No.

IN THE SUPREME COURT OF THE UNITED STATES

NANCY COLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner

QUESTIONS PRESENTED

The Ninth Circuit panel below followed a recent, 6-5 *en banc* opinion holding that the knowingly mens rea in the federal drug statutes does not apply to the elements of drug type and quantity required to trigger significant mandatory minimum and enhanced maximum sentences. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*). The five dissenting judges in *Collazo* explained that the majority's conclusion was inconsistent with the presumption of mens rea, as explained by Justice Kavanaugh in *United States v. Burwell*, 690 F.3d 500, 527-53 (D.C. Cir. 2012) (*en banc*) (Kavanaugh, J., dissenting), and otherwise conflicted with a wealth of this Court's precedent culminating in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). This petition presents the important statutory construction question that divided the *en banc* panel in *Collazo* and a related constitutional question. The questions presented are:

1. Whether the knowingly mens rea in the federal drug statutes, 21 U.S.C. §§ 841, 960, applies to the elements of drug type and quantity that establish mandatory minimum and enhanced maximum sentences.

2. If the answer to question 1 is no, whether a strict liability element that converts a misdemeanor with a one-year maximum sentence into a felony with a ten-year minimum and a life maximum violates the Fifth and Sixth Amendments.

STATEMENT OF RELATED CASES

- *United States v. Nancy Cole*, No. 17CR4414-CAB, U.S. District Court for the Southern District of California. Judgment entered March 22, 2019.

- *United States v. Nancy Cole*, No. 19-50104, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 9, 2021.

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

OPINION BELOW

The decision below can be found at *United States v. Cole*, ___ Fed. Appx. ___, No. 19-50104, 2021 WL 461941 (9th Cir. Feb. 9, 2021). It was held pending the decision in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*), App. 1, and therefore *Collazo* is also included in the Appendix. App. 6-34.[1]

JURISDICTION

The court of appeals filed its memorandum opinion on February 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

21 U.S.C. § 960 and the Fifth and Sixth Amendments are at App. 35-42.

STATEMENT OF THE CASE

Petitioner is a single mother of two young children and has no prior record. PSR 9-10. On November 27, 2017, federal officers arrested her at the Otay Mesa, California port of entry when they found approximately 14 kilograms of methamphetamine hidden in the gas tank of her vehicle. CR 1. A federal grand jury in the Southern District of California returned a two-count indictment charging her with conspiracy to import and importation of methamphetamine in violation of 21 U.S.C. §§ 952, 960, and 963. ER 36-37. The indictment alleged that she "did knowingly and intentionally import 500 grams and more, to wit:

---

[1] "App." is the Appendix, "PSR" is the Presentence Report, "ER" is the Excerpts of Record in the Ninth Circuit, and "CR" is the Clerk's Record.

approximately 14.28 kilograms (31.48 pounds) of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II Controlled Substance . . . ." ER 36-37.

Petitioner proceeded to a jury trial, where the testimony established that she traveled in her vehicle from the Los Angeles area to Tijuana, Mexico so that she could receive breast implant surgery. PSR 5. Petitioner's friend accompanied her on the trip. *Id.* When the two arrived in Tijuana, petitioner turned her car over to a man, who took the vehicle while she underwent surgery; after the surgery was completed and the car was returned, the friend drove it to the port of entry, while petitioner rode as a passenger. *Id.*

Upon inspecting the vehicle at the border, officers found 14 kilograms of methamphetamine hidden in the gas tank. PSR 4. They also seized two cell phones belonging to petitioner. PSR 6. The government's theory was that one phone was petitioner's personal phone while the other, which had been recently activated, was the one she used to conduct drug trafficking activity. *Id.* The government introduced text messages that petitioner had sent and received to support its theory, such as messages of various meeting locations. *Id.* The government also presented an expert witness who testified that a courier like petitioner is often not involved in the loading and unloading of the vehicle, ER 34-35, and thus would not necessarily know the type and quantity of drug involved.

The district court instructed the jury that it had to find petitioner "knew the substance she was bringing into the United States was methamphetamine *or* some other federally controlled substance." ER 23. Similarly, the court instructed the jury: "It does not matter whether the defendant knew that the substance was methamphetamine. It is sufficient that the defendant knew that it was some kind of a federally controlled substance." *Id.* Consistent with these instructions, the prosecutor argued in summations: "The United States is not required to prove that she knew specifically it was methamphetamine. If you believe beyond a reasonable doubt that she knew it was a federally controlled substance, a drug, illegal narcotic, a federally controlled substance, that is sufficient." ER 28. The instructions also informed the jury that it had to determine whether the amount of methamphetamine exceeded 500 grams, but that the "government does not have to prove that the defendant knew the quantity of methamphetamine." ER 24.

