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 OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Association of Federal Defenders (NAFD) was founded in 1995 as a nationwide, volunteer organization of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A. A guiding principle of NAFD is to promote the fair administration of justice in federal courts by appearing as amicus curiae in litigation relating to issues affecting indigent criminal defendants. Every year, federal defenders represent tens of thousands of indigent criminal defendants in federal courts, including many defendants accused of violating their supervised release. Accordingly, NAFD members have particular expertise and interest in the subject matter of this case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Congress created supervised release to provide former prisoners with post-release supervision while achieving greater uniformity and certainty in sentencing. Judicially adopting a fugitive-tolling doctrine would undermine these goals by injecting an unclear and unpredictable legal standard into the heart of supervised release. Because courts have long struggled to define what it means to abscond from supervision, the "ease and clarity of the current regime" would be "transform[ed]" into "an onerous task for the courts, and a complicated regime for the supervisee in attempting to determine … when his term of supervised release ends." *United States v. Island*, 916 F.3d 249, 259 (3d Cir. 2019) (Rendell, J., dissenting).

A judicially adopted fugitive-tolling doctrine would also undermine rehabilitation, the principal purpose Congress intended supervised release to serve. Empirical research suggests that consistency and predictability in administering supervised release helps win buy-in from supervisees, promoting their successful reentry. However, defendants would likely experience fugitive tolling as arbitrary and degrading, which would be counterproductive in their "transition to community life." *United States v. Johnson*, 529 U.S. 53, 59 (2000). Consistent with the purpose of supervised release, this Court should avoid the disparities and uncertainties that would come with a judicially created fugitive-tolling doctrine and reverse the judgment below.

ARGUMENT

The circuits that have adopted fugitive tolling claim that it furthers the "purpose" of supervised release by ensuring that defendants cannot avoid supervision by absconding. *United States v. Murguia-Oliveros*, 421 F.3d 951, 953 (9th Cir. 2005); *see also United States v. Swick*, 137 F.4th 336, 344 (5th Cir. 2025); *Island*, 916 F.3d at 255; *United States v. Barinas*, 865 F.3d 99, 107, 109-10 (2d Cir. 2017); *United States v. Buchanan*, 638 F.3d 448, 455 (4th Cir. 2011).

That argument, however, misunderstands the purpose of supervised release. Congress created supervised release not only to provide defendants with post-release supervision, but also to ensure that their sentences would be uniform and predictable, thus enhancing rehabilitation. Given these goals, lawmakers wisely omitted any provision for fugitive tolling, which would vary the duration of a sentence based on the discretion of judges and probation officers applying an unclear and unpredictable legal standard. Judicially adopting fugitive tolling would invite disparity and uncertainty and therefore undermine Congress's purpose in creating supervised release.

I. Congress created supervised release to provide post-release supervision while promoting uniformity and predictability in sentencing.

Congress created supervised release in the Sentencing Reform Act of 1984 (SRA). *Johnson v. United States*, 529 U.S. 694, 696-97 (2000). The SRA's "most important" goal was to eliminate the

"unfettered discretion the law confer[red] on those judges and parole authorities responsible for imposing and implementing the sentence" in order to promote "greater certainty and uniformity in sentencing." S. Rep. No. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221; *see also United States v. Booker*, 543 U.S. 220, 267 (2005) (describing SRA's "basic objective of promoting uniformity in sentencing"). One way the SRA achieved these goals was by abolishing parole and replacing it with supervised release. *See* S. Rep. No. 98-225, at 38.

Under the old parole system, a district judge would sentence a convicted defendant to a term of imprisonment, and after serving one-third of that term, the defendant could ask to serve the rest of the sentence under supervision in the community. *See* 18 U.S.C. § 4205 (1982), *repealed by Comprehensive Crime Control Act*, Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984). Whether a defendant would be granted early release from prison depended on an assessment of his rehabilitative prospects by the United States Parole Commission. 18 U.S.C. § 4206 (1982), *repealed by Comprehensive Crime Control Act*, Pub. L. No. 98-473, tit. II, 98 Stat. 1976. Since the defendant's term of imprisonment was not fixed at the time of imposition, this system was known as "indeterminate" sentencing. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

The "grave defect" of indeterminate sentencing was that it made punishments inconsistent and indefinite. S. Rep. No. 98-225, at 49. Because judges and parole officials could adjust the length of a defendant's imprisonment based on their assessments

of his behavior, there were "substantial disparities" in the system, and "no one [wa]s ever certain how much time a particular offender w[ould] serve." *Id.* at 48-49. Commentators at the time condemned the "completely unstructured discretionary power" of parole officials, which left "[e]ven the most flagrant abuse of discretion … likely to go uncorrected." KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 126-28 (1969).

