

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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EDGARDO ESTERAS, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 23-7483  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 85  
Place: Washington, D.C.  
Date: February 25, 2025

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EDGARDO ESTERAS, )

Petitioner, )

v. ) No. 23-7483

UNITED STATES, )

Respondent. )

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Washington, D.C.

Tuesday, February 25, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:17 a.m.

APPEARANCES:

CHRISTIAN J. GROSTIC, Assistant Federal Public Defender, Cleveland, Ohio; on behalf of the Petitioner.

MASHA G. HANSFORD, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:17 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-7483, *Esteras versus United States*.

Mr. Grostic.

ORAL ARGUMENT OF CHRISTIAN J. GROSTIC  
ON BEHALF OF THE PETITIONER

MR. GROSTIC: Mr. Chief Justice, and may it please the Court:

In Section 3583(e), Congress listed factors that courts must consider when terminating, modifying, or revoking supervised release and omitted the factors that it intended to preclude, most important here Section 3553(a)(2)(A)'s retribution factors. 3553(a) expressly states that (a)(2)'s four subsections are the purposes of sentencing which courts must satisfy when imposing prison, a fine, or probation. Courts have wide discretion about what to consider and how to fulfill those purposes, but they do not have discretion about what purposes to satisfy.

In 3583(e), Congress was surgical and removed one of those purposes: retributive

1 punishment under (a)(2)(A). That was different  
2 from every other sentencing option, including  
3 the otherwise identical language in the  
4 probation statute. Congress thereby precluded  
5 courts from considering (a)(2)(A)'s retributive  
6 purposes in the supervised release context, as  
7 this Court recognized in *Tapia* regarding the  
8 identical list in subsection (c).

9           And the Senate report confirms what we  
10 see in the text. Under subsection (c), courts  
11 "may not" -- supervised release "may not be  
12 imposed for purposes of punishment." And the  
13 identical list in subsection (e) has the same  
14 meaning. That also fits with the history of the  
15 statute. When Congress abolished parole, it  
16 created supervised release to fulfill the -- the  
17 rehabilitative purposes following a prison  
18 sentence that satisfies (a)(2)(A). Congress  
19 gave courts tools to adjust supervision, such as  
20 extending or modifying, but only for the limited  
21 purposes listed in 3583(e).

22           Congress did not add (a)(2)(A) to that  
23 list when --- in later amendments when it added  
24 the revocation tool and when it added additional  
25 fact -- factors to consider. Congress thus

1 precluded courts from relying on (a)(2)(A) in  
2 the supervised release context.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: How do you square  
5 your argument with provisions that more  
6 expressly limit consideration of other  
7 sentencing factors?

8 MR. GROSTIC: The -- what Congress did  
9 here was rely on a well-established mechanism  
10 for excluding factors, which was the negative  
11 implication canon, and, in particular, there's  
12 two aspects of that that I believe put that  
13 implication at its highest here.

14 The first, as this Court noted I  
15 believe most recently in Johnson versus Guzman  
16 Chavez, when -- when Congress specifies one item  
17 from a list of associated -- an associated group  
18 or series, it excludes those that it does not  
19 mention. Here, we don't just have an associated  
20 group or series. We have a defined list. We  
21 know the exact universe. So that -- that puts  
22 that associated group or series implication at  
23 its highest point.

24 The second, as this Court said in --  
25 for example, in Bittner, when Congress includes

1 language in one statute but omits it in a  
2 neighbor, that also brings the negative  
3 implication canon to the fore. And, here, we  
4 have, again, multiple neighbors where (a)(2)(A)  
5 is listed and an otherwise identify language in  
6 the probation statute. So, again, that's at its  
7 highest there.

8           And one further point, the -- Congress  
9 did actually remove two factors from -- from  
10 3583(e), the second being (a)(3), the kinds of  
11 sentences available. If that were also  
12 permissive, as the government contends, that  
13 would be nonsensical. Courts could or could  
14 not, at their option, consider other kinds of  
15 sentences.

16           So, when we put all of those things  
17 together, we believe that the negative  
18 implication canon here is at its highest, and --  
19 and Congress thus excluded the (a)(2)(A)  
20 factors.

21           CHIEF JUSTICE ROBERTS: How do you --  
22 how precise is the split? I mean, let's say  
23 under (c) the judge says: I have to consider  
24 what's necessary to protect the public from  
25 further crimes, right, and because it was such a

1 serious offense and there was no respect for the  
2 law, I'm going to do this or that.

3 Is -- is that acceptable or not?

4 MR. GROSTIC: I believe that would be  
5 acceptable because the judge specifically tied  
6 it to a permissible factor.

7 CHIEF JUSTICE ROBERTS: Even though,  
8 in doing so, he recited an impermissible factor?

9 MR. GROSTIC: I -- I -- I believe so,  
10 and I -- I -- I do understand Your Honor's  
11 question, and I believe that that puts -- that's  
12 the most puzzling thing about what Congress did  
13 here, but I also believe Congress solved that  
14 puzzle for us in the text because Congress must  
15 have known when they drafted this statute that  
16 there was the possibility that a reader could  
17 see overlap or surplusage. And yet, it still  
18 did two things. In 3553(a), it listed the  
19 factors in separate subsections. And then, in  
20 3583(e) and (c), it obviously excluded one of  
21 those.

22 So I believe what Congress was  
23 directing is focus on the permissible factors.  
24 Obviously, we don't need to fly-speck every word  
25 that a court uses, and as long as the district



1 court makes clear it's relying on a permissible  
2 factor, that would be permissible.

3 JUSTICE ALITO: Let me give you  
4 another example. Under the statute, the judge  
5 must consider the nature and circumstances of  
6 the offense. But, on your reading of this  
7 statute, the judge may not consider the  
8 seriousness of the offense. I mean, how is a  
9 judge supposed to do that?

10 Let me give you this -- let me give  
11 you an example. The offense is a bank robbery.  
12 Fifty thousand dollars is stolen in the robbery.  
13 The robber terrorizes the bank employees and the  
14 clients who are present in the bank at the time,  
15 and one of the clients has a heart attack.

16 So the judge -- how is the judge going  
17 to consider the nature and circumstances of that  
18 offense without considering the severity of the  
19 offense?

20 MR. GROSTIC: Understood, Your Honor.  
21 And -- and what I would point to, again, is, in  
22 the text of the statute, I believe by splitting  
23 those two factors out, Congress, in identifying  
24 the nature and circumstances, was talking about  
25 the type of -- the type of offense involved, the

1 circumstances that surrounded it, many of the  
2 facts that Your Honor just pointed to.

3 Those facts allow a court to make a  
4 judgment about the seriousness of the offense if  
5 that's permissible. But those facts also allow  
6 a court to make judgments about other things,  
7 like the need to protect the public, the need to  
8 deter.

9 And so, when Congress in (a)(2)(A)  
10 specifically said consider the need to reflect  
11 the seriousness of the offense, that points to  
12 the retributive purpose. And so what Congress  
13 was doing there is saying consider those facts,  
14 and then how you use those facts is what we  
15 direct in (a)(2)(A).

16 JUSTICE ALITO: Well, I'm sorry, I  
17 don't really understand the answer. I just  
18 don't see the difference between the nature and  
19 circumstances of the offense and the severity of  
20 the offense.

21 MR. GROSTIC: Well --

22 JUSTICE ALITO: Let me ask you -- let  
23 me ask you this as to where your argument leads.  
24 It could mean that there's a violation if --  
25 I'll give you three possibilities. Maybe there

1 are more, but I'll give you three.

2 One, there's a violation if the judge  
3 refers by -- by name to the particular statutory  
4 provision that he can't consider. That's number  
5 one.

6 Number two is that it's a magic words  
7 test. So there's a violation if the judge says  
8 anything, uses the words "seriousness of the  
9 offense, respect for the law, provide just  
10 punishment for the offense."

11 Three is the reviewing court has to  
12 look at the essence of what the judge is doing,  
13 and if the reviewing court thinks that the  
14 essence goes to the prohibited factor, the  
15 factor you think is prohibited, there's a  
16 violation.

17 Which one is it?

18 MR. GROSTIC: Your Honor, I -- I  
19 believe it would be closest to the second,  
20 although I'd like to explain further. The --  
21 the most important thing here is that district  
22 courts orient their decision-making around what  
23 Congress directed.

24 JUSTICE ALITO: Well, I mean, I think  
25 those are the three choices. So, if it's -- is

1 it the -- is it a magic words test? Is the  
2 judge okay if the judge doesn't use the magic  
3 words? Or do you look beyond that?

4 MR. GROSTIC: I think we look -- and  
5 the reason I know the magic words is something  
6 I'm not supposed to say, right, and yet I  
7 indicated that anyway. And this is -- this is  
8 my reasoning.

9 The first is, again, the -- the most  
10 important thing is that district courts direct  
11 their analysis to the factors that Congress  
12 indicated they should direct to. How a  
13 reviewing court reviews that is going to be  
14 based on the words that the court uses. That's  
15 true in every context on appeal.

16 But the -- the -- the words that a  
17 court uses in this context are for a purpose,  
18 and (a)(2)(A)'s purpose, as this Court again  
19 recognized in *Tapia*, was about that retributive  
20 purpose.

21 JUSTICE ALITO: All right. One  
22 last --

23 MR. GROSTIC: That's --

24 JUSTICE ALITO: -- one last try. You  
25 know, in -- in reading your brief, I couldn't

1 help thinking how this would go over with the  
2 trial judges I used to talk to all the time.  
3 They want to know: What am I supposed to do or  
4 what can't I do? And -- and I don't know.

5 Which of the three is it? Am I safe  
6 if I just don't use the magic words, I don't  
7 cite this statute?

8 MR. GROSTIC: I -- I think what courts  
9 need to do is direct their analysis towards  
10 deterring, protecting the public, and  
11 rehabilitation.

12 JUSTICE JACKSON: And is that because  
13 we're talking about supervised release?

14 MR. GROSTIC: That's exactly right.

15 JUSTICE JACKSON: I mean, I -- I -- I  
16 sort of think we have to orient this in the  
17 right way. Courts sentence in different  
18 functions. There are different things that are  
19 happening. So, when you have an original  
20 offense, Congress directs in 3553(a) that the  
21 court shall impose a sentence sufficient but not  
22 greater than necessary to comply with the  
23 purposes set forth in paragraph 2.

24 All right. So we have a direct  
25 reference to purposes being relevant to the

1 sentencing exercise. The court in determining  
2 the particular sentence shall consider, and  
3 among the things are the nature and  
4 circumstances that you talked about with Justice  
5 Alito. But, clearly, purposes are something  
6 different in the statute.

