No. _____

In The Supreme Court of the United States

MICHAEL ROY SHARPE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Congress created the novel system of supervised release for federal criminal defendants, it authorized district judges to act as factfinders and impose new punishment in revocation proceedings under 18 U.S.C. § 3583(e)(3). Those proceedings ordinarily do not require the constitutional safeguards of an original prosecution, because postrevocation sanctions are treated as part of the penalty for the underlying conviction and usually don't raise the minimum or surpass the maximum. But in *United States v. Haymond*, 139 S. Ct. 2369 (2019), the Court recognized that a revocation provision mandating an increased minimum sentence violated constitutional guarantees of due process and trial by jury.

This case presents a closely related question that *Haymond* left open: whether the same juryless procedure presents the same constitutional problems when it increases punishment at the other end, authorizing imprisonment beyond the maximum for the conviction. After serving the statutory maximum 10 years for his conviction, Mr. Sharpe was reimprisoned for another 2 years because a judge found he violated conditions of his supervised release. His imprisonment for 12 years would have been unlawful for the conviction itself, without new factfinding. He presents this question:

> Does § 3583(e)(3) as applied here violate the Fifth and Sixth Amendments by authorizing punishment beyond the maximum for a conviction, based solely on a judge's preponderance finding of a supervised-release violation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Constitution of the United States **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Michael Roy Sharpe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished opinion affirming Mr. Sharpe's sentence is available at 2021 WL 4452532 and is included in Appendix A. Pet. App. 1a. The district court's unpublished memorandum opinion is available at 2020 WL 6047816 and is included in Appendix B. Pet. App. 9a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. §§ 3231 and 3583. The Eleventh Circuit had appellate jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and affirmed Mr. Sharpe's sentence on September 29, 2021. Pet. App. 1a. This petition is timely under Supreme Court Rule 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Jury Trial Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed . . . ."

Section 3583 of United States Code Title 18 is reproduced in full in Appendix C. Pet. App. 14a.

INTRODUCTION

The Court should grant certiorari to decide whether a criminal defendant may constitutionally be imprisoned beyond the statutory maximum for his conviction based on a judge's preponderance-of-the-evidence finding of a supervised-release violation. Sanctions upon revocation of supervised release are "[t]reat[ed] . . . as part of the penalty for the initial offense" to avoid "serious constitutional questions," because the revocation procedure prescribed in subsection (e)(3) of the federal supervised-release statute, 18 U.S.C. § 3583, lacks safeguards sufficient to support freestanding criminal punishment. *Johnson v. United States*, 529 U.S. 694, 700 (2000). But after the district judge in this case found that Mr. Sharpe violated conditions of his supervised release, the penalty for the initial offense swelled to 12 years' imprisonment, a term that his initial conviction could not support on its own.

That increased punishment was authorized by § 3583(e)(3), under which a district judge's preponderance-of-the-evidence finding that a defendant violated a condition of supervised release endows the judge with new power to order additional imprisonment. Ordinarily, facts that increase the maximum lawful punishment must be found by a jury beyond a reasonable doubt, not by a judge. Supervised-release revocation is not exempt from that rule; in *Haymond*, the Court held that a manda-

tory minimum prison term prescribed in § 3583(k) could not rest on § 3583(e)(3)'s juryless revocation procedure.

Haymond might seem to provide a straightforward answer here, because Fifth and Sixth Amendment guarantees apply equally to findings that increase the maximum penalty and those that increase the minimum. But the divided decision in *Haymond*—comprising Justice Gorsuch's opinion for a four-justice plurality and Justice Breyer's separate solo concurrence—has confounded lower courts' attempts to determine the decision's force beyond the specific § 3583(k) context in that case. A few aspects of the decision are clear, though, and they show why the question here merits the Court's review. First, *Haymond*'s result reflects structural differences between supervised release and traditional parole, because parole revocation never requires a jury; *Haymond* recognizes that supervised-release revocation sometimes does. Second, while the structural differences are not constitutionally consequential in a typical revocation, they can be when the streamlined revocation procedure increases the penalty that the original conviction authorized; in *Haymond*, the increase was a new mandatory minimum prison term, which a parole revocation could not produce.

