No. 23-7483

IN THE SUPREME COURT OF THE UNITED STATES

EDGARDO ESTERAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district courts in the three cases at issue in the certiorari petition relied on improper factors to determine the terms of imprisonment imposed following the revocations of each petitioner's supervised release.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ohio):

United States v. Esteras, No. 4:14-cr-425 (Sept. 11, 2018) (criminal judgment)

United States v. Esteras, No. 4:14-cr-425 (May 9, 2023) (order revoking supervised release)

United States v. [Jaimez f.n.a.] Watters, No. 3:10-cr-4 (Mar. 11, 2015) (amended criminal judgment)

United States v. [Jaimez f.n.a.] Watters, No. 3:10-cr-4 (Sept. 5, 2019) (first order revoking supervised release)

United States v. [Jaimez f.n.a.] Watters, No. 3:10-cr-4 (Feb. 24, 2023) (second order revoking supervised release)

United States v. Leaks, No. 1:19-cr-283 (Jan. 13, 2020) (criminal judgment)

United States v. Leaks, No. 1:19-cr-283 (June 29, 2023) (order revoking supervised release)

United States Court of Appeals (6th Cir.):

United States v. Esteras, No. 23-3422 (Dec. 20, 2023) (amended judgment)

United States v. Jaimez, No. 23-3189 (Mar. 12, 2024)

United States v. Leaks, No. 23-3547 (Mar. 6, 2024)

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OPINIONS BELOW

In petitioner Esteras's case, the initial order of the court of appeals (Pet. App. 1a-3a) is unreported and the amended order of the court of appeals (Pet. App. 4a-13a) is reported at 88 F.4th 1163. The order of the district court (Pet. App. 14a-18a) is unreported.

In petitioner Leaks's case, the order of the court of appeals (Pet. App. 74a-75a) is not reported in the Federal Reporter but is available at 2024 WL 2196795. The order of the district court (Pet. App. 76a) is unreported.

In petitioner Jaimez's case, the opinion of the court of appeals (Pet. App. 53a-58a) is reported at 95 F.4th 1004. The order of the district court (Pet. App. 59a) is unreported.

JURISDICTION

In Esteras's case, the amended judgment of the court of appeals was entered on December 20, 2023. Petitions for rehearing were denied on December 20, 2023 (Pet. App. 19a-29a) and March 7, 2024 (Pet. App. 30a-34a). In Leaks's and Jaimez's cases, the judgments of the court of appeals were entered, respectively, on March 6, 2024, and on March 12, 2024. The petition for a writ of certiorari was filed on May 15, 2024. Cf. Sup. Ct. R. 12.4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in separate cases in the United States District Court for the Northern District of Ohio, each petitioner was sentenced to a term of imprisonment to be followed by a term of supervised release. In 2023, after each petitioner violated one or more terms of his supervised release, the district court revoked each petitioner's supervised release and imposed a term of imprisonment. Pet. App. 14a-18a, 59a, 76a. In each case, the court of appeals affirmed. Id. at 4a-13a, 53a-58a, 74a-75a.

1. a. In 2018, petitioner Esteras pleaded guilty to conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 5a. The

district court sentenced Esteras to 12 months of imprisonment, consecutive to a 15-month prison term for violating his probation for a prior federal drug-trafficking conviction, to be followed by six years of supervised release. Ibid.

In January 2020, Esteras began serving his six-year term of supervised release. Pet. App. 5a. In January 2023, the Probation Office reported to the district court that Esteras had violated terms of his supervised release by (1) committing domestic violence, aggravated menacing, and criminal damaging in violation of state law, and (2) possessing a firearm. Id. at 5a, 16a. The report stated that, on January 23, 2023, Esteras had struck the mother of his children in the head at her residence; stormed out to his vehicle; and, after the victim followed him and attempted to grab his car keys, pointed a handgun at her, threated to kill her, and fired three rounds from his handgun into her vehicle. Id. at 15a.

