No.

IN THE SUPREME COURT OF THE UNITED STATES

ERIC SCHMIDT,

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 the presumption of mens rea only applies to elements that criminalize otherwise innocent conduct or instead also applies to elements that increase statutory minimum and maximum penalties.

2. Whether a knowingly or recklessly mens rea applies to the elements of drug type and quantity establishing mandatory minimum and enhanced maximum sentences under 21 U.S.C. § 841.

STATEMENT OF RELATED CASES

- *United States v. Eric Schmidt*, No. 22CR00174-SB, U.S. District Court for the Central District of California. Judgment entered March 1, 2023.

- *United States v. Eric Schmidt*, No. 23-334, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 31, 2024.

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INTRODUCTION

The principal federal drug law prohibits "knowingly or intentionally" distributing or possessing with intent to distribute a controlled substance. 21 U.S.C. § 841(a). In the Anti-Drug Abuse Act of 1986, Congress amended the statute to add an escalating series of mandatory-minimum and maximum prison sentences based on drug type and quantity. *See* Pub. L. No. 99-570, 100 Stat. 3207 (1986). For example, drug type and quantity can increase the minimum term from zero to ten years, and the maximum from a one-year misdemeanor to life in prison. *See* 21 U.S.C. § 841(b). This Court has described the 1986 changes as having "redefined the offense categories," and it has stated that § 841(a) is a "lesser included offense" of § 841(b)(1). *Burrage v. United States*, 571 U.S. 204, 209 and n.3 (2014). Likewise, this Court has clarified that facts determining both mandatory minimum and enhanced maximum sentences, like those in § 841(b), 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).

This petition presents a threshold and far-reaching question of statutory interpretation that has divided the lower courts – does the presumption of mens rea apply to elements like those in § 841(b) that dramatically increase the statutory penalties, or is the presumption instead limited to elements that distinguish

criminal from otherwise innocent conduct. 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 to elements that distinguish criminal from innocent conduct. 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 suggested, the mens rea presumption "should apply in those cases as well, given the presumption's historical foundation and quasi-constitutional if not constitutional basis." *Id.* While exceptionally reasoned, Justice Kavanaugh's opinion is the minority view in the lower courts, and it has only been adopted by the First Circuit. *See United States v. Perez-Greaux*, 83 F.4th 1, 17-19 (1st Cir. 2023). This Court should grant review to resolve the conflict on this important principle of statutory construction, as the majority view is inconsistent with the history and tradition standing as the foundation for the mens rea presumption.

This Court should also grant review to resolve the specific question of whether a knowingly or at least recklessly mens rea applies to the elements of drug type and quantity under § 841. Although the lower courts have unanimously held that there is no mens rea for drug type and quantity, that rule is based on the view that the mens rea presumption does not apply, and several judges have expressed

sharp disagreement. *See United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*) (6-5 decision); *United States v. Dado*, 759 F.3d 550 (6th Cir. 2014) (split decision). If the mens rea presumption does apply, the principles set forth in a long line of this Court's precedent, including the recent analysis of § 841 in *Ruan v. United States*, 597 U.S. 450 (2022), dictate that the presumption has not been rebutted. This Court should grant review.

OPINION BELOW

The decision below can be found at *United States v. Schmidt*, No. 23-334, 2024 WL 3594381 (9th Cir. July 31, 2024).

JURISDICTION

The court of appeals filed its memorandum opinion on July 31, 2024. App. 1.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

A complete version of 21 U.S.C. § 841 is set forth at App. 6-15. The initial part of the statute reads as follows:

> (a) Unlawful acts
>
> > Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

[1] "App." refers to the Appendix. "ER" refers to the Excerpts of Record in the Ninth Circuit. "CR" refers to the Clerk's Record (district court docket number).

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

> Except as otherwise provided in sections 849, 859, 860, or 861 of this title, any 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 – . . . .

