No. 20-7253

**IN THE SUPREME COURT OF THE UNITED STATES**

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NANCY COLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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# REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

Petitioner Nancy Cole submits this reply to the Brief for the United States in Opposition ("BIO"). This Court's decision in *McFadden v. United States*, 576 U.S. 186 (2015) did not address the questions presented in this petition, as apparently recognized by even the majority opinion in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*). While the government complains that a "circuit-split" is lacking, numerous judges have dissented from the prevailing view, most recently in a closely divided *en banc* setting, demonstrating that the important questions presented should be reviewed by this Court. Review is particularly appropriate after the further clarification in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) that the presumption of mens rea applies to *all* material elements of an offense. Indeed, the petition in *Rehaif* was not based on a "circuit-split" and instead primarily relied on a dissenting view expressed by Justice Gorsuch while on the Tenth Circuit, much like petitioner has relied on the dissenting view expressed by Justice Kavanaugh in *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (*en banc*). Tellingly, the BIO does not respond to petitioner's arguments regarding the historical and constitutional role of the presumption of mens rea and why it is fully applicable in this context, nor does it make a showing that the presumption is otherwise rebutted. Finally, the Ninth Circuit did *not* apply the plain error standard below, and this case is a fine vehicle for review.

## ARGUMENT

1. Despite the government's contention, BIO 8-10, this Court's opinion in *McFadden* did not address the questions presented here. If *McFadden* were controlling, the majority in *Collazo*, which cited *McFadden*, *see Collazo*, 984 F.3d at 1320, 1325, would have simply stated that the issue was controlled by this Court's opinion. Even the majority in *Collazo*, however, apparently recognized that *McFadden* did not address the mens rea required for the offenses set forth in subsection (b) of 21 U.S.C. §§ 841 and 960.

Instead, *McFadden* addressed the mens rea required under the Controlled Substance Analogue Enforcement Act, 21 U.S.C. § 813, and this Court held that the knowledge requirement of an analogue offense is satisfied if the government proves that the defendant knew "he was dealing with 'a controlled substance" or if he "knew the specific features of the substance that make it a 'controlled substance analogue.'" *McFadden*, 576 U.S. at 188-89. In finding that the jury instructions on the requisite mens rea for an analogue offense were *insufficient*, this Court stated that § 841(a) "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." *Id.* at 192. "That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not

know which substance it was." *Id.*

This Court, however, did not consider what knowledge is required to prove the offenses in §§ 841(b) and 960(b). *See United States v. Jefferson*, 791 F.3d 1013, 1022-23 (9th Cir. 2015) (Fletcher, J., concurring) ("the Court had no reason in *McFadden* to consider whether the government must prove that a defendant knew 'the particular identity' of the controlled substance he dealt with in order to subject him to the escalating mandatory minimums set out in the Anti-Drug Abuse Act for particular illegal drugs"). Quite unlike the situation here, the Analogue Act provided a penalty once a violation of that separate statute, which could be satisfied by the mens rea for § 841(a) alone, was proven. *See* 21 U.S.C. § 813 (treating analogue offenses as schedule I offenses, which are subject to no mandatory minimum and a 20-year maximum under § 841(b)(1)(C)).

The government, however, agrees that §§ 841(a) and 960(a) do not alone define the §§ 841 and 960 offenses. *See* Brief for the United States in *Terry v. United States*, No. 20-5904, at 24-25 ("In seeking this Court's review, however, [petitioner] argued that the relevant 'Federal criminal statute' that he violated was 21 U.S.C. 841(a) 'alone,' not Sections 841(a)(1) and (b)(1)(C) taken together. That argument lacks merit.") (citation omitted). As the government has very recently acknowledged, "because Section 841(a)(1) does not provide for any

penalties at all if viewed in complete isolation, it is questionable whether it alone could even define a complete criminal 'offense.'" *Id.* at 25. Thus, the observations in *McFadden* regarding what is required to prove § 841(a) in "isolation" do not control what is required to prove violations of §§ 841(b) and 960(b).

Moreover, Chief Justice Roberts warned in *McFadden* that "the Court's statements on [§ 841(a)] are not necessary to its conclusion that the District Court's jury instructions 'did not fully convey the mental state required by the Analogue Act.'" *McFadden*, 576 U.S. at 199 (Roberts, C.J., concurring). "Those statements should therefore not be regarded as controlling if the issue arises in a future case." *Id.* The lower courts have heeded this warning and have not treated *McFadden* as controlling the issues presented in this case. Of the eleven judges who participated in the *en banc* proceedings in *Collazo*, not one concluded that *McFadden* controlled.