Following a revocation hearing, 4:14-cr-425 D. Ct. Doc. 439 (June 22, 2023) (transcript), the district court found that Esteras had "brandished and shot a firearm" in the manner that the victim had described to the police, as memorialized in body-camera video evidence. Id. at 80; see Pet. App. 16a-17a & n.1. The court noted that it "suspect[ed]" that Esteras's conduct satisfied "the elements" of the state-law violations reported, but was not sufficiently versed in the state-law provisions to be certain. Pet.

App. 37a. But the court explained that "it really d[id]n't matter" and determined that, whether or not Esteras had violated state law, he had "violated [his] term of supervision by possessing a [firearm]." Ibid.; see id. at 17a.

Under 18 U.S.C. 3583(e)(3), a district court that determines that a defendant has violated a condition of supervised release "may, after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)," revoke the defendant's term of supervised release and order reimprisonment. The provisions of Section 3553(a) that Section 3583(e) cross-references set forth a number of factors to consider in imposing a sentence, including the "nature and circumstances of the offense" and "the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1); the need for the sentence imposed to "adequate[ly] deter[]" crime and "protect the public," 18 U.S.C. 3553(a)(2)(B) and (C); the need to "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment," 18 U.S.C. 3553(a)(2)(D); the sentencing range recommended by the Sentencing Guidelines, 18 U.S.C. 3553(a)(4); pertinent policy statements issued by the Sentencing Commission, 18 U.S.C. 3553(a)(5)(A); the need to avoid unwarranted sentence disparities, 18 U.S.C. 3553(a)(6); and the need to provide restitution to victims, 18 U.S.C. 3553(a)(7). Section 3583(e) does not expressly cross-reference Section 3553(a)(2)(A), which

addresses "the need for the sentence imposed * * * to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. 3553(a)(2)(A).

Before deciding on the appropriate course for Esteras's supervised-release violation, the district court recounted his prior federal offenses, noted that he was "no stranger to federal court" or to "law violations," and observed that "what's been done before [wa]sn't sufficient enough to deter [him], to encourage [him] to be respectful of the law, to be law-abiding." Pet. App. 38a-39a. And after recounting the circumstances surrounding Esteras's supervised-release violation and observing that it was "not really sure what it will require for [Esteras] to learn that enough is enough," the court stated that it would now "escalate the consequences" by "exercising [its] discretion to vary upwards" from the Guidelines recommendation because Esteras's "dangerous" and "disrespectful" behavior was "[a]typical" and "exceptional" and "must stop." Id. at 39a-41a.

Esteras objected to the district court's consideration of factors identified in Section 3553(a)(2)(A), including the need to promote "respect for the law" and to reflect the "seriousness" of, and provide "just punishment for[,] the offense." Pet. App. 47a-48a. The court noted in response stated that its revocation term was based in part "to promote respect for the law" and to "deter[]" Esteras, but that it also rested on the court's "concern about the

safety of the community" and its desire to distinguish Esteras from a "typical" defendant. Id. at 48a. In a subsequent written order (id. at 14a-18a), the district court observed that it had considered the factors in Section 3553(a) and 3583(d), and stated that its revocation determination was based, "among other reasons," on the need "to protect society and promote respect for the law." Id. at 17a-18a; see 18 U.S.C. 3553(d) (addressing imposition of conditions of supervised release).

b. The court of appeals initially affirmed the supervised-release-revocation judgment in an unpublished order. Pet. App. 1a-3a. The court later amended and reissued the order as a published disposition. Id. at 4a-13a.

