

SUPREME COURT OF THE UNITED STATES

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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1 P R O C E E D I N G S

2 (10:17 a.m.)

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

6 Mr. Grostic.

7 ORAL ARGUMENT OF CHRISTIAN J. GROSTIC

8 ON BEHALF OF THE PETITIONER

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

11 In Section 3583(e), Congress listed
12 factors that courts must consider when
13 terminating, modifying, or revoking supervised
14 release and omitted the factors that it intended
15 to preclude, most important here Section
16 3553(a)(2)(A)'s retribution factors.

17 3553(a) expressly states that (a)(2)'s
18 four subsections are the purposes of sentencing
19 which courts must satisfy when imposing prison,
20 a fine, or probation. Courts have wide
21 discretion about what to consider and how to
22 fulfill those purposes, but they do not have
23 discretion about what purposes to satisfy.

24 In 3583(e), Congress was surgical and
25 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 the --
13 that 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 identical language
6 in the probation statute. So, again, that's at
7 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. And I --

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

1 that surrounded it, many of the facts that Your
2 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 -- I know the magic words is
6 something I'm not supposed to say, right, and
7 yet I -- I indicated that anyway. And this
8 is -- this is 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 --
20 retributive 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 simper -- 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 -- so,
18 theoretically, we're completely sort of outside
19 of the realm of punishment now. We're in the
20 world of supervised release, and the court is
21 being 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 -- a person probably thinks
19 they're punished -- being punished in that
20 world. I wouldn't -- I 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 find it's not.
9 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 -- and on --
21 on -- on the exclusio unius point, which I --
22 I -- I take as a strong one, as I read (e),
23 it -- it says you -- you effectively must
24 consider these factors, which I think,
25 certainly, from an -- you know, a linguistic

1 perspective, means that you don't have to
2 consider other factors. I'm not sure it quite
3 goes so far to say you must not consider other
4 factors.

5 Do you follow me?

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

8 JUSTICE GORSUCH: Help me with that.

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

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

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

25 It wouldn't -- it wouldn't take you so

1 far as to must not and maybe particularly given
2 that Congress has elsewhere said you -- you must
3 not consider other factors.

4 What do I do about that?

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

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

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

16 JUSTICE GORSUCH: Yeah -- yeah.

17 But -- but --

18 MR. GROSTIC: It also there does not
19 say "shall not."

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

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

25 JUSTICE JACKSON: And is -- and -- and

1 in those situations in other contexts, isn't
2 that statement being made in the context of the
3 universe of factors, the world -- the possible
4 world of factors, and so they isolate one and
5 say: Don't consider this.

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

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

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

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

1 JUSTICE GORSUCH: So, Mr. Grostic, I
2 think what I was thinking of, and I do want your
3 help with this, is, you know, Congress has said
4 in (a) that the factors set forth in 3553(a) --
5 this is 3582(a), I'm sorry -- recognizing
6 imprisonment is not an appropriate means of --
7 of promoting correction or rehabilitation --
8 there, we have clear language saying "may not"
9 or "shall not" consider certain things.

10 MR. GROSTIC: Well --

11 JUSTICE GORSUCH: We don't -- we don't
12 have that here. So what do we do about that?

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

16 JUSTICE GORSUCH: Not for certain --
17 it is for certain purposes.

18 MR. GROSTIC: Precisely.

19 JUSTICE GORSUCH: Right.

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

24 JUSTICE GORSUCH: Yeah.

25 MR. GROSTIC: 3582(a) works in tandem,

1 obviously, with -- with the instructions for
2 imposing prison generally.

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

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

9 JUSTICE GORSUCH: But not for certain
10 purposes.

11 MR. GROSTIC: But not for -- but not
12 for lengthening or imposing --

13 JUSTICE GORSUCH: Yeah, I get all
14 that.

15 MR. GROSTIC: Right.

16 JUSTICE GORSUCH: We're going around
17 the same tree here together.

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

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

25 JUSTICE GORSUCH: Okay.

1 MR. GROSTIC: -- the non-listed
2 factors.

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

8 And this is not stopping sentencing
9 courts from looking at any evidence whatsoever.

10 MR. GROSTIC: Correct.

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

14 MR. GROSTIC: That's correct.

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

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

1 JUSTICE SOTOMAYOR: As to purpose. I
2 think of this -- we do -- courts do this all the
3 time with hearsay. We tell courts you can't use
4 hearsay for the purpose of the truth of the
5 matter, but you could use it for all -- for a
6 lot of other reasons, correct?

7 MR. GROSTIC: Correct.

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

14 MR. GROSTIC: Correct.

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

20 MR. GROSTIC: Correct.

21 JUSTICE SOTOMAYOR: All right.

22 MR. GROSTIC: And that follows from --
23 from the structure of the entire statute. As --
24 as Justice Jackson brought up, the initial
25 sentencing, (a)(2)(A) is satisfied. The

1 supervised release is imposed for these
2 additional purposes.

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

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

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

20 But the fundamental point is that the
21 words reflect a purpose. They reflect that
22 Congress said, in this context, we're taking
23 retribution off the table. That was done for
24 the initial -- the initial offense. Nothing can
25 change about the person's conduct that would

1 make the need to punish that original offense
2 more stark now. And if there is new conduct
3 that needs retributive punishment, the proper
4 course is a new prosecution.

5 JUSTICE SOTOMAYOR: Now, going to --

6 MR. GROSTIC: It's not a supervised
7 release --

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

13 MR. GROSTIC: Correct.

14 JUSTICE SOTOMAYOR: Pardon the pun of
15 using "purpose" in another way.

16 MR. GROSTIC: Of course, Your Honor.

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

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

1 negative implication has force and also noted --

2 JUSTICE SOTOMAYOR: That's why the
3 negative implication has so much force here,
4 which is --

5 MR. GROSTIC: Correct.

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

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

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

25 And I don't know how courts would be

1 guided by that. I don't know what
2 considerations they would -- that -- that would
3 be appropriate to decide that. What we have
4 are -- are established ways to impose
5 rehabilitative punishment. They're in an
6 initial prosecution.

7 JUSTICE SOTOMAYOR: All right. Thank
8 you, counsel.

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

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

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

23 MR. GROSTIC: The need to repote --
24 promote respect for the law in (a)(2)(A),
25 because of what it's next to and how we read

1 that statute together, still reflects that
2 retributive purpose.

3 JUSTICE ALITO: But isn't that built
4 into the idea of deterrence?

5 MR. GROSTIC: Not the retributive
6 purpose itself. Deterrence can --

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

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

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

24 JUSTICE JACKSON: Mr. Grostic, can --
25 can I get you to react to the thought that maybe

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

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

23 And so part, I think, of what Congress
24 might have been trying to do was to avoid that
25 kind of problem by indicating very clearly that

1 in supervised release, we're really not about
2 punishment. We're not trying to go -- you know,
3 run into the same kinds of concerns that you
4 would have if you were allowing people to go
5 above the statutory maximum.

