No.

IN THE SUPREME COURT OF THE UNITED STATES

HECTOR MARTINEZ-ROBOS,

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 an instructional error is "plain" for purposes of Fed. R. Crim. P. 52(b) when the charge to the jury is erroneous under an opinion of this Court interpreting an identical term in a related statute.

2. Whether the knowingly mens rea in 21 U.S.C. § 960 applies to the type and quantity of controlled substance involved in the offense when those elements are used to establish mandatory minimum and enhanced maximum sentences.

STATEMENT OF RELATED CASES

- *United States v. Hector Martinez-Robos*, No. 19CR0369-DMS, U.S. District Court for the Southern District of California. Judgment entered July 27, 2020.

- *United States v. Hector Martinez-Robos*, No. 20-50205, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 24, 2022.

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The decision below can be found at *United States v. Martinez-Robos*, No. 20-50205, 2022 WL 2287427 (9th Cir. June 24, 2022).

JURISDICTION

The court of appeals filed its memorandum opinion on June 24, 2022. App. 1.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Rule 52(b) of the Federal Rules of Criminal Procedure states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Title 21 U.S.C. § 960 is set forth in the Appendix. App. 5-10.

STATEMENT OF THE CASE

Federal officers arrested petitioner as he attempted to enter the United States at the San Ysidro, California port of entry when they found approximately 28 kilograms of cocaine hidden in a spare tire and the rear quarter panel of his vehicle; riding as passengers in his car were Rosela Isela Acuna and her granddaughter. 1-ER-39-40, 79. The government subsequently filed a one-count information charging petitioner and Acuna with importation of "5 kilograms and more" of cocaine in violation of 21 U.S.C. §§ 952 and 960. 1-ER-292.

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[1] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit.

At trial, the government introduced the post-arrest statements of both defendants; they both denied knowledge of the cocaine and generally stated that they had traveled from the Los Angeles area to Tijuana, Mexico so that Acuna could see her son who was in the hospital for a medical procedure and for petitioner to explore having work done on his vehicle. 1-ER-190-201, 206; 2-ER-294-426. The government, however, emphasized inconsistencies in their statements to argue that they had guilty knowledge. 1-ER-43, 47, 53-54, 57-59, 64. The government also heavily relied on photographs found on Acuna's cell phone; several of the photographs depicted packages of an unknown crystal-like substance that an agent testified looked like methamphetamine, although there was a dispute about whether the substance was instead "bath salts" or some other mineral. 1 ER-111-15; 2-ER-428-35, 445-53.

The jury was instructed that the government only had to prove that "the defendant knew the substance he or she was bringing into the United States was cocaine or some other *prohibited drug*." 1-ER-23 (emphasis added). The instructions also stated: "It does not matter whether the defendant knew that the substance was cocaine. It is sufficient that the defendant knew that it was *some kind of prohibited drug*." *Id.* (emphasis added). The instructions further told the jury that the "government does not have to prove that the defendant knew the quantity of cocaine." 1-ER-25.

Based on these instructions, the jury returned a guilty verdict and found that the offense involved more than 5 kilograms of cocaine, CR 91, triggering a 10-year minimum sentence under 21 U.S.C. § 960(b)(1). Accordingly, the district court imposed the minimum 10-year sentence. 1-ER-3. The Presentence Report ("PSR") stated that if the 10-year minimum had not applied, a sentence of 42 months would have been appropriate. PSR 13.

Petitioner appealed to the Ninth Circuit. Among other things, he claimed that the jury instructions regarding the requisite mens rea were flawed because they only required proof that he knew he was importing some kind of "prohibited drug" as opposed to a "controlled substance." He also claimed that the jury instruction that the government did not need to prove his knowledge of the quantity of cocaine was insufficient to trigger enhanced penalties, including a 10-year minimum.. The Ninth Circuit rejected his challenges.

As to the first challenge, the Ninth Circuit held: "The district court also did not plainly err in giving the jury instructions on the mens rea requirements for the 21 U.S.C. § 960(a) importation offense that did not follow *McFadden v. United States*, 576 U.S. 186 (2015). *McFadden* concerned a statute that is not at issue here. Neither the Supreme Court, this court, nor the model jury instructions has extended *McFadden* to the 21 U.S.C. § 960(a) importation offense charged here." App. 3.

On the second claim, the Ninth Circuit held: "Martinez-Robos concedes that his sentence is correct under current law. *See United States v. Collazo*, 984 F.3d 1308, 1321-29 (9th Cir. 2021) (en banc). We express no view on whether his sentence must be reversed if the view of the *Collazo* dissent were governing law." App. 4.

