No. 17-1672

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,
*Petitioner,*

v.

ANDRE RALPH HAYMOND,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Section 3583(k) required a district court to revoke Andre Haymond's supervised release and impose a prison term of five years to life if it found by a preponderance of the evidence that Mr. Haymond had committed a new offense listed in the statute. But for § 3583(k), the maximum term of imprisonment the district could have imposed was two years based upon Mr. Haymond's original conviction. The question presented is whether § 3583(k) violates the jury trial right.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States at Article III, § 2, in relevant part, provides: "The trial of all crimes, except in cases of impeachment, shall be by jury . . . ."

The Fifth Amendment to the Constitution, in relevant part, provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution, in relevant part, 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."

Title 18 United States Code, § 3583(e) 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)—
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, 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 . . . .

Title 18 United States Code, § 3583(k) provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, 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 exception contained therein. Such term shall be not less than 5 years.

## STATEMENT OF THE CASE

The district court described the principal issue in this case when revoking Andre Haymond's supervised release and imposing a mandatory-minimum term of imprisonment under § 3583(k): "It's repugnant to me that there is a mandatory five-year sentence in such a case where a defendant does not have the opportunity to ask for a jury or to be tried under what should be the legal standard that is beyond a reasonable doubt." Respondent's Appendix 9a ("Resp't App."). The Tenth

Circuit correctly concluded that § 3583(k) was unconstitutional and unenforceable because it imposed a mandatory five-year sentence, up to life, without a jury trial.

Section 3583(k) works an undeniable constitutional harm. It imposes a mandatory minimum penalty far in excess of that otherwise allowable under § 3583(e)(3) and, at the top end, authorizes a potential punishment leagues beyond what a recidivist criminal charge might yield. Under this Court's precedents in *Apprendi*, *Alleyne*, *Booker*, and others, such a potential punishment requires a jury trial where prosecutors must prove their case beyond a reasonable doubt. Here, both the district court and the court of appeals openly acknowledged that the evidence presented at Mr. Haymond's revocation hearing did not meet that standard.

The Solicitor General contends that the application of § 3583(k) is constitutionally permissible because the judicial fact finding at issue "occurred long after [Mr. Haymond's] criminal prosecution had ended and concerned sentence-implementation facts that did not exist when the criminal prosecution occurred." United States Brief 19 ("U.S. Br."). But "[i]f 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." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). A potential lifetime term of imprisonment that is nowhere else authorized in the supervised release statute is "unquestionably of constitutional significance." *Apprendi* v. *New Jersey*, 530 U.S. 466, 495 (2000).

The Solicitor General's alternative remedy—empaneling juries to make some, but not all, factual findings at a revocation hearing—only raises more significant

questions than it answers. Even assuming juries might be assembled for revocation purposes, Congress made no provision for such a proceeding. Indeed, it did the opposite by creating a revocation scheme that, aside from § 3583(k), stays within the *Apprendi* lanes by limiting reimprisonment based upon the nature of the original felony and period of supervised release.

### A. Mr. Haymond's 2010 Conviction and Sentence

Mr. Haymond was eighteen years old when he was charged with possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) and (b)(2). *United States* v. *Haymond*, 672 F.3d 948, 950 (10th Cir.), *cert. denied*, 567 U.S. 923 (2012). After a jury trial, Mr. Haymond was found guilty and sentenced to thirty-eight months imprisonment to be followed by ten years of supervised release. *Id.* at 953. The advisory guidelines range was fifty-one to sixty-one months. Statement of Reasons, 2 C.A. App. 23, *United States* v. *Haymond*, No. 10-5079 (10th Cir.), ECF No. 9795139 (filed under seal). The court granted a four-level variance from the guidelines based upon the personal history of Mr. Haymond and because the number of images at issue was small compared to most cases. *Id.* at 25.[1] Mr. Haymond had no criminal history or substance abuse problem. *Id.* The court believed he was intelligent. *Id.* He had attended

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[1] The government's case was based upon seven thumbnail images found on a computer. *Haymond*, 672 F.3d at 951; *see also United States* v. *Helton*, 782 F.3d 148, 158 (4th Cir. 2015) (Gregory, J., concurring) (noting that 79% of non-production cases involve 600 or more images). The computer contained over 60,000 images, mostly related to music. *Haymond*, 672 F.3d at 952. Mr. Haymond presented forensic analysis that indicated the seven images at issue were inaccessible and lacked metadata, making it impossible to determine their origin. *Id.* at 952-53.

community college at age sixteen and obtained an Associate's Degree in order to get out of a family situation where he had little contact with his father and was largely isolated from others his own age. *Id.* Mr. Haymond had worked regularly and was now working to help support his mother, who had suffered a debilitating stroke. *Id.* All of this led the court to conclude that Mr. Haymond would "not get much out of prison" and a sentence outside the guidelines range was appropriate. *Id.*

At sentencing, the court announced the conditions of supervised release that would apply after Mr. Haymond completed his term of imprisonment. Sentencing Transcript, 3 C.A. App. 512, *United States* v. *Haymond*, No. 10-5079 (10th Cir.), ECF No. 9800563. The court further explained that "[s]hould the term of supervised release be revoked, an additional term of imprisonment of two years could be imposed at each revocation." *Id.* at 511. There was no mention that § 3583(k) was an exception to the two-year limit on imprisonment and Mr. Haymond could actually be reimprisoned for life if the court later found by a preponderance of the evidence that he committed a second sex offense.

### B. Mr. Haymond's Supervised Release Revocation Proceedings

Upon Mr. Haymond's release from prison in 2013, he began serving his ten-year term of supervised release. Early on during his term, a state law enforcement agent accused Mr. Haymond of failing to register a new address because the officer could not find Mr. Haymond at the motel he had registered as his address. 1 C.A. App. 173-74. The charges were transferred to federal court and Mr. Haymond entered into a deferred prosecution agreement after his probation officer acknowledged that Mr. Haymond was staying

in the motel's parking lot and sleeping in his car because he could not afford to pay for a room. *Id.*

While on supervised release, Mr. Haymond took several lie detector tests and was asked each time whether he had possessed or viewed child pornography since the previous test. Mr. Haymond denied possessing or viewing child pornography each time and each time the test indicated no deception. Petition Appendix 38a ("Pet. App."). The last such test was administered in September 2015, one month before the probation officer conducted an unannounced search of Mr. Haymond's apartment, computers, and cellphone. *Id.* at 38a-39a. On the cellphone, the government found, among thousands of images related to Mr. Haymond's online gaming activities and music interests, fifty-nine thumbnail images the government identified as child pornography. *Id.* at 2a-3a. The government moved to revoke supervised release and alleged five violations of the terms of Mr. Haymond's release, including the possession of child pornography. *Id.* at 35a.

