No. 14-378

IN THE

Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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The Government acknowledges that the petition presents a question that has divided the circuits. It further does not dispute that the proper construction of the Analogue Act's state of mind requirement is an issue of recurring importance. Indeed, the Government admits that the nature of the mens rea requirement has a critical effect on prosecutions under what it concedes is a statute whose application to any given substance can be determined only by holding jury trial. *See* BIO 15-16. The Government nonetheless opposes certiorari because, it says, the circuit split could be bigger, the decision below is correct, and this case presents a poor vehicle for resolving the conflict. None of those arguments has merit.

I. The Circuits Are Intractably Divided.

1. Numerous courts, and indeed the United States itself, have acknowledged that the circuits are broadly divided over the Analogue Act's state of mind requirement. *See, e.g.*, *United States v. Gross*, No. 13-0268-WS, 2014 WL 6483307, at *4 (S.D. Ala. Nov. 20, 2014) (addressing Act's mens rea element and explaining that the "government properly points out that three appellate courts have reached conclusions opposite those of the Fourth and Fifth Circuits," citing cases from the Second, Seventh, and Eighth Circuits); *United States v. Ramos*, No. 13-CR-2034-LLR, 2014 WL 4437554, at *6 (N.D. Iowa Sep. 9, 2014) (acknowledging conflict between Fourth and Eighth Circuits); *United States v. Makkar*, No. 13-CR-0205-CVE, 2014 WL 1572394, at * 1 (N.D. Okl. Apr. 19, 2014) (discussing conflicting decisions of

Second, Fourth, and Seventh Circuits). The Government's newfound skepticism of the extent of the conflict is unsupported.

Seventh Circuit. The United States admits that the Fourth and Seventh Circuits have reached diametrically opposite conclusions about whether the Government must prove that a defendant knew that the substance he sold was a controlled substance analogue. BIO 19. It nonetheless attempts to diminish the "practical difference" between these two rules, *id*. 17, by pointing to the Seventh Circuit's adoption of a permissive inference under which proof that the defendant knew or represented that a substance had a substantially similar physiological effect to a controlled substance permits a jury to infer that he also knew of the substances' similar chemical structure. *Id*. 19-20. But the Seventh Circuit took pains to emphasize that even when that rule applies, the inference is "permitted – but *not required*." *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005) (emphasis added). Accordingly, the "jury is always free to accept or reject any such permissible inference, and it remains the government's burden to prove all the elements of the offense beyond a reasonable doubt." *Id*. at 527 n.4. The Seventh Circuit explained that rejecting the inference often will be perfectly reasonable, as a defendant "could represent to others (earnestly or not) that a substance has physiological effects similar to a controlled substance despite being totally ignorant of its actual chemical properties." *Id*. at 528. Such a claim is particularly plausible, the Government all but acknowledges, when defendants are simply

"street-level dealers" uninvolved in the development of the alleged analogue. BIO 14.

In contrast, in the Fourth Circuit, the jury need not find that the defendant even knew of the similarities in *effect* between his substance and a controlled substance, much less that the Government proved (directly or inferentially) that he was aware of the similarities in chemical structure. Pet. App. 21a.

The predictable difference in outcome under these competing rules is no doubt why the Government is zealously defending the Fourth Circuit's rejection of any meaningful mens rea element rather than asking the Court to adopt the Seventh Circuit's position.

In any event, the Government does not claim that the Second or Eighth Circuits have adopted the *Turcotte* inference. Instead, it asserts that neither circuit has "squarely" addressed the question presented. BIO 21. But that is wrong as well.

Eighth Circuit. The Government acknowledges that in *United States v. Sullivan*, 714 F.3d 1104 (8th Cir. 2013), the Eighth Circuit forthrightly held that "the defendant must 'kn[o]w he was in possession of a controlled substance analogue.'" BIO 22 (quoting 714 F.3d at 1107). The Government cannot, and does not, claim this was dicta – the Eighth Circuit was addressing a defendant's claim that the evidence was insufficient to establish his mens rea, which necessarily required the court to decide what state of mind the statute required. *See* 714 F.3d at 1107.