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

9 JUSTICE JACKSON: Yes.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas, anything further?

24 Justice Alito?

25 JUSTICE ALITO: Suppose a district

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

11 Is the district court home free then?

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

21 JUSTICE ALITO: Reorients -- the judge
22 reorients his or her consideration away from the
23 seriousness of the offense but directs it to the
24 nature and circumstances of the offense.
25 Reorients it away from promoting respect for the

1 law. No, you can't do that, but you can try to
2 promote deterrence.

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

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

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

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

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

1 also, if you were providing that same kind of
2 guidance to appellate courts, especially given,
3 in the first couple of years, they're going to
4 be looking at sentences that happened even
5 before any opinion we would write, what would
6 that be?

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

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

24 And then, for courts of appeals, I
25 take -- I take Your Honor's question to heart

1 because it is this interim period, I think,
2 that's the most important. After Tapia, we
3 haven't seen a --

4 JUSTICE KAGAN: I mean, that was my
5 experience in Tapia. I actually paid some close
6 attention to what was happening --

7 MR. GROSTIC: Mm-hmm.

8 JUSTICE KAGAN: -- and the first
9 couple of years, people were having a hard time
10 figuring it out, and courts of appeals were
11 going different ways, and then it just
12 completely ended --

13 MR. GROSTIC: Right.

14 JUSTICE KAGAN: -- because district
15 courts just started doing the things that we had
16 said to do.

17 MR. GROSTIC: Right. And that's my
18 experience as well. So in that interim period
19 is kind of the most important of reviewing what
20 the district courts have said, ensuring that
21 they comply with -- with the -- the factors that
22 are listed.

23 In that interim period, unless a
24 court -- if a court cites an (a)(2)(A) purpose
25 and unless it has made clear I didn't mean those

1 words for what it seems like, I meant it for
2 this other purpose, I mean, at that point, we're
3 into something like normal harmless error
4 procedural reasonableness review, which is, when
5 a court relies on an impermissible factor,
6 considers an impermissible factor, which is what
7 the statute says they're not permitted to do,
8 that's reversible.

9 But, again, even at that point, we're
10 talking about a vacatur to send it back to the
11 district court. If it really did mean to impose
12 the same sentence for the permissible purposes,
13 it can do so and re-explain.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: It seems to me the
17 upshot of the opinion we would write is say:
18 Don't use the word "punishment," but you can use
19 the words "protect the public, adequately deter,
20 and the history of this defendant."

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

23 MR. GROSTIC: I -- I -- I believe
24 that's -- those are -- those are kind of the key
25 touchstones, yes. And that, again, is towards

1 reorienting district courts away from punishment
2 in this context and courts --

3 JUSTICE GORSUCH: Yeah, I just don't
4 know what it says -- what it means to reorient
5 away from punishment when you're saying: I --
6 I'm sending you back to prison in order to
7 protect the public --

8 MR. GROSTIC: I -- I -- and --

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

11 MR. GROSTIC: And I understand that,
12 Your Honor.

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

15 MR. GROSTIC: To -- to a defendant, it
16 may mean very little.

17 In the context of how district courts
18 are managing their docket and -- and the
19 supervision docket, it's -- I -- I believe it's
20 quite important because, at this point, under
21 the Sixth Circuit's rule, district courts can
22 treat a supervised release revocation the same
23 as in an initial sentencing, where they can
24 punish the offender for what's happened before,
25 no matter what has changed in the meantime.

1 JUSTICE GORSUCH: Well, they -- they
2 can't go beyond what -- the -- the factual
3 findings of the jury to issue a new sentence.
4 That's not permissible. We dealt with that in
5 Haymond, for example, right? We're now dealing
6 in the context of supervised release.

7 And it just -- and magic words, I -- I
8 appreciate some words are important, but I --
9 I -- I -- I struggle with synonyms. And a
10 synonym to "protecting the public" might be
11 "punishment." A synonym to "punishment" might
12 be "you're a bad person," which I can say.
13 Your -- your history, you're a bad person,
14 you've done bad things. I need to deter crime.
15 Punishment.

16 Thank you. I -- I -- I get it.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: When you consider
20 the nature and circumstances of the offense,
21 which you can and are supposed to, what if the
22 district judge says: Well, I'm considering the
23 nature and circumstances of the offense, and it
24 was a serious offense?

25 MR. GROSTIC: I believe if they stop

1 there that that's reversible error because
2 there's no indication that it means anything
3 other than relying on the (a)(2)(A) factor.

4 If a court is careful and says: This
5 was a serious offense and, therefore, I'm not --
6 I'm not trying to punish you, but I -- I
7 conclude that you need to be -- that -- that I
8 need to revoke your supervision so that we can
9 protect the public, and that's clear in the
10 transcript, I believe that the district court
11 would have made clear that it's not relying on
12 an impermissible factor.

13 But the -- the -- again, the core here
14 is what is the district court trying to do.
15 And -- and I -- I do appreciate the
16 hypotheticals. I think it's helpful to -- to --
17 to tease out the edges of this. But, at the
18 same time, this is in a sense normal appellate
19 review in -- in the sentencing context too. Has
20 the court relied on this or not? Has the court
21 considered this or not?

22 JUSTICE KAVANAUGH: I guess my
23 question also gets to my -- when I read
24 (a)(2)(A), I think, the -- of the three things
25 there, the first two, seriousness of the offense

1 and respect for the law, are almost completely
2 overlapping with other factors that you're
3 supposed to consider.

4 So that leads me to think what's left
5 is, as Justice Gorsuch just said, the just
6 punishment. As long as you -- avoid the word
7 "punishment" or "punish," you should be okay.

8 MR. GROSTIC: And -- and two responses
9 to that.

10 One, I do think that the -- the
11 additional text is important, which is the need
12 to reflect the seriousness of the offense, the
13 need to promote respect for -- reflecting the
14 seriousness of the offense, I believe, does
15 bring that back into something akin to
16 retribution and punishment.

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

19 JUSTICE KAVANAUGH: That's okay.

20 MR. GROSTIC: But Congress was doing
21 something here when they listed these factors
22 separately. And when they omitted this one,
23 I -- again, I think we can all agree Congress
24 must have been doing something.

25 And so the -- the sense that because

1 there is a sense that perhaps they overlap or
2 surplusage, that's something Congress must have
3 been aware of, and yet they chose to surgically
4 remove this particular purpose --

5 JUSTICE KAVANAUGH: Thank you.

6 MR. GROSTIC: -- from this context.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: So mine is a
10 practical question as well. I mean, I -- I
11 think Justice Sotomayor is right that we often
12 consider evidence for some purposes, not others.