STATEMENT OF THE CASE

In September of 2021, federal agents took custody of a package that had been returned to the post office in Llano, California. 2-ER-268-90. Agents obtained a search warrant and discovered that the package contained a brick of fentanyl weighing approximately one kilogram. *Id.* The brick was wrapped in several layers of packaging and other items, which were contained within at least two other boxes or outer packaging materials. *Id.* Agents conducted a fingerprint analysis on the packaging materials and obtained prints belonging to petitioner. *Id.*

On June 30, 2022, agents executed a search warrant at petitioner's residence. 2-ER-291-99. They also arrested and interviewed petitioner, although they did not record the interview. *Id.* Whether petitioner confessed during the interview was ultimately contested vigorously at trial, but it was undisputed that he admitted heat-

sealing some of the outer packaging and sending the package. *Id.* He stated that a person named Oscar gave him a plastic-wrapped package and paid him cash to mail the package. *Id.* Although the agents' testimony differed (and this point was hotly contested at trial), they maintained that petitioner admitted that he knew the package contained "drugs" when he sent it. *Id.* He also stated that Oscar later approached him to mail a second package, but he asked Oscar what the package contained, and when Oscar informed him that it contained fentanyl, he declined to mail the second package. *Id.*

On July 20, 2022, a grand jury in the Central District of California returned an indictment charging petitioner with possessing fentanyl with intent to distribute in violation of 21 U.S.C. § 841. 1-ER-251-52. The indictment alleged that petitioner "knowingly and intentionally possessed with intent to distribute at least 400 grams, that is, approximately 1,008.2 grams, of a mixture and substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide ('fentanyl'), a Schedule II narcotic drug controlled substance." *Id.* Before trial, the district court rejected petitioner's claim that the government had to prove that he knew the type and quantity of controlled substance that he possessed with intent to distribute. CR 41; 1-ER-243-50; 2-ER-386-88.

At trial, the main dispute focused on whether petitioner knew the package contained a controlled substance and thus whether he actually confessed to such

knowledge during the unrecorded interrogation. Two government agents testified that they interviewed petitioner at the time of his arrest, but their testimony about the alleged confession differed; one agent stated that petitioner admitted that he thought the package contained methamphetamine, while the other agent testified that petitioner thought the package contained "drugs." 1-ER-349, 366-67, 370; 2-ER-298, 332. Meanwhile, petitioner also testified, and, while he admitted packaging and sending the parcel, he asserted that he did not know that it contained a controlled substance. 1-ER-98-112. Petitioner denied that he made such an admission during the interrogation. 1-ER-110.

The jury instructions did not require the jury to find that petitioner had knowledge or any type of mens rea regarding the type and quantity of controlled substance. 1-ER-11. Over objections, CR 41; 1-ER-243-50; 2-ER-386-88, the district court instructed that the government only had to prove that "the defendant knowingly possessed any controlled substance" and that "[i]t does not matter whether the defendant knew that the substance was fentanyl" because "[i]t is sufficient that the defendant knew that it was some kind of a federally controlled substance." 1-ER-11. Likewise, the instructions stated that the "government does not have to prove that the defendant knew the quantity of fentanyl." *Id.* The prosecutor emphasized in summations that "it does not matter whether defendant Schmidt knew that the substance was specifically fentanyl." 1-ER-141-42.

The jury ultimately returned a guilty verdict on the single count charged and also returned a finding that the offense involved at least 400 grams of fentanyl. 1-ER-165. Before sentencing, the government filed a motion to strike the 10-year mandatory minimum penalty charged under 21 U.S.C. § 841(b). CR 65. The district court granted the motion and imposed a sentence of 70 months in custody and three years of supervised release. 2-ER-254.

On appeal, petitioner contended that, given the jury instructions' failure to include any mens rea regarding the type and quantity of controlled substance involved, his sentence of 70 months in custody and three years of supervised release should be reversed with instructions to apply a maximum of one year in custody and one year of supervised release, the least onerous penalties under § 841(b). The Ninth Circuit rejected petitioner's claim, relying on its sharply divided opinion in *United States v. Collazo*, 984 F.3d 1308 (9th Cir. 2021) (*en banc*). App. 2. The Ninth Circuit explained that, under *Collazo*, the government need not prove that the defendant had knowledge or intent with respect to drug type and quantity under § 841(b). *Id.* The Ninth Circuit also concluded that this Court's subsequent opinion in *Ruan v. United States*, 597 U.S. 450 (2022) did not undermine *Collazo* and that *Collazo* also rejected petitioner's alternative claim that § 841(b) at least requires a recklessness mens rea as to drug type and quantity. App. 2.

