No.

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR ACOSTA,

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*

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QUESTIONS PRESENTED

1. Whether a federal court of appeals can reject a defendant's testimony denying the requisite criminal knowledge as implausible in determining that a preserved trial error was harmless.

2. 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.

STATEMENT OF RELATED CASES

- *United States v. Salvador Acosta*, No. 17CR03289-AJB, U.S. District Court for the Southern District of California. Judgment entered January 11, 2019.

- *United States v. Salvador Acosta*, No. 19-50007, U.S. Court of Appeals for the Ninth Circuit. Judgment entered December 15, 2020 and rehearing denied February 22, 2021.

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The decision below can be found at *United States v. Acosta*, 839 Fed. Appx. 87 (9th Cir. Dec. 15, 2020). It was held pending the decision in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*), and therefore *Collazo* is also included in the Appendix.[1]

JURISDICTION

The court of appeals filed its memorandum opinion on December 15, 2020 and denied petitioner's request for rehearing and rehearing en banc on February 22, 2021. App. 1, 6. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *See* Order, March 19, 2020 (extending deadline for petitions for a writ of *certiorari* to 150 days).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner is currently 62-years old. PSR 2; ER 53. He has no prior record, not even a prior arrest. PSR 8. On September 15, 2017, federal officers arrested him as he attempted to enter the United States at the San Ysidro, California port of entry when they found approximately 15 kilograms of fentanyl hidden in the spare

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

tire area of his vehicle. CR 1; PSR 1. A federal grand jury in the Southern District of California subsequently returned a one-count indictment charging him with importation of fentanyl in violation of 21 U.S.C. §§ 952 and 960. ER 174. The indictment alleged: "On or about September 15, 2017, within the Southern District of California, defendant [petitioner] did knowingly and intentionally import 400 grams and more of a mixture and substance containing a detectable amount, to wit: approximately 15.78 kilograms (34.80 pounds), of N-phenyl-N-[1-(2-phenylethyl) -4-piperidinyl] propanamide (commonly known as fentanyl), a Schedule II Controlled Substance, into the United States from a place outside thereof; in violation of Title 21, United States Code, Sections 952 and 960." ER 174.

Petitioner proceeded to a jury trial in August of 2018. CR 42. The government presented evidence that petitioner drove a Prius, which had Uber and Lyft stickers on the windshield, to the San Ysidro Port of Entry at approximately 4:30 am on September 15, 2017. RT 145, 156 (Aug. 15, 2018). He was wearing a chef shirt stating that he was an assistant pastry chef at the Pechanga Resort and Casino. *Id.* at 150. An officer at the primary inspection area asked him where he was going, and he stated he was headed to work. *Id.* at 152. The officer asked him if he had anything to declare and what he did for work, and petitioner responded that he had nothing to declare and he was a chef. *Id.* The officer inspected the back of the vehicle and discovered packages of fentanyl in the spare tire area. *Id.*

at 153-55, 162-65.

The government also presented evidence that petitioner had crossed numerous times from Mexico into the United States in his Prius during the preceding months. ER 125. An agent who interrogated petitioner after his arrest testified: "[T]hrough the course of our interview, [petitioner] told me that he lives sometimes in the Chula Vista/National City area, and sometimes in Tijuana. So the numerous crossings seemed routine to me. He also told me he crossed several times a week, early in the morning, on his way to work." ER 137. The agent testified that there was nothing suspicious about his crossing activity. *Id.*

Agents found $884 in petitioner's possession at the time of his arrest, ER 134, and they also subsequently searched his cell phone and Facebook account. ER 146. Despite the vast array of information searched, an agent maintained that there was a single Facebook message with an individual named Alberto Aldana on August 18, 2017, approximately one month prior to petitioner's arrest, that raised "concerns" because he believed it was a "coded" message. ER 126-27. The text message was in Spanish and Aldana used the word "botes," which the parties stipulated could mean boats or cans/containers, and the term "orallz." ER 126, 142, 149.[2] Agents testified that the word "botes" refers to one thousand pills of

[2] The English translation of the message, *see* CR 41, maintaining the word "botes," was as follows:

ecstasy, and one agent stated that the purported Spanish word "horalles" means oral. ER 148, 152. Petitioner also called Aldana numerous times the day before his arrest. ER 127-28.

