No._____

IN THE SUPREME COURT OF THE UNITED STATES

DONTE ISLAND,
a/k/a Norman Tomas, a/k/a Norman Thomas,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether a term of supervised release may be tolled for periods of noncompliance with release conditions (as the Third Circuit, joining one side in a mature split, held in this case), or if instead the governing statute limits tolling to certain periods of renewed imprisonment (as held by the First Circuit and urged by a dissenting judge here).

RELATED PROCEEDINGS

United States v. Island, No. 17-3826, United States Court of Appeals for the Third Circuit (Feb. 26, 2019).

United States v. Island, No. 03-592, United States District Court for the Eastern District of Pennsylvania (Dec. 14, 2017).

United States v. Island, No. 05-10779, United States Supreme Court (June 5, 2006).

United States v. Island, No. 05-2758, United States Court of Appeals for the Third Circuit (Nov. 28, 2005).

United States v. Island, No. 03-592, United States District Court for the Eastern District of Pennsylvania (May 19, 2005).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donte Island respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 26, 2019.

OPINION BELOW

The opinion of the court of appeals affirming the district court's order revoking supervised release and sentencing Mr. Island to two further years' imprisonment is published at 916 F.3d 249 and attached as Appendix A. The court of appeals' order denying rehearing is at Appendix B. The district court's order revoking supervised release is at Appendix C. The original judgment of conviction is at Appendix D.

JURISDICTION

As reviewed in the discussion that follows, the district court lacked jurisdiction to enter the order revoking supervised release that is the subject of this appeal.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, as well as 18 U.S.C. § 3742(a). That court entered its opinion and judgment on February 26, 2019. Rehearing was denied by order of May 10, 2019. This petition is timely filed pursuant to Rule 13.3 and the

granting on July 29, 2019, of petitioner's application for a 30-day extension of time, docketed at No. 19A113.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides:

> The Congress shall have the Power***
>
> To constitute Tribunals inferior to the Supreme Court.

Article III, Section 1, of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.***

Section 3583 of Title 18, United States Code, provides:

> (a) In general. – The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]
>
> (b) Authorized terms of supervised release. – Except as otherwise provided, the authorized terms of supervised release are –
>
> > (1) for a Class A or Class B felony, not more than five years;
> >
> > (2) for a Class C or Class D felony, not more than three years; and
> >
> > (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.
>
> ***
>
> (e) Modification of conditions or revocation. – The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) –
>
> > (1) terminate a term of supervised release … after the expiration of one year of supervised release***;
> >
> > (2) extend a term of supervised release if less than the maximum authorized term was previously imposed***;
> >
> > (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release***

> (h) Supervised release following revocation. – When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment.***
>
> (i) Delayed revocation. – The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.
>
> ***

Section 3624(e) of Title 18, United States Code, provides:

> Supervision after release. – ***A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.***

STATEMENT OF THE CASE

Following a substantial period of federal imprisonment, petitioner Donte Island commenced a three-year term of supervised release. Two days after the term's expiration, the probation office filed a petition alleging that Mr. Island had violated release conditions by committing a new crime. At the hearing that ensued, the judge ordered that Mr. Island be returned to prison for two years based on the violation.

On appeal, Mr. Island challenged this exercise of jurisdiction, contending that the district court's revocation power had expired with the conclusion of his term of supervised release. The Third Circuit disagreed, holding the term of supervised release to have been "tolled" from a point at least nine months earlier by what it called Island's "fugitive status, *i.e.*, [his] fail[ure] to report and comply with the terms of his postrelease sentence." Pet. App. A at 8. While acknowledging the governing statute "do[es] not expressly provide" for such tolling, *id.* at 7, the majority concluded that the "design and purpose" of supervised release supported the exercise of jurisdiction, *id.* at 9.

In so ruling, the Third Circuit deepened what is now a 4-1 circuit split over whether federal courts possess authority to toll periods of supervised release based on a defendant's failure to comply with conditions of post-confinement monitoring. The broad tolling power divined by the Third Circuit and several others represents an instance of judicial policymaking with no grounding in the text or structure of the statute. The important and recurring question presented by this split merits consideration on the part of this Court to bring an end to the freewheeling authority presumed by those circuits that have seen fit to approve "fugitive" tolling of a term of supervised release.

