No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

ANDRE RALPH HAYMOND, RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF FAMM AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Statutes, rules, and guideline:

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INTEREST OF *AMICI CURIAE*

Amici curiae are FAMM and the National Association of Criminal Defense Lawyers (NACDL).[*]

FAMM is a national, nonprofit, nonpartisan organization of over 75,000 members. FAMM was founded in 1991 to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Today, FAMM pursues a

[*] No counsel for a party authored this brief in whole or in part, and no counsel or entity other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. *Amici* received the government's consent to file this brief by letter and have filed that letter with the Clerk. Respondent's consent to the filing of *amicus* briefs is filed with the Clerk.

broader mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences and prison polices, FAMM gives voice to incarcerated individuals, their families, and their communities.

NACDL is a nonprofit voluntary professional bar association founded in 1958 that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

Amici advance their missions in several ways, including through *amicus* filings in this Court and other courts throughout the country. *Amici* are filing this brief because this case illustrates the heavy and unnecessary toll extracted by mandatory sentencing laws. The district court sentenced respondent Andre Haymond to a mandatory, five-year term of reimprisonment after finding, by a preponderance of the evidence based on "less than clear" testimony and "circumstantial" proof, that he had possessed a few thumbnail images of child pornography while on supervised release. Pet. App. 64a–65a. The district court was explicit that "[i]f this were a criminal trial [on possession] and the Court were the jury, the United States would have lost." Pet. App. 68a. The court also expressed serious misgivings about the mandatory minimum penalty, noting if 18 U.S.C. § 3583(k) did not require at least a five-year sentence, "the court would have looked

at this as a grade B violation and probably would have sentenced in the range of two years or less." Pet. App. 15a. This case accordingly highlights the grave unfairness of Section 3583(k), and the inconsistency between its requirements and the constitutional guarantees of due process and the right to trial by jury.

SUMMARY OF ARGUMENT

The constitutional problems in this case stem from a unique feature of a unique federal criminal statute.

In most cases, when a jury convicts a defendant (or the defendant enters a knowing and intelligent guilty plea), the verdict authorizes not only an initial term of imprisonment, but also a period of supervised release. This period of post-imprisonment conditional liberty is "overseen by the sentencing court," *Johnson v. United States*, 529 U.S. 694, 697 (2000), which administers supervised release within the limits of the jury's mandate. If the defendant violates the terms of her supervised release, then the sentencing court has the authority to return the defendant to prison. A federal statute, 18 U.S.C. § 3583(e)(3), ties the maximum potential term of reimprisonment to the offense of conviction, with a maximum possible term of five years for serious offenders. Under this system, the jury's verdict alone authorizes the potential sentences the defendant may receive—both initially, and if the defendant commits a supervised release violation.

The statute at issue here, 18 U.S.C. § 3583(k), is different. It provides that the sentencing court must sentence the defendant to *at least* five years' reimprisonment if the court finds, by a preponderance of the reliable evidence presented at a summary hearing—that the defendant committed one of a specified set of statutory offenses

while on supervised release. That requirement applies even though the jury's verdict authorizes *at most* five years' reimprisonment for serious offenders, and much less for others.

That unique aspect of Section 3583(k) is what renders it unconstitutional. As this Court's precedents make clear, "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 549 U.S. 270, 281 (2007). That principle applies both to statutes that increase the maximum potential term of imprisonment as well as those that trigger or increase any minimum. *Alleyne v. United States*, 570 U.S. 99, 115–16 (2013). And that is just what Section 3583(k) does. As this Court has made clear, supervised release, including the term of reimprisonment in the event of a violation, is part of the punishment for the original offense of conviction. *See Johnson*, 529 U.S. at 700; *see also* 18 U.S.C. § 3583(a) (supervised release is "part of the sentence"). And Section 3583(k) increases that term of reimprisonment beyond the term authorized by the jury verdict, based on facts "found by . . . a judge . . . merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at 281.