Petitioner testified in his own defense. He stated that he did not know that the fentanyl was hidden in his vehicle. ER 61. He had used valet parking in Tijuana the night before his arrest. ER 62-63. He testified that Aldana was his nephew and that there were several attempted calls between the two the day before his arrest to discuss a family birthday celebration, not drug smuggling, and most of the attempted calls did not even result in a connection. ER 63-65. With respect to the terms "botes" and "orallz" in the August message found by the agents, petitioner's nephew had asked him to buy cans ("botes") of cleaner for the seats and carpets of a car from O'Reilly's Auto Parts ("orallz"), and he produced an O'Reilly's receipt to prove the purchase. ER 55-61.

On cross-examination, the prosecutor elicited that, in addition to his job as a chef, petitioner worked for Uber and Lyft to make extra money to pay bills. ER 67-68. During April through June 2017, petitioner worked consistently as a driver, but he only worked one day in July and no days before August 15, 2017. ER 68-

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> Aldana: Uncle can buy me about 6 botes
> Aldana: That's what they sell in orallz
> Aldana: They cost as [probably should be translated "like"] 3 dlls
> Acosta: OK no problem

69. The prosecutor did not ask petitioner whether he worked as a driver during September 2017, nor did he ask petitioner how long he had worked for Uber and Lyft and why he worked less as a driver in July and August. ER 69.

Although the indictment only alleged a single incident of knowingly smuggling fentanyl on September 15, 2017, the prosecutor argued during summations that petitioner began smuggling drugs by at least August of 2017. ER 93, 108-09. The district court *twice* instructed the jury that it did not need to find that petitioner knew that he was importing fentanyl. Instead, the district court instructed the jury that it was required to find that petitioner "knew the substance he was bringing into the United States was fentanyl *or some other federally controlled substance*" and later emphasized: "It does not matter whether the defendant knew that the substance was fentanyl. It is sufficient that the defendant knew that it was some kind of a federally controlled substance." ER 12-13. The jury returned a guilty verdict on the single count in the indictment. CR 43.

At sentencing, the district court commented that "[i]t was a remarkable trial, and it probably could have gone either way . . . ." ER 48-49. The district court sentenced petitioner to a mandatory minimum of ten years in custody and five years of supervised release. CR 64; ER 44-45, 49. On appeal, petitioner made several claims, including that the district court erred by failing to give a limiting instruction regarding the other-act evidence and that the jury instructions

constructively amended the indictment. The Ninth Circuit affirmed. App. 1-5.

The Ninth Circuit recognized that the government conceded that the district court erred in failing to give a limiting instruction regarding the other-act evidence and that the claim was preserved. App. 1-2. Nevertheless, the Ninth Circuit concluded that the error was harmless, rejecting the district court's assessment that the trial "could have gone either way" and instead concluding that its "independent review of the record confirms that extensive evidence supported [petitioner]'s conviction." App. 2. The Ninth Circuit explained that there was a large and highly valuable quantity of a toxic drug hidden in petitioner's vehicle, and it rejected his testimony that he did not know about the drugs as implausible. *Id.* It also reasoned that the general jury instruction that petitioner was only on trial for the charge in the indictment mitigated any prejudice. App. 2-3.

With respect to the constructive amendment claim, the Ninth Circuit held that although the indictment specifically charged fentanyl, the jury instructions permitting the jury to find petitioner guilty as long as he knew he was importing any controlled substance did not constitute a constructive amendment. App. 3-4. The Ninth Circuit concluded that the government is not required to prove that the defendant knew the type and quantity of drugs to trigger the penalties in § 960(b), and therefore there was no plain error. App. 4.

