No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MONICA RODRIGUEZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

To prove conspiracy to distribute a controlled substance triggering mandatory-minimum and increased-maximum penalties, does the government need to establish the defendant knew the drug type and quantity?

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Petitioner Monica Rodriguez respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

In an unpublished memorandum, the Ninth Circuit affirmed petitioner's convictions. *United States v. Rodriguez*, No. 19-50177 (9th Cir. 2022).[1]

[1] A copy of the memorandum is attached as Appendix A. The memorandum addressed petitioner's co-defendant in case number 19-50253.

JURISDICTION

On August 23, 2022, the Ninth Circuit filed its memorandum decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Overview.

This case began with an investigation of the Canta Ranas (CR or CRO), a gang operating in and around Santa Fe Springs, California. ER:5-15.[2] The government believed the gang was controlled by an incarcerated member of the Mexican Mafia, David Gavaldon, who exercised his authority through a "shot caller" on the streets. ER:9-10. According to the government, Ms. Rodriguez briefly served as one of Mr. Gavaldon's "secretaries," "who transmitted messages about CRO business between CRO members inside and outside of prison[.]" ER:202.

After several years of investigating, on January 8, 2016, the government filed a wide-ranging indictment (followed by a 167-page superseding indictment) against alleged members and associates of the CRO. ER:1, 211. In 41 counts, the government charged 51 individuals. ER:1-4, 211-14.

Count 1 of the superseding indictment charged a single RICO conspiracy

[2] The Excerpts of Record (ER) are on file with the Ninth Circuit.

(18 U.S.C. § 1962(d)). ER:225. It alleged over 500 overt acts, including drug sales, money laundering and homicide, beginning in 2004 and extending to 2017. ER:225-315. Few of the allegations had anything to do with Ms. Rodriguez.

The remaining 40 counts charged a host of additional substantive crimes and conspiracies against different groups of defendants. Count 11 charged Ms. Rodriguez and others with conspiracy to distribute at least 50 grams of methamphetamine and other controlled substances (21 U.S.C. § 846). ER:326. Count 41 charged her with conspiracy to launder money (18 U.S.C. § 1956(h)). ER:366.

B. The trial.

As relevant here, during trial the government called numerous witnesses to testify about CRO and its drug trafficking. *See*, *e.g.*, ER:958, 965-67, 1005, 1235. They all agreed, however, no drugs or indicia of drug trafficking was ever found on Ms. Rodriguez or at her residence. ER:636, 664, 839, 1132, 1174. Nor was there any evidence she *ever* discussed drug trafficking with anyone in the CRO. ER:636, 664, 839, 1132, 1174.

Following the close of evidence, Ms. Rodriguez moved for judgments of acquittal, which the court ultimately denied. ER:1460.

As to the drug conspiracy count, the court instructed the jury: "If you

find a defendant guilty of Count Eleven of the indictment, you are then to determine whether the government proved beyond a reasonable doubt that it was *reasonably foreseeable to that defendant that the amount of methamphetamin[e] involved in furtherance of the drug conspiracy* equaled or exceeded certain weights." ER:1896 (emphasis added)

The special verdict form further stated: "We, the Jury, further unanimously find that it was within the scope of defendant's agreement with her co-conspirators *or* reasonably foreseeable to the defendant [] that the overall drug conspiracy would involve . . . at least 50 grams of methamphetamine." ER:1909-10, 1913-14 (emphasis added).

Ultimately, the jury convicted on all counts, and found Ms. Rodriguez responsible for more than 50 grams of methamphetamine. ER:1909-10, 1913-14. The court sentenced Ms. Rodriguez to 168 months. ER:1992.

C. The appeal.

On appeal, Ms. Rodriguez argued the evidence was insufficient to support her conviction for conspiracy to distribute a controlled substance and the drug quantity finding because the government failed to prove she *knew* the drug type and quantity. AOB:44-47. She further contended the jury instructions and verdict forms also failed to include the necessary mens rea elements. AOB:45.

The court of appeals rejected her argument. Based on its decision in *United States v. Collazo*, 984 F.3d 1308, 1319 (9th Cir. 2021) (en banc), the court held that the government was required to prove only that "the conspiracy involved a specific drug quantity and type," not that Ms. Rodriguez knew the type and quantity involved or that it was foreseeable to her. App A at 6. And because there was strong evidence that "the drug distribution conspiracy involved more than 50 grams of methamphetamine," it affirmed the conspiracy conviction and drug quantity finding. *Id.*

This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

This case presents an opportunity to resolve a 3-9 split among the circuits about what must be proven for mandatory minimum sentences to apply in drug conspiracy cases.

