No. 20-1708

# Supreme Court of the United States

JOSE LEONEL BONILLA-ROMERO,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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

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## REPLY BRIEF FOR PETITIONER

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Focusing on the merits of the case, the Government argues in its BIO that the lower court properly "severed" or substituted the sentencing range for second-degree murder into first-degree murder. The BIO is strangely silent as to why the Government is pursuing such an unprecedented charge, acknowledging that it may seek the exact same maximum sentence of up to life for second-degree murder. The BIO also fails to address the profound impact of retrospective severance on plea bargaining, or mention the plea bargaining system at all, as if it were nothing but paperwork that could be filled in after the case is over. Most important, the BIO ignores the deep circuit split that has arisen over "who decides." This case provides a clean and uncontroversial vehicle to answer that crucial question for so many duplicative sentencing and regulatory appeals.

### I. A deep split of authority exists over "who decides."

The Government recognizes that the opinion below conflicts with *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016) insofar as the Fourth Circuit "declined to import [§ 1956(a)(1)'s] lesser penalties for kidnapping to the murder provision" of the same subsection. BIO 20. Here, the Fifth Circuit imported § 1111(b)'s lesser penalty for second-degree murder into the first-degree murder provision of the same subsection. The BIO states without explanation that the lesser penalty in this case was an "acceptable alternative" but the lesser penalty in *Under Seal* was not. BIO 21. The BIO offers no basis for its conclusory

distinction. Other courts citing *Under Seal* have not recognized any conflict. *Jackson v. Vannoy*, 981 F.3d 408, 415 (5th Cir. 2020) (noting application of *Under Seal* to state-law second-degree murder); *Clemons v. Leblanc*, No. 20-1465, 2020 U.S. Dist. LEXIS 247273, at *24 (W.D. La. 2020) (same).

The lower court distinguished *Under Seal* on grounds that it involved a lesser penalty for a "distinct" kidnapping offense rather than for a "lesser included offense." 984 F.3d at 420. The Government itself does not go down this particular rabbit trail, recognizing that the "will of Congress" deliberately reserved first-degree for the "most heinous" acts and mental states, as distinct from second-degree murder. BIO 14. This dual classification dates back more than 500 years in England and was codified by the First Congress in 1790. Indeed, the BIO would be frivolous if there were not a material difference between these two basic types of murder. The fact that second-degree murder is defined by omission does not make it any less "distinct." Rather, "Congress's omissions from its 'first degree' murder list reflect a considered legislative judgment" that it has revisited many times, "subtracting certain specified circumstances or adding others." *Lewis v. United States*, 523 U.S. 155, 169-70 (1998). In fact, § 1111(b) was considered not to apply to juveniles from the beginning. In short, the purported statutory gap in § 1111(b) is bigger and older, no less the "will of Congress," and no more amenable to judicial revision.

The BIO does not address the much deeper split identified in the petition as to "who decides." The lower court held that the *Booker* authorizes judges in their discretion to delete as well as to insert language into statutes to fill purported gaps. The court applied

this expansive holding to § 1111(b) "as currently drafted," in other words as a work in progress, and concluded it was missing a "penalty for juvenile first-degree murders" for which "Congress would obviously cap a juvenile's sentencing exposure . . . at life imprisonment." 984 F.3d at 414, 419 & n.13. The court revised the statute accordingly.

*Under Seal* reaching a diametrically opposed conclusion: "[N]othing in Booker allows this Court to replace excised language." 819 F.3d at 725. The Court further reasoned:

> Despite having four years to act since being alerted by Miller to the constitutional problem posed by statutes that have a mandatory minimum of life imprisonment, Congress has failed to address the matter. It is their place under the Constitution's separation of powers to do so, not ours.

819 F.3d at 725 n.12.[1]

The irreconcilable holdings of *Under Seal* and the opinion below represent a deep and broad split regarding the proper scope of severance under *Booker*. *See California v. Texas*, 141 S. Ct. 2104, 2139 (2021) (Alito, J., dissenting) (describing conflicting authority); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., dissenting) (same). The lower court's opinion

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[1] Congress is now considering a bipartisan bill that would apply to all life-without-parole statutes. H.R. 2858, 117th Cong. (Parole for Juveniles) (introduced Apr. 26, 2021). *See also* First Step Act of 2018, Pub. L. No. 115- 391 (2018) (reducing "three strikes" rule from life sentence to 25 years).

significantly deepens the split by resurrecting a form of aggressive severance once common in England under the rubric of "equity of the statute." *See DaimlerChrysler Fin. Servs. Ams. LLC v. Miller (In re Miller)*, 570 F.3d 633, 639-40 (5th Cir. 2009) (noting that equity of the statute was last disapproved by the Court in *Lewyt Corp. v. Comm'r*, 349 U.S. 237, 249 (1955)).

Glossing over these conflicting authorities, the Government draws several broad analogies between severance of § 1111 in the prosecution of this case and procedures by which charges or charging statutes may be modified *after* the prosecution of the case.