ARGUMENT

I. The circuits are split on whether the presumption of mens rea only applies to elements that criminalize otherwise innocent conduct or instead also applies to elements that increase statutory minimum and maximum penalties, and this Court should settle this important question of statutory interpretation.

A. This Court's precedent has generated confusion

This Court's precedent arguably points in different directions regarding the reach of the mens rea presumption, which has led to conflict in the lower courts. Despite this confusion, petitioner maintains that the weight of this Court's precedent and long historical tradition demonstrate that the mens rea presumption is not limited to separating criminal from innocent conduct and instead also applies to critical facts that increase statutory minimum and maximum penalties.

The confusion mostly stems from two cases decided in 2009. In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), this Court interpreted the aggravated identity theft statute, 18 U.S.C. § 1028A, and addressed whether its "knowingly" mens rea meant that the defendant had to know that the identification he was using belonged to another actual person. In answering the question affirmatively, this Court 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." *Id.* at 652 (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).

Importantly, the aggravated-identity theft statute at issue in *Flores-Figueroa* added a two-year minimum penalty to an underlying criminal offense, like fraud or theft. *See* 18 U.S.C. § 1028A. In other words, the mens rea presumption was *not* applied in order to avoid criminalizing conduct that was otherwise innocent, as the statute only came into play if the defendant had engaged in another underlying crime. Instead, the presumption applied to a fact that added a two-year penalty to conduct that was already criminal.

In the same Term, this Court decided *Dean v. United States*, 556 U.S. 568 (2009), which considered a somewhat similar statute, 18 U.S.C. § 924(c), that added a mandatory penalty for possessing or using a firearm in an underlying drug or violent crime. Under the statute, if a gun is merely possessed or used in the underlying crime, the additional mandatory penalty is five years, but, if it is brandished or discharged, the additional penalties increase to seven and ten years respectively. This Court had previously determined that the brandish and discharge increases were merely "sentencing factors," not elements of the offense, and therefore did not have to be proved to a jury. *See Harris v. United States*, 536 U.S. 545 (2002).

Accordingly, in *Dean*, this Court held that the defendant did not have to

know that the gun would be brandished or discharged in order to trigger the higher penalties. This Court explained that no presumption of mens rea applied because brandishing and discharge were merely sentencing factors that apply to a defendant who "is already guilty of unlawful conduct twice over; a violent or drug trafficking offense and the use, carrying, or possession of a firearm in the course of that offense." *Dean*, 556 U.S. at 576.

Justice Stevens dissented, explaining that the brandishing and discharge facts should be treated as elements of the offense under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) given that they triggered increased minimum penalties, and he also explained that there is "no sensible reason" for treating *Apprendi* elements differently for purposes of the mens rea presumption. *See Dean*, 556 U.S. at 580-82 (Stevens, J., dissenting). Ultimately, his view was partially vindicated, as this Court overruled *Harris* a few years later, determining that brandishing and discharging a firearm were not simply "sentencing factors" under § 924(c) and instead were elements that had to be proved to the jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99 (2013).

This Court has not clarified whether *Dean* remains good law after *Alleyne*, nor has it resolved the tension between *Dean* and *Flores-Figueroa* regarding the

mens rea presumption.[2] This Court's more recent opinion in *Rehaif v. United States*, 588 U.S. 225 (2019) is a good example of the unclear state of affairs. In *Rehaif*, this Court cited the Model Penal Code when discussing the mens rea presumption, which 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[.]" *Id*. at 229 (quoting Model Penal Code § 2.02(4)) (emphasis added).[3]

Similarly, *Rehaif* stated that the mens rea presumption arguably applies with "greater force when Congress includes a general scienter provision in the statute itself." *Id.* This Court then 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), and, in doing so, overruled the unanimous view of the circuits holding that a defendant did not have to know of his prohibited status in order to be guilty of the § 922(g) offense. On the other hand, however, *Rehaif*

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[2] One possible way to harmonize the two is that *Flores-Figueroa* considered a statute that expressly included a "knowingly" mens rea, whereas *Dean* considered statutory language that did not contain any explicit scienter requirement.

