No. 23-7483

# In the Supreme Court of the United States

EDGARDO ESTERAS; TIMOTHY MICHAEL JAIMEZ F/K/A TIMOTHY M. WATTERS; TORIANO A. LEAKS, JR., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Whether 18 U.S.C. 3583(e)(3), which provides that a court "may, after considering the factors set forth in [specified provisions] * * * revoke a term of supervised release, and require the [offender] to serve [time] in prison," prohibits the court from also considering additional factors.

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### OPINIONS BELOW

In petitioner Esteras's case, the initial order of the court of appeals (J.A. 117a-120a) is unreported and the amended order of the court of appeals (J.A. 121a-135a) is reported at 88 F.4th 1163. The order of the district court (J.A. 110a-116a) is unreported.

In petitioner Jaimez's case, the opinion of the court of appeals (J.A. 229a-236a) is reported at 95 F.4th 1004. The order of the district court (J.A. 227a-228a) is unreported.

In petitioner Leaks's case, the order of the court of appeals (J.A. 249a-251a) is not reported in the Federal Reporter but is available at 2024 WL 2196795. The order of the district court (J.A. 247a-248a) 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 (J.A. 136a-149a) and March 7, 2024 (J.A. 150a-154a). 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, see Sup. Ct. R. 12.4, was filed on May 15, 2024, and was granted on October 21, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The supervised-release revocation provision, 18 U.S.C. 3583(e)(3), provides in pertinent part:

> (e) MODIFICATION OF CONDITIONS OR REVOCATION—The court may, 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)—
>
> * * *
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release * * * .

Other relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

## 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 required reimprisonment. J.A. 110a-116a, 227a-228a, 247a-248a. In each case, the court of appeals affirmed. J.A. 121a-135a, 229a-236a, 249a-251a.

### A. Legal Background

1. In the Sentencing Reform Act of 1984 (Sentencing Reform Act), Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987, Congress enacted "sweeping reforms" to the nation's criminal justice system. *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). Among those reforms was the introduction of supervised release into the federal criminal system to replace "most forms of parole." *Cornell Johnson* v. *United States*, 529 U.S. 694, 696 (2000).

Supervised release is "a form of postconfinement monitoring" that "facilitate[s] a transition to community life" after a term of imprisonment. *Mont* v. *United States*, 587 U.S. 514, 523 (2019) (citation and internal quotation marks omitted); see S. Rep. No. 225, 98th Cong., 1st Sess. 125 (1983) (Senate Report). It allows offenders to serve "part of the[ir] sentence" out of prison, subject to conditions on their behavior. 18 U.S.C. 3583(a); see 18 U.S.C. 3583(d). Some conditions, such as not committing additional crimes and drug testing, are mandatory; the court also has discretion to specify additional conditions. See 18 U.S.C. 3583(d).

2. As originally enacted in the Sentencing Reform Act, the supervised-release statute (18 U.S.C. 3583) provided a mechanism for early termination of the supervised-release term (thereby discharging the offender from the requirements of supervision), as well as mechanisms for otherwise adjusting the length and conditions of the supervised-release term. See Sentencing Reform Act, 98 Stat. 2000. But the statute did not provide a mechanism for revoking a term of supervised release in the event of a violation. See Sentencing Reform Act, 98 Stat. 1999-2000; Senate Report 125. Instead, it authorized the court to treat a violation "as contempt of court pursuant to [18 U.S.C. 401(3)]." Sentencing Reform Act, 98 Stat. 2000.

In the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, Congress amended Section 3583(e) to add what is now Section 3583(e)(3). The new provision allowed a court to revoke an offender's supervised release, and require a term of reimprisonment, if the offender violated one or more conditions of his release. See *ibid.* The primary purpose of that provision is to allow a court to "sanction" an offender's "breach of trust" in committing such a violation. Sentencing Guidelines Ch. 7, Pt. A, § 3(b); see Sentencing Guidelines Ch. 7, Pt. B, intro. comment. (setting out "penalties * * * for the violation of the judicial order imposing supervision"); see also *Cornell Johnson*, 529 U.S. at 700-701. The term of reimprisonment is attributable "to the original conviction," rather than a sentence for a new offense. *Cornell Johnson*, 529 U.S. at 701.

3. The provision governing the imposition of a term of imprisonment, Section 3582(a), provides that a 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 [18 U.S.C.] 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." Section 3553 lists a number of factors that a "court, in determining the particular sentence to be imposed, shall consider." 18 U.S.C. 3553(a).

Multiple provisions of the supervised-release statute cross-reference subsets of the Section 3553(a) factors. Most relevant here, Section 3583(c) states that a court, "in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider 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)." 18 U.S.C. 3583(c). The same factors are then listed, in slightly different language, as considerations under Section 3583(e), which covers termination, extension, modification, and discretionary revocation of supervised release. See 18 U.S.C. 3583(e). In the revocation context, the statute states that a court "may, 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) * * * revoke a term of supervised release, and require the defendant to serve" a term of imprisonment. 18 U.S.C. 3583(e)(3).

The factors cross-referenced in Section 3583(c) and Section 3583(e) include 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 educa-

tional or vocational training, medical care, or other correctional treatment," 18 U.S.C. 3553(a)(2)(D); "the kinds of sentence and the sentencing range" recommended by the Sentencing Guidelines, 18 U.S.C. 3553(a)(4)(A); pertinent "policy statements" issued by the Sentencing Commission for "violation[s] of probation or supervised release," 18 U.S.C. 3553(a)(4)(B); other 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).

The factors that a court is required to consider when imposing a sentence for a criminal conviction, but that are not cross-referenced in Section 3583(e), are the factors set out in Section 3553(a)(2)(A) and Section 3553(a)(3). Those non-cross-referenced factors are "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), and "the kinds of sentences available," 18 U.S.C. 3553(a)(3).

4. In some circumstances, such as when an offender violates his supervised release by possessing drugs or a firearm, revocation and reimprisonment are mandatory under 18 U.S.C. 3583(g). Section 3583(g) caps that term of reimprisonment at the maximum authorized under Section 3583(e)(3), but does not provide a particular set of factors for a court to consider in determining how long that term should be.

**B. Factual And Procedural Background**

***1. Esteras's Revocation Proceedings***

a. In 2018, petitioner Esteras pleaded guilty to conspiring to distribute and to possess with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 846. J.A. 110a, 122a. The district court varied below the recommendation of the Sentencing Guidelines to impose a sentence consisting of 12 months of imprisonment (to run consecutively 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. J.A. 122a.

In January 2020, Esteras was released from prison and began serving his six-year term of supervised release. J.A. 122a. 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. J.A. 112a, 122a. The report stated that, on January 23, 2023, Esteras had struck the mother of his children in the head, pointed a handgun at her, threatened to kill her, and fired three rounds from his handgun into her vehicle. J.A. 112a.

Following a revocation hearing, the district court found that Esteras had "brandished and shot a firearm" in the manner that the victim had described, as memorialized in body-camera video evidence. J.A. 93a. And the court explained that whether or not Esteras had violated state law, he had "violated [his] term of supervision by possessing a [firearm]." J.A. 94a. The court was thus "obligated, * * * pursuant to [Section 3583(g)], to revoke" Esteras's supervision. J.A. 93a; see 18 U.S.C. 3583(g).

Before deciding on the appropriate course for Esteras's supervised-release violation, the district court recounted Esteras's prior federal offenses, noted that Esteras 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." J.A. 96a. In particular, the court "worr[ied]" that sentences for previous drug crimes, and revocation of a prior term of supervised release, had failed "to deter [Esteras], to encourage [him] to be respectful of the law." *Ibid.* And the court was "not really sure what it will require for [Esteras] to learn that enough is enough." *Ibid.*

The district court stated that it would now "escalate the consequences" by "exercising [its] discretion to vary upwards" from the term of reimprisonment recommended by the Sentencing Guidelines, because Esteras's "dangerous" and "disrespectful" behavior was "[a]typical" and "exceptional" and "must stop." J.A. 97a-98a. The court explained that if Esteras could not "stop [him]self," the court would "separate [him] from society for long enough to at least allow [him] to reconsider his behavior," so that "hopefully when [he] return[s] under the new term of supervision" that would follow the reimprisonment, he would "do better." J.A. 98a.

