No. 19-6282

IN THE
SUPREME COURT OF THE UNITED STATES

ALDO SALAZAR-MARTINEZ,
RICARDO ROOSBEL MORALES-GALLEGOS, and
VICTOR MANUEL ROBLEDO-CUEVAS,
Petitioners,

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 PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners have argued this Court should grant certiorari to address whether, in light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the Due Process Clause, the "knowingly or intentionally" mens rea contained in 21 U.S.C. § 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 960(b). Pet. i. The government, in its brief in opposition, asserts that *McFadden v. United States*, 135 S. Ct. 2298 (2015), already provided the answer. BIO 8-14. That assertion is wrong. *McFadden* did not address, much less decide, the interpretive issues presented here. Those issues remain undecided.

The type and quantity elements of 21 U.S.C. § 960(b) trigger severe, mandatory penalties. This Court has long held that, absent a clear indication from Congress, statutes imposing penalties of that degree should not be construed as dispensing with "the ancient requirement of a culpable state of mind." *Morissette v. United States*, 342 U.S. 246, 251 (1952). There is no such clear indication here. And the government, quite tellingly, has not even tried to identify one. The petitions for a writ of certiorari should be granted.

I. Petitioners' cases present important, undecided questions of federal law that warrant this Court's review.

1. As an initial matter, the government points out, correctly, that petitioners did not raise their alternative constitutional argument (Pet. i, 16-18) in the court of appeals. BIO 14. The government errs, however, in suggesting that this should automatically preclude review of the second question presented. Rather than a new claim, the constitutional contention is

better understood as a "new argument to support what has been [petitioners'] consistent claim" that the government was required to prove that they knew the type and quantity of drugs necessary to support their convictions. *Lebron v. National R.R. Passage Corp.*, 513 U.S. 374, 379 (1995).

In any event, the statutory issue raised in the first question presented is the primary basis for petitioners' request for certiorari. Petitioners raise the constitutional question only out of an abundance of caution, and, if certiorari is granted, any need for the Court to consider the limitations due process places on strict liability crimes would likely be subsumed in the statutory analysis through potential application of the avoidance canon—a matter plainly encompassed by the first question presented. *See* Pet. 12 & n.8 (raising avoidance in support of statutory argument). Regardless, for the reasons discussed below and in the petition, the statutory question independently warrants review.

2. The government does not dispute petitioners' claim (Pet. 18-21) that the question whether a defendant must know the facts necessary to trigger the enhanced maximum and mandatory minimum penalties of Section 960(b)(1)-(2) is one of surpassing importance. Nor could it. The scope of statutorily required mens rea—particularly where courts have interpreted Congress as having dispensed with it—is a question that is "both fundamental and far-reaching in federal criminal law." *Morissette*, 342 U.S. at 247 (granting review based on importance of mens rea question alone); *see also Rehaif v. United States*, 139 S. Ct. 2191 (2019) (reviewing scope of mens rea in federal firearms statute despite the absence of any circuit conflict on the issue).

3. The government's primary basis for opposing certiorari is its view that the Fifth Circuit's strict-liability construction of the type and quantity elements of Sections 841(b) and 960(b) of Title 21 is correct. The premise of that argument is the government's claim that this Court reached the same conclusion in *McFadden v. United States*, *supra*. *See* BIO 7-14. That premise is false. *McFadden* did not consider, much less decide, the issues presented here.

In *McFadden*, the Court considered the mens rea required to support a conviction for violating the Controlled Substances Analogue Enforcement Act of 1986, which provides that any substance meeting the statutory definition of a "controlled substance analogue," *see* 21 U.S.C. § 802(32)(A), "shall, to the extent intended for human consumption, be treated . . . as a controlled substance in schedule I." *Id.* § 813. McFadden was charged, through Sections 813 and 841, with distributing just such an analogue substance; but the jury was instructed that it only had to find that he intended the substance to be consumed by humans, and the court of appeals affirmed. *McFadden*, 135 S. Ct. at 2303. This Court reversed. Pointing to Section 813's command that analogue substances be treated as schedule I substances, the Court held that, "even in prosecutions involving an analogue," the government must prove the same thing it must prove under Section 841(a)(1): "that the defendant knew that the substance with which he was dealing was 'a controlled substance[.]'" *Id.* at 2305. And, in reaching that conclusion, the Court interpreted the "ordinary meaning of § 841*(a)(1)*" to require the defendant "to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." *Id.* at 2304 (emphasis added).

As the government is aware, this Court's cases "cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion). *McFadden* involved *only* Section 841 (as it relates to the Analogue Act), and its interpretive analysis was expressly confined to subsection (a)(1) of that section. The Court did not cite, much less authoritatively construe, subsections (b)(1)(A) or (B) (or their counterparts in Section 960(b)(1)-(2)). With good reason: none of those provisions can form the basis of an Analogue Act prosecution. *See United States v. Jefferson*, 791 F.3d 1013, 1022-23 (9th Cir. 2015) (Fletcher, J., concurring) (making this point as to Section 960).