The facts of this case well illustrate the problem. The jury convicted respondent of a violation of 18 U.S.C. § 2252(a)(4)(B), which is a Class C felony. *See* 18 U.S.C. § 3559(a)(3) (classifications of federal offenses). That conviction authorized respondent's initial prison term (38 months), which fell within the statutory range of 0 to 10 years. *See id.* § 2252(b)(2). The conviction also authorized the term of supervised release that the judge imposed—10 years, within the statutory range of five years to life. *See id.* § 3583(k). Finally, and most pertinent here, the

conviction for committing a Class C felony authorized imposition of up to two *additional* years' imprisonment in the event that respondent were to violate a condition of his supervised release. *See id.* § 3583(e)(3).

Section 3583(k) would require that respondent serve a much longer term of reimprisonment, based solely on judge-found facts. In 2015, respondent's probation officer reported several supervised release violations. The district court then conducted a revocation hearing under Federal Rule of Criminal Procedure 32.1(b) to determine whether respondent had committed one of the offenses specified in Section 3583(k). This proceeding looked like a trial, but lacked many of the accompanying procedural safeguards. As the government notes, Br. 13, respondent called several witnesses (including an expert) and provided testimony, and both respondent and the government filed extensive legal briefs about whether his conduct amounted to the commission of one of those offenses. The court then found, by a preponderance of the reliable evidence,[1] that Haymond had committed a predicate offense under Section 3583(k), which triggered a mandatory prison term more than double the maximum term of reimprisonment authorized by the jury's verdict for the offense of conviction.

The government's brief largely sails past this problem, focusing instead on a defense of the general proposition that the Fifth and Sixth Amendments do not forbid the

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[1] The Federal Rules of Evidence do not apply at a revocation hearing or at sentencings. *See* Fed. R. Evid. 1101(d)(3). The admissibility of evidence at a revocation hearing is governed not by the Rules of Evidence, but by a minimal due process standard of reliability. *See Gagnon v. Scarpelli*, 411 U. S. 778, 786 (1973).

imposition of a prison term for a supervised release violation. *See* Br. 23–28. *Amici* do not dispute that point. But the statute at issue here does something more: It *increases* the prison term for a supervised release violation term beyond what the jury's verdict authorizes. And the fact that this constitutional flaw occurs in the context of supervised release revocation changes nothing, because "[t]he dispositive question . . . 'is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)). Indeed, this Court has already suggested that it would be unconstitutional to increase post-revocation penalties based on something other than the "original conviction." *See Johnson*, 529 U.S. at 701.

For these reasons, Section 3583(k) is unconstitutional, and the judgment below should be affirmed.

ARGUMENT

18 U.S.C. § 3583(K) IMPERMISSIBLY INCREASES A DEFENDANT'S SENTENCE BASED ON JUDGE-FOUND FACTS ABOUT A NEW AND DIFFERENT CRIMINAL OFFENSE.

This Court has already determined that any term of supervised release and any penalty for violating supervised release are part of the sentence for the initial offense. *See Johnson*, 529 U.S. at 700. This Court's precedents also make clear that a defendant's sentence must be within the range authorized by the jury's verdict. *See Cunningham*, 549 U.S. at 281. Accordingly, the punishment for a violation of supervised release must be within the statutory range for that violation, which is in turn authorized by the plea or jury verdict underlying the original offense of conviction.

A. The Fifth and Sixth Amendments Do Not Permit A Defendant's Sentence To Be Increased Beyond What The Jury Authorized Based on Judge-Found Facts.

1. This Court has repeatedly instructed that "a judge may impose" a sentence "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original); *accord Cunningham*, 549 U.S. at 288; *Ring*, 536 U.S. at 586. "[W]hile judges may exercise discretion in sentencing, they may not 'inflic[t] punishment that the jury's verdict alone does not allow.'" *Southern Union Co. v. United States*, 567 U.S. 343, 348 (2012) (quoting *Blakely*, 542 U.S. at 304). The Fifth and Sixth Amendments therefore require that any fact that increases the maximum or minimum penalty for a crime "must be submitted to the jury." *Alleyne*, 570 U.S. at 108.

This Court has also rejected the notion that a necessary fact for a heightened penalty can escape the purview of this rule merely because it is labeled as a sentencing enhancement. If a defendant's punishment is contingent on the finding of a fact, "that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602; *accord Sattazahn v. Pennsylvania*, 537 U.S. 101, 110–12 (2003). This principle applies "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). The question "is one not of form, but of effect." *Apprendi*, 530 U.S. at 494.

