No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR LUNA-AQUINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

By common-law tradition, criminal intent (or "mens rea") is presumptively a part of "every crime," "even where the statutory definition d[oes] not in terms include it." *Morissette v. United States,* 342 U.S. 246, 258 (1952). But in the late twentieth century, a wave of new legislation raised "[t]he question of how to define a 'crime.'" *Alleyne v. United States*, 570 U.S. 99, 105 (2013) (plurality opinion). These new laws mandated enhanced penalties when offenses involved specific, aggravated facts. It was only in recent years that this Court deemed such aggravated facts to be "elements" of a crime—not mere "sentencing factors." *Id*. at 103, 105–106; *id*. at 111–17 (majority opinion). That development sparked a new controversy, concerning whether the presumption of mens rea applies to the elements defining an aggravated offense.

The question presented here is:

Whether a mens rea applies to the drug-type-and-quantity elements of an aggravated drug importation offense, where those elements substantially increase the statutory minimum and maximum sentence. *See* 21 U.S.C. § 960(b).

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Petitioner Oscar Luna-Aquino respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 20, 2021.

INTRODUCTION

This case presents the question whether knowledge of drug type and quantity is an element of an aggravated federal drug crime—a question that recently split the en banc Ninth Circuit. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021). Five judges would have answered in the affirmative. *Id.* at 1337–43 (Fletcher, J., dissenting). But a six-judge majority held that the statute holds defendants strictly liable for drug type and quantity. *Id.* at 1315–36. The en banc panel's dueling opinions reveal confusion about how the presumption of mens rea applies to aggravated offenses. The court divided on foundational questions like: Does the presumption attach to all offense elements, or only those that distinguish

culpable from innocent conduct? Does it apply less forcefully to "elements" that were recognized as such only after *Apprendi* and *Alleyne*? And does it function differently when an express mens rea appears in the provision defining the core crime?

The answers to these questions have grave consequences for defendants facing federal drugs charges. If the en banc Ninth Circuit is correct, then a defendant may be subject to a mandatory "decade in prison based on a fact that [they] did not know"—or even that they "reasonably believed not to be true." *United States v. Jefferson*, 791 F.3d 1013, 1021 (9th Cir. 2015) (Fletcher, J., concurring).

OPINION BELOW

The Ninth Circuit Court of Appeals affirmed Mr. Luna-Aquino's conviction in an unpublished memorandum disposition. *See United States v. Luna-Aquino*, No. 20-50234, 2021 WL 6067014 (9th Cir. Dec. 20, 2021) (attached here as Appendix A). The Ninth Circuit held that its recent en banc decision in *United States v. Collazo*, 984 F.3d 1308 (2021), "foreclosed" Mr. Luna-Aquino's claim that a "knowing" mens rea applies to the drug type and quantity elements in 21 U.S.C. § 960(b). *Id*.

JURISDICTION

The Ninth Circuit Court of Appeals entered its judgment on December 20, 2021. On March 16, 2022, Justice Kagan extended the time to file this petition until May 19, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 960 of Title 18 provides, in relevant part:

> **(a)** Any person who—**(1)** contrary to section 825, 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance . . . shall be punished as provided in subsection (b).
>
> **(b)(1)** In the case of a violation of subsection (a) of this section involving . . . **(H)** 50 grams or more of methamphetamine . . . the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life[.]

In the United States Code, subsection (a) is titled "unlawful acts" and subsection (b) is titled "penalties." These labels are not a part of the enacted statute but were added during the codification process. *Compare* 21 U.S.C. § 960, *with* Pub. L. 91-513, § 1010, 84 Stat. 1290. A copy of the full statute as codified is included as Appendix B.

STATEMENT OF THE CASE

I. Legal background

A. This Court's strong presumption in favor of mens rea has deep common law roots.

"[A] basic principle that underlies the criminal law [is] the importance of showing what Blackstone called 'a vicious will.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 21 (1769)). American courts inherited from their English predecessors a notion of "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette, v. United States*, 342 U.S. 246, 251 (1952). From those theoretical foundations arose an "interpretive maxim [known] as a presumption in favor of 'scienter,'" or mens rea,

"by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to 'mak[e] a person legally responsible for the consequences of his or her act or omission.'" *Rehaif*, 139 S. Ct. at 2195 (quoting BLACK'S LAW DICTIONARY 1547 (10th ed. 2014)). Even when American legislators "were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette,* 342 U.S. at 251–52.

This "background rule of the common law favoring mens rea" has retained its potency. *Staples v. United States*, 511 U.S. 600, 619 (1994). In recent years, this Court has "interpreted statutes to include a scienter requirement even where the statutory text is silent on the question." *Rehaif*, 139 S. Ct. at 2197 (citing *Staples*). And the Court has "interpreted statutes to include a scienter requirement even where 'the most grammatical reading of the statute' does not support one." *Id*. (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)). In all instances, this Court has been guided by "the ancient requirement of a culpable state of mind." *Morissette*, 342 U.S. at 250.

B. Federal drug importation and distribution statutes mandate escalating penalties for aggravated drug types and quantities.

