No. 23-7483

In the

Supreme Court of the United States

EDGARDO ESTERAS,
TIMOTHY MICHAEL JAIMEZ FKA TIMOTHY M. WATTERS, AND
TORIANO A. LEAKS, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY SUPPORTING PETITION FOR A WRIT OF CERTIORARI

JOSEPH MEDICI
Federal Public Defender,
Southern District of Ohio

KEVIN M. SCHAD
250 E. 5th Street, Suite 350
Cincinnati, OH 45202
(513) 929-4834
kevin_schad@fd.org

STEPHEN C. NEWMAN
Federal Public Defender,
Northern District of Ohio

CHRISTIAN J. GROSTIC
Counsel of Record
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
christian_grostic@fd.org

Counsel for Petitioners

September 6, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR GRANTING THE PETITION 2

I. The split among the lower courts is deep, pervasive, and of real practical effect. 2

II. This Court's intervention is necessary to ensure that the lower courts apply 18 U.S.C. § 3583(e) as Congress intended, without circumventing the Constitution's criminal due-process and trial guarantees. 5

CONCLUSION 6

APPENDIX M: *United States v. Green*, No. 4:19CR206, Northern District of Ohio hearing transcript, May 2, 2023 .... 87a

TABLE OF AUTHORITIES

CASES

Baldwin v. New York, 399 U.S. 66 (1970) 5

Duncan v. Louisiana, 391 U.S. 145 (1968) 5

Gamble v. United States, 587 U.S. 678 (2019) 5

Johnson v. United States, 529 U.S. 694 (2000) 6

United States v. Barnes, 258 F. App'x 95 (9th Cir. 2007) 3

United States v. Burden, 860 F.3d 45 (2d Cir. 2017) 6

United States v. Durrell, No. 23-3841, 2024 WL 2830632 (6th Cir. Jun. 4, 2024), *pet. for cert. pending*, No. 24-5456 (filed Aug. 27, 2024) 4

United States v. Haymond, 588 U.S. 634 (2019) 5

United States v. Jones, 81 F. 4th 591 (6th Cir. 2023) 4

United States v. Pennington, No. 21-4664, 2022 WL 2702577 (4th Cir. Jul. 12, 2022) 2, 3

United States v. Rivera, 784 F.3d 1012 (5th Cir. 2015) 3

United States v. Waffle, No. 22-5084, 2023 WL 2964480 (10th Cir. Apr. 17, 2023) 3, 4

United States v. Wilcher, 91 F.4th 864 (7th Cir. 2024) 6

STATUTES

18 U.S.C. § 3553 1

18 U.S.C. § 3583 ..... 5, 6

ADDITIONAL AUTHORITY

Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381 (2024) 6

INTRODUCTION

The parties agree that the courts of appeals are split regarding whether a court revoking supervising release may consider the factors listed in 18 U.S.C. § 3553(a)(2)(A): the need to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense.

The Government claims that the lower courts have only a "modest disagreement" that "has no practical effect and would not change the results of petitioners' cases." Not so. Take Petitioner Leaks. Imposing a 12-month prison term consecutive to state sentences previously imposed for convictions based on the same conduct, the district court cited a section 3553(a)(2)(A) factor—the need for just punishment—and only that factor. The Sixth Circuit affirmed, while other circuits have vacated district-court judgments when faced with similar facts.

And the practical effect is not just on appeal. District courts in four circuits operate under instructions not to consider the section 3553(a)(2)(A) factors when revoking supervised release. District courts elsewhere do not. As one district judge in the Sixth Circuit put it, "I absolutely can punish him. . . . We do it all the time."

Moreover, if the Government were correct, the statute would be unconstitutional. Under the Government's approach, section 3583(e) would allow district courts to impose new criminal punishments without providing defendants their required trial and due-process rights. The opposition brief does not even mention this concern.