1. The Sentencing Reform Act of 1984 abolished parole and created supervised release, a "unique method of post-confinement supervision," *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991), intended to "make a significant break with prior practice," *Johnson v. United States*, 529 U.S. 694, 724-25 (2000) (Scalia, J., dissenting); *see United States v. Haymond*, 139 S. Ct. 2369, 2382 (2019) (describing one-time operation of federal parole and observing "[a]ll that changed" with the invention of supervised release) (plurality opinion). In designing supervised release, Congress carried over some features of parole while rejecting others, with the broad goal of focusing resources upon those offenders most likely to benefit from post-confinement assistance. *See* S. Rep. 98-225 at 124-25 (1983), *reprinted at* 1984 U.S.C.C.A.N. 3182, 3307-08; *Johnson*, 529 U.S. at 709.

One feature of parole that the Sentencing Reform Act did not carry over to supervised release was fugitive tolling. Under the old system, a term of parole was subject to tolling (or its functional equivalent) in two circumstances: (1) if the defendant became a fugitive or (2) if the defendant was convicted of a new offense punishable by a term of imprisonment. *See* 28 C.F.R. § 2.52(c)(1) (fugitive tolling) & (2) (imprisonment tolling) (1981).[1] When Congress passed the Sentencing Reform Act, however, it enacted only one tolling provision: when the defendant "is imprisoned in connection with a conviction for a … crime unless the imprisonment is for a

[1] With regard to fugitivity, the parole regulations provided that "[i]f the … parolee intentionally refused or failed to respond to any reasonable request, order, summons or warrant of the [Parole] Commission or any agent thereof," then he would "forfeit[] … the time during which the parolee so refused or failed to respond, and such time shall not be credited to service of the sentence." 28 C.F.R. § 2.52(c)(1) (1981); *see also id.* § 2.40(i) (1983) ("Any parolee who absconds from supervision has effectively prevented his sentence from expiring."). With regard to a new conviction, the regulations provided that "[i]f the parolee [was] convicted of a new offense … punishable by a term of imprisonment," then he would "forfeit[] … the time from the date of [his] release to the date of execution of the [violation] warrant … and such time shall not be credited to service of the sentence." 28 C.F.R. § 2.52(c)(2) (1981).

period of less than 30 consecutive days." 18 U.S.C. § 3624(e); *see Mont v. United States*, 139 S. Ct. 1826 (2019) (construing § 3624(e) with regard to pretrial detention). Separately, a court's power to adjudicate a violation may be indefinitely extended in the event of abscondment, or other failures of compliance with release conditions, so long as before the supervised release term's expiration, a warrant or summons issues based on that violation. 18 U.S.C. § 3583(i); *see generally United States v. Buchanan*, 638 F.3d 448, 450 n.1 (4th Cir. 2011) (explaining that § 3583(i) affords reach-back jurisdiction but does not toll running of supervised release term).[2]

2. In 2004, petitioner Donte Island was convicted after a jury trial of illegal gun possession in violation of 18 U.S.C. § 922(g)(1) and sentenced to 110 months of imprisonment to be followed by 3 years of supervised release. Pet. App. D at 1-2. On June 26, 2013, he completed the prison sentence and began the term of supervised release, which was scheduled to end on June 25, 2016. C.A. App. 27.

Mr. Island did reasonably well for the first two years of supervised release. But on September 18, 2015, the probation office filed a petition alleging that he had violated the conditions of release by certain non-criminal conduct, namely, failing several drug tests, not informing the office of a changed address, and not reporting to his supervising officer or responding to attempts at contact. C.A. App. 27-30. The district court issued a warrant for his arrest, which remained outstanding. C.A. App. 30, 74.

[2] Section 3583(i) provides: "Delayed revocation. – The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation."

On June 27, 2016 – two days after the end of the supervised release term – the probation office submitted a second petition alleging that six days earlier Mr. Island had newly violated the conditions of release by shooting a gun at two police officers, one of whom he struck. C.A. App. 35-36. The district court issued a second warrant for his arrest. C.A. App. 75.

