No. _____

IN THE

Supreme Court of the United States

DELVAREZ LONG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Tapia v. United States*, 564 U.S. 319 (2011), this Court held that the Sentencing Reform Act bars federal courts from imposing or lengthening a prison term to promote a criminal defendant's rehabilitation. Circuits are split on how to apply the Sentencing Reform Act after *Tapia*.

Does a sentencing court violate the Sentencing Reform Act only when rehabilitation is the "primary consideration" behind a prison sentence, as the Seventh Circuit held below and as is the rule in the First, Second, Third, Fourth, Fifth, and Eighth Circuits? Or does the act prohibit sentencing courts from relying even in part on rehabilitation as a reason to impose prison time, as is the rule in the Sixth, Ninth, Tenth, and Eleventh Circuits?

LIST OF PARTIES

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

RELATED PROCEEDINGS

United States Court of Appeals (7th Cir.):

United States v. Long, No. 22-2275, (August 22, 2023)

United States District Court (S.D. Ind.):

United States v. Long, No. 1:21-CR-00212, (July 20, 2022).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delvarez Long respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

DECISIONS BELOW

The Seventh Circuit's opinion (App. 1a–12a) is not yet published but is available on Westlaw at 2023 WL 5362668. The district court's judgment (App. 13a–19a) and the sentencing transcript (App. 20a–38a) are unpublished.

JURISDICTION

The Seventh Circuit entered judgment on August 22, 2023. App. 1a. Neither side petitioned for rehearing. This petition is filed within 90 days of the August 22, 2023 judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3582(a) provides in relevant part:

> **(a) Factors to be considered in imposing a term of imprisonment.**--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

INTRODUCTION

The Sentencing Reform Act says that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). When enacted, this policy declaration marked a shift away from the rehabilitative model that drove criminal sentences for most of the twentieth century. But many federal courts dragged their feet in embracing this policy change; despite the act's clear mandate, courts continued to rely on rehabilitation as a justification for imposing prison time. This Court eventually intervened and, in a unanimous decision, clarified that the Sentencing Reform Act created a bright line rule: Courts cannot impose or lengthen a prison term to promote a criminal defendant's rehabilitation. *Tapia v. United States*, 564 U.S. 319, 321 (2011).

In the following decade, however, the federal circuits split on how to apply the *Tapia* rule. *See United States v. Schonewolf*, 905 F.3d 683, 691 (3d Cir. 2018) (describing split). Four circuits took *Tapia*'s holding to heart. The Sixth, Ninth, Tenth, and Eleventh Circuits will vacate any prison sentence motivated—even only in part—by a district court's desire to rehabilitate a defendant.

Seven other circuits adopted rules that narrowed *Tapia*'s holding. Even post-*Tapia*, the First, Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits continue to hold that a district court may rely on rehabilitation as a reason to impose prison time. These circuits maintain that imprisonment *is* an appropriate means of rehabilitation, so long as rehabilitation is not the sole or primary reason for a prison sentence.

This Court again needs to intervene and clarify the role of rehabilitation in sentencing. The courts of appeal are hopelessly split, and the issue presented in this case has already been decided by 11 of the 12 geographical circuits. As it stands, a majority of circuits continue to embrace the rehabilitative theory of imprisonment that Congress explicitly rejected in the Sentencing Reform Act. Only this Court can put those circuits back on the track that Congress intended.

STATEMENT OF THE CASE

I. Background on the Sentencing Reform Act and this Court's decision in *United States v. Tapia*

For decades, federal courts embraced the idea that prison was rehabilitative. *Tapia v. United States*, 564 U.S. 319, 324 (2011). Sentencing judges relied on a system of indeterminate sentencing, in which they were given "almost unfettered discretion" to choose prison sentences within wide outer boundaries. *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989). But defendants were not expected to serve their entire sentences. Reflecting a policy that convicts should remain imprisoned only until able to safely reenter society, inmates could often seek parole after the successful completion of rehabilitative programming. *Tapia*, 564 U.S. at 324. If parole officials determined that the prisoner had become rehabilitated, the prisoner could be released. *Id.*

