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

REPLY BRIEF FOR PETITIONER

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This Court should reject fugitive tolling in the supervised-release context for a simple reason: there is no statutory support for it.

Under the government's proposed rule, supervisees who abscond are bound by the conditions of supervised release for longer than specified in their sentences—and, in many cases, longer than the statutory maximum sentence. This type of increased punishment requires statutory authorization. There is none.

The government seeks to reframe the question presented as whether Ms. Rico "is entitled to credit" for the period during which she absconded. Br. i; *see, e.g.*, Br. 3, 12, 21. But the government buries a crucial point: Congress provided a different mechanism for stripping absconding supervisees of credit. Under 18 U.S.C. § 3583(e)(3), when supervised release is revoked based on a violation of supervised-release conditions, the supervisee is denied credit for time previously served on supervised release and must start his new sentence from scratch. The question presented is whether, *in addition* to being stripped of credit via that statutory mechanism, Ms. Rico can *also* be punished for pre-revocation violations of her supervised-release conditions occurring after the scheduled expiration of her term. For fear of repetition, the answer is no because no statute provides for that result.

Overwhelming textual and historical evidence establishes that fugitive tolling for supervised release does not exist. The government's textual argument, such as it is, relies on statutes stating that probation officers are

responsible for supervision. Those statutes say nothing more: they are silent on tolling, silent on the consequences of violating supervised-release conditions, and silent on stripping violators of credit for time served. Meanwhile, each of those topics is addressed elsewhere in the Sentencing Reform Act in a manner inconsistent with the government's position.

As for history: Prior to 1984, a statute and implementing regulation explicitly authorized fugitive tolling for parole. When Congress enacted the Sentencing Reform Act, it preserved those provisions for legacy parolees, but repealed them prospectively—while enacting no replacement provision for supervised release. This distinction between parole and supervised release persists today and reflects Congress's deliberate choice not to create a fugitive-tolling regime for supervised release.

The government invokes a purported "common law" tradition of fugitive tolling that Congress supposedly incorporated silently into supervised release. The government's position requires believing that courts can increase criminal punishments based on common-law doctrines lacking any statutory tether. Even accepting that dubious premise, the government's reliance on a supposed traditional common-law rule fails for a more basic reason: the government identifies no case that has ever applied its purported common-law rule extending absconders' release conditions past the scheduled expiration date. Literally, none. If something has never happened, there is no tradition.

Making matters worse for the government, in 1983 the Parole Commission promulgated a *prospective* regulation providing for fugitive tolling based on the parole

statute enacted in 1976. This regulation would have made no sense if fugitive tolling were already an established common-law rule. And as noted above, Congress repealed that statute a year later.

The government resorts to policy arguments, pointing to various perceived statutory gaps that fugitive tolling could fill. These arguments fail on their own terms: Congress provided powerful tools to sentencing courts that are beyond sufficient to achieve the Sentencing Reform Act's goals, including the power to revoke supervised release, strip defendants of credit for time previously served, and impose a fresh term of imprisonment and supervised release. More fundamentally, the government's perception that the statutory procedures are insufficiently harsh is not a basis for inventing nonstatutory punishments.

This Court should reverse the Ninth Circuit's judgment.

I. FUGITIVE TOLLING FOR SUPERVISED RELEASE HAS NO SUPPORT IN THE SENTENCING REFORM ACT'S TEXT.

The government contends that supervisees who abscond exist in a liminal state—bound by the conditions of supervised release, yet not actually serving a supervised-release term. Nothing in the statutory text supports this theory.

A. The Government Seeks to Extend Ms. Rico's Sentence Beyond the Term Specified in the Judgment.

Ms. Rico's sentence provided for a 42-month term of supervised release, scheduled to expire in June 2021. Pet. App. 11a. But according to the government, because she absconded, she was subject to the conditions of supervised release until January 2023—a total of 61 months, which exceeded not only the term in the judgment but also the statutory maximum. No statute authorizes this extension of Ms. Rico's sentence.