Subsequently Mr. Island, who had been apprehended by local police at the time of the shooting, was convicted in state court on several counts and sentenced to 33 to 100 years of imprisonment, which he is currently serving. C.A. App. 54-55, 69. Following imposition of the state sentence, the district court went forward with revocation proceedings. The court stated it would not sanction the technical violations set out in the first petition filed by the probation office, but would revoke supervised release based on the shooting alleged in the second petition and impose the maximum sentence of 24 months' imprisonment, consecutive to the state prison term. C.A. App. 69, 71. The court subsequently entered an order so providing. Pet. App. C.

3. On appeal, Mr. Island argued that the district court lacked jurisdiction[3] to order him returned to prison based on the shooting because the warrant for that violation had not issued until after the term of supervised release ended. He stressed that the statute provides for reach-back jurisdiction only if the alleged violation is set forth in support of a warrant or summons that issues before the term expires. 18 U.S.C. § 3583(i); *see Mont*, 139 S. Ct. at 1834 n.1 (noting § 3583(i)'s mechanism for "preserving jurisdiction"); *id.* at 1841 (Sotomayor, J., dissenting) (explaining that § 3583(i) "provides a way for a court to extend its revocation power"). Here,

[3] "[A] jurisdictional defect is not subject to waiver or forfeiture and may be raised at any time in the court of first instance and on direct appeal." *Hamer v. Neighborhood Housing Servs. of Chicago*, 138 S. Ct. 13, 17 (2017); *see United States v. Block*, 927 F.3d 978, 981 (7th Cir. 2019) (entertaining and according plenary review defendant's unpreserved objection to district court's exercise of jurisdiction to revoke supervised release); *United States v. Campbell*, 883 F.3d 1148, 1152 (9th Cir. 2018) (same); *United States v. Juarez-Velasquez*, 763 F.3d 430, 433 (5th Cir. 2014) (same).

Mr. Island submitted, § 3583(i) supplied jurisdiction over the technical violations set out in support of the warrant that issued when he ceased reporting, but not over the shooting for which he had been sentenced in state court to a 100-year term (unless released sooner by the Commonwealth of Pennsylvania pursuant to its own traditional parole system). The government disagreed, contending that § 3583(i) supplied jurisdiction to address the shooting as well as the technical violations, and arguing in the alternative that the term of supervised release was tolled during the period when Mr. Island "absconded" and his whereabouts were supposedly unknown.[4]

The Third Circuit declined to resolve whether the district court's exercise of jurisdiction under § 3583(i) was proper, *see* Pet. App. A at 3, instead holding that jurisdiction lay because "a defendant's term of supervised release is tolled during the period he is of 'fugitive' status," meaning any period he "fails to report and comply with the terms of his postrelease sentence," *id*. at 8. By that measure, the court concluded, Mr. Island's "fugitive status" had tolled the term of supervised release "at least" since September 2015. *Id*. at 14. Therefore, the term did not really end on June 25, 2016, and the warrant for the shooting "fell well within the tolled term." *Id.* at 15.

The majority acknowledged that the "plain language" of the governing statute "do[es] not expressly provide for tolling when a defendant absconds from supervision." Pet. App. A at 7. Nevertheless, the court applied fugitive tolling based on its interpretation of "two key principles that align with the purposes of supervised release." *Id*. at 8. "First, the rehabilitative goals of supervised release are served only when defendants abide by the terms of their supervision." *Id.*

[4] In fact, Mr. Island had been arrested on the occasion of the shooting at an address the federal probation office had on file.

"Second, … defendants are not generally credited for misdeeds, such as failing to comply with the terms of supervised release." *Id.* Presuming "the fugitive tolling doctrine" to "help[] realize the design and purpose of supervised release," the court held that "a supervised release term tolls while a defendant is of fugitive status." *Id*. at 9. In this conclusion, the Third Circuit expressly recognized a circuit split on fugitive tolling of supervised release, joining the three circuits that have adopted the doctrine while acknowledging the First Circuit to have held to the contrary. *See id.* at 8.[5]

Judge Rendell dissented based on the "plain language" of the governing statute, which "incorporate[s] tolling under 18 U.S.C. § 3624(e) for periods of imprisonment, but … not … for fugitive status." Pet. App. A at 17. Therefore, "we should presume Congress intended to exclude" fugitive tolling. *Id.* Fugitive tolling also is not necessary to further the "purpose" of supervised release, Judge Rendell explained, since "absconding from supervision is, on its own, grounds to revoke supervision," and § 3583(i) supplies jurisdiction to address a violation so long as a warrant issues "before the expiration of the term." *Id*. at 20-21. Indeed, fugitive tolling arguably undermines the purpose of supervised release, since it complicates the "ease and clarity of the current regime" by raising "complex factual questions" of fugitive status. *Id*. at 21.

