No. 23-7483

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Congress deliberately chose to omit Section 3553(a)(2)(A) from Section 3583(e)'s list of factors for courts to consider when terminating, modifying, or revoking supervised release. Under the Government's telling, those factors are nevertheless permissible to consider; in fact, it is impossible not to, and Congress had no apparent reason for choosing to omit Section 3553(a)(2)(A) from the list.

There was a reason: Congress omitted factors that it intended to preclude. That was the Government's previous position, which reflects a traditional rule of statutory construction: *expressio unius est exclusio alterius*. The Government spends much of its brief arguing that there are other ways to preclude relying on certain factors, such as by using the word "only." But those methods are not necessary when the text is otherwise clear, as it is here.

Congress precluded courts from relying on Section 3553(a)(2)(A)'s retribution factors to keep retributive punishment out of supervised-release considerations, both when courts impose supervised release and when they terminate, modify, or revoke it.[1] That is consistent with the text of Section 3583(c) and (e), the textual differences between Section 3583 and neighboring statutes, and the

1. The Government claims that "retributive punishment" is "simply petitioners' gloss" on Section 3553(a)(2)(A). Gov't Br. at 35. Not so. It reflects how both this Court and the Senate Report have described Section 3553(a)(2)(A). *See Tapia v. United States*, 564 U.S. 319, 326 (2011) (noting that "retribution" is "the first purpose listed in § 3553(a)(2)"); S. Rep. No. 98-225, at 75 (1983) (explaining that the "first purpose listed" in Section 3553(a)(2) is "essentially the 'just deserts' concept").

history of the Sentencing Reform Act. In particular, it reflects the textual differences between the statutes governing probation and governing supervised release, consistent with the different histories and structures of those provisions.

The Government's contrary approach is inconsistent with the text and the history of the statute. It is also internally inconsistent, claiming that precluding omitted factors is not feasible but also that Congress did so elsewhere. And it introduces intractable interpretive problems, assigning different meanings to provisions with the same listed factors (Sections 3583(c) and (e)) but the same meaning to provisions with different listed factors (Sections 3565(a) and 3583(e)).

Congress's deliberate choice to preclude relying on Section 3553(a)(2)(A)'s retribution factors was not a semantic formality. Congress took a different approach to imposing and to terminating, modifying, and revoking supervised release than it did with all other federal sentencing options. Following the text as written is a practicable framework that implements Congress's substantive design for supervised release.

I. The Government's approach would render meaningless Congress's deliberate choice to exclude Section 3553(a)(2)(A) from Section 3583(e)'s list of factors.

Congress made a deliberate choice to omit Section 3553(a)(2)(A) from Section 3583(e)'s list of factors, and that choice was not meaningless. It precludes courts from considering the (a)(2)(A) factors when terminating, modifying, or revoking supervised release.

The Government contrasts Section 3583(e) with several other provisions, but the key comparison is with 18 U.S.C. § 3565(a), which applies when courts modify or revoke probation. The two provisions use identical language except for different listed factors. *Compare* 18 U.S.C. § 3565(a) (permitting a court to modify or revoke probation "after considering the factors set forth in section 3553(a) to the extent that they are applicable"), *with* 18 U.S.C. § 3583(e) (permitting a court to modify or 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)"). The only interpretation that gives effect to the textual difference between the statutes is that Section 3583(e) precludes courts from relying on the (a)(2)(A) factors. Under the Government's interpretation, the two provisions would mean the same thing—consider any factors to the extent that they apply—and Congress's decision to omit Section 3553(a)(2)(A) in Section 3583(e) would be meaningless. *See* Pet. Br. at 13, 21-22. The Government's brief does not mention Section 3565(a).

The negative-implication canon, *expressio unius est exclusio alterius*, is strongest when text is included in one statute but omitted from a neighbor. *Bittner v. United States*, 598 U.S. 85, 94 (2023). It is even stronger when the neighboring statutes use otherwise-identical language. And it gives effect to Congress's deliberate choice to exclude Section 3553(a)(2)(A) from the list in Section 3583(e).

The Government's approach also would make the omission in Section 3583(e) meaningless in another way. Although the Government says the omission means that the listed factors are mandatory and the Section 3553(a)(2)(A)

factors are permissive, Gov't Br. at 16-17, it also says that the factors "inherently overlap," *id.* at 16, and further that it is "all but impossible," *id.* at 20, and not "feasible," *id.* at 35, to consider the listed factors without considering the (a)(2)(A) factors. Thus, according to the Government, Section 3583(e) permits courts to consider the (a)(2)(A) factors while mandating the rest, but it is impossible to consider the rest without considering the (a)(2)(A) factors, so a statute in which Congress deliberately chose to omit Section 3553(a)(2)(A) actually mandates considering Section 3553(a)(2)(A).