At the revocation hearing, Mr. Haymond's forensic expert provided uncontroverted testimony that all of the images at issue were thumbnail images found in the cellphone's "cache," a folder or database that could not be accessed without specialized software that was not present on the phone. *Id.* at 43a. The expert further explained that information can be automatically downloaded to a cellphone's cache and a user may or may not have viewed or accessed the images that are downloaded. *Id.* at 43a-44a. The images at issue lacked metadata and it was impossible to determine when the file was created or modified. *Id.* at 44a. Because the images were thumbnails, there would have been a second identical image in the cellphone's data if the user had clicked on the thumbnail. *Id.*

Notwithstanding this evidence, the district court found sufficient evidence to show by a preponderance of the evidence that Mr. Haymond knowingly possessed some of the images found in the cellphone's cache. The court was clear, however, that "[i]f this were a criminal trial and the Court were the jury, the United States would have lost." Pet. App. 68a.

Of the fifty-nine images at issue in the revocation hearing, forty-three images came from the cellphone's browser cache, three images came from malicious "ransomware" software that had been installed on the phone, and thirteen images came from the phone's gallery cache *Id*. at 42a-43a. The district court found insufficient evidence to show that Mr. Haymond knowingly possessed the forty-six images from the cellphone's browser cache and ransomware software. *Id*. at 58a. The court explained that the cellphone user would not necessarily view, access, or control images stored in the browser cache or images downloaded by ransomware software. *Id*. at 59a. Accordingly, in the absence of additional evidence to establish a volitional act, the court could not find knowing possession. *Id*. On the other hand, the district court found sufficient evidence to conclude that it was more likely than not that Mr. Haymond knowingly possessed the thirteen images from the gallery cache. *Id*. at 59a-66a. Relying on factual findings that the court of appeals later held to be clear error, the district court concluded that given the file location of the images there was evidence that Mr. Haymond took some volitional act in downloading, viewing, or saving those images. *Id*. at 66a.

The district court expressed significant misgivings about imposing an extended and mandatory term of imprisonment by operation of § 3583(k) and doing so without constitutional protections. See *infra* II; Pet.

App. 50a; Resp't App. 9a. But for the mandatory minimum five-year term of imprisonment, the district court explained, it "probably would have sentenced in the range of two years or less." Resp't App. 10a.

### C. The Tenth Circuit's Decision

The Tenth Circuit affirmed in part and vacated in part Mr. Haymond's sentence. The court of appeals held that the district court had made a number of clearly erroneous factual findings related to the thirteen images found in the gallery cache of the smartphone. Pet. App. 6a-9a. The district court had cited testimony from Mr. Haymond's expert as evidence that Mr. Haymond took some volitional act that resulted in the images being on the phone. *Id.* But as the court of appeals explained, the expert testimony could not establish that Mr. Haymond saved, downloaded, or otherwise placed the photos on the phone. *Id.* Rather, the expert had testified that the presence of the photos in the gallery cache meant, at most, that the images were at some point accessible on the phone. *Id.*

After excluding the erroneous factual findings, the evidence only established that Mr. Haymond had nearly exclusive use and possession of the cellphone, that the images were accessible somewhere on the phone, and that the images were consistent with images from the original conviction. *Id.* at 9a. The court of appeals nonetheless concluded that there was sufficient evidence to show that Mr. Haymond knowingly possessed the images. *Id.* The court emphasized that it was a "close case" even under a preponderance standard and agreed it was possible that the images originated from an automatic process as opposed to a volitional act. *Id.* at 9a-10a.

However, the Tenth Circuit held that § 3583(k) violates the Fifth and Sixth Amendments. *Id.* at 15a. The court concluded that the last two sentences of § 3583(k) increase the mandatory minimum penalty in violation of the jury trial right as interpreted in *Apprendi*, 530 U.S. 466, *Alleyne* v. *United States*, 570 U.S. 99 (2013), and *United States* v. *Booker*, 543 U.S. 220 (2005). Under those cases, facts that increase the penalty for a crime are elements of the crime and must be found by a jury beyond a reasonable doubt. Pet. App. 15a-16a. The court of appeals also held that general principles of due process govern the procedures that must be afforded a defendant in a revocation hearing, in particular where a "grievous loss" could result. *Id.* at 19a n.1.

The Tenth Circuit explained that § 3583(k) unquestionably increases the minimum sentence to which a defendant may be subjected. In Mr. Haymond's case, the court noted when he was originally convicted by a jury, the conviction carried a potential term of imprisonment of zero to ten years. *Id*. at 20a. After the court found a supervised release violation that fell within § 3583(k), that potential term of imprisonment now ranged from five years to life. *Id.* Because a judge made the factual finding that triggered this increased mandatory minimum by a preponderance of the evidence, as opposed to a jury by a reasonable doubt, the court concluded that § 3583(k) violates the jury trial right. *Id*. at 20a-21a.

The government had argued before the court of appeals that *Apprendi*, *Alleyne*, and *Booker* did not apply to revocation proceedings. Pet. App. 16a-19a. The court rejected this argument, explaining that *Booker* had applied to sentencing proceedings, of which the revocation of supervised release was one component. *Id*. And although the revocation of supervised release

may not directly contemplate a "criminal prosecution" under the language of the Sixth Amendment, the court explained that it can indirectly implicate the Sixth Amendment if facts presented based upon a new alleged criminal act increase the sentencing range represented by the original offense of conviction. *Id.* at 19a n.1 ("[H]olding that the Sixth Amendment does not require particular procedures in a revocation hearing is not the same as holding that a defendant, once convicted of a crime, loses all Sixth Amendment rights during the time of imprisonment and supervised release."). Accordingly, the court emphasized that § 3583(k) cannot be excused from constitutional review simply because it is a revocation statute.