Mr. Island's petition for rehearing was denied. Pet. App. B. This timely petition follows.

[5] *Compare United States v. Barinas*, 865 F.3d 99, 106 (2d Cir. 2017) (adopting fugitive tolling), *United States v. Buchanan*, 638 F.3d 448, 453–58 (4th Cir. 2011) (same), *and United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005) (same), *with United States v. Hernandez-Ferrer*, 599 F.3d 63, 67–68 (1st Cir. 2010) (rejecting fugitive tolling).

REASONS FOR GRANTING THE WRIT

Unlike the old parole regulations, the Sentencing Reform Act provides for tolling of supervised release in a single circumstance: when the defendant is imprisoned in connection with a new offense. *See* 18 U.S.C. § 3624(e). Nevertheless, four courts of appeals have held that the "purpose" of supervised release also requires tolling when a defendant absconds and becomes a fugitive, or even should he fail to comply with *any* condition of supervised release, such as obligations to maintain employment or submit to drug testing. One circuit, by contrast, has held the governing statute to preclude such "fugitive" tolling.

The resurrection of fugitive tolling marks a troublesome departure from the statute enacted by Congress, injecting complexity and inconsistency into a system that was designed to be streamlined and predictable. Fugitive tolling is also entirely needless in light of the alternative mechanism by which the statute, at 18 U.S.C. § 3583(i), specifically ensures that jurisdiction may be indefinitely preserved over defendants who in fact abscond, simply by issuing a warrant or summons for that violation before the term of supervision expires. And fugitive tolling undermines the rehabilitative purpose of supervised release by leaving defendants in limbo as to whether they have fully discharged a sentence or instead remain subject to further sanctions in abbreviated proceedings.

Because the resurrection of fugitive tolling potentially enlarges jurisdiction to return a defendant to prison whenever revocation proceedings go forward following the supervised release term's scheduled expiration, the question presented is an important and recurring issue that merits this Court's attention. The entrenched 4-1 split should be resolved by holding that a term of supervised release is not tolled for periods of fugitive status.

A. The Circuit Courts are Split on Whether Fugitive Tolling Applies to a Term of Supervised Release.

The Sentencing Reform Act expressly provides for tolling of supervised release only when the defendant "is imprisoned in connection with a conviction for a … crime unless the imprisonment is for a period of less than 30 consecutive days." 18 U.S.C. § 3624(e); *see generally Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (holding § 3624(e) to toll supervised release for pretrial detention later credited as time served for a new conviction). Yet a split has emerged among the courts of appeals as to whether a term of supervised release should nonetheless also be tolled when the defendant absconds from supervision and becomes a fugitive.

The Second, Third, Fourth, and Ninth Circuits have adopted fugitive tolling on the view that it "helps realize the design and purpose of supervised release." Pet. App. A at 9; *see United States v. Barinas*, 865 F.3d 99, 107-09 (2d Cir. 2017); *United States v. Buchanan*, 638 F.3d 448, 455-57 (4th Cir. 2011); *United States v. Murguia-Oliveros*, 421 F.3d 951, 953-54 (9th Cir. 2005). These circuits recognize that the "statutory provisions regarding supervised release do not expressly provide for tolling during fugitive status." *Murguia-Olveros*, 421 F.3d at 953. But they hold that fugitive tolling is "necessary to the purpose of supervised release," *id.* at 954, since it supposedly prevents the defendant from "benefit[ing] from his fugitivity," *Barinas*, 865 F.3d at 109, and furthers "the congressional intent … for defendants to serve their full release terms," *Buchanan*, 638 F.3d at 455.

