No. 18-7000

IN THE

Supreme Court of the United States

LUIS ROLANDO BUENO JIMENEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The government expressly concedes that the circuits are divided 3–1 on the question presented. The government does not meaningfully dispute that this case presents an ideal vehicle for resolving that split. And the government offers only a superficial defense on the merits. The government's only real argument against review is that Congress recently amended the safety-valve statute. But the circuit split remains live; the question presented continues to affect a substantial number of cases; resolution of the split would be consistent with this Court's prior practice, as well as equitable considerations; and, in accordance with Congress' recent policy judgment, a decision in Petitioner's favor would enable numerous low-level, non-violent drug offenders to seek relief from harsh mandatory minimum penalties.

I. THE CIRCUITS ARE ADMITTEDLY DIVIDED ON THE QUESTION PRESENTED

The circuits are unquestionably divided on whether those convicted of violating the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. §§ 70501 *et seq.*, and subject to a mandatory minimum sentence under 21 U.S.C. § 960, are eligible for safety-valve relief under 18 U.S.C. § 3553(f) (2010). The Fifth, Ninth, and Eleventh Circuits have held that they are not. *United States v. Anchundia-Espinoza*, 897 F.3d 629, 632–34 (5th Cir. 2018); *United States v. Gamboa-Cardenas*, 508 F.3d 491, 497–502 (9th Cir. 2007) (2–1 decision); *United States v. Castillo*, 899 F.3d 1208, 1212 (11th Cir. 2018) (re-affirming *United States v. Pertuz-Pertuz*, 679 F.3d 1327, 1328–29 (11th Cir. 2012)). Expressly disagreeing, the D.C. Circuit has held that they are. *United States v. Mosquera-Murillo*, 902 F.3d 285, 292–96 (D.C. Cir. 2018). *See* Pet. 10–15 (summarizing the circuit conflict).

The government expressly acknowledges this division of authority but dismisses it as "shallow." BIO 3. However, this Court routinely grants certiorari in federal criminal cases to resolve 3–1, 2–1, and even 1–1 circuit splits over questions of statutory interpretation.[1] That practice reflects the sound view that criminal defendants should not be treated differently based solely on the happenstance of geography. When it comes to an individual's life and liberty, *any* such disparity is untenable. Moreover, the government does not suggest that the competing legal arguments have not been fully aired or that further percolation is necessary. And because the government has not urged the D.C. Circuit to reconsider its position, the conflict is now intractable. Only this Court can resolve it.

II. THIS CASE IS AN IDEAL VEHICLE

The government does not seriously dispute that this case is an ideal vehicle to resolve the split. Procedurally, the government does not dispute that Petitioner repeatedly preserved his argument that he was statutorily eligible for safety-valve relief, making that argument in a pre-trial motion to dismiss, at sentencing, and then again on appeal. The government does not dispute that the courts below deemed that argument foreclosed by the Eleventh Circuit's contrary precedent. And the government does not dispute that Petitioner satisfied § 3553(f)'s five criteria for safety-valve relief. *See* Pet. 18.

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[1] *See, e.g.*, *Dahda v. United States*, 138 S. Ct. 1491, 1496 (2018) (2–1); *Koons v. United States*, 138 S. Ct. 1783 (2018) (3–1); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2–1); *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1–1); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2–1); *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016) (1–1); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1–1).

The government nonetheless suggests that Petitioner would not have obtained such relief had he been eligible for it. BIO 3. But that suggestion is belied by the record. The sentencing court—over the government's objection—granted Petitioner's request for a downward variance to the ten-year mandatory minimum. And it did so because it had already imposed that same sentence on two co-defendants who the government expressly admitted were more culpable than Petitioner. Indeed, one of them was the leader of the conspiracy, and the government explained that Petitioner was only the fourth most culpable of the five defendants charged in that conspiracy. So the court had no choice but to impose that same sentence on Petitioner, the lowest one legally available. *See* Pet. App. 32a–34a. But had the court not been constrained by the mandatory minimum, it would have been required to give him an even lower sentence in order to avoid creating an unwarranted sentencing disparity. 18 U.S.C. § 3553(a)(6). Indeed, Petitioner would have had an unassailable argument for a lower sentence, but his ineligibility for safety-valve relief precluded the court from considering it.

The clean procedural and factual circumstances of this case distinguish it from the recent petition in *Castillo* (U.S. No. 18-374) (cert. denied Jan. 7, 2019). In that case, the defendant failed to preserve the argument that the he was statutorily eligible for safety-valve relief, making a distinct constitutional argument instead. *Castillo*, BIO 15–18. And the defendant did not receive the ten-year mandatory minimum; rather, the court granted a downward variance to 132 months, and expressly stated that Petitioner should receive one year *more* than the mandatory

minimum. *Castillo*, BIO 15. A similar dynamic also exists in *Anchundia-Espinoza*, where the district court imposed a downward variance to 175 months, and expressly stated that it would have gone no lower than 168 months. *Anchundia-Espinoza*, BIO 4 (U.S. No. 18-6482) (awaiting distribution). Thus, while those petitions did not and do not present an ideal vehicle for resolving the conflict, this one does.[2]