In the final quarter of the twentieth century, however, policymakers changed their views of parole and indeterminate sentencing. From the 1970s through the 1990s, 14 states abolished parole as a part of their state criminal-justice systems.[1] Congress likewise turned a critical eye toward the federal parole system. One criticism was that indeterminate sentencing created unfair disparities among similarly situated defendants. *Tapia*, 564 U.S. at 324 (citing *Mistretta*, 488 U.S., at

[1] Paula M. Ditton & Doris James Wilson, Bureau of Justice Statistics, *NCJ 170032, Truth in Sentencing in State Prisons* (1999), 3, https://bjs.ojp.gov/content/pub/pdf/tssp.pdf (last visited September 28, 2023).

365). Lawmakers also started to doubt the prison system's ability to rehabilitate inmates. *Mistretta*, 488 U.S., at 365.

Thus, Congress made a policy decision to abolish parole for new convictions and shifted federal law to a system of determinate sentencing. *Tapia*, 564 U.S. at 325. Under the Sentencing Reform Act of 1984, inmates could no longer obtain early relief by showing their successful rehabilitation. And federal courts were stripped of any power to order rehabilitative programming for imprisoned persons; prison time was now exclusively for the purposes of retribution, deterrence, and incapacitation. 18 U.S.C. §§ 3553(a)(2), 3582(a); *Tapia*, 564 U.S. at 325–26. Courts could still address rehabilitative concerns through sentences of probation or supervised release, and courts remained empowered to order rehabilitative programming for these components of a federal sentence. 18 U.S.C. §§ 3563(a), 3583(c); *Tapia*, 564 U.S. at 330. But rehabilitation was no longer a reason to impose prison time.

To emphasize the policy change underlying the Sentencing Reform Act, Congress directed sentencing courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). Similarly, Congress instructed the Sentencing Commission to "insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant." 28 U.S.C. § 944(k).

But old habits die hard. Even after passage of the Sentencing Reform Act, federal courts continued to cite rehabilitation as a reason to increase defendants' prison sentences. *See, e.g., United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994);

United States v. Hawk Wing, 433 F.3d 622 (8th Cir. 2006); *United States v. Jimenez*, 605 F.3d 415 (6th Cir. 2010). Indeed, despite the cautionary language of § 3582(a), many courts treated as *frivolous* the idea the Sentencing Reform Act barred imprisonment for the purpose of rehabilitation. *See, e.g., United States v. Davis*, 406 F. App'x 52, 54 (7th Cir. 2010) (granting *Anders* motion because rehabilitation justified prison sentence); *United States v. Fairley*, 395 F. App'x 33, 34 (4th Cir. 2010) (same); *United States v. Wazwaz*, 327 F. App'x 669, 670 (8th Cir. 2009) (same); *United States v. Jones*, 216 F. App'x 189, 192 (3d Cir. 2007) (same). *See also United States v. Burford*, 220 F. App'x 414, 417 (6th Cir. 2007) (chastising counsel for not filing *Anders* brief when rehabilitation justified prison sentence).

Eventually, this Court intervened. *United States v. Tapia* addressed the question of "whether the Sentencing Reform Act precludes federal courts from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation." 564 U.S. at 321. All nine justices agreed that the act imposes this restriction. *Id.* And in reaching this holding, this Court abrogated the rule in some circuits that § 3582(a) allows a court to lengthen, although not to impose, a prison term based on the need for rehabilitation. *Id.* at 323 n.1. The Sentencing Reform Act, this Court explained, clearly articulated Congress's message: "Do not think about prison as a way to rehabilitate an offender." *Id.* at 330.

In the 12 years since *Tapia*, this Court has not revisited 18 U.S.C. § 3582(a)'s prohibition against imprisonment for rehabilitative purposes.

II. The district court proceedings in this case

In 2021, police arrested Delvarez Long pursuant to a state warrant for domestic battery. R. 43, ¶ 6. They found a gun in his possession. R. 43, ¶ 8. A grand jury then indicted Long for unlawful possession of a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). R. 15.

While on bond, Long was involved in another domestic disturbance. His then-girlfriend (now wife) called police to report that Long had threatened her and waived a gun in her face. R. 47-1. Officers responded to the call and interviewed Long's partner, but they did not find the alleged firearm. App. 38a.

