No. 21-7958

IN THE
Supreme Court of the United States

OSCAR LUNA-AQUINO,

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals in federal court each year, including many who face or risk facing the sentences imposed by 21 U.S.C. § 960(b). NAFD therefore has particular expertise and interest in the subject matter of this appeal. The issues presented are of great importance to its work and to the lives of its clients.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL has a keen interest in the question presented, which concerns the scienter requirement for substantive drug offenses under 21 U.S.C. § 960(b). NACDL has long advocated for enforcement of scienter requirements in criminal prosecutions. This includes a white paper in collaboration with the Heritage Foundation in April 2010. *See* Brian Walsh & Tiffany Joslyn, Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law (2010).

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of the appropriate *mens rea* requirement for substantive drug offenses under 21 U.S.C. § 960. Section 960(a), which codifies the Anti-Drug Abuse Act of 1986, prohibits "knowingly or intentionally" importing or exporting a controlled substance. Section 960(b), in turn, specifies a series of aggravated offenses—and correspondingly severe punishments—based on the type and quantity of the "controlled substance" involved. *See* 21 U.S.C. § 960(b). A defendant who imports or distributes 280 grams of crack-cocaine, for instance, faces a mandatory minimum of ten years in prison. *Id.* § 960(b)(1)(C). A defendant who imports or distributes the same amount of marijuana faces no mandatory minimum and only a five-year statutory maximum. *Id.* § 960(b)(4) (cross-referencing *id.* § 841(b)(1)(D)).

The question in this case is whether the government can subject a defendant to these escalating mandatory minimums and maximums without proving that he knew which illegal drug he was importing or the quantity of that illegal drug. The answer is no: Courts presume a statutory *mens rea* requirement applies to "all the material elements of the offense." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (internal citation omitted). And any fact that increases the statutory minimum or maximum under Section 960 (or any other statute) is an element of an offense. *See Alleyne v. United States*, 570 U.S. 99, 116 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 476–85 (2000). Therefore, defendants must know what drug they were importing before a court can subject them to statutorily increased sentences. *See United States v.*

Collazo, 984 F.3d 1308, 1338 (9th Cir. 2021) (en banc) (Fletcher, J., dissenting).

Amici write to explain why this analysis is sound not just as a matter of this Court's precedent but also as a matter of history. *First*, from the earliest era of codified law, the *mens rea* presumption has been concerned with ensuring a fair and proportional punishment. *Second*, and precisely for that reason, the historical *mens rea* requirement did more than ensure that only defendants with a generally vicious will were punished; it also protected defendants guilty of otherwise culpable conduct from receiving more severe punishments if they engaged in a less blameworthy version of the relevant offense. *Third*, the only conceivably pertinent exception to this otherwise steadfast requirement—for public-welfare regulations—is something of a historical aberration. This exception thus has been, and should be, construed narrowly.

In light of the historical pedigree of *mens rea* requirements, this Court should grant certiorari and hold that the presumption of *mens rea* applies to drug type and quantity that increase a defendant's statutorily prescribed sentence. The federal courts of appeals have resisted this seemingly straightforward conclusion. *See Collazo*, 984 F.3d at 1329 (collecting cases from the various circuits). But at common law, the facts at issue here would have been treated like any other material element of a crime—necessary ingredients of the offense and thus ones the defendant must commit knowingly or intentionally. Because Section 960 contains no clear statement to the contrary, this Court should hold that the statutes' drug

type and quantity elements indeed incorporate the traditional *mens rea* requirement.

ARGUMENT

I. The deeply rooted presumption of *mens rea* has long been used not just to separate culpable from innocent conduct, but also to distinguish gradations of offenses.