The court of appeals rejected Esteras's argument that the district court had improperly relied on Section 3553(a)(2)(A) factors when imposing a term of imprisonment after revoking his supervised release. Pet. App. 6a-13a. The court observed that, under its previous decision in United States v. Lewis, 498 F.3d 393 (6th Cir. 2007), cert. denied, 555 U.S. 813 (2008), the district court permissibly considered Section 3553(a)(2)(A)'s factors. Pet. App. 8a. The court highlighted Lewis's observation that, as a "textual" matter, Section 3583(e) requires a district court to "consider[] the listed factors" before making supervised-release decisions but that, unlike other sentencing provisions, Section 3583(e) "never says that the court may consider 'only'

those factors." Ibid. (citation omitted). The court also highlighted Lewis's concern that a "proposed bright-line rule" forbidding consideration of Section 3553(a)(2)(A) factors "was unworkable," because "the purportedly forbidden considerations mentioned in [Section] 3553(a)(2)(A) tend to be 'essentially redundant' with the permitted ones." Ibid. (citation omitted).

The court of appeals also offered several examples illustrating that "Esteras's [proposed] bright-line rule is unworkable," Pet. App. 9a. See id. at 8a-10a. First, the court observed that Section 3553(a)(2)(A)'s "'seriousness of the offense'" factor -- which Esteras argued could not be considered -- "aligns with [Section] 3553(a)(1) and its emphasis on 'the nature and circumstances of the offense,'" which Section 3583(e) expressly requires the district court to consider. Id. at 8a-9a. Second, the court stated that Section 3553(a)(2)(A)'s "need 'to promote respect for the law'" factor "meshes with the rationale that revoking supervised release will 'help' the defendant 'learn to obey the conditions of his supervised release.'" Id. at 9a (citation omitted). The court observed "[t]o neglect the one dishonors the other," noting that the district court judge "quite understandably could not see how she could ignore respect for the law but consider a defendant's need to respect the terms of supervised release." Ibid. Third, the court of appeals observed that Section 3553(a)(2)(A)'s "just punishment for the offense" factor paral-

leled considerations that Section 3553(a)(5) requires the district court to consider. Ibid. More specifically, the court explained that a district court "cannot" adhere to Section 3553(a)(5)'s requirement to consider various "'pertinent policy statement[s]' of the Sentencing Commission," which instruct that a court must impose a revocation term that reflects the breach of trust occasioned by the original sentence, "without accounting for the conduct that violated supervised release." Ibid.

The court of appeals additionally stated that the view that Section 3583(e) lists the only permissible factors that may inform a revocation term was "unworkable in another way": Section 3583(c) includes the same set of factors that are listed in Section 3583(e) as considerations for a district court in initially imposing a term of supervised release at a defendant's original sentencing. Pet. App. 6a, 9a; see id. at 8a (observing that "Esteras claims that [Section] 3583(c) and (e) create a divide between permitted and forbidden supervised-release considerations"). The court stated that "Congress could not have expected courts" at an initial sentencing "to wipe their minds of" more expansive sentencing "concerns when they move from one type of sentence to the other, and nothing in the statute requires such compartmentalization." Id. at 9a-10a.

Finally, the court of appeals observed that its "understanding of [Section] 3583(e) accords with the analysis of most other

circuits and the outcomes of all of them." Pet. App. 11a. The court explained that the "general rule is that courts may invoke factors related to the three general considerations in [Section] 3553(a)(2)(A) without creating a procedurally unreasonable sentence," and that the circuits that have "described the [Section] 3553(a)(2)(A) factors as impermissible when used punitively still recognize that they may play supporting roles in a district court's analysis," such that "[e]ven under these decisions," the district court here "acted properly." Id. at 11a-12a.

c. On the same day that the panel issued its amended order, the court of appeals denied rehearing en banc. Pet. App. 19a-29a. Judge Moore dissented from the denial, on the view that the panel decision was incorrect. Id. at 21a-27a. Judge Griffin, joined by Judge Bloomekatz, took the view that rehearing was warranted, but did not state that the panel had erred. Id. at 28a-29a.

