No. 25-5091

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

REPLY BRIEF FOR PETITIONER

CUAUHTEMOC ORTEGA
Federal Public Defender
HOLT ORTIZ ALDEN*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0081
Holt_Alden@fd.org

Attorneys for Petitioner
**Counsel of Record*

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition reinforces the need for this Court to grant review and determine whether simultaneous possession of a single controlled substance in two distinct locations constitutes a single offense under 21 U.S.C. § 841(a)(1). The government does not dispute the question's importance, recurring nature, or significant impact on Mr. Burgara's convictions and sentence. Nor does the government defend the Ninth Circuit's rule. Instead, it resists the reality of a clear circuit split, fails to offer an affirmative textual analysis of § 841(a)(1), and asserts boilerplate vehicle objections that lack purchase.

First, the government's attempts to explain away the entrenched circuit split on this question are mistaken. There can be no doubt that multiple circuits would have decided this case the other way. The Sixth and Eleventh Circuits have held "that the simultaneous possession of multiple 'stashes' of the same controlled substance—even in different locations—gives rise to but one offense under 21 U.S.C. § 841(a)(1)." *United States v. Stephens*, 118 F.3d 479, 481 (6th Cir. 1997); *United States v. Clay*, 355 F.3d 1281, 1284 (11th Cir. 2004) (per curiam) (same). And the Second and Fourth Circuits are in accord. The government's argument misrepresents the facts of *Stephens* and distinguishes cases from the Second, Fourth, and Eleventh Circuits on irrelevant grounds.

Second, the government offers no defense of the Ninth Circuit's rule or any coherent interpretation of § 841(a)(1), which leaves this Court guessing as to what position it would take on the merits. The government instead suggests that sometimes "a defendant's simultaneous possession of multiple stashes of a controlled substance amounts to a single offense," while at other times "the evidence supports multiple offenses," but, crucially, fails to offer any distinguishing principle. BIO 9-10. It thus provides no basis on which to decide whether an individual's Fifth Amendment rights were violated, further illustrating the need for this Court's intervention.

Third, the government endeavors to manufacture vehicle problems that do not exist. It claims this appeal is interlocutory, but that is not true in any meaningful sense: the Ninth Circuit remanded only for a correction of the judgment and reconsideration of a Sentencing Guidelines enhancement, neither of which affects the two cocaine convictions at issue. And this Court routinely grants certiorari despite a limited remand on issues independent from the question presented. The government also contends the Ninth Circuit's plain-error review weighs against certiorari. But this Court regularly reviews important questions that have divided the courts of appeals and then, as a "practice," leaves questions of plain error for remand. *Tapia v. United States*, 564 U.S. 319, 335 (2011).

This case, in short, is a sound vehicle for resolving the question presented and providing much-needed guidance on the meaning of this exceptionally important statute. There is no impediment to reaching and resolving the issue. This Court should grant certiorari.

I. The courts of appeals are split.

Contrary to the government's contentions, the circuit courts are intractably divided on the question presented.

A. The government argues that no court of appeals would be required to resolve the question presented in Mr. Burgara's favor. BIO 10. That is wrong. In *Stephens*, the Sixth Circuit addressed identical facts and held that the "two different caches of cocaine," charged in separate counts, constituted just one § 841(a)(1) offense. 118 F.3d at 481-82; Pet. 13. It reasoned that § 841 contains "no indication that Congress intended to permit multiplication of the offenses of possession at any given time by a defendant upon evidence that the [drug] may merely have been separately packaged or stashed." *Stephens*, 118 F.3d at 482 (quoting *United States v. Woods*, 568 F.2d 509, 513-14 (6th Cir. 1978)). The court's holding would control this case and require the opposite result. *Id.*; *see also Woods*, 568 F.2d at 512-13 (rejecting *United States v. Privett*, 443 F.2d 528 (9th Cir. 1971)).

