No. 24-1056

IN THE
Supreme Court of the United States

ISABEL RICO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the government candidly concedes, there is an entrenched circuit split on whether the fugitive-tolling doctrine applies in the context of supervised release. Indeed, since the petition was filed, the Fifth Circuit has opined precedentially on the question presented, deepening the split to 5-2. *See United States v. Swick*, 137 F.4th 336, 340-44 (5th Cir. 2025).

The government's primary argument against certiorari (Br. in Opp. 6, 11-13) is that the question presented lacks practical consequence. According to the government, it does not much matter whether a criminal defendant's supervised-release period extends beyond the originally scheduled expiration of the supervision term, because the defendant's abscondment is a sufficient basis to revoke supervised release, regardless of what violations the defendant might commit afterwards.

That argument is both wrong and disingenuous. It is wrong because the answer to the question presented will have a drastic effect on the Sentencing Guidelines range in essentially every case in which it arises. In this case, for example, application of the fugitive-tolling doctrine increased Ms. Rico's Guidelines range from 8-14 months to 33-36 months. More fundamentally, supervised release fundamentally reshapes a person's legal status, rights, and obligations. It is indeed practically significant whether the government may extend a period of supervised release beyond the expiration of the originally scheduled term.

The government's argument is disingenuous because the government fights hard for the application of the

fugitive-tolling doctrine whenever the opportunity arises and regularly obtains heightened sentences as a result of its efforts. The government has litigated this issue frequently and vigorously enough to have obtained precedential opinions from seven different courts of appeals, all of which would be surprised to hear that they wasted judicial resources on a legal issue that the government now declares to be unimportant. Having persuaded five circuits to adopt a doctrine that allows for heightened punishments with little statutory grounding, the government cannot now avoid review based on its self-serving assertion that its own successful litigation campaign was inconsequential.

This Court should grant certiorari and restore the necessary "uniformity and predictability in federal sentencing" that is currently lacking. *United States v. Gonzales*, 520 U.S. 1, 13 (1997) (Stevens, J., dissenting).

I. THE SPLIT ON THE QUESTION PRESENTED IS GROWING DEEPER.

As the government acknowledges (Br. in Opp. 11 & n.3), the split continues to grow. It was 4-2 when Ms. Rico filed the petition; it is now 5-2 after the Fifth Circuit's decision last month in *Swick*, 137 F.4th 336.

In *Swick*, the Fifth Circuit acknowledged that "there is currently a four-to-two circuit split on whether fugitive tolling exists in the supervised release context." 137 F.4th at 340. The court concluded that, despite the lack of any textual support for the doctrine, it must apply to vindicate the purportedly "long-standing principle" that "a defendant should not benefit from his own wrongdoing." *Id.* at 344. Ms. Rico, of course, disagrees with

Swick's reasoning, which elevates questionable inferences from now-repealed parole and probation statutes over the text of the Sentencing Reform Act of 1984. But more fundamentally, *Swick* highlights that the government continues to press for heightened sentences based on fugitive tolling and that the question presented continues to recur frequently.

The government observes (Br. in Opp. 6) that this Court has denied review of the question presented "despite the existence of a conflict since 2010." But this is the first time the question presented has been before this Court since the Eleventh Circuit joined the minority side of the split. *See United States v. Talley*, 83 F.4th 1296, 1300-05 (11th Cir. 2023); Br. in Opp. 6 n.1 (listing denials of certiorari between 2011 and 2021). So perhaps there was once force to the government's position that the split here is a mere "lopsided disagreement," Br. in Opp. 6, that can resolve itself in time. Not anymore.[1]

II. THE QUESTION PRESENTED IS WORTHY OF THIS COURT'S REVIEW.

The government urges this Court to abide the deep circuit split because it purportedly "has little practical

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[1] The government cites (Br. in Opp. 6 n.1) six denials of petitions raising the question presented here. The government waived its right to respond to the most recent two. *See Thompson v. United States*, 141 S. Ct. 1427 (2021) (No. 20-6757); *Island v. United States*, 140 S. Ct. 405 (2019) (No. 19-5891). The next petition principally presented a different question. *See* Petition for a Writ of Certiorari at i, *Barinas v. United States*, 586 U.S. 826 (2018) (No. 17-7873) (first question relating to doctrine of specialty). And the remaining three petitions were filed between 2010 and 2012, when the split was either 1-1 or 2-1. *See* Br. in Opp. 6 n.1.

importance." Br. in Opp. 11. This argument is easily rebutted.

