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

AMICUS BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files many amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.[1]

NACDL's interest in this case centers on three critical concerns: (1) the fundamental equity principles that constrain judicial expansion of criminal sentences; (2) the constitutional protections that safeguard defendants from vague and arbitrary punishment; and (3) the practical enforcement problems that undermine supervised release's rehabilitative purposes.

NACDL agrees with Petitioner that there is no common-law fugitive tolling doctrine that resembles

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[1] No persons or entities other than *amici*, their members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission.

the government's supervised-release fugitive tolling theory, and that, more fundamentally, common-law principles cannot support increasing criminal sentences without congressional authorization. *See* Pet. Br. 33–34, 44–47. This brief offers a complementary analysis demonstrating *why* the government's fugitive tolling theory in the context of supervised release misapplies centuries-old equity principles and violates core criminal law protections.

NACDL's perspective draws on extensive experience representing defendants in supervised release proceedings across all federal circuits, providing practical insights into how the government's theory operates inequitably and undermines Congress's carefully designed supervised release framework.

SUMMARY OF THE ARGUMENT

The equitable doctrine of fugitive tolling draws on the ancient maxim that no one should profit from their wrongdoing. It also reflects common sense: the law should not let a wrongdoer disappear into the night only to come back better off in the morning. Here is how the principle works: it pauses the clock—stopping the sentence (or statute of limitations) from running—then restarts it when the fugitive returns. Nothing more.

The government's fugitive tolling theory in the context of supervised release, however, bears no resemblance to this equitable principle. The government's theory is something else altogether, parting ways with equity in two distinct ways.

First, the government applies fugitive tolling where there is no profit to prevent. Unlike prison escapees

who stop serving their sentences, supervised-release absconders remain bound by every condition, no matter where they are, subject to revocations for even non-criminal violations. These safeguards block any potential benefit that absconders might gain.

Second, the government uses tolling to punish. It allows the supervision clock to run throughout the abscondment: a three-year supervision term becomes four or more. It then uses that extra time as a springboard for higher ranges under the Federal Sentencing Guidelines and longer prison terms. This converts a fixed period of supervision into an open-ended vehicle for increased punishment, flipping equity and the no-profit maxim on its head.

This betrayal of equity principles also collides with bedrock criminal law protections. It offends due process by giving no clear notice of what counts as absconding or when supervision ends, inviting arbitrary enforcement akin to what the void-for-vagueness doctrine forbids. It triggers double jeopardy concerns by increasing a sentence after it was imposed and had become final, outside Congress's statutory scheme. And it raises Sixth Amendment and separation-of-powers concerns by letting probation officers, prosecutors, and courts, not juries, extend supervision past statutory limits.

Equity and the no-profit maxim have always been a shield against unfair advantage, not a weapon for expanded punishment. The Court should reject the government's novel supervised-release fugitive tolling theory that finds no grounding—and indeed flouts—this centuries-old maxim.

ARGUMENT

I. No Common-law Principle Supports the Government's Punitive Expansion of Fugitive Tolling to Supervised Release.

Proponents of fugitive tolling in supervised release frequently invoke the maxim that no one should profit from their own wrongdoing as support.[2] Yet they misunderstand the maxim, and their reliance on it is misplaced.

History shows that the no-profit maxim operates by preventing unjust advantages and denying unearned benefits. But properly understood, the maxim does not authorize new punishment. Indeed, no equitable or common-law principle supports *increasing* a sentence simply because a defendant becomes a fugitive after sentencing.

The government's supervised-release fugitive tolling theory breaks with every principle of equity and the common law. It applies fugitive tolling to supervisee absconding where no benefit exists. And it creates punishment in two unprecedented ways: first, by extending supervised release beyond its scheduled end; and second, by using post-expiration conduct to enhance Guidelines ranges. In doing so, the government's theory results in a Schrodinger's cat scenario: supervised release is both suspended and unsuspended, depending on which status yields a

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[2] *See, e.g., United States v. Barinas*, 865 F.3d 99, 107 (2d Cir. 2017) (invoking the no-profit maxim to apply fugitive tolling to supervised release); *see also United States v. Island*, 916 F.3d 249, 253–54 (3d Cir. 2019); *United States v. Buchanan*, 638 F.3d 448, 455 (4th Cir. 2011); *United States v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005).

harsher outcome. This theory defies the no-profit maxim's core distinction between preventing unearned benefits and imposing punishment beyond existing legal consequences.

A. The maxim "no man may take advantage of his own wrong" operates as an equity principle to deny wrongdoers unearned benefits, not to impose punishment.