Congress's decision to omit Section 3553(a)(2)(A) was not meaningless. It precludes courts from considering Section 3553(a)(2)(A)'s retribution factors when terminating, modifying, or revoking supervised release.

II. The Government's approach creates conflicts with other provisions of the Sentencing Reform Act that the plain text avoids.

The Government claims that interpreting Section 3583(e) to preclude relying on the Section 3553(a)(2)(A) factors would conflict with other provisions of the SRA. That is not accurate. The Government's approach, not petitioners', would create new interpretive problems, including reading identical text in the same provision to mean different things.

a. The Government argues that Congress could have used the word "only" or similar language to indicate that the omitted factor was precluded. Gov't Br. at 23. True enough. Congress also could have done what it did here—used the "ancient maxim" of *expressio unius est exclusio*

alterius, *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974), to convey the same meaning. Using additional limiting language was not necessary, particularly given the close textual similarities between Sections 3565(a) and 3583(e).

The Government asserts that, because Congress used the word "only" or other limiting language in unrelated contexts elsewhere in Section 3583, Congress could not have meant to preclude relying on Section 3553(a)(2)(A) without using the word "only" in Section 3583(e). Gov't Br. at 24, 27-29. That conclusion does not follow. There are several provisions throughout the SRA where Congress did not use "only" but indisputably limited court actions to what is stated. Section 3583(e) itself states that a court may terminate supervised release, extend or modify it, revoke it, or impose home confinement. *See* 18 U.S.C. § 3583(e). It does not say that a court may do "only" those things, but the same principle—the negative-implication canon—dictates that the listed actions are the only options available, and not, say, imposing a fine. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (noting that the negative-implication canon has "force" when "the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence"). Similarly, Section 3583(e)(3) states that a court may revoke supervised release if it finds by a preponderance of the evidence that the defendant violated a condition of supervised release. *See* 18 U.S.C. § 3583(e). It does not say "only," but Congress's meaning again is clear: a court may not revoke supervised release when it does not find that a person violated a condition, and it may not apply a different burden of proof. Congress used "only"

when it was necessary to do so, as in Section 3583(d) when specifying the limited circumstances under which intermittent confinement could be imposed. *See* 18 U.S.C. § 3583(d) (discussing 18 U.S.C. § 3563(b)(10)). Congress did not when its meaning was otherwise clear, as when it omitted Section 3553(a)(2)(A) from the lists in Section 3583(c), (d), and (e).

Even the Government recognizes that the negative-implication canon still applies in Section 3583(e). It argues that petitioners ask the Court to make the "wrong inference," though, because the canon applies to "after considering" but not to the listed and omitted factors. Gov't Br. at 30. There is no apparent reason for this distinction, and again the Government ignores the key comparison to Section 3565(a). Regardless, this is yet another provision in Section 3583 that does not use the word "only," yet Congress's meaning is apparent.

b. The Government claims that petitioners' approach creates an "anomaly" with Section 3583(g) that its approach does not. Gov't Br. at 25-26. Not so. First, the better reading of 3583(g) is that it sets forth situations where revocation under Section 3583(e)(3) is mandatory, not that it is wholly separate from (e)(3). Section 3583(e) includes not only what factors to consider in revocation proceedings, but also what procedures to use and what burden of proof to apply. *See* 18 U.S.C. § 3583(e)(3). Section 3583(g) does not contain any of this. *See* 18 U.S.C. § 3583(g). If Section 3583(g) were seen as an independent revocation provision, separate from Section 3583(e), it would lack procedures to implement it and a burden of proof, and it would be the only sentence in the SRA (along with the equivalent probation provision, 18 U.S.C. § 3565(b)) for

which Congress did not specify what sentencing factors to apply. *Cf.* 18 U.S.C. § 3562(a) (specifying factors to apply when imposing probation); 18 U.S.C. § 3565(a) (modifying or revoking probation); 18 U.S.C. § 3572(a) (imposing fine); 18 U.S.C. § 3582(a) (imposing prison); 18 U.S.C. § 3583(c) (imposing supervised release); 18 U.S.C. § 3583(e) (modifying or revoking supervised release). Understanding Section 3583(g) as specifying situations where revocation under Section 3583(e) is mandatory, there is no anomaly.