But Congress did not enact an unconstitutional statute. The text, statutory context, legislative history, and this Court's precedents establish that section 3583(e)

bars district courts from considering punishment and the other section 3553(a)(2)(A) factors when revoking supervised release. The Court should grant certiorari, resolve the circuit split, and reverse the judgments below.

REASONS FOR GRANTING THE PETITION

I. The split among the lower courts is deep, pervasive, and of real practical effect.

Courts and commentators alike have noted the established split among the courts of appeals regarding whether district courts may consider the section 3553(a)(2)(A) factors when revoking supervised release. *See* Pet. at 13-14.

According to the Government, though, the lower courts have only a "modest disagreement" that "has no practical effect and would not change the results of petitioners' cases." Br. in Opp'n at 15. That is not accurate. Petitioner Leaks' case provides the clearest example. When the district court revoked his supervised release and imposed a 12-month sentence, to be served consecutive to his state sentences, the court pointed to a section 3553(a)(2)(A) factor, and only that factor: the need for just punishment. *See* App. at 85a ("Concurrent time does not punish Mr. Leaks for violating supervision and -- and. . . that is not justice." (ellipses in transcript)). The Sixth Circuit affirmed, relying on its published precedent holding that district courts may consider the section 3553(a)(2)(A) factors without restriction. *See* App. at 75a.

Faced with similar scenarios where district courts relied primarily on section 3553(a)(2)(A) factors, the Fourth and Ninth Circuits have reached the opposite result. For example, in *United States v. Pennington*, No. 21-4664, 2022 WL 2702577 (4th Cir. Jul. 12, 2022), the district court "particularly" relied on "the seriousness of the

violation conduct"—a section 3553(a)(2)(A) factor—while "briefly mention[ing]" four other factors, including the remaining two section 3553(a)(2)(A) factors. *Id.* at *2. Relying on its published precedent, the Fourth Circuit vacated the resulting sentence because the court "relied predominantly on impermissible factors." *Id.* Likewise, in *United States v. Barnes*, 258 F. App'x 95 (9th Cir. 2007), the court of appeals determined from the district court's comments that punishment was "a primary basis" for its sentence. *Id.* at 96. Relying on published Ninth Circuit precedent, the court therefore vacated the sentence. *Id.*

The Fifth and Tenth Circuits have indicated that they also will vacate sentences on the same grounds when defendants properly preserve their issues for appeal, as petitioners did here. In *United States v. Rivera*, 784 F.3d 1012 (5th Cir. 2015), the Fifth Circuit concluded that the district court committed plain error by using two section 3553(a)(2)(A) factors—the seriousness of the violation conduct and the need to provide just punishment—as dominant factors in its sentence. *Id.* at 1017. The appellate court further found that the error affected the defendant's substantial rights, but under the fourth prong on plain-error review, declined to exercise its discretion to remedy the error. *Id.* at 1018-19. Similarly, in *United States v. Waffle*, No. 22-5084, 2023 WL 2964480 (10th Cir. Apr. 17, 2023), the Government conceded that, under published Tenth Circuit precedent, the district court committed plain error by considering two section 3553(a)(2)(A) factors when revoking the defendant's supervised release—the need to promote respect for the law and provide just punishment.

Id. at *2. The court of appeals affirmed the sentence, but only because the defendant did not prevail on the third and fourth prongs of plain-error review. *Id.* at *4.

In each of the three petitioners' cases, the district court expressly relied on section 3553(a)(2)(A) factors, and the issues are properly preserved for appeal. In Petitioner Leaks' case, a section 3553(a)(2)(A) factor was the only factor that the district court pointed to. The Sixth Circuit affirmed, while the Fourth, Fifth, Ninth, and Tenth Circuits would have vacated and remanded in these circumstances. The split among the lower courts has a real, practical effect.