The longstanding maxim that "no man may take advantage of his own wrong"—*Nullus commodum capere potest de injuria sua propria*—has anchored common law equity for centuries. *See* 1 Hale, *The History of the Pleas of the Crown* 482 (1726); Herbert Broom & R.H. Kersley, *A Selection of Legal Maxims* 191 (10th ed. 1939). Early commentators understood the maxim as an equitable principle preventing wrongdoers from earning unjust legal advantages rather than imposing punishment. *See id.* Blackstone, for example, shows this protective function through the fraudulent conveyance doctrine, where transfers made to cheat creditors are void. 2 William Blackstone, *Commentaries on the Laws of England*, Ch. 30 (1766). The doctrine illustrates the no-profit maxim that shields against unjust advantages but does not act as a sword to impose additional punishment.

American courts have "long recognized the fundamental equitable principle that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105,

119 (1991) (cleaned up). Early cases established the principle that a wrongdoer should not "make a profit out of his own wrong." *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 207 (1881).[3]

This principle underlies established doctrines like Slayer's Rule, which prohibits murderers from collecting their victims' life insurance proceeds. *See, e.g., Riggs v. Palmer*, 115 N.Y. 506, 511–12 (1889) (denying Palmer his inheritance because he murdered his grandfather to prevent a will challenge based on the principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong…").[4] Slayer's Rule reflects how all equity doctrines operate, "not by way of punishment but on considerations that make for the advancement of right and justice." *Pappas v. Pappas*, 320 A.2d 809, 811 (Conn. 1973) (citing *Johnson v. Yellow Cab Co.*, 321 U.S. 383, 387 (1944)).

Another well-known expression of the no-profit maxim is the unclean hands doctrine. English

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[3] *See also Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244–45 (1933) (stating the governing principle that courts are shut to parties whose prior conduct "has violated conscience, or good faith, or other equitable principle" (citation omitted)); *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) (affirming the principle that a "court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless…").

[4] *See also Mut. Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (stating that "[i]t would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of the party whose life he had feloniously taken.").

barrister Richard Francis first developed this conception in his 1728 book "Maxims of Equity," articulating the principle that "[h]e that hath committed iniquity shall not have equity." T. Leigh Anenson, *Announcing the "Clean Hands" Doctrine*, 51 U.C. Davis L. Rev. 1827, 1847 (2018). This doctrine has "served the justice system for more than three centuries," preventing wrongdoers from taking unfair advantage of their misconduct. *Id.*[5]

American courts adopted this principle just after the founding, *Talbot v. Jansen*, 3 U.S. 133 (1795), and within half a century described it as "well settled," *Cathcart v. Robinson*, 30 U.S. 264, 276 (1831). The doctrine is "rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith," and operates through a principled "refusal on its part to be 'the abetter of iniquity.'" *Precision Instrument Manufacturing Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814–15 (1945) (citing *Bein v. Heath*, 6 How. 228, 247 (1848)). And like all doctrines deriving from the no-profit maxim, it "is not applied for the protection of the parties nor as a punishment to the wrongdoer; rather, the doctrine is intended to protect the courts from having to endorse or reward inequitable conduct." *WinMark Ltd. Partnership v. Miles & Stockbridge*, 345 Md. 614, 628 (1997).

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[5] For instance, Joseph Story remarks that "[a]ny willful act in regard to a matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men will be sufficient to make hands of the application unclean." Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 99 (W.H. Lyon ed., 14th ed. 1918).

Taken together, these principles form the foundation of all no-profit doctrines, ensuring wrongdoers do not benefit from their misdeeds without adding punishment. *See* Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 Legal Theory 171, 195–96, 199–200 (2011).

B. Related equity doctrines confirm that the no-profit maxim prevents unfair advantages without imposing punishment.

Other well-known equitable doctrines also reflect the principles embodied by the no-profit maxim, guarding against unjust advantage without creating or increasing punishment.

Consider the related doctrine of equitable tolling. This Court has explained that equitable tolling rules flow directly from the principle that "no man may take advantage of his own wrong." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232–33 (1959). The doctrine is "deeply rooted in Anglo-American history, deriving from the courts' traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice." *California Pub. Employees' Retirement System v. ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Bailey v. Glover*, 88 U.S. 342, 349 (1874).[6]

[6] Courts require that "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012).