The district court required 24 months of imprisonment, to be followed by three more years of supervised release. J.A. 98a. As to the latter, the court carried over Esteras's prior conditions of supervised release and added requirements that Esteras submit to an anger management program and that he "be on location monitoring with a curfew" for the first six months of his new supervised-release term. J.A. 99a, 101a. The court

noted that Esteras's reimprisonment term was "not long enough for the most intensive drug treatment program," but expressed hope that Esteras would "sign up and apply [him]self to any programs" available. J.A. 104a.

Esteras objected to any consideration of factors identified in 18 U.S.C. 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"—which are not explicitly cross-referenced in the revocation-and-reimprisonment provision, 18 U.S.C. 3583(e)(3). See J.A. 105a. In response, the district court acknowledged that its revocation term was premised in part on "promot[ing] respect for the law" and "deterring" Esteras, but made clear that it also rested on the court's "concern about the safety of the community" and the need to distinguish Esteras from a "typical" offender. J.A. 105a-106a. In a subsequent written order (J.A. 110a-116a), the court stated that it had considered the factors in Sections 3553(a) and 3583(d) (which governs conditions of supervised release), and stated that the revocation term was based on, "among other reasons," the need "to protect society and promote respect for the law." J.A. 115a-116a.

b. The court of appeals initially affirmed the supervised-release-revocation judgment in an unpublished order. J.A. 121a-135a. The court later amended and reissued the order as a published disposition. *Ibid.*

The court of appeals rejected Esteras's claim that a district court is prohibited from considering Section 3553(a)(2)(A) factors when revoking supervised release and requiring a term of reimprisonment. J.A. 127a-135a. The court of appeals explained that, as a "textual"

matter, while Section 3583(e) requires a district court to "consider[] the listed factors" in its decisionmaking, the provision is unlike other sentencing provisions in that it "never says that the court may consider '*only*' those factors." J.A. 128a (citation omitted). The court of appeals found that omission particularly pertinent because, in a nearby statute, Congress used an "express command" to instruct a court "to disregard the goal of rehabilitation" when imposing a term of imprisonment. *Ibid.* (citing 18 U.S.C. 3582(a)).

The court of appeals also explained 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." J.A. 128a (citation omitted). "To think about the one," the court observed, "requires the judge to think about the other." *Ibid.* And the court of appeals identified several examples illustrating that "Esteras's [proposed] bright-line rule is unworkable." J.A. 130a; see J.A. 128a-130a. For example, the court observed that Section 3553(a)(2)(A)'s allegedly impermissible "'seriousness of the offense'" factor "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. J.A. 128a.

The court of appeals additionally observed that Section 3553(a)(2)(A)'s allegedly impermissible "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.'" J.A. 129a (citation omitted). The court of appeals emphasized that "[t]o neglect the one dishonors

the other," noting that the district court "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.*

As a third example of overlap, the court of appeals observed that Section 3553(a)(2)(A)'s allegedly impermissible "just punishment for the offense" factor parallels considerations that Section 3553(a)(5) requires the district court to consider. J.A. 129a. Specifically, the court reasoned 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.*

c. On the same day that the panel issued its amended order, the court of appeals denied a petition for rehearing en banc that Esteras had filed following the initial unpublished order. J.A. 136a-149a. Judge Moore dissented from that denial, on the view that the panel decision was incorrect. J.A. 137a-148a. Judge Griffin, joined by Judge Bloomekatz, took the view that rehearing was warranted, but did not state that the panel had erred. J.A. 137a, 148a-149a.

The court of appeals later denied Esteras's petition for rehearing of the panel's amended order. J.A. 150a-154a. Judge Moore, joined by Judge Stranch, restated her belief that the panel decision was incorrect. J.A. 151a-152a. Judge Griffin, joined by Judges Stranch and Bloomekatz, restated his view that rehearing was warranted but again did not opine that the panel erred. J.A. 152a-154a.

***2. Jaimez's Revocation Proceedings***

a. 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. 10-cr-4 Presentence Investigation Report (PSR) ¶¶ 4-60 (Nov. 20, 2013). A federal grand jury indicted him on drug charges, and 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. 10-cr-4 Amended Judgment 1 (Mar. 11, 2015); see 10-cr-4 Indictment. The district court sentenced Jaimez to 120 months of imprisonment, to be followed by five years of supervised release. 10-cr-4 Amended Judgment 2-3.

After Jaimez was released from prison and started his term of supervised release, he "used drugs, failed to maintain employment, and failed to truthfully disclose financial information to his probation officer." J.A. 230a. In September 2019, the district court revoked Jaimez's supervised release and required a 14-month term of reimprisonment, to be followed by three years of supervised release. 10-cr-4 Order (Sept. 5, 2019); see J.A. 230a.

b. After Jaimez was re-released from prison and started his second term of supervised release, he returned to drug dealing. J.A. 230a. 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.*

After the federal Probation Office moved for revocation of Jaimez's supervised release, Jaimez admitted to

violating his supervised-release conditions by trafficking drugs, associating with a convicted felon, and possessing drug paraphernalia. 10-cr-4 D. Ct. Doc. 342, at 1-2 (Apr. 20, 2022) (Violation Report); see J.A. 228a. The district court revoked Jaimez's supervised release and required a within-Guidelines term of 60 months of reimprisonment, to be followed by six years of additional supervised release. *Ibid.*; see J.A. 215a-216a.

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." J.A. 218a. 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" containing "upward[s] of a kilo" of marijuana illustrated that Jaimez was "paying no attention" to those conditions. J.A. 216a-217a.

The district court noted 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." J.A. 216a-217a; see J.A. 218a (reiterating that reasons for the revocation term were "to protect the public * * * to encourage understanding of compliance of the terms and conditions, individual deterrence, and public deterrence" and to make clear that there "is a consequence of not obeying a court order"). And the court observed that "somebody looking at this with the overall circumstances would find that this is both a just and deserved sanction, and would hope that it would enhance respect for the

law." *Ibid.* Jaimez did not object to the factors that the court had considered. J.A. 221a.

c. The court of appeals affirmed. J.A. 229a-236a. 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." J.A. 232a. The court based that rejection on its prior decisions, including the decision in petitioner Esteras's case. *Ibid.*

***3. Leaks's Revocation Proceedings***

In 2019, petitioner Leaks was arrested after police officers stopped his vehicle and discovered a machinegun under his seat with 15-, 20-, and 30-round-capacity magazines containing a total of 21 rounds of ammunition. 19-cr-283 PSR ¶¶ 7-14. 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). J.A. 250a. The district court sentenced Leaks to 30 months of imprisonment, to be followed by three years of supervised release. *Ibid.*

In July 2021, Leaks was released from prison and 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 state unlawful-firearm-possession and robbery offenses that had resulted in state sentences of, respectively, three years and four-to-six years of imprisonment. J.A. 239a-240a, 250a.

Leaks subsequently admitted, and the federal district court found, that he had committed five violations of his federal supervised release: the two above-

mentioned state-law crimes, failing to report for supervision, failing to attend mental-health treatment, and failing to work toward a GED. J.A. 76a, 241a. Leaks also acknowledged that because he had admitted to a firearm offense, "the [c]ourt [wa]s required by statute to impose a term of imprisonment." J.A. 241a; see 18 U.S.C. 3583(g). But Leaks requested that the court run the term of imprisonment concurrent with, not consecutive to, the state-court sentences for his state-law violations. J.A. 241a.

