No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SALINAS,
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

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

Counsel for Petitioner

QUESTION PRESENTED

Whether, to prove conspiracy to distribute a controlled substance triggering mandatory-minimum and increased-maximum penalties, the government must prove knowledge of drug type and quantity, or at least some form of mens rea.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

- *United States v. Salinas*, No. 16-cr-00390, U.S. District Court for the Central District of California. Judgment entered Nov. 22, 2021.
- *United States v. Salinas*, No. 20-50182, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 21, 2023, Petition for Rehearing Denied September 27, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Salinas respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States court of appeals appears at Appendix-1 and is unpublished.

JURISDICTION

Petitioner was convicted of violating of 18 U.S.C. § 1962(d) and 21 U.S.C. §§ 841 and 846, in the United States District Court for the Central District of California. The United States Court of Appeals for the Ninth Circuit reviewed his convictions under 28 U.S.C. § 1291, and denied a petition for rehearing on September 27, 2023. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

21 U.S.C. § 846

21 U.S.C. 841

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 841 provides, in relevant part:

(a) [I]t shall be unlawful for any person knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

(b) [A]ny person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving – [llisting controlled substance types and quantities] . . .

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . .

Such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life[.] . . .

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture of substance containing a detectable amount of heroin;

. . . [listing controlled substances and quantities]

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years[.]

STATEMENT OF THE CASE

Generally, a person who "knowingly or intentionally" distributes any quantity of a schedule I or II controlled substance may be sentenced to prison. 21 U.S.C. §§ 841(a); (b)(1)(C) (twenty-year maximum). But harsh mandatory-minimum sentences (and significantly higher maximum sentences) apply if the government proves additional facts about the type and quantity of the controlled substance. *See*, *e.g.*, 21 U.S.C. § 841(b)(1)(A) (requiring sentence of ten years to life when offense involves at least 50 grams of methamphetamine). "[T]he core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Alleyne v. United States*, 570 U.S. 99, 113 (2013). This case concerns what must be proven to demonstrate a conspiracy to commit an aggravated controlled substance offense.

The Court has traditionally limited coconspirators' liability based upon the "scope" of their criminal agreement, *Pinkerton v. United States*, 328 U.S. 640, 648 (1946), such that "each conspirator must have specifically intended that some conspirator commit each element of the substantive offense," *Ocasio v. United States*, 578 U.S. 282, 292 (2016) (emphasis original).

The government charged Petitioner with conspiracy to distribute methamphetamine and heroin, alleging amounts that would trigger minimum and maximum sentences depending on the amount of drugs the jury found were involved in the conspiracy. Petitioner could face between ten years and life, or he could face between five and 40 years, depending on the jury's finding. Petitioner was subject to

those sentences even though the jury never found that petitioner knew, agreed to, or intended for those particular drugs or amounts to be distributed.

The question presented in this case, and the question over which the Circuits are divided, is what defendant-specific jury findings are necessary in relation to drug type and quantity where the government hopes to prove an aggravated form of conspiracy to distribute a controlled substance.

1. The government accused Petitioner of being a member of the Canta Ranas street gang in California. It alleged Petitioner was a "foot soldier" in the organization, smuggling drugs into the prison where he was incarcerated, selling the drugs for profits to further the gang's activities, and then transferring the profits to others outside of prison so they could be used by the gang. He was charged with RICO conspiracy, *see* 18 U.S.C. § 1962(d), and conspiracy to possess with intent to distribute and distribute at least 5 or 50 grams of methamphetamine, and at least one kilogram or 100 grams of heroin, in violation of 21 U.S.C. §§ 846, 841 (a)(1), (b)(1).

Petitioner argued that the jury needed to be instructed for this charge that the defendants had to know "the type and amount or weight of the controlled substance distributed." The district court overruled this objection, and instructed the jury, in relevant part:

> The defendants are charged in Count Eleven of the indictment with conspiracy to distribute controlled substances. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> (1) Beginning on an unknown date and ending on or about October 18, 2017, there was an agreement between two or more persons to

> distribute, or possess with intent to distribute, a controlled substance; and
> (2) the defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose.

The jury was also asked to make special findings regarding drug quantity:

> 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 methamphetamine and the amount of heroin involved in furtherance of the drug conspiracy equaled or exceeded certain weights.
>
> …
>
> The government does not have to prove that a defendant knew the quantity of methamphetamine or heroin.

After a nine-day trial, the jury convicted Petitioner, along with one co-defendant accused of being the gang's "secretary," of both counts. The jury made special findings for the drug conspiracy, finding it was within the scope of the agreement and reasonably foreseeable to Petitioner that the overall drug conspiracy would involve at least 5 grams of methamphetamine and 100 grams of heroin. This meant he was subject to a mandatory-minimum sentence of five years, and a maximum sentence of 40 years. *See* 21 U.S.C. § 841(b)(1)(B)(i), (viii). Petitioner was sentenced to 292 months (or a little more than 24 years) for the drug conspiracy, concurrent with a 292-month sentence for the RICO conspiracy.

