No. 17-5503

IN THE
Supreme Court of the United States

RAMIRO OCHOA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The Fifth Amendment speaks clearly: "No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Framers included no exception for situations in which an "offense" may violate the laws of separate sovereigns. And, in fact, they specifically rejected an attempt to include language that would allow for separate prosecutions by the State and Federal Governments. Nonetheless, the "separate-sovereigns" exception has, over time, swallowed this proscription whole. The Government offers little in its brief in opposition to defend the exception, other than reruns of old cases taking it for granted. Justices Ginsburg and Thomas recently called for reexamination of this exception, recognizing the "affront to human dignity" it has entrenched. *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg and Thomas, J.J., concurring). The time is now.

But even if the Court does not revisit the separate-sovereigns exception, it should grant plenary review for another reason: The lower courts are desperately in need of guidance on whether it is error for a district court to rely on the seriousness of violation conduct in fashioning a supervised-release revocation sentence. The split is real, and few cases offer such a clear example of such reliance being outcome-determinative. What is more, few supervised-release revocation cases result in sentences long enough to allow for this Court's meaningful review. The Court should take the opportunity to clarify the law on this important question.

ARGUMENT

I. THE COURT SHOULD REVISIT THE LEGITIMACY OF THE SEPARATE-SOVEREIGNS EXCEPTION

A. The Issue Is Important.

In its brief in opposition, the Government argues first that the Court should not reconsider the separate-sovereigns exception at all. In support, it cites *Heath* v. *Alabama* for the proposition that offenses that violate the laws of two separate sovereigns are not the "same offence" for purposes of the Double Jeopardy Clause. 474 U.S. 82, 88 (1985). In *Heath*, the Court upheld an Alabama capital conviction that followed a Georgia murder conviction for the same homicide. *Id.* at 94. The Court held that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offenses.'" *Id.* at 88. Because Alabama and Georgia were separate sovereigns—they "draw their authority to punish the offender from distinct sources of power"—the Court held that the case fell squarely within the separate-sovereigns exception

described in *Abbate* v. *United States*, 359 U.S. 187 (1959), and *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). *Id.* at 88-89. But this contention has no support in the text of the Fifth Amendment: That Amendment admits of no exceptions to the prohibition against double jeopardy. And, as the dissenters in *Heath* explained, this interpretation has no support in the history of the Fifth Amendment: "No evidence has ever been adduced to indicate that the Framers intended the word 'offence' to have so restrictive a meaning.' " *Id.* at 98 (Marshall and Brennan, J.J., dissenting).[1]

The Government turns next to the "undesirable consequences" that it believes would follow if prosecution by one State could bar prosecution by the Federal Government. Opp. 9 (quoting *Abbate*, 359 U.S. at 195). But that argument misses the mark. First, it ignores the structure of our Government. "The Constitution . . . withhold[s] from Congress a plenary police power." *United States* v. *Lopez*, 514 U.S. 549, 566 (1995). It is the States, not the Federal Government, that possess such plenary authority. *Torres* v. *Lynch*, 136 S. Ct. 1619, 1625 (2016); *Abbate*, 359 U.S. at 195 ("the States under our federal system have the principal responsibility for defining and prosecuting crimes").

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[1] As it happens, the facts of *Heath* represent one of the most pernicious consequences of the separate-sovereigns exception: Larry Heath confessed to having hired other men to murder his wife in Georgia. He pleaded guilty to malice murder in exchange for the Georgia prosecutor's offer not to seek the death penalty. *Heath*, 474 U.S. at 96 (Marshall and Brennan, J.J., dissenting). Three months after entry of his plea, he was indicted in Alabama for the same murder. Seventy-five of eighty-two potential jurors admitted they were aware that Heath had pleaded guilty to the same crime in Georgia. *Id.* He was convicted and sentenced to death: "With such a well-informed jury, the outcome of the trial was surely a foregone conclusion." *Id.* at 97.

What is more, nothing precludes the States and the Federal Government from collaborating in their investigations and prosecution decisions to determine whether the state or federal interest in a case is more significant. In fact, they already do so early and often. As Judge Calabresi has noted: "The degree of cooperation between state and federal officials in criminal law enforcement has * * * reached unparalleled levels in the last few years." *United States* v. *All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995) (citing Sandra Guerra, *The Myth of Dual Sovereignty: Multi-jurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1180-91 (1995)). This extensive collaboration, in his view, "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *Id.*

Quite right. Neither is it the primary role of our federal system to police the relationship between the Federal Government and the States at the expense of individual liberty. After all, federalism is designed to "enhance[] freedom" and " 'secure[] to citizens the liberties that derive from the diffusion of sovereign power.' " *Bond* v. *United States*, 564 U.S. 2355, 2364 (2011) (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992)). There is something uniquely perverse about construing its structure to assure the vindication of each government's asserted interests at the expense of individual liberty.