Today, courts "begin with a general presumption that the specified *mens rea* applies to all the elements of an offense." *Flores-Figueroa v. United States*, 556 U.S. 646, 660 (2009) (Alito, J., concurring); *Wooden v. United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) ("The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise."). The presumption rests on the belief that, absent clear text to the contrary, it is "a sound rule to construe a statute in conformity with the common law rather than against it." *See Regina v. Morris* [1867] 1 LRCCR 90 (UK) (Byles, J.). To understand why this presumption arose—and how broadly it sweeps—it is helpful to trace the history of the *mens rea* requirement to its common-law origin.

A. The *mens rea* requirement arose to ensure punishment was fair and proportional.

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); *see also Collazo*, 984 F.3d at 1338 (Fletcher, J., dissenting).

1. For a time, the law had a checkered relationship with *mens rea*. Early Anglo-Saxon criminal law developed as an attempt to supplant the blood feud, "inducing the victim or his kin to accept money payments in place of taking violent revenge." Francis Bowes Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 976–77 (1932). The focus of this system was more on appeasing the victim than the "actual blameworthiness of the accused." *Id.* at 977. For the would-be avenger, after all, the consequences of a perpetrator's actions were far more salient than the intent behind them. *Id.*

But even from these earliest times, "the intent of the defendant seems to have been a material factor . . . in determining the extent of punishment." *Id.* at 981–82. For example, the law imposed death as the penalty for an intentional homicide, but 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). By the late 800s, the Laws of Alfred provided: "Let the man who slayeth another willfully perish by death." 1 Thorpe, Ancient Laws and Institutes of England 21 (1840). But if "one man slay another unwillfully, let [only] the tree be given to the kindred." *Id.* at 31.

2. By the end of the twelfth century, the concept of *mens rea* gained a firmer foothold in English jurisprudence, as two influences shaped the development of law. The first was the rediscovery of Roman law which, "resuscitated in the universities in the eleventh and twelfth centuries, was sweeping over Europe with new power." Sayre, *Mens Rea, supra*, at 982. Scholars and legal writers developed a renewed enthusiasm for

these classical texts, including the notions of "*dolus*" (malice) and "*culpa*" (fault). *Id*. at 983.

The second and "even more powerful" influence was the canon law, "whose insistence upon moral guilt emphasized still further the mental element in crime." *Id*. "The canonists had long insisted that the mental element was the real criterion of guilt." *Id*. at 980. The man who "looketh on a woman to lust after her hath committed adultery already in his heart," *Matthew* 5:27–28, and the man who "has planned in his heart to smite [a] neighbor" must abstain from wine and the eating of meat" for a year. Ayer, Source Book for Ancient Church History 626 (1913). Informed by these teachings, the law, too, began treating "blameworthiness as the foundation of legal guilt." Sayre, *Mens Rea, supra*, at 980.

These new influences, like the old, stressed the importance of tailoring punishment to the appropriate *mens rea*. 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.

Legal scholars accordingly came to believe that "punishment should be dependent upon moral guilt." *Id*. at 988. Originally, the law effected this requirement through a blunt instrument: the pardon. Where, for example, "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a

girl, . . . the king moved by pity pardoned him [from] death." 1 Frederic William Maitland, Select Pleas of the Crown No. 114 (London, Selden Society 1888). With time, however, to constrain "the too free use of king's pardons in certain crimes," the courts created "a separation of different kinds of felonious homicides in accordance with moral guilt." Sayre, *Mens Rea, supra*, 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.

B. The *mens rea* requirement applies to offenders guilty of otherwise culpable conduct.

The Ninth Circuit has asserted that the presumption of *mens rea* "does not apply to elements that do not separate innocent from wrongful conduct." *United States v. Collazo*, 984 F.3d 1308, 1325 (9th Cir. 2021) (en banc); *see also United States v. Jefferson*, 791 F.3d 1013, 1018 (9th Cir. 2015) (explaining that the *mens rea* presumption applies only when necessary to avoid "the penalization of innocent conduct"). The D.C. Circuit, too, has suggested that the presumption was "[h]istorically" meant to protect "the altar boy archetype, *i.e.*, innocent conduct." *United States v. Burwell*, 690 F.3d 500, 516 (D.C. Cir. 2012). Not so. As then-Judge Kavanaugh noted, "[t]he Supreme Court has never drawn such a distinction when employing the presumption of mens rea." *Id*. at 543 (dissenting opinion); *see also Collazo*, 984 F.3d at 1342–43 (Fletcher,

J., dissenting) (same). And there is no "[h]istorical[]" basis for cabining the presumption in that way either. *Cf. Burwell*, 690 F.3d at 516 (majority opinion).