13 And hearsay is a great example of
14 that. But I think the questions that you're
15 getting show a distinction between this
16 circumstance and hearsay because, with hearsay,
17 it's essentially you can consider it for any
18 other purpose, assuming other evidentiary rules
19 don't bar it, except for the truth of the matter
20 asserted.

21 And, here, it's just saying you can't
22 consider it for this one purpose, but you can
23 consider it for these other synonymous purposes.
24 So it's like in a hearsay rule, if you could say
25 you can't consider it for the truth of the

1 matter asserted, but think of all the synonyms
2 you want for "truth."

3 So, you know, we've -- we've pointed
4 out the difficulties for the district judge,
5 we've pointed out the difficulties it will pose
6 on appellate review. What is the advantage to
7 the defendant? Because, if you can consider it
8 for these other overlapping purposes, like the
9 nature and circumstances of the offense, is it
10 really going to affect the length of the
11 sentence? Like, why is this important?

12 MR. GROSTIC: So I -- I believe
13 sometimes it will have the same result but not
14 always, and I can point to two examples, I
15 think.

16 The first is conditions may have
17 changed since the offense in a significant way
18 where the need to protect the public, the need
19 to deter has dropped significantly.

20 One example would be the defendant's
21 incapacitation or something like it. Another
22 would be the defendant's extreme rehabilitation
23 since the offense.

24 JUSTICE BARRETT: But let me just stop
25 you right there. I thought it was nature and

1 circumstances of the offense. It sounds like
2 you're talking about nature and circumstances
3 surrounding the violation of supervised release.

4 MR. GROSTIC: That's correct, Your --
5 so (a)(1) requires considering the nature and
6 circumstances of the offense and the history and
7 characteristics of the offender. In all of
8 that, there could be a significant change since
9 the offense, is -- is my point here.

10 If there is that significant change,
11 then a court may think: Well, to reflect the
12 need to -- to just -- provide just punishment,
13 regardless of what's changed with the defendant,
14 I need to impose a significant punishment.

15 But, because this defendant has shown
16 that they're rehabilitated, because this
17 defendant is incapacitated, once I take that off
18 the table, there's really very little need to
19 impose incarceration. That would be one
20 difference.

21 The other and very practical
22 difference, I think, for Petitioner Leaks is
23 when someone has a state court sentence or a
24 federal court sentence for the same conduct.

25 I -- I -- I understand that the

1 statute allows the supervising court to make a
2 new judgment on its own about whether additional
3 time in custody or modifying supervised release
4 is necessary to fulfill the three permissible
5 purposes, but they may well conclude: Well, the
6 punishment's done, that other sentence also
7 fulfills the three permissible purposes,
8 concurrent time is sufficient.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So, Mr. Grostic,
12 just to sort of flesh that out some, I mean, I
13 perceive and I think sentencing theory perceives
14 a difference between retributive purposes and
15 other purposes.

16 And so, even though there may be
17 overlap in some of the discussions that we've
18 had, suppose you have a defendant who is on
19 supervised release and discovers that he is
20 terminally ill, terminally ill, six months to
21 live. And he stops calling his probation
22 officer. He stops doing all the things. And
23 the probation officer comes back to court and
24 says: I -- think this person's supervised
25 release should be revoked because they are not

1 doing what it is that you've required on
2 supervised release. Absolutely a basis for
3 revocation.

4 But then the question becomes, from
5 the judge's perspective, it's not going to make
6 any difference if I incarcerate this guy for the
7 last six months of his life because he's not
8 going to be able to commit other crimes, he's
9 not -- it's not going to protect the public in
10 any way.

11 A judge who was imposing supervised
12 release revocation for retributive purposes,
13 even though the statute says you don't do that,
14 would say it doesn't matter. What you've done
15 is violated the conditions, and for that, you
16 need to be punished and, therefore, back to
17 jail.

18 A judge who is looking at the statute
19 and says retribution is off the table might
20 determine not to do those things because the
21 other purposes of punishment would not be
22 fulfilled given this person's circumstances. Is
23 that a concrete example of how you can separate
24 out retributive purposes from other purposes and
25 sentence differently as a result?

1 MR. GROSTIC: Yes, I -- I believe so.
2 And -- and, specifically, I think that relates
3 to the promoting respect for the law in
4 (a)(2)(A), which is, even if there hasn't been
5 an offense here, because there was a court order
6 that was violated, in -- in some sense, that's
7 disrespecting the law, and so (a)(2)(A), even if
8 there wasn't an offense in -- in -- in Your
9 Honor's example committed here, would allow for
10 punishment to promote --

11 JUSTICE JACKSON: If punishment was on
12 the table --

13 MR. GROSTIC: Correct.

14 JUSTICE JACKSON: -- you could still
15 impose punishment.

16 MR. GROSTIC: That would -- that would
17 be on the table, but --

18 JUSTICE JACKSON: Thank you.

19 MR. GROSTIC: -- but -- but,
20 otherwise, no.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Ms. Hansford.

24

25

1 ORAL ARGUMENT OF MASHA G. HANSFORD

2 ON BEHALF OF THE RESPONDENT

3 MS. HANSFORD: Mr. Chief Justice, and
4 may it please the Court:

5 Section 3583(e) does not displace a
6 district court's broad discretion to think about
7 any considerations it finds helpful at a
8 sentencing or sentence modification proceeding.
9 Section 3583(e)(3) authorizes a court to revoke
10 supervised release "after considering certain
11 factors." That language makes clear that a
12 court is required to consider the enumerated
13 factors, but it does not prohibit the court from
14 considering others.

15 To take an example, if a judge tells
16 her law clerk that the clerk may turn in his
17 bench memo after considering the petitioner's
18 brief, the respondent's brief, and the reply
19 brief, that does not suggest that the law clerk
20 is forbidden from also considering the amicus
21 briefs. And if a college physics department
22 announces that a student may declare a physics
23 major after completing Physics 101, Physics 103,
24 and Physics 104, that does not suggest the
25 student is forbidden from also taking Physics

1 102. Just like Section 3583(e), those
2 instructions set a floor, not a ceiling.

3 Petitioners argue that because the
4 Section 3553(a)(2)(A) factors reflect
5 retribution, they don't belong in a supervised
6 release revocation proceeding. And the colloquy
7 with Justice Jackson was getting at a similar
8 idea. But Congress knows how to limit a
9 sentencing decision to one that serves
10 particular purposes, and it uses express
11 language to do so. Congress did not use that
12 type of language here.