The First Circuit, by contrast, does not apply fugitive tolling to supervised release because it is contrary to the text and structure of the governing statute. *See United States v. Hernandez-Ferrer*, 599 F.3d 63, 67-69 (1st Cir. 2010) (per Selya, J., joined by Torruella and Lipez, JJ.). "The only tolling provision that Congress saw fit to enact … provided for tolling

when [the defendant] was imprisoned for another offense," not "tolling during periods when offenders were in fugitive status." 599 F.3d at 67-68. The interpretive canon of *expressio unius est exclusio alterius* thus demands recognition of Congress's intent to limit tolling to periods of imprisonment, prohibiting courts from presuming authority to toll a term of supervised release "for any other reason (including an offender's fugitive status)." *Id.* at 68-69.

The First Circuit further explained why fugitive tolling does not promote any purpose of supervised release. Under § 3583(i), "as long as a warrant or summons issues before the expiration of the term, an offender who remains a fugitive will still be subject to the court's jurisdiction once located, and his conduct while a fugitive will be considered at sentencing." 599 F.3d at 69. "It follows that a judicially contrived tolling mechanism is not necessary to deter offenders from absconding." *Ibid.*

The 4-1 circuit split reflects deep division on whether a term of supervised release should be tolled when the defendant absconds and becomes a fugitive. Further percolation of the question will not be helpful, as five circuits have weighed in and the lines of argument on each side are clearly drawn. The time is now for this Court to resolve the dispute as to whether some singular "purpose" of supervised release permits tolling of a sentence's expiration for fugitive status, or if instead the text and structure of the governing statute prohibit it.

B. Whether Fugitive Tolling Applies Is an Important and Recurring Question.

The circuit split merits this Court's attention. Whether a court may toll for fugitive status can determine whether it has jurisdiction in any case where a hearing goes forward on an alleged violation after the scheduled end of the term. Indeed, judges, probation officers, and prosecutors have every reason to invoke fugitive tolling even at hearings where no jurisdictional issue arises

should they wish to extend the term of supervision. The Court should step in to address the critical question thus presented as to the administration of supervised release.

Fugitive tolling is a broad and imprecise doctrine that is potentially applicable at every revocation proceeding. According to at least some of the circuits that have adopted fugitive tolling, a term of supervision should be tolled whenever the defendant 'absconds,' as it were, "by failing to comply with the terms of his supervised release," *Murguia-Oliveros*, 421 F.3d at 953, even if no arrest warrant has been issued, *United States v. Ignacio Juarez*, 601 F.3d 885, 888-91 (9th Cir. 2010). *Accord* Pet. App. A at 8 (defining "fugitive status" to attach whenever defendant "fails to report and comply with the terms of his postrelease supervision"); *see also United States v. Thompson*, 924 F.3d 122, 127-28 (4th Cir. 2019) (fugitive tolling applies whenever a defendant "fail[s] to report for supervision" even without "an active and knowing effort to evade adjudication of a supervised release petition"). By definition, however, *every* revocation proceeding involves an allegation that the defendant failed to comply with the conditions of supervised release. As a result, a judge may virtually always invoke fugitive tolling as a means of extending the term of supervision.[6]

The resurrection of fugitive tolling stands to vastly enlarge district court jurisdiction. As Judge Rendell explained in dissent below, § 3583(i) vests district courts with the "the power to adjudicate matters *after* the expiration of supervised release *if* a warrant or summons had been

[6] *See, e.g.*, *United States v. Ertell*, No. 11-cr-278, 2016 WL 7491630, at *3-4 (E.D. Cal. Dec. 29, 2016) (applying fugitive tolling when defendant failed to pay fine, complete community service, or attend review hearing); *United States v. Warren*, No. 91-72, 2016 WL 3457161, at *3 (D. Or. June 23, 2016) (same, when defendant moved without informing probation office and did not report for work); *United States v. Bristow*, No. 89-cr-268, 2007 WL 2345037, at *5 (S.D. Cal. Aug. 16, 2007) (same, when defendant failed to surrender to probation office after submitting a fraudulent urine sample); *see also United States v. Hunter*, No. 94-cr-32, 2017 WL 2290836, at *1-3 (E.D. Va. May 25, 2017) (same, when defendant's mother told probation office she did not know his whereabouts and defendant failed to turn himself in on arrest warrant).

issued *before* the expiration of supervised release." Pet. App. A at 16. Tolling for "fugitive status" circumvents these limitations and instead conditions post-expiration jurisdiction instead on whether the court finds the defendant violated a condition of supervised release. If so, the noncompliance retroactively suspends the running of the term such that no further jurisdictional issue need arise. *See* Pet. App. A at 13-14.