7           That's in the original sentencing  
8 exercise. But then you have a situation in  
9 which the court sentences someone to a term of  
10 imprisonment, they impose supervised release in  
11 lieu of what used to be probation or whatnot as  
12 a result of the sentence, and then we have a  
13 different set of instructions in the statute for  
14 what you're supposed to do with respect to  
15 supervised release.

16           So, to start, are you supposed to  
17 consider punishment or retribution in the  
18 context of imposition of -- of supervised  
19 release?

20           MR. GROSTIC: No, Your Honor. And --  
21 and that's quite clear in the statute. And the  
22 reason is because the court is directed to  
23 fulfill that purpose with the prison sentence.

24           So the person has committed an  
25 offense. A judgment about how serious the

1 offense has been made. The court decides this  
2 length of a prison term is the appropriate  
3 retributive sanction for that and imposes that  
4 sanction.

5 Now, moving to the supervised release  
6 context about what follows, because there is no  
7 parole, Congress said: We recognize that there  
8 could be value still to the court providing  
9 rehabilitative services to an offender and, at  
10 the same time, to manage that transition back  
11 into society to make sure that the public is  
12 protected at every turn.

13 JUSTICE JACKSON: And so the purposes  
14 there relate to other things. You're not  
15 imposing supervised release to punish the person  
16 for the crime that they committed. That's the  
17 incarcerative term that you've already imposed.

18 Is that right?

19 MR. GROSTIC: That's correct. And --  
20 and -- and then, in -- later on, when we're  
21 talking about extending, modifying, those are  
22 responses then to a person's potential actions  
23 while on supervised release.

24 JUSTICE JACKSON: And, in fact, you  
25 could revoke a person's supervised release even

1 for non-criminal behavior.

2 MR. GROSTIC: That's correct.

3 JUSTICE JACKSON: So you're not  
4 necessarily punishing them at least  
5 theoretically for a revocation. You are trying  
6 to figure out what is necessary to get this  
7 person to conform to the conditions of  
8 supervised release that you've imposed.

9 MR. GROSTIC: That's -- that's exactly  
10 correct. And -- and what's happening is, at the  
11 initial sentencing, the judge is making their  
12 best forward-looking determination, after this  
13 person is released, what conditions are going to  
14 be necessary, what term is going to be  
15 appropriate, what's going to satisfy these  
16 purposes.

17 JUSTICE JACKSON: So, theoretically,  
18 we're completely sort of outside of the realm of  
19 punishment now. We're in the world of  
20 supervised release, and the court is being  
21 instructed through these directions in the  
22 statute that preclude consideration of  
23 punishment that we're now thinking about  
24 rehabilitation and deterrence and the kinds of  
25 things that are necessary to operate fairly a



1 supervised release system.

2 MR. GROSTIC: That -- that's correct.

3 And -- and after that initial judgment, what  
4 we're talking about is a person on supervised  
5 release. Their conduct might shift what the  
6 judge now considers is necessary to meet those  
7 factors, rehabilitation, deterrence --

8 JUSTICE GORSUCH: Mr. --

9 MR. GROSTIC: -- or protecting the  
10 public.

11 JUSTICE GORSUCH: Mr. Grostic, in the  
12 real world, an individual comes before a judge  
13 having violated a term of supervised release and  
14 is remanded to prison.

15 In what world does he think he's not  
16 being punished?

17 MR. GROSTIC: The -- I -- I understand  
18 that -- that a person probably thinks they're  
19 being punished in that world. I wouldn't -- I  
20 wouldn't dispute that.

21 JUSTICE GORSUCH: Yeah.

22 MR. GROSTIC: At the same time, what  
23 the district court is instructed to do is not to  
24 say: You have done something wrong here, and  
25 because of that wrongness, I'm going to measure

1     how wrong it is and I'm going to punish you as a  
2     result.

3                     What it's doing is trying to say: I  
4     thought initially this was going to be  
5     sufficient to rehabilitate, to deter, and --

6                     JUSTICE GORSUCH: And -- and -- and  
7     now I find it's not.

8                     MR. GROSTIC: And now I found it's  
9     not. So I'm going to --

10                    JUSTICE GORSUCH: And so, instead of  
11    being free, you're -- you're going to prison.

12                    MR. GROSTIC: I'm going to adjust  
13    what -- what I'm doing. I thought that  
14    initially my prison term --

15                    JUSTICE GORSUCH: I'm adjusting what  
16    I'm doing by sending you to prison.

17                    MR. GROSTIC: Correct.

18                    JUSTICE GORSUCH: Yeah.

19                    MR. GROSTIC: I --

20                    JUSTICE GORSUCH: And on -- on -- on  
21    the exclusio unius point, which I -- I -- I take  
22    as a strong one, as I read (e), it says you --  
23    you effectively must consider these factors,  
24    which I think, certainly, from an -- you know, a  
25    linguistic perspective, means that you don't

1 have to consider other factors. I'm not sure it  
2 quite goes so far to say you must not consider  
3 other factors.

4 Do you follow me?

5 MR. GROSTIC: I do follow. And --  
6 and --

7 JUSTICE GORSUCH: Help me with that.

8 MR. GROSTIC: Well, that's going back  
9 to my answer to Justice Thomas. I mean, the --  
10 this Court has adopted a series of -- of -- in a  
11 series of decisions, guideposts, obviously, for  
12 how we can determine when that -- that negative  
13 implication canon is at its highest.

14 We believe it's at its highest here.  
15 And it's not just a matter of how courts review  
16 a statute. It's also the backdrop against what  
17 Congress drafted.

18 JUSTICE GORSUCH: I accept that -- I  
19 accept that it's at its highest, but its  
20 highest, it strikes me, would only -- only get  
21 you so far normally, unless we have something  
22 extra to suggest that they must -- need not  
23 consider the other factors.

24 It wouldn't -- it wouldn't take you so  
25 far as to must not and maybe particularly given

1 that Congress has elsewhere said you -- you must  
2 not consider other factors.

3 What do I do about that?

4 MR. GROSTIC: Well, in -- in this  
5 context, Your Honor, we believe this is the  
6 clearest way that Congress has spoken in the  
7 Sentencing Reform Act. And it's by --

8 JUSTICE GORSUCH: Even though, when it  
9 comes to setting supervised release initially,  
10 Congress has said you may not consider certain  
11 factors?

12 MR. GROSTIC: Well, in setting  
13 initially, the language of 3583(c) is "shall  
14 consider" and then the list of factors.

15 JUSTICE GORSUCH: Yeah. But -- but --

16 MR. GROSTIC: It also there does not  
17 say "shall not."

18 JUSTICE GORSUCH: Correct. But there  
19 are places where Congress says you may not  
20 consider certain factors, aren't there?

21 MR. GROSTIC: I -- I don't believe so.  
22 Not -- not in this context.

23 JUSTICE JACKSON: And is -- and in  
24 those situations in other contexts, isn't that  
25 statement being made in the context of the

1 universe of factors, the world -- the possible  
2 world of factors, and so they isolate one and  
3 say: Don't consider this.

4 I thought your strongest argument on  
5 this point was the fact that the reference being  
6 made here is to a defined set. So we have 10  
7 factors to begin with. That is the universe.

8 And then, in this particular  
9 circumstance, they leave out two. So it seems  
10 odd to believe that they still considered -- you  
11 know, they still wanted those two to be a  
12 permissible consideration under those  
13 circumstances.

14 MR. GROSTIC: Yeah, that -- that's  
15 correct, Your Honor. And -- and I would add  
16 again that we can look that -- look at that  
17 provision in comparison to the otherwise  
18 identical probation statute.

19 If Congress truly meant that in both  
20 contexts anything was permissive, then that  
21 language in the probation statute, to the extent  
22 they apply, is essentially the same language  
23 that we're reading into 3583(c) and (e).

24 JUSTICE GORSUCH: So, Mr. Grostic, I  
25 think what I was thinking of, and I do want your

1 help with this, is, you know, Congress has said  
2 in (a) that the factors set forth in 3553(a) --  
3 this is 3582(a), I'm sorry -- recognizing  
4 imprisonment is not an appropriate means of  
5 promoting correction or rehabilitation -- there,  
6 we have clear language saying "may not" or  
7 "shall not" consider certain things.

8 MR. GROSTIC: Well --

9 JUSTICE GORSUCH: We don't have that  
10 here. So what do we do about that?

11 MR. GROSTIC: -- in Tapia, this Court  
12 did not say that that was an outright bar on  
13 considering that factor actually.

14 JUSTICE GORSUCH: Not for certain --  
15 it is for certain purposes.

16 MR. GROSTIC: Precisely.

17 JUSTICE GORSUCH: Right.

18 MR. GROSTIC: And -- and so, in Tapia,  
19 the Court recognized that 3583(c) was a more  
20 clear way to outright bar considering of a  
21 factor.

22 JUSTICE GORSUCH: Yeah.

23 MR. GROSTIC: 3582(a) works in tandem,  
24 obviously, with -- with the instructions for  
25 imposing prison generally.

1 JUSTICE GORSUCH: Right. So there we  
2 have a clear -- clear way of Congress telling us  
3 certain things are out of bounds.

4 MR. GROSTIC: Well, what Congress did  
5 there is -- is, in imposing prison, tell courts  
6 they can consider rehabilitative factors.

7 JUSTICE GORSUCH: But not for certain  
8 purposes.

9 MR. GROSTIC: But not for cert -- but  
10 not for lengthening or imposing --

11 JUSTICE GORSUCH: Yeah, I get all  
12 that.

13 MR. GROSTIC: Right.

14 JUSTICE GORSUCH: We're going around  
15 the same tree here together.

16 But -- but we don't have language in  
17 this statute saying "may not" for any purpose.

18 MR. GROSTIC: That's correct. And --  
19 and our position is, and I believe that when  
20 Congress drafted against the backdrop of the  
21 negative implication canon, that this was a more  
22 clear way than 3582(a) to exclude the --

23 JUSTICE GORSUCH: Okay.

24 MR. GROSTIC: -- the non-listed  
25 factors.

1 JUSTICE SOTOMAYOR: Counsel, I've been  
2 thinking of this case because I keep going back  
3 to the question that Justice Alito did, which is  
4 we have a backdrop that sentencing courts can  
5 look at almost anything.

