No. 24-1056

In the Supreme Court of the United States

ISABEL RICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
MATTHEW R. GALEOTTI
SANGITA K. RAO
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner may avoid any consequences from dealing drugs in violation of the terms of her supervised release by having absconded from supervision and then arguing that the term of supervised release expired while she was a fugitive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished but available at 2025 WL 720900. The district court's order (Pet. App. 4a-7a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2025. The petition for a writ of certiorari was filed on April 3, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of California, petitioner was convicted of conspiring to distribute methamphetamine and heroin, in violation of 21 U.S.C. 841(b)(1)(B), (C), and 846. The district court sentenced petitioner to 84 months of imprisonment, to be followed by four years

of supervised release. 10/5/11 Judgment 1-2. Petitioner violated her supervised release, and the district court ordered a new term of imprisonment and supervised release. Pet. App. 11a. During her second term of supervised release, petitioner failed to report and was a fugitive from justice for many years. *Id.* at 11a-12a. After petitioner's apprehension in 2023, the district court revoked her supervised release and, following an unrelated appeal and remand, ordered a 16-month term of imprisonment, to be followed by two years of supervised release. *Id.* at 5a, 12a-13a. The court of appeals affirmed. *Id.* at 1a-3a.

1. a. In September and October 2009, petitioner and a co-conspirator sold methamphetamine and heroin to a confidential informant working with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. 12/7/10 Presentence Investigation Report (PSR) ¶¶ 9-13. A federal grand jury in the Central District of California charged petitioner with conspiring to distribute methamphetamine and heroin, in violation of 21 U.S.C. 841(b)(1)(B), (C), and 846, and distributing the same in violation of 21 U.S.C. 841(b)(1)(B) and (C). Indictment 1-6. Petitioner pleaded guilty to the conspiracy count. D. Ct. Doc. 47 (Sept. 8, 2010); 10/5/11 Judgment 1.

In September 2011, the district court sentenced petitioner to 84 months of imprisonment, to be followed by four years of supervised release. 10/5/11 Judgment 1. Under the conditions of her supervised release, petitioner was prohibited from committing another federal, state, or local crime; prohibited from using controlled substances; required to participate in drug testing and treatment; and required to notify her probation officer at least ten days prior to any change in residence. 10/5/11 Judgment 1-3.

Petitioner was released from custody in January 2017 and began serving her initial term of supervised release. Pet. App. 11a. Several months later, petitioner violated her supervised release by using methamphetamine and failing to report for drug treatment and testing. *Ibid.* In November 2017, the district court revoked petitioner's supervision and ordered two additional months of imprisonment, to be followed by a new 42-month term of supervised release. *Ibid.*

b. Petitioner was released from custody again in December 2017 and began serving her second term of supervised release, which was then set to expire in June 2021. Pet. App. 11a. Two months later, petitioner again began violating her release terms by using illegal drugs. *Ibid.* A few months thereafter, in May 2018, petitioner changed her residence without notifying her probation officer and absconded from supervision. *Ibid.*; 5/14/18 PSR 3-4.

The Probation Office filed a petition alleging that petitioner had violated her supervised release by using drugs and absconding from supervision. 5/14/18 PSR 3-4. Petitioner faced a statutory maximum revocation term of 36 months of imprisonment based on her original offense. 18 U.S.C. 3583(e)(3); see 18 U.S.C. 3559(a)(2). The Probation Office calculated her advisory imprisonment range based on the Sentencing Guidelines' policy statement for supervised-release revocation as 8 to 14 months. 5/14/18 PSR 5. That reflected her criminal history of Category VI (the maximum) and her Grade C violations (the least serious). *Ibid.*; see Sentencing Guidelines § 7B1.4(a). The district court issued a warrant for petitioner's arrest. Pet. App. 12a.