1. Over the centuries, punishment has become more tailored to "approximate the culpability of the defendant and the dangerousness of his act." *See Jefferson*, 791 F.3d at 1021 (Fletcher, J., concurring) (explaining this tailoring in the Anti-Drug Abuse Act); *see also Collazo*, 984 F.3d at 1338 (Fletcher, J., dissenting) (explaining "the relation between *mens rea* and punishment" in Anglo-American criminal law more generally). By the middle of the thirteenth century, English law articulated the generalized principle that "justifiable punishment is premised on and proportional to moral guilt." Martin R. Gardner, *The* Mens Rea *Enigma*, 1993 Utah L. Rev. 635, 655. As the English jurist and cleric Henry de Bracton wrote in the 1200s: "[i]t is will and purpose which mark *maleficia*"—that is, an evil deed—and "a crime is not committed unless the intention to injure exists." 2 Henry De Bracton, On the Laws and Customs of England 384 (Samuel E. Thorne trans., 1968).

At the time Bracton wrote, the law also had evolved to distinguish between "major" and "minor" crimes, punishing the former by "death, exile, or the loss of members, and the latter by flogging, the pillory, the ducking-stool, or imprisonment." Martin R. Gardner, *The* Mens Rea *Enigma*, 1993 Utah L. Rev. 635, 655 n.90 (internal quotation marks omitted). This gradation of offenses and corresponding punishments was so well established by the time of the American Revolution that William Blackstone wrote that, under the common law, it was considered "absurd"—a "kind

of quackery in government"—"to apply the same punishment to crimes of different malignity." 4 W. Blackstone, Commentaries on the Laws of England 17 (1769). Instead, "in every state a scale of crimes should be formed, with a corresponding scale of punishments." *Id.* at 18.

Early American law tracked Blackstone's approach: "[S]ubstantive criminal law . . . prescribed a particular sentence for each offense." *Alleyne*, 570 U.S. at 108 (internal citation omitted); *see Apprendi*, 530 U.S. at 479 (same); *see also, e.g., Commonwealth v. Smith*, 1 Mass. 245 (1804) (state law specified a punishment for larceny of damages *three times* the value of the stolen goods). "The system left judges with little sentencing discretion: once the facts of the offense were determined by the jury, the judge was meant simply to impose [the prescribed] sentence." *Alleyne*, 570 U.S. at 108 (internal citation omitted) (alteration in original). Even where "early American statutes provided ranges of permissible sentences," those *ranges* "were linked to particular facts constituting the elements of the crime." *Id.* at 108–09 (internal citation omitted). A Wisconsin arson statute, for instance, provided for a sentence of 7 to 14 years where the house was occupied at the time of the offense, but a sentence of 3 to 10 years if it was not. *Lacy v. State*, 15 Wis. 13, 15 (1862). A Georgia robbery statute provided that robbery "by open force or violence" was punishable by 4 to 20 years' imprisonment, while "[r]obbery by intimidation, or without using force and violence," was punishable by 2 to 5 years. *See* Ga. Penal Code §§ 4324, 4325 (1867).

"This linkage of facts with particular sentence ranges," this Court has explained, "reflect[ed] the intimate connection between crime and punishment" described above. *Alleyne*, 570 U.S. at 109. From a retributive perspective, it avoided the "quackery," decried by Blackstone, of "apply[ing] the same universal remedy . . . to every case of difficulty." Blackstone, *supra*, at 17. It also served a deterrent purpose: by "[t]hreatening certain pains" for "certain things," the law gave the defendant "motive for not doing them." Oliver Wendell Holmes, Jr., The Common Law 40 (1881).