Drug offenses are the "second most common federal crimes" and "over half (66.9%) of all drug trafficking offenders were convicted of an offense carrying a mandatory minimum penalty." Glenn R. Schmitt & Amanda Russell, The United States Sentencing Commission, *Fiscal Year 2020: Overview of Federal Criminal Cases* (April 2021) *available at* www.ussc.gov. This case presents an opportunity to resolve a 3-9 split among the circuits about what must be proven for those mandatory minimum sentences to apply in conspiracy cases.

All but three courts of appeals agree that the harsh sentencing provisions enshrined in sub-sections 841(b)(1)(A) and (b)(1)(B) require *some* form of mens rea in relation to the drug type and quantity. *See e.g.*, *United States v. Ellis*, 868 F.3d 1155, 1170 (10th Cir. 2017) (jury must find drug type and quantity were both "within the scope of [defendant's] agreement and reasonably foreseeable to him" (quotation mark omitted)); *United States v. Stoddard*, 892 F.3d 1203, 1221 (D.C. Cir. 2018) ("'Reasonable foreseeability' shapes the outer bounds of co-conspirator liability").

However, the Sixth, Ninth, and Eleventh Circuits have adopted a strict-liability, "conspiracy-wide approach." *Stoddard*, 892 F.3d at 1220. In those circuits, the enhanced sentencing provisions of sub-sections 841(b)(1)(A) and (b)(1)(B) apply without any showing that the person sentenced knew, intended, or could reasonably foresee that the conspiracy involved drug types and quantities that might trigger the enhanced sentences. *See United States v. Robinson*, 547 F.3d 632, 639 (6th Cir. 2008); *Collazo*, 984 F.3d at 1336; *United States v. Colston*, 4 F.4th 1179, 1189 (11th Cir. 2021).

Additionally, to obtain a conviction for conspiracy, the government must prove the defendant harbored a specific intent "that *some conspirator* commit each element of the substantive offense." *Ocasio v. United States*, 578 U.S. 282, 292 (2016) (emphasis original). Thus, this case presents an opportunity to

resolve an important question of federal law which has sharply divided judges and about which the court below is wrong. As the dissent in *Collazo* persuasively argued, drug type and quantity are elements of the "aggravated crime" of conspiracy to distribute the predicate amount. *Collazo*, 984 F.3d at 1337 (Fletcher, J., dissenting). Since there is a strong presumption Congress "intends to require a culpable mens rea as to every element of a crime," the mens rea in § 841(a) applies to the drug types and quantities set forth in § 841(b)(1). *Id.* A slim, 6-5 majority of the Ninth Circuit disagreed.

Only this Court can correct the Ninth Circuit's error. Accordingly, the Court should grant certiorari. Doing so would end the disparate and sometimes haphazard application of harsh minimum-mandatory sentences, restore uniformity amongst the circuit courts on this issue, and correct the error of the Ninth Circuit below.

I. The Courts of Appeals Are Divided Over the Mens Rea Required to Trigger Escalating Minimum and Maximum Sentences in Cases Charging Conspiracy to Commit a Violation of 21 U.S.C. § 841.

"The circuits are split on whether an individualized jury finding as to the quantity of drugs attributable to (*i.e.*, foreseeable by) an individual defendant is required to trigger a mandatory minimum, or if it is sufficient for the jury to find that the conspiracy as a whole resulted in distribution of the mandatory-

minimum-triggering quantity." *Stoddard*, 892 F.3d at 1219; *Collazo*, 984 F.3d at 1335. "The difference is subtle but important." *Stoddard*, 892 F.3d at 1219.

The Dominant View. The First through Fifth, Seventh, Eighth, Tenth, and D.C. Circuits require an individualized finding that the quantity and type of drug triggering a mandatory minimum sentence were *at least* foreseeable to the defendant. *See Pizarro*, 772 F.3d 284, 293-94 (1st Cir. 2014) (jury must find it was "foreseeable to the defendant"); *United States v. Adams*, 448 F.3d 492, 499 (2d Cir. 2006) ("we require proof that this drug type and quantity were at least reasonably foreseeable to the co-conspirator defendant"); *United States v. Williams*, 974 F.3d 320, 364-65 (3d Cir. 2020) (quoting *Pinkerton v. United States*, 328 U.S. 640, 648 (1946)) ("A 'ramification of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement' does not bind the co-conspirator. . . . These principles inform the extent of a defendant's sentencing exposure under § 846"); *United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005) ("for purposes of setting a specific threshold drug quantity under § 841(b), the jury must determine what amount of [the specific substance] was attributable to [defendant] using *Pinkerton* principles"); *United States v. Haines*, 803 F.3d 713, 741 (5th Cir. 2015) ("the amount which each defendant knew or should have known was involved in the conspiracy"); *United States v. Seymour*, 519 F.3d 700, 710-13 (7th Cir. 2008)