The government emphasizes (Br. 19) that Ms. Rico was not actively "supervised" during her period of abscondment. But Ms. Rico's sentence did not impose upon her a duty of "being supervised." Instead, it was defined by the conditions of supervised release. *See* D. Ct. Doc. 147 (Nov. 16, 2017); *see also* 18 U.S.C. § 3583(f) (defendant must receive 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"). Those conditions were binding throughout her abscondment. Indeed, Ms. Rico was specifically charged with violating the enumerated condition to promptly report a change of address, Pet. App. 12a, not some abstract duty to remain "supervised."

The government's position, therefore, hinges on Ms. Rico occupying a Schrödinger's-cat-like state—she must have simultaneously been *on* supervised release in January 2022 (such that her state-law offense was a violation) and *off* supervised release (such that she was not satisfying her sentence). Yet nothing in the Sentencing

Reform Act suggests that a supervisee can be both on and off supervised release at the same time.

Attempting to explain away this problem, the government argues (Br. 21) that its proposed rule is similar to the treatment of "other defendants who abscond from conditional liberty." The government notes (*id.*) that *pursuant to a statute*, pretrial releasees who abscond may remain subject to release conditions though the speedy-trial clock is tolled, and that *pursuant to a regulation*, furloughed federal prisoners who violate release conditions can forfeit credit toward satisfaction of their prison terms. But even assuming these contexts were analogous,[1] they merely serve to confirm that statutes and regulations, when they exist, can authorize fugitive tolling. In the supervised-release context, however, no such statute or regulation exists.

Without any real solution to the problem, the government resorts to consequential arguments. It suggests (Br. 22-23) that since abscondment is already a Grade C violation, it would (absent tolling) permit the supervisee to commit countless other Grade C violations with no repercussions. But this is true of *any* Grade C violation. And as explained (Pet. Br. 46-47), though additional minor violations may not alter the Sentencing Guidelines

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[1] In reality, these contexts are very different. Both pretrial release and furlough are privileges that the defendant must request; there is nothing strange about the defendant agreeing that if he violates the release conditions, he forfeits credit and is subject to additional punishment. By contrast, adherence to the conditions of supervised release is *part of the defendant's sentence*, so it is highly anomalous to be subject to those conditions while supposedly not serving the sentence.

range, they will, practically speaking, affect the district court's ultimate exercise of discretion.

The government also maintains (Br. 23) that the only violations likely to increase an absconder's Guidelines range are felonies, and that "[n]o unfairness inheres" in treating felonies as supervised-release violations long after the scheduled expiration of the supervision term because "the obligation not to commit such crimes stems from the general obligation to follow the law—not some rule of conduct unique to releasees." But supervisees are differently situated from non-supervisees bound to obey criminal law. Supervisees accused of supervised-release violations have no right to a jury trial or the reasonable-doubt standard. *See* Pet. Br. 16-17. And supervisees who commit crimes while on supervised release are exposed to consecutive sentences—both a sentence for the crime *and* a sentence for the supervised-release violation. In any event, the question is not whether "unfairness inheres" in the government's position, but instead whether a statute authorizes it. None does.

B. The Government's Purported Textual Support for Fugitive Tolling Is Insubstantial.

Having previously relied solely on equitable principles to justify fugitive tolling here, the government now unveils (Br. 16-18) a textual argument. The government observes (Br. 16) that under 18 U.S.C. § 3601, a defendant on supervised release "shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court." And Section 3624(e) likewise states that a probation officer "shall, during the term imposed, supervise the person released to the degree warranted by the

conditions specified by the sentencing court." *Id.* § 3624(e). According to the government, these provisions imply that "a releasee discharges her term of supervised release only when she is, in fact, 'be[ing] supervised by a probation officer,'" which occurs only when the probation officer supplies sufficient "observation and direction." Br. 16 (alteration in original) (quoting 18 U.S.C. § 3601).

These provisions do not support the government's position. They merely identify the individual—the probation officer—responsible for supervision. They do not purport to impose burdens on the supervisee, much less make the running of a supervision term contingent on the degree of "observation and direction," Gov't Br. 16, the probation officer provides. And they are completely silent on the consequences of abscondment.