2. As punishment became increasingly differentiated to suit the particular offense at issue, the *mens rea* requirement grew to protect more than just defendants with a clear conscience. "After all, a comparable degree of inequity exists in (1) punishing a person who, but for the strict liability application to the element, would have received zero punishment . . . and (2) punishing with more years of imprisonment a person who, but for the strict liability application to the element, would still have received substantial punishment." *Burwell*, 690 F.3d at 544 (Kavanaugh, J., dissenting) (internal citation omitted).

The changing views on the felony-murder rule are illustrative of this evolution in the law. Whereas in the early 1600s, "Coke thought that a death caused as the result of *any* unlawful act" could be punished as murder, the eighteenth-century jurist Sir Michael Foster limited the doctrine to any crime that was the result of *felonious* intent. J. W. C. Turner, *The Mental Element in Crimes at Common Law*, 6 Cambridge L.J. 31, 43, 55 (1936) (emphasis added). Even then, "all felonies except petty larceny were in theory capital

crimes," giving jurists an "excuse for clinging to a remnant of the old rule of absolute liability." *Id.* As capital punishment became used more sparingly, Foster's rule was viewed by the nineteenth century as "cruel and indeed monstrous." *Id.* at 55 (internal quotation marks omitted).

Outside the felony-murder context, judges were even more inclined to reject the idea that an evil motive could suffice to establish liability for any crime, requiring instead an intent related to the specific *actus reus* of the offense. In one oft-cited case, the Irish Court of Crown Cases Reserved considered whether the defendant could be convicted of arson for "unlawfully[] and maliciously" setting fire to a ship. *Regina v. Faulkner* [1877] 11 Ir. R-CL 8–9 (UK). The defendant there had entered a ship cabin intending to steal some of its cargo of rum. *Id.* at 9. In an attempt to obtain sufficient light once inside, the defendant lit a match, which ignited the rum and set the ship ablaze. *Id.* The Crown brought arson charges, maintaining it was enough that the defendant had an evil motive—stealing rum—to punish him under the arson statute. *Id.* at 11–12. The *Faulkner* court rejected that "very broad proposition," holding such general intent could not establish liability for the specific crime of arson. *Id.* at 12.

3. This offense-specific requirement of *mens rea*, "congenial to [the] intense individualism" of the colonial days, "took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). If anything, the American requirement was even "more rigorous than English law." *Radin*, *supra*, at 127–28. With respect to homicide, for example, American law divided murder and manslaughter into

degrees, and was stricter than its English counterpart in "insisting on direct intention." *Id.* at 128. In his leading treatise, the American lawyer Joel Prentiss 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 purposes for requiring *mens rea* in the first place. "[T]he 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). Thus, Bishop believed that where "there [was] no low degree of a very aggravated offence, the law, leaning to mercy, should refuse to recognize [some cases] as within it," even where the defendant was otherwise culpable. *Id.*

4. Courts also increasingly recognized that *statutes* imposing enhanced penalties should be understood to include specific *mens rea* requirements, even if the statutes were silent on that front. As this Court has explained, "[a]s the state codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette*, 342 U.S. at 252. This was true even where the conduct would have been criminal even without the presence of the element at issue.

In a particularly illustrative antebellum case, the Ohio Supreme Court considered whether a defendant could be found guilty of murder in the first degree by committing "homicide by administering poison" without the intent to kill. *Robbins v. State*, 8 Ohio St. 131, 172 (1857), *abrogated on other grounds by Adams v. State*, 28 Ohio St. 412 (1876). The statute created three "classes" of first-degree murder: (1) killing with premeditated malice; (2) killing in the perpetration of a felony; and (3) killing by administering poison. *Id.* at 175. The question was whether the general *mens rea* requirement for first-degree murder (that the defendant act "purposely" with the intent to kill) applied to all three classes of murder or just the first. *Id.* at 175–76.

