No. 19-1365

IN THE
Supreme Court of the United States

RAMON HUESO,
Petitioner,

v.

J. A. BARNHART, WARDEN,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government explicitly concedes, as it must, that there is a lopsided split in the circuits on the question presented in this case. The government acknowledges, BIO 17-18, that nine federal circuits reject the government's current position on the interpretation of the § 2255 savings clause. Only two accept it. The government does not even attempt to argue that the split will resolve itself, and all indications are to the contrary. In fact, since the Brief in Opposition was filed, the Ninth Circuit has rejected the government's petition for rehearing en banc raising this issue. *See* BIO 18 n.2. The Ninth Circuit judges who concurred in the denial of rehearing en banc, as well as those who dissented, were united in concluding that review by this Court is called for. *See, e.g.*, *Allen v. Ives*, 950 F.3d 1184, 1186 (9th Cir. 2020), *reh'g denied*, No. 18-35001, __ F.3d __, 2020 WL 5639693, at *6 (9th Cir. Sept. 22, 2020) (*en banc*) ("We … agree with our dissenting colleague's implicit argument that the Supreme Court should grant certiorari—in this or in some other case—to resolve the circuit split.").

The government itself has previously emphasized the importance of resolving this "particularly problematic" circuit split in which "the cognizability of the same prisoner's claim may depend on where he is housed by the Bureau of Prisons." Petition for a Writ of Certiorari at 25, *United States v. Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420), 2018 WL 4846931 ("*Wheeler* Pet."). It is bad enough that a petitioner's entitlement to relief currently depends on the jurisdiction in which he is incarcerated; it is even worse that the government, the petitioner's adversary, controls which jurisdiction that is—a point that the government's Brief in Opposition studiously ignores.

Instead, the government asserts that an individual in Mr. Hueso's position would not be entitled to relief in any circuit. That is wrong. The government also points to other occasions on which this Court has declined to review the question presented here, but there were vehicle problems in those cases that are not present here. And the government deploys a variety of chaff to try to show that there are "wrinkle[s]," BIO at 22, in this case that warrant denying relief. None of those arguments is correct. This Court should grant review.

1. The government asserts that Mr. Hueso "would not be entitled to relief even in the circuits that have adopted the most prisoner-favorable interpretation of the saving clause." BIO 19. In the petition, we demonstrated (Pet. 12-14) that at least the Fourth, Seventh, and Ninth Circuits would grant relief to an individual in Mr. Hueso's position. The government does not refute or call into question our description of the law in those circuits. Indeed the government does not even cite any cases from either the Fourth or the Ninth Circuit. It cites, BIO 19, one Seventh Circuit case, *Brown v. Rios*, 696 F.3d 638, 640-41 (7th Cir. 2012), but that case *granted* relief to a § 2241 petitioner with a claim similar to Mr. Hueso's and said nothing remotely inconsistent with the Seventh Circuit cases we rely on.[1]

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[1] The claim in *Brown v. Rios* (in which the government conceded the availability of § 2241 relief) was based on a Supreme Court statutory decision, as opposed to a court of appeals decision, that made a sentencing enhancement unlawful. The more recent Seventh Circuit cases we cited in the petition, unmentioned by the government, leave no doubt that the Seventh Circuit grants savings clause relief on the basis of court of appeals decisions as well. *See* Pet. 13, citing *Beason v. Marske*, 926 F.3d 932, 938-39 (7th Cir. 2019); *United States v. Spencer*, 739 F.3d 1027 (7th Cir. 2014); and *Chazen*

Rather than specifically address the law of the circuits in which Mr. Hueso would have been granted relief, the government asserts that "generally" the "prisoner-favorable" circuits provide relief upon a showing that the habeas petitioner "received an erroneous statutory minimum sentence" and that the claim "was foreclosed by (erroneous) precedent at the time of his sentencing, direct appeal, and initial motion under Section 2255." BIO 19. But even according to these generalizations that the government offers, Mr. Hueso is entitled to relief.

