No. 17– ___

In the
Supreme Court of the United States

Eduardo Barinas,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two distinct questions that divide the courts of appeals:

I. Under the doctrine of specialty, a nation that receives a criminal defendant pursuant to an extradition treaty may try and punish the defendant only for those offenses for which the other nation granted extradition. "The question of whether a criminal defendant has standing to assert a violation of the doctrine of specialty has split the federal circuit courts of appeals." *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (footnote omitted). This case squarely presents that question.

II. Whether a defendant's fugitive status tolls a term of supervised release, even though the statutory provisions governing supervised release neither expressly require nor expressly permit such tolling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page (s)**

Statutes

Treaties

Other

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eduardo Barinas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 865 F.3d 99 and appears at Pet. App. 1a. The relevant trial court transcript and order are unpublished and appear at Pet. App. 21a. The Second Circuit's order denying panel rehearing and rehearing en banc appears at Pet. App. 48a.

JURISDICTION

Petitioner contends that the district court lacked jurisdiction. The district court rejected that contention, asserted jurisdiction under 18 U.S.C. § 3231, and entered judgment on June 17, 2016. The Second Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), entered judgment on July 28, 2017, and denied a timely petition for panel rehearing and rehearing en banc on October 19, 2017. On January 10, 2018, this Court granted Mr. Barinas an extension to file his petition for certiorari by February 16, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

The pertinent statutory and treaty provisions are reproduced at Pet. App. 49a.

STATEMENT OF THE CASE

The facts of this case are not in dispute. In 1997, petitioner Eduardo Barinas began a five year term of supervised release following his incarceration on a narcotics conviction in the United States District Court for the Eastern District of New York. He did not report to his probation officer as directed, and instead returned home to the Dominican Republic. The Probation Department filed a violation report with the court, charging petitioner with failing to report as directed, and the court issued a warrant for his arrest.

In 2008, petitioner, still a fugitive, was indicted in the United States District Court for the District of New Jersey on three counts of importing and conspiring to import narcotics into the United States, conduct alleged to have occurred in 2007. In 2009, pursuant to an extradition treaty between the United States and the Dominican Republic, the United States formally requested petitioner's extradition from the Dominican Republic. *See* Convention Between the United States and the Dominican Republic for the Extradition of Criminals, June 19, 1909, 36 Stat. 2468 (the "Treaty"). The extradition request noted that petitioner was "wanted to stand trial in the District of New Jersey for narcotics offenses," enumerated the charges in the District of New Jersey indictment, and recited the factual allegations underlying the indictment. Pet. App. 6a. The extradition request did not mention petitioner's pending violation charges or open warrant in the Eastern District of New York.

In 2013, petitioner was arrested in the Dominican Republic and extradited to the District of New Jersey, where he pled guilty to a one-count superseding information charging him with conspiracy to import cocaine into the United States, and was sentenced principally to 78 months' incarceration.

After sentencing in federal court in New Jersey, the Probation Department in the Eastern District of New York supplemented the 1997 supervised release violation report with two additional charges: leaving the district without permission (when he absconded in 1997), and committing a new crime while on supervised release (namely, the crime he was convicted of in the District of New Jersey, which occurred in 2007). Petitioner was transferred to the Eastern District of New York to face the three violation charges. He moved to dismiss all three on the grounds that the New York proceeding violated the rule of specialty, and the district court lacked jurisdiction because the violation charges had not been specified in the extradition request. Independently, he moved to dismiss the third charge (committing a new crime while on supervised release) because the conduct underlying that charge had occurred after the scheduled expiration of his term of supervision in 2002, once again depriving the court of jurisdiction. The District Court (Glasser, J.) denied the motion, ruling that petitioner did not have standing to raise a specialty challenge, and that the supervision period was tolled while Mr. Barinas was a fugitive. Pet. App. 22a-47a. The court subsequently held a hearing on stipulated facts and found petitioner guilty of all three charges: failing to report to Probation (Charge 1); leaving the district without permission (Charge 2); and committing a new crime while on supervised release (Charge 3). Petitioner was sentenced to one year and one day of imprisonment, to run consecutively to his 78 month sentence in the District of New Jersey.