This case raises the issue of how the presumption of mens rea applies to federal drug crimes—some of the most frequently charged offenses in the federal system.[1] The Controlled Substances Act of 1970 ("CSA"), as amended by the Anti-

[1] U.S. SENTENCING COMMISSION, FISCAL YEAR 2020: OVERVIEW OF FEDERAL CRIMINAL CASES 13 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-

Drug Abuse of Act of 1986, criminalizes unauthorized drug distribution and importation. *See Burrage v. United States*, 571 U.S. 204, 208 (2014). The provision punishing distribution, 21 U.S.C. § 841, and the provision punishing importation, 21 U.S.C. § 960, share a similar overall structure. Subsection (a) describes the core crime of drug importation and distribution. Subsection (b) sets forth a series of aggravated crimes based on drug type and quantity.

Penalties for the aggravated offenses vary widely depending on the drug type and quantity involved. For example, the threshold for a sentencing range of 10 years to life starts at 1,000 kilograms, for marijuana; 5 kilograms, for cocaine; 50 grams, for methamphetamine; and 10 grams, for LSD. 21 U.S.C. §§ 841(b)(1), 960(b)(1). Lesser amounts carry increasingly diminished penalties, all the way down to a 1-year maximum sentence for importing an unspecified quantity of a Schedule V drug. 21 U.S.C. §§ 841(b)(3), 960(b)(7).

II. Factual and procedural history

A. After receiving instructions that knowledge of drug type and quantity was an element of one count but not the other, Mr. Luna-Aquino's jury delivered a split verdict.

In the fall of 2019, as Oscar Luna-Aquino waited in line at the U.S.-Mexico border, a drug-sniffing dog alerted to his SUV. Customs agents x-rayed and searched the car. They found about 43 kilograms of methamphetamine.

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publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf

Federal prosecutors charged Mr. Luna-Aquino in a two-count indictment with both importing and conspiring to import a controlled substance. *See* 21 U.S.C. §§ 952, 960, 963. The indictment alleged that Mr. Luna-Aquino had imported and conspired to import more than 50 grams of methamphetamine, exposing him to a potential statutory sentencing range of 10 years to life. 21 U.S.C. § 960(b)(1)(H).

1. The jury was instructed that knowledge of drug type and quantity was an element of the drug conspiracy, but not of the substantive drug offense.

Before trial, the parties submitted proposed jury instructions. Both parties agreed that to prove the aggravated offenses under § 960(b), the government had to submit the drug type and quantity elements to the jury. But Mr. Luna-Aquino's proposed instruction also required proof that he knew he was importing more than 50 grams of methamphetamine. The government opposed the instruction, and the court rejected it.

Mr. Luna-Aquino also proposed a similar modification to the aggravated conspiracy count, based on Ninth Circuit case law at the time. *See United States v. Jauregui*, 818 F.3d 1050 (9th Cir. 2019). Under his proposed instruction, the government would have to prove that he knew the conspiracy's object was to import more than 50 grams of methamphetamine. The government acceded to his proposal "in an abundance of caution." The court agreed to make the modification and instructed the jury accordingly.

2. The jury asked the court to clarify the difference in intent between the two counts, then acquitted on the conspiracy but convicted on the substantive count.

About five hours into deliberations, the court recalled the parties to examine two notes from the jury. One note read, "For both counts, the indictment mentions methamphetamine. Are the terms 'methamphetamine' and 'federally controlled substance' interchangeable?" The second said, "In order to be guilty of [the conspiracy count], does the defendant have to know only that the conspiracy is to import something illegal, or does he need to know specifically that the conspiracy was to import a controlled substance/methamphetamine illegally?"

The court consulted with the parties, then summoned the jury. In response to the first question, the court said that the terms "methamphetamine" and "federally controlled substance" were interchangeable as to the substantive count but not as to the conspiracy count. In response to the second question, the court said that the government was required to prove that Mr. Luna-Aquino joined a conspiracy to import 50 grams or more of methamphetamine. "So there's a difference between the two," the court explained. "Conspiracy, it's drug-specific. He has to know that it's methamphetamine-involved, and he additionally must know that it's 50 grams or more, that that's the agreement. And then as to the importation count, it only need be proven beyond a reasonable doubt that he knew it was methamphetamine or some other federally controlled substance."

The jury resumed deliberations. A little over an hour later, they reached a split verdict. They found Mr. Luna-Aquino guilty of importation but not guilty of conspiracy.

B. The Ninth Circuit relied on its recent en banc decision in *United States v. Collazo* to affirm Mr. Luna-Aquino's conviction.

On appeal to the Ninth Circuit, Mr. Luna-Aquino renewed his claim that knowledge of drug type and quantity is an element of an aggravated drug importation offense under § 960(b). While his appeal was pending, the en banc Ninth Circuit decided *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021), which held that knowledge of drug type and quantity was not an element of § 841(b)'s aggravated drug distribution offenses. A Ninth Circuit panel later affirmed Mr. Luna-Aquino's conviction in an unpublished decision, holding that *Collazo*'s reasoning "foreclosed" his interpretation of § 960(b).