The 4-1 circuit split has led to strikingly incommensurate outcomes based on geographical happenstance. In *United States v. Barinas*, for instance, the Second Circuit held that the defendant's term of supervised release had been tolled for several years because he had absconded from supervision, giving the court jurisdiction to revoke his release and sentence him to imprisonment for a violation committed five years after the term was scheduled to end. 865 F.3d at 106-09. In *Hernandez-Ferrer*, by contrast, the First Circuit held that a district court that convened a revocation hearing within months of the defendant's failure to report lacked jurisdiction over a violation committed one day after the scheduled end of the term. 599 F.3d at 64-65, 67-69.

C. Fugitive Tolling Is Contrary to the Text and Structure of the Sentencing Reform Act.

In adopting fugitive tolling, the Third Circuit employed a flawed approach to statutory interpretation that favors a supposedly singular "purpose" of supervised release over the text and structure of the governing statute. The majority acknowledged that "[t]he plain language of the supervised release statutory provisions is … silent on how a defendant's failure to comply with release terms [a]ffects the running of his sentence," Pet. App. A at 7, but nevertheless concluded that Mr. Island's term of supervision should be tolled to "help[] realize the design and purpose of supervised release," *id*. at 9.

"[V]ague notions of a statute's 'basic purpose,'" however, "are ... inadequate to overcome the words of its text regarding the specific issue under consideration." *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661 (2016); *see also N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 941-42 (2017) (when "[t]he text is clear," courts should "not consider … extra-textual evidence" such as "legislative history, purpose, [or] post-enactment practice"). Fugitive tolling of supervised release violates this cardinal rule of statutory interpretation.

The majority below opined that Congress's "silence" on fugitive tolling was not dispositive because "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept … it makes that intent specific." Pet. App. A at 12 (citation and internal quotation marks omitted). Yet that rule of statutory construction does not apply here, because fugitive tolling of parole was not a "judicially created concept" but instead a provision of a regulatory scheme that Congress chose not to carry over when enacting the statutory framework for supervised release. *Compare* 28 C.F.R. § 2.52(c)(1) (1981) (fugitive tolling of parole), *and id.* § 2.40(i) (1983) (same), *with* 18 U.S.C. § 3624(e) (no fugitive tolling of supervised release).

Instead, the "venerable" canon of construction that controls this case is *expressio unius est exclusion alterius*. *Hernandez-Ferrer*, 599 F.3d. at 67-69. Indeed, this Court reiterated in a case construing § 3624(e) itself that "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000). "The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Ibid*.; *see also* Pet. App. A at 25 (Rendell, J., dissenting) ("Where Congress has explicitly allowed for tolling only when

the defendant is imprisoned on another charge, it does not intend for district courts to toll supervised release under any other circumstance."). Properly construed, the text and structure of the Sentencing Reform Act thus prohibit fugitive tolling.

The Third Circuit erred in attempting to derive a "purpose" of supervised release that could justify fugitive tolling. After all, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). As regards post-expiration jurisdiction, Congress aimed "to balance the need to revoke supervised release for late-term violations with the need to protect defendants from hasty revocation hearings held at the 11th hour." *United States v. Merlino*, 785 F.3d 79, 93-94 (3d Cir. 2015) (Ambro, J., concurring). Informed by these considerations, Congress declined to include a fugitive tolling provision, instead extending reach-back jurisdiction over defendants who abscond "as long as a warrant or summons issues before the expiration of the term." *Hernandez-Ferrer*, 599 F.3d at 69 (citing 18 U.S.C. § 3583(i)). Fugitive tolling upsets this careful design reflected in the statutory text.