6 And this is not stopping sentencing  
7 courts from looking at any evidence whatsoever.

8 MR. GROSTIC: Correct.

9 JUSTICE SOTOMAYOR: What it's saying  
10 instead is: You can't use that evidence for  
11 certain purposes.

12 MR. GROSTIC: That's correct.

13 JUSTICE SOTOMAYOR: And so it's not  
14 that it's a list of factors or evidence that you  
15 can or cannot use. It's more what purpose  
16 you're using that evidence for, correct?

17 MR. GROSTIC: That's correct. And --  
18 and just as in the initial sentencing context,  
19 if a court, say -- say, refused -- said I don't  
20 believe that deterrence is a proper purpose of  
21 sentencing, I refuse to consider it, that would  
22 be error because it would have refused to follow  
23 Congress's direction, so --

24 JUSTICE SOTOMAYOR: As to purpose. I  
25 think of this -- we do -- courts do this all the



1 time with hearsay. We tell courts you can't use  
2 hearsay for the purpose of the truth of the  
3 matter, but you could use it for all -- for a  
4 lot of other reasons, correct?

5 MR. GROSTIC: Correct.

6 JUSTICE SOTOMAYOR: And we do the same  
7 thing with propensity evidence. You can look at  
8 propensity evidence. You just can't use it  
9 to -- for the purpose of -- of proof of  
10 propensity, but you can use it for -- to prove  
11 intent --

12 MR. GROSTIC: Correct.

13 JUSTICE SOTOMAYOR: -- or knowledge or  
14 a lot of other reasons. So it's not -- what you  
15 are basically saying is you can use anything you  
16 want, District Court Judge; you just can't use  
17 it for this purpose.

18 MR. GROSTIC: Correct.

19 JUSTICE SOTOMAYOR: All right.

20 MR. GROSTIC: And that follows from --  
21 from the structure of the entire statute. As --  
22 as Justice Jackson brought up, the initial  
23 sentencing, (a)(2)(A) is satisfied. The  
24 supervised release is imposed for these  
25 additional purposes.

1           3583(d) instructs courts about how to  
2 consider what conditions they might impose. It  
3 also omits (a)(2)(A) because, again, this is not  
4 for a retributive purpose.

5           JUSTICE SOTOMAYOR: And you said  
6 earlier that you don't mind -- it is a magic  
7 words requirement. When we admit hearsay, don't  
8 use it for the truth. We say, if you're using  
9 it for the truth, you've committed error. Are  
10 you using it for another purpose? You're okay.

11           MR. GROSTIC: Right. And -- and,  
12 again, I know that that's -- I'm not supposed to  
13 say this is magic words, and it isn't magic  
14 words except to the extent about how courts are  
15 reviewing what a district court does. The same  
16 as in any other appellate context, we look at  
17 the words that the court used.

18           But the fundamental point is that the  
19 words reflect a purpose. They reflect that  
20 Congress said, in this context, we're taking  
21 retribution off the table. That was done for  
22 the initial -- the initial offense. Nothing can  
23 change about the person's conduct that would  
24 make the need to punish that original offense  
25 more stark now. And if there is new conduct

1 that needs retributive punishment, the proper  
2 course is a new prosecution.

3 JUSTICE SOTOMAYOR: Now, going to --

4 MR. GROSTIC: It's not a supervised  
5 release --

6 JUSTICE SOTOMAYOR: -- Justice  
7 Gorsuch's point, throughout the sentencing  
8 factors, the Court routinely has said use all  
9 the 3553(a) factors, but it chose here not to do  
10 that, so there has to be a purpose for that.

11 MR. GROSTIC: Correct. And --

12 JUSTICE SOTOMAYOR: Pardon the pun of  
13 using "purpose" in another way.

14 MR. GROSTIC: Of course, Your Honor.

15 JUSTICE SOTOMAYOR: But, if it had  
16 wanted to say everything's there, it could have  
17 said it the way it did it everywhere else,  
18 correct?

19 MR. GROSTIC: Correct. And -- and, in  
20 fact, in -- in -- again, in Guzman Chavez, the  
21 Court noted by listing things in a -- in a -- in  
22 an aligned series, a group or associated series,  
23 and -- and omitting others, that means the  
24 negative implication has force and also noted --

25 JUSTICE SOTOMAYOR: That's why the

1 negative implication has so much force here,  
2 which is --

3 MR. GROSTIC: Correct.

4 JUSTICE SOTOMAYOR: -- if Congress  
5 didn't want to eliminate something from  
6 consideration -- a purpose from consideration,  
7 it had a way that it used throughout all of the  
8 sentencing provisions, but it chose explicitly  
9 to exclude something here.

10 MR. GROSTIC: Correct. And -- and as  
11 in -- as in Guzman Chavez, there was no  
12 catch-all provision at the end to say consider  
13 these and these others to the extent they apply.  
14 Nothing like that.

15 And -- and colloquially even, if I --  
16 if I may, it would be -- what -- what the  
17 government's position here is, courts, you must  
18 make sure you deter, you must make sure that you  
19 promote -- that you protect the public, you must  
20 make sure that you rehabilitate, and, courts,  
21 you can decide to punish someone if you want to  
22 or if you find that it's warranted here.

23 And I don't know how courts would be  
24 guided by that. I don't know what  
25 considerations they would -- that -- that would

1 be appropriate to decide that. What we have  
2 are -- are established ways to impose  
3 rehabilitative punishment during an initial  
4 prosecution.

5 JUSTICE SOTOMAYOR: All right. Thank  
6 you, counsel.

7 JUSTICE ALITO: Would you agree that  
8 the purpose of general deterrence is to cause  
9 people to respect the law and obey the law?

10 MR. GROSTIC: To obey the law,  
11 absolutely. I -- I do agree with that.

12 JUSTICE ALITO: All right. So how  
13 can -- again, we have a contradiction in this --  
14 in your -- in the way you read this statute.  
15 The judge shall take into account what's needed  
16 to afford adequate deterrence to criminal  
17 conduct, but the judge cannot take into --  
18 cannot do this, cannot revoke or modify  
19 supervised release to promote respect for the  
20 law.

21 MR. GROSTIC: The need to promote  
22 respect for the law in (a)(2)(A), because of  
23 what it's next to and how we read that statute  
24 together, still reflects that retributive  
25 purpose.

1 JUSTICE ALITO: But isn't that built  
2 into the idea of deterrence?

3 MR. GROSTIC: Not the retributive  
4 purpose itself. Deterrence can --

5 JUSTICE ALITO: No, but to cause -- to  
6 cause people to respect the law and obey the  
7 law.

8 MR. GROSTIC: In a sense, but in  
9 (a)(2)(A), Congress has used "respect for the  
10 law" differently, and we know that simply  
11 because of the way that they drafted the  
12 statute, that these are separate purposes that  
13 courts need to fulfill.

14 I mean, under any analysis, we -- I --  
15 I think we all agree that Congress must have  
16 done something here. And if we conclude that  
17 (a)(2)(A) and (a)(2)(B) are necessarily involved  
18 in the same thing anytime we consider (a)(2)(B),  
19 then Congress has done nothing. (a)(2)(B),  
20 every time we consider it, will involve  
21 considering (a)(2)(A).

22 JUSTICE JACKSON: Mr. Grostic, can --  
23 can I get you to react to the thought that maybe  
24 what Congress was doing was reacting to  
25 potential concerns about constitutional

1 problems? And -- and what I mean by that is  
2 that we have a system in which judges impose  
3 penalties subject to limitations in the form of,  
4 say, the statute of maximum, right? You can  
5 only impose a -- a -- a term of imprisonment up  
6 to a certain point.

7           When Congress crafted this statute to  
8 allow for supervised release and then permitted  
9 revocation, unless retribution, punishment, is  
10 sort of removed from the supervised release  
11 dynamic, wouldn't you run into a potential  
12 problem of having people being sentenced -- or  
13 at least this would be an argument that the  
14 defense would make -- people being sentenced in  
15 the supervised release realm above the statutory  
16 maximum because now what we're doing is  
17 punishing people, not just someone who gets the  
18 stat max for the initial offense, but then  
19 you're tacking on an extra two years, three  
20 years, whatever it is, in the revocation realm?

21           And so part, I think, of what Congress  
22 might have been trying to do was to avoid that  
23 kind of problem by indicating very clearly that  
24 in supervised release, we're really not about  
25 punishment. We're not trying to go -- you know,

1 run into the same kinds of concerns that you  
2 would have if you were allowing people to go  
3 above the statutory maximum.

4 MR. GROSTIC: I -- I think that's  
5 possible, Your Honor. I have hesitation, which  
6 I will explain.

7 JUSTICE JACKSON: Yes.

8 MR. GROSTIC: One, I do think it's  
9 possible because of the -- the considerations,  
10 the serious constitutional questions this Court  
11 identified in Cornell Johnson.

12 My hesitation in -- in -- in just  
13 agreeing to Your Honor's question is that when  
14 Congress initially drafted 3583(e), there was no  
15 revocation provision. It was terminate, modify,  
16 extend, or refer to a new prosecution. So, in  
17 that context, there was no need to adopt a need  
18 for retributive punishment.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas, anything further?

22 Justice Alito?

23 JUSTICE ALITO: Suppose a district  
24 judge reads the kind of opinion you would like  
25 us to write and says: Well, how am I going to



1     comply with this, okay? I'm going to write out  
2     in advance everything that I'm going to say and  
3     I'm going to be sure never to use the magic  
4     words, plus I'm going to put a disclaimer on --  
5     whenever I -- I do this, I'm going to have a  
6     standard disclaimer: I am not taking into  
7     account this particular provision of the  
8     statute.

9                     Is the district court home free then?

10                    MR. GROSTIC: I -- I mean, I believe  
11     it would be for appellate review, but the more  
12     important thing from reading this Court's  
13     opinion would hopefully be that the district  
14     court, acting conscientiously, as our -- as  
15     our -- in my experience, our judges do actually  
16     reorient their -- their analysis away from the  
17     retributive factors and towards the permissible  
18     factors.

19                    JUSTICE ALITO: Reorients -- the judge  
20     reorients his or her consideration away from the  
21     seriousness of the offense but directs it to the  
22     nature and circumstances of the offense.  
23     Reorients it away from promoting respect for the  
24     law. No, you can't do that, but you can try to  
25     promote deterrence.

1           MR. GROSTIC: Yes, Your Honor. The --  
2           the -- the purposes of sentencing -- deterrence,  
3           protecting the public, and -- and  
4           rehabilitating -- would be the reorientation.

5           JUSTICE ALITO: You want us to write  
6           an opinion saying, Judges, when you are revoking  
7           or modifying supervised release, do not try to  
8           promote respect for the law?

