No. _____

IN THE

Supreme Court of the United States

ANDRES BURGARA,

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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QUESTION PRESENTED

Section 841(a) of Title 21 of the United States Code makes it "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." The question presented is:

Does the simultaneous possession of one type of controlled substance in two different locations constitute a single offense under 21 U.S.C. § 841(a)(1)?

LIST OF PRIOR PROCEEDINGS

United States v. Andres Burgara,
Case No. 2:18-cr-00221-JVS (C.D. Cal.)

United States v. Andres Burgara,
Case No. 23-581 (9th Cir.)

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Petitioner Andres Burgara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished and included in the Appendix at 1a.[1] The Ninth Circuit's decision denying panel and en banc rehearing is included in the Appendix at 12a. The district court's Judgment and Commitment Order is included in the Appendix at 13a. The district court did not otherwise make relevant written or oral rulings.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on January 2, 2025. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on February 11, 2025. Pet. App. 12a. On May 5, 2025, Justice Kagan extended the time within which to file a petition

[1] "Pet. App. xx" refers to a page in the attached Appendix. "xx-ER-xx" refers to a volume and a page in the appellant's excerpts of record electronically filed in the Ninth Circuit on December 4, 2023. *United States v. Burgara*, No. 23-581, Dkt. 13 (9th Cir.). "MJN-xx" refers to the documents attached to the appellant's motion for judicial notice electronically filed in the Ninth Circuit on December 4, 2023. *United States v. Burgara*, No. 23-581, Dkt. 15 (9th Cir.). The Ninth Circuit granted the motion for judicial notice on January 2, 2025. Pet. App. 11a.

for certiorari to and including July 11, 2025. No. 24A1068. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Section 841(a)(1) of Title 21 of the United States Code provides, in pertinent part:

> (a) Unlawful acts
> Except as authorized 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 . . . .

INTRODUCTION

This case concerns the proper interpretation of 21 U.S.C. § 841(a)(1), the most commonly charged federal criminal statute. Section 841(a)(1) is a generally applicable drug trafficking law, which makes it unlawful for a person to possess with the intent to distribute a controlled substance. The penalties that criminal defendants face for violating the statute are graduated based on the type and weight of the controlled substance that is possessed. 21 U.S.C. § 841(b). The question presented involves the correct

interpretation of the word "possess," *id.* § 841(a)(1), specifically whether the simultaneous possession of two packages containing the same controlled substance, held in two distinct locations, constitutes a single offense.

Mr. Burgara's convictions and sentence turn on this question. Following a traffic stop, Mr. Burgara was found to possess cocaine in his car, along with a pistol. Later that day, police executed a search warrant at his home and found a separate package of cocaine located in a truck parked on his property, along with two other firearms. The government charged Mr. Burgara with two counts of possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1), and two counts of possessing a firearm during and in relation to, or in furtherance of, a drug trafficking offense, 18 U.S.C. § 924(c)(1)(A). After Mr. Burgara was convicted at trial, he argued on appeal that the 21 U.S.C. § 841(a)(1) convictions were multiplicitous, meaning the government improperly charged "a single offense in separate counts." *Sanabria v. United States*, 437 U.S. 54, 65 n.19 (1978). The Ninth Circuit affirmed Mr. Burgara's convictions and sentence as to those counts. But in the Second, Fourth, Sixth, and Eleventh Circuits, Mr. Burgara's conduct would have given rise only to a single possession with intent to distribute offense, and thus only a single 18 U.S.C. § 924(c) conviction. And because of the stacking penalties associated with § 924(c) convictions, had Mr. Burgara's conduct occurred in one of those circuits, he would have faced a mandatory-

minimum sentence five years lower than the sentence he was subject to in the Ninth Circuit. Mr. Burgara's case highlights the impact of an entrenched split between the courts of appeals as to whether simultaneous possession of the same controlled substance in two distinct locations constitutes one or more offenses under 21 U.S.C. § 841(a)(1). This Court should grant review to resolve this question.