The jury sent a note expressing confusion regarding the drug type and quantity issue. ER 89-91. The district court did not provide any further clarification in response to the note. *Id.* The jury returned guilty verdicts and returned a finding that the offense involved more than 500 grams of methamphetamine. ER 17-18. The PSR stated that Ms. Cole was subject to a 10-year mandatory minimum sentence due to the jury finding, PSR 15-16, and the district court imposed the mandatory minimum sentence of 10 years. ER 14.

Petitioner appealed to the Ninth Circuit. She challenged the jury instructions regarding the mens rea required as to the elements of drug type and quantity triggering the 10-year minimum sentence. The Ninth Circuit followed its recent and divided opinion in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*), holding that the government must "prove beyond a reasonable doubt the specific type and quantity of substance involved in the offense, but not the defendant's knowledge of (or intent) with respect to that type and quantity." App. 4-5. The Ninth Circuit further explained that *Rehaif v. United States*, 139 S. Ct. 2191 (2019) "does not compel a different result." App. 5. The panel reasoned that *Rehaif* involved a statute that was "structured much differently" and only "required a mens rea for the one element separating the criminal conduct from otherwise innocent behavior." *Id.*

The Ninth Circuit also rejected petitioner's challenge that, if the elements of drug type and quantity require no mens rea, then her 10-year minimum sentence based on a strict liability element violated the Fifth and Sixth Amendments. The lower court simply reasoned: "So long as the defendant 'recognizes that she is doing something culpable, she need not be aware of the particular circumstances that result in greater punishment.'" App. 5 (citation omitted).

ARGUMENT

I. The question of whether the knowingly mens rea in the federal drug statutes applies to the elements of drug type and quantity triggering mandatory minimum and enhanced maximum sentences, and the important underlying questions regarding the scope of the mens rea presumption, have divided judges throughout the lower courts and should now be resolved by this Court.

A. Introduction – an important and timely issue

The federal drug statutes prohibit "knowingly or intentionally" distributing or importing a controlled substance. 21 U.S.C. §§ 841(a), 960(a). In the Anti-Drug Abuse Act of 1986, Congress amended the statutes to provide an escalating series of mandatory minimum prison sentences, where previously there had been none. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986). In an effort to ensure "the kingpins—the masterminds who are really running these operations" serve a substantial prison term, Congress set a mandatory minimum sentence of 10 years for offenses involving specific amounts of specific types of drug, and to reach those "middle-level dealers as well," it set a mandatory minimum sentence of 5 years for offenses involving lesser amounts of those drugs. 132 Cong. Rec. 27, 193-94 (Sept. 30, 1986) (statement of Sen. Robert Byrd). The remainder of offenses would continue to carry no mandatory minimum sentence at all.

Therefore, since 1986, drug type and quantity increase the mandatory minimum term from zero to ten years, and serve as the gateway for substantially

higher mandatory minimum sentences for those with prior drug convictions. *See* 21 U.S.C. §§ 841(b), 960(b). This Court has described Congress's enactment of mandatory minimums in 1986 as having "redefined the offense categories," and it has stated that § 841(a) is a "lesser included offense" of § 841(b)(1). *Burrage v. United States*, 571 U.S. 204, 209 and n.3 (2014).

Since this Court has clarified that facts determining both mandatory minimum and enhanced maximum sentences are elements of an offense that must be proved to a jury beyond a reasonable doubt, *see Alleyne v. United States*, 570 U.S. 99 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), two circuits have issued split decisions on whether the knowingly mens rea in the drug statutes applies to the elements of drug type and quantity. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*); *United States v. Dado*, 759 F.3d 550 (6th Cir. 2014). Of the 14 circuit judges to consider the question in these two cases, eight have determined that the statutes' mens rea does not apply to those elements, while six have concluded that it does.

Although addressing a different statute, Justice Kavanaugh's dissenting opinion in *United States v. Burwell*, 690 F.3d 500, 527-53 (D.C. Cir. 2012) (*en banc*) explains that the majority view in the lower courts has incorrectly limited the presumption of mens rea to elements that distinguish criminal from innocent conduct, contrary to this Court's precedent. The similar explanation that the mens

rea presumption does not apply to "*Apprendi* elements" is flawed, and, at the very least, is an "interesting question" worthy of review. *Id.* at 540 n.13 (Kavanaugh, J., dissenting). As Justice Kavanaugh has commented: "The presumption of mens rea arguably should apply in those cases as well, given the presumption's historical foundation and quasi-constitutional if not constitutional basis." *Id.*

The specific question concerning the mens rea requirements for the federal drugs statutes is extraordinarily important. The federal drug statutes are among the most frequently prosecuted federal offenses, constituting 27% of all federal criminal filings in 2020. *See* Federal Judicial Caseload Statistics 2020. At stake are decades and even lifetimes in prison due to the statutes' onerous mandatory minimum penalties, penalties that have been repeatedly criticized. *See, e.g.*, Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."). And, at a more general level, the lower courts have erroneously restricted the mens rea presumption in contravention of this Court's precedent and the historical foundation for mens rea requirements, thereby distorting one of the most fundamental principles of criminal law. For all of these reasons, and as explained below, this Court should grant review.