B. This Case Is A Proper Vehicle.

The Government next argues this case is a poor vehicle for revisiting the validity of the separate-sovereigns exception because the District Court's revocation sentence was part of the punishment for Mr. Ochoa's underlying federal offense, not punishment for the offenses for which he was convicted under state law. Opp. 10-11 (citing *Johnson* v. *United States*, 529 U.S. 694, 700 (2000)). Mr. Ochoa's case, though, is a perfect example of why that assumption is not reliably true. The District Court placed significant weight on the seriousness of the offense conduct that served as the basis of his supervised release revocation, describing it as "serious" no fewer than five times. And for the reasons discussed below and in Mr. Ochoa's petition for certiorari, the District Court was *required* to determine the grade of the violation by reference to the seriousness of the conduct, guiding the District Court's discretion through the policy statement range in much the same way the advisory guideline range serves as the "lodestone" for a federal criminal sentence. *See Peugh* v. *United States*, 133 S. Ct. 2072, 2084 (2013).

Mr. Ochoa was, indeed, punished a second time by the District Court after having served a sixty-month sentence imposed by a North Carolina court. This is precisely the harm the Framers intended to prevent when they drafted the Double Jeopardy Clause. And only this Court can set the issue to rights by eliminating the judicially created separate-sovereigns exception. The exception has no basis in either the text or history of the Fifth Amendment. And as Justices Ginsburg and

Thomas have recognized, it is "an affront to human dignity." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg and Thomas, J.J., concurring).

II. THE COURT SHOULD CLARIFY FOR THE LOWER COURTS WHETHER CONSIDERATION OF THE SERIOUSNESS OF VIOLATION CONDUCT IS ERROR WHEN IMPOSING A SENTENCE ON REVOCATION OF SUPERVISED RELEASE

A. The Issue Is Important And Has Bedeviled The Lower Courts.

The Government suggests that the Court's denial of certiorari in previous cases counsel in favor of denial of certiorari in this case. Opp. 7-8. But none of those denials included a statement respecting denial of certiorari and, especially in light of the extremely low percentage of filed cases that are granted each Term, it would be the height of speculation to conclude that these petitions were not granted because the issues raised in Mr. Ochoa's petition do not warrant the Court's review. *See, e.g.*, *Equality Foundation of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 525 U.S. 943, 943 (1998) (Stevens, Souter, and Ginsburg, J.J., respecting denial of petition for certiorari) ("As I have pointed out on more than one occasion, the denial of a petition for a writ of certiorari is not a ruling on the merits. Sometimes such an order reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue."); *Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter and Black, J. J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner.").

Here, the issue is significant. The Government acknowledges that 18 U.S.C. § 3583(e) instructs district courts to consider eight of ten factors of 18 U.S.C. § 3553(a) when fashioning a sentence on revocation of supervised release. And it argues that "Section 3583(e) neither expressly requires nor expressly prohibits consideration of the factors set forth in those provisions." Opp. 13. But Congress's silence here speaks volumes. It was expressly tracking the statute that sets forth the factors to be considered at sentencing. By leaving only two of them out, it clearly intended to foreclose district courts from applying them in fashioning supervised release sentences. It is hard to believe that Congress did not intend to exclude only two of ten factors, and harder still to credit the Government's assertion that exclusion of these two factors "would draw an artificial and untenable line," Opp. 14. In fact, the line drawn by Congress represents an effort to avoid exactly the commonsense double jeopardy concerns articulated by this Court in *Johnson*: By foreclosing consideration of the seriousness of the violation conduct, Congress hoped to maintain the construct that "postrevocation sanctions [are] part of the penalty for the initial offense." *See Johnson*, 529 U.S. at 700.

The circuit split on this issue is real; it is not "overstated," Opp. 15. Five courts of appeals have concluded that reliance on an omitted factor is not error. Three have concluded that it is. The Government acknowledges that the Fifth Circuit has held "that it is improper for a district court to rely on § 3553(a)(2)(A) for the modification or revocation of a supervised release term." Opp. 16 (quoting *United States* v. *Miller*, 634 F.3d 841, 844 (5th Cir. 2011). But it then relies on two

unpublished decisions to suggest that holding has somehow been undermined. It has not. The first case, *United States* v. *Zamarippa*, held only that it was "not improper * * * for the district court to consider the need to punish Zamarippa for violating the conditions of her supervised release by committing another law violation." 517 F. App'x 264, at *1 (5th Cir. 2013). That is a tautology, and entirely consistent with *Miller*, considering the court of appeals' finding that the record "does not reflect that the district court intended improperly that the sentence reflect the seriousness of or impose just punishment for the original offense." *Id.* And the second case, *United States* v. *Jones*, merely confirms that a district court does not rely on an improper factor when it says once that the sentence "addressed an objective of punishment" and once that the violation conduct reflected that Jones was "incapable of following any kind of supervised release" and needed to be punished. 538 F. App'x 505, 508 (5th Cir. 2013). This holding, too, is consistent with punishing only the breach of trust respecting the underlying conviction and forbidding a district court from relying on § 3553(a)(2)(A) at revocation. The district court did not reference the seriousness of the violation conduct (two misdemeanors) while imposing its revocation sentence. *Id.*

