No. 06-1456

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

RICHARD ANDERSON
(Counsel of Record)
JERRY V. BEARD
KEVIN JOEL PAGE
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

Blank Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The En Banc Court of Appeals Decision Incorrectly Expands the Scope of the Money Laundering Statute 2

II. The Decision of the En Banc Court of Appeals Deepens an Existing Circuit Split 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

United States v. Dimeck,
24 F.3d 1239 (10th Cir. 1994).....passim

United States v. Esterman,
324 F.3d 565 (7th Cir. 2003).....8, 9

United States v. McGahee,
257 F.3d 520 (6th Cir. 2001).....8, 9

United States v. Morales-Rodriguez,
467 F.3d 1 (1st Cir. 2006).....7

United States v. Ness,
466 F.3d 79 (2d Cir. 2006),
petition for cert. filed,
No. 06-1604 (June 1, 2007).....1, 6, 7

United States v. Santos,
cert. granted, No. 06-1005
(Apr. 23, 2007).....1, 7

STATUTES

18 U.S.C. § 1956.....4

18 U.S.C. § 1956(a)(1)(B)(i).....4

18 U.S.C. § 1956(a)(2)(B)(i).....2, 3

REPLY BRIEF FOR PETITIONER

Our opening petition apparently put the government in a box. As no less than six federal appellate judges have expressly recognized, there is a "circuit split" (Pet. App. 39a) concerning whether merely hiding illegally-obtained funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. In opposing further review, the government ordinarily would have conceded the circuit court disagreement but suggested other grounds to avoid review, such as the need for additional time for other courts to consider the question or the need to select a better vehicle for consideration of the issue. This Court, however, just granted review where the government claimed, as we do here, that "a circuit conflict is particularly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute." (Pet. at 6 (quoting *Santos* Gov't Pet. in No. 06-1005, at 25-26).) And, given that the decision below is a published en banc opinion that directly addresses the question presented, there is no conceivable vehicle objection to granting review here.

Unable to dispute the importance of a circuit conflict on the meaning of the money laundering statute and unable to dispute that the issue is squarely presented here, the government opposes review by denying the existence of a conflict in the courts of appeals. But the government's brief confirms rather than denies the circuit court disagreement. The government does not even address the leading case on the other side of the split, *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), until page 16 of its 19-page brief, and addresses in a footnote another case expressly noting the conflict, *United States v. Ness*, 466 F.3d 79 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (June 1, 2007). As we show below, an objective assessment of the relevant circuit deci-

sions confirms the views of the six appellate judges who have noted the circuit discord.

Review is warranted.

I. The En Banc Court of Appeals Decision Incorrectly Expands the Scope of the Money Laundering Statute

As explained in our opening petition (at 7-11), the relevant money laundering provision, 18 U.S.C. § 1956(a)(2)(B)(i), requires the government to prove that petitioner transported funds to conceal or disguise the funds' attributes in order to create the appearance of legitimate wealth.[1] Although the methods for laundering illegal funds are varied and numerous, they are all captured by the Congressional prohibition of "conceal[ing] or disguis[ing]" the various attributes of the funds tying them to illegality: their "nature," "location," "source," "ownership," or "control." 18 U.S.C. § 1956(a)(2)(B)(i).

The government suggests that petitioner does not prevail even under the reading of the statute we advance. (U.S. Br. 11.) The government notes that "United States dollars are as negotiable as Mexican pesos" in Mexico and thus "petitioner's transportation of the money into Mexico would have converted it into useable funds." *Id.* But even if petitioner could have spent the illegally obtained dollars in Mexico, that would not at all establish a design to create the appearance of legitimate wealth—he would just be spending drug money. Spending stolen money is not money laundering. (*See* U.S. Br. 13-14.) Contrary to the government's view, transporting illegal funds abroad is not money laundering

---

[1] For the full text of the statute, see Pet. App. 63a-74a. The concealment provision reads, "knowing that such transportation, transmission, or transfer is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." § 1956(a)(2)(B)(i).

because that act alone does not establish that the defendant knew that the purpose of the transportation was to conceal or disguise the money's attributes.

