No._____

In the

Supreme Court of the United States

ROBERT PAUL DURRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The supervised-release statute, 18 U.S.C. § 3583(e), lists factors from 18 U.S.C. § 3553(a) for a court to consider when sentencing a person for violating a supervised-release condition. In that list, Congress omitted the factors set forth in section 3553(a)(2)(A)—the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. The question presented is:

Even though Congress excluded section 3553(a)(2)(A) from section 3583(e)'s list of factors to consider when revoking supervised release, may a district court rely on the section 3553(a)(2)(A) factors when revoking supervised release?

Five circuit courts of appeals, including the panel order below, have concluded that district courts may rely on the section 3553(a)(2)(A) factors. Four circuit courts of appeals have concluded that they may not.

[The same question is presented in *Esteras et al. v. United States*, No. 23-7483. In that case, petitioners filed a petition for a writ of certiorari on May 15, 2024. On May 28, 2024, the Court requested a response, which is due on August 30, 2024.]

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INTRODUCTION

This case presents an established and acknowledged circuit split that affects all persons facing supervised-release-revocation proceedings: what factors the court may consider. The statute, 18 U.S.C. § 3583(e), instructs 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)." 18 U.S.C. § 3583(e). Congress omitted section 3553(a)(2)(A) from that list: the need "to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).[1]

Despite the omission, five circuit courts of appeals have concluded that courts may rely on the section 3553(a)(2)(A) factors when revoking supervised release. Four circuit courts of appeals have concluded that they may not.

The question presented is important, and this case is an excellent vehicle for resolving it. Robert Durrell is among the thousands of people each year who have their supervised release revoked. When sentencing Durrell for violating his supervised-release conditions, the only factors that the district court relied on were those found in section 3553(a)(2)(A). The Sixth Circuit affirmed based on its published precedent holding that courts may rely on those factors when revoking supervised release.

The decision below is wrong. The statute's text, this Court's precedent, the legislative history, and background constitutional principles all indicate that a district

1 Congress also left out section 3553(a)(3), "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). Section 3583(e) itself lists the kinds of sentences and other supervised-release modifications available in revocation proceedings, making section 3553(a)(3) unnecessary. *See* 18 U.S.C. § 3583(e).

court may not rely on the section 3553(a)(2)(A) factors when revoking supervised release. By excluding section 3553(a)(2)(A) from section 3583(e)'s list of factors, Congress drew a careful line instructing courts to rely on punishment and factors related to punishment only when sentencing defendants for their initial offenses, consistent with constitutional protections for those facing criminal punishment. The decision below erased that line.

Robert Paul Durrell therefore respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINION AND ORDER BELOW

The U.S. Court of Appeals for the Sixth Circuit's opinion is unpublished. *See* App. at 1a-2a. The order of the U.S. District Court for the Northern District of Ohio revoking Durrell's supervised release and the hearing transcript are unpublished. *See* App. at 3a; App. at 4a-13a.

JURISDICTION

The court of appeals entered judgment on June 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3583(e) of Title 18, U.S. Code, provides:

> MODIFICATION OF CONDITIONS OR REVOCATION.—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)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(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 post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

18 U.S.C. § 3583(e).

Section 3553(a) of Title 18, U.S. Code, provides:

FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amend-

ments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

STATEMENT OF THE CASE

This petition squarely presents the same question presented to this Court in *Esteras et al. v. United States*, No. 23-7483: whether a district court may rely on the section 3553(a)(2)(A) factors when revoking supervised release, even though Congress excluded section 3553(a)(2)(A) from section 3583(e)'s list of factors to consider. This question has split the federal circuit courts of appeals, affects all federal defendants who may have their supervised release revoked, and is ripe for this Court's review.

Durrell was charged with and convicted of a federal crime, over which the district court had jurisdiction under 18 U.S.C. § 3231. After completing his custodial sentence, he began serving a term of supervised release.

Durrell later admitted to violating his supervised-release conditions by committing a new offense (robbery, to which Durrell pleaded guilty in state court). App. at 6a. The district court revoked his supervised release and sentenced him to 14 months in prison, to be served consecutive to his six- to eight-year state sentence. App. at 3a, 12a. Explaining its decision, the court stated: "A sentence of 14 months reflects the seriousness of this conduct and shows respect for the law." App. at 12a.

Durrell appealed, arguing that the district court erred by relying on the section 3553(a)(2)(A) factors when revoking his supervised release. As the panel summarized:

> Under 18 U.S.C. § 3583(e), district courts must consider certain factors when revoking a defendant's supervised release. That statute cross-references most of the § 3553(a) sentencing factors but omits § 3553(a)(2)(A)—the factor directing courts to impose sentences that "reflect the seriousness of the offense," "promote respect for the law," and

> "provide just punishment." Thus, Durrell argues, the district judge erred by considering that factor.