Indeed, the majority position gets the "design" of supervised release, Pet. App. A at 9, exactly wrong. In *Buchanan*, arguably the most influential of the precedents, the Fourth Circuit framed its analysis around the concern that the absence of a fugitive tolling mechanism stands to "reward an absconder for his misconduct." 638 F.3d at 455. But 18 U.S.C. § 3583(i) already provides a specific mechanism by which courts may ensure abscondment does not inure to a fugitive defendant's benefit. Indeed, in conjunction with other provisions of the governing

statute, § 3583(i) permits jurisdiction to be indefinitely carried over any period of fugitivity and vests district courts with power thereafter to return the defendant to prison for years and then require him to serve a fresh term of supervised release, all without credit for the earlier street time. *See* 18 U.S.C. § 3583(b), (e)(3), (h); *United States v. Vera*, 542 F.3d 457, 459-60 (5th Cir. 2008). The First Circuit thus got things exactly right in recognizing that "a judicially contrived tolling mechanism" is unnecessary. *Hernandez-Ferrer*, 599 F.3d at 69; *cf. Mont*, 139 S. Ct. at 1841 (Sotomayor, J., dissenting) (explaining that § 3624(e) need not be construed to toll term of supervised release for periods of pretrial detention because § 3583(i) "already provides a way for a court to extend its revocation power" for conduct "significant enough to justify a warrant").

Finally, the broad tolling power divined by the Third Circuit impairs the rehabilitative aim that post-confinement monitoring is said to promote. An uncertain tolling doctrine that provides for the term of supervised release to stop and start and stop again, obscuring when the sentence will conclude and vesting probation officers with extraordinary discretion, is unlikely to promote former prisoners' efforts to readapt to life in a community. As Justice Harlan once observed in a distinct context, it is "a matter of fundamental import that there be a visible end" to the criminal process, in part because it does not serve reentry to leave defendants' exposure to further incarceration forever "subject to fresh litigation." *Williams v. United States*, 401 U.S. 667, 690 (1971). Judge Rendell echoed that view in lamenting that the majority's rule here creates "a complicated regime for the supervisee in attempting to determine the applicable period of tolling, and thus, when his term of supervised release ends." Pet. App. A at 21.

The judgment of the Third Circuit should be reversed to "enforce [the] plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The Sentencing Reform Act does not provide for tolling of

supervised release when the defendant is a fugitive. To the extent the "purpose" of supervised release is relevant, it does not support fugitive tolling, since the district court may always punish a defendant for absconding so long as a warrant or summons alleging that violation is timely issued.

D. This Case Is a Suitable Vehicle.

Mr. Island's case squarely presents the question of whether courts may toll a supervised release period based upon "fugitive status." Pet. App. A at 8. His term of supervised release was scheduled to end on June 25, 2016, but the shooting giving rise to the two-year revocation sentence was not brought to the district court's attention until two days later. C.A. App. 27, 35-36, 75. If the term of supervised release was tolled based on fugitive status beginning in September 2015, the exercise of jurisdiction did not exceed statutory limits and the Third Circuit's decision may be affirmed. But if the Sentencing Reform Act prohibits such tolling, the ultimate outcome of this appeal depends on whether § 3583(i) supplied the district court with jurisdiction to order Mr. Island returned to prison based upon the shooting (as distinct from the technical violations set forth in the September 2015 petition). It did not. To the extent any controversy on that point remains, it may be resolved in proceedings on remand.[7]

[7] Whether § 3583(i) supplies jurisdiction was disputed by the parties in the Third Circuit, and the court declined to resolve the issue. Pet. App. A at 3. As developed in the briefing, the question would appear to be the subject of another circuit split. *Compare, e.g.*, *United States v. Campbell*, 883 F.3d 1148, 1148 (9th Cir. 2018), *with, e.g.*, *United States v. Naranjo*, 259 F.3d 379 (5th Cir. 2001). Separately, we note that the government elected not to argue below that Mr. Island's term of supervised release was tolled pursuant to 18 U.S.C. § 3624(e) by "imprison[ment] in connection with a conviction," *see* C.A. Appellee's Br. 13 n.5; *Mont*, 139 S. Ct. at 1832-35, nor does the record demonstrate that any such tolling would be proper.

CONCLUSION

For the foregoing reasons, Mr. Island respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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