Originally, "there was no limitation as to the time within which an action might be brought," reflecting the maxim "that a right never dies." James John Wilkinson, *A Treatise on the Limitation of Action* 2 (1829). Over time, however, the "abuses from stale demands became so great as to be unendurable," prompting English legislators to create statutes of limitations. 1 H.G. Wood, *Statutes of Limitations* § 2, at 6 (2d ed. 1893). American colonists "founded" their own statutes of limitations using these English statutes as a guide. *Walden v. Heirs of Gratz*, 14 U.S. 292, 297 (1816). Yet despite the justifications for these limitation periods, courts of equity quickly began permitting exceptions to them, even when those exceptions were not "within the letter" of the statute. *Sherwood v. Sutton*, 21 F. Cas. 1303, 1308 (C.C.D.N.H. 1828) (Story, J.).[7]

Equitable tolling prevents defendants from profiting through misconduct while preserving the protective character that defines all proper equity applications. Courts apply equitable tolling when defendants have concealed fraud, explaining that "where fraud or concealment of the existence of a claim prevents an individual from timely filing, equitable tolling of a statute of limitations is permitted until the fraud or concealment is, or should have been, discovered." *Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000). The doctrine thus operates as a shield protecting legitimate claims against defendant manipulation,

[7] Justice Story, for example, instructed that "Courts of Equity [should] not refuse their aid in furtherance of the rights of the party," when there are "peculiar circumstances . . . excusing or justifying the delay." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 529, at 503–04 (1836).

not as a sword extending time periods beyond their authorized scope, underscoring the essential limitation that governs all applications of the no-profit maxim.

This Court has consistently interpreted tolling, including in various contexts informed by equitable tolling, as a mechanism that pauses or suspends the running of time periods without extending them beyond their original limits. *See Artis v. District of Columbia*, 583 U.S. 71, 80–81 (2018) ("tolled," in the statutory context, means "that the limitations period is suspended (stops running) while the claim is sub judice elsewhere, then starts running again when the tolling period ends, picking up where it left off."); *see also id.* at 81 (providing that the Court's "decisions employ the terms 'toll' and 'suspend' interchangeably.").

This consistent understanding shows that tolling functions as a protective pause, preventing injustice without adding time to impose punishment. Equitable tolling "effectively extends an otherwise discrete limitations period set by Congress," doing so only to restore the plaintiff's position without the injustice. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). When applied, "the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991). In this way, all tolling doctrines deny advantages from misconduct while avoiding punishment beyond what the law originally allows under the no-profit maxim.

Forfeiture by wrongdoing provides another example of the no-profit principle in operation. This ancient doctrine "permit[s] the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." *Giles v. California*, 554 U.S. 353, 359 (2008) (citing *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H.L. 1666)).

Reynolds v. United States, 98 U.S. 145 (1878), explains the basic rule, which rests on the no-profit maxim: while "[t]he Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him," when "a witness is absent by his wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Id.* at 158. *Crawford v. Washington*, 541 U.S. 36 (2004), emphasized that forfeiture by wrongdoing rests on "essentially equitable grounds." *Id.* at 62.

The doctrine thus embodies the no-profit maxim by neutralizing the unfair advantage a defendant would otherwise gain by removing adverse witnesses, while maintaining the original confrontation framework. In this way, it restores balance without extending punishment or adding new disadvantages beyond those flowing from the defendant's own misconduct.[8]

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[8] Another example of this principle is a defendant's Sixth Amendment right to be present, which he forfeits if he is so disruptive that he must be removed from the courtroom. Having forfeited that right, he cannot later profit by claiming that the trial violated it. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970).

C. True fugitive tolling reflects equity's core principle by denying unearned benefits without creating additional punishment.

Building on these principles, true fugitive tolling operates under the same equitable logic: it denies defendants unearned advantages without imposing additional punishment. For example, the First Congress exempted fugitives from the first federal statute of limitations: "Nothing herein contained shall extend to any person or persons fleeing from justice." 1 Stat. 119 (1790).[9]

Nearly a century later, *Streep v. United States*, 160 U.S. 128 (1895), explained that this rule operates according to equitable principles. *Id.* at 133. There, the Court explained that defendants who flee "with the intention of avoiding being prosecuted" cannot "benefit" from the statute of limitations. *Id. Streep* thus illustrates how the no-profit maxim functions, making sure defendants gain no procedural advantage from flight (like invoking the statute of limitations as a defense) while imposing no additional punishment beyond the denial of that unearned benefit.

In time, courts applied similar logic to fugitives in the custodial context through the continuous sentence rule, which provides that "a prisoner has a right to serve his sentence continuously, and c[ould not] be required to serve it in installments." *McDonald v. Lee*,

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[9] This provision, codified at 18 U.S.C. § 3290, has "remained virtually unchanged since it was enacted by the First Congress in 1789" and reflects "the generally accepted rule of law." *United States v. Morgan*, 922 F.2d 1495, 1497 n.1 (10th Cir. 1991).