To the extent Sections 3601 and 3624(e) are relevant, they negate the government's theory. Both provisions set the probation officer's duty only "during the term imposed" by the sentencing court, 18 U.S.C. §§ 3601, 3624(e), whereas under the government's theory that duty may extend past the imposed term. Further, both provisions explicitly tether the directed supervision to the supervised-release *conditions*—requiring supervision "to the degree warranted by the conditions specified by the sentencing court," *id.* Yet the government's theory hinges on decoupling supervised-release conditions, which define the supervisee's legal burdens, from "supervision," which (per the government) determines whether the defendant is serving a supervision term.

The government's theory also implies that a supervision term stops progressing *any time* the supervisee is

not being actively supervised by the probation office, even if it is not his fault. If that theory were correct, then a supervisee who complies with all supervised-release conditions could nevertheless be subject to tolling due to a lax probation officer. Resisting this implication, the government proposes (Br. 44) that its rule apply only to those who "knowingly render[] supervision impossible." But this limitation does not appear in Sections 3601 or 3624(e), which merely direct the *probation officer* to supervise and are silent on the supervisee's *mens rea*.

The government insists (Br. 17) that this Court has "effectively recognized" its inadequate-supervision-means-no-credit theory by previously "construing the supervised-release statutes so as to preserve the full period of meaningful, active supervision required by the sentencing court." But in both cases the government cites, the Court's interpretation hinged entirely on the plain text of the on-point statutory tolling provisions, with the quoted policy justifications a mere tack-on. *See Mont v. United States*, 587 U.S. 514, 521-24 (2019); *United States v. Johnson*, 529 U.S. 53, 56-59 (2000). In this case, no on-point provision exists.

C. All Contextual Indicators Are Inconsistent with Fugitive Tolling.

Other provisions of the Sentencing Reform Act address—in granular detail—tolling, extensions of supervised-release terms, and denial of credit for violators. Yet they nowhere mention fugitive tolling. This Court should adhere to, rather than supplement, Congress's carefully reticulated scheme.

1. Begin with Section 3624(e). As noted above, the government relies on Section 3624(e)'s first sentence, which assigns supervision responsibility to probation officers. That provision is followed immediately by a detailed set of timing rules for the supervised-release term. Section 3624(e) goes on to state that the term: (i) begins upon the defendant's release from prison; (ii) runs concurrently with other periods of probation, parole, or supervised release; and (iii) is tolled during subsequent imprisonment of 30 days or more. 18 U.S.C. § 3624(e). Given these sentences' attention to calculating satisfaction of a supervised-release term—and their inclusion of an explicit tolling rule for imprisonment—it would be highly unusual if the preceding sentence obliquely created a separate, *harsher* tolling rule under which the supervisee remains bound by the conditions of supervised release despite earning no credit. And in fact, that hidden rule would be *inconsistent* with the actual statutory language, which states that the supervised-release period begins to run "on the day the person is released from imprisonment," *id.*—not, as the government argues (Br. 16), when the person is released *and* reports to his probation officer to facilitate sufficient "observation and direction."

The government insists (Br. 30-31) that Section 3624(e)'s express tolling provision for incarceration actually *supports* fugitive tolling, because it purportedly shows that Congress wished generally to "promote service of the full period of supervision." Br. 30 (emphasis omitted). That is not how statutory interpretation works. "[N]o statute yet known pursues its stated purpose at all costs," *Stanley v. City of Sanford*, 606 U.S. 46,

58 (2025) (internal quotation marks omitted), and courts should apply only the tolling provision Congress actually enacted. As this Court has recognized in interpreting this exact same provision, when a statute delineates exceptions, "[t]he proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Johnson*, 529 U.S. at 58.

2. Next is 18 U.S.C. § 3583(i), which preserves sentencing courts' revocation jurisdiction if a summons or warrant issues during the scheduled term, but says nothing about extending that term in the case of abscondment. The government observes (Br. 38) that Section 3583(i) does not *only* apply to abscondment but also preserves revocation jurisdiction for other supervised-release violations. That point is unavailing. Section 3583(i) was designed to solve a problem that includes (though is not limited to) abscondment. If the Congress that enacted Section 3583(i) in 1994 wished to address abscondment through fugitive tolling, it had the ideal opportunity to do so. It chose a less aggressive solution.