B. The majority view erroneously limits the mens rea presumption to elements that distinguish criminal from innocent conduct

This Court has stated that it "ordinarily read[s] a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to *each* element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) (emphasis added). Concurring in part in *Flores-Figueroa*, Justice Alito agreed "with a general presumption that the specified mens rea [in a statute] applies to *all* the elements of an offense . . . ." *Id.* at 660 (emphasis added). This Court has also recently cited the Model Penal Code when discussing the mens rea presumption, which similarly states that "when a statute 'prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to *all* the material elements of the offense, unless a contrary purpose plainly appears[.]" *Rehaif*, 139 S. Ct. at 2195 (quoting Model Penal Code § 2.02(4)) (emphasis added).[2]

Given this presumption, the dissent in *Collazo* remarked that "[t]his should be an easy case." *Collazo*, 984 F.3d at 1341 (Fletcher, J., dissenting). The *Collazo* majority, however, reasoned that the mens rea presumption only applies to "each of

---

[2] Drug type and quantity are "material elements," as they do not relate to matters such as jurisdiction, venue, or statute of limitations. *See* Model Penal Code § 1.13(10) (defining "material element of an offense").

the statutory elements that criminalize otherwise innocent conduct." *Id*. at 1324. It explained that knowingly distributing or importing a controlled substance "is not an 'entirely innocent' act." *Id.* at 1327. Accordingly, it reasoned, the mens rea presumption did not apply to the elements of drug type and quantity. Other courts have articulated a similar restriction on the mens rea presumption, including in *en banc* opinions. *See, e.g.*, *Burwell*, 690 F.3d at 505 ("The Supreme Court developed the presumption in favor of *mens rea* for one particular reason: to avoid criminalizing otherwise lawful conduct.").

Justice Kavanaugh's dissent in *Burwell*, however, explains that this purported restriction on the mens rea presumption is "illogical in the extreme" and constitutes a misreading of this Court's precedent, particularly *Flores-Figueroa*. *Burwell*, 690 F.3d at 529 (Kavanaugh, J., dissenting); *see Collazo*, 984 F.3d at 1342-43 (Fletcher, J., dissenting). The statute at issue in *Flores-Figueroa* was 18 U.S.C. § 1028A, which punished someone who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" while committing an enumerated predicate crime. The question was whether the government had to prove that the defendant *knew* the identification card contained the identity of another actual person. Because the statute applied only to those who committed a predicate crime *and* who had illegally used a false identification, proof that the defendant knew the identification card contained the identity of

another actual person was not necessary to avoid criminalizing apparently innocent conduct.

As Justice Kavanaugh recounted, "the Government tried to distinguish *Morissette*, *U.S. Gypsum*, *Liparota*, *Staples*, and *X-Citement Video* on the ground that those cases involved statutes that 'criminalize conduct that might reasonably be viewed as innocent or presumptively lawful in nature.'" *Burwell*, 690 F.3d at 545 (Kavanaugh, J., dissenting) (quoting *Flores-Figueroa* Brief for United States at 42-43).[3] "The Government further contended that the Supreme Court's mens rea precedents 'should not be understood apart from the Court's primary stated concern of avoiding criminalization of otherwise nonculpable conduct.'" *Id.* (quoting Brief for United States at 18). "But the Supreme Court rejected those arguments wholesale," *id.* at 545, and the "government's submission garnered zero votes in the Supreme Court." *Id.* at 529.

