No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

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

REPLY BRIEF FOR THE UNITED STATES

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Respondent fails to supply a coherent rationale for facially invalidating the revocation provisions of 18 U.S.C. 3583(k). He expressly acknowledges (Br. 16-17) that a court may revoke a defendant's supervised release and reimprison him based solely on a judicial finding by a preponderance of the evidence. Yet he identifies no logical distinction between Section 3583(k) and the supervised-release provisions whose constitutionality he recognizes. He cannot explain why those parallel provisions of the same statute should be viewed as a constitutional baseline that Section 3583(k) "enhance[s]," Br. 12; why any such "enhancement" would trigger a jury-trial right in a proceeding that "arises *after* the end of the criminal prosecution," *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (emphasis added); or why five years of reimprisonment for violating the conditions of his ten-year term of supervised release was unconstitutional. His characterization of Section 3583(k) as punishing a new criminal

offense, rather than the one for which supervised release was imposed, runs counter to *Johnson* v. *United States*, 529 U.S. 694, 700 (2000), and relies on the specter of unrealistically excessive reimprisonment terms that the law would not allow. And his insistence that it would make no sense to remedy the asserted violation of his jury-trial right by actually providing him with a jury trial serves only to illustrate that no such violation occurred. The court of appeals' judgment should be reversed.

I. RESPONDENT'S REIMPRISONMENT UNDER 18 U.S.C. 3583(k) WAS CONSTITUTIONALLY VALID

It is common ground that respondent's conviction following a jury trial authorized not only the imposition of his ten-year term of supervised release, but also revocation and reimprisonment of supervised release under 18 U.S.C. 3583(e)(3)—*without* any further findings by a jury. For the same reasons that the jury's verdict authorized revocation and reimprisonment based on judicial findings under Section 3583(e)(3), it likewise authorized revocation and reimprisonment based on judicial findings under Section 3583(k).

A. The Jury-Trial Right Does Not Apply To The Revocation Of Respondent's Supervised Release And His Resulting Reimprisonment

As the government's opening brief explained (at 4-14, 23-43), for a federal crime, a jury verdict of guilt (or a guilty plea) authorizes the court to impose a term of supervised release to follow imprisonment, which inherently includes the possibility of postjudgment revocation and reimprisonment based on judicial factfinding. Respondent not only declines to dispute that; he affirmatively agrees with it.

1. Respondent acknowledges that the district court in his case "was authorized on the basis of the jury's verdict to impose a term of supervised release"; that it "was also authorized to revoke a term of supervised release *if the court found by a preponderance of the evidence* that [he] violated a condition of supervised release" under 18 U.S.C. 3583(e)(3); and that as "part of revoking supervised release," the court could require a "term of imprisonment (or, more precisely, 'reimprisonment')." Resp. Br. 16-17 (emphasis added). And respondent recognizes (Br. 19) that such revocation and reimprisonment would *not* violate the jury-trial right as interpreted in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

Respondent's acknowledgment of those points—which are the crux of this case—accords with this Court's longstanding precedent. The Court has repeatedly held that the jury-trial right does not extend to postjudgment proceedings—even when they result in new or additional imprisonment—because such proceedings are "not part of a criminal prosecution." *Morrissey*, 408 U.S. at 480; see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973). Respondent may dispute whether the relevant decisions, which addressed probation and parole, are directly controlling in the analogous context of supervised release. But, at bottom, he accepts the basic principle that revocation of supervised release and reimprisonment do not generally require a jury finding beyond a reasonable doubt.

2. To the extent that respondent tries to justify a novel expansion of the jury-trial right to postjudgment proceedings like the one here, those efforts disregard not only precedent, but the text and history of the Sixth Amendment as well. Respondent characterizes (Br. 20) the difference between imposition of a sentence in a

criminal judgment (to which the jury-trial right applies) and administration of a sentence after judgment (to which it does not) as a mere "labeling exercise[]." But his characterization gives short shrift to the operative text of the Sixth Amendment, which guarantees the jury-trial right only during "criminal prosecutions." U.S. Const. Amend. VI; see, *e.g.*, *Morrissey*, 408 U.S. at 480. And Article III's jury-trial right, which respondent mentions in passing (Br. 16 n.2), reaches no further than the Sixth Amendment's. See, *e.g.*, *United States* v. *Wood*, 299 U.S. 123, 142 (1936).