The government also complains (Br. 39) that Section 3583(i) is "deficien[t]" because it fails to address the purported concern "that a fugitive may reduce her term of supervision through abscondment." That is wrong on its own terms, as Ms. Rico's position does not permit a fugitive to "reduce" the supervision term. Ms. Rico agrees that an absconder is subject to the conditions of supervised release throughout the scheduled term, including during any abscondment period. More fundamentally, that Section 3583(i)'s solution to abscondment is not as severe as the government's preferred approach does not

mean this Court should create a harsher, nonstatutory penalty.

3. Section 3583(e) offers perhaps the strongest repudiation of the government's theory.

The government's case rests on the intuition that supervisees who do not adhere to supervised-release conditions should not get credit for time served on supervised release. Congress shared that intuition. That is why it enacted 18 U.S.C. § 3583(e)(3), which authorizes sentencing courts to revoke supervised release while explicitly depriving supervisees of "credit for time previously served on post-release supervision" if supervised release is revoked.

In two respects, Section 3583(e)(3) is incompatible with the government's theory. First, Section 3583(e)(3) demonstrates that Congress was carefully attuned to the credit-no-credit issue. Congress concluded that courts *should* strip supervised-release violators of credit, but only *after* revoking supervised release. Given that Congress has already legislated on the specific issue of credit-stripping, this Court should not superimpose an additional, nonstatutory credit-stripping rule that applies *before* a court issues a revocation order.

Second, Section 3583(e)(3) demonstrates that Congress made a different policy judgment from what the government advocates. Section 3583(e)(3) exudes discretion: the sentencing court *may* revoke supervised release (thus stripping the defendant of credit for time served), and may craft whatever post-revocation combination of imprisonment and supervised release (up to the statutory maximum) the court believes to be

appropriate. Congress made revocation mandatory for some types of supervised-release violations, *see* 18 U.S.C. § 3583(g), but for abscondment, Congress concluded that courts should have discretion to decide whether the violation was sufficiently serious to warrant revocation, and if so, what the resultant sanction should be. Further, Section 3583(e)(2), which authorizes (but does not require) courts to extend supervised release, gives courts a different way of effectively denying credit for time previously served. Yet the government would undermine Congress's policy judgment by replacing that discretionary scheme with a rigid rule under which an absconder's supervised-release term is automatically extended by the precise length of the abscondment—cutting out the district court's discretion.

To all this, the government responds (Br. 37-38) that "Section 3583(e) is an inadequate substitute for fugitive-tolling principles" because there are circumstances where the tools Section 3583(e) gives sentencing courts cannot perfectly replicate the version of fugitive tolling the government here invokes. In particular, Section 3583(e)(3) is supposedly inadequate because courts might prefer the purported "default option," Gov't Br. 38, of fugitive tolling without revocation, and Section 3583(e)(2) is inadequate because it does not permit extending a supervision term beyond the statutory maximum (itself a significant hint the government's theory is wrong).

Again, statutory interpretation does not work that way. A federal statute is not "inadequate"—and subject to judicial revision—merely because it imperfectly aligns with the government's preferred approach. This

Court should follow Section 3583(e) according to its terms rather than inventing atextual doctrines to fill perceived gaps.[2]

II. THE GOVERNMENT HAS NO MEANINGFUL RESPONSE TO THE STATUTORY HISTORY.

Before 1984, the federal parole statute (enacted in 1976) had two adjacent tolling provisions—18 U.S.C. § 4210(b)(2), which authorized incarcerated-prisoner tolling, and Section 4210(c), which authorized fugitive tolling. When Congress eliminated parole prospectively in the Sentencing Reform Act and replaced it with supervised release, Congress preserved a version of the former provision but not the latter. This history is irreconcilable with the government's position.