217 F.2d 619, 623 (5th Cir. 1954). This rule safeguarded against governmental manipulation: the state could not delay sentence completion by "postponing the commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994).

At the same time, courts recognized that "a continuous sentence may be interrupted by some fault of the prisoner," *United States v. Liddy*, 510 F.2d 669, 674–75 (D.C. Cir. 1974), such as "escape" or "violation of parole," *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). This balance reflects how the no-profit maxim operates, shielding prisoners from state abuse while denying them advantage from their misconduct, ensuring the sentence runs as imposed.

Anderson v. Corall, 263 U.S. 196 (1923), articulates this principle across custodial sentences, including both prison and parole. There, the Court held that "[m]ere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." *Id.* at 196. Consequently, when prisoners escape, *Anderson* explained, "time elapsing between escape and retaking will not be taken into account or allowed as a part of the term." *Id.* (citing *Dolan's Case*, 101 Mass. 219, 223 (1869) ("Expiration of time without imprisonment is in no sense an execution of sentence")). And while parole represents "an amelioration of punishment, it is in legal effect imprisonment" because the "convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term." *Id.*

These applications show that true fugitive tolling "does not increase the total length of a sentence. It simply pauses and then restarts the clock, such that the original end date of the sentence is pushed down the road for however long the clock was stopped." *United States v. Talley*, 83 F.4th 1296, 1301 (11th Cir. 2023). Fugitive tolling, in other words, preserves the sentence without adding to it, reflecting the limits of the no-profit maxim, especially in the criminal context. *See id.* at 1302.

D. The government's theory violates the no-profit maxim.

Against this backdrop, the government's claim that its supervised-release fugitive tolling theory comports with established common-law principles falls apart. Rather than seeking a legitimate extension of fugitive tolling based on equity, it pushes an unprecedented expansion that breaks with equity in two key ways: by applying it where no unearned benefit exists and by imposing punishment rather than denying advantage.

No Benefit: As explained, equity and the no-profit maxim apply when wrongdoers gain unfair benefit. So the no-profit maxim may well be invoked when discussing traditional fugitive tolling in the custodial setting because custodial defendants gain measurable benefits through flight. *See Anderson*, 263 U.S. at 196–97. Prison escapees stop serving their sentences, while parolees, who remain "in legal effect imprisonment" and "bound to remain under the control of his parole supervisor," interrupt lawful custody and avoid completing their terms. *Id.*; *see also Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (explaining

that probation and parole were considered nothing more than an "act of grace").

Supervised release, however, operates through a different architecture that eliminates comparable benefits. It is "a form of postconfinement monitoring" that permits "conditional liberty" rather than temporal custody that can be interrupted. *Mont v. United States*, 587 U.S. 514, 523 (2019). And it is designed "to assist individuals in their transition to community life" and "fulfill rehabilitative ends, distinct from those served by incarceration." *Johnson v. United States*, 529 U.S. 694, 709 (2000). In contrast to parole, supervised release "wasn't introduced to replace a portion of the defendant's prison term, [but] only to encourage rehabilitation after the completion of his prison term." *United States v. Haymond*, 588 U.S. 634, 652 (2019) (plurality).

"Unlike a sentence of imprisonment, a sentence of supervised release imposes restraints contemplated by the law that a defendant must follow no matter where he is physically located." *Talley*, 83 F.4th at 1302 (cleaned up). Congressional design thus binds the supervisee to all conditions regardless of location or compliance, leaving no custodial time to evade and foreclosing the type of sentence-shortening advantage that traditional fugitive tolling prevents.

Fair enough, absconding supervisees might seem to gain some advantage by evading reporting requirements and day-to-day monitoring. But this apparent benefit is illusory. The supervisee remains subject to legal consequences for any such evasion throughout the authorized supervision term. Put another way, while absconders may temporarily avoid

monitoring, this comes at the cost of triggering other legal sanctions that render fugitive tolling both unnecessary and inequitable.

Specifically, when defendants violate supervision conditions, the court may continue supervision by extending the term or modifying its conditions, or it may revoke the offender's term of supervision. *See* 18 U.S.C. § 3583(e)(2). And when revocation happens, the court may send the defendant to prison for "all or part of the term of supervised release authorized for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision." *Id.* § 3583(e)(3).[10]

As a result, "an offender who flees supervision in violation of his supervision conditions will not evade his sentence or otherwise benefit from his misconduct." *Talley*, 83 F.4th at 1302–03. "Instead, that violation grants the sentencing court authority to revoke the absconder's supervised release and resentence him to a term of imprisonment." *Id.* at 1303. Therefore, far from providing an advantage, absconding triggers the same consequences as any other violation subject to revocation, making any apparent benefit illusory.

