No. 21-5016

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Salvador Acosta submits this reply to the Brief for the United States in Opposition ("BIO"). As to the first question presented, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), a habeas corpus case, does not control the correct application of harmless error review in a *direct* federal criminal appeal.

On the second question presented, *McFadden v. United States*, 576 U.S. 186 (2015) did not address the mens rea requirements under 21 U.S.C. §§ 841(b) and 960(b), 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 question 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.

ARGUMENT

1. The government contends that *Brecht* permits appellate judges to review the cold record and reject a defendant's testimony as not credible when conducting harmless error review. BIO 15-16. But *Brecht* was a habeas corpus case, and this Court's precedent suggests otherwise in the context of a direct appeal in a federal criminal case. *See Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946); *Weiler v. United States*, 323 U.S. 606, 611 (1945); *see also Neder v. United States*, 527 U.S. 1, 16-17 (1999). The government ignores this authority.

The government notes that this Court has denied petitions seeking review of other harmless error questions, BIO 11-12 n.1, and it has recently done so in *Pon v. United States*, No. 20-1709. These other cases, however, did not really frame the harmless error question the way this petition is framed. Moreover, they generally did not involve a situation like the one here, where the court of appeals made a credibility determination regarding the defendant's testimony that essentially rejected the district court's assessment of the evidence. The district judge here had an opportunity to view petitioner's testimony first-hand, and he believed that the case was close and could have gone either way. Thus, this case presents an ideal

vehicle for this Court to clarify how federal appellate courts should conduct harmless error review of a preserved claim in a direct appeal of a criminal conviction.

2. The government apparently acknowledges the importance of the second question presented regarding the mens rea required for the enhanced penalties in the federal drugs statutes based on the type and quantity of controlled substance involved in the offense. It nevertheless contends that this case is not a suitable vehicle to review that question because the plain error standard applies. BIO 25-26. It was the Ninth Circuit, however, that rejected petitioner's constructive amendment claim by reasoning that no mens rea as to the type and quantity of drug is required under §§ 841(b) and 960(b). App. 4. 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); *see United States v. Wells*, 519 U.S. 482, 487-89 (1997). The Ninth Circuit expressly passed on the question presented, and therefore this case is a suitable vehicle for review.

On the merits, despite the government's contention, BIO 18-21, this Court's opinion in *McFadden* did not address the question presented. 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.

The government also 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 22-24. 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.[1]

The government dismisses the importance of *Rehaif*, insisting that the opinion was "informed" by the need to separate wrongful from innocent conduct, BIO 23, 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 24-25.

In its brief discussion of Justice Kavanaugh's opinion in *Burwell*, the

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[1] The fact that other somewhat similar petitions have been denied in the past, BIO 12 n.2, demonstrates that further "percolation" is unnecessary and now is the time to grant review.

government states that he "reserved judgment" on whether the mens rea presumption applies to so-called "*Apprendi* elements." BIO 25. 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 did 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.

These fundamental questions regarding the mens rea presumption should finally be addressed by this Court. And more specifically, the time has come for this Court to decide whether defendants who may have no knowledge of the type and quantity of drug in their possession, and who may even be reasonably mistaken in that regard, are subject to a 10-year mandatory minimum penalty. There have been enough persistent dissenting positions in the lower courts that this important issue deserves review.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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