Reformers like District Judge Marvin Frankel argued that a defendant in the parole system likely experienced "as cruel and degrading," rather than rehabilitative, "the command that he remain in custody for some uncertain period, while his keepers study him, grade him in secret, and decide if and when he may be let go." MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 96 (1973). In Judge Frankel's view, the disparity and unpredictability of parole was "an affront to the *dignity* of defendants," which caused them to "experience unnecessary anxiety and anger," "impaired their ability to make well-informed decisions about their conduct," and "fostered a sense of resentment … against the legal system." Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 760 (2006) (quotation marks omitted). These critiques "were consistently echoed by reformers following in Frankel's footsteps, right through … the SRA." *Id.* at 805; *see also* S. Rep. No. 98-225, at 37 (attesting to influence of Frankel on SRA).

By replacing parole with supervised release, the SRA "meant to make a significant break with prior practice." *Johnson*, 529 U.S. at 724-25 (Scalia, J.,

dissenting); *see also United States v. Haymond*, 588 U.S. 634, 651 (2019) (plurality opinion) (describing "[a]ll that changed" when Congress created supervised release); *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (describing supervised release as "unique method of post-confinement supervision invented by the Congress for a series of sentencing reforms"). Going forward, the defendant would serve the prison term in full, followed by a separate term of supervised release imposed by the judge at sentencing. *See* 18 U.S.C. §§ 3582 & 3583. Because the length of the prison and supervision terms would now be fixed at the time of imposition, this system was known as "determinate" sentencing. *Mistretta*, 488 U.S. at 368.

The purpose of supervised release was to provide former prisoners with post-release supervision while also making their sentences more uniform and predictable. *See Tapia v. United States*, 564 U.S. 319, 324-25 (2011) (SRA intended to reduce "disparities" in sentences (quoting *Mistretta*, 488 U.S. at 366 (SRA intended to reduce "uncertainty" about length of sentence))). As Justice Alito explained, "the SRA sought to retain the chief benefit of parole, *i.e.*, providing a transition period of monitoring to ensure that a prisoner who leaves prison has been sufficiently reformed so that he is able to lead a law-abiding life," while "[a]t the same time … to promote truth in sentencing and thus to eliminate a much-derided feature of the old parole system." *Haymond*, 588 U.S. at 664 (Alito, J., dissenting).

Promoting predictability and uniformity, in turn, would help to encourage rehabilitation. Although the authors of the SRA rejected the notion that

"confinement itself—its inherent solitude and routine—will lead to rehabilitation," *Tapia*, 564 U.S. at 332, they still had faith that post-release supervision could provide former prisoners with treatment and support that would facilitate their "transition into the community." S. Rep. No. 98-225, at 124; *see* 18 U.S.C. §§ 3582(a) & 3583(c). By replacing parole with supervised release, they sought to enhance "rehabilitation efforts" by allowing officials to "develop realistic work programs and goals within a set term." S. Rep. No. 98-225, at 57. They predicted that "[p]risoners' morale will probably improve when the uncertainties about release dates are removed" and that public respect for the law would likewise grow when the sentence was not "subject to constant adjustment." *Id.* at 56.

Recent empirical research confirms that consistency and clarity in sentencing aid rehabilitation. Studies show that improving perceptions of procedural fairness among supervisees, particularly as to whether they are treated "like others on supervision" and provided with "clear guidelines," leads to lower rates of recidivism. Brandy L. Blasko & Faye S. Taxman, *Are Supervision Practices Procedurally Fair? Development and Predictive Utility of a Procedural Justice Measure for Use in Community Corrections Settings*, 45 CRIM. JUST. & BEHAVIOR 402, 409-15 (2018). Because "offenders are more likely to abide by conditions if they view them as just and reasonable," experienced probation officers have recommended "clearly outlin[ing] to offenders the terms of supervision, reasons for the conditions, and potential penalties for infractions." Joseph A. DaGrossa, *Improving Legitimacy in Community-*

Based Corrections, 78 FED. PROB. 22, 24-25 (2014); *see also* Kevin A. Wright & Faith E. Gifford, *Legal Cynicism, Antisocial Attitudes, and Recidivism: Implications for a Procedurally Just Community Corrections*, 12 VICTIMS & OFFENDERS 624, 633-34 (2017) (recommending "a fair, respectful, and transparent approach regarding expectations of offenders"). Promoting uniformity and certainty thus also promotes rehabilitation, by giving individuals more certain expectations and ensuring fairer treatment.