In deciding on the revocation term, 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." J.A. 244a. 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 Guidelines § 7B1.3(f) provided for a consecutive term of imprisonment, J.A. 242a; see Sentencing Guidelines § 7B1.3(f) (2018).

The district court also stated that "[c]oncurrent time" would "not [be] justice" and would "not punish Mr. Leaks for violating supervision." J.A. 244a. The court required a within-Guidelines term of 12 months of imprisonment to be served, consistent with the Guidelines, "consecutive[ly] to the time being served in the two state cases," with no further term of supervised release to follow the reimprisonment. *Ibid.*; see J.A. 248a.

Leaks objected to the district court's "consideration of punishment" on the ground that Section 3583 "specifically omits" Section 3553(a)(2)(A) factors from considerations. J.A. 241a, 245a. The court acknowledged that

objection but did not alter the revocation term or its assessment of why that term was warranted. See J.A. 245a-246a. When Leaks raised a similar objection on appeal, the court of appeals affirmed based on circuit precedent. J.A. 249a-251a.

## SUMMARY OF ARGUMENT

The court of appeals correctly recognized that Section 3583(e)(3) *requires* a court to consider certain factors before revoking supervised release, but does not *foreclose* the court from considering other factors that are traditionally within the scope of a court's wide discretion. Such other factors include those in 18 U.S.C. 3553(a)(2)(A), which are not listed in Section 3583(e)(3), but inherently overlap with the factors that are. Section 3583(e)(3) does not mandate that a court do the impossible: consider the mandatory factors disentangled from the Section 3553(a)(2)(A) factors. Instead, Section 3583(e)(3) leaves unimpeded a court's authority to consider additional factors that are relevant and helpful to achieving a just result.

A. Courts have long had broad discretion in what they may consider at sentencing proceedings and proceedings to modify sentences—discretion that plainly applies here. And as this Court has repeatedly recognized, that broad authority is unlimited absent an express limitation. Section 3583(e)(3), however, contains no such limitation.

Section 3583(e)(3) authorizes a court 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)." 18 U.S.C. 3583(e). The text makes clear that the court *must* consider enumerated factors as a prerequisite to revocation. But it does not

*limit* a court's authority to consider other, unlisted factors, such as the factors set out in Section 3553(a)(2)(A).

If Congress had wanted to prohibit consideration of unlisted factors, it could have authorized courts to revoke supervised release "after considering *only* the [listed] factors." But Congress did not include such a prohibitory term in Section 3583(e)(3)—even though it did do so elsewhere in Section 3583. And this Court has repeatedly made clear that it will not read the word "only" into a statute when Congress has declined to include that term. Doing so here would be particularly unwarranted because it would create a disparity with another revocation provision, 18 U.S.C. 3583(g), which plainly does allow consideration of all Section 3553(a) factors.

Section 3583(e)(3)'s language also contrasts sharply with the language Congress has used to limit courts' authority in related contexts, both within and without Section 3583, such as "except that" clauses, language explicitly prohibiting consideration of certain factors, and clauses directing that the outcome fulfill some limited set of purposes. See, *e.g.*, 18 U.S.C. 3553(a), (b)(1) and (2); 18 U.S.C. 3563(b); 18 U.S.C. 3582(a); 18 U.S.C. 3583(f). Congress had numerous models for the type of limitation that petitioners would impose here; it did not adopt any of them, or any equivalently explicit indicator of preclusive intent.

Petitioners nonetheless assert that Congress meant to limit courts' discretion purely through negative implication. But petitioners cannot explain why Congress would be so oblique in a context in which wide discretion and express limits are the norm. In any event, they draw the wrong inference. It is reasonable to infer that

by directing a court to decide on revocation "after considering" the listed factors, a court may not decide the issue "before," or "without" considering those factors. But petitioners take a leap too far by insisting that, when a court has considered those factors, it automatically errs in considering other factors, too.

B. Construing Section 3583(e)(3) to forbid consideration of the factors in Section 3553(a)(2)(A)—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"—is particularly unwarranted because those factors are inherently intertwined with other Section 3553(a) factors that the court is required to consider. It is difficult, for instance, to see how a court can consider the Section 3553(a)(2)(B) factor of "afford[ing] adequate deterrence to criminal conduct" if it must put out of mind the similar Section 3553(a)(2)(A) factor of "promot[ing] respect for the law." Nor is it obvious how a court might consider the Section 3553(a)(1) factor of "the nature and circumstances of the offense," as it is required to do, if it must disregard the Section 3553(a)(2)(A) factor of "the seriousness of the offense."

Petitioners appear to accept (Br. 33) that the mandatory factors may "address much of what Section 3553(a)(2)(A) covers." But they posit (Br. 14) that Section 3583(e)(3) requires a court to "filter[]" its analysis through a limited set of "purposes." The statutory text, however, refers to "factors," not to "purposes," and Section 3583(e)(3) lacks the sort of purpose-filtering clause that Congress has used in related statutes. And on a practical level, experience illustrates that petitioners' suggested approach could, at best, only be administered

if it is reduced to a formalistic magic-words requirement, devoid of substantive meaning.

C. Petitioners' additional arguments are unsound. Petitioners invoke a 1983 Judiciary Committee report, but that report addressed an earlier version of Section 3583(e) that did not provide a mechanism for revoking supervised release and that does not reflect the intent of the 1986 Congress that enacted the revocation provision. And both the language of that report and the original text of Section 3583(e) illustrate that Congress listed particular factors to ensure that courts give adequate emphasis to each, not to prohibit courts from considering anything else.

Nor do passing references in this Court's prior decisions to Section 3583(c), the provision that governs the imposition of supervised release, shed light on the proper interpretation of Section 3583(e)(3). The questions presented in those prior decisions did not concern Section 3583(c) or supervised release, and the parties did not meaningfully join issue on the proper interpretation of Section 3583(c). In any event, even if the Section 3553(a)(2)(A) factors are never relevant to *imposing* supervised release under Section 3583(c), it does not follow that they are irrelevant to *revoking* supervised release and ordering reimprisonment under Section 3583(e)(3).

Petitioners' invocation of statutory purpose likewise conflates the different purposes of imposing a term of supervised release and revoking it when it is violated. The former is an attempt to facilitate an offender's reintegration with the community; the latter recognizes that the attempt has fallen short in one or more significant ways. To the extent that the initial purpose of

providing for supervised release continues when it is violated, Congress evidently took a moderate approach: requiring consideration of certain factors without precluding the consideration of others.

Finally, the constitutional-avoidance canon does not support superimposing petitioners' additional limitation on text that does not contain it. There is no sound basis to conclude that the Fifth and Sixth Amendments apply to Section 3583(e)(3) proceedings. And a different conclusion would implicate only whether a jury must sometimes determine that a supervised-release violation had occurred—not what factors a court may consider once a violation has been found.

## ARGUMENT

### THE INCORPORATION OF CERTAIN 18 U.S.C. 3553(a) FACTORS AS MANDATORY FOR SUPERVISED-RELEASE DECISIONS UNDER 18 U.S.C. 3583(e)(3) DOES NOT PRECLUDE DISCRETIONARY CONSIDERATION OF OTHER FACTORS

Section 3583(e)(3) lists factors that courts *must* consider before revoking supervised release. But nothing in its text purports to prohibit the additional consideration of other factors, including those listed in Section 3553(a)(2)(A). In contrast to neighboring provisions, where Congress expressly limited what a court is permitted to consider, or expressly limited a court's considerations to the purposes served by particular factors, Congress did no such thing in Section 3583(e). The overlap between the mandatory factors and the Section 3553(a)(2)(A) factors makes it particularly implausible that Congress was implicitly banning consideration of the latter: it is all but impossible for courts to consider the former while excising the latter, and to the extent such a regime might be administrable, it would amount

to an empty formality. This Court has been particularly reluctant "to read any implicit directive into * * * congressional silence" in the sentencing context. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). It should reject petitioners' request to do so here.