While a fugitive, petitioner committed additional crimes. In January 2021, petitioner was arrested by state

authorities for evading a police officer, driving without a license, and possessing drug paraphernalia. Pet. App. 25a. In May 2021, she pleaded guilty to evading police and being an unlicensed driver. *Ibid.*; 2/21/23 PSR 42. And in January 2022, petitioner was charged with possession of fentanyl for sale. Pet. App. 24a-25a; C.A. E.R. 100-105. Petitioner pleaded guilty to that crime and was sentenced to two years in state custody. Pet. App. 25a; C.A. E.R. 107-108.

c. In January 2023, after four years and eight months as a fugitive, petitioner appeared before a federal magistrate judge on the pending supervised-release violations. Pet. App. 12a. In February 2023, the Probation Office filed an amended violation petition. 2/21/23 PSR 39-47. The amended petition dismissed the 2018 drug-related allegations but maintained the failure-to-report allegation. 2/21/23 PSR 41-42, 47. The petition also added two new allegations: (1) evading a police officer and driving without a license in January 2021, and (2) possessing a controlled substance for sale in January 2022. *Ibid.*; Pet. App. 12a-13a.

At a March 2023 hearing, petitioner admitted to the three allegations charged in the amended petition. Pet. App. 12a-13a; C.A. E.R. 119-121. The district court ordered a revocation term of 24 months of imprisonment with no additional supervision to follow. Pet. App. 13a.

d. Petitioner appealed, and, on the parties' agreement, the case was remanded for further record development and resentencing. Pet. App. 13a; see D. Ct. Doc. 178 (Apr. 18, 2023); 23-807 Order (9th Cir. Dec. 14, 2023).

On remand, the district court held another sentencing hearing in April 2024. The court found that petitioner's 2022 fentanyl conviction constituted a maximum-level Grade A violation, while the abscondment and 2021

offenses were Grade C violations. Pet. App. 24a-26a. Based on the Grade A violation, petitioner faced an advisory range of 33 to 36 months of imprisonment (as capped by the statutory maximum), rather than 8 to 14 months for a Grade C violation. *Id.* at 31a-32a; see Sentencing Guidelines § 7B1.4(a).

The district court rejected petitioner's argument that her supervised-release term expired in June 2021 and that the court thus lacked authority to revoke her supervised release based on her 2022 fentanyl conviction. Pet. App. 26a-31a. Relying on circuit precedent, the district court explained that "a defendant's fugitive status tolls the term of supervised release and prevents it from expiring." *Id.* at 31a.

The court revoked petitioner's supervised release and varied downward from the Guidelines' recommendation to order that she serve 16 months of imprisonment, to be followed by two years of supervised release. Pet. App. 35a; see 18 U.S.C. 3583(e)(3).

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court rejected petitioner's challenge to the district court's consideration of her 2022 fentanyl offense in revoking her supervised release. *Ibid.* Relying on circuit precedent, the court of appeals reasoned that petitioner's abscondment tolled her term of supervised release. *Id.* at 2a-3a (citing *United States* v. *Ignacio Juarez*, 601 F.3d 885, 889 (9th Cir. 2010) (per curiam); *United States* v. *Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005), cert. denied, 546 U.S. 125 (2006); *United States* v. *Crane*, 979 F.2d 687, 691 (9th Cir. 1992)). The court also denied petitioner's request for initial en banc review to reconsider the fugitive-tolling doctrine, stating that "this case does not meet the standard for en banc review." *Id.* at 3a.

ARGUMENT

Petitioner contends (Pet. 14-19) that one of three independent bases for revoking her supervised release is invalid because, in her view, courts lack authority to toll a term of supervision when a defendant is a fugitive and, absent tolling, her supervision ended before her third violation. The court of appeals correctly rejected that contention and further review is unwarranted. Although a lopsided disagreement exists among the courts of appeals on the question presented, that disagreement lacks practical significance, as this case illustrates. This Court has repeatedly denied review of this issue despite the existence of a conflict since 2010.[1] The same result is warranted here.

