No. 24-1056

IN THE
Supreme Court of the United States

ISABEL RICO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the fugitive-tolling doctrine applies in the context of supervised release.

PARTIES TO THE PROCEEDING

Petitioner Isabel Rico was defendant-appellant in the court of appeals and defendant in the district court.

Respondent is the United States of America, which was appellee in the court of appeals.

RELATED PROCEEDINGS

United States District Court for the Central District of California:

United States of America v. Isabel Rico, No. 2:10-cr-00381-FLA-1 (Apr. 22, 2024)

United States Court of Appeals for the Ninth Circuit:

United States of America v. Isabel Rico, No. 23-807 (Dec. 14, 2023)

United States of America v. Isabel Rico, No. 24-2662 (Mar. 6, 2025)

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INTRODUCTION

Almost all defendants released from federal prison serve a term of supervised release. Supervisees must, among other things, keep in regular contact with their probation officers. Sometimes they violate that requirement and are deemed absconders. This case is about the consequences of abscondment.

The parties agree that a defendant's abscondment violates the conditions of his supervised release. As a result, the sentencing court is authorized to revoke supervised release and impose an additional prison term plus a new supervision period, with no credit given for any time previously spent on supervised release. The parties also agree that a supervisee who absconds is not relieved of his supervised-release conditions. Violations occurring after abscondment can be the basis for revocation and an enhanced Sentencing Guidelines range, so long as a warrant or summons issues for those violations before the scheduled expiration of the supervision term.

The question in this case is whether abscondment results in an additional consequence: an automatic, pre-revocation extension of the period during which the defendant is subject to the supervised-release conditions. According to the government, when a defendant absconds from supervised release, he remains, by operation of law, subject to the conditions of supervised release until he is apprehended. The practical effect of that position is that a supervisee will remain subject to the conditions of supervised release for a longer period than that specified in the criminal judgment—and, in some cases, longer even than the maximum period specified in the statute.

This Court should reject the government's position for a simple reason: there is no textual support for it. It is fundamental in the federal criminal-justice system that all sentences—and all enhancements of those sentences—must be authorized by Congress. Yet, though the Sentencing Reform Act of 1984 contains other provisions addressing tolling and absconders, it nowhere authorizes the automatic extension of a supervised-release term. Under the Act, the consequence of abscondment is revocation and a fresh sentence, not an automatic pre-revocation extension.

Indeed, there is powerful evidence that Congress did not want such automatic extensions in the supervised-release context. Less than a decade before the enactment of the Sentencing Reform Act, Congress had authorized such automatic extensions in the context of parole—supervised release's predecessor system—both for parolees who absconded and those who were incarcerated. When Congress created the supervised-release system to replace parole, Congress carried forward a version of incarcerated-prisoner tolling, but it conspicuously did not enact any analogous fugitive-tolling provision.

The government and lower courts adopting the doctrine have not claimed that fugitive tolling in the supervised-release context has any textual support. Instead, they have relied on a purported common-law tradition of fugitive tolling in parole and probation cases that Congress supposedly incorporated silently into the Sentencing Reform Act. That theory fails for many reasons: a court may not extend a sentence based on the common law; no such common-law tradition existed; and even if it

did exist, Congress abrogated it. Nor can fugitive tolling be grounded in the vague principle that defendants must not benefit from their wrongdoing—not only is it wrong that fugitive tolling is necessary to prevent absconding supervisees from benefiting, there is simply no such principle in our system. And if there were any doubt, principles of lenity and fair notice require that this Court reject the government's effort to impose sentencing enhancements that Congress did not expressly authorize.

The sentence petitioner Isabel Rico received in this case was enhanced based on the judge-made fugitive-tolling doctrine, which has no support in text or history. This Court should reverse.

OPINIONS BELOW

The memorandum disposition of the court of appeals (Pet. App. 1a-3a) is unreported but is available at 2025 WL 720900. The judgment and commitment order of the district court (Pet. App. 4a-7a) is unpublished.

JURISDICTIONAL STATEMENT

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, and granted on June 30, 2025. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent sections of the U.S. Code, 18 U.S.C. §§ 3583 and 3624, are reproduced in the appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

A. Legal Background

1. For most of the twentieth century, the federal criminal-justice system had a parole process, by which a defendant could serve a portion of his custodial sentence outside the prison walls. *See Bradley v. United States*, 410 U.S. 605, 610 (1973). The first parole statute was enacted in 1910.[1] But in the Sentencing Reform Act of 1984, Congress "eliminated most forms of parole" and replaced it with supervised release, "a form of postconfinement monitoring overseen by the sentencing court." *Johnson v. United States*, 529 U.S. 694, 696-97 (2000); *see* Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987.

Unlike parole, supervised release "is not a punishment in lieu of incarceration." *United States v. Granderson*, 511 U.S. 39, 50 (1994). It is instead meant to "fulfill[] rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000); *see Esteras v. United States*, 145 S. Ct. 2031, 2041 (2025).

Supervised release plays an important role in the federal criminal-justice system. Between 2005 and 2009, approximately 95% of defendants sentenced to prison were also sentenced to supervised release; in cases where the defendant was sentenced to more than one

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[1] U.S. Parole Comm'n, U.S. Dep't of Just., *History of the Federal Parole System* 1 (May 2003), https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf.

year in prison, the sentencing court imposed a supervised-released term over 99% of the time.[2]

Courts have significant discretion in choosing the length and conditions of supervised release, although there is generally a maximum duration of one, three, or five years, depending on the severity of the underlying offense. 18 U.S.C. § 3583(b)-(c); *see, e.g.*, *Holguin-Hernandez v. United States*, 589 U.S. 169, 173 (2020).[3] Certain conditions are mandatory for certain offenses. *See* 18 U.S.C. § 3583(d). And some conditions are *always* attached to supervised release—including, as relevant here, "that the defendant not commit another Federal, State, or local crime during the term of supervision." *Id.*

A court has the power to terminate, extend, or revoke a term of supervised release. *See* 18 U.S.C. § 3583(e)(1)-(3). Revocation is a permissible sanction if the court finds by a preponderance of the evidence that a defendant has violated a condition of his supervision. *Id.* § 3583(e)(3). The court may then "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in [the] term of supervised release"—potentially up to five years for the most serious underlying offenses—"without credit for time previously served" on supervised release. *Id.* And the court may impose a *new*

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[2] U.S. Sent'g Comm'n, *Federal Offenders Sentenced to Supervised Release* 7, 55 tbl.1 (July 2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

[3] For particularly serious offenses (*e.g.*, terrorism, child sexual abuse), there is no upper limit on the length of a supervised-released term. *See* 18 U.S.C. § 3583(j)-(k). No such offenses are at issue here.

term of supervised release to be served following satisfaction of the prison sentence for the violation. *Id.* § 3583(h).

2. This case concerns the time at which a supervised-release term ends.

The rules for calculating satisfaction of a supervised-release term appear in 18 U.S.C. § 3624(e). That provision states that "[t]he term of supervised release commences on the day the person is released from imprisonment." *Id.* It provides that defendants can serve periods of supervised release concurrently with probationary periods under state or local law (or with another federal supervised-release term). *Id.* And Section 3624(e) authorizes tolling of a supervised-release term in only one circumstance: "[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." *Id.*

The Sentencing Reform Act as initially enacted did not address the situation where a court was asked to revoke supervised release *after* the term's expiration based on a violation that occurred during the term. This silence potentially allowed for violations occurring late in a supervision term to evade adjudication; by the time the violation was brought to the court's attention, there might no longer be any active supervised release to "revoke." *See United States v. Buchanan*, 638 F.3d 448, 452 (4th Cir. 2011). Congress addressed this problem in 1994 by enacting 18 U.S.C. § 3583(i). *See United States v. Janvier*, 599 F.3d 264, 265-66 (2d Cir. 2010); *see also*

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 1796, 2017.

Section 3583(i) clarified that a court's power to revoke a term of supervised release and impose additional sanctions generally does not "extend[] beyond the expiration of the term of supervised release." 18 U.S.C. § 3583(i). But that provision extends jurisdiction "for any period reasonably necessary for the adjudication of matters arising before [the supervision term's] expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." *Id.* In other words, if a warrant or summons has issued relating to a violation while a defendant is still on supervised release, the violation can be adjudicated for a reasonable period following the end of the term. But if no warrant or summons is issued before the expiration of supervised release, courts lack jurisdiction to revoke supervised release and impose additional sentences.

3. The Sentencing Guidelines include a policy statement classifying violations of supervised release into three categories. The most serious violations—Grade A violations—are crimes of violence, controlled-substance offenses, or weapons-related felonies (or other crimes punishable by more than 20 years' imprisonment). U.S.S.G. § 7B1.1(a)(1). Other felonies are deemed Grade B violations. *Id.* § 7B1.1(a)(2). Lesser crimes and non-criminal violations of supervised-release conditions are Grade C violations. *Id.* § 7B1.1(a)(3). When a supervisee commits multiple violations, "the most serious grade" of those violations governs for Guidelines purposes. *Id.* § 7B1.1(b). The higher the grade of the violation, the

higher the sentencing range provided by the Guidelines. *See id.* § 7B1.4(a).

B. Procedural History

1. Ms. Rico pleaded guilty in 2010 to a drug-trafficking offense. D. Ct. Doc. 47 (Sept. 8, 2010). She was sentenced to 84 months' imprisonment to be followed by four years of supervised release. Pet. App. 11a. Among the imposed conditions of supervised release were that Ms. Rico would not commit another federal, state, or local crime; that she would refrain from using drugs; that she would undergo drug testing and participate in a drug-treatment program; and that she would notify a probation officer before changing her residence. D. Ct. Doc. 103, at 1, 3 (Oct. 5, 2011).

