

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

EDGARDO ESTERAS,)
)
 Petitioner,)
)
 v.) No. 23-7483
)
 UNITED STATES,)
)
 Respondent.)

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EDGARDO ESTERAS,)

Petitioner,)

v.) No. 23-7483

UNITED STATES,)

Respondent.)

- - - - -

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 I -- otherwise identical
6 language in the probation statute. So, again,
7 that's at its highest there.

8 And one further point. The --
9 Congress did actually remove two factors from --
10 from 3583(e), the second being (a)(3), the kinds
11 of 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 did
18 two things. In 3553(a), it listed the factors
19 in separate subsections. And then, in 3583(e)
20 and (c), it obviously excluded one of those.

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

1 factor, that would be permissible.

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

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

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

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

1 facts that Your Honor just pointed to.

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

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

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

20 MR. GROSTIC: Well --

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

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

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

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

16 Which one is it?

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

23 JUSTICE ALITO: Well, I mean, I think
24 those are the three choices. So, if it's -- is
25 it the -- is it a magic words test? Is the

1 judge okay if the judge doesn't use the magic
2 words? Or do you look beyond that?

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

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

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

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

22 MR. GROSTIC: That's --

23 JUSTICE ALITO: -- one last try. You
24 know, in -- in reading your brief, I couldn't
25 help thinking how this would go over with the

1 trial judges I used to talk to all the time.
2 They want to know: What am I supposed to do or
3 what can't I do? And -- and I don't know.

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

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

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

13 MR. GROSTIC: That's exactly right.

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

23 All right. So we have a direct
24 reference to purposes being relevant to the
25 sentencing exercise. The court, in determining

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

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

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

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

23 So the person has committed an
24 offense, a judgment about how serious the
25 offense has been made. The court decides this

1 length of a prison term is the appropriate
2 retributive sanction for that and imposes that
3 sanction.

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

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

17 Is that right?

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

23 JUSTICE JACKSON: And, in fact, you
24 could revoke a person's supervised release even
25 for non-criminal behavior.

1 MR. GROSTIC: That's correct.

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

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

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

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

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

7 JUSTICE GORSUCH: Mr. --

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

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

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

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

20 JUSTICE GORSUCH: Yeah.

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

1 result.

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

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

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

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

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

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

16 MR. GROSTIC: Correct.

17 JUSTICE GORSUCH: Yeah.

18 MR. GROSTIC: I --

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

1 quite goes so far to say you must not consider
2 other factors.

3 Do you follow me?

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

6 JUSTICE GORSUCH: Help me with that.

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

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

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

23 It wouldn't -- it wouldn't take you so
24 far as to must not and maybe particularly given
25 that Congress has elsewhere said you -- you must

1 not consider other factors.

2 What do I do about that?

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

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

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

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

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

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

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

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

1 world of factors, and so they isolate one and
2 say: Don't consider this.

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

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

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

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

23 JUSTICE GORSUCH: So, Mr. Grostic, I
24 think what I was thinking of, and I do want your
25 help with this, is, you know, Congress has said

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

7 MR. GROSTIC: Well --

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

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

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

15 MR. GROSTIC: Precisely.

16 JUSTICE GORSUCH: Right.

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

21 JUSTICE GORSUCH: Yeah.

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

25 JUSTICE GORSUCH: Right. So there we

1 have a clear -- clear way of Congress telling us
2 certain things are out of bounds.

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

6 JUSTICE GORSUCH: But not for certain
7 purposes.

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

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

12 MR. GROSTIC: Right.

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

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

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

22 JUSTICE GORSUCH: Okay.

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

25 JUSTICE SOTOMAYOR: Counsel, I've been

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

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

7 MR. GROSTIC: Correct.

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

11 MR. GROSTIC: That's correct.

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

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

23 JUSTICE SOTOMAYOR: As to purpose. I
24 think of this -- we do -- courts do this all the
25 time with hearsay. We tell courts you can't use

1 hearsay for the purpose of the truth of the
2 matter, but you could use it for all -- for a
3 lot of other reasons, correct?

4 MR. GROSTIC: Correct.

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

11 MR. GROSTIC: Correct.

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

17 MR. GROSTIC: Correct.

18 JUSTICE SOTOMAYOR: All right.

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

25 3583(d) instructs courts about how to

1 consider what conditions they might impose. It
2 also omits (a)(2)(A) because, again, this is not
3 for a retributive purpose.

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

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

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

1 course is a new prosecution.