### A. Section 3583(e)(3)'s Text Requires Consideration Of Certain Factors Without Prohibiting Consideration Of Others

#### *1. Absent an express limitation, courts revoking supervised release would have broad discretion to consider any relevant factor*

Since the Founding, sentencing courts have been "entrusted with wide sentencing discretion." *Concepcion* v. *United States*, 597 U.S. 481, 490 (2022) (citation omitted). That "long and durable tradition" allows sentencing courts to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come." *Id.* at 491-492 (citations and internal quotation marks omitted).

The "unbroken tradition" of broad discretion "characterizes federal sentencing history as well." *Concepcion*, 597 U.S. at 492. Indeed, Congress has codified the background principle, directing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661.

A federal court's discretion is not limited to the initial imposition of a sentence, but also "carries forward to later proceedings that may modify an original sentence." *Concepcion*, 597 U.S. at 491. And petitioners do

not dispute that discretion likewise carries over to proceedings for the administration of a previously imposed sentence, such as revocation and reimprisonment for a supervised-release violation. Cf. *id.* at 492-493 (analogizing across sentence-related contexts).

In each of those contexts, a federal court's "discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence." *Concepcion*, 597 U.S. at 491. As this Court's decisions make clear, absent such a limitation, a court has broad authority to take into account any consideration it deems relevant. See, *e.g.*, *id.* at 499; *Dean* v. *United States*, 581 U.S. 62, 69 (2017); *Pepper* v. *United States*, 562 U.S. 476, 487-489 (2011).

***2. Section 3583(e)(3) sets out a list of required considerations without purporting to forbid others***

Nothing in the text of Section 3583(e) purports to limit the scope of a federal court's discretion with respect to a sentence. Instead, the provision's plain terms set forth a procedural protection for an offender by requiring consideration of certain factors in each case. But nothing in the text divests the district court of its discretion to also consider other factors.

a. Section 3583(e)(3) provides that if an offender has violated a condition of his supervised release, "[t]he court 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 [his] term of supervised release, and require [him] to serve in prison all or part of the term of supervised release." 18 U.S.C. 3583(e)(3). The provision thereby conditions revocation

and reimprisonment on the court's consideration of certain factors. But requiring consideration of those factors does not preclude consideration of others.

The "after considering" language imposes a procedural prerequisite on revocation and reimprisonment: the court cannot revoke supervised release or reimprison the offender until it has considered the listed factors. See, *e.g.*, *Oxford English Dictionary* (3d ed. Dec. 2024) (defining "after" as "[s]ubsequent to, following the interval of, at the conclusion of"). And because the listed factors do not include the factors in Section 3553(a)(2)(A)—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"—a court is not *obligated* to consider those particular factors before revoking supervised release. But nothing in the text *forbids* a court from exercising its traditional discretion to consider the Section 3553(a)(2)(A) factors—alongside the listed factors—if it so chooses.

b. Had Congress wanted to prohibit consideration of the Section 3553(a)(2)(A) factors, it could simply have instructed that "[t]he court may, after considering *only* 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), * * * revoke [an offender's] term of supervised release, and require [him] to serve in prison all or part of the term of supervised release." Congress did not do so, and there is no sound reason to "read an absent word into the statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004).

This Court has on multiple occasions expressly declined to read the word "only" into a statute, and thereby create a limitation that Congress did not itself enact. See *Marx* v. *General Revenue Corp.*, 568 U.S.

371, 384 (2013) (explaining that if Congress intended to "limit [the] court's discretion * * * it could have easily done so by using the word 'only' before setting forth the condition"); *Miller* v. *Youakim*, 440 U.S. 125, 136 (1979) (rejecting an interpretation that would read "only" into a statute that "does not use the word 'only'"). And here, Congress's repeated use of "only" elsewhere in Section 3583 underscores that, if it had intended to "restrict" the district court's discretion under Section 3583(e)(3), it "would have done so expressly." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The subsection that directly precedes Section 3583(e) states that a court "may order" certain conditions of supervised release, "provided, however[,] that a [certain restriction] shall be imposed *only* for a violation of a condition of supervised release in accordance with section 3583(e)(2) and *only* when facilities are available." 18 U.S.C. 3583(d) (emphasis added). Similarly, the paragraph of Section 3583(e) that directly follows Section 3583(e)(3), and was enacted only two years later, grants a court authority to order home confinement "*only* as an alternative to incarceration." 18 U.S.C. 3583(e)(4) (emphasis added); see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, Subtit. G, § 7321, 102 Stat. 4466; see also *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) ("[T]he implications of a statute may be altered by the implications of a later statute.").

This Court is "doubly careful to avoid" the "temptation" to "read into statutes words that aren't there" when "Congress has (as here) included the term in question elsewhere in the very same statutory provision." *Romag Fasteners, Inc.* v. *Fossil Grp., Inc.*, 590 U.S. 212, 215 (2020). And even more caution is warranted here, where Congress expressly framed the

court's authority—under which it "may" revoke and reimprison, 18 U.S.C. 3583(e)(3)—in discretionary language. Such language is inherently a poor foundation for an artificially constructed limitation. Cf. *Biden* v. *Texas*, 597 U.S. 785, 803 (2022) (explaining that if Congress intended to limit discretion "it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term 'may' "). And yet more caution is warranted because Congress's authorization invokes a tradition of "wide" sentencing discretion. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989).

c. Construing Section 3583(e)(3) to divest courts of their traditional discretion would also create a significant statutory anomaly. Certain types of supervised-release violations are governed not by Section 3583(e)(3) but instead by Section 3583(g), which directs that a court "*shall* revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3)" if a certain type of violation occurs. 18 U.S.C. 3583(g) (emphasis added). And Section 3583(g) does not itself identify any particular factors that a court must consider in determining the length of the required prison term.

The argument that petitioners make with respect to Section 3583(e)(3) is therefore not even possible with respect to Section 3583(g). Instead, reimprisonment under Section 3583(g) is presumably subject to the general rule in 18 U.S.C. 3582(a), which provides that a court, "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." 18 U.S.C. 3582(a). Under that rule, *all* of the Section 3553(a) factors are potentially relevant.

It would be highly anomalous to have different regimes for determining the length of prison terms under Sections 3583(e)(3) and 3583(g). The supervised-release violations that trigger mandatory reimprisonment under Section 3583(g)—possession of a controlled substance or firearm, and refusing or failing drug tests, 18 U.S.C. 3583(g)(1) to (4)—are not categorically more or less serious than the full set of violations covered by Section 3583(e)(3), which run the gamut from cooperating with DNA collection to first-degree murder, see 18 U.S.C. 3583(e)(3). And permitting consideration of the Section 3553(a)(2)(A) factors for one provision and not the other would be inexplicable.[1]

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[1] In each of petitioners' cases, the district courts appear to have been required to revoke the term of supervised release under Section 3583(g). In sentencing petitioner Esteras, the district court specifically invoked Section 3583(g)'s mandatory revocation provision. See J.A. 93a; 18 U.S.C. 3583(g)(2). The record in the cases of petitioners Jaimez and Leaks also appears to support mandatory revocation under Section 3583(g). See J.A. 176a-177a, 183a (Jaimez); 18 U.S.C. 3583(g)(1); J.A. 240-241 (Leaks); 18 U.S.C. 3583(g)(2). Because the government did not contend that Section 3583(g) governs the analysis of the appropriate factors in the court of appeals or in its brief in opposition, the government is not asking this Court to affirm on that basis. But the fact that the district courts were required in these very cases to revoke under Section 3583(g) illustrates the oddity of an interpretation that would render consideration of certain factors forbidden at a revocation hearing.