2. Petitioner appealed to the Ninth Circuit. Relevant here, he argued that the jury was improperly instructed that Petitioner didn't have to agree to the quantity and drug type, and that he didn't have to know the quantity or type of drugs involved

in the drug conspiracy. Because the statutory minimum and maximum penalties turned on the drug type and quantity involved, he argued, they were elements of the aggravated offense under this Court's caselaw in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), so the "knowingly" mens rea applied to these elements.

The Ninth Circuit rejected Petitioner's argument, finding any error in the jury instructions did not warrant reversal. App-7. The court relied on its existing precedent, in *United States v. Collazo*, 984 F.3d 1308, 1318-19 (9th Cir. 2021) (en banc), to reject Petitioner's argument. *See* App-7. In *Collazo*, a divided *en banc* panel had held that it is not necessary for the government to prove that defendants know the type or drug quantity for a drug conspiracy charge. 984 F.3d at 1336 (the "government does not have to prove that the defendant had any knowledge or intent with respect to" drug type or quantity). It is also not necessary for the government to prove that the type or quantity were reasonably foreseeable to individual conspirators or within the scope of their own agreement. *Id.* at 1335. All the government must prove is that the defendant agreed with others that some member of the conspiracy would commit an § 841 offense, and that the defendant had the requisite mens rea for the underlying offense. *Id.* at 1320.

REASONS FOR GRANTING THE PETITION

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 at least *some* measure 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 even could reasonably foresee that the conspiracy involved drug types and quantities that might trigger the enhanced sentences. *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).

Yet, 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 that has sharply divided judges and about which the Ninth Circuit decision in this case 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. *See* 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.*

The Court should grant certiorari here. 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 mandatory sentences in cases charging conspiracy to commit a violation of 21 U.S.C. § 841.

1. As both the Ninth and D.C. Circuits have observed, "[t]he 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 United States v. 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. *See Williams*, 974 F.3d at 365 (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). Rather, the majority view is that Congress intended § 846 to incorporate the "well-established principles" of conspiracy liability described in *Pinkerton*. *See Williams*, 974 F.3d at 364 (quoting *Salinas v. United States*, 522 U.S. 52, 63 (1997)). One such principle expands criminal liability to the

actions of co-conspirators, but "contains its own limiting principle: the act must be 'done in furtherance of the conspiracy,' or 'fall within the scope of the unlawful project.'" *Id.* at 364 (quoting *Pinkerton*, 328 U.S.at 647-48); *see also United States v. Irvin*, 2 F.3d 72, 77 (4th Cir. 1993) (the legislative history of § 846 indicates Congress intended to incorporate *Pinkerton*'s principles rather than "reject application of a standard of reasonable foreseeability").

Amending § 846 to state that conspirators "shall be subject to the same penalties as those prescribed for the offense," Congress sought to ensure "higher echelon ringleaders" were punished at least as harshly as lower-level dealers based upon substantive-offense liability principles enshrined in *Pinkerton*. *Martinez*, 987 F.2d at 925. But Congress did not intend to increase punishments for low-level conspirators. At bottom, the prevailing view of the circuits is that no person may be sentenced to harsh mandatory-minimum and maximum sentences for conspiring to distribute controlled substances unless the predicate drugs and quantities fell within "the fair import of the concerted purpose or agreement as he understands it." *Williams*, 974 F.3d at 363 (quoting *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, J.)).

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 knew, 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.[1]

The Sixth Circuit first held that the principles enshrined in *Pinkerton* only apply when examining criminal liability for the substantive offenses of coconspirators, 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 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*, which the court relied upon to reject Petitioner's argument below, 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

---

[1] 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 1155, 1178 n.30 (10th Cir. 2017) (collecting similar concessions).

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.

Recently, 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.

2. This issue is ripe for resolution. Every circuit has now reached a reasoned decision in conflict with other circuits; and the divide has persisted for more than a decade. *Cf. Irvin*, 2 F.3d at 76 ("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, *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 five years, the four circuits to consider the issue (including the *en banc* Ninth Circuit in *Collazo*) 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"). In fact, 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 decision in *Collazo* and Petitioner's case demonstrates that those hopes were misplaced.

II. A defendant is not subject to § 841(b)'s increased sentences where he does not know the drug type or quantity involved.

This Court should also grant certiorari to resolve the foundational question which divided the en banc Ninth Circuit 6 to 5 in *Collazo*: 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 of the presumption contravenes this Court's precedent and undermines the historical role of mens rea in fitting punishment to crime. If the court's reasoning in *Collazo* persists, 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 1980s, 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 court of appeals 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 84l(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.* at 1324 & n.17.

3. However, Judge Fletcher's dissenting opinion in *Collazo* 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. *United States v. Burwell*, 690 F.3d 500, 544 (D.C. Cir. 2012) (en banc) (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* 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 *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) here—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 in *Collazo*, facts that increase punishment are bona fide elements—and not by virtue of a constitutional fiction.[2] "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

---

[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). 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.

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.[3]

Recently, in fact, the Court, while examining the same criminal statute at issue here, 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 § 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

---

[3] 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).

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

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

Date: December 26, 2023

Respectfully submitted,

KRISTI A. HUGHES
Law Office of Kristi A. Hughes
P.O. Box 141
Cardiff, California 92007
Telephone: (858) 215-3520

Counsel for Petitioner