2 JUSTICE SOTOMAYOR: Now, going to --

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

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

10 MR. GROSTIC: Correct. And --

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

13 MR. GROSTIC: Of course, Your Honor.

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

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

24 JUSTICE SOTOMAYOR: That's why the
25 negative implication has so much force here,

1 which is --

2 MR. GROSTIC: Correct.

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

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

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

22 And I don't know how courts would be
23 guided by that. I don't know what
24 considerations they would -- that -- that would
25 be appropriate to decide that. What we have

1 are -- are established ways to impose
2 rehabilitative punishment. They're in an
3 initial prosecution.

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

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

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

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

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

25 JUSTICE ALITO: But isn't that built

1 into the idea of deterrence?

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

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

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

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

21 JUSTICE JACKSON: Mr. Grostic, can --
22 can I get you to react to the thought that maybe
23 what Congress was doing was reacting to
24 potential concerns about constitutional
25 problems? And -- and what I mean by that is

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

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

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

1 would have if you were allowing people to go
2 above the statutory maximum.

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

6 JUSTICE JACKSON: Yes.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas, anything further?

21 Justice Alito?

22 JUSTICE ALITO: Suppose a district
23 judge reads the kind of opinion you would like
24 us to write and says: Well, how am I going to
25 comply with this, okay? I'm going to write out

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

8 Is the district court home free then?

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

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

25 MR. GROSTIC: Yes, Your Honor. The --

1 the -- the purposes of sentencing -- deterrence,
2 protecting the public, and -- and
3 rehabilitating -- would be the reorientation.

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

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 Justice Kagan?

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

1 be looking at sentences that happened even
2 before any opinion we would write, what would
3 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 analysis towards
10 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 reasonableness review, which is, when
22 a 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 -- and --

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

3 MR. GROSTIC: And I understand that,
4 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 -- I do appreciate the hypotheticals. I
7 think it's helpful to -- to -- to tease out the
8 edges of this. But, at the same time, this is
9 in a 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 is, 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 --

21 JUSTICE KAVANAUGH: Thank you.

22 MR. GROSTIC: -- from this context.

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 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

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

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

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

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

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

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

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

3 MR. GROSTIC: Correct.

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

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

8 JUSTICE JACKSON: Thank you.

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Ms. Hansford.

14 ORAL ARGUMENT OF MASHA G. HANSFORD
15 ON BEHALF OF THE RESPONDENT

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

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

1 factors, but it does not prohibit the court from
2 considering others.

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

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

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

14 I welcome the Court's questions.

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

18 MS. HANSFORD: I think the reason that
19 Congress listed only certain factors were
20 because those were the factors that it thought
21 would be the primary considerations across the
22 board. So, of course, Congress was not drafting
23 this provision just for the revocation section.
24 In fact, when it was drafting it, the revocation
25 provision, (e)(3), wasn't even in the statute.

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

13 JUSTICE SOTOMAYOR: I'm --

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

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

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

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

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

23 JUSTICE SOTOMAYOR: What is the
24 workability problem? The district court says
25 something wrong. You have to object. Now the

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

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

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

19 JUSTICE SOTOMAYOR: Give me --

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

1 mind.

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

4 MS. HANSFORD: The pattern of --

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

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

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

25 MS. HANSFORD: So I would say about

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

5 JUSTICE SOTOMAYOR: But why?

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

7 JUSTICE SOTOMAYOR: But why?

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

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

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

24 And so, when Congress was thinking
25 about the whole range of actions, including

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

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

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

1 assessing deterrence, and certainly not in
2 revocation.

3 JUSTICE JACKSON: No, you're arguing
4 the intertwinement. What I'm saying is the
5 intertwinement undermines your argument that
6 Congress omitted this to relieve district courts
7 of having to consider those things.

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

10 MS. HANSFORD: So two points to that.

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

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

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

24 And in this particular section, it
25 omitted one, and you say it omitted one to give

1 courts the permission not to consider it, but it
2 can still allow courts to consider it.

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

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

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

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. -- Ms. Hansford,
3 let me ask you a question that you probably
4 won't like, 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, that to the extent that the
24 revocation involves no greater deprivation -- so
25 a court may revoke to the extent that the

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

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

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

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

25 I still think that this would not be a

1 helpful rule for courts. I think it would still
2 devolve to labels and not substance.

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

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

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

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

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

1 result.

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

6 JUSTICE BARRETT: Thank you.

7 JUSTICE GORSUCH: Ms. --

8 CHIEF JUSTICE ROBERTS: Your friend --

9 JUSTICE GORSUCH: I'm sorry, Chief.

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

14 (Laughter.)

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

25 But I think, when you get to

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

6 CHIEF JUSTICE ROBERTS: Well --

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

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

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

24 MS. HANSFORD: So, Mr. Chief Justice,
25 even if that is what Congress was thinking, I

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

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

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

23 And I think, to go back to the
24 workability concerns I was discussing with
25 Justice Sotomayor, you -- it's really the height

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

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

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

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

5 JUSTICE KAVANAUGH: Can I --

6 MS. HANSFORD: -- to --

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

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

25 Does that come in on negative

1 implication?

