No. 05-1018

In the Supreme Court of the United States

JOGA SINGH JOHAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in its jury instruction explaining the criminal intent required for conviction under 21 U.S.C. 841(c)(2), which proscribes knowing or intentional possession or distribution of a listed chemical, "knowing, or having reasonable cause to believe," that the listed chemical will be used to unlawfully manufacture a controlled substance.

2. Whether the government must prove as an element of the offense under 21 U.S.C. 841(c)(2) that the listed chemical possessed or distributed by a defendant was in fact actually used in the subsequent manufacture of a controlled substance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 428 F.3d 823.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2005 (Pet. App. 30). A petition for rehearing was denied on October 14, 2005 (Pet. App. 15). An amended judgment of the court of appeals was entered on November 9, 2005. The petition for a writ of certiorari was filed on February 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner

was convicted on two counts of distributing, and on one count of possessing, a listed chemical, pseudoephedrine, knowing or having reasonable cause to believe that the chemical would be used to manufacture a controlled substance, methamphetamine, in violation of 21 U.S.C. 841(c)(2). Gov't C.A. Br. 4, 6. The district court sentenced petitioner to 70 months of imprisonment. Pet. App. 33. The court of appeals affirmed petitioner's convictions, but remanded for reconsideration of his sentence. *Id.* at 1-14.

1. Petitioner operated a grocery business in Spokane, Washington, called "J & K Gas & Grocery." Beginning in the winter of 2001, the Drug Enforcement Agency began surveillance of petitioner's grocery store and a number of other convenience stores in the area. The DEA suspected that the store owners were selling excessive quantities of pseudoephedrine to individuals who then used the ingredient to make methamphetamine. Pet. App. 3.

Pseudoephedrine is a chemical ingredient in a number of cold medicines that can be purchased over-the-counter without a prescription. Pseudoephedrine may be extracted from cold pills and mixed with other chemicals, however, to manufacture methamphetamine. Certain brands of pseudoephedrine pills, including the "Action" brand, facilitate the process of extraction because they do not have a coating. Petitioner stocked Action brand pseudoephedrine behind the counter and in the back room of his store. Pet. App. 3-4.

Petitioner's convictions arose from a series of transactions in which he sold large amounts of Action cold pills. Pet. App. 4. On March 7, 2002, petitioner sold 61 boxes of Action to an informant and an undercover DEA task force officer in a series of purchases. *Ibid.* During

the afternoon on that day, the two first purchased a total of 21 boxes of Action, three at a time on seven separate trips to the store. Gov't C.A. Br. 8-10. The two then advised petitioner that they wanted to purchase a case (144 boxes) of Action in order to "cook" "crystal," a shorthand reference to crystal methamphetamine. Petitioner told the two to return to the store later that evening. They returned after the store closed, and petitioner sold the informant 40 more boxes of Action. Pet. App. 4; Gov't C.A. Br. 10.

On March 13, 2002, a second DEA informant made a controlled purchase from petitioner of a case of Action for $1500. A week earlier, DEA agents had pulled the informant over in his car after he had purchased a case of matches from petitioner's store. The matches had red phosphorous tips, which are also used in methamphetamine production. The informant agreed to cooperate in the investigation after DEA agents found methamphetamine and ingredients used to make methamphetamine inside his car. During the March 13th purchase, after the informant had paid for the case of Action, petitioner had him wait while another store employee put the pills in a "Mike's Hard Lemonade" box and further concealed the pills by putting ice on top of the boxes of Action. Petitioner also asked the informant at that time if he wanted to buy more matches. Pet. App. 4-5.

Earlier that same evening, a third party not working with the DEA bought $950 worth of Action from petitioner's store that he had ordered in advance. DEA agents arrested the third party purchaser as he was driving away from the store. Pet. App. 4-5. The third party had previously made purchases of Action from petitioner on about seven occasions in amounts that varied from 10 to 180 boxes. Gov't C.A. Br. 12. The third

party stated that petitioner usually placed the Action in a brown paper bag and then placed bananas on top of the pseudoephedrine pills, even though he had not purchased bananas. *Id*. at 12-13.