This understanding that the presumption of mens rea applies to all elements, not just those that distinguish wrongful conduct from innocent conduct, was confirmed in *Rehaif*, which cited *Flores-Figueroa*, 556 U.S. at 650, for the general rule that "we normally read the statutory term 'knowingly' as applying to *all* the

---

[3] *See United State v. X-Citement Video, Inc.*, 513 U.S. 64 (1994); *Staples v. United States*, 511 U.S. 600 (1994); *Liparota v. United States*, 471 U.S. 419 (1985); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952).

subsequently listed elements of the crime." *Rehaif*, 139 S. Ct. at 2196 (emphasis added). It applied this rule to jump from the mens rea in a penalty provision, 18 U.S.C. § 924(a)(2), to the elements in a separate violation provision, 18 U.S.C. § 922(g). In applying the presumption in this manner, this Court overruled the unanimous view of the circuits and held that a defendant had to know of his prohibited status in order to be guilty of the § 922(g) offense. Likewise, the fact that no circuit has adopted petitioner's position on the drug statutes (although many dissenting judges have), does not undermine the worthiness of this petition. Indeed, the petition in *Rehaif* was based on Justice Gorsuch's lone dissenting view in *United States v. Games-Perez*, 667 F.3d 1136, 1142-46 (10th Cir. 2012) (Gorsuch, J., concurring).

Finally, even if the presumption of mens rea were somehow limited to elements that separate criminal from innocent conduct, this Court has distinguished the Controlled Substances Act from "criminal" statutes as a "quintessentially economic" statutory scheme, and "most" of the substances covered "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." *Gonzales v. Raich*, 545 U.S. 1, 23-24 (2005) (quoting 21 U.S.C. § 801(1)). Chief Justice Roberts has recognized that § 841 can cover apparently innocent conduct, explaining: "A pop quiz for any reader who doubts the point: Two drugs – dextromethorphan and hydrocodone – are both

used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?" *McFadden v. United States*, 576 U.S. 186, 198 (2015) (Roberts, J., concurring). Many states have legalized conduct related to some federally "controlled substances," like marijuana, creating a trap for those less versed in the law. *See* MORE Act of 2020, H.R. 3884. In short, conduct related to a controlled substance is no less "innocent" than taking another's bomb casings, *see Morissette*, 342 U.S. 346, possessing an unregistered machinegun, *see Staples*, 511 U.S. 600, or sending a threatening communication, *see Elonis v. United States*, 575 U.S. 723 (2015), all of which found that mens rea applied to the disputed element. The majority in *Collazo* incorrectly failed to apply the presumption of mens rea to the elements of drug type and quantity. The historical analysis discussed below further demonstrates the flaw in the *Collazo* majority's analysis.

C. The *Collazo* majority's view that the mens rea presumption does not apply to "*Apprendi* elements" conflicts with it historical foundation

Perhaps recognizing that its restriction on the mens rea presumption stood on a shaky foundation, the majority in *Collazo* also reasoned that the presumption did not apply because drug type and quantity are really sentencing factors turned elements to comply with *Apprendi* and *Alleyne*. *See Collazo*, 984 F.3d at 1321-22 and 1327 n.20. It is far from clear that Congress intended drug type and quantity

to be sentencing factors rather than elements of the offense. *See United States v. Cotton*, 535 U.S. 625 (2002); *Castillo v. United States*, 530 U.S. 120 (2000). But even if they are "only" *Apprendi* elements, Justice Kavanaugh has suggested that they would still be entitled to the mens rea presumption, *see Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting), and he is not the only member of this Court to doubt whether there is a difference between statutory-interpretation elements and *Apprendi* elements. *See United States v. O'Brien*, 560 U.S. 218, 241 (2010) (Thomas, J., concurring); *Burwell*, 690 F.3d at 539-40 (Kavanaugh, J., dissenting) (collecting opinions).[4]

Justice Stevens has also explained that there is "no sensible reason" for treating *Apprendi* elements differently for purposes of the mens rea presumption. *See Dean v. United States*, 556 U.S. 568, 580-82 (2009) (Stevens, J., dissenting). The *Collazo* majority cited *Dean* but failed to recognize that the lead opinion in

---

[4] Given the *Collazo* majority's description of footnote 13 of Justice Kavanaugh's opinion, *see Collazo*, 984 F.3d at 1327 n.20, petitioner quotes it in full: "A fact is an element of the offense for mens rea purposes if Congress made it an element of the offense. An interesting question – not presented in this case – is how the presumption applies to a fact that Congress made a sentencing factor but that must be treated as an element of the offense for Fifth and Sixth Amendment purposes. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). The presumption of mens rea arguably should apply in those cases as well, given the presumption's historical foundation and quasi-constitutional if not constitutional basis. But I need not cross that bridge in this case because *O'Brien* said that Congress intended the automatic character of the gun to be an element of the Section 924(c) offense, not a sentencing factor." *Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting).

Dean was based on the understanding that the requisite finding to trigger a mandatory minimum under 18 U.S.C. § 924(c) was a sentencing factor, not an *Apprendi* element, a premise that was overruled in *Alleyne*. *See Burwell*, 690 F.3d at 541 (Kavanaugh, J., dissenting) ("To rely on *Dean* here – as the majority opinion does relentlessly – is to miss the boat on the crucial distinction between sentencing factors and elements of the offense for purposes of the presumption of mens rea.").