The court of appeals later denied Esteras's petition for rehearing of the panel's amended order. Pet. App. 30a-34a. Judge Moore, joined by Judge Stranch, restated her belief that the panel decision was incorrect. Id. at 32a. Judge Griffin, joined by Judges Stranch and Bloomekatz, restated his view that rehearing was warranted but again did not opine that the panel erred. Id. at 33a-34a.

2. In 2019, petitioner Leaks was arrested after police officers stopped his vehicle and discovered a machinegun under his

seat with three (15-, 20- and 30-round-capacity) magazines containing 21 rounds of ammunition. 1:19-cr-283 D. Ct. Doc. 25 ¶¶ 7-14 (Dec. 23, 2019) (Presentence Investigation Report). Leaks pleaded guilty to two counts of unlawfully possessing a machinegun, in violation of 18 U.S.C. 922(o) and 924(a)(2) (2018). Pet. App. 74a. The district court sentenced Leaks to 30 months of imprisonment, to be followed by three years of supervised release. Ibid.

In July 2021, Leaks began serving his term of supervised release. 23-3547 Gov't C.A. Br. 5. In 2023, the Probation Office reported to the district court that Leaks had committed several supervised-release violations, including a state unlawful-firearm-possession offense and a state robbery offense to which Leaks had pleaded guilty and had been sentenced, respectively, to three years and four to six years of imprisonment. Pet. App. 74a, 80a-81a. Leaks subsequently admitted to committing five supervised-release violations: the two state-law crimes just noted, failing to report for supervision, failing to attend mental-health treatment, and failing to work towards a GED. Ibid.; see id. at 76a. The district court accordingly found that Leaks had violated the terms of his supervised release. Id. at 81a. Leaks then acknowledged through counsel that "the [c]ourt [wa]s required by statute to impose a term of imprisonment" given "the nature of [Leaks's] violation" but requested that the court run the term of imprisonment concur-

rent with, not consecutive to, the state-court sentences for his state-law violations. Id. at 82a.

Before making its supervised-release revocation determination, the district court noted that Leaks's "original [federal] offense" for which supervision was ordered "involved a machine gun" and that Leaks's two "new law violations[] both involv[ed] firearms." Pet. App. 85a. The court also noted that Leaks had committed a total of "five violations" while on supervised release. Ibid. And the court agreed with "all of the statements made by [government counsel]," ibid., who had noted that Sentencing Guideline 7B1.3(f) required a consecutive term of imprisonment, id. at 83a; see Sentencing Guidelines § 7B1.3(f) (2018). The court added that "[c]oncurrent time" would "not [be] justice" and would "not punish Mr. Leaks for violating supervision." Pet. App. 85a. The court then imposed a within-Guidelines term of 12 months of imprisonment to be served "consecutive[ly] to the time being served in the two state cases," with no further term of supervised release to follow the imprisonment. Ibid.; see id. at 76a.

Leaks objected to the district court's "consideration of punishment" on the ground that Section 3583 "specifically omits" that Section 3553(a)(2) factor from considerations. Pet. App. 82a, 86a. The court acknowledged that objection. Id. at 86a.

The court of appeals subsequently affirmed, noting that Leaks had "acknowledge[d] that his argument is foreclosed by United States v. Lewis, [supra]." Pet. App. 74a-75a.

3. From 2002 to 2010, petitioner Jaimez (formerly known as Timothy Watters), transported cocaine and marijuana from Texas and Michigan to Ohio, where he distributed the drugs. 3:10-cr-4 Presentence Investigation Report ¶¶ 4-60 (report for Timothy M. Watters dated Nov. 20, 2013). After a federal grand jury indicted him on federal drug charges, Jaimez pleaded guilty to conspiring to possess cocaine, cocaine base, and marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. 3:10-cr-4 Judgment 1 (Mar. 11, 2015); see 3:10-cr-4 Indictment. The district court sentenced Jaimez to 120 months of imprisonment, to be followed by five years of supervised release. 3:10-cr-4 Judgment 2-3.