Petitioner appealed, renewing his contention that he had standing to raise a specialty challenge, that the Eastern District of New York proceedings did in fact violate the rule of specialty, and that his term of supervised release was already complete by the time of the conduct underlying the third violation charge. The Second Circuit (Kearse, J., joined by Cabranes and Calabresi, JJ.) affirmed, holding that "the principle of specialty can be invoked here only by the Dominican Republic." Pet. App. 12a. On the second question, the panel held that a period of supervised release is tolled on the basis of a defendant's fugitive status. Pet. App. 13a-19a.

Petitioner sought panel rehearing and rehearing en banc, urging the Second Circuit to reconsider the specialty standing holding. The Second Circuit denied the petition. Pet. App. 48a.

REASONS FOR GRANTING THE WRIT

This petition presents two distinct questions, both of which implicate open splits between the federal courts of appeals and involve important questions that bear on the uniform administration of criminal justice.

I. RULE OF SPECIALTY STANDING

More than 130 years ago, this Court held that extradited persons have standing to invoke the rule of specialty in the same case where the Court first recognized the doctrine of specialty itself, *United States v. Rauscher*, 119 U.S. 407 (1886). The rule of specialty generally provides that an extradited defendant may be tried by the receiving nation only for those offenses charged in the extradition proceedings or for which he or she was delivered up. *Id*. at 419-20. Since *Rauscher*, the number of extraditions to the United States has risen dramatically, and it has become increasingly common for extradited persons to move for dismissal of charges based upon an alleged specialty violation. This Court should grant certiorari in order to resolve the substantial confusion that has arisen in the circuits in the century since the Supreme Court's first and last word on the subject.

In *Rauscher*, a second mate on an American vessel was extradited from Great Britain on a charge of murder, but was tried and convicted of a lesser included crime instead, inflicting cruel and unusual punishment on a seaman. *Id.* at 409-11. The extradition treaty between the United States and Great Britain did not contain an explicit provision incorporating the specialty doctrine, but the *Rauscher* Court found that it was implicit. *Id*. at 415-16. Though Great Britain did not object, this Court held that "a person who has been brought within the jurisdiction of the court, by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition . . . ." *Id.* at 430. *Rauscher* created a judicial remedy for specialty violations raised by the defendant, even in the absence of official protest from the extraditing country.

Twenty years later, in *Johnson v. Browne*, this Court reiterated the principle first articulated in *Rauscher*, that an extradited person has standing to raise a specialty challenge, and clarified that the principle of specialty extends to protect an extraditee not only from prosecution for offenses outside the extradition grant, but also from the service of a sentence on a prior conviction not mentioned in the extradition grant. 205 U.S. 309 (1907); *see also Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir. 1973) (holding that "the requisitioning state may not, without the permission of the asylum state, try *or punish* the fugitive for any crimes committed before the extradition except the crimes for which he was extradited" (emphasis added)).[1]

Rauscher and *Browne* make clear that specialty rights are conferred to the individuals who are the objects of the treaty between the contracting nations. *Rauscher*, 119 U.S. at 422 ("[I]t is impossible to conceive of the exercise of

[1] Thus, whether the charges leading to revocation of supervised release in petitioner's case are conceived of as new offenses or the continued service of a sentence on a past offense, petitioner is protected by the doctrine of specialty. The language of the extradition treaty at issue in petitioner's case, like the treaty in *Johnson v. Browne*, makes clear that it applies equally to punishment on prior convictions. Article I of the Treaty states that upon mutual requisition the asylum country shall deliver up any person "who may be charged with, or may have been convicted of" an extraditable offense. Pet. App. 49a. Article IV of the Treaty incorporates the rule of specialty. Pet. App. 51. And Article XI of the Treaty states that "[i]f the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the Court before which such conviction took place, duly authenticated, shall be produced." Pet. App. 53a.

jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited.”).[2] The *Rauscher* Court conceived of its holding as “a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.” *Id.* at 431. A defendant is guaranteed the right to assert in court that the government may not prosecute or punish him for something outside the explicit grant of extradition.

A. Federal Courts of Appeals Are Intractably Split Over Whether Extradited Defendants Have Standing To Invoke The Rule Of Specialty

Since this Court’s last pronouncements on specialty standing in *Rauscher* and *Browne*, the federal courts of appeals have become deeply and irreconcilably divided over how—or whether there is even a need—to interpret those decisions.