("a criminal defendant convicted of a drug trafficking conspiracy is liable for the reasonably foreseeable quantity of drugs sold by his or her co-conspirators"); *United States v. Littrell*, 439 F.3d 875, 881 (8th Cir. 2006) ("responsible for all reasonably foreseeable drug quantities that were in the scope of the criminal activity that he jointly undertook"); *United States v. Ellis*, 868 F.3d 1155, 1177 (10th Cir. 2017) (mandatory minimums apply "so long as the amount is within the scope of the conspiracy and foreseeable" to defendant); *Stoddard*, 892 F.3d at 1221 (citing *Pinkerton*, 328 U.S. at 647-48) ("It is a core principle of conspiratorial liability" that defendants are liable only where acts were reasonably foreseeable to the defendant").

Several circuits require more. *United States v. Williams*, 974 F.3d 320, 365 (3d Cir. 2020) (collecting cases requiring proof the type of drug and quantity were both "reasonably foreseeable" *and* "within the scope of the agreement").

Thus, most circuits have concluded that Congress did not intend escalating mandatory-minimum and maximum sentences to apply to low-level conspirators who lack sufficient knowledge, intent, and position from which to reasonably foresee the conspiracy's scope. *See e.g. United States v. Martinez*, 987 F.2d 920, 925-26 (2d Cir. 1993) (Congress did not intend § 846 to enhance sentences "where an individual small-time dealer becomes associated with a

large-scale conspiracy"); *Ellis*, 868 F.3d at 1175 (street-level dealer who "knew no one in the chain above his street supplier" could not automatically be sentenced based upon hundreds of kilograms of cocaine attributable to entire Mexican cartel).

The Sixth, Ninth, and Eleventh Circuits. The Sixth, Ninth, and Eleventh Circuits, by contrast, permit mandatory-minimum sentences based upon the drug type and aggregate quantity linked to the entire conspiracy—without regard to whether the sentenced conspirators intended or could reasonably foresee the controlled substance and scale involved. *Robinson*, 547 F.3d at 639; *Collazo*, 984 F.3d at 1336; *Colston*, 4 F.4th at 1189.[3]

The Sixth Circuit first held that the principles enshrined in *Pinkerton* only apply when examining criminal liability for the substantive offenses of co-conspirators, but not where liability for the conspiracy itself is concerned. *Robinson,* 547 F.3d at 638-39. It reasoned that § 841(b)(1)(A) imposes mandatory sentences for "'a violation' - including a conspiracy - 'involving' certain threshold amounts of drugs," without reference to any mens rea. *Id.* at

[3] Even the government has sometimes conceded that this approach is not correct. *See Stoddard*, 892 F.3d at 1210 (government agreed in district court that conspiracy-wide drug quantity finding was insufficient to trigger mandatory-minimum sentences); *Ellis*, 868 F.3d at1178 n.30 (collecting similar concessions).

639. Thus, in the Sixth Circuit's view, every conspirator is subject to the same harsh sentences, so long as the conspiracy involves aggregate quantities of specific drugs triggering the statute's escalating penalties.

The Ninth Circuit's *en banc* opinion in *Collazo* – upon which the decision below is based – agreed with the *Robinson* panel that "the rule of coconspirator liability for substantive offenses in *Pinkerton* does not apply to the liability determination for a § 846 conspiracy offense." *Collazo*, 984 F.3d at 1335. Before reaching that holding, the Ninth Circuit concluded that the Government is not required to prove "the defendant's knowledge of (or intent)" in relation to drug type and quantity when pursuing a mandatory-minimum sentence for a substantive violation of § 841. *Id.* at 1329. With that holding in mind, the Ninth Circuit found that a conspiracy charge requires nothing more than "the requisite intent necessary for a § 841(a) conviction." *Id.* Thus, in the *en banc* majority's view, mandatory-minimum and heightened-maximum sentences apply so long as the jury makes a finding that the entire conspiracy involved the predicate drug type and quantities necessary—without regard to an individual defendant's knowledge or intent.