After he started that term of supervised release, "Jaimez used drugs, failed to maintain employment, and failed to truthfully disclose financial information to his probation officer." Pet. App. 54a. In September 2019, the district court revoked Jaimez's supervised release and imposed a 14-month term of imprisonment, to be followed by three years of supervised release. 3:10-cr-4 Order (Sept. 5, 2019).

After Jaimez started his second term of supervised release, he returned to drug dealing. Pet. App. 54a. Police officers found

Jaimez "transporting marijuana in his car with the co-felons from his original conviction." Ibid. "And at Jaimez's properties, police found cocaine base, a shell casing, and a drug press." Ibid. Based on that conduct, Jaimez was convicted in Ohio state court of attempting to transport marijuana. Ibid.

In 2022, the Probation Office reported to the district court that Jaimez had committed multiple supervised-release violations, including drug trafficking, associating with a convicted felon, and possessing drug paraphernalia. 3:10-cr-4 D. Ct. Doc. 342, at 1-2 (Apr. 20, 2022). The court held a revocation hearing. 3:10-cr-4 D. Ct. Doc. 381 (Mar. 27, 2023) (transcript). Jaimez admitted committing those three violations, and the court accordingly found that Jaimez had violated the terms of his supervised release. Pet. App. 59a. The court revoked Jaimez's supervised release and imposed a within-Guidelines term of 60 months of imprisonment, to be followed by six years of supervised release. Ibid.; see id. at 54a.

The district court stated that its "reasons" were "to protect the public," "to encourage understanding of compliance of the terms and conditions," and to foster "individual deterrence" and "public deterrence." Pet. App. 64a. The court observed that Jaimez had "now twice" shown that he treats "the terms and conditions of supervised release [as] optional" and that the discovery of Jaimez and his former drug-dealing compatriots with a "garbage bag" con-

taining "upward[s] of a kilo" of marijuana illustrated that Jaimez was "paying no attention" to those conditions. Id. at 62a-63a. The court stated that the revocation term would emphasize to Jaimez and "the public generally" that such conditions are mandatory and that violating them means that "you're going to get punished" and may receive meaningful "prison time." Ibid. The court added that the term of imprisonment was "a just and deserved sanction" that was "sufficient but not greater than necessary to get [Jaimez's] attention" and would hopefully "enhance respect for the law" by showing that compliance with supervised-release conditions is "your only option." Id. at 65a-66a. Jaimez did not lodge any objection to the factors that the court had considered. Id. at 67a-71a; see 3:10-cr-4 D. Ct. Doc. 381, at 57-60.

The court of appeals affirmed. Pet. App. 53a-58a. The court rejected Jaimez's argument that the district court impermissibly relied on Section 3553(a)(2)(A)'s factors by considering "the seriousness of his offense, the promotion of respect for the law, and the provision of just punishment." Id. at 55a. The court based its decision on its prior decisions in petitioner Esteras's case and in Lewis. Ibid.

ARGUMENT

Petitioners contend (Pet. 16-20) that the district courts erred by considering factors in 18 U.S.C. 3553(a)(2)(A) -- "the seriousness of the offense," "promot[ing] respect for the law,"

and "provid[ing] just punishment for the offense" -- when revoking their supervised release and ordering imprisonment. Petitioners further contend (Pet. 12-16) that the decisions below implicate a division of authority warranting review. Those contentions lack merit. Section 3583(e)'s directive that a court consider certain factors listed in Section 3553(a) before revoking supervised release and ordering reimprisonment did not require that the district courts wholly disregard those other factors irrespective of their relevance to the factors that Section 3583(e) expressly cross-references. Any modest disagreement among the courts of appeals on the question presented has no practical effect and would not change the result of petitioners' cases, in which the district courts briefly referred to the Section 3553(a)(2)(A) factors while considering undisputedly permissible factors.