### *3. Section 3583(e)(3) contrasts sharply with provisions that do limit a court's traditional discretion in the sentencing context*

Reading in an implicit limit is "particularly inappropriate" because in other sentencing provisions, "Congress has shown that it knows how to direct sentencing practices in express terms." *Dean*, 581 U.S. at 70 (quoting *Kimbrough*, 552 U.S. at 103). Presumably because wide discretion is so ingrained in this context, Congress has repeatedly been explicit when it is limiting a court's presumptively broad authority. And here, Congress's silence on the matter leaves that authority intact.

a. In Section 3583 itself, Congress has used the formulation "except that" to indicate a limitation on a court's authority. For example, the home-confinement provision, 18 U.S.C. 3583(e)(4), allows a court to require home confinement during a supervised-release term "except that" it may not do so if it is also ordering imprisonment. Similarly, Section 3583(a) provides that when a criminal defendant is being sentenced, the sentencing court "may" include a term of supervised release "*except that* the court *shall*" include such a term where required by statute. 18 U.S.C. 3583(a) (emphasis added).

Indeed, Section 3583(e)(3) itself has an "except that" proviso—just not one that would apply to the issue here. Specifically, Section 3583(e)(3) authorizes a court to revoke supervised release and reimprison an offender who violates the conditions of that release, "except that" an offender whose term is revoked "may not be required to serve" more than a specified number of years that varies depending on the classification of the original offense. 18 U.S.C. 3583(e)(3). That qualification limiting the court's sentencing discretion relates only to the length of a reimprisonment term. It does not limit the court's traditional

discretion to consider relevant factors, even nonmandatory ones, in deciding whether revocation and reimprisonment are warranted in the first place.

b. As other provisions of the sentencing statutes illustrate, Congress has taken care to be explicit when it wants to limit the scope of considerations for a court's discretionary decision. In some provisions, Congress has specifically precluded particular considerations. Section 3582(a), for example, requires courts to "consider the factors set forth in section 3553(a) * * * , recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. 3582(a); see *Tapia* v. *United States*, 564 U.S. 319, 327 (2011); see also, *e.g.*, 18 U.S.C. 3553(f) (instructing that certain "[i]nformation disclosed by a defendant * * * may not be used to enhance the sentence of the defendant" in most circumstances); 18 U.S.C. 3559(c)(3)(A) (instructing that certain offenses "shall not serve as a basis for sentencing" in certain circumstances); cf. 18 U.S.C. 3553(b)(1) and (2) (instructing that courts deciding whether to vary from the Sentencing Guidelines can "consider only" certain materials); *United States* v. *Booker*, 543 U.S. 220, 245 (2005) (invalidating Section 3553(b)(1) and (2) limitations on constitutional grounds).

Another method that Congress has employed is to allow a court to take a sentence-related action only "to the extent that" it reflects a limited set of purposes. For example, Section 3583(d)—Section 3583(e)(3)'s neighbor—authorizes a court to impose certain conditions of supervised release "to the extent that such condition[s] * * * involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)."

18 U.S.C. 3583(d)(2); see, *e.g.*, 18 U.S.C. 3563(b) (authorizing court to impose "further conditions of a sentence of probation * * * to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2)").

Indeed, the very provision that Section 3583(e)(3) cross references—Section 3553(a)—itself contains limiting language that has no counterpart in Section 3583(e)(3). Section 3553(a) provides that when "impos[ing] a sentence" for a criminal conviction, that sentence must be "sufficient, but not greater than necessary, to comply with the purposes set forth in" Section 3553(a)(2). 18 U.S.C. 3553(a). In Section 3583(e), by contrast, Congress did not use language restricting a court's authority to revoke supervised release and to reimprison an offender to circumstances where that action serves particular sentencing purposes. Nor did it include any other sort of language that would cabin the court's traditional discretion, which relies on a court's ability to take all relevant information into account. It is therefore evident that Congress did not intend any such limitation.

***4. The negative-implication canon does not support petitioners***

In arguing to the contrary, petitioners primarily rely on the expressio unius canon, which provides that "one item of a commonly associated group or series excludes another left unmentioned," *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). That reliance is misplaced.

a. As a threshold matter, "[t]he force of any negative implication * * * depends on context," and both "background presumptions" and Congress's "use of explicit

language in other statutes" can "caution[] against inferring a limitation" that does not appear on the face of the statute. *Marx*, 568 U.S. at 381, 384. Here, both the background principle of wide discretion in the sentencing context and Congress's use of express limitations in other provisions overcome the force of the negative implication that petitioners would draw. See pp. 21-29, *supra*; *Kimbrough*, 552 U.S. at 103 ("Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms."); *Burns* v. *United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

b. More fundamentally, petitioners' expressio unius argument asks the Court to draw the wrong inference. It is reasonable to infer that by allowing a court to revoke supervised release "after considering" the listed factors, Section 3583(e)(3) forbids a court from revoking supervised release without first considering those listed factors. *Christensen* v. *Harris County*, 529 U.S. 576, 583 (2000) (recognizing that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (citation omitted). And it is similarly reasonable to infer that because Congress omitted Section 3553(a)(2)(A) from those listed factors, consideration of the Section 3553(a)(2)(A) factors is not itself mandatory (as it is in other provisions, see, *e.g.*, 18 U.S.C. 3553(a), 3572(a)).

But there is no basis to leap from those inferences to the inference that petitioners need: that consideration of Section 3553(a)(2)(A) factors is not only nonmanda-

tory, but wholly forbidden. Cf. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[T]hat an agency is not *required* to [engage in a particular analysis] does not mean that an agency is not *permitted* to do so."). Petitioners' negative-implication argument would have more force in the context of a provision that *authorized* certain considerations, such as one that said, "a court *may* consider 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)." In that case, the negative implication of "may not" consider other factors would be stronger. But that is not how Section 3583(e)(3) is worded.

c. For similar reasons, petitioners are mistaken in contending (Br. 19-23) that only their reading gives effect to the difference between Section 3583(e)(3) and the provisions governing the imposition of imprisonment, probation, and fines. Those provisions differ from Section 3583(e)(3) in their wording and in what they require, and they do not suggest that Section 3583(e)(3) forbids consideration of unlisted factors.

The provisions governing the imposition of imprisonment and probation require a court to "consider the factors set forth in section 3553(a) to the extent that they are applicable," 18 U.S.C. 3562(a), 3582(a). The overarching reference to all the Section 3553(a) factors (to the extent applicable) indicates that they all could be prerequisites to the sentencing determination. But that reference provides no support for petitioners' argument that listing fewer prerequisites inherently forecloses any other consideration.

The provision governing the imposition of fines, in turn, instructs that a court "shall consider" certain factors "in addition to the factors set forth in section 3553(a)," 18 U.S.C. 3572(a). There, consideration of all

Section 3553(a) factors is plainly mandatory; it would be error *not* to consider them. Section 3583(e)(3), however, does not specify that the unlisted factors must or must not be considered, thereby leaving the matter to the court's discretion.

### B. Overlap Of The Section 3553(a) Factors Precludes Treating Section 3583(e)'s List Of Mandatory Considerations As Exhaustive

Construing Section 3583(e) to forbid consideration of the factors listed in Section 3553(a)(2)(A)—"the need for the sentence imposed" (1) "to reflect the seriousness of the offense"; (2) "to promote respect for the law"; and (3) "to provide just punishment for the offense"—is particularly unwarranted given the overlap between the purportedly forbidden factors and the factors that Section 3583(e) expressly requires a court to consider. Attempting to truly excise Section 3553(a)(2)(A) factors is impossible, and any administrable effort to try would simply be form without substance.

#### *1. The Section 3553(a) factors inherently overlap*

The factors in Section 3553(a) are not compartmentalized, but are instead inextricably intertwined—making it impossible for a court to ignore the unlisted factors while considering the listed ones. The Section 3553(a)(2)(A) factor of "promot[ing] respect for the law," for example, is inherently quite broad and overlaps significantly with, *inter alia*, the Section 3553(a)(2)(B) factor of "afford[ing] adequate deterrence to criminal conduct." It is difficult to envision how a court could consider the latter, as Section 3583(e)(3) requires, without any consideration of the former.

