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

BRIEF OF CRIMINAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JACOB SCHUMAN
Counsel of Record
TEMPLE UNIVERSITY
BEASLEY SCHOOL OF LAW
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-5840
jacob.schuman@temple.edu

ED SPREHA
LAW OFFICES OF WAGNER AND SPREHA
2401 North Front Street
Harrisburg, PA 17110
(717) 234-7051
edspreha@wagnersprehalaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who teach and research criminal law and procedure.[2] They have no personal interests in this case. Their sole interest is in the fair and proper application of federal criminal law. Their names are:

- Valena Beety, Robert H. McKinney Professor of Law at Indiana University Maurer School of Law.
- Zamir Ben-Dan, Assistant Professor of Law at Temple University Beasley School of Law.
- Douglas Berman, Newton D. Baker-Baker & Hostetler Chair in Law at the Ohio State University Moritz College of Law.
- Ingrid Eagly, Professor of Law at UCLA School of Law.
- Eric Fish, Acting Professor of Law at UC Davis School of Law.
- Cynthia Godsoe, Professor of Law at Brooklyn Law School.
- Sarah Gottlieb, Assistant Clinical Professor of Law at Washington and Lee University School of Law.

---

[1] No party authored this brief in whole or in part, and no one other than *amici* and their counsel have paid for the preparation or submission of this brief.

[2] *Amici* submit this brief in their individual capacities only, not on behalf of the institutions with which they are affiliated.

- Alison Guernsey, Clinical Professor of Law at the University of Iowa College of Law.

- Alexis Hoag-Fordjour, Associate Professor of Law at Brooklyn Law School.

- Aliza Hochman Bloom, Assistant Professor of Law at Northeastern University School of Law.

- Alexandra Klein, Assistant Professor of Law at Washington and Lee University School of Law.

- Daniel Medwed, University Distinguished Professor of Law and Criminal Justice at Northeastern University School of Law.

- Jacob Schuman, Associate Professor of Law at Temple University Beasley School of Law.

- Christine Scott-Hayward, Professor of Law, Criminology, and Criminal Justice at California State University, Long Beach.

- Charles D. Weisselberg, Yosef Osheawich Professor of Law at UC Berkeley School of Law.

SUMMARY OF ARGUMENT

In this case, district judges revoked petitioners' supervised release and sentenced them to imprisonment to reflect the seriousness of their violations, promote respect for the law, and provide just punishment, also known as "retribution." *Tapia v. United States*, 564 U.S. 319, 326 (2011). Retribution is a "backward-looking" theory of punishment based on the defendant's "moral culpability." Jacob Schuman, *Revocation and Retribution*, 96 WASH. L. REV. 881, 890 (2021) (citations omitted). Petitioners contend that 18 U.S.C. § 3583(e)(3) forbids judges from considering retribution when revoking supervised release. This brief of criminal law scholars as *amici curiae* in support of petitioners explains why § 3583(e)(3) instructs judges not to revoke supervised release for the purpose of retribution.

Section 3583(e)(3) authorizes judges to revoke supervised release after considering all the purposes of punishment except for retribution. Why does § 3583(e)(3) exclude retribution as a consideration? The answer is the "structural difference" between parole, probation, and supervised release. *United States v. Haymond*, 588 U.S. 634, 652 (2019) (plurality op.). Parole and probation both conferred a benefit on the defendant by granting conditional liberty in lieu of imprisonment. Supervised release, by contrast, imposes a penalty by adding a term of conditional liberty to follow imprisonment. Therefore, violating a condition of parole or probation was arguably a moral wrong deserving of retribution. But violating a condition of supervised release is not a moral wrong and does not deserve retributive punishment.

ARGUMENT

The reason that § 3583(e)(3) prohibits judges from considering retribution when revoking supervised release is the "structural difference" between parole, probation, and supervised release. *Haymond*, 588 U.S. at 652. Parole and probation both conferred a benefit, so violating their conditions was arguably an immoral act deserving of retributive punishment. By contrast, supervised release imposes a penalty, and therefore violating its conditions only merits punishment for purposes of deterrence, incapacitation, and rehabilitation, not retribution.

I. Parole and probation both conferred a benefit on the defendant by granting conditional liberty in lieu of imprisonment.

