No. 17–7873

In the
Supreme Court of the United States

Eduardo Barinas,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY BRIEF FOR PETITIONER

Samuel I. Jacobson*
Counsel of Record

Federal Defenders of New York, Inc.
One Pierrepont Plaza, 16th Floor
Brooklyn, New York 11201
Samuel_I_Jacobson@fd.org
(718) 407-7429

Counsel for Petitioner

* assigned pursuant to the Criminal Justice Act of 1964

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page (s)**

Statutes & Guidelines Provisions

Treaties

REPLY BRIEF FOR PETITIONER

The courts of appeals are split sharply over the two questions presented in the petition. On the question of whether a criminal defendant has standing to assert a violation of the rule of specialty, respondent falsely claims that there is no real division of authority because the circuit decisions all involved different underlying extradition treaties. This is misdirection, and belies the substance at the heart of the split, which is that under the *Rauscher*-derived rule adopted by a plurality of circuits, a defendant has standing to invoke specialty regardless of the specific treaty at issue. That respondent fails to even cite this Court's decision in *Rauscher*, 119 U.S. 407 (1886), highlights the need for intervention.

Respondent's vehicle quibbles—that the nature of the specialty violation in this case is 'atypical'; that the Dominican Republic could in theory still waive the issue; and that the 1909 treaty has been superseded—similarly lack merit. And because this case involves a clear specialty violation, there are no alternative grounds for affirmance. This is the rare case where the central question of specialty standing is squarely presented and preserved, and ripe for resolution on certiorari.

This Court should also grant certiorari on the question of whether a defendant's fugitive status tolls a term of supervised release. Contrary to respondent's assertions, resolution of this question has practical importance for the many defendants charged each year with absconsion from supervised release. On the merits, respondent relies on a common law principle articulated in the context of parole violation cases, which are materially different from the supervised release question at issue. Respondent raises no issues with this case as a vehicle for resolution of this question, and there are none. The petition should be granted.

I. RULE OF SPECIALTY STANDING

A. The Conflict is Deep and Intractable

Respondent does not dispute that the Eighth, Ninth, Tenth, and Eleventh Circuits all hold that a criminal defendant has the right to raise violations of the rule of specialty, in sharp contrast to the Second Circuit below. Br. in Opp. ("BIO") 12-14.

While acknowledging a "tension," *id.* at 14, respondent contends that there is no real division of authority because the circuit decisions all involved different underlying extradition treaties. *Id.* at 13. Respondent seeks to distract from the substance of the split by suggesting that the differing holdings merely reflect variations in general interpretative approach, and that this does not reflect a conflict because the contrary holdings "have yet to generate inconsistent results with respect to specific treaties." *Id*. at 14. Respondent's argument might have some merit if every circuit approached the question of specialty standing the way the Second Circuit approached it in the decision below, that is, applying the rule that a defendant "lacks standing to complain of noncompliance with an extradition treaty," unless the treaty contains "language indicating that the intent of the treaty drafters was such that benefits could be vindicated through private enforcement." Pet. App. 12a. Under the Second Circuit's framework, a treaty-specific inquiry is necessary because a defendant lacks standing absent express language conferring an individualized right. It follows then, that if all circuits adopted the Second Circuit's rule a split would exist only if multiple circuits had come to different conclusions about the same treaty, or at least treaties with materially identical language.

But this is not the rule in the plurality of circuits. Respondent ignores the core holdings of the precedential opinions in the Eighth, Ninth, Tenth, and Eleventh Circuits, which are not treaty-specific findings but categorical holdings on the rights of defendants to invoke specialty, as established in *United States v. Rauscher*, 119 U.S. 407 (1886), and its progeny.[1] Should a court in any of these circuits be called to review a standing question involving a challenge brought under Article IV of the 1909 Extradition Treaty, it would be compelled to accept that the defendant has specialty standing regardless of the language or particularities of the specialty provision itself.[2] Respondent's hypothetical treaty distinctions, in a plurality of circuits, would be distinctions without a difference.