ARGUMENT

I. The Ninth Circuit's decision conflicts with this Court's precedent, including *Johnson v. United States*, 520 U.S. 461 (1997), which makes clear that an instructional error is "plain" for purposes of Fed. R. Crim. P. 52(b) when the charge to the jury is erroneous under an opinion of this Court interpreting an identical statutory term in a related statute.

The jury was instructed that the government only had to prove that "the defendant knew the substance he or she was bringing into the United States was cocaine of some other *prohibited drug*." 1-ER-23 (emphasis added). The instructions also stated: "It does not matter whether the defendant knew that the substance was cocaine. It is sufficient that the defendant knew that it was *some kind of prohibited drug*." *Id.* (emphasis added).

Petitioner's trial attorney did not object to the these instructions, and therefore the plain-error standard of appellate review applied. *See* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see also* Fed. R. Crim. P. 30(d). In *United States v. Olano*, 507 U.S. 725 (1993), this Court adopted a now-familiar

test to obtain relief under plain-error review: (1) there must be error (2) that is plain (3) and affects substantial rights such that (4) the reviewing court exercises its discretion to reverse because the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See, e.g.*, *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018).

The jury instructions at petitioner's trial constituted *plain* error under the first two prongs of the *Olano* test given the plain language of the statutory scheme and this Court's opinion in *McFadden v. United States*, 576 U.S. 186 (2015). Title 21, United States Code Section 952 prohibits the importation of "controlled substances." 21 U.S.C. § 952. Section 960(a) states that "[a]ny person who . . . contrary to section . . . 952 . . . of this title, knowingly or intentionally imports or exports a *controlled substance* . . . shall be punished as provided in subsection (b) of this section." 21 U.S.C. § 960(a) (emphasis added). A "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). Section 960 is "structurally identical" to 21 U.S.C. § 841, which prohibits the knowing possession/distribution of a "controlled substance," and the two statutes have generally been interpreted similarly. *See,* e.g., *United States v. Jefferson*, 791 F.3d 1013, 1017 n.4 (9th Cir. 2015).

In *McFadden*, this Court explained that the government can prove the

requisite mens rea for a § 841(a) offense in two alternative ways. The government can prove that the defendant knew the particular controlled substance possessed; for example, the government can prove that the defendant knew that he possessed cocaine. Alternatively, the government can prove that a defendant "knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *McFadden*, 576 U.S. at 192.

With respect to this second theory, however, this Court explicitly rejected the government's contention that it is sufficient to prove that the "'defendant knew he was dealing with an illegal or regulated substance' under some law." *Id.* at 195. This Court explained: "Section 841(a)(1), however, requires that a defendant knew he was dealing with 'a controlled substance.' That term includes only those drugs listed on the federal drug schedules . . . . It is not broad enough to include all substances regulated by law." *Id.*

Thus, the district court clearly erred when it instructed the jury that the government only had to prove that petitioner knew that he was importing "some kind of a prohibited drug." 1-ER-23. Instead, the government had to prove that he knew that his vehicle contained some kind of "controlled substance" on the federal schedules. *McFadden*, 576 U.S. at 195 n.3.

The Ninth Circuit held that the instruction was not *plainly* erroneous under Rule 52(b) because *McFadden* interpreted § 841, the possession/distribution

statute, while the charge here was importation under § 960. App. 3. But the related statutes use the identical term: "controlled substance." Furthermore, this Court has found that an instructional error was "plain" for purposes of Rule 52(b) under nearly identical circumstances.

In *Johnson v. United States*, 520 U.S. 461 (1997), the district court determined that it did not have to instruct the jury on materiality in a perjury prosecution under 18 U.S.C. § 1623. While the case was on direct appeal, this Court decided *United States v. Gaudin*, 515 U.S. 506 (1995), which held that it was error to fail to instruct the jury on the element of materiality in a false statements prosecution under a different statute, 18 U.S.C. § 1001. In finding that the instructional error in *Johnson* was *plain* under Rule 52(b), this Court explained: "Although we merely assumed in *Gaudin* that materiality is an element of making a false statement under 18 U.S.C. § 1001, and although we recently held that materiality is not an element of making a false statement to a federally insured bank under 18 U.S.C. § 1014, there is no doubt that materiality is an element of perjury under § 1623. The statutory text expressly requires that the false declaration be 'material.' *Gaudin* therefore dictates that materiality be decided by the jury, not the court." *Johnson*, 520 U.S. at 465 (citation omitted). In other words, although *Gaudin* and *Johnson* involved different statutes, the error was plain given the plain language of the statute and the analysis in *Gaudin*. *Id.* at 467-