REASONS FOR GRANTING THE PETITION

The presumption of mens rea is among the oldest and most important interpretive principles in American criminal law. But the en banc Ninth Circuit's 6-5 decision in *Collazo* exposed fundamental disagreements about how that presumption applies to aggravated offenses. These disagreements are rooted in this Court's recent precedents. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the Court held that sentence-enhancing facts are offense "elements," raising the possibility that a mens rea should presumptively apply. And *Rehaif v. United States*, 139 S. Ct. 2191 (2019), revealed that nearly every court of appeals in the nation had unduly limited the presumption's reach. Yet, the Ninth Circuit is the only court of appeals since *Apprendi* to reexamine en banc whether, in light of these shifts, knowledge of drug type and quantity is an element of an aggravated federal drug felony.

This case squarely presents that important question, providing an excellent opportunity to resolve the divisions in *Collazo*. And it is vital that this Court do so. If *Collazo* is allowed to stand, defendants may face "*years* of mandatory imprisonment . . . *based on a fact [they] did not know*." *United States v. Burwell*, 690 F.3d 500, 528 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (describing the effect of strict liability for aggravated firearms offenses). That result cannot be squared with the deeply rooted "background presumption of evil intent." *X-Citement Video*, 513 U.S. at 70. When it comes to the type and quantity elements in §§ 841(b), 960(b), this Court's "generally inhospitable attitude to non-*mens rea* offenses is reinforced by an array of considerations," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978)—not the least of which are the severe, mandatory consequences of aggravated drug convictions.

I. *Apprendi*, *Alleyne*, and *Rehaif* have reignited debate about whether knowledge of drug type and quantity is an element of an aggravated drug distribution or importation offense.

Starting in the 1980s, the courts of appeals built a consensus that no mens rea attaches to the type and quantity provisions in §§ 841(b), 906(b). *See, e.g.*, *United States v. Cruz-Rivera*, 14 F.4th 32, 55 (1st Cir. 2021) (collecting cases). But *Apprendi*, *Alleyne*, and *Rehaif* have sparked debate about whether that consensus rests on solid ground. The dueling opinions in *Collazo* reveal sharp disagreements about how the presumption of mens rea functions, particularly as applied to aggravated offense elements.

A. Changes in law have caused some judges to reexamine the question presented.

The presumption of mens rea applies to certain offense "elements"—though, just what those elements are is subject to dispute. *See infra*, Section I.B.1. For forty-three years after Congress passed the CSA, however, the definition of "element" remained unsettled.

In the 1980s, the Court adopted a limited view of what qualifies as an "element." *See McMillan, v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, the Court drew a distinction between "elements" and "sentencing factors." The former defined the crime. *Id*. at 85. The latter "c[ame] into play only after the defendant has been found guilty of [a] crime[] beyond a reasonable doubt." *Id*. at 86. Under *McMillan*, § 841's and § 960's drug type and quantity provisions were sentencing factors, not elements. *See, e.g.*, *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Gibbs*, 813 F.2d 596, 599 (3d Cir. 1987); *United States v. Wood*, 834 F.2d 1382, 1390 (8th Cir. 1987).

During this era, several courts of appeals held that no mens rea applied to drug type and quantity. These pre-*Apprendi* opinions often echo the distinction drawn in *McMillan*. One early Ninth Circuit opinion reasoned that § 841(b) "merely" set forth "penalty provision[s]," "wholly separate from the definition of unlawful acts." *United States v. Normandeau*, 800 F.2d 953, 956 (9th Cir. 1986) (simplified); *see also United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir. 1988) (adopting *Normandeau*'s reasoning). An early Second Circuit opinion likewise concluded that quantity "forms no part of the substantive offense" but "comes into

play only at the sentencing stage." *United States v. de Velasquez*, 28 F.3d 2, 4–5 (2d Cir. 1994); *see also United States v. Valencia-Gonzales*, 172 F.3d 344, 346 (5th Cir. 1999) (distinguishing the "specific intent necessary for the unlawful act" and the "strict liability punishment" (internal quotation marks omitted)).

Starting in the year 2000, however, the Court began the process of abandoning *McMillan* and, with it, the element/sentencing factor distinction. In *Apprendi*, , the Court held that all facts increasing the maximum penalty must be proved to a jury beyond a reasonable doubt. 530 U.S. at 490. The Court expanded that holding in *Alleyne*, concluding that "[a]ny fact that, by law, increases the penalty for a crime is an 'element'" subject to Sixth Amendment protections. 570 U.S. at 103. Under *Apprendi* and *Alleyne*, the facts set forth in §§ 841(b), 960(b) are elements of an aggravated drug offense. *See Burrage*, 571 U.S. at 209–10.

In the wake of *Apprendi* and *Alleyne*, some court of appeals judges concluded that a "knowing" mens rea should attach to those elements. Sixth and Ninth Circuit panels split on the issue, spawning lengthy separate opinions. *See United States v. Jefferson*, 791 F.3d 1013, 1019 (9th Cir. 2015) (Fletcher, J., concurring); *United States v. Dado*, 759 F.3d 550, 571 (6th Cir. 2014) (Merritt, J., dissenting). Several courts of appeals, however, deemed *Apprendi* and *Alleyne* "inapposite" to the mens rea question, *United States v. Gamez-Gonzalez*, 319 F.3d 695, 700 (5th Cir. 2003); *see also United States v. Villarce*, 323 F.3d 435, 439 (6th Cir. 2003) (collecting cases). They either joined or reaffirmed the "reasoning of pre-*Apprendi* federal appellate authority." *United States v. Barbosa*, 271 F.3d 438, 459 (3d Cir. 2001).