STATEMENT OF THE CASE

A. Factual Background

1. In 2016, a joint task force between the Drug Enforcement Administration ("DEA") and the Los Angeles Sheriff's Department ("LASD") began investigating suspected drug sales at a restaurant in Los Angeles. MJN-43. The task force executed multiple wiretaps and identified a suspected drug dealer, later determined to be Mr. Burgara. MJN-46-57. Agents ultimately identified Mr. Burgara, his car (the "Honda"), and his home address, obtained his call and text message activity, and obtained GPS and wiretap warrants for Mr. Burgara's suspected cell phones.

In 2017, agents saw Mr. Burgara conduct a suspected hand-to-hand drug transaction. 7-ER-1458-59. This led a task force agent to tell LASD detective Roberto Reyes that Mr. Burgara was a drug dealer in Reyes's neighborhood. 7-ER-1458. After receiving the tip, Reyes began surveilling Burgara's residence and car. 7-ER-1459-60.

2. In March 2018, Reyes surveilled Mr. Burgara's home and watched him drive away in the Honda. 7-ER-1274-75. Reyes followed Mr. Burgara and saw him double park for a few minutes, before driving away. 7-ER-1274-77. Reyes subsequently called two LASD deputies and asked them to conduct a "wall stop" of Mr. Burgara, which meant that the deputies should develop a legal basis to stop Mr. Burgara's car and search him, if justified. 7-ER-1461. Reyes told the deputies that he believed Burgara was carrying drugs in the Honda. *Id.*

The deputies stopped Burgara's Honda after observing traffic infractions and ultimately searched it. The deputies found metal boxes under the modified rear passenger seats, which contained a pistol, methamphetamine, cocaine, and a few thousand dollars. 7-ER-1470. A deputy interrogated Mr. Burgara and he said the drugs and money belonged to him. 7-ER-1471. Law enforcement obtained a search warrant for Mr. Burgara's home and executed the warrant later that day. 7-ER-1462. In addition to other contraband found at the house, deputies searched a truck parked on Mr. Burgara's property and discovered a hidden compartment that contained two firearms and cocaine. 7-ER-1463. During a second interrogation later that night, Mr. Burgara stated that the cocaine and firearms were his. 7-ER-1464.

B. Procedural Background

1. The government subsequently indicted Mr. Burgara on numerous drug and firearm charges. In the operative indictment, the government charged in Count One possession with intent to distribute at least 50 grams of methamphetamine, based on the methamphetamine found in the Honda. Pet. App. 19a-20a. Count Two charged possession with intent to distribute cocaine, based on the cocaine found in the Honda. Pet. App. 21a. Count Three charged Mr. Burgara with carrying a firearm during and relation to a drug trafficking crime based on the pistol found in the Honda. Pet. App. 22a. Count Seven charged possession with intent to distribute cocaine, based on the cocaine found in the truck parked at his home. Pet. App. 28a. And Count Eight charged Mr. Burgara with possessing a firearm in furtherance of a drug trafficking crime, based on the firearms found in the truck parked at his house. Pet. App. 29a.

The case proceeded to trial. Law enforcement officers testified that they found methamphetamine, cocaine, and a pistol in Mr. Burgara's Honda, 3-ER-497-98, as well as cocaine and two guns in the truck parked at his house. 4-ER-655-57. Reyes testified that during an interrogation, Mr. Burgara admitted to selling drugs and possessing the drugs and firearms at his house. 4-ER-677-86. The jury returned a guilty verdict as to all counts. 5-ER-958-63.

The district court sentenced Mr. Burgara on Counts Two and Seven, the cocaine counts, to 151 months' imprisonment on each count, to run concurrently. Pet. App. 13a. The court also sentenced Mr. Burgara to 151 months' imprisonment on each of Counts One, Four, Five, Six, and Nine, to run concurrently with each other and Counts Two and Seven. *Id.* Finally, the court sentenced Mr. Burgara to 60 months' imprisonment on each of Counts Three and Eight, the 18 U.S.C. § 924(c) counts, to run consecutively to each other and the 151-month term. *Id.* This resulted in a total sentence of 271 months' imprisonment. *Id.*

2. On appeal, Mr. Burgara, argued, *inter alia*, that Counts Two and Seven were multiplicitous because his simultaneous possession of cocaine in the Honda and at his residence constituted a single violation of 21 U.S.C. § 841(a)(1). He argued that the error was plain under the statute's text and *United States v. Mancuso*, which held that a single charge alleging possession with intent to distribute cocaine from 2002 to 2009, witnessed at various times by others who supplied or consumed cocaine with the defendant, was properly charged as a single offense. 718 F.3d 780, 792-93 (9th Cir. 2013). Mr. Burgara also explained that his circumstances are indistinguishable from those presented in *United States v. Stephens*, 118 F.3d 479 (6th Cir. 1997), and *United States v. Clay*, 355 F.3d 1281 (11th Cir. 2004) (per curiam), in which the Sixth and Eleventh Circuits held that simultaneous possession of

one controlled substance in two locations constituted one offense under § 841(a)(1).