Even if the Government were correct, though, its approach would not avoid the anomaly that it says exists. The Government claims that it would be "inexplicable" for Congress to preclude considering Section 3553(a)(2)(A)'s retribution factors in Section 3583(e)(3) revocations but not in Section 3583(g) revocations. Gov't Br. at 26. But it is just as inexplicable that Congress would merely permit considering Section 3553(a)(2)(A)'s retribution factors in Section 3583(e) revocations but make those factors mandatory in Section 3583(g) revocations.

Section 3583(g) reflects Congress's judgment that certain violations require court intervention via revocation, though perhaps for as short as one day in custody before returning to supervised release. *See* 18 U.S.C. § 3583(g). It does not alter what Congress instructed when it chose to omit Section 3553(a)(2)(A) from Section 3583(e)'s list of factors to consider when terminating, modifying, or revoking supervised release.

c. The Government's approach would create additional interpretive problems. The Government suggests that the Court could interpret Section 3583(c)

and (e) to mean different things, repeatedly noting that the two subsections have "different wording ('shall consider' versus 'after considering')." Gov't Br. at 42, 44. But the two provisions use the same listed factors: "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)," omitting Section 3553(a)(2)(A). 18 U.S.C. §§ 3583(c), (e). Thus, the Government's interpretation would create a difference between Sections 3583(c) and (e), even though those provisions use the same listed factors, in addition to erasing the textual difference between Sections 3565(a) and 3583(e), even though those provisions use different listed factors. *See supra* Section I.

The Government's claimed difference between Sections 3583(c) and (e) would create an additional problem: although a court could not impose supervised release based on Section 3553(a)(2)(A)'s retribution factors, it could extend the term based on those factors even if nothing else changed. Note that, unlike before revoking supervised release, Section 3583(e)(2) does not require a triggering event before a court extends a term of supervised release—it requires only that the court consider the listed factors. *See* 18 U.S.C. § 3583(e)(2). Thus, if Section 3583(c) precluded considering the Section 3553(a)(2)(A) factors but Section 3583(e) permitted it, a court could rely on only the listed factors when imposing supervised release and determining the length of the term, then at any time later extend the term based on the court's view that the Section 3553(a)(2)(A) factors warranted an extended term as punishment that the court initially could not consider.

The better view is that Sections 3583(c) and (e) both preclude considering Section 3553(a)(2)(A)'s retribution factors, because the two subsections list the same factors

to consider and omit the same factors to preclude. *See* Pet. Br. at 17-19, 20-22. In the context of Section 3583, the difference between "shall consider" in Section 3583(c) and "after considering" in Section 3583(e) is what the listed factors apply to, not the substance. Congress used "after considering" to apply the listed factors to the different possible court actions that follow in Section 3583(e), the same as if it instead had listed the factors in each of the four subsections. *Cf. Pulsifer v. United States*, 601 U.S. 124, 137 (2024) ("Congress, we recognize, just opted to draft more concisely.").

Understanding the identical lists in Sections 3583(c) and (e) to have the same meaning reveals additional problems with the Government's approach. First, just as Sections 3565(a) and 3583(e) use identical language except for different listed factors governing revoking probation and revoking supervised release, so do Sections 3562(a) and 3583(c) use identical language except for different listed factors governing imposing probation and imposing supervised release. *Compare* 18 U.S.C. § 3562(a) ("shall consider the factors set forth in section 3553(a) to the extent that they are applicable"), *with* 18 U.S.C. § 3583(c) ("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)"). Thus, just as the Government's interpretation would erase the textual differences between Sections 3565(a) and 3583(e), *see supra* Section I, so too would it erase the textual differences between Sections 3562(a) and 3583(c).

Second, because their identical lists of factors carry the same meaning, the history behind Section 3583(c) is equally informative in interpreting Section 3583(e). The Government argues that those authorities do not matter

because, in its view, revocation under Section 3583(e) is different from imposition under Section 3583(c). *See* Gov't Br. at 19, 40. Recognizing that the lists in Sections 3583(c) and (e) have the same meaning, though, that argument collapses.