Haymond disturbed the principle that most federal courts of appeals had adopted—that supervised-release revocation, like parole revocation, never implicates the Constitution's jury-trial guarantee. Yet the lower courts have adhered to precedents embodying that principle even after *Haymond*, treating the decision as a legal one-off that is animated by no principle applicable beyond § 3583(k). There is

more than one way to increase the legal punishment, though, and this case involves a different kind of increase—imprisonment beyond the prescribed maximum—based on the same revocation procedure as in *Haymond*. Mr. Sharpe asks the Court to grant review and decide whether, under the Fifth and Sixth Amendments, judge-found facts in a supervised-release revocation may authorize imprisonment beyond the maximum for the underlying conviction.

STATEMENT OF THE CASE

1. Legal Background: The Elimination of Federal Parole and Creation of Supervised Release. Supervised release was a novel creation, part of the Sentencing Reform Act of 1984,[1] which was itself part of "sweeping reforms," *Mistretta v. United States*, 488 U.S. 361, 366 (1989), "to many . . . aspects of the federal criminal justice system," *Gozlon-Peretz v. United States*, 498 U.S. 395, 400 n.2 (1991). The Act abolished parole as the system for supervising federal inmates after their release from prison, replacing it with supervised release. *Id.* at 400; *Johnson*, 529 U.S. at 696–97.

This Court has described supervised release as "analogous" and "similar[]" to parole, *Johnson*, 529 U.S. at 710–11, but some structural aspects of supervised release are notably "distinct[]" from the parole system it replaced, *id.* at 725 (Scalia, J., dissenting). One fundamental distinction is that supervised release comes after

[1] Pub. L. No. 98-473, ch. 2, 98 Stat. 1987, 1999–2000.

and in addition to the entire prison term[2] for the original conviction—regardless of what that term was, even if it was the statutory maximum. *See* 18 U.S.C. § 3583(e)(3).

By contrast, "parole . . . replaced a portion of a defendant's prison sentence," *Johnson*, 529 U.S. at 725 (Scalia, J., dissenting). Both in and beyond the federal system, "[t]he essence of parole [was] release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). "[R]evocation of parole [was] not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding [did] not apply to parole revocations," because they "deprive[d] an individual . . . only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. A defendant whose parole was revoked could be reimprisoned to *complete* (in whole or in part) a prison term that was imposed for the original conviction. *See Haymond*, 139 S. Ct. at 2377 (plurality opinion). But the term "normally could not exceed the remaining balance of the [original] term," *id.* Reimprisonment after revocation, therefore, activated a punishment already imposed for conduct fully prosecuted in a proceeding affording "the full panoply of rights" guaranteed by the Constitution. *See Morrissey*, 408 U.S. at 480.

Sanctions for revocation of supervised release are not so directly tied to the original sentence. Instead, courts draw those sanctions from a new well of carceral authority. Section 3583(e)(3) describes a district court's general power to revoke

[2] "[U]p to 54 days" per year, or about 15 percent, of the term may be satisfied by credit for compliant conduct in custody, but that counts toward service of the sentence, not early release. 18 U.S.C. § 3624(a), (b)(1).

supervised release "if the court, pursuant to the Federal Rules of Criminal Procedure . . . , finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . . ." Upon revocation, the court may "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," § 3583(e)(3). The length of imprisonment for any given revocation is limited according to the severity of the original conviction. For instance, because the maximum prison sentence for Mr. Sharpe's conviction is 10 years, it is a Class C felony, 18 U.S.C. § 3559(a)(3), and the maximum term of imprisonment upon revocation is 2 years, § 3583(e)(3).