The government misrepresents the facts of *Stephens* by claiming the defendant in that case possessed a single load of cocaine and "moved a small

portion of it to his car in order to sell it." BIO 11. In fact, the stashes of cocaine in *Stephens* had "two distinct identities": the cocaine found in the defendant's car was "a new load" from Florida and had been stored at a co-defendant's house, while the cocaine found at the defendant's residence had been "acquired during an earlier drug buying trip" and had just been "dug up . . . from [his] back yard that morning." 118 F.3d at 480 & 482. The court nonetheless held the two stashes of cocaine constituted one offense. *Id.* Had Mr. Burgara's offense occurred in the Sixth Circuit, *Stephens* would control.

The government also contends the Eleventh Circuit would have affirmed Mr. Burgara's two cocaine convictions. But *Clay* also addressed essentially identical facts and held that only one § 841(a)(1) offense occurred. 355 F.3d at 1284-85; Pet. 13. "The key issue in th[e] case [was] whether Clay's possession of two separate caches of cocaine base on the same date but at different locations constitutes a single § 841(a) offense and thus may be aggregated." *Clay*, 355 F.3d at 1284. The court concluded that the stashes of cocaine at the defendant's business and his residence "were a single, simultaneous possession" that "constitute[d] but one single § 841(a)(1) offense." *Id.* at 1284-85. *Contra United States v. Blakeney*, 753 F.2d 152, 155 (D.C. Cir. 1985) (holding stashes at defendant's apartment and place of employment constituted separate offenses). *Stephens* and *Clay* reached a legal conclusion different from the Ninth Circuit on identical facts—the very

definition of a genuine split in authority. Stephen M. Shapiro, et al., *Supreme Court Practice* 4-11 (11th ed. 2019) (explaining that a "genuine conflict" arises when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts").

Rather than confront *Stephens* and *Clay* head on, the government quibbles with this clear split by citing two other cases from the respective circuits. But neither purports to overrule *Stephens* or *Clay*. As Mr. Burgara explained, Pet. 14, the Eleventh Circuit in *United States v. Maldonado* held that two stashes of cocaine found "in different counties" constituted two § 841(a)(1) offenses. 849 F.2d 522, 524 (11th Cir. 1988) (per curiam). *Maldonado*, decided over fifteen years before *Clay*, does not render the division in authority any less obvious; rather, it emphasizes the arbitrary line-drawing to which courts of appeals have resorted in determining whether two simultaneously possessed stashes of the same drug constitute one or more offenses.

The government fares no better in the Sixth Circuit, where it points to a case, *Rashad v. Burt*, 108 F.3d 677 (6th Cir. 1997), that further *highlights* the split. BIO 11. In *Rashad*, the defendant arrived at his house in a car, which was later found to contain over four kilograms of cocaine. 108 F.3d at 678. Police also found more cocaine in a locked storage area in the defendant's basement. *Id.* The court held that his "possession of cocaine in his

home and in his automobile constituted a single transaction." *Id.* at 680-81. *Rashad* is in direct conflict with the Ninth Circuit rule. *Privett*, 443 F.2d at 531 (holding heroin found in defendant's shirt pocket, under his seat, and in the trunk of the car constituted three distinct offenses).

B. Next, the government tries to distinguish cases from the Second and Fourth Circuits, but fails to do so on any meaningful ground. BIO 11-12. As Mr. Burgara explained, Pet. 14-15, both courts have held that possession of the same substance on the same day, in two distinct locations, constitutes one offense. *United States v. McCourty*, 562 F.3d 458, 465, 470-73 (2d Cir. 2009); *United States v. Bennafield*, 287 F.3d 320, 322-24 (4th Cir. 2002).