9           MR. GROSTIC: Do not consider  
10          (a)(2)(A) because, in that context, promoting  
11          respect for the law reflects the retributive  
12          purpose because of the -- the -- the context in  
13          which it's written.

14          CHIEF JUSTICE ROBERTS: Justice  
15          Sotomayor?

16          Justice Kagan?

17          JUSTICE KAGAN: So, I mean, there are  
18          hypotheticals that we could throw at you all day  
19          reflecting some kind of mishmash of these  
20          factors, and -- and I think that that's the  
21          concern. So, if you were saying simply,  
22          quickly, to district courts what they should do,  
23          what they shouldn't do, what would that be? And  
24          also, if you were providing that same kind of  
25          guidance to appellate courts, especially given

1 in the first couple of years they're going to be  
2 looking at sentences that happened even before  
3 any opinion we would write, what would that be?

4 MR. GROSTIC: So, on the first  
5 question, Your Honor, about what directions to  
6 district courts, two points. The first would be  
7 a clear statement of the three permissible  
8 purposes, what their meaning is, and to -- to  
9 follow those, to direct the -- the analysis  
10 towards those purposes.

11 And I do believe that there's a  
12 helpful under -- underpinning to all of those,  
13 which is forward-looking, what needs to happen  
14 for the future for this person, not -- it's  
15 obviously based on nature and circumstances,  
16 their history and characteristics, what has  
17 happened before but not because you did this  
18 before, now we need to do this in response.  
19 Just what is needed to protect the public, to  
20 deter, and to rehabilitate.

21 And then, for courts of appeals, I  
22 take -- I take Your Honor's question to heart  
23 because it is this interim period, I think,  
24 that's the most important. After Tapia, we  
25 haven't seen a --

1 JUSTICE KAGAN: I mean, that was my  
2 experience in Tapia. I actually paid some close  
3 attention to what was happening, and the first  
4 couple of years, people were having a hard time  
5 figuring it out, and courts of appeals were  
6 going different ways. And then it just  
7 completely ended because district courts just  
8 started doing the things that we had said to do.

9 MR. GROSTIC: Right. And that's my  
10 experience as well. So in that interim period  
11 is kind of the most important of reviewing what  
12 the district courts have said, ensuring that  
13 they comply with -- with the -- the factors that  
14 are listed.

15 In that interim period, unless a  
16 court -- if a court cites an (a)(2)(A) purpose  
17 and unless it has made clear I didn't mean those  
18 words for what it seems like, I meant it for  
19 this other purpose, I mean, at that point, we're  
20 into something like normal harmless error  
21 procedural reasonable review, which is, when a  
22 court relies on an impermissible factor,  
23 considers an impermissible factor, which is what  
24 the statute says they're not permitted to do,  
25 that's reversible.

1           But, again, even at that point, we're  
2 talking about a vacatur to send it back to the  
3 district court. If it really did mean to impose  
4 the same sentence for the permissible purposes,  
5 it can do so and re-explain.

6           CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8           JUSTICE GORSUCH: It seems to me the  
9 upshot of the opinion we would write is say:  
10 Don't use the word "punishment," but you can use  
11 the words "protect the public, adequately deter,  
12 and the history of this defendant."

13           Is -- is that the gist of what -- what  
14 we'd essentially be doing here?

15           MR. GROSTIC: I -- I -- I believe  
16 that's -- those are -- those are kind of the key  
17 touchstones, yes. And that, again, is towards  
18 reorienting district courts away from punishment  
19 in this context and courts --

20           JUSTICE GORSUCH: Yeah, I just don't  
21 know what it says -- what it means to reorient  
22 away from punishment when you're saying: I --  
23 I'm sending you back to prison in order to  
24 protect the public --

25           MR. GROSTIC: I -- I --

1 JUSTICE GORSUCH: -- or "given" -- or  
2 "given the history of what you've done."

3 MR. GROSTIC: And -- and I understand  
4 that, Your Honor.

5 JUSTICE GORSUCH: What's the delta  
6 between that and saying: I am punishing you?

7 MR. GROSTIC: To -- to a defendant, it  
8 may mean very little.

9 In the context of how district courts  
10 are managing their docket and -- and the  
11 supervision docket, it's -- I believe it's quite  
12 important because, at this point, under the  
13 Sixth Circuit's rule, district courts can treat  
14 a supervised release revocation the same as in  
15 an initial sentencing, where they can punish the  
16 offender for what's happened before, no matter  
17 what has changed in the meantime.

18 JUSTICE GORSUCH: Well, they can't go  
19 beyond what -- the -- the factual findings of  
20 the jury to issue a new sentence. That's not  
21 permissible. We dealt with that in Haymond, for  
22 example, right? We're now dealing in the  
23 context of supervised release.

24 And it just -- and magic words, I -- I  
25 appreciate some words are important, but I --

1 I -- I struggle with synonyms. And a synonym to  
2 "protecting the public" might be "punishment."  
3 A synonym to "punishment" might be "you're a bad  
4 person," which I can say. Your -- your history,  
5 you're a bad person, you've done bad things. I  
6 need to deter crime. Punishment.

7 Thank you. I -- I get it.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: When you consider  
11 the nature and circumstances of the offense,  
12 which you can and are supposed to, what if the  
13 district judge says: Well, I'm considering the  
14 nature and circumstances of the offense, and it  
15 was a serious offense?

16 MR. GROSTIC: I believe if they stop  
17 there that that's reversible error because  
18 there's no indication that it means anything  
19 other than relying on the (a)(2)(A) factor.

20 If a court is careful and says: This  
21 was a serious offense and, therefore, I'm not --  
22 I'm not trying to punish you, but I -- I  
23 conclude that you need to be -- that -- that I  
24 need to revoke your supervision so that we can  
25 protect the public, and that's clear in the

1 transcript, I believe that the district court  
2 would have made clear that it's not relying on  
3 an impermissible factor.

4 But the -- again, the core here is  
5 what is the district court trying to do. And --  
6 and I do appreciate the hypotheticals. I think  
7 it's helpful to -- to -- to tease out the edges  
8 of this. But, at the same time, this is in a  
9 sense normal appellate review in -- in the  
10 sentencing context too. Has the court relied on  
11 this or not? Has the court considered this or  
12 not?

13 JUSTICE KAVANAUGH: I guess my  
14 question also gets to my -- when I read  
15 (a)(2)(A), I think of the three things there,  
16 the first two, seriousness of the offense and  
17 respect for the law, are almost completely  
18 overlapping with other factors that you're  
19 supposed to consider.

20 So that leads me to think what's left,  
21 as Justice Gorsuch just said, the just  
22 punishment, as long as you avoid the word  
23 "punishment" or "punish," you should be okay.

24 MR. GROSTIC: And -- and two responses  
25 to that.



1           One, I do think that the -- the  
2 additional text is important, which is the need  
3 to reflect the seriousness of the offense, the  
4 need to promote respect for the law. Reflecting  
5 the seriousness of the offense I believe does  
6 bring that back into something akin to  
7 retribution and punishment.

8           But, secondly -- and -- and I -- I  
9 know I'm repeating myself to some extent here.

10           JUSTICE KAVANAUGH: That's okay.

11           MR. GROSTIC: But Congress was doing  
12 something here when they listed these factors  
13 separately. And when they omitted this one,  
14 I -- again, I think we can all agree Congress  
15 must have been doing something.

16           And so the -- the sense that because  
17 there is a sense that perhaps they overlap or  
18 surplusage, that's something Congress must have  
19 been aware of, and yet they chose to surgically  
20 remove this particular purpose from this  
21 context.

22           JUSTICE KAVANAUGH: Thank you.

23           CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25           JUSTICE BARRETT: So mine is a

1 practical question as well. I mean, I -- I  
2 think Justice Sotomayor is right that we often  
3 consider evidence for some purposes, not others.

4           And hearsay is a great example of  
5 that. But I think the questions that you're  
6 getting show a distinction between this  
7 circumstance and hearsay because, with hearsay,  
8 it's essentially you can consider it for any  
9 other purpose, assuming other evidentiary rules  
10 don't bar it, except for the truth of the matter  
11 asserted.

12           And, here, it's just saying you can't  
13 consider it for this one purpose, but you can  
14 consider it for these other synonymous purposes.  
15 So it's like in a hearsay rule, if you could say  
16 you can't consider it for the truth of the  
17 matter asserted, but think of all the synonyms  
18 you want for "truth."

19           So, you know, we've -- we've pointed  
20 out the difficulties for the district judge,  
21 we've pointed out the difficulties it will pose  
22 on appellate review. What is the advantage to  
23 the defendant? Because, if you can consider it  
24 for these other overlapping purposes, like the  
25 nature and circumstances of the offense, is it

1 really going to affect the length of the  
2 sentence? Like, why is this important?

3 MR. GROSTIC: So I -- I believe  
4 sometimes it will have the same result but not  
5 always, and I can point to two examples, I  
6 think.

7 The first is conditions may have  
8 changed since the offense in a significant way  
9 where the need to protect the public, the need  
10 to deter has dropped significantly.

11 One example would be the defendant's  
12 incapacitation or something like it. Another  
13 would be the defendant's extreme rehabilitation  
14 since the offense.

15 JUSTICE BARRETT: But let me just stop  
16 you right there. I thought it was nature and  
17 circumstances of the offense. It sounds like  
18 you're talking about nature and circumstances  
19 surrounding the violation of supervised release.

20 MR. GROSTIC: That's correct. So  
21 (a)(1) requires considering the nature and  
22 circumstances of the offense and the history and  
23 characteristics of the offender. In all of  
24 that, there could be a significant change since  
25 the offense, is -- is my point here.

1           If there is that significant change,  
2 then a court may think: Well, to reflect the  
3 need to -- to just -- provide just punishment,  
4 regardless of what's changed with the defendant,  
5 I need to impose a significant punishment.

6           But, because this defendant has shown  
7 that they're rehabilitated, because this  
8 defendant is incapacitated, once I take that off  
9 the table, there's really very little need to  
10 impose incarceration. That would be one  
11 difference.

12           The other and very practical  
13 difference, I think, for Petitioner Leaks is  
14 when someone has a state court sentence or a  
15 federal court sentence for the same conduct.

16           I -- I -- I understand that the  
17 statute allows the supervising court to make a  
18 new judgment on its own about whether additional  
19 time in custody or modifying supervised release  
20 is necessary to fulfill the three permissible  
21 purposes, but they may well conclude: Well, the  
22 punishment's done, that other sentence also  
23 fulfills the three permissible purposes,  
24 concurrent time is sufficient.