The presumption of mens rea should apply to *Apprendi* elements "given the presumption's historical foundation and quasi-constitutional if not constitutional basis." *Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting). Since its origins, Anglo-American law has treated mens rea as "an index to the extent of the punishment to be imposed." Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. R. 117, 136 (1922-1923). Even from the earliest times, "the intent of the defendant seems to have been a material factor . . . in determining the extent of punishment." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 981-82 (1932). For example, while death was the penalty for an intentional homicide, one who killed another accidentally needed pay only the "wer," the fixed price to buy off the vengeance of his victim's kin. *See* Pollock and Maitland, History of English Law 471 (2d ed. 1923).

Classical law emphasized "distinguish[ing] between the harmful result and

the evil will," with "[p]unishment . . . confined as far as possible to the latter." Max Radin, *Criminal Intent*, 7 Encyclopedia Soc. Sci. 126, 126 (eds. Edwin R. Seligman & Alvin Johnson 1932). The Christian penitential books likewise made the penance for various sins turn on the accompanying state of mind. Sayre, *Mens Rea*, *supra*, at 983.

Thus, legal scholars came to believe that "punishment should be dependent upon moral guilt." *Id.* at 988. Eventually, the "times called for a separation of different kinds of felonious homicides in accordance with moral guilt." *Id.* at 996. During the first half of the sixteenth century, a series of statutes were passed dividing homicides into two camps: on the one hand was "murder upon malice prepensed;" on the other, homicides where the defendant lacked malice aforethought. *Id.* The first was punishable by death, the latter often "by a year's imprisonment and branding on the brawn of the thumb." *Id.* at 996-97.

The requirement of mens rea, "congenial to [the] intense individualism" of the colonial days, "took deep and early root in American soil." *Morissette*, 342 U.S. at 251-52. If anything, the American requirement was even "more rigorous than English law." Radin, *supra*, at 127-28. In his leading treatise, Bishop explained that for an offense like "felonious homicide," guilt "must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong." 1 Bishop, Criminal Law § 334 (7th ed. 1882). In Bishop's view, this

result followed naturally from the very purposes behind requiring mens rea in the first place. "The evil intended *is the measure of a man's desert of punishment*," such that there "can be no punishment" without a concurrence between the mens rea and "wrong inflicted on society." *Id.* (emphasis added).

This view has not changed. "As Professor LaFave has explained, rules of mens rea apply both to a defendant who is unaware of the facts that make his conduct criminal and to a defendant who is 'unaware of the magnitude of the wrong he is doing.' The idea that 'the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong' is – in Professor LaFave's words – 'unsound, and has no place in a rational system of substantive criminal law.'" *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting) (quoting Wayne R. LaFave, Criminal Law 304-05 (5th ed. 2010)).

While commentators have generally decried the advent of strict liability crimes, they eventually tolerated "such stringent provisions" so long as the crime carried "nominal punishment," as was typically the case. R.M. Jackson, *Absolute Prohibition in Statutory Offences*, 6 Cambridge L.J. 83, 90 (1936). This Court's precedent has historically emphasized that dispensing with mens rea is only permissible if the penalty is slight. *X-Citement Video, Inc.*, 513 U.S. at 72; *Staples*, 511 U.S. at 616; *U.S. Gypsum*, 438 U.S. at 442 n.18; *Morissette*, 342 U.S. at 260.

All of this is to say that the historical background establishes that one of the

fundamental purposes of mens rea is to tie the punishment to the magnitude of the defendant's evil intent. For this reason, the presumption should especially apply to so-called *Apprendi* elements, and there is no reason to think that Congress would have been legislating based on a different understanding. The fact that so-called *Apprendi* elements are constitutionally required should make the presumption all the more applicable. *See Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting); *see also Collazo*, 984 F.3d at 1343 (Fletcher, J., dissenting). The slim majority in *Collazo* erred in concluding otherwise and by declining to apply the presumption.

D. The mens rea presumption is not rebutted in this context

With the strong mens rea presumption in effect, the statutory language and other principles of statutory construction clearly do not rebut it. Indeed, central to the *Collazo* majority's analysis was that the presumption did not apply, and the majority in *Dado* likewise failed to apply the presumption. *Compare Dado*, 759 F.3d at 569-71 (no mention of the presumption); *with id.* at 571-72 (Merritt, J., dissenting) (applying a presumption).

