No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MAXIMO FLORES-LEZAMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a supervised release revocation sentence may be imposed to punish a defendant for his underlying criminal conduct, or whether a punitive revocation sentence violates 18 U.S.C. § 3583(e) and this Court's precedents stating that supervised release is not intended as a punishment?

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Petitioner, Maximo Flores-Lezama, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On February 11, 2020, the Ninth Circuit affirmed Petitioner's sentence. *See* Appendix ("App").

JURISDICTION

The district court in the United States District Court for the Southern District of California revoked Petitioner's supervised release under 18 U.S.C. § 3583(e). The United States Court of Appeals for the Ninth Circuit reviewed the court's final

judgment under 28 U.S.C. § 1291, and affirmed on February 11, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 3583(e) provides:

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, …

STATEMENT OF THE CASE

A. The district court revokes Petitioner's supervised release, and imposes a sentence that is based on the district court's view that Petitioner needs to be punished for the underlying criminal conduct more harshly than he has previously been punished.

Petitioner is a Mexican citizen who came to California as a teenager. He lived in California for several years, worked as a roofing contractor, and had three children. In 2015, he was convicted of illegal reentry and removed to Mexico.

However, his daughter begged him to return for her quinceañera, and when he did, he was found in the United States and arrested for attempted entry after a previous illegal entry conviction, under 8 U.S.C. § 1325. Because committing a new federal offense was a violation of the supervised release terms from his 2015 conviction, his supervised release was revoked.

His new criminal conviction and his supervised release violation were consolidated for sentencing, and Petitioner requested a total 24-month sentence for both. At sentencing, the district court expressed its disapproval with the prosecutor's charging decision—charging an entry offense under § 1325 that had a statutory maximum sentence of 24 months, rather than an offense under 8 U.S.C. § 1326 that would allow for a higher sentence. *See* 8 U.S.C. § 1325 (a) (maximum two-year sentence for anything after first-time illegal entry conviction). It said it wished to "reject" the "charge bargain" outright because the bargain tied its hands at sentencing. Only after the government explained that there were proof problems with Petitioner's A-file, did the court agree to "go along with the charge bargain."

Turning to the appropriate sentences for the new conviction and the supervision violation, the court again referenced the "charge bargain," saying that Petitioner had "lucked out" because his sentence would be capped at 24 months. The court wished to impose a longer sentence and couldn't—but it noted that Petitioner still "face[d] time on a supervised release violation," implying that the court could make up the difference in the sentence when it came time to sentence him for the supervision violation.

The court imposed the maximum 24-year sentence for the illegal entry conviction, and then discussed the supervision sentence. It rejected Probation's recommendation for an 18-month sentence, and said that because Petitioner previously received illegal entry sentences of 30 and 46 months, he should not have expected a lower sentence after returning again. It did not agree that the supervision sentence should run concurrent to the criminal sentence. Instead, it imposed a consecutive sentence of 24 months—for what the court referred to as a "total sentence" of 48 months—for the supervision violation, to ensure that Petitioner was punished with a longer sentence than he had previously received for illegal entry.

B. On appeal, the Ninth Circuit affirmed Petitioner's supervision sentence, rejecting his argument that the district court had impermissibly used his supervision sentence to punish him for the underlying criminal conduct.

Petitioner argued that the district court had plainly erred by imposing the 24-month revocation sentence to punish him for the underlying criminal conduct of again illegally entering the United States. He pointed to the district court's focus on the

length of his prior criminal sentences, and its sentencing explanation that Petitioner needed to receive a longer sentence for this entry. Because the "charge bargain" barred the district court from imposing a criminal sentence longer than Petitioner's previous sentences, the district court used the revocation sentence to make up the difference, and ensure that Petitioner received a longer sentence of 48 months. However, this meant that his revocation sentence was based on the need to punish, which was impermissible.

The Ninth Circuit disagreed. It found that the district court did not plainly err, and instead "relied only on proper sentencing factors, including [Petitioner's] significant immigration and criminal history, and the need to afford adequate deterrence." *See* App.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's decision conflicts with clear statutory authority prohibiting district courts from considering punishment when imposing revocation sentences.

When a defendant violates the terms of his supervised release, a district court may revoke the supervision and impose a custodial sentence for the violation. 18 U.S.C. § 3583 (e) allows a court to revoke a supervision term and impose a custodial sanction for the violation. The language of section 3583(e) is clear that, in determining the length of the custodial sanction, a district court may consider the need for deterrence, protection of the public, and rehabilitation when determining the revocation sentence, as section 3583(e) specifically directs courts to 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)." But the revocation sentence cannot be imposed to account for the well-known 18 U.S.C. § 3553(a) sentencing factors that apply to criminal offenses, as section 3583(e) omits the factors listed in subsection (a)(2)(A)—"to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *See* 18 U.S.C. § 3553(a)(2)(A); § 3583(e).