The Ninth Circuit affirmed, with a limited remand to correct the judgment on an unrelated issue. Pet. App. 10a-11a. The Ninth Circuit concluded that Mr. Burgara's multiplicity claim was not plain error in light of *United States v. Privett*, 443 F.2d 528 (9th Cir. 1971), which held that packages of heroin found in the defendant's pocket, under the seat of the defendant's car, and in the car's trunk, each of which contained heroin of a different purity, constituted three separate drug offenses. *Privett*, 443 F.2d at 531; Pet. App. 8a. The court explained that "where separate caches of a controlled substance are found in separate vehicles which are themselves found in different locations, it was at the very least not plain error for Burgara to be charged and convicted of multiple § 841(a) offenses." Pet. App. 8a.

Separately, the Ninth Circuit held that the district court erred by sentencing Mr. Burgara on Counts Four, Five, Six, and Nine to terms of imprisonment that exceeded the respective statutory maximums. Pet. App. 10a. The court ordered that as part of a limited resentencing hearing, the district court may also reconsider its imposition of a two-level enhancement under U.S.S.G. § 2D1.1(b)(1). Pet. App. 10a-11a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeals are split over the question presented.

Mr. Burgara was convicted of two 21 U.S.C. § 841(a)(1) offenses for simultaneously possessing cocaine in his car and in a truck parked at his nearby house. The question presented addresses "[w]hat Congress has made the allowable unit of prosecution" for drug possession offenses. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *Callanan v. United States*, 364 U.S. 587, 597 (1961) (explaining such questions ask "whether conduct constitutes one or several violations of a single statutory provision"). "Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice." *Sanabria v. United States*, 437 U.S. 54, 70 (1978).

The Ninth Circuit held that Mr. Burgara's course of conduct constituted two offenses under § 841(a)(1). The Third, Seventh, Eighth, and D.C. Circuits would have reached the same result. But the Sixth and Eleventh Circuits have held that identical conduct constitutes a single § 841(a)(1) offense, and published decisions from the Second and Fourth Circuits suggest the same would be true under those courts' precedents. Absent a clear directive from Congress or this Court, the courts of appeals have become deeply divided in determining whether the simultaneous

possession of two packages containing the same controlled substance, in two different locations, constitutes one or more offenses under § 841(a)(1).

1. The Third, Seventh, Eighth, Ninth, and D.C. Circuits have held that even slight differences in location and drug purity make possession of two packages of the same controlled substance multiple offenses under 21 U.S.C. § 841(a)(1) and related federal statutes. The Third Circuit has held that two stashes of heroin, seized at the same time from two cars parked at the same address, constituted two offenses because the stashes "had different compositions and purities, . . . bore different brand stamps," and were "stored in separate vehicles." *United States v. Kennedy*, 682 F.3d 244, 257 (3d Cir. 2012).[2] The Seventh Circuit similarly ruled that packages of cocaine found on the defendant's person and "some thirty feet away . . . on the front floorboard of his car" constituted two offenses because the packages were "stored in separate locations" and testing by a chemist showed the packages contained "cocaine of different purity." *United States v. Griffin*, 765 F.2d 677, 682-83 (7th Cir. 1985).

[2] The Third Circuit's rule rests on a faulty foundation—in *Kennedy*, the court relied on a prior case, *United States v. Carter*, which held that a defendant's convictions for two different statutory offenses, possession with intent to distribute and actual distribution of a controlled substance, were proper. 576 F.2d 1061, 1064 (3d Cir. 1978); *Kennedy*, 682 F.3d at 257 (citing *Carter*).

