Nos. 15-50509, 16-50048, 16-50117, 16-50195, 16-50345

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Robert Collazo, Lino Delgado-Vidaca, Julio Rodriguez, Steven Amadaor, Isaac Ballesteros,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benetiz, United States Senior District Judge

Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Defendants-Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* National Association of Criminal Defense Lawyers hereby states that it does not issue stock or have a parent corporation.

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INTEREST OF AMICUS CURIAE[1]

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 is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus brief assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a keen interest in the question presented, which concerns the scienter requirement for substantive drug offenses under 21 U.S.C. § 841. NACDL has long advocated for enforcement of rigorous scienter requirements in criminal prosecutions. This includes publishing 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).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel certifies that this brief was authored in full by Amicus and its counsel, no party or counsel for a party authored or contributed monetarily to this brief in any respect, and no person or entity other than Amicus and its counsel contributed monetarily to this brief's preparation or submission.

SUMMARY OF ARGUMENT AND INTRODUCTION

This Court has requested briefing on, *inter alia*, the appropriate *mens rea* requirement for substantive drug offenses under 21 U.S.C. § 841. Section 841(a), which codifies the Anti-Drug Abuse Act of 1986, prohibits "knowingly or intentionally" manufacturing, distributing, or possessing with intent to distribute a "controlled substance." Section 841(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. § 841(b). A defendant who distributes 280 grams of crack-cocaine, for instance, faces a ten-year mandatory minimum. *Id.* § 841(b)(1)(A). A defendant who distributes the same amount of marijuana faces a five-year statutory maximum. *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." *See United States v. Jefferson*, 791 F.3d 1013, 1023 (9th Cir. 2015) (Fletcher, J. concurring). The answer turns on a simple syllogism: (1) 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) (citation omitted); and (2) any fact that increases the statutory minimum or maximum is an element of an offense, *see*

Alleyne v. United States, 570 U.S. 99, 116 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466, 476–85 (2000). Ergo, (3) the offender must know what drug he was importing before a court could subject him to statutorily increased sentences. *See Jefferson*, 791 F.3d at 1022 (Fletcher, J., concurring).

Amicus writes to explain why this analysis is sound not just as a matter of precedent but also as a matter of history. *First*, from the earliest era of codified law, the *mens rea* requirement has been concerned with ensuring a fair and proportional punishment. *Second*, and precisely for that reason, the *mens rea* requirement did more than ensure the defendant had a generally vicious will. Rather, the requirement has traditionally protected defendants guilty of otherwise culpable conduct from receiving more severe punishments. *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 has every reason to apply the presumption of *mens rea* to facts—like drug quantity and type—that increase a defendant's statutorily prescribed sentence. Indeed, at common law, these facts would have been treated like any other material element of a crime—a necessary ingredient of the offense and thus one the defendant must

commit knowingly or intentionally. Absent a clear statement to the contrary, this Court should presume Section 841 requires the same treatment here.

ARGUMENT

I. THE PRESUMPTION OF *MENS REA* IS DEEPLY ROOTED AND HAS HISTORICALLY APPLIED BEYOND MERELY DISTINGUISHING CULPABLE FROM INNOCENT CONDUCT

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). 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.). Hence 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 place at common law.

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).

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). Naturally enough, 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. While death was the penalty for an intentional homicide, for example, 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." *See* Max Radin, *Criminal Intent*, 7 Encyclopedia Soc. Sci. 126, 126 (eds. Edwin R. Seligman & Alvin Johnson 1932). The Christian penitential books likewise made the penance for various sins turn on the accompanying state of mind. Sayre, *Mens Rea*, *supra*, at 983.

Thus, legal scholars came to believe that "punishment should be dependent upon moral guilt." *Id.* at 988. 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." *See* 1 Frederic William Maitland, Select Pleas of the Crown No. 114 (London, Selden Society 1888). Eventually, the "times called for 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.

3. Over time, punishment became 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). By the middle of the thirteenth century, English law distinguished "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). And by 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).

In early American law, too, the "the relationship between crime and punishment was clear." *Alleyne*, 570 U.S. at 108. As the Supreme Court has recognized, "[t]he substantive criminal law tended to be sanction-specific," meaning "it prescribed a particular sentence for each offense." *Apprendi*, 530 U.S. at 479 (citation omitted); *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). Even where "early American statutes provided *ranges* of permissible sentences," those ranges "were linked to particular facts constituting the elements of the crime." *Alleyne*, 570 U.S. 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," the Supreme Court has explained, "reflect[ed] the intimate connection between crime and punishment"

described above. *See 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." Holmes, The Common Law 40 (1881).

B. The *Mens Rea* Requirement Applies To Offenders Guilty Of Otherwise Culpable Conduct

As punishment and crime became increasingly interconnected, *see supra*, at 6–8, 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." *United States v. Burwell*, 690 F.3d 500, 544 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (citation omitted).

This Court has nevertheless thought the presumption of *mens rea* applies only when necessary to avoid "the penalization of innocent conduct." *Jefferson*, 791 F.3d at 1018. The D.C. Circuit, too, has asserted that the presumption was "[h]istorically" meant to protect "the altar boy archetype, *i.e.*, innocent conduct."

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

1. Perhaps at one time, any vicious will might suffice to inflict any punishment, and the task of judges was simply to determine whether "the heart [was] free from guilt." *See* J. W. C. Turner, *The Mental Element in Crimes at Common Law*, 6 Cambridge L.J. 31, 42 (1936) (internal quotation marks and emphasis omitted). Summing up this "old view," *id.*, Henry of Bracton, a thirteenth century cleric and jurist, adhered to the doctrine of *versanti in re illicitae imputantur omnia guae sequntur ox delicto*, *i.e.*, one acting unlawfully is held responsible for all the consequences of his conduct. Gardner, *supra*, at 656. Blackstone, too, wrote "if a man be doing any thing *unlawful* … his want of foresight shall be no excuse" in imposing capital punishment. 4 W. Blackstone, Commentaries on the Laws of England 26–27 (1769); *see also Dean v. United States*, 556 U.S. 568, 576 (2009) (citing the same).