[2] The Court in *Rauscher* could not conceive of the “exercise of jurisdiction” for anything outside the scope of the extradition grant. Thus, properly framed, what the Second Circuit below calls “prudential standing,” Pet. App. 2a-3a, is merely the defendant’s ability to tell a court that the court lacks jurisdiction over the defendant. *See United States v. Levy*, 947 F.2d 1032, 1034 (2d Cir. 1991) (“[W]e agree with the First Circuit that [specialty] is a jurisdictional limitation, restricting a court’s power to enter judgment against the defendant. . . . [T]he doctrine of specialty does not guarantee a right not to be tried, but rather a right to be protected from a court’s authority. The doctrine limits the personal jurisdiction of the domestic court.” (citing *United States v. Sorren*, 605 F.2d 1211, 1214 (1st Cir. 1979))); *see also Rauscher*, 119 U.S. at 433 (the trial court “did not have jurisdiction of the person at that time, so as to subject him to trial”); *United States v. Isaac Marquez*, 594 F.3d 855, 857 (11th Cir. 2010).

The lower courts' decisions fall into two general categories: (1) decisions holding that a defendant has no standing to raise a specialty claim unless the surrendering country protests, i.e., the "no standing without protest" approach, and (2) decisions holding that a defendant has standing to raise a specialty claim unless the surrendering country has waived the claim, i.e., the "standing unless waiver" approach.

The Third, Fifth and Sixth Circuits, joined now by the Second Circuit, hold that a defendant has no standing to claim a violation of the doctrine of specialty unless the surrendering nation protests—or would protest.[3]

The Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have held that a defendant has standing to assert a specialty violation without any protest from the surrendering nation.[4] The defendant may raise any objections the extraditing

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[3] *See United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (3d Cir. 1997); *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985). It appears likely that the Seventh Circuit would also adopt this approach. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").

[4] *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("The government's argument that [defendant] lacked standing to complain of a violation of the treaty is without merit." (citing *Rauscher*)); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) ("An extradited person may raise whatever objections the extraditing country is entitled to raise." (citing *Rauscher*)); *United States v. Levy*, 905 F.2d 326 (10th Cir. 1990) (citing *Rauscher*); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) ("We hold that a criminal defendant has standing to allege a violation of the principle of specialty." (citing *Rauscher*)); *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017) (citing *Rauscher*).

country "might have" made.[5] Here, the Dominican Republic did not waive objections to the extradition request, so petitioner would have had standing under the majority rule.

The need to resolve this conflict is manifest, as it has grown deeper and more entrenched over several decades. Almost every federal circuit has weighed in on one side or the other of the divide, and any new courts to confront the issue are no longer contributing to any process of percolation. This widespread, intractable conflict requires this Court's intervention.

B. The Second Circuit's Decision Is Incorrect

Why all the discord within the circuits? The culprit, in part, is *Ker v. Illinois*, 119 U.S. 436 (1886), which was decided on the same day as *Rauscher*. In *Rauscher*, this Court held that a person brought into the United States pursuant to an extradition treaty has standing to bring a challenge if she is prosecuted or punished for something outside the grant of extradition. *Ker*, in contrast, establishes that defendants who are either brought into the United States by means *other than an extradition treaty*, or who challenge a violation of a non-specialty provision of a treaty, do not have standing to make such challenges. The *Ker-Frisbie* line of cases involve defendants who were kidnapped, abducted, or otherwise subject to extra-treaty transfers into the United States. *See Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker*. Under *Ker*, absent the asylum country's objection, the defendant has no

[5] *See United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986).

standing to challenge the means by which she was brought into the jurisdiction, and no standing to challenge any violation of the extradition treaty—if there was one—because the transfer was executed outside the treaty process.