But § 3583 doesn't directly cap the number of times supervised release may be revoked and a new prison term imposed.[3] *See id.* A revocation sentence may include further supervised release after a prison term, with no credit for time spent on supervised release before revocation. *See* § 3583(h). And supervised release after reimprisonment may in turn lead to further revocation and additional prison time. § 3583(e)(3). Because no undischarged prison term is held in reserve, as it would be in a parole system, the maximum that limits the original sentence does not directly constrain a sentence upon revocation of supervised release. A judge's finding of a violation unlocks separate authority to order imprisonment within distinct limits prescribed in § 3583.

[3] In complicated concert, subsections (b), (e)(3), and (h) of § 3583 serve to limit the total amount of imprisonment that may be imposed over the course of multiple revocations. The statute includes exceptions, however, which in some cases entirely remove any constraint on the possible total. *See infra* p. 7.

Section 3583(e)(3) generally authorizes a postrevocation prison term equal to "the term of supervised release authorized by statute for the [original] offense . . . ." For Mr. Sharpe and many other defendants, though, there is no maximum term of supervised release—and, therefore, no limit on the total amount of imprisonment to which they may be sentenced over the course of multiple revocations. *See* § 3583(j), (k) (authorizing life term of supervised release for listed offenses, including a violation of 18 U.S.C. § 2252A); 21 U.S.C. § 841(b)(1)(A)–(D) (prescribing minimum supervised-release terms for drug-distribution convictions, with no maximum, "[n]otwithstanding section 3583"). Consequently, § 3583 authorizes unlimited supervised release, unlimited revocations, and unlimited reimprisonment for any defendant convicted of such an offense. The government emphasized that point at Mr. Sharpe's revocation hearing, telling the district court that for the rest of his life the court can reimprison him repeatedly, without trial and based on the court's own factfinding.

2. Mr. Sharpe's Original Conviction and Sentence. In March 2010, Mr. Sharpe pleaded guilty to one count of possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). The plea colloquy followed the procedure prescribed in Federal Rule of Criminal Procedure 11(b),[4] and as part of that, the district court told Mr. Sharpe that a conviction would subject him to "imprisonment of not more than ten years" under § 2252A(b)(2) and "a supervised release term of any term of years

[4] Rule 11(b)(1) requires, among other things, that "[b]efore the court accepts a plea of guilty . . . the court must inform the defendant of, and determine that the defendant understands, . . . any maximum possible penalty, including imprisonment, fine, and term of supervised release," Fed. R. Crim. P. 11(b)(1)(H).

not less than five years or your lifetime."[5] The court identified the same parameters at sentencing and imposed the maximum prison term, ten years, with ten years' supervised release to follow.

3. Supervised Release and Revocation. A little more than two years after Mr. Sharpe completed the prison term and began supervised release, a probation officer filed a revocation petition, alleging that Mr. Sharpe violated conditions of his supervised release. Before a scheduled revocation hearing, Mr. Sharpe argued in a written pleading that if the court were to revoke his supervised release based on its own findings by a preponderance of the evidence, then any new term of imprisonment would increase the penalty for his conviction beyond the statutory maximum and violate the Due Process and Jury Trial Clauses. Accordingly, he argued, findings of fact to support further imprisonment could only be made by a jury on proof beyond a reasonable doubt.

The district court rejected Mr. Sharpe's constitutional objections, holding that it was bound by *United States v. Cunningham*, 607 F.3d 1264 (11th Cir. 2010), which held that there simply "is no right to trial by jury in a supervised release revocation hearing," 607 F.3d at 1268. *See* Pet. App. 9a–13a. The district court heard evidence on the allegations and found by a preponderance of the evidence that Mr. Sharpe committed the violations as alleged. The court sentenced him to two years' imprisonment, to be followed by another term of supervised release. And although the court had

[5] The court also noted that a recidivist enhancement could increase the imprisonment range to 10 to 20 years, but Mr. Sharpe was not a recidivist.

imposed a 10-year term of supervised release for the original conviction, its revocation sentence includes supervised release for life.