Consider Petitioner's case, where her 2018 abscondment provided no benefit comparable to custodial escape. She remained continuously subject to all supervision conditions throughout the flight period, with abscondment itself constituting a Grade

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[10] The Federal Rules require hearings before modification, ensuring due process while maintaining continuous accountability. *See id.*; Fed. R. Crim. P. 32.1(c).

C violation sufficient for revocation. Her flight eliminated no legal obligations, avoided no consequences, and shortened no supervision term. It simply triggered violation procedures that could result in imprisonment as allowed by her original judgment.

Congress reinforced this framework by providing mechanisms to address post-expiration revocation through 18 U.S.C. § 3583(i), which lets courts adjudicate matters arising before expiration for "any period reasonably necessary." As for concerns about evading accountability in the waning days of supervision, empirical evidence confirms the absence of any such strategic advantage. For example, Sentencing Commission data shows violations typically occur within the first 22 months of supervision, contradicting any theory of strategic late-term manipulation. *See* USSC, *Federal Probation and Supervised Release Violations* (July 28, 2020).[11] Even in the rare instances of late-term violations, amicus's research identifies no empirical or anecdotal support for the type of strategic advantage that traditional law fugitive tolling addresses.[12] The statutory incentive

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[11] *See id.* at 4 (providing that supervisees who violated their conditions of supervision typically did so within the first two years), https://tinyurl.com/yu78bwmt.

[12] Moreover, having surveyed defense attorneys representing supervised releasees across federal districts nationwide, amicus can confirm that abscondment categorically fails to benefit supervisees. Defense counsel report that absconders face cascading consequences: employment termination due to inability to report to work, loss of housing assistance, severed family relationships, and complete disruption of rehabilitative programming. Far from gaining advantage, absconders invariably find themselves in worse circumstances: homeless,

structure forecloses this manipulation because successful supervisees may petition for early termination, while violators face revocation and re-imprisonment. *See* § 3583(e).

In short, absconding from supervised release provides no unearned benefit to deny. The government's theory thus fails at the threshold: the no-profit maxim cannot apply where no profit is gained.

Added punishment: Beyond operating where no benefit exists, the government's theory inverts the no-profit maxim and equity's character by imposing additional punishment rather than preventing advantage.

First, the government's theory extends supervised release terms beyond their scheduled end dates. This effectively adds years to the originally imposed sentences, which is textbook added punishment.

Traditional fugitive tolling in custodial contexts ensures defendants serve the correct sentence term by pausing the clock during flight. For example, when a prisoner escapes for two years, those two years are added back to ensure the whole sentence is served as imposed. *See Talley*, 83 F.4th at 1303 ("[T]he fugitive tolling doctrine…is meant to ensure that an original sentence is served, not to increase a sentence's length.").

The government's theory operates differently: it extends supervision beyond what a sentencing court

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unemployed, and isolated from support systems essential for successful reintegration.

originally imposed with no intervening judicial proceeding. A straightforward example proves the point.

Suppose a court sentences a defendant to a term of imprisonment followed by three years on supervised release.[13] Suppose further the defendant absconds during year two and remains missing until year six. The government's theory keeps the defendant under supervision for the entire four-year flight when the supervised release term was allegedly tolled. This effectively stretches the original three-year term into six years—adding three extra years beyond what the court imposed—all by operation of the fugitive tolling doctrine. That increases the sentence. *See* § 3583(a) (providing that supervised release is a part of a sentence). And that is added punishment.

Second, the government's theory allows for actions after the scheduled supervision end dates to support revocation and can increase Guidelines ranges under U.S.S.G. § 7B1.1(a). Under this approach, while abscondment is only a Grade C violation, courts can rely on post-expiration conduct that qualifies as Grade A or Grade B violations. *See id*. The government's theory thus transforms tolling from an equity principle designed to deny unearned benefits into a punitive device that inflates punishment through temporal extension of the supervised release

[13] In fiscal year 2024, courts imposed average supervision terms of 47 months. In nearly sixty percent of cases the court imposed three years to less than five years of supervised release. *See* USSC, *Quick Facts – Supervised Release* (FY 2024), https://tinyurl.com/rmf5dz4b. The median term of supervision was 36 months. *See* USSC, *Supervised Release Toolkit: Research and Data*, https://tinyurl.com/yhwwnn9x.

term combined with enhanced Guidelines calculations.