The Seventh Circuit based its reasoning in part on the Ninth Circuit's opinion in *United States v. Privett*, 443 F.2d 528 (9th Cir. 1971), which similarly held that packages of heroin found in the defendant's pocket, under the front seat of his car, and in the trunk constituted three distinct offenses due to the different locations in which the packages were found and the different purities of heroin found in each package. *Id.* at 531; *Griffin*, 765 F.2d at 683 (citing *Privett*). Because of the "[d]ifferent facts as to the purity of the heroin and its location," the Ninth Circuit concluded that each package constituted a distinct offense under 21 U.S.C. § 174, a precursor statute to 21 U.S.C. § 841(a)(1). *Privett*, 443 F.2d at 531. The Ninth Circuit has since relied on *Privett* to hold that possessing the same controlled substance in multiple locations constitutes multiple offenses under § 841(a)(1). In Mr. Burgara's case, the court of appeals held that although there was no evidence of varying purities between the two stashes of cocaine, the court's prior holding in *Privett* meant that any error was not plain. Pet. App. 8a.

The Eighth and D.C. Circuits have established a similarly expansive rule. Both courts of appeals held that possessing the same controlled substance simultaneously in two locations, without evidence that the packages contain different purities of the controlled substance, is sufficient to establish two drug offenses. The Eighth Circuit has held that controlled substances found in the defendant's luggage and at his home constituted

distinct possession offenses under 21 U.S.C. § 844, which criminalizes simple possession, because "the drugs were found in two separate and distinct locations." *United States v. Rich*, 795 F.2d 680, 682-83 (8th Cir. 1986). The D.C. Circuit similarly held that packages of the same controlled substance found at the defendant's home and place of employment, located several miles away, constituted "two separate and distinct possessions." *United States v. Blakeney*, 753 F.2d 152, 155 (D.C. Cir. 1985). Following *Blakeney*, the D.C. Circuit has further outlined what conduct constitutes "separate and distinct possessions." *Id.* In *United States v. Johnson*, the court held that two stashes of the same controlled substance located in one apartment constitutes a single offense, even if the controlled substance is possessed in two distinct forms. 909 F.2d 1517, 1518-19 (D.C. Cir. 1990). Thus, in the D.C. Circuit, two stashes of a controlled substance in one residence constitutes one offense, whereas a stash at the defendant's home and at work count as two offenses.

2. The Second, Fourth, Sixth, and Eleventh Circuits have taken a contrary position and held that simultaneous possession of one controlled substance in two different locations comprises just one offense. The Sixth and Eleventh Circuits, specifically, have clearly held that simultaneous possession of the same controlled substance in two distinct locations constitutes one § 841(a)(1) offense. In the Sixth Circuit, possessing "two different caches of cocaine with two distinct identities" constitutes a single

offense under § 841(a)(1), so long as the possession was simultaneous. *United States v. Stephens*, 118 F.3d 479, 481-82 (6th Cir. 1997). In *Stephens*, the court considered circumstances identical to those in Mr. Burgara's case. Law enforcement stopped the defendant's van and searched it, revealing five kilograms of cocaine. *Id.* at 480. Officers searched the defendant's house later that day and found an additional 115 grams of cocaine. *Id.* After the defendant was charged with and pleaded guilty to two counts of possession with intent to distribute cocaine under § 841(a)(1), the Sixth Circuit held the two offenses were multiplicitous and remanded for the district court to vacate one of the two § 841(a)(1) convictions. *Id.* at 482.

The Eleventh Circuit has similarly held that "possession of two separate caches of the same drug on the same day constitutes but one single § 841(a)(1) offense." *United States v. Clay*, 355 F.3d 1281, 1284 (11th Cir. 2004) (per curiam) (citing *Stephens*, 118 F.3d at 482). In *Clay*, the court of appeals held that cocaine found at the defendant's business and cocaine found later that day at his nearby motel room constituted a single § 841(a)(1) offense. *Id.* at 1284-85 (concluding the two caches "were separated by only 'a few blocks' and were a single, simultaneous possession, at least constructively").