Before 1984, the federal government used two forms of community supervision: parole and probation. *Haymond*, 588 U.S. at 651. Parole allowed defendants to earn early release from prison, whereas probation offered them the chance to avoid prison entirely. Because both forms of supervision granted the defendant conditional liberty in lieu of imprisonment, this Court described them both as conferring a benefit.[3]

[3] In practice, the power disparity between the defendant and the government may have made parole and probation more coercive than compassionate. Nevertheless, the formal relationship between each form of supervision and the defendant's potential term of imprisonment led this Court to characterize them as benefits.

Parole allowed a defendant who had served one-third of their prison term to request early release on condition of their good behavior, to serve the rest of their sentence under supervision in the community. *See* 18 U.S.C. §§ 4205-06 (1982). If a defendant violated a condition of parole, then an administrative board could "revoke" their release and return them to prison to serve the rest of their original sentence. *Id.* § 4214. The "purpose" of parole was "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

Probation allowed sentencing judges to suspend a defendant's prison term on condition of their good behavior, to serve a term of supervision in the community. *See* 18 U.S.C. § 3651 (1982). If a defendant violated a condition of probation, then the judge could "revoke" the suspension and impose their original prison sentence. *Id.* § 3653. The "great *desideratum*" of probation was "the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment." *United States v. Murray*, 275 U.S. 347, 357 (1928).

Parole and probation were slightly different from each other, because parole reduced the defendant's term of imprisonment, whereas probation allowed the defendant to avoid prison entirely. Nevertheless, both forms of supervision served as an "amelioration" of punishment by granting the defendant conditional liberty in lieu of imprisonment.

Murray, 275 U.S. at 357 (probation); *Anderson v. Corall*, 263 U.S. 193, 196 (1923) (parole). As a result, this Court described them both as a benefit to the defendant.

In the early days of the supervision system, for example, the Court held that prisoners had no right to a hearing when seeking early release, because parole was "a favor," which "gives to a criminal … the privilege to make application," and was "a question of state policy exclusively." *Ughbanks v. Armstrong*, 208 U.S. 481, 487-88 (1908). Similarly, the Court held that probation "provide[d] a period of grace" and was "conferred as a privilege, and cannot be demanded as a right. It is a matter of favor, not of contract." *Burns v. United States*, 287 U.S. 216, 220 (1932); *see also Escoe v. Zerbst*, 295 U.S. 490, 492-93 (1935) (same).

In later cases, the Court cautioned that the process due when revoking parole and probation did not depend on their categorization as a "privilege" versus a "right," but still concluded that the proceedings could be "informal" because of the benefit that the government had conferred on the defendant. *Morrissey*, 408 U.S. at 482; *see also Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 & n.4 (1973). The Court explained that granting parole and probation required the government to take "a risk that [the defendant] will not be able to live in society without committing additional antisocial acts," while enabling them "to do a wide range of things open to persons who have never been convicted of any crime," including "be gainfully employed … be with family and friends and … form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482-83. The government

therefore had "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions." *Id.* at 483.

Finally, the Court took a similar view in its Fourth Amendment cases, holding that the exclusionary rule did not apply to revocation of parole, which "accord[ed] a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release." *Pa. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998). Applying the exclusionary rule might actually work to defendants' "disadvantage," the Court explained, because it "could reduce the State's incentive to extend parole in the first place." *Id.* at 367; *see also Samson v. California*, 547 U.S. 843, 850 (2006) (applying similar logic to uphold parole condition authorizing suspicionless searches); *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (same, for probation condition authorizing warrantless home searches). Because parole and probation both allowed the defendant to avoid prison by serving a term of supervision in the community, the Court described them both as a benefit.

II. Supervised release imposes a penalty on the defendant by adding conditional liberty to follow imprisonment.

In 1984, Congress passed the Sentencing Reform Act (SRA), which abolished parole and replaced it with a new form of community supervision

called "supervised release."[4] Pub. L. No. 98-473, 98 Stat. 1837, 1999-2000 (codified as amended at 18 U.S.C. § 3583). Going forward, defendants would have to serve their prison terms in full, with no opportunity for early release, followed by separate terms of supervised release imposed at sentencing. Because supervised release adds conditional liberty to follow imprisonment, rather than in lieu of imprisonment, this Court described it as imposing a penalty on the defendant, not a benefit.