ARGUMENT

I. This Court should grant review to clarify the confusion and inconsistency in the lower courts' application of the harmless error doctrine and to make clear that a federal court of appeals cannot reject a defendant's testimony denying the requisite criminal knowledge as implausible in determining that a preserved trial error was harmless.

A. There is widespread confusion, conflict, and inconsistency in the lower courts' application of harmless error review

In finding that an error was not harmless in a factually similar case to this one, Judge Wallace observed: "The standards guiding appellate determination of harmless error are variable, often confusing and frequently left unarticulated." *United States v. Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977).[3] This Court granted review in *Vasquez v. United States*, No. 11-199, 566 U.S. 375 (2012) to resolve some of this confusion but ultimately dismissed the petition as improvidently granted. Given that *Vasquez* ultimately did not provide any further

[3] The various standards include the harmless beyond a reasonable doubt standard for constitutional errors on direct review, *see Chapman v. California*, 386 U.S. 18 (1967), the substantial effect on the verdict test for non-constitutional errors on direct appeal, *see* Fed. R. Crim. P. 52(a); *Kotteakos v. United States*, 328 U.S. 750, (1946), and other tests for constitutional errors on habeas corpus review and forfeited errors on direct review that are somewhat similar to the *Kotteakos* standard but arguably involve slightly different burdens and factors. *See* Fed. R. Crim. P. 52(b); *O'Neal v. McAninch*, 513 U.S. 432 (1995); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *United States v. Olano*, 507 U.S. 725 (1993). For its part, Congress has stated: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111.

guidance, the confusion persists and is arguably more widespread than ever.

The petition in *Vasquez* and a currently pending petition have framed the conflict in terms of an "overwhelming guilt" test versus an "effect-on-the-verdict" test. *See David Ming Pon v. United States*, No. 20-1709. While there is much confusion in the lower courts regarding the use of "overwhelming guilt" in harmless error analysis, and such confusion is manifested by the decision below which only found "extensive" evidence of guilt, App. 2, there is an additional layer of confusion that should also be clarified by this Court, particularly after *Neder v. United States*, 527 U.S. 1 (1999).

In *Barker v. Yunis*, 199 F.3d 867 (6th Cir. 1999), the Sixth Circuit held that an appellate court cannot reject a defendant's testimony establishing a meritorious defense as incredible in conducting harmless error review. There, the defendant killed an 81-year old man and testified that she did so in self-defense because she believed that the victim was going to rape her. The Michigan Supreme Court held that, although the trial court gave a general self-defense instruction, it erred in failing to instruct the jury specifically that the defendant was entitled to use deadly force if she reasonably believed that she was about to be raped. The court, however, held that the error was harmless because no reasonable juror would have believed the defendant's claim of self-defense given that the victim was 81-years old and "enfeebled." *Id.* at 870.

Applying the AEDPA and the harmless error standard for habeas corpus cases, the Sixth Circuit determined that the harmless error finding was unreasonable, explaining that "the Michigan Supreme Court improperly invaded the province of the jury in determining that . . . the error was harmless because no reasonable juror could have believed" the defendant's testimony. *Id.* at 874. The Sixth Circuit reasoned that the constitutional right to a jury trial is "interpreted as prohibiting judges from weighing evidence and making credibility determinations, leaving these functions for the jury." *Id.* It concluded: "[T]he Michigan Supreme Court's determination that the erroneous jury instruction was harmless necessarily means that the court believed some evidence but discredited other evidence. This, however, it cannot do and remain in compliance with our constitutional guarantees. It is neither the proper role for state supreme courts, nor for this Court, to stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others." *Id.* at 874-75.