Despite the clarity of the rule articulated in *Rauscher*, numerous courts have gone astray, importing the "no standing" or "no standing without protest" principles that flow from the *Ker-Frisbie* doctrine onto cases that fall squarely under the specialty standing holding of *Rauscher*. The Second Circuit's recent specialty standing jurisprudence, for example, entirely ignores *Rauscher* and relies instead on "no standing" *Ker-Frisbie* abduction cases and a general principle that a defendant cannot ordinarily complain of violations of international law. In petitioner's case, the Second Circuit pointed to *Rauscher* for the definition of specialty, but failed to discuss *Rauscher* or a single *Rauscher*-line case in the context of standing to bring a specialty challenge. *See* Pet. App. 10a. Likewise, the panel below points only to *Ker*-line cases, including *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (a *Ker* abduction case), *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) (a *Ker* abduction case), and *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (a *Ker* abduction case). *See* Pet. App. 10a-11a.

In *United States v. Suarez*, a pre-*Barinas* case in the Second Circuit, the panel relied on *Alvarez-Machain*, 504 U.S. 655 (1992), for the proposition that a defendant has standing to raise an extradition violation only if the extraditing country first makes an official protest. 791 F.3d 363, 367 (2d Cir. 2015). But that inference, without more, conflates the factual finding in *Alvarez-Machain* (the defendant was abducted, therefore *Ker* applies and the defendant lacks standing) with the more nuanced theoretical distinction that *Alvarez-Machain* is careful to draw between *Ker* and *Rauscher*.

The Second Circuit had previously gotten the distinction between *Ker* and *Rauscher* right in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 n.3 (2d Cir. 1975) ("There were limited exceptions to the *Ker-Frisbie* rule. If the defendant was brought into the United States under an extradition treaty, the 'principle of specialty' decreed that he could be tried only for the crime for which he was extradited. *United States v. Rauscher*, 119 U.S. 407 (1886) (decided on the same day as *Ker*)."). *Lujan*, like *Alvarez-Machain*, was a case about an abduction, so the *Lujan* court determined that the defendant lacked standing because *Ker* applied. But subsequent panels, including the panel in petitioner's case, have failed to make the distinction clearly made in *Lujan* and *Alvarez-Machain*, and have instead simply grabbed the quick headline, taking those cases to mean that defendants—whether abducted or extradited—lack standing to bring a challenge.

The five courts of appeals that have found standing for an extraditee are the circuits that have traced the specialty doctrine back to *Rauscher*, and teased it apart from the decisions over the last few decades that have applied *Ker-Frisbie* with imprecise and overbroad brush strokes. Those circuits come to the correct conclusion that with respect to specialty cases, *Rauscher* controls. *See, e.g.*, *United States v. Trabelsi*, 845 F.3d 1181 (D.C. Cir. 2017) (citing *Rauscher*, distinguishing

Ker); *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (citing *Rauscher*, distinguishing *Ker*).[6] When read in parallel with *Rauscher*, it is clear that *Ker* does not disturb the longstanding principle that persons extradited under a treaty between two nations can raise challenges to their prosecution or punishment sounding in specialty.

Yet confusion persists. This Court should revisit the first principles articulated in *Rauscher* and *Ker*, and hold that an extradited defendant can raise rule of specialty challenges to the extent that the extraditing country could raise them.

C. The Question Presented Significantly Impacts The Administration of Criminal Justice, And This Case Is An Excellent Vehicle To Resolve The Conflict

The Court should use this case to finally resolve this important and frequently recurring question. Standing to assert a specialty challenge is a pressing issue that significantly impacts the administration of criminal justice across the country.

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[6] Though in *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990), a forcible kidnapping *Ker*-line case, the Seventh Circuit suggested that it would hold that an extraditee does not have standing to raise a specialty challenge, a panel of that circuit has more recently called its prior decision into question, noting its failure to heed *Rauscher*. *See United States v. Stokes*, 726 F.3d 880, 888-889 (7th Cir. 2013) ("On the face of it, *Burke* appears to foreclose further inquiry into the Rule of Specialty. But there is reason to question this circuit precedent. . . . Our decision in *Burke* is hard to square with *Rauscher,* which though old remains good law today.").

In recent decades, the number of extraditions has dramatically increased. Until the early 1970's, the United States received and submitted fewer than 50 extradition requests a year, but by the mid-1990's the number had grown to over 700 requests a year. Michael Abbell, *Extradition to and from the United States* 10 (Marinus Nijhoff 2010). In an increasingly globalized world, with prosecutions for international terrorism, drug trafficking, and cyber crimes, specialty issues will recur with even greater frequency in the coming years.