The Tenth Circuit also concluded § 3583(k) requires a term of imprisonment based upon a new offense and thus imposes a penalty that is at least in part punishment for the new criminal conduct. *Id.* at 23a. Using revocation as punishment, rather than as a rehabilitative tool, thus raised the same "serious constitutional questions" this Court avoided in *Johnson* v. *United States*, 529 U.S. 694, 700 (2000). The court of appeals also noted that § 3583(k)'s mandatory minimum stripped the revocation judge of discretion to impose punishment within a statutorily prescribed range. Pet. App. at 15a. "Discretion is key" in revocation cases as well as at original sentencing, the court held, relying on *Booker*. *Id.* at 16a.

As for the remedy, the court of appeals concluded that the last two sentences of § 3583(k) that impose the heightened unconstitutional penalty could be severed from the remaining provisions of § 3583 and the sentencing code. *Id.* 26a-28a. The court noted § 3583(k) was only added in 2006 and the invalidation of portions of the statute would have "no significant effect" on the sentencing code. *Id.* at 28a. Without

§ 3583(k), the penalties available for revocation would be governed by § 3583(e)(3), which ties the penalty to the original crime of conviction and does not raise an *Apprendi* issue. *Id.* at 27a-28a.

Judge Kelly dissented in part, disagreeing that any of the district court's factual findings were erroneous, but agreeing that there was sufficient evidence to establish that it was more likely than not that Mr. Haymond possessed child pornography. *Id.* at 29a-34a. Regarding the constitutional issues, Judge Kelly reasoned that the increased penalty triggered by § 3583(k) had no constitutional significance because a revocation proceeding is not a stage of the criminal prosecution. *Id.* at 31a-32a. On this view, Congress could provide for a mandatory lifetime term of reimprisonment based upon a violation of supervised release that is found by a judge applying a preponderance of the evidence standard.

The government moved for panel rehearing and rehearing en banc. The court of appeals denied rehearing. Pet. App. 70a. Judge Kelly voted for a rehearing before the panel, but no active judge voted for rehearing en banc. *Id.*

On remand, the district court imposed a sentence of time served for the supervised release violation, as Mr. Haymond had already been detained for approximately twenty-eight months following his arrest. See Judgment and Commitment at 2, *United States* v. *Haymond*, 08-CR-00201 (N.D. Okla. Feb. 14, 2018), ECF No. 266. Mr. Haymond is now on an additional twenty-four months of supervised released as imposed by the district court. *Id.* at 3.

## SUMMARY OF THE ARGUMENT

Section 3583(k), a recent addition to the system of supervised release, is a peculiar feature of the supervised release statute. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 587, 603 (amendments to § 3583(k) at issue in this case). It is the *only* provision of the various provisions governing supervised release that mandates revocation and a mandatory minimum term of imprisonment. It is the *only* provision that provides for an enhanced revocation penalty based upon the nature of the supervised release violation. And it is the *only* provision that permits the court to bypass the limits on reimprisonment set by § 3583(e)(3).

In this way, § 3583(k) is fundamentally out of step with the system of supervised release that the Court has considered in prior cases. As the Court warned in *Johnson* v. *United States*, "serious constitutional questions" related to the jury trial right necessarily would arise if the revocation process, in substance, imposes an aggravated penalty for the violation conduct. *Johnson*, 529 U.S. at 700. By mandating an aggravated penalty for a particular violation of supervised release, § 3583(k) cannot be viewed as a mere modification of the original sentence.

The jury trial issue that the Court avoided in *Johnson* can be resolved in this case by a straightforward application of the Court's precedents interpreting the jury trial right. Beginning with *Apprendi* and continuing through *Alleyne*, this Court has announced a firm rule when it comes to sentencing enhancements triggered by judicial fact finding: "When a finding of fact

alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 570 U.S. at 114-15.

Section 3583(k) is one such unconstitutional sentencing enhancement. Mr. Haymond's original conviction for a Class C felony permitted a term of reimprisonment between zero and two years. 18 U.S.C. § 3583(e)(3). Because a court at a revocation hearing applying a preponderance of the evidence standard determined that Mr. Haymond committed a new crime, the court could disregard the statutory limits in § 3583(e)(3) and impose an enhanced and severe penalty: five years imprisonment at least and lifetime imprisonment at most. This enhanced penalty was not a mere matter of the district court's "administration" of a previous sentence. U.S. Br. 23-31. Rather, it was a clear violation of the jury trial right and fundamental notions of due process that will only further erode the role of the jury in adjudicating allegations of criminal wrongdoing.

The Solicitor General places heavy reliance on the historical practice and judicial precedent surrounding the revocation of parole and probation. U.S. Br. 31-43. But § 3583(k) has little in common with these historical revocation proceedings, where juries were not required as a matter of constitutional right. With revocation in the context of parole, probation, and most applications of supervised release, the court or parole authority is imposing a penalty that is authorized by the original conviction where the jury trial right applied. In contrast, § 3583(k) requires an enhanced penalty based upon new conduct that is not tethered to the original jury-authorized sentence.

And in the event the Court agrees that § 3538(k) is unconstitutional, the Solicitor General proposes a middle-ground remedy: empanel juries to make "any required findings" at a revocation hearing. *Id*. at 53. This remedy is impractical and inconsistent with congressional intent. Congress made no provision for the Solicitor General's proposal, which would only engender a host of constitutional and procedural questions. Rather, Congress intended for courts to exercise discretion in monitoring compliance with the conditions of supervised release. The most straightforward remedy in this case is to set aside § 3583(k) and to permit courts to continue to exercise that discretion within the statutory boundaries defined by § 3583(e)(3) and the original crime of conviction.