The history of the jury-trial right likewise undermines respondent's position. See *Southern Union Co.* v. *United States*, 567 U.S. 343, 353 (2012) ("[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law.") (citation omitted). Respondent identifies no precedent for post-judgment jury trials to determine a defendant's compliance with the conditions of a sentence. He instead expressly recognizes (Br. 27) that, historically, "there was no direct role for the jury to play at a revocation hearing for parole or probation." Respondent's ten-year period of supervised release, however, is not meaningfully different from a ten-year period of automatic parole. See *Morrissey* 408 U.S. at 477 ("Under some systems, parole is granted automatically after the service of a certain portion of a prison term."). Such conditional liberty can be revoked, and reimprisonment ordered, without the jury findings beyond a reasonable doubt that respondent insists are required here. See, *e.g.*, *id.* at 480, 484, 489.

This Court has refused to "cut the [*Apprendi*] rule loose from its moorings" by extending it to matters that "ha[ve] not traditionally belonged to the jury." *Oregon*

v. *Ice*, 555 U.S. 160, 172 (2009). It should similarly refuse to do so here. Although respondent observes (Br. 25-29) that supervised release differs in certain respects from its "precursor" systems of parole and probation, he identifies no difference that would justify expanding the jury-trial right to the revocation of his supervised release. *Johnson*, 529 U.S. at 710. All three are systems of conditional liberty that involve out-of-prison supervision, based on a criminal conviction, where breaching trust by violating the release conditions can lead to imprisonment. See U.S. Br. 31-35. This Court has accordingly considered parole reimprisonment as the proper analogue for supervised-release reimprisonment, see *Johnson*, 529 U.S. at 701; any analogy to a proceeding for contempt of court (Resp. Br. 28 n.7), in which criminal penalties are imposed in the first instance *without* any prior criminal conviction, is inapposite. Indeed, the Court in *Johnson* viewed the treatment of "postrevocation sanctions as part of the penalty for the initial offense" in the context of supervised release to have been "all but entailed" by a summary affirmance in the context of parole. 529 U.S. at 700-701.

B. Respondent's Reimprisonment Under Section 3583(k) Was Indistinguishable From Undisputedly Constitutional Reimprisonment Under Section 3583(e)(3)

The application of Section 3583(k), rather than Section 3583(e)(3), to respondent's revocation proceeding, long after his criminal prosecution ended, did not entitle him to a second jury trial. Just as respondent's original conviction by a jury beyond a reasonable doubt authorized later application of Section 3583(e)(3), it also authorized later application of Section 3583(k).

1. Reimprisonment under Section 3583(k), like reimprisonment under Section 3583(e), is authorized by the jury's verdict

Respondent recognizes (Br. 19) that *Apprendi* allows for revocation of supervised release and reimprisonment under Section 3583(e)(3), which authorizes reimprisonment for up to five years depending on the classification of a defendant's offense of conviction. He asserts (Br. 16), however, that the "*Apprendi* rule governs" and facially invalidates the revocation provisions of Section 3583(k). The latter position cannot be squared with the former, and it reflects a misunderstanding of *Apprendi*.

The *Apprendi* rule is grounded in the Sixth Amendment. See 530 U.S. at 476-478. Under that rule, any fact, other than the fact of a prior conviction, "that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013); see, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 231 (2005). The rule is inapplicable at a revocation proceeding that involves Section 3583(k) for the same reason that it is inapplicable at a proceeding that involves Section 3583(e)(3)—in neither case is the proceeding part of a "criminal prosecution[]" under the Sixth Amendment. Instead, the criminal prosecution ended with the imposition of a sentence that *authorized* the later revocation proceeding.