A search of petitioner's store in August 2002 resulted in the discovery of a stack of more than 50 invoices showing frequent, large-quantity orders of Action from two different suppliers. Gov't C.A. Br. 13-14.

2. Petitioner was indicted on two counts of distribution and one count of possession of a listed chemical, pseudoephedrine, knowing or having reasonable cause to believe that it would be used to manufacture a controlled substance, methamphetamine, in violation of 21 U.S.C. 841(c)(2). Gov't C.A. Br. 4. Section 841(c)(2) punishes "[a]ny person who knowingly or intentionally * * * possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter."[1] Pseudoephedrine is a listed chemical. See 21 U.S.C. 802(34)(K). Following a jury trial, petitioner was convicted on all three counts of the indictment and sentenced to 70 months of imprisonment. Gov't C.A. Br. 6; Pet. App. 33.

3. The court of appeals affirmed, but remanded for reconsideration of his sentence. Pet. App. 1-14.

a. The court of appeals disagreed with petitioner's contention that, because 21 U.S.C. 841(c)(2) permits conviction if the defendant has "reasonable cause to be-

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[1] Before a redesignation in 2000, the current language of 21 U.S.C. 841(c)(2) was set out in 21 U.S.C. 841(d)(2) (1994). See *United States* v. *Sdoulam*, 398 F.3d 981, 988 n.5 (8th Cir. 2005). Where appropriate, references in this brief to Section 841(c)(2) include the former Section 841(d)(2).

lieve" the listed chemical will be used to manufacture a controlled substance, it criminalizes conduct without imposing a *mens rea* requirement. The court held that "reasonable cause to believe," in the context of Section 841(c)(2), "requires that a defendant subjectively know facts that either cause him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs." Pet. App. 7.[2] That interpretation of the statute, the court of appeals held, limits the likelihood of a defendant being prosecuted for "mere inadvertent conduct" and is consistent with the long-standing principle presuming a *mens rea* requirement for criminal activity. *Ibid*. The court noted that since the text of Section 841(c)(2) "already limits criminal punishment to those who acted 'knowing or having reasonable cause to believe' that illegal activity was afoot," the statute was unlike the provision addressed in *Staples* v. *United States*, 511 U.S. 600, 605 (1994), which did not specify a *mens rea* requirement at all. Pet. App. 7-8 n.1.

The court of appeals also rejected petitioner's argument that the "reasonable cause to believe" standard requires proving actual knowledge of the purchaser's intended illegal use of the pills. Such a reading would be redundant, the court held, because Section 841(c)(2) already provides for conviction based on a defendant's actual knowledge of the intended illegal use. The court further observed:

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[2] The court of appeals thus approved the district court's jury instruction that defined "reasonable cause to believe" in Section 841(c)(2) as "to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance." Pet. App. 7.

> [R]easonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant in a particular case*—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs.

Pet. App. 8. Because the determination whether a defendant had "reasonable cause to believe" turns on the particular facts known to the defendant, the court of appeals concluded that, as a practical matter, "the differences between actual and constructive 'knowledge' under the statute are not substantial." *Ibid.*

Turning to an examination of the evidence presented against petitioner at trial, the court of appeals concluded that the evidence was sufficient to show that he had the requisite criminal intent to violate the statute. Petitioner was aware of the sales of Action in bulk quantities to repeat purchasers, and the purchasers in this case specifically told him that they were going to make "crystal." Further, petitioner's own behavior, such as his concealment of the pseudoephedrine packages he sold, was strong circumstantial evidence that he knew he was selling Action for an illicit use, "not to cure runny noses." Pet. App. 9.

b. The court of appeals also rejected petitioner's claim that Section 841(c)(2) requires actual production of methamphetamine as an element of the offense. Pet. App. 9-10. Because the crime is committed at the moment a defendant possesses or distributes a listed chemical while knowing or having reasonable cause to believe the chemical will be used to make drugs, the court of appeals explained, "a defendant violates the statute based on his understanding that he or she is contribut-

ing to the production of illicit drugs, even if the drugs ultimately are not made." *Id.* at 10.

c. In the court of appeals petitioner also unsuccessfully claimed that the jury instructions failed to ensure a unanimous verdict on one count, and that the sentencing judge erred in calculating his Guidelines sentencing range. See Pet. App. 10-14. Petitioner does not renew those claims here. Because petitioner had been sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), the court of appeals remanded the case to the district court for reconsideration of petitioner's sentence with the Guidelines treated as advisory, in accordance with its decision in *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc).