Other circuits seemingly disagree. In another case where the defendant testified in support of a self-defense theory but the jury was not instructed on self-defense, the Seventh Circuit found harmless error, explaining: "There are indeed some questions of credibility in deciding the correct version of the facts. . . . Insofar as possible the habeas or appellate court shuns resolving credibility and weighing the evidence. Nevertheless, the *Brecht-Kotteakos* test for harmless error

requires the habeas court to evaluate to some extent the probability of the outcome if the case were tried under proper instructions." *Everette v. Roth*, 37 F.3d 257, 262 (7th Cir. 1994). Echoing the Sixth Circuit's view, however, Judge Ripple dissented, stating: "[T]he majority's conclusion that the error is harmless is based on an impermissible substitution of its judgment on a matter of credibility for that of the state court jury. As the majority quite frankly admits, reliance on the harmless error doctrine in this case requires the judges of this court to perform a task that the jury may never have addressed because of the refused jury instruction. It requires that the panel resolve matters of credibility and weigh the evidence on the primary issue of guilt or innocence. [The defendant] has a right to have that issue determined by a jury, not by federal appellate judges." *Id.* at 263 (Ripple, J., dissenting).

Similar to the divided Seventh Circuit panel in *Everette*, a split panel of the D.C. Circuit has also rejected a defendant's testimony as not credible in conducting its harmless error review. *See United States v. Williams*, 212 F.3d 1305, 1311-12 (D.C. Cir. 2000). But again, that harmless error analysis did not carry the day with the entire panel and was met with a dissent by Judge Silberman. *Id.* at 1312-13. Like the D.C. and Seventh Circuits, panels in other circuits have also rejected a defendant's testimony supporting a viable defense as not credible in finding harmless error. *See United States v. Jackson*, 852 F.3d 764, 773-74 (8th Cir. 2017);

United States v. Burrows, 36 F.3d 875, 880 (9th Cir. 1994).

The view that an appellate court can judge the defendant's credibility when conducting harmless error review has recently come under attack in several dissenting opinions. These dissenting judges have relied on *Neder*, where this Court's harmless error analysis depended on whether a juror *could* reasonably find in favor of the defense. *See Neder*, 527 U.S. at 16. This Court stated that where the defendant does not raise a defense to an element at all, *id.* at 16-17, or where there is "uncontroverted evidence" on an element, applying harmless error review "reaches an appropriate balance between 'society's interest in punishing the guilty and the method by which decisions of guilt are to be made.'" *Id.* at 18 (citation omitted). Stated differently, "where a defendant did not, and apparently could not, bring forth facts contesting [an] element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.

Thus, relying on *Neder*, Judge Collins recently noted in dissent that an appellate court should not weigh a defendant's credibility when conducting harmless error review, even when the testimony "strikes us as patently incredible." *United States v. Price*, 980 F.3d 1211, 1265 (9th Cir. 2020). He explained that the majority's harmless error analysis in *Price* constituted an "implicit embrace of appellate weighing of a criminal defendant's credibility [that] is unsupported by

precedent and is anathema to the fundamental right to trial by jury in criminal cases – a right that Framers considered so important that they put in the Constitution twice." *Id.* (Collins, J., dissenting).

Similarly in dissent, Judge Bumatay recently observed that "while harmless and plain error might be necessary doctrines, we must tread carefully before overtaking the jury's role to determine guilt[,]" relying on the majority opinion in *Neder*. *United States v. Gear*, 985 F.3d 759, (9th Cir. 2021) (Bumatay, J., concurring in part and dissenting in part). Also quoting Justice Scalia's dissenting opinion in *Neder*, he concluded: "'The Constitution does not trust judges to make determinations of guilt.' Judges – and federal judges in particular – are 'proper objects of that healthy suspicion of the power of government,' which prompted the people to 'reserve the function of determining guilt to *themselves*, sitting as jurors. . . . [O]ur role is to send the case back to the jury rather than 'reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty.'" *Id.* at 700 (quoting *Neder*, 527 U.S. at 32 (Scalia, J., concurring in part and dissenting in part)) (emphasis in original).