The two offense-focused Section 3553(a)(2)(A) factors —"seriousness of the offense" and "just punishment for

the offense"—likewise overlap with the factors whose consideration Section 3583(e)(3) expressly requires.[2] The revocation of supervised release is part of the punishment for the original offense of conviction, see *Cornell Johnson* v. *United States*, 529 U.S. 694, 700-701 (2000), and a court can sensibly look back at that offense in deciding what to do when an offender violates the conditions of his supervised release. Indeed, the mandatory factors listed in Section 3583(e) require a court to do so.

Most obviously, one of the mandatory factors is "the nature and circumstances of the offense." 18 U.S.C. 3553(a)(1); see 18 U.S.C. 3583(e). That would naturally include such seriousness-related considerations as "the amount of harm done by the offense, whether a weapon was carried or used" and "whether there were any particular aggravating or mitigating circumstances." Senate Report 75 (listing typical considerations under Section 3553(a)(1)).

Other mandatory factors are the "history and characteristics of the" offender, 18 U.S.C. 3553(a)(1), "afford[ing] adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B), and "protect[ing] the public from further crimes," 18 U.S.C. 3553(a)(2)(C). Those likewise cannot sensibly be considered if a court is required to ignore the seriousness of an offender's conduct. See, *e.g.*, *United States* v. *Webb*, 738 F.3d 638, 641 (4th Cir.

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[2] The "offense" referred to in Section 3553(a) is the "offense" of conviction, rather than violation of a supervised-release condition. As the terminology in Section 3583 shows, Congress uses the term "offense" to refer to the offense of conviction and "violation" to refer to a violation of a supervised-release condition. See 18 U.S.C. 3583. And, as this Court has observed, violations of supervised release are not inherently "new offenses." *Cornell Johnson*, 529 U.S. at 700 (citation omitted); see *id.* at 699-701.

2013) (noting that the Section 3553(a) factors are "intertwined").

It would also be impossible for a court to comply with the requirement to consider the factors in Section 3553(a)(4)(B)—"the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994(a)(3)]"—in a manner that is completely sealed off from Section 3553(a)(2)(A). The Commission's policy statements look to both the severity of the supervised-release violation and (to a small degree) the seriousness of the original offense in recommending how to "sanction" the "breach of trust" that the violation entails. Sentencing Guidelines Ch. 7, Pt. A, § 3(b); see Sentencing Guidelines §§ 7B1.4(a) (recommended reimprisonment terms based on seriousness of violation), 7B1.4(a)(2) (differentiating revocation terms based on seriousness of original offense), 7B1.4 comment. (n.4) (similar); see also Sentencing Guidelines § 7B1.1 (grading violations by severity).[3]

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[3] Requiring consideration of the severity of a supervised-release violation is well within the Sentencing Commission's authority. Unlike other certain other types of authority conferred on the Commission under 28 U.S.C. 994, the authority conferred under Section 994(c)(3)—the source of authority referenced in Section 3553(b)(2)—is not expressly cabined in any way. See 18 U.S.C. 3553(a)(4)(B) (referencing 28 U.S.C. 994(c)(3)); compare 28 U.S.C. 994(c)(3), with, *e.g.*, 28 U.S.C. 994(e) and (k) (requiring the Commission to exclude certain considerations). Nor is there any constitutional infirmity in the Commission's approach, as this Court has expressly recognized that supervised-release revocation and reimprisonment can constitutionally be "sanctions" that are "part of" the sentence for the original offense of conviction. *Cornell Johnson*, 529 U.S. at 700-701.

***2. Petitioners err in suggesting that areas of overlap can simply be deemed out of bounds***

Petitioners appear to accept (Br. 33) that the factors whose consideration is required by Section 3583(e)(3) may "address much of what Section 3553(a)(2)(A) covers." See Pet. Br. 33-35. But they nonetheless suggest (*id.* at 14) that a court could "filter[]" its consideration of "all relevant information" under Section 3583(e)(3) "through only the purposes of sentencing" expressly listed in that provision. As they would have it (*id.* at 35), the Section 3553(a)(2)(A) factors collectively refer to "retributive punishment," any consideration of which is altogether "impermissible."

Petitioners' approach is neither consistent with the statutory language nor feasible in practice. Section 3583(e)(3) requires consideration of "the factors set forth in" the listed provisions of Section 3553. There is no sound principle of statutory interpretation that would read its text to (at least) *allow* full consideration of those "factors" (*e.g.*, "the seriousness of the offense," 18 U.S.C. 3553(a)(2)(A)) but to *forbid* consideration of information to the extent it is characterized as relevant to "retributive punishment," Pet. Br. 35. Nor does Section 3553(a)(2)(A) even use the term "retributive punishment"; that is simply petitioners' gloss.

Petitioners' reading is particularly untenable because, as noted above, Congress used express language to limit a court's sentencing authority to requirements that serve particular "purposes" reflected in Section 3553(a) factors. See, *e.g.*, 18 U.S.C. 3563(b) (authorizing conditions "to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section

3553(a)(2)"); 18 U.S.C. 3583(d)(2) (authorizing a condition "to the extent that [it] * * * involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)"); see pp. 28-29, *supra*. Indeed, Congress included such a limitation in Section 3553(a) itself. See 18 U.S.C. 3553(a) (requiring sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)"). But Congress did not do so in Section 3583(e)(3).

Petitioners' own proceedings illustrate the inherent amorphousness of the Section 3553(a) factors and the impossibility of the compartmentalization that petitioners envision. The court in Jaimez's case, for example, emphasized that the revocation term was "necessary * * * to make clear that [Jaimez has] got to do what the law and [t]he [c]ourt requires," which would teach others that "that's what's going to happen to them" in similar circumstances, thereby "protecting the community." J.A. 219a-220a. While Jaimez presumably would (or at least plausibly could) characterize that as impermissibly considering "respect for the law," 18 U.S.C. 3553(a)(2)(A), it could just as (if not more) easily be classified as permissibly considering "adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B), and the need "to protect the public" from petitioner, 18 U.S.C. 3553(a)(2)(C). Likewise, the district judge in Esteras's case "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": "[t]o neglect the one dishonors the other." J.A. 129.

Yet more examples of the inherent intertwinement can be found in cases involving other offenders who

have pressed petitioners' view of the law. Such offenders have argued, for example, that a court erred by considering that an offender had "demonstrated a lack of respect for the Court's orders" and "had a history of non-compliance with the supervised release conditions," on the ground that those points "substantially overlap with section 3553(a)(2)(A)'s instruction 'to promote respect for the law.'" *United States* v. *Vargas-Dávila*, 649 F.3d 129, 131-132 (1st Cir. 2011) (brackets omitted); see, *e.g.*, *United States* v. *Williams*, 443 F.3d 35, 44, 47 (2d Cir. 2006) (argument that court erred by considering seriousness of supervised-release violation).

Even the experience of the courts of appeals that have adopted petitioners' approach reveals its inherent flaws. One court of appeals, for example has "recognize[d] that the difference between sanctioning a supervised release violator for breach of trust and punishing him in order to promote respect for the law is subtle indeed," yet deemed the first required and the second forbidden when "intertwined with the concept of punishment." *United States* v. *Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006); see *United States* v. *Simtob*, 485 F.3d 1058, 1062 (9th Cir. 2007) (explaining that "seriousness of the offense underlying the revocation" may not be "a focal point of the inquiry," but "may be considered to a lesser degree as part of the criminal history of the violator"). Such distinctions, however, are in the eye of the beholder; as such, they are neither objective nor predictable.