2. But, as punishment and crime grew more intertwined, jurists began requiring that the defendant intend to commit the specific crime charged. The changing views on the felony-murder rule are illustrative. Where 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. Turner, *supra*, at 43, 55 (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).

Especially outside the felony-murder context, judges rejected 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. The 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, Bishop explained that for an offense like "felonious homicide," guilt "must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong." 1 Bishop, Criminal Law § 334 (7th ed. 1882).

In Bishop's view, this result followed naturally from the very purposes behind requiring *mens rea* in the first place. "[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. The presumption of *mens rea* followed the same course. As the Supreme 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 presumption—like the *mens rea* requirement on which it was based—applied even to defendants who committed otherwise unlawful acts.

In a particularly illustrative antebellum case, the Ohio Supreme Court considered whether a defendant could be found guilty in the first degree of "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") 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. True enough, this rule might excuse some otherwise culpable actors—those defendants who administered poison "to produce some temporary sickness with a mischievous sportive view, or some temporary disability or bodily injury"—from 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.[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 requirement: for so-called "public welfare" offenses. *See*

[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). 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). Yet the Government has similarly argued that the rule of lenity applies only when distinguishing innocent from guilty conduct. The Supreme Court, however, has consistently rejected that proposition, extending the rule of lenity "not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *See R.L.C.*, 503 U.S. at 305 (plurality); *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) (internal quotation marks omitted).

Jefferson, 791 F.3d at 1021 (Fletcher, J., concurring) (citing, *e.g.*, *United States v. Balint*, 258 U.S. 250 (1922)).[3] This rule has been narrowly construed by the Supreme Court and rightly so, as the exception is something of 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 defendants from letting out his carriage 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).

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

It was not until the late 1800s that some courts began dispensing with the *mens rea* requirement for certain 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); § 383 (3d ed. 1865); § 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 as a matter of statutory interpretation, 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 in the absence 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).

It was against that backdrop that the Supreme 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 far 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 262-263.

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 (quotation marks omitted and ellipses altered). 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. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *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).

II. THE PRESUMPTION OF *MENS REA* SHOULD APPLY TO DRUG QUANTITY AND TYPE IN SECTION 841

Once situated in the proper historical perspective, this case becomes straightforward: The presumption of *mens rea* should apply to all facts necessary to statutorily increase punishments, including drug quantity and type in Section 841. 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, *see supra*, at 9–13. Modern criminal statutes should be construed the same way, unless Congress clearly indicated to the contrary. *See Rehaif*, 139 S. Ct. at 2195.

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)) (internal citations omitted).

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 this Court has recognized—operates in exactly that way. *See United States v. Buckland*, 289 F.3d 558, 565 (9th Cir. 2002). In *Buckland*, the 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 quantity and type 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 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 hold that the substantive drug offenses under 21 U.S.C. § 841 require *mens rea* as to the type and quantity of drugs.

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Dated: March 16, 2020

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) and Circuit Rule 32-1 because it contains 4,978 words exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: March 16, 2020

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Nos. 15-50509, 16-50048, 16-50117, 16-50195, 16-50345

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT COLLAZO, LINO DELGADO-VIDACA, JULIO RODRIGUEZ, STEVEN AMADOR, ISAAC BALLESTEROS,

Defendants-Appellants.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benetiz, United States Senior District Judge

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Amicus Curiae respectfully requests leave to file the attached brief in support of Defendants-Appellants. This motion is made pursuant to Federal Rule of Appellate Procedure 29 and is based upon the attached motion, all files and records in this case, and any other information that may be properly brought to the attention of this Court in connection with the consideration of this motion.

Respectfully submitted,

By */s/ Jeffrey L. Fisher*
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Motion for Leave to File Amicus Brief

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 was founded in 1958 and has a nationwide membership of many thousands of direct members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus brief assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This amicus brief is limited to one of the questions posed in this Court's order for supplemental briefing after hearing argument: "Whether this Court should adopt Judge W. Fletcher's position in *United States v. Jefferson,* 791 F.3d 1013, 1019 (9th Cir. 2015) (W. Fletcher, J., concurring), as to . . . substantive drug offenses under § 841(a)." Amicus has a direct interest in that question. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, and this Court's interpretation of Section 841 will affect the sentencing of numerous criminal defendants throughout this Circuit. NACDL has also long

advocated for enforcement of rigorous scienter requirements in criminal prosecutions.

Amicus writes to explain why a rigorous *mens rea* requirement in this case is appropriate not only as a matter of precedent but as a matter of history. The analysis turns on two principles: (1) courts presume a statutory *mens rea* requirement applies to all material elements of the offense; and (2) any fact that increases the statutory minimum or maximum is an element of an offense. Both principles are deeply rooted in Anglo-American law, and Amicus believes considering that historical background will aid the Court in deciding this case.

The United States, through counsel of record Daniel E. Zipp, and Defendants-Appellants, through counsel of record Benjamin L. Coleman, have consented to the filing of this brief.

While all parties have consented, Amicus requests this Court's leave to file this brief because the Federal Rules of Appellate Procedure do not expressly address the filing of an amicus brief in response to an order for supplemental briefing after argument before an en banc panel.

For the foregoing reasons, Amicus respectfully requests that the Court grant this motion for leave to file a brief as *amicus curiae* in support of Defendants-Appellants.

Respectfully submitted,

By */s/ Jeffrey L. Fisher*

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