Just as importantly, the effect is not limited to petitioners. On appeal, the Sixth Circuit has unfailingly affirmed revocation sentences where district courts relied on the section 3553(a)(2)(A) factors, *see United States v. Jones*, 81 F. 4th 591, 601-02 (6th Cir. 2023), even when the court relied on only those factors, *see United States v. Durrell*, No. 23-3841, 2024 WL 2830632 (6th Cir. Jun. 4, 2024), *pet. for cert. pending*, No. 24-5456 (filed Aug. 27, 2024). And in the many cases that do not result in appeals, the split among the lower courts also has real, practical effect. The Fourth, Fifth, Ninth, and Tenth Circuits, district courts revoking supervised release are operating under their appellate court's instructions not to consider the section 3553(a)(2)(A) factors. In the Sixth Circuit and elsewhere, though, the district courts have free reign to rely on them, including by expressly imposing new criminal punishments. As one district judge in the Sixth Circuit put it, "I absolutely can punish him. . . . We do it all the time." App. at 97a.

II. This Court's intervention is necessary to ensure that the lower courts apply 18 U.S.C. § 3583(e) as Congress intended, without circumventing the Constitution's criminal due-process and trial guarantees.

If 18 U.S.C. § 3583(e) were as the Government says, it would be unconstitutional. Under the interpretation urged by the Government and adopted by the Sixth Circuit and others, a district court could impose a multi-year prison term primarily or exclusively based on the need to punish (one of the section 3553(a)(2)(A) factors). But the Constitution guarantees defendants a trial if facing a prison term of more than six months as a new criminal punishment. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality op.); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968). Under the Government's approach, a district court could impose a prison term as a criminal punishment even if a defendant had already been sentenced by a federal court in a new criminal case for the same offense. But the Double Jeopardy Clause bars the same sovereign from imposing multiple criminal punishments for the same offense. *See Gamble v. United States*, 587 U.S. 678, 683-84 (2019). The Government's opposition brief ignores these problems. *See* Pet. at 18-19.

Per Justice Breyer's controlling concurrence in *United States v. Haymond*, 588 U.S. 634 (2019), this Court has already indicated that a district court may not impose a new criminal punishment for a supervised release violation without providing the required due-process and trial rights. Justice Breyer concluded that 18 U.S.C. § 3583(k) was unconstitutional because that particular revocation provision "more closely resemble[d] the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* at 659 (Breyer, J., concurring). The same constitutional problem exists when

district courts expressly impose punishment. *See Johnson v. United States*, 529 U.S. 694, 700 (2000); App. at 37a; App at 85a; App. at 97a-98a. That is consistent with the original understanding of the jury-trial right. *See* Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. 1381 (2024).

As written, though, section 3583(e) does not violate the Constitution. The text, statutory context, legislative history, and this Court's precedent all indicate that district courts may not rely on punishment and the other section 3553(a)(2)(A) factors when revoking supervised release. *See* Pet. at 16-17. Other circuits have found little difficulty addressing the "unworkability" concerns suggested by the *Esteras* panel and echoed by the Government (Br. in Opp'n at 8). *See United States v. Wilcher*, 91 F.4th 864, 872 (7th Cir. 2024); *United States v. Burden*, 860 F.3d 45, 57 (2d Cir. 2017); App. at 25a-26a (Moore, J., dissenting from order denying rehearing en banc).

Congress did not attempt to create a new, broad exception to criminal defendants' constitutionally guaranteed trial and due-process rights when it enacted 18 U.S.C. § 3583(e). This Court should grant certiorari, resolve the circuit split, and instruct the lower courts to apply the statute as written.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOSEPH MEDICI
Federal Public Defender,

STEPHEN C. NEWMAN
Federal Public Defender,

Southern District of Ohio

Kevin M. Schad
250 E. 5th Street, Suite 350
Cincinnati, OH 45202
(513) 929-4834
kevin_schad@fd.org

Northern District of Ohio

/s/ Christian J. Grostic
Christian J. Grostic
Counsel of Record
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113
(216) 522-4856
christian_grostic@fd.org

Counsel for Petitioners