2. Ms. Rico was released from prison in 2017 and began serving her supervised-release term. Pet. App. 11a. A few months later, she violated several drug-related conditions of her supervised release. *Id.* That led the district court to revoke supervised release and sentence Ms. Rico to two additional months' imprisonment, to be followed by a new 42-month supervised-release term. *Id.*

In December 2017, Ms. Rico was again released from prison and began serving her second term of supervised release, which was scheduled to expire in June 2021. Pet. App. 11a. Within a few months, Ms. Rico failed a drug test and was placed in a residential drug-treatment program, which she successfully completed. *Id.*; Appellant's C.A. Br. 5; Gov't C.A. Br. 6. A probation officer then attempted to place Ms. Rico in an outpatient program, but she did not report, missed a drug test, and lost

contact with the officer. Appellant's C.A. Br. 5; Gov't C.A. Br. 6; *see* C.A. Doc. 10.1, at 3-4 (Aug. 19, 2024). The officer visited Ms. Rico's last known address but learned that Ms. Rico had moved out. Appellant's C.A. Br. 5; *see* C.A. Doc. 10.1, at 4. With her whereabouts unknown, the probation officer determined that Ms. Rico had absconded. Appellant's C.A. Br. 6; *see* C.A. Doc. 10.1, at 3-4.[4]

In May 2018, the probation office filed a violation petition alleging that Ms. Rico had violated the conditions of her supervised release by using drugs and by changing her residence without notice. Appellant's C.A. Br. 6; Gov't C.A. Br. 6. The probation office calculated a Sentencing Guidelines range of 8 to 14 months based on a Grade C violation of the supervised-release conditions. Appellant's C.A. Br. 6; *see* Gov't C.A. Br. 24; C.A. Doc. 10.1, at 5. A bench warrant then issued. Appellant's C.A. Br. 6; Gov't C.A. Br. 6.

3. Ms. Rico was ultimately arrested on the bench warrant in January 2023. D. Ct. Doc. 155, at 1 (Jan. 25, 2023). The probation office then amended the pending violation petition. The probation office dismissed the earlier drug-use charges but now alleged that, in addition to absconding, Ms. Rico had also committed multiple new state-law offenses—evading police and driving without a license in January 2021 (before the scheduled

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[4] Though the labels "abscondment" and "fugitive" may evoke images of a dangerous outlaw repeatedly evading capture, in reality Ms. Rico (joined by her mother) had simply gone to live in Northern California without informing her probation officer of her change in address. Appellant's C.A. Br. 6 n.2; *see* Pet. App. 34a; D. Ct. Doc. 174, at 5-6 (Apr. 11, 2023).

expiration of the supervised-release term), and a possession-for-sale offense in January 2022 (*after* the scheduled expiration). Pet. App. 24a-25a; *see* Appellant's C.A. Br. 7-8; Gov't C.A. Br. 7.

Ms. Rico admitted the alleged violations. Pet. App. 4a-5a, 12a-13a.[5] The abscondment violation and January 2021 offenses were deemed to be Grade C violations, but the January 2022 offense was deemed to be a Grade A violation (and thus the pertinent violation for sentencing purposes). *Id.* at 24a-26a. Ms. Rico objected that the district court lacked jurisdiction to adjudicate the January 2022 drug-related offense as a supervised-release violation, since her term of supervised release had expired in June 2021. D. Ct. Doc. 202, at 5-8 (Mar. 8, 2024). The government responded that the clock on Ms. Rico's supervision term was paused when she absconded in May 2018 (with about three years remaining) and did not resume until she was apprehended in January 2023—meaning that she remained on supervised release when she committed the 2022 offense. D. Ct. Doc. 201, at 5-7 (Mar. 8, 2024); D. Ct. Doc. 204, at 1-2 (Mar. 22, 2024); *see* Pet. App. 14a. For her part, Ms. Rico argued that the "fugitive tolling" doctrine on which the government relied was inapplicable in the context of supervised release. D. Ct. Doc. 202, at 6-7.

4. The district court held that the fugitive-tolling doctrine applied in Ms. Rico's case, and that it therefore

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[5] After an initial revocation sentence in April 2023, Ms. Rico appealed and the case was remanded for resentencing by agreement of the parties. D. Ct. Doc. 178 (Apr. 18, 2023); *see* Order, *United States v. Rico*, No. 23-807 (9th Cir. Dec. 14, 2023), ECF No. 24.1. The first appeal concerned an aspect of the case not relevant here.

had jurisdiction to adjudicate her January 2022 violation. Pet. App. 26a-31a. Because that violation was a Grade A violation, it controlled the Sentencing Guidelines analysis, and the district court calculated Ms. Rico's range as 33 to 36 months. *Id.* at 31a-32a.[6] The court revoked Ms. Rico's supervised release and sentenced her to 16 months' imprisonment—a significant downward variance, but still above the 8-to-14-month range that would have applied if the January 2022 violation were not considered. *Id.* at 35a; *see* U.S.S.G. § 7B1.4(a). The court also imposed an additional two-year term of supervised release. Pet. App. 35a. That term is scheduled to expire in May 2026. *See* D. Ct. Doc. 155, at 1 (Ms. Rico began serving custodial portion of sentence on January 24, 2023).

5. The Ninth Circuit affirmed Ms. Rico's sentence. Pet. App. 1a-3a. The panel noted that it was "bound by circuit precedent applying the fugitive tolling doctrine," *id.* at 2a, and under that doctrine, Ms. Rico's "term of supervised release was tolled while she was a fugitive from May 2018 to January 2023," *id.* at 3a. It therefore concluded that the district court had jurisdiction to adjudicate the January 2022 violation occurring after the scheduled expiration of Ms. Rico's supervision term. *Id.*

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[6] The range was 33 to 41 months under the Guidelines, but the statutory maximum was 36 months due to the classification of Ms. Rico's underlying federal conviction. Pet. App. 31a; *see* 18 U.S.C. § 3583(e)(3); U.S.S.G. § 7B1.4(b)(1).

SUMMARY OF THE ARGUMENT

Fugitive tolling does not apply to supervised release.

At the outset, while lower courts have used the phrase "fugitive tolling" (and Ms. Rico uses that terminology as well for simplicity's sake), that phrase is misleading. The government does not argue that a supervised-release term stops when a supervisee absconds and resumes when he is apprehended. Instead, the government argues that the supervised-release term should be *extended* to cover this period. According to the government, the supervisee should be subject to the conditions of supervised release until his originally scheduled term expires, *and* for a subsequent post-expiration period until he is apprehended.

I. This Court should reject that argument because it lacks the slightest basis in the Sentencing Reform Act's text. The Act addresses both tolling and fugitives, but does not authorize the form of fugitive tolling the government endorses. The government relies on case law holding that defendants must serve their full sentences, but those precedents address situations where tolling causes defendants to serve the accurate sentence as set forth in their criminal judgments; the precedents do not approve of tolling rules, like the one the government advocates here, requiring defendants to serve *more* than their full sentences.

II. Statutory history confirms what the text makes clear: there is no such thing as fugitive tolling for supervised release. In 1976, Congress authorized fugitive tolling for the preexisting parole system. But when Congress abolished parole in 1984 and replaced it with

supervised release, Congress eliminated the statute authorizing fugitive tolling and enacted no replacement provision. Meanwhile, Congress left fugitive tolling intact for legacy parole cases. Indeed, such tolling remains in force today for the few remaining federal parolees. And Congress likewise carried forward a version of incarcerated-prisoner tolling that it had also authorized in 1976, further proving Congress's intent to leave fugitive tolling by the wayside. This Court should not disrupt that reticulated statutory scheme.

III. The government does not suggest that any statute supports its position. Instead, it relies on a purported common-law tradition of fugitive tolling that, it claims, Congress should be understood to have impliedly incorporated into the Sentencing Reform Act. That argument fails because the common law, untethered from any statutory term, cannot be the basis to impose an enhanced sentence. Further, no common-law tradition of fugitive tolling existed in the context of parole or probation prior to the 1984 enactment of the Sentencing Reform Act. Even if it did, there is no basis for concluding that Congress silently transplanted that purported tradition into the supervised-release context, given both that Congress repealed the preexisting parole statute authorizing fugitive tolling and that supervised release is fundamentally different from both parole and probation.

The government also invokes the supposed common-law rule that people should not benefit from wrongdoing. But that vague maxim is not a basis for increasing sentences without congressional authorization. And in any event, if Ms. Rico prevails, absconders will not benefit

from their abscondment. To the contrary, they will face revocation of supervised release as a result of their abscondment, which will likely require them to serve additional prison and supervision terms. And if supervised release is revoked, abscondment will prevent defendants from getting credit even for the period of supervision *before* abscondment.

IV. Principles of lenity and fair notice require rejecting fugitive tolling as applied to supervised release. The Sentencing Reform Act is certainly not unambiguous on this issue, as required to overcome the rule of lenity. Further, the government's position would introduce intolerable uncertainty as to whether defendants remain on supervised release after the scheduled end of their terms.

V. It is clear that Ms. Rico's sentence was enhanced as a result of the lower courts' application of fugitive tolling. The judgment below must therefore be reversed.

ARGUMENT

The question presented in this case is whether abscondment from supervised release results in the extension of the supervision term beyond the originally scheduled expiration date. The answer is no for a simple reason: there is no textual basis for such an extension. The government attempts to fill this textual lacuna by invoking supposed common-law principles. But without a textual anchor, the common law cannot enhance a criminal sentence—and even if it could, no relevant common-law tradition exists.