25           JUSTICE BARRETT: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: Mr. Grostic, just to  
4 sort of flesh that out some, I mean, I perceive  
5 and I think sentencing theory perceives a  
6 difference between retributive purposes and  
7 other purposes.

8 And so, even though there may be  
9 overlap in some of the discussions that we've  
10 had, suppose you have a defendant who is on  
11 supervised release and discovers that he is  
12 terminally ill, terminally ill, six months to  
13 live. And he stops calling his probation  
14 officer. He stops doing all the things. And  
15 the probation officer comes back to court and  
16 says: I think this person's supervised release  
17 should be revoked because they are not doing  
18 what it is that you've required on supervised  
19 release. Absolutely a basis for revocation.

20 But then the question becomes, from  
21 the judge's perspective, it's not going to make  
22 any difference if I incarcerate this guy for the  
23 last six months of his life because he's not  
24 going to be able to commit other crimes, he's  
25 not -- it's not going to protect the public in

1 any way.

2 A judge who was imposing supervised  
3 release revocation for retributive purposes,  
4 even though the statute says you don't do that,  
5 would say it doesn't matter. What you've done  
6 is violated the conditions, and for that, you  
7 need to be punished and, therefore, back to  
8 jail.

9 A judge who is looking at the statute  
10 and says retribution is off the table might  
11 determine not to do those things because the  
12 other purposes of punishment would not be  
13 fulfilled given this person's circumstances. Is  
14 that a concrete example of how you can separate  
15 out retributive purposes from other purposes and  
16 sentence differently as a result?

17 MR. GROSTIC: Yes, I -- I believe so.  
18 And -- and, specifically, I think that relates  
19 to the promoting respect for the law in  
20 (a)(2)(A), which is, even if there hasn't been  
21 an offense here, because there was a court order  
22 that was violated, in -- in some sense, that's  
23 disrespecting the law, and so (a)(2)(A), even if  
24 there wasn't an offense in -- in -- in Your  
25 Honor's example committed here, would allow for

1 punishment to promote --

2 JUSTICE JACKSON: If punishment was on  
3 the table --

4 MR. GROSTIC: Correct.

5 JUSTICE JACKSON: -- you could still  
6 impose punishment.

7 MR. GROSTIC: That would -- that would  
8 be on the table, but --

9 JUSTICE JACKSON: Thank you.

10 MR. GROSTIC: -- but -- but,  
11 otherwise, no.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Ms. Hansford.

15 ORAL ARGUMENT OF MASHA G. HANSFORD

16 ON BEHALF OF THE RESPONDENT

17 MS. HANSFORD: Mr. Chief Justice, and  
18 may it please the Court:

19 Section 3583(e) does not displace a  
20 district court's broad discretion to think about  
21 any considerations it finds helpful at a  
22 sentencing or sentence modification proceeding.  
23 Section 3583(e)(3) authorizes a court to revoke  
24 supervised release "after considering certain  
25 factors." That language makes clear that a

1 court is required to consider the enumerated  
2 factors, but it does not prohibit the court from  
3 considering others.

4 To take an example, if a judge tells  
5 her law clerk that the clerk may turn in his  
6 bench memo after considering the petitioner's  
7 brief, the respondent's brief, and the reply  
8 brief, that does not suggest that the law clerk  
9 is forbidden from also considering the amicus  
10 briefs. And if a college physics department  
11 announces that a student may declare a physics  
12 major after completing Physics 101, Physics 103,  
13 and Physics 104, that does not suggest the  
14 student is forbidden from also taking Physics  
15 102. Just like Section 3583(e), those  
16 instructions set a floor, not a ceiling.

17 Petitioners argue that because the  
18 Section 3553(a)(2)(A) factors reflect  
19 retribution, they don't belong in a supervised  
20 release revocation proceeding. And the colloquy  
21 with Justice Jackson was getting at a similar  
22 idea. But Congress knows how to limit a  
23 sentencing decision to one that serves  
24 particular purposes, and it uses express  
25 language to do so. Congress did not use that



1 type of language here.

2 Nor would it make sense for the Court  
3 to prohibit -- for Congress to prohibit a court  
4 from considering the (a)(2)(A) factors, which,  
5 as the discussion this morning emphasized,  
6 include the need to promote respect for the law  
7 in determining what to do about the breach of  
8 trust that court-ordered supervision that  
9 reflects and in light of the deep overlap  
10 between the factors, and I think the colloquy  
11 this morning well illustrated that that would  
12 really raise profound workability problems and,  
13 at best, would devolve into a reverse magic  
14 words requirement.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Why would you -- why  
17 would Congress write a provision like this in  
18 such a roundabout way?

19 MS. HANSFORD: I think the reason that  
20 Congress listed only certain factors were  
21 because those were the factors that it thought  
22 would be the primary considerations across the  
23 board. So, of course, Congress was not drafting  
24 this provision just for the revocation section.  
25 In fact, when it was drafting it, the revocation

1 provision, (e)(3), wasn't even in the statute.

2 But the way the statute reads now is  
3 the list of factors is in the umbrella paragraph  
4 at (e), and it covers the whole range of  
5 actions, terminating the term of supervision  
6 early, extending the term of supervision,  
7 modifying the conditions of supervision, as well  
8 as revocation. And I think that the discretion  
9 that Congress gave courts reflects that in some  
10 of those circumstances, a court may not think  
11 that the (a)(2)(A) factors, to the extent they  
12 do work beyond the other factors, need to be  
13 considered.

14 JUSTICE SOTOMAYOR: I'm --

15 JUSTICE THOMAS: You mentioned  
16 workability. What role should that play in our  
17 assessment of the arguments here, in our  
18 interpretation of these provisions?

19 MS. HANSFORD: I think the profound  
20 unworkability of Petitioners' rule, which would  
21 require parsing what a court is doing in  
22 extricating the promoting respect from the law  
23 from deterrence and incapacitation  
24 considerations that are intimately intertwined,  
25 I think should give the Court a lot of pause

1 from reading the text to say that.

2 Now -- especially here, where  
3 Petitioners' textual argument is really an  
4 argument of negative implication. I think that  
5 Petitioners are suggesting the wrong negative  
6 implication, so the argument doesn't get off the  
7 ground. But, before drawing the inference  
8 Petitioners seek, I think the Court should take  
9 cognizance of the fact that this would be a  
10 really bizarre thing for Congress to do in this  
11 way.

12 JUSTICE SOTOMAYOR: Counsel, I -- I'm  
13 having a little problem with this workability  
14 argument because there's four circuits, one of  
15 them pretty large, the Ninth, but the Fourth,  
16 the Fifth, the Ninth -- I can't remember the  
17 fourth one -- and the Tenth, all of whom have  
18 the rule you say is unworkable, they seem to be  
19 functioning fine.

20 MS. HANSFORD: I think the experience  
21 in those circuits well reflects the workability  
22 problems here. First of all, most of the  
23 circuits --

24 JUSTICE SOTOMAYOR: What is the  
25 workability problem? The district court says

1 something wrong. You have to object. Now the  
2 three people here objected or at least two of  
3 them objected, and the district court decided  
4 that instead of saying I'm doing it for dual  
5 purposes, which would have made this a harmless  
6 error case, said no, I'm not doing it for  
7 deterrence, incapacitation, or rehabilitation;  
8 I'm doing it for punishment.

9 So the -- but, if it had been objected  
10 to, it would have been fine. If it had not been  
11 objected to, we're in harmless error territory.  
12 And -- and I don't understand that those courts  
13 have had a problem with this.

14 MS. HANSFORD: I think the workability  
15 problem is extricating even in the judge's own  
16 mind the factors that are required to be  
17 considered, like the nature and circumstances of  
18 the offense and deterrence, incapacitation, from  
19 promoting respect for the law.

20 JUSTICE SOTOMAYOR: Give me --

21 MS. HANSFORD: Justice Sotomayor, I  
22 would direct you to take a look at pages 96, 98,  
23 216 to 217, and 219 to 220 of the Joint  
24 Appendix, which shows how the judges in these  
25 cases were thinking about those factors, and

1 they were all completely intertwined in their  
2 mind.

3 JUSTICE SOTOMAYOR: All right. Let's  
4 go back --

5 MS. HANSFORD: The pattern of --

6 JUSTICE SOTOMAYOR: -- to Justice  
7 Thomas's question, which is I see Section  
8 3553(a)(2) normally directs district courts to  
9 consider all the relevant facts in evidence.  
10 That includes the four purposes, okay?

11 Why would Congress have written this  
12 provision, taking out two factors, only two  
13 factors, one of which is not pertinent at all,  
14 so they were being purposeful in what they were  
15 doing, and there was one factor that they put --  
16 took out and then put back in. Why would they  
17 have bothered to put it back in if you're right  
18 that it was always there? Because, under your  
19 theory, it was -- whether they took it out the  
20 first time or not is irrelevant. It could  
21 always be considered.

22 It doesn't make much sense to me that  
23 Congress was that precise in taking some things  
24 out and then very precise in putting it back in  
25 if you think it was always in to start with.

1 MS. HANSFORD: So I would say about  
2 that is I think Congress cared about the floor  
3 it was setting. Setting the floor a little bit  
4 higher by adding in a factor means that a court  
5 must consider --

6 JUSTICE SOTOMAYOR: But why?

7 MS. HANSFORD: -- a certain factor --

8 JUSTICE SOTOMAYOR: But why?

9 MS. HANSFORD: -- in each case. And I  
10 think --

11 JUSTICE SOTOMAYOR: Every time it --  
12 it has done it in every other situation, it just  
13 said consider them all.

14 MS. HANSFORD: Sure. And I think the  
15 reason that Congress wanted to give a court  
16 discretion not to consider the factors in this  
17 case, to the extent that they add something  
18 beyond the overlapping factors, is because  
19 Congress's view of the term of supervised  
20 release itself, I think, Congress probably  
21 thought the primary purpose of that term is a  
22 period of transition as opposed -- and that the  
23 term of imprisonment often will fully serve the  
24 retributive ends.

25 And so, when Congress was thinking

1 about the whole range of actions, including  
2 terminating the term of supervision early or  
3 extending the term of supervision or modifying  
4 the conditions, Congress wanted to give courts  
5 the flexibility to just think about these kind  
6 of rehabilitative considerations of how well the  
7 defendant was doing on --

8 JUSTICE JACKSON: But, if they  
9 overlap, Ms. Hansford, what -- what -- what kind  
10 of a gift is that? I mean, part of our  
11 discussion was how much these factors overlap.  
12 So it seems like a weird thing to say that  
13 Congress went through all the trouble of  
14 omitting this factor for the purpose of allowing  
15 district courts not to consider this thing that  
16 you say is so intertwined with everything else  
17 that it's hard to separate out.