13 Nor would it make sense for the Court
14 to prohibit -- for Congress to prohibit a court
15 from considering the (a)(2)(A) factors, which,
16 as the discussion this morning emphasized,
17 include the need to promote respect for the law
18 in determining what to do about the breach of
19 trust that court-ordered supervision that
20 reflects and in light of the deep overlap
21 between the factors, and I think the colloquy
22 this morning well illustrated that that would
23 really raise profound workability problems and,
24 at best, would devolve into a reverse magic
25 words requirement.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Why would you -- why
3 would Congress write a provision like this in
4 such a roundabout way?

5 MS. HANSFORD: I think the reason that
6 Congress listed only certain factors were
7 because those were the factors that it thought
8 would be the primary considerations across the
9 board. So, of course, Congress was not drafting
10 this provision just for the revocation section.
11 In fact, when it was drafting it, the revocation
12 provision, (e)(3), wasn't even in the statute.

13 But the way the statute reads now is
14 the list of factors is in the umbrella paragraph
15 at (e), and it covers the whole range of
16 actions, terminating the term of supervision
17 early, extending the term of supervision,
18 modifying the conditions of supervision, as well
19 as revocation. And I think that the discretion
20 that Congress gave courts reflects that in some
21 of those circumstances, a court may not think
22 that the (a)(2)(A) factors, to the extent they
23 do work beyond the other factors, need to be
24 considered.

25 JUSTICE SOTOMAYOR: I'm --

1 JUSTICE THOMAS: You mentioned
2 workability. What role should that play in our
3 assessment of the arguments here, in our
4 interpretation of these provisions?

5 MS. HANSFORD: I think the profound
6 unworkability of Petitioner's rule, which would
7 require parsing what a court is doing in
8 extricating the promoting respect from the law
9 from deterrence and incapacitation
10 considerations that are intimately intertwined,
11 I think should give the Court a lot of pause
12 from reading the text to say that.

13 Now -- especially here, where
14 Petitioner's textual argument is really an
15 argument of negative implication. I think that
16 Petitioners are suggesting the wrong negative
17 implication, so the argument doesn't get off the
18 ground. But, before drawing the inference
19 Petitioners seek, I -- I think the Court should
20 take cognizance of the fact that this would be a
21 really bizarre thing for Congress to do in this
22 way.

23 JUSTICE SOTOMAYOR: Counsel, I -- I'm
24 having a little problem with this workability
25 argument because there's four circuits, one of

1 them pretty large, the Ninth, but the Fourth,
2 the Fifth, the Ninth -- I can't remember the
3 fourth one -- and the Tenth, all of whom have
4 the rule you say is unworkable, they seem to be
5 functioning fine.

6 MS. HANSFORD: I think the experience
7 in those circuits well reflects the workability
8 problems here. First of all, most of the
9 circuits --

10 JUSTICE SOTOMAYOR: What is the
11 workability problem? The district court says
12 something wrong. You have to object. Now the
13 three people here objected or at least two of
14 them objected, and the district court decided
15 that instead of saying I'm doing it for dual
16 purposes, which would have made this a harmless
17 error case, said no, I'm not doing it for
18 deterrence, incapacitation, or rehabilitation;
19 I'm doing it for punishment.

20 So the -- but, if it had been objected
21 to, it would have been fine. If it had not been
22 objected to, we're in harmless error territory.
23 And -- and I don't understand that those courts
24 have had a problem with this.

25 MS. HANSFORD: I think the workability

1 problem is extricating even in the judge's own
2 mind the factors that are required to be
3 considered, like the nature and circumstances of
4 the offense and deterrence, incapacitation, from
5 promoting respect for the law.

6 JUSTICE SOTOMAYOR: Give me --

7 MS. HANSFORD: Justice Sotomayor, I
8 would direct you to take a look at pages 96, 98,
9 216 to 217, and 219 to 220 of the Joint
10 Appendix, which shows how the judges in these
11 cases were thinking about those factors, and
12 they were all completely intertwined in their
13 mind.

14 JUSTICE SOTOMAYOR: All right. Let's
15 go back --

16 MS. HANSFORD: The pattern of --

17 JUSTICE SOTOMAYOR: -- to Justice
18 Thomas's question, which is I see Section
19 3553(a)(2) normally directs district courts to
20 consider all the relevant facts in evidence.
21 That includes the four purposes, okay?

22 Why would Congress have written this
23 provision, taking out two factors, only two
24 factors, one of which is not pertinent at all,
25 so they were being purposeful in what they were

1 doing, and there was one factor that they put --
2 took out and then put back in. Why would they
3 have bothered to put it back in if you're right
4 that it was always there? Because, under your
5 theory, it was -- whether they took it out the
6 first time or not is irrelevant. It could
7 always be considered.

8 It doesn't make much sense to me that
9 Congress was that precise in taking some things
10 out and then very precise in putting it back in
11 if you think it was always in to start with.

12 MS. HANSFORD: So I would say about
13 that is I think Congress cared about the floor
14 it was setting. Setting the floor a little bit
15 higher by adding in a factor means that a court
16 must consider --

17 JUSTICE SOTOMAYOR: But why?

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

19 JUSTICE SOTOMAYOR: But why?

20 MS. HANSFORD: -- in each case. And I
21 think --

22 JUSTICE SOTOMAYOR: Every time it --
23 it has done it in every other situation, it just
24 said consider them all.

25 MS. HANSFORD: Sure. And I think the

1 reason that Congress wanted to give a court
2 discretion not to consider the factors in this
3 case, to the extent that they add something
4 beyond the overlapping factors, is because
5 Congress's view of the term of supervised
6 release itself, I think, Congress probably
7 thought the primary purpose of that term is a
8 period of transition as opposed -- and that the
9 term of imprisonment often will fully serve the
10 retributive ends.

11 And so, when Congress was thinking
12 about the whole range of actions, including
13 terminating the term of supervision early or
14 extending the term of supervision or modifying
15 the conditions, Congress wanted to give courts
16 the flexibility to just think about these kind
17 of rehabilitative considerations of how well the
18 defendant was doing on --

19 JUSTICE JACKSON: But, if they
20 overlap, Ms. Hansford, what -- what -- what kind
21 of a gift is that? I mean, part of our
22 discussion was how much these factors overlap.
23 So it seems like a weird thing to say that
24 Congress went through all the trouble of
25 omitting this factor for the purpose of allowing

1 district courts not to consider this thing that
2 you say is so intertwined with everything else
3 that it's hard to separate out.

4 MS. HANSFORD: Yes, and let me
5 explain. I think that the -- really, the place
6 where that delta is, is the just punishment
7 factor that Justice Kavanaugh was referring to,
8 because, of course, the provision has three
9 factors. And I don't think that a court can
10 really ever not think about the seriousness of
11 the offense, can ever really not think about
12 promoting respect for the law in the context of
13 assessing deterrence, and certainly not in
14 revocation.