---

[1] *See, e.g.*, *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995) (discussing *Rauscher*, and distinguishing *Ker*) ("We hold that a criminal defendant has standing to allege a violation of the principle of specialty."); *United States v. Andonian*, 29 F.3d 1432, 1435 (9th Cir. 1994) (citing *Rauscher*) ("An extradited person may raise whatever objections the extraditing country is entitled to raise."); *United States v. Levy*, 905 F.2d 326 (10th Cir. 1990) (citing *Rauscher*); *United States v. Thirion*, 813 F.2d 146, 151 n.5 (8thCir. 1987) (same).

[2] For this reason, respondent's argument that further review is unwarranted because petitioner does not address the language or drafting history of the 1909 treaty, BIO 11-12, is largely spurious. The panel below squarely held that the treaty contained "no language indicating that the Dominican Republic and the United States intended the Treaty to be enforceable by individual defendants." Pet. App. 12a. But in a plurality of circuits, that would not be relevant, because they take *Rauscher* to control. That is the crux of the split.

B. This Case is an Excellent Vehicle to Resolve the Conflict

None of respondent's arguments regarding various perceived imperfections with the posture of this case diminish its suitability as a vehicle for resolving the question of whether a criminal defendant has standing to invoke the rule of specialty.

1. Respondent contends that this case is not an ideal vehicle because the underlying specialty violation is a supervised release revocation proceeding, and therefore petitioner's right "may not be congruent to a defendant's right to invoke the rule of specialty in other contexts." BIO 15. Respondent's argument is baseless, and seems to rest—to the extent that it is ever fully articulated—on a vague and underdeveloped notion that it matters to the threshold standing question whether the nature of the government's specialty violation is "atypical." *Id*.

Contrary to the respondent's assertion, the posture of this challenge is in fact a far better vehicle than nearly any other specialty case because, unlike the vast majority of cases, there can be no serious dispute here that the United States violated Article IV of its 1909 Extradition Treaty with the Dominican Republic. Should this Court find that petitioner has standing to raise the issue, Mr. Barinas would prevail on remand.[3]

---

[3] Notably, at no point does respondent argue that Mr. Barinas' case would be a poor vehicle because his specialty challenge would fail on the merits. It would not. The government does not, and cannot, advance a harmless error theory or an alternative theory of affirmance as it does in the many cases where courts note the open standing question, but opt instead to hold that there was no specialty violation on the merits.

2. Respondent next maintains that this case is a poor vehicle because petitioner's specialty challenge "may be overtaken by events," because the Department of Justice has notified the Dominican Republic's office of the Attorney General about this case, and the Dominican Republic may, in the future, decide to waive any specialty objections. BIO 17. Should the Dominican Republic fail to provide a waiver, respondent argues, Mr. Barinas could reassert his specialty claim by moving to vacate his sentence under 28 U.S.C. 2255(a). *Id.* at 17-18. This argument has no bearing on the case's suitability as a vehicle, because it is always true that the Department of Justice can notify the extraditing country—for the first time, at the eleventh hour, subsequent to a petition for certiorari—and then argue that the case is not cert-worthy because a waiver could—it's possible—be forthcoming. Notably, following the district court's ruling that Mr. Barinas lacked standing to raise a specialty challenge, Mr. Barinas asked for an adjournment so that the extraditing country could be notified of the specialty violation. The district court denied the adjournment request, and only now does the government claim to have notified the Dominican Republic, a claim that is supported nowhere in the record. This case is ripe for review, notwithstanding respondent's speculations to the contrary.

3. Respondent also argues that this case would be a poor vehicle for review because the 1909 treaty has been superseded, BIO 18, but under the Second Circuit's test, which looks for "language indicating that the intent of the treaty drafters was such that benefits could be vindicated through private enforcement,"

Pet. App. 12a, the 1909 and 2015 treaties are not materially different. And, more fundamentally, under the plurality *Rauscher*-derived rule the treaty language is not determinative. *See*, p.3 n.2, *supra*.

None of respondent's observations about the posture of this case has any bearing on its suitability as a vehicle for resolving whether a defendant is entitled to assert a specialty defect. Unlike the overwhelming majority of other specialty cases, the question here is squarely presented, and the Second Circuit issued a precedential opinion explicitly rejecting petitioner's standing claim. This Court can and should decide whether that holding is correct.

C. The Decision Below is Incorrect

Like the Second Circuit's opinion below, respondent's brief in opposition fails to discuss—or even cite—this Court's controlling decision in *Rauscher*. *See* Pet. 9-12. Nor does the government argue that the Second Circuit's holding is correct. The government's silence on the merits of the standing question confirms the need for this Court's intervention.