1. The court of appeals correctly recognized that a defendant's fugitive status tolls her term of supervised release. Pet. App. 1a-3a. Such tolling reflects the "well-established common law principle that '[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence.'" *Caballery* v. *United States Parole Comm'n*, 673 F.2d 43, 46 (2d Cir.) (quoting *Anderson* v. *Corall*, 263 U.S. 193, 196 (1923)) (brackets in original), cert. denied, 457 U.S. 1136 (1982). Because "Congress 'legislates against the backdrop of common-law adjudicatory principles,'" courts apply those principles "'except when a statutory purpose to the contrary is evident.'" *Minerva Surgical, Inc.* v. *Hologic, Inc.*, 594 U.S. 559,

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[1] See, *e.g.*, *Thompson* v. *United States*, 141 S. Ct. 1427 (2021) (No. 20-6757); *Island* v. *United States*, 140 S. Ct. 405 (2019) (No. 19-5891); *Barinas* v. *United States*, 586 U.S. 826 (2018) (No. 17-7873); *Ketron* v. *United States*, 568 U.S. 838 (2012) (No. 11-10264); *Watson* v. *United States*, 565 U.S. 849 (2011) (No. 10-10774); *Nuno-Garza* v. *United States*, 562 U.S. 1182 (2011) (No. 10-6376).

572 (2021) (brackets and citation omitted). Nothing in the supervised-release statute's text, context, or purpose signals that Congress intended to displace the background rule here.

Petitioner accepts the common-law rule that "[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." Pet. 24 (quoting *Anderson*, 263 U.S. at 196) (brackets in original). But petitioner urges that those "common-law practices" do not apply here "'because supervised release is a recent statutory innovation.'" Pet. 23 n.14 (quoting *United States* v. *Talley*, 83 F.4th 1296, 1304 (11th Cir. 2023)). Supervised release, however, is "closely analogous" to parole. *Johnson* v. *United States*, 529 U.S. 694, 710 (2000); see *United States* v. *Swick*, 137 F.4th 336, 344 (5th Cir. 2025). And the fugitive-tolling doctrine is well settled for parole, just as it is for imprisonment and probation. *Caballery*, 673 F.2d at 46; see *Anderson*, 263 U.S. at 196; *Swick*, 137 F.4th at 343 & n.5.

Petitioner offers no meaningful evidence that Congress intended to displace common-law fugitive tolling. "[T]o abrogate a common-law principle, [a] statute must 'speak directly' to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted). Accordingly, this Court has declined to use "an express tolling provision" in one section of the Bankruptcy Code to draw any "negative inference" against tolling in another section of the Code given traditional background tolling principles. *Young* v. *United States*, 535 U.S. 43, 52 (2002). Yet petitioner's textual argument relies (Pet. 21-23) on such negative inferences—and ones that are, in any event, inapt.

Petitioner invokes (Pet. 21-23) 18 U.S.C. 3624(e), which provides that a "term of supervised release does

not run" while the defendant is serving a prison term of 30 days or more, but does run for shorter prison terms. In petitioner's view, that provision signals a deliberate omission of tolling for fugitives. That is incorrect. Section 3624(e) addresses the distinct circumstance in which an individual is unable to serve a term of supervised release because of her imprisonment for another offense. "[S]erving time as a prisoner is not so closely associated with being a fugitive that enumerating a tolling provision for one necessarily implies the exclusion of tolling for the other." *United States* v. *Cartagena-Lopez*, 979 F.3d 356, 362 (5th Cir.), vacated as moot, No. 20-40122, 2020 WL 13837259 (5th Cir. Nov. 19, 2020).

Indeed, Congress needed to enact Section 3624(e) because it *deviates* from the common-law rule by rejecting tolling for custodial sentences under 30 days, thereby requiring Congress to "speak directly" to the matter, *Texas*, 507 U.S. at 534. Congress had no comparable reason to address fugitive tolling, where judicial practice was already settled. For similar reasons, petitioner's reliance (Pet. 23) on 18 U.S.C. 3564(b) is misplaced. That provision tolls a term of federal probation while the defendant is imprisoned for 30 days or more. *Ibid.* Again, Congress rejected tolling for prison terms under 30 days and needed to address that scenario expressly.

Petitioner similarly errs in relying (Pet. 22) on 18 U.S.C. 3583(i). That provision extends courts' power to revoke supervised release after the end of the term when "reasonably necessary" to adjudicate violations that occurred during the term, so long as a warrant or summons issues during the term. *Ibid.* Petitioner argues (Pet. 22) that Congress could have created a "similar exception" for fugitives. But Section 3583(i) "is not a tolling provision." *United States* v. *Hernández-Ferrer*,

599 F.3d 63, 68 n.4 (1st Cir. 2010). The statute merely authorizes a court to adjudicate the revocation within a reasonable time after the supervised-release term ends. *Cartagena-Lopez*, 979 F.3d at 361. Because Section 3583(i) does not address tolling at all, it does not support the implication petitioner urges.