The debate intensified in 2019, when this Court decided *Rehaif*. *Rehaif* revealed that almost every court of appeals in the nation had misapplied the presumption of mens rea to a statute prohibiting certain persons from possessing firearms. 139 S. Ct. at 2199. Using the correct rule, the Court held that the "knowingly" mens rea in 18 U.S.C. § 924(a)(2) travelled to the prohibited status elements in 18 U.S.C. § 922(g). *Id*. at 2195–99. Like the drug-type-and-quantity cases, then, *Rehaif* concerned whether "knowingly" applied to elements in two separate provisions, even though only one included an express mens rea. *Id*. at 2194; *compare* 21 U.S.C. §§ 841(a)–(b), 960(a)–(b).

B. *Collazo* revealed fundamental disagreements about the presumption of mens rea, especially as applied to elements of aggravated offenses.

It was in *Rehaif*'s wake that the en banc Ninth Circuit reconsidered the question presented. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021). The majority reaffirmed traditional arguments in favor of reading § 841 to impose strict liability. The dissent brought out counterarguments that have emerged in light of *Apprendi*, *Alleyne*, and *Rehaif*. Their disagreements implicate not only the proper interpretation of §§ 840(b), 960(b), but also broader and more fundamental questions about the presumption of mens rea.

1. Does the presumption apply only to elements that distinguish culpable from innocent conduct?

The first question that divided the en banc Ninth Circuit had to do with the type of elements to which mens rea presumptively applies.

According to the majority, mens rea presumptively applies only to "the statutory elements that criminalize otherwise innocent conduct." *Collazo*, 984 F.3d at 1324 (quoting *Rehaif*, 139 S. Ct. at 2195). Conversely, "absent statutory language suggesting otherwise, the scienter presumption does not apply to elements that do not separate innocent from wrongful conduct." *Id.* at 1325. The majority deployed that rule to conclude that the presumption did not apply to § 841(b). The court reasoned that the core crime in § 841(a) already distinguishes innocent from culpable conduct by criminalizing "knowing[] or intentional[]" drug distribution. *Id.* at 1327. Thus, there is no need to extend the presumption to the aggravating facts in § 841(b). In short, the majority concluded, the presumption does not apply because, "[r]egardless of the type and quantity of the controlled substance, there is no risk that a defendant would fail to understand the unlawful nature of the act." *Id.* Other courts of appeals have employed similar reasoning to justify a strict liability reading of the CSA's aggravated offenses. *See, e.g.*, *United States v. Mahaffey*, 983 F.3d 238, 245 (6th Cir. 2020); *United States v. King*, 345 F.3d 149, 153 (2d Cir. 2003); *United States v. Collazo-Aponte*, 281 F.3d 320, 326 (1st Cir. 2002).

For the majority, the same considerations eliminated the fear that a defendant would receive a severe sanction for unknowing conduct. Though harsh statutory penalties cut against "the inference that Congress . . . intend[ed] to create a strict liability public welfare offense," "[s]uch a concern is not implicated in § 841, under which the defendant must be found guilty of knowingly or intentionally

distributing controlled substances." *Collazo*, 984 F.3d at. at 1327. According to the majority, "[o]nce a defendant knowingly or intentionally violates federal law, 'it is not unusual to punish individuals for the unintended consequences of their unlawful acts.'" *Id.* at 1327–28 (quoting *Dean v. United States*, 556 U.S. 568 (2009)) (emphasis omitted); *see also United States v. Gomez*, 905 F.2d 1513, 1514–15 (11th Cir. 1990) (persons knowingly distributing drugs "assume the risk" as to drug type and quantity).

In the dissent's view, on the other hand, Anglo-American legal traditions establish "a strong presumption that a mens rea requirement exists for *all* elements of a crime." *Id.* at 1338–39 (Fletcher, J., dissenting) (emphasis added). That view coincided with then-Judge Kavanaugh's dissent from *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc).

Like the *Collazo* majority, the majority in *Burwell* believed that the presumption applies only to elements that distinguish innocent from culpable conduct. *Id.* at 506–07. They held that defendants are strictly liable for the facts supporting a machinegun enhancement under 18 U.S.C. § 924(c). *Id.* at 503–04. Then-Judge Kavanaugh disagreed. *Id.* at 528 (Kavanaugh, J., dissenting). His dissent concluded that the presumption extends "*both* when necessary to avoid criminalizing apparently innocent conduct (when the defendant would be innocent if the facts were as the defendant believed) *and* when necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct (that is, when the defendant would receive a less serious criminal sanction if the

facts were as the defendant believed)." *Id*. at 529. On that view, aggravated offense elements—like the machine gun enhancement in § 924(c) and the drug type and quantity elements in §§ 841(b), 960(b)—are subject to the presumption.