Facts found by a district court in a revocation proceeding do not "increase the penalty," *Alleyne*, 570 U.S. at 103, to which a defendant is exposed by the jury's verdict. Instead, "supervised release, and the subsequent possibility of reimprisonment after a violation of that release, is a part of the *original* sentence imposed

by the sentencing court following a defendant's conviction by a jury." *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.) (emphasis added), cert. denied, 563 U.S. 951 (2011). Respondent acknowledges (Br. 16-17) as much with respect to reimprisonment under Section 3583(e)(3). It is no less true for Section 3583(k). As the government has explained (Br. 35-43), a sentence to a term of supervised release following a conviction like respondent's inherently incorporates the possibility of revocation and reimprisonment under Section 3583(k), in the same way that it incorporates the possibility of revocation and reimprisonment under Section 3583(e)(3). Respondent offers no explanation for why such a sentence would incorporate one subsection of Section 3583, but not another.

2. Section 3583(k) is not an "enhancement" of Section 3583(e)

Respondent nevertheless asserts (Br. 19-20) that application of Section 3583(k) requires a jury to find the facts underlying a supervised-release violation pursuant to *Apprendi*, on the theory that Section 3583(k) "mandate[s] an aggravated penalty based upon facts that were never submitted to the jury." To the extent that respondent would characterize *any* term of reimprisonment following supervised-release revocation as an "aggravated penalty" requiring a separate jury finding, his position—a position that would appear to invalidate every one of the many thousands of annual revocations in federal and state systems, see Pet. 27; States Amici Br. 13-14—cannot be squared with his recognition that a term of reimprisonment *can* be ordered "based upon facts that were never submitted to the jury" under Section 3583(e)(3). And to the extent that respondent is characterizing reimprisonment under

Section 3583(k) as an "aggravated penalty" *as compared to* reimprisonment under Section 3583(e)(3), that characterization is both irrelevant and incorrect.

a. Respondent's view that Section 3583(k) is an enhancement of Section 3583(e) rests on the faulty premise that reimprisonment under Section 3583(e)(3) is part of the baseline penalty authorized by the jury verdict, while reimprisonment under Section 3583(k) is not. But respondent never explains why the jury's verdict authorizes only *some* of the applications of Section 3583. Nor does he explain why, even if Section 3583(k) *could* be characterized as an aggravated version of Section 3583(e)(3) that requires additional factfinding (but see pp. 10-11, *infra*), Section 3583(k)'s application would trigger a requirement of a jury finding beyond a reasonable doubt in the postjudgment context—that is, "after the end of the criminal prosecution," *Morrissey*, 408 U.S. at 480.

Respondent emphasizes (Br. 18-21) that Section 3583(k) authorizes a longer term of reimprisonment than Section 3583(e)(3) does. But nothing in the *Apprendi* line of cases suggests that alternative ranges of imprisonment, applicable in the same context, might require *different* standards of proof. The fundamental teaching of *Apprendi* is that all elements of a crime that affect the range are subject to the *same* requirement of proof. See, *e.g.*, *Alleyne*, 570 U.S. at 113. In a criminal prosecution, that requirement is proof beyond a reasonable doubt to a jury, which applies regardless of the particular range of imprisonment; an assault punishable by 0-2 years of imprisonment and a drug crime punishable by 10-20 years of imprisonment must both meet that standard. The question here, however, is whether revocation of respondent's supervised release *is* a criminal

prosecution, subject to the Sixth Amendment's jury-trial requirement, in the first place. As respondent recognizes with respect to Section 3583(e)(3), it is not.

The Court in *Morrissey* "emphasize[d]" that it had "no thought to equate" a parole-revocation hearing "to a criminal prosecution in any sense," 408 U.S. at 489, without any suggestion that the jury-trial right's application would be different for a defendant facing revocation of, say, a 20-year parole term as opposed to a one-year parole term. See, *e.g.*, *id.* at 480 (noting that a "returnee may face a potential of substantial reimprisonment"). It is irrelevant that Section 3583(k)—like 18 U.S.C. 3583(g), which applies to certain repeated firearm and drug violations—requires the judge to order revocation and reimprisonment, whereas Section 3583(e)(3) allows the judge to decline. See Resp. Br. 18, 20. If supervised-release revocation were a proceeding in which a jury-trial right applied, then a fact triggering a mandatory term of imprisonment of even one day would require a jury finding beyond a reasonable doubt. See *Alleyne*, 570 U.S. at 117. But mandatory reimprisonment for a particular term does not in itself give rise to a jury-trial right that would not otherwise exist.