The upshot of this constitutional doctrine is that the jury is not permitted to "mak[e] a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542

U.S. at 306. But that is precisely how the challenged provision of 18 U.S.C. § 3583(k) operates. Unlike all other provisions of the supervised release statute, Section 3583(k) requires judicial factfinding that not only establishes the existence of a supervised release violation (which is not constitutionally problematic) but also increases the range of penalties that must be imposed upon that finding (which is constitutionally prohibited). *See United States v. Booker*, 543 U.S. 220, 235 (2005); *Blakely*, 542 U.S. at 305.

In finding the defendant in this case guilty of violating 18 U.S.C. § 2252(a)(4)(B) beyond a reasonable doubt, the jury authorized "imprison[ment] not more than 10 years," 18 U.S.C. § 2252(b)(2),[2] and a term of supervised release between five years and life, 18 U.S.C. § 3583(k); *see also* 18 U.S.C. § 3583(a) (supervised release is "part of the sentence"). Further, by convicting the defendant of a Class C felony based on the facts that it found beyond a reasonable doubt, the jury authorized a term of imprisonment for any revocation of supervised release of up to "2 years in prison." 18 U.S.C. § 3583(e)(3). Under that statute, the potential terms of imprisonment for supervised release violations flow from the jury's verdict (or guilty plea): For Class A felonies, a defendant can receive up to five years; for Class B felonies, up to three years; for Class C and D felonies, up to two years, and for all others, up to one year. *Ibid.*

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[2] Monetary penalties and forfeiture are also permitted, *see* 18 U.S.C. §§ 2252(b)(2), 2253, 2259(a), but were not applied in this case. The district court did impose a $100 special assessment, as required by 18 U.S.C. § 3013(a)(2). J. & Commitment, *United States v. Haymond*, Crim. No. 08-201, Dkt. No. 150 (Jun. 21, 2010).

Respondent, however, received a higher sentence for his supervised release violation, based on the last two sentences of Section 3583(k). That statute requires the judge to impose a sentence of at least five years' imprisonment, and potentially as long as life, "only upon finding [of] some additional fact." *Blakely*, 542 U.S. at 305. That additional fact is that the defendant has "commit[ted] any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed." 18 U.S.C. § 3583(k).[3] Because that additional fact increased the sentencing range for respondent's supervised release violation, the Constitution required a jury, not a judge, to make that finding.

The contrast between the relevant provisions of Section 3583 highlights why Section 3583(k) violates the Fifth and Sixth Amendments. Section 3583(e)(3)—and the idea of revocation generally—is consistent with the Sixth Amendment principle recognized in *Apprendi* and the cases that followed because it permits imposition of prison terms within limits set by the jury's findings. *See, e.g.*, *United States v. McIntosh*, 630 F.3d 699, 703 (7th Cir. 2011) (reimprisonment for a violation of supervised release pursuant to Section 3583(e)(3) does not create "an additional penalty on top of a defendant's original sentence" that "go[es] beyond the statutory maximum . . . im-

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[3] This case does not present the question whether the increased penalty set forth in Section 3583(k) may constitutionally be imposed on a releasee if the fact of having committed a specified additional offense were to be established by a judgment of conviction for that new offense, rather than by evidence of criminal conduct with no new conviction. *Cf. Almendarez-Torres v. United States*, 523 U. S. 224 (1998).

posed by the sentencing court following a defendant's conviction"). Under Section 3583(e)(3), the jury's verdict as to a defendant's initial offense establishes the outer limits of the consequences of any future supervised release violation, and the judge's finding of a supervised release violation simply triggers a sentence within that jury-authorized range. Section 3583(k), by contrast, creates a mandatory, elevated sentence range based not on the original offense of conviction, but on post-sentencing conduct found by a judge. This outcome is unlawful, because "the jury's verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305.