This Court has emphasized that Guidelines ranges exert a "critical anchoring effect" in sentencing determinations, serving as a "meaningful benchmark" that influences both "the initial determination of a sentence and through the process of appellate review." *Molina-Martinez v. United States*, 578 U.S. 189, 198–99 (2016); *Rosales-Mireles v. United States*, 585 U.S. 129, 133 (2018). This anchoring effect means that higher Guidelines ranges typically result in greater punishment than would otherwise be imposed. The government's theory produces this punitive consequence. Yet equity forbids this.[14]

In the end, the government's theory creates a type of Schrodinger's supervision, whereby defendants exist in a dual state of being subject to supervision conditions for violation purposes while exempt from those same conditions for tolling purposes, depending on whether the government seeks enhanced punishment or an extended end-of-supervision term.[15]

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[14] To be clear, district courts may consider post-violation conduct when imposing revocation sentences, which leaves defendants in the same position as any other supervised release violator. *See* § 3583(e); *see also Talley*, 83 F.4th at 1303 (noting that the "district court could have imposed the same consequence…without resorting to fugitive tolling…"). The problem with the government's theory is that it impermissibly bootstraps post-expiration conduct to enhance Guidelines ranges while simultaneously extending supervision terms through tolling.

[15] *Cf. United States v. Juan-Manuel*, 222 F.3d 480, 487 (8th Cir. 2000) ("a supervised release order cannot simultaneously be suspended and actively in effect.").

In this way, its rule violates equity's core principle by trying to have it both ways, creating unearned prosecutorial benefits through punishment mechanisms that equity prohibits.[16]

II. The Government's Theory Contravenes Core Doctrines of Criminal Law.

On top of departing from centuries-old equity principles, the government's theory runs headlong against core protections that have governed criminal law since the founding. By inverting equity and the no-profit maxim from a shield into a sword, the government's theory undermines due process and mens rea requirements, violates finality and double jeopardy, and raises serious Sixth Amendment and separation of powers concerns, all conflicting with the measured restraint equity was meant to secure.

A. Due Process

American criminal law rests on bedrock principles: no one may be punished without fair notice of prohibited conduct, and no one may be punished without proof of a culpable mental state. *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). The void-for-vagueness doctrine enforces these principles by requiring that criminal laws "define the criminal

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[16] The result also runs counter to *Esteras v. United States*, 145 S. Ct. 2031 (2025), in which this Court recently emphasized that supervised release serves rehabilitative rather than retributive purposes and that revocation proceedings may not consider backward-looking punishment reasons. *See id.* at 2040-41. By using tolling to allow revocation based on post-supervision conduct, the government's theory further strips supervised release of its rehabilitative function and shifts it towards a punishment tool.

offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and [that they] do not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). There is also a "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Rehaif v. United States*, 588 U.S. 225, 229 (2019).

The government's theory violates these principles in two interrelated ways: defendants cannot know what conduct triggers absconding, and they cannot know when their supervision ends. Together, these failings produce the standardless, arbitrary punishment our criminal system was designed to prevent.

First, the government's theory runs up against basic due process requirements of notice and knowledge, thus inviting arbitrary enforcement.

In the custodial setting, fugitivity is easy to understand. *Streep*, for example, explains that one who flees "with the intention of avoiding being prosecuted" is a fugitive. 160 U.S. at 133. Statutory definitions reinforce this understanding: fugitives "move or travel" to avoid prosecution, 18 U.S.C. § 1073; "flee from any State," § 921(a)(15); or "flee from justice," § 3290.

Supervised release is different. It is served in the community under "conditional liberty" aimed at reintegration, not physical restraint. *Mont*, 587 U.S. at 523. Unsurprisingly then, § 3583 does not use the

words "fugitive," "absconding," or "fleeing," let alone define them. Common law likewise offers no comparison to supervised release's community-based conditional liberty.

The lack of defined terms and disconnect from the common law creates an acute notice problem and invites arbitrary enforcement. Because supervision is not necessarily associated with physical confinement, conduct later reclassified as "absconding" often consists of ordinary condition violations: missing appointments, failing to disclose associations, or leaving the jurisdiction. Defendants understand these acts can lead to revocation, but they do not necessarily have a basis to believe the same conduct could extend their supervision indefinitely.

The nature of supervision conditions compounds the uncertainty. Congress mandates only a handful of required conditions: not committing another crime, making restitution (if ordered), and refraining from unlawful possession of controlled substances. *See* § 3583(d). All others are discretionary, such as association limits, financial disclosure requirements, or location restrictions. And as the Sentencing Commission's 2025 amendments emphasize, courts are encouraged to take an individualized approach to setting conditions, stressing that conditions "should be imposed only when warranted by an individualized assessment" and that even "standard" conditions "may be modified, omitted, or expanded" as appropriate.[17]

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[17] *See* USSC, *Reader-Friendly Version of Final 2025 Amendments to the Sentencing Guidelines* (Apr. 30, 2025), https://tinyurl.com/26ycpzzj.