The Ohio Supreme Court held the former. While the statute admitted some "ambiguity," the default "rule" was "that the *motive, intention*, or *willfulness* of a party, in doing an act, is essential to its criminality." *Id.* at 174, 176. In the court's view, "[f]ew, if any, exceptions to th[at] rule . . . are to be met within our statutes." *Id.* at 174. The court acknowledged that this rule might excuse some otherwise culpable actors from being convicted of first-degree murder. *Id.* at 168. But "the law," reasoned the court, "ha[d] made *the motive* and *intention* of offenders an important, indeed, a controlling element in discriminating between crimes of different degrees of turpitude and danger." *Id.* at 172–73. The court's construction thus held "[t]he gradation of criminal punishment proportionate to the turpitude of crime." *Id.* at 172.

The Ninth Circuit suggested in *Collazo* that *Dean v. United States*, 556 U.S. 568 (2009), disregarded all of this history and held to the contrary—namely, that

the presumption of *mens rea* does not apply where a statute merely separates more serious from less serious criminal conduct. *See Collazo*, 984 F.3d at 1325. But as then-Judge Kavanaugh has recognized, *Dean* involved a mere "sentencing factor" rather than an offense element. *Burwell*, 690 F.3d at 538–42 (Kavanaugh, J., dissenting); *accord id.* at 523–24, 529 (Rogers, J., dissenting). *Dean*, therefore, does not restrict the presumption of *mens rea* to elements that separate criminal from "apparently innocent" conduct.).[2]

C. The presumption of *mens rea* contains only a narrow exception for public-welfare offenses.

Historically, courts have recognized just one conceivably pertinent exception to an otherwise uniform *mens rea* requirement for so-called "public welfare" of-

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[2] Another "venerable" canon is instructive here—the rule of lenity. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion); *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring). This canon, too, was "founded on the tenderness of the law for the rights of individuals." *See United States v. Wiltberger*, 18 U.S. 76, 95 (1820). This Court has consistently rejected arguments that the rule of lenity applies only when distinguishing innocent from guilty conduct, extending it "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *R.L.C.*, 503 U.S. at 305 (plurality opinion); *see also United States v. Granderson*, 511 U.S. 39, 54 (1994); *Bifulco v. United States*, 447 U.S. 381, 387 (1980). After all, a rule "rooted in the instinctive distaste against men languishing in prison" applies equally when a man languishes in prison *for longer* than he otherwise would. *See R.L.C.*, 503 U.S. at 305 (plurality opinion) (internal quotation marks omitted).

fenses. *See Collazo,* 984 F.3d at 1338 (Fletcher, J., dissenting); *Jefferson*, 791 F.3d at 1021 (Fletcher, J., concurring) (citing, *e.g., United States v. Balint*, 258 U.S. 250 (1922)).[3] This exception has been narrowly construed by this Court and rightly so, as the exception is an aberration.

Before the mid-1800s, there "seem[ed] to be no thought on the part of American judges of relaxing the general requirement of *mens rea* even in the case of violations of regulatory statutes." Francis Bowes Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 62 (1933). In one 1816 case, the Connecticut Supreme Court considered a law barring persons from letting out their carriages for hire on Sunday except "on the ground of necessity or charity." *Myers v. State*, 1 Conn. 502, 504 (1816). Though the statute was silent on the question of *mens rea*, the court reversed a guilty verdict where the defendant failed to violate the statute *knowingly*. *Id*. To hold otherwise, it explained, would "oppugn the maxim that a criminal intent is essential to constitute a crime." *Id*. The pattern repeated across state courts. As the Alabama Supreme Court put it, to convict a defendant of keeping "a dog of ferocious and furious nature," or "for selling unwholesome meat[or] a diseased cow . . . or for any offense of like character,—it is held[] that an averment of knowledge is necessary." *Stein v. State*, 37 Ala. 123, 131–32 (1861) (collecting cases).