III. The Government's approach is inconsistent with the history of the Sentencing Reform Act.

The SRA's history further bolsters petitioners' position. Congress created supervised release to encourage rehabilitation and supervise an offender's transition back into society, following a prison term that previously fulfilled the need for retributive punishment. It thus precluded courts from considering Section 3553(a)(2)(A)'s retribution factors when imposing supervised release and when terminating or modifying supervised release, by using the same listed factors in the statutory provision governing each. Importantly, Congress created supervised release to be different from probation, which could be imposed as a complete sentence on its own and for which Congress included Section 3553(a)(2)(A) in the list of factors to consider. Congress made a deliberate choice to use different text in the statutes governing probation and governing supervised release, and those textual differences reflected Congress's different goals. *See* Pet. Br. at 24-28.

The Government contorts the SRA's history to claim that it supports a different view. It asserts that the Senate Report's discussion of Section 3583(c) "is wholly consistent with the potential for permissive consideration of other factors." Gov't Br. at 39. But it ignores the clearest statement on the issue: "The term of supervised release

is 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." S. Rep. No. 98-225, at 125 (1983) (emphasis added). The Government shifts to claim that the Report's discussion of Section 3583(c) provides "little insight" into the interpretation of Section 3583(e). Gov't Br. at 40. But the identical lists of factors in Sections 3583(c) and (e) have the same meaning, *see supra* Section II.c, as the Senate Report expressly states, *see* S. Rep. No. 98-225, at 124 (noting that Section 3583(e) directs the court to "consider[] the same factors considered in the original imposition of a term of supervised release").

The Government says that the Court should ignore the original SRA and look instead to the intent of the 1986 Congress, which added Section 3583(e)(3)'s revocation provision. *See* Gov't Br. at 19. But the 1986 Congress nested the new revocation provision under the previously enacted Section 3583(e), without altering Section 3583(e)'s list of factors to consider. The Government offers nothing, textual or otherwise, to suggest that the 1986 amendment altered the meaning of the unaltered lists of factors in Sections 3583(c) and (e) as enacted in the SRA.

IV. *Tapia v. United States* supports petitioners.

This Court's decision in *Tapia v. United States*, 564 U.S. 319 (2011), also supports petitioners' interpretation of Section 3583(e). After describing the four purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—as set forth in Section 3553(a)(2), the *Tapia* Court observed that the SRA "provides additional

guidance" about how those factors apply to different sentencing options. *Id.* at 325-26. "These provisions make clear that a particular purpose may apply differently, or not at all, depending on the kind of sentence under consideration. For example, 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)." *Id.* at 326 (emphasis in original)). Because Sections 3583(c) and (e) contain the same listed factors, the same conclusion follows for Section 3583(e). *See* Pet. Br. at 17-19, 20-22; *supra* Section II.c.

The *Tapia* briefing provides further support. The Government itself stated: "Section 3583(c) explicitly lists each Section 3553(a) factor that courts must consider and omits the factors whose consideration Congress intended to preclude. See 18 U.S.C. 3583(c)." Reply Brief for United States, *Tapia v. United States*, 564 U.S. 319 (2011) (No. 10-5400), 2011 U.S. S. Ct. Briefs LEXIS 451, *20. That reflects a straightforward application of the negative-implication canon. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 111 (2012) ("[T]he negative-implication canon is so intuitive that courts often apply it correctly without calling it by name.").

The Government now claims that it merely "accepted the amicus's characterization" of Section 3583(c). Gov't Br. at 43 n.5. It did more than that. At issue in *Tapia* was the partially restrictive language in Section 3582(a). The parties agreed that Section 3583(c)'s limited list was a *clearer* way to preclude consideration of omitted factors. The Government argued that "Section 3583(c) removes multiple Section 3553(a) factors from consideration

(Section 3553(a)(2)(A) and Section 3553(a)(3)).” Reply Brief for United States, *Tapia v. United States*, 564 U.S. 319 (2011) (No. 10-5400), 2011 U.S. S. Ct. Briefs LEXIS 451, *20. It further argued that Congress did not use the same formulation in Section 3582(a) because there, it “did not intend to preclude courts from considering rehabilitative purposes entirely when making imprisonment decisions,” *id.* at *21—in contrast with Section 3583(c), which precludes courts from considering retributive purposes entirely when making supervised-release decisions.

The Government here argues that language like in Section 3582(a) is required to do what, in *Tapia*, it said was clearer in Section 3583(c). *See* Gov’t Br. at 28. The Government was right the first time. The “intuitive” negative-implication canon led it to the correct interpretation, consistent with Congress’s deliberate choice to omit Section 3553(a)(2)(A)’s retribution factors.