The government asserts that *McCourty* doesn't implicate the question presented because it addressed a single count, not "'two counts' or 'two crimes.'" BIO 11 (quotations omitted). But duplicity and multiplicity are two sides of the same coin. Both challenge the government's charging decision and address the same question: whether the alleged conduct constitutes one offense or two. In *Clay*, for example, the defendant made a duplicity argument after the government aggregated two caches of cocaine into a single count to achieve the requisite weight for a mandatory-minimum sentence. 355 F.3d at 1284. The Eleventh Circuit, relying in part on *Stephens*, affirmed and noted that "courts have routinely held that possession of two separate caches of the same drug on the same day constitutes but one single

§ 841(a)(1) offense." *Id.* A similar defense challenge was rejected in *McCourty*, where the Second Circuit held that the defendant's two alleged stashes, possessed on the same day, were properly charged in a single count because they constituted "only one offense." 562 F.3d at 465, 470-73. *McCourty* is in accord with *Stephens* and *Clay*.

The government also challenges the Fourth Circuit's position in the split by trying to distinguish the facts in *Bennafield*. BIO 12. But *Bennafield*, like Mr. Burgara's case, addressed one controlled substance that was found in two distinct locations—on the defendant's person and in the defendant's car—and held the conduct constituted a single offense. 287 F.3d at 322-24. In contrast, the Third, Seventh, and Ninth Circuits have considered nearly identical facts and held that multiple offenses occurred. Pet. 10-11.

Further, the government tries to draw an arbitrary distinction by asserting the stashes in Mr. Burgara's case were found "at different times." BIO 12. But Mr. Burgara constructively possessed both stashes of cocaine simultaneously, and the fact that law enforcement found the stashes one after the other is immaterial. The Second, Fourth, Sixth, and Eleventh Circuits are in accord. *McCourty*, 562 F.3d at 464 (explaining search of apartment occurred after police recovered a package dropped by the defendant); *Bennafield*, 287 F.3d at 322 (explaining cocaine was found on the defendant's person and in a subsequent search of his car); *Rashad*, 108 F.3d

at 678 (explaining the second cocaine stash was discovered twelve days after the initial arrest); *Clay*, 355 F.3d at 1283 (explaining the search warrant for defendant's motel room, which followed a search of defendant's business, was prepared and executed "[l]ater that day"). Mr. Burgara's case, the question presented, and the split in authority all concern stashes of drugs that were possessed simultaneously.

C. Finally, the government argues there isn't a split because all courts of appeals "apply the same general standard" by considering whether the possessions are "distinct in time, location, or purpose." BIO 9.[1] That overgeneralization does not explain why the courts of appeals have reached opposite conclusions on the same facts, and it ignores important differences in the circuits' methods of analysis. Pet. 10-16. The Second, Fourth, Sixth, and Eleventh Circuits ask whether Congress intended that multiple offenses result, *Bennafield*, 287 F.3d at 323; *Stephens*, 118 F.3d at 482; *Clay*, 355 F.3d at 1284, and whether the evidence of either stash would satisfy a guilty verdict on one or both counts. *McCourty*, 562 F.3d at 471; *Stephens*, 118 F.3d at 482. By contrast, the Third, Seventh, Eighth, Ninth, and D.C. Circuits rely on the slightest differences in location, packaging, or drug purity to conclude

[1] Contrary to the government's suggestion, Mr. Burgara never conceded this point. Rather, Mr. Burgara explained that courts generally agree § 841(a)(1) is a continuing offense. Pet. 21.

multiple stashes of the same substance constitute multiple offenses. Pet. 10-12. The government cannot reconcile those lines of decisions, so the entrenched 4-5 split "raise[s] a square conflict for settlement by this Court." *Bell v. United States*, 349 U.S. 81, 82 (1955); Pet. 9.

II. The government's defense of Mr. Burgara's convictions misunderstands the nature of a Double Jeopardy claim and ignores the statute's text.

The government does little to defend the rule in the Ninth Circuit. It mistakenly argues that Double Jeopardy claims are a jury question and otherwise equivocates on the merits, asserting only that Mr. Burgara's two cocaine convictions were not "plain error." Its inability to identify any principles for distinguishing between conduct that would result in one § 841(a)(1) offense or two cements the need for this Court's review.