The Solicitor General concedes that the "common understanding of what it means to 'launder' money" is to "disguis[e] funds for the purposes of creating the appearance of legitimate wealth." (U.S. Br. 12.) Nevertheless, the government urges a far more expansive reading of the criminal statute, but elects to address most of our substantive points in a footnote. (U.S. Br. 13 n.5.). Our opening petition anticipates and refutes this reading (Pet. 7-11 (government's view ignores both statutory text and purpose)), and we reserve a more thoroughgoing discussion of the merits for later briefing should this Court grant review. (*See also* Amicus Curiae Brief of National Association of Criminal Defense Lawyers 3-12 (explaining errors in decision below).)

II. The Decision of the En Banc Court of Appeals Deepens an Existing Circuit Split

The Solicitor General's sole reason for opposing certiorari is that the circuit courts are not in conflict. (U.S. Br. 10, 13-19.) The en banc court below held that the "conceal or disguise" element of international transportation money laundering, 18 U.S.C. 1956(a)(2)(B)(i), does not require proof of a design to create the appearance of legitimate wealth. (Pet. App. 12a.) Instead, the court held that "simply taking steps to hide illicit funds is sufficient to prove concealment." (Pet. App. 13a.) In the government's view, this ruling (and similar rulings by the Second, Third, and Eleventh Circuits) does not conflict with rulings by other courts of appeals. (U.S. Br. 13.) That view is wrong.

1. The leading case in conflict with the decision below is *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994). *Dimeck* involved a covert transportation of drug proceeds. *Id.* Dimeck, a courier, used his company van and a company

box to secretly deliver drug proceeds to another driver, whom he met in a hotel room for the hand-off. *Id.* at 1242-43. He suggested to the second driver, Moore, that the proceeds be concealed in a suitcase or taped box before traveling on the second leg of the trip. *Id.* at 1243. He was arrested and charged with conspiracy to violate 18 U.S.C. § 1956(a)(1)(B)(i). *Id.* at 1241. At trial, the United States urged, and the jury found, that the "conceal or disguise" element of international transportation money laundering was met by "Dimeck's actions in telling Moore to tape up the box and inquiring . . . about any markings on the box that would tie the money to him after it was seized by police." *Id.* at 1243.

The Tenth Circuit reversed the conviction. 24 F.3d at 1246. The court held that the concealment surrounding the transportation was not designed to "confuse or mislead anyone as to the characteristics of those proceeds, or to assist in allowing these proceeds to enter into legitimate commerce." *Ibid.* Because the illegal funds, though transported secretly, were to be *received* "as illegal funds" (*i.e.*, with no concealment or disguise of their illegal attributes) the concealment fell outside the scope of the statute. *Id.* at 1246. The court held that hiding the money would not sustain a conviction under § 1956 because "[t]he money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to *legitimize their proceeds* so that observers think their money is derived from legal enterprises." *Id.* (emphasis added). "The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering." *Id.* at 1247.

In the decision below, the Fifth Circuit, on facts and arguments paralleling *Dimeck*, reached the opposite result. Like *Dimeck*, the case below involved (1) a courier, (2) transporting money, (3) that was obtained from illegal drug

activity, (4) who took steps to hide the money during transportation. (Pet. App. 2a-6a, 10a-11a.) As in *Dimeck*, the United States argued that the courier's secretive actions while transporting the money were "designed to conceal or disguise the nature," "location," "source, ownership, and control" of the proceeds. Pet. App. 11a. But the Fifth Circuit here, in conflict with the Tenth Circuit in *Dimeck*, accepted the government's urgings and rejected the requirement that there be "proof that the defendant's acts created the appearance of legitimate wealth or converted dirty money into clean." *Id.* at 12a. Instead, the court held that "simply taking steps to hide illicit funds is sufficient to prove concealment" (Pet. App. 13a), a holding directly at odds with *Dimeck*'s holding that the money laundering statute only reaches those "drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises." 24 F.3d at 1246.

