" are pronounced rather than a sentence expressed as a term of months that clearly has exactly the same effect. *See* U.S. Sent. Comm'n., *Life Sentences in the Federal System* (2015) at p. 10-14 and 23 n.52 (internal citation omitted) (discussing "de facto life sentences" and noting that a sentence of 470 months is considered to be a life sentence). The Second Circuit's legal wordplay and insistence that only a written demand for a imposition of a sentence that did not "exceed[] the defendant's expected lifespan" would be sufficient to effectuate the clear intention of the government of Colombia to protect Mr. Rios Suarez from remaining incarcerated until the end of his natural lifespan exposes the United States to international condemnation because it calls the good faith intentions of the United States to abide by its international agreements into question. In *Baez*, the Second Circuit itself cautioned against "elevate[ing] legalistic formalism over substance." *Baez*, 349 F. 3d at 93. Yet, in this case, the Second Circuit did just that.

IV.
This Case Presents an Ideal Vehicle to Resolve the Circuit Split Identified Herein.

Mr. Rios Suarez' case presents an ideal vehicle for the Court to resolve the split in the Circuits over individual standing to assert a violation of the rule of specialty. The issue is ripe for the Court's review and numerous Circuits have noted the split. *See*, *e.g.*, *Saccoccia*, 58 F.3d at 767 n.6; *Puentes*, 50 F.3d at 1574; *Lopesierra-Gutierrez*, 708 F.3d at 206. The majority of Circuits has found an individual right to assert a violation of the rule of specialty. Many other Circuits have assumed without deciding that an individual had standing, reaching the merits of the issues. Only in the Second and Seventh Circuits is an individual denied any relief based on

an incorrect application of this Court's holding in *Rauscher*. In a country of laws, an individual's fate should not vary depending on which district first asserts jurisdiction. The Sentencing Guidelines and principles of sentencing equivalence were enacted to avoid such discrepancies and the Court's intervention is respectfully requested to decide this important question.

This case further presents an ideal opportunity for the Court to rule on an individual's standing to assert a violation of the rule of specialty because the Second Circuit, based on an alleged lack of prudential standing, declined to consider the merits of Mr. Rios Suarez' arguments. However, the record is clear that the district court imposed a de facto life sentence (despite protestations to the contrary), disregarded Colombia's mandate that Mr. Rios Suarez be given credit for the 100-month sentence already imposed in Colombia and for the time spent in extradition proceedings, and ignored Colombia's requirement that the sentence have an essentially rehabilitative purpose. A ruling on the merits for Mr. Rios Suarez would be likely to substantially lower his sentence. At the same time, it would confirm this Court's determination to uphold the United States' treaty and extradition agreements as originally established in *Rauscher*.

As a simple Internet search of his name illustrates, Mr. Rios Suarez was believed to be a highly important target in the United States' war on drugs. In the interests of continued future international cooperation from asylum countries in which the United States seeks extradition of individuals who are wanted to stand trial in this county, there can be no better case for this Court to rule on the important questions raised herein and to take this opportunity to assure the international community that the United States lives up to its obligations at all stages of criminal prosecution and sentencing.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to consider the questions raised herein and to review Petitioner's sentence.

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Respectfully submitted,

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APPENDIX