## ARGUMENT

### I. SECTION 3583(K) VIOLATES THE JURY TRIAL RIGHT BY ALTERING THE STATUTORY RANGE OF REIMPRISONMENT ON THE BASIS OF POST-CONVICTION JUDICIAL FACT FINDING

#### A. Section 3583(k) is distinct from the system of supervised release the Court considered in *Johnson*.

In defending the constitutionality of § 3583(k), the Solicitor General does not have the Court's decision in *Johnson* in his corner. U.S. Br. 39-43. As part of resolving an *ex post facto* challenge to an amendment to § 3583(h), the Court in *Johnson* treated supervised release revocation and reimprisonment as "part of the penalty for the initial offense" as opposed to "punishment for the violation of the conditions of supervised release." *Johnson*, 529 U.S. at 700. The Court emphasized that it was not "mere formalism to link the second prison sentence to the initial offense" because

"the gravity of the initial offense determines the maximum term of reimprisonment." *Id.* at 708. *Johnson* also recognized that any prison term imposed as a sanction for a violation of supervised release was to be "limited," *id.* at 712, because its purpose must only be "to assist individuals in their transition to community life." *Id.* at 709. The "use [of] the district courts' discretionary judgment" was paramount. *Id.*

In *Johnson*, the Court noted that it would "raise serious constitutional questions" if the court revoking supervised release and imposing a new term of imprisonment were punishing the defendant for the supervised release violation. *Id.* at 700. "Although such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* In addition, there would be an issue of double jeopardy where the violations were "criminal in their own right" and could be separately prosecuted. *Id.*

*Johnson* thus suggests nothing more than that there is no constitutional issue related to the lack of a jury trial at a revocation proceeding *so long as* the revocation penalty is attributable to the initial offense. But in amending § 3583(k), Congress severed the link between the original crime of conviction and the authorized term of reimprisonment. Now, the available punishment in a revocation proceeding is tied directly to the nature of the new conduct that serves as the basis for the revocation. Section 3583(k)'s potential lifetime term of imprisonment makes impossible any return by a defendant to the community at all, and its mandatory five-year term of imprisonment strips district court judges of needed discretion to handle individual revocation cases. This raises the "serious constitutional questions" that the Court avoided in *Johnson*, in

particular the lack of a jury trial in a proceeding where the available punishment turns on whether the defendant has committed a new criminal offense.

### B. Under a straightforward application of *Apprendi*, § 3583(k) is an unconstitutional invasion of the jury trial right.

The *Apprendi* rule governs this case and renders § 3583(k) constitutionally unworkable under the Fifth and Sixth Amendments. *Apprendi*, 530 U.S. at 490.[2] As with New Jersey's "hate crime" statute, § 3583(k) operates to increase both the minimum and maximum period of reimprisonment that would otherwise be available based upon the original Class C felony.

#### 1. Section 3583(k) acts as a mandatory sentencing enhancement, increasing both the minimum and maximum term of reimprisonment.

In this case, the court was authorized on the basis of the jury's verdict to impose a term of supervised release to follow imprisonment of at least five years and at most life. 18 U.S.C. §§ 3583(a), (k).[3] The court was

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[2] While *Apprendi* and its progeny have cited the Fifth and Sixth Amendments in support of the jury trial right, Article III, § 2 applies with equal force in these cases to guarantee that "the trial of all crimes, except in cases of impeachment, shall be by jury." *See Callan* v. *Wilson*, 127 U.S. 540, 549 (1888) ("The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character."); *Bloom* v. *Illinois,* 391 U.S. 194, 201 (1968) ("Criminal contempt is a crime in the ordinary sense; it is . . . a public wrong.").

[3] Section 3583(k), besides imposing a mandatory term of reimprisonment that is the subject of this dispute, also sets the authorized term of supervised release for certain sex offenses. This

also authorized to revoke a term of supervised release if the court found by a preponderance of the evidence that Mr. Haymond violated a condition of supervised release. 18 U.S.C. § 3583(e)(3). As part of revoking supervised release, the court could require Mr. Haymond "to serve in prison all or part of the term of supervised release authorized" by the original criminal offense "without credit for time previously served on postrelease supervision." *Id.* This term of imprisonment (or, more precisely, "reimprisonment") would, however, be limited to not more than two years in prison because Mr. Haymond's conviction for possession of child pornography was a Class C felony. *Id.*

The term of reimprisonment the court could impose in a revocation proceeding on the basis of Mr. Haymond's criminal conviction was between zero and two years. In other words, the statutory minimum for *Apprendi* purposes was zero years and the statutory maximum was two years. See *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.") (emphasis omitted). The statutory range of zero to two years was based upon § 3583(e)(3) and the legislature's judgment as to severity of the original conviction. *Johnson*, 529 U.S. at 708 (noting that under § 3583(e)(3) "the gravity of the initial offense determines the maximum term of reimprisonment, just as it controls the maximum term of supervised release in the initial sentencing") (citation omitted).

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aspect of § 3583(k) and the length of the term of supervised release imposed at Mr. Haymond's original sentencing is not at issue here.

Section 3583(k) transformed the short term of reimprisonment between zero to two years that Mr. Haymond's original crime of conviction authorized into a lengthy and mandatory term of reimprisonment of five years to life. This increased the statutory minimum term of reimprisonment (the statutory floor) from zero years to five years and the statutory maximum term of reimprisonment (the statutory ceiling) from two years to life.[4] The new statutory range was triggered by factual findings made by a judge at the revocation hearing applying a preponderance of the evidence standard.

The operation of § 3583(k) at Mr. Haymond's revocation hearing is substantively indistinguishable from the operation of the various sentencing enhancements that the Court has struck down as part of the *Apprendi* line of cases. In those cases, if a court found that a defendant committed a crime in a particular fashion, it was authorized to impose a longer term of imprisonment. See *Apprendi*, 530 U.S. at 491; *Ring*, 536 U.S. at 592-93; *Booker*, 543 U.S. at 227-28. In the same way, § 3583(k) authorized a longer term of imprisonment—indeed, it mandated a five-year term—if the court determined that Mr. Haymond had violated the terms of supervised release in a particular fashion. See *Ap-*

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[4] Section 3583(k) does not explicitly mention life imprisonment, but states that the court shall "require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein." 18 U.S.C. § 3583(k). Without the exception in § 3583(e)(3) that limits reimprisonment based upon the class of the felony, the court is authorized to impose a term of reimprisonment equal to "all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." 18 U.S.C. § 3583(e)(3). In Mr. Haymond's case, the maximum authorized term of supervised release was life. 18 U.S.C. § 3583(k).