The 1976 parole statute authorized the Parole Commission to extend its jurisdiction over parolees who did not comply with their release conditions, even after the scheduled expiration of parole—that is, it authorized a form of fugitive tolling. *See* Pet. Br. 27-28. In 1983, the Parole Commission promulgated a regulation adopting precisely the form of fugitive tolling applied here, providing that if a parolee absconded, "any violations of the conditions of release . . . 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

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[2] The government has no response to Ms. Rico's invocation (Pet. Br. 23) of 18 U.S.C. § 3290, which explicitly creates a fugitive-tolling rule for statutes of limitation and thus proves that Congress knows how to enact such rules when it wishes.

Supervising Federal Prisoners, 48 Fed. Reg. 22,917, 22,917 (May 23, 1983); *see* Pet. Br. 28-29. Just a year later, Congress opted not to carry forward either the regulation or the statute authorizing it into the supervised-release scheme. The import of that choice is clear: Congress rejected fugitive tolling for supervised release.

The government argues (Br. 41) that because Congress repealed all parole provisions in 1984—not just Section 4210(c)—its action cannot be taken "as a targeted repudiation" of fugitive tolling. This argument lacks force given that the neighboring provision—Section 4210(b)(2), which authorized a different form of tolling for incarcerated parolees—*was* carried forward to supervised release. Pet. Br. 31-32; *see* 18 U.S.C. § 3624(e). So the conspicuous failure to enact an analogue of Section 4210(c) for supervised release indeed supports the inference that Congress "repudiat[ed]" fugitive tolling. Moreover, Congress's decision in 1984 to enact a jurisdiction-extending provision for probation (but not supervised release) reinforces that its failure to carry forward Section 4210(c) was a deliberate choice. *See* Pet. Br. 32-33.

The government insists (Br. 40-41) that Section 4210(c) was not actually a fugitive-tolling provision, so no inference can be drawn from its repeal (and lack of a replacement). Instead, the government contends, Section 4210(c) merely authorized parole to be revoked based on violations that occurred during, not after, the term. That is incorrect. By its terms, Section 4210(c) authorized the Parole Commission to exercise authority over an absconder *regardless* of whether the violation

occurred before or after the term's scheduled expiration. Unlike modern-day 18 U.S.C. § 3583(i), it did not require the violation to occur during the originally scheduled term.

Indeed, this Court need not take Ms. Rico's word for it—that is exactly how the *Department of Justice* understood Section 4210(c). The 1983 Parole Commission regulation, which expressly invoked Section 4210, extended an absconder's parole conditions even after the term's scheduled expiration—precisely the rule the government advocates here.

The government claims (Br. 42) that the 1983 regulation "did not address an issue that fugitive-tolling principles would: namely, whether the undischarged portion of the parole term would continue beyond the time that the parolee is presented for a revocation hearing." This response is inscrutable. Fugitive tolling addresses whether a defendant remains on parole after the sentence expires *until* a revocation hearing. That is what this Court is deciding here: whether Ms. Rico was still on supervised release in January 2023, after she absconded but before her revocation hearing. That is *exactly* the subject addressed by the 1983 regulation.

Congress's careful distinction between parole and supervised release persists today. Federal prisoners sentenced prior to 1987 continue to be subject to the preexisting parole regime. For those parolees, a Parole Commission regulation continues to impose fugitive tolling. *See* Pet. Br. 29-30. That regulation was quoted in Ms. Rico's opening brief, but it is so remarkably clear that we re-quote it here:

> 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).

28 C.F.R. § 2.40(e). Nothing comparable exists for supervised release.

In short, for decades, Congress has maintained a two-track system: one for parole for pre-1987 offenders, with a statute and regulation authorizing fugitive tolling, and one for supervised release for post-1987 offenders, with no comparable provisions. This Court should respect that dichotomy.

III. THE GOVERNMENT'S INVOCATION OF COMMON-LAW PRINCIPLES IS UNAVAILING.

Lacking any statutory hook for its position, the government represents that there was a purported common-law fugitive-tolling rule for parole that Congress impliedly incorporated into supervised release. This theory fails at the threshold because unwritten common law cannot enhance a criminal sentence. And on its own terms, this Court will rarely see weaker support for a claimed common-law rule. The government cannot come

up with *any* case applying its common-law fugitive-tolling rule to parole absconders.