3. Affirmance by the Eleventh Circuit. Mr. Sharpe appealed the prison portion of his revocation sentence, arguing that his imprisonment beyond the maximum for his conviction—and, therefore, that § 3583(e)(3) as applied to him—violated the Fifth and Sixth Amendments. The Eleventh Circuit held that *Haymond* did not abrogate *Cunningham*, because in the former case this Court's decision "was 'limited to § 3583(k) . . . and the *Alleyne*[6] problem raised by its 5-year mandatory minimum term of imprisonment,' and declined expressly to address the constitutionality of section 3583(e)." Pet. App. 8a (quoting *Haymond*, 139 S. Ct. at 2382 n.7, 2383 (plurality opinion)). Precedent therefore compelled a holding that, "[b]ecause the revocation of Sharpe's supervised release and the resulting prison sentence are considered a part of the penalty for Sharpe's original offense—not a separate criminal proceeding or penalty—Sharpe was unentitled to a jury trial or to factfinding beyond a reasonable doubt." *Id.* at 7a (citing *Cunningham*, 607 F.3d at 1267–68).

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to decide whether the juryless revocation procedure under § 3583(e)(3) violates the Fifth and Sixth Amendments where a judge's findings enlarge the penalty for a conviction by authorizing imprisonment beyond the original maximum. The courts below held that a judge's preponderance-

[6] *Alleyne v. United States*, 570 U.S. 99 (2013), *cited in Haymond*, 139 S. Ct. at 2378.

of-the-evidence finding was sufficient to support that result, despite the Constitution's due-process and jury-trial guarantees and this Court's decision in *Haymond*. The revocation sentence there, like Mr. Sharpe's, was "considered a part of the penalty for [the] original offense," yet this Court rejected the argument that Mr. Haymond therefore "was unentitled to a jury trial or to factfinding beyond a reasonable doubt." *Cf.* Pet. App. 7a.

The Eleventh Circuit stood by that reasoning in this case, though, and other courts of appeals have likewise held that *Haymond* did not abrogate precedents broadly holding that supervised-release revocation *never* carries a jury right.[7] That reading of *Haymond* is so stinting that it does not even allow for *Haymond*'s result, which recognizes that, at the margins, revocation proceedings entail a jury right. This Court should decide whether that applies at both margins—not only where revocation factfinding increases the minimum penalty, but also where it increases the maximum.

[7] *United States v. Seighman*, 966 F.3d 237, 244–45 (3d Cir. 2020) (citing *United States v. Dees*, 467 F.3d 847, 854 (3d Cir. 2006)); *United States v. Salazar*, 987 F.3d 1248, 1260–61 (10th Cir. 2021) (citing *United States v. Robinson*, 62 F.3d 1282, 1286 (10th Cir. 1995)); *United States v. Henderson*, 998 F.3d 1071, 1074 (9th Cir. 2021) (citing *United States v. Purvis*, 940 F.2d 1276, 1279 (9th Cir. 1991)); *United States v. Childs*, 17 F.4th 790, 791–92 (8th Cir. 2021) (citing *United States v. Postley*, 449 F.3d 831, 833 (8th Cir. 2006)); *but see Henderson*, 998 F.3d at 1078 (Rakoff, J., dissenting) ("upon [a judge's own] finding [of] a violation of supervised release the judge may not impose a prison term that, together with the original term, would exceed the statutory maximum for the underlying offense").

I. Juryless revocation proceedings implicate the Fifth and Sixth Amendments' protections where they authorize an increase to the punishment for a conviction.

A. The jury right attaches to all factfinding that is necessary to increased criminal punishment.

A criminal defendant has the right, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment," to have a jury find beyond a reasonable doubt every fact that authorizes punishment. *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). That includes a fact that increases either the top or bottom of the range of punishment. *Id.* at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Alleyne*, 570 U.S. at 103 ("Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum . . . must be submitted to the jury.").

A penal statute cannot withhold the jury right by using semantics or formalisms to recharacterize a fact, or a factfinding proceeding, as something else. *Apprendi*'s rule extends to every determination that requires proof, if the determination is necessary to a court's authority to impose increased punishment—regardless of what the determination is called, and regardless of whether it is made during or outside of a traditional proceeding to adjudicate guilt:

> "Merely using the label 'sentence enhancement' to describe [a particular finding] surely does not provide a principled basis for treating [it] differently [from other findings]."