68. The same rationale applies here given the plain language in § 960 and the analysis in *McFadden*.

This Court's other precedent further reinforces the flaw in the Ninth Circuit's approach. For example, the standard for establishing a "plain" error under Rule 52(b) is not as high as establishing a violation of "clearly established" precedent in the qualified-immunity context. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 664-65 n.9 (2d Cir. 2003). Yet, even in the qualified-immunity context, "this Court's case law does not require a case directly on point for a right to be clearly established," and instead the relevant standard is whether "existing precedent . . . placed the statutory or constitutional question beyond debate." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7-8 (2021) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017). While petitioner submits that *McFadden* is directly on point given that it interpreted an identical term of art in a related statute, even if it weren't somehow on "all fours," there can be little question that the statutory question here is beyond debate.

Likewise, the burden to establish a "plain" error under Rule 52(b) is not as high as establishing an unreasonable application of "clearly established" federal law for purposes of habeas corpus review of state-court convictions under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Brown*, 352 F.3d at 664-65 n.9. Yet, even in the AEDPA context, this Court has stated that

there is no requirement of an "identical factual pattern before a legal rule must be applied." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). Instead, the relevant standard is whether the legal principle is "squarely established" by this Court's precedent such that there can be no "fairminded disagreement" on the question. *Id.* The Ninth Circuit did not identify any reasonable or plausible basis for distinguishing *McFadden* such that there could be "fairminded disagreement" on the statutory question.

Instead, the Ninth Circuit simply asserted that this Court had not "extended" *McFadden* to § 960. App. 3. There was nothing to "extend" here, as the exact same statutory term of art was used in two highly related statutes. In any event, the "difference between applying a rule and extending it is not always clear," and therefore the standard, even under AEDPA review, is simply whether the answer to the question is "obvious." *White*, 572 U.S. at 427. The answer to the question is obvious here, nor can there be any fairminded dispute – the jury instructions on the mens rea for § 960 were erroneous under *McFadden*.

Accordingly, this Court should grant this petition, find that the instructional error was "plain," and instruct the Ninth Circuit to consider the third and fourth prongs of the plain-error test in the first instance, as it did not proceed past the second prong of the test. *See McFadden*, 576 U.S. at 197. Petitioner notes that the government introduced photographs found on Acuna's phone of an unknown

substance and maintained that the evidence showed petitioner's guilty knowledge. The case agent speculated that the substance was "crystal meth" but was not certain, as he had not tested the substances. 1-ER-111-15. In response to the case agent's testimony, the defense expert testified that the pictures depicted something that "could be" "contraband" but also could be "something else." 1-ER-157. Acuna maintained that the substances were bath salts or some mineral. Given that the government used the photographs to show petitioner's knowledge, the jury could have concluded that he knew that the car contained some type of "prohibited drug" but not necessarily cocaine or another *federally controlled substance*. Under these circumstances, the Ninth Circuit may very well find that the plain instructional error was prejudicial when considering the third and fourth prongs in the first instance.

II. The question of whether the knowingly mens rea in the controlled-substance statutes applies to the elements of type and quantity of controlled substance 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

Although the jury was explicitly instructed that it did not have to find that petitioner knew the type or quantity of controlled substance involved (or even that he had to know that a "controlled substance" was involved), the Ninth Circuit

affirmed the district court's determination that a 10-year mandatory minimum sentence was required based on its sharply divided *en banc* opinion in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021). App. 4. This Court should grant review and adopt the position of the five dissenting judges in *Collazo*.[2]

The importation statute prohibits "knowingly or intentionally" importing a controlled substance. 21 U.S.C. § 960(a). In the Anti-Drug Abuse Act of 1986, Congress amended the controlled-substance statutes to add an escalating series of mandatory minimum prison sentences. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986). Thus, the elements of 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. § 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 a violation of subsection (a) of the controlled-substance statutes is a "lesser included offense" of subsection (b). *Burrage v. United States*, 571 U.S. 204, 209 and n.3 (2014).