II. Experience shows that the legal definition of absconding from supervision is unclear and unpredictable.

Given Congress's purpose in creating supervised release, it wisely omitted any provision for fugitive tolling. Evidence from past and present shows that attempts to define what it means for a defendant to abscond from supervision have frequently divided the lower courts, resulting in an unclear and unpredictable legal standard.

The circuits that have adopted fugitive tolling of supervised release often draw an analogy to the rule that prisoners do not receive credit toward their sentences for any period during which they have escaped from prison. *See United States v. Cartagena-Lopez*, 979 F.3d 356, 360, 362 (5th Cir. 2020), *vacated as moot*, 2020 WL 13837259 (5th Cir. Nov. 19, 2020) (per curiam); *Island*, 916 F.3d at 254; *Buchanan*, 638 F.3d at 452-54. Just so, they argue, supervisees should not receive credit toward their sentences during time they abscond from supervision.

That analogy does not hold, however, because absconding from supervision is much harder to define than escaping from prison. It is obvious when a prisoner escapes from prison—at the moment they leave the state's physical custody. *See United States v. Luck*, 664 F.2d 311, 312 (D.C. Cir. 1981) (per curiam). And it is equally clear when that escape ends—once they return to custody. *See Edwards v. Va. State Dep't of Corr.*, 462 F. Supp. 164, 165 (W.D. Va. 1978).

Community supervision, by contrast, "is very different from … confinement in a prison." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Unlike prisoners, supervisees are not in the state's physical custody. They "can be gainfully employed and [are] free to be with family and friends and to form the other enduring attachments of normal life." *Id.* As a result, it is far less certain when a defendant absconds from supervision than it is when they escape from prison. For example, does a supervisee abscond whenever he fails to attend a required meeting with his probation officer? What if he misses a random drug test ordered with minimal notice? Or submits late paperwork notifying his officer of a new residence? If not, then what level of violation is required to abscond, and why? Must the supervisee intend to elude the officer? Does fugitivity from supervision begin immediately, or does the court have to issue a violation warrant first? And when does such fugitivity end? Is it enough for the defendant to have been detained by state or local authorities, unbeknownst to the federal probation office? None of these questions have clear or easy answers.

The difficulty of making these determinations is evident in the multiple splits among those circuit courts that have adopted fugitive tolling of supervised release. For example, the Ninth Circuit has held that a defendant triggers fugitive tolling "merely by failing to comply with the terms of his supervised release," even if they have not "fled" or "hidden from the jurisdiction of the court." *Murguia-Oliveros*, 421 F.3d at 953-54. By contrast, the Fourth Circuit has concluded that a "defendant does not become a fugitive for tolling … simply because he violates a condition," but only when he engages in a "sustained and knowing course of conduct, which 'precludes the sentencing court from exercising [the] supervision.'" *United States v. Thompson*, 924 F.3d 122, 129 (4th Cir. 2019) (quoting *Buchanan*, 638 F.3d at 458).

In another split, the Ninth Circuit has held that "fugitive tolling begins with fugitive status and not when the government is able to secure a warrant." *United States v. Ignacio Juarez*, 601 F.3d 885, 888 (9th Cir. 2010) (per curiam). By contrast, other circuits have suggested that fugitive tolling begins only once a violation warrant issues. *See Island*, 916 F.3d at 256; *United States v. Gomez-Diaz*, 415 F. App'x 890, 894 (10th Cir. 2011) (unpublished). Indeed, in the most recent case joining the 5-2 split on the question presented, the probation office itself disagreed with the district judge's view that fugitive tolling began with the defendant's failure to report, instead recommending the defendant be discharged from supervision where the original term had expired

before issuance of a warrant. *See Swick*, 137 F.4th at 339.[2]