Petitioner also cites (Pet. 22-23) 18 U.S.C. 3290, which suspends statutes of limitations for fugitives. Petitioner characterizes that provision as a fugitive-tolling rule and infers that Congress could have included similar language in Section 3583(e). But that provision involves the distinct context of statutes of limitations for separate charges of a violation of a federal criminal law. Not only are some supervised-release violations not in themselves federal crimes, see 18 U.S.C. 3583(d) (mandatory condition prohibiting commission of "another Federal, State, or local crime"), but even a federal crime may be charged as such whether or not it was the basis for revoking supervised release, see *Johnson*, 529 U.S. at 700. Section 3290 thus provides no insight on whether Congress intended to displace the traditional fugitive-tolling rule for a criminal sentence.

Nor can petitioner's policy arguments supply (Pet. 24-26) the necessary "clear[] expression" that Congress intended "to override such longstanding precepts as the principle that a fugitive should not profit by his unlawful or contumacious conduct." *United States* v. *Barinas*, 865 F.3d 99, 109 (2d Cir. 2017), cert. denied, 586 U.S. 826 (2018); accord *United States* v. *Buchanan*, 638 F.3d 448, 452-456 (4th Cir. 2011). And contrary to her contentions (Pet. 24), that principle fully coheres with a defendant's bearing responsibility for violating supervised-release conditions either while still a fugitive or at a later time that accounts for tolling. Absconding does

not entitle a defendant either to shorten her term of supervised release or time-shift it by inserting an anything-goes period of violations that have no consequences with respect to the term of supervised release that she should be serving. See *Swick*, 137 F.4th at 344.

Indeed, petitioner's theory would apply equally to parole, even though parolees are also subject to conditions while out of prison. Yet for parole, it is well settled that "lapse of time does not constitute service of sentence and, hence, [tolling] stops the sentence from running for that period during which the offender, through some fault of his own, has failed to serve his sentence." *Caballery*, 673 F.2d at 46. It would be "not reasonable to assume that Congress intended that a parolee," by virtue of his own misconduct, could "reduc[e] the time during which the [Parole] Board has control over him." *Zerbst* v. *Kidwell*, 304 U.S. 359, 363 (1938). The same logic applies to supervised release.

Petitioner downplays (Pet. 26) concerns about supervisees benefiting from their own misconduct as "overblown," pointing out that abscondment itself is a basis for revocation. That overlooks the "case where a defendant absconds late in the release term and his absence is not detected in time for a warrant or summons to be issued before the term expires," as required to adjudicate violations. *Buchanan*, 638 F.3d at 456 n.7. Furthermore, abscondment accompanied by other supervised-release violations, such as the commission of other crimes, is even more inconsistent with the rehabilitative function of supervised release than abscondment alone. And as even courts adopting petitioner's preferred approach recognize, the revocation proceed-

ings can always take that reality into account, one way or another. See pp. 12-13, *infra*.[2]

2. The Second, Third, Fourth, and Fifth Circuits agree that fugitive tolling applies in this context. See *Swick*, 137 F.4th at 344; *United States* v. *Island*, 916 F.3d 249, 251 (3d Cir.), cert. denied, 140 S. Ct. 405 (2019); *Barinas*, 865 F.3d at 101; *Buchanan*, 638 F.3d at 452-458.[3] Petitioner asserts (Pet. 18-20) that review is warranted because the First Circuit in *Hernández-Ferrer*, 599 F.3d at 64, and the Eleventh Circuit in *Talley*, 83 F.4th at 1297, reached a different conclusion. Although those circuits have rejected the application of fugitive tolling to supervised release, that limited and lopsided disagreement has little practical importance, including to this case.

As petitioner recognizes (Pet. 26), a supervisee's abscondment will virtually always provide an independent basis to revoke supervised release. The government is unaware of any case in which the sole basis for revocation was a violation that occurred outside the period of supervised release absent tolling.