Last year, the Eleventh Circuit joined the Sixth and Ninth Circuits on this issue. But the Eleventh Circuit's decision does not discuss *Pinkerton*. Rather, in the Eleventh Circuit's view, the matter is resolved by the fact that

"unlike § 841(a)(1), § 841(b) has no mens rea requirement. The § 841(b) penalties are based on only the type and quantity of drug 'involved,' not on what the defendant knew." *United States v. Colston*, 4 F.4th 1179, 1188 (11th Cir. 2021). Besides distinguishing prior cases in that circuit upon which the defendant there relied, *Colston* offers little new analysis.

This issue is now ripe for resolution. Every circuit has reached a reasoned decision in conflict with other circuits; and the divide has persisted for more than a decade. *Cf. United States v. Irvin*, 2 F.3d 72, 76 (4th Cir. 1993) ("the most reasonable interpretation of the relevant statutory provisions requires a sentencing court to assess the quantity of narcotics attributable to each coconspirator by relying on the principles set forth in *Pinkerton*") *with Robinson,* 547 F.3d at 639 (opposite).

Lamenting the Sixth Circuit's approach and noting "[t]here is a split in the circuits on the issue," Judge Rogers suggested in 2016 that the Sixth Circuit may take the matter *en banc*. *United States v. Gibson*, No. 15-6122, 2016 WL 6839156, at *2 (6th Cir. Nov. 21, 2016), *reh'g en banc granted, opinion vacated,* 854 F.3d 367 (6th Cir. 2017), *and on reh'g en banc,* 874 F.3d 544 (6th Cir. 2017). But when the Sixth Circuit did so, it "divid[ed] equally," leaving *Robinson* undisturbed. *Stoddard*, 892 F.3d at 1220.

The split among circuits has only grown more pronounced. In the past

four years, the four circuits to consider the issue (including the *en banc* Ninth Circuit) have divided equally. *See Williams*, 974 F.3d at 365 (*Pinkerton's* "principles inform the extent of a defendant's sentencing exposure under § 846"); *Collazo*, 984 F.3d at 1335 (*Pinkerton* "is irrelevant to a defendant's liability for conspiracy"); *Colston*, 4 F.4th at 1188 ("penalties are based on only the type and quantity of drug 'involved,' not on what the defendant knew); *Stoddard*, 892 F.3d at 1221 ("'Reasonable foreseeability' shapes the outer bounds of co-conspirator liability").

And, whereas the D.C. Circuit once expressed hope that this Court's decision in *Alleyne v. United States*, 570 U.S. 99, 113 (2013), would help settle the matter, *Stoddard*, 892 F.3d at 1220-21, the Ninth Circuit's *Collazo* decision demonstrates that those hopes were misplaced. Only this Court can bring uniformity to the law. And it should do so now.

II. A Defendant Is Not Subject to § 841(b)'s Increased Sentences Where He Does Not Know the Drug Type or Minimum Quantity Involved.

This Court should also grant certiorari to resolve the foundational question which divided the *en banc* Ninth Circuit 6 to 5: whether knowledge of the controlled substance type and quantity is an element of the substantive aggravated offenses set forth in sub-sections 841(b)(1)(A) and (b)(1)(B). The fundamental divide within the Ninth Circuit about the presumption of mens

rea itself warrants review, no matter which side prevails. But granting certiorari is particularly vital here, because the Ninth Circuit's cramped understanding contravenes this Court's precedent and undermines the historical role of mens rea in fitting the punishment to the crime.

If the 6-5 opinion below is allowed to stand, defendants may face "years of mandatory imprisonment ... based on a fact [they] did not know." *See United States v. Burwell*, 690 F.3d 500, 528 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (describing the effect of strict liability for aggravated firearms offenses). That result cannot be squared with this Court's precedent.

1. *Apprendi, Alleyne,* and *Rehaif* have placed the required mens rea for aggravated controlled substance distribution in doubt.

In the 1980's, the Court drew a distinction between "elements" and "sentencing factors." The former defined the crime. *McMillan, v. Pennsylvania*, 477 U.S. 79, 85-86 (1986). Under *McMillan*, however, § 841's drug type and quantity provisions were sentencing factors, not elements. *See, e.g., United States v. Gibbs*, 813 F.2d 596, 599 (3d Cir. 1987); *United States v. Powell*, 886 F.2d 81, 85 (4th Cir. 1989); *United States v. Wood*, 834 F.2d 1382, 1390 (8th Cir. 1987).