This Court has repeatedly denied review in other cases presenting this question, including the earlier Sixth Circuit decision relied upon by the courts below. See Lewis v. United States, 555 U.S. 813 (2008) (No. 07-1295); see also, e.g., Jones v. United States, 139 S. Ct. 2692 (No. 18-7857); Clay v. United States, 574 U.S. 1080 (2015) (No. 14-6010); Overton v. United States, 565 U.S. 1063 (2011) (No. 11-5408); Young v. United States, 565 U.S. 863 (2011) (No. 10-11026). The same result is warranted here.

1. Section 3583(e) provides in pertinent part that a district court may revoke supervised release and reimprison a defen-

dant "after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. 3583(e). Although Section 3583(e) does not cross-reference 18 U.S.C. 3553(a)(2)(A) -- which describes the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" (ibid.) -- nothing in Section 3583(e) precludes consideration of those factors when the district court deems them relevant.

a. The "enumeration in [Section] 3583(e) of specified subsections of [Section] 3553(a) that a court must consider in revoking supervised release does not mean that it may not take into account any other pertinent factor." United States v. Young, 634 F.3d 233, 239 (3d Cir.) (emphasis omitted), cert. denied, 565 U.S. 863 (2011). Section 3583(e)'s cross-reference to specific provisions of Section 3553(a) reflects a legislative judgment that the factors listed in those provisions are the only factors that a court must consider. But as the court of appeals recognized, the omission of Section 3553(a)(2)(A)'s factors from the list of mandatory factors does not mean that any reference to the seriousness of the underlying offense, promoting respect for the law, or providing just punishment is automatically erroneous. See Pet. App. 8a (emphasizing that Section 3583 "never says that the court

may consider 'only' [the listed] factors") (citation omitted); see also, e.g., Young, 634 F.3d at 239.

Nothing in Section 3583(e) requires district courts to wholly disregard the Section 3553(a)(2)(A) factors, including the federal crimes underlying the original imposition of the supervised release that is being revoked, see Johnson v. United States, 529 U.S. 694, 701 (2000), when determining an appropriate postrevocation penalty. As a practical matter, the factors listed in Section 3553(a)(2)(A) overlap substantially with the ones listed in the provisions of Section 3553(a) that Section 3583(e) expressly cross-references. The cross-referenced provisions require consideration of, among other factors, "the nature and circumstances of the offense," "the history and characteristics of the defendant," the need to "afford adequate deterrence," and the need to "protect the public from further crimes of the defendant." 18 U.S.C. 3553(a)(1), (2)(B), and (C). Effective consideration of those factors will often require some recognition of the Section 3553(a)(2)(A) factors. It is hard to "see how" a district court "could possibly ignore" the Section 3553(a)(2)(A) factors -- including "the seriousness of the offense" -- while evaluating, for example, the need for "'adequate deterrence,'" the objective of protecting "the public from 'further crimes of the defendant,'" and "'the nature and circumstances of the offense.'" United States v. Williams, 443 F.3d 35, 48 (2d Cir. 2006) (quoting 18 U.S.C.

3553(a)(1), (2)(B) and (C)); see United States v. Lewis, 498 F.3d 393, 400 (6th Cir. 2007) ("[T]he three considerations in § 3553(a)(2)(A) * * * are essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release."), cert. denied, 555 U.S. 813 (2008).

The district courts' approaches here did not violate Section 3583(e). In Esteras's case, the district court referred to the Section 3553(a)(2)(A) factors, Pet. App. 48a, but it considered other indisputably permissible factors, emphasizing in particular the need to deter Esteras from future misconduct and to protect the public. See p. 5, supra; see also Pet. App. 12a-13a. In Leaks's case, the district court briefly referred to Leaks's underlying firearms offense, but it did so in the context of considering his supervised-release violations -- which likewise involved firearms -- and the court ultimately determined that the Sentencing Guidelines themselves called for consecutive terms of imprisonment. See p. 11, supra. And in Jaimez's case, the district court emphasized that the "reasons" for its revocation order were factors that Section 3583(e) required the court to consider: the need to adequately "deter[]" criminal misconduct and "protect the public." Pet. App. 64a-65a; see pp. 13-14, supra; see also 18 U.S.C. 3553(a)(2)(B) and (C). While the court referred briefly to Jaimez's "prior criminal record," and the need to enhance "respect

for the law," Pet. App. 65a, it was required to consider Jaimez's background and history, see 18 U.S.C. 3553(a)(1), and "respect for the law" goes hand-in-hand with deterrence.