Also recently dissenting, Judge Berzon explained that, under *Neder*, an instructional error is not harmless "if the defendant presented *sufficient* evidence to permit a finding in his favor." *Sansing v. Ryan*, 997 F.3d 1018, 1044 (9th Cir. 2021) (Berzon, J., dissenting) (emphasis in original). "The question is not what a

court believes a reasonable jury *would* have found, but what a reasonable jury *could* have found, given the evidence in the record." *Id.* (emphases in original). In conducting this inquiry, the reviewing court must weigh the evidence in the light most favorable to the *defendant*. *Id.* A reviewing court should not weigh and discount defense testimony because "those determinations are improper in a sufficiency-of-evidence review, as it is the jury's role to assess the weight and credibility of testimony." *Id.*

When appellate courts, like the panel below, speculate about what a jury "would have" done, rather than applying a "could have" standard, the results are widely inconsistent, as one would expect with such speculation. For example, the Ninth Circuit has repeatedly found harmful error where the facts were extraordinarily similar to the facts of this case, and it has done so as recently as within the last couple of weeks. *See, e.g.*, *United States v. Velasquez*, ___ F.4th ___, No. 19-50099, 2021 WL 2559474, at *6-7 (9th Cir. June 23, 2021); *United States v. Caruto*, 532 F.3d 822, 831-32 (9th Cir. 2008); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-36 (9th Cir. 2001) (*en banc*); *United States v. Foster*, 227 F.3d 1096, 1101 (9th Cir. 2000); *United States v. Chu*, 988 F.2d 981, 984-85 (9th Cir. 1993); *Valle-Valdez*, 554 F.3d at 915 .

In a 180-degree turn from the panel's rationale below, the Ninth Circuit recently rejected the argument that a trial error in a similar case involving fentanyl

was harmless because "the value, type, [and] amount of drugs found in [the defendant]'s car would not have been stored there without his knowledge" and likewise dismissed inconsistencies in the defendant's statements that were far worse than the purported and unexplained inconsistencies mentioned by the panel here. *Velasquez*, 2021 WL 2559474, at *6-7. This different Ninth Circuit panel explained: "To be sure, we do not suggest the government had no case against [the defendant] or that the evidence demonstrating his knowledge of the drugs was wholly lacking. But our job is not to demonstrate [the defendant]'s innocence or eliminate any inkling of guilt." *Id.* at *7. Due to the confusion surrounding harmless error review, however, a judge dissented in *Velazquez*, explaining that the defendant's testimony that he did not know about the drugs was not credible and the jury must have determined that his testimony was not believable. *Id.* at *16-17 (Bade, J., dissenting).

In sum, there is not only conflict and confusion among the circuits, there is conflict and confusion within the circuits. This Court should grant review and provide necessary guidance on this all-important doctrine of criminal law.

B. The decision below is inconsistent with this Court's precedent, and this case is a good vehicle to review this important question

This Court should grant review in this case because the view taken below – it is permissible to weigh and reject a defendant's credibility as part of appellate

harmless error review – is inconsistent with this Court's precedent. As explained above, that approach is inconsistent with *Neder*.

Even long before *Neder*, however, this Court made clear that when conducting harmless error review, "it is not the appellate court's function to determine guilt or innocence." *Kotteakos*, 328 U.S. at 763. This Court also warned that an appellate court conducting harmless error review is not "to speculate upon probable reconviction and decide according to how the speculation comes out." *Id.*

"In view of the place of importance that trial by jury has in our Bill of Rights, [harmless error review is not] intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946). Appellate judges "are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant is guilty." *Weiler v. United States*, 323 U.S. 606, 611 (1945). "That would be to substitute our [appellate judges'] judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." *Id.*

That was exactly what the panel below did, however, and it did so in

contravention of the district court's observation that it was a "remarkable" trial that "could have gone either way." App. 2. In other words, the district judge, who had the opportunity to observe petitioner's testimony first-hand, apparently did not believe that petitioner was so incredible and that the lack of knowledge defense was entirely implausible. It is unusual that the panel below felt that it had the ability to make a contrary determination on a cold record, and these circumstances make this case an excellent vehicle for review.

