No. 18-192

IN THE

Supreme Court of the United States

J.B.R.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government does not deny that, under *United States v. Evans*, 333 U.S. 483 (1948), the Due Process Clause bars it from prosecuting someone for a criminal offense that lacks a statutory penalty. And the Government concedes (BIO 14) that 18 U.S.C. § 1111(b), as written, provides no penalty for first-degree murder that can constitutionally be imposed on a juvenile like petitioner.

The Government nonetheless maintains that it can cobble together a hybrid offense by *prosecuting* petitioner for first-degree murder and then *sentencing* him to the separate penalty Congress prescribed for second-degree murder. But the Government does not even try to square that rewrite of Section 1111(b) with fundamental principles of severability or the separation of powers. Nor could it: Only Congress can amend the statute to create a first-degree murder offense that can be applied to juveniles.

The Government's remaining arguments against certiorari are equally unpersuasive. It does not seriously defend the Fifth Circuit's holding that petitioner's due process challenge to his pending transfer is unripe. And though the Government strives to distinguish this case from *Evans* and *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016), its distinctions do not hold up—which is unsurprising, since the Fifth Circuit itself recognized that *Under Seal* sustained "a parallel challenge" at "a similar procedural juncture." Pet. App. 6a.

Finally, the Government is wrong to assert that the current procedural posture makes this case an unsuitable vehicle for resolving the question presented.

An order transferring a juvenile to the adult system is not interlocutory; it is a final collateral order. In any event, this Court routinely grants review in interlocutory cases that otherwise satisfy its certiorari standards. Immediate review is especially appropriate here because the important and recurring question presented will seldom reach the Court in any posture, let alone in an appeal following a final judgment.

This Court should grant certiorari and end the confusion and uncertainty spawned by the Government's insistence on continuing to charge juveniles with offenses that lack a valid penalty.

I. Petitioner's due process challenge to his prosecution is both ripe and meritorious.

Although the Government seeks to muddy the waters, petitioner's claim has always been clear: He maintains that the Due Process Clause bars his prosecution for first-degree murder because Section 1111(b) provides no penalty for that offense that can constitutionally be applied to him. That claim is both ripe and meritorious.

A. The Government does not seriously defend the Fifth Circuit's ripeness holding.

The Fifth Circuit held that petitioner will not have a ripe claim until he is subjected to "an unconstitutional sentence." Pet. App. 4a-5a. The Government purports to defend that holding, but it does so only by mischaracterizing petitioner's claim as a challenge "to a hypothetical future sentencing range." BIO 10; *see* BIO 14-17.

In fact, petitioner has consistently asserted a due process objection to his *transfer*, not merely an

Eighth Amendment objection to his potential *sentence*. In the district court, he explained that "[t]he sentence itself is not the issue" and that he objects to his transfer because he is "entitled to notice" of the statutory penalty he faces. ROA 32-33. On appeal, he likewise emphasized that he "is not challenging a sentence that has not happened," but rather a transfer that requires him "to stand trial for a crime that has no valid penalty." Pet. C.A. Reply Br. 12; *see, e.g.*, Pet. C.A. Br. 5, 9, 11, 16-18 (the transfer "violates the due process clause").

Even the Government elsewhere recognizes that petitioner is challenging his transfer on the ground that "the first-degree murder statute [can]not apply at all to him." BIO 19; *see* BIO I. That challenge does not rest on any "contingent future events," *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted), and it is plainly ripe. The Government does not appear to argue otherwise—and it certainly does not cite any decision, by any court, finding a ripeness obstacle to a criminal defendant's challenge to the validity of the statute he is charged with violating.

B. The Government's proposed rewrite of Section 1111(b) flouts bedrock principles of severability and the separation of powers.