III. PETITIONER WAS ELIGIBLE FOR SAFETY-VALVE RELIEF

In arguing that Petitioner was ineligible for safety-valve relief, the government emphasizes that the MDLEA was not expressly enumerated in § 3553(f)'s list of eligible offenses. BIO 2–3 (cross-referencing *Castillo*, BIO 8–13). But that observation merely raises rather than resolves the statutory dispute. For all agree that MDLEA offenses are subject to the mandatory minimum penalties in § 960(b), and § 3553(f) *does* include "offenses under" § 960. The government's response to that crucial point rests on a faulty assumption—namely, that § 3553(f)'s reference to "offenses under § 960" refers *only* to the "unlawful acts" enumerated in § 960(a). *Castillo*, BIO 11–12. But despite its purported adherence to the plain statutory text, the government ignores that § 3553(f) refers to *all* of § 960, not subsection (a). Congress could have easily enumerated § 960(a) had it seen fit to do so. And there is little reason why that limitation should be inferred. After all, the relevant language referring to offenses under § 960 occurs in the context of § 3553(f), a statute designed exclusively to supply relief from mandatory minimum penalties like those prescribed by § 960(b).

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[2] The government also refers to two more unsuccessful petitions, *see* BIO 2, but they were denied back in 2014, years before the circuit conflict emerged.

Because the plain text of § 3553(f) refers to all of § 960, and thus naturally includes the mandatory minimum penalties in § 960(b), offenses subject to § 960(b)'s mandatory minimum penalties are covered. In that regard, the government has no answer to the "pivotal" reasoning in the D.C. Circuit's opinion in *Mosquera-Murillo*. Specifically, the government does not address, let alone dispute, that the drug-type and quantity thresholds in § 960(b) constitute "elements" under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and, as elements, they necessarily form part of the "offense" of conviction. *Mosquera-Murillo*, 902 F.3d at 293–96. That is precisely why the indictment charged Petitioner with violating not only the MDLEA but also § 960(b). Pet. App. 18a. The prosecutors included the drug-type and quantity allegations in the indictment because they correctly recognized what the Solicitor General now does not: they were required elements of the "offense" of conviction.

Because Petitioner was convicted of an offense not only under the MDLEA but also under § 960, he was eligible for safety-valve relief pursuant to § 3553(f).

IV. THE QUESTION PRESENTED CONTINUES TO WARRANT REVIEW

Petitioner previously explained that the question presented is recurring and important, affecting whether countless non-violent, low-level, first-time drug traffickers could obtain relief from harsh mandatory minimum penalties. *See* Pet. 15–17. Rather than dispute that characterization, the government argues that the question presented is no longer one of "prospective importance" because, after this Petition was filed, the First Step Act of 2018 amended the safety-valve statute by expressly including MDLEA offenses. BIO 3–4; *see* Pub. L. No. 115-

3191, § 402(a)(1)(A). But that amendment—vindicating Petitioner's statutory argument—provides no basis for denying certiorari here for several reasons.

1. Although the First Step Act now makes abundantly clear that MDLEA offenders are eligible for safety-valve relief, that amendment "appl[ies] only to a conviction entered on or after the date of enactment" (*i.e.*, December 21, 2018). First Step Act § 402(b). Thus, it does not apply to Petitioner's case or to any other currently-pending MDLEA case where the conviction was entered before December 21, 2018. That is a substantial number of cases.

In the Eleventh Circuit alone, several appeals in pre-amendment cases presenting the safety-valve issue have recently been adversely decided or remain pending. *See, e.g.*, *United States v. Valois*, __ F.3d __, 2019 WL 547458, at 7–8 (11th Cir. Feb. 12, 2019); *United States v. Mastarreno*, 748 F. App'x 291 (11th Cir. Jan. 16, 2019); *United States v. Diaz*, 745 F. App'x 148 (11th Cir. Dec. 13, 2018); *United States v. Torres*, 742 F. App'x 493 (11th Cir. Nov. 15, 2018); *United States v. Hamilton*, 2018 WL 6928139 (11th Cir. No. 18-14265) (appellant brief filed Dec. 28, 2018); *United States v. Vargas*, 2018 WL 6333825, at 19–22 (11th Cir. No. 18-13175) (government brief filed Nov. 30, 2018); *United States v. Palacios-Solis*, 2018 WL 5732941, at 46–50 (11th Cir. No. 17-14294) (government brief filed Oct. 26, 2018); *United States v. Quijije-Napa*, 2018 WL 5318446, at 8–18 (11th Cir. No. 18-11471) (appellant brief filed Oct. 24, 2018); *United States v. Pena-Valois*, 2018 WL 4208926, at *14 (11th Cir. No. 17-13982) (appellant's reply brief filed Aug. 27, 2018).