Supervised release is a term of conditional liberty under supervision in the community, imposed by the judge at sentencing to follow the defendant's term of imprisonment. *See* 18 U.S.C. §§ 3624(a) & 3583(a). The "primary goal" of supervised release is to "ease the defendant's transition into the community after the service of a long prison term … or to provide rehabilitation [through] … supervision and training programs after release," and it "may not be imposed for purposes of punishment," which is "served to the extent necessary by the term of imprisonment." S. REP. NO. 98-225, at 124-25 (1983).

The replacement of parole with supervised release was "meant to make a significant break with

---

[4] The SRA preserved probation as an option for sentencing judges, but eliminated their authority to "suspend" prison terms and instead "recognized probation as a sentence in itself." U.S.S.G. Ch. 7, Pt. A.2(a). The probation provisions are currently codified at 18 U.S.C. §§ 3561-66. There are also a small number of federal prisoners convicted of crimes committed before the SRA took effect who are still eligible for parole. *See* Charles D. Weisselberg & Linda Evans, *Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All "Old Law" Federal Prisoners for Release*, 35 FED. SENT'G REP. 106, 107-08 (2022).

prior practice." *Johnson v. United States*, 529 U.S. 694, 724-25 (2000) (Scalia, J., dissenting). "Unlike parole," which "replace[d] a portion of the sentence of imprisonment," supervised release is imposed "in addition to any term of imprisonment imposed by the court." U.S.S.G. Ch. 7, Pt. A.2(b). Lawmakers replaced parole with supervised release for two reasons. First, they had lost faith in the rehabilitative theory of imprisonment, so no longer saw any reason to release prisoners early. *Tapia*, 564 U.S. at 324-25. Second, they sought to rationalize the supervision system by "giving district courts the freedom to provide postrelease supervision for those, and only those, who needed it." *Johnson*, 529 U.S. at 709.

Originally, the SRA did not provide any mechanism for judges to revoke supervised release, instead instructing that they should treat violations as "contempt of court." 98 Stat. at 2000. The Senate Report explained that "supervised release [wa]s not subject to revocation for a violation" because lawmakers "d[id] not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant and because [they] believed that a more serious violation should be dealt with as a new offense." S. REP. NO. 98-225, at 125.

Before long, however, the Administrative Office of U.S. Courts and U.S. Parole Commission started lobbying Congress to create a more "streamlined procedure for enforcing the conditions of supervised release," 131 CONG. REC. 14,177 (1985), complaining that contempt proceedings were "cumbersome," "inefficien[t]," and made responding to violations much "more difficult and time consuming," *Departments of Commerce, Justice, and State, the*

Judiciary, and Related Agencies Appropriations for 1986: Hearings Before a Subcomm. of the H. Comm. on Appropriations, 99th Cong. 64, 66 (1985) (statement of Benjamin F. Baer, Chairman, U.S. Parole Comm'n). Congress granted their wish in the Anti-Drug-Abuse Act of 1986 (ADAA), which authorized judges to "revoke" supervision and impose a prison sentence if a defendant violated a condition of supervised release. Pub. L. No. 99-570, 100 Stat. 3207, 3207-7 (codified as amended at 18 U.S.C. § 3583(e)(3)). Effectively, the ADAA "grafted the revocation mechanism for probation onto supervised release." Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1002 (2013).

Because supervised release adds a term of conditional liberty to follow imprisonment, rather than in lieu of imprisonment, this Court has described it not as conferring a benefit on the defendant, but instead as imposing a penalty. For example, a plurality of the Court found that the jury right applied to revocation of supervised release due to its "structural difference" from parole: "[U]nlike parole," which "suspend[ed] part … of a defendant's prescribed prison term and afford[ed] him a period of conditional liberty as an 'act of grace,'" supervised release "wasn't introduced to replace a portion of the defendant's prison term, only to encourage rehabilitation *after* the completion of his prison term." *Haymond*, 588 U.S. at 643, 652 (citation omitted); *see also United States v. Thompson*, 777 F.3d 368, 372 (7th Cir. 2015) (Posner, J.) ("Supervised release does not shorten prison time; instead it imposes restrictions on the prisoner to take effect upon his release from prison. Parole mitigates punishment; supervised release augments it.").