b. Petitioners' reliance (Pet. 16-17) on this Court's decision in Tapia v. United States, 564 U.S. 319 (2011), is misplaced. The question in Tapia was whether a district court could properly consider the need for rehabilitation when imposing a term of imprisonment in an initial sentencing despite the statement in 18 U.S.C. 3582(a) that "imprisonment is not an appropriate means of promoting correction and rehabilitation." The Court relied on the plain meaning of that statutory language to conclude that the sentencing court could not consider rehabilitation. 564 U.S. at 326-327. No similar statutory language prohibits consideration of the factors specified in Section 3553(a)(2)(A) at a supervised-release revocation proceeding. Indeed, as Tapia and Section 3582(a) illustrate, Congress knows how to clearly prohibit consideration of a sentencing factor, see ibid., but Congress did not do so in Section 3583(e).

In describing the statutory background, Tapia stated that "a court may not take account of retribution (the first purpose listed in § 3553(a)(2) when imposing a term of supervised release." 564 U.S. at 326. Petitioners do not suggest that that the Court's statement on that point constitutes a holding, see Pet. 16-17, and the Court in any event referred only to the "imposi[tion]" of

supervised release, Tapia, 564 U.S. at 326, not to revocation of supervised release or an order of reimprisonment -- the proceedings at issue here.

2. Petitioners assert (Pet. 12-15) that the court of appeals are divided about whether a district court may consider the factors listed in Section 3553(a)(2)(A) in revoking supervised release and ordering reimprisonment under Section 3583(e). Like other petitioners who have unsuccessfully raised this question, e.g., Jones, supra; Clay, supra, petitioners substantially overstate the extent of any disagreement in the circuits. And, as in those previous cases, any modest disagreement has little practical effect and does not warrant this Court's review. See p. 15, supra.

a. The majority of circuits that have addressed the issue, including the court below, have correctly determined that Section 3583(e)'s directive that a court revoking supervised release and ordering reimprisonment must consider factors enumerated in particular provisions of Section 3553(a) does not mean that a court may not consider other pertinent factors. See, e.g., United States v. Vargas-Dávila, 649 F.3d 129, 132 (1st Cir. 2011) (observing that Section 3583(e) "does not forbid consideration of other pertinent section 3553(a) factors"); Young, 634 F.3d at 239; Williams, 443 F.3d at 47 (observing that Section 3583 does not "forbid[] consideration of other pertinent factors"); see also United States v. Clay, 752 F.3d 1106, 1108 (7th Cir. 2014) (observing that a

district court may consider Section 3553(a)(2)(A) so long as it "relies primarily on the factors" in Section 3583(e)), cert. denied, 574 U.S. 1080 (2015); United States v. Webb, 738 F.3d 638, 641 (4th Cir. 2013) (joining "many of our sister circuits" on this issue).

b. Petitioners contend (Pet. 12-13) that the Fourth, Fifth, Ninth, and Tenth Circuits support their position.

As to the Fourth Circuit, petitioners cite (Pet. 12) only United States v. Crudup, 461 F.3d 433, 439 (4th Cir. 2006), cert. denied, 549 U.S. 1283 (2007), which ultimately affirmed a revocation term. And the nondispositive discussion of the issue in Crudup has since been superseded by the Fourth Circuit's direct consideration of the issue in United States v. Webb, as cited above.