18 MS. HANSFORD: Yes, and let me  
19 explain. I think that the -- really, the place  
20 where that delta is, is the just punishment  
21 factor that Justice Kavanaugh was referring to,  
22 because, of course, the provision has three  
23 factors. And I don't think that a court can  
24 really ever not think about the seriousness of  
25 the offense, can ever really not think about

1 promoting respect for the law in the context of  
2 assessing deterrence, and certainly not in  
3 revocation.

4 JUSTICE JACKSON: Well, you're arguing  
5 the intertwinement. What I'm saying is the  
6 intertwinement undermines your argument that  
7 Congress omitted this to relieve district courts  
8 of having to consider those things.

9 If they're so intertwined, then why  
10 would Congress have taken this out?

11 MS. HANSFORD: So two points to that.

12 First, I want -- or one thing I want  
13 to do is give you an example of how this might  
14 work, but I also want to note that even -- that  
15 the rule that Petitioners are asking for, which  
16 is a rule that you may not consider the factors,  
17 is a really troubling one.

18 I think that Congress could have  
19 written a statute --

20 JUSTICE JACKSON: Right. What I'm  
21 trying to understand is the rule that you're  
22 asking for, which is Congress had a list of four  
23 purposes. That's the given, the -- the  
24 beginning point.

25 And in this particular section, it



1 omitted one, and you say it omitted one to give  
2 courts the permission not to consider it, but it  
3 can still allow courts to consider it.

4 Ordinarily, when Congress omits  
5 something, you would think they were taking it  
6 off the table. So what we have to do is  
7 understand the circumstances under which  
8 Congress would indicate you have permission to  
9 consider something by removing it from the list.

10 MS. HANSFORD: So the first thing I  
11 would say is that this statute is not what gives  
12 courts permission to consider various factors.  
13 That is the background rule reflected in 3661  
14 and decisions like Kimbrough and Concepcion.

15 So I think it would be a little bit of  
16 a different situation if this was what was  
17 giving courts authority in that particular --

18 JUSTICE JACKSON: Precisely. But that  
19 undermines your -- your argument. It doesn't  
20 help you.

21 If the background rule is that you can  
22 consider everything and Congress really intended  
23 for you to be able to consider this, why would  
24 they have omitted it from this statute?

25 MS. HANSFORD: Sure. So let me -- I

1 want -- I want to get back to the language that  
2 Congress would have used if it wanted to do what  
3 I think you're suggesting, Justice Jackson.

4           But just to give an example of how  
5 this discretion might matter, consider an  
6 offender who committed -- who committed an  
7 offense and went to prison for, say, a drug  
8 distribution conspiracy. Got out, is on  
9 supervision, is doing well on supervision, is  
10 complying with the conditions, and is up under  
11 3583(e)(1) asking for early termination.

12           I think that the discretion the court  
13 has given -- that Congress -- I apologize -- has  
14 given the court is to say: We're looking at how  
15 you're doing on supervision. You -- you're  
16 doing well. We don't think we need to deter  
17 you. You've rehabilitated, allowing us to  
18 terminate for --

19           JUSTICE JACKSON: But we're in  
20 revocation. We're in revocation, Ms. Hansford.  
21 We're talking about the revocation scenario.

22           MS. HANSFORD: Yes. So the -- so I'm  
23 giving you an example of where this might make a  
24 difference. Or at a --

25           JUSTICE KAGAN: Can I -- can I ask

1 another question, Ms. Hansford, and I think it  
2 was something that was in part in Justice  
3 Jackson's questions.

4 But, I mean, you're saying that this  
5 is impossible, it's unworkable, and that seems  
6 in tension with your own argument.

7 In other words, if it's so impossible  
8 and unworkable to distinguish between the  
9 mandatory and the prohibited in the way that  
10 Petitioner wants courts to, it seems as though  
11 it would be just as impossible and unworkable to  
12 distinguish between the mandatory and permissive  
13 in the way you want courts to do.

14 So either way, courts have to make a  
15 distinction. And for -- you know, it -- it --  
16 it might be difficult in some circumstances, but  
17 if it's so impossible, it's so impossible for  
18 your purposes too.

19 MS. HANSFORD: So I don't think that's  
20 correct, Justice Kagan, because I think there's  
21 a big difference between the affirmative and the  
22 negative. The negative rule that Petitioners  
23 are asking is: You may not consider seriousness  
24 of the offense. You may not consider promoting  
25 respect for the law.

1                   And that is the problem. In my  
2                   example, when the judge is --

3                   JUSTICE KAGAN: No, but in -- but  
4                   you're saying you have to think about what you  
5                   have to consider and just what -- what you may  
6                   consider. So that suggests that a court is  
7                   capable of distinguishing between the two.

8                   And once you've decided that the court  
9                   is capable of distinguishing the two, then the  
10                  court is equally capable of distinguishing  
11                  between the mandatory and the prohibited.

12                  MS. HANSFORD: I don't think the court  
13                  would ever be capable of distinguishing between  
14                  seriousness of the offense in the (a)(2)(A)  
15                  sense and in the (a)(1) sense. And I don't  
16                  think a court is ever capable of  
17                  distinguishing -- of truly disentangling  
18                  promoting respect for the law from deterrence  
19                  and incapacitation.

20                  I think the one place where that  
21                  discretion that Congress gave here relative to  
22                  the probation statute makes a difference is in  
23                  considering whether something is a just  
24                  punishment. I think that's the one place where  
25                  they might come apart.

1                   JUSTICE KAGAN: I mean, either way,  
2 the -- the -- it works the same for the two  
3 arguments, this question of the difficulty of  
4 disentangling these things, because you're  
5 requiring a court also to disentangle these  
6 things.

7                   But let me ask you another question,  
8 which is: When you say something is mandatory,  
9 what exactly do you mean by that?

10                   In other words, there are all these  
11 factors, and Congress says you shall consider  
12 these factors. Now does that mean that the  
13 factors have to be reflected in the sentence or,  
14 instead, can the court say: Well, I'm going to  
15 reflect -- or the revocation, whatever it is, or  
16 can the court say: Well, this factor seems  
17 peculiarly relevant here, and I'm going to, you  
18 know, do something that reflects that factor,  
19 but this other factor seems completely  
20 irrelevant, so I'm going to toss that away.

21                   So what does "mandatory" mean in this  
22 context?

23                   MS. HANSFORD: I think "mandatory"  
24 means that the court must think about it, but it  
25 does not need to give it a large amount of

1 weight.

2 JUSTICE KAGAN: I mean, it can  
3 decide -- it can give it zero weight, right? I  
4 mean, it has to think about it, but it can say:  
5 For my purposes, this is irrelevant.

6 MS. HANSFORD: Yes, I think -- I think  
7 that's --

8 JUSTICE KAGAN: Yeah. So that's got  
9 to be the case, right? And once you're in that  
10 world, the difference between mandatory and  
11 permissive is vanishingly slim because, in both  
12 cases, a court is doing the same thing, which is  
13 saying, like: I'm going to pick up the factor  
14 and look at it and decide whether it's  
15 completely irrelevant or whether it's relevant  
16 and how to take it into account. And once  
17 that's become vanishingly slim, your argument  
18 begins to seem sort of peculiar.

19 MS. HANSFORD: I -- I think the  
20 difference is fairly thin, especially because  
21 all the factors are going to be --

22 JUSTICE KAGAN: I think I said  
23 "vanishingly slim."

24 (Laughter.)

25 MS. HANSFORD: But I -- but -- but I

1 don't think it's nonexistent. And so, in the  
2 early termination of release example I was  
3 giving, the court might say: I am not going to  
4 think about how serious your initial -- so I --  
5 here -- here is the difference.

6 In one set of circumstances, the judge  
7 says: I am going -- I'm going to choose to  
8 think about whether this is a just punishment.  
9 And so you're asking for early termination, but  
10 because your offense was a serious offense and I  
11 think that the term of imprisonment you served  
12 was kind of on the low end, I'm not going to  
13 terminate your sentence early.

14 Or the court might say the opposite.  
15 They might say: You know, I'm a little bit on  
16 the fence on deterrence and rehabilitation, but  
17 I think the term of imprisonment you already  
18 served is on the high end, so I actually am  
19 going to terminate the sentence early.

20 And so that's the just punishment  
21 piece of it that I think Congress left to be  
22 discretionary in the supervised release context  
23 but is required to be considered in the  
24 probation context. And I think the reason for  
25 that is that --

1 JUSTICE KAGAN: Thank you.

2 JUSTICE BARRETT: Ms. Hansford, let me  
3 ask you a question that you probably won't like,  
4 but it's just a hypothetical.

5 If, hypothetically, the government  
6 loses, are there pitfalls that you would want us  
7 to take into account in writing an opinion in  
8 favor of the Petitioner?

9 MS. HANSFORD: Yes, absolutely. So I  
10 think -- I really think that the textual  
11 argument Petitioner is making is extremely  
12 troubling and is really unclear what district  
13 courts should be doing under that rule.

14 I really think that the way to capture  
15 this intuition, to the extent that you have  
16 Petitioner's intuition that retribution  
17 shouldn't be doing any additional work, is not  
18 to take Petitioner's argument that you may not  
19 consider seriousness of the offense, you may not  
20 consider respect for the law, you may not  
21 consider just punishment. But it would be to  
22 have a provision that is written in the way  
23 3583(d) is written.

24 That to the extent that the revocation  
25 involves no greater deprivation -- so a court



1 may revoke to the extent that the revocation  
2 involves no greater deprivation of liberty than  
3 is reasonably necessary for the purposes set  
4 forth in Sections 3553(a)(2)(B), (a)(2)(C), and  
5 (a)(2)(D). And I think that that formulation  
6 addresses some of the workability concerns  
7 because it is not saying you just can't consider  
8 the other factors. It just says you can't do  
9 that extra work.

10 But I think the existence of that  
11 provision, the very neighboring provision that  
12 courts set out for conditions -- for conditions  
13 of release shows that that is not what Congress  
14 was doing in the language here. Congress had --

15 JUSTICE BARRETT: Okay. But I just  
16 wanted to know, like, how we should write it in  
17 a way, if you lose, that would satisfy the  
18 government that we weren't resolving open  
19 questions.

20 MS. HANSFORD: I think the least bad  
21 approach would be -- would be to adopt that  
22 formulation in 3583(d). I don't think you can  
23 get there textually, but I do think that that's  
24 how you would avoid the -- the -- the  
25 workability issues.