V. The Government’s policy arguments are mistaken and do not warrant rejecting Congress’s contrary policy choice reflected in the statutory text.

Finally, the Government asserts that it is not “feasible” for courts to rely only on the factors listed in Section 3583(e) when terminating, modifying, or revoking supervised release. Gov’t Br. at 35. Those policy arguments are wrong, and they do not justify abandoning the plain meaning of the text.

a. Experience since *Tapia* shows that Congress did not give courts an impossible assignment in Sections 3583(c) and (e) when it precluded considering the Section 3553(a)(2)(A) factors. In *Tapia*, this Court stated that

district courts could not rely on Section 3553(a)(2)(A)'s retribution factors when imposing supervised release. *See Tapia*, 564 U.S. at 326. There has been no confusion or rash of appeals since then, and courts of appeals have adopted practices to ensure that the district courts follow this Court's ruling. *See United States v. Wilcher*, 91 F.4th 864, 872 (7th Cir. 2024); *United States v. Burden*, 860 F.3d 45, 57 (2d Cir. 2017).

The Government points to petitioners' proceedings, Gov't Br. at 35, and decisions from the Ninth Circuit, Gov't Br. at 37, to argue the "impossibility" of relying only on the factors listed in Sections 3583(c) and (e), Gov't Br. at 36. But the Sixth Circuit had previously held that courts could consider any sentencing factor when revoking supervised release. *See United States v. Lewis*, 498 F.3d 393, 399-400 (6th Cir. 2007). It is no surprise, then, that the district courts in petitioners' proceedings did not distinguish between permitted and precluded factors.[2] Similarly, although the Ninth Circuit held that relying on omitted factors "would be improper," *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006), it also adopted the atextual qualification that a sentence would be unreasonable only "if the court based it *primarily* on an omitted factor," *id.* (emphasis added), inviting unnecessary confusion. Those decisions indicate the importance of clear statements that

2. The courts made clear, though, that they relied on precluded factors. The district court revoking Esteras's supervised release confirmed that it relied on Section 3553(a)(2)(A) in response to an objection, *see* JA 105a, the parties agreed that the court revoking Jaimez's supervised release considered the Section 3553(a)(2)(A) factors, *see* Gov't Supp. Br. at 6-7, Sixth Cir. No. 23-3189; JA 232a, and the court revoking Leaks's supervised release expressly relied on the need to "punish Mr. Leaks for violating supervision," JA 244a.

omitted factors are precluded, but they do not indicate that following Congress's instructions is impossible. The Tenth Circuit, which adopted an unambiguous rule, has had no similar difficulties. *See United States v. Booker*, 63 F.4th 1254, 1259-60 & n.1 (10th Cir. 2023); *United States v. Waffle*, No. 22-5084, 2023 WL 2964480, at *2 (10th Cir. Apr. 17, 2023) (noting Government concession that district court erred under *Booker* by considering two Section 3553(a)(2)(A) factors when revoking supervised release).

The Government claims that a court could not consider the Sentencing Commission's policy statements without considering the Section 3553(a)(2)(A) factors. Gov't Br. at 34. But the Commission has published guidance stating that, "in a supervised release revocation proceeding, the court should consider all of the factors except section 3553(a)(2)(A)," U.S. Sentencing Commission, Federal Sentencing: The Basics 57 n.186 (Sep. 2020),[3] and it has proposed amendments revising the background commentary that the Government cites, *see* U.S. Sentencing Commission, Proposed Amendments to the Sentencing Guidelines (Preliminary) 30-32 (Jan. 24, 2025).[4] Regardless, the Court must interpret the statute consistent with Congress's intent as reflected in the text, irrespective of what the Commission does. *See United States v. Labonte*, 520 U.S. 751, 753 (1997); *Neal v. United States*, 516 U.S. 284, 289-90 (1996).

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3. Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf.