Elsewhere, other pre-amendment cases also remain pending. And that includes cases at all stages—where the conviction has been entered, but the sentencing has not yet occurred, *see, e.g.*, *United States v. Mosquera-Murillo*, Case No. 13-cr-00134, Dkt. Entry No. 272 (D.D.C. Nov. 30, 2018); where the appeal remains pending in the court of appeals, *see, e.g.*, *United States v. Espinal-Mieses*, 313 F.Supp.3d 376, 381–85 (D. P.R. 2018), *appeal pending* (1st Cir. No. 18-828); and where a petition for certiorari remains pending in this Court, *see, e.g.*, *Anchundia-Espinoza* (U.S. No. 18-6482) (awaiting distribution). And the number of pre-amendment cases presenting the safety-valve issue is likely much greater than known given that it is difficult to identify cases where the sentencing has not yet occurred or where the appeal is still in its early stages.

In addition to still-pending cases, a decision in Petitioner's favor would allow MDLEA offenders whose convictions are final to seek relief under 28 U.S.C. § 2255. That is so because such a decision would announce a substantive (not procedural) rule with retroactive effect in collateral cases. Rather than regulating the manner of determining a defendant's sentence, a decision declaring MDLEA offenders eligible for safety-valve relief would "change the substantive reach of the [safety valve statute], altering the range of conduct or the class of persons" covered by it. *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016). In *Welch*, this Court held that a decision narrowing the scope of the Armed Career Criminal Act, which subjects certain offenders to a 15-year mandatory minimum penalty, had retroactive effect because it meant that certain offenders were erroneously subject to that mandatory

minimum penalty. The same logic would apply here: broadening § 3553(f)'s substantive reach to include MDLEA offenders would mean that an entire class of persons had been erroneously bound by a mandatory minimum penalty. And that ruling would establish a new right for those in the Fifth, Ninth, and Eleventh Circuits, re-starting the one-year statute of limitations under § 2255(f)(3). Thus, a ruling in Petitioner's favor would allow numerous MDLEA offenders satisfying § 3553(f)'s criteria to seek relief from mandatory minimums, an opportunity they had previously been wrongfully denied at sentencing. *See* Pet. 15 (documenting number of MDLEA offenders brought to U.S. for prosecution in recent years).

2. In addition to the number of people potentially affected, there are two equitable reasons militating in favor of review. First, denying review would have the anomalous effect of making safety-valve eligibility arbitrarily turn on the happenstance of when a defendant's conviction was entered. MDLEA offenders in busy districts with clogged dockets would end up better off than those in other districts. Even more oddly, defendants who plead guilty would be placed in a worse position vis-à-vis sentencing than those who proceed to trial and are convicted. Where the date of conviction after a jury trial post-dates December 21, 2018, then that defendant will be eligible for safety-valve relief; yet a co-defendant who quickly pled guilty to the same offense would not. That bizarre result would upend the traditional principle that defendants who plead guilty and accept responsibility should fare better at sentencing, not worse. Absent review by this Court, that anomaly would continue to affect cases in the Fifth, Ninth, and Eleventh Circuits.

Second, the First Step Act reflects Congress' considered policy judgment that MDLEA offenders should indeed be eligible for safety-valve relief. Congress sought to eliminate any such sentencing disparity between drug traffickers caught on a boat and those caught on land. It would be passing strange if the First Step Act—designed to eliminate the unfairness in the previous sentencing regime—served as a basis for *denying* certiorari, thereby condemning Petitioner and other similarly-situated defendants to mandatory minimum sentences that this Court would have otherwise reviewed and potentially vacated.

3. Lastly, granting certiorari would be fully inconsistent with this Court's past practice of deciding issues affecting only a closed set of criminal cases. Indeed, that describes every case where this Court grants review to decide whether one of its criminal decisions has retroactive effect (*e.g.*, *Welch*). And other examples involving circuit splits abound. In *Nichols*, for example, this Court decided (rather than dismissed as improvidently granted) a live circuit split over SORNA even though, while that case was pending, Congress enacted prospective legislation criminalizing the defendant's conduct. *See* Supp. Br. for U.S. (U.S. No. 15-5238) (filed Feb. 10, 2016). In *Dorsey v. United States*, 567 U.S. 260 (2012), this Court resolved a live circuit split about whether the Fair Sentencing Act applied to defendants whose crimes preceded enactment, even though that question had no prospective importance. And, in *Johnson v. United States*, 529 U.S. 694 (2000), this Court resolved a circuit split about the supervised release statute by applying a version of the law that had since been amended.

Here, there is a live 3–1 circuit split on a statutory question affecting a substantial number of federal prisoners. And resolution of that split in Petitioner's favor would be consistent with Congress' recent policy judgment and allow scores of low-level, non-violent drug offenders to seek relief from harsh mandatory minimum sentences. Under these circumstances, this Court's review remains warranted. Indeed, while the First Step Act's recent amendment is laudable, it never should have been necessary. The Fifth, Ninth, and Eleventh Circuits have been erroneously barring all MDLEA offenders from seeking safety-valve relief. This Court should grant certiorari, embrace the D.C. Circuit's contrary position, and declare Petitioner eligible for safety-valve relief from his ten-year sentence.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, this Court should grant certiorari.

Respectfully submitted,

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