1. The Government cites resentencing decisions after mandatory life sentences had been validly imposed prior to *Miller*. BIO 15. As *Under Seal* explained, these cases "did not give rise to the due process problems" of severing a statute that was unconstitutional at the time the crime was committed and prosecuted, which "presents a fundamentally different inquiry." 819 F.3d at 727. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting) ("It surely cannot be a denial of due process for a court to pronounce a final judgment which, though fully in accord with federal constitutional law at the time, fails to anticipate a change to be made by this Court half a century into the future.").
2. The Government states erroneously that the crime was committed "pre-*Miller*." The crime was committed in 2013, after *Miller* was decided in 2012.
3. The Government cites *Brady v. United States*, 397 U.S. 742 (1970), in which the sentencing

statute was modified ten years *after* the defendant pled guilty.

4. The Government cites the lower court's analogy to "lesser included offenses" under Fed. Crim. Proc. R. 31, which are introduced in limited circumstances after evidence is submitted to the jury.

None of these analogies pertains to severance of the charging statute during the plea stage, when everything depends on certainty of the statutory sentencing range for the charged offenses.

## II. This case is an ideal vehicle to resolve the question.

This case is the antidote to *Miller,* in which the Court imposed a categorical limit on sentencing statutes, triggering waves of judicial revision and and clouds of uncertainty for both sides of the plea process. For defense counsel, the impending uncertainty of "unforeseeable and retroactive judicial severability," *Under Seal*, 819 F.3d at 727, made plea discussions practically impossible, as trial counsel vividly explained at the transfer hearing:

> What is the statutory maximum? What is the statutory minimum? As a defense attorney, it's my obligation to give those to my client. And I am left here -- if that's what the Court is proposing, I'm left here having to advise my client that the law is not the law, that the Court may have some other procedure that I don't know that may apply or may not apply whose guidelines may or may not be applicable who is -- and that affects every decision and every

> counsel and every communication that I have with my client…

ROA.241-242. The Government now insists that Petitioner "cannot plausibly assert that he lacked information concerning the possible sentence." The Government conflates two very different types of uncertainty: uncertainty as to the possible sentence within a statutory range, and uncertainty as to who will decide want the statutory range is, an open-ended issue that the lower court refused to resolve on interlocutory appeal.[2] Maintaining that Petitioner *agreed* as to the Government's theory of severance, the Government brushes aside the fact that each plea was conditional, and revoked. At each successive hearing, the judges and magistrates acknowledged "prospective uncertainty" and ambivalence as to the possible sentence Petitioner faced and whether the Government might be required to replead or transfer the case back to the State of Texas. ROA.35-36.[3] The

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[2] *Sealed Appellee 1 v. Sealed Juvenile 1*, No. 15-20262 (5th Cir., March 9, 2018) ("We acknowledge that the appellant has raised an important constitutional question that may deserve a thorough review when the appropriate time comes. If we were to consider this question now, however, our answer would amount to an advisory opinion.").

[3] *See* ROA.119-120 (Plea Hearing) ("THE COURT: "I'm not askingyou to agree to it. I just want to make sure that the Defendant understands that that is -- *according to the government*, that is the potential penalty with which he's faced if he were convicted."); ROA. 150-151;159-160 (Final Plea Hearing) "[MR. SANCHEZ: We have an understanding [with the Government] that the defense is not accepting the sentencing scheme articulated [in the withdrawn plea agreement]….THE COURT: That [sic]

BIO omits the mounting bewilderment and exasperation expressed by the successive magistrates, district and circuit judges during these hearings.

The line prosecutor faced the same paralyzing uncertainty. In that respect, the BIO betrays a strange disconnect between the Government's ongoing pursuit of juvenile first-degree murder and the reality of the plea bargaining process. Perhaps the Government is institutionally compelled to seek statutory gaps to fill through aggressive use of the courts. Whatever the reason, the BIO does not articulate any criminal justice policy or practical drawback to granting cert and reversing for the benefit of both parties. Unlike *Miller*, a reversal in this case would only *increase* the Government's ability to prosecute and punish juvenile murder. If first-degree murder were not available, the Government would simply have to charge second-degree with the same punishment up to life. So it would force the Government to refile a case that would be easier for it to prove.[4]

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would be unconstitutional, if applied to you."); ROA.192-193 (Sentencing) ("THE COURT: I gave an example of how that might be done. There's another way to look at it as well. . . .").

[4] The lower court erroneously states: "deleting any penalty for juvenile first-degree murderers . . . would completely frustrate the will of Congress by placing juveniles who committed the most heinous murders in a better position than those who committed second-degree murder." 984 F.3d at 420. This fallacy is contradicted by the rest of the lower court's opinion. *Id.* at 419 ("Either approach yields the result reached by the district court: that Bonilla-

In sum, this case represents a uniquely apolitical and uncontroversial vehicle free of procedural defects and fact issues to safeguard and streamline plea bargaining for the benefit of all parties, and finally to state in plain terms whether judges may "fix" purported gaps in statutes under *Booker*. This vast split in authority, which already generates a large volume of sentencing appeals, should not be left to percolate.

## III. Conclusion

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

Respectfully submitted,

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Romero shall be punished by imprisonment "for any term of years or for life."); BIO 14 (same).