The experience of the courts of appeals also illustrates that petitioners' approach could only be administered as a substance-free reverse magic-words requirement. It would regulate not the substance of a court's decisional process, but instead how the court describes

that process. A court could not refer to certain considerations using the particular terminology of Section 3553(a)(2)(A), but could proceed with a substantively identical decision process couched in slightly different language. See *United States* v. *Booker*, 63 F.4th 1254, 1261-1262 (10th Cir. 2023) (recognizing that "violation of the terms of supervised release may be considered" but criticizing district court for "direct quotation to [Section 3553(a)(2)(A)] factors" and determining that "the quotation [of 3553(a)(2)(A)] itself was error"); *United States* v. *Sanchez*, 900 F.3d 678, 685 (5th Cir. 2018) (taking the view that it would be impermissible for the district court to have a "retributive purpose" but declining to "assume that the district court in fact had such a purpose in mind—at least where the only purposes the district court actually mentioned were permissible ones").

Thus, to the extent that something like petitioners' approach could ever be implemented, it would only be with respect to form, not substance. There is little point in burdening the judicial system with that, and Congress did not require any such regime.

### C. Petitioners' Remaining Arguments Are Unsound

Lacking a sound foothold in the statutory text, petitioners look to legislative history, prior decisions of this Court addressing different issues, asserted statutory purposes, and constitutional-avoidance principles. None provides meaningful support for their position.

#### *1. The legislative history does not indicate that Congress desired or expected petitioners' approach*

Petitioners' reliance (Br. 23-31) on legislative history is misplaced. Petitioners principally focus (Br. 24-28) on the 1983 Judiciary Committee report accompanying the

bill that became the Sentencing Reform Act. But that Act did not even include the revocation provision at issue here.

The original Act "did not provide for revocation proceedings for violation of a condition of supervised release"; instead, it treated a "violation of a condition of a term of supervised release" "as contempt of court" under Section 401(3). Senate Report 125; see Sentencing Reform Act § 212(a)(2), 98 Stat. 1999-2000. The 1984 Congress's cross-reference to a provision that explicitly granted courts the "power to punish" a violation of a judicial order, 18 U.S.C. 401, cannot sensibly be understood as a rejection of Section 3553(a)(2)(A)'s so-called "retribution factors," *e.g.*, Pet. Br. 25. Thus, to whatever extent the intent of the 1984 Congress is relevant to the interpretation of Section 3583(e)(3), which was adopted by the 1986 Congress, it would cut strongly against petitioners' construction.

Petitioners would nonetheless have the Court infer the meaning of Section 3583(e)(3) from the committee report's discussion of what became 18 U.S.C. 3583(c). But even that does not support them. Section 3583(c) cross-references the same set of factors that Section 3583(e) does, but with different language and in a different context. Specifically, Section 3583(c) identifies those factors as ones that a court "shall consider" when "determining whether to include a term of supervised release" in, for example, the sentence that follows a criminal offense. *Ibid.*; see, *e.g.*, 18 U.S.C. 3583(a). And in the report cited by petitioners, the Committee described Section 3583(c) as "specif[ying] the factors that the judge is required to consider" in that context. Senate Report 124.

That description, however, is wholly consistent with the potential for permissive consideration of other factors. See Senate Report 119 (explaining that "the listing of the

factors to be considered serves to focus attention on the specific purposes of the sentencing process and to assure that adequate emphasis is given to each"). Cf. *id.* at 142 (noting that another provision "listing factors" "does not intend to restrict or limit the Bureau [of Prisons] in the exercise of its existing discretion * * * but intends simply to set forth * * * appropriate factors that the Bureau should consider").

Petitioners also attempt to draw support from the Committee's statements that "the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release," and that "the primary goal of such a term" should be "to ease the defendant's transition into the community" following a prison sentence. Senate Report 124. But those statements speak to the reasons for requiring a term of supervised release in the first place (the subject of Section 3583(c))—not the reasons for revoking that term and reimprisoning the offender for violating the conditions of that release (the subject of Section 3583(e)(3)).

The Committee's views about the purposes of *imposing* a term of supervised release—a period of community supervision outside of prison—provide little insight into a later Congress's purposes with respect to *revoking* a term of supervised release—requiring the offender to return to incarceration. While the former provides "a form of postconfinement monitoring" that "facilitate[s] a 'transition to community life,'" *Mont* v. *United States*, 587 U.S. 514, 523 (2019) (quoting *Cornell Johnson*, 529 U.S. at 697), the latter sanctions the

breach of the Court's trust entailed by a violation, see p. 34, *supra*.[4]

Aside from the 1983 report, petitioners note (Br. 30-31) that, since enacting Section 3583(c), Congress has amended Section 3583 in other ways but has not added the Section 3553(a)(2)(A) factors to Section 3583(e)(3)'s list. But as usual with "Congressional inaction," "several equally tenable inferences may be drawn." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (citation and internal quotation marks omitted). Among other things, subsequent Congresses might simply not have viewed the Section 3553(a)(2)(A) factors as critical enough to be mandatory in every case, or might have been comfortable leaving the precise details of the procedure to the Sentencing Commission. But whatever the case, the text of Section 3583(e)(3) does not itself forbid consideration of the Section 3553(a)(2)(A) factors—and subsequent inaction by Congress cannot change that fact.

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[4] Petitioners also cite the Committee's description of a term of supervised release as "very similar to a term of probation, except that it follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment." Senate Report 125. That description suggests that the Committee's view was that when a term of imprisonment and a term of supervised release are imposed at the initial sentencing, the term of imprisonment should itself be of sufficient length to punish and incapacitate. See *id.* at 119. The description does not, however, speak to the purposes of revocation and imprisonment following revocation, which was not authorized at the time of the Committee's report.

***2. No prior decision of this Court decides the question presented***

Contrary to petitioners' suggestion (see Br. 17-18; see also Br. 21), passing references to Section 3583(c) in previous decisions of this Court do not shed any substantial light on the interpretation of Section 3583(e)(3) in this case. As noted above, Section 3583(c) cross-references the same list of factors as Section 3583(e)(3), but in the distinct context of providing *for* a term of supervised release (not revocation and reimprisonment), and with different wording ("shall consider" rather than "after considering"). And the questions presented in the cited decisions did not even directly concern Section 3583(c)—let alone Section 3583(e)(3).

In *Tapia* v. *United States*, *supra*, the Court held that Section 3582(a), which (*inter alia*) requires a court imposing a term of imprisonment to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," precludes a court from increasing the length of a prison term in the hope that it will make a criminal defendant eligible for a particular rehabilitative program. See 564 U.S. at 322, 327, 335. In describing the statutory backdrop, the Court observed that "a particular [sentencing] purpose may apply differently, or even not at all, depending on the kind of sentence under consideration." *Id.* at 326. "For example," the Court continued, "a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release. See § 3583(c)." *Ibid.*

Later, in *Concepcion* v. *United States*, *supra*, the Court held that a court could, in its discretion, consider certain factors in the context of adjudicating requests to reduce a final sentence under a special mechanism

adopted in the First Step Act of 2018. See 597 U.S. at 486-487. The Court briefly touched on the landscape of sentencing law and stated, citing *Tapia*, that "in determining whether to include a term of supervised release, and the length of any such term, Congress has expressly precluded district courts from considering the need for retribution. See § 3583(c)." *Id.* at 494. As in *Tapia*, the specific issue in the case did not concern Section 3583(c) itself—or even supervised release more generally—and the Court did not spend more than a sentence on its description of Section 3583(c).