15 JUSTICE JACKSON: No, you're arguing
16 the intertwinement. What I'm saying is the
17 intertwinement undermines your argument that
18 Congress omitted this to relieve district courts
19 of having to consider those things.

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

22 MS. HANSFORD: So two points to that.

23 First, I want -- or one thing I want
24 to do is give you an example of how this might
25 work, but I also want to note that even -- that

1 the rule that Petitioners are asking for, which
2 is a rule that you may not consider the factors,
3 is a really troubling one.

4 I think that Congress could have
5 written a statute --

6 JUSTICE JACKSON: Right. What I'm
7 trying to understand is the rule that you're
8 asking for, which is Congress had a list of four
9 purposes. That's the given, the -- the
10 beginning point.

11 And in this particular section, it
12 omitted one, and you say it omitted one to give
13 courts the permission not to consider it, but it
14 can still allow courts to consider it.

15 Ordinarily, when Congress omits
16 something, you would think they were taking it
17 off the table. So what we have to do is
18 understand the circumstances under which
19 Congress would indicate you have permission to
20 consider something by removing it from the list.

21 MS. HANSFORD: So the first thing I
22 would say is that this statute is not what gives
23 courts permission to consider various factors.
24 That is the background rule reflected in 3661
25 and decisions like Kimbrough and Concepcion.

1 So I think it would be a little bit of
2 a different situation if this was what was
3 giving courts authority in that particular
4 thing.

5 JUSTICE JACKSON: Precisely. But that
6 undermines your -- your argument. It doesn't
7 help you.

8 If the background rule is that you can
9 consider everything and Congress really intended
10 for you to be able to consider this, why would
11 they have omitted it from this statute?

12 MS. HANSFORD: Sure. So let me -- I
13 want -- I want to get back to the language that
14 Congress would have used if it wanted to do what
15 I think you're suggesting, Justice Jackson.

16 But just to give an example of how
17 this discretion might matter, consider an
18 offender who committed -- who committed an
19 offense and went to prison for, say, a drug
20 distribution conspiracy. Got out, is on
21 supervision, is doing well on supervision, is
22 complying with the conditions, and is up under
23 3583(e)(1) asking for early termination.

24 I think that the discretion the court
25 has given -- that Congress -- I apologize -- has

1 given the court is to say: We're looking at how
2 you're doing on supervision. You -- I don't --
3 I don't -- you're doing well. We don't think we
4 need to deter you. You've rehabilitated,
5 allowing us to terminate for --

6 JUSTICE JACKSON: But we're in
7 revocation. We're in revocation, Ms. Hansford.
8 We're talking about the revocation scenario.

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

12 JUSTICE BARRETT: Ms. --

13 JUSTICE KAGAN: Can I -- can I ask
14 another question, Ms. Hansford, and I think it
15 was something that was in part in Justice
16 Jackson's questions.

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

20 In other words, if it's so impossible
21 and unworkable to distinguish between the
22 mandatory and the prohibited in the way that
23 Petitioner wants courts to, it seems as though
24 it would be just as impossible and unworkable to
25 distinguish between the mandatory and permissive

1 in the way you want courts to do.

2 So, either way, courts have to make a
3 distinction. And for -- you know, it -- it --
4 it might be difficult in some circumstances, but
5 if it's so impossible, it's so impossible for
6 your purposes too.

7 MS. HANSFORD: So I -- I don't think
8 that's correct, Justice Kagan, because I think
9 there's a big difference between the affirmative
10 and the negative. The negative rule that
11 Petitioners are asking is: You may not consider
12 seriousness of the offense. You may not
13 consider promoting respect for the law.

14 And that is the problem. In my
15 example, when the judge is --

16 JUSTICE KAGAN: No, but in -- but
17 you're saying you have to think about what you
18 have to consider and just what -- what you may
19 consider. So that suggests that a court is
20 capable of distinguishing between the two.

21 And once you've decided that the court
22 is capable of distinguishing the two, then the
23 court is equally capable of distinguishing
24 between the mandatory and the prohibited.

25 MS. HANSFORD: I don't think the court

1 would ever be capable of distinguishing between
2 seriousness of the offense in the (a)(2)(A)
3 sense and in the (a)(1) sense. And I don't
4 think a court is ever capable of
5 distinguishing -- of truly disentangling
6 promoting respect for the law from deterrence
7 and incapacitation.

8 I think the one place where that
9 discretion that Congress gave here relative to
10 the probation statute makes a difference is in
11 considering whether something is a just
12 punishment. I think that's the one place where
13 they might come apart.

14 CHIEF JUSTICE ROBERTS: Can I --

15 JUSTICE KAGAN: I mean, either way,
16 the -- the -- it works the same for the two
17 arguments, this question of the difficulty of
18 disentangling these things, because you're
19 requiring a court also to disentangle these
20 things.

21 But let me ask you another question,
22 which is: When you say something is mandatory,
23 what exactly do you mean by that?

24 In other words, there are all these
25 factors, and Congress says you shall consider

1 these factors. Now does that mean that the
2 factors have to be reflected in the sentence or,
3 instead, can the court say: Well, I'm going to
4 reflect -- or the revocation, whatever it is, or
5 can the court say: Well, this factor seems
6 peculiarly relevant here, and I'm going to, you
7 know, do something that reflects that factor,
8 but this other factor seems completely
9 irrelevant, so I'm going to toss that away?

10 So what does "mandatory" mean in this
11 context?

12 MS. HANSFORD: I think "mandatory"
13 means that the court must think about it, but it
14 does not need to give it a large amount of
15 weight.

16 JUSTICE KAGAN: I mean, it can
17 decide -- it can give it zero weight, right? I
18 mean, it has to think about it, but it can say:
19 For my purposes, this is irrelevant.

20 MS. HANSFORD: Yes, I think -- I think
21 that's --

22 JUSTICE KAGAN: Yeah. So that's got
23 to be the case, right? And once you're in that
24 world, the difference between mandatory and
25 permissive is vanishingly slim because, in both

1 cases, a court is doing the same thing, which is
2 saying, like: I'm going to pick up the factor
3 and look at it and decide whether it's
4 completely irrelevant or whether it's relevant
5 and how to take it into account. And once
6 that's becomes vanishingly slim, your argument
7 begins to seem sort of peculiar.

8 MS. HANSFORD: I -- I think the
9 difference is fairly thin, especially because
10 all the factors are going to be --

11 JUSTICE KAGAN: I think I said
12 "vanishingly slim."

13 (Laughter.)