*prendi*, 530 U.S. at 495 (noting that it was "unquestionably of constitutional significance" that the sentencing enhancement doubled the maximum sentence from ten years to twenty years). Accordingly, under a straightforward application of the *Apprendi* rule to this case, § 3583(k) was an unconstitutional invasion of the jury trial right because it "increase[d] the punishment above what is otherwise legally prescribed" by the jury's verdict. *Alleyne*, 570 U.S. at 108.

To be sure, the Court has not previously considered how to apply the *Apprendi* rule to supervised release revocation proceedings. But this is not the first time that the Court has been called upon to figure out how to preserve the "ancient guarantee" of the jury trial right "under a new set of circumstances." *Booker*, 543 U.S. at 237. The *Apprendi* rule itself emerged in response to new sentencing schemes where judges during sentencing would apply "sentencing factors" that exposed defendants to additional punishment. *Apprendi*, 530 U.S. at 483, 494. As with *Apprendi*, the analysis of the jury trial right here should be motivated "by the need to preserve Sixth Amendment substance" as opposed to "Sixth Amendment formalism." *Booker*, 534 U.S. at 237.

To take *Apprendi* at face value is to conclude that courts imposing a term of imprisonment in a supervised release revocation proceeding cannot engage in fact finding that increases the "prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Consistent with *Apprendi* and *Johnson*, Congress can provide for reimprisonment as a limited penalty for violation of the conditions of supervised release so long as the court in revoking supervised release has discretion to set the term of reimprisonment within a statutory range de-

termined by the original crime of conviction. But Congress cannot, as it has done here, mandate an aggravated penalty based upon facts that were never submitted to the jury. As the Court declared in *Blakely*, "[t]he Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State." *Blakely*, 542 U.S. at 313-14 (citation omitted).

The Solicitor General responds that *Apprendi* and its progeny recognize a distinction between "proceedings relevant to the *imposition* of a sentence and proceedings relevant to the *administration* of a sentence," where the *Apprendi* rule applies to the former but not the latter category. U.S. Br. 23-24. Revocation of supervised release, in this view, is merely part of the administration of a sentence.

But in applying the *Apprendi* rule, the Court has cautioned against such labeling exercises. See *Ring*, 536 U.S. at 602 ("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."). And even if the Court has somehow implicitly recognized this distinction, the revocation of supervised release must be viewed as the imposition of a sentence. Supervised release is, of course, a component of the sentence for the original crime of conviction. See 18 U.S.C. § 3583(a) (referring to supervised release as a "part of the sentence"); 18 U.S.C. §§ 3583(c), (d)(1), (d)(2), (e) (instructing courts, when imposing a term of supervised release, setting the conditions of supervised release, and terminating, extending, or revoking supervised release, to consider the

§ 3553(a) factors, which are "[f]actors to be considered in imposing a sentence," 18 U.S.C. § 3553(a)); U.S. Sentencing Guidelines Manual Ch. 7 (U.S. Sentencing Comm'n 2018) ("USSG") (setting forth policy statements regarding violations of supervised release). And the revocation hearing is, in many ways, a reenactment of the original sentencing proceeding. The court hears evidence about the relevant factors under § 3553(a), consults the Sentencing Guidelines to determine the recommended range of imprisonment, and makes an individualized determination about the appropriate term of imprisonment. USSG §§ 7B1.1-1.4.

It is very odd to say that the court is merely administering the original sentence when § 3583(k) revokes supervised release and requires that it reincarcerate a defendant for a mandatory minimum period that is longer than the original sentence itself. Such a mandatory minimum constitutes a *substantial* term of imprisonment and leaves a defendant open to a separate criminal prosecution for the same offense. The decision is no mere administrative matter and has little in common with, for example, the decision to impose consecutive and concurrent sentences after a trial where a defendant has just had the benefit of a jury and the beyond a reasonable doubt standard. See *Oregon* v. *Ice*, 555 U.S. 160, 164-66 (2009); U.S. Br. 30-31.

**2. Section 3538(k) imposes severe penalties on the basis of the limited procedural protections available in a revocation proceeding.**

A component of the jury trial right described in *Apprendi* is due process. *Apprendi*, 530 U.S. at 478; see also Pet. App. 19a-20a n.1 (explaining that even if a revocation proceeding is not a "criminal prosecution," a Fifth Amendment violation occurs because § 3583(k)

inflicts a "grievous loss" and due process requires "flexibility"). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). As written, the penalties and procedural guarantees in § 3583(k) are incompatible with basic notions of due process, which further supports the application of the *Apprendi* rule in this context. "Fundamental fairness," which is "the touchstone of due process," would not permit a citizen to face lifetime imprisonment by nothing more than judicial fact finding under a preponderance of the evidence standard. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 790 (1973).

*First,* § 3583(k) exposes defendants to severe penalties. In the due process context, what procedural protections are due depends, in part, on the extent to which an individual will be "condemned to suffer grievous loss." *Morrissey*, 408 U.S. at 481. In a typical revocation proceeding, the maximum term of reimprisonment that the court could impose on a defendant like Mr. Haymond is two years because his original conviction was a Class C felony. 18 U.S.C. § 3583(e)(3); see also 18 U.S.C. § 3559 (classification of offenses). But § 3583(k) mandates a minimum five year term of imprisonment and authorizes a maximum lifetime term of imprisonment. 18 U.S.C. § 3583(k).

A lifetime term of imprisonment in the federal prison system where there is no possibility of parole is "the second most severe [sentence] known to the law," surpassed only by the death penalty. *Harmelin* v. *Michigan*, 501 U.S. 957, 996 (1991); see also *Graham* v. *Florida*, 560 U.S. 48, 74 (2010) ("A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State

makes an irrevocable judgment about that person's value and place in society. "). Indeed, this maximum lifetime term of imprisonment surpasses the statutory maximum sentence for Mr. Haymond's first conviction for possession of child pornography and would surpass the maximum sentence if he were charged with possession a second time. See 18 U.S.C. § 2252(b)(2) (ten-year maximum for first conviction and twenty-year maximum for second conviction).