For both the *Collazo* dissent and the *Burwell* dissent, the enhancements' severe consequences reinforced that interpretation. *Collazo*, 984 F.3d at 1338 (Fletcher, J., dissenting); *Burwell*, 690 F.3d at 547–48 (Kavanaugh, J., dissenting). In prior cases, the Court has deemed 10-, 5-, and even 1-year statutory maxima to disrupt any inference of strict liability. *See Staples*, 513 U.S. at 72; *U.S. Gypsum*, 438 U.S. at 442 n.18; *Morissette*, 342 U.S. at 248 & n.2. The penalty difference between degrees of aggravation can be even more dramatic, like the 10-, 20-, and 30-year mandatory minimum sentences at issue in *Collazo* and *Burwell*. 18 U.S.C. § 924(c); 21 U.S.C. § 841(b). In the dissenters' view, "it would be illogical in the extreme to apply the presumption of mens rea to an element of the offense that would, say, increase the defendant's punishment from no prison time to a term of 2 years in prison, but not to apply the presumption of mens rea to an element of the offense that would aggravate the defendant's crime and increase the punishment from 10 years to 30 years." *Burwell*, 690 F.3d at 529 (Kavanaugh, J., dissenting).

2. Does the presumption apply less forcefully to facts that were deemed "elements" only after *Apprendi* and *Alleyne*?

The second question that split the en banc Ninth Circuit built on the first: Accepting that a presumption of mens rea applies to at least some "elements" of the offense, does it apply less forcefully when the "element" was recognized as such only by virtue of *Apprendi* and *Alleyne*?

For the *Collazo* majority, the answer was "yes." *See Collazo*, 984 F.3d at 1321–22. The majority pointed out that the Ninth Circuit's pre-*Alleyne* precedent deemed drug type and quantity to be sentencing factors, not elements. *Id.* at 1321. According to the majority, the Ninth Circuit had reinterpreted drug type and quantity as elements only "to save the statute from unconstitutionality." *Id.* at 1322 (simplified). But because constitutional imperatives forced that construction, the majority believed that drug type and quantity should be "treat[ed] . . . as elements under section 841(b)(1) *only* for these constitutional purposes"—not when applying the presumption of mens rea. *Id.* at 1322 (emphasis added). "Because *Apprendi* and *Alleyne* 'did not rewrite § 841(b) to add a new mens rea requirement,'" the majority concluded, "they do not assist us in determining the requisite mens rea necessary for the imposition of penalties under § 841(b)(1)(A)–(B)." *Id.* (quoting *United States v. Dado*, 759 F.3d 550, 570 (6th Cir. 2014)). Other courts of appeals' "post-*Apprendi* cases [agree] that drug quantity and type are not elements of the offense for mens rea purposes." *United States v. Hussein*, 351 F.3d 9, 18 n.3 (1st Cir. 2003); *see also Barbosa*, 271 F.3d at 458 (holding that no mens rea attaches to § 841(b) based, in part, on prior precedent that deemed drug type and quantity "penalty factors" under *McMillan*); *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002) (similar).

The dissent disagreed. In the dissent's view, *Apprendi* and *Alleyne* held that sentence-enhancing facts are elements, full stop. *Collazo*, 984 F.3d at 1339 (Fletcher, J., dissenting). Thus, the dissent believed, they should be treated no

differently for purposes of the presumption. *Id.* at 1341.[2] That approach would, in the dissent's view, dovetail with the animating principles behind *Apprendi* and *Alleyne*. *Id.* at 1343. Those cases recognized the "historic" and "intimate connection between crime and punishment," and they affirmed the jury's role in ensuring that the punishment fit the crime. *Alleyne*, 570 U.S. at 109 (plurality opinion). For the *Collazo* dissent, the presumption of mens rea springs from the same historic and intimate connection, and it serves a similar role in ensuring fair and proportional punishment. *See Collazo*, 984 F.3d at 1343 (Fletcher, J., dissenting). Other courts of appeals judges have likewise criticized the idea that drug type and quantity are elements for some purposes, but not others. *See United States v. Buckland*, 289 F.3d 558, 575 (9th Cir. 2002) (Hug, J., concurring); *United States v. Vazquez*, 271 F.3d 93, 107–09 (3d Cir. 2001) (Becker, J., concurring).

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[2] Then-Judge Kavanaugh's *Burwell* dissent was written before *Alleyne*, and it avoided reaching definitive conclusions about the element/sentencing factor debate. 690 F.3d at 538–541 & n.13 (Kavanaugh, J., dissenting). The dissent did, however, recognize some of the arguments on each side. On the one hand, this "Court's traditional view of sentencing as a more flexible, open-ended proceeding that takes account of a wide variety of circumstances" may justify a relaxed approach to mens rea for sentencing factors. *Id.* at 539. On the other hand, several Justices up to that point had "voice[d] weighty arguments that the protections attached to elements of the offense—including Fifth and Sixth Amendment rights, as well as the presumption of mens rea—should also attach to sentencing factors." *Id.* As for the "interesting question" whether the presumption should apply to facts that became elements only after *Apprendi*, the *Burwell* dissent opined that it "arguably should," "given the presumption's historical foundation and quasi-constitutional if not constitutional basis." *Id.* at 540 n.13.

3. Does the presumption apply differently when part of the statute includes an express mens rea?

Third, the en banc Ninth Circuit divided over the question whether § 841(b)'s text and structure express a sufficiently clear congressional intent to omit a mens rea.

As both sides recognized, "silence on [mens rea] by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Staples*, 511 U.S. at 605. Rather, some additional "indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id.* at 606. But the en banc court disagreed about how to interpret congressional silence when an express mens rea appears in one part of a statute, but not another.