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[2] Petitioner also mentions (Pet. 21 n.11) decisions that decline to toll a term of supervised release when an offender is absent by reason of deportation. Those decisions are consistent with the decision below. Tolling is warranted when a "fugitive-defendant's absence arises from h[er] own misconduct," but "[t]he same cannot be said about a defendant who has been removed from the country by government order." *Buchanan*, 638 F.3d at 457.

[3] The Tenth Circuit has followed the same approach in an unpublished opinion. *United States* v. *Gomez-Diaz*, 415 Fed. Appx. 890, 894 (2011). As of the petition's filing, the Fifth Circuit had adopted the majority position only in a nonprecedential opinion. Pet. 16-17 (discussing *Cartagena-Lopez*, 979 F.3d at 363). The Fifth Circuit later issued a published opinion to the same effect. *Swick*, 137 F.4th at 344.

District courts revoking a fugitive's supervised release are thus free to impose the same sentence whether or not the later violation is technically a basis for revocation. *Talley*, 83 F.4th at 1303. Even the courts adopting petitioner's preferred non-tolling approach recognize that district courts may consider conduct from the time when the defendant was a fugitive. *Ibid.*; *Hernández-Ferrer*, 599 F.3d at 69; see Pet. C.A. Br. 26. If, as here, "a warrant or summons issues before the expiration of the term," the fugitive "will still be subject to the court's jurisdiction once located, and h[er] conduct while a fugitive *will* be considered at sentencing." *Hernández-Ferrer*, 599 F.3d at 69 (emphasis added). That includes "misconduct that occurred *after* the expiration of the supervision period." *Talley*, 83 F.4th at 1303.

The United States Sentencing Commission's policy statements on revocation sentences support that conclusion. Those policy statements have always been advisory, even before *United States* v. *Booker*, 543 U.S. 220 (2005). *Hernández-Ferrer*, 599 F.3d at 66 n.2; see Sentencing Guidelines Ch. 7, Pt. A.1 (providing only "policy statements," not "guidelines," for supervised-release revocation). On their own terms, those policy statements "expressly contemplate that an 'upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.'" *Talley*, 83 F.4th at 1303 (discussing Sentencing Guidelines § 7B1.4 comment. (n.2)).

The district courts in both *Hernández-Ferrer* and *Talley* thus both imposed effectively the same sentences on remand that the courts of appeals had vacated. See Judgment, *United States* v. *Hernández-Ferrer*, No. 99-cr-344 (D.P.R. June 17, 2010); Judgment,

United States v. *Talley*, No. 09-cr-61 (M.D. Fla. Dec. 12, 2023) (imposing time-served sentence, which exceeded original 18-month sentence, see D. Ct. Doc. 132, at 3, *Talley*, No. 09-cr-61 (Oct. 26, 2023)). Petitioner's case would likely be no different. The district court found three distinct violations of petitioner's conditions of her release, only one of which petitioner views as occurring after her term of supervision had ended.

Petitioner appears to accept (Pet. 29-30) that those independent violations justify revocation. And petitioner offers no sound basis to believe that the district court would reduce her sentence if her 2022 conviction for possessing fentanyl for sale could not itself provide a formal basis for revocation. The district court already gave petitioner a substantial downward variance, imposing a 16-month sentence far closer to the 8-to-14-month advisory range for petitioner's earlier violations than the 33-to-36-month range for her fentanyl conviction. See pp. 4-5, *supra*. And because even courts applying the minority view could take the fentanyl conviction into account, that view offers "little consolation" to fugitives like petitioner. *Barinas*, 865 F.3d at 109.

Moreover, petitioner has already served her custodial sentence and is now in the final year of her supervised release, which, barring additional violations, will conclude in May 2026. See Pet. 12, 28. Petitioner proposes (Pet. 28-29 & n.15) that this Court could, and should, expedite proceedings to ensure that it issues a decision before next Term ends. But even with a decision in early 2026, the case could well moot on remand before resentencing. Accordingly, even if the question presented otherwise warranted this Court's review, this case would not provide a good vehicle for reviewing it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
MATTHEW R. GALEOTTI
SANGITA K. RAO
Attorneys

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