We begin with a preliminary point. It is important to be precise about exactly what the government is

advocating in this case. Lower courts have used the phrase "fugitive tolling" to describe the government's theory, and Ms. Rico will use that nomenclature for simplicity's sake. But this use of the word "tolling" is atypical. The government is not arguing that a supervised-release term stops during the period of abscondment and then later resumes, which is what "tolling" usually means. *See Artis v. District of Columbia*, 583 U.S. 71, 82-83 (2018) (the word "tolled" generally means "'suspended,' or 'paused,' or 'stopped'"). To the contrary, the government argues—and Ms. Rico agrees—that a supervised-release term does *not* stop during a period of abscondment. Instead, during that entire period, the supervisee remains subject to the conditions of supervised release. Thus, the parties agree that Ms. Rico's motor-vehicle crimes in January 2021—which she committed following her abscondment, but within the 42-month period of supervision specified in the judgment—were violations of supervised release.

Instead, the government's theory is that an absconder's supervised-release term is automatically extended until the absconder is apprehended. The effect of the government's position is that supervisees will be subject to supervised-release conditions for a period longer than the term of the sentence specified in the criminal judgment. In this case, for example, the government claims that Ms. Rico was subject to supervised-release conditions for the entire 42-month term specified by the judgment (through June 2021) *and* she continued to be subject to those conditions until her apprehension in January 2023. That is the government's basis for contending that Ms. Rico's drug-possession crime in

January 2022 (after the expiration of the 42-month term) was a Grade A violation of supervised release.

Hence, the fugitive-tolling doctrine as applied in this and similar cases is an "extension" doctrine rather than a true "tolling" doctrine. *See United States v. Talley*, 83 F.4th 1296, 1301-02 (11th Cir. 2023). The question presented is whether the Sentencing Reform Act authorizes that extension. To be clear, Ms. Rico does not dispute that after she was apprehended, the district court was authorized to revoke supervised release and impose a fresh sentence based on her abscondment. The question is whether an extension of the initial supervision term automatically occurs *prior to* any revocation proceeding.

As this case illustrates, that question has important practical consequences. Supervised release imposes significant legal disabilities on supervisees—including those that abscond. For example, all supervisees are subject to the mandatory condition that they not commit a federal, state, or local crime during the term of supervision. 18 U.S.C. § 3583(d). If the court finds that a supervisee violated those conditions, it may impose additional prison time and supervised release, with the supervisee receiving no credit for time spent on supervised release prior to the violation. *Id.* § 3583(e)(3). But whether the defendant's conduct constitutes a violation (*e.g.*, whether he committed a new offense) is judged under significantly harsher procedures than ordinarily apply. Supervised-release revocation proceedings are conducted under a preponderance-of-the-evidence standard—not proof beyond a reasonable doubt—and there is no jury-trial right. *See United States v. Haymond*, 588 U.S. 634, 638 (2019). Thus, a supervisee

accused of committing a crime while on supervised release—even during the period of abscondment—is exposed to prison time (and additional supervised release) without the traditional protections of the Fifth and Sixth Amendments. *See Talley*, 83 F.4th at 1302.

Although absconders from supervised release already face revocation based purely on the abscondment, regardless of whether they commit additional violations, committing a crime while on supervised release carries more serious consequences than the abscondment. Whereas revocation for abscondment is discretionary, committing certain crimes while on supervised release makes revocation mandatory. *See* 18 U.S.C. § 3583(g). And many crimes will be categorized as more serious violations than abscondment (a noncriminal violation), resulting in a higher Guidelines range in the event of revocation. Indeed, that is the dynamic giving rise to this case: the parties agree that Ms. Rico violated her supervised release by absconding (a Grade C violation), but the government sought and obtained a sentence based on an elevated Guidelines range by treating her January 2022 offense as an additional (Grade A) supervised-release violation, resulting in a substantial increase in her Guidelines range.

Text, history, and traditional principles of criminal law all point to the same result here: there is no fugitive tolling in the supervised-release context.

I. THERE IS NO TEXTUAL BASIS FOR THE FUGITIVE-TOLLING DOCTRINE IN THE CONTEXT OF SUPERVISED RELEASE.

Applying fugitive tolling to supervised release is inconsistent with the text and structure of the Sentencing Reform Act. Nor does the doctrine find support in this Court's precedents.

A. The Sentencing Reform Act Does Not Authorize Fugitive Tolling for Supervised Release.

The Court should reject the fugitive tolling doctrine because there is no statutory basis for it.

If an individual on supervised release absconds and thus violates the supervision conditions, the court may, after considering certain enumerated factors, revoke supervised release. 18 U.S.C. § 3583(e)(3). The court may then impose a new sentence that includes an additional supervision term. *Id.* But nothing in the Sentencing Reform Act suggests that an absconder's initial supervised-release term is automatically and indefinitely extended by operation of law.

That should be the end of this case. As American courts have made clear since the early days of the Republic, it is "essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted." *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 394 (C.C.D. Pa. 1798) (Chase, J.); *see, e.g.*, *Tennessee v. Davis*, 100 U.S. 257, 282 (1880) (federal courts lack power to "try or punish any offender, except when authorized by an act of Congress"); *United States v. Santos*, 553

U.S. 507, 523 (2008) (opinion of Scalia, J.) ("[I]n a criminal case, . . . the law must be written by Congress.").

Supervised release is "a component of a defendant's prison sentence." *Esteras v. United States*, 145 S. Ct. 2031, 2039 n.4 (2025) (emphasis omitted). Therefore, extending the supervision period increases the sentence. Congress has not authorized increasing criminal sentences in the form of fugitive tolling of supervision periods, so no such doctrine can apply.

Fugitive tolling is not merely *unauthorized* by the statutory text; it frequently *violates* that text. The statute sets out maximum "authorized terms of supervised release." 18 U.S.C. § 3583(b). For an initial supervision term (*i.e.*, one following a custodial sentence for the underlying offense), the Sentencing Reform Act generally authorizes "not more than" one, three, or five years, depending on the offense's severity. *Id.* § 3583(b)(1)-(3). When supervised release is revoked and a defendant serves a new custodial term following revocation, the length of any new supervised-release term "shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release." *Id.* § 3583(h).

Fugitive tolling, however, can result in supervisees remaining subject to the conditions of supervised release for a period exceeding the statutory maximum. In this case, for example, Ms. Rico's supervised release began in December 2017. The lower courts held that Ms. Rico was still on supervised release over five years later in January 2023, *see* Pet. App. 3a, not only beyond the supervision term to which she was sentenced, but beyond

the five-year maximum term authorized by statute. Congress did not permit that result.

B. Context Reinforces That Fugitive Tolling Does Not Apply to Supervised Release.

Other provisions of the Sentencing Reform Act specifically address both tolling and fugitives. They do not, however, authorize fugitive tolling, further confirming that Congress made a deliberate choice to eschew it.

Start with 18 U.S.C. § 3624(e), the provision of the Act governing the start and stop of a supervision term. Section 3624(e) contains exactly one tolling rule, providing that "[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." *Id.*[7] But Section 3624(e) says nothing about tolling a supervision term when a supervisee absconds. That should be dispositive. As this Court has recognized in the precise context of Section 3624(e): "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v.*

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[7] The prisoner-tolling rule set forth in Section 3624(e), contrary to the fugitive-tolling doctrine applied in this case, is a *true* tolling rule, in that it simply pauses the supervision period—the conditions of supervised release are paused as well. So the unwritten tolling doctrine the government defends here is actually harsher than the tolling doctrine codified in the statute. The unwritten, fugitive version of the doctrine also lacks any exception for brief abscondments, another harsh anomaly in the government's approach.

Johnson, 529 U.S. 53, 58 (2000); *see also City & County of San Francisco v. EPA*, 145 S. Ct. 704, 713-14 (2025) (when a statute "includes particular language in one section . . . but omits it in another," it is "generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)).

Also significant is 18 U.S.C. § 3583(i), which addresses abscondment from supervised release—but in a limited way that forecloses the government's expansive theory. Under the original version of the Sentencing Reform Act, there was no explicit provision allowing courts to adjudicate violations of supervised release once the supervision term expired. This meant that if a person absconded from supervised release and eluded apprehension during the supervision term, he could evade punishment even for violations that occurred *during* the term. Although some courts adopted creative readings of the Act to avoid this result, *see United States v. Janvier*, 599 F.3d 264, 265-66 (2d Cir. 2010), Congress ultimately fixed the problem in 1994 by enacting Section 3583(i), which provides that "[t]he power of the court to revoke a term of supervised release . . . and to order the defendant to serve a term of imprisonment" does not categorically end at the scheduled expiration of the supervision term, 18 U.S.C. § 3583(i). Instead, the court's jurisdiction "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." *Id.* (emphasis added).

Thus, Section 3583(i) specifically addresses the problem of absconders by setting out the precise circumstances under which the court's jurisdiction "extends beyond the expiration of the term of supervised release." 18 U.S.C. § 3583(i). In doing so, it expressly requires that the violation occur *during* the term. The clear-as-day implication is that a court may not revoke supervised release for violations committed *after* the term. What is more, Congress spoke of the "power of the court" to extend the term of supervised release, suggesting that Section 3583(i) is a limited expansion of courts' jurisdiction—as the courts of appeals have uniformly held. *See United States v. Gulley*, 130 F.4th 1178, 1184-85 (10th Cir. 2025) (collecting cases holding that Section 3583(i) is jurisdictional); *see also Mont v. United States*, 587 U.S. 514, 526 (2019) (noting that a court "los[es] authority over the defendant" if it does not comply with Section 3583(i)). This Court should not adopt a purported common-law doctrine that would permit courts to exceed limitations on their jurisdiction. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Section 3583(e) is yet another structural indicator pointing against the government's position. The government's argument reflects the intuition that if a supervisee is not complying with the conditions of supervised release, he should not get credit for serving that time. But the Sentencing Reform Act includes a provision addressing that very intuition. If a person does not comply with supervised-release conditions, the court may revoke supervised release "and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted

in such term of supervised release *without credit for time previously served on postrelease supervision*." 18 U.S.C. § 3583(e) (emphasis added). In other words, if a defendant violates the conditions of supervised release, he can be sentenced to prison for the entirety of the supervision term that he failed to complete (not to mention a brand new supervised-released period on the other side). Because Congress addressed the problem of noncompliant supervisees in one way, courts should not supplement the statutory text by addressing it in a different way.