ARGUMENT

1. The petition does not warrant this Court's review for the threshold reason that the Court generally awaits final judgment in the lower courts before exercising its certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The court of appeals remanded this case for reconsideration of petitioner's sentence. The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). The denial of certiorari at this time does not preclude petitioner from raising the same issues in a later petition, after the entry of final judgment. This Court routinely denies petitions by criminal defendants challenging interlocutory determinations

that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice of deferring review until final judgment promotes judicial efficiency by ensuring that, if the defendant's conviction and sentence ultimately are affirmed on appeal, all of the defendant's claims—or at least those that the defendant concludes are most meritorious—will be consolidated and presented in a single petition to this Court. See *ibid.*

2. Petitioner contends (Pet. 11-24) that the district court erred in instructing the jury on the intent required for conviction under 21 U.S.C. 841(c)(2). He argues that the instruction approved by the court of appeals removes any *mens rea* requirement in Section 841(c)(2) prosecutions, and he contends that the Constitution in most cases prohibits conviction for a criminal offense without a showing of *mens rea*. The court of appeals correctly rejected petitioner's argument that the challenged instruction eliminates any *mens rea* element, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

a. Section 841(c)(2) punishes persons who knowingly or intentionally possess or distribute a listed chemical, such as pseudoephedrine, "knowing, or having reasonable cause to believe," that the listed chemical will be used to unlawfully manufacture a controlled substance. 21 U.S.C. 841(c)(2). The jury instruction at petitioner's trial defined having "reasonable cause to believe" as "to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the

pseudoephedrine would be used to manufacture a controlled substance." Pet. App. 7.

Contrary to petitioner's argument, the instruction describing the meaning of "reasonable cause to believe" does not eliminate the criminal intent requirement from the statute. Rather, the challenged instruction describes an intent requirement that, as the court of appeals observed, "incorporates both subjective and objective considerations to ensure the defendant had a sufficiently 'guilty mind' in violating the statute." Pet. App. 2-3, 7. The district court's instruction did not permit a conviction for mere negligence in ascertaining the facts. See *United States* v. *Green*, 779 F.2d 1313, 1318 (7th Cir. 1985) ("reasonable cause to believe" provision in the statute "does not criminalize a negligent or reckless act"). Rather, in accord with the language of Section 841(c)(2), the instruction required the government to prove that petitioner subjectively knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. As the court below correctly noted, that "standard [of proof] limits the likelihood that a defendant will be prosecuted for mere inadvertent conduct and is consistent with the longstanding principle presuming a mens rea requirement for criminal activity." Pet. App. 7.

b. Because the instructions at petitioner's trial did not eliminate the criminal intent required for conviction under Section 841(c)(2), petitioner's reliance on decisions of this Court that have either imputed a knowledge requirement where a statute was silent as to the requi-

site intent,[3] or construed ambiguous language in a statute to apply a knowledge requirement to particular elements of an offense,[4] do not apply. Here, the court of appeals concluded that there is no need to read a mental state requirement into Section 841(c)(2) because "it already limits criminal punishment to those who acted 'knowing or having reasonable cause to believe' that illegal activity was afoot." Pet. App. 7-8 n.1. Moreover, petitioner's opposing view, which would require the government to prove that the defendant had actual subjective knowledge that the chemical was to be used to unlawfully manufacture controlled substances fails to take into account the "reasonable cause to believe" language in the statute. See *id.* at 8 ("Such a reading would be redundant because the statute already provides for conviction based on a defendant's actual knowledge of the intended illegal use."); see also *United States* v. *Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004) ("[T]he statute clearly presents knowledge and reasonable cause to believe as two distinct alternatives; reasonable cause to believe would be superfluous if it meant knowledge.").