Long later pleaded guilty to the federal gun charge. R. 38. The district court calculated a sentencing range of 33 to 41 months' imprisonment under the Sentencing Guidelines. App. 44a. The court found a lack of evidence to hold Long responsible for the alleged second gun that his girlfriend said he used to threaten her while on bond. App. 40a–42a. But it still considered the overall incident in which Long threatened his girlfriend as relevant conduct tied to Long's history of domestic violence. App. 52a.

The district court imposed a 51-month prison sentence. App. 49a. Recognizing that this sentence was above the advisory guidelines range, the court explained why it believed an upward variance was warranted. App. 51a. The court said that this offense was Long's fourth felony conviction. App. 51a. And it reasoned that Long had already "been afforded the opportunity for rehabilitation by probation, parole, supervision, community corrections, jail sentences, and even a prison sentence."

App. 52a. The court further focused on Long's history of family and domestic issues. App. 52a–53a. Along with the domestic incident from when Long was on bond, Long also owed about $80,000 in child support and had other children placed with relatives after being adjudicated in need of services. App. 52a–53a. The court also noted that Long had requested addiction and mental health treatment. App. 53a. The district court concluded:

> Mr. Long needs to gain control of his life by maintaining sobriety, establishing legitimate employment, and taking care of his children. He needs some domestic violence assistance, because he was—he's violent. He's domestically violent. He needs to get his child support paid and become a productive member of society.
>
> So the Court is ordering this sentence to promote respect for the law and provide just punishment, and it is a long enough time that the defendant can participate in prison industries, as well as learn some job skills so that — that he can use upon his release. Those are the reasons the Court intends to impose the stated sentence.

App. 54a.

III. The Seventh Circuit's decision

On appeal to the Seventh Circuit, Long contended that the district court erred by imposing prison for the purpose of rehabilitation. App. 2a. He relied on the district court's statements about his need for job training and domestic-violence programming as evidence that the length of his prison term was based, at least in part, by the court's desire to rehabilitate him. App. 4a–5a.

The Seventh Circuit acknowledged a circuit split on how to apply *Tapia*. App. 6a, n.1. Some circuits apply a rule "that Tapia errors exist only when the record demonstrates that rehabilitation was the district court's primary

consideration in determining the length of the prison term." *Id.* On the other hand, several circuits "hold that a prison term cannot be based on any rehabilitative concerns." *Id.*

The Seventh Circuit sided with the government and joined the "primary consideration" side of the split. App. 2a. "*Tapia* permits a judge to discuss rehabilitation so long as she does not make rehabilitation a primary consideration in deciding whether to impose a prison sentence or how long it should be." *Id*. Thus, the Seventh Circuit held, Long needed to show that the district court focused "exclusively or disproportionately on rehabilitation" when imposing the prison sentence. App. 11a–12a.

The Seventh Circuit recognized that the district court's comments supported "an inference that prison programming was at least *a* reason for the length of the prison term." App. 10a. And it noted that "one could find error" under the strict version of the *Tapia* rule used in some other circuits. *Id.* But because other factors seemed to be more dominant, like the seriousness of the offense and Long's criminal history, the sentence was affirmed. App. 8a–10a.

REASONS FOR GRANTING THE PETITION

The circuits disagree on how to apply *Tapia*'s rule that rehabilitation cannot be used as a reason to impose prison time. Four circuits accept *Tapia* on its face; they apply a bright-line rule that sentencing courts cannot rely on rehabilitation as a reason for imprisonment. Other circuits, including the court below, have taken it upon themselves to narrow *Tapia*'s holding. They hold that a sentencing court *can*

rely reliance on rehabilitation as a reason for imprisonment—so long as rehabilitation is not the primary reason for lengthening a prison sentence. The split is unlikely to resolve itself; the issue has already fully percolated through the appellate courts with eleven circuits taking a side.

This case would be an excellent vehicle for this Court to resolve the split. Because rehabilitation was a *significant* factor—but not the *primary* factor—underlying Long's prison sentence, his case falls directly in the middle of the split. As the Seventh Circuit recognized, Long could have succeeded on appeal if the Seventh Circuit applied the rule used in the Sixth, Ninth, Tenth, and Eleventh Circuits. App. 10a.