The Court also identified the same structural difference between probation and supervised release, holding that the statute governing revocation of probation should not be construed *in pari materia* with the statute governing revocation of supervised release because "[s]upervised release, in contrast to probation, is not a punishment in lieu of incarceration," but rather "follow[s] up prison terms." *United States v. Granderson*, 511 U.S. 39, 50 (1994). Therefore, the Court concluded, they are "sentences of unlike character." *Id.* at 51; *see also United States v. Reyes*, 283 F.3d 446, 461 (2d. Cir. 2002) (Cabranes, J.) ("supervised release … in contrast to probation, is 'meted out in addition to, not in lieu of, incarceration.'") (citation omitted).

One might wonder whether, in practice, supervised release could confer a benefit on the defendant, if the sentencing judge imposed it in conjunction with a shorter prison term. However, neither the governing statute nor the Sentencing Guidelines instructs judges to make this trade-off, and there is no reason to think it is typical. To the contrary, the empirical evidence shows that judges almost always impose the term of supervised release recommended by the Sentencing Guidelines, *see* U.S. SENTENCING COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 57 (July 2010), and that it is "neither discussed by judges at the sentencing hearing, nor mentioned by the parties in sentencing submissions," Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 206 (2013). Moreover, mandatory-minimum prison sentences often make it impossible for judges to

reduce imprisonment in favor of supervised release. In both theory and practice, therefore, supervised release imposes a penalty, not a benefit.

III. Because of the structural difference between parole, probation, and supervised release, § 3583(e)(3) instructs judges not to consider retribution when revoking supervised release.

The structural difference between parole, probation, and supervised release explains why § 3583(e)(3) excludes retribution as a factor for judges to consider when revoking supervised release. Because parole and probation both conferred a benefit, violating their conditions was arguably a moral wrong deserving of retributive punishment. By contrast, because supervised release imposes a penalty, violating its conditions only merits punishment for purposes of deterrence, incapacitation, and rehabilitation, not retribution.

Section 3583(e)(3) authorizes judges to revoke supervised release "after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." This list of cross-references to 18 U.S.C. § 3553(a) includes eight considerations: (1) deterrence, (2) incapacitation, (3) rehabilitation, (4) the characteristics of the offense and the offender, (5) the Sentencing Guidelines' recommended sentence, (6) the Sentencing Guidelines' policy statements, (7) the need to avoid unwarranted sentencing disparities, and (8) the need to provide restitution to any victims. The only § 3553(a) factors omitted are retribution and the

kinds of sentences available. *See* 18 U.S.C. §§ 3553(a)(2)(A) & 3553(a)(3).

The best interpretation of § 3583(e)(3) is that a judge "may *not* take account" of retribution or the kinds of sentences available when revoking supervised release. *Tapia*, 564 U.S. at 326 (interpreting identically worded 18 U.S.C. § 3583(c)). According to the interpretative canon of *expressio unius est exclusion alterius*, a statute that lists some items of an "associated group or series" but omits others "justif[ies] the inference that [the] items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citation omitted). Section 3583(e)(3)'s partial list of § 3553(a) factors is "a classic example of where the *expressio unius* canon should apply." Schuman, *supra*, at 912. Indeed, the original version of § 3583(e)(3) did not include incapacitation as a factor, but Congress later amended the provision to add it, suggesting careful legislative attention to the contents of the list. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4419 (codified at 18 U.S.C. § 3583(e)(3)).

Although § 3583(e)(3) prohibits judges from considering retribution or the kinds of sentences available when revoking supervised release, it does not explain why. The reason for excluding the kinds of sentences available is obvious: every subsection of § 3583(e) authorizes judges to take a different action, such as terminating, modifying, or revoking supervised release. For each of these actions, there are no other kinds of sentences available, and therefore no point in considering them. *See* Schuman, *supra*, at 913.

But why does § 3583(e)(3) exclude retribution? Retributivism is a "backward-looking" theory of sentencing that justifies punishment as a good-in-itself, based on the defendant's "moral culpability." Schuman, *supra*, at 890 (citations omitted). It contrasts to utilitarianism, which is a "forward-looking" theory of sentencing that justifies punishment as a means to "achiev[e] good outcomes," such as deterrence, incapacitation, and rehabilitation. *Id.* at 891. Why would lawmakers want to forbid judges from revoking supervised release based on the defendant's moral culpability?