*Second,* § 3583(k) mandates these significant terms of imprisonment in the procedural context of a revocation hearing where there is no jury and a defendant is not afforded the "full panoply of rights" applicable to a criminal trial. *Morrissey*, 408 U.S. at 480; see also *Middendorf* v. *Henry*, 425 U.S. 25, 51 (1976) (Marshall, J., dissenting) ("It is inconceivable, for example, that this Court could conclude that a defendant in a general court-martial proceeding, where sentences as severe as life imprisonment may be imposed, is not entitled to the same protection our Constitution affords a civilian defendant facing even a day's imprisonment."). The Federal Rules of Evidence and the exclusionary rule, for example, do not apply at revocation. See *United States* v. *Bari*, 599 F.3d 176, 179 (2d Cir. 2010) (per curiam); *United States* v. *Charles*, 531 F.3d 637, 640 (8th Cir. 2008).

Critically, the burden of proof that the government must meet to trigger § 3583(k) is a preponderance of the evidence, an evidentiary standard that is more at home in a civil proceeding than a criminal proceeding where years of imprisonment are at stake. See *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (explaining that preponderance of the evidence standard is appropriate "in a civil suit between two private parties for money damages" because "we view

it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor"). Indeed, it is a lower standard of proof than that which applies in civil commitment proceedings for sexually dangerous federal prisoners. See *United States* v. *Comstock*, 560 U.S. 126, 130 (2010) (noting that government must prove its claims by "clear and convincing evidence").

Mr. Haymond's case is illustrative of the impact of the lower standard of proof. A district court and court of appeals have examined the factual record presented at the revocation hearing. Both concluded that this was a "close case" under a preponderance of the evidence standard. Pet. App. 9a.[5] The district court went further and stated that "if the court were to decide this case under the standard of beyond a reasonable doubt . . . the government would not have been able to bear that burden of proof." 3 C.A. App. 150.

*Third,* courts and parole boards historically maintained discretion and flexibility in supervising a defendant's release and making determinations related to revocation. In evaluating the due process protections that apply to revocation proceedings, this Court has repeatedly emphasized the preeminent role of discretion in those systems. See *Gagnon,* 411 U.S. at 784 (noting that a probation and parole officer was "entrusted traditionally with broad discretion to judge the progress of rehabilitation"); *Black* v. *Romano,* 471 U.S. 606, 611 (1985) ("In identifying the procedural require-

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[5] In dissent, Judge Kelly concurred with the majority that the case satisfied the preponderance of the evidence standard, but did not express a view on the strength of the evidence. Pet. App. 29a-31a.

ments of due process, we have observed that the decision to revoke probation typically involves . . . a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation."); *Burns* v. *United States,* 287 U.S. 216, 220 (1932) ("To accomplish the purpose of the [Federal Probation Act of 1925], an exceptional degree of flexibility in administration is essential."). The courts of appeals have announced the same principle in describing supervised release. See *United States* v. *Huerta-Pimental,* 445 F.3d 1220, 1224 (9th Cir. 2006) ("[R]evocation is, and always has been fully discretionary."); *United States* v. *Cordova,* 461 F.3d 1184, 1188 (10th Cir. 2006) (same); *United States* v. *Hinson,* 429 F.3d 114, 117 (5th Cir. 2005) (same). As the Tenth Circuit explained in the decision below, "discretion is key." Pet. App. 16a. Section 3583(k) is the antithesis of discretion and flexibility because it mandates a hefty term of imprisonment based upon a type of supervised release violation that Congress has singled out for punitive treatment.

### 3. Section 3583(k) is a historical outlier and distinct from prior systems of parole and probation.

Another principal argument from the Solicitor General's asserts that *Apprendi* has nothing to say about revocation proceedings because historically juries have not played a role in the decision to revoke parole and probation. U.S. Br. 31-43. But parole and probation are relatively recent and oft-changing systems that were unknown to the Framers. By contrast, the Framers implemented a jury trial right at a time when "the English trial judge of the later Eighteenth Century had very little explicit discretion in sentencing" and "[t]he substantive criminal law tended to be sanction specific." *Apprendi,* 530 U.S. at 479.

Parole, for example, did not come to the United States until 1876 in New York at the Elmira Reformatory and the federal government did not adopt a parole statute until 1910. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 976, 984 (2013). Probation has a similarly thin historical grounding, with Congress passing the first federal probation statute in 1925. *Id.* at 986. Because probation and parole were considered to constitute nothing more than an "act of grace," *Escoe* v. *Zerbst,* 295 U.S. 490, 492 (1935), the practice developed few procedural safeguards. For example, the defendant who was placed on parole remained in the custody of the warden of the penitentiary from where he was released. His status was "analogous to those of an escaped convict," and the parole board "was authorized at any time during his term of sentence in its discretion to revoke the order and terminate the parole." *Anderson* v. *Corall,* 263 U.S. 193, 196-97 (1923).

Parole revocation penalties could not exceed reimprisonment *for the remainder of the original sentence*, with no credit for any time out on parole. See Parole Act, Pub. L. No. 61-269, § 6, 36 Stat. 819, 820 (1910) (stating that the parole board could "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed"); *Anderson*, 263 U.S. at 195-96 (same); Doherty, *supra*, at 1005-06.[6] The penalty for revocation of probation was similarly tethered

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[6] In addition, until at least 1967, when a federal parolee was charged with a new criminal offense, the parole board would wait to issue a warrant and revoke parole until the new charges were resolved. *See* Notes, *Parole Revocation in the United States*, 56 Geo. L.J. 705, 712 (1968). The board's policy was based upon constitutional concerns, as the board was reluctant to revoke parole when a parolee could later be acquitted and wished to afford the

to the original crime of conviction. If a court decided to revoke probation, the court could impose the sentence that had been suspended by the period of probation. See Probation Act of 1925, Pub. L. No. 68-596, § 2, 43 Stat. 1259, 1260 (the court "may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed"); *Burns*, 287 U.S. at 221 (same); 18 U.S.C. § 3565(a)(2) (current revocation procedure for probation). In sum, historically there was no direct role for the jury to play at a revocation hearing for parole or probation because the court or the parole authority was simply imposing the terms of the original sentence that the original jury's verdict supported. For this reason, there would be no right to a jury determination of the facts underlying the revocation decision.