Moving outside the Sentencing Reform Act, Congress has also enacted a different tolling provision addressing absconders. Under 18 U.S.C. § 3290, "[n]o statute of limitations shall extend to any person fleeing from justice"; as this Court has explained, "the statute of limitations normally applicable to federal offenses would be tolled" under this provision "while [the defendant] remained at large." *United States v. Bailey*, 444 U.S. 394, 414 n.10 (1980). This further confirms that Congress understands the concerns posed by abscondment and addresses them explicitly when it wishes to.

C. The "Mere Lapse of Time" Doctrine Does Not Justify Departing from the Statutory Text.

This Court has noted that the "[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." *Anderson v. Corall*, 263 U.S. 193, 196 (1923). In its brief in opposition (at 6), the government invoked this principle in an effort to defend fugitive tolling. That principle,

however, does not support extending supervised-release terms without congressional authorization.

The "mere lapse of time" principle reflects the intuitively obvious proposition that a prisoner does not get credit for serving a sentence unless he is actually serving it—that is, actually subject to the burdens the sentence imposes. For example, as *Corall* noted, "[e]scape from prison interrupts service, and the time elapsing between escape and retaking will not be taken into account or allowed as a part of a term." 263 U.S. at 196. As described by a modern court, "[t]he idea is that a person should not be credited with serving a prison sentence if he is not, in fact, in prison." *Talley*, 83 F.4th at 1301. Thus, if a person serving a ten-year prison sentence escapes after five years, he must serve five more years after he is caught. In that context, the prison sentence is "tolled" as that term is usually used: the clock stops when he escapes, and restarts when he returns. And because the sentence is tolled while the prisoner is a fugitive, he is of course not subject to the conditions of confinement—no one would think, for example, that if an escapee grows a beard while on the lam, he can be punished for violating prison grooming policy. This principle is not a common-law overlay on statutory law. It reflects a common-sense interpretation of the criminal judgment: if the judgment recites "ten years in prison," then the person must serve a ten-year prison term to discharge that judgment.

In *Corall*, this Court approved of a modest extension of that doctrine: tolling for parolees who go to prison. The defendant there was paroled from the federal prison in Leavenworth and then incarcerated in Joliet, Illinois, for a state-law offense. 263 U.S. at 193-94. The Court

held that this imprisonment tolled the parole term for purposes of preserving the parole board's revocation authority. *Id.* at 194-95, 197. The Court recognized that parole "is in legal effect imprisonment" in that "[w]hile on parole the convict is bound to remain in the legal custody and under the control of the warden." *Id.* at 196. It reasoned that the defendant's status as a parolee of the Leavenworth warden was fundamentally at odds with being in the custody of a different authority (the Joliet warden). *Id.* at 196-97. As the Court explained, during that period, his "status and rights were analogous to those of an escaped convict": he "ceased to be in the legal custody and under the control of the warden of the Leavenworth Penitentiary," as "required by" the "terms of the parole." *Id.* In other words, parole, by definition, required that the defendant be under the Leavenworth warden's control; while he was at Joliet, he was not under the Leavenworth warden's control, and he was therefore not, in fact, on parole and could not get credit toward his parole sentence. This Court's follow-up decision in *Zerbst v. Kidwell*, 304 U.S. 359 (1938), framed the doctrine the same way, explaining that "[i]t is not reasonable to assume that Congress intended . . . that misconduct of a parole violator could result in reducing the time during which the board has control over him to a period less than his original sentence." *Id.* at 363.

This "mere lapse of time" principle does not support the version of fugitive tolling that the government offers here. Unlike the escaped prisoner or the incarcerated parolee, Ms. Rico actually *was* on supervised release during the entire abscondment period. Though she was not reporting to her probation officer, she remained

subject to the disabilities and conditions of supervised release. That was the district court's basis for treating her January 2021 and January 2022 offenses as violations of supervised release warranting revocation. As such, unlike in *Corall* and *Kidwell*, the government proposes to alter, not interpret—to extend, not preserve—the terms of her sentence. *See Talley*, 83 F.4th at 1301-02 (making the same point).

Further, applying the "mere lapse of time" doctrine to supervised release is unnecessary because Congress has already addressed the doctrine's concerns. *Corall* concerned the problem of incarcerated parolees, but Congress has enacted legislation addressing that very issue in the supervised-release context, precisely because of Congress's understanding that an incarcerated inmate is not subject to supervised-release conditions. *See* 18 U.S.C. § 3624(e); *see also Mont*, 587 U.S. at 526 (observing that an incarcerated supervisee "will be unable to comply with many ordinary conditions of supervised release intended to reacclimate him to society"). And as already described, Congress has ensured that absconders from supervised release serve their full terms by requiring them to restart their sentences from scratch after supervised release is revoked. *See* 18 U.S.C. § 3583(e)(3). Because the legislation in this area is so comprehensive, this Court should be particularly reluctant to supplement Congress's handiwork.

II. STATUTORY HISTORY CONFIRMS THAT THERE IS NO FUGITIVE TOLLING FOR SUPERVISED RELEASE.

A comparison between the Sentencing Reform Act and preexisting law confirms that there is no such thing as fugitive tolling in the supervised-release context.

A. Absconders from Parole

In 1976, Congress enacted legislation authorizing a version of fugitive tolling for parole. But when Congress eliminated parole in 1984 and replaced it with supervised release, it prospectively abolished fugitive tolling for the new supervised-release regime it created, while leaving it intact for legacy parole cases. This provides some of the strongest evidence that Congress did not intend for fugitive tolling to apply in supervised-release cases.

Prior to 1976, the federal parole statute contained no provision allowing parole conditions to extend beyond the originally scheduled term. Indeed, even when a parolee violated parole conditions *during* the original term, the Parole Board was powerless to act if the violation was discovered after the term ended: the parole statute only allowed a "warrant for the retaking" of a parolee to be issued "within the maximum term or terms for which he was sentenced." 18 U.S.C. § 4205 (1970 ed.).

When Congress overhauled the parole system in 1976, it carried forward that general rule, providing that "the jurisdiction of the Commission[8] over the parolee shall terminate no later than the date of the expiration

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8 The 1976 legislation renamed the "Parole Board" the "Parole Commission."

of the maximum term or terms for which he was sentenced." 18 U.S.C. § 4210(b) (1976 ed.); *see* Parole Commission and Reorganization Act, Pub. L. No. 94-233, sec. 2, § 4210, 90 Stat. 219, 226 (1976). But Congress enacted an exception addressing parolees who absconded, providing that "[i]n the case of any parolee found to have intentionally refused or failed" to respond to the Parole Commission's instructions or commands, "the jurisdiction of the Commission may be extended for the period during which the parolee so refused or failed to respond." 18 U.S.C. § 4210(c) (1976 ed.). The next year, the Commission adopted a rule that if a parolee was a fugitive for a portion of his parole and later had his parole revoked, he would not receive credit toward the years remaining on his sentence for the time he was a fugitive. Paroling, Recommitting and Supervising Federal Prisoners, 41 Fed. Reg. 19,326, 19,326 (May 12, 1976) (1976 Rule); *see* 28 C.F.R. § 2.52(c) (1977).

Even the 1976 Rule, however, did not say that parole fugitives continued to be bound by their parole conditions after the originally scheduled term expired. The Parole Commission filled that gap in 1983, when it promulgated a regulation stating that if a parolee absconds, it "prevents his sentence from expiring on the original full term date," and that "any violations of the conditions of release (e.g., new crimes) committed prior to the execution of the warrant, whether committed before or after the original full term date, may be charged as a basis for revocation of parole." Paroling, Recommitting, and Supervising Federal Prisoners, 48 Fed. Reg. 22,917, 22,917 (May 23, 1983) (1983 Rule). The Parole Commission was clear that its new fugitive-tolling rule was based on the

statutory authority of 18 U.S.C. § 4210, the parole provision enacted in 1976. *See* 1983 Rule, 48 Fed. Reg. at 22,917.

Thus, in 1984, when Congress enacted the Sentencing Reform Act, the ink was barely dry on a regulation that implemented, in the preexisting parole context, precisely the type of fugitive-tolling scheme that the government now advocates for supervised release. Congress was undoubtedly aware of the regulation: the Department of Justice, which had crafted it, was intimately involved in the development of the 1984 Act. *See, e.g.*, S. Rep. No. 98-225, at 30, 33, 35 (1983) (noting the Department's recommendations). It would have been easy for Congress to apply fugitive tolling to supervised release: it could have merely copied versions of the 1976 statute or the 1983 regulation (or both) into the text governing the new supervised-released scheme.

But Congress did not do that. Instead, it prospectively repealed Section 4210(c), which was the Parole Commission's sole statutory basis for promulgating the 1983 Rule, while enacting no analogous replacement provision in the Sentencing Reform Act. Congress's decision to repeal the statute authorizing fugitive tolling for parole is powerful evidence that fugitive tolling does not exist for supervised release. *See United States v. Quality Stores, Inc.*, 572 U.S. 141, 148 (2014) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (internal quotation marks omitted)).