App. at 2a. Relying on the Sixth Circuit's prior decisions in *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), and *United States v. Esteras*, 88 F.4th 1163 (6th Cir. 2023), the panel affirmed. App. at 2a.

REASONS FOR GRANTING THE PETITION

I. The panel decision is part of a deep and pervasive circuit split regarding how to interpret 18 U.S.C. § 3583(e).

The panel decision reflects one side of a well-established circuit split over how to interpret 18 U.S.C. § 3583(e). Relying on the Sixth Circuit's prior published decisions in *United States v. Lewis*, 498 F.3d 393 (6th Cir. 2007), and *United States v. Esteras*, 88 F.4th 1163 (6th Cir. 2023), the panel held that a court may consider the section 3553(a)(2)(A) factors when revoking supervised release. Four other federal courts—the First Circuit, Second Circuit, Third Circuit, and Seventh Circuit—have also held that a court may consider those factors. *See United States v. Vargas-Dávila*, 649 F.3d 129, 132 (1st Cir. 2011); *United States v. Williams*, 443 F.3d 35, 47 (2d Cir. 2006); *United States v. Young*, 634 F.3d 233, 239 (3d Cir. 2011); *United States v. Clay*, 752 F.3d 1106, 1108 (7th Cir. 2014).

On the other side of the split, four federal courts—the Fourth Circuit, Fifth Circuit, Ninth Circuit, and Tenth Circuit—have held that a court may not consider the section 3553(a)(2)(A) factors. *See United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006) ("According to § 3583(e), in devising a revocation sentence 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,' § 3553(a)(2)(A), or whether there are other 'kinds of sentences available,' § 3553(a)(3)."); *United States v. Miller*, 634 F.3d 841, 844 (5th Cir. 2011) (holding that a district court revoking supervised release "may not consider

§ 3553(a)(2)(A) because Congress deliberately omitted that factor from the permissible factors enumerated in the statute"); *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006) ("Given that § 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper."); *United States v. Booker*, 63 F.4th 1254, 1261 (10th Cir. 2023) ("[T]he omission of § 3553(a)(2)(A) from the sentencing factors enumerated in § 3583(e) means that a district court may not consider the need for a revocation sentence to (1) 'reflect the seriousness of the offense,' (2) 'promote respect for the law,' and (3) 'provide just punishment for the offense' when modifying or revoking a term of supervised release.").

Courts and commentators alike have noted the circuit split. For example, the Congressional Research Service issued a report summarizing the state of the law before the Tenth Circuit weighed in:

> On one side of the divide, the U.S. Courts of Appeals for the First, Second, Third, Sixth, and Seventh Circuit have held that federal courts may consider retribution in making revocation decisions. On the other side, the Fourth, Fifth, and Ninth Circuit have concluded that courts either may not consider retribution in these decisions at all or may consider it only to a limited degree.

Dave S. Sidhu, Cong. Research Serv., LSB10929, *Can Retribution Justify the Revocation of Supervised Release? Courts Disagree* 1 (2023).[2] Likewise, prior to authoritative decisions from the Seventh and Tenth Circuits, the Eleventh Circuit observed that "[t]he First, Second, Third, and Sixth Circuits have concluded that it is not error to consider §3553(a)(2)(A) when revoking supervised release, while the Fourth, Fifth,

2 Available at: https://crsreports.congress.gov/product/pdf/LSB/LSB10929.

and Ninth Circuits concluded that it is error." *United States v. Vandergrift*, 754 F.3d 1303, 1308 (11th Cir. 2014) (collecting cases and declining to decide the issue on plain-error review). The split is deep and pervasive.

II. The question presented raises an important and recurring issue fundamental to federal supervised-release-revocation law.

The question presented is fundamental to every revocation of supervised release: what factors the court may consider when deciding the appropriate sanction. And it affects thousands of federal cases each year. There were over 108,000 federal supervision violations from fiscal year 2013 through fiscal year 2017, over 86% of which resulted in a new prison term. *See* U.S. Sentencing Commission, *Federal Probation and Supervised Release Violations* 13, 34 (2020).[3] Of those who had their supervision revoked, the vast majority were serving terms of supervised release, not probation or other supervision. *See* U.S. Courts, Judicial Business 2023, Table E-2 (of 122,824 persons under post-conviction supervision as of September 30, 203, over 110,000 were serving terms of supervised release).[4]

3 Available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200728_Violations.pdf.

4 Available at: https://www.uscourts.gov/statistics/table/e-2/judicial-business/ 2023/09/30.

III. The decision below is wrong.

The statutory text, this Court's precedent, legislative history, and background constitutional principles establish that courts may not consider the section 3553(a)(2)(A) factors when revoking supervised release.