Moreover, Section 3583(k)'s mandatory-sentencing requirement distinguishes it from the discretionary scheme established by the rest of the supervised release statute and accompanying guidelines. Section 3583(k) contains the *only* provision in the supervised release statute that imposes a mandatory sentence.[4] All other post-revocation sentences are governed by Section 3583(e)(3), which gives judges discretion over whether to imprison defendants at all within statutorily-specified ranges set by the original offense of conviction. Similarly, Chapter 7 of the Sentencing Guidelines provides advisory policy statements regarding the period of reincarceration attendant

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[4] *Amici* do not understand 18 U.S.C. § 3583(g) to require imposition of any minimum term of imprisonment in the cases covered by that provision. If it did, the same issue presented here would seemingly arise. In any event, that provision is not before the Court in the present case and need not be further addressed.

to different types of violations.[5] *See* U.S.S.G. § 7B1.4. This discretion—which is absent in Section 3583(k)—is critical to the very purpose of supervised release. *See Johnson*, 529 U.S. at 708–09 ("The congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from prison to liberty . . . . Congress aimed, then to use the district courts' discretionary judgment to those who needed it the most.").[6]

2. The government's opening brief ignores these straightforward conclusions and focuses largely on defending issues that *amici* do not dispute, such as the ability of judges to revoke supervised release in a similar manner to their ability to revoke probation or parole. In focusing on these uncontroversial issues, the government sidesteps this Court's mandate that "all facts legally essential to the punishment" must be proven beyond a reasonable doubt to a jury. *Blakely*, 542 U.S. at 313.

a. The government's lengthy arguments that the Sixth Amendment does not apply to "the revocation of conditional liberty" are nonresponsive to the question

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[5] Courts of Appeals that have upheld the constitutionality of post-revocation sentencing for violations of supervised release against *Apprendi*-type challenges have often based their decisions on the discretionary nature of the penalty. *See, e.g.*, *United States v. Contreras-Martinez*, 409 F.3d 1236, 1243 (10th Cir. 2005).

[6] Importantly, the discretion afforded to judges under Section 3583(e)(3) does not infringe upon "the jury's traditional function of findings facts essential to the lawful imposition of the penalty." *Blakely*, 542 U.S. at 309. Section 3583(k), on the other hand, infringes not only on the traditional role of the jury but also that of the judge.

presented. Br. at 23–31. *Amici* are not arguing that judicial factfinding as to the *existence* of a supervised release violation necessarily runs afoul of constitutional safeguards. As noted above, that factfinding simply triggers the imposition of a sentence authorized by the jury's verdict. *See* 18 U.S.C. § 3583(e)(3). The problem with Section 3583(k) instead is that it impermissibly *increased the penalty* for respondent's violation of supervised release, which is "a part of the original sentence imposed by the sentencing court following a defendant's conviction by a jury based on proof beyond a reasonable doubt." *McIntosh*, 630 F.3d at 703.

Take, for example, Cornell Johnson, who was originally convicted of a Class D felony and sentenced to 25 months' imprisonment and three years' supervised release. *Johnson*, 529 U.S. at 697. Johnson subsequently violated the conditions of his supervised release by committing another crime. *Id.* at 697. Under Section 3583(e)(3), the statutory maximum for this violation (two years) was determined by the fact that the jury *originally* convicted him of a Class D felony—not the nature of the *new* crime underlying his violation. In other words, Johnson's "new prison term [was] limited . . . according to the gravity of the original offense." *Id.* at 712. And the judge's factfinding simply triggered a reimprisonment range already established by the jury's verdict. As a result, this Court explained that it was no "mere formalism to link the second prison sentence to the initial offense." *Id.* at 708.

Here, however, Haymond's "second prison sentence" has nothing to do with his original offense of conviction; instead, it has everything to do with the *new* crime he was accused of committing while on supervised release. Even though Section 3583(e)(3) provides a two-year maximum

term of imprisonment for Class C felonies, Haymond received a sentence of five years based solely on the judge's finding that he had committed a specific type of supervised release violation. While Johnson's punishment for violating supervised release was authorized by the jury's verdict, Haymond's was not (and could not have been).

b. The government also misses the mark in citing caselaw regarding the revocation of probation and parole, as well as "[h]istorical practice" regarding probation and parole, in defending the constitutionality of Section 3583(k). *See* Br. 31–39. Again, Section 3583(k)'s constitutional flaw is not that it allows for the revocation of supervised release by a judge, without all the procedural protections of a new criminal trial.[7] Rather, Section 3583(k)'s flaw is its requirement that the district court impose penalties for certain supervised release violations within an elevated sentencing range, including an otherwise inapplicable mandatory minimum, based on the finding of additional facts unrelated to the jury's initial verdict.