Supervised release has an even shorter history, emerging as part of the Sentencing Reform Act of 1984. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a), § 3583, 98 Stat. 1987, 1999-2000. Supervised release was meant to be a form of "post-confinement supervision," *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991), that would "improve the odds of a successful transition from the prison to liberty." *Johnson,* 529 U.S. at 708-09; see also *United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."). Supervised release was not a form of "conditional liberty," *Morrissey*, 408 U.S. at 480, where a defendant was released into the community on the condition that he abide by rules and regulations. A defendant who began a term of supervised release had completed his term of imprisonment and there was no pending term that he

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parolee "every opportunity to use his adversary rights in the criminal defense." *Id.*

could resume serving (as in the case of parole) or begin serving (as in the case of probation). See S. Rep. No. 98-225, at 58 (1983) ("A prisoner has completed his prison term when released even if he is released to serve a term of supervised release.").

Because supervised release served rehabilitative ends and defendants had already completed a term of imprisonment, reimprisonment as a penalty was historically modest, incidental to the supervision of the defendant, and limited by the gravity of the initial offense. See, *e.g.*, *Johnson*, 529 U.S. at 700-01, 708; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1006, 100 Stat. 3207, 3207-6 to -7 (introducing reimprisonment as a penalty for supervised release revocation and limiting reimprisonment to the defendant's term of supervised release); Sentencing Act of 1987, Pub. L. No. 100-182, § 25, 101 Stat. 1266, 1272 (adding further limitations on reimprisonment based upon classification of original felony); see also *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 627 (9th Cir. 2014) ("[The] conditions may not be made more severe, nor may the defendant's term of incarceration after his violation be made more onerous by any act adopted after he was sentenced.") (quoting *United States* v. *Paskow*, 11 F.3d 873, 881 (9th Cir. 1993)).[7] Indeed,

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[7] The initial system of supervised release did not provide a mechanism for imposing a new prison term. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, sec. 212(a), § 3583, 98 Stat. 1999. For technical violations, the release conditions could "be made more severe." S. Rep. No. 98-225, at 58. For serious violations, the defendant could "depending on the circumstances of the case, be punished for contempt of court or be held pending trial if the violation is a new criminal offense." *Id.* Since the 1960s, incarceration for contempt of court was limited to no more than six months unless the defendant was given a jury trial. See *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966); *Bloom,* 391 U.S. 194; *Frank* v. *United States,* 395 U.S. 147 (1969). Finally, if the

under the current iteration of the statute, the most dangerous and violent felons in the federal criminal system who are serving a term of supervised release cannot be reimprisoned for more than five years. 18 U.S.C. § 3583(e)(3) (maximum term for Class A felony). Section 3583(k) breaks with this tradition of limited penalties and violates *Apprendi* by using new criminal conduct to justify an aggravated penalty (here, both ceiling and floor) that far exceeds the limited penalty which could be imposed based upon the original crime of conviction, see *infra* I.B.2

**4. Section 3583(k) encourages further erosion of the role of the jury trial right.**

The Solicitor General's argument that *Apprendi* does not apply to "postjudgment facts" that "do not exist at the time of indictment or sentencing" proves too much. U.S. Br. 26. If *Apprendi* ceases to apply when the jury is disbanded and the sentence is imposed, Congress could constitutionally enact provisions similar to § 3583(k) for drug dealers, bank robbers, or any other class of offenders that fall into disfavor. Prosecutors could seek lifetime terms of imprisonment for recidivists on the basis of minimal evidence. Cases like this one where the government could not meet the beyond a reasonable doubt standard in a jury trial could be resolved in the government's favor under a preponderance of the evidence standard. Supervised release has already become a *de facto* addition to a defendant's sentencing regimen while conditions imposed have become onerous and complex. See U.S. Sentencing Comm'n, *Federal Offenders Sentenced to*

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defendant committed a more serious violation, Congress noted that it "should be dealt with as a new offense." S. Rep. No. 98-225, at 58.

*Supervised Release*, at 4 (2010) (noting that from 2005 to 2009, sentencing courts imposed supervised release in 99.1% of cases where it was not statutorily required); 18 U.S.C. § 3583(d); United States Courts, Form AO-245B Judgment in a Criminal Case (Revised Sept. 2008) (listing the five mandatory conditions and thirteen standard conditions that a typical defendant must follow while on supervised release).

The supervised release revocation statute thus could render many recidivist criminal statutes dead letter and revocation proceedings could become a shadow court system where significant terms of imprisonment are doled out without regard to the historic role of the jury in determining guilt. In such a system, the "jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping." *Jones* v. *United States*, 526 U.S. 227, 243-44 (1999).

## II. THE PROPER REMEDY FOR § 3583(K)'S CONSTITUTIONAL INFIRMITIES IS TO HOLD THE OFFENDING PORTIONS OF THE STATUTE UNENFORCEABLE

In the event this Court agrees that § 3583(k) is incompatible with *Apprendi*, the Solicitor General argues that the proper remedy is to "permit enforcement of § 3583(k) so long as the statutory procedures are satisfied" and a jury is empaneled to make "any required findings beyond a reasonable doubt." U.S. Br. 53. The Solicitor General's proposed remedy would create more problems than it would solve.

*First*, holding the last two sentences of § 3583(k) unenforceable and leaving the rest of the statutory structure of supervised release untouched would be more consistent with congressional intent. See *Booker*, 543 U.S. at 258-59 ("[W]e must retain those portions of the

Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute.") (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)).

Congress intended that judges, not juries, supervise defendants who have completed a term of imprisonment. *Johnson*, 529 U.S. at 697 (noting that supervised release is a "form of postconfinement monitoring overseen by the sentencing court"). The text of the supervised release statute is clear that courts, and courts alone, determine whether to, among other things, revoke supervised release and sanction a defendant for failure to comply with its terms. *E.g.*, 18 U.S.C. § 3583(e) ("The court may . . . terminate a term of supervised release . . . extend a term of supervised release . . . [or] revoke a term of supervised release . . . ."). "[T]he words 'the court' mean 'the judge without the jury,' not 'the judge working together with the jury.'" *Booker*, 543 U.S. at 249.