The Court's prior descriptions of Section 3583(c) in setting forth the statutory background in cases that did not implicate that provision or involve supervised release should not be determinative here. See *Campos-Chaves* v. *Garland*, 602 U.S. 447, 464 (2024) (declining to rely on language in a prior decision because "[t]he meaning of [8 U.S.C.] 1229(a)(2) was not at issue in [the prior decision]" and any discussion of Section 1229(a)(2) accordingly "was mere dicta"); see also *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."). That is particularly so when the issue was not a subject of focused briefing in the prior cases.[5]

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[5] The characterization of Section 3583(c) in *Tapia* first appeared in the brief of the Court-appointed amicus. Amicus Br. at 33-34, *Tapia*, *supra* (No. 10-5400). The petitioner did not address it in the reply brief that she filed in response to the amicus's brief. Pet. Reply Br. at 1-27, *Tapia*, *supra* (No. 10-5400). The government, as respondent supporting petitioner, accepted the amicus's characterization but distinguished the provision at issue in *Tapia* from Section 3583(c) in other respects. U.S. Reply Br. at 12-13, *Tapia*, *supra* (No. 10-5400). And in *Concepcion*, the provision was mentioned only once, in a single sentence, in the petitioner's opening brief. See Pet.

In any event, the provisions have different wording ("shall consider" versus "after considering"), and even if the Section 3553(a)(2)(A) factors are never relevant in deciding whether to *include* a term of supervised release in the original criminal sentence, it does not follow that they are irrelevant to *revoking* that term of supervised release and requiring reimprisonment. In the latter context, it may make sense for a court to start by considering the reasons why supervised release might have originally been imposed before addressing whether to revoke it—as Section 3583(e)(3) requires. But particularly with respect to the court's discretion to reimprison the offender following the supervised-release violation, other considerations could naturally come into play.

Indeed, as noted above, the general rule, specified in 18 U.S.C. 3582(a), is that a term of imprisonment should be informed by consideration of *all* Section 3553(a) factors, except for rehabilitation, "to the extent that they are applicable." *Ibid.* Petitioners' approach, under which a court must try to exclude all considerations that might plausibly be characterized as within the purview of Section 3553(a)(2)(A), would therefore be a sharp departure from the normal procedures regarding imprisonment. There is nothing in *Tapia*, *Concepcion*, or any other precedent that would require such an approach.

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Br. at 19, *Concepcion*, *supra* (No. 20-1650). Meanwhile, both before and after *Tapia* and *Concepcion*, the government has adhered to the interpretation of Section 3583(e)(3) that it is maintaining in this Court. See Br. in Opp. 15-20 (defending district court's position and citing examples of pre-*Tapia* cases raising the question presented in which this Court denied review); see also, *e.g.*, Br. in Opp. at 7-11, *Lewis* v. *United States*, 555 U.S. 813 (No. 07-1295).

### *3. Petitioners' statutory-purpose arguments are misconceived*

Petitioners' assertions about the purposes of the sentencing scheme likewise do not provide a sound basis for adopting their atextual interpretation. Petitioners principally claim that retribution is not an appropriate consideration in the context of supervised-release revocations because, in their view, supervised release "is a forward-looking project." Pet. Br. 35. But that claim is untenable.

To the extent that "Congress intended supervised release to assist individuals in their transition to community life," such "rehabilitative ends" are "distinct from those served by incarceration." *United States* v. *Roy Lee Johnson*, 529 U.S. 53, 59 (2000). And incarceration, for offenders unwilling to comply with the terms of their supervised release, is a subject of Section 3583(e)(3). That provision addresses the unfortunate end, rather than the hopeful anticipation, of a supervised-release term.

Indeed, petitioners' blinkered view of the purposes of supervised-release revocation cannot be reconciled with the mandatory revocation provision, 18 U.S.C. 3583(g). If revocation of supervised release were exclusively a "forward-looking project," Pet. Br. 35, Section 3583(g)'s omission of any reference to—let alone preclusion of—a court's consideration of the Section 3553(a)(2)(A) factors would be difficult to explain.

In any event, even if the purposes underlying supervised-release revocation and reimprisonment were solely forward-looking, "no law 'pursues its purposes at all costs.'" *Luna Perez* v. *Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023) (brackets and ellipsis omitted) (quoting *Henson* v. *Santander Consumer USA Inc.*, 582

U.S. 79, 89 (2017)). And Congress reasonably furthered those purposes here with a lighter hand, by requiring consideration of forward-looking factors in each case, rather than with a heavier one, by altogether prohibiting consideration of backward-looking factors.

#### *4. Constitutional avoidance principles do not require petitioners' reading*

Petitioners briefly suggest (Br. 31-32) that the canon of constitutional-avoidance favors their approach, on the theory that permitting courts to consider the Section 3553(a)(2)(A) factors in the revocation context would raise "constitutional questions" under the Fifth and Sixth Amendments because a revocation hearing is conducted by a judge rather than a jury and because the violative conduct can, in some cases, be separately charged as a criminal offense. That suggestion is mistaken.

As a threshold matter, the better view is that the Fifth and Sixth Amendments do not apply to Section 3583(e)(3). That conclusion follows from *Morrissey* v. *Brewer*, 408 U.S. 471 (1972)—the most analogous precedent of this Court—which declined to consider parole revocation part of a criminal prosecution for constitutional purposes. *Id.* at 480. And it is far from clear why the Fifth and Sixth Amendments would apply in this context. See *United States* v. *Haymond*, 588 U.S. 634, 669-675 (2019) (Alito, J., dissenting) (suggesting that the Fifth and Sixth Amendments do not apply); see also *id.* at 658 (Breyer, J., concurring in the judgment) (differentiating Section 3583(e)(3) from supervised-release provision deemed unconstitutional); *id.* at 652 n.7, 655-656 (2019) (plurality opinion) (declining to address the constitutionality of Section 3583(e)(3)).

In any event, any constitutional problem that could exist would be with the absence of factfinding and a jury trial regarding the occurrence of the violation—not with the consideration of the Section 3553(a)(2)(A) factors in determining how to sanction the violation. If, for example, petitioners' violations had been found by a jury beyond a reasonable doubt, petitioners would have no viable Fifth or Sixth Amendment challenge to the court's consideration of the Section 3553(a)(2)(A) factors in deciding whether to revoke their supervised release and reimprison them. The Fifth and Sixth Amendments therefore provide no plausible basis for adopting the atextual interpretation of Section 3583(e)(3) that petitioners propose.[6]

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[6] Petitioners' passing suggestion (Br. 31) of a potential double-jeopardy problem if a supervised release violation is subsequently prosecuted is even more mistaken. This Court has already recognized that no double-jeopardy problem arises when a violation of supervised release is subsequently criminally prosecuted because "postrevocation penalties" are "attribute[d] * * * to the original conviction." *Cornell Johnson*, 529 U.S. at 701; see *id.* at 700-701; see also 18 U.S.C. 3583(e)(3) (limiting the consequences of a supervised release violation by the severity of the original crime of conviction); *Haymond*, 588 U.S. at 658 (Breyer, J., concurring in the judgment); Sentencing Guidelines Ch. 7, Pt. B, intro. comment. ("prescrib[ing] penalties only for the violation of the judicial order imposing supervision" rather than "the criminal charge itself").

## CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2025

# APPENDIX

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## APPENDIX

1. 18 U.S.C. 3553(a) provides:

**Imposition of a sentence**

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

2. 18 U.S.C. 3562(a) provides:

**Imposition of a sentence of probation**

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

3. 18 U.S.C. 3572(a) provides:

**Imposition of a sentence of fine and related matters**

(a) FACTORS TO BE CONSIDERED.—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

(1) the defendant's income, earning capacity, and financial resources;

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[1] So in original. The period probably should be a semicolon.

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

4. 18 U.S.C. 3582(a) provides:

**Imposition of a sentence of imprisonment**

(a) 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 im-

prisonment 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. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

5. 18 U.S.C. 3583 provides in pertinent part:

**Inclusion of a term of supervised release after imprisonment**

* * * * *

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider 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).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release

for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the

Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he

be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION.—The court may, 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)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modifi-

cation of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

* * * * *

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

* * * * *