During that era, several circuits concluded that no mens rea applied to drug type and quantity. These pre-*Apprendi* opinions often echoed 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. de Velasquez*, 28 F.3d 2, 4-5 (2d Cir. 1994) (the quantity "forms no part of the substantive offense"); *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)); *United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir. 1988) (adopting *Normandeau's* reasoning).

Starting in the year 2000, however, the Court began to leave behind *McMillan's* 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. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). 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) are elements of an aggravated drug offense. *See Burrage v. United States*, 571 U.S. 204, 209-10 (2014).

In the wake of *Apprendi* and *Alleyne*, some circuit judges concluded that

a "knowing" mens rea should attach to those elements. Sixth and Ninth Circuit panels divided 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. *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Using the correct rule, the Court held that the "knowingly" mens rea in 18 U.S.C. § 924(a)(2) extended to the prohibited status elements in 18 U.S.C. § 922(g). *Id.* at 2195-99. Like the drug-type-and-quantity cases, *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).

2. It was in *Rehaif*'s wake that the *en banc* Ninth Circuit

reconsidered the question presented here. *See Collazo*, 984 F.3d 1308. The majority held that mens rea presumptively applies only to "the statutory elements that criminalize otherwise innocent conduct." *Id.* at 1324 (quoting *Rehaif*, 139 S. Ct. at 2195). Furthermore, in the majority's view, the presumption of mens rea applies less forcefully when the "element" was only recognized as such "to save the statute from unconstitutionality." *Id.* at 1322 (simplified). Since constitutional imperatives forced such a construction, the majority believed that drug type and quantity should be "treat[ed] ... as elements under section 841(b)(l) only for these constitutional purposes," but not when applying the presumption of mens rea. *Id.* at 1322 (emphasis added). In the majority's view, "where a statute includes a[n] [express] mens rea requirement," as § 841(a) does, the interpreting court need not assess "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.*, 984 F.3d at 1324 & n.17.

3. However, Judge Fletcher's dissenting opinion more naturally follows from this Court's precedent in *Apprendi*, *Alleyne*, and *Rehaif*.

First, the Court has rejected the Ninth Circuit majority's view that the presumption of mens rea serves only to distinguish innocent from culpable conduct. *See Flores-Figueroa v. United States*, 556 U.S. 646 (2009). *Flores-*

Figueroa considered whether an aggravated form of identity theft required knowledge that a fake I.D. 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. "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* 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. Then-Judge Kavanaugh's dissent from *United States v. Burwell*, helps explain the majority's error below.

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 argued 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)—are presumed to carry some mens rea.

For both the *Collazo* dissent and the *Burwell* dissent, the enhancements' severe consequences reinforce that interpretation. *Collazo*, 984 F.3d at 1338 (Fletcher, J., dissenting); *Burwell*, 690 F.3d at 547-48 (Kavanaugh, J., dissenting). The harsh penalties enshrined in § 841 militate in favor of applying "normal scienter principles" to different portions of the statute. *Ruan v. United States*, 142 S. Ct. 2370, 2380 (2022). But the penalties need not be extreme to trigger a presumption of mens rea. The Court has deemed 10-, 5-, and even 1-year statutory maxima to disrupt any inference of strict liability. *See Staples v. United States,* 511 U.S. 600, 616 (1994); *United States v. U.S. Gypsum Co.,* 438 U.S. 422, 442 n.18 (1978); *Morissette v. United States,* 342 U.S. 246, 248 n.2 & 260 (1952).

Nonetheless, the penalty difference between degrees of aggravation can

be far more dramatic, like the 10-, 20-, and even 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).

Second, contrary to the majority's reasoning below, facts that increase punishment are bona fide elements—and not by virtue of a constitutional fiction.[4] "A long line of essentially uniform authority addressing accusations,

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[4] 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). It 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.

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.[5]

In fact, recently, the Court observed that some statutory requirements are "sufficiently like an element" to trigger the same presumption of mens rea unless there is evidence that "Congress intended to do away with, or weaken, ordinary and longstanding scienter requirements." *Ruan,* 142 S. Ct. at 2380. Thus, even if the drug types and quantities triggering enhanced penalties in §

[5] 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).

841(b)(1) were second-class elements as the Ninth Circuit majority held in *Collazo*, 984 F.3d at 1322, it would not resolve the question of whether the presumption of mens rea applies.

Third, the presumption of mens rea does not evaporate when a statute includes an express mens rea. To the contrary, "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) 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

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: October 18, 2022

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