Congress deliberately omitted subsection (a)(2)(A)'s sentencing considerations from § 3583(e)'s list of proper sentencing factors, since seriousness of the offense, promoting respect for the law, and just punishment are not listed as revocation sentencing factors. *See*, *e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alterations omitted) (citation and internal quotation marks omitted)). Because Congress deliberately omitted these considerations from the revocation statute, relying on one of these sentencing factors—like punishment—would be improper. *See generally United States v. Miqbel*, 444 F.3d 1173, 1181-83 (9th Cir. 2006) (explaining that violations of supervised release are breaches of the court's trust, and punishment for the underlying criminal conduct must be imposed separately in a separate criminal proceeding).

Yet the Ninth Circuit's affirmance of Petitioner's sentence contravenes Congress's intent, which was to eliminate punishment as a rationale for revocation

sentences. The district court clearly explained that it wished to impose a higher criminal sentence than Petitioner had received for his prior illegal entries, but that it couldn't because of the statutory maximum for the offense. So instead, it determined the length of the revocation sentence in order to make up the difference and ensure that Petitioner served a 48-month sentence—two months longer than his previous criminal sentence. The problem is that while criminal sentences may account for punishment, revocation sentences may not, according to Congress's clear intent as outlined in § 3583(e)'s clear language.

But the Ninth Circuit's decision does not just conflict with Congressional intent. It also contravenes this Court's caselaw. In *United States v. Granderson*, the Court explained that "[s]upervised release … is not a punishment in lieu of incarceration." 511 U.S. 39, 50-51 (1994). And in *Tapia v. United States*, the Court analyzed the structure of 18 U.S.C. § 3553(a)(2) and determined that sentencing courts may not consider the need for rehabilitation when determining appropriate punishment because the statute does not list rehabilitation as a proper sentencing factor. 564 U.S. 319 (2011) (also noting that § 3582(a) instructs courts to recognize that "imprisonment is not appropriate to promote rehabilitation"). Taken together, these decisions dictate that sentencing courts may not rely on punishment as a factor when imposing a revocation sentence because it is omitted from § 3583. Yet the Ninth Circuit's decision ignores this guidance from the Court. The Court should grant the Petition to clarify the proper sentencing factors for a violation of supervised release. *See* Sup. Ct. R. 10(c).

B. This Petition raises an important federal question and the case presents an ideal vehicle to resolve the issue because the district court's reliance on punishment as a sentencing factor is clear from the record.

The Court should grant this Petition. First, it presents an important federal question. Supervised release is imposed in almost 75% of federal criminal cases. *See* Supervised Release by Type of Crime (Table 18), *2019 Annual Report and Sourcebook of Federal Sentencing Statistics*, United States Sentencing Commission, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table18.pdf. Over one-third of these supervisees will recidivate, *see Recidivism Among Federal Offenders: A Comprehensive Overview*, United States Sentencing Commission, Mar. 2016, at 8, meaning that the issue of revocation sentences is a prevalent issue that arises all over the country, in a large number of criminal cases. The Court should therefore grant the petition to provide guidance to the lower courts on the proper sentencing factors since the issue frequently arises and it is important to ensure supervisees receive just sentences based on proper considerations. *See* Sup. Ct. R. 10(c).

Second, this case presents an ideal vehicle to resolve the issue because a decision from this Court would impact Petitioner's sentence on remand. While the district court acknowledged the differences between criminal and revocation sentences, it still determined the length of the revocation sentence based on its desire to punish Petitioner for the criminal conduct of reentering the United States without permission. The court did not hide its frustration at the 24-month statutory cap on the sentence for the illegal entry conviction—it believed the criminal conduct

warranted more time than the previous 30 and 46-month sentences. When discussing the appropriate revocation sentence, the court repeatedly referenced the prior criminal sentences Petitioner had received for illegal entry and said that he should have expected to receive a longer sentence when he entered illegally this time: "he's been sentenced twice for coming into the United States illegally. … he got 30 months, then 46 months"; "You come back again, and you think you're going to get a lesser sentence? That's not realistic"; "30 months, then he comes back. 46 months, and he's back within a year." It then used the revocation sentence to accomplish what it could not because of the charge bargain—impose a "total sentence here [of] 48 months," to ensure that Petitioner suffered a harsher punishment for his entry than he had previously received.

If the Court grants the petition and reaffirms that revocation sentences may not be imposed to punish a defendant, vacating Petitioner's sentence and remanding would mean that the district court could only base the revocation sentence on proper sentencing factors—and not on punishment. This would more than likely result in a shorter sentence for Petitioner, since most of his 24-month sentence was based on the district court's desire to punish him for his repeated illegal entries.

For all these reasons, this Court should grant the Petition. *See* Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant the writ to address this important question of federal law.

Date: July 10, 2020

Respectfully submitted,

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