4. Available at: https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20250124_prelim_rf.pdf.

District courts can follow the statute by relying on the listed factors and not the precluded factors. That is what the Government said in *Tapia*, without expressing any concern about feasibility. Even now, the Government appears to recognize this—it says that Congress instructed courts to do so in Section 3583(d). *See* Gov't Br. at 28-29, 35-36. But it would be impossible there, too, if the Government were right that the distinction is impossible.

b. Congress enacted Sections 3553(a)(2)'s subsections as distinct factors because they address different aspects of sentencing. They are not "essentially redundant," as the *Esteras* panel said. JA 128a. The Section 3553(a)(2)(A) factors reflect retributive punishment, directing courts to consider not just "the seriousness of the offense," for example, but "the need for the sentence imposed . . . to reflect the seriousness of the offense," 18 U.S.C. § 3553(a)(2)(A).[5] *See Tapia*, 564 U.S. at 326 (noting that "retribution" is "the first purpose listed in § 3553(a)(2)"); *Miqbel*, 444

5. The Government states that "[t]he 'offense' referred to in Section 3553(a)"—including Section 3553(a)(2)(A)'s references to the seriousness of the offense and just punishment for the offense—"is the 'offense' of conviction, rather than violation of a supervised-release condition." Gov't Br. at 33 n.2. Lower courts do not consistently follow that view. *See*, *e.g.*, *United States v. Sanchez*, 900 F.3d 678, 683 n.3 (5th Cir. 2018) (construing "the offense" to "mean the conduct that constituted the violation of the conditions of supervised release"); JA 244a (relying on the need to "punish Mr. Leaks for violating supervision"). But the Government's formulation further shows that it is feasible for courts to avoid relying on the Section 3553(a)(2)(A) factors when revoking supervised release. Courts can well avoid basing revocation sentences on the need to reflect the seriousness of or provide just punishment for the original offense.

F.3d at 1182 (noting that the need to promote respect for the law and reflect the seriousness of the offense "is often intertwined with the concept of punishment, as it is in § 3553(a)(2)(A) itself"). Those factors are backward-looking, calling for a sentence proportional to the offense. *See* S. Rep. No. 98-225, at 75 (explaining that the Section 3553(a)(2)(A) factors are "another way of saying that the sentence should reflect the gravity of the defendant's conduct"). The other factors are forward-looking. For example, "the need for the sentence imposed . . . to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), requires a determination about what is needed for the future. A greater need to protect the public might follow from a more severe offense or violation, but it might not. For example, changed conditions after even a severe offense might indicate little likelihood of repeat and thus little need to protect the public, whereas otherwise-minor conduct that suggests a likelihood of escalating might indicate an increased need to protect the public. Section 3553(a)(2)(A)'s retribution factors address different aspects of sentencing than the listed factors.

Following Congress's design is straightforward. Sections 3583(c) and (e) permit courts to consider most of the various typical sentencing factors with broad discretion, but not Section 3553(a)(2)(A)'s retribution factors. The lower courts have experience from other contexts with considering whether to order a purpose into custody for non-retributive purposes. *See*, *e.g.*, 18 U.S.C. § 3142(g) (pretrial detention); 18 U.S.C. § 4246 (civil commitment); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (civil contempt). If a district court appears to rely on precluded factors, timely objections can allow the court to clarify. *See* JA 105a; JA 245a. And appellate

review will police the outer bounds of the district courts' discretion, just as it has done in the supervised-release-imposition context since *Tapia*.

c. The Government's arguments about feasibility are wrong, but more fundamentally, they ask the Court to "rewrite clear statutes under the banner of [its] own policy concerns." *Azar v. Allina Health Servs.*, 587 U.S. 566, 581 (2019). Congress deliberately chose to omit Section 3553(a)(2)(A) from the listed factors in Sections 3583(c) and (e), because it pursued a different policy than the Government's preferred course. "Ultimately, the Government's policy arguments do not obscure what the statutory language makes clear." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 131 (2018).

Congress's policy decision was not merely a semantic formality, as the Government asserts. Gov't Br. at 37. Congress deliberately chose to exclude Section 3553(a)(2)(A)'s retribution factors when imposing and when terminating, modifying, or revoking supervised release. It took a different approach to post-sentencing supervision than it had done previously, *see* Pet. Br. at 23-25, and it took a different approach to supervised release than it did for the other sentencing options—prison, fine, or probation, *see* Pet. Br. at 19-23, 25-28. Precluding courts from relying on the Section 3553(a)(2)(A) factors when revoking supervised release is not about "magic words" or putting form over substance. Gov't Br. at 37. Precluding those factors is substantive, and it reflects Congress's decision that one of the traditional sentencing factors—retribution—will not be part of imposing supervised release and will not be part of terminating, modifying, or revoking supervised release. When courts rely on Section 3553(a)(2)(A)'s retribution

factors when revoking supervised release, as the courts did below, they have done what Congress prohibited.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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