Nor was the Court in *McFadden* presented with adversarial briefing on the question whether the phrase "knowingly or intentionally" applies to Section 841's type and quantity elements. Just the opposite: *both* parties' arguments assumed that a defendant may violate the Controlled Substances Act even without knowing the type or quantity of substance involved. *See* Brief for the United States at 21, 24, *McFadden v. United States*, 135 S. Ct. 2298 (2015) (No. 14-378) (noting this and citing relevant portions of the petitioner's brief). Put simply, *McFadden* is "not a binding precedent on th[at] point." *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *see Jefferson*, 791 F.3d at 1022-23 (Fletcher, J., concurring) (concluding that *McFadden* is not controlling as to Section 960(b)).

If any doubt remained, Chief Justice Roberts' concurring opinion in *McFadden* removes it. Writing separately—specifically to stress the limited nature of the Court's opinion—the Chief Justice highlighted the fact that all that was necessary to dispose of the judgment below was the Court's conclusion that the "intended for human consumption" mens

rea set out in Section 813 was insufficient to support conviction under the Analogue Act. *See McFadden*, 135 S. Ct. at 2307-08 (Roberts, CJ., concurring in part and concurring in the judgment). That being the case, the Chief Justice emphasized that the Court's statements regarding the scope of the terms "knowingly" and "controlled substance," even as limited to Section 841(a)(1), "should therefore not be regarded as controlling" in future cases. *Id.* at 2308. In short, this Court has never decided whether the mens rea requirements of Sections 841 and 960 apply to those statutes' drug type and quantity elements. The government errs in arguing otherwise.

4. Nor does *McFadden* justify the government's wholesale dismissal (BIO 11-12) of this Court's decisions in *Flores-Figueroa*, *X-Citement Video*, and *Rehaif* as irrelevant to the inquiry into the scope of the mens rea requirements in Section 960 (and also Section 841). The first two decisions confirm that the "ancient" presumption in favor of mens rea applies with full force to the interpretive analysis of those statutes' type and quantity elements. And *Rehaif* reinforces that conclusion.

The presumption in favor of mens rea is a "rule of construction" that "reflects the basic principle that 'wrongdoing must be conscious to be criminal,'" *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette*, 342 U.S. at 250), and it applies "to *each* of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994), and adding emphasis). But lower courts have not always afforded the presumption to *all* statutory elements. Although this Court recognized as far back as *Morissette* that Congress legislates with awareness that

mens rea performs a "decisive function" both when it "make[s] criminal an otherwise indifferent act" and when it "increase[s] the degree of the offense or its *punishment*," 342 U.S. at 264 (emphasis added), the lower courts consistently held that elements which only increased the punishment for otherwise unlawful conduct were not entitled to the presumption, *see, e.g.*, *United States v. Hurtado*, 508 F.3d 603, 609-10 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 216-17 (4th Cir. 2006), including as to the type and quantity elements at issue here. *See, e.g.*, *United States v. King*, 345 F.3d 149, 153 (2d Cir. 2003).

In the petition (at 7-8), petitioners explained that this Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), rejected that distinction. The aggravated-identity statute at issue there mandated additional punishment for "knowingly" using "another person['s]" means of identification—while committing certain other listed crimes. *Id.* at 647 (quoting 18 U.S.C. § 1028A(a)(1)). Even so, this Court applied the ordinary presumption that courts "read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652 (citation omitted). And, finding nothing in the statute's text or purpose that clearly rebutted that presumption, the Court held that the statute required a defendant to know the identification he used in fact belonged to someone else. *See id.* at 652-57. It did not matter that a defendant who was unaware of that critical fact could not be described as totally innocent of wrongdoing.

The government thus errs in suggesting (BIO 12) that there is no basis to apply the mens rea presumption to the drug type and quantity elements at issue here because transporting a controlled substance across the border "is not 'entirely innocent' conduct," even when

the defendant does not know what kind of substance it is. As Justice, then-Judge, Kavanaugh has noted, the Court's application of the presumption in *Flores-Figueroa* confirmed that it "applies to each element of the offense, not just when necessary to avoid criminalizing apparently innocent conduct." *United States v. Burwell*, 690 F.3d 500, 545-46 & n.20 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting). In other words, *Flores-Figueroa* teaches that elements like drug type and quantity *do* separate innocent from guilty conduct in the relevant sense. In any prosecution under Section 841(b)(1)(B), for example, the identity and amount of the substance involved represent "crucial element[s] separating *legal* innocence from wrongful conduct." *Elonis*, 135 S. Ct. at 2010 (quoting *X-Citement Video*, 513 U.S. at 73) (emphasis added). Without proof of those elements, the defendant is legally innocent of the separate, aggravated offense. Mens rea as to drug type and quantity would thus perform precisely the "decisive function" this Court contemplated in *Morissette*, 342 U.S. at 264.[1]