A. This Court has consistently recognized the critical anchoring effect of the Sentencing Guidelines. *See, e.g.*, *Molina-Martinez v. United States*, 578 U.S. 189, 198-99 (2016); *Peugh v. United States*, 569 U.S. 530, 542 (2013); *Gall v. United States*, 552 U.S. 38, 49 (2007). And the question presented has a significant effect on the Guidelines range in essentially *every* case in which it arises. That is because abscondment itself is a Grade C violation of supervised release; the question presented becomes relevant when the defendant has committed a Grade A or Grade B violation after the scheduled expiration of the supervision period. *See* U.S.S.G. § 7B1.1(a); Pet. 8. For offenders in criminal-history category VI, the difference between tolling and no tolling would be a recommended Guidelines range of 33-41 months for a Grade A violation versus a range of just 8-14 months for a Grade C violation.[2] Given the crucial role the Guidelines range plays in determining the defendant's ultimate sentence, it is difficult to fathom how a fourfold increase in a bottom-of-the-Guidelines sentence could possibly be described as bearing "little practical importance." Br. in Opp. 11.

The government claims support (Br. in Opp. 12-13) from the post-remand proceedings in *Hernández-Ferrer* and *Talley*, in which the defendants received the same or greater sentences on remand after the courts of appeals held that post-expiration violations could not be

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[2] Ms. Rico's range only went up to 36 months because that was the statutory maximum. *See* Pet. 12 n.8.

the basis for revocation. In the government's view, this proves that the question presented is irrelevant because defendants in Ms. Rico's position will generally receive the same sentence regardless of whether the post-expiration conduct is adjudicated as an independent violation of supervised release or is merely considered as a basis for an upward variance. *See id.*; *see also* 18 U.S.C. § 3553(a)(1). But *Hernández-Ferrer* and *Talley* do not support this theory because, in both cases, the defendant had *already served the longer sentences imposed under the erroneous application of the Sentencing Guidelines*. The defendant in *Hernández-Ferrer* had been sentenced to 21 months; on remand, he was resentenced to 21 months, which he had already served. *See United States v. Hernández-Ferrer*, No. 99-cr-344-20 (D.P.R.), ECF No. 930 (June 17, 2010). Likewise, in *Talley*, the defendant was resentenced to time served, per his own request. *See United States v. Talley*, No. 09-cr-61 (M.D. Fla.), ECF No. 138 (Dec. 12, 2023). It was not even theoretically *possible* for the district court to give a lower post-remand sentence than it did. And in neither case did the defendant receive any additional term of supervised release.

In this case, too, the question presented was plainly important to Ms. Rico's sentence. The district court spent a great deal of time analyzing whether Ms. Rico's Guidelines range should be based on a Grade A violation or a Grade C violation. *See, e.g.*, Pet. App. 16a ("So, if I did adopt the defense's argument and elect . . . to find that Ms. Rico could not be held accountable for [a] Grade A violation, does that leave me with a Grade C violation as opposed to B, because that does affect the range.").

See generally id. at 15a-32a. The district court then explicitly concluded that Ms. Rico should be subjected to a heightened Guidelines range under the fugitive-tolling doctrine. *See id.* at 31a ("So, until the Ninth Circuit or the Supreme Court hold otherwise, a defendant's fugitive status tolls the term of supervised release and prevents it from expiring. . . . [A]s a result, I am finding today that the most serious violation that Ms. Rico committed is a Grade A violation."). There is no reason to think that the court would have gone through this effort if it believed an accurate Guidelines calculation—and thus the question presented—was immaterial.