[3] Elements relating to matters such as jurisdiction, venue, or statute of limitations are not material elements of the offense and therefore are not entitled to the mens rea presumption. *See* Model Penal Code § 1.13(10). Elements such as drug type and quantity qualify as "material elements."

also emphasized the importance of scienter "to separate wrongful from innocent acts." *Id.* at 231-32.

Accordingly, and as discussed below, the lower courts have cited *Rehaif* to support the two different views of the presumption. Justice Kavanaugh and the First Circuit believe that this Court's precedent does not limit the mens rea presumption to facts that criminalize otherwise innocent conduct. Other lower courts, however, disagree. This Court's guidance is needed.

B. Presumption – Justice Kavanaugh in *Burwell* and the First Circuit

The dispute in the lower courts regarding the reach of the mens rea presumption has manifested itself mostly in the context of the statute at issue here, § 841, and in the context of § 924(c). When he was on the D.C. Circuit, Justice Kavanaugh forcefully explained, in the context of § 924(c), that the mens rea presumption is not limited to distinguishing criminal from innocent conduct. *See United States v. Burwell*, 690 F.3d 500, 527-53 (D.C. Cir. 2012) (*en banc*) (Kavanaugh, J., dissenting).

At issue in *Burwell* was a provision of § 924(c) that carried a mandatory 30-year sentence for using a machinegun during a crime of violence or drug trafficking crime, and the question was whether the defendant had to know that the weapon had the characteristics of a machinegun. Unlike *Harris* (which was subsequently overturned in *Alleyne*), this Court had previously held that the use of

a machinegun was an element of the offense and not a mere sentencing factor. *See United States v. O'Brien*, 560 U.S. 218 (2010). Nevertheless, a majority of the D.C. Circuit concluded that such a mens rea was not required and explained that the mens rea presumption did not apply because the "Supreme Court developed the presumption in favor of *mens rea* for one particular reason: to avoid criminalizing otherwise lawful conduct." *Burwell*, 690 F.3d at 505.

Writing in dissent, Justice Kavanaugh explained that the mens rea presumption applied, even though the defendant was otherwise engaged in criminal conduct. He asserted that the majority's restriction on the mens rea presumption was "illogical in the extreme" and misread this Court's precedent, particularly *Flores-Figueroa*. *Burwell*, 690 F.3d at 529 (Kavanaugh, J., dissenting).

As Justice Kavanaugh recounted, in *Flores-Figueroa*, "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

[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).

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. Meanwhile, he criticized the majority in *Burwell* for relying on *Dean*, which was based on the understanding that the requisite findings to trigger increased minimum penalties under § 924(c) were sentencing factors, not elements of the offense. *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 sentencing factors and elements of the offense for purposes of the presumption of mens rea.").

Justice Kavanaugh also explained that a "fact is an element of the offense for mens rea purposes if Congress made it an element of the offense." *Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting). He noted that 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" under *Apprendi*. *Id.* He suggested: "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." *Id*.

While Justice Kavanaugh's opinion did not carry the day with the D.C. Circuit in *Burwell*, the First Circuit recently adopted his position in *United States v. Perez-Greaux*, 83 F.4th 1 (1st Cir. 2023). Like Justice Kavanaugh, the First Circuit rejected the government's argument that the mens rea presumption only applies to avoid criminalizing otherwise innocent conduct. *Id.* at 17-18. Relying on *Flores-Figueroa*, the First Circuit concluded that "it does not necessarily follow that the presumption *only* applies there and nowhere else." *Id.* at 17.