The Government also argues that the Ninth Circuit's decision in *United States* v. *Miqbel*, 444 F.3d 1173 (9th Cir. 2006), has since been revised. Opp. 16. Later courts have indeed described the Ninth Circuit's rule as precluding only making the seriousness of the offense conduct "a focal point of the inquiry," *United States* v. *Anderson*, 302 F. App'x 723, 724 (9th Cir. 2008) (quoting *United States* v. *Simtob*,

485 F.3d 1058, 1062 (9th Cir. 2007)). But that does nothing to undermine the real and entrenched split among the circuits. Nearly all of those that conclude no error results when the seriousness of the violation conduct is considered do so irrespective of whether that factor is "a focal point of the inquiry." *See United States* v. *Vargas-Davila*, 649 F.3d 129, 132 (1st Cir. 2011) ("Although section 3583(e)(3) incorporates by reference, and thus encourages, consideration of certain enumerated subsections of section 3553(a), it does not forbid consideration of other pertinent section 3553(a) factors."); *United States* v. *Williams*, 443 F.3d 35, 48 (2d Cir. 2006) ("we cannot see how, in order to impose a sentence that will provide 'adequate deterrence,' * * * and protection of the public from 'further crimes of the defendant,' * * *, in light of 'the nature and circumstances of the offense,' * * * the court could possibly ignore the seriousness of the offense."); *United States* v. *Young*, 634 F.3d 233, 239 (3d Cir. 2011) ("Indeed, the 'nature and circumstances of the offense,' a mandatory revocation consideration under § 3583(e), necessarily encompasses the seriousness of the violation of supervised release."); *United States* v. *Lewis*, 498 F.3d 393, 400 (6th Cir. 2007) ("[§ 3583(e)] does not state that a court may revoke supervised release after '*only* considering' the enumerated factors.").

The Government also suggests (at 17) that the Fourth Circuit has itself modified its conclusion in *United States* v. *Crudup* that "the district court is not authorized to consider whether the revocation sentence 'reflect[s] the seriousness of the offense, * * * promote[s] respect for the law, and * * * provide[s] just punishment for the offense.' " 461 F.3d 433, 439 (4th Cir. 2006). But the Fourth Circuit case it cites,

United States v. *Webb*, 738 F.3d 638, 642 (4th Cir. 2013), does no such thing. In *Webb*, the Fourth Circuit did not overrule its prior decision in *Crudup*. Rather, the *Webb* court explained that the appellant was not, in that case, entitled to relief because a "district court's reference to the § 3553(a)(2)(A) sentencing considerations, without more" is not the same as "a revocation sentence based predominately on the seriousness of the releasee's violation or the need for the sentence to promote respect for the law and provide just punishment." Although the latter would be foreclosed by *Crudup*, the former, the court held, was not plain error. This understanding of the relationship between the *Webb* and *Crudup* cases was reaffirmed earlier this year. *United States* v. *McArthur*, 677 F. App'x 856, 858-859 (4th Cir. 2017) ("Although mere mention of these factors will not 'automatically render a revocation sentence unreasonable,' a district court commits procedural error if its sentencing decision relies predominately on these factors.").

The split is real. This Court's guidance is needed.

B. This Case Is A Proper Vehicle.

The Government argues that granting certiorari would be inappropriate because Mr. Ochoa's argument was neither pressed nor passed upon below. Opp. 11-12. That is incorrect. Mr. Ochoa argued to the Fourth Circuit that his revocation sentence was plainly unreasonable, explaining that the court "cannot affirm a revocation sentence based predominantly on an impermissible sentencing factor." Reply Br. 4. He cited the court's recent decision in *United States v. McArthur*, 677 F. App'x 856 (4th Cir. 2017), for the proposition that "a district court may not rely

on several of the 18 U.S.C. § 3553(a) factors it considers in initial sentencing," including 18 U.S.C. § 3553(a)(2)(A), and that "a district court commits procedural error if its sentencing decision relies predominately on these factors." *Id.* at 858 (citing *Webb*, 738 F.3d 638, 641-642). In few cases will the District Court's reliance on this improper factor be so clearly outcome-determinative. What is more, few supervised-release revocation cases result in sentences long enough to allow for this Court's meaningful review. The Court should take the opportunity to clarify the law on this important question.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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