Furthermore, the other rationale offered below – that the error in failing to give a limiting instruction on the other-act evidence was not prejudicial because of the general jury instruction that the defendant was only on trial for the charge in the indictment – is also inconsistent with this Court's precedent. App. 2-3. Specifically tailored limiting instructions, like the one omitted here, are extremely important and cannot be obviated by generalized instructions. *See Carter v. Kentucky*, 450 U.S. 288, 302-04 (1981) ("[t]he other trial instructions . . . were no substitute for the explicit instruction"); *Bollenbach*, 326 U.S. at 612 ("the error is not cured by a prior unexceptional and unilluminating abstract charge"). Indeed, reliance on the "general" instruction is a non-sequitur because it did not explain to the jury the *appropriate and limited* purpose of the other-act evidence and therefore did not eliminate the possibility that the jurors used the alleged other acts as impermissible propensity evidence to prove the charge in the indictment or as

evidence undermining petitioner's credibility. In other words, the general instruction that the defendant was only on trial for the charge in the indictment served a "different function[,]" and the "jury would not have derived 'significant additional guidance'" from it. *Carter*, 450 U.S. at 304.

Contrary to this Court's precedent, the panel below also ignored that the prosecutor emphasized the other-act evidence during closing arguments, demonstrating that the error was not harmless. *See Chapman*, 386 U.S. at 25-26. For example, the prosecutor repeatedly made the argument that petitioner had stopped driving for Uber and Lyft more than a month before his arrest because he began crossing drugs. ER 93, 108-09. The prosecutor also repeatedly mentioned the purported ecstasy message, ER 91, and even advocated using the evidence for an impermissible purpose. ER 106 ("there is evidence that the defendant sent a message, *you can ascribe any conclusion you want to that evidence*, to make a determination of the defendant's guilt or innocence") (emphasis added). The other-act evidence became a major part of the entire trial with multiple witnesses, including a government expert, testifying about the evidence. The fact that the evidence was introduced in this manner added to the prejudice, as jurors often defer to such law enforcement expertise. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

In sum, the harmless error doctrine has long been a source of confusion and

inconsistent application. This case provides an excellent vehicle to clarify the doctrine, particularly because it is undisputed that there was error and the error was preserved. Petitioner is serving 10 years in prison, likely until he turns about 70-years old, for his first conviction, which was obtained after a trial that was undisputedly flawed. The Ninth Circuit's decision to overlook the significant and conceded error that tainted his trial conflicts with this Court's precedent and even numerous Ninth Circuit opinions finding harmful error under very similar facts. Its decision to reject petitioner's testimony and defense as not credible to arrive at a harmless error finding infringed his constitutional right to a jury trial and otherwise conflicted with long-established precedent establishing the proper role for appellate judges when conducting harmless-error review in a federal criminal case.

II. 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

Relying on the recent, 6-5 opinion in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*), the panel below rejected petitioner's constructive amendment claim, reasoning that the government is not required to prove knowledge of the type and quantity of controlled substance to trigger the

mandatory 10-year penalty set forth in § 960(b). App. 4. The five dissenting judges in *Collazo* explained that such knowledge is required, and this Court should grant review and adopt their construction of the statute.

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. *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).

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), the *en banc* Ninth Circuit panel in *Collazo* and the Sixth Circuit 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. 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 v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting Model Penal Code § 2.02(4)) (emphasis added).[4]

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 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

[4] 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").

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).[5] "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 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

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[5] *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).

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).[6] 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.*

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[6] *McFadden* addressed the mens rea required under the Controlled Substance Analogue Enforcement Act, 21 U.S.C. § 813. 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." *McFadden*, 576 U.S. 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"). 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. 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. 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). 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.*

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. Congress did not intend 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).[7]

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 *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

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[7] 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).

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.

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 that certainly 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, 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. The doctrine of constitutional avoidance or doubt therefore supports a mens rea requirement, *see Jones v. United States*, 526 U.S. 227, 239-40 (1999), so as not to "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.

CONCLUSION

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

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Respectfully submitted,

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