On the *Collazo* majority's view, precedents about congressional silence have "little relevance" in cases "[w]here a statute includes a[n] [express] mens rea requirement," as § 841(a) does. *Collazo*, 984 F.3d at 1324 & n.17. In that circumstance, the interpreting court is "not faced with the question whether Congress intended to dispense with a mens rea requirement entirely." *Id.* at 1324. Rather, the only question is "how far into the statute" the express mens rea "extends." *Id.* at 1324 (quoting *Rehaif*, 139 S. Ct. at 2196).

Addressing that issue, the majority reasoned that "[a]s a matter of ordinary English grammar, it is natural to read the intent requirement of 'knowingly or intentionally' as modifying only the elements contained in the statutory phrase

defining the § 841(a)(1) offense, i.e., 'distribute' and 'a controlled substance.'" *Id.* at 1326. But because "[t]here is no natural or ordinary way to read the intent requirement in § 841(a)(1) as modifying the drug types and quantities in § 841(b)," the mens rea does not extend that far. *Id.* Other courts of appeals have employed similar reasoning. *See, e.g.*, *Mahaffey*, 983 F.3d at 243; *United States v. Betancourt*, 586 F.3d 303, 309 (5th Cir. 2009); *King*, 345 F.3d at 152–53; *Collazo-Aponte*, 281 F.3d at 326); *United States v. Branham*, 515 F.3d 1268, 1276 (D.C. Cir. 2008).

The *Collazo* dissent disagreed. The dissent reasoned that if the presumption applies even when Congress is completely silent on mens rea, then it should have "'equal or greater force' when Congress includes an explicit mens rea provision." *Id.* at 1338 (Fletcher, J., dissenting) (quoting *Rehaif*, 139 S. Ct. at 2195). This perspective tracks then-Judge Kavanaugh's in the *Burwell* dissent. The *Burwell* dissent interpreted the Court's precedents to "appl[y] the presumption of mens rea not just to statutes that are silent about mens rea . . . but also to statutes that contain a mens rea requirement for one element but are silent or ambiguous about mens rea for other elements." *Burwell*, 690 F.3d at 535 (Kavanaugh, J., dissenting). "And whether the statute is completely silent as to mens rea, or only partially silent, the presumption applies to each element of the offense." *Id.* at 537. On this view, even when a statute contains an express mens rea as to one element, silence or ambiguity on another element does not defeat the presumption absent "a plainly contrary congressional intent, as revealed in the statutory text or context." *Id.* at 547.

The *Collazo* dissent found no plainly contrary congressional intent when it came to § 841(b). To the dissent, the question was not "centrally a grammatical" one, "to be answered as if we were diagramming a sentence." *Collazo*, 984 F.3d at 1341–42 (Fletcher, J., dissenting). Indeed, the dissent pointed out, this Court has hesitated "to simply follow the most grammatical reading of [a] statute" when the presumption of mens rea pointed in the opposite direction. *Id.* at 1339 (quoting *X-Citement Video*, 513 U.S. at 70); *see also Rehaif*, 139 S. Ct. at 2197 (same). Rather, the question was "a broader interpretive" one, *id.* at 1341–42, namely, "how to construe the statute in light of the background rules of the common law," *Staples*, 411 U.S. at 605. Applying those rules, the dissent believed that "it is easy to read the statute in a natural or ordinary way to apply the *mens rea* requirement contained in one subsection to the criminal behavior specified in the immediately following subsections that impose mandatory sentences." 984 F.3d at 1342 (Fletcher, J., dissenting).

C. This issue has sufficiently percolated in the courts of appeals.

Apprendi, *Alleyne*, and *Rehaif* have not gone unnoticed in other appellate courts. But despite repeated requests, the remaining courts of appeals have declined either to reconsider the question en banc or to find that *Apprendi*, *Alleyne*, and *Rehaif* undermine prior precedents' rationales. Post-*Apprendi*, every court of appeals reaffirmed their prior precedent. *See Cruz-Rivera*, 14 F.4th at 55–56 (collecting cases). And post-*Rehaif*, four courts of appeals (not counting the Ninth Circuit) have done the same. *See, e.g.*, *United States v. Colston*, 4 F.4th 1179, 1187 (11th Cir. 2021); *Cruz-Rivera*, 14 F.4th at 55; *Mahaffey*, 983 F.3d at 244; *United*

States v. Vela Diaz, 793 F. App'x 351 (5th Cir. 2020). The disagreements raised in *Collazo* therefore will not be resolved without this Court's intervention.

Rehaif itself illustrates as much. In that case, every court of appeals to address the issue had held that no mens rea applied to the status elements in 18 U.S.C. § 922(g).[3] *See Rehaif*, 888 F.3d at 1145 n.3 (collecting cases). Only a handful of dissenting opinions had reached the opposite conclusion. *See, e.g.*, *United States v. Games-Perez*, 695 F.3d 1104 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc). But even in the absence of a circuit split, this Court granted certiorari to ensure that the presumption of mens rea was faithfully applied. *Rehaif*, 139 S. Ct. 2191. This Court should do the same here.

II. Resolving how the presumption of mens rea applies to the aggravated offenses within the federal drug statutes is extremely important.