The Government does not dispute the fundamental due process principle that governs this case: Under *Evans*, it may not prosecute someone for an offense that lacks a statutory penalty. The Government also concedes (BIO 14) that 18 U.S.C. § 1111(b) provides no statutory penalty for first-degree murder that can constitutionally be imposed on a juvenile. The Government's claim that it can prosecute petitioner

for first-degree murder thus rests entirely on its assertion (BIO 18-20) that a court can supply the missing penalty by swapping in the separate punishment Congress prescribed for second-degree murder. That assertion conflicts with bedrock principles of severability and the separation of powers.

1. When some portions of a statute are unconstitutional, the continuing viability of the remainder is a question of severability. Under this Court's settled approach to such questions, courts must "excise" the unconstitutional provisions and retain only those portions of the statute that are "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress's basic objectives." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citation omitted); *see, e.g.*, *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018).

The application of that familiar test to Section 1111(b) is straightforward. After excising the penalties that are concededly unconstitutional, the first-degree murder provision (as applied to juveniles) reads:

> Whoever is guilty of murder in the first degree shall be punished ~~by death or by imprisonment for life~~

That remaining provision specifies no penalty for juvenile offenders. It is thus neither "constitutionally valid" nor "capable of 'functioning independently.'" *Booker*, 543 U.S. at 258-59 (citation omitted). It necessarily follows that, as applied to juveniles, the entire first-degree murder provision must fall along with the invalid penalties.

2. The Government balks at that straightforward severability analysis. Instead, it asserts that courts

should replace the invalid penalties for first-degree murder with "the statutory sentencing range for the lesser-included offense of second-degree murder." BIO 18; *see* BIO 18-20. But the Government does not even try to reconcile that assertion with this Court's severability precedents, and it could not do so.

To achieve the result it seeks, the Government would not only have to "sever and excise" portions of Section 1111(b), *Booker*, 543 U.S. at 258, but also to *insert* new language that Congress never enacted:

> Whoever is guilty of murder in the first degree shall be ~~punished by death or by imprisonment for life~~ imprisoned for any term of years or for life

This Court has long held that courts may not rewrite a statute in that fashion. A court may "strike out words" that are inconsistent with the Constitution, but it may not "insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968); *see, e.g.*, *United States v. Reese*, 92 U.S. 214, 221 (1875). "This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922).[1]

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[1] The district court suggested that it could reach the same bottom line as the Government through excision alone:

> Whoever is guilty of murder in the first degree ~~shall be punished by death or by imprisonment for life;~~
>
> ~~Whoever is guilty of murder in the second degree,~~ shall be imprisoned for any term of years or for life.

Pet. App. 10a-11a. The Government wisely eschews that approach. Among other things, the district court inadvertently deleted the entire prohibition on second-degree murder.

The Government confidently predicts (BIO 19) that Congress "would have intended" to apply the penalty for the lesser-included offense of second-degree murder had it known that the first-degree penalties would be held invalid as applied to juveniles. But that sort of speculation about congressional intent does not authorize the courts to rewrite a statute. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010); *see Under Seal*, 819 F.3d at 725 & n.13. Congress defined two murder offenses with two distinct statutory penalties, and a court cannot substitute one for the other without usurping Congress's function and doing violence to Section 1111(b)'s text.[2]

What's more, precisely because second-degree murder is a lesser-included offense, the implication of petitioner's position is not, as the Government claims, that juveniles who commit first-degree murder must "remain in juvenile proceedings" (BIO 19) or face "*no* punishment" (BIO 22). Those

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[2] The Government notes (BIO 19-20) that courts have resentenced juveniles who were sentenced to mandatory life imprisonment before *Miller v. Alabama*, 567 U.S. 460 (2012), without vacating their convictions. But as the Fourth Circuit explained, those cases did not involve the same "due process problems" posed here because they sought "to remedy a mandatory life sentence that was validly imposed at the time." *Under Seal*, 819 F.3d at 727-28. The appropriate remedy for those pre-*Miller* sentences sheds no light on whether the Government can bring *new* charges under statutes that now concededly lack a penalty that can be applied to juveniles.

offenders can be subject to the second-degree murder penalty *after being prosecuted for second-degree murder.* Remarkably, the Government has never identified any legitimate interest served by its jury-rigged approach that would not be equally well served by proceeding directly under the second-degree murder statute—an obvious alternative that petitioner has always acknowledged is available, but that the Government has inexplicably declined to pursue. Pet. 35-36; ROA 33.