A. On the merits, the government's primary argument suggests the question presented is "fundamentally a question of fact for the jury." BIO 7-8. Not so. This Court has repeatedly recognized that whether a discrete set of facts constitutes one or more offenses under a single statute requires determining what "Congress has defined" as "the 'allowable unit of prosecution.'" *Sanabria v. United States*, 437 U.S. 54, 69-70 (1978) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)). And it reviews de novo this question of statutory "construction." *Ladner v. United States*, 358 U.S. 169, 171-73 (1958) (addressing after jury trial whether the

defendant was guilty of two assaults when he fired a single shot that injured two federal officers); *Bell*, 349 U.S. at 81-84 (addressing after a guilty plea whether transporting two women in the same vehicle constituted multiple offenses under the Mann Act). The courts of appeals also recognize the question presented as a "quintessential pure question of law" that is "review[ed] de novo." *Stephens*, 118 F.3d at 481; *United States v. Kennedy*, 682 F.3d 244, 255 n.8 (3d Cir. 2012) (reviewing "multiplicity de novo").

The government's reliance on *Universal C.I.T. Credit Corp.* is mistaken. There, the Court affirmed the district court's pretrial ruling that consolidated a thirty-two count information into three counts. *Universal C.I.T. Credit Corp.*, 344 U.S. at 219-220, 226. The Court noted that "[w]hether an aggregate of acts constitute . . . a single offense, or more than one, may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts." *Id.* at 225. Far from holding that multiplicity issues are jury questions, the Court merely explained that its decision had been made at the pleading stage and additional evidence may show multiple offenses were committed.[2]

[2] The government also fails to recognize that whether a jury is presented with one offense or two is a result of the prosecutor's charging decision. But "[i]t is Congress, and not the prosecution, which establishes and defines offenses." *Sanabria*, 437 U.S. at 69.

B. Setting aside its erroneous argument that a jury can decide the meaning of a federal criminal statute, BIO 8, the government makes no attempt to interpret the text of § 841(a)(1). The government derides Mr. Burgara's interpretation and claims it cannot be true that a court must "aggregate" the weight of whatever controlled substance "a defendant has in his possession at a given time." BIO 8. But that is a perfectly reasonable interpretation of the statute's text, which makes it unlawful for an individual to "possess with intent to manufacture, distribute, or dispense, a controlled substance." § 841(a)(1); Pet. 19-24; *see also possess*, American Heritage Dictionary (5th ed. 2022) ("1.b. *Law* To have under one's power or control").

The government instead contends that interpreting § 841(a)(1) is a "case-specific inquiry," although it offers no guidelines for what such an inquiry would entail. BIO 9. That should come as no surprise, as it reflects the government's trend of taking different positions on the question presented when it so benefits. Usually, the government argues distinct stashes of a particular drug establish multiple § 841(a)(1) offenses. But sometimes, when distinct stashes are insufficient to meet the weight required to charge a mandatory-minimum sentence, the government has successfully argued that it can aggregate the stashes to achieve the necessary minimum weight. *Clay*, 355 F.3d at 1284; *cf. McCourty*, 562 F.3d at 469-70. Proceeding

without any intelligible boundaries allows the government to shift position at will, which underscores the need for this Court's review.

C. The government's ambivalence on the question presented is further emphasized by the fact that it cannot bring itself to say that Mr. Burgara's conduct constituted two offenses. It instead couches its argument in terms of "plain error" and declines to defend the two convictions on the merits. BIO 7-8. Nor does it defend the Ninth Circuit rule announced in *Privett*. Those conspicuous omissions encapsulate the need for this Court's review—the courts of appeals, and the government, are hopelessly lost in determining whether two stashes of the same substance, possessed simultaneously, constitute one or more possession offenses under § 841(a)(1).

III. This case is a sound vehicle.

Contrary to the government's claim, this case is an appropriate vehicle for resolving the conflict over the meaning of § 841(a)(1).