The Solicitor General nevertheless insists that the court did not mean what it said, because in applying its rule, the Eighth Circuit did not "point[]

to any record evidence of the defendant's knowledge of drug chemistry," instead relying on facts "indicating that he knew 'the bath powder was illegal.'" BIO 23 (quoting 714 F.3d at 1107). But there is nothing inherently contradictory in that – the Government's own brief extols the virtues of the Seventh Circuit's permissible inference that likewise allows a jury to find that a defendant knew of the chemical structure of a substance without direct "evidence of the defendant's knowledge of drug chemistry." BIO 23.

In any event, courts in the Eighth Circuit – as well as Government attorneys litigating in that forum – take *Sullivan* at its word when it says that the Analogue Act requires the jury to find that the defendant knew he was selling a controlled substance analogue. *See, e.g., United States v. Browning*, No. 6:12-CR-03105-MDH-1, 2014 WL 4996400, at *2 (W.D. Mo. Oct. 7, 2014) (citing *Sullivan* as establishing the Government's "burden to show that (1) the substances charged in the indictment are controlled substance analogues, and (2) Defendant knew the substances at issue were controlled substance analogues"); United States' Response to Defendant's Motions to Dismiss 5, *Browning, supra*, Docket No. 69 (same); *United States v. Franklin*, Nos. 12-03085-01/10-CR-S-MDH, 2014 WL 1953077, at *7 (W.D. Mo. May 15, 2014) ("[T]he Eighth Circuit has adopted the Seventh Circuit's requirement . . . that the defendant must have known that the substance(s) at issue was a controlled substance analogue.") (citing *Sulivan*, 714 F.3d at 1107); United

States' Response to Defendants' Motions to Dismiss 13, *Franklin*, *supra,* Docket No. 166 (same).[1]

Moreover, even if the Government were right that *Sullivan* requires only proof that the defendant knew that his substances were illegal, that would only show that the circuits have split three ways instead of two – the Government does not claim that any other circuit requires proof of knowledge of unlawfulness, and none does.

Second Circuit. The Government argues that the Second Circuit's listing of the elements of an analogue offense in *United States v. Roberts*, 363 F.3d 118 (2d Cir. 2004), was dicta because it addressed the question in the course of rejecting a vagueness challenge. BIO 21-22. But the Second Circuit's understanding of the statute's mens rea element was necessary to its conclusion that "the defendants' vagueness challenge must be met with some measure of skepticism" because the Act "contains a scienter requirement." 363 F.3d at 123.

Accordingly, the Government recently argued to the Second Circuit that a jury instruction requiring that an analogue defendant "knew that the substance . . . was controlled or regulated by federal drug abuse laws" was proper because it was "consistent with *Roberts*," which the Government described as the circuit's "Controlling Law" on the Analogue Act's mens rea element. Brief for Appellee United States of America 67, 71, *United States v. Zhang*, No. 13-

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[1] The Government briefs cited herein are available on Pacer.

3410; *see also id.* 73-74 n.21. In direct conflict with the Solicitor General's assertion to this Court, the United States represented that the "*Roberts* Court's description of the mental state requirement . . . was critical to its decision and thus was not dictum." *Id.* 72; *see also* U.S. Br. 3, *United States v. Gross*, *supra* (describing circuit conflict and citing *Roberts* as controlling Second Circuit precedent).

The Government thus is reduced to arguing that *Roberts* "is unsound and unlikely to be followed when the issue is squarely presented." BIO 22. But that prediction rings hollow. Rather than challenging *Roberts*' authority, the Government's position in the Second Circuit has been that "*Roberts* not only bound the district court but also binds future panels of this Circuit 'until such time as [it is] overruled either by an *en banc* panel of our Court or by the Supreme Court." U.S. Br. 71, *Zhang*, *supra* (citation omitted). And the Second Circuit has a "tradition of hearing virtually no cases *in banc*." *Ricci v. DeStafano*, 530 F.3d 88, 92 (2008) (Jacobs, J., dissenting from denial of rehearing en banc).