Contrary to respondent's contention (*e.g.*, Br. 19), the *Apprendi* rule does not reflect any constitutional preference for greater judicial discretion at sentencing; indeed, the common-law system that informs it "left judges with little sentencing discretion," because the law "'prescribed a particular sentence for each offense.'" *Alleyne*, 570 U.S. at 108 (plurality opinion) (citation omitted). Instead, *Apprendi*'s "animating principle is the preservation of the jury's historic role." *Ice*, 555 U.S. at 168 (citing *Apprendi*, 530 U.S. at 477). And in postjudgment proceedings involving revocation of

conditional liberty, the jury historically had *no* role. See U.S. Br. 31-35; accord Resp. Br. 27.

b. In any event, respondent errs in suggesting (*e.g.*, Br. 12) that reimprisonment under Section 3583(k) is an "enhancement" to reimprisonment under Section 3583(e)(3) that requires additional factfinding. Sections 3583(e)(3) and (k) are in fact parallel provisions of the same statute that provide alternative bases for reimprisonment.

Under either provision, a judicial finding by a preponderance of the evidence that a defendant violated the conditions of his supervised release is the prerequisite for revocation and reimprisonment. Revocation and reimprisonment under Section 3583(e)(3) is applicable to any defendant who is found to have violated any supervised-release condition, whether specific to that defendant (*e.g.*, a requirement to attend counseling) or universal to all defendants on supervised release (*e.g.*, the requirement not to commit a crime). Revocation and reimprisonment under Section 3583(k) is applicable to a specific type of defendant who is found to have violated a specific supervised-release condition.

A court considering the consequences of revocation is routed to one provision rather than the other based not on any *additional* factfinding, but instead on the *legal consequences* of the facts that it has found. The provisions could be seen to overlap, in that Section 3583(e)(3) would apply to any defendant who violates supervised release by committing any crime, see 18 U.S.C. 3583(d), while Section 3583(k) would apply to a specific type of defendant who violates supervised release by committing a specific type of crime. But the question of whether Section 3583(e)(3) or Section 3583(k) applies turns only

on the particular legal prohibitions that the defendant's conduct violated; it is a question of law, not of fact.

The provisions would function in precisely the same way if Congress had made their parallelism even more explicit—*e.g.*, by including a proviso spelling out that Section 3583(e)(3) applies only "except as otherwise provided in Section 3583(k)." But Congress was not required to include such nonoperative language simply to forestall an argument like respondent's. As a functional matter, Sections 3583(e)(3) and (k) work side-by-side, with no additional finding of fact required to trigger the latter.

C. Section 3583(k) Did Not Punish Respondent For A New Criminal Offense

Respondent appears to contend (Br. 12, 14-16) that this case calls for a novel application of *Apprendi*, or of due-process principles, on the theory that Section 3583(k) penalizes a new crime (the one underlying the violation) rather than the original one (for which the term of supervised release was imposed). That theory is unsound. Respondent's five-year term of reimprisonment —which followed proceedings initiated by the Probation Office (an arm of the court) upon finding a violation of the terms of his previously imposed sentence—was tied directly to his initial offense. Indeed, the link between his original conviction and his reimprisonment under Section 3583(k) was even tighter than it would have been under Section 3583(e)(3). Respondent's contrary theory relies on a strawman portrayal of Section 3583(k) in which courts order reimprisonment terms far longer than he received, than any other offender to our knowledge has ever received, or than the law would allow.

1. Respondent's reimprisonment under Section 3583(k) was tied to his original crime

The only authority respondent cites in laying out his theory is this Court's decision in *Johnson*—which *rejected* the argument that reimprisonment "imposes punishment for defendants' new offenses for violating the conditions of their supervised release." 529 U.S. at 699-700 (citation omitted). The Court noted that the argument had "some intuitive appeal," but explained that constitutional-avoidance principles required "[t]reating postrevocation sanctions as part of the penalty for the initial offense." *Id.* at 700.