Although the Eleventh Circuit's holding in *Clay* follows the Sixth Circuit's decision in *Stephens* and would control had Mr. Burgara's case

arisen in that regional circuit, the Eleventh Circuit has apparently distinguished packages of the same drug separated by only a few blocks, and packages separated by a county line. In *United States v. Maldonado*, the Eleventh Circuit affirmed two possession offenses for cocaine found in the defendant's car during his arrest in Volusia County, Florida, and for cocaine found subsequently at his home in Seminole County, Florida. 849 F.2d 522, 524 (11th Cir. 1988) (per curiam). Thus, in the Eleventh Circuit, drug caches located in the same city are likely to constitute one offense, while those separated by a county line are likely to constitute two offenses.

The Second and Fourth Circuits have also held that simultaneous possession of separate packages of the same controlled substance, in nearby but distinct locations, constitute one offense. The Second Circuit has held that a package dropped by the defendant while he fled law enforcement, and a package of cocaine found approximately twenty-minutes later inside the defendant's residence, constituted a single offense under § 841(a)(1). *United States v. McCourty*, 562 F.3d 458, 464 & 473 n.4 (2d Cir. 2009); *See also Thompson v. United States*, No. 3:04-CV-1321, 2005 WL 1173560, at *2 (N.D.N.Y. May 2, 2005) (holding simultaneous possession of separate caches of marijuana in defendant's farmhouse and car "constitute only a single § 841(a)(1) offense"). The Fourth Circuit has similarly held that a package of cocaine found after the defendant fled and threw the package to the ground,

and a package subsequently found inside the car from which the defendant fled, constituted a single possession offense. *United States v. Bennafield*, 287 F.3d 320, 323 (4th Cir. 2002); *see also United States v. Leftenant*, 341 F.3d 338, 348 (4th Cir. 2003) (citing *Bennafield* for proposition that a "defendant could only be convicted of single act of possession for simultaneous possession of multiple packages of cocaine"), *abrogated in part on other grounds by Bloate v. United States*, 559 U.S. 196 (2010); *United States v. Battle*, 370 F. App'x 426, 431 (4th Cir. 2010) (same). Those cases show that in the Second and Fourth Circuits, Mr. Burgara's possession of cocaine in his car and at his house would have constituted a single § 841(a)(1) offense.

3. The Fifth Circuit has not addressed directly the question presented but has explained that whether possession of a controlled substance constitutes multiple offenses turns on whether the defendant "continuously possessed [the substance] or whether he had it in his possession on distinct occasions." *United States v. Register*, 931 F.2d 308, 312 (5th Cir. 1991) (quoting *United States v. Fiallo-Jacome*, 784 F.2d 1064, 1066 (11th Cir. 1986)). In *Register*, the court concluded that two counts charging possession with intent to distribute cocaine on two separate dates were not multiplicitous because the defendant did not offer "evidence to establish that the cocaine in each of the two transactions came from a common 'stash.'" *Id.* at 312-13.

* * *

Most regional circuits have reviewed the question presented and many have reached conflicting results on nearly identical sets of facts. Mr. Burgara's actions would constitute multiple offenses in the Third, Seventh, Eighth, Ninth, and D.C. Circuits. However, the Third and Eleventh Circuits have held that nearly identical action constitutes a single § 841(a)(1) offense, and published decisions from the Second and Fourth Circuits suggest the same would be true under those circuits' precedents. This intractable split, in which the same actions constitute one crime in some parts of the country, and two crimes in others, should be resolved by this Court.

II. It is important that the Court resolve the question presented.

The question presented matters a great deal for the accuracy of criminal convictions and the impact of multiple offenses that may result in consecutive sentences. As the numerous cases in the circuit split show, the question presented arises relatively frequently in the federal courts. Since the 1970s, at least one court of appeals has addressed the question during each decade. And the question whether specific conduct constitutes one or more offenses impacts an individual's substantial rights. *United States v. Ankeny*, 502 F.3d 829, 839 (9th Cir. 2007); *see also Ball v. United States*, 470 U.S. 856,

865 (1985) (explaining that a "second conviction, even if it results in no greater sentence, is an impermissible punishment").