Meanwhile, Congress left fugitive tolling intact for legacy parole cases. The Sentencing Reform Act extended the parole statutes for pre-1987 (the Act's

effective date) offenders for five years, and Congress has continually extended the extension since then to account for the offenders in the federal system who remain either on parole or parole-eligible. *See, e.g.*, Continuing Appropriations Act, 2025, Pub. L. No. 118-83, div. A, § 121, 138 Stat. 1524, 1528 (2024); *see also* 18 U.S.C. § 3551 note (listing statutes since 1987 extending Parole Commission's jurisdiction). Accordingly, for the small number of remaining federal parolees, versions of the 1976 and 1983 Rules remain in force. *See* 28 C.F.R. §§ 2.40(e), 2.52(c)(1) (2024). Under current law, the following is a condition of parole:

> If you abscond from [parole] supervision, you will stop the running of your sentence as of the date of your absconding and you will prevent the expiration of your sentence. You will still be bound by the conditions of release while you are an absconder, even after the original expiration date of your sentence. [The Parole Commission] may revoke your release for a violation of a release condition that you commit before the revised expiration date of your sentence (the original expiration date plus the time you were an absconder).

Id. § 2.40(e). This regulation accomplishes, in pellucidly clear language, exactly what the government says applies in the supervised-release context. But there is no comparable language anywhere in the statute or policy statements governing supervised release.

In other words, the Sentencing Reform Act created a two-track system: parole for pre-1987 offenders, which carried forward an explicit statute and explicit

regulation authorizing fugitive tolling, and supervised release for post-1987 offenders, with no such statute and no such regulation. This Court should not disrupt that scheme by nonetheless creating fugitive tolling for supervised release. *See Jama v. ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

B. Incarcerated Parolees

The government's argument becomes even weaker when the history of fugitive tolling is juxtaposed with the history of prisoner tolling (*i.e.*, tolling of parole terms when the parolee is incarcerated). As noted above, in 1976, Congress enacted 18 U.S.C. § 4210(c), which extended the Parole Commission's jurisdiction when a parolee absconded. At the same time, Congress enacted an immediately adjacent provision, Section 4210(b)(2), which contained a different tolling rule. That provision stated that if a parolee committed a crime after being paroled and was sentenced to prison for that crime, the Commission had the authority to decide "whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense." 18 U.S.C. § 4210(b)(2) (1976 ed.). In other words, by allowing the parole sentence to run "consecutively," the Commission could toll the parole sentence by stopping the clock while the prisoner was incarcerated. *See United States v. Swick*, 137 F.4th 336, 341 (5th Cir. 2025) ("Paragraph

(b)(2) tolled the end of parole during custodial sentences.").

When Congress enacted the Sentencing Reform Act in 1984, it *did* carry forward prisoner tolling by providing that supervised-release terms are generally paused while the prisoner is incarcerated for a different offense. *See* 18 U.S.C. § 3624(e). In other words, in the preexisting parole statute, Congress had enacted two adjacent tolling provisions, one for incarcerated prisoners (Section 4210(b)(2)) and one for absconders (Section 4210(c)). When Congress replaced parole with supervised release, it chose to retain the first but not the second. This Court should respect that clear choice.

C. Absconders from Probation

Finally, Congress's treatment of probation in the Sentencing Reform Act further undermines the government's position. Under the Sentencing Reform Act, courts may impose probation sentences, which (like supervised release) require the defendant to adhere to a set of conditions. *See* 18 U.S.C. §§ 3561(a), 3563. To address the problem of probationers who violate probation conditions during their scheduled terms but elude apprehension until after probation expires, Congress provided that "[t]he power of the court to revoke a sentence of probation . . . extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation." Sentencing Reform Act sec. 212(a)(2), § 3565(b), 98 Stat. at 1995. As noted above, Congress initially included no analogous provision for supervised release; Section

3583(i), which accomplishes the same result for supervised release, was not enacted until 1994. *See* pp. 6-7, 21, *supra*.

Thus, when it enacted the Sentencing Reform Act, Congress *included* a provision that extends the court's authority over probation absconders after the probation term expires, while *excluding* such a provision for supervised-release absconders. This legislative choice is incompatible with the government's position that the Act all along implicitly gave courts the authority to punish supervised-release absconders for their post-expiration violations. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

III. THE FUGITIVE-TOLLING DOCTRINE APPLIED HERE CANNOT BE GROUNDED IN ANY COMMON-LAW TRADITION.

Neither the government nor any lower court has suggested that there is any textual basis for the fugitive-tolling doctrine in the supervised-release context. Instead, they have relied on a purportedly "long-standing common-law tradition of fugitive tolling" in the parole or probation context that Congress must be presumed to have implicitly baked into the novel supervised-release system it created in the Sentencing Reform Act. *Swick*, 137 F.4th at 340; *see* Br. in Opp. 6-7.

That argument fails several times over. First, common-law sentencing enhancements like the version of fugitive tolling applied here cannot exist. Even if they could, there is no common-law tradition of fugitive tolling for parole or probation. And even if there were,

Congress ended that tradition in 1984. There is thus no basis for departing from the statutory text.

A. Courts May Not Increase a Defendant's Sentence via the Common Law.

The government invokes the "common law" in an effort to increase Ms. Rico's sentence beyond what is authorized by statute. That argument fails at the outset because common-law punishments are categorically impermissible.

As noted above, this Court has long held that criminal punishments must be authorized by Congress. *See* pp. 18-19, *supra*. The corollary of that principle is that there are "no common-law punishments in the federal system." *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). Here, the government is invoking the common law to advocate for a term of supervised release exceeding the term authorized by statute. That is forbidden.

The idea on which the government relies—that there is a presumption that common-law notions flow through to new criminal statutes—"applies only when Congress makes use of a statutory *term* with established meaning at common law." *Carter v. United States*, 530 U.S. 255, 264 (2000). That principle reflects the familiar canon that "[w]hen Congress transplants a common-law term, the old soil comes with it." *United States v. Hansen*, 599 U.S. 762, 778 (2023) (internal quotation marks omitted). When courts apply that doctrine, they do not impose common-law punishments; instead, they interpret statutory terms according to their traditional meaning. Thus,

in *Neder v. United States*, 527 U.S. 1 (1999), this Court imported the common-law principle of materiality into federal fraud statutes because those statutes used the word "defraud," a term with common-law ancestry. *Id.* at 22-23. Similarly, common-law principles were applied to the statutory term "extortion" at issue in *Evans v. United States*, 504 U.S. 255, 259-65 (1992). *See Carter*, 530 U.S. at 266.

But common-law principles are not incorporated into federal criminal law when "Congress simply describes an offense analogous to a common-law crime without using common-law terms." *Carter*, 530 U.S. at 265; *see Morissette v. United States*, 342 U.S. 246, 263 (1952). That is why in *United States v. Turley*, 352 U.S. 407 (1957), this Court did not apply common-law principles to a federal theft statute because neither the term it used ("stolen") nor its analogues (*e.g.*, "stealing") had established common-law meanings. *Id.* at 411-12. Likewise, in *Carter*, the Court declined to import common-law "robbery" and "larceny" principles when neither term appeared in the statute at issue. 530 U.S. at 266-67; *accord Van Buren v. United States*, 593 U.S. 374, 384 n.4 (2021) (declining to import "principles of property law" into Computer Fraud and Abuse Act).

That principle defeats the government's argument in this case. The government is not purporting to construe any particular provision of the Sentencing Reform Act. Instead, the government's theory is that because "[s]upervised release is closely analogous to parole," and "the fugitive-tolling doctrine is well settled for parole," that doctrine can be transplanted into supervised release—even absent any specific textual anchor. Br. in

Opp. 7 (internal quotation marks omitted). That is precisely the analytical move that *Turley*, *Carter*, and *Van Buren* forbid.

B. There Is No Common-Law Tradition of Fugitive Tolling for Parolees.

Even if it were possible for an unwritten common-law principle to enhance a criminal sentence, that principle would have to be a "long-established and familiar principle[ ]," *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)), truly and beyond a doubt "settled . . . at common law," *Yegiazaryan v. Smagin*, 599 U.S. 533, 547 (2023) (alteration in original) (quoting *Beck v. Prupis*, 529 U.S. 494, 500 (2000)).

Indeed, even when Congress enacts a statute that contains *text* from an old regime, this Court assumes that the language carries with it the "old soil" only if its "meaning was well-settled before the transplantation." *Kemp v. United States*, 596 U.S. 528, 539 (2022) (internal quotation marks omitted); *see Kousisis v. United States*, 145 S. Ct. 1382, 1392 (2025). Here, the government seeks to transplant fugitive tolling from the parole and probation contexts to the supervised-release context without any textual hook, based instead on the generalized sense that in 1984, fugitive tolling was a brooding presence in the ether. So the burden on the government to show that the doctrine was firmly settled as of 1984 is particularly heavy—this Court should demand a precisely analogous version of the doctrine, consistently and uniformly applied as a common-law matter over a long period.

The historical record is severely wanting in this regard. Neither the government nor any lower court has ever cited any parole case from before 1976 applying the version of fugitive tolling that the government advocates here—that is, holding that an absconder is subject to the conditions of parole for longer than the scheduled term. Congress ultimately enacted former 18 U.S.C. § 4210(c), a fugitive-tolling provision, in 1976. *See* pp. 27-28, *supra*. But that provision does not suggest there was some longstanding common-law tradition of fugitive tolling for parolees. To the contrary, if such a tradition existed, the statute would have been unnecessary.