1           I still think that this would not be a  
2 helpful rule for courts. I think it would still  
3 devolve to labels and not substance.

4           JUSTICE BARRETT: I know. You didn't  
5 give your argument away.

6           MS. HANSFORD: But I -- I also want to  
7 note that the consideration of just punishment  
8 is not a factor that necessarily harms the  
9 defendant. It could also benefit the defendant.

10           So, for example, at a revocation  
11 hearing, consider an offender who has a not very  
12 serious initial offense but a very, very serious  
13 violation. The court might look at that  
14 violation and say: Boy, deterrence concerns are  
15 off the charts. Rehabilitation, you really need  
16 a lot of rehabilitation. Incapacitation is  
17 really important.

18           And so I would impose -- I would  
19 impose a very lengthy term of reimprisonment,  
20 but your initial offense is not that bad. And,  
21 of course, any sanction I impose at a revocation  
22 is supposed to be justified by reference to your  
23 initial offense.

24           And because your initial offense is  
25 not that serious, I just don't think that's a

1 just punishment. I don't think that's the right  
2 result.

3 And I think Petitioners' argument  
4 would take that off the table. I think that's a  
5 reason that Congress did not write the statute  
6 in that 3583(d) --

7 JUSTICE BARRETT: Thank you.

8 JUSTICE GORSUCH: Ms. --

9 CHIEF JUSTICE ROBERTS: Your friend --

10 JUSTICE GORSUCH: I'm sorry.

11 CHIEF JUSTICE ROBERTS: Your friend  
12 said, I think near the end of his argument, he  
13 said we can all agree that Congress was doing  
14 something. Are you part of that "all"?

15 (Laughter.)

16 MS. HANSFORD: Absolutely, Mr. Chief  
17 Justice. I think Congress was doing something.  
18 It was giving the court that additional  
19 discretion to reflect its view that the term of  
20 supervision sometimes is really purely  
21 rehabilitative and sometimes you are just  
22 looking at does this offender need a GED or does  
23 he need some sort of housing support, and you're  
24 not necessarily thinking punitive thoughts when  
25 you're taking the range of actions.

1           But I think when you get to  
2           revocation, it becomes a lot harder to think of  
3           Congress's purpose as primarily rehabilitative  
4           because one thing that is crystal clear from the  
5           statute is that Congress did not think  
6           imprisonment should be used to rehabilitate.

7           CHIEF JUSTICE ROBERTS: Well --

8           MS. HANSFORD: That, of course, is  
9           3582, as this Court recognized in Tapia.

10          And so the idea that Congress was  
11          really trying to further the rehabilitative  
12          purposes of the term of supervised release with  
13          reimprisonment feels really strange.

14          CHIEF JUSTICE ROBERTS: Well, I mean,  
15          the different provisions -- I mean, obviously,  
16          it's apparent there's a lot of synonyms that  
17          overlap, but (a) does kind of look backward,  
18          right? I mean, the -- the offense, the  
19          punishment. And (b), (c), and (d) are looking  
20          forward. What's deterrence, protecting the  
21          public, and all that. And it seems to me that  
22          in leaving (a) out, Congress meant to focus on  
23          going forward when you're talking about  
24          revoking.

25          MS. HANSFORD: So, Mr. Chief Justice,

1 even if that is what Congress was thinking, I  
2 think Congress had the ability to act with a  
3 lighter hand by requiring the things it thought  
4 were most important or with a heavier hand by  
5 forbidding all others. And I think the text  
6 here plainly does the first, particularly when  
7 you contrast it to the various provisions  
8 throughout to do what the heavier handed  
9 approach would do.

10 CHIEF JUSTICE ROBERTS: Well, I think  
11 "plainly" is a -- is a real reach in this  
12 situation. And it is a significant step, I  
13 think, to just leave (a) off the table.

14 MS. HANSFORD: I -- I -- I agree that  
15 it's a significant step and that it gives courts  
16 discretion, but I do think that discretion has a  
17 lot more weight in contexts outside of  
18 revocation because of the nature of revocation.  
19 It is very strange -- even if you put limits  
20 into your opinion against us, it is still very  
21 strange to tell a court that is sending someone  
22 to prison that they cannot consider whether that  
23 term of imprisonment is just.

24 And I think to go back to the  
25 workability concerns I was discussing with

1 Justice Sotomayor, you -- it's really the height  
2 of absurdity what you see in the courts that are  
3 trying to apply the rule on the other side. You  
4 see courts parsing things like is a reference to  
5 rule of law suggesting respect for the law? Is  
6 a reference to whether this result is just  
7 suggesting just desserts or that this punishment  
8 is deserved?

9           And I think that that's a really  
10 strange thing to be parsing. Defendants are  
11 making arguments -- there's a First Circuit case  
12 we cite on page 37 of our brief where the court  
13 did what courts primarily do at a revocation  
14 hearing, which is complained about the number of  
15 violations and the disrespect for the court that  
16 those violations reflect. And the defendant  
17 argued that considering the pattern of  
18 violations and flouting court-ordered  
19 supervision can't be considered because it's a  
20 form of promoting respect for the law.

21           So I think you're either in an absurd  
22 situation where -- in a topsy-turvy world where  
23 you're looking at all -- where you're not  
24 considering kind of the core of the reasons for  
25 the revocation, or you are just looking for

1 magic words. And a court that is actually  
2 thinking all these things and what the just  
3 result is in this case is forced to use  
4 particular words or issue certain disclaimers,  
5 as Justice Alito indicated --

6 JUSTICE KAVANAUGH: Can I --

7 MS. HANSFORD: -- to --

8 JUSTICE KAVANAUGH: -- ask a question  
9 to go back to Justice Thomas's question about  
10 workability? Because it's important for me what  
11 role workability plays here.

12 Is it -- my understanding, I think, is  
13 that workability comes into play when we think  
14 about what significance to give the negative  
15 implication canon in this particular case. But  
16 you tell me how you think workability comes in  
17 or at least that's one key part of it, because,  
18 negative implication canon, we often look to  
19 context to determine whether to draw it. The  
20 context here would include, I think, how  
21 workable this is. And, obviously, it's not  
22 completely unworkable, the other side's  
23 position, but your point is it -- it borders --  
24 you used the word "absurd," not workable, magic  
25 words.

1                   Does that come in on negative  
2                   implication?

3                   MS. HANSFORD: I -- I think that's  
4                   fair, Justice Kavanaugh, that you can think of  
5                   it as part of the context. And I think you can  
6                   also think of it as kind of a gut check as was  
7                   this really what Congress was intending to do,  
8                   or is the fact that it didn't use the much more  
9                   direct formulations it used elsewhere really an  
10                  indication it was trying to accomplish something  
11                  quite different and just give the courts a  
12                  little bit of discretion, but not tie courts  
13                  hands on anything because that, of course, is a  
14                  really big step to tell a court that it can't  
15                  think certain thoughts at sentencing.

16                  JUSTICE KAVANAUGH: Yeah. They're  
17                  probably going to think the thoughts anyway.

18                  (Laughter.)

19                  JUSTICE KAVANAUGH: The -- on the  
20                  three things listed in (a)(2)(A), seriousness of  
21                  the offense, respect for the law, and just  
22                  punishment, on the first two, seriousness of the  
23                  offense and respect for the law, I think I asked  
24                  your -- your friend on the other side -- those  
25                  are going to be almost completely overlapping, I



1 think, with other things listed.

2           So -- but then the third one, just  
3 punishment, maybe not so much. And so how do I  
4 analyze the case if I think -- I look at  
5 (a)(2)(A) and think two are completely or  
6 largely overlapping, and the other one, you  
7 could draw some kind of line?

8           MS. HANSFORD: I think if you think  
9 that, Justice Kavanaugh, we absolutely win  
10 because Petitioners' rule, the negative  
11 implication Petitioners are considering is you  
12 may not consider the factors in 3553(a)(2)(A),  
13 so you may not consider any one of them. And if  
14 any one of them is impossible, I don't think  
15 that argument can hold up.

16           JUSTICE KAGAN: I -- I don't think  
17 that that's quite right, Ms. Hansford. I mean,  
18 think of this as like a Venn diagram, you know?  
19 You have two circles and they intersect and  
20 there's some overlap, but as long as you're  
21 within your circle, you're fine, whether it's  
22 the non-shaded area or the shaded area.

23           But when you're outside your circle,  
24 as you would be if you were starting to think  
25 about just punishment, then you're not fine.

1 MS. HANSFORD: I -- I appreciate that  
2 intuition, Justice Kagan, but I think that if a  
3 sentence says you may not consider A, B, or C  
4 that means that you cannot consider any one of  
5 them. And I think that the way --

6 JUSTICE KAGAN: To the extent --

7 MS. HANSFORD: -- to capture --

8 JUSTICE KAGAN: -- that they  
9 overlap --

10 MS. HANSFORD: Yeah.

11 JUSTICE KAGAN: -- to the extent that  
12 it's like one and the same thing, you can  
13 consider it because you can consider all the  
14 other factors and you're just doing the same  
15 thing. To the extent it's not the same thing,  
16 then you can't consider it.

17 So in the area of overlap, you're  
18 golden. It's in the area of non-overlap that  
19 you're not.

20 MS. HANSFORD: Justice Kagan, I think  
21 the exact way to capture that intuition if  
22 that's what Congress was trying to do is, of  
23 course, a 3583(d) formulation that to the extent  
24 that the factors reflect more of a deprivation  
25 of liberty than is reasonably necessary for the

1 enumerated purposes, that "to the extent  
2 language" is critical, and that's what's missing  
3 here and what is in the nearby provision. And  
4 that's how I think Congress would do it if it  
5 was trying to do what you're suggesting.

6 And it was trying to do what you're  
7 suggesting but only for the conditions of  
8 release. It wanted those not to be increased  
9 based on retributive thoughts.

10 JUSTICE KAGAN: Thank you.

11 MS. HANSFORD: But it was not doing  
12 that for the term of imprisonment itself.

13 JUSTICE JACKSON: Ms. Hansford, can I  
14 just ask you when -- when 3582 -- sorry,  
15 3553(a)(2)(A) says to reflect the seriousness of  
16 the offense, and we've had some question about  
17 how you can revoke without doing that, what  
18 offense do you take that to be referring to in  
19 the revocation scenario? Is it the original  
20 offense, or is it the offense that the person is  
21 being brought to the court?

22 MS. HANSFORD: It's the original  
23 offense of conviction. I think the statute is  
24 consistent in referring to "offense" to mean the  
25 original offense of conviction.