Perhaps most importantly, the question presented can impact both mandatory-minimum and mandatory-consecutive sentences. In *Clay*, for example, the Eleventh Circuit approved of the government aggregating the weight of two packages of cocaine base found at two different locations to establish the requisite weight for a sentencing enhancement under § 841(b). 355 F.3d at 1284-85. Although the individual packages each weighed less than 50 grams and were found in two different locations, the government charged them as a single possession and alleged that the defendant had possessed "at least fifty grams of a mixture and substance containing a detectable amount of cocaine base." *Id.* at 1284. The court of appeals approved of the aggregation of the two packages "for the purpose of achieving the requisite 50 grams of cocaine base to require a mandatory 240-month sentence." *Id.* There, the court's holding that the defendant's conduct constituted a single possession favored the government. But in the Third, Seventh, Eighth, Ninth, and D.C. Circuits, such aggregation would be impermissible.

Additionally, the question presented has significant impact where firearms are involved. In *Kennedy*, for example, the Third Circuit concluded that because two stashes of heroin were stored in separate vehicles, they

constituted separate offenses and could each form the predicate offense for separate convictions under 18 U.S.C. § 924(c). 682 F.3d at 257. Under the current version of § 924(c), that result would lead to two mandatory 60-month sentences, both of which must run consecutively to each other and any other sentence. 18 U.S.C. § 924(c)(1)(A). Indeed, that is precisely what occurred in Mr. Burgara's case, where the two cocaine counts each served as distinct predicates for stacking § 924(c) convictions. Pet. App. 22a, 29a. For Mr. Burgara, the result was a mandatory-minimum sentence five years higher than it would have been had the cocaine counts been properly charged as a single offense. Pet. App. 13a. In the Second, Fourth, Sixth, and Eleventh Circuits, such multiplication of possession offenses would be impermissible—as a result, the same conduct would result in just one § 924(c) offense, rather than two.

To be sure, the resolution of the question presented may have little impact in certain drug trafficking cases, such as where the weight of each individual package satisfies a proscribed mandatory-minimum sentence in 21 U.S.C. § 841(b). In those cases, the defendant's sentence will be determined largely by the total weight of the combined packages under the United States Sentencing Guidelines. But when only the combined weight satisfies a mandatory-minimum provided in § 841(b)—for example, the combined weight is just over five kilograms of cocaine—the resolution of the question

presented may mean the difference between a sentencing hearing with no mandatory-minimum sentence, and one in which the district court is bound to impose no less than a ten-year sentence. 21 U.S.C. § 841(b)(1)(A); *see Clay*, 355 F.3d at 1284. And when firearms are involved, the multiplication of offenses based on various stashes of the same controlled substance can create mandatory stacking of consecutive 60-month sentences under 18 U.S.C. § 924(c)(1)(A), as occurred in Mr. Burgara's case. Overall, the resolution of the question presented carries important implications for mandatory-minimum and mandatory consecutive sentences that regularly arise in federal drug cases.

III. The Ninth Circuit's decision is wrong.

A. The Ninth Circuit's position ignores section 841's text and structure.

1. The Ninth Circuit's position, which considers whether a single possession has occurred by looking to the purity of the drug and its precise location, is atextual. *See Privett*, 443 F.2d at 531. Section 841(a)(1) specifies that it is unlawful for someone to "possess" a controlled substance with the requisite intent, without mentioning weight, purity, or location. And the law applies equally to both constructive and actual possession. *See Henderson v. United States*, 575 U.S. 622, 626 (2015) (explaining "that in 'legal terminology' the word 'possession' is 'interchangeably used to describe' both

the actual and the constructive kinds" (quoting *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914)); *United States v. Lemus*, 847 F.3d 1016, 1020 (9th Cir. 2016) ("To violate [21 U.S.C. § 841(a)(1)], actual possession is not required: constructive possession also suffices."). Congress's use of the word "possess" shows its intent to encompass equally controlled substances on or near the defendant's person and those well beyond a defendant's immediate reach. In other words, under § 841(a)(1), the controlled substance's location in relation to the defendant is often irrelevant to proving possession. *Lemus*, 847 F.3d at 1021-22 (holding sufficient evidence of constructive possession existed despite drug being "in a city nearby").

Furthermore, unlike other contraband, such as firearms, controlled substances by their nature are susceptible to being broken down into ever-smaller packages. Thus, no court has held that an individual who possesses 100 baggies of cocaine in their backpack has committed 100 federal offenses. And the text of § 841 does not distinguish that circumstance from one in which an individual keeps 50 baggies of cocaine in his car and 50 baggies at his house. The Ninth Circuit's reliance on the packages' precise location is not tied to any part of the statute.