> The dispositive question . . . "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Ring v. Arizona, 536 U.S. 584, 602 (2002) (citations omitted) (quoting *Apprendi*, 530 U.S. at 476, 483, 494); *see also Haymond*, 139 S. Ct. at 2379 (plurality opinion) ("Calling part of a criminal prosecution a 'sentence modification' imposed at a 'post-judgment sentence-administration proceeding' can fare no better" than "relabeling a criminal prosecution a 'sentencing enhancement.'").

B. Supervised-release revocation, unlike parole revocation, can increase the punishment for a conviction.

Supervised release was created to replace parole's function, but not to be the same as parole, and this Court has always recognized differences between the two. Parole has been described as "an act of grace to one convicted of a crime, [which] may be coupled with such conditions in respect of its duration as Congress may impose." *Escoe v. Zerbst*, 295 U.S. 490, 492–93 (1935). But Congress scrapped that balance between give and take—grace, but with conditions—when it decided "to eliminate most forms of parole and to replace them" with supervised release, "a unique method of post-confinement supervision invented by the Congress for a series of sentencing reforms," *Gozlon-Peretz*, 498 U.S. at 400, 407. For a defendant who has been sentenced to the statutory maximum prison term and has completed it, supervised release is all take, no give—conditions without the grace of early release.

Congress erected guardrails to mitigate the effects of supervised release's structural differences from parole—limiting the lengths of prison terms for violations, *see* § 3583(e)(3), and of supervision terms after both the original prison term, § 3583(b), and any term imposed upon revocation, § 3583(h). But Congress has removed those guardrails in places, *see supra* p. 7 (citing § 3583(j)–(k), 21 U.S.C. § 841(b)(1)(A)–(D)), and without them, supervised release is able to drift further and further from its predecessor, parole. *Haymond* confronted one of those places, § 3583(k), which imposes a floor and removes the ceiling on a revocation prison term for a sex offender who commits a new offense enumerated in the statute. *See* 139 S. Ct. at 2374 (plurality opinion) (explaining that § 3583(k) requires "an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant's initial crime of conviction").

C. *Haymond* recognizes that revocation proceedings are not categorically exempt from Fifth and Sixth Amendment guarantees.

Exempting supervised release from "the full panoply of rights due a defendant" in an original prosecution, *Morrissey*, 408 U.S. at 480, has always depended on the analogy to parole, and the notion that in either system, postrevocation penalties draw from the authority furnished by the original conviction. *See Johnson*, 529 U.S. at 700–01. That principle allows the revocation procedure to ride the constitutional coattails of the original prosecution and the safeguards provided in it. *See id.* at 700. But as the Court recognized in *Haymond*, the principle didn't hold in § 3583(k), because a district judge's finding of a supervised-release violation under that provision required a minimum penalty not mandated for the original conviction. *Haymond*, 139 S. Ct. at

2374 (plurality opinion) (noting the conviction carried "a prison term of between zero and 10 years" (citing 18 U.S.C. § 2252(b)(2))).

Haymond concluded that the "structural difference[s]" between supervised release and parole sometimes "bear[] constitutional consequences." *Haymond*, 139 S. Ct. at 2382 (plurality opinion). A finding of a supervised-release violation can "increase the penalty for a crime," *Alleyne*, 570 U.S. at 103, and a majority of the Court in *Haymond* held that § 3583(k)'s mandatory minimum could not be based on judge-found facts. Specifically, a "find[ing] by a preponderance of the evidence that the defendant violated a condition of supervised release," § 3583(e)(3), *cited in* § 3583(k), "can, at least . . . in [some] cases," trigger the jury right by increasing the penalty for the initial conviction. *See Haymond*, 139 S. Ct. at 2382 (plurality opinion); *accord id.* at 2386 (Breyer, J., concurring in the judgment) (§ 3583(k) "is unconstitutional" because it does not "grant[] a defendant the right[] . . . [to have] a jury . . . find facts that trigger a mandatory minimum prison term").