The government seeks to further obfuscate the central standing question by maintaining that further review is unwarranted because the parties have not previously addressed whether the 1909 treaty is "self-executing." BIO 11 (citing *Medellin v. Texas*, 552 U.S. 491, 505 & n.2 (2008)). The government states that the parties have focused on the "separate" question of whether petitioner has standing to enforce the specialty provisions of the 1909 treaty. *Id*. The government muddies the water by suggesting that they are independent questions. Specialty is necessarily self-executing, or conditionally self-executing (self-executing absent waiver by the extraditing country) in those circuits where defendants have standing to raise the issue.

Though "[t]he label 'self-executing' has on occasion been used to convey different meanings," *Medellin*, 522 U.S. at 505 n.2, what it means in this context is synonymous with the question presented for review. In the circuits where a defendant has standing to raise a specialty challenge, the treaty must be self-executing at least for that purpose. "A treaty . . . is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *Rauscher*, 119 U.S. at 419.

In *Alvarez-Machain*, this Court made clear that in connection with specialty, the question of whether a treaty is self-executing is coextensive with the question of whether a defendant has the right to invoke it, and, turning to *Rauscher*, answered the question in the affirmative:

> In Rauscher, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992); *see also United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir. 1995) ("*Alvarez–Machain* demonstrates the infirmity in the reasoning of those cases which require an affirmative protest by the requested nation in order for the extradited individual to contest personal jurisdiction under the rule of specialty."); *Medellin v. Texas*, 552 U.S. 491, 556

(2008) (Breyer, J. dissenting) ("This Court has found similar treaty provisions self-executing." (citing *Rauscher,* 119 U.S., at 410–411, 429–430 (violation of extradition treaty could be raised as defense in criminal trial); *Johnson v. Browne,* 205 U.S. 309, 317–322 (1907) (extradition treaty required grant of writ of habeas corpus))).

II. FUGITIVE TOLLING OF SUPERVISED RELEASE

For the reasons set forth in the petition, this Court should also grant certiorari on the second question presented. *See* Pet. 14-19. After the Second Circuit's decision below, the split in authority is now deeper than it was when certiorari was denied in 2011 and 2012. *See* BIO 19 n.5. And respondent points to no issues with this case as a vehicle.

On the merits, respondent points to the common law principle that mere lapse of time without imprisonment does not constitute service of a sentence, as a reason not to apply the *expressio unius* canon applied by the First Circuit. *See* BIO 19-21 (citing *Caballery v. United States Parole Comm'n*, 673 F.2d 43, 46 (2d Cir. 1982); *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938)). But *Caballery* and *Kidwell* were both decided in the context of parole, which matters in the application of the common law principle pressed by respondent. The parolees in those cases were conditionally released from incarceration, as opposed to those on supervised release who have completed their terms of incarceration.

Finally, respondent maintains that the question has little practical importance, because a defendant's conduct while a fugitive can still be considered at sentencing, whether or not that conduct is legally sufficient for a separate violation charge. BIO 22-23 (citing *United States v. Hernandez*-Ferrer, 599 F.3d 63, 69 (1st Cir. 2010). While it is true that the conduct could be considered as a factor at sentencing under 18 U.S.C. § 3583(e), it is important for the uniform administration of justice that a defendant not be held liable for a violation in one circuit that would be dismissed in another. Moreover, charges brought after the expiration of the supervised release term could often mean a difference under the U.S. Sentencing Guidelines. In petitioner's case, for example, the initial absconsion would be a Grade C violation, while subsequent post-expiration violations—which could not be charged in the First Circuit—would be Grade B or A. *See* U.S.S.G. § 7B1.1.

The question presented impacts the uniform administration of criminal justice in a way that makes a practical difference for the large number of individuals charged with absconding from supervision every year, *see* Pet. 18-19, and the split in authority is ripe for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/

Samuel I. Jacobson
Counsel of Record

Federal Defenders of New York, Inc.
One Pierrepont Plaza, 16th Floor
Brooklyn, New York 11201
Samuel_I_Jacobson@fd.org
(718) 407-7429

Counsel for Petitioner

September 18, 2018