The United States now is party to over 100 extradition treaties.[7] All contain specific, though varying, provisions incorporating the specialty doctrine. *See* Note, *International Extradition, the Principle of Specialty and Effective Treaty Enforcement*, 76 Minn. L. Rev. 1017, 1027-28 (1992). But they are generally silent as to whether they confer any right upon the extradited individual to enforce the terms of the specialty provisions. *See* Note, *Standing for the Doctrine of Specialty in Extradition Treaties: A More Liberal Exposition of Private Rights*, 25 Loy. L.A. L. Rev. 1377, 1396 (1992).

It is a strange result indeed that defendants extradited to federal courts in North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Arkansas, Alaska, California, Arizona, Nevada, Idaho, Montana, Washington, Oregon, Wyoming, Utah, Colorado, New Mexico, Kansas, Oklahoma, Alabama, Georgia, Florida, and Washington, D.C. have a right to enforce violations of the rule of specialty, but in New York, Vermont, Connecticut, New Jersey, Delaware,

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[7] *See* 18 U.S.C. § 3181 note (extradition treaties currently in force).

Pennsylvania, Mississippi, Louisiana, Texas, Tennessee, Kentucky, Ohio, and Michigan, they do not.

This petition offers an ideal vehicle to resolve the conflict. Petitioner has pressed *Rauscher* at each stage of the litigation. The issue is preserved, the facts are uncontroverted, and the answer is outcome-determinative. If petitioner had standing, his specialty challenge would prevail because the New York proceedings were outside the scope of the extradition grant. And both sides of the split have been fully ventilated—additional percolation would not aid this Court's consideration of the issue.

Over 130 years have passed since the decision in *Rauscher*. It is time for this Court to take up the question again.

II. FUGITIVE TOLLING OF SUPERVISED RELEASE

Section 3583(i) of Title 18 allows the court a reasonable amount of time beyond the expiration of the supervised release period, where needed, in order to adjudicate a charge that a defendant violated a condition of release during the period:

> 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 . . . 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.

18 U.S.C. § 3583(i). This extends the district court's jurisdiction beyond the scheduled expiration of a term of supervised release, but only if the violation

occurred during the term of supervision. The statute does not address the court's authority to adjudicate a charge that the defendant, while a fugitive, violated a condition of release after the scheduled end of the period.

The question presented is whether tolling is available during a period in which a supervisee has absconded from supervision. The only express supervised release tolling provision is contained in 18 U.S.C. § 3624(e), which tolls the running of a term of supervised release during any period in which an offender is imprisoned for thirty days or more in connection with a different crime.

A. The Decision Below Deepens A Conflict Between Circuits

The courts of appeals are split on the question of whether supervised release is tolled during a period of fugitivity.

The Fourth, Ninth, and now the Second Circuits have held that supervised release is tolled when an individual absconds. *See United States v. Buchanan*, 638 F.3d 448, 455 (4th Cir. 2011); *United States v. Delamora*, 451 F.3d 977, 978 (9th Cir. 2006); Pet. App. 12a-19a.

The Second Circuit acknowledged that § 3583(i) does not authorize tolling, but based its holding on the "traditional principle that an absconder should not benefit from his fugitivity." Pet. App. 18a; *see also Buchanan*, 638 F.3d at 454 ("[A] person on supervised release should not receive credit against his period of supervised release for time that, by virtue of his own wrongful act, he was not in fact observing the terms of his supervised release.").

The court of appeals below pointed to its prior ruling that fugitive tolling is permissible in the parole context, because such tolling "merely incorporates the common law rule that lapse of time does not constitute service of sentence and, hence, stops the sentence from running for that period during which the offender, through some fault of his own, has failed to serve his sentence." Pet. App. 16a (quoting *Caballery v. United States Parole Commission*, 673 F.2d 43, 46 (2d Cir.), *cert denied*, 457 U.S. 1136 (1982)).

The supervised release fugitive tolling holdings of the Fourth, Ninth, and Second Circuits rest on a comparison to equitable tolling in other areas of criminal law, consistent with the "strong federal policy disfavoring fugitives in analogous circumstances." Pet. App. 15a (quoting *Buchanan*, 638 F.3d at 453 n.3). The panel below pointed approvingly to, *inter alia*, 18 U.S.C. § 3290, which provides that "no statute of limitations shall extend to any person fleeing from justice," *id*., and to the principle that "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal," *id*. (quoting *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993)).