II. The Decision Below Is Wrong.

The Government's defense of the Fourth Circuit's decision on the merits is no reason to decline to resolve the circuit conflict, particularly because it is unpersuasive.

1. The Government begins its analysis by belaboring an uncontested point: the definition of an analogue does not require proof that the defendant knew the chemical nature of what he was selling. BIO 10-12. But that observation is beside the point: the definition of an ordinary controlled substance

does not contain a mens rea element either. *See* 21 U.S.C. § 802(6). The knowledge requirement arises from Section 841(a), which prohibits sale of a controlled substance only if the possession is "knowing[] or intentional[.]" And that requirement is made applicable to analogue prosecutions by Section 813, which commands that an analogue "shall . . . be treated" as a "controlled substance."

The Government acknowledges that in an ordinary drug prosecution, it must prove that the defendant knew that the substance he sold was a controlled substance. BIO 12. But it insists that applying that same requirement in an analogue prosecution is "nonsensical" because "controlled substance analogues are, by definition, not 'controlled substances.'" BIO 12 (citation omitted). That argument is itself pure nonsense. By its express terms, the Analogue Act provides that an analogue is *by definition* a controlled substance. *See* 21 U.S.C. § 813. Thus, in an analogue case, the Government proves that a defendant knew he was selling a controlled substance by proving that he knew he was selling a controlled substance analogue.

2. The Government complains that this is too hard and would undermine the Analogue Act's purposes, but that is both untrue and no reason to disregard the plain text of a criminal statute.

The Government itself emphasizes that the principal target of the Act was "underground" or "clandestine chemists" and their employers who were intentionally designing drugs to mimic the effect of controlled substances through minor changes in their chemistry. BIO 14. The United States does not claim that it has had any difficulty proving that such

defendants were aware of the similarities in chemical structure and effect between their products and the controlled substances they were designed to imitate.

Instead, the Government says that enforcing the statute as written "could impede prosecution of street-level dealers." BIO 14. But that complaint is difficult to square with the Government's insistence elsewhere in its brief that there is little practical difference between prosecutions in the Fourth Circuit (where no proof of knowledge is required) and the Seventh (where it is). *Id*. 20. And it is diminished further by the Government's insistence that it amply proved petitioner's knowledge in this case. *Id*. 24-27.

But even if it is true that prosecutions of low-level sellers would be more difficult if the statute were enforced by its terms, that is no basis for rejecting a straight-forward reading of the statute. As noted, the legislative history indicates that Congress's principal concern was with chemists, not ignorant salespeople. And any difficulty prosecuting sellers should be temporary, given the Attorney General's power to schedule substances on an emergency basis. *See* Pet. 4.

3. In addition to being overblown, the Government's policy arguments are perverse. At bottom, the Solicitor General argues that because the statute is so vague that an ordinary person often cannot know if what he is selling meets the statutory definition of a controlled substance analogue, the Government should be given special dispensation from the usual requirement that it prove the defendant knew the substance he was selling had the characteristics that made it illegal. *See* BIO 15-16. But our legal traditions run in the opposite

direction – when a criminal statute is so hopelessly vague that its meaning cannot be predicted prior to empanelling a criminal jury, the rule of lenity and doctrine of constitutional avoidance compel an interpretation that protects defendants, not one that facilitates prosecutions. *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 519 (2008) (plurality).

III. The Government's Vehicle Objections Provide No Barrier To Review.

The Government's vehicle objections are meritless as well.