Long's and other defendants' fundamental rights are at stake. The district court imposed an above-guidelines sentence. The sentencing transcript shows that at least some of that extra time is attributable to the court's desire to rehabilitate Long—a factor that is 18 U.S.C. § 3582(a) says is "inappropriate," and that *Tapia* declared verboten. "Few things should give [a court] more pause than the possibility of mistakenly sending to prison a man Congress has said should not be there." *United States v. Mendiola*, 696 F.3d 1033, 1045 (10th Cir. 2012) (Gorsuch, J., Concurring) (discussing *Tapia* error). And because the circuits fundamentally disagree on the role of rehabilitation at sentencing, the length of any defendant's prison sentence can hinge upon what circuit the defendant is sentenced in.

I. A well-developed split exists, with the majority of circuits misapplying the Sentencing Reform Act.

Tapia has had a "fracturing effect" on the federal circuits. Owen M. Mattox, *Tapia v. United States: The Appropriateness of Considering Rehabilitation at Sentencing*, 44 Am. J. Trial Advoc. 213, 214 (2020). *See also United States v. Schonewolf*, 905 F.3d 683, 691 (3d Cir. 2018) (describing split). The opposing sides are firm in their positions, and this Court's intervention is necessary to ensure uniform application of federal sentencing law.

A. The Sixth, Ninth, Tenth, and Eleventh Circuits correctly apply *Tapia*.

Four circuits apply *Tapia* strictly. They hold that 18 U.S.C. § 3582(a) is violated whenever "the district court based the length of the sentence of incarceration *in part* on rehabilitation." *United States v. Adams*, 873 F.3d 512, 521 (6th Cir. 2017) (emphasis added). *See also United States v. Joseph*, 716 F.3d 1273, 1281 n.10 (9th Cir. 2013) (ordering district court to not consider rehabilitation on remand because record suggested rehabilitation "may have been a factor"); *United States v. Thornton*, 846 F.3d 1110, 1116 (10th Cir. 2017) ("If the sentence of imprisonment is based even partially on rehabilitation, it is erroneous."); *United States v. Vandergrift*, 754 F.3d 1303, 1310 (11th Cir. 2014) ("*Tapia* error occurs where the district court *considers* rehabilitation" even if not the "'dominant' factor").

This bright-line rule is consistent with § 3582(a) and "faithful to *Tapia*'s reasoning." *Vandergrift*, 754 F.3d at 1310. Both the Sentencing Reform Act and this Court have dictated that courts "should consider the specified rationales of

punishment *except for* rehabilitation" when imposing or lengthening a prison sentence. *Tapia*, 564 U.S. at 327. And as with any other instance in which a court considers an impermissible sentencing factor, even partial reliance on rehabilitation is error. *Vandergrift*, 754 F.3d at 1311. An alternative rule requiring reversal only when rehabilitation is the sole motivation "would not make sense" because "there will almost always be some valid reasons advanced by the district court for imposing the sentence issued." *Thornton*, 846 F.3d at 1116.

B. The "primary consideration" test applied in other circuits has no basis in *Tapia* or the statutory text of the Sentencing *Reform* Act.

Every other geographic circuit, except for the D.C. Circuit, has adopted some variant of a "primary consideration" or "dominant factor" test. "Under this standard, rehabilitation may be a factor granted some weight in selecting a prison sentence, so long as it is not the primary or dominant consideration." *United States v. Schonewolf*, 905 F.3d 683, 692 (3d Cir. 2018). The test is "whether rehabilitation is a 'secondary concern' or 'additional justification' (permissible) as opposed to a 'dominant factor' (impermissible)." *United States v. Garza*, 706 F.3d 655, 660 (5th Cir. 2013). *See also United States v. Del Valle-Rodriguez*, 761 F.3d 171, 174 (1st Cir. 2014) (*Tapia* error occurs when "the record indicates that rehabilitative concerns were the driving force behind, or a dominant factor in, the length of a sentence"); *United States v. Lifshitz*, 714 F.3d 146, 148, 150 (2d Cir. 2013) (No error to impose sentence so defendant could get prison medical care when other factors were the "primary considerations"); *United States v. Bennett*, 698 F.3d 194, 201 (4th Cir.