Nor does the statute include any mention of the purity of a controlled substance, let alone provide that packages containing slightly different concentrations of cocaine or heroin should result in multiple offenses. Mr.

Burgara's own case exemplifies the statute's straightforward elements—there is no question that either stash of cocaine would have satisfied the elements of either Count Two or Count Seven, which charged possession with intent to distribute cocaine. *See Stephens*, 118 F.3d at 482 ("[P]roof that Stephens possessed either stash of cocaine would sustain his conviction under either count one or two.").

2. Section 841(a)(1) is also a continuing offense, which further shows that the simultaneous possession of two distinct packages constitutes only one crime. The courts of appeals generally agree that possession with intent to distribute a controlled substance is a "continuing offense," which means that one offense is comprised of "a continuous unlawful act or series of acts set on foot by a single impulse." *Mancuso*, 718 F.3d at 792 (quoting *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939)); *see United States v. Rowe*, 919 F.3d 752, 760 & 760 n.5 (3d Cir. 2019) (collecting cases); *United States v. Muhammad*, 502 F.3d 646, 653 n.3 (7th Cir. 2007) (same). Thus, possession of a controlled substance "begins when a defendant has the power and intention to exercise dominion and control" over the substance, "and ends when his possession is interrupted by a complete dispossession." *Rowe*, 919 F.3d at 760. For individuals who simultaneously possess packages of a single controlled substance in two distinct locations, there is no dispossession or temporal distinction—the offense is ongoing and

is not limited by any particular distance between the two packages. *See Sanabria*, 437 U.S. at 72 (explaining that Double Jeopardy Clause cannot be avoided "by the simple expedient of dividing a single crime into a series of temporal or spatial units . . . [or] into 'discrete bases of liability' not defined as such by the legislature" (quoting *Brown v. Ohio*, 432 U.S. 161, 169 & 169 n.8 (1977)).

3. The structure of punishment provided for in § 841 also signals Congress's intent that possession of the same controlled substance in multiple locations comprise just one offense. Section 841(b)(1) graduates punishment for drug trafficking offenses based on the type and weight of the controlled substance, not whether a defendant was prosecuted for multiple offenses. If an individual receives 5 kilograms of cocaine and splits the packages between their home and their car, it appears Congress intended the defendant to be subject to a mandatory-minimum sentence under § 841(b)(1) based on the total weight possessed, rather than two distinct offenses that each carry a lower minimum and maximum sentence. Indeed, such a rule would draw an arbitrary distinction between possessing multiple packages of cocaine within one's home and possessing two packages of cocaine that are each located in a different car. Rather than imposing enhanced punishments for multiple simultaneous offenses, Congress's chose instead to increase the

defendant's sentence based on the type of drug possessed and its total weight. *See* 21 U.S.C. § 841(b).

4. Finally, to the extent there is any ambiguity as to Congress's intent, it weighs in Mr. Burgara's favor. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). And this Court has previously applied the rule to determine the appropriate unit of prosecution under a federal criminal statute. In *Ladner v. United States*, the Court was tasked with interpreting a law that criminalized the assault of a federal officer. 358 U.S. 169, 170 (1958). The defendant had fired a single discharge from a shotgun that wounded two federal officers; he argued that his actions constituted "but one 'assault' within the meaning" of the statute. *Id.* at 171. After analyzing the law's text, the Court concluded that it "may as reasonably be read to mean that the single discharge of the shotgun would constitute an 'assault' without regard to the number of federal officers affected, as it may be read to mean that as many 'assaults' would be committed as there were officers affected." *Id.* at 177. Because Congress's intent was ambiguous, "the Court applie[d] a policy of lenity and adopt[ed] the less harsh meaning." *Id.* To the extent § 841(a)(1) is ambiguous and susceptible to mean either that two packages of the same controlled substance stored separately constitute just one crime, or

that storing the packages separately creates multiple crimes, the question "should be resolved in favor of lenity." *Id.* at 178 (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955)).