1. The Government asserts that "no circuit has squarely adopted the particular formulation petitioner advanced below" because "petitioner's proposed instruction did not provide for the inference *Turcotte* articulated." BIO 23. But as discussed, both the Second and Eighth Circuits have adopted petitioner's interpretation without adopting the *Turcotte* inference. In any event, the *Turcotte* inference is not a part of the offense elements even in the Seventh Circuit – it is simply an instruction the Government may request in order to assist it in proving that the defendant knew he possessed a controlled substance analog. *Cf. Gross*, *supra*, at *5 (adopting *Turcotte* inference in response to Government motion). In this case, the Government chose not to request a similar instruction, but that does not render petitioner's proposed jury instructions on the elements of the offense at odds with the law of the Seventh Circuit. *See Turcotte*, 405 F.3d at 528-29 (invalidating jury instructions

even though defendant did not request any instruction on permissive inference).[2]

Moreover, as the Government acknowledged below, even if petitioner's proposed instruction was incomplete, that does not insulate from review the district court's submission of an incorrect instruction on mens rea. U.S. C.A. Br. 55 (citing *United States v. Hurwitz*, 459 F.3d 463, 480 (4th Cir. 2006)).

2. The Government also claims, as it almost always does, that any error in this case was harmless. BIO 24-27. That contention – which neither court below addressed – is no basis to deny review. This Court regularly grants certiorari to resolve circuit conflicts, remanding to allow the lower courts to resolve any unreviewed claim of harmless error. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n. 11 (2011); *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011); *Skilling v. United States*, 561 U.S. 358, 414 n.46 (2010); *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008).

In any event, the Government's harmless error argument is meritless. The Government points to certain phone calls in which petitioner compared the physiological effect of some of his mixtures to the effect of cocaine and methamphetamine. BIO 25. But even if this evidence would have compelled a jury to find that petitioner knew of the substantial similarity in *effect* between his products and controlled substances, the Government points to no

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[2] The court ultimately found the error harmless on other grounds inapplicable to this case. *See id*. at 529-30.

significant – much less compelling – evidence that petitioner was aware of the alleged substantial similarity in in *chemical structure*, an independent element of the crime. Even if the Fourth Circuit adopted the *Turcotte* inference, that would provide no basis for finding any instructional error here harmless beyond a reasonable doubt because under *Turcotte* a jury is simply "permitted – but not required" to draw the inference. 405 F.3d at 527. Thus, in *Turcotte* itself, the Seventh Circuit rejected any suggestion that the inference rendered the instructional error harmless, explaining that even if the jury "*could* have determined that Turcotte had the requisite knowledge" using the inference, "the evidence does not compel such a conclusion." *Id*. at 528 (emphasis added).

In fact, the Government's own expert testified that the alleged analogues in this case were *not* similar in chemical structure to cocaine or methamphetamine, but rather to a different controlled substance (methcathinone). Pet. App. 24a. Accordingly, the Government's harmless error argument depends on the resolution of what the court of appeals recognized to be an open question: whether "the pharmacological similarity element may be established by comparing the alleged analogue substance to a different controlled substance than used for comparison under the chemical structure element." *Id*. 25a n. 11.

The Government also points to facts – from the packaging of petitioner's products to vague snippets of phone calls – that it says "*suggest* his knowledge of *illegality*." BIO 24 (emphasis added); *see id*. 24-27. But any inference that petitioner knew his products

were illegal is rebutted by the uncontested testimony that petitioner sought the assistance of his law-enforcement brother-in-law to verify the legality of his products before he sold them. Pet. 7. And it is further disproven by petitioner's immediate destruction of certain products when one of their ingredients was classified as a controlled substance, as well as his refusal to sell those products to an undercover DEA agent on the ground that it was illegal. *Id*. 7-8.

The Government says that petitioner's efforts to comply with the law show that he knew his products were likely illegal. BIO 26. To the contrary, at most they suggest that petitioner was aware that his products could create psychological effects, which made further investigation into their legality prudent. Critically, however, Congress has *not* prohibited sale of all products that produce what the Government calls "drug effects." *Id*. Congress was aware that many lawful products – like the caffeine in coffee and energy drinks, or alcohol – can produce such effects. *See, e.g.*, H.R. Rep. No. 99-848, at 7. But it criminalized sale only of those substances specifically classified as controlled substances and those a seller knows to have a "substantially similar" chemical structure and effect. The Government's harmless error argument, like its interpretation of the statute, effectively reads out of the statute the important requirement that the defendant know *all* of the aspects of his product that make its sale illegal.

CONCLUSION

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

Respectfully submitted,

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