The government emphasizes (Br. in Opp. 13) that Ms. Rico received a 16-month sentence that was below the Guidelines range for a Grade A violation. But that sentence was still *above* the Guidelines range for a Grade C violation. Nothing in the sentencing record suggests that the district court would have imposed an above-Guidelines sentence had it calculated the Guidelines range differently. *Cf. Molina-Martinez*, 578 U.S. at 201 ("Where . . . the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights."). As a result, there is every reason to believe that the district court would sentence Ms. Rico to a time-served sentence on remand—precisely as the court did in *Talley*.

B. The question presented is also important for a more fundamental reason: individuals deserve to know their status. If a person absconds, returns, and the original period of supervised release then ends, she needs to

know whether she is still on supervised release or not. That is currently impossible in the five circuits that have adopted the government's approach.

Being on supervised release carries significant restrictions on liberty. Supervisees are subject to numerous restrictions on where they may live, where they may work, and whom they may talk to. *See* U.S.S.G. § 5D1.3. In addition to court-imposed supervised release conditions, supervisees are also subject to independent legal restrictions. *See, e.g.*, 29 U.S.C. § 3195(b)(2) (ineligibility for the Job Corps). The government cannot seriously claim that it is inconsequential whether or not a person is on supervised release at a particular time.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The government offers (Br. in Opp. 13) a single argument as to why this case is not a good vehicle for this Court's review: Ms. Rico's sentence will expire in May 2026. But if this Court schedules argument for October or November, there would be plenty of time to deliberate and issue a decision. If Ms. Rico prevails, this Court and the Ninth Circuit could issue mandates forthwith to ensure prompt resentencing.[3] The government's fears of mootness are therefore unfounded.

The same, however, cannot be said in many other cases raising the question presented. As noted above, in *Hernández-Ferrer* and *Talley*, by the time the cases

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[3] The government would have no alternative arguments for affirmance available on remand.

were remanded after defendants won in the courts of appeals, it was too late for them to benefit from those rulings. *See* pp. 4-5, *supra*. In *United States v. Cartagena-Lopez*, 979 F.3d 356 (5th Cir. 2020), *opinion withdrawn on grant of reh'g*, No. 20-40122, 2020 WL 13837259 (5th Cir. Nov. 19, 2020), it had become too late even *before* the court of appeals ruled. *See* Pet. 16-17. In these cases, the question presented evaded meaningful review even in the courts of appeals. Here, though, this Court has a rare opportunity to resolve this recurring question, cleanly presented, once and for all.

IV. THE MAJORITY POSITION IS WRONG.

The bulk of the government's brief in opposition (at 6-11) is dedicated to defending the majority position on the merits. That effort falls flat. Neither text, history, nor logic supports applying the fugitive-tolling doctrine in the supervised-release context.

A. The petition sets forth (at 20-23) a number of textual and historical indications that fugitive tolling is inapplicable in the context of supervised release. For one, 18 U.S.C. § 3624(e) *does* authorize tolling of supervised release for a different reason—sufficiently lengthy prison sentences—but says nothing of fugitive tolling. Pet. 21-22. Congress also enacted 18 U.S.C. § 3583(i) to address the problem of certain supervised-release violations that previously went unadjudicated, yet it declined to address abscondment and instead added language unambiguously precluding jurisdiction over violations occurring after the expiration of the supervision term. Pet. 22. And other federal criminal statutes *do* expressly provide for tolling. Pet. 22-23; *see, e.g.*, 18 U.S.C. § 3290

(statutes of limitations for federal crimes are tolled while defendant is "fleeing from justice").

The government shrugs off (Br. in Opp. 6-9) all this evidence as insufficient to overcome the purported common-law principle that post-carceral supervision periods are tolled when the defendant absconds. The government's theory fails for several reasons.

First, even if the government were correct that fugitive tolling was well established with respect to *parole*, the principle should not automatically carry over to supervised release, a "recent statutory innovation" with "no common law history." *Talley*, 83 F.4th at 1304. The common-law principle on which the government relies is that a parolee operates under a "'restraint contemplated by the law'" since he is "is bound to remain under the control of his parole supervisor." *Caballery v. U.S. Parole Comm'n*, 673 F.2d 43, 46 (2d Cir. 1982) (quoting *Anderson v. Corall*, 263 U.S. 193, 196 (1923)). The same is not true of supervised release, which "is not a punishment in lieu of incarceration," *United States v. Granderson*, 511 U.S. 39, 50 (1994), and instead "fulfills rehabilitative ends, distinct from those served by incarceration," *United States v. Johnson*, 529 U.S. 53, 59 (2000). Plus, creation of supervised release "*eliminated*" the parole system, *Johnson v. United States*, 529 U.S. 694, 696 (2000) (emphasis added), further straining the notion that all common-law parole principles carried forward.