Citing several of this Court's cases, including *Rehaif*, the First Circuit explained that "the Supreme Court has made clear that 'the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" *Id.* at 18. "This is particularly true where the [fact at issue] can potentially result in a sixfold sentencing increase." *Id.* This observation applies with full force to § 841(b), which provides for minimum and maximum penalties that can far exceed a sixfold increase.

In sum, at least one current member of this Court and one Circuit believe that the mens rea presumption is not limited to distinguishing criminal from innocent conduct. As discussed below, several Circuits disagree.

C. The majority view – no presumption

The majority of the *en banc* panel of the D.C. Circuit in *Burwell* reasoned that the mens rea presumption is limited to distinguishing criminal from innocent conduct. *See Burwell*, 690 F.3d at 505. A majority of an *en banc* panel of another Circuit, the Ninth Circuit, took the same approach in the case that stands as the foundation for the decision under review here. *See United States v. Collazo*, 984 F.3d 1308, 1324-25 (9th Cir. 2021) (*en banc*).

The majority of the *en banc* panel in *Collazo* explained that "the scienter presumption does not apply to elements that do not separate innocent from wrongful conduct." *Id.* at 1325. The Ninth Circuit heavily relied on *Dean* and its statement that the defendant was already guilty of conduct twice over in reaching its conclusion. *Id.* The *Collazo* majority ignored that the fact at issue in *Dean* was considered a "sentencing factor" and not an element of the offense, a conclusion that was later overruled in *Alleyne*. Meanwhile, the five-judge dissent in *Collazo* relied on Justice Kavanaugh's dissent in *Burwell* and *Flores-Figueroa* to conclude that the presumption is not limited to separating innocent from criminal conduct. *Id.* at 1342-43 (Fletcher, J., dissenting).

Also when interpreting § 841, the Sixth and Eighth Circuits followed the *Collazo* majority's view that the mens rea presumption is limited to separating innocent from criminal conduct, relying on *Dean* and some of the language in

Rehaif. *See United States v. Edwards*, 111 F.4th 919, 929 (8th Cir. 2024); *United States v. Mahaffey*, 983 F.3d 238, 244-45 (6th Cir. 2020). As discussed below, the majority view restricting the mens rea presumption to elements that distinguish criminal from innocent acts is inconsistent with history and tradition.

D. History favors Justice Kavanaugh's view of the presumption

This Court should grant review because the approach taken by the majority of lower courts is flawed – the presumption of mens rea is not limited to distinguishing innocent from criminal conduct and should apply to elements that increase the minimum and maximum penalties "given the presumption's historical foundation and quasi-constitutional if not constitutional basis." *Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting). This is the long-established historical rule, and this rule should apply whether the elements are statutory-construction elements or *Apprendi* elements. *See O'Brien*, 560 U.S. at 241 (Thomas, J., concurring); *Dean*, 556 U.S. at 580-82 (Stevens, 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. Accordingly, the presumption of mens rea should apply to provisions that increase mandatory minimum and maximum penalties, particularly those provisions like the ones in § 841 that add many years and even decades of punishment.

The Model Penal Code reflects this tradition. The Model Penal Code applies the presumption to *all* material elements of the offense, *see Rehaif*, 588 U.S. at 229 (quoting Model Penal Code § 2.02(4)), and elements that ramp up minimum and maximum penalties are considered material elements of the offense. *See* Model Penal Code § 1.13(10). This Court has frequently relied on the Model Penal Code as reflecting "traditional understanding," and even when interpreting the statute at issue here, § 841(b). *Burrage*, 571 U.S. at 210-11.

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. Thus, the presumption should especially apply to so-called *Apprendi* elements. 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 majority of the Circuits have erred in concluding otherwise.

II. The prevailing view in the lower courts that § 841(b) does not require any mens rea as to drug type and quantity conflicts with the mens rea presumption and this Court's precedent.