C. The proceedings in the district court did not cure the due process problem with this prosecution.

The Government separately asserts (BIO 17-18) that petitioner has somehow received constitutionally adequate "notice of the penalties to which he will be subject if convicted" because the district court has promised to apply the second-degree penalty and because petitioner purportedly "embraced that procedure" in connection with a now-withdrawn guilty plea. That is not so.

First, the Due Process Clause requires *statutory* notice of the penalty attached to an offense. *Beckles v. United States*, 137 S. Ct. 886, 892 (2017). Section 1111(b) does not provide the required notice to juvenile offenders, and a court cannot cure that defect by declaring that it will impose a particular unauthorized penalty. "[D]efining crimes and fixing punishments are legislative, not judicial, functions." *Evans*, 333 U.S. at 486.

Second, the Government is wrong to assert that the district court has pledged to apply the second-degree penalty. In fact, the court merely identified

that as a "possible" outcome; it made no firm commitments about how it would "fashion[] . . . a constitutional sentence." Pet. App. 13a. And the court has given no indication at all about which sentencing guideline it might apply. So the court's statements have not only failed to cure the fundamental due process problem with this prosecution—they have actually exacerbated the profound uncertainty facing petitioner and his counsel. *See* Pet. 22-26.

Finally, the Government goes badly astray by invoking (BIO 15-16, 18) petitioner's withdrawn guilty plea. After the district court entered the transfer order under review here, petitioner agreed to withdraw his appeal and plead guilty in a Rule 11(c)(1)(C) agreement. ROA 392-93. As part of that agreement, he consented to be transferred to adult proceedings and to a theoretical statutory penalty of up to life in prison. *Id.* 393. But he did so only in exchange for an agreed-upon sentence of "no more than 30 years." *Id.* The Government expressly stipulated that if the district court rejected that agreement—as it ultimately did—petitioner's plea would be "withdrawn" and he would be allowed to "proceed with his [pending] appeal" challenging his transfer on due process grounds. *Id.* 397. The Government provides no basis for holding petitioner to supposed concessions in a now-rejected agreement made in connection with a now-withdrawn plea. *Cf.* Fed. R. Evid. 410(a).[3]

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[3] Relatedly, the Government is wrong to suggest (BIO 18-19) that petitioner failed to preserve his challenge to the application of the second-degree penalty. That possibility was first raised in

II. The Government cannot distinguish this case from *Evans* or *Under Seal*.

The petition demonstrated (Pet. 12-17) that the Fifth Circuit's decision conflicts with this Court's decision in *Evans* and with the Fourth Circuit's decision in *Under Seal*. The Government offers no persuasive response.

1. *Evans* and *Under Seal* stand for the proposition that a defendant charged with an offense that lacks a statutory penalty has a ripe due process claim justifying immediate dismissal of the indictment. The Government's only response is to note (BIO 22 n.4, 23-24) that those cases involved government appeals from orders dismissing the indictments. But that does not alter the ripeness analysis, which is the same in a district court as it is on appeal. If the Fifth Circuit were correct that petitioner lacks a ripe claim, then *Evans* and *Under Seal* should have vacated the dismissals on ripeness grounds. Conversely, because the Government does not deny that the defendants in *Evans* and *Under Seal* had ripe claims, petitioner does too.