The presumption of mens rea is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U.S. at 250. And since the founding, American courts have embraced "traditional legal concepts which render intent a critical factor" in criminal culpability. *U.S. Gypsum,* 438 U.S. at 437.

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[3] The one exception was a Sixth Circuit case, which—out of concern that a defendant might be indicted secretly—required knowledge that the defendant knew they were under indictment. *United States v. Renner*, 496 F.2d 922, 926 (6th Cir. 1974). The Sixth Circuit later held that no mens rea applied to § 922(g)'s other status elements. *United States v. Olender*, 338 F.3d 629, 637 (6th Cir. 2003).

The question presented asks how this traditional legal concept applies to a modern innovation: criminal statutes that mandate "substantially increased punishment when a specified aggravating circumstance exists in connection with the commission of a crime." Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 69 (1993). "Modern mandatory sentence enhancement legislation differs from the fixed sentences imposed in colonial times," as well as the more open-ended, indeterminate regimes of the early nineteenth and twentieth centuries. *Id*. at 69; *see also United States v. O'Brien*, 560 U.S. 218, 235 (2010) (Stevens, J., concurring). As the fissures in *Collazo* show, many questions remain about how the presumption of mens rea functions in this new context. Their resolution is a matter of great importance to federal criminal law.

Resolution of the question presented would dramatically affect statutory sentencing ranges in a circumscribed but substantial set of federal drug cases. The issue is circumscribed, because drug traffickers often cannot transact business without knowing *what* they are buying, selling, or importing. The kingpin does not make deals to deliver unknown drugs in unknown quantities; the street dealer cannot close a sale without revealing their wares. But it is substantial, because in at least two recurring scenarios, ignorance, lies, or mistakes prevent defendants from knowing the pertinent facts.

The first scenario involves couriers like Mr. Luna-Aquino. *See United States v. Diaz*, 884 F.3d 911, 917 (9th Cir. 2018) (no knowledge of drug type and quantity);

United States v. Quintero-Leyva, 823 F.3d 519, 521 (9th Cir. 2016) (same); *United States v. Rodriguez-Castro*, 641 F.3d 1189, 1190–91 (9th Cir. 2011) (same); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 423 (3d Cir. 2013) (en banc) (law enforcement testifying to same). Couriers are hired to "[t]ransport[] or carr[y] drugs using a vehicle or other equipment."[4] The Sentencing Commission ranks them among a drug trafficking organization's ("DTO") least culpable members.[5] Because couriers have no role other than to drive drugs from point A to point B, they can perform their function without knowing drug type or quantity. And DTOs often take steps to keep them in the dark by, for instance, loading and unloading the drugs outside the courier's presence. *See Quintero-Leyva*, 823 F.3d at 521. But unlike many low-level players (e.g., a street-level dealer[6]), couriers do not carry small quantities of drugs. Instead, the DTO loads their vehicles with wholesale amounts, *see, e.g.*, *Diaz*, 884 F.3d at 913; *Quintero-Leyva*, 823 F.3d at 521; *Rodriguez-Castro*, 641 F.3d at 1190—the same large hauls typically associated with high-level players.[7] In a strict liability regime, then, the couriers at the bottom of the pyramid face statutory penalties on par with those near the top.

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[4] U.S. SENTENCING COMMISSION, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 167 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf.
[5] *Id.* at 166–167.
[6] *Id.* at 167 (describing street-level dealers as handling "retail quantities" of "less than one ounce").
[7] Report to Congress, *supra* note 4, at 166 (stating that the most culpable suppliers or importers deal in amounts of one kilogram or more).

The second common scenario involves mistakes of fact. That makes a difference when, for example, one co-conspirator lies to another. A recruiter may tell a drug courier that they are transporting marijuana, which—in quantities under 50 kilograms—carries a 5-year maximum penalty. *See, e.g.*, *Quintero-Leyva*, 823 F.3d at 521; *Jefferson*, 791 F.3d at 1014; 21 U.S.C. § 960(b)(4). But often, the DTO will instead load the courier's car with kilogram amounts of a drug like methamphetamine, which comes with a 10-year minimum. *Quintero-Leyva*, 823 F.3d at 521; *Jefferson*, 791 F.3d at 1014; 21 U.S.C. § 960(b)(1)(H). A glitch in the supply chain can create similar disconnects between expectation and reality. In *Barbosa*, for instance, recorded conversations showed conclusively that the defendant intended to traffic heroin, a 10-year mandatory minimum offense. 271 F.3d at 445–47. His supplier, however, sent him cocaine base, resulting in a 20-year mandatory minimum. *Id.* at 461; *cf. United States v. Strange*, 102 F.3d 356, 360 (8th Cir. 1996) (sentencing co-conspirators for cocaine, even though both conspirators professed to ordering marijuana and two prior mailings had contained marijuana).

Factual mistakes like these are generally a defense if they "negative the existence of a mental state essential to" the crime. WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6(a) (3d ed.). Under a strict liability regime, however, no mental state attaches to drug type and quantity, eliminating mistake-of-fact defenses.

III. This case is the right vehicle for resolving this issue.

This case is an excellent vehicle for deciding the question presented, because there is little doubt that it was outcome-determinative at Mr. Luna-Aquino's trial.