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[7] *See Black v. Romano*, 471 U.S. 606, 607 (1985) (considering "whether the Due Process Clause of the Fourteenth Amendment generally requires a sentencing court to indicate that it has considered alternatives to incarceration before *revoking* probation") (emphasis added); *Gagnon*, 411 U.S. at 779 (addressing the "questions whether a previously sentenced probationer is entitled to a hearing when his probation is *revoked* and, if so, whether he is entitled to be represented by appointed counsel at such a hearing") (emphasis added); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (considering whether "the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to *revoking* his parole" (emphasis added)).

The government's references to parole ultimately support *amici*'s position, because—in contrast to the penalties imposed pursuant to Section 3583(k)—the penalties imposed for violating parole fall within a range established by "facts reflected in the jury verdict." *Blakely*, 542 U.S. at 303. Like supervised release, revocation of parole may call for the deprivation of "the conditional liberty properly dependent on observance" of certain conditions imposed on the individual. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Revocation precedes its consequences, which in some cases can involve the imposition of a term of reimprisonment. But in the parole context, the term of reimprisonment after revocation is the "remainder of the term for which [the defendant] was sentenced." 18 U.S.C. § 4207 (1970); *see also* 18 U.S.C. §§ 4210(a), (b)(2) (1982).[8] That remainder term necessarily flows from the jury's verdict.

Probation operations similarly. After revocation, the district court "resentence[s] the defendant" based on the same statutory range that was determined by the jury's original verdict. 18 U.S.C. § 3565(a)(2); *see United States v. Holdsworth*, 830 F.3d 779, 783 (8th Cir. 2016) (district court has power "to sentence a probation violator within the range of sentences available at the time of the initial sentence" (citations omitted)). Under no circumstances

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[8] The Sentencing Reform Act of 1984 eliminated parole for offenses committed after November 1, 1987. Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2) 98 Stat. 1987, 1999. To comply with the Ex Post Facto Clause, Congress has extended the authority of the Parole Commission to administer parole for those serving pre-SRA sentences. *See* Pub. L. No. 115-274, § 2, 132 Stat. 4160, 4160.

can the revocation sentence exceed the statutory maximum for the original offense. *See, e.g.*, *United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014).

In short, in the parole or probation contexts, the district court cannot impose a term of imprisonment above the sentencing range authorized by the jury verdict (or guilty plea) for the original offense. More specifically, the district court cannot trigger a mandatory heightened range of penalties by finding additional facts regarding the particular manner in which the defendant violated the terms of his or her conditional release.

c. The government's argument that there is a talismanic distinction between the "imposition" of a sentence (which is protected by the jury trial right) and the "administration" of a sentence through post-conviction proceedings (which is not), is similarly ill-conceived. *See* Br. 23-24, 30-31. The government cites one case for this proposition (*Oregon v. Ice*), and it refutes the government's distinction. In *Ice*, which the government characterizes as a case about "administering . . . sentences," the Court repeatedly stated that it was evaluating the constitutionality of "a judge's *imposition* of consecutive, rather than concurrent, sentences." 555 U.S. 160, 169 (2009) (emphasis added); *see also id.* at 163, 164, 165, 166, 168, 171.

Moreover, the government's attempt to ascribe constitutional significance to a temporal distinction should be rejected. The constitutional problem presented here was not at issue in *Ice*. There, the jury's guilty verdicts on six distinct counts authorized separate sentences for each offense, and the only issue was the sentencing court's authority to determine how those already-authorized sentences should be served. *Id.* at 165–66. Section 3583(k), by contrast, does increase penalties beyond the bounds of

the jury's verdict, and so "implicates *Apprendi*'s core concern: a legislative attempt to 'remove from the [province of the] jury' the determination of facts that warrant punishment for a specific statutory offense." *Id.* at 170 (alterations in original) (quoting *Apprendi*, 530 U.S. at 490).

d. Finally, the government ignores *Alleyne* in urging that Section 3583(k)'s mandatory minimum of five years is constitutionally insignificant because, "[a]t respondent's initial sentencing, the court was authorized to impose a sentence of zero to ten years of imprisonment, 18 U.S.C. 2252(b)(2)." Br. 46. As this Court explained in *Alleyne*, "when a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact." 570 U.S. at 114–15.