2. The Government fares no better in seeking to distinguish *Evans* and *Under Seal* on the merits.

a. The Government asserts (BIO 21) that the statute at issue in *Evans* was somehow more

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the district court's supplemental order, which was entered while petitioner's appeal was already pending. Pet. App. 10a-11a. Petitioner promptly challenged that approach, arguing at length that it "misapplies the principles of severability" and "violates the separation of powers." Pet. C.A. Br. 10-11; *see id.* at 10-19.

"ambiguous" than Section 1111(b). But once shorn of the penalties that cannot be applied to juveniles, Section 1111(b)'s first-degree murder provision contains no punishment at all. That is the height of ambiguity. And *Evans* rejected the Government's suggestion (BIO 21-22) that Congress's presumed desire "to make criminal and to punish" particular conduct, 333 U.S. at 495, gives courts license to select a penalty that Congress itself did not adopt.

b. The Government contends (BIO 24) that *Under Seal* is distinguishable because the statute at issue there contained only a single murder offense, whereas Section 1111(b) also defines a lesser-included offense of second-degree murder. But the Fifth Circuit did not rely on the presence of a lesser-included offense here, and that fact would not have altered the Fourth Circuit's analysis in *Under Seal*. The Fourth Circuit recognized that it was bound to apply this Court's "well established standard for determining severability." 819 F.3d at 722 (citation and internal quotation marks omitted). And it emphasized that no severability principle authorizes a court "to replace excised language from one provision with language not previously applicable to it from a separate provision." *Id.* at 725. That is just what the Government seeks to do here.

III. This Court's review is warranted now.

Finally, the Government errs in asserting (BIO 10-13) that this Court should deny review because this case is in an interlocutory posture.

1. The courts of appeals uniformly hold that orders transferring juveniles to adult proceedings are final decisions under the collateral-order doctrine.

Pet. 9 n.6; *see United States v. J.J.K.*, 76 F.3d 870, 871 (7th Cir. 1996) (collecting cases). By definition, a collateral order is "effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995). A case on collateral-order review thus is not interlocutory in any sense that counsels against this Court's review. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 284 n.74 (10th ed. 2013) (the collateral-order doctrine determines "whether particular types of orders are final or interlocutory"). And the Court routinely reviews decisions in that posture. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Yeager v. United States*, 557 U.S. 110 (2009).

The Government does not dispute that the collateral-order doctrine applies here. But it asserts without explanation (BIO 12) that the considerations justifying collateral-order review have less force in this case because petitioner's challenge to his transfer does not "implicate[]" the loss of confidentiality and other statutory protections that ordinarily result from a transfer to adult proceedings. That is just wrong. If the Government prevails, petitioner will be transferred to adult proceedings and will irrevocably lose those protections. *See J.J.K.*, 76 F.3d at 871. But if petitioner prevails, he will remain in the juvenile system unless and until the Government files a new transfer request based on a constitutionally permissible charge. The Government was adamant about that below, telling the district court that it must "deny transfer" if petitioner cannot be prosecuted for first-degree murder. ROA 38.

2. In any event, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. at 5, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (No. 17-654). And immediate review is particularly appropriate where, as here, an important legal issue is otherwise unlikely to reach the Court.

As we have explained—and as the Government does not dispute—juveniles charged with offenses that carry mandatory life sentences face enormous pressure to plead guilty and waive their constitutional claims, in part because that is the only way they can obtain certainty about the penalties they face. Pet. 17-19; *cf. United States v. Conyers*, 227 F. Supp. 3d 280 (S.D.N.Y. 2016). That means that despite its importance, the question presented will seldom reach this Court—and that cases presenting the question after a final judgment will be even rarer.

Meanwhile, if this Court denies certiorari here, the Government will be able to continue using unconstitutional charges to extract guilty pleas from juvenile defendants while the Court awaits another vehicle. There is no sound reason for the Court to tolerate that situation. The question presented is squarely and cleanly raised here, and the Court should resolve it now.

CONCLUSION

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

Respectfully submitted,

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February 6, 2019