Earlier attempts to define what it means to abscond from supervision met with similar confusion. For example, in 1976, Congress enacted a statute expressly authorizing the Parole Commission to toll parole whenever the parolee was "found to have intentionally refused or failed to respond to any reasonable request, order, summons, or warrant of the Commission or any member or agent thereof." *Parole Commission and Reorganization Act*, Pub. L. No. 94-233, § 2, 90 Stat. 219, 226 (1976), *codified at* 18 U.S.C. § 4210(c), *repealed by Comprehensive Crime Control Act*, Pub. L. No. 98-473, tit. II, 98 Stat. 1976; *see also* 28 C.F.R. § 2.52(c)(1) (1982) (implementing statute). Despite the statute's seeming precision, courts still reached conflicting conclusions about when a parolee had absconded. Some held that a parolee's sentence should be tolled whenever they failed to report "as required by the general conditions of parole." *Leszynski v. U.S. Parole Comm'n*, 721 F. Supp. 1108, 1110-11 (W.D. Mo. 1989).[3] Others found that "simple failure to report [to a probation officer] does *not*

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[2] Courts have also had to confront the question of when fugitive tolling of supervised release ends—once the defendant is back in state or federal custody, once the federal government has constructive knowledge of his location, or once he is officially under the control of federal authorities. *See United States v. Watson*, 633 F.3d 929, 932 (9th Cir. 2011).

[3] By contrast, parolees argued that the tolling provision "d[id] not apply to violations of general conditions of parole and [wa]s to be considered only if an individual refuses to obey an order made directly to him." *Leszynski*, 721 F. Supp. at 1110.

automatically suspend parole credit," even if that failure was a "violation of general parole terms." *Papadakis v. Warden of Metro. Corr. Ctr.*, 822 F.2d 240, 243-44 (2d Cir. 1987) (emphasis added); *see also Toomey v. Young*, 449 F. Supp. 336, 340 (D. Conn. 1978) (same, for parolee's failure to file required supervision reports), *aff'd without opinion*, 589 F.2d 123 (2d Cir. 1979) (per curiam).

Finally, the few courts that have adopted fugitive tolling of probation have also struggled to define the concept of fugitivity, resulting in "considerable litigation." *United States v. Workman*, 617 F.2d 48, 51 (4th Cir. 1980).[4] Disagreements include whether issuance of a warrant for an alleged violation automatically tolls the period of supervision, *compare Nicholas v. United States*, 527 F.2d 1160, 1161-62 (9th

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[4] Even the federal officials charged with managing the system have expressed uncertainty about the rule. *See* David N. Adair, Jr., *Looking at the Law*, 51 FED. PROB. 75, 76 (1987):

> The December 1979 *Federal Probation* "Looking at the Law" column … concluded that the probation period is tolled from the act which initiates the revocation proceeding (the issuance of the probation violation warrant) until the revocation process is completed, including any appeal. Although language in a number of appellate decisions supports that determination, a close examination of the decisions leads to the conclusion that the mere issuance of an arrest warrant may not be sufficient to toll the probation period.
>
> There is, in fact, a line of cases in which the probation period was held to be tolled, but either there was no warrant, or the court did not deem the issuance of the warrant to be determinative of whether or not the period was tolled.

Cir. 1976) (yes), *with United States v. Paden*, 558 F. Supp. 636, 640-41 (D.D.C. 1983) (no), and whether violating a condition can toll a term of supervision even in the absence of a warrant, *compare United States v. Green*, 429 F. Supp. 1036, 1038 (W.D. Tex. 1977) (yes), *with Paden*, 558 F. Supp. at 640 n.2 (no). States with the doctrine have experienced similar problems. *Compare In re Townsend*, 554 N.E.2d 1336, 1337 (Ohio 1990) (per curiam) (failing to report triggers fugitive tolling of probation), *with Francois v. Florida*, 695 So.2d 695, 697 (Fla. 1997) (failing to report does not trigger fugitive tolling of probation). Because it is not clear how to define what it means to abscond from supervision, the fugitive-tolling doctrine implicates an uncertain and unpredictable legal standard.[5]

III. Judicially adopting fugitive tolling would undermine Congress's purpose in creating supervised release.

Given the deep and recurring disagreements about what it means to abscond from supervision, judicially adopting the fugitive tolling doctrine would render the duration of supervised release subject to change depending on the views of each defendant's supervising judge and probation officer. The result would be "a complicated regime for the supervisee in attempting to determine the applicable period of tolling, and thus, when his term of supervised release

[5] Indeed, the definition of abscondment is so unclear that it arguably violates due process, being "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

ends." *Island*, 916 F.3d at 259 (Rendell, J., dissenting). That is exactly what Congress sought to avoid when it enacted the SRA.