The legislative history for § 3583(e)(3) does not directly address this question. The discussions about how judges should respond to supervised-release violations in the Senate Report and the statements of the Administrative Office of U.S. Courts and U.S. Parole Commission all focused on utilitarian concerns like efficiency, public safety, and rehabilitation. *See* 131 CONG. REC. 14,177; 99th Cong. at 66; S. REP. NO. 98-225, at 124-25. They suggest that lawmakers were not motivated by retribution, but do not say explicitly why they excluded it as a consideration.

The best explanation for why § 3583(e)(3) forbids judges from revoking supervised release for retribution is the "structural difference" between parole, probation, and supervised release. *Haymond*, 588 U.S. at 652. Parole and probation both conferred a benefit by allowing the defendant to serve a term of conditional liberty in the community rather than a term of imprisonment. Because the government had taken a "risk," *Morrissey*, 408 U.S. at 483, by granting the defendant "a limited degree of freedom in return

for [his] assurance that he will comply with the … conditions of his release," *Scott*, 524 U.S. at 365, it was arguably immoral for the defendant to violate those conditions. In other words, violating a condition of parole or probation was a betrayal of the "favor" and "privilege" bestowed by the government. *Burns*, 287 U.S. at 220; *Ughbanks*, 208 U.S. at 487. That betrayal could be considered a "moral wrong" deserving of retributive punishment. Schuman, *supra*, at 907.

Supervised release, by contrast, does not confer a benefit on the defendant, but instead imposes a penalty by adding a term of conditional liberty to follow imprisonment. The government takes no risk by imposing supervised release and grants no freedom in return for the defendant's assurance that they will comply with the conditions. To the contrary, supervised release *reduces* the government's risk by *subjecting* the defendant to an additional term of supervision after they complete their prison sentence. Indeed, using the word "revoke" in relation to supervised release is actually a "misnomer" – the government has granted the defendant nothing, so there is nothing for it to revoke. *United States v. Trotter*, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018) (Weinstein, J.). Defendants who violate a condition of supervised release therefore betray no favor or privilege bestowed by the government.[5] Violations of

[5] Although the Sentencing Guidelines describe violations of probation and supervised release as a "breach of trust," they use that phrase solely to explain the distinction between sentencing violators for "failing to abide by the conditions of the court-ordered supervision" versus "the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct." U.S.S.G. Ch. 7, Pt. A.3(b). The

supervised release may be "misguided and even harmful," and they may merit punishment for purposes of deterrence, incapacitation, or rehabilitation. Schuman, *supra*, at 907. But they do not constitute moral wrongs deserving of retribution. *See id.* at 907-08.

The text of the governing statutes reflects this logic. Although the ADAA "grafted the revocation mechanism for probation onto supervised release," Doherty, *supra*, at 1002, lawmakers still carefully distinguished between the factors judges should consider when revoking probation versus revoking supervised release. The provision authorizing revocation of probation says that judges should "consider[] the factors set forth in section 3553(a) to the extent that they are applicable," which would include retribution. 18 U.S.C. § 3565(a). By contrast, § 3583(e)(3) authorizes judges to revoke supervised release after considering all the purposes of sentencing *except* for retribution. The best explanation for the differences between these provisions is that probation confers a benefit, whereas supervised release applies a penalty. *See Granderson*, 511 U.S. at 50-51; *Reyes*, 283 F.3d at 461. Therefore, violations of probation arguably deserve retributive punishment, whereas violations of supervised release

---

Guidelines adopted the former approach for practical reasons, "[g]iven the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics." *Id.* They also acknowledge "considerable debate as to whether the sanction imposed upon revocation of probation should be different from that imposed upon revocation of supervised release." *Id.* Ch. 7, Pt. A.4; *see also* Schuman, *supra*, at 909-11.

do not. Because of the structural difference between parole, probation, and supervised release, § 3583(e)(3) forbids judges from revoking supervised release for retribution.

CONCLUSION

This Court should reverse the judgments below.

Respectfully submitted,

JACOB SCHUMAN
Counsel of Record
TEMPLE UNIVERSITY
BEASLEY SCHOOL OF LAW
1719 North Broad Street
Philadelphia, PA 19122
(215) 204-5840
jacob.schuman@temple.edu

EDWARD SPREHA
LAW OFFICES OF WAGNER AND SPREHA
2401 North Front Street
Harrisburg, PA 17110
(717) 234-7051
edspreha@wagnersprehalaw.com

December 16, 2024