A. The presumption of a knowingly mens rea should apply to § 841(b), and the presumption is not rebutted

Section 841(a) states: "Except as provided by this subchapter, it 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 . . . ." 21 U.S.C. § 841(a)(1).[5] Section 841(b) provides that "any person who violates subsection (a) of this section shall be sentenced as follows" and then lists multiple subsections that establish maximum and minimum penalties "[i]n the case of a violation of subsection (a) of this section involving" different types and quantities of controlled substances. 21 U.S.C. § 841(b). Those penalties can be as low as a maximum of one year in custody under § 841(b)(3) for controlled substances in schedule V, to a minimum of ten years and a maximum of life imprisonment for other substances under § 841(b)(1)(A). This Court should hold that the mens rea presumption applies to elements that increase

[5] 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). This Court has stated that "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)).

statutory minimum and maximum penalties like drug type and quantity in § 841(b), and therefore the statute's knowingly mens rea applies to those elements.[6]

If the strong mens rea presumption applies to elements like drug type and quantity, then it is clear that the language in § 841 and other principles of statutory construction do not rebut the presumption. 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

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[6] Section 841(a) sets forth a "knowingly or intentionally" mens rea. Arguably, "intentionally" is an even higher mens rea than "knowingly." This petition will simply use the "knowingly" mens rea for simplicity. Also, in *McFadden v. United States*, 576 U.S. 186 (2015), this Court addressed the mens rea for the Controlled Substance Analogue Enforcement Act, 21 U.S.C. § 813. In finding that jury instructions on the requisite mens rea for an analogue offense were *insufficient*, this Court stated that § 841(a) "requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules." *McFadden*, 576 U.S. at 192. "That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *Id.* This Court, however, did not consider what knowledge is required under § 841(b). *See United States v. Jefferson*, 791 F.3d 1013, 1022-23 (9th Cir. 2015) (Fletcher, J., concurring). The Analogue Act provided a penalty once a violation of that separate statute, which could be satisfied by the mens rea for § 841(a) alone, was proven. *See* 21 U.S.C. § 813. Thus, *McFadden*'s observations regarding what is required to prove § 841(a) in "isolation" do not control, and Chief Justice Roberts warned that "the Court's statements on [§ 841(a)] are not necessary to its conclusion that the District Court's jury instructions 'did not fully convey the mental state required by the Analogue Act.'" *McFadden*, 576 U.S. at 199 (Roberts, C.J., concurring). "Those statements should therefore not be regarded as controlling if the issue arises in a future case." *Id.*

presumption). If, on the other hand, the strong mens rea presumption applies, then "[t]his should be an easy case." *Collazo*, 984 F.3d at 1341 (Fletcher, J., dissenting).

The fact that the "knowingly or intentionally" mens rea is contained in subsection (a) of § 841, while the type and quantity elements are in subsection (b), does not overcome the strong 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.* For example, 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.*

The essence of the majority's reasoning in *Collazo* was that the knowingly mens rea set forth in § 841(a) does not "travel" to § 841(b) under a "natural reading" of the text and structure of the statute. *Collazo*, 984 F.3d at 1322-27. In *Ruan v. United States*, 597 U.S. 450, 142 S. Ct. 2370 (2022), however, this Court rejected that type of approach to the knowingly mens rea in § 841(a). *Ruan* held that the knowingly mens rea applied to the "except as authorized" language appearing *before* the word "knowingly" in § 841(a), which is even more unnatural than applying it to § 841(b). *See Ruan*, 142 S. Ct. at 2381-82.

This Court also rejected the government's argument that the knowingly

mens rea should not apply because the "except as authorized" provision was not a true element of the offense, *id.* at 2379-80, undermining the *Collazo* majority's suggestion that drug type and quantity are not true elements of the § 841 offense. *See Collazo*, 984 F.3d at 1327 n.20.[7] And, *Ruan* emphasized the severe penalties set forth in § 841(b) as "counsel[ing] in favor of a strong scienter requirement." *Ruan*, 142 S. Ct. at 2378.

Moreover, 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 prescribed 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 are combined 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 § 841 also does not overcome the strong mens rea presumption. The headings "Unlawful Acts," and "Penalties" that

[7] Footnote 20 in *Collazo* suggested that drug type and quantity are *Apprendi* elements, but this Court has never made that determination. Even if they are "only" *Apprendi* elements, the presumption still applies.

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)).