The 1983 Rule provides particularly compelling evidence that there is no common-law tradition of fugitive tolling. As noted above, in 1983, the Parole Commission promulgated a new regulation providing that an absconder remains subject to parole conditions after the expiration of the parole term. *See* pp. 28-29, *supra*. In several respects, the 1983 Rule is incompatible with the government's common-law theory. First, the 1983 Rule stated that it was rooted in 18 U.S.C. § 4210—not in some preexisting common-law tradition. *See* 1983 Rule, 48 Fed. Reg. at 22,917. Second, the 1983 Rule stated that it applied only to "revocation hearings conducted on or after July 4, 1983," implying that its tolling rule did not apply to revocation hearings before that date. *Id.* Third, it is unlikely that the Commission would have gone through the trouble of promulgating this Rule unless it was altering the status quo. In other words, prior to the Rule, absconders were *not* automatically subject to parole conditions after their terms expired. Again, this negates the government's view that there was a

longstanding tradition of fugitive tolling that Congress impliedly incorporated into the Sentencing Reform Act—particularly given that Congress quickly repealed the statute on which the 1983 Rule rested.

In its brief in opposition (at 6-7), the government relied on *Caballery v. United States Parole Commission*, 673 F.2d 43 (2d Cir. 1982), a case arising under the former Youth Corrections Act. In that case, the court approved, against an Ex Post Facto Clause challenge, application of fugitive tolling to a youth parolee pursuant to a 1977 Parole Commission regulation providing that "[s]ervice of the sentence of a committed youth offender . . . is interrupted" when he "is in escape status" or "has absconded from parole supervision." *Id.* at 44 (quoting 28 C.F.R. § 2.10(c) (1980)). *Caballery* does not assist the government.

First, *Caballery* made clear that fugitive tolling was *not* a longstanding tradition. Prior to 1977, the Parole Commission's "practice . . . was not to toll a youth offender's sentence for the time during which he was in abscondence from supervision." 673 F.2d at 47.

Second, *Caballery* apparently assumed that wayward youths were *not* subject to parole conditions during their fugitive status, emphasizing that "tolling a parolee's sentence for the period during which he is in abscondence *does not extend or increase the original sentence*." *Id.* at 46 (emphasis added) (internal quotation marks omitted). Indeed, that facet of the tolling doctrine was precisely why *Caballery* rejected the Ex Post Facto challenge. *See id.* But that logic is inapplicable here, where Ms. Rico was subject to supervised release

conditions during the entire period of abscondment—*i.e.*, her sentence *was* extended as a result of fugitive tolling.

Third, although *Caballery* referred to fugitive tolling as grounded in the "common law," it did not substantiate that assertion. Far from invoking a rich common-law tradition, *Caballery* cited just a single district-court case that had also applied fugitive tolling in a similar context, and even that case postdated the 1977 Parole Commission regulation. *See* 673 F.2d at 46 (citing *Henrique v. U.S. Marshal*, 476 F. Supp. 618 (N.D. Cal. 1979)). In sum, neither *Caballery* nor any other case shows that there was a common-law tradition of fugitive tolling for parole by 1984.

C. There Is No Common-Law Tradition of Fugitive Tolling for Probationers.

Probation differs from both parole and supervised release in that it does not *follow* a prison sentence; instead, probation is *in lieu of* a prison sentence. Despite that distinction, in *Swick*, the Fifth Circuit suggested that pre-1984 probation cases might be informative as to the proper interpretation of the supervised-release provisions of the Sentencing Reform Act. But even assuming that pre-1984 probation cases have any relevance, the Fifth Circuit's analysis is faulty because there is no relevant pre-1984 common-law tradition of fugitive tolling in the probation context, either.

The federal probation statute, from its inception in 1925 and all the way through 1984, contained a limitation on the court's power to revoke probation and impose a previously suspended sentence; revocation had to occur either "within the probation period" or "after the

probation period, but within the maximum period for which the defendant might originally have been sentenced." Probation Act, ch. 521, § 2, 43 Stat. 1259, 1260 (1925); *see* 18 U.S.C. § 3653 (1982 ed.) (similar); *United States v. Fisher*, 895 F.2d 208, 210 (5th Cir. 1990). There was no provision for extending the probation term beyond that maximum period for absconders.

Nor is there any relevant common-law tradition. In *Swick*, the Fifth Circuit relied on a line of pre-1984 cases purporting to show that "fugitive tolling applied in the analogous probation context." 137 F.4th at 343 & n.5. But that line of cases offers little support. Aside from passing dictum in a 1961 district-court decision, the oldest case cited by the Fifth Circuit is *United States v. Lancer*, 508 F.2d 719, 734 (3d Cir. 1975) (en banc). That case—decided 50 years after probation's enactment and nine years before the Sentencing Reform Act—hardly establishes a common-law tradition. And *Lancer* merely offered a cryptic, unexplained one-sentence assertion that the court "cannot credit" probationary time during abscondment, *id.*; it does not appear the court was holding the defendant accountable for post-expiration violations.

The Fifth Circuit's second-oldest case—and its sole other appellate decision that did not involve dicta—is *Nicholas v. United States*, 527 F.2d 1160 (9th Cir. 1976). That case also does not support the government. There, the Ninth Circuit did not hold that an absconder was subject to probation conditions *after* expiration of the original term. Instead, it held that probation could be revoked when a warrant had issued *during* the original term but could not be executed because the probationer

had left the jurisdiction, *id.* at 1162, as is now expressly permitted for probation under 18 U.S.C. § 3565(c) and for supervised release under 18 U.S.C. § 3583(i). Also, *Nicholas* reversed a contrary district court holding, suggesting that there was no settled tradition on this issue. Finally, *Nicholas* framed its holding as an interpretation of particular language in the 1976 probation statute, which permitted revocation during "any extension [ ]of" the probation period. 527 F.2d at 1161. In short, *Nicholas* does not suggest there is some kind of longstanding, generalizable common-law rule on point.

D. Even If a Common-Law Tradition Existed for Parole or Probation, Congress Eschewed It in the Supervised-Release Context.

As explained above, there was no common-law tradition of fugitive tolling for parole or probation. But even if there were, there is no basis for concluding that Congress impliedly incorporated that tradition into the supervised-release provisions of the Sentencing Reform Act.

First, Congress abrogated any common-law rule that existed. Congress can override common-law principles, and though its intent to do so "should be *clear*, it need not be *express*." *Talley*, 83 F.4th at 1304-05 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012)); *see Sebelius v. Cloer*, 569 U.S. 369, 380-81 (2013). In this case, as explained above, Congress repealed 18 U.S.C. § 4210(c) and declined to enact a provision that would authorize fugitive tolling. *See* pp. 27-31, *supra*. That is clear

enough evidence that Congress displaced any preexisting common-law rule.

Second, supervised release is meaningfully different from parole and probation. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (supervised release is a "unique method of post-confinement supervision invented by the Congress" in 1984). Thus, whatever common-law baggage parole and probation had adopted by 1984 is irrelevant; supervised release was a new system that started on fresh footing. *Accord Talley*, 83 F.4th at 1304 ("[T]here is no common law history of tolling terms of supervised release because supervised release is a recent statutory innovation.").

As this Court recognized just recently, whereas probation and imprisonment are among "a court's primary tools for ensuring that a criminal defendant receives just deserts for the original offense," supervised release, "by contrast, 'is not a punishment in lieu of incarceration.'" *Esteras*, 145 S. Ct. at 2041 (quoting *United States v. Granderson*, 511 U.S. 39, 50 (1994)). Rather, supervised release "'fulfills rehabilitative ends' and 'provides individuals with postconfinement assistance.'" *Id.* (quoting *Johnson*, 529 U.S. at 59-60). That is why supervised-release sentences, as well as decisions around modification and revocation of supervised release, are not meant to be retributive. *See* 18 U.S.C. § 3583(c), (e); *Esteras*, 145 S. Ct. at 2040-42.

Parole and supervised release likewise differ in key respects. Parole, unlike supervised release, "replace[s] a portion of the sentence of imprisonment"; it is thus a backward-looking punishment for the underlying offense. U.S.S.G. ch. 7, pt. A, § 2(b). By contrast,

supervised release is rehabilitative; its purpose, again, is not to punish for the underlying offense but to "assist individuals in their transition to community life." *Johnson*, 529 U.S. at 59; *see Esteras*, 145 S. Ct. at 2041 (rejecting view that supervised release reflects "just deserts for the original offense").

These differences matter. It may make some sense to say that a probationer or parolee should not receive credit for time spent as a fugitive; since his supervision is punitive, there is a strong public interest in ensuring strict monitoring of each and every condition throughout the period, lest the defendant escape due punishment. But because supervised release is meant to rehabilitate, rather than punish, the defendant, there is no reason for such a strict, mechanical scheme—particularly because indefinite tolling of a supervision term will inevitably stunt, rather than assist, a defendant's reentry to society. The statute instead provides for a more flexible, forward-looking approach: courts can address supervision violations by revoking the existing supervised-release term and crafting a new one.

One final point on probation. In the Sentencing Reform Act, Congress overhauled the probation system. Before the Act, probation was an *alternative* to a sentence; after the Act, it became a *type* of sentence. *See Granderson*, 511 U.S. at 61-62 (Kennedy, J., concurring in the judgment). There is thus no reason to believe that Congress intended to preserve *any* pre-1984 probation "traditions" going forward—much less transplant those traditions to the very different context of supervised release.

E. The Purported Common-Law Principle That "Wrongdoers Should Not Benefit" Does Not Provide Any Stronger Support for Fugitive Tolling.