Mr. Hueso claims in his petition that he received an erroneous statutory minimum sentence. And at the time of Mr. Hueso's sentence (2010), direct appeal (2011), and Section 2255 motion (2011), the law in the Ninth Circuit squarely foreclosed his claim. *See United States v. Rosales*, 516 F.3d 749, 758 (9th Cir. 2008); *United States v. Murillo*, 422 F.3d 1152, 1153-54 (9th Cir. 2005), *overruled by United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019). The Ninth Circuit did not change its position until 2019, when it overruled the *Rosales* - *Murillo* line of cases in *United States v. Valencia-Mendoza*, 912 F.3d 1215, 1222 (9th Cir. 2019).

The government nonetheless asserts that Mr. Hueso's claim was not foreclosed because the Ninth Circuit "may well" have overruled *Rosales* and *Murillo* earlier if Mr. Hueso had asked it to. BIO 20, quoting Pet. App. 32a. The government does not even attempt to show that any circuit that entertains claims like Mr. Hueso's requires claimants to have challenged binding circuit law as a prerequisite to obtaining relief under the

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v. Marske, 938 F.3d 851, 864 & n.3 (7th Cir. 2019) (Barrett, J., concurring).

savings clause. Nor does it identify any such circuit that, in evaluating claims under the savings clause, speculates about whether a court might have changed course earlier than it actually did.

In any event, the Ninth Circuit showed no inclination to question *Rosales* or *Murillo* before it changed its position in *Valencia-Mendoza.* To the contrary, in 2015, the Ninth Circuit stated that *Murillo* "has not been abrogated or overruled and remains binding law in this circuit." *United States v. Fletes–Ramos*, 612 F. App'x 484, 485 (9th Cir. 2015). And the Ninth Circuit relied on *Murillo* again in 2018, explaining that "it was legally proper to use the maximum authorized sentence for [petitioner's] crime of conviction under Washington law." *Green v. Johnson*, 744 F. App'x 413, 414 (9th Cir. 2018).

2. The government asserts, BIO 10, 21, that this petition should be denied because the Court denied review of the government's petition in *Wheeler.* But *Wheeler* presented a litany of vehicle issues that are not present here. The government asserts, BIO 21, that there were no mootness concerns in *Wheeler*, but mootness was only one of the problems in *Wheeler*. *Wheeler* was in an interlocutory posture. The resentencing ordered by the Fourth Circuit had not taken place, so it was unclear whether the government would suffer any injury. *See* Brief in Opposition at 12-13, *United States v. Wheeler*, 139 S. Ct. 1318 (2019) (No. 18-420), 2019 WL 528355. The government in *Wheeler* had adopted contrary positions in the district court and on appeal. That alone made the case an unsuitable vehicle. *See United States v. Wheeler*, 886 F.3d 415, 426 (4th Cir. 2018) (criticizing the government for changing its position), *cert. denied*, 139 S. Ct. 1318 (2019).

Moreover, the court of appeals seriously considered the possibility that the government's change in position constituted a waiver (before determining that the savings clause was jurisdictional), *see id.* at 422-26—raising the possibility that, if this Court granted review, it might never reach the merits.

The government refers, BIO 18-19, to a number of other petitions that have been denied since *Wheeler*, but they had vehicle problems this case does not. For example, the petitioner in *Jones v. Underwood* relied on a change in precedent that was from neither his circuit of confinement nor his circuit of conviction. *See* Brief for the United States in Opposition at 21, *Jones v. Underwood*, 140 S. Ct. 859 (2020) (No. 18-9495). The petitioner in *Walker v. English* failed to brief the issues raised by his petition below and never even served the government with his habeas petition. *See* Brief for the United States in Opposition at 18, *Walker v. English*, 140 S. Ct. 910 (2020) (No. 19-52), 2019 WL 4750035. The petitioner in *Dyab v. English* based his petition on a case that predated his guilty plea and sentencing, and therefore was not an intervening decision that would qualify him for relief under § 2241. *See* Brief for the United States in Opposition at 12-13, *Dyab v. English*, 140 S. Ct. 847 (2020) (No. 19-5241). None of these obstacles to granting certiorari are present in this case.

The government pointed out in its *Wheeler* petition that there was, even then, a "widespread circuit conflict" that was producing "divergent outcomes for litigants in different jurisdictions on an issue of great significance." *Wheeler* Pet. at 12-13. The only thing that has changed since the government made that statement is that the circuits have become more divided over how to address this important issue. *See, e.g.*, *Allen v. Ives*, 950 F.3d at

1186. This issue "of great significance" will not resolve itself without this Court's intervention.

3. The ancillary issues raised by the government provide no reason for this Court to deny review. Those issues will persist as long as the split in the circuits on the scope of the savings clause persists. This case, far from being a poor vehicle, is typical of savings clause cases.