14 MS. HANSFORD: But I -- but -- but I
15 don't think it's nonexistent. And so, in the
16 early termination of release example I was
17 giving, the court might say: I am not going to
18 think about how serious your initial -- so I --
19 here -- here is the difference.

20 In one set of circumstances, the judge
21 says: I am going -- I'm going to choose to
22 think about whether this is a just punishment.
23 And so you're asking for early termination, but
24 because your offense was a serious offense and I
25 think that the term of imprisonment you served

1 was kind of on the low end, I'm not going to
2 terminate your sentence early.

3 Or the court might say the opposite.
4 They might say: You know, I'm a little bit on
5 the fence on deterrence and rehabilitation, but
6 I think the term of imprisonment you already
7 served is on the high end, so I actually am
8 going to terminate the sentence early.

9 And so that's the just punishment
10 piece of it that I think Congress left to be
11 discretionary in the supervised release context
12 but is required to be considered in the
13 probation context. And I think the reason for
14 that is that --

15 JUSTICE KAGAN: Thank you.

16 JUSTICE BARRETT: Ms. -- Ms. Hansford,
17 let me ask you a question that you probably
18 won't like, but it's just a hypothetical.

19 If, hypothetically, the government
20 loses, are there pitfalls that you would want us
21 to take into account in writing an opinion in
22 favor of the Petitioner?

23 MS. HANSFORD: Yes, absolutely. So I
24 think -- I really think that the textual
25 argument Petitioner is making is extremely

1 troubling and is really unclear what district
2 courts should be doing under that rule.

3 I really think that the way to capture
4 this intuition, to the extent that you have
5 Petitioner's intuition that retribution
6 shouldn't be doing any additional work, is not
7 to take Petitioner's argument that you may not
8 consider seriousness of the offense, you may not
9 consider respect for the law, you may not
10 consider just punishment, but it would be to
11 have a provision that is written in the way
12 3583(d) is written, that -- to the extent that
13 the revocation involves no greater
14 deprivation -- so a court may revoke to the
15 extent that the revocation involves no greater
16 deprivation of liberty than is reasonably
17 necessary for the purposes set forth in Sections
18 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D). And I
19 think that that formulation addresses some of
20 the workability concerns because it is not
21 saying you just can't consider the other
22 factors. It just says you can't do that extra
23 work.

24 But I think the existence of that
25 provision, the very neighboring provision that

1 courts set out for conditions -- for conditions
2 of release shows that that is not what Congress
3 was doing in the language here. Congress had --

4 JUSTICE BARRETT: Okay. But I just
5 wanted to know, like -- how we should write it
6 in a way, if you lose, that would satisfy the
7 government that we weren't resolving open
8 questions.

9 MS. HANSFORD: Yeah. I think the
10 least bad approach would be -- would be to adopt
11 that formulation in 3583(d). I don't think you
12 can get there textually, but I do think that
13 that's how you would avoid the -- the -- the
14 workability issues.

15 I still think that this would not be a
16 helpful rule for courts. I think it would still
17 devolve to labels and not substance.

18 JUSTICE BARRETT: I know. You didn't
19 give your argument away.

20 MS. HANSFORD: But I -- I also want to
21 note that the consideration of just punishment
22 is not a factor that necessarily harms the
23 defendant. It could also benefit the defendant.

24 So, for example, at a revocation
25 hearing, consider an offender who has a not very

1 serious initial offense but a very, very serious
2 violation. The court might look at that
3 violation and say: Boy, deterrence concerns are
4 off the charts. Rehabilitation, you really need
5 a lot of rehabilitation. Incapacitation, really
6 important.

7 And so I would impose -- I would
8 impose a very lengthy term of re-imprisonment,
9 but your initial offense is not that bad. And,
10 of course, any sanction I impose at a revocation
11 is supposed to be justified by reference to your
12 initial offense.

13 And because your initial offense is
14 not that serious, I just don't think that's a
15 just punishment. I don't think that's the right
16 result.

17 And I think Petitioner's argument
18 would take that off the table. I think that's a
19 reason that Congress did not write the statute
20 in that 3583(d) --

21 JUSTICE BARRETT: Thank you.

22 JUSTICE GORSUCH: Ms. --

23 CHIEF JUSTICE ROBERTS: Your friend --

24 JUSTICE GORSUCH: I'm sorry, Chief.

25 CHIEF JUSTICE ROBERTS: Your friend

1 said, I think near the end of his argument, he
2 said we can all agree that Congress was doing
3 something. Are you part of that "all?"

4 (Laughter.)

5 MS. HANSFORD: Absolutely, Mr. Chief
6 Justice. I think Congress was doing something.
7 It was giving the court that additional
8 discretion to reflect its view that the term of
9 supervision sometimes is really purely
10 rehabilitative and sometimes you are just
11 looking at does this offender need a GED or does
12 he need some sort of housing support, and you're
13 not necessarily thinking punitive thoughts when
14 you're taking the range of actions.

15 But I think, when you get to
16 revocation, it becomes a lot harder to think of
17 Congress's purpose as primarily rehabilitative
18 because one thing that is crystal-clear from the
19 statute is that Congress did not think
20 imprisonment should be used to rehabilitate.

21 CHIEF JUSTICE ROBERTS: Well --

22 MS. HANSFORD: That, of course, is
23 3582, as this Court recognized in *Tapia*.

24 And so the idea that Congress was
25 really trying to further the rehabilitative

1 purposes of the term of supervised release with
2 re-imprisonment feels really strange.

3 CHIEF JUSTICE ROBERTS: Well, I mean,
4 the different provisions -- I mean, obviously,
5 it's apparent there's a lot of synonyms that
6 overlap, but (a) does kind of look backward,
7 right? I mean, the -- the offense, the
8 punishment. And (b), (c), and (d) are looking
9 forward. What's deterrence, protecting the
10 public, and all that. And it seems to me that
11 in leaving (a) out, Congress meant to focus on
12 going forward when you're talking about
13 revoking.

14 MS. HANSFORD: So, Mr. Chief Justice,
15 even if that is what Congress was thinking, I
16 think Congress had the ability to act with a
17 lighter hand by requiring the things it thought
18 were most important or with a heavier hand by
19 forbidding all others. And I think the text
20 here plainly does the first, particularly when
21 you contrast it to the various provisions
22 throughout to do what the heavier-handed
23 approach would do.

24 CHIEF JUSTICE ROBERTS: Well, I -- I
25 think plain -- "plainly" is -- is a real reach

1 in this situation. It is a significant step, I
2 think, to just leave (a) off the table.

3 MS. HANSFORD: I -- I -- I agree that
4 it's a significant step and that it gives courts
5 discretion, but I do think that discretion has a
6 lot more weight in contexts outside of
7 revocation because of the nature of revocation.
8 It is very strange -- even if you put limits
9 into your opinion against us, it is still very
10 strange to tell a court that is sending someone
11 to prison that they cannot consider whether that
12 term of imprisonment is just.