Some lower courts have relied upon a much broader common-law principle that purportedly justifies fugitive tolling in the supervised-release context: "the principle that defendants should not benefit from their own wrongdoing." *United States v. Cartagena-Lopez*, 979 F.3d 356, 362 (5th Cir. 2020), *opinion withdrawn on grant of reh'g*, No. 20-40122, 2020 WL 13837259 (5th Cir. Nov. 19, 2020); *see United States v. Barinas*, 865 F.3d 99, 109 (2d Cir. 2017); *United States v. Buchanan*, 638 F.3d 448, 452-56 (4th Cir. 2011). The government has gestured (Br. in Opp. 9) at such a theory as well.

This extraordinarily general maxim should not qualify as a common-law principle that can be deployed to fill gaps in the federal criminal code. Criminal defendants are routinely accused of benefiting from their misdeeds—think fraudsters, thieves, and drug dealers. If "cheaters never prosper" governs our system as a matter of common law, then that principle would function as a kind of rule of anti-lenity: in any case where a criminal statute is silent on a particular issue, the court would proclaim that the defendant loses because otherwise he would "benefit from [his] own wrongdoing." *Cartagena-Lopez*, 979 F.3d at 363. That cannot be.

In any case, following the statutory text would not afford a supervisee any "benefit" from absconding. Under Ms. Rico's position, there is no circumstance under which absconding makes the supervisee better off. True, during the abscondment period, the supervisee is

avoiding the scrutiny of his probation officer. But absconding itself is a violation of supervised release that can result in revocation, yielding a renewed prison sentence, plus additional supervised release, without any credit for time spent on supervision even prior to abscondment. *See* 18 U.S.C. § 3583(e)(3). In other words, if a person absconds now, he likely will serve even more time later. *See Talley*, 83 F.4th at 1302-03 ("An offender who flees supervision in violation of his supervision conditions will not evade his sentence or otherwise benefit from his misconduct.").

When a supervisee does abscond, he has every incentive to come back into compliance with his supervision conditions as soon as possible. The sentencing court has broad discretion whether to respond to the abscondment by doing nothing, modifying the length or conditions of supervision, or revoking supervision and resentencing the supervisee to prison. *See* 18 U.S.C. § 3583(e)(2)-(3). The longer the supervisee absconds and the more violations occur during that period, the more likely a revocation sentence is. And the length of that sentence is highly discretionary, too. *See id.* § 3583(e); U.S.S.G. § 7B1.4(a). There is no point where the supervisee cannot still avoid more serious sanction by ceasing to be a fugitive and returning to the good graces of his probation officer and the sentencing court.

The government has also suggested (Br. in Opp. 10) that without fugitive tolling, absconding would somehow win the supervisee "an anything-goes period of violations that have no consequences." That is wrong. Ms. Rico agrees that the conditions of supervised release

continue to apply when a supervisee absconds, until the scheduled expiration of the term.

Further, because 18 U.S.C. § 3583(i) authorizes the sentencing court to adjudicate violations even after the supervision term expires if a warrant or summons issues prior to expiration, it is not as if the supervisee can defeat revocation jurisdiction by remaining a fugitive for sufficiently long. The Sentencing Reform Act already provides a mechanism to ensure that a defendant who absconds before the expiration of her supervised-release term "will not do so with impunity." *See United States v. Hernández-Ferrer*, 599 F.3d 63, 69 (1st Cir. 2010) (defendant who absconds before the expiration of her supervised-release term "will not do so with impunity" even without tolling). And of course, if a supervisee commits a crime on supervised release, the supervisee can be separately prosecuted for that crime. Indeed, that occurred here: Ms. Rico was convicted in state court (and incarcerated) for the January 2022 offense at issue here. Pet. App. 25a.

Finally, the supervisee's conduct *after* the expiration of the term can still be considered by the sentencing court as part of the relevant 18 U.S.C. § 3553(a) analysis when selecting the appropriate revocation sentence. *See Talley*, 83 F.4th at 1303; *Hernández-Ferrer*, 599 F.3d at 69-70; *see also* 18 U.S.C. § 3553(a)(1) (sentencing court considers "the history and characteristics of the defendant"). So sentencing courts do not need fugitive tolling to sufficiently handle supervisees who commit numerous serious offenses following the expiration of the scheduled supervision term. "As long as the Government issues a warrant before the expiration" for the

abscondment itself, all this information will be before the sentencing court when the supervisee is ultimately apprehended. *United States v. Island*, 916 F.3d 249, 258 (3d Cir. 2019) (Rendell, J., dissenting).

IV. PRINCIPLES OF LENITY AND FAIR NOTICE REQUIRE REJECTING THE FUGITIVE-TOLLING DOCTRINE.

This is a textbook case for application of the rule of lenity. The lenity doctrine, whose common-law roots undoubtedly run deeper than fugitive tolling, provides that "an individual 'is not to be subjected to a penalty unless the words of the statute plainly impose it.'" *Bittner v. United States*, 598 U.S. 85, 102 (2023) (opinion of Gorsuch, J.) (quoting *Comm'r v. Acker*, 361 U.S. 87, 91 (1959)). Lenity is premised on the importance of "fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" *United States v. Davis*, 588 U.S. 445, 464-65 (2019) (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)). Here, the words of the Sentencing Reform Act say nothing on fugitive tolling; they in fact suggest that Congress eschewed such a doctrine. The government cannot possibly argue that the Sentencing Reform Act is *unambiguous* in its favor. A statute that is silent on fugitive tolling cannot simultaneously be sufficiently clear to overcome the rule of lenity.

Lenity considerations are particularly pertinent here because application of the fugitive-tolling doctrine creates serious concerns of fair notice. As the fugitive-tolling doctrine is a judicially invented doctrine with no

textual or historical basis, the doctrine's contours are naturally impossible to define.

Consider again the analogy to true fugitive tolling: the case of the prison break. There is no serious question when a prisoner becomes a fugitive; it is when he goes over (or under, or through) the prison walls. But what does it mean for an individual on supervised release to become a "fugitive"? The Ninth Circuit holds that a person becomes a fugitive "merely by failing to comply with the terms of his supervised release." *United States v. Murguia-Oliveros*, 421 F.3d 951, 953 (9th Cir. 2005). If that is right, then untold supervisees have had their supervised-release periods extended by operation of law, almost certainly unbeknownst to them and their probation officers. And if that is wrong, when does a supervisee become a fugitive? Is it when she misses a drug test? Two drug tests? Misses a phone call from her probation officer? *See Island*, 916 F.3d at 259 (Rendell, J., dissenting) (describing the "difficulties associated with defining a 'fugitive' in the supervised release context").

In *Swick*, for instance, the defendant was deemed a fugitive based on his failure to report to federal authorities to begin his supervision period after being released from state prison. 137 F.4th at 345. It was undisputed that the defendant had not been evasive in any way or even "confronted . . . with his failure to report" until his arrest on other charges six years later. *Id.* The defendant maintained that he had simply not known his federal supervision period remained unsatisfied. *Id.* Nevertheless, he was deemed a fugitive—and his supervision period tolled—based on the court of appeals' analysis of dictionary definitions of the word "fugitive" (though the

word appears in no statute authorizing tolling). *Id.* at 345-46. This analysis was not rooted in any statute, regulation, or common-law tradition; instead, it merely reflected the court's intuitions on how far this judge-made doctrine should extend.

These fairness problems are exacerbated by the fact that many supervised-release conditions are vague or require interpretation by probation officers. For example, one standard condition requires that supervisees "not communicate or interact with someone the defendant knows is engaged in criminal activity." U.S.S.G. § 5D1.3(c)(8). The boundaries of this provision are entirely unclear: does someone become an "absconder" if he speaks on the phone with a sibling who occasionally smokes marijuana? Under the government's proposed judge-made rule, anyone who violates this condition—or perhaps anyone who violates enough conditions to be deemed an "absconder" under some arbitrary standard—*automatically* has his supervised-release term extended by operation of law.

As a result, the very existence of the fugitive-tolling doctrine makes it impossible for defendants on supervised release to know their own status. Imagine a federal criminal defendant who completes a prison term and believes that he has completed his term of supervised release as well. He knows that he missed a drug test or spoke to a drug-using relative toward the end of his supervision term, but no warrant or summons issued for that violation, so under his reading of the statutory text, he is in the clear, fully done with the criminal-justice system. *See* 18 U.S.C. § 3583(i). Years after the expiration of his term, he is arrested for a minor state-law offense.

This individual now learns that because of that missed drug test or prohibited communication, the government deemed him a "fugitive." The result: he has remained on supervised release all this time; his state-law offense is a violation; and he can be returned to *federal prison* as a result of that violation without the usual constitutional trial rights, only to restart the supervised-release process from scratch on the other side. *See Island*, 916 F.3d at 259 (Rendell, J., dissenting) (fugitive-tolling doctrine "transforms a minimal burden on the Government into an onerous task for the courts, and a complicated regime for the supervisee in attempting to determine the applicable period of tolling, and thus, when his term of supervised release ends" (internal quotation marks and citation omitted)).

This hypothetical also illustrates how fugitive tolling subverts the purposes of supervised release. Again, supervised release is meant to serve a rehabilitative end and ease a defendant's transition back into the community. *See Johnson*, 529 U.S. at 59 (citing S. Rep. No. 98-225, at 124). A system where minor missteps lead to defendants perpetually remaining on supervision status is inconsistent with the reason Congress established the supervised-released system.

V. MS. RICO'S SENTENCE IS INVALID.

Under a correct understanding of the Sentencing Reform Act, the revocation sentence Ms. Rico received in these proceedings was improper. The applicability of the fugitive-tolling doctrine was the central question before the district court. *See* Pet. App. 15a-32a. If fugitive tolling applied, as the government urged, then Ms. Rico's January 2022 state-law drug offense was a Grade A

violation of her supervised release, leading to a Guidelines range of 33 to 36 months. *Id.* at 31a-32a; *see* U.S.S.G. § 7B1.4(a)(1). If fugitive tolling did not apply, then the 2022 offense was not a violation of supervised release, and Ms. Rico's Guidelines range would have been just 8 to 14 months, premised on only Grade C violations of her supervision terms. *See* U.S.S.G. § 7B1.4(a).