As the government conceded on appeal, the jury "most likely" acquitted Mr. Luna-Aquino on the aggravated conspiracy count after finding that the government had not proved knowledge of drug type and quantity. Thus, if instructed that knowledge of drug type and quantity was an element of aggravated importation, the jury very likely would have acquitted on the importation count, too.

That is not to say that the government would have had no path to conviction. As one option, the government could have requested a "deliberate ignorance" instruction. *See United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007). The jury could then find that Mr. Luna-Aquino "knowingly" violated § 960(b)(1)(H) if he was "aware of a high probability that he [was] in possession of" more than 50 grams of methamphetamine but "deliberately avoided learning the truth." *Id.* at 919 n.6 (simplified). Alternatively, the prosecutors could have requested instructions on whatever lesser-included offenses they believed they could prove. *Cf. United States v. Rodriguez*, 831 F.3d 663, 666, 669 (5th Cir. 2016) (affirming conviction when the government requested a series of lesser-included instructions for diminishing quantities of marijuana). But because the government chose to go forward only on the aggravated offense in 21 U.S.C. § 960(b)(1)(H), the instruction at issue here made the difference between conviction and acquittal.[8]

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[8] For this reason, the court's error in rejecting Mr. Luna-Aquino's proposed instruction warrants reversal irrespective of what sentence Mr. Luna-Aquino received. As it happens, Mr. Luna-Aquino qualified for relief from the mandatory minimum under the so-called "safety-valve" provision in 18 U.S.C. § 3553(f). Not only does this post-trial relief fail to cure the trial error, but the trial error also factored into the court's sentencing calculus under 18 U.S.C. § 3553(a). As the court

The Ninth Circuit was therefore able to affirm only by rejecting Mr. Luna-Aquino's interpretation of § 960(b). If the dissenters in *Collazo* have the better of the argument, then Mr. Luna-Aquino's conviction must be reversed.

IV. The Ninth Circuit's decision is incorrect.

The many deep-seated disagreements among the *Collazo* judges about the presumption of mens rea warrants review no matter which side prevails. But granting certiorari is particularly vital here, because the Ninth Circuit's cramped understanding of the presumption contravenes this Court's precedent and inhibits mens rea's historical role in fitting punishment to crime.

First, the Court has squarely rejected the argument that mens rea serves only to distinguish innocent from culpable conduct. *See Flores-Figueroa v. United States*, 556 U.S. 646 (2009). *Flores-Figuroa* considered whether an aggravated form of identity theft required knowledge that a fake ID belonged to a real person. *Id*. at 648. The government forcefully argued that no mens rea should apply, as anyone using a fake ID could hardly be considered innocent. *Burwell*, 690 F.3d at 544 (Kavanaugh, J., dissenting). "No Justice on the Court accepted the Government's argument[.]" *Id*. "The Court ruled that the Government still must prove the defendant knew the card contained the identity of another person, even though the defendant was already committing two other crimes—the predicate crime and the use of a fake ID card." *Id*. at 545. *Flores-Figueroa* therefore reveals that the *Collazo*

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explained, "I don't think the statutory penalties [of 10 years to life] are irrelevant. They inform the seriousness of the offense."

majority's view was based on a misreading: The Court has certainly counted among the presumption's virtues that it helps distinguish culpable from innocent conduct, but it has never limited the presumption to that singular role.

Second, contrary to *Collazo*'s reasoning, facts that increase punishment are bona fide elements—and not by virtue of a mere Fifth or Sixth Amendment fiction. "A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, . . . establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). And "[n]umerous high courts agreed that this formulation accurately captured the common-law understanding of what facts are elements of a crime." *Alleyne*, 570 U.S at 109 (Thomas, J., plurality opinion). *Apprendi* and *Alleyne* therefore have their roots in "common-law and early American" conceptions of what an element essentially *is*. *Id.* at 111. The presumption of mens rea, with its equally established common law pedigree, should be interpreted in tandem with this historic understanding. *Morissette*, 342 U.S. at 250–63.

Third, the presumption of mens rea does not diminish or evaporate when a statute includes an express mens rea. Rather, "the presumption applies with equal or greater force when Congress includes a general scienter provision in the statute itself." *Rehaif*, 139 S. Ct. at 2195. To hold otherwise would have the effect of extending greater mens rea protections when a statute's literal terms impose strict liability. Instead of adopting that counterintuitive rule, the Court should take a

uniform approach, "requir[ing] the Government to prove the defendant's mens rea with respect to each element of a federal offense, unless Congress plainly provides otherwise." *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (citing *Rehaif*); *see also Flores-Figueroa*, 556 U.S. at 660 (Alito, J., concurring). Applying that rule here, a mens rea presumptively applies to drug type and quantity in §§ 841(b), 960(b), and Congress has not plainly expressed a contrary view. If anything, the statutes' "explicit *mens rea* requirement," "the proximity of" the aggravated offenses to the section defining the core offense, "the fact that type and quantity of the controlled substances . . . are elements of" the aggravated crimes, and "the mandatory nature and severity of the penalties" all reinforce the appropriateness of the presumption here. *Collazo*, 984 F.3d at 1341 (Fletcher, J., dissenting).

CONCLUSION

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

Respectfully submitted,

s/ Katie Hurrelbrink

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