Respondent would invert the constitutional-avoidance principle by interpreting Section 3583(k) to *invite* a constitutional problem. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (citation omitted); see also *Jones* v. *United States*, 526 U.S. 227, 239-252 & n.6 (1999) (construing a federal statute to avoid *Apprendi* concerns). Indeed, his express goal is to invalidate most of that provision. Resp. Br. 30-35.

Nothing requires respondent's interpretation—least of all *Johnson*, which points directly the other way. See 529 U.S. at 701 ("We * * * attribute postrevocation penalties to the original conviction."). Respondent observes that *Johnson* considered only Section 3583(e)(3) and again tries to distinguish the later-enacted Section 3583(k). But he again identifies no relevant distinctions.

Respondent contends (Br. 15) that Section 3583(k) "severed the link between the original crime of conviction and the authorized term of reimprisonment" that

would exist under Section 3583(e)(3). To the contrary, however, the first sentence of Section 3583(k) makes clear that it applies to defendants who were originally convicted of certain specific crimes—primarily, sex crimes against children. See 18 U.S.C. 3583(k). And the second and third sentences of Section 3583(k) prescribe the reimprisonment term for such defendants who, while on supervised release and required to register as sex offenders, commit other listed offenses (again, primarily sex crimes against children). See *ibid.* The original conviction thus plays a central role in determining an offender's term of reimprisonment. A defendant originally convicted of a different type of crime—say, a drug crime—would not be subject to Section 3583(k) even if he violated supervised release by possessing the same images of child pornography that respondent did.

If anything, the link between the authorized term of reimprisonment and the original offense is even *tighter* under Section 3583(k) than under Section 3583(e)(3). Respondent does not dispute (*e.g.*, Br. 15) that under *Johnson*, reimprisonment under Section 3583(e)(3) for violating supervised release by, say, possessing drugs—which triggered mandatory revocation both at the time of *Johnson* and now, see 18 U.S.C. 3583(g); 18 U.S.C. 3583(g) (1994)—would be attributable to a conviction for a tax offense. By comparison, reimprisonment under Section 3583(k) for violating supervised release through illicit sexual activities involving minors is even more readily attributable to a conviction for illicit sexual activities involving minors.

Respondent also contends (Br. 14-15) that Section 3583(k) punishes a new crime, while Section 3583(e)(3) does not, because of the length of reimprisonment it requires. But nothing in *Johnson* suggests that the term of

reimprisonment authorized under Section 3583(e)(3) sets a ceiling (constitutional or otherwise) on what may be attributed to the original offense. And to the extent that such a ceiling may exist, respondent provides no reason to believe that a five-year term, like the one he received, exceeds it. Both at the time of *Johnson* and now, Section 3583(e)(3) *itself* has authorized a five-year term of reimprisonment for certain felons. See 18 U.S.C. 3583(e)(3) (1994). The Sentencing Commission likewise views terms of more than five years as sometimes appropriate, see Sentencing Guidelines § 7B1.4(a) (recommending reimprisonment for 63 months for certain defendants), even though its recommended reimprisonment terms are designed to "sanction primarily the defendant's breach of trust," *not* "new criminal conduct," *id.* Ch. 7, Pt. A, intro. 3(b).

Although a five-year term of reimprisonment is the maximum authorized under Section 3583(e)(3), Congress is entitled to view illicit sexual activity involving a minor, by someone on supervised release following a conviction for illicit sexual activity involving a minor, as an especially egregious breach of trust. It has long been the case that the length of a term of reimprisonment for violating parole, which is likewise attributable to the original offense, depends on "how many and how serious the violations were." *Morrissey*, 408 U.S. at 480; see Note, *Parole Revocation in the Federal System*, 56 Geo. L.J. 705, 731 (1968) (observing that a parole violator "may be * * * made to serve only part of the outstanding sentence"); see also *Morrissey*, 408 U.S. at 480 n.7 (citing that note). The Sentencing Commission's guidance similarly reflects that determining the appropriate term of reimprisonment for a breach of trust involves some consideration of the nature of the breach.

See Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b), §§ 7B1.1, 7B1.4(a). Courts, in turn, obviously may recognize that failure to attend counseling sessions is a lesser breach of trust than running a sex-trafficking ring, and should not result in the same term of imprisonment. And Congress, no less than a parole board, the Commission, or a judge, may consider the nature of the violation—and, in particular, how it relates to the offense of conviction—in determining an appropriate term of reimprisonment.

2. Respondent's speculation about hypothetical excessive reimprisonment does not support facial invalidation of Section 3583(k)'s revocation provisions

Although the application of Section 3583(k) to respondent resulted in five years of reimprisonment, his argument relies in large part (*e.g.*, Br. 11) on Section 3583(k)'s authorization of longer terms that would not be available under Section 3583(e)(3). See 18 U.S.C. 3583(k) (term of "not less than 5 years"). Nothing in Section 3583(k), however, empowers courts to order reimprisonment terms that seek to punish a new criminal offense—indeed, courts are *precluded* from doing so. The sorts of excessive terms that respondent hypothesizes are thus nonexistent as a practical matter, impossible as a legal matter, and no reason to invalidate Section 3583(k)'s reimprisonment provisions in all of their applications.

a. In the analogous context of parole, this Court has recognized that even though "[i]n many cases, the parolee faces lengthy incarceration if his parole is revoked," *Morrissey*, 408 U.S. at 482, such reimprisonment is attributable to the original offense, and its imposition is not a new criminal prosecution, see *id.* at 480, 489. The Court has accordingly not applied the Sixth

Amendment, but instead relied on general due-process principles to balance a defendant's interest in continued conditional liberty against the government's "overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions" of that liberty. *Id.* at 483. And based on that balancing, the Court has held that due process for revocation and reimprisonment require an "informal hearing structured to assure that the finding of a parole violation will be based on verified facts"—but not any requirement that the finding be made by a jury beyond a reasonable doubt. *Id.* at 484, 489.

The effective substitution of five years of reimprisonment and five years of supervised release for the ten years of supervised release included in respondent's original sentence is precisely analogous to parole revocation. See *Morrissey*, 408 U.S. at 480. And the procedures applied at respondent's revocation hearing were undisputedly consistent with the "minimum requirements of due process" for such a revocation, *id.* at 489. Compare *ibid.*, with Fed. R. Crim. P. 32.1. Respondent accordingly does not contend that it would be an unconstitutional deprivation for a court to rely on judicial factfinding to order a five-year reimprisonment term under Section 3583(e)(3). It necessarily follows that it is not an unconstitutional deprivation for a court to rely on judicial factfinding to order an identical term under Section 3583(k).

If a defendant were actually subjected to a reimprisonment term of such length that it could not constitutionally be ordered without additional procedures, he would have standing to bring an as-applied due process

claim. But respondent, who received a five-year reimprisonment term, is not such a defendant. And if Section 3583(k) is not unconstitutional as applied to him, then it is not facially unconstitutional either. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

b. In any event, excessive terms of reimprisonment —such as the specter of life imprisonment that respondent frequently invokes (see Br. 11, 13, 15, 16, 18, 22, 23, 29, 32)—are not available even as a *statutory* matter under Section 3583(k). Instead, Congress has placed statutory constraints on a court's discretion to order reimprisonment for a violation of supervised release. Under those constraints, a court errs by treating reimprisonment as punishment for the supervised-release violation itself.

In any matter concerning the administration of supervised release, including revocation and reimprisonment, a court must "consider[] the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. 3583(e); see 18 U.S.C. 3583(k) (authorizing reimprisonment "under subsection (e)(3)"). That directive requires consideration of most of the same factors that a court considers when it imposes sentence following a criminal conviction, see 18 U.S.C. 3553(a), but excludes the factor under which a court considers "the need * * * to provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A).