As mentioned, 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. § 841(b). As Judge Merritt noted in *Dado*, 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 statute in particular, *see Burrage*, 571 U.S. at 216; *Bifulco v. United States*, 447 U.S. 381, 387 (1980), any ambiguities regarding the mens rea requirement are to be resolved in the defendant's favor. *See, e.g.*, *Liparota*, 471 U.S. at 427. In addition, imposition of a dramatically increased statutory 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).

In sum, this Court should grant review to correct the flawed interpretation of

§ 841 reached by the Ninth Circuit and other lower courts. This Court should adopt the view of numerous dissenting circuit judges and conclude that the mens rea presumption applies to the elements of drug type and quantity, the presumption has not been rebutted, and therefore the statute's knowingly mens rea applies to those elements.

B. At least a recklessly mens rea applies to § 841(b)

If the mens rea presumption applies, then the drug type and quantity involved under § 841(b) must require at least some level of mens rea, even if not the knowingly mens rea set forth in § 841(a). "[R]ecklessness [i]s the default minimum mens rea for criminal offenses when a mental state is not specified." *Borden v. United States*, 141 S. Ct. 1817, 1845 (2021) (Kavanaugh, J., dissenting) (citing Model Penal Code § 2.02). Thus, just because § 841(b) does not explicitly mention a mens rea does not mean that it dispenses with mens rea altogether, and there is no compelling reason for foregoing the "default" mental state of recklessness, particularly given the extraordinary minimum and maximum penalties set forth in § 841(b). *See Dubin v. United States*, 143 S. Ct. 1557, 1571-72 (2023) (criminal statutes must be construed in light of the harsh mandatory penalties they require).

This Court has recently explained that a recklessness standard often offers the right "balance" to "both sides of the scale." *Counterman v. Colorado*, 143 S.

Ct. 2106, 2119 (2023) (recklessness mens rea required for threats statute). Here, a recklessly mens rea achieves some form of balance by providing at least a limited defense to those less culpable defendants who were not the intended targets of the extraordinary penalties set forth in § 841(b). *See United States v. Winston*, 37 F.3d 235, 240-41 (6th Cir. 1994) (interpreting § 841(b) in accordance with its "purpose," which was to "target" the "kingpins, and masterminds of criminal organizations" and citing statements of Senators Biden, Byrd, and Chiles).

Because the jury was not required to find *any* mens rea as to the type and quantity of controlled substance, petitioner's sentence of 70 months and three years of supervised release should be vacated. Given that the jury was only required to find a base § 841(a) offense, he should be resentenced under the least onerous sentencing provision in section 841(b), which is a maximum of one year in custody and one year of supervised release under § 841(b)(3) and 18 U.S.C. § 3583(b). *See United States v. Jauregui*, 918 F.3d 1050, 1059-60 (9th Cir. 2019); *United States v. Hunt*, 656 F.3d 906, 916 (9th Cir. 2011).

C. The importance of this petition and the lesson of *Rehaif*

Finally, the fact that no Circuit has adopted petitioner's position on § 841 (although many dissenting judges have) does not undermine the strength and importance 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), which ultimately became the law of the land despite the contrary unanimous view of the lower courts. *See Rehaif*, 588 U.S. at 238-39 (Alito, J., dissenting) (majority "overturns the long-established interpretation of an important criminal statute, 18 U.S.C. § 922(g), an interpretation that has been adopted by every single Court of Appeals to address the question").

The statute at issue in *Rehaif*, § 922(g), was important, but § 841 is just as important, if not more so. Drug crimes are among the most frequently prosecuted federal offenses, constituting 30% of all federal criminal filings in 2022. *See* Federal Judicial Caseload Statistics 2022. At stake are decades and even lifetimes in prison due to the statute's onerous 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."). Despite these stakes, most of the lower courts continue to restrict the mens rea presumption in contravention of the historical foundation for mens rea requirements, and the lower courts do not appear likely to budge on their interpretation of § 841. The conflict and confusion regarding the mens rea presumption has been percolating for more than a decade, and it is time for this Court to intervene.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

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Respectfully submitted,

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