Only in the late 1800s did some courts begin dispensing with the *mens rea* requirement for certain

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[3] This Court has also recognized exceptions for jurisdictional elements or other "well-known" strict liability offenses. *See Burwell*, 690 F.3d at 537 n.10 (Kavanaugh, J., dissenting).

regulatory measures. Sayre, *Public Welfare Offenses*, *supra*, at 64–65. Once again, Bishop's treatise on this point is telling. Bishop's first treatise, published in 1856, states without exception that: "The wrongful intent [is] the essence of every crime." 1 Bishop, Criminal Law § 242 (1st ed. 1856). The next three editions repeated similar sentiments. *Id.* § 242 (2d ed. 1858); *id.* § 383 (3d ed. 1865); *id.* § 383 (4th ed. 1868). In his fifth edition, Bishop recognized a "few cases" in which convictions stood with no *mens rea* requirement, but dismissed them as "too monstrous to be accepted as law." *Id.* § 304 (5th ed. 1872). By his sixth edition in 1877, Bishop attacked such decisions as "wreck[ing] . . . sound doctrine," explaining that courts had wrongly "fail[ed] to apply the rule of the common law in the interpretation of some statute expressed in general terms." *Id.* § 304, n.1 (6th ed. 1877).

Still, while commentators generally decried the practice, they 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). One English jurist, for instance, canvassed convictions imposed without proof of *mens rea* and found they had historically occurred in cases not constituting true "crimes" at all, such as trespass in pursuit of game or piracy of literary and dramatic works. *Regina v. Prince* [1875] 2 LRCCR 154, 163 (UK) (Brett, J., dissenting).

Against this backdrop, this Court decided *United States vs. Balint*, 258 U.S. 250 (1922). There, the Court considered whether the Narcotic Act of 1914 required the Government to prove that a defendant had known the items he sold to be "narcotics." *Id.* at 254.

In a case with no appearance entered for the defendant, *see* Herbert L. Packer, Mens Rea *and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 113–14 (1962), Chief Justice Taft held that the statute had dispensed with any knowledge requirement, *Balint*, 258 U.S. at 254. He reasoned that courts might dispense with the *mens rea* requirement for "regulatory measures . . . where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes[.]" *Id.* at 252. This was arguably true of the Narcotic Act, as a convicted defendant faced only the imposition of a discretionary fine or a short term in prison. *See* Pub. L. No. 63– 223, ch. 1, § 9 (1914).

When the Court faced a more punitive statute, however, it reverted to the default rule. *See Morissette v. United States*, 342 U.S. 246 (1952). In *Morissette*, the Court considered a statute that applied to "[w]hoever embezzles, steals, purloins, or *knowingly* converts" government property. *Id.* at 248 n.2 (emphasis added). The Government maintained the word "knowingly" applied to defendants who had converted government property only, not defendants who had stolen such property. *Id.* at 248, 263. The Court disagreed. The Government's view, it explained, "would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind"—a result that would be "inconsistent with our philosophy of criminal law." *Id.* at 250. It thus held the "knowingly" requirement applied to each element of the offense, even if not clearly stated. *Id.* at 262–63.

Since *Morissette*, the Court has consistently refused to abandon the presumption for cases involving

more than "nominal punishment[s]," Jackson, *supra*, at 90. In *Morissette* itself, the Court stressed that the statutory "penalty [was] high and, . . . the infamy is that of a felony, which . . . [is] as bad a word as you can give to man or thing." 342 U.S. at 260 (internal quotation marks omitted and ellipses altered); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978) ("severity of [Act's] sanctions provide[d] further support" for importing a *mens rea* requirement). The Court later explained that public-welfare offenses, as a historical matter, "almost uniformly . . . provided for only light penalties such as fines or short jail sentences." *Staples v. United States*, 511 U.S. 600, 616 (1994). But where a "concern with harsh penalties looms," the Court will presume a *mens rea* requirement applies to every element of an offense. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

II. The presumption of *mens rea* applies with equal force to facts that are deemed elements under *Apprendi* or *Alleyne*.