A. The Common Law Cannot Increase Ms. Rico's Punishment.

The government seeks to increase Ms. Rico's punishment based on the common law. But as Ms. Rico has explained (Pet. Br. 18-19, 34-36), there is no federal common law of crimes. For instance, even though "[a]iding and abetting is an ancient criminal law doctrine," it is incorporated into federal criminal law not via the common law but through 18 U.S.C. § 2. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).

The government points (Br. 34-35) to decisions in *civil* cases applying nonstatutory common-law rules, but identifies exactly zero *criminal* cases in which this Court has applied a common-law principle to enhance a criminal sanction absent a statutory hook for the common-law baggage. As Ms. Rico has explained (Pet. Br. 23-26), cases denying credit for prison escapees and incarcerated parolees reflect the interpretation of criminal sentences, not the application of a common-law rule to *increase* sentences. There is simply no room for unwritten common law to fill gaps in federal criminal law and increase a defendant's sentence.

B. There Is No Relevant Common-Law Tradition of Fugitive Tolling for Either Parolees or Probationers.

In any event, no relevant common-law tradition exists. For the government to import a common-law principle into the criminal law, one should at least expect

that principle to be "long-established and familiar." *United States v. Texas*, 507 U.S. 529, 534 (1993). Here, far from a firmly rooted close analogue, there was apparently not one single case in history in which courts applied fugitive tolling to parole absconders.

1. The government first addresses (Br. 24-26) prison escapees, citing cases dating back to 1592. But as the opening brief explains (at 23-24), that is a different situation. Absconders from supervised release are still subject to supervised-release conditions, which define the metes and bounds of their sentences; not so for prison escapees, whose sentences require physical confinement. Moreover, Congress has crafted a means for supervised-release absconders to restart their terms following revocation (with no credit for time previously served); there is nothing like that for prison escapees.

2. The government then turns to old parole cases. The government's theory is that courts applied fugitive tolling in parole cases, and Congress therefore should be understood to have impliedly preserved that practice for supervised release.

It is doubtful that preexisting judicial practices associated with parole are relevant at all. In the Sentencing Reform Act, Congress abolished parole and replaced it with supervised release; there is no reason to assume that Congress silently incorporated practices associated with the very system it was bent on eliminating. *See* Pet. Br. 42-43.

But even assuming parole traditions are relevant, the government's argument still fails. The federal parole statute was enacted in 1910 and repealed (prospectively)

in 1984. One would imagine that, during this time, parolees sometimes absconded from supervision. Yet, remarkably, the government cannot locate a single case from that 74-year period applying a common-law fugitive-tolling rule. Here are the cases the government cites (Br. 27, 30-31, 33) as support for the putatively rich tradition:

- *Anderson v. Corall*, 263 U.S. 193 (1923), and *Zerbst v. Kidwell*, 304 U.S. 359 (1938), which address tolling for *incarcerated* parolees. As the opening brief explains (at 24-25), that doctrine is based on a different rationale, and Congress expressly codified it in the Sentencing Reform Act, *see* 18 U.S.C. § 3624(e).

- *Biddle v. Asher*, 295 F. 670 (8th Cir. 1924), which applied *Corall* to reject a prisoner's habeas petition when both the defendant's abscondment and the revocation hearing occurred *during* the originally scheduled term. *See id.* at 670-71 (parolee was required to stay in Wyoming until April 1921 and absconded in June 1917; parole was revoked in February 1921). *Asher* has never been relied upon as support for fugitive tolling and has been cited a total of four times ever, most recently in a string-cite in a 1951 state-court case. *See Anderson v. Alexander (In re Anderson)*, 230 P.2d 770, 770 (Or. 1951) (Brand, C.J., in chambers).

- *United States v. Gerson*, 192 F. Supp. 864 (E.D. Tenn. 1961), *aff'd*, 302 F.2d 430 (6th Cir. 1962) (per curiam), which addresses prisoner tolling, not fugitive tolling. The statements the government quotes are dicta.