Because discretionary conditions vary widely, identical conduct can yield vastly different legal consequences. One supervisee might be considered absconding for being near a prohibited location; another, without that restriction, faces no consequence. Failing to disclose a financial interest, speaking to a restricted associate, temporarily leaving the state (especially near a state line or border), or missing a single check-in could all be recharacterized as evasion. For many defendants, however, such acts are either permitted or addressed through ordinary violation procedures. Furthermore, probation officers have "broad discretion in choosing how strictly to enforce particular conditions and how to respond to violations." Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. Rev. 958, 1014 (2013). Layering this discretion over undefined "fugitive" standards produces precisely the arbitrary enforcement *Kolender* forbids.

The ambiguity deepens when constructive flight concepts enter the picture. At common law, there were two categories: (1) traditional fugitives—people who flee the jurisdiction; and (2) constructive-flight fugitives—people who refuse to submit to the court's jurisdiction. *United States v. Bescond*, 24 F.4th 759, 771–72 (2d Cir. 2021); *United States v. Vladimirovich*, No. 24-2038-CR, 2025 WL 2101184, at *5 (2d Cir. July 28, 2025).

Terms like "evading" or "concealment" sound concrete in the custodial setting, but prove elusive when applied to supervision. For example, does failing to report a temporary move count? What about

leaving the state for a day when one lives near a border? Or how about hiding a line of credit or a social media account? These questions lack clear answers in the supervised-release context.

The problem emerges not so much when defendants disappear or abandon jurisdictions completely, but in common situations involving missed appointments or temporary absences. In amicus's experience, most cases involve defendants who miss several reporting sessions due to work demands, family emergencies, or transportation difficulties, particularly as supervision terms near the end. With individualized conditions, evading monitoring or constructive concealment can mean hiding information that other defendants may simply fail to disclose. But under the government's theory, any of these routine compliance failures, which statutory design addresses through established violation procedures, become vehicles for indefinite supervision extensions through fugitive tolling.

The uncertainty worsens when supervisees cannot tell whether their term has ended.[18] Exit interview practices illustrate the problem. Some districts conduct formal exit interviews near the end of supervision, marking the term's conclusion. Others do not, relying instead on informal signals or no contact.

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[18] While *Mont* acknowledged that uncertainty about time credited during pretrial detention "matters little," the Court's analysis rested on a tolling mechanism built into the statutory framework itself, providing notice through established legal processes. *See Mont*, 587 U.S. at 526–27.

Here, however, uncertainty exists because courts can apply tolling based on undefined administrative determinations that lack statutory guidance or procedural safeguards.

In some offices, reduced communication in the final months is an accepted sign of successful reintegration; in others, it is treated as evasion. Absent statutory standards, such administrative variability means that identical conduct may end supervision in one jurisdiction but extend it indefinitely in another.

Practices vary a lot among districts and even among probation officers within the same district. Some officers interpret reduced reporting near the end of supervision as acceptable or routine; others see it as defiance. Two identically situated supervisees may receive opposite designations, with one declared free and the other retroactively branded a fugitive.

Take two defendants sentenced to identical three-year terms with the same standard conditions. Both stop reporting six months before their scheduled end dates and move for employment opportunities.

- *Person A* develops good rapport with his probation officer, who recognizes stable employment as proof of reintegration. Reduced contact follows local practice where continued monitoring fades. No fugitive finding is made; when Person A commits a new offense a few months later, he faces only new charges.
- *Person B* engages in identical conduct but has an officer who treats the reduced contact as defiance. That officer considers him to have "absconded," tolling his supervision. A few months after his scheduled end date, Person B faces new charges *and* revocation.

This disparate enforcement is particularly troubling because it operates through administrative

determinations by probation officers, not judicial or jury findings. A defendant's liberty turns on whether their particular probation officer characterizes missed appointments as non-compliance or absconding, with no statutory guidance to constrain this discretion. Differences like these can emerge between districts or even within the same district based on individual probation practices. As a result, under the government's theory, a defendant who reasonably believes his term has ended can have ordinary, lawful conduct recharacterized as a violation, converting innocent acts into revocable offenses or aggravating factors under the Guidelines. *Cf. Rehaif*, 588 U.S. at 233 (describing knowledge as essential in "separating innocent from wrongful conduct").