A. It is immaterial that, after affirming all nine of Mr. Burgara's convictions, the Ninth Circuit ordered "a limited remand to correct the judgment to accurately reflect the statutory maximums" and allow the district court to reconsider a Sentencing Guidelines enhancement. Pet. App. 10a-11a. Any potential change to Mr. Burgara's sentence would not resolve the question presented, both because Double Jeopardy violations are never harmless, *Rutledge v. United States*, 517 U.S. 292, 302 (1996), and because

the two cocaine convictions improperly supported two 18 U.S.C. § 924(c)(1)(A) convictions that increased the mandatory-minimum sentence. Pet. 17-18.

The government's boilerplate "interlocutory posture" argument, BIO 6-7, therefore, is unavailing. As the government itself has emphasized, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 584 U.S. 726 (2018) (No. 17-654). And this Court routinely grants petitions in criminal cases where a partial remand order does not implicate the question presented. In *Van Buren v. United States*, 593 U.S. 374 (2021), for example, the court of appeals had vacated the defendant's honest-services-fraud conviction and remanded for a new trial, but affirmed his computer-fraud conviction. *United States v. Van Buren*, 940 F.3d 1192, 1210 (11th Cir. 2019). This Court granted certiorari to consider the validity of the defendant's computer-fraud conviction and "resolve [a] split in authority." *Van Buren*, 593 U.S. at 381; *see also Smith v. United States*, 568 U.S. 106, 108 n.1 & 109 (2013) (granting certiorari in the same posture). Here, too, the remand order did not affect the convictions at issue. Pet. App. 10a-11a. The posture of this case is no bar to review.

B. It is equally irrelevant that the Ninth Circuit reviewed Mr. Burgara's argument for plain error. This Court regularly leaves plain-error contentions for remand. In *Tapia v. United States*, 564 U.S. 319 (2011), the

defendant challenged her sentence on appeal, despite not objecting to the sentence in the district court. *Id.* at 322. The court of appeals held there was no reversible error, relying on prior published precedent. *United States v. Tapia*, 376 F. App'x 707 (9th Cir. 2010). This Court granted certiorari to resolve a circuit split and reversed the court of appeals. *Tapia*, 564 U.S. at 323. After addressing the merits, the Court explained that, "[c]onsistent with our practice," it would "leave it to the Court of Appeals to consider the effect of Tapia's failure to object to the sentence when imposed." *Id.* at 335. Similar circumstances did not bar review in *Dubin v. United States*, 599 U.S. 110 (2023). *See* Gov't Opp. Br. 15, *Dubin v. United States*, 599 U.S. 110 (2023) (No. 22-10) (noting petitioner's claim was subject to plain error review). And contrary to the government's argument that Mr. Burgara would not be able to show obvious error on remand, BIO 13, if this Court granted review and ruled for Mr. Burgara, the first two plain error prongs would be satisfied. *Henderson v. United States*, 568 U.S. 266, 279 (2013); Gov't Br. Supporting Vacatur at 42 n.9, *Tapia v. United States*, 564 U.S. 319 (2011). There is no procedural impediment to this Court's review.

C. Lest there be any doubt, this is a particularly suitable vehicle because the question presented has a significant impact on the applicable mandatory-minimum sentence. Pet. 17-18, 26-27. In many instances, whether someone is convicted of one or more § 841(a)(1) offenses will not have

a meaningful impact on the sentence. Pet. 18. Here, however, the two cocaine counts served as predicates for stacking 18 U.S.C. § 924(c)(1)(A) convictions, which resulted in a twenty-year mandatory-minimum sentence—five years higher that it would have been following a single cocaine conviction.

IV. The importance of the issue is undisputed.

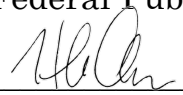
The government does not dispute that the proper interpretation of § 841(a)(1) is critically important, that the question presented arises frequently across the country, and that the issue has enormous impact on both mandatory-minimum and mandatory-consecutive sentences. Pet. 16-19. This court regularly grants certiorari to "resolve [a] split in authority regarding the scope of liability under" federal criminal statutes. *See Van Buren*, 593 U.S. at 381; *Dubin*, 599 U.S. at 116. It should do the same here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender



HOLT ORTIZ ALDEN*
Deputy Federal Public Defender
Attorneys for Petitioner
**Counsel of Record*

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