Empaneling a jury in connection with a revocation proceeding to make "any required findings," U.S. Br. 53, is a "system far more complex than what Congress could have intended." *Booker*, 543 U.S. at 254; see also *United States* v. *Jackson*, 390 U.S. 570, 580 (1968) ("It is one thing to fill a minor gap in a statute . . . . It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."). Moreover, engrafting jury trial requirements to the current revocation system would transform the focus of supervised release revocation proceedings from issues of transition and rehabilitation overseen by a judge acting with full discretion to address a defend-

ant's individual needs to an adversarial setting promoted by prosecutors seeking reimprisonment as their primary objective. Prison would no longer be "a last resort," *Gagnon,* 411 U.S. at 785, it would be the only goal. Applying *Booker*'s words, it would "destroy the system" of supervised release. *Booker*, 543 U.S. at 252.

To be sure, Congress's intent in enacting § 3583(k) may well have been to deter and to punish more severely recidivist possessors of child pornography. U.S. Br. 54.[8] But Congress has already done so. The penalties that are already available for the enumerated offenses in § 3583(k) are substantial, with many of the offenses imposing significant mandatory minimum terms of imprisonment. *E.g.*, 18 U.S.C. § 1201(g) (twenty years imprisonment); 18 U.S.C. § 2241(c) (thirty years imprisonment); 18 U.S.C. § 1591(b)(1) (fifteen years imprisonment), (b)(2) (ten years imprisonment). What Congress may not do is to exceed even the maximum penalty for recidivist crimes of this nature by exposing a recidivist to a life sentence through

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[8] The mandatory penalties imposed by § 3583(k) were largely based upon assumptions about the recidivism risk posed by non-contact sexual offenders that are contradicted by empirical data. Several empirical studies have cast "serious doubt on the existence of a substantial relationship between the consumption of child pornography and the likelihood of a contact sexual offense against a child." *United States* v. *Apodaca,* 641 F.3d 1077, 1086 (9th Cir. 2011) (Fletcher, J., concurring); *see also* U.S. Sentencing Comm'n*, 2012 Report to the Congress: Federal Child Pornography Offenses* 12-13, 293, 299-310 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf (noting that penalty ranges for sexual offenses assume a high risk of recidivism but finding in a study of released offenders that the rate of "sexual recidivism" measured by arrests or convictions for new sexual offenses was 7.4% and the rate of "general recidivism" was consistent with the overall population of offenders).

the expediencies of revocation proceedings. See *infra* I.B.1-2.

On the other hand, striking down portions of § 3583(k) would not frustrate or interfere with Congress' basic purpose in enacting supervised release to "assist individuals in their transition to community life." *Johnson*, 529 U.S. at 709; see also *Booker*, 543 U.S. at 250-51 (explaining that advisory guidelines would continue to serve Congress' "basic statutory goal" of diminishing sentencing disparity and promoting uniformity in sentencing). In particular, courts would continue to have the discretion to revoke supervised release based upon the failure to comply with its conditions and impose a term of reimprisonment to be followed by an additional term of supervised release. 18 U.S.C. §§ 3583(e)(3), (h). This was substantially the system of supervised release that existed from 1986—when Congress added a provision to § 3583 that permitted a court to revoke supervised release and order a term of reimprisonment—until 2006 when Congress added the portions of § 3583(k) at issue in this case.

*Second*, striking down targeted portions of § 3583(k) would be consistent with the Court's approach in prior *Apprendi* cases. In *Booker*, the Court invalidated two portions of the Sentencing Reform Act and made the guidelines system advisory as a remedy for the Act's infringement of the jury trial and due process rights. *Booker*, 543 U.S. at 259. The Court considered as an alternative remedy whether to "engraft" the jury trial requirement onto the guidelines. *Id.* at 246. But there, the Solicitor General argued and the Court held that such a system would have raised difficult questions of how a jury would find all the offense and offender related facts that are part of the guidelines calculation. *Id.* at 254-55. Here, the Court faces a similar

*Booker* dilemma: whether to excise portions of the supervised release statute and keep the bulk of the statutory structure intact or amend the statute to require amorphous jury trial proceedings that Congress has not authorized. The same answer should apply.

In contrast, the remedy the Court imposed in *Southern Union* and *Cunningham* is distinguishable. U.S. Br. 52-53. In *Southern Union*, it was a sensible and workable constitutional fix to have a jury *that would already be empaneled for a criminal trial* make factual findings that set the maximum criminal fine. *S. Union Co.* v. *United States*, 567 U.S. 343, 360 (2012) (holding that the *Apprendi* rule applies to facts that increase the maximum criminal fine). Here, there is no jury ready and waiting to make factual determinations at a revocation hearing. In *Cunningham*, the Court left it to the California legislature to decide whether to modify the system to retain determinate sentencing or give judges discretion at sentencing. *Cunningham* v. *California*, 549 U.S. 270, 293-94 (2007). One possible solution the Court suggested would be to modify the law to have juries already empaneled make additionalfactual determinations that trigger an enhanced sentence.

*Finally,* empaneling a jury at a revocation hearing to make "required findings beyond a reasonable doubt" would raise a host of constitutional and procedural questions. U.S. Br. 53. The Solicitor General does not specify what the "required findings" would be in a revocation proceeding under § 3583(k). Presumably, the findings relate to whether a defendant has "commit[ed] any criminal offense" enumerated in the statute "for which imprisonment for a term longer than 1 year can be imposed." But such a solution may violate double jeopardy protections if a jury decides that a defendant has committed a new criminal offense and a

subsequent prosecution is brought for the same offense. See *United States* v. *Dixon*, 509 U.S. 688, 695-96 (1993). Courts have previously rejected double jeopardy challenges in the context of a revocation hearing precisely because the punishment imposed is not punishment for the new criminal conduct. *Johnson*, 529 U.S. at 700 (citing cases). But if a revocation hearing begins to take on the appearance of a criminal trial related to the new criminal conduct, this undermines the reasoning of those decisions and suggests that double jeopardy should apply. The Solicitor General also fails to explain whether the "full panoply of rights" applicable to a criminal trial apply to the revocation trial that is proposed. *Morrissey*, 408 U.S. at 480.

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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