The First Circuit however, has found that there can be no tolling of supervised release on the basis of fugitive status. *See United States v. Hernandez-Ferrer*, 599 F.3d 63, 64 (1st Cir. 2010). In reaching this conclusion, the court reasoned that because 18 U.S.C. § 3624(e) provides a statutory tolling provision for terms of incarceration lasting longer than thirty days, Congress did not intend to allow any other tolling of the term of supervised release. The First Circuit found that:

> The absence of an express tolling provision for fugitive status, coupled with the presence of an express tolling provision that encompasses other circumstances, is highly significant. The maxim "*expressio unius est exclusio alterius* "—which translates roughly as "the expression of one thing is the exclusion of other things"—is a venerable canon of statutory construction, and that maxim is directly applicable here.

599 F.3d at 57-68 (citations omitted). The First Circuit noted that several other circuits citing the *expressio unius* canon have ruled that the supervised release statutes do not authorize tolling a term of supervised release during the period that an offender is absent by reason of his deportation. *See, e.g.*, *United States v. Cole*, 567 F.3d 110, 114-15 (3d Cir. 2009); *United States v. Ossa-Gallegos*, 491 F.3d 537, 543 (6th Cir. 2007) (en banc); *United States v. Okoko*, 365 F.3d 962, 967 (11th Cir. 2004); *United States v. Juan-Manuel*, 222 F.3d 480, 487-88 (8th Cir. 2000); *United States v. Balogun*, 146 F.3d 141, 146-47 (2d Cir. 1998).

The Second Circuit distinguished its holding that fugitivity tolls supervised release, while deportation does not, on the grounds that a defendant should not benefit from "his own misconduct." Pet. App. 19 (citing *Balogun* 146 F.3d at 142). But the lack of fugitive tolling in the First Circuit has not led to a windfall for supervised release absconders who remain fugitives until their term of supervision expires. Though such an offender cannot be formally charged with violations occurring after the term of supervision has ended, as long as a warrant or summons issues before the expiration of the term—as it would at the time of the initial absconsion—he would still be subject to the court's jurisdiction once located, and his conduct while a fugitive can still be considered at sentencing. *Hernandez-Ferrer*, 599 F.3d at 69 (citing 18 U.S.C. § 3583(i)). And in addition to any incarceratory sentence, the court could impose an extended term of supervised release.

This Court should apply the *expressio unius* canon and hold that there can be no fugitive tolling of supervised release. When Congress explicitly allows for supervised release tolling in a particular circumstance, there is a strong presumption that Congress did not intend to allow tolling for other reasons. If Congress had wanted to authorize tolling for supervised release absconders, it would have said so.

B. This Case Is An Ideal Vehicle For Considering This Important Question

The Court should grant certiorari to resolve the acknowledged conflict over this important and recurring question of federal statutory interpretation. In the decision below, the Second Circuit recognized that it was deepening an existing split over whether fugitivity tolls a period of supervised release. The Second Circuit's affirmative answer, while consistent with decisions of the Fourth and Ninth Circuits, conflicts with the First Circuit's rule that fugitivity is irrelevant to the expiration of a term of supervision.

The question is of practical importance, as the answer has significant consequences for many criminal defendants and affects the uniform administration of federal criminal law. Absconders accounted for 53 percent of federal probation revocations for technical violations, according to a study in 2014. *See* Kelli Stevens-Martin, Olusegun Oyewole & Cynthia Hipolito, *Technical Revocations of Probation in One Jurisdiction: Uncovering the Hidden Realities*, 78 Federal Probation, a Journal of Correctional Philosophy and Practice 3, 19 (Administrative Office of the U.S. Courts 2014). More than half of those absconders were fugitives for longer than six months. *Id* at 18-19.

This case is also an ideal vehicle. The Second Circuit issued a thorough published opinion that engaged the question presented at length. And the undisputed facts throw the issue into sharp relief: barring fugitive tolling, the adjudication of Charge 3 was beyond the court's authority because the conduct at issue occurred in 2007, well after the 2002 expiration of petitioner's supervised release term. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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