The fact that the "knowingly or intentionally" mens rea is contained in subsection (a) of the drug statutes, while the type and quantity elements are in subsection (b), does not overcome the strong presumption. *See Collazo*, 984 F.3d at 1340 (Fletcher, J., dissenting). This "Court has allowed considerable distance

between the words specifying the mens rea and the words describing the element of the crime." *Id.* For example, in "*Rehaif*, the word specifying the mens rea and the words specifying elements of the crime were in entirely different sections of Title 18." *Id.*

Similarly, the fact that subsection (b) of the drug statutes is silent as to mens rea does not rebut the presumption. "To state the obvious: If the presumption of mens rea were overcome by statutory silence, it would not be much of a presumption." *Burwell*, 690 F.3d at 549 (Kavanaugh, J., dissenting). Divorcing the mens rea prescribed in subsection (a) from the aggravated offense elements in subsection (b) would be particularly inappropriate here, where the elements of the core offense and the aggravating elements must be combined to create the new, aggravated offense, *Alleyne*, 570 U.S. at 113, and where the aggravating elements follow hard upon the definition of the core offense in the statute. *See Collazo*, 984 F.3d at 1341-42 (Fletcher, J., dissenting).

The "structure" of the drug statutes also do not overcome the strong mens rea presumption. The headings "Unlawful Acts," and "Penalties" that appear in the U.S. Code were not enacted by Congress, and thus "the 'look' of this statute is not a reliable guide to congressional intentions." *United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002) (*en banc*) (citing *Jones v. United States*, 526 U.S. 227, 233 (1999)). Meanwhile, two aspects of the aggravated drug offenses strongly

reinforce the presumption: the severity of the sentences for the aggravated offenses and the fact that individuals, especially drug couriers, could genuinely and reasonably believe that they were committing a lesser offense.

The severe penalties at issue strongly reinforce the presumption. As mentioned, this Court has repeatedly stated that "the penalty imposed under a statute has been a significant consideration in determining whether the statutes should be construed as dispensing with *mens rea*," and has described a punishment of *up to* ten years' imprisonment as "harsh" and "severe." *Staples*, 511 U.S. at 616; *see also X-Citement Video*, 513 U.S. at 72. This Court has also described three-year and even one-year maximum terms as sufficiently "sever[e]" and "high" to support a requirement of mens rea. *U.S. Gypsum*, 438 U.S. at 442 n. 18; *Morissette*, 342 U.S. at 248 & n. 2, 260. Here, the penalties involved are ten-year *minimum* terms, which in turn serve as gateways to even greater minimum terms of 15 and 25 years. 21 U.S.C. § 960(b). As Judge Merritt noted, permitting punishment for the aggravated offense without a mens rea "disregards the presumption that the more serious the penalty at issue, the more important intent is to guilt." *Dado*, 759 F.3d at 572 (Merritt, J., dissenting).

Furthermore, the fact that individuals may "genuinely and reasonably believe" their offense was only the lesser-included core drug offense supports requiring proof of mens rea. *Burwell*, 690 F.3d at 548 (Kavanaugh. J., dissenting)

(quoting *Staples*, 511 U.S. at 615); *see also X-Citement Video*, 513 U.S. at 72 n. 2. Low-level drug couriers may genuinely be unaware of the type and quantity of drug involved, and the government even acknowledged that may have been the case here with petitioner.

The government sometimes contends that the presumption is rebutted because requiring such proof will create too difficult a burden for the prosecution. This Court has repeatedly rejected this complaint, often noting that the burden constructed by the government is exaggerated and that "if Congress thinks it is necessary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend [the statute] by explicitly eliminating a mens rea requirement." *Staples*, 511 U.S. at 615 n.11; *see also Flores-Figueroa*, 556 U.S. at 655-56; *Liparota*, 471 U.S. at 434 and n.17. The same is true here.

Most defendants know the type and quantity of drugs they are dealing, and it will not be particularly burdensome for the government to prove this. As mentioned, the one notable exception is the low-level courier, who may not know what he is carrying. But, even as to that particular defendant, the government has a powerful weapon in its arsenal, the deliberate ignorance instruction, as it can argue that the courier had the requisite mens rea because he deliberately avoided knowledge of the drug type and quantity involved. *See United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (*en banc*); *see also Burwell*, 690 F.3d at 552 n.24

(Kavanaugh, J., dissenting). Furthermore, under the doctrine of transferred intent, *see* 1 Subst. Crim. L. § 5.2(c) (3d ed.), a courier who successfully argues that he believed he was importing a small quantity of most common street drugs rather than an amount triggering the enhanced penalties will still often be subject to a maximum of 20 years, *see* 21 U.S.C. §§ 841(b)(1)(C), 960(b)(3), thereby giving the government ample room to request a heavy sentence.