- *Drinkall v. Spiegel*, 36 A. 830 (Conn. 1896), a state-court case preceding the federal parole statute which addressed whether a parolee could be extradited and had nothing to do with fugitive tolling.
- *Caballery v. United States Parole Commission*, 673 F.2d 43 (2d Cir. 1982), whose relevance is refuted in Ms. Rico's opening brief (at 38-39). As there explained, *Caballery* makes explicit that fugitive tolling was *not* a parole practice before 1977 and rejected an Ex Post Facto challenge to a fugitive-tolling regulation precisely because the doctrine as applied there did *not* result in an extension of the defendant's sentence. 673 F.2d at 46-47.[3]

In short, there are apparently zero cases in the entire history of the federal parole system applying the government's supposedly well-settled common-law rule.

And there is not just absence of evidence of fugitive tolling—there is evidence of absence. In 1983, as explained, the Parole Commission enacted a prospective rule (pursuant to a 1976 statute) stating that parole conditions extended beyond the expiration date for absconders—precisely the effect of the fugitive-tolling doctrine. If there was a longstanding, common-law

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[3] The government also cites (Br. 26) *Dimmick v. Tompkins*, 194 U.S. 540 (1904), and *In re Cross*, 146 U.S. 271 (1892), but neither case has anything to do with fugitive tolling or abscondment. *Dimmick* addresses the appropriate prison for service of a sentence, 194 U.S. at 546-49, and *Cross* addresses the interplay between appeals and execution dates, 146 U.S. at 277-78.

fugitive-tolling principle for parole, the promulgation of this regulation is inexplicable. The Parole Commission would not have needed to enact the rule at all, would not have made it prospective, and would not have needed to ground it in a 1976 statute (that was repealed shortly thereafter).

3. With no evidence for a pre-1984 common-law rule of fugitive tolling for parole, the government turns (Br. 28-29) to pre-1984 practice in the context of probation. Once again, the government comes up empty.

Though the federal probation statute was enacted in 1925, the government has presented zero cases hinting at fugitive tolling for the first 50 years under the statute. The government's first case is *United States v. Lancer*, 508 F.2d 719 (3d Cir. 1975) (en banc), which includes a Delphic, one-sentence dictum that the court "cannot credit . . . probationary time" during abscondment. *Id.* at 734. Next is *Nicholas v. United States*, 527 F.2d 1160 (9th Cir. 1976), whose relevance Ms. Rico has already debunked (Pet. Br. 40-41): the Ninth Circuit applied fugitive tolling as a matter of *statutory interpretation* of a now-repealed probation provision, and it acknowledged the novelty of tolling in the probation context. 527 F.2d at 1161-62. And finally there is *United States v. Workman*, 617 F.2d 48 (4th Cir. 1980), which *rejected* tolling and merely noted in dicta that a 1977 district-court decision had applied fugitive tolling. *Id.* at 51. This all leaves the government, again, with zero cases to support its supposedly entrenched common-law rule.

4. Apparently acknowledging that Congress did not legislate on this issue, the government characterizes Congress's silence as "audible" and even "eloquen[t]" on

the theory that, via its silence, Congress preserved preexisting law. Br. 29-30 (internal quotation marks omitted). But even accepting that congressional silence can ever authorize enhanced criminal punishments, it did not do so here. Preexisting common law did not authorize fugitive tolling for parole or probation, and Congress audibly and eloquently kept it that way.[4]

IV. PRINCIPLES OF LENITY AND FAIR NOTICE DEMAND REVERSAL.

If ever a statute was not sufficiently clear to overcome the rule of lenity, it is this one. When the government must resort to relying on Congress's "audible" and "eloquent" silence, this Court can be confident that the statute is not unambiguous in the government's favor.

Making matters worse, as Ms. Rico has explained (Pet. Br. 49-50), there is no principled basis for determining when the vague concept of "abscondment" is satisfied and fugitive tolling is triggered. The existence of the doctrine thus makes it impossible for supervisees themselves to know their own status.