Start with the text. The supervised-release statute, 18 U.S.C. § 3583, states that, when a person violates a condition of supervised release, the court may revoke supervised release and impose a prison term "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)." 18 U.S.C. § 3583(e)(3). Section 3553(a)(2)(A) is not one of the factors listed for a court to consider. As this Court has instructed, "[w]here 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." *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, "given that § 3553(a)(2)(A) is a factor that Congress deliberately omitted from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." *Miqbel*, 444 F.3d at 1182.

Further, this Court has applied the same rule in another subsection of the same statute. Section 3583(e)'s list of factors for consideration is the same as the list in 18 U.S.C. § 3583(c)—the two subsections use identical text. Reviewing the latter subsection, this Court stated: "a court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release. See § 3583(c)." *Tapia v. United States*, 564 U.S. 319, 326 (2011) (emphasis in original). The Court reaffirmed that conclusion in *Concepcion v. United States*, 597 U.S. ---,

142 S. Ct. 2389, 2400 (2022) ("[I]n determining whether to include a term of supervised release, and the length of any such term, Congress has expressly precluded district courts from considering the need for retribution. See § 3583(c)[.]").

The legislative history confirms this interpretation. Congress enacted sections 3553 and 3583 as part of the Comprehensive Crime Control Act of 1984. *See* Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837. Congress excluded the factors listed in section 3553(a)(2)(A) from the factors for courts to consider both when deciding to impose a term of supervised release, *see* 18 U.S.C. § 3583(c), and when deciding to revoke supervised release and impose a prison sentence, *see* 18 U.S.C. § 3583(e). That decision was intentional. Addressing section 3583(c), the Senate Judiciary Committee stated:

> The Committee has concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release-- that the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.

S. Rep. No. 98-225, at 124 (1983). The Committee further noted that section 3583(e) permitted district courts to modify or revoke supervised release "after considering the same factors considered in the original imposition of a term of supervised release." *Id.* at 125.

Finally, the constitutional context. By prohibiting courts from considering the section 3553(a)(2)(A) factors when revoking supervised release, Congress drew a careful line that avoided the "serious constitutional questions" that would arise if it

did not. *Johnson v. United States*, 529 U.S. 694, 700 (2000). By excluding section 3553(a)(2)(A) from the list in section 3583(e), Congress instructed courts not to consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). Failing to exclude those factors, and thereby allowing courts to consider the need to punish the offender, could run afoul of several constitutional requirements. *See Johnson*, 529 U.S. at 700 (holding that "construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release" would raise "serious constitutional questions").

For example, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." *Id.* Similarly, because petitioners' supervised-release violations carried a maximum sentence of more than six months in prison, imposing punishment for those violations could run afoul of the right to a jury trial under the Sixth Amendment. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality op.); *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968); *see also United States v. Haymond*, 588 U.S. ---, 139 S. Ct. 2369, 2381 (2019) (plurality op.) ("If the government were right, a jury's conviction on one crime would . . . permit perpetual supervised release and allow the government to evade the need for another jury trial on any other offense the defendant might commit, no matter how grave the punishment.").

The law Congress drew in section 3583(e) keeps a court's focus on the forward-looking goals of supervised release. Punishment is an inherently backward-looking analysis, examining what a person did and determining what sanction is appropriate in retribution. Supervised release is a forward-looking endeavor, tasking courts with managing a person's transition back into society after serving their punishment. *See Haymond*, 139 S. Ct. at 2382 (plurality op.) ("[S]upervised release wasn't introduced to replace a portion of the defendant's prison term, only to encourage rehabilitation *after* the completion of his prison term."); S. Rep. No. 98-225, at 124 (1983) (noting that the "primary goal" of supervised release "is to ease the defendant's transition into the community" and "to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release"). In the same way that supervision is directed toward forward-looking goals, a court may revoke a person's supervised release only based on forward-looking goals—for example, to provide needed correctional treatment, 18 U.S.C. § 3553(a)(2)(D), to deter them or others from violating supervised release, 18 U.S.C. § 3553(a)(2)(B), or to protect the public from further offenses, 18 U.S.C. § 3553(a)(2)(C)—while the person is transitioning back into society. *See* 18 U.S.C. § 3553(e). Inserting backward-looking punitive goals into that analysis violates the statute and the underlying constitutional requirements.

IV. These case is an ideal vehicle for resolving the question presented.

This case squarely presents whether a court may rely on the section 3553(a)(2)(A) factors when revoking supervised release. The district court expressly

relied on the section 3553(a)(2)(A) factors, and only those factors, *see* App. at 12a, and the court of appeals reviewed the resulting sentence on the merits and addressed the question presented. *see* App. at 2a. This case is thus an ideal vehicle for the Court to review and decide the question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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