13 And I think, to go back to the
14 workability concerns I was discussing with
15 Justice Sotomayor, you -- it's really the height
16 of absurdity what you see in the courts that are
17 trying to apply the rule on the other side. You
18 see courts parsing things like, is a reference
19 to rule of law suggesting respect for the law?
20 Is a reference to whether this result is just
21 suggesting just desserts or that this punishment
22 is deserved?

23 And I think that that's a really
24 strange thing to be parsing. Defendants are
25 making arguments -- there's a First Circuit case

1 we cite on page 37 of our brief where the court
2 did what courts primarily do at a revocation
3 hearing, which is complained about the number of
4 violations and the disrespect for the court that
5 those violations reflect, and the defendant
6 argued that considering the pattern of
7 violations, then flouting court-ordered
8 supervision can't be considered because it's a
9 form of promoting respect for the law.

10 So I think you're either in an absurd
11 situation where -- in a topsy-turvy world where
12 you're looking at all -- where you're not
13 considering kind of the core of the reasons for
14 the revocation, or you are just looking for
15 magic words. And a court that is actually
16 thinking all these things and what the just
17 result is in this case is forced to use
18 particular words or issue certain disclaimers,
19 as Justice Alito indicated --

20 JUSTICE KAVANAUGH: Can I --

21 MS. HANSFORD: -- to --

22 JUSTICE KAVANAUGH: -- can I ask a
23 question to go back to Justice Thomas's question
24 about workability? Because it's important for
25 me what role workability plays here.

1 Is it -- my understanding, I think, is
2 that workability comes into play when we think
3 about what significance to give the negative
4 implication canon in this particular case. But
5 you tell me how you think workability comes in,
6 or at least that's one key part of it because,
7 negative implication canon, we often look to
8 context to determine whether to draw it. The
9 context here would include, I think, how
10 workable this is. And, obviously, it's not
11 completely unworkable, the other side's
12 position, but your point is its -- it borders --
13 you used the word "absurd," not workable, magic
14 words.

15 Does that come in on negative
16 implication?

17 MS. HANSFORD: I -- I think that's
18 fair, Justice Kavanaugh, that you can think of
19 it as part of the context. And I think you can
20 also think of it as kind of a gut check as was
21 this really what Congress was intending to do,
22 or is the fact that it didn't use the much more
23 direct formulations it used elsewhere really an
24 indication that it was trying to accomplish
25 something quite different and just give the

1 courts a little bit of discretion, but not tie
2 courts' hands on anything because that, of
3 course, is a really big step to tell a court
4 that it can't think certain thoughts at
5 sentencing.

6 JUSTICE KAVANAUGH: Well, yeah.
7 They're probably going to think the thoughts
8 anyway.

9 (Laughter.)

10 MS. HANSFORD: Yes, exactly.

11 JUSTICE KAVANAUGH: The -- on the
12 three things listed in (a)(2)(A), seriousness of
13 the offense, respect for the law, and just
14 punishment, on the first two, seriousness of the
15 offense and respect for the law -- I think I'm
16 asked your -- your friend on the other side --
17 those are going to be almost completely
18 overlapping, I think, with other things listed.

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

25 MS. HANSFORD: I think, if you think

1 that, Justice Kavanaugh, we absolutely win
2 because Petitioner's rule, the negative
3 implication Petitioners are considering is you
4 may not consider the factors in 3553(a)(2)(A),
5 so you may not consider any one of them. And if
6 any one of them is impossible, I don't think
7 that argument can hold up.

8 JUSTICE KAGAN: I -- I don't think
9 that that's quite right, Ms. Hansford. I mean,
10 think of this as like a Venn diagram. You know,
11 you have two circles and they intersect and
12 there's some overlap, but as long as you're
13 within your circle, you're fine, whether it's
14 the non-shaded area or the shaded area.

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

18 MS. HANSFORD: I -- I appreciate that
19 intuition, Justice Kagan, but I think that if a
20 sentence says you may not consider A, B, or C,
21 that means that you cannot consider any one of
22 them. And I think that the way --

23 JUSTICE KAGAN: To the extent --

24 MS. HANSFORD: -- to capture --

25 JUSTICE KAGAN: -- that they

1 overlap --

2 MS. HANSFORD: Yeah.

3 JUSTICE KAGAN: -- to the extent that
4 it's like one and the same thing, you can
5 consider it because you can consider all the
6 other factors and you're just doing the same
7 thing. To the extent it's not the same thing,
8 then you can't consider it.

9 So, in the area of overlap, you're
10 golden. It's in the area of non-overlap that
11 you're not.

12 MS. HANSFORD: Justice Kagan, I think
13 the exact way to capture that intuition if
14 that's what Congress was trying to do is, of
15 course, a 3583(d) formulation that to the extent
16 that the factors reflect more of a deprivation
17 of liberty than is reasonably necessary for the
18 enumerated purposes, that "to the extent
19 language" is critical, and that's what's missing
20 here and what is in the nearby provision. And
21 that's how I think Congress would do it if it
22 was trying to do what you're suggesting.

23 And it was trying to do what you're
24 suggesting but only for the conditions of
25 release. It wanted those not to be increased

1 based on retributive thoughts.

2 JUSTICE KAGAN: Thank you.

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

5 JUSTICE JACKSON: Ms. Hansford, can I
6 just ask you when -- when 3582 -- or sorry,
7 3553(a)(2)(A) says to reflect the seriousness of
8 the offense, and we've had some question about
9 how you can revoke without doing that, what
10 offense do you take that to be referring to in
11 the revocation scenario? Is it the original
12 offense, or is it the offense that the person is
13 being brought to the court?

14 MS. HANSFORD: It's the original
15 offense of conviction. I think the statute is
16 consistent in referring to "offense" to mean the
17 original offense of conviction.

18 JUSTICE JACKSON: So why -- why
19 couldn't you base a revocation decision on what
20 happened that is leading to revocation and not
21 the seriousness of the initial offense? You
22 sort of seem to suggest --

23 MS. HANSFORD: Yeah.

24 JUSTICE JACKSON: -- that there's no
25 way you could revoke and send somebody back to

1 prison without considering what you're now
2 saying is the original offense.

3 And I don't --

4 MS. HANSFORD: Yeah.

5 JUSTICE JACKSON: -- understand that.

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

7 First, I think, on Petitioner's view that this
8 is an exclusive universe, the seriousness of the
9 violation also couldn't be considered because
10 it's now --

11 JUSTICE JACKSON: No, I understand.
12 I'm talking about your view.

13 MS. HANSFORD: Yes. But --

14 JUSTICE JACKSON: You're -- you're
15 saying that there's no way to take out the
16 seriousness of the offense, and you're now saying
17 the seriousness of the offense is the initial
18 offense.