II. *Haymond* raises, but does not directly resolve, questions about revocation findings that authorize punishment beyond the maximum for the original conviction.

Although *Haymond* specifically concerned the penalties in § 3583(k), that subsection expressly incorporates the general revocation provision, § 3583(e)(3). *See* § 3583(k) (prescribing circumstances in which "the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment *under subsection (e)(3)* without regard to the [maximum prison terms] contained therein" (emphasis added)). So although *Haymond* involved mandatory revocation and impris-

onment under subsection (k), the case was procedurally no different from a garden-variety revocation, like Mr. Sharpe's, under § 3583(e)(3). The decision naturally raises related questions where that same factfinding procedure increases the *ceiling* on punishment, instead of the floor, because this Court recognizes "no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum," *Alleyne*, 570 U.S. at 116.

Haymond did not try to answer those questions; the plurality emphasized that the case was not one where "combining a defendant's initial and post-revocation sentences issued under § 3583(e) . . . yield[s] a term of imprisonment that exceeds the statutory maximum term of imprisonment the jury has authorized for the original crime of conviction." 139 S. Ct. at 2384. But since *Haymond*, courts of appeals that *have* encountered such cases have fallen back on prior holdings that "there is *no right* to trial by jury in a supervised release revocation hearing," *Cunningham*, 607 F.3d at 1268 (emphasis added), which are inimical to *Haymond*'s result.

The lower courts appear uncertain about how to apply the fractured 4-1-4 decision in *Haymond*, and they effectively have treated the precedent as *sui generis*, with no legal meaning beyond the specific § 3583(k) question decided there. *See supra* p. 10 n.7. The greatest source of uncertainty appears to be the extent to which a majority of the Court subscribed to the plurality's rationale, given Justice Breyer's solo concurrence:

> I agree with much of the dissent, in particular that the role of the judge in a supervised-release proceeding is consistent with traditional parole. As 18 U.S.C. § 3583 makes clear, Congress did not intend the system of supervised release to differ from parole in this respect. And in light of

> the potentially destabilizing consequences, I would not transplant the *Apprendi* line of cases to the supervised-release context.

Haymond, 139 S. Ct. at 2385 (Breyer, J., concurring in the judgment) (citations omitted).

The *Haymond* dissent questioned whether "there is a constitutional basis for . . . Justice BREYER's opinion," *id.* at 2386 (Alito, J., dissenting). But Justice Breyer said he had concluded that "§ 3583(k) *is unconstitutional*" because it prescribes penalties that "more closely resemble the punishment of new criminal offenses, but without granting a defendant the rights, including the jury right, that attend a new criminal prosecution." *Id.* (Breyer, J., concurring in the judgment) (emphasis added). That plainly relies on the Sixth Amendment Jury Trial Clause, where the constitutional jury right resides. So it doesn't much matter whether Justice Breyer's concurrence successfully avoided "transplant[ing] the *Apprendi* line of cases to the supervised-release context," *Haymond*, 139 S. Ct. at 2385, because either way, it *did* recognize that constitutional guarantees like the jury right are not entirely inert in that context. And *Apprendi* describes the fundamental rule about where those guarantees have force. Despite that, the lower courts have read *Haymond* as saying nothing new about revocation factfinding except where § 3583(k)'s penalties are concerned. *See Seighman*, 966 F.3d at 244–45; *Salazar*, 987 F.3d at 1260–61; *Henderson*, 998 F.3d at 1074; *Childs*, 17 F.4th at 791–92; Pet. App. 7a–8a. If they are right, then revocation stands alone as a context where judicial factfinding could be adequate to increase the maximum, but not the minimum.

Haymond is not an inscrutable black box. The Court left no doubt about at least one matter outside of § 3583(k): a typical revocation shouldn't require a jury. *See* 139 S. Ct. at 2384 (plurality opinion) ("[E]ven if § 3583(e)(3) turns out to raise Sixth Amendment issues in a small set of cases, . . . the vast majority . . . would likely be unaffected."); *id.* at 2385 (Breyer, J., concurring in the judgment) (citing with approval the dissent's concern that "the defendant [might be] entitled to a jury trial" in "[a]ll supervised-release revocation proceedings," *id.* at 2388). So on the continuum between all and nothing, *Haymond*'s holding about the right to a jury in a revocation proceeding definitely is not "all." But it definitely *is* "not nothing"; some revocation sanctions require a new jury finding.