The government broadly asserts that this petition presents a "complicated scenario," because the petitioner is seeking relief in a circuit different from that in which he was convicted. BIO 10. But that "scenario" will be routine in savings clause cases; federal prisoners can be designated or transferred to facilities far from where they were sentenced. *See Custody & Care: Designations*, Federal Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/designations.jsp (last visited Oct. 20, 2020). A case in which an individual invoking the savings clause (and therefore § 2241) is incarcerated in the circuit of conviction will be the exception, not the rule—a fact that Congress obviously understood when it made § 2241 relief available under the savings clause.

The government asserts that the resulting question of which circuit's law should govern when savings clause relief is available is "underdeveloped" and that review should be denied for that reason. BIO 22. But it is not clear why the supposedly "underdeveloped" nature of that separate issue is a reason for the Court not to review the acknowledged and intractable split presented by the question in this case. If the Court grants review here, it can resolve that separate issue

itself, or it can allow further development in the lower courts.

In any event, no further development is needed, because the correct answer is evident: the lawfulness of an individual's sentence should be determined by the law of the circuit in which the sentence was imposed. Applying the law of the circuit of confinement would allow the Bureau of Prisons—the prisoner's adversary—to control the choice of law, *see* Pet. 16-17, and "recreat[e] some of the problems that § 2255 was designed to fix." *Chazen v. Marske*, 938 F.3d 851, 864-65 (7th Cir. 2019) (Barrett, J., concurring). And the government never explains why further development should be a prerequisite to resolving the circuit split presented here.

Finally, the government contends that the Court should not grant certiorari because the Sixth Circuit has not yet addressed the underlying statutory issue—whether Mr. Hueso's Washington convictions constitute "felony drug offense[s]" under § 841(b)(1)(A). BIO 23. Because this supposedly renders the statutory issue "unsettled," the government argues that "the circuit decision on which … petitioner relies is subject to reasonable dispute" and "there is no basis for supposing him unjustly convicted." *Id.* (citations omitted). But as the government concedes, "no circuit conflict has yet developed" on this issue. *Id.* In fact, every circuit to squarely confront the issue has agreed with the Ninth Circuit's reasoning. *See Valencia-Mendoza*, 912 F.3d at 1223-24 (collecting cases). The government's argument suggests the Court should not address the persistent circuit split on the savings clause issue unless and until every circuit has explicitly considered the underlying

statutory issue, thus eliminating the possibility of "reasonable dispute." This cannot be correct.

4. Tellingly, the principal argument in the Brief in Opposition is directed to the merits, not to whether this case is suitable for this Court's review. *See* BIO 10-17. We explained in the petition why the government is wrong on the merits—and by the government's own admission, nine circuits reject the government's position. In fact, the government itself, for many years, rejected the position it now takes.

The government first maintained its current position in the years immediately following the amendments to § 2255 added by Section 105 of the Antiterrorism and Effective Death Penalty Act of 1996. The courts of appeals widely rejected that position. *See, e.g.*, *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) (questioning whether the government's "narrow[ ]" interpretation of § 2255(e) would even be constitutional); *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997) (rejecting the government's "restrictive reading" of § 2255(e)). The government changed its position in 1998 and, for the next two decades, maintained the position (in the government's own words) "that an inmate can seek relief for a statutory-based claim of error under Section 2255(e)." *Wheeler* Pet. 13. Only recently did the government change again, to its current position. *See, e.g.*, *Wheeler* Pet. 9-10. In fact, even though the government now embraces the position announced by the Eleventh Circuit in 2017, the government did not argue for that position in the Eleventh Circuit case. *See* Pet. 16 n.1, citing *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017).

The government's decades-long rejection of its current view, as well as the lopsided split in the circuits, reveals the weakness of the government's position on the merits. The government acknowledges the split in the circuits and provides no reason to think it will be resolved without this Court's intervention. And the government fails to identify any aspect of this case that is atypical or otherwise makes this case unsuitable for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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