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[3] For example, petitioner cites (Pet. 24) *Staples* v. *United States*, 511 U.S. 600, 605 (1994), where the Court read a criminal intent requirement into a firearms statute that was otherwise silent on the required *mens rea*. Unlike the firearms statute in *Staples*, the text of Section 841(c)(2) specifies the intent requirement—*i.e.*, that the defendant know, or have reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance.

[4] Petitioner cites (Pet. 21-23) *Liparota* v. *United States*, 471 U.S. 419 (1971) and *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994). The statutes in those cases included the term "knowingly," and the cited decisions addressed whether that intent requirement applied to certain offense elements. That type of interpretive question is not presented by the language of Section 841(c)(2).

d. Petitioner contends (Pet. 11-14) that the decision below conflicts with Tenth Circuit decisions on the proof of intent required for conviction under Section 841(c)(2), but it is not clear that any substantive difference exists.

In *United States* v. *Saffo*, 227 F.3d 1260, 1268-1269 (2000), cert. denied, 532 U.S. 974 (2001), the Tenth Circuit held that a defendant may be convicted under Section 841(c)(2) if he had "reasonable cause to believe" that the listed chemical would be used to manufacture a controlled substance, and it rejected the argument that such a *mens rea* requirement is constitutionally insufficient. The court in *Saffo* stated that the statute's *mens rea* requirement looks to "whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance"—a standard that "requires scienter to be evaluated through the lens of this particular defendant, rather than from the p[er]spective of a hypothetical reasonable man." *Id.* at 1268-1269; accord *United States* v. *Muessig*, 427 F.3d 856, 862 (10th Cir. 2005) (upholding conviction where "[a] reasonable jury could infer from [the defendant's] conduct and admissions that she had reasonable cause to believe the pseudoephedrine would be used to make controlled substances"). That position is consistent with the standard approved by the court below, which cited *Saffo* with approval and stated that "reasonable cause to believe is not purely objective, but turns on *the facts actually known by the defendant* in a particular case—facts from which the jury can infer that any reasonable person in the defendant's position would have had to know that the ingredients were being bought to make illegal drugs." Pet. App. 8.

Petitioner argues (Pet. 12, 14) that the decision in this case conflicts with the Tenth Circuit's later decision in *United States* v. *Truong*, 425 F.3d 1282 (2005). *Truong* did not address a challenge to jury instructions, as in this case, but instead addressed a claim that the evidence was insufficient to prove that the defendant violated Section 841(c)(2). The Tenth Circuit in *Truong* stated that the Ninth Circuit had adopted an "objective" standard, under which the government need only prove "that a reasonable person in the defendant's circumstances should have known * * * that the substance would be used to manufacture methamphetamine," and the court appeared to draw a contrast between that standard and its own, more "subjective" standard. 425 F.3d at 1289. As the decision in the instant case makes clear, however, the Ninth Circuit has not adopted an entirely objective standard. Instead, the Ninth Circuit requires proof that the defendant *subjectively* knew facts that either caused him or would cause a reasonable person to believe that the ingredients are being used to produce illegal drugs. Pet. App. 8. That standard is quite similar to the Tenth Circuit's standard in *Saffo* and in *Truong* itself.[5] The Tenth Circuit's comment that the "reasonable cause to believe" standard under Section 841(c)(2) is "akin to actual knowledge," *Truong*, 425 F.3d at 1289 (quoting *Saffo*, 227 F.3d at 1269), is also

[5] See *Truong*, 425 F.3d at 1289 (noting that it is not sufficient "for the government to prove that the defendant was negligent or reckless with respect to the risk that the [listed chemical] would be used to manufacture methamphetamine," but that it would be sufficient for the government to prove that "the defendant was aware, *or had reasonable cause to believe*, that the substance would be used for the specific purpose of manufacturing methamphetamine") (emphasis added). Accord *Muessig*, 427 F.3d at 861-862.

consistent with the position adopted by the court of appeals in this case, which noted that, "[a]s a practical matter," the "differences between actual and constructive 'knowledge' under the statute are not substantial." Pet. App. 8.