Other principles of statutory construction also reinforce the presumption in this context. Under the rule of lenity, which applies not only to the scope of criminal statutes but also to the severity of sentencing and subsection (b) of the drug statutes in particular, *see Burrage*, 571 U.S. at 216; *Bifulco v. United States*, 447 U.S. 381, 387 (1980), any ambiguity regarding the mens rea requirement are to be resolved in the defendant's favor. *See, e.g.*, *Liparota*, 471 U.S. at 427. Finally, as discussed below, imposition of an extraordinary sentence based on a material element that does not require a mens rea creates a significant constitutional question under the Fifth and Sixth Amendments. Thus, the doctrine of constitutional avoidance or doubt supports a mens rea requirement. *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 239-40 (1999). In other words, rejection of a mens rea requirement would "open up an entire new body of constitutional mens rea law." *Burwell*, 690 F.3d at 551 (Kavanaugh, J., dissenting).

In sum, this Court should grant review to correct the flawed interpretation

reached by the Ninth Circuit and other lower courts. This Court should adopt the view of the numerous dissenting circuit judges and should conclude that the mens rea presumption applies to the elements of drug type and quantity and that the presumption has not been rebutted.

II. This Court should grant review to clarify the constitutional limits for strict liability in the criminal context and should conclude that the ten-year mandatory minimum penalty imposed under 21 U.S.C. § 960(b), which was triggered by a material element of the offense that did not require the government to prove mens rea, is unconstitutional.

The type and quantity of controlled substance can be the difference between a misdemeanor with a one year maximum sentence and the 10-year mandatory minimum felony imposed here. *See* 21 U.S.C. §§ 841(b)(1)(A), (b)(3), 960(b)(1), (b)(7). Petitioner contends that such an increase in punishment based on a strict liability element is unconstitutional, and this Court should grant review because the lower courts have long needed guidance on this constitutional question.

In *Lambert v. California*, 355 U.S. 225 (1957), this Court struck down a criminal statute because its mens rea requirements did not satisfy the Due Process Clause. The defendant in *Lambert* was convicted of violating a local ordinance that required convicted felons to register and had attempted to defend the charge by arguing that she did not know that she was required to register, but that defense was refused. *Id.* at 227. This Court explained that lawmakers have latitude "to declare an offense and to exclude elements of knowledge and diligence from its

definition" but warned that "due process places some limits on [their] exercise." *Id.* at 228. This Court noted that the defendant was subject to "heavy criminal penalties" – she received a $250 fine and 3 years of probation (nothing compared to the mandatory 10-year sentence in this case). *Id.* at 228. As a result, this Court held that application of the statute violated the Due Process Clause. *Id.* at 229-30.

In the decades since *Lambert*, however, the lower courts have struggled with the constitutional limits on strict liability penalties. Nearly thirty years ago, Judge Weinstein noted that "[t]he more recent [Supreme Court] opinions have not clarified the picture[,]" and "[t]his body of law has left unsettled the question of what role the mens rea principle plays in our constitutional law." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 505 (E.D.N.Y. 1993). "Academic commentators are in general agreement that this collection of Supreme Court decisions give the mens rea principle uncertain constitutional status." *Id.* at 515 (citing John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1374 (1979)).

More recently, while lower courts have continued to acknowledge some constitutional limit on strict criminal liability, those limits remain elusive. *See United States v. Apollo Energies, Inc.*, 611 F.3d 679, 688 n.4 (10th Cir. 2010) ("due process suggests some constitutional limits on the penalties contained in strict liability crimes"); *United States v. Garrett*, 984 F.2d 1402, 1409 n.15 (5th Cir.

1993) ("under some circumstances, the imposition of criminal liability without mens rea violates due process"). As the Eleventh Circuit stated: "The Supreme Court has acknowledged that its work in this area has only just begun, noting twice that no court 'has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.'" *Shelton v. Secretary, Department of Corrections*, 691 F.3d 1348, 1354 (11th Cir. 2012).

Citing *Lambert*, Justice Kavanaugh has stated that the "principle undergirding the presumption of mens rea is so fundamental that the Supreme Court has held that, in some circumstances, imposing criminal liability without proof of mens rea is unconstitutional." *Burwell*, 690 F.3d at 533 n.7 (Kavanaugh, J., dissenting). He noted that the Sixth Amendment may also limit strict criminal liability, explaining that "when the Constitution was ratified and the Sixth Amendment adopted, 'part of what was guaranteed to criminal defendants was the right to have a jury decide whether they were morally blameworthy.'" *Id.* (citing Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 Cal. L. Rev. 391, 397 (1988)). Indeed, the jurors' power to modulate the verdict to match their view of moral culpability of the defendant was well established at the time of the Founding. *See Jones*, 526 U.S. at 245 (describing the power of juries, during Colonial era, to return verdicts to lesser included offenses where the consequences of a conviction

outstripped their view of culpability).[5]

As explained by Justice Kavanaugh in *Burwell*, the fact that §§ 841 and 960 require a mens rea for the basic drug offense does not resolve the constitutional question. "[R]ules of mens rea apply both to a defendant who is unaware of the facts that make his conduct criminal and to a defendant who is 'unaware of the magnitude of the wrong he is doing.' The idea that 'the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong' is – in Professor LaFave's words – 'unsound, and has no place in a rational system of substantive criminal law.'" *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting) (citation omitted).