Following Ninth Circuit precedent, the district court concluded that fugitive tolling applied and deemed Ms. Rico to have remained on supervised release at the time of the January 2022 offense. The court therefore sentenced her based on a 33-to-36-month Guidelines range. While it is true that Ms. Rico received a 16-month sentence—*i.e.*, one below the recommended range for a Grade A violation—that sentence was still *above* the range for a Grade C violation that would have otherwise applied had the district court correctly rejected the fugitive-tolling doctrine. The court also added on a further two-year term of supervised release. So the error here was not harmless. *Cf. Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016) ("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 noted by both parties at the certiorari stage, Ms. Rico's supervised-release term expires in May 2026. Should this Court conclude that resentencing is warranted, Ms. Rico respectfully requests that the Court issue an expeditious decision and issue its mandate

forthwith to ensure meaningful relief at that resentencing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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1. Title 18 U.S.C. § 3583, as added by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1987, 1999-2000, and as subsequently amended, provides:

§ 3583. Inclusion of a term of supervised release after imprisonment

(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, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(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.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in deter-

mining the length of the term and the conditions of supervised release, shall consider 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).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of super-

vised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

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[1] See References in Text note below.

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(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 and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such

revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(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. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(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.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

2. Title 18 U.S.C. § 3624, as added by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1987, 2008-09, and as subsequently amended, provides:

§ 3624. Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—

> (1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence of up to 54 days for each year of the prisoner's sentence imposed by the court, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence

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[1] So in original. Probably should be followed by a comma.

or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) PRERELEASE CUSTODY.—

(1) IN GENERAL.—The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and

prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.

(2) HOME CONFINEMENT AUTHORITY.—The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months. The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.

(3) ASSISTANCE.—The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.

(4) NO LIMITATIONS.—Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621.

(5) REPORTING.—Not later than 1 year after the date of the enactment of the Second Chance Act of 2007 (and every year thereafter), the Director of the Bureau of Prisons shall transmit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report describing the Bureau's utilization of community corrections facilities. Each report under this paragraph shall set forth the number and percentage of Federal prisoners placed in community corrections facilities during the preceding year, the average length of such

placements, trends in such utilization, the reasons some prisoners are not placed in community corrections facilities, and number of prisoners not being placed in community corrections facilities for each reason set forth, and any other information that may be useful to the committees in determining if the Bureau is utilizing community corrections facilities in an effective manner.

(6) ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of the enactment of the Second Chance Reauthorization Act of 2018, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—

(A) conducted in a manner consistent with section 3621(b) of this title;

(B) determined on an individual basis; and

(C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs

of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised 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. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of failure to pay such fines under sections 3611 through 3614 of this title.

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause

as determined and documented on an individual basis.

(g) PRERELEASE CUSTODY OR SUPERVISED RELEASE FOR RISK AND NEEDS ASSESSMENT SYSTEM PARTICIPANTS.—

(1) ELIGIBLE PRISONERS.—This subsection applies in the case of a prisoner (as such term is defined in section 3635) who—

(A) has earned time credits under the risk and needs assessment system developed under subchapter D (referred to in this subsection as the "System") in an amount that is equal to the remainder of the prisoner's imposed term of imprisonment;

(B) has shown through the periodic risk reassessments a demonstrated recidivism risk reduction or has maintained a minimum or low recidivism risk, during the prisoner's term of imprisonment;

(C) has had the remainder of the prisoner's imposed term of imprisonment computed under applicable law; and

(D)

(i) in the case of a prisoner being placed in prerelease custody, the prisoner—

(I) has been determined under the System to be a minimum or low risk to recidivate pursuant to the last 2 reassessments of the prisoner; or

(II) has had a petition to be transferred to prerelease custody or supervised release approved by the warden of the prison, after the warden's determination that—

(aa) the prisoner would not be a danger to society if transferred to prerelease custody or supervised release;

(bb) the prisoner has made a good faith effort to lower their recidivism risk through participation in recidivism reduction programs or productive activities; and

(cc) the prisoner is unlikely to recidivate; or

(ii) in the case of a prisoner being placed in supervised release, the prisoner has been determined under the System to be a minimum or low risk to recidivate pursuant to the last reassessment of the prisoner.

(2) TYPES OF PRERELEASE CUSTODY.—A prisoner shall be placed in prerelease custody as follows:

(A) HOME CONFINEMENT.—

(i) IN GENERAL.—A prisoner placed in prerelease custody pursuant to this subsection who is placed in home confinement shall—

(I) be subject to 24-hour electronic monitoring that enables the prompt identification of the prisoner, location, and time, in the case of any violation of subclause (II);

(II) remain in the prisoner's residence, except that the prisoner may leave the prisoner's home in order to, subject to the approval of the Director of the Bureau of Prisons—

(aa) perform a job or job-related activities, including an apprenticeship, or participate in job-seeking activities;

(bb) participate in evidence-based recidivism reduction programming or productive activities assigned by the System, or similar activities;

(cc) perform community service;

(dd) participate in crime victim restoration activities;

(ee) receive medical treatment;

(ff) attend religious activities; or

(gg) participate in other family-related activities that facilitate the prisoner's successful reentry such as a family funeral, a family wedding, or to visit a family member who is seriously ill; and

(III) comply with such other conditions as the Director determines appropriate.

(ii) ALTERNATE MEANS OF MONITORING.—If the electronic monitoring of a prisoner described in clause (i)(I) is infeasible for technical or religious reasons, the Director of the Bureau of Prisons may use alternative means

of monitoring a prisoner placed in home confinement that the Director determines are as effective or more effective than the electronic monitoring described in clause (i)(I).

(iii) MODIFICATIONS.—The Director of the Bureau of Prisons may modify the conditions described in clause (i) if the Director determines that a compelling reason exists to do so, and that the prisoner has demonstrated exemplary compliance with such conditions.

(iv) DURATION.—Except as provided in paragraph (4), a prisoner who is placed in home confinement shall remain in home confinement until the prisoner has served not less than 85 percent of the prisoner's imposed term of imprisonment.

(B) RESIDENTIAL REENTRY CENTER.—A prisoner placed in prerelease custody pursuant to this subsection who is placed at a residential reentry center shall be subject to such conditions as the Director of the Bureau of Prisons determines appropriate.

(3) SUPERVISED RELEASE.—If the sentencing court included as a part of the prisoner's sentence a requirement that the prisoner be placed on a term of supervised release after imprisonment pursuant to section 3583, the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months, based on the application of time credits under section 3632.

(4) DETERMINATION OF CONDITIONS.—In determining appropriate conditions for prisoners placed in prerelease custody pursuant to this subsection, the Director of the Bureau of Prisons shall, to the extent practicable, provide that increasingly less restrictive conditions shall be imposed on prisoners who demonstrate continued compliance with the conditions of such prerelease custody, so as to most effectively prepare such prisoners for reentry.

(5) VIOLATIONS OF CONDITIONS.—If a prisoner violates a condition of the prisoner's prerelease custody, the Director of the Bureau of Prisons may impose such additional conditions on the prisoner's prerelease custody as the Director of the Bureau of Prisons determines appropriate, or revoke the prisoner's prerelease custody and require the prisoner to serve the remainder of the term of imprisonment to which the prisoner was sentenced, or any portion thereof, in prison. If the violation is nontechnical in nature, the Director of the

Bureau of Prisons shall revoke the prisoner's prerelease custody.

(6) ISSUANCE OF GUIDELINES.—The Attorney General, in consultation with the Assistant Director for the Office of Probation and Pretrial Services, shall issue guidelines for use by the Bureau of Prisons in determining—

> (A) the appropriate type of prerelease custody or supervised release and level of supervision for a prisoner placed on prerelease custody pursuant to this subsection; and

(B) consequences for a violation of a condition of such prerelease custody by such a prisoner, including a return to prison and a reassessment of evidence-based recidivism risk level under the System.

(7) AGREEMENTS WITH UNITED STATES PROBATION AND PRETRIAL SERVICES.—The Director of the Bureau of Prisons shall, to the greatest extent practicable, enter into agreements with United States Probation and Pretrial Services to supervise prisoners placed in home confinement under this subsection. Such agreements shall—

(A) authorize United States Probation and Pretrial Services to exercise the authority granted to the Director pursuant to paragraphs (3) and (4); and

(B) take into account the resource requirements of United States Probation and Pretrial Services as a result of the transfer of Bureau of Prisons prisoners to prerelease custody or supervised release.

(8) ASSISTANCE.—United States Probation and Pretrial Services shall, to the greatest extent practicable, offer assistance to any prisoner not under its supervision during prerelease custody under this subsection.

(9) MENTORING, REENTRY, AND SPIRITUAL SERVICES.—Any prerelease custody into which a prisoner is placed under this subsection may not include a condition prohibiting the prisoner from receiving

mentoring, reentry, or spiritual services from a person who provided such services to the prisoner while the prisoner was incarcerated, except that the warden of the facility at which the prisoner was incarcerated may waive the requirement under this paragraph if the warden finds that the provision of such services would pose a significant security risk to the prisoner, persons who provide such services, or any other person. The warden shall provide written notice of any such waiver to the person providing such services and to the prisoner.

(10) TIME LIMITS INAPPLICABLE.—The time limits under subsections (b) and (c) shall not apply to prerelease custody under this subsection.

(11) PRERELEASE CUSTODY CAPACITY.—The Director of the Bureau of Prisons shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.