3. Petitioner also contends (Pet. 25-27) that the government must prove as an element of the Section 841(c)(2) offense that the pseudoephedrine pills he sold were actually used to manufacture methamphetamine unlawfully. According to petitioner, since the pseudoephedrine pills he sold to informants and a law enforcement officer in the "sting" investigation were not in fact used to unlawfully make methamphetamine, his convictions must be reversed. The court of appeals correctly rejected that claim.

As the court of appeals explained, the Section 841(c)(2) offense is committed at the moment a defendant possesses or distributes a listed ingredient while knowing or having reasonable cause to believe the chemical will be used to unlawfully make drugs. Pet. App. 10. Accordingly, "a defendant violates the statute based on his understanding that he or she is contributing to the production of illicit drugs, even if the drugs ultimately are not made." *Ibid.*

That understanding is consistent with the ordinary meaning of the terms involved. Section 841(c)(2) does not contain two independent requirements—the existence of a reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance *and* actual use of the chemical to do so. Rather, Section 841(c)(2) contains the single requirement that the defendant have reasonable cause to believe that the listed chemical will be so used. Just as, for example, a person may have a reasonable cause to believe that her

husband will be going to the supermarket if various facts (such as the husband's statement, the time of day, his possession of a grocery list, etc.) indicate that destination, a defendant may have a reasonable cause to believe that a listed chemical will be used to manufacture methamphetamine based on various circumstances known to the defendant. The fact that the spouse does not in fact go to the supermarket, or that the listed chemical is not in fact used to manufacture a controlled substance, does not negate the conclusion that there was reasonable cause to believe that those events would occur.

The only appellate courts that have addressed the issue have agreed with the court below that the language of Section 841(c)(2) does not require proof that controlled substances were actually manufactured from chemicals possessed or sold by a defendant. See *United States* v. *Prather*, 205 F.3d 1265, 1269 (11th Cir.) (plain language of the statute indicates that "Congress did not intend to require proof that the controlled substance had actually been manufactured"), cert. denied, 531 U.S. 879 (2000); *United States* v. *Benbrook*, 40 F.3d 88, 94 (5th Cir. 1994) ("statute does not require the possessor to be either in the process of manufacturing the drug or presently able to do so to be guilty of this charge"); *Green*, 779 F.2d at 1319 (proof of the actual manufacture of drugs using the prohibited chemical is not necessary).

There is no conflict among the circuits on this issue. While petitioner cites (Pet. 26) decisions from the Fifth Circuit and the Seventh Circuit to support his claim that a conflict exists—see *United States* v. *Plyman*, 551 F.2d 965 (5th Cir. 1977), and *United States* v. *Kraase*, 484 F.2d 549 (7th Cir. 1973)—those cases construed a firearms statute containing language different from the

drug statute at issue here.[6] As the Seventh Circuit itself explained in *Green*, the firearms statute is only "superficially similar" to Section 841(c)(2), in that the firearms statute requires knowledge of or reasonable cause to believe an existing "fact" (the residency of the potential firearm purchaser) that can be verified at the time of the sale of the firearm, while Section 841(c)(2) requires knowledge or reasonable cause to believe that a future event (the use of the listed chemical to manufacture a controlled substance) will occur. *Green*, 779 F.2d at 1319. Indeed, in cases specifically addressing Section 841(c)(2), the Fifth Circuit and the Seventh Circuit, consistent with the court of appeals in this case, have directly rejected claims that the government must prove actual manufacture of controlled substances. See *Benbrook*, 40 F.3d at 94 (5th Cir.); *Green*, 779 F.2d at 1319 (7th Cir.).

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[6] *Kraase* and *Plyman* involved the interpretation of language in a firearms statute barring licensees from making certain gun sales knowing, or having reasonable cause to believe, the sale was to an out-of-state resident. Based on an assessment of the legislative history and intent underlying the firearms statute, *Kraase* and *Plyman* held that it did not apply where the purchase was actually made to an in-state resident, regardless of the defendant's belief to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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