Which ones, though? The traditional rule described in *Apprendi* looks to a finding's effect on punishment. And that rule provides a natural explanation for *Haymond*'s result, as all members of the majority agreed that subsection § 3583(k)'s increased mandatory minimum can't be based on § 3583(e)(3)'s juryless procedure. The majority also agreed that § 3583(k)'s penalties stretched the analogy between supervised release and parole too far. *Haymond*, 139 S. Ct. at 2382 (the "structural difference [between supervised release and parole] bears constitutional consequences"); 2385–86 ("Section 3583(k) is difficult to reconcile with [the] understanding of supervised release" as "consistent with traditional parole"). However those conclusions are characterized vis-à-vis *Apprendi*, they certainly appear rooted in the principle that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the

punishment, and the judge exceeds his proper authority." *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (internal quotation marks and citation omitted). If *Apprendi*'s rule does not illuminate where the jury right would arise in a revocation proceeding, then some different rule must; yet no alternative—nor any reason for one—appears in *Haymond* or the lower courts' subsequent decisions that limit its reach.

Judge Rakoff, sitting by designation with the Ninth Circuit in *Henderson*, wrote that when *Haymond* is placed in legal context, its import seems clear: "[T]he supervised release system writ large is consistent with the Sixth Amendment," and a judicial finding of a violation is sufficient to "allow the judge to send the defendant back to prison to serve more or all of the prescribed maximum term." *Henderson*, 998 F.3d at 1078 (Rakoff, J., dissenting). But under the Constitution, Judge Rakoff noted, that authority is finite. If a judge may rely on her own factfinding, without a jury right, to "impose a prison term that, together with the original term, would exceed the statutory maximum for the underlying offense," then "the judge effectively arrogates to herself the power that the Sixth Amendment gives solely to a jury." *Id.*

That view did not carry the day in *Henderson*, though, nor in decisions by other courts of appeals, including the Eleventh Circuit in this case. Instead, those courts have read *Haymond* to stand for a principle so narrow that it cannot even accommodate *Haymond* itself. *See, e.g.*, Pet. App. 7a ("Because the revocation of Sharpe's supervised release and the resulting prison sentence are considered a part of the penalty for Sharpe's original offense . . . Sharpe was unentitled to a jury trial or to factfinding beyond a reasonable doubt." (citing *Cunningham*, 607 F.3d at 1267–68)).

It's hard to see how that understanding could survive *Haymond*. This Court should decide whether the Fifth and Sixth Amendments provide any principled basis for distinguishing between the minimum and maximum prison terms where a judge's revocation finding increases the original penalty.

III. This case squarely presents an important question that *Haymond* left unanswered, and the case is a good vehicle.

Although the lower courts have consistently ascribed no meaning to *Haymond* outside of § 3583(k), their decisions do not suggest a confident application of *Haymond* as much as an uncertainty about how to apply it. That uncertainty shows why this Court should address the question naturally implied by *Haymond* and squarely presented here: whether the revocation procedure that the Court found inadequate to increase the minimum punishment is also inadequate to increase the maximum.

A. The penalty for Mr. Sharpe's underlying conviction was expanded by a district judge's preponderance finding of a supervised-release violation.

Mr. Sharpe was accorded the right to a jury trial just once, during his prosecution under the original indictment for one count of violating § 2252A(a)(5)(B). Under § 2252A(b)(2), he could be "imprisoned not more than 10 years," and the district court imposed 10 years. The conviction also authorized (indeed, required) a term of supervised release for "any term of years not less than 5, or life." § 3583(k) (requiring such a term for "any offense under" one of the statutes enumerated there, which include § 2252A). But additional punishment would require proof of new facts, entirely separate from the original offense. Put another way, Mr. Sharpe's original

conviction gave the district court no power to imprison him for more than 10 years. To acquire that power under § 3583, the district judge had to find new facts constituting a supervised-release violation.