1 JUSTICE JACKSON: So why -- why  
2 couldn't you base a revocation decision on what  
3 happened that is leading to revocation and not  
4 the seriousness of the initial offense? You  
5 sort of seem to suggest --

6 MS. HANSFORD: Yeah.

7 JUSTICE JACKSON: -- that there's no  
8 way you could revoke and send somebody back to  
9 prison without considering what you're now  
10 saying is the original offense.

11 And I don't --

12 MS. HANSFORD: Yeah.

13 JUSTICE JACKSON: -- understand that.

14 MS. HANSFORD: So -- so two points.  
15 First, I think on Petitioners' view that this is  
16 an exclusive universe, the seriousness of the  
17 violation also couldn't be considered because it  
18 is not --

19 JUSTICE JACKSON: No, I understand.  
20 I'm talking about your view.

21 MS. HANSFORD: Yes. And our --

22 JUSTICE JACKSON: You're saying that  
23 there's no way to take out the serious of the  
24 offense, and you're now saying the seriousness  
25 of the offense is the initial offense.

1 MS. HANSFORD: Yes. And --

2 JUSTICE JACKSON: But you concede that  
3 supervised release is a totally different thing  
4 than the initial offense.

5 MS. HANSFORD: Yeah.

6 JUSTICE JACKSON: So why couldn't you  
7 revoke --

8 MS. HANSFORD: So --

9 JUSTICE JACKSON: -- without looking  
10 at the initial offense?

11 MS. HANSFORD: Two reasons you can't  
12 revoke without looking at the seriousness of the  
13 initial offense. 3553(a)(1) also refers to  
14 nature and circumstances of the offense, which  
15 is that same original offense of conviction. So  
16 the overlap is exactly the same. It's the  
17 offense in (a)(1) and in (a)(2)(A).

18 And the second --

19 JUSTICE JACKSON: All right. So -- so  
20 nature and circumstances is the facts related to  
21 the original offense. Seriousness of the  
22 offense is an -- a relative consideration. How  
23 serious is this relative to other kinds of  
24 offenses and other people and whatever?

25 So, I mean, those are two different

1 factors in this very statute. They're listed  
2 differently.

3 MS. HANSFORD: Sure. So I think the  
4 other reason that a court -- that Congress  
5 couldn't have meant for that to be excluded is  
6 that (e)(3) actually ties the maximum term of  
7 reimprisonment to the severity of the initial  
8 offense, which is another way it shows that a  
9 court must be allowed to consider it.

10 But in practice just to flesh this  
11 out, why would a court think about the  
12 seriousness of the offense even beyond the  
13 requirement to do so, if a -- an -- it might  
14 cast light on the nature of the violation.

15 So consider an offender whose  
16 violation is carrying a weapon. If that  
17 offender's initial offense was a murder or  
18 assault on a domestic partner with a weapon, I  
19 think that a court would perceive that violation  
20 very differently than if the underlying offense  
21 was fraud.

22 So the severity of the underlying  
23 offense can provide critical context in  
24 assessing the violation and in informing a  
25 court's decision about what to do about the

1 violation.

2 JUSTICE GORSUCH: Ms. Hansford --

3 JUSTICE KAVANAUGH: Can I --

4 JUSTICE GORSUCH: -- I -- I -- I see  
5 almost complete overlap with all three. I mean,  
6 seriousness of offense, as you say, appears  
7 through the first -- first one, nature and  
8 circumstances of the offense and the history of  
9 the offender basically.

10 The second one, respect for the law,  
11 deterrence.

12 Just punishment seems to me to capture  
13 all those things, right? Look at the -- look at  
14 the defendant -- look at his offense, look at  
15 the need for deterrence and incapacitation to  
16 protect the public. It's all the same thing.  
17 It's all the same thing.

18 So -- but some courts are doing it.  
19 They follow this rule. And you -- you say that  
20 that's proved unworkable. And I -- I -- I -- I  
21 wanted you to spin out how exactly it's proven  
22 unworkable because judges are very good with  
23 words, and when you tell them they can't use  
24 certain words, that there are certain magic  
25 words, they will avoid those words. They will

1 use synonyms for those words.

2           So why should we worry? All we're  
3 doing is requiring judges to pull out a  
4 thesaurus.

5           MS. HANSFORD: If I may respond?

6           CHIEF JUSTICE ROBERTS: Sure.

7           MS. HANSFORD: I think that you're  
8 getting no value by asking justices -- judges to  
9 pull out a thesaurus.

10           JUSTICE GORSUCH: I understand. I  
11 understand. I understand that it's a  
12 hoop-jumping exercise.

13           MS. HANSFORD: Sure.

14           JUSTICE GORSUCH: But some circuits  
15 have done it. Tell me how it's proven  
16 unworkable on the ground.

17           MS. HANSFORD: So I think that it  
18 hasn't had a huge practical effect on the ground  
19 so far. And we did oppose review in this case.  
20 But I think that part of the reason it hasn't  
21 had a huge practical effect is that courts have  
22 generally just found a way to affirm. And,  
23 frankly, a lot of these have been coming up in  
24 plain-error posture because most offenders don't  
25 think to make this objection at all.



1           And I -- and other courts have imposed  
2 other atextual limits that Petitioner disclaims,  
3 like that it has to be the primary  
4 consideration, and so just referring to it as  
5 not enough, but you have to refer to it, I don't  
6 know, five times. And so I think there have  
7 been limits.

8           I think, as soon as this Court  
9 announces a different rule, every offender will  
10 be raising this. And, of course, there are a  
11 huge number of these revocation proceedings, and  
12 this will be coming up. There will be a huge  
13 hoop-jumping exercise that I don't think will  
14 benefit offenders or affect the substance, but  
15 there will be a lot of court of appeals work to  
16 parse the particular words that a district court  
17 used at a revocation hearing.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20           Justice Thomas?

21           Justice Alito, anything further?

22           Justice Sotomayor?

23           Justice Kagan?

24           Justice Gorsuch?

25           JUSTICE KAVANAUGH: Just to pick up on

1 Justice Barrett's question and what Justice  
2 Gorsuch was just saying, you know, if you lose,  
3 I think telling district courts: Just avoid the  
4 word "punish" or "punishment" and you're good to  
5 go, and if it's not objected to, it's not plain  
6 error if you have used it, is probably what  
7 you're looking for.

8 But tell me -- tell me if -- tell me  
9 what else.

10 MS. HANSFORD: I mean, I -- I think,  
11 if the -- you know, if we're losing, we would  
12 ask this Court to give as specific instructions  
13 as possible for what words courts should avoid.

14 I think the nature of a revocation  
15 hearing is often it's the court kind of  
16 instructing the offender on how to do better and  
17 is a really particularly strange type of hearing  
18 to -- for a judge to have to prescript, as  
19 Justice Alito was indicating.

20 And so I do think that whatever the  
21 magic words are, yes, courts will learn to avoid  
22 them. But I really think that will skew the  
23 process, particularly if it suggests that on the  
24 substance courts should not be considering what  
25 is --

1 JUSTICE KAVANAUGH: Well, I think the  
2 only magic word is "punish," right? The only  
3 reverse magic word, as you put it in your brief.

4 MS. HANSFORD: The --

5 JUSTICE KAVANAUGH: "Punish" or  
6 "punishment."

7 MS. HANSFORD: And I guess one other  
8 thing I would note about "punish" or  
9 "punishment" is there is some sense that  
10 retribution is a hallmark of punishment, but, of  
11 course, deterrence is another hallmark of  
12 punishment and -- and another core feature of  
13 punishment.

14 So it's a -- it's a little bit weird  
15 to have that be the wrong word --

16 JUSTICE KAVANAUGH: Okay.

17 MS. HANSFORD: -- because, when  
18 something is used for deterrence as opposed to  
19 compensatory purposes, we often think it's  
20 punitive, like punitive damages.

21 So I'm -- I'm not really sure why  
22 "punish" --

23 JUSTICE KAVANAUGH: I think you're  
24 arguing again for why you should win, but  
25 that's -- that's good enough. Thanks.

1 CHIEF JUSTICE ROBERTS: Justice

2 Barrett?

3 Justice Jackson?

4 Thank you, counsel.

5 Rebuttal?

6 REBUTTAL ARGUMENT OF CHRISTIAN J. GROSTIC

7 ON BEHALF OF THE PETITIONER

8 MR. GROSTIC: Thank you, Mr. Chief

9 Justice.

10 And I -- I want to respond to the --  
11 the repeated questions about the hoop-jumping  
12 exercise idea and the -- and the magic words  
13 idea, is there anything really happening here.

14 And I'd start with what this Court has  
15 said in numerous cases, in Granderson, in Roy  
16 Lee Johnson, in Gozlon-Peretz, that supervised  
17 release was created for different purposes, both  
18 different purposes than parole that came before  
19 and different purposes than a prison sentence  
20 that it precedes.

21 And sub -- subsection (c), 3583(c), is  
22 the codification. It's Congress stating those  
23 purposes. It's where I believe all of the court  
24 statements regarding that come from. And it's  
25 that the court shall consider (a)(1), (a)(2)(B),

1 (a)(2)(C), and -- and down the line.

2 In -- in Tapia, this Court observed  
3 that that meant that retribution was off the  
4 table. The Senate report confirms what we see  
5 in the text, again, that supervised release "may  
6 not be imposed for purposes of punishment."

7 And then, as we follow down through  
8 3583, everything that Congress wrote follows  
9 that same beginning. In (D), courts can impose  
10 conditions but not for (a)(2)(A) purposes.

11 My -- my -- my friend on the other  
12 side does note (D)'s statement to the extent  
13 that that actually introduces a list of three  
14 different things that the court has to satisfy.  
15 So I'm not sure that the court can really read  
16 to the extent that is -- is directly related  
17 only to the greater deprivation of liberty for  
18 those purposes.

19 But the important point here is that  
20 the conditions are unrelated to (a)(2)(A).  
21 They're only for the other purposes.

22 And then, when we get to (e) and the  
23 options of terminating, modifying, or revoking,  
24 if an offender while on supervision now has --  
25 their conduct has indicated some need for a

1 change from what the court originally thought  
2 was appropriate, Congress gave courts tools to  
3 do that but, again, for those same purposes and  
4 not the retributive purpose.

5 That's the core of what Congress was  
6 excluding in the statute. It's what Congress  
7 said it was doing in the Senate report. It's  
8 what this Court observed in Concepcion and  
9 Tapia. And we would ask the Court to reverse  
10 the judgments below on that basis.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 The case is submitted.

14 (Whereupon, at 11:32 a.m., the case  
15 was submitted.)

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