Even if some authoritative definition of absconding from supervision were to develop over time, problems with disparity and uncertainty would remain. For example, if issuance of a violation warrant were required to toll supervised release, it would simply generate more disparities as a function of different judges' and probation officers' relative dispatch in taking that action. Empirical research reveals significant geographic and demographic disparities in the administration of supervised release, including rates of revocation and early termination, and the same problems would be sure to arise with fugitive tolling. *See, e.g.,* Jacob Schuman, *Prosecutors in Robes*, 77 STAN. L. REV. 629, 676-80 (2025) (inter-district disparities in revocation-per-conviction rates ranging from 10.93% to 103.91%); U.S. DEP'T OF JUST., RESOURCES AND DEMOGRAPHIC DATA FOR INDIVIDUALS ON FEDERAL PROBATION OR SUPERVISED RELEASE 15-18 (2023) (race disparities in revocation rates ranging from 16.6% to 59.4%); Laura M. Baber & James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77 FED. PROB. 17, 17 (2013) (inter-district disparities in early-termination rates ranging from 0% to 46%).

Conversely, if no violation warrant were necessary to toll supervised release, then the situation would become even more chaotic. Under that regime, "every minor supervised release violation" could "become a basis for fugitive tolling," even just "missing

a meeting with a probation officer." *Thompson*, 924 F.3d at 129. As Judge Rendell warned:

> [T]he clock m[ight] stop and start again when, for example, a supervisee fails to immediately notify his supervisor of a change in address, but does so a week later, fails to show up for a drug test, but calls his supervisor two hours after the missed appointment, and misses a required Alcoholics Anonymous meeting, but shows up to the meeting the following week.

Island, 916 F.3d at 259 (Rendell, J., dissenting). Even if a more serious violation were required to toll supervision, defendants still would have no idea whether they were subject to tolling until the government invoked it during a revocation proceeding, making the end of their terms unpredictable and unclear. The result would be "an onerous task for the courts, and a complicated regime for the supervisee." *Id.*

To be sure, one of Congress's goals in creating supervised release was to provide former prisoners with post-release monitoring and support. *See Mont v. United States*, 587 U.S. 514, 523 (2019). But "no legislation pursues its purposes at all costs," and "the very essence of legislative choice" is to balance "what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). It would "frustrate[] rather than effectuate[] legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* (emphasis omitted).

Here, Congress has already provided a clean and easy way for judges to sanction defendants who abscond from supervised release by authorizing delayed revocation hearings so long as a violator warrant or summons issues before the scheduled end of the term. 18 U.SS.C. § 3583(i). The availability of this provision means that courts "d[o] not need to resort to the fugitive tolling doctrine" in order to punish absconders. *United States v. Talley*, 83 F.4th 1296, 1303 (11th Cir. 2023); *see also United States v. Hernández-Ferrer*, 599 F.3d 63, 69 (1st Cir. 2010) (same).

Contrary to the claims of the circuits that have adopted fugitive tolling, the purpose of supervised release was *both* to provide former prisoners with post-release supervision *and* to promote predictability and uniformity in federal sentencing. A judicially created fugitive tolling doctrine that stops and starts and stops the term of supervision, obscuring when the sentence ends and vesting district courts and probation officers with extraordinary discretion to adjust the length of the term, would be unlikely to further these goals. Rather, the defendant would likely experience "as cruel and degrading the command that he remain [on supervision] for some uncertain period, while his keepers study him, grade him in secret, and decide if and when he may be let go." FRANKEL, LAW WITHOUT ORDER, *supra*, at 96. The empirical evidence suggests that by diminishing the consistency and transparency of the system, fugitive tolling would also hamper its ability to achieve rehabilitation. *See* Blasko & Taxman, 45 CRIM. JUST. & BEHAVIOR at 409-15. Judicially adopting a fugitive-

tolling doctrine would therefore undermine Congress's purpose in creating supervised release.

CONCLUSION

The Court should reject the judicially created fugitive-tolling doctrine and reverse the judgment below.

Respectfully submitted,

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