The Solicitor General denies that *Dimeck* and the decision below conflict, emphasizing that in *Dimeck* the courier made only a "minimal attempt at concealment." (U.S. Br. 17; *see also* Pet. App. 15a.) But the ruling in *Dimeck* in no way turns on the level of secrecy involved. *All* secrecy during transportation fails to show the required "concealment" under *Dimeck*'s reasoning, because, no matter its degree, such concealment is not aimed at creating the appearance of legitimate wealth. The government concedes this point. (U.S. Br. 17.) ("[S]ome language in *Dimeck* could be read to preclude prosecutions absent a specific showing that the defendant has 'attempted to legitimize the proceeds.'" (emphasis removed)).[2]

---

[2] The government's "minimal attempt at concealment" distinction between *Dimeck* and the decision below has no statutory basis. Although initially emphasizing the "plain reading of the statutory text" (U.S. Br. at 10), the government nowhere explains where in the statute the "minimal

Confirming that the conflict with *Dimeck* is plain, no fewer than six circuit judges have expressly stated that the courts are divided on the question presented. The "circuit split" was explicitly noted by Judge Smith, who wrote the en banc dissent below (and called for the Attorney General to confess error in this case) (Pet. App. 44a):

> [T]he majority ignores the overwhelming caselaw, in both this court and our sister circuits, to the effect that the statute requires a design to create the appearance of legitimate wealth. It is astounding that the majority rewrites the law in this circuit, and creates a circuit split, in such a cavalier and intellectually imprecise manner.

Pet. App. 38a-39a (Smith, J., dissenting, joined by DeMoss, Dennis, JJ.) (citing, *e.g.*, *Dimeck*, 24 F.3d at 1246). The Solicitor General omits mention of these judges' identification of the "circuit split."

Likewise, the Second Circuit expressly recognized the circuit court disagreement in *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006) (Calabresi, J.), *petition for cert. filed*, No. 06-1604 (June 1, 2007). There, the court admitted that its rejection of the rule that "the concealment element is satisfied only when the transaction or transportation at issue was designed to give unlawful proceeds the appearance of legitimate wealth" was in conflict with "some other courts of appeals," including the Tenth Circuit. *Id.* (citing *Dimeck*). Although the Solicitor General suggests that the Second Circuit did not sufficiently analyze "the facts" in *Dimeck*, as ex-

---

level of secrecy" criteria is included. It is not. The statute criminalizes transportation undertaken with any "design" to "conceal or disguise" the "nature," "source," and so on of the illegal proceeds. The crime does not at all turn on whether the design to conceal is "minimal," "significant," or any other quantitative term.

plained above *Dimeck* turns on a statutory reading squarely at odds with both the decision below and the Second Circuit.

A conflict between the decision below and *Dimeck* is itself sufficient to merit this Court's review of the issue. In *Santos*, this Court recently granted certiorari where a single circuit, the Seventh Circuit, created a conflict with the other circuits' interpretation of "proceeds" under the very statute at issue here. *United States v. Santos*, *cert. granted*, No. 06-1005 (Apr. 23, 2007). The government urged review in *Santos* even though its holding was only in direct conflict with two other circuits, *Santos* Gov't Pet. at 22, characterizing *any* split over the "substantive meaning" of the money laundering statute as "particularly problematic." *Id.* at 26. So too, in this case, the conflict between *Dimeck* on one side and the en banc decision below and *Ness* on the other side is sufficient to warrant this Court's attention.[3]

2. Furthermore, as the petition explains (at 11-16), the circuit court conflict over the meaning of "designed" "to conceal" extends well beyond *Dimeck*. The First, Sixth and Seventh Circuits are also in direct conflict with the decision here, a decision that accords with the views of the Second and Eleventh Circuits.