In a parole system, "not more than 10 years" would mean just that. A released defendant could have his parole revoked and be returned to prison without a jury finding beyond a reasonable doubt. But the finding of a violation could not increase his sentence; it could only "return the parolee to prison to serve out the balance" that remained when he was paroled—a sentence already imposed in the original prosecution, with the jury right provided. *Morrissey*, 408 U.S. at 478–79. Congress changed that when it replaced parole with supervised release, and as a purely statutory matter, § 3583 unquestionably authorized the district court to reimprison Mr. Sharpe beyond the 10-year maximum. In fact, the statute places no limit on the number of times the court may do so in this case, because § 3583(k) subjects Mr. Sharpe to supervised release for the rest of his life. The only limitation is that the prison term for any given revocation cannot exceed two years. *See* §§ 3583(e)(3), 3559(a)(3).

That clearly is as Congress intended, but whether it comports with due process and the jury right is a harder question. The Court recognized in *Johnson* that features of the novel supervised-release regime—such as that "the violative conduct need not be . . . [found] by a jury beyond a reasonable doubt"—could present constitutional hazards. 529 U.S. at 700. And the Court saw "[t]reating postrevocation sanctions as part of the penalty for the initial offense" as a way to "avoid[] these difficulties." *Id.*

That treatment gives a revocation sentence the constitutional cover provided by procedural safeguards in the original prosecution.

But can it *enlarge* the cover? Can constitutional safeguards in one proceeding inoculate later punishment that the original proceeding didn't directly authorize? *Haymond* suggests not, because if the jury right in the original prosecution had been constitutionally adequate to support the revocation penalties there, then denying that right at revocation would not have been a problem. Yet a majority of the Court considered it a fatal problem. *Haymond*, 139 S. Ct. at 2382, 2386.

B. Postrevocation imprisonment beyond the original maximum raises particularly important questions where lifetime supervised release allows unlimited revocations.

This case is a good vehicle for the Court to decide *Haymond*'s implications for postrevocation imprisonment beyond the original statutory maximum, because that issue has been squarely presented throughout these proceedings. And the issue's importance is especially clear, because if the jury right is unavailable in these circumstances, a judge's factfinding can expand his own carceral authority without limit. Mr. Sharpe is on supervised release—and so, under § 3583(e)(3) and (k), can be repeatedly reimprisoned—for the rest of his life. A parole-like revocation procedure for supervised release has always been justified by the premise that the consequences usually would be about the same as in a parole regime. But that premise assumes § 3583's usual guardrails remain in place. Here, the guardrails have been removed almost entirely, making the analogy to parole particularly strained, and the justification for withholding the jury right particularly shaky.

At Mr. Sharpe's revocation hearing, an attorney for the government told the district judge, "[T]here are certain defendants—and this defendant falls in that class—that you can sentence . . . over and over and over again to 24 months every single time he violates his supervised release." It was meant as a warning to Mr. Sharpe, presumably, and it undoubtedly served as that. But it's also a very candid description of a perpetual state of legal peril without a true parallel in American criminal justice, with a judge, unchecked by a citizen jury, holding the power to enlarge a defendant's punishment for a conviction. By conferring that power, § 3583 tests the Sixth Amendment's jury guarantee, under which "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252 (Stevens, J., concurring)). Even after *Haymond*, the courts of appeals continue to deny that rule's force where revocation factfinding authorizes imprisonment beyond the maximum a defendant originally faced. The Court should grant review to decide whether the lower courts' decisions are compatible with due process and the jury right, because imprisonment for 12 years could not lawfully have been "the penalty for Sharpe's original offense," Pet. App. 7a, and only a judge's preponderance factfinding authorized it under § 3583(e)(3).

CONCLUSION

For the foregoing reasons, Mr. Sharpe prays that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted this, the 8th day of December, 2021.

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