2. The government contends that there is no "division in the circuits" and that this Court's recent opinion in *Rehaif* is not cause to review the "uniform" view of the lower courts. BIO 11-13. The only post-*Rehaif* opinion to consider the statutory construction question presented in depth resulted in a 6-5 *en banc* decision. Thus, while there may not be a division among the circuits themselves, there is certainly division among circuit judges. Similarly, in *Rehaif*, the circuits

had adopted (incorrectly) a longstanding and unanimous view. *See Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting) ("The Court casually overturns the long-established interpretation of an important criminal statute, an interpretation that has been adopted by every single Court of Appeals to address the question.") (citation omitted). Arguably, the contrary view taken by the dissenting circuit judges here has gained more support than the contrary view relied upon by the petitioner in *Rehaif*, and the criminal statute involved in this petition is perhaps even more important than the one in *Rehaif* given the frequency of federal drug prosecutions.

The government dismisses the importance of *Rehaif*, insisting that the opinion was "informed" by the need to separate wrongful from innocent conduct, BIO 12, but it ignores *Rehaif*'s reliance on the Model Penal Code, which applies the presumption of mens rea to *all* material elements of the offense. *See Rehaif*, 139 S. Ct. at 2195 (quoting Model Penal Code § 2.02(4)). The fact that the government and the lower courts continue to cling to this flawed view of the mens rea presumption, a position thoroughly debunked by Justice Kavanaugh in *Burwell*, reinforces the need for review. *See Burwell*, 690 F.3d at 529, 545 (Kavanaugh, J., dissenting). The government makes the obvious point that *Burwell* involved a different statute, but it does not even attempt to take on Justice Kavanaugh's dismantling of such a limited view of the mens rea presumption. BIO 13-14.

In its brief discussion of Justice Kavanaugh's opinion in *Burwell*, the government states that he "reserved judgment" on whether the mens rea presumption applies to so-called "*Apprendi* elements." BIO 14. The government, however, does not cite any authority to support the conclusion that drug type and quantity are *Apprendi* elements rather than traditional elements. This Court's precedent indicates that Congress intended for them to be elements, *see United States v. Cotton*, 535 U.S. 625 (2002); *Castillo v. United States*, 530 U.S. 120 (2000), as does the government's brief in *Terry*. *See* Brief for the United States in *Terry v. United States*, No. 20-5904, at 24-25. But even if they are *Apprendi* elements, Justice Kavanaugh at least tentatively suggested that the presumption would still apply, *see Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting), and the government does not respond to petitioner's arguments that the historical and constitutional underpinnings of the presumption strongly reinforce his view.

3. The government's brief response to the constitutional question presented essentially asserts that as long as a statute contains some form of mens rea as to one element, then the potential penalties are limitless. BIO 14-15. Under this view, a defendant who knowingly jay-walks presumably can receive mandatory life imprisonment if he unintentionally (and even without recklessness or negligence) causes a fatal accident. Such a view is irrational and unconstitutional,

and 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). The government does not even attempt to defend the rationality of the 10-year minimum penalty involved here if the elements of drug type and quantity require no mens rea, nor has it cited a case sustaining a 10-year minimum penalty based on an element that requires no mens rea whatsoever.

4. Finally, the government apparently acknowledges that the issues presented are neatly teed up by this case, and it does not contend that the errors asserted by petitioner were harmless. Instead, the government contends that this case is not a suitable vehicle to address the questions presented because plain error review is applicable. BIO 15-16. The government, however, merely states that it *argued* for plain error review below (and then only as to the statutory construction question, not the constitutional question), apparently acknowledging that the Ninth

Circuit did *not* accept its argument and declined to apply the plain error standard.

The "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below[,]" and "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . . ." *United States v. Williams*, 504 U.S. 36, 41 (1992). This rule applies in the jury instruction context. *See United States v. Wells*, 519 U.S. 482, 487-89 (1997). Like *Wells*, it is particularly appropriate to consider the question presented because this Court decided *Rehaif* after the district court proceedings, and therefore nothing should disqualify petitioner "from the chance to make [her] position good in this Court." *Id*. at 489.

Given that the Ninth Circuit passed upon the questions presented without applying plain error review, this case is a fine vehicle. Certainly, this case is a suitable vehicle to address whether "error" occurred, and the government can attempt to resurrect its rejected plain error arguments, including the second through fourth prongs of that test, *see United States v. Olano*, 507 U.S. 725, 733-34 (1993), on remand if this Court finds error and sends the case back to the Ninth Circuit to consider prejudice and whether petitioner's convictions and sentence should otherwise be vacated. That is typically the procedure when the lower court does not find error in the first place. *See McFadden*, 576 U.S. at 197.

## CONCLUSION

The questions presented are extraordinarily important, and the government does not contend otherwise. The fact that other somewhat similar petitions have been denied in the past, BIO 7, demonstrates that further "percolation" is unnecessary and now is the time to grant review. Indeed, after *Rehaif*, the dissenting view in the lower courts has grown even stronger, as demonstrated by the 6-5 decision in *Collazo*. The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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