19 MS. HANSFORD: Yes. And --

20 JUSTICE JACKSON: But -- but you
21 concede that supervised release is a totally
22 different thing than the initial offense.

23 MS. HANSFORD: Yeah.

24 JUSTICE JACKSON: So why couldn't you
25 revoke --

1 MS. HANSFORD: So --

2 JUSTICE JACKSON: -- without looking
3 at the initial offense?

4 MS. HANSFORD: -- two reasons you
5 can't revoke without looking at the seriousness
6 of the initial offense. 3553(a)(1) also refers
7 to nature and circumstances of the offense,
8 which is that same original offense of
9 conviction. So the overlap is exactly the same.
10 It's the offense in (a)(1) and in (a)(2)(A).

11 And the second --

12 JUSTICE JACKSON: All right. So -- so
13 nature and circumstances is the facts related to
14 the original offense. Seriousness of the
15 offense is an -- a -- a -- relative
16 consideration. How serious is this relative to
17 other kinds of offenses and other people and
18 whatever?

19 So, I mean, those are two different
20 factors in this very statute. They're listed
21 differently.

22 MS. HANSFORD: Sure. So I think the
23 other reason that a court -- that Congress
24 couldn't have meant for that to be excluded is
25 that (e)(3) actually ties the maximum term of

1 re-imprisonment to the severity of the initial
2 offense, which is another way it shows that a
3 court must be allowed to consider it.

4 But, in practice, just to flesh this
5 out, why would a court think about the
6 seriousness of the offense even beyond the
7 requirement to do so, if a -- an -- it -- it
8 might cast light on the nature of the violation.

9 So consider an offender whose
10 violation is carrying a weapon. If that
11 offender's initial offense was a murder or
12 assault on a domestic partner with a weapon, I
13 think that a court would perceive that violation
14 very differently than if the underlying offense
15 was fraud.

16 So the severity of the underlying
17 offense can provide critical context in
18 assessing the violation and in informing a
19 court's decision about what to do about the
20 violation.

21 JUSTICE GORSUCH: Ms. Hansford --

22 JUSTICE KAVANAUGH: Can I --

23 JUSTICE GORSUCH: -- I -- I -- I see
24 almost complete overlap with all three. I mean,
25 seriousness of offense, as you say, appears

1 through the first -- first one, nature and
2 circumstances of the offense and the history of
3 the offender basically.

4 The second one, respect for the law,
5 deterrence.

6 Just punishment seems to me to capture
7 all those things, right? Look at the -- look at
8 the defendant -- look at his offense, look at
9 the need for deterrence and incapacitation to
10 protect the -- it's all the same thing. It's
11 all the same thing.

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

21 So why -- why should we worry? All
22 we're doing is -- is requiring judges to pull
23 out a thesaurus.

24 MS. HANSFORD: If I may respond?

25 CHIEF JUSTICE ROBERTS: Sure.

1 MS. HANSFORD: I think that you're
2 getting no value by asking justices -- judges to
3 pull out a thesaurus.

4 JUSTICE GORSUCH: I understand. I
5 understand. I understand that it's a
6 hoop-jumping exercise.

7 MS. HANSFORD: Sure.

8 JUSTICE GORSUCH: But some circuits
9 have done it. Tell me how it's proven
10 unworkable on the ground.

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

20 And I -- and other courts have imposed
21 other atextual limits that Petitioner disclaims,
22 like that it has to be the primary
23 consideration, and so just referring to it is
24 not enough, but you have to refer to it, I don't
25 know, five times. And so I think there have

1 been limits.

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas?

15 Justice Alito, anything further?

16 Justice Sotomayor?

17 Justice Kagan?

18 Justice Gorsuch?

19 JUSTICE KAVANAUGH: Just to pick up on
20 Justice Barrett's question and what Justice
21 Gorsuch was just saying, you know, if you lose,
22 I think telling district courts: Just avoid the
23 word "punish" or "punishment" and you're good to
24 go, and if it's not objected to, it's not plain
25 error if you have used it, is probably what

1 you're looking for.

2 But tell me -- tell me if -- tell me
3 what else.

4 MS. HANSFORD: I mean, I -- I think,
5 if the -- you know, if -- if we're losing, we
6 would ask this Court to give as specific of
7 instructions as possible for what words courts
8 should avoid.

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

15 And so I do think that whatever the
16 magic words are, yes, courts will learn to avoid
17 them. But I really think that will skew the
18 process, particularly if it suggests that on the
19 substance courts should not be considering what
20 is --

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

24 MS. HANSFORD: The --

25 JUSTICE KAVANAUGH: "Punish" or

1 "punishment."

2 MS. HANSFORD: And -- and I guess one
3 other thing I would note about "punish" or
4 "punishment" is there is some sense that
5 retribution is a hallmark of punishment, but, of
6 course, deterrence is another hallmark of
7 punishment and -- and -- and another core
8 feature of punishment.

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

11 JUSTICE KAVANAUGH: Okay.

12 MS. HANSFORD: -- because, when
13 something is used for deterrence as opposed to
14 compensatory purposes, we often think it's
15 punitive, like punitive damages.

16 So I'm -- I'm not really sure why
17 "punish" --

18 JUSTICE KAVANAUGH: I think you're
19 arguing again for why you should win, but
20 that's -- that's good enough. Thanks.

21 MS. HANSFORD: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 Thank you, counsel.

1 Rebuttal?

2 REBUTTAL ARGUMENT OF CHRISTIAN J. GROSTIC
3 ON BEHALF OF THE PETITIONER

4 MR. GROSTIC: Thank you, Mr. Chief
5 Justice.

6 And I -- I -- I want to respond to
7 the -- the repeated questions about the
8 hoop-jumping exercise idea and the -- and the
9 magic words idea, is there anything really
10 happening here.

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

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

25 In -- in *Tapia*, this Court observed

1 that that meant that retribution was off the
2 table. The Senate report confirms what we see
3 in the text, again, that supervised release "may
4 not be imposed for purposes of punishment."

5 And then, as we follow down through
6 3583, everything that Congress wrote follows
7 that same beginning. In (d), courts can impose
8 conditions but not for (a)(2)(A) purposes.

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

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

20 And then, when we get to (e) and the
21 options of terminating, modifying, or revoking,
22 if an offender while on supervision now has --
23 their conduct has indicated some need for a
24 change from what the court originally thought
25 was appropriate, Congress gave courts tools to

1 do that but, again, for those same purposes and
2 not the retributive purpose.

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:32 a.m., the case
13 was submitted.)
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