Indeed, the lower courts have emphasized the magnitude of the penalty when addressing the constitutional limits for strict liability, although they have reached conflicting results. The confusion as to this important constitutional question has persisted for decades, demonstrating the need for review, and is perhaps best exemplified by the conflicting opinions in *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985) and *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986). In *Wulff* and *Engler*, the Third and Sixth Circuits considered a federal statute proscribing the sale of migratory bird parts. The statute did not contain a scienter element and

---

[5] Most courts have discussed the constitutional right as rooted in the Fifth and Sixth Amendments. To the extent that the right is also rooted in the Eighth Amendment, petitioner's claim also incorporates that constitutional guarantee.

set forth both a misdemeanor provision and a separate felony offense punishable by 2-years imprisonment and a $2,000 fine.

The Sixth Circuit held that the felony provision violated the Due Process Clause. The Sixth Circuit explained: "The elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." *Wulff*, 758 F.2d at 1125. The Sixth Circuit reasoned that the felony punishment was not relatively small and "irreparably damages one's reputation." *Id.* at 1125. The Sixth Circuit therefore concluded: "[I]n order to be convicted of a felony . . . Congress must require the prosecution to prove the defendant acted with some degree of scienter. Otherwise, a person acting with a completely innocent state of mind could be subjected to a severe penalty and grave damage to his reputation. This, in our opinion, the Constitution does not allow." *Id.* at 1125.

In *Engler*, the Third Circuit reached a different result in a divided opinion. The lead opinion observed that the "Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be." *Engler*, 806 F.2d at 433. The opinion reasoned that the differences between misdemeanor penalties, for which strict liability is allowed, and the 2-year felony at issue were, "for due process purposes, *de minimis*." *Id.* at 434. The opinion explained: "To

decide cases on constitutional law, to be sure, is to draw lines and to make judgment calls. But where differences between misdemeanor and felony penalties are as close as they are here, we feel that the analysis takes place on a very slippery slope . . . ." *Id.* at 435. The *Engler* court noted that courts had approved of other strict liability crimes with greater penalties and concluded that the due process test should depend upon whether strict liability is being imposed "for omissions which are not 'per se blameworthy' . . . ." *Id.* at 435.[6]

Judge Higginbotham concurred in the result. *Id.* at 436-41. He believed that the statute should be read as containing a scienter requirement. He disagreed with the majority's due process analysis. Judge Higginbotham explained that the difference between misdemeanor and felony penalties are significant, and the latter were not justified under the Due Process Clause for a strict liability offense of the type at issue. *Id.* at 440-41. He also reasoned that there is a difference, for due process purposes, as to the propriety of "the penalty imposed for violation of the" statute and whether a defendant can "be penalized at all." *Id.* at 441. In other words, while the Due Process Clause may allow *conviction* without proof of scienter for an offense, it may not allow the potential *penalties* that the offense entails. Accordingly, he agreed with the majority's conclusion to reverse the

---

[6] The cases cited in *Engler* where strict liability offenses carried greater penalties, such as *United States v. Freed*, 401 U.S. 601 (1971), were not on point for several reasons, including the fact that they did not involve due process claims.

dismissal of the indictment but believed that the defendant should be sentenced under the misdemeanor provision of the statute. *Id.* at 441.

The conflicting views in *Wulff* and *Engler* demonstrate why this case is an excellent vehicle to review the constitutional question. While there may be room for disagreement at the margins, the statute at issue here, as interpreted below, provides for an extraordinary 10-year minimum penalty and a maximum of *life* in prison based on a strict liability element. To the extent that the 2-year felony in *Wulff* and *Engler* presented a close call, this case presents a clear framework to address the constitutional boundaries for strict liability. Accordingly, the Court should grant review and provide guidance on the constitutional boundaries for criminal penalties based on strict liability.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: February 22, 2021

Respectfully submitted,

BENJAMIN L. COLEMAN
COLEMAN & BALOGH LLP
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone (619) 794-0420
blc@colemanbalogh.com

Counsel for Petitioner