The government responds (Br. 43) that not every violation triggers fugitive tolling, only those that "render[] the probation officer incapable of supervising his conduct." That clarification is unhelpful—how is the supervisee to identify this invisible line? The government

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[4] Turning the tables, the government contends (Br. 34) that this Court should infer a common-law fugitive-tolling rule on the theory that *Ms. Rico* has not cited cases rejecting it. But it is the *government* that is attempting to supplement the statutory text with a supposed common-law rule. The onus is on the government to prove that rule exists.

insists (Br. 44) that its regime is no "trap for the unwary" because tolling applies only if the supervisee "was on notice of the supervision that he avoided," but it conspicuously does not suggest that the supervisee must know his conduct rises to the level of "abscondment" warranting extension of the term. Perhaps if Congress had enacted the fugitive-tolling doctrine, it could have crafted a statutory definition addressing these issues. But no such statute exists.

V. THE GOVERNMENT'S RESORTS TO POLICY ARE UNAVAILING.

The government argues (Br. 45) that supervisees who abscond would receive a "windfall[]" absent fugitive tolling. Not so. As Ms. Rico has explained (Pet. Br. 44-47), there is no scenario where an absconder benefits from wrongdoing. Because a court is authorized to revoke an absconder's supervised release and impose a new prison sentence (and supervised-release term) while giving no credit for the prior period served on supervised release—whenever the revocation occurs, even years after the original supervision term's expiration—abscondment always makes the supervisee worse off.

In response, the government argues (Br. 45) that absconders *must* be benefiting from their wrongdoing under Ms. Rico's position, because otherwise why would Ms. Rico advance it? That is an absurd retort. The question is not whether Ms. Rico would benefit from *winning her case* (of course she would, like all defendants), but whether she would benefit from *absconding*. She would not—as her new prison sentence and supervision term prove.

The government offers (Br. 45-47) hypotheticals where it worries that the supervised-release regime without fugitive tolling might be too lax on defendants. For instance, the government frets that it will be unable to utilize the express statutory mechanism for preserving a sentencing court's revocation jurisdiction, *see* 18 U.S.C. § 3583(i), because the probation officer "may not learn about a violation in time," Gov't Br. 46, or due to an "administrative oversight," *id.* at 47. But this is little more than an objection to the balance Congress struck in Section 3583(i). It is true that, under Ms. Rico's position, late-in-term abscondments might go unadjudicated, but the same is true of *any* late-in-term violation. That is a function of Congress's choice to require that a warrant or summons issue prior to the term's expiration. The government should not be heard to complain about having to follow rules that Congress expressly set forth.

The government also expresses concern (Br. 46) about cases where a supervisee fails to report upon release from state prison and the probation officer is unaware of the prisoner's release. By statute, however, the probation office has a duty to supervise. 18 U.S.C. § 3601. If the probation office fails to keep track of supervisees' release dates from state prison, the solution is better communication between federal and state officials, not the nonstatutory fugitive-tolling doctrine.

Finally, the government emphasizes (Br. 47-48) the value of supervised release in ensuring that supervisees stay on the "straight-and-narrow" as they reintegrate into society. The fugitive-tolling doctrine, however, does not serve this purpose.

Consider this case. The government declares (Br. 4) that "having absconded with 37 months of supervision remaining," Ms. Rico "remained subject to 37 months of supervision upon recapture." Its implication is that Ms. Rico should *serve* those remaining 37 months to get on the "straight-and-narrow." But that is not what happened here; Ms. Rico was not required to serve those 37 months. Upon apprehension, Ms. Rico's supervised release was *revoked*, and her prior term—including the 37 supposedly remaining months—vanished, replaced by a new revocation sentence. Instead, the practical effect of fugitive tolling in this case—as in each reported appellate case addressing the question presented—is to classify a crime during the abscondment period as a supervised-release violation for purposes of a post-revocation sentencing enhancement. Contrary to the government's suggestion (Br. 48), this did not result in Ms. Rico obtaining the benefit of additional time under a probation officer's "watchful eye," but instead resulted in a several-fold increase to her recommended prison sentence under the Guidelines, in addition to a *new* supervised-release sentence. *See* Pet. Br. 10-11. Whatever may be said about the government's position, it is not helpful to criminal defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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