At the same time, the directive requires consideration of the Sentencing Commission's policy statements, see 18 U.S.C. 3553(a)(5), which take the approach that "at revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying

violation and the criminal history of the violator," Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b). The Commission's recommended ranges thus "seek to prescribe penalties *only* for the violation of the judicial order imposing supervision," and "do not purport to provide the appropriate sanction for [a] criminal charge" that "is a basis of the violation." *Id.* Ch. 7, Pt. B, intro. comment. Congress's omission of punishment for the new offense as a consideration in imposing reimprisonment, reinforced by the Guidelines and *Johnson*'s instruction to "attribute postrevocation penalties to the original conviction," 529 U.S. at 701, ensures that revocation sentences are reasonable and do not seek to punish the criminal conduct that may underlie a supervised-release violation.

Appellate review provides an additional safeguard against excessive reimprisonment. An offender who objects to the term of reimprisonment ordered by the district court may appeal, and the court of appeals will review it for procedural or substantive unreasonableness. See, *e.g.*, *United States* v. *Tyson*, 413 F.3d 824, 825 (8th Cir. 2005) (per curiam); see also, *e.g.*, *United States* v. *Mulero-Algarín*, 866 F.3d 8, 11 (1st Cir. 2017) (abuse-of-discretion review); *United States* v. *Vigil*, 696 F.3d 997, 1003 & n.3 (10th Cir. 2012) (review for "plain[] unreasonable[ness]") (citation omitted). Such review is deferential, and a district court's consideration of an excluded factor may not in itself always require reversal. See, *e.g.*, *United States* v. *Young*, 634 F.3d 233, 241 (3d Cir.), cert. denied, 565 U.S. 863 (2011); see also *United States* v. *Miqbel*, 444 F.3d 1173, 1183 & n.21 (9th Cir. 2006) (suggesting that reversal might be required). But courts of appeals can and should vacate inappropriate reim-

prisonment terms. See, *e.g.*, *Young*, 634 F.3d at 241 (explaining that reimprisonment term would be unreasonable if district court "place[d] undue weight on the seriousness of the violation"); see also, *e.g.*, *United States* v. *Simtob*, 485 F.3d 1058, 1063-1064 (9th Cir. 2007) (vacating for resentencing because the district court may have treated "the seriousness of [the defendant's] new criminal conduct as the primary consideration" for the reimprisonment term, which "would be unreasonable"). That includes unduly harsh terms that appear to sanction a new offense, rather than the breach of trust in violating supervised release on the original one, and thereby violate the basic premise of revocation, see *Johnson*, 529 U.S. at 700.

The courts of appeals have apparently not needed to vacate excessive reimprisonment terms of the kind respondent posits because the situation has not arisen. Respondent identifies no case in which a court has actually imposed life imprisonment—or anything close to it—under Section 3583(k). In the government's experience, nearly all terms of reimprisonment under Section 3583(k) are five years. Longer terms are quite rare, and to our knowledge, no court has ever ordered more than ten years of reimprisonment. The leeway provided by the statute allows courts to take account of especially problematic violations, such as engaging in sex-trafficking of a minor and production of child pornography under the Probation Office's nose. See D. Ct. Doc. 168, *United States* v. *Phillips*, No. 12-cr-161 (E.D. Mo. Mar. 8, 2018). It also allows defendants to stipulate to terms above five years as part of agreements that avoid new criminal charges that could result in even longer recidivist sentences. See D. Ct. Doc. 21, at 2, *United States* v. *Hammalian*, No. 15-cr-119 (D. Vt. July 5, 2018) (stipulated

six-year term); D. Ct. Doc. 52, at 1-2, *United States* v. *Masitis*, No. 06-cr-72 (D. Idaho June 9, 2016) (stipulated seven-year term).

II. AT A MINIMUM, SECTION 3583(k) CAN BE ENFORCED IF A JURY FINDS THE RELEVANT FACTS

After arguing at length (Br. 14-29) that Section 3583(k) violates the jury-trial right, respondent turns around and insists (Br. 30-35) that a jury trial would in fact be untenable. Respondent's resistance to an actual jury trial highlights the flaws in his merits position. At the same time, the difficulties he identifies are not so insurmountable as to justify the court of appeals' erroneous remedy of facial invalidation.