2012) (No error when court gave multiple reasons and rehabilitation was "only a minor fragment of the court's reasoning"); *United States v. Replogle*, 678 F.3d 940, 943 (8th Cir. 2012) (No error when permissible factors "were the dominant factors in the district court's analysis").

This balancing test of some-but-not-too-much prison for rehabilitative purposes is contrary to Congress's command that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). The test is also contrary to this Court's precedent. This Court stated at least five times in *Tapia* that rehabilitation is not a reason to lengthen a prison sentence. *Id.* at 321, 323, 330, 332, 335. Neither Congress nor this Court suggested that the existence of other permissible factors could excuse a district court's reliance on rehabilitation. To the contrary, this Court noted in *Tapia* that rehabilitation was only one of the sentencing court's reasons for the challenged prison sentence. *Tapia*, 564 U.S. at 322. Yet this Court concluded that statutory language from throughout the Sentencing Reform Act created a bright-line rule against reliance on rehabilitation when imposing prison time: "Each actor at each stage in the sentencing process receives the same message: Do not think about prison as a way to rehabilitate an offender." *Id.* at 330.

Circuits that apply a primary-consideration rule nonetheless say that courts *can* think about prison as a way to rehabilitate an offender, at least to a certain extent. *See e.g., Garza*, 706 F.3d at 660. The primary-consideration test is thus "not only incorrect as a matter of law but also disruptive of the [Sentencing Reform

Act]'s underlying goals." Matt J. Gornick, *Finding "Tapia Error": How Circuit Courts Have Misread Tapia v. United States and Shortchanged the Penological Goals of the Sentencing Reform Act*, 69 Vand. L. Rev. 845, 867 (2016) (internal quotation omitted). Congress killed the rehabilitative model when it abolished parole. Courts are not entitled to overrule that policy decision.

The primary-consideration rule also reanimates doctrines that this Court already abrogated in *Tapia*. This Court granted certiorari in *Tapia* in part to resolve a circuit split about whether § 3582(a) allowed courts to lengthen, if not impose, a prison term for rehabilitative purposes. *Tapia*, 564 U.S. at 323. This Court then abrogated cases like *Duran*, 37 F.3d 557, *Hawk Wing*, 433 F.3d 622, and *Jimenez*, 605 F.3d 415, that allowed courts to rely on rehabilitation in this way. *Tapia*, 564 U.S. at 323 n.1. Now, multiple circuits are once again allowing judges to lengthen prison sentences in part for rehabilitative purposes. Along with misconstruing the text of the Sentencing Reform Act, these circuits have failed to follow this Court's instructions.

C. The Seventh Circuit picked the wrong side of the split.

In this case, the Seventh Circuit acknowledged the circuit split and sided with the courts that use a primary-consideration test. App. 2a; App. 6a, n.1. For the reasons stated above, the Seventh Circuit picked the wrong side of the split. *Supra* p. 11–14.

Notably, the Seventh Circuit's holding was driven at least in part by policy concerns. The court explained that § 3582(a) and *Tapia* put sentencing judges "in a

difficult position" and "can cast a shadow" over otherwise thoughtful comments. App. 11a. And the court worried about discouraging judges from engaging with a defendant's personal background or telling defendants to take advantage of rehabilitative opportunities. *Id.*

The Seventh Circuit's policy concerns did not appear in a vacuum. Judge David Hamilton, a former district judge and author of the opinion below, had expressed similar concerns in an earlier opinion. *United States v. Shaw*, 39 F.4th 450, 461 (7th Cir. 2022) (Hamilton, J., concurring). In his view, the requirements of § 3582(a) and *Tapia* are "not realistic and invite hypocrisy or silence from sentencing judges." *Id.* at 462. Ultimately, he agreed that § 3582(a) and *Tapia* "compelled" remand in that case—but he nonetheless lauded the sentencing judge's comments and viewed the outcome as "unfortunate and otherwise unnecessary." *Id.*

Policy disagreements are not an appropriate ground to ignore the text of § 3582(a), nor are they an appropriate ground to narrow *Tapia*'s holding. *See United States v. Grant*, 664 F.3d 276, 281–82 (9th Cir. 2011) (Noting that even if judges have a hard time following *Tapia*, this Court's decision is the controlling statutory construction). Judge Hamilton and the Seventh Circuit may have valid policy insights. But Congress sets policy. *See Pereida v. Wilkinson*, 141 S. Ct. 754, 766–67 (2021). The Seventh Circuit erred by adopting a rule that contradicts § 3582(a)'s clear text.