B. The Ninth Circuit's position does not provide any coherent bounds for what constitutes a distinct "possession."

The Ninth Circuit's position, as well as the rules in the Third, Seventh, Eight, and D.C. Circuits, are also wrong because they fail to draw a meaningful line between a single possession and multiple, simultaneous possessions. The Ninth Circuit looks to the "purity" of the controlled substance and its location, and distinguishes between even the front seat of a car and the car's trunk. *Privett*, 443 F.2d at 531. So too does the Eighth Circuit. *Rich*, 795 F.2d at 682 (citing *Privett*). The Third Circuit considers essentially any facts that make the "quantities and means of packaging" distinct, including whether the controlled substance was "stored in two separate vehicles." *Kennedy*, 682 F.3d at 257. The Seventh Circuit has relied on the "different purity" of two packages and a distance of "some thirty feet." *Griffin*, 765 F.2d at 682-83. And the D.C. Circuit has found that packages possessed a few miles apart constitute separate possessions, *Blakeney*, 753 F.2d at 337, while a controlled substance possessed within one apartment, albeit "in two forms," constitutes just one possession offense. *Johnson*, 909 F.2d at 1519. None explain exactly what distinguishes possessing a controlled

substance in two cars parked on the same property, *Kennedy*, 682 F.3d at 257, as compared to possessing different packages and forms of a controlled substance inside one's apartment, *Johnson*, 909 F.2d at 1519.

Nor has any of these circuits explained what marks a sufficiently different "purity" to qualify two packages as two separate offenses. In *Privett*, for example, the Ninth Circuit distinguished heroin in the defendant's shirt pocket that was "26% Pure heroin" from heroin in the trunk of his car that was "27.3% Pure heroin." 443 F.2d at 531. But the court of appeals provided no citation whatsoever for that reasoning, failed to explain how the purity of the substance related to a distinct "possess[ion]," and offered no methodology for determining what purity level would be sufficiently different to create multiple crimes. The rules in these circuits find no support in the text of § 841(a)(1) and offer no clear guidance as to what constitutes separate possession offenses.

IV. This case is an appropriate vehicle for resolving the question presented.

1. The question presented was pressed and passed upon below. To be sure, the issue was raised in the Ninth Circuit on plain error. But had Mr. Burgara been prosecuted in the Sixth or Eleventh Circuits, the multiplicity error as to Counts Two and Seven would have been plain. *See Stephens*, 118 F.3d at 481-82; *Clay*, 355 F.3d at 1284. And it likely would have constituted

plain error in the Second and Fourth Circuits based on those courts' precedents. *See McCourty*, 562 F.3d at 464 & 473 n.4; *Bennafield*, 287 F.3d at 323-24. The text of § 841(a)(1), the relevant cases from the Second, Fourth, Sixth, and Eleventh Circuits, and this Court's multiplicity precedents all show that the Ninth Circuit's rule is atextual and plainly wrong. *See Bennafield,* 287 F.3d at 323-24 (holding prior case involving different statute rendered plain multiplicity error as to federal controlled substance statute).

2. The question presented will also have a significant impact on Mr. Burgara's convictions and sentence. Should Mr. Burgara prevail, one of his § 841(a)(1) convictions under Counts Two and Seven must be vacated. Additionally, because Counts Two and Seven comprised a single offense, Counts Three and Eight, both of which charged an 18 U.S.C. § 924(c) offense, were impermissibly based on the same predicate offense. Thus, as the government conceded at oral argument before the Ninth Circuit,[3] if Counts Two and Seven are a single offense, one of the 18 U.S.C. § 924(c) convictions in Count Three or Count Eight must also be vacated, *United States v. Smith*, 924 F.2d 889, 894 (9th Cir. 1991) (holding that "each 924(c)(1) count must be

[3] Oral Argument, 29:35-30:20, *United States v. Burgara*, No. 23-581 (9th Cir.), available at https://www.youtube.com/watch?v=BFP9X_2s4yo&t=1874s (last visited July 9, 2025).

supported by a separate predicate offense"), resulting in a mandatory-minimum sentence 60 months lower than that which the district court applied. Pet. App. 13a. In short, a ruling in favor of Mr. Burgara would result in a full resentencing hearing with two fewer convictions and a substantially lower mandatory-minimum sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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