A. Respondent's identification of the practical problems with a jury trial in the supervised-release context reinforces why the Constitution does not in fact require one. In particular, it shines a spotlight on the central premise that respondent fails to refute: that revocation of supervised release under Section 3583(k)—like revocation of supervised release under Section 3583(e)(3), revocation of parole, or revocation of probation—"arises after the end of the criminal prosecution." *Morrissey*, 408 U.S. at 480.

Notwithstanding his position that the Constitution requires a jury trial, respondent explains (Br. 31) that "engrafting jury trial requirements" onto revocation proceedings would be unprecedented, inappropriate, and infeasible. He devotes particular attention (Br. 34) to the practical problem that "there is no jury ready and waiting to make factual determinations at a revocation hearing," unlike in previous *Apprendi* cases where juries were "already empaneled" to make factual "determinations that trigger an enhanced sentence."

The government made similar observations in its opening brief (Br. 36-39). The government also pointed out (Br. 29-30) that the facts relevant to supervised-release revocation do not exist until after trial and judgment (and imprisonment) and thus cannot be "alleged in the indictment" as an "element[]" of the offense, which this Court has repeatedly described as central to the right to a jury trial in a criminal prosecution. *Apprendi*, 530 U.S. at 480; see, *e.g.*, *Alleyne,* 570 U.S. at 109-111 (plurality opinion). Requiring a new jury to be convened to find the facts underlying a supervised-release violation would create "bifurcated or trifurcated" trials that this Court has said "make scant sense" and that *Apprendi* does not require. *Ice*, 555 U.S. at 171-172. Respondent's own recognition of those problems is the thirteenth chime of the clock on his constitutional claim.

B. Although practically difficult, it would not be impossible to convene a jury in a supervised-release proceeding at which Section 3583(k) applies. And allowing for that option is a less extreme, and more appropriate, remedy than outright invalidation, if this Court concludes that the jury-trial right in fact applies to such a proceeding.

As the government has explained (Br. 52-53) and respondent nowhere refutes, requiring jury findings beyond a reasonable doubt is not incompatible with any statutory requirement. The statute incorporates the Federal Rules of Criminal Procedure, which could be amended to provide for convening a jury when necessary. See 18 U.S.C. 3583(e)(3) and (k); Fed. R. Crim. P. 32.1. Respondent contends (Br. 32) that allowing courts to enforce Section 3583(k) following jury findings is unnecessary to vindicate "Congress's intent in enacting

§ 3583(k)." His arguments, however, disregard that intent. He asserts (*ibid.*) that "Congress has already" accomplished its "intent in enacting § 3583(k)" through *other* statutes. But Congress evidently disagreed with that judgment, or else it would not have enacted Section 3583(k). Respondent similarly asserts (Br. 33) that invalidating the challenged provisions "would not frustrate or interfere with Congress' basic purpose" because the remainder of the statute would be "substantially the system of supervised release that existed" *before* "Congress added the portions of § 3583(k) at issue in this case." But invalidating a statute always restores the statutory scheme that existed before "Congress added" the challenged law, *ibid.* Respondent's focus on Congress's intent in statutory provisions other than the one "at issue in this case," *ibid.*, cannot be squared with this Court's directive to determine "the Legislature's intent *as embodied in the*" the statute at issue, *Booker*, 543 U.S. at 246 (emphasis added).

Remedying the denial of the jury-trial right by providing a jury trial reflects the commonsensical approach that this Court has taken in most of its *Apprendi* decisions. See U.S. Br. 52. In urging a different approach, respondent cites (Br. 33) *Booker*, *supra*, which declared the Sentencing Guidelines advisory rather than requiring their enforcement as mandatory with a jury-trial requirement. 543 U.S. at 245-246. But *Booker* adopted that distinctive remedy only after determining that, among other things, requiring a jury would undermine "Congress' basic statutory goal" to "diminish[] sentencing disparity," which "depend[ed] for its success upon *judicial* efforts to determine, and to base punishment upon, the real conduct that underlies the crime of conviction," *id.* at 250 (emphasis added and omitted);

see *id.* at 251-254. Jury findings in revocation proceedings, while difficult, would not "destroy the system" that Congress designed, *id.* at 252—if the Constitution in fact required such findings.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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