The Fifth Circuit has stated "that it is improper for a district court to rely on § 3553(a)(2)(A) for the modification or revocation of a supervised release term." United States v. Miller, 634 F.3d 841, 844 (5th Cir.), cert. denied, 565 U.S. 976 (2011). But the Fifth Circuit did not grant relief to the defendant in Miller, ibid., and subsequent decisions of that court (albeit in unpublished orders) illustrate that any marginal difference between its standard and that of other courts of appeals makes little practical difference.

For example, in United States v. Zamarripa, 517 Fed. Appx. 264 (2013) (per curiam), the Fifth Circuit rejected a claim that a district court had violated Miller, distinguishing "properly [considering] the nature and circumstances of the original offense" from "intend[ing] improperly that the sentence reflect the seriousness of or impose just punishment for the original offense." Id. at 265; see United States v. Jones, 538 Fed. Appx. 505, 508 (5th Cir. 2013) (per curiam) (rejecting Miller claim). Petitioners thus fail to show that the Fifth Circuit would have resolved their cases differently. And as noted above, this Court denied review in Miller and has denied review in subsequent cases presenting the same question.

The Ninth Circuit has taken a slightly different approach. In United States v. Miqbel, 444 F.3d 1173 (2006), that court concluded that a district court revoking supervised release erred by failing to set forth sufficient reasons for ordering a term of reimprisonment outside the recommended guidelines range. Id. at 1177-1179. In providing guidance for the district court on remand, the Ninth Circuit stated that because "[Section] 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." Id. at 1182. The Ninth Circuit then explained, however, that consideration of the factors in Section 3553(a)(2)(A) would contravene Section

3583(e) only if reliance on those facts was "a primary basis for a revocation sentence." Ibid. (emphasis added).

For example, the Ninth Circuit explained, a "mere reference to promoting respect for the law" would not itself "render a sentence unreasonable." Miqbel, 444 F.3d at 1182. In keeping with that understanding, the Ninth Circuit has clarified that Miqbel "did not set forth a blanket proposition that a court in no circumstances may consider the seriousness of the criminal offense underlying the revocation," but merely explained that this consideration should not be the primary "foc[us]" of an order of reimprisonment following revocation. United States v. Simtob, 485 F.3d 1058, 1062 (2007). Petitioners have thus failed to show that their cases would have been resolved differently under Miqbel.

Finally, the Tenth Circuit in United States v. Booker, 63 F.4th 1254 (10th Cir. 2023), concluded that a district court may not "revoke a term of supervised release based on the need for retribution," on the theory that Section 3583(e) "'implicitly forbids'" consideration of "the retribution factor found in [Section] 3553(a)(2)(A)." Id. at 1256, 1259-1260; see id. at 1258-1262. But the Booker panel ultimately affirmed the district court on the ground that any erroneous invocation of a Section 3553(a)(2)(A) factor in the case could not satisfy the plain-error standard of review. Id. at 1262-1264. The panel observed that the revocation court made only a "single impermissible reference" to Section

3553(a)(2)(A) factors, and that such a reference was insufficient to demonstrate that it made any difference to the resulting term of imprisonment. Id. at 1263.

As such, the ultimate result in Booker -- affirmance -- does not conflict with the results reached here. And after Booker, the Tenth Circuit has declined to infer that a revocation term of imprisonment was impermissibly grounded in retribution where the district court did not clearly indicate as much. See United States v. Kearse, No. 23-1071, 2024 WL 488391, at *3-*6 (10th Cir. Feb. 8, 2024) (unpublished). The court has also repeatedly affirmed revocation terms of imprisonment based on a Booker error on plain-error review. See United States v. Kratz, No. 22-5089, 2023 WL 3035195, at *7-*9 (10th Cir. Apr. 21, 2023) (unpublished); United States v. Waffle, No. 22-5084, 2023 WL 2964480, at *2-*4 (10th Cir. Apr. 17, 2023) (unpublished).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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