The government's dismissive treatment of *X-Citement Video* (BIO 11) is similarly misplaced. In *X-Citement Video*, the Court was asked to decide whether the term "knowingly" in a child-pornography statute modified several offense elements that appeared in "independent clauses separated by interruptive punctuation." 513 U.S. at 68. As petitioners have explained (Pet. 10-11), in holding that it did, the Court made clear that the presumption that a statute's express mens rea requirement applies to all the elements that follow it applies even

[1] The government's observation that *Flores-Figueroa* was cited in *McFadden* (BIO 11) does not help its case. If anything, by affirming that the mens rea expressed in Section 841(a)(1) modifies *all* of that provision's elements, not just the surrounding verbs, *see McFadden*, 135 S. Ct. at 2304 (citing *Flores-Figueroa*, 556 U.S. at 650), the Court's reference to *Flores-Figueroa* confirms that the statute is subject to the ordinary presumption.

where, as there, the "most natural grammatical reading" suggested otherwise. *Id.* at 68, 70-72. That point is particularly salient here because, in refusing to apply the mens rea components of Section 960(a), and Section 841(a), to drug type and quantity, the lower courts have primarily relied on the statutes' structures—*i.e.*, the fact that the type and quantity elements are set out in "independent clauses separated by interruptive punctuation." *X-Citement Video*, 513 U.S. at 68. The Fifth Circuit's reasoning is typical. *See United States v. Betancourt*, 586 F.3d 303, 309 (5th Cir. 2009) (stating that "it would not be natural to apply the word 'knowingly' used in subsection (a) [of Section 841] to language used in subsection (b), especially because a period separates the two subsections"). This reasoning is plainly at odds with *X-Citement Video*'s instruction that, when it comes to the presumption in favor of mens rea, this kind of statutory structure "is [not] the end of the matter." 513 U.S. at 68.

Finally, the government errs in sweeping aside (BIO 12) this Court's recent decision in *Rehaif v. United States*, 139 S. Ct. 2191. *Rehaif* involved a statutory scheme that, like Section 960, places an express mens rea component in an entirely separate provision from other elements necessary to support a conviction. *See* 18 U.S.C. § 922(g) (making it unlawful for persons falling in one of nine categories to possess a firearm); *id.* § 924(a)(2) (providing that anyone who "knowingly violates" Section 922(g) may be imprisoned for up to 10 years). Despite this structural separation, the Court both reaffirmed that the statutory inquiry into mens rea must start from the "longstanding presumption" that "criminal statutes require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission,'" and stressed that the presumption "applies with equal or

greater force when Congress includes a general scienter provision in the statute itself." *Rehaif*, 139 S. Ct. at 2195 (quoted source omitted). Finding "no convincing reason to depart from the ordinary presumption" in the statutory text, structure, or purpose, the Court held that the government must prove that a firearm possessor knew of his or her prohibited status. *See id.* at 2195-2200.

Far from irrelevant, *Flores-Figueroa* and *X-Citement Video* confirm that neither the absence of entirely innocent conduct nor the presence of structural separation exempt the type and quantity elements of Section 960(b) from the presumption in favor of mens rea. *Rehiaf* reinforces that conclusion. The question is not whether the presumption applies to drug type and quantity; rather, the question is whether the presumption is overcome by a clear indication of congressional intent to dispense with mens rea as to those elements. That question is open, important, and ripe for this Court's review.

II. Review is warranted in petitioners' cases.

In its brief, the government makes much of the fact that the courts of appeals are uniformly in its corner. BIO 13. But that is no reason to deny review of this important issue of statutory interpretation. The government made the same argument in opposing review in *Rehaif*. *See* United States' BIO 5-7, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560). That did not deter this Court from inspecting, and later soundly rejecting, the then-uniform view of the lower courts. Indeed, as then-Judge Gorsuch noted in dissenting from the denial of a request for en banc review, the strength of the lower courts' unanimity pre-*Rehaif* was quite deceptive, as many of the opinions failed to engage in a searching, text-

based interpretive analysis. *See United States v. Games-Perez*, 695 F.3d 1104, 1124 (10th Cir. 2012) (Gorsuch, J., joined by Holmes, J., dissenting from the denial of rehearing en banc).

The lower courts' unanimity does, however, confirm that there is no need to wait for further percolation. As was the case at the certiorari stage of *Rehaif*, the courts of appeals have firmly cemented their positions.

Also, the plain-error posture of petitioners' claims presents no obstacle to this Court's ability to reach the questions presented, and the government does not argue otherwise. The Court has previously granted certiorari in, and decided, cases in which the central legal issue was not raised in the trial court. *See, e.g.*, *Tapia v. United States*, 564 U.S. 319, 322 (2011). Moreover, the government makes no attempt to argue that plain-error review would preclude any of petitioners from obtaining relief even under their preferred interpretations of Section 960(b)(1).

Each of petitioners' cases squarely presents, and is a suitable vehicle for resolving, the question whether the "knowingly or intentionally" mens rea of Section 960 apply to that statute's drug type and quantity elements.

CONCLUSION

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

Respectfully submitted,

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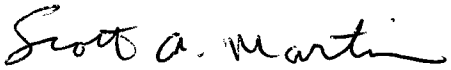

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