In any event, even if fugitive tolling were a relevant common-law principle here, Congress abrogated it in the Sentencing Reform Act. *See Talley*, 83 F.4th at 1304-05 ("Although Congress's intention to override a common-

law rule should be *clear*, it need not be *express*." (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012))). Prior to the Act, the fugitive-tolling doctrine was partially codified for purposes of abscondment from parole; by statute, the Parole Commission's jurisdiction was "extended for the period during which [a] parolee . . . refused or failed to respond" to the Commission's directives. 18 U.S.C. § 4210(c) (1982) (repealed 1984). Congress's decision not to re-codify such a provision for supervised release—particularly in light of the other textual evidence pointing against fugitive tolling—easily overcomes any purported common-law principle to the contrary.

The government struggles, too, to address the textual evidence head on. Take the explicit tolling provision in 18 U.S.C. § 3624(e). In the government's view (Br. in Opp. 8), Congress only spoke to tolling for lengthy prison sentences because it was departing from the common-law tolling rule for *brief* sentences; since Congress was not altering the rule for fugitive tolling, in the government's telling, Congress had no need to mention it at all. But it is difficult to imagine that Congress truly intended to convey its intent in such a convoluted way.

B. The petition also explains (at 24-26) why applying the fugitive-tolling doctrine to supervised release makes little sense. Unlike in the custodial context, fugitive tolling does not result in the correct amount of service time; it results in *over*service. Ms. Rico, for instance, was anomalously treated as both *on* and *off* supervised release between 2018 and 2023—*on* supervised release in that her state-law offenses during this period were violations, but *off* supervised release in that she

received no credit toward satisfaction of her supervision term. Pet. 24-25; *see Talley*, 83 F.4th at 1302 ("Because the conditions of supervised release are a continuing restraint on a supervisee's liberty, even when he is violating them, there is no role for fugitive tolling to ensure that an absconder serves the full term of his sentence.").

The government has no real response to this flaw in its position. All it offers is the "longstanding precept[]" that "a fugitive should not profit by his unlawful or contumacious conduct." Br. in Opp. 9 (quoting *United States v. Barinas*, 865 F.3d 99, 109 (2d Cir. 2017)). But as Ms. Rico has explained, supervisees who abscond do not reap any benefit because the abscondment itself is a basis for revocation of supervision and a new custodial sentence. Pet. 26; *accord Talley*, 83 F.4th at 1303; *United States v. Island*, 916 F.3d 249, 258 (3d Cir. 2019) (Rendell, J., dissenting); *United States v. Hernández-Ferrer*, 599 F.3d 63, 69 (1st Cir. 2010).[4]

The government nevertheless worries that without tolling, abscondment may go unpunished in the rare case that it occurs so close to the end of the supervision term that it cannot be "detected in time for a warrant or summons to be issued before the term expires," as would be required under 18 U.S.C. § 3583(i). Br. in Opp. 10 (quoting *United States v. Buchanan*, 638 F.3d 448, 456 n.7 (4th Cir. 2011)). But the government's "solution" to this

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[4] The government also asserts (Br. in Opp. 9-10) that "[a]bsconding does not entitle a defendant either to shorten her term of supervised release or time-shift it." But Ms. Rico is not advocating either result. Under Ms. Rico's view, a three-year supervision term runs for three years unless and until it is revoked. It neither ends nor pauses upon abscondment.

"problem" is remarkably overbroad—declare this hypothetical supervisee, who by hypothesis has absconded from a portion of his supervision so slight that there is no time to issue a summons, to be on supervised release indefinitely. Addressing this illusory concern provides no sound reason to ignore the Sentencing Reform Act's text and history.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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