Once situated in the proper historical perspective, this case becomes straightforward. As the Ninth Circuit has acknowledged, "the facts of drug type and quantity . . . constitute elements or ingredients of the crime because they affect the penalty that can be imposed on a defendant." *Collazo*, 984 F.3d at 1322 (interpreting Section 841(b)); *see* Pet. App. 2 (applying *Collazo* to Section 960(b) offenses). Accordingly, the presumption of *mens rea* should apply to these facts.

The Ninth Circuit, however, has resisted this logic. According to the Ninth Circuit, drug type and quantity under Section 841 (and Section 960) are elements

"only for the[] constitutional purposes" of requiring jury findings beyond a reasonable doubt. *Id.* This reasoning flouts history. At common law, courts would not have distinguished these facts from any other element of the offense, *see Alleyne*, 570 U.S. at 109, and thus would have applied the *mens rea* requirement with full force.

At common law, "[i]f a fact was by law essential to the penalty, it was an element of the offense." *Alleyne*, 570 U.S. at 109. Precisely because the substantive criminal law during that era "tended to be sanction-specific," *see supra*, at 6–8, "various treatises defined 'crime' as consisting of every fact which 'is in law essential to the punishment sought to be inflicted,' or the whole of the wrong 'to which the law affixes . . . punishment,'" *Alleyne*, 570 U.S. at 108–09 (quoting 1 Bishop, Criminal Procedure 50, 51 (2d ed. 1872)) (citations omitted); *see also United States v. Haymond*, 139 S. Ct. 2369, 2376–78 (2019) (plurality opinion).

This was equally true for statutes that created sentencing ranges. The Massachusetts Supreme Judicial Court, for instance, explained that if "certain acts are, by force of the statutes, made punishable with greater severity, when accompanied with certain aggravating circumstances," then the statute has "creat[ed] two grades of crime." *Larned v. Commonwealth*, 53 Mass. 240, 242 (1847). In that case, "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime," with each fact a necessary "element" of that offense, the same as any other element of that offense. *See Alleyne*, 570 U.S. at 113.

The Anti-Drug Abuse Act—as even the Ninth Circuit has recognized—operates in exactly that way. *See United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002). In *Buckland*, that court explained Congress's "intent" behind Section 841(b) was "apparent": "to ramp up the punishment for controlled substance offenders based on the type and amount of illegal substance involved in the crime." *Id.* at 568. The Court thus held it "[h]onor[ed] the intent of Congress" by treating drug type and quantity the same "as we would any other material fact in a criminal prosecution." *Id.* In *Buckland*, that meant submitting these facts to a jury, in accord with common-law practice and due process concerns. *See id.* at 565. In this case, it means applying a *mens rea* requirement to drug quantity and type, consistent with a historical practice that insisted on *mens rea* to impose or "ramp up" punishment. *See id.* at 568.

At bottom, the Anti-Drug Act is no innovation—it reflects the same "intimate connection between crime and punishment" that existed at common law, *see Alleyne*, 570 U.S. at 109, and for centuries before, *see supra*, at 3–8. That "intimate connection," however, means little if a defendant who believes he is importing or distributing marijuana faces a mandatory minimum of ten years if he in fact carried methamphetamine. The presumption of *mens rea*, for all the reasons explained, was "designed to avoid precisely this injustice." *Jefferson*, 791 F.3d at 1021 (Fletcher, J., concurring).

CONCLUSION

For reasons of both history and precedent, this Court should grant certiorari and hold that the substantive drug offenses under 21 U.S.C. § 960 require *mens rea* as to the type and quantity of drugs.

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