What is more, the government's apparent position—that all post-conviction consequences can be characterized as the sentencing court's implementation of the original sentence—proves far too much. *See* Br. 46 ("The court simply implemented the sentence that respondent received initially and was 'exposed' to all along."). After all, in each of the cases in which this Court has struck down statutes enhancing sentences based on facts not found by a jury beyond a reasonable doubt—going all the way back to *Apprendi* itself—those very statutes could also be semantically recast as "the sentence that respondent . . . was 'exposed' to all along" by virtue of his original conviction. U.S. Br. 46. In essence, the government's argument is that a conviction authorizes the maximum sentence the statute permitted if every unfavorable and sentence-enhancing fact were found by a jury. But "the relevant 'statutory maximum' is not the maximum sentence a

judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303–04.

B. The Mandatory Sentencing Enhancement in Section 3583(k) Is Not Part of The Penalty for The Initial offense and Therefore Violates Due Process.

In *Johnson v. United States*, the Court concluded that both supervised release and penalties for revocation are part of the sentence for an offense. 529 U.S. at 624 ("We . . . attribute post-revocation penalties to the original conviction."). This outcome was appropriate under the statutory regime then in place, where Section 3583(e)(3) always provided the upper limits on post-revocation penalties based on the severity of the initial crime of conviction.

Section 3583(k)'s later-enacted requirement that a judge impose a mandatory enhanced penalty based on judge-found facts about a *different* offense contravenes that foundational underpinning of *Johnson*. As discussed, *infra* at 12–15, for parole, probation, and supervisees like Johnson, the upper limit of their period of reimprisonment after revocation of conditional liberty is defined by the jury verdict. For respondent, by contrast, the upper limit for reimprisonment was set by the judge's findings regarding a different, uncharged criminal offense, which resulted in a sentencing range that looked nothing like the original sentencing range. Thus, Section 3583(k)'s penalties cannot be said to be "part of the penalty for the initial offense." *Johnson*, 529 U.S. at 700.

Punishing the defendant for an offense other than the crime of conviction does not just invalidate the logic underpinning *Johnson*—it also raises serious due process concerns. *See Blakely*, 542 U.S. at 306 (rejecting a system in which "a judge could sentence a man for committing

murder even if the jury convicted him only of illegally possessing the firearm used to commit it"). The penalty under Section 3583(k), which not only requires a minimum of five years in prison but also allows for a life sentence, is commensurate with the sentencing scheme for Class A felonies. *See* 18 U.S.C. § 3559(a)(1). But no jury ever convicted respondent of a Class A offense. Adopting the government's construction of Section 3583(k) would improperly bless a sentencing regime in which a judge effectively can sentence a defendant to a draconian, previously-unavailable prison term for a new criminal offense. The Court has rejected previous efforts to allow judge-found facts to dramatically alter a defendant's sentencing range. *See United States v. O'Brien*, 560 U.S. 218, 229 (2010) (concluding that use of a machine gun was an "element" of 18 U.S.C. § 924(c) as opposed to a "sentencing factor," in part, because such a finding can "vault[] a defendant's mandatory minimum sentence from 5 to 30 years"). Permitting that outcome here by upholding Section 3583(k) would allow the "tail"—an additional finding of fact—to "wag the dog of the substantive offense," in violation of the Due Process Clause. *Blakely*, 542 U.S. at 344 (Breyer, J., dissenting) (quotations and alterations omitted); *see also ibid.* ("[T]hat is the kind of problem that the Due Process Clause is well suited to cure.").

* * * * *

As this Court has recognized, the "ancient guarantee" of the right to trial by jury is the "great bulwark of our civil and political liberties." *Booker*, 543 U.S. at 237–39 (quotations and alterations omitted). The Framers understood—and feared—that this "jury right could be lost not only by gross denial, but by erosion." *Apprendi*, 530 U.S. at 483 (quoting *Jones v. United States*, 526 U.S. 227, 247–

48 (1999)). As a result, while policy and statutory procedure may evolve, "new sentencing practice" may not supersede the constitutional guarantee that the jury will always "stand between the individual and the power of the government." *Booker*, 543 U.S. at 237. For the reasons explained above, Section 3583(k) is inconsistent with this guarantee and violates both the Fifth and Sixth Amendments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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