B. Double Jeopardy

The government's theory also raises double jeopardy concerns. The primary purpose of the Double Jeopardy Clause "was to protect the integrity of a final judgment." *United States v. Scott*, 437 U.S. 82, 92 (1978). Hence, under long-established law, once a sentence has been imposed and fully entered, a court cannot later increase the punishment. As *United States v. Benz*, 282 U.S. 304 (1931), explains, while a court may amend a sentence to mitigate punishment during the term in which it was imposed, it may not increase the sentence without violating the Fifth Amendment's Double Jeopardy Clause. *See id.* at 306–07; *see also Ex parte Lange*, 85 U.S. 163, 176 (1873) (once a defendant has "fully suffered" the punishment allowed by law, "the power of the court to punish further was gone").

The issue here is not that absconding cannot be punished. It can. Congress also created a complete statutory process for modifying, extending, or revoking supervision (*see* § 3583(e)(2)–(3), (i)), each of which carries its own statutory and rule-based protections.

The government's theory, however, bypasses this process. Its rule increases punishment based on post-sentencing conduct without using the framework Congress provided.

Consider the example from Part I.D., *supra*: a defendant receives a three-year term of supervision, absconds in year two, and is found in year six. Under the government's theory, the three-year term imposed by the sentencing court becomes a six-year one, not through a statutory revocation framework, but by operation of fugitive tolling. This effectively changes the judgment the sentencing judge originally imposed.

By analogy, suppose that a court imposed a five-year prison sentence that became final, and the defendant subsequently escaped. If the court were to increase the sentence to six years, that change would present a clear double jeopardy problem. The same logic applies to supervised release because supervised release is "a part of the sentence." § 3583(a).

Thus, whether a prison sentence or a term of supervised release, applying fugitive tolling to extend a sentence that the court has already imposed and finalized imposes additional punishment for the same offense. This raises serious double jeopardy concerns.

C. Sixth Amendment

Finally, the government's theory implicates both the Sixth Amendment and core separation-of-powers principles.

The Sixth Amendment requires jury findings for any fact (other than a prior conviction) that increases punishment beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Haymond* applied this principle to supervised release, recognizing that "an accused's final sentence includes any supervised release sentence he may receive" and that "supervised release punishments arise from and are 'treat[ed] ... as part of the penalty for the initial offense.'" 588 U.S. at 648.

Congress set clear limits on supervised release. For a Class A or Class B felony, not more than five years; for a Class C or Class D felony, not more than three years; and for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year. *See* § 3583(b). Congress reinforced these temporal constraints in § 3583(h), which provides that even when supervised release is revoked and reimposed following 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." § 3583(h).

The government's theory circumvents these constitutional and legislative constraints through a layered administrative process that erodes the jury's

role. Probation officers first determine fugitive status through administrative assessment, then courts apply tolling based on that determination, extending supervision terms that can later support enhanced Guidelines ranges and longer imprisonment. This multi-step expansion of punishment—first through executive determination of fugitive status, then through judicial application of tolling, finally through enhanced sentencing based on post-expiration conduct—removes the jury even further from the punishment enhancement process than the statutes this Court scrutinized in *Haymond*. The result extends the supervised release term imposed in the original judgment well beyond what the sentencing court authorized and what Congress permitted.

The practical effect risks violating both constitutional protections and legislative design: a defendant sentenced to the five-year maximum for a Class A felony could find supervision extended to ten, fifteen, or twenty years based only on non-jury fugitive findings. This extension operates without the procedural safeguards Congress required and effectively usurps legislative authority by allowing the executive and judiciary together to impose punishment that the legislature never authorized.

To be clear, nothing here suggests that courts cannot punish absconding conduct under the existing statutory framework, that a jury is required for every fugitive determination, or that revocation is unavailable for violations involving leaving the jurisdiction or failing to report. The concern is when undefined, preponderance-based fugitive findings extend the supervision imposed in the original

judgment well beyond Congress's statutory limits—sometimes by decades—not through any statutory processes or judicial proceeding, but by operation of the government's novel supervised-release fugitive tolling. That type of tolling effectively usurps legislative authority and raises serious Sixth Amendment and separation of powers concerns.

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These problems flow directly from the government's misuse of equity principles. By transforming protective equity doctrines into punitive tools, the government's theory not only betrays centuries of common law but also undermines key safeguards that constrain criminal punishment. This Court should reject that attempt to invent a novel tolling doctrine under the guise of equity, as it undermines the very common-law principles the government claims to invoke.

CONCLUSION

For all the reasons and those in Petitioner's brief, amicus urges this Court to rule in Petitioner's favor.

Respectfully submitted,

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