Since this Court has clarified that facts determining both mandatory

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[2] A petition for a writ of *certiorari* is pending in *Collazo* in Case No. 22-5378. If the Court grants the petition in *Collazo*, it should alternatively hold this petition pending resolution of *Collazo* and then order appropriate relief depending upon the outcome in *Collazo*.

minimum and enhanced maximum sentences are elements of an offense that must be proved to a jury beyond a reasonable doubt, *see Alleyne v. United States*, 570 U.S. 99 (2013); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), two circuits have issued split decisions on whether the knowingly mens rea in the controlled-substance statutes applies to the elements of drug type and quantity. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*); *United States v. Dado*, 759 F.3d 550 (6th Cir. 2014). Of the 14 circuit judges to consider the question in these two cases, eight have determined that the statute's 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

controlled-substance statutes is extraordinarily important. The 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. *See Wooden v. United States*, 142 S. Ct. 1063, 1075-76 (2022) (Kavanaugh, J., concurring). 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).[3]

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 possessing and distributing a controlled substance "is not an 'entirely innocent' act." *Id.* at 1327. Accordingly, it reasoned, the mens rea presumption did not apply to the elements of drug type and quantity. Other courts have articulated a similar restriction on the mens rea presumption, including in *en*

[3] 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").

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 punishes 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).[4] "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 unanimous view of the circuits and held that a defendant had to know of his

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[4] *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).

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 statute (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 the controlled-substance statutes 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*, 576 U.S. at 198 (Roberts, J., concurring). Many states have legalized conduct related to some federally "controlled substances," like marijuana, creating a trap for those less versed in the law. *See* MORE Act of 2020, H.R. 3884. In short, conduct

related to a controlled substance is no less "innocent" than taking another's bomb casings, *see Morissette*, 342 U.S. 346, possessing an unregistered machinegun, *see Staples*, 511 U.S. 600, or sending a threatening communication, *see Elonis v. United States*, 575 U.S. 723 (2015), all of which found that mens rea applied to the disputed element. The majority in *Collazo* incorrectly failed to apply the presumption of mens rea to the elements of drug type and quantity. The historical analysis discussed below further demonstrates the flaw in the *Collazo* majority's analysis.

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

Perhaps recognizing that its restriction on the mens rea presumption stood on a shaky foundation, the majority in *Collazo* also reasoned that the presumption did not apply because drug type and quantity are really sentencing factors turned elements to comply with *Apprendi* and *Alleyne*. *See Collazo*, 984 F.3d at 1321-22 and 1327 n.20. It is far from clear that Congress intended drug type and quantity to be sentencing factors rather than elements of the offense. *See United States v. Cotton*, 535 U.S. 625 (2002); *Castillo v. United States*, 530 U.S. 120 (2000). But even if they are "only" *Apprendi* elements, Justice Kavanaugh has suggested that they would still be entitled to the mens rea presumption, *see Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting), and he is not the only member of this Court

to doubt whether there is a difference between statutory-interpretation elements and *Apprendi* elements. *See United States v. O'Brien*, 560 U.S. 218, 241 (2010) (Thomas, J., concurring); *Burwell*, 690 F.3d at 539-40 (Kavanaugh, J., dissenting) (collecting opinions).[5]

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

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[5] 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).

sentencing factors and elements of the offense for purposes of the presumption of mens rea.").

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

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

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

The requirement of mens rea, "congenial to [the] intense individualism" of the colonial days, "took deep and early root in American soil." *Morissette*, 342 U.S. at 251-52. If anything, the American requirement was even "more rigorous than English law." Radin, *supra*, at 127-28. In his leading treatise, Bishop explained that for an offense like "felonious homicide," guilt "must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong." 1 Bishop, Criminal Law § 334 (7th ed. 1882). In Bishop's view, this result followed naturally from the very purposes behind requiring mens rea in the first place. "The evil intended *is the measure of a man's desert of punishment*," such that there "can be no punishment" without a concurrence between the mens rea and "wrong inflicted on society." *Id.* (emphasis added).

This view has not changed. "As Professor LaFave has explained, rules of

mens rea apply both to a defendant who is unaware of the facts that make his conduct criminal and to a defendant who is 'unaware of the magnitude of the wrong he is doing.' The idea that 'the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong' is – in Professor LaFave's words – 'unsound, and has no place in a rational system of substantive criminal law.'" *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting) (quoting Wayne R. LaFave, Criminal Law 304-05 (5th ed. 2010)).

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

In sum, the historical background establishes that a fundamental purpose 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), while the type and quantity elements are in subsection (b), does not overcome the 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.* 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) 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 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 combine 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 statute also does 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)). Furthermore, the severe penalties at issue strongly reinforce the presumption. 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).

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.

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; *see also Wooden v. United States*, 142 S. Ct. 1063, 1075-76 (2022) (Kavanaugh, J.,

concurring) (explaining that the mens rea presumption is a substitute for the rule of lenity). 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. Thus, the doctrine of constitutional avoidance or doubt supports a mens rea requirement. *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 239-40 (1999). In other words, rejection of a mens rea requirement would "open up an entire new body of constitutional mens rea law." *Burwell*, 690 F.3d at 551 (Kavanaugh, J., dissenting).

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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