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

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

18 (Laughter.)

19 MS. HANSFORD: Yes.

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

1 those are going to be almost completely
2 overlapping, I think, with other things listed.

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

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

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

24 But, when you're outside your circle,
25 as you would be if you were starting to think

1 about just punishment, then you're not fine.

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

7 JUSTICE KAGAN: To the extent --

8 MS. HANSFORD: -- to capture --

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

11 MS. HANSFORD: Yeah.

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

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

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

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

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

11 JUSTICE KAGAN: Thank you.

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

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

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

1 original offense of conviction.

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

7 MS. HANSFORD: Yeah.

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

12 And I don't --

13 MS. HANSFORD: Yeah.

14 JUSTICE JACKSON: -- understand that.

15 MS. HANSFORD: So -- so two points.

16 First, I think, on Petitioner's view that this
17 is an exclusive universe, the seriousness of the
18 violation also couldn't be considered because
19 it's now --

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

22 MS. HANSFORD: Yes. But --

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

1 the seriousness of the offense is the initial
2 offense.

3 MS. HANSFORD: Yes. And --

4 JUSTICE JACKSON: But -- but you
5 concede that supervised release is a totally
6 different thing than the initial offense.

7 MS. HANSFORD: Yeah.

8 JUSTICE JACKSON: So why couldn't you
9 revoke --

10 MS. HANSFORD: So --

11 JUSTICE JACKSON: -- without looking
12 at the initial offense?

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

20 And the second --

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

1 offenses and other people and whatever?

2 So, I mean, those are two different
3 factors in this very statute. They're listed
4 differently.

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

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

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

24 So the severity of the underlying
25 offense can provide critical context in

1 assessing the violation and in informing a
2 court's decision about what to do about the
3 violation.

4 JUSTICE GORSUCH: Ms. Hansford --

5 JUSTICE KAVANAUGH: Can I --

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

12 The second one, respect for the law,
13 deterrence.

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

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

1 certain words, that there are certain magic
2 words, they will avoid those words. They will
3 use synonyms for those words.

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

7 MS. HANSFORD: If I may respond?

8 CHIEF JUSTICE ROBERTS: Sure.

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

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

15 MS. HANSFORD: Sure.

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

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

1 plain-error posture because most offenders don't
2 think to make this objection at all.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 Justice Alito, anything further?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

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

10 But tell me -- tell me if -- tell me
11 what else.

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

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

23 And so I do think that whatever the
24 magic words are, yes, courts will learn to avoid
25 them. But I really think that will skew the

1 process, particularly if it suggests that on the
2 substance courts should not be considering what
3 is --

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

7 MS. HANSFORD: The --

8 JUSTICE KAVANAUGH: "Punish" or
9 "punishment."

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

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

19 JUSTICE KAVANAUGH: Okay.

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

24 So I'm -- I'm not really sure why
25 "punish" --

1 JUSTICE KAVANAUGH: I think you're
2 arguing again for why you should win, but
3 that's -- that's good enough. Thanks.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 Justice Jackson?

7 Thank you, counsel.

8 Rebuttal?

9 REBUTTAL ARGUMENT OF CHRISTIAN J. GROSTIC
10 ON BEHALF OF THE PETITIONER

11 MR. GROSTIC: Thank you, Mr. Chief
12 Justice.

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

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

24 And sub -- subsection (c), 3583(c), is
25 the codification. It's Congress stating those

1 purposes. It's where I believe all of the
2 court's statements regarding that come from.
3 And it's that the court shall consider (a)(1),
4 (a)(2)(B), (a)(2)(C), and -- and down the line.

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

10 And then, as we follow down through
11 3583, everything that Congress wrote follows
12 that same beginning. In (d), courts can impose
13 conditions but not for (a)(2)(A) purposes.

14 My -- my -- my friend on the other
15 side does note (a)(2) -- (d)'s statement to the
16 extent that that actually introduces a list of
17 three different things that the court has to
18 satisfy. So I'm not sure that the court can
19 really read to the extent that is as directly
20 related only to the greater deprivation of
21 liberty for those purposes.

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

25 And then, when we get to (e) and the

1 options of terminating, modifying, or revoking,
2 if an offender while on supervision now has --
3 their conduct has indicated some need for a
4 change from what the court originally thought
5 was appropriate, Congress gave courts tools to
6 do that but, again, for those same purposes and
7 not the retributive purpose.

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 11:32 a.m., the case
18 was submitted.)

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