II. The split will not resolve itself without this Court's intervention.

The issue presented in this petition has already percolated through the courts of appeal. Apart from the D.C. Circuit, all 11 other geographic circuits have taken a position. "Without some level of intervention by the Supreme Court, the consideration—or lack thereof—of rehabilitation at sentencing will continue to produce disparate prison sentences." Owen M. Mattox, *Tapia v. United States: The Appropriateness of Considering Rehabilitation at Sentencing*, 44 Am. J. Trial Advoc. 213, 232 (2020).

The split shows no signs of resolving on its own. Neither side has clear momentum compared to the other. Take, for instance, the Eleventh Circuit's 2014 decision in *Vandergrift*, 754 F.3d at 1310. That court recognized that other circuits had already adopted a primary-consideration test, but it rejected those circuits' reasoning as inconsistent with *Tapia* and its own pre-*Tapia* interpretations of the Sentencing Reform Act. *Id.* The Eleventh Circuit's decision, however, did not affect the outcome in other circuits. The First and Second Circuits still adopted a primary-consideration test even after *Vandergrift*, rejecting explicitly the Eleventh Circuit's reasoning. *Del Valle-Rodriguez*, 761 F.3d at 175 n.2; *Schonewolf*, 905 F.3d at 691–92. And although the Tenth Circuit later adopted a bright-line rule similar to the Eleventh Circuit's, it did so independently without reliance on *Vandergrift*. *Thornton*, 846 F.3d at 1116.

History also shows that judges have deeply held preconceptions about the role of rehabilitation at sentencing. Lower courts have long been hesitant to

abandon rehabilitation as a goal of imprisonment. As explained above, many federal courts continued to rely on rehabilitation as a reason to impose prison time even after passage of the Sentencing Reform Act. *Supra* p. 5–6. Indeed, courts often dismissed appeals as frivolous or encouraged defense counsel to file *Anders* motions when sentencing courts relied on rehabilitation to justify prison sentences. *E.g., Davis*, 406 F. App'x at 54; *Fairley*, 395 F. App'x at 34; *Wazwaz*, 327 F. App'x at 670; *Jones*, 216 F. App'x at 192; *Burford*, 220 F. App'x at 417. These courts continued to apply the Sentencing Reform Act incorrectly for more than 25 years—until this Court finally intervened in *Tapia*. And *Tapia* was, itself, an appeal from an unpublished, four-sentence order. *United States v. Tapia*, 376 F. App'x 707 (9th Cir. 2010). This Court was the first to treat seriously the claim in *Tapia*.

The same hesitancy to embrace the Sentencing Reform Act's policy determinations has popped up again in the current split. The majority side of the split has resurrected rules abrogated by *Tapia*. *See supra*, p. 14. And policy disagreements with Congress partially undergirded the Seventh Circuit's decision below. *See supra*, p. 14–15. Many courts are reluctant to give up rehabilitation as a reason for imprisonment. And given this hesitancy, circuits applying a primary-consideration test are unlikely to change their positions even though their positions conflict with § 3582(a) and *Tapia*.

III. This case is an excellent vehicle for resolution of the split.

This case is an ideal vehicle for review, for at least four reasons.

First, the issue presented for review is purely legal: What is the proper role of rehabilitation in deciding a prison sentence? Does 18 U.S.C. § 3582(a) create a bright-line rule, such that the length of a prison term cannot be based even in part on rehabilitation? Or should reviewing courts apply a balancing test, in which they must determine whether rehabilitation was the dominant factor over other factors at sentencing?