As noted in the petition, the First Circuit in *United States v. Morales-Rodriguez*, 467 F.3d 1 (1st Cir. 2006), recently adopted *Dimeck*'s rule that "mere transportation of concealed drug money [does] not constitute money laundering because the money laundering statute 'was designed to punish those . . . who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.'" *Id.* at 13. In that case, the court found conspiracy to launder using the *Dimeck* test.

---

[3] The circuit court disagreement between the Fifth Circuit and the Tenth Circuit creates particularly acute practical problems because these two circuits make up a significant, adjacent portion of the southern border.

("Morales did far more than simply transport ill-gotten wealth" because his repeated transfers of money between three bank accounts were "complicated machinations [that] were intended to create the appearance of legitimate wealth."). *Ibid.* The government ignores this case.

The conflict is also clear with the Sixth and Seventh Circuit. In *United States v. McGahee*, 257 F.3d 520 (6th Cir. 2001), the court reversed a money laundering conviction premised on payments made from a bank account containing illegal proceeds. The court based its decision on its ruling that the purpose of the transactions was not "to create the appearance of legitimate wealth" but rather to "merely to convert [illegal funds] to liquid assets." *Id.* Similarly, in *United States v. Esterman*, 324 F.3d 565 (7th Cir. 2003), the court reversed the money laundering conviction of a defendant who transferred money from a joint account he shared with a Russian business partner into a series of personal accounts in the United States. *Id.* at 570. Because there was an "absence of efforts to transform ill-gotten funds into apparently innocent assets or funds that the criminal can use later with impunity," *id.* at 572, the court ruled there was no concealment.

The Solicitor General points out that both *Esterman* and *McGahee* are applications of the holding in *United States v. Sanders*, 929 F.2d 1466 (10th Cir.), *cert denied*, 502 U.S. 846 (1991). (U.S. Br. 13-14.) And, indeed, the two cases applied the *Sanders* test: "whether the defendant merely spent or invested his money" or whether he "engag[ed] in transactions in order to conceal or disguise" the illegal attributes of the money. *Id.* at 14. But that test is simply a specific application of the basic requirement that a transaction be for the purpose of creating the appearance of legitimate wealth, and not for another purpose (which in these particular cases was mere spending or investing). *Ibid.* Both courts ruled that the evidence showed that the defendants'

purpose in conducting the transactions was simply to obtain goods and services, not to hide an attribute of the money that would connect it to crime. Here (and in *Dimeck*), the purpose of the transportation, according to the government's own expert, was to repay a drug debt, not to conceal dirty attributes in order to pass the money off as legitimate. *Esterman*, *McGahee*, and *Sanders* all therefore directly conflict with the decision below, in which the court ruled that the government need not prove that the purpose of the transportation was to create the appearance of legitimate wealth.

The Solicitor General also argues that *McGahee* and *Esterman* hold that creating the appearance of legitimate wealth is just one way to prove the "conceal or disguise" element of international transportation money laundering. (U.S. Br. 15.) He asserts that the "conceal or disguise" requirement is met if there is "unusual secrecy surrounding the transactions, careful structuring of transactions to avoid attention, folding . . . illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction." *Id.* (quoting *Esterman*, 324 F.3d at 573). *Esterman*, however, did not hold that those acts, on their own, constituted money laundering. *See id.* Instead, the court used these as examples of circumstantial evidence that could show a design to create the appearance of legitimate wealth.

* * *

The government's sole reason for opposing review here is the absence of a conflict in the circuits. But, as the dissenting judges below and a panel of the Second Circuit have expressly observed, the circuits do in fact disagree over whether hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. There is no dispute that a circuit conflict on a substantive element of the money laundering statute war-

rants this Court's prompt attention and no dispute that the en banc decision below provides an excellent vehicle for resolving the circuit court disagreement. Review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD ANDERSON
(Counsel of Record)
JERRY V. BEARD
KEVIN JOEL PAGE
FEDERAL PUBLIC
DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
819 Taylor Street, Suite 9A10
Fort Worth, Texas 76102
(817) 978-2753

WALTER DELLINGER
MARK S. DAVIES
SUSAN M. MOSS
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

August 14, 2007