Second, resolution of the circuit split is outcome determinative in Long's case. The district court's explanation at sentencing uniquely positions Long between the competing tests for assessing *Tapia* claims. No doubt rehabilitation was *a* factor underlying Long's prison sentence; the district court expressly cited drug treatment, domestic-violence programming, and job training as reasons for an upward variance. App. at 53a–54a. But rehabilitation was not necessarily the court's "primary" consideration; the court also relied heavily on permissible factors like the seriousness of the offense and Long's criminal history. App. at 51a–54a. Long's *Tapia* challenge could not succeed under the primary-consideration test adopted by the Seventh Circuit. But the Seventh Circuit recognized that Long may have been able to succeed under the stricter standard used in some circuits. App. 10a.

Third, the issue was fully presented before the Seventh Circuit, which explicitly adopted the "primary consideration" test and deepened the circuit split. App. 2a; App. 11a–12a. True, the Seventh Circuit decided Long's appeal on plain-

error review. App. 4a. But that standard of review would not impede this Court's ability to squarely address and answer the question presented. Most *Tapia* claims are decided on plain-error review because, as was the case in *Tapia* itself, these claims are frequently raised for the first time on appeal. *See Tapia*, 564 U.S. at 322 ("Tapia did not object to the sentence at that time.").[2] Yet appellate courts, including the Seventh Circuit, are willing to find plain error when a case falls within that circuits' view of § 3582(a) and the *Tapia* rule. *See, e.g., United States v. Kopp*, 922 F.3d 337 (7th Cir. 2019); *United States v. Wooley*, 740 F.3d 359, 368–69 (5th Cir. 2014). The only reason the Seventh Circuit did not find plain error in this case was *because* it narrowed *Tapia*'s holding. Under a stricter rule, error would be plain because "[a]fter *Tapia*, we know § 3582(a) means what it says, ruling out any use of prison for rehabilitation." *Mendiola*, 696 F.3d at 1044 (Gorsuch, J., Concurring) (finding plain error).

Fourth, Long's case does not pose a danger of mootness. Long's prison sentence runs into 2025, after which he will be subject to three years' supervised release. App. 13a–15a. His case will pose an active controversy until at least 2028, when he is scheduled to complete his sentence.

[2] *See also, e.g.*, *Schonewolf*, 905 F.3d at 686-87 ("[Schonewolf] did not raise this argument as an objection at her sentencing, and thus it is not preserved for appeal."); *Thornton*, 846 F.3d at 1114 ("Thornton did not argue below that the district court improperly based Thornton's sentence on rehabilitation."); *Vandergrift*, 754 F.3d at 1307 (explaining that Vandergrift made no objection at sentencing); *Lifshitz*, 714 F.3d at 149 (explaining that since the defendant did not object at sentencing).

IV. Resolution of this issue is necessary both for Long and for federal defendants nationwide.

Long will spend at least some time in prison for rehabilitative purposes. This fact should sound alarm bells. Any time spent in prison for rehabilitation—a ground that Congress expressly disavowed—undercuts the very fairness of Long's sentence. *See Mendiola*, 696 F.3d at 1045 (Gorsuch, J., Concurring).

But the issue presented here is important beyond just Long's individual case. As it stands, the circuit split means that federal defendants in different parts of the country are subject to what are effectively two different sentencing policies. Defendants in the Sixth, Ninth, Tenth, or Eleventh Circuits are sentenced under the policy intended by Congress and described by this Court in *Tapia*. Prison is used only for retribution, deterrence, and incapacitation, while rehabilitative concerns are addressed through other types of sentences. Defendants in other circuits are subject to a different policy that combines the sentencing schemes from before and after passage of the Sentencing Reform Act. As under the old system, the primary-consideration rule allows federal judges to use prison as a way to rehabilitate defendants. Unlike the old system, however, defendants can no longer seek release through parole once they are rehabilitated.

A primary goal of the Sentencing Reform Act was to alleviate sentencing disparities among defendants in different parts of the country. *Mistretta*, 488 U.S. at 366. That goal has been thwarted by the current circuit split. This Court should

accept Long's case so that this Court can resolve the split and save Congress's policy objectives.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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